	Court Order or Miscellaneous Ruling	**_OP**	Commitment Order **(Criminal ONLY)** Criminal Orders **(Criminal ONLY)**

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Case No. 2690-N

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DATED: February 9, 2007

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PRELIMINARY STATEMENT

This action presents a straightforward issue: whether Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. (collectively, "Harbinger") properly complied with the bylaws of Openwave Systems Inc. ("Openwave") relating to the advance nomination of directors for election. If the Court determines that Harbinger did not properly comply with these bylaws in advance of Openwave's annual meeting on January 17, 2007 (the "Annual Meeting"), then Harbinger's two director nominations were invalid, those nominees did not properly stand for election, and the votes cast in their favor were of no effect. As a result, Openwave's two director candidates – David C. Peterschmidt and Gerald Held – would win the election.[1]

As explained herein, the undisputed facts demonstrate that Harbinger had two separate opportunities under Openwave's bylaws to provide notice of its nominations, and failed to do so. In fact, Harbinger *never* provided written notice of its intention to nominate director candidates to Openwave's Secretary – or anyone else at Openwave, for that matter – as required by Openwave's bylaws.

Instead, Harbinger unilaterally announced, in its December 28, 2006 proxy materials, that it had nominated two director candidates for election at the Annual Meeting. This "nomination by ambush" tactic indisputably deprived Openwave and its

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[1] If the Court determines that the votes cast in favor of Harbinger's nominees – James L. Zucco and Andrew Breen – are valid, then based on the final vote count Peterschmidt and Zucco would win the election.

board of having the opportunity provided by the advance notice bylaws to fairly and meaningfully evaluate Harbinger's proposed nominees and prepare a response.

Harbinger has offered a number of excuses for why it missed the deadlines for making nominations imposed by Openwave's bylaws. For example, Harbinger claimed in both the press and a lawsuit (which it did not actively pursue before the Annual Meeting), that the advance notice bylaws were "confusing" and "contradictory." Harbinger also claimed that Openwave's board somehow "manipulated" the advance notice bylaws to prevent Harbinger from running a proxy contest. These excuses, however, provide no justification for Harbinger's disregard of both director nomination deadlines under Openwave's advance notice bylaws -- *i.e.*, November 2, 2006 (pursuant to Section 2.2(c)) and December 11, 2006 (pursuant to Section 2.5). In fact, Harbinger admittedly did not even decide to submit its own nominees until *late December*, and thus, concocted its excuses for missing both deadlines *well after* both deadlines had passed. Moreover, Harbinger's charges about Openwave's advance notice bylaws are entirely without merit, and can be disposed of on summary judgment based on (1) the plain language of those bylaws; (2) the undisputed fact that Harbinger, a sophisticated hedge fund, failed to provide notice of its intent to nominate director candidates by the deadlines imposed by those bylaws; and (3) the undisputed fact that Openwave's advance notice bylaws have not been modified or amended at any time since the Company went public in 1999.

In addition to its attack on Openwave's advance notice bylaws, Harbinger contests the election of directors at the Annual Meeting on other equally meritless

grounds. First, Harbinger suggests that Openwave improperly voted 1.3 million shares of restricted stock in favor of its nominees at the Annual Meeting. This is simply untrue. These shares were issued and outstanding, and owned by Openwave employees who were entitled to vote them. This is also not a secret – Openwave has consistently reported these shares as issued and outstanding in its public filings. Moreover, as Harbinger concedes, even if the Court determines that Harbinger's nominees were validly nominated, and even if all 1.3 million of these shares voted for Harbinger's nominees, it would not have impacted the outcome of the election.

Second, Harbinger claims that Openwave issued a false and misleading statement on January 12, 2007, when it issued a press release stating that Proxy Governance, Inc. ("Proxy Governance") – one of three shareholder advisory services covering the election at the Annual Meeting – recommended that Openwave's candidates be re-elected to the board. This press release was true and accurate when issued, and is not fairly the subject of dispute. At the time Openwave issued its January 12 press release, Proxy Governance had not even issued its revised recommendation in favor of Harbinger's nominees. (Harbinger admits as much in its Amended Complaint. (Harbinger Am. Compl. ¶ 35)) Nor did Openwave have any reason to know by January 12 that Proxy Governance would be changing its recommendation – Proxy Governance's original report, which was issued on January 9 and formed the basis for Openwave's statements in the January 12 press release, addresses the purported Harbinger nominations and contains no indication whatsoever that Proxy Governance would be issuing a revised report or changing its recommendation. In fact, Openwave did not

become aware of Proxy Governance's change of recommendation until January 16, 2007 – the day before the annual meeting and four days after the January 12 press release was issued – when a Reuters article was issued reporting on the change in recommendation. Thus, Proxy Governance's change of recommendation – to the extent it was even material in light of the other two influential shareholder advisory group recommendations in favor of one of Harbinger's nominees – was clearly in the mix of information available to Openwave shareholders before the Annual Meeting.

