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

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

MEMORANDUM OPINION AND ORDER

Submitted: March 2, 2007
Decided: March 5, 2007

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LAMB, Vice Chancellor.

This is a coordinated proceeding involving two related actions brought pursuant to Section 225 of the Delaware General Corporation Law. In the first filed action, a hedge fund stockholder in a Delaware corporation that attempted to nominate candidates for two board seats at the corporation's January 2007 annual meeting seeks to invalidate the election or, in the alternative, have one of its nominees (who received the most votes) installed as a validly elected director. The centerpiece of its complaint is the allegation that the provisions of the bylaws relating to nominations of directors are so confusing as to excuse its strict compliance. Relying on those same bylaws, the corporation seeks to declare invalid the nomination of the hedge fund's slate of two directors and to validate the reelection of management's two candidates. The cases are scheduled for trial on March 12 and 13, 2007.

The corporation moved for summary judgment on the issue of whether or not the hedge fund's nominations were compliant with the bylaws. The corporation argues that the bylaws afforded the hedge fund with as many as two opportunities to make timely nominations but that the hedge fund failed to satisfy either deadline. Moreover, the corporation argues that the hedge fund had ample notice and opportunity to meet the deadlines and that its failure to do so is not attributable to any inequity on the part of the corporation. In response, the hedge fund argues that it did comply with one possible interpretation of the bylaw

provisions at issue and, further, points to evidence that the board of directors acted defensively and unfairly in manipulating the number of seats for election at the meeting. After considering the briefs and hearing an extensive oral presentation, the court concludes that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances. Therefore, the motion for summary judgment will be denied and the matter will proceed to trial.

I.

Openwave is a Delaware corporation headquartered in Redwood City, California. Bernard Puckett is the Chairman of Openwave's board of directors. Openwave and Puckett are the plaintiffs in C.A. No. 2690-N seeking an order declaring the corporation's two director nominees (David C. Peterschmidt and Gerald Held) validly elected at its recent annual meeting of stockholders. Harbinger Capital Partners Master Fund I and Harbinger Capital Partners Special Situations Fund, L.P. (collectively, "Harbinger") are hedge funds that together own 10.3% of Openwave's common stock. James L. Zucco and Andrew Breen were nominated by Harbinger for election to Openwave's board. Harbinger, Zucco and Breen are the plaintiffs in C.A. No. 2646-N, in which they seek either a new meeting and election or confirmation of Zucco's election.

The court will only briefly summarize the facts here. On December 1, 2006, Openwave announced its annual meeting was to be held on January 17, 2007. In

prior years, Openwave held its annual meetings in November. For example, the last meeting was held on November 22, 2005. The delay in calling the 2006 meeting was caused by a delay in publishing the company's financial results that resulted from the need to review Openwave's accounting for option awards.

Openwave has two advance notification bylaws, both of which purport to relate to the nomination of persons to serve as directors. Apparently, these bylaws remain unchanged since Openwave went public in 1999. Harbinger named its two director nominees, Zucco and Breen, on December 28, 2006, just 20 days before the annual meeting. Openwave takes the position that this was too late and that Harbinger had two earlier opportunities to nominate its slate: (1) on or before November 2, 2006, pursuant to section 2.2(c) of the bylaws; and (2) within 10 days of the December 1, 2006 announcement of the meeting, pursuant to section 2.5 of the bylaws.

Openwave allowed the Harbinger nominees to appear on the ballot while expressly reserving it's rights to challenge the nominations. In the election, Zucco received the most votes, followed by Peterschmidt (Openwave's CEO), Held, and finally Breen. After the meeting, Harbinger sued, challenging the bylaws as improperly confusing, among other things. Openwave and Puckett responded by filing a Section 225 action. Harbinger then moved to amend its complaint to change it to a Section 225 action as well. Although the court has agreed to hear

this matter expeditiously, with trial scheduled in one week, Openwave moved for summary judgment on the issue of whether Harbinger complied with the company's advance notification bylaws and, thus, whether Harbinger's nominations were proper. In addition, Openwave contends that Harbinger's other claims, relating to statements made during the proxy contest and the number of shares entitled to vote, are moot if, as it contends, Harbinger's nomination of Zucco and Breen is found to be improper.

II.

The legal standard for a motion for summary judgment is well known. To prevail, the moving party must show that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law."[1] In deciding a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party.[2] The moving party bears the burden of demonstrating that there is no material question of fact.[3] "A party opposing summary judgment, however, may not merely deny the factual allegations adduced by the movant."[4] "If the movant puts in the record facts which, if undenied, entitle him to summary judgment, the burden shifts to the defending party to dispute the

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[1] Court of Chancery Rule 56(c); *see also Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002); *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).
[2] *Tanzer v. Int'l Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979) (citing *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).
[3] *Id.*
[4] *Id.*

facts by affidavit or proof of similar weight."[5] Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or "if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[6]

III.

This court and Delaware law are especially solicitous of the franchise rights of stockholders and "are vigilant in policing fiduciary misconduct that has the effect of impeding or interfering with the effectiveness of a stockholder vote."[7] As the Delaware Supreme Court stated in *MM Cos. v. Liquid Audio, Inc.*, "[t]his is particularly the case in matters relating to the election of directors . . . ."[8] Here 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. Before undertaking the task of construing these bylaws, the court concludes it is necessary first to develop a full trial record in this matter. This is particularly the case because the outcome may well turn on an assessment of the overall equities of the parties' conduct. On the one hand, Harbinger insists that Openwave's board of

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[5] *Id.*
[6] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[7] *In Re MONY Group, Inc. S'holder Litig*., 853 A.2d 661, 673 (Del. Ch. 2004).
[8] 813 A.2d 1118, 1127 (Del. 2003).

directors was aware that the bylaws were confusing and allowed that situation to persist in order to make stockholder nominations more difficult. On the other hand, trial could lead the court to conclude that Harbinger had a reasonable opportunity to submit its nominations and chose not to, either to gain the advantage of surprise or out of neglect. Similarly, there are issues of fact relating to the Openwave board's decision to shrink the board size to six in advance of the meeting and its alleged plan to appoint a seventh director immediately afterward. For these and other reasons, the court concludes it should "inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[9]

IV.

For the foregoing reasons, Openwave's motion for summary judgment is DENIED and the case will proceed to trial as scheduled. IT IS SO ORDERED.

[9] *Williams*, 671 A.2d at 1389; *Wilson v. Triangle Oil Co.*, 566 A.2d 1016, 1018 (Del. 1989); *In re Estate of Turner*, 2004 WL 74473, at *6 (Del. Ch. Jan. 9, 2004).