IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JANA MASTER FUND, LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: 3447-CC
	)	
CNET NETWORKS, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

POTTER ANDERSON & CORROON LLP
Donald J. Wolfe, Jr. (#285)
Kevin R. Shannon (#3137)
Brian C. Ralston (#3770)
Hercules Plaza, 6th Floor
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Defendant CNET Networks, Inc.

OF COUNSEL:

Robert C. Myers
Richard W. Reinthaler
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Dated: February 22, 2008
848290

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page No.

STATUTES

OTHER AUTHORITIES

NATURE AND STAGE OF PROCEEDINGS

JANA Master Fund, Ltd. ("JANA") has declared its interest in attempting to amend certain Bylaws of CNET Networks, Inc. ("CNET" or the "Company") and to elect a majority of the CNET board of directors by a vote of stockholders at the next annual meeting. In light of the fact that both such actions are barred by the clear terms of CNET's existing Bylaws, JANA filed its Complaint (the "Complaint") against CNET on January 7, 2008, in which it requests that the Court declare invalid the relevant portions of CNET's Bylaws. JANA alternatively requests that the Court enjoin the application of CNET's Bylaws to JANA's proposed proxy solicitation. The Complaint also seeks an order requiring the Company to provide certain stocklist materials to JANA.[1]

In connection with filing the Complaint, JANA moved for expedited proceedings and asserted that its claims implicated only discrete legal issues that could be resolved promptly through a dispositive motion to be subsequently identified. On January 15, 2008, following an office conference with the Court, the parties agreed to a stipulated schedule governing briefing with regard to JANA's anticipated dispositive motion. In accordance with that schedule, CNET filed its Answer to the Complaint on January 22, 2008. JANA filed its Motion for Judgment on

[1] On or about December 26, 2007, JANA submitted a demand to inspect CNET's stocklist and related materials (the "Demand") in connection with its intention to solicit proxies at the 2008 Annual Meeting. (Compl. Ex. B). In response to that Demand, CNET promptly notified JANA that is not entitled to solicit proxies because it has not owned at least $1,000 of CNET common stock for a year. (Compl. Ex. C). Accordingly, CNET refused to allow JANA to inspect the stocklist materials. (*Id.*) At the scheduling conference with the Court, JANA represented that it had two separate purposes for the Demand: (i) to facilitate the solicitation of proxies; and (ii) to enable it to communicate with the Company's other stockholders. On the basis of that representation, CNET has provided certain stocklist materials to JANA, which materials may be used solely for purposes of communicating with stockholders (but not in connection with soliciting proxies). CNET continues to dispute JANA's right to use the stocklist materials to solicit proxies given that JANA has not complied with CNET's Bylaws.

the Pleadings on February 4, 2008, along with its Opening Brief in support thereof. This is CNET's Answering Brief in Opposition to JANA's Motion for Judgment on the Pleadings. The hearing on JANA's motion is scheduled to be held on March 3, 2008.

PRELIMINARY STATEMENT

JANA's opening submission in support of its rigorously narrow motion is a model of misdirection.[2] Its overheated oratory sets alight all manner of straw men, while leaving largely unexamined the central issue before the Court: whether a corporation may validly enforce a stockholder-approved bylaw that places limited conditions on the ability of stockholders to present new business at the Company's annual meeting. It is an understandable, if effective, tactic, given that Delaware law has long recognized the utility and propriety of reasonably crafted provisions of this kind, even when approved only by the board.

Notwithstanding JANA's overwrought assertions to the contrary, this case is not about the right of CNET stockholders to cast their votes. The Bylaw in question places no restriction whatsoever on the ability of CNET stockholders to exercise their franchise for or against matters properly placed before them. Nor does this case present the question whether a corporation may eliminate a stockholder's right to nominate directors or propose business at an annual meeting. The Bylaw in question contains no such prohibition, but merely places reasonable limitations on the stockholders' right to do so.

This case also is not about director entrenchment, as JANA strains to imply. The Bylaw in question has been in place since the Company's inception as a public entity over a decade ago, long predating JANA's recent investment in the Company. Moreover, the Bylaw was approved and implemented by the CNET stockholders (not solely upon the authority of the incumbent

[2] For example, JANA devotes much its argument to decrying the application of Article III, Section 6 of the CNET Bylaws. CNET, however, has never taken the position that this provision is applicable to JANA's effort here to propose amendments to the CNET bylaws or to nominate candidates for election to the board. Indeed, as JANA specifically acknowledges, CNET so advised JANA and the Court at the very outset of this litigation. (*See* JANA Opening Brief (hereinafter "JANA OB") at 17, fn. 6).

CNET directors or any of their predecessors) -- a fact that JANA fails even to mention in its submission to the Court.

Ultimately, this case presents two discrete legal issues that can be decided based on the unambiguous language of CNET's Bylaws and established Delaware law. First, it is clear that CNET's Bylaws, which impose notice and stock ownership requirements on all stockholders who seek to transact business at an annual meeting, apply to JANA's various proposals through which it seeks to seize control of the Company. Conceding that it has not satisfied those requirements, JANA is relegated to arguing that the Bylaws apply only in the limited circumstances that arise when a stockholder seeks to include its proposals in the Company's proxy materials, and that the Bylaws impose absolutely no notice or ownership requirements where, as here, a stockholder intends to solicit proxies. The Bylaws, however, do not contain the extremely unusual limitation that JANA suggests, and its proposed interpretation is patently unreasonable.

Second, as JANA reluctantly concedes in its submissions, Delaware courts have repeatedly upheld reasonable limitations on a stockholder's ability to present business at an annual meeting, even when (unlike the situation at hand) those restrictions are imposed on stockholders through unilateral action of the board. As explained herein, the challenged Bylaw was approved by CNET's stockholders, has been consistently applied by the Company over the last decade, has not been previously challenged, contains reasonable limitations, and serves a proper corporate purpose. Moreover, as a sophisticated market player, JANA plainly knew of the existence and requirements of the Bylaw when it made its first investment in the Company just a few months ago and therefore cannot credibly contend that it has been inequitably harmed by the application of the Bylaw.

STATEMENT OF FACTS

Notwithstanding its tactical decision to present this issue on a motion for judgment on the pleadings and thereby rest its hopes for success solely on the Complaint and the Answer, JANA's purported Statement of Facts is replete with allegations that are not contained in either the Complaint or the Answer and that are patently irrelevant to the legal issues before the Court. By way of example, JANA misleadingly refers to certain prior accounting restatements and actions allegedly taken by the CNET Board after the Complaint was filed, all of which appear more appropriate for inclusion in a dissenter's proxy statement than in an argument directed to the limited record that JANA itself has opted to create. Its resort to irrelevant information of this kind serves only to underscore the weakness of JANA's legal arguments.

A summary of the relevant facts that are properly before the Court in connection with the pending motion is set forth below.