For these reasons, and as explained further below, Openwave's motion for summary judgment should be granted, and judgment should be entered in favor of Openwave.

STATEMENT OF FACTS

A. The Parties

Openwave is a Delaware corporation with its headquarters in Redwood City, California. Openwave makes software for mobile phones, and its software is used by many of the leading cellular telephone equipment companies in the world. Bernard Puckett is Chairman of Openwave's board of directors, and brings this action in his capacity as a director of Openwave. Incumbent directors, Peterschmidt and Held, were nominated by Openwave for two seats on Openwave's board of directors. (Harbinger Am. Compl. ¶ 6; Harbinger Answer ¶ 3)

Harbinger Capital Partners Master Fund I, Ltd. ("Master Fund") and Harbinger Capital Partners Special Situations Fund, L.P. ("Special Situations Fund") are sophisticated and activist hedge funds, and are shareholders of Openwave. Zucco and

Breen were purportedly nominated by Harbinger as candidates for two seats on Openwave's board of directors. (Harbinger Am. Compl. ¶ 3)

B. Harbinger Fails To Comply With Openwave's Advance Notice Bylaws

On December 1, 2006, the Company announced in a press release that the Annual Meeting would be held on January 17, 2007. (Rachel Jacobs Aff. Ex. 1) The headline of the press release, in large bold letters, conspicuously declared: "**Annual Meeting Scheduled for January 17, 2007.**"

Two Openwave bylaws provided Harbinger – or any other Openwave stockholder – with two separate opportunities to provide notice of director nominations. Harbinger missed both opportunities.

First, Section 2.2(c) of Openwave's bylaws, which addresses both shareholder proposals and nominations of directors to be brought before an annual meeting, states, in pertinent part, that:

> 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 . . . 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.

(Jacobs Aff. Ex. 2; Article II, § 2.2(c)) (emphasis added)

Thus, because last year's annual meeting took place on November 22, 2005 (and the date of this year's meeting – January 17, 2007 – is not 30 days prior to or more than 60 days after such date), Harbinger had the opportunity to provide notice of its director nominees by November 2, 2006.[2] *Harbinger failed to do so.* (Wu Aff. ¶ 2)

Second, Section 2.5 of the Company's bylaws, which is entitled "Advance Notice of Stockholder Nominees," provides an additional, "fail-safe" option for the nomination of directors. Specifically, this section requires, in pertinent part, that:

> 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 made 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 mailed or such public disclosure was made.***

(Jacobs Aff. Ex. 2; Article II, § 2.5) (emphasis added).

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[2] In addition, the November 2 deadline was *specifically referenced* in the proxy materials disseminated to stockholders in connection with the 2005 annual meeting, in disclosing the deadlines for submitting stockholder proposals at the 2006 annual meeting. Page 3 of the 2005 Proxy Statement, provides, in pertinent part, that:

> To be timely, stockholder proposals submitted outside the processes of Rule 14a-8 must be received by the Company *no earlier than August 24, 2006 and* ***no later than November 2, 2006*** unless the 2006 Annual Meeting is called for a date earlier than October 23, 2006 or later than January 21, 2007, in which case such proposals must be received no earlier than the 90th day prior to the 2006 Annual Meeting and no later than the close of business on the latter of the 20th day prior to the 2006 Annual Meeting or the 10th day following the day on which public announcement of the date of the 2006 Annual Meeting is first made. (Jacobs Aff. Ex. 3) (emphasis added).

Thus, Harbinger had nearly twelve months notice of the deadline imposed under Section 2.2 (c) for making proposals at the 2006 annual shareholders' meeting.

Because the December 1, 2006 press release was issued less than 60 days before the January 17, 2007 meeting, Harbinger had the opportunity pursuant to Section 2.5 to provide notice of its director nominees by December 11, 2006 (*i.e.*, 10 days following the public announcement of the meeting date). *Again, Harbinger failed to do so.* (Wu Aff. ¶ 2)

These advance notice bylaw provisions have not been modified or amended at any time since the Company went public in 1999. (Puckett Aff. ¶ 2)

C. Harbinger Surfaces Less Than Three Weeks Before The Annual Meeting, And Purports To Nominate Two Director Candidates

On December 28, 2006, nearly 2 months after the November 2, 2006 deadline (imposed by Section 2.2(c)), and more than 2 weeks after the December 11, 2006 deadline (imposed by Section 2.5), Harbinger filed proxy materials claiming that it had nominated Zucco and Breen for election to the Openwave board of directors. (Jacobs Aff. Ex. 4; Harbinger Preliminary Proxy) Harbinger admittedly surfaced "relatively late in the process," because it reached the decision to nominate director candidates in "late December," after both nomination windows had closed. (Jacobs Aff. Ex. 5; Harbinger Schedule 14A, 1/9/07, at 3)

On that same day, Harbinger filed a lawsuit, seeking to have the Court declare that its nomination of Zucco and Breen was valid and to enjoin the Company from "taking any steps to prevent or interfere" with these nominations at the Annual Meeting. Harbinger did not take any further steps to prosecute this action or seek relief before the Annual Meeting. Instead, Harbinger took the position in its definitive proxy materials filed on January 8, 2007 that it intended to pursue litigation in Delaware

following the Annual Meeting in the event that Harbinger's nominations were declared invalid. (Jacobs Aff. Ex. 6; Harbinger Definitive Proxy).

