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-VCL

OPENWAVE'S POST-TRIAL BRIEF

SKADDEN, ARPS, SLATE,
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DATED: March 23, 2007

TABLE OF CONTENTS

TABLE OF CASES

PRELIMINARY STATEMENT

The central issue in this case has never changed: whether Harbinger complied with Openwave's bylaws relating to the advance nomination of directors for election. The trial record conclusively supports that Harbinger failed to comply with either deadline imposed by these provisions. Here are the salient points revealed at trial:

- Harbinger is a *$6 billion* hedge fund with experience in other proxy contests and director elections. (Tr. 40-41, 156, 191, 447, 508-509, 514-515; JX 91)

- Harbinger hired a consulting firm, Treyex LLC ("Treyex"), in September 2006 to assist it with identifying Openwave board members, and Harbinger and Treyex had discussions for the next few months about nominating directors to the Openwave board. (Tr. 108-109, 112-113, 128-129)

- On November 8, 2006, Hal Covert, Openwave's Chief Financial Officer, notified Harbinger that Openwave's Form 10-K was "basically done" and would be filed as soon as it was cleared by the Securities and Exchange Commission ("SEC"), with the goal of filing it on or before December 3, 2006, before certain default provisions in indenture agreements would be triggered. (Tr. 217-221, 574-575; JX 50)

- On December 1, 2006, Joseph Anto, a Senior Analyst at Harbinger, read an Openwave press release issued that same day (the "December 1 Press Release"), and learned that the annual meeting would be held on January 17, 2007. (Tr. 196-197; JX 54) Andrew Breen, one of Harbinger's purported nominees, also observed that this announcement was "important" if Harbinger "wants to do something via proxy," including nominating directors to the Openwave board. (Tr. 122-125; JX 57)

- Harbinger failed to review or consider Openwave's bylaws until mid-December – most likely on December 22, 2006 – when Howard Kagan, a Harbinger managing partner, asked Anto to e-mail the bylaws to him, which Anto did that same day. (Tr. 193-196) This e-mail is the only document in evidence that reflects Harbinger's consideration of Openwave's bylaws. (JX 65) Kagan's self-serving statement that he sent the bylaws to his lawyers in early December, and received legal advice shortly after that time (Tr. 464-465), is belied by his own testimony, and other record evidence, that show he did not receive or focus on his counsel's advice until "mid-December." (Tr. 131-132, 158, 195-196, 434-435)

- For whatever reason – either tactical advantage or perhaps out of desperation knowing it had neglected to review the bylaws before December 11, Harbinger finally decided on December 22 to nominate directors by December 27, and was able to file its preliminary proxy materials and provide notice to Openwave of its decision *within five days.* (Tr. 131-132, 158, 207-209)

In short, Harbinger was contemplating director nominations for months in advance of the January 17, 2007 annual meeting (the "Annual Meeting") and had the ability to move quickly to provide notice of such nominations by either November 2, 2006 (pursuant to Section 2.2(c) of Openwave's bylaws) or December 11, 2006 (pursuant to Section 2.5 of Openwave's bylaws) – but for tactical reasons or out of neglect, failed to do so. (Tr. 67-69, 84) As a result, Harbinger's nominations are invalid, the votes cast for Harbinger's nominees were of no effect, and the remainder of the claims raised by Harbinger in this lawsuit are moot and without merit.

Ultimately, the trial record reveals that Harbinger is a hedge fund willing to disregard Openwave's bylaws and play by its own rules in order to ambush its way into a contested election for two Openwave board seats. It is also clear that Harbinger's counsel was similarly willing to flout the rules throughout this lawsuit – whether by engaging in bullying tactics at the depositions of Harbinger's witnesses, or engaging in an improper cynical manipulation of the evidentiary process at trial. But even that improper conduct could not prevent Harbinger's witnesses from making numerous key admissions in Openwave's favor at trial.

As explained further below, these admissions, along with the other record evidence, respectfully warrant a judgment being entered in Openwave's favor.

STATEMENT OF FACTS

A. Harbinger Began Researching Openwave In March 2006.

Harbinger is a sophisticated New York-based hedge fund that manages in excess of $6 billion of capital and invests in companies across a broad array of industries. (Tr. 40-41, 156, 191, 508-509) As part of its normal business practices, Harbinger has nominated directors to the boards of public companies and engaged in proxy contests. (Tr. 40-41; JX 91) In particular, Kagan testified that he is familiar with public company bylaws, and understood that they typically contain advance notice requirements for nominating directors to a board of directors. (Tr. 514-515) He also clearly understands how they work; in his own words, Kagan explained that "you have to back up from the meeting date *enough* to have time for [the proxy] to be filed and for the nominations of the directors to be noticed…" (Tr. 447) (emphasis added).

