IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JANA MASTER FUND, LTD., A Cayman Islands exempted company, Plaintiff, v. CNET NETWORKS, INC., A Delaware corporation, Defendant.	)	Civil Action No. 3447-CC

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

Stockholder value has fallen precipitously at CNET Networks, Inc. under current leadership. CNET's shares returned approximately +1%, -38% and -19% in the one, two and three year holding periods ending at the close of 2007, respectively, while CNET's stated benchmark, the Inter@ctive Week Index, returned approximately +15%, +32% and +32%, respectively, in the same periods and the NASDAQ index returned approximately +10%, +20% and +22% respectively, during those same periods. JANA Master Fund, Ltd. -- who together with its affiliates beneficially owns 10.9% of the CNET stock outstanding -- is seeking to give the CNET stockholders the opportunity to elect a new board majority of individuals it believes are highly qualified and committed to rebuilding stockholder value.

Unfortunately, the incumbent board of CNET is unwilling to allow stockholders to determine for themselves whether to chart a new course. The incumbent board seeks to thwart the exercise of the stockholder franchise through the improper application of two bylaws that the incumbent board claims prohibit JANA from presenting its nominees and proposals to increase the size of the board to the stockholders at the forthcoming 2008 annual meeting because JANA has not owned $1,000 in common stock for one year. By their terms, however, these bylaws do not prohibit JANA from directly presenting its nominees or proposals, but rather are applicable only to stockholders who wish to recommend director candidates for inclusion on the management slate or who wish to include stockholder proposals in management's proxy statement and proxy card pursuant to federal stockholder access rules.

Even if the bylaws could be read to limit the right to nominate a competing slate of directors or to present proposals for stockholder action to only those stockholders who have held more than $1,000 in stock for at least one year, such bylaws would be invalid under

Delaware law. The stockholders' rights to nominate directors and to present proposals are fundamental to the stockholder franchise and cannot be substantially abridged in a bylaw.

Delaware law requires the free exercise of the stockholder franchise once a year at an annual meeting. This is the bedrock of the Delaware system of corporate governance. The bylaws, as construed by the incumbent board, arbitrarily deny that franchise right to JANA and all those stockholders who support JANA's efforts to elect nominees who will seek change and a reversal of CNET's dismal performance in recent years. This assault on the fundamental rights of stockholders cannot stand.

Unless this Court acts to enjoin the improper application of these bylaws to JANA's nominees and proposals, CNET stockholders will be denied the opportunity to exercise their franchise right at the upcoming 2008 annual meeting to elect directors who can put CNET on a course to rebuild stockholder value. Unless application of these bylaws is enjoined, the incumbent board will have constructed the ultimate mousetrap: while CNET's fortunes continue to decline and more stockholders vote with their feet and sell their shares in frustration, the purported one-year ownership requirement ensures that fewer stockholders will be eligible to actively seek to change the board.

NATURE AND STAGE OF THE PROCEEDINGS

On January 7, 2008, JANA filed a Verified Complaint challenging CNET's purported application of Article III, Section 6 and Article II, Section 3 of CNET's bylaws to thwart a proxy contest at the forthcoming 2008 annual meeting. Along with the Complaint, JANA also filed a Motion to Expedite Proceedings. The Court granted JANA's Motion to Expedite and set the matter for a hearing on JANA's Motion for Judgment on the Pleadings for March 3, 2008. CNET answered the Verified Complaint on January 22, 2008. JANA filed its Motion for Judgment on the Pleadings on February 4, 2008. This is JANA's Opening Brief in Support of Its Motion for Judgment on the Pleadings.

STATEMENT OF FACTS

A. Background.

Plaintiff JANA Master Fund, Ltd. ("JANA") is an investment fund that, together with its affiliates, beneficially owns over 10.9% of the outstanding common stock of CNET Networks, Inc. ("CNET" or the "Company"). *See* CNET Networks, Inc., Schedule 13D (SC 13 D/A) (Jan. 15, 2008). If the upcoming annual meeting is held, as expected, in June 2008, JANA will have beneficially owned shares of CNET stock for eight months prior to the meeting. Compl. ¶ 1.

Defendant CNET, a Delaware corporation, is an interactive media company that builds brands in technology, entertainment, business, food and parenting, including such brands as CNET, GameSpot, MP3.com, ZDNet, TechRepublic, CHOW and Urban Baby. Compl. ¶ 6. CNET was the ninth largest Internet network in the world based on total unique users in December 2006. *Id.*

Over the last three years, CNET's shares have consistently underperformed the market and its competitors. CNET's shares returned approximately +1%, -38% and -19% in the one, two and three year holding periods ending at the close of 2007, respectively, while CNET's stated benchmark, the Inter@ctive Week Index, returned approximately +15%, +32% and +32%, respectively, in the same periods and the NASDAQ index returned approximately +10%, +20% and +22% respectively, during those same periods. As a result of options backdating that took place at the Company, the Company was forced to restate its financials for the years ended December 31, 2003, 2004 and 2005. CNET Networks, Inc., Amendment to Annual Report (form 10-K/A) at 1 (Jan. 29, 2007). A special committee of the Company's Board of Directors (the "Board") determined that the former CFO and recently resigned CEO, General Counsel and

Senior Vice President of Human Resources were all responsible, in varying degrees, for the options backdating. *Id.* at 25.

Although not required to do so by the Bylaws of CNET (the "Bylaws," attached hereto as Exhibit A), on December 26, 2007, JANA sent CNET a written notice (the "Notice") of JANA's intention to, among other things, (i) nominate two persons for election as Class III directors at the 2008 annual meeting, (ii) propose that the Bylaws be amended to cause an increase in the size of the Board from eight to 13 directors and (iii) nominate an additional five persons to fill the new directorships resulting from such increase.[1] Compl. ¶ 7.

JANA's nominees for director are highly qualified and will bring valuable experience to CNET:

- Paul Gardi, a Class III nominee, is the current Managing Member of Alex Interactive Media, LLC and, from 2003 to 2005, he led operations and strategic planning for Ask Jeeves, Inc. worldwide. Before joining Ask Jeeves, Inc., Mr. Gardi was president of Teoma Technologies and a managing director of Hawk Holdings, a venture capital, investment and operating company.

- Santo Politi, a Class III nominee, is a founder and General Partner of Spark Capital and leads Spark Capital's investments in KickApps, Me.dium, Genie and Admeld. Prior to joining Spark Capital, Mr. Politi was a partner with Charles River Ventures with an investment focus on media and entertainment technologies.