Nevertheless, the Openwave board determined that it would permit the provisional nomination by Harbinger of Zucco and Breen solely for purposes of the conduct of business at the Annual Meeting and without waiver of any of the Company's rights to challenge Harbinger's nominations in a court proceeding. These determinations were communicated to Harbinger promptly following the board meeting and in advance of the Annual Meeting. In response, Harbinger told the Company that it too reserved its rights to challenge the results of the election after the Annual Meeting was held. (Harbinger Answer ¶ 19)

On January 17, 2007, Openwave held its Annual Meeting. (Harbinger Answer ¶ 21) Two board seats (out of six) were up for election at the meeting. Pursuant to Delaware law, the winners of those board seats would be determined by a plurality of the votes cast at the annual meeting, 8 *Del. C.* § 216, and pursuant to Openwave's certificate of incorporation, they would serve as directors for a three-year term. (Jacobs Aff. Ex. 7, Art. VI) At the meeting, Peterschmidt and Held were properly nominated as the board's nominees for re-election to Openwave's board of directors. The Chairman of the meeting explained that, as had been previously communicated to Harbinger, the board of Openwave had determined to permit Zucco and Breen to be placed in nomination at the Annual Meeting on a provisional basis only, pending the final adjudication by this Court on whether Harbinger's nominees were validly before the shareholders at the Annual Meeting. The Chairman further explained that the board's position was that

Zucco and Breen were not properly placed in nomination due to their failure to comply with the Company's advance notice bylaws. (Harbinger Answer ¶ 22)

D. The Current Lawsuit

On January 22, 2007, IVS Associates, Inc., the independent inspector of election, released its preliminary tabulation report, which indicated that Peterschmidt and Zucco had received the most votes in the election. The preliminary vote count was reported as follows: Peterschmidt (for: 30,171,456; withheld: 1,567,716); Held (for: 29,312,775; withheld: 2,426,397); Zucco (for: 41,603,961; withheld: 274,462); Breen (for: 20,295,508; withheld: 21,582,915).[3] (Jacobs Aff. Ex. 8)

That same day, Openwave and the Chairman of Openwave's board of directors, Puckett, commenced this action under 8 *Del. C.* § 225, requesting that the Court determine who are the lawful directors of Openwave. In response, the next day Harbinger amended its original complaint to include a substantially similar claim under 8 *Del. C.* § 225. Harbinger also requested that the Court issue a status quo order pending the outcome of the litigation. On January 29, 2007, Openwave moved to coordinate the proceedings and for summary judgment, and opposed Harbinger's motion for a status quo order. The following day, a hearing was held on these matters and the Court granted the motion to coordinate proceedings, denied the motion for a status quo order, and scheduled a hearing date for this motion for summary judgment (and, alternatively, a trial

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[3] On January 29, 2007, IVS issued its final report, certifying the vote count at the same amounts. (Jacobs Aff. Ex. 9)

date provided that this action could not be resolved at summary judgment). (January 30 Tr. at 33-38, Jacobs Aff. Ex. 10)

ARGUMENT

I. STANDARD OF REVIEW

Section 225 cases are commonly resolved on summary judgment. *See, e.g.*, *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 913 (Del. Ch. 2002) (granting summary judgment in favor of former directors of a corporation in an action brought by shareholders under 8 *Del. C.* § 225); *North Fork Bancorporation v. Toal*, 825 A.2d 860, 871 (Del. Ch. 2000), *aff'd mem., sub nom. Dime Bancorp., Inc. v. North Fork Bancorporation*, 781 A.2d 693 (Del. 2001) (granting summary judgment of an action brought under 8 *Del. C.* § 225); *Frankino v. Gleason*, C.A. No. 17399, 1999 Del. Ch. LEXIS 219 (Del. Ch. Nov. 5, 1999) (same); *AGR Halifax Fund, Inc. v. Fiscina*, 743 A.2d 1188 (Del. Ch. 1999) (same).

