IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF OFFICE DEPOT, INC. IN OPPOSITION TO PLAINTIFF LEVITT CORP.'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF CROSS-MOTION OF OFFICE DEPOT, INC. FOR JUDGMENT ON THE PLEADINGS

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Dated: April 4, 2008

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Defendant Office Depot, Inc. ("Office Depot"), by and through its undersigned counsel, respectfully submits this Answering Brief in response to plaintiff Levitt Corp.'s Opening Brief in Support of Levitt Corp.'s Motion for Judgment on the Pleadings and in support of its own cross-motion for judgment on the pleadings herein.

PRELIMINARY STATEMENT

Plaintiff Levitt Corp. ("Levitt") is a Florida-based real estate development company. Levitt's business has been plagued by poor results – its share price has dropped approximately 93% over the past three years, and its wholly-owned subsidiary Levitt and Sons is in bankruptcy. Levitt's Chairman and CEO, Alan Levan, is the Chairman and CEO of other poorly performing companies as well: BankAtlantic Bancorp Inc. (where one of Levitt's nominees, Mark Begelman, is president of real estate, construction and development) has seen its share price drop approximately 75% over the past three years, and BFC Financial Corporation has seen its share price drop approximately 88% over the past three years. It is with this questionable track record that Levitt now seeks, for the first time, to enter the world of stockholder activism.

Levitt has publicly reported owning, together with its affiliates, 3,000,200 shares of Office Depot common stock, which is less than 1.1% of Office Depot's outstanding shares. According to their public filings, Levitt and its affiliates acquired all but 200 of these shares within four business days of launching their proxy contest on March 17, 2008, and will beneficially own only 200 shares of Office Depot common stock as of the record date for Office Depot's 2008 annual stockholder meeting.

Having chosen this eleventh-hour timeframe, and without even alleging any excuse for its failure to comply with Office Depot's Bylaws, Levitt now asks this Court to change the rules to aid it in conducting its proxy contest to elect two dissident directors at Office Depot's 2008

stockholder meeting, currently scheduled for April 23. Specifically, Levitt asks the Court to declare that the Office Depot advance notice Bylaw, Article II, Section 14, does not apply to stockholder nominations of directors. The advance notice requirement that Levitt seeks to invalidate is meant to protect the interests of all of Office Depot's stockholders by preventing the kind of last-minute proxy contest that Levitt is now waging. The crux of Levitt's claim is that the advance notice provision does not apply to stockholder nominations of directors because the provision refers only to "business" to be brought before the annual meeting, and does not specifically refer to nominations. However, the term "business" must be read to include nominations. "Business" is a term that is used throughout the provisions of the Delaware Corporation Law that deal with stockholder meetings to include nominations of directors, is so used elsewhere in the Office Depot Bylaws, and has been so used in Office Depot's definitive proxy statements since 1999. Houston Aff. Exhs. G-O. Delaware case law supports reading the term "business" in the context of an advance notice bylaw to include nomination of directors. The recent decision in *JANA Master Fund, Ltd.* v. *CNET Networks, Inc.*, 2008 WL 660556, at *5 (Del. Ch. Mar. 13, 2008), *expedited appeal granted by CNET Networks, Inc.* v. *JANA Master Fund, Ltd.*, No. 140, 2008, Order (Del. Mar. 19, 2008), construed a bylaw that similarly referred to "business" to include nominations of directors. There is thus no merit to Levitt's contention that Article II, Section 14 does not apply to its nomination of two candidates for director at the 2008 annual meeting.

STATEMENT OF FACTS

The following statement is based on the pleadings herein, supplemented by publicly available materials.[1]

A. The Office Depot Bylaws.

The 1996 version of Office Depot's Bylaws contained two different provisions that referred to the advance notice requirement for all stockholder-submitted business, including director nominations. Houston Aff. Exh. A. The first, Article II, Section 5, imposed an advance notice requirement on any business or proposal submitted by stockholders, including those relating to nominations of directors. That provision applied to all "business" to be conducted at the annual meeting, and to all "proposals" to be acted upon at the annual meeting:

> 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. (Houston Aff. Exh. A at 1-2).

Specifically, Article II, Section 5 required "timely advance notice," defined as delivery or receipt "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

[1] Documents referred to herein, including documents attached to and referred to in the pleadings, are attached as Exhibits to the Affidavit of Andrew C. Houston ("Houston Aff."), submitted herewith. Delaware courts have routinely held that documents referenced in pleadings may be cited on a motion for judgment on the pleadings. *See In re JCC Holding Co.*, 843 A.2d 713, 719-20 (Del. Ch. 2003) ("I may consider the unambiguous terms of the proxy statement, which has been incorporated into the plaintiffs' complaint by reference"); *accord McMillan* v. *Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000). Certain publicly available information not necessary for the resolution of this motion is referred to herein only for purposes of providing background and to place in context allegations made in Levitt's Opening Brief.

seven days after notice of such meeting has been given (or such greater period of time as is set forth in such notice)."