A. The Parties

CNET is a Delaware corporation founded in 1992, which conducts business in the United States, Asia and Europe. (Compl. ¶ 6, Ans. ¶ 6). CNET is an interactive media company that builds brands in technology, entertainment, business, food and parenting; those brands include CNET, MP3.com, ZDNet, TechRepublic, Chow and Urban Baby. *Id.*

JANA is an investment fund and the record holder of 1,000 shares of CNET common stock. (Compl. ¶ 5, Ans. ¶ 5). JANA began purchasing its Company stock in or about October 2007 and claims to beneficially own more than 11,000,000 shares of CNET stock. *Id.* JANA also has entered into equity swaps with respect to over 7,000,000 shares of CNET stock, which

expire in July 2008. (LeGrow Declaration Ex. E).[3] As a result of its equity swaps, JANA has a unique interest with regard to short-term changes in the market price of CNET stock.

B. CNET's Amended And Restated Bylaws

CNET's Amended and Restated Bylaws (the "Bylaws") were originally adopted by CNET's board of directors and approved by written consent of its stockholders in May 1996. (LeGrow Decl. Ex. A). The relevant provision at issue in this action, Article II, Section 3 (the "Notice Bylaw"), was contained in the version of the Bylaws adopted by its stockholders in 1996 and has not substantively changed in the intervening eleven years. (*Id.*). The Notice Bylaw provides in its entirety as follows:

> Section 3. 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 stockholders (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.

(CNET Amended and Restated Bylaws, Article II, Section 3 (emphasis added)).

[3] The Declaration of Abigail LeGrow ("LeGrow Decl.") is being filed simultaneously herewith.

By its express terms, the Notice Bylaw requires stockholders to own at least $1,000 of common stock for at least one year before independently submitting any proposal for the consideration of stockholders at an annual meeting. Following its initial public offering in 1996, CNET has repeatedly disclosed in its SEC filings the existence and requirements of the Notice Bylaw, and its impact on stockholder proposals. (*See, e.g.*, LeGrow Decl. Exs. B and C (CNET Proxy Statement for 2007 Annual Meeting of Stockholders, dated Apr. 30, 2007, p. 5-6; CNET Proxy Statement for 2006 Annual Meeting of Stockholders, dated Apr. 10, 2006, p. 4-5; Compl. Ex. A, p. 2-3)).

The next annual meeting of CNET's stockholders (the "2008 Annual Meeting") is expected to be held in June 2008 -- approximately one year from the date of the 2007 Annual Meeting. The CNET board is currently comprised of eight directors. The Bylaws provide that the number of directors shall be fixed by resolution of the Board. (Amended and Restated Bylaws at Article III, § 2(b)). CNET's board is divided into three classes, designated Class I, Class II and Class III. (*Id.* at Article III, § 2(a)). At the 2008 Annual Meeting, the Class III directors will be elected to a three year term. (*Id.*).

C. JANA Purchases CNET Stock And Quickly Attempts To Seize Control Of The Company

It appears that JANA began purchasing its CNET shares in or around October 2007, approximately three months prior to its initiation of this lawsuit. (Compl. ¶ 1). As a result, pursuant to the explicit terms of CNET's Bylaws, JANA is not eligible to transact any business (including nominating directors) at the Company's 2008 Annual Meeting. JANA cannot reasonably dispute that it was aware of the Notice Bylaw at the time it purchased its CNET stock. JANA's own communications with the Company disclose its awareness of the provision

and its understanding of its effect on JANA's ability to submit its proposals. (*See, e.g.*, Compl. Ex. A).

In violation of the Company's Bylaws, JANA notified CNET by letter dated December 26, 2007 that it intended to nominate directors to CNET's board and to propose for stockholder approval certain amendments to CNET's Bylaws at the 2008 Annual Meeting. (Compl. Ex. A, p. 1). Specifically, JANA's letter and accompanying notice stated its intent to:

1. Nominate two individuals for election to CNET's board as Class III directors;

2. Propose an amendment to CNET's Bylaws to require that CNET's board be comprised of thirteen directors;

3. Propose an amendment to the Bylaws that would eliminate provisions stating that, in the event of an increase in the number of director positions in advance of an annual meeting, the resulting directorships would be apportioned by the board between the three classes of directors, and additional directors would be elected by the board and serve until the next election of the class for which such director shall have been chosen;

4. Propose an amendment providing that any director vacancy, or any new directorship created as a result of an increase in the number of directors, may be filled with a person elected by the stockholders; and

5. Nominate for election five persons to serve in the new directorships created by the adoption of the bylaw amendment described above, or in any other vacant or new directorship created prior to the Annual Meeting.

(Compl. Ex. A, p. 6-7). Thus, having started acquiring CNET stock only a few months before and, despite the fact that the Company has a staggered Board, JANA seeks to elect a majority of the Company's directors at the 2008 Annual Meeting and thereby seize control of the Company.[4]

[4] JANA's repeated assertion in its Opening Brief that it has no intention of gaining control of CNET is belied by its undisputed conduct. As explained above, JANA seeks to elect a majority of the Company's directors at the 2008 Annual Meeting, and JANA has stated that it may make significant additional purchases of the Company's stock such that it would own a potential controlling interest in the Company.

JANA's letter of December 26 conclusively demonstrates that it was acutely aware of the Company Bylaws, and specifically the Notice Bylaw. In that letter, JANA acknowledged that "[t]he Company's proxy statement for its 2007 annual meeting implies that [JANA] cannot present its proposals at the Annual Meeting unless it complies with the requirements of Section 3 of Article II of the Bylaws … . If [that section] were to apply to [JANA], [JANA] would not satisfy the requirements of that section because it has not beneficially owned $1,000 of such securities for the required one-year period." *Id*. at p. 4.

ARGUMENT

I. APPLICABLE STANDARD OF REVIEW

In connection with the resolution of a motion for judgment on the pleadings under Court of Chancery Rule 12(c), the Court "is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993) (citations omitted). The Court may grant judgment on the pleadings only if the pleadings fail to reveal the existence of any disputed material fact and establish that the movant is entitled to judgment as a matter of law. *Id.* [5] JANA has not satisfied that demanding standard.

II. THE NOTICE BYLAW APPLIES TO ALL OF JANA'S PROPOSALS AND PRECLUDES JANA FROM PRESENTING ITS PROPOSALS AT THE ANNUAL MEETING

As a preliminary matter, we note that JANA devotes a significant portion of its argument to asserting that Article III, Section 6 of the Bylaws applies solely to "stockholder-recommended candidates for nomination by the Board" and therefore does not apply where a stockholder seeks to run its own competing slate of nominees. (JANA OB at 10).[6] It does so even as it acknowledges that CNET has not argued to the contrary and that CNET so advised JANA and the Court at the outset of the litigation. (*See, e.g.*, JANA OB at 17). What CNET does contend

[5] When considering a motion for judgment on the pleadings, it is appropriate for the Court to consider any documents attached to the pleadings or incorporated by reference. *See Rag Am. Coal Co. v. AEI Res., Inc.*, 1999 WL 1261376, at *1 (Del. Ch). The Court may also take notice of the Company's public filings. *See In re Tyson Foods, Inc.*, 2007 WL 2351071, at *2 (Del. Ch.). Copies of unreported cases cited herein are included in the Compendium filed contemporaneously herewith.