The movant's burden on summary judgment is to show that, viewing the evidence in the light most favorable to the non-movant, there are no genuine disputes as to *material* facts and he is entitled to judgment as a matter of law. *See* Court of Chancery Rule 56(c); *see also Krahmer v. Christie's, Inc.*, 911 A.2d 399, 404 (Del. Ch. 2006). "Summary judgment will be denied only if 'there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or inferences to be drawn therefrom.'" *See AGR Halifax*, 743 A.2d at 1192 (citing *Seagraves v. Urstadt Prop. Co.*, C.A. No. 10307, 1996 Del. Ch. LEXIS 36, at *10 (Del. Ch. Apr. 1, 1996)).

As discussed below, there are no material facts in dispute, and the core issue of whether Harbinger complied with the Company's advance notice bylaws (as well as the other extraneous issues raised by Harbinger) can be resolved on summary judgment as a matter of law.

II. HARBINGER FAILED TO COMPLY WITH OPENWAVE'S ADVANCE NOTICE BYLAWS

It is well-settled that advance notice bylaws, which are designed to provide a corporation with prior notice of an impending proxy contest, together with information about the proposed opposition slate, are "commonplace" and routinely upheld as valid. *See, e.g.*, *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25, 43 (Del. Ch. 1998), *aff'd on other grounds sub nom. Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998) (observing that advance notice bylaws are commonplace and upholding a 90-day advance notice bylaw as reasonable); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 n.38 (Del. 1995) (stating that, even in the hostile takeover context, advance notice bylaws are valid); *see also In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462, 482 (Del. Ch. 2000) (accord); *Accipiter Life Scis. Fund, L.P. v. Helfer*, 905 A.2d 115, 127 (Del. Ch. 2006) (upholding advance notice bylaw similar to Openwave's bylaws); *Oliver Press Partners, LLC v. Decker*, C.A. No. 1817-N, 2005 Del. Ch. LEXIS 189 (Del. Ch. Dec. 6, 2005) (implying that, absent inequitable conduct, an advance notice bylaw may not be deemed invalid); *Stroud v. Grace*, 606 A.2d 75, 95 (Del. 1992) (upholding validity of advance notice bylaw); *Nomad Acquisition Corp. v. Damon Corp.*, C.A. Nos. 10173, 10189, 1988 Del. Ch. LEXIS 133 (Del. Ch. Sept. 16, revised Sept. 20, 1988) (accord).

It is equally well-established that if a bylaw is unambiguous in its language, the Court will not search for the partics' intent behind the bylaw, but will construe the bylaw as it is written, giving its language the force and effect required. *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 343 (Del. 1983); *see also Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001). Moreover, bylaws are not made ambiguous merely because the parties disagree on their proper construction. *Hibbert*, 457 A.2d at 343. Rather, the Court will, wherever possible, read the bylaws together to harmonize and give effect to all of their provisions. *See Minn. Invco of RSA # 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 794 (Del. Ch. 2006) (explaining that contracts should be construed, wherever possible, to harmonize and give effect to all of their provisions).

Here, Openwave's bylaws are clear and unambiguous, and provide *two* separate opportunities for shareholders to properly give notice of their intention to run a competing slate of directors at the Annual Meeting. Harbinger failed to comply with either of these bylaws. (Wu Aff. ¶ 2)

First, Harbinger could have provided timely notice of its director nominees pursuant to Section 2.2(c). Section 2.2(c) requires that a shareholder deliver notice to the Secretary at the principal executive offices of the Corporation "not less than 20 days nor more than 90 days prior to thc first anniversary of the preceding year's annual meeting of stockholders," unless the date of the annual meeting is more than 30 days prior to or more than 60 days after that anniversary date. (Jacobs Aff. Ex. 2; Article II, § 2.2(c)). Thus, because last year's annual meeting took place on November 22, 2005 (and

the date of this year's meeting – January 17, 2007 – is not 30 days prior to or more than 60 days after such date), Harbinger had the opportunity to provide notice of its director nominees by November 2, 2006.[4]

Second, Harbinger could also have complied with the more specific provision of Section 2.5, which is entitled "Advance Notice of Stockholder Nominees." Section 2.5 operates as an additional, "fail-safe" method for providing advance notice of director nominees. *See, e.g.*, Section 2.2(c) ("*In addition to* the requirements of Section 2.5....") (emphasis added). Specifically, Section 2.5 provides that, if the Company gives less than 60 days' notice or prior public disclosure of the date of the annual shareholders' meeting, then notice by a shareholder to be timely must be received by the Company no later than the close of business on the 10th day following the day the disclosure was made public. (Jacobs Aff. Ex. 2; Article II, § 2.5). As noted above, on December 1, 2006, Openwave issued a press release that unambiguously announced in large, bold letters in the headline the date of its Annual Meeting.[5] (Jacobs Aff. ¶ 1) Because the press release

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[4] In addition to being able simply to calculate the November 2, 2006 deadline well in advance of that date, Openwave had explained in the proxy materials disseminated in connection with last year's annual meeting that the deadline for making shareholder proposals pursuant to Section 2.2(c) was November 2, 2006. Because the deadline for making shareholder proposals and director nominations are calculated the exact same way under Section 2.2(c), Harbinger – a sophisticated and activist hedge fund – effectively had *for nearly twelve months* express written notice of the deadline imposed under Section 2.2(c). (Jacobs Aff. Ex. 3 at 3) (emphasis added); *see supra* n.2.