Article II, Section 5 contained specific requirements for each proposal included in the required advance notice. For proposals that included the nomination of directors, Article II, Section 5 referenced the requirements of Article III, Section 3 of the Bylaws:

> A stockholder's notice to the Secretary shall set forth, as to each matter the stockholder proposes to bring before the meeting, (i) a description of the proposal desired to be brought before the meeting and the reasons for conducting such business at the meeting, (ii) the name and address, as they appear on the corporation's books, of the stockholder proposing such business and any other stockholders known by such stockholder to be supporting such proposal, (iii) the class and number of shares of the corporation's stock which are beneficially owned by the stockholder on the date of such notice, the dates upon which such shares were acquired and documentary support for such beneficial ownership claim, (iv) any financial interest of the stockholder in such proposal, and (v) *if such proposal includes the nomination of directors, the information required by Article III, Section 3.* (Houston Aff. Exh. A at 5-6 (Italics added)).

Article III, Section 3 dealt generally with nominations of directors, whether by the Board of Directors or by stockholders, and provided generally that "only persons who are nominated in accordance with the procedures set forth in this Article III, Section 3 shall be eligible for election as, and to serve as, directors," including persons nominated "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."

Although Article II, Section 5 imposed a 90-day advance notice requirement on all proposals, including those that "includes the nomination of directors," Article III, Section 3 also, somewhat redundantly, required 90-day advance notice of stockholder nominations:

> 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 a 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*; 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). (Houston Aff. Exh. A at 1-2 (Italics added)).

It also provided specific requirements for any notice that related to nomination of directors, in addition to the general requirements on any notice, imposed by Article II, Section 5, including, with respect to nominees, (i) name, age, business address and residence address, (ii) principal occupation or employment, (iii) number of shares beneficially owned, (iv) a written consent to being nominated and serving as a director, and (v) any other information required by SEC Rule 14a-8, 17 C.F.R. § 240.14a-8(e)(2), and with respect to the stockholder giving the notice, (i) name and address, and (ii) information regarding share ownership.

Office Depot's 1997 Amended and Restated Bylaws contained substantially identical provisions. Houston Aff. Exh. B at 1-2, 7-8.

In 1999, Office Depot adopted another set of Amended and Restated Bylaws. Houston Aff. Exh. C. As is apparent from a comparison with the 1996 and 1997 Bylaws, the 1999 Bylaws constituted an overhaul of the preexisting bylaws. Among other things, the 1999 Bylaws: (1) rewrote Article II to eliminate former Section 5 ("Stockholder Proposals") and to add a new Section 13 regarding "Stock Records" (Houston Aff. Exh. C. at 1-4); (2) rewrote Article III to eliminate Section 3 ("Nomination of Directors"), and to overhaul the portions of the Article relating to Board Committees completely, eliminating sections of the former Bylaws relating to "Committees," the "Audit Committee," the "Compensation Committee," the "Nominating Committee," and the "Stock Option Committee," and adding a new Section 10 on "Other Committees of the Board" and a new Section 11 on "Limitations on Committee Powers," as well as to add a new Article III, Section 16 ("Books and Records") (Houston Aff. Exh. C at 4-7); (3) added a new Article IV on "Waiver of Notice" (Houston Aff. Exh. C at 7); (4) rewrote Article V on "Officers" to eliminate sections of the former Bylaws relating to "Chief Executive

Officer," "Chief Financial Officer," "Vice-Presidents," and "Absence or Disability of Officers," and to add a new Section 6 on "Chairman of the Board" (Houston Aff. Exh. C at 7-9); (5) rewrote Article VI on "Indemnification of Officers, Directors and Others" to eliminate the former section regarding "Claims" (Houston Aff. Exh. C at 9-10). The 1999 Bylaws also made numerous smaller additions, deletions and language changes throughout the Bylaws. Because this overhaul eliminated both Article II, Section 5 and Article III, Section 3 of the prior Bylaws, the resulting 1999 Bylaws contained no advance notice provisions with respect to stockholder meetings at all. Accordingly, Levitt's assertion (Br. 16) that the aforementioned provisions were deleted in 2000 is simply wrong; rather, the modifications were part of a complete overhaul of Office Depot's Bylaws in 1999.

In April 2000, the Bylaws were amended once again to add the immediate predecessor of the current Article II, Section 14. Houston Aff. Exh. D at 3-4. Like the former Article II, Section 5, the current Article II, Section 14 is a comprehensive provision relating to all "business" proposed by stockholders at Office Depot's annual meetings:

> 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. (Houston Aff. Exh. E at 5-6).

Specifically, Article II, Section 14 requires "timely notice." The original version of Article II, Section 14 defined timely notice as delivery "not less than 120 days prior to the first anniversary of the preceding year's meeting and not more than 180 days prior to the first anniversary of the preceding year's meeting." Houston Aff. Exh. D at 3-4. The version of the

Bylaw included as an exhibit to the 2006 Form 10-K mandates delivery "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," except where the meeting is delayed or advanced by more than 30 days. Houston Aff. Exh. E at 5-6. Article II, Section 14 also contains certain requirements for the content of the advance notice, including "as to each matter the stockholder proposes to bring before the annual meeting . . . a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made" and information concerning the stockholder giving the notice, such as its name and address and information regarding its share ownership.

