IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HARBINGER CAPITAL PARTNERS MASTER FUND I, LTD., HARBINGER CAPITAL PARTNERS SPECIAL SITUATIONS FUND, L.P., JAMES L. ZUCCO and ANDREW J. BREEN Plaintiffs, v. OPENWAVE SYSTEMS, INC., DAVID C. PETERSCHMIDT and GERALD HELD, Defendants.	)	C.A. No. 2646-VCL

OPENWAVE SYSTEMS, INC. AND BERNARD PUCKETT Plaintiffs, v. HARBINGER CAPITAL PARTNERS MASTER FUND I, LTD., HARBINGER CAPITAL PARTNERS SPECIAL SITUATIONS FUND, L.P., JAMES ZUCCO AND ANDREW BREEN Defendants.	)	C.A. No. 2690-VCL

POST-TRIAL BRIEF OF HARBINGER CAPITAL PARTNERS MASTER FUND I, LTD., HARBINGER CAPITAL PARTNERS SPECIAL SITUATIONS FUND, L.P., JAMES ZUCCO AND ANDREW BREEN

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PRELIMINARY STATEMENT

This case presents three essential questions. First, did the board of directors of Openwave Systems, Inc. ("Openwave" or the "Company") both properly interpret, and then properly enforce that interpretation of, the Company's advance notice bylaws when it blocked the seating of James Zucco? Second, in reducing the size of its board on November 1, 2006 with the intention of increasing it again a few months later, and in publicly claiming that Proxy Governance Inc. ("PGI") was supporting the management slate, did Openwave act improperly, thus requiring a new stockholder meeting? Finally, if a new meeting is held, should Openwave's restricted stock be allowed to vote at that meeting?

On the first issue, there is no doubt that Mr. Zucco gained over 11 million votes more than Mr. Peterschmidt, and that management was repeatedly told by the Company's stockholders that they were impressed by Mr. Zucco and that they wanted the board to provide more oversight of Mr. Peterschmidt. It is also clear that Harbinger did not decide to seek to nominate directors until December, 2006, when, after reading the Company's long-delayed 10-K, its managers reached a similar conclusion. There is no evidence that Harbinger unnecessarily delayed nominating its slate. Rather it was trying to discern whether a proxy contest was necessary and then put together a slate and a platform before what it in good faith believed was the deadline for doing so. And, while the testimony is more contradictory on this point, we respectfully submit that the board never seriously considered waiving the advance notification bylaws, and probably did not know it was allowed to do so.

One can debate at length the proper interpretation of those bylaws, but even if they allowed a "window" from December 1-11 for nominations, the testimony made clear that such a

window was insufficient under these circumstances to allow for the nomination of qualified directors. (Tr. at 375-76 (Peterschmidt), 641 (Puckett); *see* Tr. at 477-78 (Kagan)). Stockholders needed to read and interpret the very lengthy and very late 10-K and then find qualified directors. Those tasks could not reasonably be accomplished in that short period, even if some initial scouting for directors (for a friendly nomination) had been undertaken. The board was thus under a duty to waive the bylaws, and in apparent ignorance of its right, much less duty, it failed to do so.

Nor can there be real doubt that the size of the board was reduced out of worry about Harbinger. That is the conclusion one must draw from the facts presented at trial. Openwave's contrary explanation – that it would have been "bad corporate governance" to keep the seat open for another two months until it could be filled with a candidate the board already had in mind – not only strains credulity on its face but runs aground on the unarguable fact that the seventh seat had been kept open for over 13 months and was only eliminated immediately after the board received a "Vulnerability Assessment" on "Shareholder Activism and Takeover Preparedness."

Similarly, Openwave's PGI "counterattack" press release was false, it was misleading, and it was material. It appears that it might not have been intentionally false, but no one at Openwave did the basic due diligence of reading the first PGI report, which would have shown them that PGI had made no recommendation as to Harbinger's candidates or proposals, or checked PGI's website to see if the report had been withdrawn or superseded. Instead, all elementary fact checking was put aside in the hope of turning an unfavorable tide.

Finally, at trial, Openwave was utterly unable to produce the simple documentary evidence that would have shown that its non-record, restricted shares are actually issued and may be voted. Judgment should be entered for Harbinger.

ARGUMENT

I. OPENWAVE REDUCED THE SIZE OF THE BOARD FOR THE PRIMARY PURPOSE OF THWARTING AN EFFECTIVE VOTE, THUS ENTITLING THE STOCKHOLDERS TO A NEW ELECTION.

A. The Legal Standard.

The shareholder franchise forms "the ideological underpinning upon which the legitimacy of directorial power rests." *Blasius Indus., Inc. v. Atlas Corp.*, Del. Ch., 564 A.2d 651, 659 (1988); *M.M. Cos., Inc. v. Liquid Audio, Inc.*, Del. Supr., 813 A.2d 1118 (2003). "The shareholders' right to vote includes the right to nominate an opposing slate." *Hubbard v. Hollywood Park Realty Enter. Inc.*, Del. Ch., C.A. No. 11779, 1991 WL 3151, at *5 (Jan. 14, 1991) (Ex. A); *see Linton v. Everett*, Del. Ch., C.A. No. 15219, 1997 WL 441189, at *9 (July 13, 1997) (Ex. B). Thus, "director conduct intended to interfere with or frustrate shareholder voting rights is presumptively inequitable and will be invalidated, unless the directors are able to rebut that presumption be showing a compelling justification for their actions." *Hubbard*, 1991 WL 3151, at *8 (citing *Blasius)*. At a minimum, when directors adopt a defensive measure in response to a threat to corporate policy and effectiveness that touches upon issues of control, such defensive measure must be proportionate and reasonable in relation to the threat posed. *Liquid Audio*, 813 A.2d at 1129-30. Finally, it is not enough for directors to contend that their actions complied with the Delaware General Corporation Law, since "inequitable action does not become permissible simply because it is legally possible." *Schnell v. Chris-Craft Indus., Inc.*, Del. Supr., 285 A.2d 437, 439 (1971).

B. Harbinger's Emergence Throws Openwave Into Defensive Mode.

Despite Mr. Peterschmidt's denials, in the summer of 2006, Openwave's management was in turmoil. After reporting a stock-options scandal, the Company missed its June 2006 quarterly financial estimates and its stock "suffered a major hit." (Tr. at 250-52, 298 (Peterschmidt)). As a result, Mr. Peterschmidt came under heavy fire, (Tr. at 615-17 (Puckett)), and senior management lobbied the board for his removal. (Tr. at 617-621 (Puckett)). Although Mr. Peterschmidt denied knowing anything of such discussions, Mr. Puckett reluctantly confirmed them and testified that when Mr. Peterschmidt learned of the discussions, the dissenting officers were terminated. (Tr. at 300 (Peterschmidt), 617-21 (Puckett)). Meanwhile, the problems continued, as the results for the first quarter of fiscal 2007 were also bad. (Tr. at 302 (Peterschmidt)).