[5] The December 1, 2006 press release satisfied Section 2.2(e) of the Company's bylaws, which defines a "public announcement" as a "disclosure in a press release reported by the Dow Jones News Service, Associated Press or a comparable national news service." In addition, Openwave issued a proxy statement disclosing the annual meeting date on December 8, 2006; and, therefore, even if Harbinger contends, however implausibly, that it was unaware of the press release, it had, at most, 10 days from when the proxy statement was sent to shareholders *(cont'd)*

was issued less than 60 days before the Annual Meeting, there was a re-opening of the nomination window, and Harbinger had the opportunity, pursuant to Section 2.5, to provide notice of its director nominees by December 11, 2006 (*i.e.*, 10 days following the public announcement of the meeting date).

It is undisputed that Harbinger failed to provide written notice to the Secretary of the Company by either of these deadlines. (Wu Aff. ¶ 2) In fact, Harbinger *never* provided any advance notice to the Secretary of the Company in accordance with the Company's bylaws. (*Id.*) Further, Harbinger's "nomination by ambush" tactic indisputably deprived Openwave and its board from having the opportunity provided by the advance notice bylaws to fairly and meaningfully evaluate Harbinger's proposed nominees and prepare a response. For all of these reasons, Harbinger was not entitled to nominate directors Zucco and Breen for election at the Annual Meeting, Zucco and Breen did not properly stand for election at the Annual Meeting, and the votes cast in their favor were of no effect. As a result, Peterschmidt and Held should be declared the lawful directors of Openwave.

(cont'd from previous page)

– or December 18, 2006 – to provide timely notice under Section 2.5 of the Bylaws. (Jacobs Aff. Ex 11).

III. HARBINGER'S EXCUSES FOR FAILING TO COMPLY WITH OPENWAVE'S ADVANCE NOTICE BYLAWS SHOULD BE REJECTED

Harbinger does not claim that Openwave's advance notice bylaws are *per se* invalid. Nor could it. Delaware courts have repeatedly upheld the validity of similar advance notice bylaws. *See, e.g., Mentor Graphics Corp.*, 728 A.2d at 43; *Accipiter,* 905 A.2d at 127. Moreover, Harbinger does not contend that (i) Openwave's December 1, 2006 press release, which announced the date of the Annual Meeting, was inadequate or misleading; (ii) it was unaware of the date of the Annual Meeting; or (iii) it was unaware of Openwave's advance notice bylaws. This is because Openwave conspicuously disclosed the date of the Annual Meeting in large bold letters in the headline of its December 1, 2006 press release, and expressly referenced the advance notice deadline (in the context of making shareholder proposals) in its proxy materials sent to all shareholders, and filed with the SEC, in advance of the 2005 annual meeting.

Simply put, Harbinger has no legitimate excuse for missing the deadlines imposed by Openwave's bylaws for making director nominations. In fact, Harbinger has conceded in public statements that the reason it surfaced "relatively late" in the election process was because it reached the decision to propose its own nominees in *"late December"* – well after both the November 2, 2006 and December 11, 2006 deadlines provided by Openwave's advance notice bylaws. (Jacobs Aff. Ex. 5) (emphasis added). In an attempt to excuse its tardiness, Harbinger – a sophisticated hedge fund – has offered a number of hindsight justifications for its failure, claiming for instance that the Openwave board somehow "manipulated" the advance notice bylaws and intentionally

made them "confusing" and "contradictory" so that Harbinger could not comply with them. This claim is both unsubstantiated by the facts in the record, and unsupported by the plain language of the bylaws and Delaware law.

It is undisputed that Openwave's advance notice bylaws have not been modified or amended at any time after Harbinger became an Openwave stockholder, and have been in place, without alteration, since the Company went public in 1999. (Puckett Aff. ¶ 2) Further, the procedures that shareholders must follow if they want to nominate candidates to the board of directors were plainly set forth in Section 2.2(c) and Section 2.5 of Openwave's bylaws. Harbinger could have easily complied with either one of these provisions by providing timely notice to the Company by either November 2, 2006 or, again, after the Company announced the Annual Meeting date, by December 11, 2006. Harbinger contends otherwise, even though the bylaws can, and should, be read together to harmonize and give effect to all of their provisions.[6] *See, e.g., Minn. Invco of RSA # 7, Inc.*, 903 A.2d at 794 (explaining that contracts should be construed, wherever possible, to harmonize and give effect to all of their provisions); *Bayless v. Davox Corp.*, C.A. No. 17560, 2000 Del. Ch. LEXIS 35, at *18 (Del. Ch. Mar. 1, 2000) (accord); *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1184 (Del. 1992) (accord); *see Hibbert*, 457 A.2d at 343 (holding that the rules which are used to interpret statutes, contracts, and other written instruments are applicable when construing bylaws); *see also Gentile*, 788 A.2d at 113 (holding that "[i]t is a fundamental principle that the rules used