[6] Article III, Section 6 provides that the Board, or its nominating committee, will consider nominations submitted by a stockholder who has owned $1,000 of stock for at least one year. Article III, Section 6 does not apply to stockholders, such as JANA, wishing to run their own slate of directors on a separate proxy. Such proposals for stockholder action are governed by the Notice Bylaw.

is that another Bylaw -- the Notice Bylaw -- applies to all business that a stockholder seeks to transact at the Annual Meeting, including JANA's proposed director nominations. As previously explained, the Notice Bylaw expressly provides that only stockholders that have owned $1,000 worth of CNET stock for at least one year may seek to transact business at the Annual Meeting. JANA concedes that it does not meet this eligibility requirement.

It is undisputed that, since JANA went public in 1996, the Notice Bylaw, adopted at that same time by the CNET stockholders, has provided that only a 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 the annual meeting …." (Bylaws, Art. II, Sec. III). Unable to assail the conclusion that it does not yet satisfy that unambiguous and longstanding requirement, JANA devotes much of its brief to the incorrect assertion that the ownership and advance notice requirements set forth in the Notice Bylaw apply only when a stockholder seeks to include a proposal in the Company's proxy statement and are thus inapplicable both with respect to JANA's proposed Bylaw amendments and to its intended proxy contest to elect a majority of the CNET Board.

There are at least two obvious flaws in that assertion. First, the express language of the Notice Bylaw quite simply says nothing of the sort. Rather, the language of the Bylaw speaks broadly to the transaction of business at the meeting and makes no reference of any kind to the question of who is responsible for presenting a matter to the stockholders. Despite this, JANA earnestly urges this Court to construe the Notice Bylaw in a way that would stunt the express scope of its applicability and relegate it to nothing more than a redundant restatement of existing federal restrictions with respect to inclusion of stockholder proposals in the Company's proxy statement.

Second, JANA's proposed interpretation of the Notice Bylaw requires the wholly irrational conclusion that CNET's Bylaws were crafted so as to require absolutely no notice or eligibility requirements of any kind relating to stockholders who seek to solicit proxies in support of stockholder proposals or even hostile proxy contests designed, as is JANA's, to replace a majority of the Company's board. That is not only senseless, but directly contrary to the Company's consistent interpretation and application of the Notice Bylaw since its inception some 12 years ago.

A. The Notice Bylaw Applies To All Stockholder Proposals

The first sentence of the Notice Bylaw requires that the Company provide all stockholders with timely notice of the Annual Meeting. The next sentence provides, in relevant part, that:

> [a]ny 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 …***

(emphasis added). By its plain terms, the Notice Bylaw applies to any corporate business that a stockholder seeks to submit for consideration at CNET's Annual Meeting.[7]

Despite its clear language, JANA resolutely maintains that "the unambiguous terms of [the Notice Bylaw] … apply only to stockholder proposals submitted pursuant to Rule 14a-8 of the Exchange Act." (JANA OB at 26).[8] The Notice Bylaw, however, neither states nor suggests

---

[7] The broad scope of the Notice Bylaw is further discussed in Section II.B., *infra*.

[8] JANA also offers the antic argument that stockholders are not required to comply with the Notice Bylaw because it utilizes the word "may" rather than "shall." (JANA OB at 28). The language to which JANA refers states that any stockholder that has owned $1,000 of securities for at least one year "may seek to transact other corporate business at the annual meeting," provided that the advanced notice requirements are satisfied. The only common sense reading of that language is that a stockholder who satisfies the ownership requirement may (if it so chooses) transact business at stockholder meetings if the advance notice provision is satisfied, not that the (Continued …)

that it applies only to stockholder proposals to be included in the Company's proxy materials. Nor (despite JANA's transparent and heavy-handed attempt to designate the Bylaw "The 14a-8 Bylaw") does it even mention Rule 14a-8. Rather, the Notice Bylaw refers broadly to any stockholder who seeks "to transact other corporate business at the annual meeting."[9] To the extent that the Company intended to limit the scope of the Notice Bylaw to stockholder proposals made pursuant to Rule 14a-8, it would have been quite simple to expressly so provide. It does not.

Moreover, JANA's proposed interpretation of the Notice Bylaw as applying solely to stockholder proposals to be included in the Company's proxy materials is directly contrary to the Company's repeated disclosures to stockholders. For example, in its 2007 proxy (which was issued long before JANA purchased any CNET stock and is referenced in JANA's December 26, 2007 notice letter), CNET notified its stockholders that:

> A proper proposal submitted by a stockholder for presentation at our 2008 annual meeting will be included in our proxy statement and form of proxy card for that meeting. Such proposal must comply with Rule 14a-8 promulgated by the Securities and

---

Bylaw's requirements are permissive, rather than mandatory. Stated another way, it would make no sense for the Notice Bylaw to provide that each of the thousands of CNET stockholders who meet the eligibility requirements "shall" seek to transact other corporate business at the Annual Meeting.

[9] It is axiomatic that corporate bylaws are contracts among the stockholders of the corporation, and therefore the rules that govern the interpretation of statutes, contracts and other written instruments apply to the interpretation of bylaws. *Sassano v. CIBC World Markets Corp.*, 2008 WL 152582, at *5 (Del. Ch.) (citing *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990); *Perlegos v. Amtel Corp.*, 2007 WL 475453, at *26, n.184 (Del. Ch.)); *H.F. Ahmanson & Co. v. Great W. Fin. Corp.*, 1997 WL 305824, at *14 (Del. Ch.) (citing *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch.), *aff'd*, 670 A.2d 1338 (Del. 1995)). When interpreting an agreement, the court looks to the most objective indicia of the parties' intent: the words contained in the written instrument. *Sassano*, 2008 WL 152582, at *5. Those words should be afforded their "common and ordinary meaning," and the language, if simple and unambiguous, is given the force and effect required. *Id*. (citation omitted); *Openwave Sys., Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007).

> Exchange Commission under the Securities Exchange Act of 1934, as amended, and must be received at our principal executive office by January 8, 2008. ***In addition, under the terms of our bylaws, a stockholder who has been the beneficial owner of at least $1,000 of common stock for at least one year and who intends to present an item of business at the 2008 annual meeting (other than a proposal submitted for inclusion in the our proxy materials) must provide written notice of such business to the Company by January 8, 2008.***

(LeGrow Decl. Ex. B (CNET Proxy Statement for 2007 Annual Meeting of Stockholders, dated Apr. 30, 2007, p. 5-6 (emphasis added))). Indeed, the Company has repeatedly made clear in its public disclosures that the provisions of the Notice Bylaw relate to any business that a stockholder seeks to transact at the Annual Meeting and is not limited to proposals to be included in the Company's proxy materials. (*See, e.g.*, LeGrow Decl. Exs. C and D (CNET Proxy Statement for 2006 Annual Meeting of Stockholders, dated Apr. 10, 2006, p. 4-5; CNET Proxy Statement for 2005 Annual Meeting of Stockholders, dated Apr. 4, 2005, p. 10)).