Harbinger began purchasing Openwave stock in September 2006 and publicly disclosed in a Form 13-G on October 5, 2006 that it held 6.7% of Openwave's outstanding shares. (Tr. at 417 (Kagan); JX 112-A). Mr. Peterschmidt then received a "heads up" from both a private equity firm and Openwave's investor relations department, warning that Harbinger "has a behavior of activist shareholder activity" and that he should be "paying attention." (Tr. at 253, 306-09 (Peterschmidt)). Openwave heeded this warning. At 11:20 p.m. on Saturday, October 7, 2006, Openwave lawyer Jim Wu forwarded Mr. Peterschmidt a list of public relations firms and proxy solicitors provided by Openwave's legal counsel, noting that Openwave already had selected Georgeson. (JX 2; Tr. 261-62 (Peterschmidt)).

Prior to the end of October, Openwave also engaged Merrill Lynch ("Merrill") to advise it on defenses to shareholder activism. (Tr. at 255-56 (Peterschmidt)). Merrill combined with outside counsel to prepare a presentation on "Shareholder Activism and Takeover Preparedness."

(JX 5) (the "Presentation"). As discussed below, the Presentation focused directly on the "threat" Harbinger posed to Openwave management.

On November 1 and 2, 2006, the Openwave board met for the first time since learning that Harbinger had begun acquiring Openwave stock (the "November 1-2 Meeting"). (JX 6; Tr. at 253-54). According to the heavily redacted minutes, the first item the board addressed was a "Summary of Corporate Defenses/Shareholder Activism." (JX 6). The centerpiece was the Presentation. (*See id).* This marked the *first* time that the board ever had received a presentation on shareholder activism and takeover preparedness. (Tr. at 336 (Peterschmidt)). The Presentation proves that Harbinger figured prominently in the board's discussion at the November 1-2 Meeting. (JX 5 at 15-16). Indeed, the Presentation specifically notes that one of Harbinger's investment strategies is to "seek[] board representation." (*Id.* at 15). Openwave, however, failed to produce the document until after its representatives were deposed.

The withholding of the Presentation takes on added significance when one reviews the Openwave witnesses' testimony about the November 1-2 Meeting. At his deposition, Mr. Peterschmidt was asked whether Harbinger was on the agenda, to which he flatly answered "No." (Tr. at 326). He was then asked whether the board discussed Harbinger at the November 1-2 Meeting. (*Id.).* Aware that Harbinger had not yet been given a copy of the Presentation, Mr. Peterschmidt answered: "[w]e did" but "*simply in the normal routine of reviewing with the board the shareholder composition in the company ....*" (*Id.)* (emphasis added). He added that this was "*[b]asically a routine review point that we do with the board . . . just about every board meeting.*" (*Id.*) (emphasis added). His testimony was not true. It was not even close to being true. Yet that is what Mr. Peterschmidt said under oath.

At his deposition, held immediately after Mr. Peterschmidt's, Mr. Puckett offered similar testimony, saying that he "[did] not recall any significant discussion about Harbinger" at the November 1-2 Meeting and that the board only "reviewed shareholdings as, you know – just something to do." (Tr. at 624-25 (Puckett)). Indeed, Mr. Puckett testified at his deposition that (i) the first time he learned about Harbinger's involvement with Openwave was at a November 6, 2006 investor meeting, and (ii) the board did not have significant discussions about Harbinger until "[p]robably 2nd of January …." (Tr. at 623-26 (Puckett)).[1]

At trial, however, faced with the indisputable evidence of the Presentation, Messrs. Peterschmidt and Puckett both admitted that the board *had* specifically discussed Harbinger at the November 1-2 Meeting and that the discussion was anything but "routine." On direct, Mr. Peterschmidt revealed that the board discussed Harbinger "in the context of we have an activist – a potential activist shareholder invested in a company, what does that mean." (Tr. at 256-57). According to Mr. Peterschmidt, the board "probably spent less than 35 to 45 minutes in the whole area of activist shareholders, what they do, that type of thing." (Tr. at 258).[2] And while he claimed that "we probably spent less than about three or four minutes on Harbinger *per se*," the Presentation reflects that the only "activist shareholder" the board focused on was Harbinger. (Tr. 256; JX 5).

[1] Mr. Peterschmidt and Mr. Puckett were prepared jointly for their depositions, although Mr. Peterschmidt denied this during the first day of his cross examination. (*Compare*, Tr. at 627-28 (Puckett) *with* Tr. at 329-30 (Peterschmidt)). On the second day of trial (during redirect), Mr. Peterschmidt changed his testimony and admitted that he had been prepared with Mr. Puckett. (Tr. at 409-10).

[2] On cross examination, Mr. Peterschmidt reduced this time to "not more than about 20 or 30 minutes on the entire subject." (Tr. at 324).

Thus, the facts adduced at trial (as opposed to the story offered by Openwave at deposition) establish that the Openwave board had entered "defensive mode" as of the November 1-2 Meeting. This is apparent from what the board discussed and was advised about at the meeting, including:

- That Harbinger was an "activist shareholder." (Tr. at 256-57; 308 (Peterschmidt));
- The board's "vulnerability" to action from Harbinger. (JX 5-6; Tr. at 344 (Peterschmidt));
- The Company's "takeover preparedness" and "corporate defenses." (JX 5-6; Tr. at 336 (Peterschmidt)); and
- That Openwave should establish a "working group" (the "Working Group") to respond "in the event something should happen." (Tr. at 275 (Peterschmidt)).[3]

C. The Board Removes an "In Play" Board Seat Without Disclosing Its Plan to Fill the Seat in January 2007.

According to the minutes of the November 1-2 Meeting, almost immediately after the board received the Presentation and discussed "Corporate Defenses/Shareholder Activism," it amended the Company's bylaws to reduce the size of the board from seven to six members. (JX 6 at 2).[4] But for this action, the seventh seat (which was vacant) would have been one of three

[3] Openwave established the Working Group shortly after the meeting. (Tr. at 275 (Peterschmidt)). Mr. Peterschmidt headed the group, which was comprised of the Company's in-house and outside legal team and Georgeson. (Tr. at 275-76, 320-21 (Peterschmidt)). Mr. Peterschmidt testified that the Working Group (including Mr. Peterschmidt) talked with Georgeson at least once *before* Harbinger filed its preliminary proxy materials on December 27, 2006 about what would happen if Harbinger "went active" (Tr. at 318). Nevertheless, at trial Mr. Peterschmidt steadfastly denied that he ever discussed with either Georgeson or Merrill a potential proxy fight from Harbinger *until December 27, 2006*. (Tr. at 312-19). If one is to credit Mr. Peterschmidt's changed testimony, the possibility that Harbinger might wage a proxy contest if it "went active" never occurred to Georgeson, one of the world's largest proxy solicitation firms.