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[6] Moreover, Section 8.6 of Openwave's bylaws, entitled "Construction; Definitions," states that the general provisions, rules of construction, and definitions under the Delaware General Corporation Law shall govern the construction of these bylaws. (Jacobs Aff. Ex. 2)

to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws").

In fact, Harbinger's interpretation of the bylaws – *i.e.*, reading the bylaws as not allowing the second opportunity under Section 2.5 – leads to a wholly illogical result that restricts Openwave shareholders from using the "fail-safe" method for making nominations built into that section. The Court should not construe the bylaws in the manner suggested by Harbinger, which would effectively *limit* the rights of Openwave shareholders to nominate directors at the Annual Meeting. *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 297, 312 (Del. Ch. 2002) (holding 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).

Moreover, Harbinger claims that by setting the date of the annual shareholders' meeting on January 17, 2007 (which is not more than 30 days prior to or more than 60 days after last year's anniversary date), the proviso under Section 2.2(c) was not triggered and therefore it was somehow prevented from providing timely notice. This argument lacks merit and ignores that: (1) the November 2, 2006 deadline could have easily been calculated by reference to Section 2.2(c) and the date of last year's annual meeting; (2) the November 2, 2006 deadline was referenced in the proxy materials disseminated by the Company in connection with last year's annual meeting, in the context of submitting stockholder proposals at this year's annual meeting; and (3) most significantly, Harbinger was *still* able to comply with Section 2.5 of the Company's

bylaws by providing notice of director nominees by December 11, 2006 (within 10 days after the December 1, 2006 press release) – but failed to do so.[7]

This action can be resolved in the same manner that the Court resolved the dispute over an advance notice bylaw provision in *Accipiter Life Sciences Fund, L.P.*, 905 A.2d at 115. In *Accipiter*, on a motion for summary judgment, this Court upheld an analogous advance notice bylaw provision, and determined that the plaintiff stockholder there (Accipiter) failed to comply with the requirements of that provision.[8] Accipiter claimed to have missed the public announcement of the company's annual meeting, and also failed to realize, pursuant to an advance notice bylaw provision, that it had 10 days from the date of that public announcement to nominate a slate of directors to the board. *Id.* After discovering that it had missed the deadline under the company's bylaws,

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[7] Advance notice bylaws, such as Section 2.2(c), whose deadlines are calculated by reference to the anniversary date of a company's prior year's annual meeting, are common. To the extent that Harbinger claims that this case is similar to *Lerman v. Diagnostic Data, Inc.*, Openwave disagrees. 421 A.2d 906 (Del. Ch. 1980). In *Lerman*, the board of directors set the annual meeting at a time 63 days in the future, even though the Company's bylaw required a stockholder wishing to nominate directors to submit notice of its nominees at least 70 days in advance. Therefore, the board's action, which was made with full knowledge of the plaintiffs' intention to launch a proxy contest, made compliance with the bylaw literally impossible. *Id.* at 912. Here, unlike in *Lerman*, the Openwave board took no action whatsoever to make its advance bylaws impossible, or even difficult, to comply with. In fact, Harbinger had *two separate opportunities* to comply with the advance notice bylaw provisions. If Harbinger missed the November 2nd deadline, it had a second opportunity to provide notice 10 days after the board announced the date of the Annual Meeting on December 11th. It failed to do so.

[8] The advance notice bylaw in *Accipiter* is similar to Openwave's bylaws. It states, in pertinent part, that:

> "If the date of the annual meeting is advanced more than 30 days prior to or delayed more than 60 days after such anniversary date, notice by the stockholder to be timely must be delivered not later than close of business on the later of the 90th 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." *Id.* at 118 (footnote omitted).

Accipiter belatedly attempted to nominate candidates and brought an action in this Court seeking to have the election results set aside. Accipiter claimed that it could not comply with the company's advance notice bylaw because the announcement of the meeting date was purportedly buried in the company's press release. *Id.* at 121.

The Court disagreed, and held that Accipiter could easily have preserved its rights with reasonable diligence and provided notice to the company within 10 days following the annual meeting announcement. As the Court explained, consistent with the company's bylaws, "all Accipiter needed to do to preserve its rights was read the company's press release carefully and in full." *Id.* at 127.