- Jon Miller, a nominee for a new directorship, is a founding partner of Velocity Interactive Group and, from 2002 to 2006, he served as Chairman and CEO of AOL. At AOL, Mr. Miller restructured the company's core business and focused the company on advertising, including the highly successful 2004 acquisition of Advertising.com. Under his leadership, AOL delivered record

[1] JANA has also proposed that the stockholders amend the Bylaws to delete the provision vesting the Board with the exclusive power to fill new directorships under certain circumstances and to include a provision expressly vesting the stockholders with the power to fill board vacancies and new directorships. Compl. Ex. A.

annual growth of 21% and increased its online advertising growth by 46%.

- Jaynie Studenmund, a nominee for a new directorship, is currently a member of the board of directors of Orbitz Worldwide, Countrywide Bank, Western Asset Management and eHarmony. From 2001 to 2004, Ms. Studenmund served as Chief Operating Officer of Overture Services, Inc. and, during her tenure, that company grew its annual revenues from $100 million to $1.2 billion.

- Julius Genachowski, a nominee for a new directorship, is managing director of Rock Creek Ventures and co-founder of LaunchBox Digital. Prior to joining Rock Creek Ventures, Mr. Genachowski was a senior executive at IAC/InterActiveCorp, including Chief of Business Operations, General Counsel and a member of the Office of the Chairman. Mr. Genachowski previously served on the boards of Expedia, Hotels.com and Ticketmaster. Mr. Genachowski also served as Chief Counsel to Chairman Reed Hundt of the Federal Communications Commission.

- Brian Weinstein, a nominee for a new directorship, is a senior executive in the Strategy and Business Development group at Creative Artists Agency ("CAA"), a leading talent, sports and marketing agency, where he focuses on digital strategy and corporate acquisitions. In the past 12 months, CAA has successfully incubated five venture-financed internet companies, including funnyordie.com, shredordie.com, mybluecollar.com and quarterlife.com.

- Giorgio Caputo, a nominee for a new directorship, has been an Investment Analyst with JANA Partners LLC since 2002. Prior to joining JANA Partners LLC, Mr. Caputo was an associate at Credit Suisse First Boston from 2001 to 2002 and was an associate at Lehman Brothers from 1996 to 2000.

In addition to setting forth biographical information on each nominee for director and the number of shares owned beneficially and of record by JANA, the Notice also included the text of the proposed Bylaw amendments. In the Notice, JANA also informed the Board that JANA intended to solicit proxies from the other CNET stockholders in favor of its nominees and proposals.

Along with the Notice, JANA delivered a letter (the "Demand") to CNET requesting inspection of certain stocklist materials of the Company pursuant to Section 220 of the Delaware General Corporation Law (the "DGCL") for the purpose of communicating with the other CNET stockholders and soliciting proxies for JANA's nominees and proposals. Compl. ¶ 9.

On January 3, 2008, CNET sent a letter to JANA refusing to provide the requested stocklist materials (the "Demand Refusal"). Compl. ¶ 10; Ex. C. In the Demand Refusal, CNET claimed that JANA had not stated a proper purpose to inspect the stocklist materials because the Notice "fail[ed] to comply with the provisions of the Company's bylaws which require a stockholder seeking to nominate candidates for director election or seeking to transact other corporate business at an annual meeting to beneficially own $1,000 of the Company's common stock for at least one year."[2] *Id.* Thereafter, CNET reconsidered its position and agreed to produce the requested stocklist materials.

On January 7, 2008, JANA filed a Verified Complaint in the Court of Chancery seeking, among other things, a declaration that CNET's interpretation of the Bylaws is invalid and requesting that CNET be preliminarily and permanently enjoined from applying such Bylaws to the presentation of JANA's nominees and proposals at the 2008 annual meeting.

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[2] This was not the first time that CNET had failed to cooperate with its stockholders. In its November 21, 2007 Opinion in *Melzer v. CNET Networks, Inc.*, C.A. No. 3023-CC, arising from CNET's conceded backdating of stock options from its initial public offering in 1996 through at least 2003, this Court noted that CNET had failed to comply with a Federal District Court Judge's request that CNET cooperate in responding to a books and records request pursuant to Section 220 of the DGCL: "CNET, unmoved by Judge Alsup's request for cooperation, did not comply, and plaintiffs initiated the present action in this Court on June 14, 2007." 934 A.2d 912, 916 (Del. Ch. 2007). This Court granted the 220 relief sought by the CNET stockholders and expressed its displeasure with CNET's recalcitrance. *Id.* at 920.

Shortly after claiming that JANA had no right to present its nominees and proposals at the 2008 Annual Meeting, CNET took additional actions to deter stockholder efforts to unseat the incumbent directors. On January 11, 2008, the Board adopted a Stockholder Rights Plan, commonly known as a "poison pill," which effectively precludes JANA from entering into voting agreements with other stockholders for the purpose of voting in favor of JANA's nominees and proposals unless JANA and such stockholders collectively own less than 15% of the common stock outstanding.[3] Next, on January 14, 2008, the Board adopted severance agreements for certain of its senior management. CNET Networks, Inc., Current Report (Form 8-K) (Jan. 15, 2008). According to a press release, the severance agreements provide for "certain compensation and benefits" if the employee is terminated in connection with a "Change in Control." *Id.* The Company has not disclosed the agreements in any public filing and has declined to disclose either the definition of "Change in Control" or the effect of such agreements in the event the CNET stockholders elect a new majority of directors to the Board. *Id.*

B. The Bylaw Provisions Concerning Director Nominations And Other Stockholder Business Proposals Presented At Annual Meetings Of CNET Stockholders.

1. Director Nominations.

Neither CNET's Restated Certificate of Incorporation (the "Charter") nor its Bylaws include a provision addressing the procedure a stockholder must follow to nominate candidates for director election and to run such candidates on a stockholder's own slate using its

[3] CNET claims that the Rights Plan was adopted in order to "deter coercive takeover tactics and to prevent an acquiror from gaining control of the Company without offering a fair price to all of the Company's stockholders." CNET Networks, Inc. Current Report (Form 8-K) (Jan. 14, 2008). JANA has no intention of acquiring a controlling stock interest in CNET, and instead is interested only in presenting qualified candidates to compete with the management slate in the upcoming election.

own proxy card and proxy materials (rather than using the Company's proxy card and materials). Article III, Section 6 of the Bylaws authorizes the Board or its nominating committee to make director nominations and sets forth a procedure by which a stockholder may recommend director candidates for nomination by the Board or its nominating committee (the "Nomination Bylaw"), but this bylaw does not address the procedure for stockholders who nominate their own candidates. The Nomination Bylaw states:

> Nominations for Directors. Nominations for election to the Board of Directors of the Corporation at a meeting of the stockholders *may* be made *by the Board of Directors*, or on behalf of the Board of Directors by a Nominating Committee appointed by the Board of Directors. *Any stockholder* of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at such meeting for at least one year *may submit* a director nomination *to the Board of Directors* or, if designated by the Board of Directors, a Nominating Committee. Such nomination must be set forth in a written *recommendation* and mailed by certified mail to the Secretary of the Corporation and received no later than (a) with respect to an annual meeting, 120 calendar days in advance of the date of the Corporation's proxy statement released to security-holders in connection with the previous year's annual meeting of security holders . . . . Any such submission by a stockholder must set forth as to each proposed nominee who is not an incumbent director (i) the number of shares of stock of the Corporation which are beneficially owned by the nominating stockholder, (ii) a statement of the nominee's qualifications, (iii) a consent signed by the nominee evidencing a willingness to serve as a director, if elected and (iv) *a commitment by the nominee to meet personally with the Nominating Committee or the Board of Directors*.