[4] Openwave redacted a substantial portion of the November 1st minutes that immediately precedes the memorializing of this action. (JX 6 at 1-2).

available to fill at Openwave's 2006 Annual Meeting. Openwave disclosed this action in a single sentence at the end of an 8-K filed on November 7, 2006. (JX 43).[5]

The 8-K, however, failed to disclose that the board had a contemporaneous plan to reinstate and fill the seventh seat in January 2007. At trial, Mr. Peterschmidt admitted that at the time the board voted to reduce its size, he was in active dialogue with Steve McGowan about joining the board. (Tr. at 286-88.) Openwave had identified Mr. McGowan in early 2006 (Tr. at 285-86, 352-53 (Peterschmidt)), and in November, it anticipated expanding the board again in January and appointing Mr. McGowan. (Tr. at 286-88, 353 (Peterschmidt)). Indeed, as of December 31, 2006, the Working Group was preparing a press release to announce Mr. McGowan's appointment. (JX 12 at GEOPROD 0005714). Openwave failed to produce the draft press release in this litigation.

The *only* justification offered by Openwave for the board's temporary removal of the seventh board seat is Mr. Puckett's recommendation – which arose out of a conversation with Openwave's in-house counsel and Working Group member –that "it's not good and tidy to keep a board seat open when, in fact, there are no candidates coming forward." (Tr. at 353 (Peterschmidt); *see also*, Tr. at 630 (Puckett)). As of November 1st, however, the seventh board seat had been open for over a year. (Tr. at 351-52 (Peterschmidt), 632 (Puckett)). Moreover, this was not a case of "no candidates coming forward" (Tr. at 353 (Peterschmidt)); indeed, the board had already decided on a specific candidate to fill the seat. Accordingly, Openwave's supposed

[5] Openwave's 8-K also disclosed that on November 1, 2006 the board amended Messrs. Peterschmidt and Covert's Change of Control Severance Agreements to (i) expand the trigger periods for those Agreements, and (ii) provide for substantial lump-sum payments to Messrs. Peterschmidt and Covert upon a change of control. (JX 43). This purported board action is not reflected in the November 1-2 minutes produced by Openwave. (JX 6).

justification is simply not credible and is neither a "compelling justification" nor "reasonable in relation to the threat posed" as required by Delaware law.

D. The Openwave Stockholders are Entitled to a New Election to Fill the Improperly Removed Vacant Seat.

1. The Bylaw Amendment Removing the Board Seat is Invalid Under Either Blasius or Unocal.

The reduction in the size of the board is invalid under either *Blasius* or *Unocal Corp. v. Mesa Petroleum Co.,* Del. Supr., 493 A.2d 946 (1985). Under *Unocal*, when a board adopts a defensive measure in response to a threat to corporate policy and effectiveness touching upon issues of control, the measure must be proportionate and reasonable in relation to the threat posed. *Liquid Audio*, 813 A.2d at 1129-30. Under *Blasius*, when a court finds that a board of directors acted "for the primary purpose of impeding the exercise of stockholder voting power," the board "bears the heavy burden of demonstrating a compelling justification for such action." 564 A.2d at 661. Under the "compelling justification" standard, the directors' actions need not actually prevent a party from succeeding in an election contest, *nor does the contest need to involve a challenge for outright control of the board of directors. See Liquid Audio,* 813 A.2d at 1132 (board violated *Blasius* when it failed to provide a compelling justification for its decision to increase the size of the board from five to seven, thus decreasing the influence of two opposing nominees on the board); *IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 136 F.3d 940, 951 (3d Cir. 1998) (board's decision to reduce the number of directors from seven to six violated *Blasius* as it was done for the primary purpose of hindering the opposing nominee's proxy solicitation and the board could offer no compelling justification for its action).

The facts here leave no doubt that the Openwave board acted with "the primary purpose of impeding the exercise of stockholder voting power" when it cut the board's size with the

intent to reinstate and fill the seat in January 2007. At the November 1-2 Meeting, the board was in full defensive mode, as evidenced by (i) the Presentation and the discussion regarding Openwave's "corporate defenses;" (ii) the specific identification of Harbinger as a "shareholder activist;" (iii) the formation of the Working Group to respond "in case anything happened;" (iv) the generous amendments to the Golden Parachutes (*see* note 5, *supra*.); (v) the reduction in the number of board seats available for election at the 2006 Annual Meeting; and (vi) the board's contemporaneous (but undisclosed) intention to appoint Mr. McGowan to the seat in January 2007. These actions were all plainly defensive, making it clear that the temporary removal of the vacant board seat was primarily intended to prevent the election of three directors. Since the facts show that the board was reacting to Harbinger, that Harbinger had not yet formally launched a proxy contest does not excuse the board's actions from the application of *Blasius* or, at a minimum, *Unocal*.

Furthermore, the board has not – and cannot – offer any coherent reason, much less compelling justification for its interference with the stockholder franchise. Openwave claims that the board-seat reduction was merely good corporate governance (Tr. at 353 (Peterschmidt), 630 (Puckett)), but the surrounding facts eviscerate that claim. Good corporate governance had not required a reduction in the board size for more than a year, yet supposedly coincidently mandated it immediately after the board received the Presentation and focused on Harbinger as a "shareholder activist" – and only two months before the board intended to reinstate and fill the seat with Mr. McGowan.[6] Under *Liquid Audio* and *IBS*, this action constitutes a clear violation of *Blasius*, and the bylaw amendment reducing the number of board seats must be invalidated. Nor can the reduction be justified under *Unocal*, because it was not a reasonable response to any

[6] Mr. Puckett, in fact, hoped to add *even more* seats to the board after the election. (Tr. at 633-34 (Puckett)).

threat. To remedy the board's manipulation of the shareholder voting franchise, a new election should be ordered to fill at least the vacant seat that was improperly removed.

2. The Non-Disclosure Of The Board's Intent To Reverse Its Action And Reinstate The Removed Seat Was Material.

The reduction of the size of the Openwave board from seven to six was a material fact, disclosed by the Company on November 7, 2006. What the Company failed to disclose, of course, was that the board planned to reverse the reduction in January 2007. The intent to expand the board back to seven members in January was plainly material. Had the stockholders been told that the incumbent board intended to add another handpicked director to the board in January, they would have been far more likely to vote for Messrs. Zucco and Breen. And had the stockholders known that Mr. McGowan had already been selected to refill the seventh board seat, the stockholders would almost surely have run Mr. Peterschmidt out of office (as it is he barely survived). At a minimum, disclosure of the intent to expand the board back to seven members in January and to appoint Mr. McGowan to fill the seventh seat would have significantly altered the total mix of information available to stockholders. *See Arnold v. Society of Savings Bancorp Inc., Del. Supr.,* 650 A.2d 1270, 1277 (1994). Indeed the record shows that Openwave drafted a press release to announce Mr. McGowan's appointment following Harbinger's commencement of its proxy contest, but for undisclosed reasons chose not to issue that press release. (JX 12 at GEOPROD 0005714).