Here, all Harbinger needed to do to preserve its rights, consistent with the Company's bylaws, was to read the Company's press release, which, unlike the press release in *Accipiter*, unambiguously placed the annual meeting date in the headline of the press release. At that point, it could easily have provided the Company with timely notice of its intention to run a competing slate of directors at the annual shareholders' meeting. Harbinger failed to do so.

Accordingly, as a matter of law, Harbinger's director nominees, Zucco and Breen, were not properly before the shareholders for vote at the Annual Meeting. As a result, the incumbent directors, Peterschmidt and Held, who received a plurality of the votes, are the lawful directors of Openwave.

IV. HARBINGER'S OTHER CLAIMS DO NOT RAISE DISPUTED MATERIAL ISSUES OF FACT, AND ARE ENTIRELY WITHOUT MERIT.

If the Court agrees with Openwave that Harbinger failed to comply with the Company's advance notice bylaws, and therefore its nominations were not properly before the shareholders for vote at the Annual Meeting, then Harbinger's remaining claims – all of which arise out of Openwave's alleged interference with Harbinger's ability to run a competing slate of directors – are moot. *See, e.g., O'Neill v. Town of Middletown*, C.A. No. 1069-N, 2006 WL 205071, at *1 (Del. Ch. Jan. 18, 2006) (dismissing remaining claims on mootness grounds after one of the claims was resolved on summary judgment).

Nevertheless, Openwave maintains that these claims are unsubstantiated and lack merit, and will address each one below.

A. The 1.3 Million Shares Of Restricted Stock Are Validly Issued And Outstanding And Were Properly Voted At The Annual Meeting

First, Harbinger claims that Openwave improperly voted an additional 1.3 million shares of restricted stock in favor of its nominees. This claim is unfounded, and if Harbinger had done any due diligence before making such claim, it would have discovered that these shares were issued, outstanding and fully owned by employees who are entitled to vote these shares. (Wu Aff. ¶ 3; Daughenbaugh Aff. ¶ 2) Moreover, Openwave has included these shares as part of its calculation of the total issued and

outstanding shares reported in its public filings.[9] (Daughenbaugh Aff. ¶ 3) Furthermore, regardless of whether these shares were properly voted, even if the Court determines that Harbinger's nominees were validly nominated, and even if all of these shares voted for Harbinger's nominees, as Harbinger conceded during the January 30 scheduling conference, it would not have impacted the outcome of the election. (Jan. 30 Tr. at 10-11, Jacobs Aff. Ex. 10) Thus, this claim is moot. Accordingly, the undisputed facts demonstrate that this claim lacks merit and should be dismissed on summary judgment.

B. Openwave's January 12 Press Release Was True And Accurate

Next, Harbinger claims that Openwave issued a false and misleading statement in a January 12, 2007 press release that announced, among other things, that Proxy Governance had recommended that Openwave stockholders vote in favor of Peterschmidt and Held. This claim is entirely without merit. As explained below, Openwave's January 12 press release was true and accurate when issued.

On January 9, 2007, Proxy Governance issued a report recommending that Openwave stockholders vote in favor of Peterschmidt and Held. (Jacobs Aff. Ex. 12) In that report – in the very section setting forth its reasons for recommending Peterschmidt and Held for re-election – Proxy Governance expressly acknowledged that Harbinger had

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[9] In fact, Harbinger learned about these 1.3 million shares as early as January 11, 2007. On that date, Openwave's General Counsel sent an e-mail to Harbinger's proxy solicitors at MacKenzie Partners, Inc. (and Openwave's own proxy solicitors, concurrently), informing Harbinger that Openwave's transfer agent had not included them on the record list previously provided to either proxy solicitor. These shares, though validly issued and owned by employees entitled to vote, were uncertified and not tracked by the transfer agent because they were subject to risk of forfeiture if the employee left Openwave's employ early.

purported to nominate Zucco and Breen as director candidates, and then explained why it was still favoring Peterschmidt and Held:

> Harbinger Capital Partners announced on Dec. 27 that it had filed a preliminary proxy with SEC to nominate two directors to the board (James L. Zucco and Andrew J. Breen). If elected, Harbinger states that the nominees would recommend that the company create a more focused product strategy, phase out nonperforming product lines, reduce quarterly operating expenses to $50 million and launch a share buyback. Harbinger currently holds approximately 10.6% of the company's common stock.
>
> Unless there is evidence of a breakdown in board monitoring or effectiveness – such as poor corporate performance relative to peers, excessive executive compensation, non-compliance with SEC rules or SRO listing standards, a lack of responsiveness to legitimate shareholder concerns, or various other factors – we presume that the board is properly discharging its oversight role and that it is adequately policing itself in terms of board organization, composition and functioning.
>
> . . .
>
> Proxy Governance has concerns regarding both poor performance and high pay. We note, however, that the company has taken steps to improve its financial performance by instituting significant management changes and that the board continues to review the company's strategic options. As a result, we feel that the board is currently exercising appropriate oversight regarding performance issues. Further, although we feel that the company's compensation levels are high compared tot hose of peers, we believe that this concern is properly directed at the Compensation Committee. Given that no members of the committee are currently up for election, we will continue to monitor pay and performance going forward.