(emphasis added).

The Nomination Bylaw imposes three requirements that a stockholder must satisfy in order to recommend candidates for consideration by the Board or its nominating committee for inclusion on management's slate of nominees: (i) a "written recommendation" must be delivered 120 days before the one-year anniversary of the proxy statement for the

previous year's annual meeting; (ii) the stockholder must beneficially own "$1,000 of securities entitled to vote" at the meeting; and (iii) the stockholder must have owned such amount of securities for at least one year. The Nomination Bylaw provides no method for determining how to assess the market value of "$1,000" of securities, nor does the Nomination Bylaw specify the date from which the one-year holding requirement is to be measured.

By its terms, the Nomination Bylaw applies only to stockholder-recommended candidates for nomination by the Board. Because JANA intends to nominate its candidates directly and will prepare its own proxy card and other proxy materials and solicit its own proxies, the Nomination Bylaw has no application to JANA's nominees. No other provision in the Bylaws addresses the process for nominating candidates for director election, and the Nomination Bylaw does not purport to specify the exclusive method for nominating director candidates (i.e., it provides only that nominations "may" be made in accordance with its terms).

2. Other Business Proposals.

Neither the Charter nor the Bylaws include any provisions that address the procedures a stockholder must follow to present a proposal for stockholder approval at an annual meeting and to prepare its own proxy card and other proxy materials and solicit its own proxies in favor of the proposal. CNET asserts, however, that such stockholder proposals are governed by Article II, Section 3 of the Bylaws, which summarizes certain of the requirements under Rule 14a-8 of the Securities Exchange Act of 1934, as amended (the "Exchange Act") that a stockholder must satisfy to exercise its right under federal law to require CNET to include a stockholder proposal on CNET's proxy card and other proxy materials (the "14a-8 Bylaw"). The 14a-8 Bylaw states:

> Notice of Annual Meeting. Written or printed notice of the annual meeting, stating the place, day and hour thereof, shall be given to

> each stockholder entitled to vote thereat, in the manner stated in Article VII, Section 1, at such address as appears on the books of the Corporation or to any electronic mail address provided to the Corporation by a stockholder, not less than ten days nor more than sixty days before the date of the meeting. *Any stockholder of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at an annual meeting for at least one year may seek to transact other corporate business at the annual meeting, provided that such business is set forth in a written notice and mailed by certified mail to the Secretary of the Corporation and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement released to security-holders in connection with the previous year's annual meeting of security holders* (or, if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a reasonable time before the solicitation is made). *Notwithstanding the foregoing, such 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.*

(emphasis added). The 14a-8 Bylaw incorporates into its provisions certain of the requirements that appeared in Rule 14a-8 at the time the bylaw was adopted, such as the $1,000 and one-year ownership restrictions and the 120-day advance notice deadline. As with the Nomination Bylaw, it is impossible to determine how the $1,000 and one-year restrictions are ascertained if a stockholder reads only the 14a-8 Bylaw. However, applicable SEC rules provide a method for calculating the minimum ownership and one-year requirements for Rule 14a-8 proposals.[4]

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[4] *See* Division of Corporation Finance: Staff Legal Bulletin No. 14 (Jul. 13, 2001) (explaining how the minimum ownership requirement is calculated); 17 C.F.R. § 240.14a-8(b)(1) (2007) (specifying that the one-year period is determined as of the date a proposal is submitted to the company).

By its terms, the 14a-8 Bylaw applies only to proposals that are intended to be included in the Company's proxy materials and proxy card pursuant to Rule 14a-8, and does not apply to any other stockholder proposals.

3. Effect Of The Incumbents' Reading Of The Bylaws.

The incumbent directors of CNET assert that the Nomination Bylaw and the 14a-8 Bylaw apply to JANA's nominees and proposals and, therefore, bar all of CNET's stockholders from voting on JANA's nominees and proposals at the 2008 annual meeting because JANA has not owned $1,000 in common stock for one year. *See* Def. Ans. ¶ 18. CNET has attempted to justify applying these restrictions by labeling JANA an illegitimate "short-term stockholder without standing" and by asserting that so-called short-term investors do not deserve the right to present director nominations or other stockholder proposals at an annual meeting. Specifically, in a press release responding to the Notice, CNET stated: "CNET Networks' governance processes and by-laws are intended to enable all stockholders having a *legitimate interest* in enhancing the Company's value over time to submit proposals, and to prevent *short-term stockholders without standing* from using the Company's established governance procedures in order to further their individual agenda." Press Release, CNET Networks, Inc. (Jan. 7, 2008) (emphasis added).

Under the incumbent directors' interpretation of the Bylaws, the franchise rights of CNET's stockholders would be significantly diminished. For example:

- A stockholder who owns less than $1,000 of common stock could never nominate candidates for director or present stockholder proposals at any annual meeting of stockholders.

- A stockholder who purchases more than $1,000 of common stock would be disenfranchised because the stockholder may not nominate candidates for director or present stockholder proposals

until either the second or third annual meeting following the stockholder's purchase of $1,000 or more of common stock.[5]

- All stockholders would be denied the opportunity to vote for candidates and proposals that are barred by the $1,000 and one-year holding restrictions.

For the reasons set forth below, the incumbent Board cannot use the Bylaws to disenfranchise the stockholders in this manner.

[5] If the Bylaws require one-year ownership as of the date a nominee or proposal is submitted and a stockholder buys $1,000 in stock five months before the annual meeting in year 1, the stockholder would not be eligible to submit a nominee or proposal until approximately five months before the meeting in year 2. Because such a stockholder could not satisfy the 120-day advance notice deadline for submitting timely nominees or proposals for the year 2 annual meeting, which this year was approximately six months prior to the anticipated annual meeting date, the stockholder would need to wait until year 3 to submit a nominee or proposal.

ARGUMENT

I. THE MOTION FOR JUDGMENT ON THE PLEADINGS STANDARD.

Court of Chancery Rule 12(c) provides that the Court may grant judgment on the pleadings where there is no material fact in dispute and where the moving party is entitled to judgment as a matter of law. *See Desert Equities Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

Here, there are no disputed issues of material fact. Whether CNET's purported interpretation of the Nomination Bylaw and the 14a-8 Bylaw is valid under Delaware law is a question of law. *See Sassano v. CIBC World Markets Corp.*, 2008 WL 152582, at *5 (Del. Ch.) (Exhibit B) ("'Corporate charters and by-laws are contracts among the shareholder 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. 'The proper construction of any contract . . . is purely a question of law.'") (internal citations omitted). Thus, this matter is appropriate for judgment on the pleadings.