Article II, Section 14 does not cross-reference additional requirements applicable to nominations of directors, and the current Bylaws do not contain any new version or analog of the former Article III, Section 3. Instead, the new Article II, Section 14 added provisions designed to make clear that, in seeking to bring any business before the annual meeting, stockholders had to comply with the requirements of the Securities Exchange Act of 1934 (the "Exchange Act"), including the disclosure requirements of Section 14 and the rules thereunder, as well as that nothing in the Bylaws affected any stockholder's rights to include proposals in Office Depot's own proxy statement under Rule 14a-8 under that Act:

> In addition to the provisions of this paragraph, a stockholder shall also comply with all applicable requirements of the Exchange Act and the rules and regulations thereunder with respect to the matters set forth herein. Nothing in these Bylaws shall be deemed to affect any rights of the stockholders to request inclusion of proposals in the corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act. (Houston Aff. Exh. E at 6).

B. The Office Depot 2008 Annual Meeting.

On March 13, 2008, Office Depot filed its Notice of Annual Meeting of Shareholders and definitive proxy materials with the SEC. The Notice stated that Office Depot would hold its 2008 annual meeting on April 23, 2008. The materials filed by Office Depot described three "items of business" to be considered by shareholders at the annual meeting: (1) election of directors; (2) approval of the 2008 Office Depot, Inc. bonus plan for executive management; and (3) ratifying the Office Depot Audit Committee's appointment of Deloitte & Touche LLP as Office Depot's independent registered public accounting firm. Houston Aff. Exh. F at 4, 55, 58. The definitive proxy statement thus uses the term "items of business" to include the election of directors, a practice that Office Depot has followed since its 1999 stockholder meeting. Houston Aff. Exhs. G-O.

As to election of directors, the proxy statement noted that Office Depot has a single class of directors, that all directors stand for election each year, and that the 12 nominees selected by the Office Depot Board of Directors would be elected by a majority vote. Those nominees include:

- Lee A. Ault III, former Chair, President and CEO of Telecredit, Inc.;
- Neil R. Austrian, former President and COO of the NFL, and a former Managing Director of Dillon Read & Co.;
- David W. Bernauer, former Chair and CEO of Walgreen Co.;
- Abelardo E. Bru, former Vice Chair of PepsiCo;
- Marsha J. Evans, former President and CEO of American Red Cross and a retired U.S. Navy Rear Admiral;
- David I. Fuente, former Chair and CEO of Office Depot;
- Brenda J. Gaines, former President and CEO of Diners Club North America;
- Myra M. Hart, Senior Faculty Member at Harvard Business School and founding officer of Staples, Inc.;
- W. Scott Hedrick, former Director of The Office Club, Inc.;
- Kathleen Mason, President and CEO of Tuesday Morning Corporation, and former President of Filene's Basement;
- Michael J. Myers, President and Director of Smith Barney Venture Corp.; and
- Steve Odland, Chair and CEO of Office Depot since March 11, 2005.

Under Article II, Section 9 of the Office Depot Bylaws, in a non-contested election any incumbent director who does not receive more "for" than "against" votes must submit a resignation, which the Board's Corporate Governance and Nominating Committee then has 90 days to decide whether to accept. In a contested election, directors are elected by a plurality of votes cast. Of the 12 nominees, only Mr. Odland, Office Depot's current CEO, is a member of management. The proxy card submitted with the proxy statement listed three "proposals" for vote, the first being a vote "for," "against," or "abstain" on the 12 Office Depot nominees for Director listed. Houston Aff. Exh. F at 2-3.

On March 17, 2008, Levitt delivered to Office Depot a notice of its intention to solicit proxies to elect its own two nominees to the Board, Mark Begelman and Martin E. Hanaka, and the ten candidates nominated by Office Depot other than Steve Odland, Office Depot's current CEO, and David I. Fuente, a former CEO of Office Depot, as well as to vote against Office Depot's proposed bonus plan for executive management employees, and to vote for the selection of Deloitte & Touche LLP as Office Depot's independent registered public accounting firm. Levitt's notice was accompanied by a request for stockholder-related information pursuant to 8 *Del. C.* § 220. Later that day, Levitt, along with Woodbridge Equity Fund LLLP, filed a preliminary proxy statement with the SEC.

On March 25, 2008, Office Depot informed Levitt that it was not entitled to nominate candidates for election to the Office Depot Board of Directors at its annual meeting of stockholders because the time period to provide notice pursuant to Office Depot's Bylaws had expired. Notwithstanding this, Office Depot agreed to provide Levitt with the information that it had requested pursuant to 8 *Del. C.* § 220 to the extent required by that statute and to the extent such materials exist and were in, or came into, Office Depot's possession.

C. The Levitt Complaint.

On March 17, the same date that Levitt informed Office Depot of its intent to launch a proxy contest and filed a preliminary proxy statement, Levitt filed the Complaint in this action. The Complaint alleges that the advance notice provision of Article II, Section 14 of the Office Depot Bylaws does not apply to the nomination of directors. Compl. ¶¶ 23-30. However, the Complaint is as notable for what it does not allege as for what it does. It does not allege any inequitable treatment of Levitt or its nominees, or that the Bylaw in question is being applied in any inequitable or unfair fashion. Nor does it allege any actual confusion on Levitt's part as to the existence of the Bylaw or as to Office Depot's position that the Bylaw applies to nominations for directors. Nor does it seek to excuse Levitt's failure to comply with the Bylaw in any other way.