The Company's consistent interpretation apply the Notice Bylaw to all stockholder proposals -- whether or not included in the Company's proxy materials -- is the only reasonable interpretation. Moreover, it is important to recognize that the Company repeatedly disclosed its interpretation of the Bylaws long before any dispute arose. *See Bd. of Educ. of the Appoquinimink Sch. Dist. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *8 (Del. Ch.) (a party's pre-litigation words or conduct respecting the meaning of a contract provision are evidence of the party's intentions at the time as to the effect of such provision); *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 582 n.520 (Del. Super. Ct.) (same), *aff'd*, 886 A.2d 1278 (Del. 2005). Prior to JANA's recent attempt to seize control of the Company, no stockholder had challenged the Company's interpretation and application of the Notice Bylaw.

In support of its argument that the Notice Bylaw applies exclusively to Rule 14a-8 proposals for inclusion in the Company's proxy materials, JANA relies primarily on the last sentence of the Notice Bylaw, which provides that:

> 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). By its clear terms, that sentence merely requires that a stockholder seeking to transact business at an annual meeting must "also" comply with any "applicable" federal securities law. It does not state or even suggest that the Notice Bylaw applies only to Section 14a-8 proposals. Rather, the final sentence recognizes that, if a stockholder seeks to include its proposal in the Company's proxy, it must also comply with the applicable federal securities laws (including Rule 14a-8), as well as the terms of the Notice Bylaw.

If, as JANA insists, the notice deadlines and eligibility requirements contained in the Notice Bylaw are "almost a word-for-word replica" of the requirements of Rule 14a-8, there would be no reason to state such deadlines and requirements in the Notice Bylaw -- unless it also applied to stockholder proposals not covered by Rule 14a-8.[10] Indeed, JANA's strained interpretation renders much of the Notice Bylaw either meaningless or surplusage, an interpretation explicitly disdained by applicable Delaware law. *See, e.g., Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch.) ("When interpreting contracts, this

[10] If, as JANA argues, the last sentence of the Notice Bylaw "incorporates by reference the complete provisions of Rule 14a-8, as they are amended from time to time" (JANA OB at 28), there would have been no need for CNET to include the Notice Bylaw. CNET simply could have relied on Rule 14a-8 to control the circumstances under which the Company must include stockholder proposals in the proxy. Indeed, given that the requirements of Rule 14a-8 are incorporated where "applicable," the Notice Bylaw would be virtually meaningless unless it also applies to stockholder proposals that are not subject to Rule 14a-8.

Court gives meaning to every word in the agreement and avoids interpretations that would result in 'superfluous verbiage'").[11] The only reasonable interpretation of the Notice Bylaw is that it applies to all stockholder proposals, including situations where the stockholder intends to solicit its own proxies ***and*** situations where the stockholder requests that its proposal be included in the Company's proxy materials.

Moreover, JANA's assertion that the ***three sentence*** Notice Bylaw merely tracks and "summarizes the Rule 14a-8 requirements" -- which are considerably more involved and extensive -- is completely unfounded. (JANA OB at 28). As JANA concedes in its briefs, Rule 14a-8 contains numerous requirements and provisions that are not set forth in the Notice Bylaw. (*Id.* at 28-29 (noting that Rule 14a-8 "forbids the submission" of certain types of proposals and limits a stockholder to presenting one proposal per meeting)). Furthermore, contrary to JANA's labored assertion, the interpretation advanced by CNET does not require the conclusion that "***every*** notice of stockholder business to be conducted at an annual meeting" must comply with Rule 14a-8 requirements. (*Id*. at 28).[12] CNET has never taken the position that Rule 14a-8 is

[11] *See also NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 2007 WL 2088851, at *6 (Del. Ch.) ("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.") (citation omitted); *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 Del. Ch. LEXIS 154, at *49, n.96 (Del. Ch.) ("Delaware Courts have consistently held that 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.")

[12] To bolster its position, JANA speculates regarding a purported "parade of horribles" that could result if the Notice Bylaw were interpreted to apply Rule 14a-8's requirements to *all* stockholder proposals, rather than only to proposals to be included in management's proxy materials. (*See* JANA OB at 28-29). That argument, however, is a red herring. CNET has not stated that Rule 14a-8 applies where, as here, a stockholder seeks to solicit its own proxies. Instead, CNET has always taken the position (consistent with the unambiguous language of the Bylaw and the Company's repeated public disclosures) that the Notice Bylaw applies to all stockholder proposals submitted directly by a stockholder, but that if a stockholder wants its proposal to be (Continued …)

"applicable" where, as here, a stockholder seeks to solicit proxies. Rather, CNET has consistently stated that, in such circumstances, the stockholder must comply with the provisions of the Notice Bylaw -- not the requirements of Rule 14a-8.

The flaw in JANA's proposed interpretation of the Notice Bylaw is best demonstrated by the unreasonable result it suggests. JANA asserts that neither the Notice Bylaw nor any other CNET Bylaw applies unless a stockholder seeks to include its proposal in the Company's proxy materials. As a result, JANA contends that there are absolutely no notice or ownership requirements that apply if a stockholder desires to solicit its own proxies. In fact, JANA contends that any of CNET's thousands of stockholders are free to raise for the first time and present any proposals they desire at the Annual Meeting.[13] That interpretation of the Notice Bylaw is patently unreasonable. Under Delaware law, bylaws should be judicially interpreted to achieve a common sense result and to avoid a construction that would lead to an unreasonable or absurd outcome. *Snell v. Engineered Sys. & Designs, Inc.*, 669 A.2d 13, 20 (Del. 1995); *W. Ctr. City Neighborhood Ass'n v. W. Ctr. City Neighborhood Planning Advisory Comm., Inc.*, 2003 WL 241356, at *6 (Del. Ch.); *Tomei v. Sharp*, 902 A.2d 757 (Del. Super. Ct. 2006), *aff'd*, 918 A.2d 1171 (Del. 2007).[14]

---

included in management's proxy, it must, in addition, satisfy the requirements of the federal securities laws, including Rule 14a-8.

[13] Even JANA recognizes that its interpretation of the Notice Bylaw as requiring absolutely no notice that it seeks to present proposals at the Annual Meeting is unreasonable. JANA admits to having submitted its notice to the Company in accordance with the time periods set forth in the Notice Bylaw, even as it asserts that no notice is or was required. (Compl. Ex. A). Thus, JANA's erroneous interpretation of the Notice Bylaw is belied by its own conduct. *See, e.g.*, *Horizon Personal Comme'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *21 (Del. Ch.) (rejecting contract interpretation that is contrary to the party's conduct); *Interim Healthcare, Inc.*, 884 A.2d at 582 n.520 (same).