II. THE NOMINATION BYLAW DOES NOT IMPOSE ANY VALID RESTRICTIONS ON JANA'S RIGHT TO NOMINATE DIRECTOR CANDIDATES.

CNET's incumbent directors are attempting to deny the stockholders the right to vote in favor of JANA's nominees by claiming that the Nomination Bylaw prohibits JANA from presenting its nominees because it has not owned $1,000 of common stock for one year. CNET's interpretation is not only contrary to the express language of the Nomination Bylaw, but would also render the Bylaw invalid under Delaware law.

A. The Unambiguous Terms Of The Nomination Bylaw Do Not Apply To JANA's Nominees.

The simple, unambiguous language of the Nomination Bylaw addresses only nominations made by the Board itself. By its terms, the Nomination Bylaw merely offers stockholders an opportunity to "submit" a "recommendation" of a candidate for consideration by the incumbent Board or its nominating committee:

> Nominations for election to the Board of Directors of the Corporation at a meeting of the stockholders *may* be made *by the Board of Directors*, or on behalf of the Board of Directors by a Nominating Committee appointed by the Board of Directors. *Any stockholder* of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at such meeting for at least one year *may submit* a director nomination *to the Board of Directors* or, if designated by the Board of Directors, a Nominating Committee. Such nomination must be set forth in a written *recommendation* and mailed by certified mail to the Secretary of the Corporation and received no later than (a) with respect to an annual meeting, 120 calendar days in advance of the date of the Corporation's proxy statement released to security-holders in connection with the previous year's annual meeting of security holders . . . . Any such submission by a stockholder must set forth as to each proposed nominee who is not an incumbent director (i) the number of shares of stock of the Corporation which are beneficially owned by the nominating stockholder, (ii) a statement of the nominee's qualifications, (iii) a consent signed by the nominee evidencing a willingness to serve as a director, if elected and (iv) *a commitment by the nominee to meet personally with the Nominating Committee or the Board of Directors*.

(emphasis added). The Nomination Bylaw contains no language addressing nominations made by stockholders directly, and it cannot be construed to prohibit JANA's right to nominate directors and solicit proxies for the 2008 annual meeting. By providing a stockholder a means to recommend candidates for nomination by the Board in situations where the stockholder does not wish to unilaterally nominate (and solicit proxies in favor of) its own candidates, the Nomination Bylaw responds to Exchange Act requirements that a public company disclose in its proxy

materials whether a board's nominating committee "will consider director candidates recommended by security holders" and to "describe the procedures to be followed by security holders in submitting such recommendations." *See* 17 C.F.R. § 240.14a-101, Item 7, ¶ (d)(2); Reg. S-K Item 407, ¶ (c)(2)(ii) & (iv); Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Exchange Act Release No. 34-48825 (effective Jan. 1, 2004). Thus, the Nomination Bylaw is intended to cover the process by which the Board selects its own nominees in compliance with Exchange Act rules.

Moreover, even if the Nomination Bylaw somehow could be read as addressing stockholder nominees, the bylaw does not say that a stockholder "shall" present nominees "only" pursuant to the Nomination Bylaw procedures. Instead, the Nomination Bylaw states that a stockholder "may" recommend candidates for nomination by the Board. Thus, even assuming the Nomination Bylaw addresses stockholder nominees running on a stockholder's slate, the bylaw's permissive language does not specify the exclusive procedure for nominating candidates. *Compare Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 296 (Del. 1999) (noting that the word "may" in a statute "connotes [a] . . .voluntary, not mandatory or exclusive, set of options"); *Campbell v. Loew's Inc.*, 134 A.2d 852, 857 (Del. Ch. 1957) (noting that the provision in Section 223 of the DGCL specifying that directors "may" fill new directorships should not be read to mean that the stockholders cannot fill new directorships). In analogous circumstances, the Court of Chancery has held that a bylaw cannot be read to restrict a stockholder's rights unless the bylaw uses "strong" language that spells out the restriction in unambiguous language. *See Campbell*, 134 A.2d at 857 ("It would take a strong by-law language to warrant the conclusion that those adopting the by-laws intended to prohibit the stockholders from filling new directorships between annual meetings."). No such "strong" language appears in the Nomination

Bylaw, and therefore, it cannot be read as a restriction on a stockholder's right to nominate director candidates.

Because no provision in the CNET Charter or Bylaws limits the stockholders' right to make direct nominations of directors, JANA is free to nominate any candidate of its choosing for election as a director at the 2008 annual meeting.

B. Even If The Director Nomination Bylaw Were Ambiguous, The Bylaw Cannot Be Interpreted To Impose Any Restrictions On JANA's Right To Nominate Candidates.

To preclude the stockholders from considering JANA's nominees, the incumbent directors are relying on an interpretation of the Nomination Bylaw that contradicts the plain meaning of the bylaw. CNET has (i) acknowledged that the Nomination Bylaw does not preclude a stockholder from "run[ning]" its own "competing slate" of directors without seeking Board approval of the stockholder's nominees, but (ii) also asserted that, in order for a stockholder to run such a competing slate, a stockholder must satisfy the 120-day advance notice and $1,000 and one-year restrictions.[6] However, the advance notice and ownership restrictions are mentioned *only* in the context of a stockholder recommending candidates for nomination by the Board: "*Any stockholder* of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at such meeting for at least one year *may submit* a director

[6] *See* Letter Dated January 15, 2008 to The Honorable William B. Chandler, III from Donald J. Wolfe, Jr., Esquire ("The Company does not contend . . . that the bylaws vest the Company's Board or Governance and Nominating Committee with the exclusive power to nominate directors. Rather, the bylaws permit any stockholder who so chooses, and who otherwise meets the requirements of the bylaws (including the requirements that such stockholder own at least $1,000 of common stock for at least one year and provide written notice by January 8, 2008), to recommend candidates to the Governance and Nominating Committee for its consideration. *Nonetheless, any stockholder who meets the minimum holding, advance notice and other applicable requirements also remains free to run its own slate of directors.*") (emphasis added). *See also* Def. Ans. at ¶ 18.

nomination *to the Board of Directors* or, if designated by the Board of Directors, a Nominating Committee." It is impossible to read the $1,000 and one-year restrictions set forth in the Nomination Bylaw as applying to any nominees other than Board nominees.