Instead, Levitt seeks to divert the Court's attention by accusations to the effect that "Office Depot lacks strong corporate governance and effective operational management." Compl. ¶ 11. Those accusations are as irrelevant to the issue in this case, whether the 120-day advance notice provision in Office Depot's Bylaws applies to nominations of directors, as they are unfounded. Levitt's touting, in its Complaint and in its Opening Brief on this motion, the "decades of experience in retail office supply operations and substantial experience in corporate governance" of its two nominees (Compl. ¶ 12), is similarly inappropriate and the account it provides of its own record and the record of its nominees is, to put it mildly, selective.[2]

[2] For example, Levitt omits to mention that: its nominee Martin Hanaka resigned his post as president of Staples, Inc., after an incident which Staples later found, after an internal investigation, involved a violation of the company's fraternization policy; its nominee Mark Begelman's last major business venture, a chain of musical instrument superstores, ended up being liquidated in bankruptcy in 2002; and Levitt itself has seen its stock lose approximately 90% of its value to a current trading price of approximately $1.98 per share, following the bankruptcy of a subsidiary and a failed merger.

ARGUMENT

Levitt's arguments that "under the plain language of Office Depot's Bylaws and fundamental principles of Delaware law," Article II, Section 14 does not apply to director nominations are without merit.

I. THE PLAIN LANGUAGE OF ARTICLE II, SECTION 14 INDICATES IT APPLIES TO NOMINATIONS OF DIRECTORS.

Under Delaware law, the same rules used to interpret statutes, contracts, and other written instruments apply to the construction of bylaws. *Gentile* v. *SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001); *Hibbert* v. *Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983); *Openwave Sys. Inc.* v. *Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007), *judgment entered by* Order and Final Judgment, 2007 WL 2801421 (Del. Ch. May 31, 2007). Where bylaws are unambiguous, they are enforced according to their terms, and words are "given their commonly accepted meaning unless the context clearly requires a different one or unless legal phrases having a special meaning are used." *Hibbert*, 457 A.2d at 343; *accord Openwave Sys.*, 924 A.2d at 239.

Article II, Section 14 of the Office Depot Bylaws is unambiguous. And by its plain language, it applies to all "business" that any stockholder wishes to conduct at the annual meeting. Houston Aff. Exh. E at 5. The word "business" is clearly a general term, designed to capture any matter that may be brought up at a stockholder meeting, whether involving the election of directors or otherwise.

That the word "business" as used in such a bylaw includes the nomination and election of directors is confirmed by one of the principal decisions relied on by Levitt. Thus, in the recent *JANA Master Fund*, decision, Chancellor Chandler indicated, in construing the word "business," in CNET's advance notice bylaw, "[t]he business of an annual meeting is the election and voting

process." *JANA*, 2008 WL 660556, at *5. *JANA* actually makes clear that the arguments put forward by Levitt here entirely lack merit. The CNET bylaw did not contain anything remotely like the explicit reference to nominations of directors that Levitt complains so vigorously is lacking in Article II, Section 4. In fact, the CNET bylaw applied generally to attempts "to transact other corporate business at the annual meeting." *Id.* Notwithstanding this, the *JANA* Court explicitly held that the CNET bylaw applied to nominations, albeit because of the language of the CNET bylaw not present in the Office Depot Bylaws at issue here, only nominations intended to be included in the company's proxy materials: "The language of the Notice Bylaw leads to only one reasonable conclusion: the bylaw applies solely to proposals *and nominations* that are intended to be included in the company's proxy materials pursuant to Rule 14a-8." *Id.*, at *3 (Italics added).

JANA was based in part on an understanding of the word "business" as it is used in the provisions of the Delaware Corporation Law relating to stockholder meetings. Thus, *JANA* cited 8 *Del. C.* § 211(b) as authority for the proposition that the business of an annual meeting involves election of directors. *Id.*, at *5 n.42. In fact, the provisions of Subchapter VII of the Delaware Corporation Law, the subchapter that deals with stockholder "Meetings, Elections, Voting and Notice," make clear that the word "business," used in connection with such meetings, is to be taken in its broadest sense, and plainly includes nomination and election of directors. Thus, 8 *Del. C.* § 211(b) provides that "an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws," and goes on to note that "[a]ny other proper business may be transacted at the annual meeting." Similarly, 8 *Del. C.* § 216 provides that "the certificate of incorporation or bylaws of any corporation authorized to issue stock may specify the number of shares and/or the amount of

other securities having voting power the holders of which shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business," and goes on to specify default quorums and votes necessary for both election of directors and other matters in the event that the certificate or bylaws do not so specify.[3] Similarly, 8 *Del. C.* § 222(c), dealing with adjournments of stockholder meetings, provides that "[a]t the adjourned meeting the corporation may transact any business which might have been transacted at the original meeting." Finally, 8 *Del. C.* § 229, dealing with waiver of notice, provides that "[a]ttendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened."[4]

The repeated use of the word "business" in the provisions of the Delaware Corporation Law dealing with stockholder meetings accords with what is evident from the common understanding of the phrase itself: "business" means any matters to be conducted or transacted at a meeting, including election of directors. Unless we are to believe that there is a glaring ambiguity pervading 8 *Del. C.* Subchapter VII, Levitt's argument that there is any ambiguity must fail. There is a difference between generality and ambiguity. "Business" is general, but in no way ambiguous.