[14] JANA's proposed interpretation requires the Court to conclude that a stockholder who seeks to include one proposal in the Company's proxy materials must satisfy both the advance notice (Continued …)

Finally, for the reasons set forth above, CNET contends that its interpretation of the Notice Bylaw (which it has consistently applied since the Company's IPO in 1996) is the only reasonable interpretation. If the Court believes, however, that on this limited record JANA also has proffered a reasonable interpretation[15] of the Notice Bylaw, then JANA's Motion for Judgment on the Pleadings must be denied and the issue must be presented to the Court on a complete record. *See, e.g., BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *5 (Del. Ch.) (denying motion for judgment on the pleadings because both parties had set forth a plausible construction of the contract); *Rag Am. Coal Co.*, 1999 WL 1261376, at *1 (holding that "if both sides have advanced reasonable but conflicting readings of the Agreement, both motions [for judgment on the pleadings] must be denied, and the parties must be permitted to develop extrinsic evidence necessary to resolve the contractual ambiguity") (citations omitted).[16]

For all of the foregoing reasons, JANA's assertion that its proposals are not subject to the requirements of the Notice Bylaw are without merit.

---

and ownership requirements, but that such requirements do not apply to a stockholder who seeks to present multiple proposals at the annual meeting via its own proxy. That interpretation defies common sense.

[15] A contract term is ambiguous only if it is reasonably susceptible to two or more different meanings. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996). Both interpretations must be "reasonable," and mere disagreement over the proper interpretation of a contract term does not create ambiguity. *Seidensticker*, 2007 WL 4054473, at *2-3 (Del. Ch.).

[16] In its Opening Brief JANA asserts that, even if a Bylaw is ambiguous, it should be interpreted so as to favor the exercise of stockholder voting rights. (JANA OB at 18). CNET, however, has not interpreted the Notice Bylaw so as to limit JANA's "voting" rights. Moreover, neither of the cases cited by JANA were decided in the context of a motion for judgment on the pleadings, but rather involved the interpretation of a bylaw or charter provision at trial, based on a complete factual record. *See, e.g., Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294 (Del. Ch. 2002) (decision after trial); *Openwave Sys. Inc.*, 924 A.2d at 239 (decision after trial).

B. The Notice Bylaw Applies To All Of JANA's Proposals For The Annual Meeting, Including The Director Nomination

In its December 26, 2007 notice letter, JANA identified five separate business items that it intended to present at the Annual Meeting, including its purported nomination of two persons for election as Class III directors (the "Director Nomination"). (Compl. Ex. A). JANA asserts in its Opening Brief that its Director Nomination is not subject to the notice and ownership provisions of Article III, Section 6 of CNET's Bylaws, and therefore, JANA may present the Director Nomination at the 2008 Annual Meeting. As previously noted, however, the Company has not asserted that Article III, Section 6 applies where, as here, the stockholder seeks to solicit on its own proxies for its nominees. Rather, the Notice Bylaw (which contains identical notice and ownership requirements) applies, and JANA has failed to satisfy the requirements of that Bylaw.

The Notice Bylaw extends broadly to all "other corporate business" that a stockholder seeks to transact at the Annual Meeting. Thus, if a stockholder seeks to transact any business "other" than that presented by the Company, it must comply with the requirements of the Notice Bylaw. *See Sassano*, 2008 WL 152582, at *5 (words contained in a bylaw should be afforded their "'common and ordinary meaning'"). There can be little dispute, and JANA fails to advance one of substance, that the Notice Bylaw covers the three bylaw amendments that JANA wishes to propose at the 2008 Annual Meeting. It is no less apparent that the Notice Bylaw covers JANA's ostensible Director Nomination as well in that it constitutes stockholder business, and both parties agree that such nominations are not governed by Article III, Section 6 (*i.e.*, nominations that are submitted to the Nomination Committee of the CNET board for its consideration and disposition).

That interpretation of the Notice Bylaw is consistent with both its unambiguous language and the Company's repeated public disclosures, which provided that:

> ***under the terms of our bylaws***, a stockholder who has been the beneficial owner of at least $1,000 of common stock for at least one year and ***who intends to present an item of business at the 2008 annual meeting*** (other than a proposal submitted for inclusion in the our proxy materials) must provide written notice of such business to the Company by January 8, 2008.

(LeGrow Decl. Ex. B (CNET Proxy Statement for 2007 Annual Meeting of Stockholders, dated Apr. 30, 2007, p. 6)). Thus, CNET has consistently interpreted its Bylaws as requiring that any stockholder who intended to "present an item of business" at the Annual Meeting must satisfy the notice and ownership requirements. JANA's proposed Director Nomination certainly constitutes "an item of business" that it intends to present at the Annual Meeting.

Moreover, both JANA and the Company agree that no other Bylaw (including Article III, Section 6) applies to director nominations where, as here, the stockholder intends to solicit proxies in support of its nominees. (*See* JANA OB at 15-16 (asserting that Article III, Section 6 applies only when the stockholder is recommending nominees for selection by Board)). Thus, in order to conclude that the Notice Bylaw does not cover the Director Nomination, the Court must conclude that CNET's Bylaws impose no notice or ownership requirements whatsoever for stockholders that seek to: (i) run their own slate of directors; (ii) amend the Bylaws to increase the size of the Board; or (iii) seize control of the Company through a proxy contest.

In light of the undisputed fact that the Company's Bylaws impose notice and ownership requirements where a stockholder recommends a director nomination to the Board and where a stockholder intends to present any item of business at an annual meeting, it make no sense to surmise that the Bylaws were crafted so as to impose no such requirements where, as here, a stockholder intends to solicit its own proxies for the election of its own slate of directors. Under

JANA's proposed interpretation, a director slate could be presented by any stockholder for the first time at the Annual Meeting, thereby denying the Company and the stockholders any meaningful opportunity to investigate or evaluate a proposed nominee.[17] That reading of the Bylaws is patently unreasonable. *Snell*, 669 A.2d at 20 (bylaws should be interpreted to achieve a common sense result and to avoid a construction that would lead to an unreasonable or absurd outcome). As this Court has repeatedly recognized, advance notice bylaws, such as CNET's Notice Bylaw, are intended to serve the entirely legitimate purpose of ensuring that stockholders are afforded sufficient time to consider nominees and cast an informed vote. *See, e.g., Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *11 (Del. Ch.); *Nomad Acquisition Corp. v. Damon Corp.*, 1988 WL 383667, at *7-8 (Del. Ch.).[18]

For all of the foregoing reasons, CNET submits that the only reasonable interpretation of the Notice Bylaw is that it applies to JANA's Director Nomination (as well as the additional proposals that JANA intends to raise at the meeting). Even assuming, however, that based upon the extremely limited record that JANA itself has opted to present in connection with its pending motion the Court concludes that JANA has also proffered a reasonable alternative interpretation of the Notice Bylaw, then given the rigor with which such motions are tested, JANA's motion must be denied. *See Rag Am. Coal Co.*, 1999 WL 1261376, at *1.