At best, CNET's reading of the Nomination Bylaw is premised on an imagined ambiguity in the plain words of the Bylaw. However, even if the Nomination Bylaw is "susceptible to more than one interpretation," it must be read "in the manner most favorable to the free exercise of traditional electoral rights" because JANA was not involved in drafting the bylaw. *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 311 (Del. Ch. 2002) (noting that, where the stockholders have not participated in drafting the limitation on nomination rights at issue, "it is inequitable to burden the rights of public stockholders based on an obscure drafting history to which they were not a party. It is better policy to read the charter in the manner most favorable to the free exercise of traditional electoral rights, in a situation in which the charter is susceptible to more than one reasonable interpretation"); *see also, Openwave Systems, Inc. v. Harbinger Capital Partners Master Fund I, LTD.*, 924 A.2d 228, 239 (Del. Ch. 2007) (noting that, if the language in an advance notice bylaw is ambiguous, "doubt is resolved in favor of the stockholders' electoral rights").[7]

[7] The Court of Chancery faced a similar issue in *Harrah's*, where a corporation attempted to argue that a charter provision granting a stockholder a specific right to nominate one candidate without satisfying certain advance notice requirements also imposed an implied restriction on its right to nominate more than one candidate. The Court noted that the bylaw was ambiguous, but the Court ultimately declined to interpret the provision as imposing a restriction by implication. Rather, "[b]ecause the Specific Nomination Provision does not clearly limit [the stockholder's] electoral rights, the residual doubt I harbor must be resolved in favor of permitting [the stockholder] to exercise the electoral rights it would ordinarily possess as a . . . stockholder" to nominate more than one candidate. 802 A.2d at 318. The same result is required here.

C. If The Nomination Bylaw Were Read As The Incumbents Urge, It Would Be Invalid Under Delaware Law.

Even if the Nomination Bylaw could be read as imposing the $1,000 and one-year restrictions on JANA's direct nominations (which it cannot), such restrictions would be invalid because they are inconsistent with Delaware law. 8 *Del. C.* § 109(b) ("The bylaws may contain any provision, *not inconsistent with law* or with the certificate of incorporation, 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.") (emphasis added).

Application of the $1,000 and one-year restrictions would severely diminish the stockholders' statutory right to elect directors. Because stockholders primarily influence company management through their selection of directors, Delaware law recognizes that "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests." *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988); *see also State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *7 (Del. Ch.) (Exhibit C). This "ideology" is expressly embedded in the statutory requirement that stockholders be afforded the opportunity to elect directors and to transact other business (such as amending the bylaws) *at least once a year at an annual meeting*. *See* 8 *Del. C.* § 211(b). As the Court of Chancery has noted, the right to nominate candidates is inseparably tied to the right to elect directors:

> Because of the obvious importance of the nomination right in our system of corporate governance, Delaware courts have been reluctant to approve measures that impede the ability of stockholders to nominate candidates. Put simply, Delaware law recognizes that the "right of shareholders to participate in the voting process includes the right to nominate an opposing slate." And "the unadorned right to cast a ballot in a contest for [corporate] office . . . is meaningless without the right to participate in selecting the contestants. 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, 802 A.2d at 310-11 (citations and footnotes omitted).[8]

Because nomination rights are so important to the protection of the stockholder franchise, the Delaware courts have zealously protected these rights from unnecessary encroachment. Restrictions on the stockholder's fundamental right to nominate candidates have only been permitted in extremely limited circumstances where such a restriction is necessary to serve "valid corporate purposes" and does "not infringe upon the exercise of . . . such right[] in an unreasonable way." *Hubbard v. Hollywood Park Realty Enters.*, 1991 WL 3151 at *11 (Del. Ch.) (Exhibit D) (citing *Datapoint Corp. v. Plaza Sec. Co.*, 496 A.2d 1031, 1036 (Del. 1985)). For the reasons set forth below, CNET's incumbent board has not, and cannot, articulate any valid corporate purpose for imposing the $1,000 and one-year holding restrictions on the fundamental right to nominate candidates for director election. Therefore, the incumbent board's imposition of the bylaw restrictions cannot be upheld as a "reasonable" infringement on the stockholder franchise.

1. The $1,000 And One-Year Restrictions Do Not Advance The Salutary Purpose Of An Advance Notice Bylaw.

Delaware law has never sanctioned a bylaw that selectively disenfranchises stockholders based on how much stock they own or the length of their tenure as stockholders. Rather, the Delaware courts have permitted only one bylaw-imposed encroachment on the right to nominate candidates: advance notice bylaws. Reasonable advance notice bylaws have been

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[8] *See also Harrah's*, 802 A.2d at 311 n. 39 (citing PL *Capital LLC v. Bonaventura*, Del. Ch. C.A. No. 19068, tr. at 27, Noble, V.C. (Sep. 28, 2001) ("Shareholders don't run the company. Under Section 141, the directors do. Thus, for an ongoing corporate venture, the (Continued. . .)

upheld because they serve the proper purpose of enhancing the voting rights of stockholders by enabling them to cast informed votes. Advance notice bylaws (i) afford stockholders a reasonable opportunity to consider the director nominees and (ii) allow for sufficient time to enable interested parties to provide the stockholders information about the nominees. *See Hubbard*, 1991 WL 3151 at *13; *see also Harbinger*, 924 A.2d at 239 (noting that advance notice bylaws "function to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations"); *Nomad Acquisition Corp. v. Damon Corp.*, 1988 WL 383667, at *8 (Del. Ch.) (Exhibit E) (declining to enjoin the enforcement of an advance notice bylaw in light of the corporation's argument that such bylaw is "a valid method of giving the Board and shareholders time to review the qualifications of a nominee before election at a meeting"). The $1,000 and one-year holding restrictions advance neither purpose. JANA provided CNET advance notice of its nominees approximately six months before the 2008 annual meeting, which is expected to be held in June. The Company and its stockholders have ample time to consider the qualifications of JANA's nominees, and CNET's incumbent Board has sufficient time to inform the stockholders of its views on JANA's nominees and the qualifications of the incumbent nominees. Requiring JANA to own stock for any period before it delivered its Notice will not result in a more fully informed vote of the stockholders.

(. . . continued)
election of directors may be the most . . . important action[] that shareholders can take. And without a choice of candidates, there can be no election or exercise of that franchise.")).

2. The Real, Discriminatory Purpose Of The $1,000 And One-Year Restrictions Violates Delaware Law.

Recognizing that the $1,000 and one-year restrictions cannot serve the salutary purpose of a reasonable advance notice bylaw, CNET has reached for an improper purpose to justify its $1,000 and one-year restrictions: "to prevent short-term stockholders without standing from using the Company's established governance procedures in order to further their individual agenda."[9] Press Release, CNET Networks, Inc. (Jan. 7, 2008). There are several reasons why this is not a valid purpose for restricting the voting rights of stockholders under Delaware law.