The context in which this word is used in Article II, Section 14 supports this construction. All of Article II, Section 14 deals, by its terms, with the annual meeting of Office Depot

[3] 8 *Del. C.* § 215(c) contains a similar provision with respect to nonstock corporations.

[4] *See also* 2 David A. Drexler, *et al.*, *Del. Corp. Law & Practice* § 24.05[4] at 24-18 (2007) ("After the quorum has been established, the chairman should proceed to the orderly conduct of business. 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").

stockholders, at which directors are elected. *See* Houston Aff. Exh. E at 5 ("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 . . . .") (Italics added.) Moreover, other portions of the Bylaws relating to annual meetings use the word "business" in a manner that plainly refers to any matter that can be transacted at a stockholder meeting, including election of directors. For example, Article II, Section 7 of the Bylaws, which echoes the language of 8 *Del. C.* § 222(c), provides that "[a]t any such adjourned meeting at which a quorum shall be present or represented, the corporation may transact any business which might have been transacted at the original meeting." Houston Aff. Exh. E at 2. In fact, Office Depot's proxy statements since at least 1999 have consistently referred to election of directors as an item of "business" to be conducted at the annual meeting.[5]

Levitt's entire argument boils down to the proposition that because Article II, Section 14 uses the general term "business," rather than expressly mentioning nominations, it must be deemed either not to apply to nominations or at best to be ambiguous. Br. 19. As the *JANA* case shows, there is no merit to this contention. Moreover, although Levitt cites a number of cases to the general effect that Delaware law protects stockholder voting rights, it does not cite a single case that states the proposition for which it is really arguing: that to apply to nominations an advance notice bylaw must specifically use the word "nominations." And *JANA* shows this proposition is not the law of Delaware.[6]

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[5] *See* Houston Aff. Exhs. G-O.

[6] Levitt also cites cases such as *Harrah's Entm't, Inc.* v. *JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002), for the general proposition that Delaware courts protect stockholder voting rights. These cases have no application to the unambiguous plain language of Article II, Section 14.

Levitt's attempt to cite *Openwave Sys. Inc.* v. *Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228 (Del. Ch. 2007), in support of its position (Br. 22) is particularly unavailing. *Openwave* in fact demonstrates that Delaware courts do not engage in the kind of linguistic contortions urged by Levitt to allow latecomers to contest corporate elections. In *Openwave*, the Court was confronted with two different sections of the same bylaws that imposed manifestly different advance notice requirements. The Court refused to allow the resulting ambiguity and confusion to excuse failure to comply with either requirement. 924 A.2d at 239-40.

Similarly, numerous other cases demonstrate that Delaware courts have not hesitated to uphold the validity of advance notice bylaws. *Stroud* v. *Grace*, 606 A.2d 75, 95 (Del. 1992); *Accipiter Life Scis. Fund, L.P.* v. *Helfer*, 905 A.2d 115, 125 (Del. Ch. 2006); *Nomad Acquisition Corp.* v. *Damon Corp.*, 1988 WL 383667, at *8 (Del. Ch. Sept. 20, 1988).

II. THE HISTORY OF ARTICLE II, SECTION 14 SUPPORTS THE CONCLUSION THAT IT APPLIES TO NOMINATIONS.

Considerations of the history of Office Depot's Bylaws support the same conclusion. Levitt has provided an account of the history of Office Depot's Bylaws that is incomplete and misleading in several material respects:

- Demonstrating its selective reliance on only certain portions of the 1996 Bylaws, Levitt ignores the provisions of the prior Article II, Section 5 of the 1996 Bylaws, which make clear that the word "business" as used therein and in current Article II, Section 14 covers nominations of directors; and
- Levitt ignores 1999 Bylaws, which removed all advance notice provisions from the Office Depot Bylaws, although the 1999 Bylaws were provided to Levitt during the negotiation of the Stipulation regarding scheduling in this matter, and

are specifically referred to therein and are referred to and attached as Exhibit C to Office Depot's Answer.

Thus, Levitt's statement (Br. 17) that "the Office Depot Board removed this explicit provision from its 2000 Bylaws," without any mention of the 1999 Bylaws (of which Levitt was well aware), is misleading and wrong. When the 1999 Bylaws are considered, the picture becomes clear: two somewhat redundant Bylaws that existed before were both removed in a general cleanup of the Bylaws in 1999. Subsequently, in 2000, a new, general provision was added providing for advance notice with respect to "business" to be conducted at the annual meeting.

Levitt does not explain why it completely ignores the 1999 Bylaws in its account. Presumably, it believes that they are irrelevant because they are not published.[7] However, there is no support for Levitt's position that changes that were never publicized must be ignored in considering the history of the Bylaws, and Levitt nowhere explains why the 1999 Bylaws should be ignored in an account of the history of Article II, Section 14. *See* 1 Edward P. Welch, *et al.*, *Folk on the Del. Gen. Corp. Law*, § 109.2 n.4 at GCL-I-81 (5th ed. 2007) (noting that "by-laws are a private document, which, unlike the certificate of incorporation, need not be filed with the Secretary of State") (quoting Ernest L. Folk III, *The Del. Gen. Corp. Law* § 109 (1st ed. 1972)).