Accordingly, the Company should be required to issue a corrective disclosure revealing its true intentions with respect to the removal of the board seat, and a new election should be held. And, given the materiality of Openwave's non-disclosure and that the reduction in board size itself constituted a breach of fiduciary duty that cannot be upheld under *Blasius* or *Unocal*,

the stockholders are entitled to an election where two board seats are in play (the sixth and seventh seats, with Mr. Zucco's election remaining enforceable).

II. OPENWAVE'S ADVANCE NOTICE BYLAWS ARE UNENFORCEABLE HERE.

A. The Legal Standard.

Delaware law recognizes that the right of stockholders to participate in the voting process includes the right to nominate directors for election. *Hubbard v. Hollywood Park Realty Enter., Inc.*, 1991 WL 441189 at *9. Advance notice bylaws, which obviously limit those rights, are permissible, but to be enforceable their restrictions first *must* be "clear and unambiguous." *Harrah's Entertainment, Inc. v. JCC Holding Co.*, Del. Ch., 802 A.2d 294, 310-11 (2002) (quoting *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, Del. Supr., 582 A.2d 923, 927 (1990)). Second, even if Openwave's bylaws were facially valid, they may not be applied for an inequitable purpose, such as impeding the stockholder franchise or entrenching the current board of directors. *Schnell*, 285 A.2d 437*; Blasius*, 564 A.2d 651. Finally, a board has a duty to waive the bylaws when the circumstances would make their application unfair to the stockholders. *Hubbard v. Hollywood Park Realty Enter, Inc.*, 1991 WL 3151, at **10-13. Here, Openwave's bylaws are ambiguous and confusing; fairness demands the waiver of the directors' preferred interpretation and the facts demonstrate that the bylaws are being used inequitably. Mr. Zucco won the election (by a wide margin) and should be seated.

B. Openwave's Bylaws Are Hopelessly Confusing and Internally Inconsistent.

Openwave's advance notice bylaws are at best confusing, and at worst unworkable. Howard Kagan, managing director of Harbinger, "could not understand" the bylaws when he first reviewed them in the first week of December 2006. (Tr. at 423; *see* Tr. at 431-32). Mr.

Kagan also testified that Mr. Puckett acknowledged during settlement negotiations with Mr. Kagan in January 2007 that the Openwave board was aware that the bylaws were confusing but had chosen not to clarify them. (Tr. at 480-83). And while Mr. Puckett did not admit to calling them confusing, he did acknowledge that Mr. Kagan said they were and that he (Puckett) had been told that they needed to be redone. (Tr. at 638-39 (Puckett)). As this Court observed on Openwave's motion for summary judgment, "there is little question that the bylaws at issue are poorly drafted and could easily lead to some confusion where, as is true in this case, the date of the annual meeting is delayed due to circumstances beyond the control of the board of directors." *Openwave Systems, Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, Del. Ch., C. A. No. 2690-N, Mem. Op. at 5 (March 5, 2007) (Ex. C).

1. The Relevant Language of the Bylaws.

Openwave's bylaws contain two competing and sometimes flatly contradictory provisions relating to nominating directors: Section 2.2(c) and Section 2.5. Section 2.2(c) provides in relevant part:

> ***In addition to the requirements of Section 2.5*** for nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to clause (iii) of paragraph (b) of this Section 2.2, ***the stockholder must have given timely notice*** thereof in writing to the secretary of the Corporation and such business must be a proper matter for stockholder action under the General Corporation Law of Delaware. To be timely, a stockholder's notice shall be delivered to the secretary at the principal executive offices of the Corporation not less than 20 days nor more than 90 days prior to the first anniversary of the preceding year's annual meeting of stockholders; provided, however, that in the event that the date of the annual meeting is more than 30 days prior to or more than 60 days after such anniversary date, notice by the stockholder to be timely must be so delivered not earlier than the 90th day prior to such annual meeting and not later than the close of business on the later of the 20th day prior to such annual meeting or the 10th day following the day on which public announcement of the date of such meeting is first made.

(JX 36 at OPWV002670) (emphasis added). Section 2.5 provides in relevant part:

> To be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive offices of the Corporation not less than 60 days nor more than 90 days prior to the meeting; provided, however, that in the event that less than 60 days' notice or prior public disclosure of the date of the meeting is given or to stockholders, notice by the stockholder to be timely must be so received not later than the close of business on the 10th day following the day on which such notice of the date of the meeting was made or such public disclosure was made.

(JX 36 at OPWV002671-72).

2. The Legal Standard for Interpreting the Bylaws.

As Openwave has told this Court that, "in the absence of clear and convincing evidence, *a court will resolve any residual doubts it harbors about an instruments' meaning* in favor of, and against a reading that would limit, shareholders' fundamental electoral rights." (Openwave summary judgment brief at 17 (emphasis added) (citing *Harrahs Entertainment* at 297, 312)). Under this standard, not only did Openwave need to show that the bylaws are not ambiguous (because ambiguous advance notice bylaws may not be enforced), but its proof had to be so strong that the Court was left with *no residual doubts.* Openwave did not meet that burden. *See Harrahs Entertainment*, 802 A.2d at 312.

3. Possible Readings of the Bylaws.

One possible reading of the bylaws is that the requirements of *both* Section 2.2(c) and Section 2.5 must be satisfied to timely nominate directors and that the earlier date, therefore, controls. Such a reading would be supported by the language in Section 2.2(c) that states that the provisions of Section 2.2(c) are "[i]n addition to the requirements of Section 2.5." (JX 36 at OPWV002670). (*See* language emphasized above). That reading would impose a retroactive deadline of November 2, 2006 for nominations for election at Openwave's 2006 Annual Meeting even though the Company's 10-K was not filed until December 1st.

Harbinger did not file by November 2nd, and was in no position to do so. Had Openwave advanced the above interpretation, Harbinger would have argued that it would be inequitable to enforce such a restriction under these circumstances, pointing to *Hubbard.* Openwave appears to recognize the inequity in such a reading, however, describing it as leading "to a wholly illogical result …." (Openwave summary judgment brief at 17). Instead, Openwave argues that the effective deadline was December 11, 2006, because the bylaws contained two alternative windows for nominations: the Section 2.2(c) window on or before November 2, 2006, and a second window from December 1-11, 2006 pursuant to Section 2.5. (*Id.* at 17-18). Openwave characterizes Section 2.5 as a "fail safe". (*Id.* at 6).