[17] As previously noted, JANA's strained contention that CNET's Bylaws have no application to its Director Nomination is belied by the fact that JANA admits to having submitted a notice to the Company of the Director Nomination in accordance with the provisions of the Notice Bylaw. (Compl. Ex. A).

[18] In its Opening Brief, JANA expressly recognizes that advance notice bylaws "serve the proper purpose of enhancing voting rights of stockholders by enabling them to cast an informed vote." (JANA OB at 20-21).

III. THE NOTICE BYLAW IS VALID UNDER DELAWARE LAW

Delaware law provides a corporation with wide latitude to include provisions in its bylaws for the purpose of regulating the business and affairs of the corporation. Section 109(b) of the DGCL provides that "[t]he 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." 8 *Del. C.* § 109(b). Moreover, bylaw provisions of the kind at issue here are presumptively valid. *Edelman v. Authorized Distrib. Network, Inc.*, 1989 WL 133625, at *3 (Del. Ch.) (*citing Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)).

Faced with this presumption, JANA equates the threshold ownership requirement in the Notice Bylaw to a restriction on voting rights in an erroneous attempt to draw this case within the paradigm of *Blasius* and its progeny. By its plain terms, however, the Notice Bylaw does not address, much less restrict, voting rights; JANA is free to vote its CNET shares as it pleases.

The Notice Bylaw simply requires that stockholders who seek to transact business at the Company's Annual Meeting must meet certain minimum ownership requirements. The Bylaw serves the salutary and well-recognized purpose of regulating the conduct of the Company's annual meeting. Significantly, the Notice Bylaw imposes only a limited temporal restriction (JANA admittedly can present its proposals at next year's Annual Meeting), does not prohibit another qualified CNET stockholder from submitting the proposals advanced by JANA, does not prevent JANA from acting immediately by written consent, and does not prevent JANA from seeking to obtain control of the Company through other means. Thus, JANA's indignant assertion that the longstanding Notice Bylaw inequitably strips all CNET stockholders of "the opportunity to exercise their franchise rights" is little more than a transparent diversion. (JANA OB at 2).

A. The Notice Bylaw Was Approved By The CNET Stockholders A Decade Before JANA Acquired Its Shares And, Thus, This Is Not An Entrenchment Case

In its Opening Brief, JANA repeatedly insinuates that the Notice Bylaw somehow constitutes an implement of entrenchment that is being wielded by the Company's current directors to fend off dissidents. This too is mere sophistry. As previously explained, the Notice Bylaw was adopted over a decade ago, and thus quite evidently was not adopted in response to any action taken by JANA. More important, it was not adopted by the incumbent board of CNET. Rather, it was adopted by the Company's stockholders.[19] Accordingly, this is not a case that implicates the relative rights and scope of authority of directors on the one hand and stockholders on the other. Given the fact that this is an act undertaken by the CNET stockholders themselves, JANA's contention that the Bylaw constitutes an overreaching act of entrenchment unilaterally and inequitably interposed to insulate the board from stockholder action cannot sustain its own weight. This limited restriction on the ability of short-term or minimally invested stockholders to propose fundamental changes to corporate governance, a provision of which JANA was fully aware at the time of its recent investment, is a policy endorsed and approved by the CNET stockholders themselves. JANA's self-serving view that such a policy is unwise cannot change that fact, nor can it serve to implicate the judicial precedent, so heavily relied upon by JANA, addressing unilateral action by incumbent directors

[19] As previously explained, the Notice Bylaw was adopted by the Company's stockholders prior to the initial public offering in 1996. Therefore, each stockholder who purchased CNET stock in that offering or at any time thereafter acquired its stock with knowledge of the Notice Bylaw and the clear requirements set forth therein. *See Lenahan v. Nat'l Computer Analysts Corp.*, 310 A.2d 661, 663 (Del. Ch. 1973) (finding that that the plaintiff was "deemed" to have "constructive knowledge" of the bylaws governing the setting of the annual meeting date); *Saminsky v. Abbott*, 185 A.2d 765, 771 (Del. Ch. 1961) (explaining that one who buys shares after a bylaw is adopted is "deemed to have . . . full knowledge of the existing by-law").

undertaken for the purpose of thwarting a takeover attempt.[20] Thus, JANA's claims of entrenchment should be rejected and the cases that it relies upon are plainly inapposite. Rather, the applicable precedent in this instance provides that considerable judicial deference is warranted where the bylaw in question is the result of stockholder approval and the Court should exhibit considerable reluctance to adopt an interpretation that would abrogate their express intention. *See Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923 (Del. 1990) (rejecting interpretation of stockholder adopted bylaw that abrogated intention of the stockholders).

B. The Notice Bylaw Serves A Valid And Reasonable Corporate Purpose

JANA argues in its Opening Brief that the Notice Bylaw should be invalidated because it constitutes an unreasonable restriction on voting rights that serves no valid corporate purpose.[21]

---

[20] *See, e.g., Datapoint Corp. v. Plaza Secs. Co.*, 496 A.2d 1031 (Del. 1985) (granting a preliminary injunction against enforcement of an amended bylaw that imposed an arbitrary and unreasonable delay on action obtained by stockholder consent and that was adopted after the corporation was aware of a stockholder's desire to take control of the corporation); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971) (reinstating the date of an annual meeting where the corporation amended the bylaws to advance the date of the meeting to lessen the amount of time a dissident stockholder could wage a proxy contest); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) (holding that a board's action of conducting an emergency board meeting, increasing the size of the board by two members, and filling those newly-created board seats in response to what the board perceived as a risky plan for recapitalization was done with the intention of impeding the voting process and was therefore a breach of the duty of loyalty); *Mesa Petroleum Co. v. Unocal Corp.*, 1985 WL 44692 (Del. Ch.) (issuing a temporary restraining order to prevent the enforcement of an advanced notice bylaw that the corporation interpreted to prevent the plaintiff from being able to present its tender offer at the upcoming annual meeting); *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906 (Del. Ch. 1980) (declaring invalid the board's act of setting an annual meeting date 63 days out when the advanced notice bylaw required 70 days notice thereby preventing the plaintiff from submitting his opposing slate of directors in time for the annual meeting).

[21] A motion for judgment on the pleadings, JANA's chosen procedural method for resolving its claims, should only be granted "when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Desert Equities, Inc.*, 624 A.2d at 1205 (citation omitted). The Supreme Court has held that "[r]easonableness is a question of fact to be determined by the (Continued …)

As more fully explained below, however, the Notice Bylaw does not eliminate the right of any stockholder to vote, any more than do other such regulatory and now quite prevalent provisions that serve to place reasonable limitations on a stockholder's ability to present business at an Annual Meeting -- even when, unlike the provision here, that limitation is the product of unilateral director action.