First, a stockholder is entitled to exercise its voting rights and avail itself of "established governance procedures" to further its own "agenda" or self-interest. *See Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interest."). Moreover, although JANA disputes the incumbents' suggestion that all stockholders would not benefit equally from adding the highly qualified candidates it has proposed to the Board, the incumbents should hardly be concerned that JANA is acting to further its own interest. Unless other stockholders agree that JANA's "agenda" furthers their own collective "agendas," JANA cannot prevail in its effort to elect its nominees.

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[9] In responding to JANA's notice of nominees and proposals, CNET also offered another makeweight justification for the $1,000 and one-year restrictions. Specifically, in a press release, CNET suggested that it should be permitted to preclude JANA from presenting its nominees because "the Company believes that no person or group of persons should be able to gain a majority of the Board and control of the Company without offering sufficient value to all stockholders." Press Release, CNET Networks, Inc. (Jan. 7, 2008). However, JANA is not attempting to acquire the Company; rather, JANA is only asking the stockholders to elect a new majority of the directors and change the abysmal performance record of the Company. If JANA succeeds, its nominees will owe fiduciary duties to all stockholders, and, most importantly, all stockholders will continue to have the opportunity to realize a control premium if the Company is sold. CNET's "sufficient value" argument is not a valid justification for precluding JANA from running a proxy contest.

Second, discrimination against so-called "short-term" stockholders is repugnant to Delaware law. Although JANA is not a "short-term" stockholder in its goals for CNET, even if it were, such status cannot deprive it of its nomination rights. Vice Chancellor Strine recently noted:

> I am reluctant to premise an injunction on the notion that some stockholders are "good" and others are "bad short-termers." There are respectable public policy arguments that can be made for legislators and regulators to fashion statutes and regulations that require minimum holding periods, as a pre-condition to the exercise of certain rights the invocation of which impose costs on all stockholders. *That has not been done with the stockholder franchise . . .*

Mercier v. Inter-Tel (Delaware) Inc., 929 A.2d 786, 814-15 (Del. Ch. 2007) (emphasis added). Under Delaware law, a stockholder cannot be treated like a second-class citizen simply because it is labeled a short-term investor by incumbent management.

Indeed, the DGCL prohibits bylaw provisions that discriminate against the voting rights of different groups of stockholders. Section 212 of the DGCL specifies that "Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder."[10] By referencing the certificate of incorporation as the *only* governing document that may vary the voting rights of stockholders, it is clear that the incumbent Board cannot use the bylaws as a

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[10] The exception to the one-vote rule recognized by reference to Section 213 is also telling: Section 213 provides that a company may fix a record date for the right to vote at a meeting that is between ten and sixty days prior to the meeting. Thus, in prohibiting disparate treatment as to voting rights, Section 212 expressly contemplates that a tenure system (that disenfranchises stockholders based on *when* they own the stock) violates Section 212 absent a statute or charter provision to the contrary. Moreover, Section 213(c) expressly provides that the record date for determining which stockholders may exercise a right cannot precede the date of exercise by more than 60 days. The one-year requirement appears to directly contradict that limit.

means of discriminating against the voting rights of so-called "short-term" stockholders.[11] As noted above, the right to present director nominations is an inseparable component of the right to vote. *See Harrah's*, 802 A.2d at 210-11. Accordingly, the Section 212 prohibition on discrimination in relation to stockholder voting rights applies with equal force to prohibit bylaws that discriminate against so-called short-term stockholders with respect to their nomination rights.

3. Even If The Discriminatory Purpose Were Valid, The $1,000 And One-Year Restrictions Are Invalid Because They Do Not Bear A Reasonable Relationship To That Purpose.

Even if a discriminatory bylaw provision against so-called "short-term" stockholders was permissible under the DGCL (which it is not), the $1,000 and one-year restrictions are nevertheless invalid because they do not bear a reasonable relationship to that discriminatory purpose.

The incumbent directors claim that the discriminatory $1,000 and one-year restrictions are designed to protect the interests of long-term stockholders by preventing abuse of "established corporate governance procedures" by so-called short-term stockholders. However, the $1,000 and one-year restrictions are unreasonable because they impose two arbitrary restrictions that do not further the purpose of protecting long-term stockholders. First, the $1,000 requirement does not relate to the distinction between a short-term and long-term stockholder. A stockholder could own $999 worth of stock for ten years, but would still be disenfranchised under the restrictions urged by the incumbents. Second, the one-year

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[11] *Guiricich v. Emtrol*, 449 A.2d 232, 239 n.14 (Del. 1982) (noting that a stockholder "may no longer be deprived of his voting rights by a mere change in the bylaws").

requirement does not actually distinguish between short-term and long-term stockholders. Indeed, it is impossible to determine the intentions of a stockholder solely based on the date it bought its stock. JANA could hold its very substantial block of stock for the next ten years and would nevertheless have been disenfranchised for its first year as a stockholder. Such an arbitrary limitation on a stockholder's franchise rights is unreasonable and cannot withstand scrutiny under Delaware law. *See Datapoint Corp. v. Plaza Sec.*, 496 A.2d 1031, 1036 (Del. 1985) (invalidating a minimum sixty-day delay in the effectiveness of stockholder action by written consent because such delay "imposes an arbitrary delay upon shareholder action in lieu of [a] meeting").

Finally, the $1,000 and one-year restrictions are also unreasonable because they unnecessarily restrict the voting rights of *all* stockholders, even those stockholders who have held $1,000 of common stock for one year. By denying JANA the opportunity to present its nominees and proposals at the 2008 annual meeting, the $1,000 and one-year restrictions deprive *all* stockholders of the opportunity to vote for JANA's nominees. Thus, the incumbent Board cannot hide its entrenchment motive by claiming that its imposition of the Bylaw protects long-term stockholders. Long-term stockholders are only harmed by being denied the opportunity to choose for themselves between JANA's and the incumbents' nominees. A bylaw that undermines its intended purpose cannot be upheld as reasonable.

III. THE 14A-8 BYLAW DOES NOT IMPOSE ANY VALID RESTRICTIONS ON JANA'S RIGHT TO PRESENT ITS PROPOSALS.

A. The Unambiguous Terms Of The 14a-8 Bylaw Do Not Apply To JANA's Proposals.

Similar to its reading of the Nomination Bylaw, CNET has also adopted a strained interpretation of the 14a-8 Bylaw to prevent the stockholders from voting on JANA's proposals

to, among other things, amend the Bylaws to increase the size of the Board and to fill the resulting new directorships with stockholder-elected candidates. *See* Def. Ans. ¶ 18. Contrary to CNET's reading, the unambiguous terms of the 14a-8 Bylaw, including the $1,000 and one-year restrictions, apply only to stockholder proposals submitted pursuant to Rule 14a-8 of the Exchange Act. Rule 14a-8 is a specially created procedure that requires a public corporation to include certain stockholder proposals on the company's proxy card, and is intended to afford stockholders a means to present a proposal to other stockholders without incurring the expenses that a stockholder proponent would otherwise incur if it were required to file its own proxy materials and to solicit proxies in favor of its proposal. JANA does not intend to use Rule 14a-8 to present its proposals to the stockholders and will incur the costs of preparing proxy materials and soliciting proxies itself. Accordingly, the $1,000 and one-year restrictions in the 14a-8 Bylaw do not apply to JANA's proposals.