Openwave's "fail safe" argument runs into multiple problems. The logic of Openwave's argument means that the second notice period in Section 2.5 applies in *any* case in which less than 60 days notice is given. Yet, that is *not* what Openwave told its stockholders in its 2005 and 2006 proxy statements, which only referenced the provisions of Section 2.2(c). Nor is it consistent with Section 2.2(c)'s statement that stockholders must comply with *both* sections. Harbinger respectfully submits that Section 2.5 cannot be fairly read to provide a 10-day window here, and that if November 2, 2006 was not a fair date to require notice – and it was not – then the best way to understand the bylaws under these circumstances is to treat the meeting as set more than 60 days after the 2005 meeting as provided in Section 2.2(c), which would allow notice by December 28, 2006. Admittedly, that provision does not apply on its face, but given that the only facially plausible result under the bylaws as written – requiring November 2nd notice – would be unfair and inequitable under these circumstances, Harbinger respectfully submits that December 28 is the best date that can be chosen consistent with the factual circumstances here, the bylaws, and equity.

C. Openwave Is Applying Its Advance Notification Bylaws Inequitably.

1. There is Strong Circumstantial Evidence That Openwave Set The Annual Meeting Date In An Effort To Preclude Nominations.

Under normal circumstances, notice of director nominees for Openwave's 2006 Annual Meeting would have been due November 2, 2006. If the 2006 Annual Meeting were delayed to more than 60 days after such anniversary date, however, notice under Section 2.2(c) would not have been due until 20 days prior to the 2006 Annual Meeting. Here, Openwave's statements prior to November 2, 2006 had the effect of telling stockholders that the Company's stock options scandal and the resulting inability to file a Form 10-K would delay the 2006 meeting beyond 60 days from November 22 and, therefore, November 2, 2006 would in fact *not* be the due date for director nominations.

For example, on Wednesday, October 4, 2006, Openwave issued a press release saying that "*on October 2, 2006, the Company concluded that all financial statements previously issued by the Company should no longer be relied upon."* (JX 3 at p.2) (emphasis added). In addition, on October 26, 2006, Openwave's CFO, Hal Covert, on a conference call discussing first quarter 2007 results, stated that the "company has a plan to file its 10K for F2006 and 10Q FQ1, 07 *by the end of the year, although achievement of this plan is not certain due to the timing of and review required by our auditors and the SEC.*" (JX 4 at p.5 (emphasis added); Tr. 303-04 (Peterschmidt)). With no meeting scheduled, and no definite information as to when it *could* be scheduled, it is not surprising that no nominations for directorships were submitted to the Company by November 2, 2006. Indeed, stockholders were also not told that their board had temporarily eliminated a board seat with the intent of restoring it and filling it themselves in January 2007 and had otherwise gone into defensive mode (*see* pp 3 to 11).

Thus, as of November 1, 2006, the last day before the November 2, 2006 deadline for nominations under normal circumstances set forth in Section 2.2(c), Openwave's stockholders were unaware that their board had gone defensive in response to Harbinger, had no reason to expect that the Company would hold its 2006 Annual Meeting within 60 days of the anniversary date of the November 22, 2005 meeting, and would not receive the 10-K revealing the Company's true financial situation for over a month. Requiring stockholders to meet such an entirely artificial deadline would be unfair, inequitable and not serve the legitimate purposes for which such bylaws may be enacted.

Openwave filed its 10-K on December 1, 2006, just prior to the deadline for bond default, a filing that (pleasantly) surprised Mr. Kagan. (Tr. at 420 (Kagan)). On the same day, the Company announced that the 2006 Annual Meeting would be held on January 17, 2007. (JX 53 at p.1). The January 17th date appears to have been carefully selected. Had Openwave's meeting been scheduled for just three business days later (*i.e*. Monday, January 22, 2007), director nominations would have been due 20 days prior to the meeting. The board – or the Working Group lawyers guiding the board – knew this. Indeed, at some point well before the November 29th meeting at which the directors selected a January 17th meeting date, but after Harbinger had come on the scene, Openwave had informed ADP that the meeting would be held January *19*, 2007. (JX 7 at GEOPROD 0000905). January 19th was the ***last*** day that the annual meeting could be held without triggering the 20-day period set forth in Section 2.2(c). Thus, even before the November 29th board meeting, Openwave was making every effort to ensure that it would hold its 2006 Annual Meeting prior to 60 days after the anniversary of the November 22, 2005 Annual Meeting.

Although technically legal, under the facts here, this action by the Openwave board constituted an inequitable attempt to quash electoral challenges to the board and, therefore, is unenforceable under *Schnell, Blasius and Unocal.*[7] *See Linton*, 1997 WL 441189, at *10; *Hubbard*, 1991 WL 3151, at *11-13; *Aprahamian v. HBO & Co.*, Del. Ch., 531 A.2d 1204, 1208 (1987); *Lerman v. Diagnostic Data, Inc.*, Del. Ch., 421 A.2d 906, 914 (1980). Thus, the Court should deem applicable the provision of Section 2.2(c) that would have applied had the board set a meeting date of January 22, 2007 or later, a deadline (December 28, 2006) with which Harbinger complied.

2. There Was No Viable "Failsafe Option."

a. <u>Ten Days Was Insufficient Time To Form A Slate of Nominees Here.</u>

Application of a December 28, 2006 deadline is also appropriate given that Openwave's contention that its bylaws provide a 10-day "fail safe option" to nominate directors ignores the fact that 10 days is usually insufficient to contact nominees and obtain their agreement to be included on a dissident slate. Openwave relies on *Accipiter Life Sciences Fund, L.P. v. Helfer*, Del. Ch., 905 A.2d 115 (2006), for the proposition that 10 days is a reasonable time period to form a slate of nominees. In *Accipiter*, however, unlike here, the insurgent plaintiff *admitted* that it could have met the 10-day deadline had it fully read the corporation's press release announcing the meeting date. 905 A.2d at 120, 122. Here, in contrast, Mr. Kagan testified that it would have been impossible for Harbinger to have put together a slate of qualified directors within the

[7] Whether setting a January 17, 2007 meeting date rendered a proxy contest impossible as opposed to impracticable depends on how the bylaws are interpreted. If the "[i]n addition to" language in Section 2.2(c) leads to the conclusion that the requirements of both Section 2.2(c) and Section 2.5 must be satisfied, then setting a January 17, 2007 meeting date created a November 2, 2006 deadline – which was impossible to meet because it had already passed. If Openwave's current position is accepted and Section 2.2(c) and Section 2.5 are viewed as separate "opportunities", not separate requirements, then the December 1st announcement of a January 17th meeting created a December 11th deadline for nominations that Openwave essentially acknowledges would make it impracticable for shareholders to identify candidates. (Tr. at 375 – 76, (Peterschmidt), 641 (Puckett); *see* Tr. at 477-78 (Kagan)).

claimed 10-day deadline. (Tr. at 477-78 (Kagan)). Even Mr. Puckett agreed that, absent a head start, 10 days was simply too short a time period to recruit directors. (Tr. at 641). Mr. Peterschmidt also conceded that it takes a lot of time and diligence to find directors. (Tr. at 375-76). In short, the 10-day "fail safe" claimed by Openwave here would present an inequitable deadline for nominations. As this Court has held, those wishing to wage a proxy fight cannot be "required to be in a state of 'shelf-readiness'…." *Lerman*, 421 A.2d at 914, yet that is precisely what Openwave claims Harbinger should be required to have been here.

b. Harbinger Could Not Have Known That Openwave Believed A 10-Day "Fail-Safe Option" Existed.