1. The Notice Bylaw Contains Regulations On Stockholder Activity That Are Virtually Identical To Those Set Forth In SEC Regulations

As JANA concedes, the Notice Bylaw contains a similar, albeit less onerous, ownership threshold for stockholders wishing to transact business at the annual meeting than is set forth in Rule 14a-8. (JANA OB at 26-28). Specifically, Rule 14a-8, which applies when a stockholder seeks to include its proposal in the Company's proxy materials, provides that "to be eligible to submit a proposal, . . . [a stockholder] must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date . . . [the stockholder] submit[s] the proposal." 17 C.F.R. § 240.14a-8(b)(1) (2008).[22]

Significantly, JANA does not contend that the more restrictive ownership requirements set forth in Rule 14a-8 are invalid under Delaware law. To the contrary, JANA has asserted that those reasonable ownership requirements are expressly incorporated into the Notice Bylaw, and must be satisfied whenever a CNET stockholder seeks to include a proposal in the Company's proxy materials. (JANA OB at 25-26). Having so conceded, JANA is relegated to arguing that

---

finder of fact." *Id.* at 1206 (citation omitted). Consequently, to the extent that the Court determines that there is a valid dispute regarding the reasonableness of the Notice Bylaw, the Court must deny JANA's motion because such a determination would involve an issue of fact that may not be decided "without the benefit of discovery or testimony." *Id.*

[22] When originally promulgated, Rule 14a-8 had a $1,000 ownership threshold. The amount was increased to $2,000 in 1998.

Delaware law permits the Company, following federal law, to impose reasonable ownership restrictions on stockholders who seek to include proposals in the Company's proxy materials, but nonetheless prohibits the imposition of identical ownership requirements upon stockholders who intend to solicit their own proxies. Not surprisingly, JANA offers neither legal authority nor logic for that flawed proposition. Indeed, the Company's desire to ensure that only stockholders that have demonstrated a minimal commitment to the long-term interests of the Company should be permitted to inflict the burden of a costly and often divisive proxy contest on the Company applies with equal or greater force to a short-term stockholder that seeks to solicit proxies. Such a proxy contest is far more expensive and burdensome to the Company than simply including one stockholder proposal in the Company's proxy materials as permitted under Rule 14a-8.

2. The Notice Bylaw Serves The Important Corporate Purpose Of Regulating Stockholder Activity In Connection With The Annual Meeting

This Court has repeatedly upheld limited restrictions on the stockholders' ability to raise business at an annual meeting. For example, Delaware courts have held as reasonable and valid bylaws that prohibit the presentation of proposals at an annual meeting by stockholders who have not provided adequate advance notice. *See, e.g.*, *Stroud v. Grace*, 606 A.2d 75, 95 (Del. 1992) (reversing trial court's ruling that an advance notice bylaw was facially invalid); *Openwave Sys., Inc.*, 924 A.2d at 240, 246 (construing advance notice bylaw in favor of stockholder rights and finding its requirements permissible); *Accipiter Life Sciences Fund, L.P. v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006) (refusing to enjoin annual meeting where stockholder failed to comply with advance notice bylaw provision); *Nomad Acquisition Corp.*, 1988 WL 383667 at *8 (refusing to invalidate a bylaw "requiring the giving of 60 days notice prior to the submitting of a nomination

for the Board").[23] Moreover, the Court has recognized that a Delaware corporation has a legitimate interest in regulating the conduct of its annual meetings, and that, in furtherance of that purpose, the corporation may adopt reasonable restrictions on the ability of the stockholders to transact business at such meetings. *See, e.g., Openwave Sys.*, 924 A.2d at 239.

The Notice Bylaw, like the advance notice bylaws routinely upheld by this Court, serves as a limited restriction on the stockholders' ability to transact business at an annual meeting by conditioning it upon a minimal amount of ownership for a reasonable period of time. There can be no dispute that proxy contests are expensive, burdensome, and disruptive to a corporation. The Notice Bylaw, which was adopted by the Company's stockholders over a decade ago, serves the purpose of ensuring that only a stockholder that has owned $1,000 worth of Company stock -- a minimal interest -- in the Company for more than one year can force that significant expense and burden on the Company and its public stockholders. The logic underlying such a requirement is both obvious and compelling: a stockholder who has owned stock for more than a year is more likely to be focused on the long-term interests of the Company. The Notice Bylaw is merely designed to ensure that the burden of a potentially costly and divisive proxy contest, whether involving a director election or the approval of important corporate policies, will be undertaken by the Company only by stockholders whose investment evinces a minimal commitment to the long term interests of the enterprise. *Cf. Hahn v. Carter-Wallace, Inc.*, 1987 WL 18429, at *2 (Del. Ch.) ("While reasonable men may disagree as to whether long-term growth objectives should prevail over short-term profit considerations, the decision to pursue a

[23] *See also Edelman*, 1989 WL 133625, at *2 (upholding a bylaw that required a stockholder "seeking to have the stockholders authorize or take corporate action by written consent" to request, in writing, that the "board of directors . . . fix a record date"); *Stroud v. Milliken Enters., Inc.*, 585 A.2d 1306 (Del. Ch. 1988) (upholding restrictions in the certificate of incorporation on the qualifications of directors).

long range objective is a business decision subject to the presumption of propriety under the business judgment rule.") (citation omitted).[24]

The reasonableness of the Notice Bylaw is amply demonstrated by the facts of this case. Here, JANA, a sophisticated hedge fund, has entered into equity swaps relating to its CNET investment, which instruments are short-term in nature. JANA thus has a unique interest in short-term swings in CNET's stock price. (*See* LeGrow Decl. Ex. E). Certainly, it is not unreasonable for the Company to impose a limited restriction on stockholder proposals so as to ensure that the business to be transacted at an annual meeting is proposed by stockholders of the Company with "skin in the game," as opposed to a short-term investor looking to turn a quick profit without regard to the Company's long-term prospects and well being.

Regardless of whether JANA agrees with the purpose of the Notice Bylaw, it cannot dispute that it was properly adopted by the Company's stockholders, who believed that it was in the best interests of the Company. *See, e.g., Hahn*, 1987 WL 18429, at *2 (noting that the desire to "insure that the corporation will continue to be managed in accordance with its traditional business philosophy [sic] which emphasizes long-term growth rather than short-term profit performance" was a valid reason for a restructuring that favored long-term stockholders). Nor can JANA dispute that the Notice Bylaw has been consistently disclosed and applied over the

[24] As this Court noted in *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 815 (Del. Ch. 2007), 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.***" (emphasis added). Contrary to JANA's assertion, the fact that Delaware has not enacted specific statutes or regulations with respect to holding periods does not prohibit stockholders from adopting such holding periods as they deem appropriate. Delaware similarly has not enacted statutes or regulations that require advance notice by stockholders of business that they seek to present at an annual meeting -- but bylaws requiring such advance notice repeatedly have been upheld as valid.