But even if we only consider the 1996 (or 1997) and 2000 Bylaws, the evidence would still support our construction, because what Levitt studiously ignores is that prior Article II, Section 5 used both the words "business" and the word "proposal" and unambiguously applied them to director nominations. Thus, an objective reader, comparing the 2000 (or current)

[7] It appears that, due to an oversight, Office Depot's Form 10-K filing for 2000 continued to refer to the version of the Bylaws filed in 1996. However, Levitt has cited no authority for its treating the 1999 Bylaws, which were approved by the Office Depot Board of Directors, as a nullity.

Bylaws with those from 1996 (or 1997), would most reasonably conclude that: (1) Office Depot still has a general Bylaw providing for advance notice for all "business" to be conducted at the annual meeting; (2) "business" includes nomination of directors; and (3) the extra information requirements of former Article III, Section 3 relating to nominations specifically have been dropped, along with the cross-reference to those specific requirements in the general advance notice provision.

III. LEVITT'S CONSTRUCTION OF ARTICLE II, SECTION 14 TO APPLY ONLY TO RULE 14a-8 PROPOSALS IS WITHOUT MERIT.

Levitt says very little about what, under its reading, Article II, Section 14 does provide. But apparently Levitt reads the provision to mean 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)"). Br. 21. Levitt bases this reading on the fact that the version of the Bylaw attached as an Exhibit to the 2006 10-K provides for notice to be given "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," except where the meeting is delayed or advanced by more than 30 days. Br. 21 ("[T]he timing of the advance notice provision is tied to the Company's proxy statement. It follows from this 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)").

In fact, there is no basis whatsoever in the text of Article II, Section 14 for Levitt's construction. Article II, Section 14 provides three avenues by which business can come before an annual meeting: "(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." Houston Aff. Exh. E. at 5-6. The natural reading of this is that Rule 14a-8 proposals would be covered by subsection (i), since the notice of the meeting always goes out as part of Office Depot's own proxy statement, and that subsection (iii) therefore must refer to matters other than Rule 14a-8 proposals. *See Council of the Dorset Condo. Apartments* v. *Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole"), *aff'd*, 820 A.2d 371 (Del. 2002)(TABLE); *Delta & Pine Land Co.* v. *Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. May 24, 2006) ("It is, of course, a familiar principle that contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless'"). That reading is reinforced by the language at the end of the Bylaw. Far from incorporating the provisions of Rule 14a-8, that language makes clear that the Bylaw does not affect shareholder rights under Rule 14a-8: "Nothing in these Bylaws shall be deemed to affect any rights of the stockholders to request inclusion of proposals in the corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act." Houston Aff. Exh. E at 5-6.

Indeed, if the advance notice provisions of Article II, Section 14 were read to apply only to requests for inclusion of SEC Rule 14a-8 proposals in Office Depot's proxy statement, it would render those provisions superfluous, since Rule 14a-8 already requires such proposals to be sent to the company 120 days before the date of the preceding year's proxy statement issuance. It is elementary that, as contracts, Bylaws must be interpreted so as to give meaning to

each provision, and an interpretation that renders any provision superfluous is disfavored. *See* Restatement (Second) of Contracts § 203(a) (1981) (providing that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"); *NAMA Holdings, LLC* v. *World Mkt. Ctr. Venture, LLC*, 2007 WL 2088851, at *6 (Del. Ch. July 20, 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court"), *aff'd*, 2008 WL 571543 (Del. Mar. 4, 2008); *West Willow-Bay Court, LLC* v. *Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *11 n.96 (Del. Ch. Nov. 2, 2007) ("Delaware Courts have consistently held tha[t] an interpretation that gives effect to each term of an agreement is preferable to any interpretation that would result in a conclusion that some terms are uselessly repetitive" (internal quotation marks omitted)), *cert. denied*, 2007 WL 4857667 (Del. Ch. Dec. 6, 2007).

Levitt cites Chancellor Chandler's recent decision in *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 2008 WL 660556 (Del. Ch. Mar. 13, 2008), *expedited appeal granted by CNET Networks, Inc. v. JANA Master Fund, Ltd.*, No. 140, 2008, Order (Del. Mar. 19, 2008), for the proposition that Article II, Section 14 should be held to apply only to stockholder proposals submitted under SEC Rule 14-8. As shown above, *JANA* actually demonstrates that advance notice bylaws that refer to conducting "business" at the annual meeting apply to nominations of directors. But *JANA*'s holding that the CNET bylaw before it applied only to requests for the inclusion of material in the company's own proxy statement under SEC Rule 14a-8 has no application here. *JANA* based its reading on three factors present in the CNET bylaw: (1) the CNET bylaw provided that any stockholder "may seek to transact other corporate business at the

annual meeting," language that suggested that it only applied where the stockholder was requesting permission for inclusion of a proposal in management's proxy materials under SEC Rule 14a-8, *id.*, at *4-5; (2) the CNET bylaw provided specifically that any notice "must also comply with any applicable federal securities laws establishing the circumstances under which the Corporation is required to include the proposal in its proxy statement or form of proxy," a provision that again indicated that the bylaw applied only to SEC Rule 14a-8 proposals, *id.*, at *3, *6; and (3) the CNET deadline for notice was established by reference to the date on which CNET would mail its own proxy statement, which was most reasonably explained by supposing that the bylaw was designed to provide enough time to include the proposal in management's proxy materials, *id.*, at *6. None of these factors is present here:

- As set forth above, far from stating that a stockholder "may seek to transact other corporate business at the annual meeting," Article II, Section 14 explicitly provides three different avenues by which business can be brought before an annual meeting, two of which involve the Directors, and the third provides for stockholder action only with no reference to any permission. In the event that the third avenue is chosen, Article II, Section 14 provides that the stockholder "must" comply with the advance notice requirements of the Bylaw;
- As set forth above, far from providing that any notice must comply with SEC Rule 14a-8, Article II, Section 14 makes clear that it is not intended to affect stockholders' rights under that rule. In fact, Article II, Section 14 does not reference any requirements from the federal securities laws applicable specifically to the notice, but provides, "In addition to the provisions of this paragraph, a stockholder shall also comply with all applicable requirements of

the Exchange Act and the rules and regulations thereunder with respect to the matters set forth herein." Of course, the Exchange Act, and rules thereunder, impose numerous requirements on stockholders conducting proxy contests, even those that are self-financed;[8] and

- The CNET bylaw tracked the requirements of SEC Rule 14a-8 and required notice be received before the company's proxy statement went out: notice by 120 days before the date the preceding year's proxy statement went out or, if the date of the annual meeting changes by more than 30 days or there was no preceding year's annual meeting a "reasonable time" before the solicitation goes out. *Compare JANA*, 2008 WL 660556, at *2, *with* SEC Rule 14a-8(e), 17 C.F.R. § 240.14a-8(e). By contrast, nothing in Article II, Section 14 guarantees that notice is received before Office Depot's proxy statement goes out, since the Bylaw provides for notice to be received by 120 days before the date the preceding year's proxy statement went out or, if the date of the meeting changes by more than 30 days, "*not later than the 10th day following the day on which public announcement (as defined herein) of the date of such meeting is made.*" (Italics added.) Moreover, when Article II, Section 14 was first added to the Bylaws in 2000, it did not define timely notice with reference to the date of the proxy statement, but provided for advance notice "not less than 120 days prior to the first anniversary of the preceding year's meeting and not more than 180 days prior to the first anniversary of the preceding year's meeting." Levitt's argument would thus entail that, although Article II, Section 14 remained the same in every

[8] *See, e.g.*, SEC Rules 14a-1 to 14a-15, 17 C.F.R. §§ 240.14a-1 to 240.14a-15.

other respect, its purpose and scope changed entirely when timely notice became defined with reference to the date of the preceding year's proxy statement. This is nonsensical.

Accordingly, Levitt's argument that *JANA* indicates that Article II, Section 14 should be read to be limited to shareholder proposals submitted under SEC Rule 14a-8 is without merit.

IV. LEVITT'S ARGUMENT THAT NO NOTICE FOR ITS NOMINEES IS REQUIRED LACKS MERIT.

Levitt adds a makeweight argument that, even "if the Court concludes that the nomination of directors is covered by the term 'business'. . . 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." Br. 24. The simple answer to this is that the notice provided by Office Depot specified only the business of voting for or against the 12 nominees put forward by the Office Depot Board of Directors, and only placed before stockholders a "proposal" to vote on those 12 nominees. *See* Houston Aff. Exh. F at 4. Voting on Levitt's two nominees is an entirely different matter. Moreover, if Levitt's argument were accepted, it would render the advance notice provisions of Article II, Section 14 of no force and effect as to the nomination of directors, contrary to the premise that Article II, Section 14 does apply to the nomination of directors, since every annual meeting involves election of directors, and the notice provided by the company will always so state. Simply put, the Court cannot accept Levitt's invitation to hold that Article II, Section 14 applies, but has already been satisfied.

V. LEVITT'S ARGUMENT THAT THE BYLAW IS INVALID IS NOT PROPERLY BEFORE THE COURT.

In its Opening Brief, Levitt also argues, for the first time, that Article II, Section 14 is "invalid," because the notice provision it provides for is unreasonably long. Br. 23-24. Levitt's

new argument is not properly before the Court on this motion on the pleadings, because the cause of action it implicitly asserts is not in the Complaint on which it is moving. The Levitt Complaint contains no allegation that the Bylaw is in any way invalid; its sole cause of action alleges that "Article II, Section 14 of the Office Depot Bylaws is inapplicable to the nomination of directors." Compl. Count I. Nor does the prayer for relief seek invalidation of Article II, Section 14; rather, it seeks a declaration that the provision does not apply to the nomination of directors, and injunctive relief against its application to Levitt's nominees.

Further, although under Delaware law a corporation may adopt any bylaws "relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees," as long as such bylaws are "not inconsistent with law or with the certificate of incorporation," 8 *Del. C.* § 109(b), Levitt does not allege that there is any provision of either the Delaware Corporation Law or the Office Depot certificate that is inconsistent with Article II, Section 14. In fact, it is clear that what Levitt is now alleging is that the Office Depot Board breached its fiduciary duties in enacting Article II, Section 14. Indeed, virtually the sole case it relies on, *Mentor Graphics Corp.* v. *Quickturn Design Sys., Inc.*, 728 A.2d 25 (Del. Ch. 1998), involved exactly such claims. Yet not only does the Complaint not contain any cause of action for breach of fiduciary duty, it does not even name the Office Depot directors as defendants. (By contrast, in *Mentor Graphics*, the directors were defendants and the claims against them were expressly claims for breach of fiduciary duty.)[9]