(*Id.* at 9) This entire discussion is contained within a section entitled: "Management. Elect Nominees. Proxy Governance Vote Recommendation: FOR." (*Id.* at 9). There is no indication in the January 9 report, express or otherwise, that Proxy Governance intended to issue a revised report or change its recommendation in light of Harbinger's purported nominations of Zucco and Breen.

On January 12, 2007, Openwave issued a press release describing Proxy Governance's recommendation. The press release stated, in pertinent part, that:

> 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's WHITE proxy card TODAY.

(Jacobs Aff. Ex. 13) At the time this press release was issued, Openwave was only aware of the Proxy Governance recommendation contained in the January 9 report. (Puckett Aff. ¶ 4) In fact, as Harbinger concedes in its Amended Complaint, Proxy Governance did not issue its new report and recommendation until sometime *after* Openwave issued the January 12 press release. (Harbinger Am. Compl. ¶ 35) Moreover, at the time the January 12 press release was issued, Openwave had no reason to believe that Proxy Governance would change its recommendation in favor of Openwave's nominees, given that the January 9 report expressly took into consideration Harbinger's purported nominees and contained no indication that any further updates or changes to its recommendation would be forthcoming. (Jacobs Aff. Ex. 12).

Equally important, Openwave did not even become aware of Proxy Governance's change of recommendation until January 16, 2007 – the day before the Annual Meeting and four days after the January 12 press release was issued – when a Reuters article was broadcast on the subject. (Puckett Aff. ¶ 4) Harbinger contends that, in response to learning this information, Openwave should have either retracted its January 12 press release or issued a new press release disclosing Proxy Governance's

change of recommendation. However, Proxy Governance's new recommendation was disseminated to the public through the Reuters news article – indeed, that is how Openwave learned of it – and, thus, it is unlikely that any additional disclosure by Openwave would have significantly altered the mix of information available to Openwave's shareholders. *See Arnold v. Soc'y for Sav. Bancorp,* 650 A.2d 1270, 1277 (Del. 1994). (defining "materiality" as "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available"); *Abrons v. Maree*, 911 A.2d 805, 813 (Del. Ch. 2006) (holding that "[c]onsistent and redundant facts do not alter the total mix of information").

Moreover, even assuming that Openwave had a duty to issue a new press release, any such additional disclosure would not have been material under the circumstances. At the time, two other influential shareholder advisory services, ISS and Glass Lewis, had already published their recommendations in favor of Harbinger's nominee, Zucco. In light of these two other shareholder advisory recommendations, Proxy Governance's last minute change of recommendation could not possibly have impacted the shareholder vote in a material way, and Harbinger has not shown otherwise. *See Stroud*, 606 A.2d at 85 (holding that "Delaware law imposes upon a board of directors the fiduciary duty to disclose fully and fairly all material facts within its control that would have a *significant effect upon a stockholder vote*") (emphasis added); *see also Arnold*, 650 A.2d at 1277 (holding that "the essential inquiry [in disclosure based claims] is whether the alleged omission or misrepresentation is material"); *Oliver v. Boston Univ.*,

C.A. No. 16570-NC, 2006 Del. Ch. LEXIS 75, at *136 (Dcl. Ch. Apr. 14, 2006) (holding that "to prevail on a disclosure claim, a plaintiff must prove not only an omission or misstatement of a particular fact, but also that the fact was material").

Accordingly, the undisputed facts demonstrate that this claim is also meritless and should be dismissed on summary judgment.[10]

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[10] In addition, Harbinger mentions in its amended complaint (without going into detail) that Openwave reduced its board from seven members to six members in an attempt to prevent Harbinger from gaining a "near majority" of the seats on Openwave's board. It seems as though Harbinger has decided to table this claim because it did not raise it at the January 30, 2007 scheduling hearing. Nevertheless, to the extent that Harbinger is still pursuing this claim further, Openwave contends that it lacks merit because there was no connection between the reduction in the number of directors and the election process. In fact, Openwave reduced the number of directors on its board on November 1, 2006, *almost two months* before Harbinger initiated its proxy contest. (Jacobs Aff. Ex. 14) Furthermore, Harbinger could not have possibly been harmed in any way because the change in the number of directors did not prevent Harbinger from gaining control of the board, it just resulted in two out of six directors standing for election, instead of three out of seven directors standing for election. Accordingly, the undisputed facts demonstrate that this conclusory allegation is also baseless and should be dismissed on summary judgment.

CONCLUSION

For all of the foregoing reasons, Openwave respectfully requests that the Court grant its motion for summary judgment.

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