In any event, the 10–day "fail-safe option" was of no utility to Harbinger because Harbinger had no way of knowing that the option existed. As discussed above, a plain reading of the bylaws shows that the November 2, 2006 deadline set forth in Section 2(c) was "[i]n addition to the requirements of Section 2.5," *i.e.*, Section 2.2(c) and Section 2.5 set forth two separate requirements to be met, not two different "opportunities" to nominate, and Openwave's proxy statement for 2005 made *no* mention of the supposed "fail safe." Given that, Harbinger had no reason to suspect that a December 11, 2006 nomination date was an option. (Tr. at 469 (Kagan)). In short, there was no "fail-safe option" for Harbinger here. Rather, the only available options ("fail safe" or otherwise), based on the best reading of the bylaws, was either that the deadline had passed (November 2, 2006, which would be inequitable here) or that nominations were due 20 days before the annual meeting date (*i.e.* December 28, 2006). Harbinger met the December 28 deadline.

D. The Openwave Board Owed A Duty To Waive The Advance Notification Bylaw Here.

1. *Hubbard Requires The Bylaws To Be Waived.*

Even if the Court determines that Openwave's advance notice bylaws on their face would bar Harbinger's nominations, the bylaws should not be applied because Openwave's directors owed a fiduciary duty to waive the bylaws in the circumstances here.

According to Mr. Puckett, the purpose of Openwave's advance notice bylaws is "to provide an orderly process, to ensure that the company has time to respond to proposals from stockholders, and that other stockholders have time to review the impact, having heard the response from the company and from whomever the stockholders that are proposing." (Tr. at 596-597). Here, Openwave's own documents show that it had adequate time to respond to Harbinger's nominations. Harbinger served notice on December 27, 2006, which was received by Openwave on December 28th, 20 days before the Annual Meeting. (JX 16; JX 17; JX 18). Section 2.2(c) of Openwave's bylaws requires only 20 days notice of nominations prior to the anniversary of the previous year's meeting, and similarly requires only 20 days notice prior to the actual meeting date if the current year's meeting is held more than 30 days prior to or more than 60 days after such anniversary date. (JX 36 at OPWV002670). Thus, Openwave's bylaws concede the sufficiency of 20 days advance notice.

In addition, Openwave's communications demonstrate that management had taken action to prepare for a proxy contest well before Harbinger gave actual notice. As a result, the board was not limited to 20 days to respond. In an email sent to an investment banker on January 2, 2007 turning down his offer of assistance in dealing with Harbinger, Mr. Peterschmidt said: "*We actually have had a team assembled for a couple of weeks and have our strategy mapped out.*" (JX 33) (emphasis added). In another email to a different investment banker the same day, Mr.

Peterschmidt asserted: "We actually already have a team in place and *have been working* this pretty hard." (JX 34 at OPWV001490) (emphasis added). Those statements were correct since the Working Group had been in place since early November. And although Mr. Peterschmidt attempted to distance himself from these documents at trial (Tr. 407-08), they speak for themselves. Management knew it faced a threat and had long prepared for it. Openwave was not caught by surprise.

Openwave, then, is relying on a technical, and confusing, application of its bylaws, not to allow for a more informed vote, but to deny the Company's stockholders a fair opportunity to nominate and elect director candidates. Advance notice bylaws may not be used for such a purpose. *See Hubbard*, 1991 WL 3151. In *Hubbard*, the Court enjoined the application of an advance notice bylaw that was facially valid and whose deadline had passed, on the ground that application of the bylaw in the circumstances of that case would have been inequitable. 1991 WL 3151 at **12-13. The Court determined that the board had a duty to waive the bylaw because subsequent to the passage of the deadline prescribed by the bylaw, the company had reached a settlement agreement with a dissident group that resulted in "an unanticipated change of allegiance of a majority [of the board]." *Id*. at *12.[8] Here, there is a long list of reasons why the bylaws should have been waived: (i) it was not expected that the Company's 2006 Annual Meeting would be held within 60 days of the anniversary date of the November 22, 2005 meeting; (ii) the critical 10-K was not issued until December 1st; (iii) the December 11, 2006 "window" relied on by Openwave is contrary to the plain language of the bylaws, was unknown to stockholders and, in any event, was too short to be of any utility; (iv) the stockholders were

[8] The Court held that the purpose of the bylaw -- to afford adequate time for information and reflection -- could be achieved by a "modest" adjustment in the meeting date, "if needed." *Id.* at *13. Here, of course, Openwave's bylaws (and Mr. Peterschmidt's emails) make clear that the 20 days notice provided by Harbinger was sufficient.

unaware that the board had gone into defensive mode by, among other things, reducing the number of directors standing for election with the intent of expanding the board again after the Annual Meeting; and (v) waiver of the bylaws would not compromise their purpose.

2. Blasius Requires The Bylaws To Be Waived.

Blasius and its progeny make clear that, absent a compelling justification, a board may not act to thwart the stockholder franchise even if the directors in good faith believe that the election of an insurgent slate would be harmful to the corporation. *Blasius,* 564 A.2d at 659-61. To the contrary, the election of directors is an issue left to the stockholders. *Id.; Liquid Audio,* 813 A.2d at 1126-27. Thus, in deciding whether to place Messrs. Zucco and Breen in nomination at the 2006 Annual Meeting, the issue before the Openwave board was not whether it approved of Harbinger's nominees, but (i) whether the advance notice bylaws had been technically satisfied, and (ii) if Harbinger had not technically satisfied the bylaws, whether allowing Messrs. Zucco and Breen to be nominated would defeat the purpose of the bylaws, *i.e,*. to permit an orderly election. *Mentor Graphics Corp. v. Quickturn Design Sys. Inc.*, Del. Ch., 728 A.2d 25, 42, *aff'd on other grounds sub nom., Quickturn Design Sys., Inc. v. Shapiro*, Del. Supr., 721 A.2d 1281 (1998).