The 14a-8 Bylaw provides:

> Notice of Annual Meeting. Written or printed notice of the annual meeting, stating the place, day and hour thereof, shall be given to each stockholder entitled to vote thereat, in the manner stated in Article VII, Section 1, at such address as appears on the books of the Corporation or to any electronic mail address provided to the Corporation by a stockholder, not less than ten days nor more than sixty days before the date of the meeting. Any stockholder of the Corporation that has been the beneficial owner of at least $1,000 of securities entitled to vote at an annual meeting for at least one year may seek to transact other corporate business at the annual meeting, provided that such business is set forth in a written notice and mailed by certified mail to the Secretary of the Corporation and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement released to security-holders in connection with the previous year's annual meeting of security holders . . . . *Notwithstanding the foregoing, such 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.*

(emphasis added). The 14a-8 Bylaw refers only to proposals submitted under Rule 14a-8, which is the provision of "applicable securities laws" that, in the words of Rule 14a-8, "addresses when a company must include a shareholder proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual . . . meeting of shareholders." 17 C.F.R. § 240.14a-8. The final sentence of the 14a-8 Bylaw, which requires that the stockholder's 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," makes clear that notice must be delivered pursuant to this bylaw only where a stockholder seeks to have a proposal included in a company's proxy materials pursuant to federal securities Rule 14a-8. Indeed, the $1,000 and one-year holding restrictions[12] and the 120-day advance notice deadlines[13] are borrowed directly from Rule 14a-8.[14] Similarly, the final

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[12] At the time the 14a-8 Bylaw was enacted, Rule 14a-8 also contained a $1,000 minimum ownership requirement and one-year holding period. *Compare* 14a-8 Bylaw ("Any stockholder . . . that has been the beneficial owner of at least $1,000 of securities entitled to vote at an annual meeting for at least one year may seek to transact other corporate business at an annual meeting") *with* Rule 14a-8 as in effect prior to 1998 (specifying that, in order to present a proposal, "the proponent shall be a record or beneficial owner of at least 1% or $1000 in market value of securities entitled to be voted on the proposal at the meeting and have held such securities for at least one year") (1997).

[13] The 120-day deadline in the 14a-8 Bylaw is almost a word-for-word replica of the same deadline set forth in Rule 14a-8. *Compare* 14a-8 Bylaw (requiring the notice of a proposal to be "set forth in a written notice and mailed by certified mail to the Secretary of the Corporation and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement released to security-holders in connection with the previous year's annual meeting of security holders (or, if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a reasonable time before the solicitation is made)") *with* Rule 14a-8 as in effect at the time the 14a-8 Bylaw was adopted ("A proposal to be presented at an annual meeting shall be received at the registrant's principal executive offices not less than 120 calendar days in advance of the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting of security holders except that if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement,

(Continued. . .)

sentence of the 14a-8 Bylaw ensures that the bylaw incorporates by reference the complete provisions of Rule 14a-8, as they are amended from time to time. The 14a-8 Bylaw summarizes the Rule 14a-8 requirements and reminds the reader to check Rule 14a-8 for all of the applicable requirements. The 14a-8 Bylaw cannot be reasonably read to graft those requirements onto *all* stockholder proposals.

The intended limited applicability of the 14a-8 Bylaw is further supported by the fact that it is drafted in permissive rather than exclusive language. The 14a-8 Bylaw establishes a procedure by which a stockholder who owns $1,000 of common stock for one year *may* present business at an annual meeting, through the Company's notice and proxy materials. However, no language in the 14a-8 Bylaw specifies that its terms establish the only method by which stockholder business may be brought at an annual meeting.

Indeed, CNET's broad reading of the 14a-8 Bylaw would render it invalid. If read as CNET urges, *every* notice of stockholder business to be conducted at an annual meeting would need to "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." There is no valid basis for requiring a notice of proposals to be included in *JANA's proxy materials* to satisfy the federal securities laws that apply to proposals to be included in *management's proxy materials* under Rule 14a-8. Furthermore, if these requirements applied to

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a proposal shall be received by the registrant a reasonable time before the solicitation is made.").

[14] Moreover, the stated purpose of the restrictions -- to prevent stockholders from advancing a private "agenda" -- is a Rule 14a-8 concept used to prevent stockholders from abusing the federally created access rights to include proposals on the Company's proxy materials and is inapplicable to stockholders who desire to run their own slate. *See* Part III(B) below.

all stockholder proposals, as CNET's reading of the 14a-8 Bylaw suggests, then such requirements would directly conflict with Delaware law. For example:

- Rule 14a-8 forbids the submission of a proposal that "relates to an election of directors," which has been interpreted to prohibit proposals to remove directors. Rule 14a-8(i)(8); *see also* Mesaba Holdings, Inc., SEC No-Action Letter, 2001 WL 473705 (Exhibit F) (permitting exclusion from the company proxy materials of a proposal calling for the removal of directors, and citing Rule 14a-8(i)(8) as the basis for exclusion). Yet, under Delaware law, stockholders cannot be deprived of their power to propose the removal of directors. 8 *Del. C.* § 141(k) (providing stockholders a statutory right to remove directors); *see also Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190 at *11 (Del. Ch.) (Exhibit G) (holding that a bylaw may not divest stockholders of the right to remove directors).

- Rule 14a-8 forbids the submission of a proposal that "relates to the redress of a personal claim or grievance against the company or any other person, or [that] . . . is designed to result in a benefit to [the proponent] . . ., or to further a personal interest, which is not shared by the other shareholders at large." Rule 14a-8(i)(4). Yet, under Delaware law, a stockholder cannot be prohibited from presenting a proposal for a stockholder vote simply because the proposal advances the stockholder's personal interest. *See Bershad*, 535 A.2d at 845 ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interest.").

- Rule 14a-8 limits a stockholder to presenting one proposal per meeting. *See* Rule 14a-8(c). Can CNET credibly take the position that Delaware law permits a bylaw to limit a stockholder to present only one proposal per meeting?

The only reasonable interpretation of the 14a-8 Bylaw is that it only applies to proposals made by stockholders to be included in the Company's materials pursuant to Rule 14a-8.[15] Accordingly, the incumbent Board of CNET cannot use the 14a-8 Bylaw to prevent JANA from making its proposals directly to the stockholders at the 2008 annual meeting.

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[15] Even if the 14a-8 Bylaw is ambiguous, under Delaware law "doubt is resolved in favor of the stockholders' electoral rights," and, therefore, CNET cannot apply the 14a-8 Bylaw to all (Continued. . .)