last decade without objection, and that JANA acquired its CNET stock with full knowledge of the requirements of the Bylaw.[25] For all of the reasons set forth herein, JANA's challenge to the validity of the Notice Bylaw and its application to JANA's attempt to seize control of the Company fails as a matter of law.[26]

3. The Threshold Ownership Requirements In the Notice Bylaw Are Not Arbitrary Or Discriminatory

Despite JANA's attempt to spin the Notice Bylaw as a discriminatory voting provision, it is not discriminatory, does not restrict voting rights, and does not restrict any matters that may be proposed for consideration at the Company's annual meeting, including the nomination of any person to serve as a director of the Company.[27] The Notice Bylaw treats all stockholders equally, including JANA, in requiring any stockholder that seeks to transact business at an

[25] Given that JANA acquired its CNET stock with knowledge of the provisions it now challenges, JANA should be estopped in equity from pursuing this challenge to the validity of the Notice Bylaw. *See Serlick v. Pennzoil Co.*, 1984 WL 8267, at *2 (Del. Ch.) (citing *Elster v. Am. Airlines, Inc.*, 100 A.2d 219, 221 (Del. Ch. 1953).

[26] JANA contends that "Delaware law has never sanctioned a bylaw that selectively disenfranchises stockholders based on how much stock they own." (JANA OB at 20). That contention is both beside the point (since the Notice Bylaw does not disenfranchise anyone) and wrong. Delaware courts have recognized that such a corporate policy is by no means an unreasonable or inherently pernicious one. In *Providence & Worcester Co. v. Baker*, the Supreme Court upheld charter provisions that tied the number of votes a stockholder possessed to the number of shares held by that stockholder. 378 A.2d, 121, 122 n.2, 124 (Del. 1977). The provision at issue there dictated that stockholders with a greater number of shares had fewer votes per share than stockholders with a smaller number of shares. *Id.; see also Sagusa, Inc. v. Magellan Petroleum Corp.*, 1993 WL 512487 (Del. Ch. 1993), *aff'd*, 650 A.2d 1306 (Del. 1994) (TABLE) (upholding per capita voting provisions in the company's certificate of incorporation and bylaws).

[27] JANA entirely misses the thrust of the Notice Bylaw by arguing that Section 213, governing the setting of a record date for a vote, suggests that the one-year holding requirement for a stockholder to transact business at an annual meeting is invalid. Section 213 provides that a company may fix a record date for the ***right to vote*** at a meeting. 8 *Del. C.* § 213. The Notice Bylaw in no way impairs JANA's, or any other stockholder's, right to vote at the annual meeting. The Notice Bylaw merely regulates the manner in which stockholders may propose to transact business at the annual meeting.

annual meeting to own $1,000 of the Company's stock for at least one year. The one year time period is reasonable and consistent with the purpose of the Notice Bylaw to ensure that the stockholders have "skin in the game" and a long-term focus before they can cause the Company to incur the expense and distraction of a proxy contest. Moreover, the time period is not excessive as JANA admittedly can present its proposal at next year's annual meeting. *Cf. Williams v. Geier.* 671 A.2d 1368 (Del. 1996) (affirming Chancery Court's decision upholding amendment that granted greater voting rights based on duration the stock was held); *Oliver Press Partners, LLC v. Decker,* 2005 WL 3441364, at *2 (Del. Ch.) (rejecting argument that stockholder would be irreparably harmed if required to wait until the next year's annual meeting to solicit proxies in favor of an opposition slate of directors).

It is also important to recognize that any stockholder satisfying the threshold ownership requirement is free to nominate any person for election to the CNET Board or to propose amendments to the CNET Bylaws, including the individuals JANA seeks to nominate and the Bylaw amendments that JANA proposes. Indeed, assuming JANA could have found just one other stockholder that agreed with its platform (which would be necessary to succeed in a proxy contest), that stockholder could have nominated JANA's slate and proposed JANA's Bylaw amendments. Equally undisputed is the fact that JANA may act at any time by written consent. Thus, JANA cannot credibly contend that the Notice Bylaw unreasonably prevents JANA from presenting its proposals to the Company's stockholders. It simply requires that, if JANA desires to present its proposals at an annual meeting (rather than seeking to act by written consent) and no other stockholder who satisfies the ownership requirements is willing to join in submitting

such proposals to the stockholders, JANA must wait until next year's annual meeting to solicit proxies. The Notice Bylaw is far from the draconian device JANA implies.[28]

Finally, JANA unavailingly attempts to argue that CNET's Bylaw is a discriminatory voting restriction by relying on broad statements in *Harrah's* equating the right to nominate to the right to vote. *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294 (Del. Ch. 2002). JANA's reliance on *Harrah's* is misplaced. The charter and bylaw provisions at issue in *Harrah's* were specific to the plaintiff -- indeed, they identified the plaintiff by name. *Id.* at 299. Under the circumstances of that case, there was a specific restriction on the sole minority stockholder, who was one of only two stockholders. *Id.* at 297-99. If the provision at issue in *Harrah's* had been upheld, the majority stockholder would have been guaranteed board control for three years, thereby rendering the vote of the minority stockholder a useless exercise. *Id.* at 296, 310. By contrast, the control of CNET's board is not subject to the terms of what amounts to a stockholder agreement between two stockholders and does not fundamentally turn upon the right of one of those stockholders to nominate directors pursuant to those terms. Unlike the provision in *Harrah's*, the Notice Bylaw also does not foreclose the nomination of any person to serve on the CNET Board and applies equally to all of the public stockholders. Indeed, any stockholder meeting the ownership requirements is free to transact business at the annual meeting, including the type of business proposed by JANA. Moreover, JANA has the right to act immediately by written consent or to transact business at the annual meeting next year. Thus, the Notice Bylaw does not unreasonably restrict JANA's franchise.

[28] Just as advance notice bylaws have been held to apply to every stockholder equally, so too does the Notice Bylaw. *See Nomad*, 1988 WL 383667, at *8.

CONCLUSION

For all of the foregoing reasons, CNET respectfully requests that the Court deny JANA's Motion for Judgment on the Pleadings, and instead enter judgment in favor of CNET.

POTTER ANDERSON & CORROON LLP

By: */s/ Kevin R. Shannon*
Donald J. Wolfe, Jr. (#285)
Kevin R. Shannon (#3137)
Brian C. Ralston (#3770)
Hercules Plaza, 6th Floor
1313 North Market Street
P.O. Box 951
Wilmington, DE 19899
(302) 984-6000

Attorneys for Defendant CNET Networks, Inc.

OF COUNSEL:

Robert C. Myers
Richard W. Reinthaler
DEWEY & LEBOEUF LLP
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Dated: February 22, 2008
848290

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2008, a copy of the foregoing was electronically served via *LexisNexis File And Serve* on the following counsel of record:

Martin P. Tully, Esquire
Morris Nichols Arsht & Tunnell
1201 North Market Street
Wilmington, DE 19801

/s/ Kevin R. Shannon
Kevin R. Shannon (#3137)