At a January 15, 2007 meeting, the Openwave board determined that Messrs. Zucco and Breen could stand only provisionally for election and could not join the board unless the Court ruled in Harbinger's favor in this litigation. (JX 29 at OPWV003327). At the time of the meeting, the board knew that Mr. Zucco was likely to obtain the most votes at the election (Tr. at 367-68 (Peterschmidt)), and that large stockholders had given a "consistent message" that they were "impressed" by Mr. Zucco and wanted "more oversight" of Mr. Peterschmidt (Tr. at 591

(Covert)). It is not clear, however, what was discussed at that meeting. The minutes of the January 15, 2007 meeting state that the board considered whether to waive the bylaws:

> *The Board also considered whether to waive the advance notice bylaw provisions to allow Harbinger's nominations to be properly placed before the Annual Meeting. The consensus view of the Board was that it would be inappropriate to waive* for the benefit of one shareholder.

(JX 29 at OPWV003327 (emphasis added)).

As seen by the testimony on the strange omissions in the November 1-2 minutes (which contain no discussion on the Golden Parachutes the board supposedly adopted (*Compare* JX 6, JX 43 and Tr. at 586-88 (Covert), 346-49 (Peterschmidt)), Openwave's minutes must be taken with a lump of salt. Similarly, the testimony of Messrs. Peterschmidt and Puckett raises substantial doubts as to whether the Openwave directors were even aware that they could waive the bylaws much less whether they adequately considered whether they should. After testifying at deposition that he was not aware that the board could waive the bylaws, Mr. Peterschmidt attempted to change his testimony at trial (Tr. at 370-72). On cross examination, however, he stated that the board thought it had a fiduciary duty *not* to waive the bylaws. (Tr. at 373). Mr. Puckett simply could not recall at trial whether he was aware on January 15th that the board could waive the bylaws. (Tr. at 640-41). One thing that is clear is that, regardless of what – if anything – the board understood, the minutes set forth above show that the process was legally and factually deficient.

First, in deciding whether to waive the bylaws, the testimony is clear that the board *never* considered the issue of fairness. (Tr. at 376-77; 395-96 (Peterschmidt)). Second, the question should not have been whether the bylaws should be waived "for the benefit of one shareholder." (JX 29 at OPWV003327). Rather, the question that the board should have addressed was whether the bylaws should be waived for the benefit of all shareholders, who would then be

given a choice in the election of directors. That is why it is so disturbing that Mr. Puckett testified that one of his major concerns was that Harbinger's announced intent to reduce quarterly operating expenses from $60 million to $50 million would result in employees feeling that their jobs were threatened. (Tr. at 606). It was for the stockholders, not the board, to decide whether Harbinger's nominees articulated sound strategies. *Liquid Audio*, 813 A.2d at 1126-27; *Blasius*, 564 A.2d at 659-61. Third, the statement that "the Board had had no advance warning whatsoever of an intent to nominate directors" is wrong. Openwave had, weeks earlier, formed its Working Group to deal with the "threat" stockholders like Harbinger posed to Mr. Peterschmidt and Dr. Held's incumbency and had been focusing on the Harbinger "threat" since October. (*See, e.g.*, JX 2; JX 33; Tr. at 275-76, 320 (Peterschmidt)).

In fact, the best explanation for why the board refused to waive the bylaws was that it was "not thrilled" that Harbinger's nominee, Mr. Zucco, was poised to win a seat on the board. (Tr. at 368 (Peterschmidt)). That, however, is an illegitimate basis for the board's decision. *Blasius*, 564 A.2d at 659-61.[9] The Openwave board was obligated to waive the Company's advance notice bylaws and the Court should deem that waiver to have been given. *See Monroe Park v. Metropolitan Life Insurance Company*, Del. Supr., 457 A.2d 734, 737 (1983) ("equity regards that as done which in good conscience ought to be done").

[9] Even under a pure *Unocal* analysis, the board's refusal to waive the bylaw cannot be justified. The only "threat" faced by Openwave was the possibility that the stockholders would vote in favor of Mr. Zucco and Mr. Breen. Such a "threat" does not warrant the directors' refusal to waive the bylaws to allow that vote to be recognized.

III. THE JANUARY 12 PRESS RELEASE WAS FALSE AND MISLEADING AND ALTERED THE TOTAL MIX OF INFORMATION.

A. The Legal Standard.

Directors of Delaware corporations have "a general duty … to disclose to stockholders all material information reasonably available when seeking stockholder action." *Loudon v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 136, 137 (1997). Omitted information is considered material if a reasonable investor would likely view it "as having significantly altered the 'total mix' of information made available." *Rosenblatt v. Getty Oil Co*., Del. Supr., 493 A.2d 929, 945 (1985) (citing *TSC Indus. v. Northway, Inc*., 426 U.S. 438 (U.S. 1976)).

Directors must disclose all *reasonably available* material information, and cannot issue statements that they either know or *should have known* are false or misleading. *See, e.g., Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 864 (1985) (board lacked complete candor by "failing to disclose all material facts, which they knew or should have known" when seeking stockholder action); *Crescent/Match I Partners, LP v. Turner*, Del. Ch., 846 A.2d 963, 987 (2000) (disclosure violation based on omission requires "facts identifying (1) material, (2) reasonably available, (3) information, (4) that was omitted from the proxy materials"); *O'Reilly v. Transworld Healthcare, Inc.*, Del. Ch., 745 A.2d 902, 920 n. 34 (1999) (knowledge not required for claim for breach of the duty of disclosure based on false or misleading statement). Directors who "travel down the road of partial disclosure," undertake an "obligation to provide the stockholders with an accurate, full and fair characterization" of the facts. *Arnold v. Society of Savings Bancorp, Inc.*, Del. Supr., 650 A.2d 1270, 1280 (1994).

B. Openwave Knew or Should Have Known that Its January 12 Press Release was Materially False and Misleading.

Before Harbinger filed its definitive proxy statement on January 8, 2007, the three leading shareholder advisory firms issued routine reports recommending that stockholders support Openwave's then-unopposed incumbent management. (JX 21; JX 22; JX 124).[10] None of these reports made recommendations with respect to Mr. Zucco or Mr. Breen, Harbinger's nominees. Indeed, the first page of each report just showed one box addressing only management's proxy card, making it plain that each report's recommendations addressed only management's agenda. (JX 21; JX 22; Westcott Tr. 24:3-7, 25:4-5 ("The first page gives you the agenda for the meeting.")).

After Harbinger filed its definitive proxy materials, all three proxy advisory firms promptly issued amended reports analyzing both parties' nominees. (JX 135; JX 26; JX 136).[11] Each amended report made recommendations on both slates of candidates, which again was clear from the first page of each report. (*Id.*; Westcott Tr. 24:8-25:5.)[12] ISS and Glass Lewis both recommended that shareholders elect Mr. Zucco and withhold votes for defendants Peterschmidt and Held. PGI went one step further, recommending that shareholders vote for *both* of Harbinger's nominees and reject defendants' nominees (the "Amended Report"). (JX 26).