B. Even If The 14a-8 Bylaw Could Be Read As The Incumbents Urge, It Would Be Invalid Under Delaware Law.

Even if the 14a-8 Bylaw could be read as applying to proposals made by stockholders directly, the bylaw cannot prohibit JANA from presenting its proposals at the meeting because the $1,000 and one-year holding restrictions are invalid under Delaware law. The incumbents' reading of the 14a-8 Bylaw would impermissibly hinder JANA's and other CNET stockholders' statutory right to transact business *each year* at an annual meeting, including the stockholders' statutory right to amend the Bylaws. 8 *Del. C.* §§ 211(b); 109. Under Delaware law, not even the Charter can divest the stockholders of their right to amend the bylaws. *See* 8 *Del. C.* § 109(a) (specifying that the Charter can confer on the board the power to amend the bylaws but "[t]he fact that such power has been so conferred upon the directors . . . shall not divest the stockholders of the power, nor limit their power to adopt, amend or repeal bylaws"). The incumbents are attempting to stifle the full range of actions that the stockholders could take at the upcoming annual meeting by using the $1,000 and one-year holding restrictions to prevent stockholders from voting on JANA's proposals.

As noted in Part III(C), above, bylaw provisions that restrict stockholder voting rights have only been allowed in limited circumstances where they are necessary to further a "valid corporate purpose[]" and do not infringe on the right to vote in an unreasonable manner. *See Hubbard*, 1991 WL 3151, at *11. The $1,000 and one-year holding restrictions do not serve

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stockholder proposals. *See Harbinger*, 924 A.2d at 239. Under Delaware law, JANA cannot be penalized for the Board's failure to draft a bylaw that clearly and unambiguously applies to all stockholder proposals.

a valid corporate purpose and, even if they did, such restrictions do not bear a reasonable relationship to such purpose.

CNET has not articulated, and cannot articulate, any valid corporate purpose that would be served by prohibiting stockholders who have not held at least $1,000 worth of stock for one year from directly proposing business at the Company's annual meeting. In its attempt to justify the imposition of the $1,000 and one-year restrictions, CNET has alluded to the similarity between such restrictions and Rule 14a-8 of the Exchange Act, as supporting the validity of applying their restrictions to *all* stockholder proposals. *See* Letter Dated January 15, 2008 to The Honorable William B. Chandler, III from Donald J. Wolfe, Jr., Esquire. However, the SEC's purpose for enacting Rule 14a-8 cannot be used to justify such restrictions on the stockholders' right to make proposals directly under state law.

In that regard, Rule 14a-8 was enacted as a limit to the federally created access rights of stockholders to include proposals on the company's proxy. The requirements were designed to prevent stockholders from abusing that access right and imposing burdensome costs on the company. *See* Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998) ("One purpose of the requirement is to curtail abuse of the rule by requiring that those who put the company and other stockholders to the expense of including proposals in the proxy materials have had a continuous investment interest in the company."). Specifically, the SEC was concerned that parties that did not have a material economic stake or investment interest in the Company could improperly use the rights granted by Rule 14a-8 to impose unnecessary costs and burdens on the Company. However, the concerns that led to the restrictions in Rule 14a-8 are not implicated when a stockholder decides to make a proposal directly to the stockholders and bears the cost of soliciting proxies from the stockholders using

its own proxy materials. JANA is not seeking to impose such costs on the Company, but rather will bear such costs directly.

Moreover, as set forth above, to the extent CNET claims that the purpose of the $1,000 and one-year holding restrictions is to "prevent short-term stockholders" from "using the Company's established governance procedures in order to further their individual agenda," that purpose is invalid when applied to stockholder proposals, just as it is invalid when applied to director nominees. Specifically:

- Every stockholder is entitled to pursue its own "agenda," by soliciting the votes of fellow stockholders, and JANA's proposals will not be adopted unless a supermajority of the stockholders support such proposals. Indeed, JANA cannot prevail in adopting the proposed Bylaw amendments unless two-thirds of the shares held by stockholders present at the meeting in person or by proxy support it.[16]

- It is repugnant to Delaware law to treat so-called "short-term" stockholders unequally through a bylaw provision. *See Inter-Tel*, 929 A.2d at 814-15.

- Because the right to propose business is a fundamental aspect of a stockholder's voting rights, Section 212(a) of the DGCL mandates that a system by which some common stockholders but not others are entitled to present bylaw amendments must be placed only in the Charter, not the Bylaws.

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[16] *See* Bylaws, Article XII ("These bylaws may be altered, amended or repealed or new bylaws may be adopted at any annual meeting of the stockholders or at any special meeting of the stockholders at which a quorum is present or represented, by the affirmative vote of the holders of 66-2/3 percent of the shares entitled to vote at such meeting and present or represented thereat . . . .").

Finally, even if the discrimination urged by CNET's incumbent directors were proper, the $1,000 and one-year restrictions bear no reasonable relationship to that purpose. As set forth above, the $1,000 ownership and one-year restrictions:

- Discriminate against both "short-term" and "long-term" investors who own less than $1,000 of stock.
- Unnecessarily restrict the voting rights of both "short-term" and "long-term" investors during their first year of ownership.
- Unnecessarily restrict the voting rights of *all* stockholders by depriving them of the opportunity to vote on proposals otherwise barred by such restrictions.

For all of these reasons, CNET's attempt to impose the $1,000 and one-year holding restrictions to prevent the CNET stockholders from being able to consider and vote on JANA's proposals at the 2008 annual meeting unnecessarily disenfranchises the CNET stockholders and is, therefore, invalid under Delaware law.

CONCLUSION

JANA's plan to present its nominees and proposals for stockholder action at the upcoming annual meeting complies with the Bylaws and applicable Delaware law. JANA is asking the stockholders to elect JANA's candidates for director, to exercise their statutory right to amend the Bylaws to fix the size of the Board at 13 directors and to exercise their common law right to fill the resulting new directorships. Article II, Section 2 of the Bylaws permits such election and the transaction of such other business at an annual meeting: "An annual meeting of stockholders shall be held . . . at which meeting the stockholders shall (i) elect directors to fill the class of directors whose terms are expiring . . . and (ii) transact such other business as may properly be brought before the meeting." Because no provision of the Bylaws or the Charter addresses the manner in which nominations or "other business" may be "properly" brought at the annual meeting, JANA is permitted to make its nominations and present its proposals from the floor of the meeting on the day the meeting is held.

For the foregoing reasons, JANA respectfully requests that the Court grant JANA's Motion for Judgment on the Pleadings.

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February 4, 2008

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CERTIFICATE OF SERVICE

I, Kevin M. Coen, hereby certify that on the 4th day of February, 2008, PLAINTIFF'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS was served by electronic filing upon the following attorneys of record:

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