Nor did counsel for Levitt ever refer to any intent to make the argument at issue during negotiation of the Stipulation in which the parties agreed to present this matter by a motion for

[9] *See In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *38 (Del. Ch. May 3, 2004) ("The liability of the directors must be determined on an individual basis because the nature of their breach of duty (if any), and whether they are exculpated from liability for that breach, can vary for each director").

judgment on the pleading. Nor would Office Depot have ever stipulated to proceed by way of motion on the pleadings had Levitt's Complaint included such a claim, instead of the purely legal issue of the application of Article II, Section 14 that it does contain. Such a claim is rife with factual issues, as the very cases Levitt relies on recognize. *See id.* at 43 n.70 ("Without reference to a specific fact pattern . . . it is impossible to draw a line that categorically separates mandatory delay periods which have a basis in reason, from those that so manifestly burden or impede the election process that they can only be characterized as intended to entrench the incumbent board."); *see also Desert Equities, Inc.* v. *Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1206 (Del. 1993) ("[A] motion for judgment on the pleadings cannot be granted when a material question of fact exists."). It is perhaps needless to point out that Office Depot's agreement in the Stipulation relating to scheduling in this matter that "the matter is appropriate for disposition by a motion for judgment on the pleadings, and neither party will claim or argue that there is an issue of disputed fact such that the court cannot resolve the motion," Stipulation ¶ 3, related only to the matters that are alleged in the pleadings, *i.e.*, whether Article II, Section 14 applies to nominations of directors, and does not license Levitt to insert wholly new claims into its Opening Brief that obviously raise factual issues.

Indeed, were the issue of the validity of the Bylaw properly before the Court, Office Depot would point out, among other things that:

- There is a presumption in Delaware law that bylaws are valid. *See Frantz Mfg. Co.* v. *EAC Indus.*, 501 A.2d 401, 407 (Del. 1985); *accord Edelman* v. *Authorized Distribution Network, Inc.*, 1989 WL 133625, at *3 (Del. Ch. Nov. 3, 1989);

- The time period of Article II, Section 14's advance-notice provision mirrors the time period provided for in SEC Rule 14a-8, and is reasonable. *See* 17 C.F.R. § 240.14a-8(e)(2) ("The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting."). It strains credulity that such an advance-notice period is proper for the SEC to impose in the context of proxy materials relating to shareholder proposals that are to be included in the company's proxy statement, but becomes unreasonable where a shareholder will circulate its own proxy materials;
- Article II, Section 14's advance notice provisions promote an efficient annual-meeting process by permitting Office Depot to receive advance notice of, and to address, all shareholder-initiated business at once, irrespective of whether or not Office Depot will be required to include such notice in its proxy statement under SEC Rule 14a-8;
- Delaware courts have noted that advance notice bylaws are commonplace and have recognized that advance notice bylaws serve legitimate corporate purposes, *see Openwave Sys.*, 924 A.2d at 239 (advance-notice provisions in bylaws "are designed and function to permit orderly meetings and election contests"), such as (1) ensuring that only relatively long-range holders of common stock are permitted to raise issues at the annual meeting (because the interests of short-term holders tend to diverge with those of the company), *see Unitrin, Inc.* v. *Am. Gen. Corp.*, 651 A.2d 1361, 1386 (Del. 1995) (noting that "distinctions among

types of shareholders are neither inappropriate nor irrelevant for a board of directors to make," including "distinctions between long-term shareholders and short-term profit-takers, such as arbitrageurs, and their stockholding objectives"); *see also Hahn* v. *Carter-Wallace, Inc.*, 1987 WL 18429, at *2 (Del. Ch. Oct. 9, 1987) ("While reasonable men may disagree as to whether long-term growth objectives should prevail over short-term profit considerations, the decision to pursue a long range objective is a business decision subject to a presumption of propriety under the business judgment rule."), and (2) providing the corporation (and shareholders) adequate time in advance of the annual meeting to consider, and, if necessary, take actions in response to, issues to be raised at the annual meeting, *see Openwave Sys.*, 924 A.2d at 239 (advance-notice bylaws "provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations"). *See* 2 David A. Drexler, *et al.*, *Del. Corp. Law & Practice* § 24.05[3], at 24-15 to 24-16 (2007) ("[A]s a general rule, bylaws which impose advance-notice requirements upon stockholders intending to nominate prospective directors or bring other issues up for consideration serve valid corporate objectives");

- The advance-notice provisions of Article II, Section 14 were enacted well before March 2008, when Levitt obtained its Office Depot shares and attempted to nominate directors to the Board. Indeed, because of this, there is a serious issue as to whether Levitt has standing to challenge Article II, Section 14 at all; and

- Levitt's proxy contest was initiated only five weeks before the 2008 annual meeting – long after notice periods that even it admits would be fully permissible had passed.

In sum, there is no merit to Levitt's allegations that the Office Depot advance notice period bylaw is invalid, and those allegations should be disregarded on this motion.

CONCLUSION

For the foregoing reasons, the motion of plaintiff Levitt for judgment on the pleadings must be denied, and judgment should be entered on behalf of defendant Office Depot, declaring that Article II, Section 14 applies to nominations for directors and that Levitt has not complied with that bylaw, and dismissing the Complaint with prejudice.

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Dated: April 4, 2008