On the morning of January 12, Harbinger issued a press release announcing that Glass Lewis and ISS had recommended in its favor. (JX 38). Openwave responded that afternoon,

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[10] PGI's Managing Director of Policy, Shirley Westcott testified that, in accordance with PGI's typical practice, PGI's Original Report was likely issued in the first week of January. (Westcott Tr. 18:4-9; 27:2-6**;** 65:12-21).

[11] Glass Lewis and ISS issued their amended reports on January 11, 2007. (JX 135; JX 136; Tr. at 489 (Kagan)).

[12] Ms. Westcott (who had formerly worked for ISS), testified that it is standard practice in the industry for all shareholder advisory firms to issue revised reports when an election turns into a proxy contest. (Westcott Tr. 28:13-29:12; 30:1-6).

issuing what it termed a "counter-attack release" (the "January 12 Press Release"). (JX 79; JX 23). The January 12 Press Release was carefully worded to convey the impression that PGI's preliminary report (the "Original Report") was breaking news:

> PROXY ADVISORY FIRM *RECOMMENDS* THAT STOCKHOLDERS VOTE FOR OPENWAVE'S INCUMBENT DIRECTORS
>
> January 12, 1007 – Openwave Systems, Inc. (Nasdaq: OPWV), *today announced* that PROXY Governance, Inc., a leading proxy advisory firm, *recommends* that all stockholders vote FOR Openwave's incumbent directors at the Company's January 17, 2007 Annual Meeting of Stockholders. To follow PROXY Governance's recommendation, Openwave stockholders should vote FOR Openwave's incumbent directors on the Company WHITE proxy card TODAY.

(JX 79) (emphasis added). [13]

Also on January 12, PGI issued its Amended Report, which recommended voting for both of Harbinger's nominees. (Westcott Tr. at 31:4-11; JX 26).[14] PGI alerted Georgeson, Openwave's proxy solicitor, to the issuance of the Amended Report at 5:00 a.m. the next day, January 13. (JX 133; JX 95). Nevertheless, Openwave did nothing to correct the January 12th Press Release; it did not consider any correction necessary. (Tr. at 385-86 (Peterschmidt)).

Openwave knew or should have known that the January 12th Press Release was misleading. When the first ISS report came out, the Company was told to expect a revised report once Harbinger's proxy materials had cleared. (JX 21). When ISS and Glass Lewis issued

[13] Indeed, Messrs. Anto and Kagan and Ms. Westcott all testified that they believed that Openwave's January 12 Press Release referred to PGI's Amended Report. (Tr. at 177-178 (Anto)); 498-500 (Kagan); Westcott Tr. 65:22-66:10).

[14] Although the exact time PGI put its Amended Report on its platform is not in the record, Ms. Westcott testified repeatedly at her deposition that it was put on the platform the afternoon of January 12, 2007. (Westcott Tr. 31:4-11; 51:11-18; 73:13-18). Indeed, at Ms. Westcott's deposition, her counsel Mr. Hogan offered to read into the record the precise time PGI's Amended Report was put on the platform. (Westcott Tr. 34:16-35:7). Mr. Hogan had gathered this information in response to Harbinger's subpoena. (Westcott Tr. 41:1-4). Harbinger encouraged Mr. Hogan to put the time in the record. However, Mr. Welch repeatedly threatened to cross-examine Mr. Hogan if he conveyed this information (either directly or by informing Ms. Westcott of the information so she could testify about it). (Westcott Tr. 40:16-17; 41:5-6; 43:7-12; 45:20-22). Deterred by Mr. Welch, Mr. Hogan declined to provide this information. (Westcott Tr. 50:3-51:3).

revised reports, it was clear that PGI would as well—Georgeson certainly expected it. (O'Hara Tr. 82:23-86:13). Moreover, had the Company bothered to check before issuing its January 12 Press Release, it would have learned that PGI's Original Report had been removed from PGI's website as soon as Harbinger filed its definitive proxy materials. (Westcott Tr. 30:11-31:3.).

PGI's Amended Report was admittedly material – Openwave's January 12 Press Release itself refers to PGI as a "leading proxy advisor firm." The January 12 Press Release also "altered the total mix" by failing to inform shareholders that it was based on PGI's outdated Original Report, instead leading them to believe that PGI had issued an amended report favoring management. In fact the opposite was true. This left stockholders with the false impression (on Friday, January 12, before a holiday weekend that preceded the Annual Meeting on Wednesday, January 17) that the leading proxy advisory firms were split, when in fact there was a "4-0" shutout in favor of Harbinger. The "counter-attack" release was a strategic measure, clearly intended to halt Harbinger's momentum in a hotly contested proxy fight.[15] Openwave compounded this impact by failing to issue a correction despite knowing that it had misled the market.

Accordingly, Harbinger respectfully submits that the Court should hold the Openwave board – managers of a public company – accountable for misleading the Company's shareholders in a proxy contest targeted at their own board seats. Because these fiduciaries knew or should have known that the January 12 Press Release was materially false and misleading, the

[15] In response to Glass Lewis and ISS's amended reports, defendant Peterschmidt wrote in an email, "I think we need the maximum voice out there right now. This is going to go down to the wire and we need to use all communication vehicles possible." (JX 25; Tr. 383-386 (Peterschmidt)).

Court should order corrective disclosures and a new election (again, with Mr. Zucco remaining validly elected).

IV. THE RESTRICTED STOCK AWARDS WERE IMPROPERLY VOTED.

The 1.3 million "shares" of restricted stock that Openwave allowed to vote at the 2006 Annual Meeting were neither vested or certificated. (Tr. at 290 (Peterschmidt); JX 99). No stock certificates exist for unvested restricted stock awards. (JX 99). Indeed, certificates for the restricted stock are not issued until after such awards vest. (*Id.*). At trial, Mr. Peterschmidt could not confirm that the board of directors actually issued the restricted shares in writing (Tr. 295-96), which was necessary in order for stock to have been validly issued, and no such writing has been supplied by Openwave. *See Grimes v. Alteon Inc.*, Del. Supr., 804 A.2d 256, 260-61 (2002).

Furthermore, 8 *Del. C.* §219 requires that the list of stockholders entitled to vote at a meeting be set at least ten days prior to such meeting. The 1.3 million shares of restricted stock do not appear to have been added to the transfer agent's stocklist until at least January 11, 2007 at the earliest, only six days before the Annual Meeting. (JX 99). Accordingly, the awards (most of which went to Mr. Peterschmidt himself) were improperly voted at the 2006 Annual Meeting, and should not be voted at any meeting ordered by the Court.

CONCLUSION

For the foregoing reason, Harbinger respectfully requests that the Court enter judgment in its favor and grant the relief requested by Harbinger in the Pre-trial Stipulation and Order.

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