As early as March 2006, Harbinger was analyzing the fundamentals of Openwave's business, and considering whether to make an investment in the Company. (Tr. 157, 191-193, 416, 541) To this end, Harbinger reviewed, among other things: (i) Openwave's Form 8-Ks, 10-Ks and 10-Qs; (ii) materials posted on Openwave's website (including press releases); and (iii) Openwave's prior year proxy statements.[1] (*Id.*) Harbinger also began speaking with research analysts who follow the company, and several other consultants and industry experts. Then, in September 2006, after educating

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[1] At this time, Kagan and Anto were primarily responsible for conducting fundamental research on Openwave. (Tr. 156-157, 191-192) In September, Harbinger retained Treyex, which began reviewing all of Openwave's public filings and conducting extensive research on the Company. (Tr. 137) However, no one thought to review the publicly available bylaws of Openwave. (Tr. 115-116, 193, 516)

itself about the Company *for over 6 months*, including reviewing all of Openwave's public filings, Harbinger began making significant investments in Openwave stock.[2] (Tr. 415-416, 541)

Importantly, however, neither Kagan nor Anto—nor anyone else at Harbinger—reviewed Openwave's bylaws during this time, despite the fact that the bylaws were publicly available and could easily have been obtained from Openwave's website. (Tr. 66-67, 165, 191-196, 516-517) Instead, Kagan asked Harbinger's counsel, Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), to look at Openwave's bylaws sometime between August and October, as part of Harbinger's due diligence before deciding to invest in Openwave. (Tr. 512-514, 557-558) Kagan testified that he asked Milbank (at that time) to let him know if they found anything "interesting" or "unusual" about the bylaws. (*Id.*) The record reveals nothing further about this issue because Kagan's litigation counsel (from Milbank) instructed Kagan at his deposition not to respond to questions about the content of Milbank's advice about the bylaws. (Tr. 514)

B. In September 2006, Harbinger Begins To Consider Nominating Directors To The Openwave Board And Hires Treyex To Assist With This Process.

By September 2006, Harbinger began to consider the possibility of placing candidates on Openwave's board. (Tr. 108-109, 112-113) Anto conducted an analysis of the composition of Openwave's board members for Kagan and informed him that two of the incumbent directors were up for reelection at the 2006 Annual Meeting. (JX 48) In

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[2] Harbinger currently owns approximately 13% of Openwave's stock, which translates to more than $80 million. (Tr. 191, 417-418)

fact, Kagan's concern about the Openwave board was one of the reasons why Harbinger engaged Treyex – a consulting firm owned by Sanford Cohen – and Breen, who was retained by Treyex to act as an advisor for Harbinger. (Tr. 107-109, 112-113) Breen testified that one of the reasons Treyex was retained by Harbinger and paid a monthly $50,000 fee was to help Harbinger consider potential director candidates for the Openwave board. (Tr. 107-108, 112-113, 128-129; *see also* JX 45, JX 49)

Thereafter, throughout the fall of 2006, there were ongoing conversations between Harbinger and Treyex about the possibility of Harbinger nominating directors to the Openwave board. (Tr. 48-49, 108-109, 112-113, 128-129; JX 51, JX 52) Thus, Harbinger was considering the possibility of nominating director candidates to the Openwave board at the Annual Meeting as early as September 2006 – well before both advance nomination deadlines—and it had hired Treyex, at least in part, to assist it with this endeavor. (*Id.*)[3]

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[3] Kagan's testimony that he did not consider potential board candidates until after Anto e-mailed him the December 1 Press Release (Tr. 418, 421, 554), is not credible, and belied by: (1) his own testimony that he hired Treyex to identify potential board members because he was concerned that the Openwave board was not "doing a good job" (Tr. 541-546, 552); (2) Breen's testimony that he discussed with Kagan "early on" the possibility of approaching management in a "friendly manner" to nominate directors to the board (Tr. 108-109, 112-113, 128-129); (3) Zucco's testimony that there were discussions in mid to late November about the possibility of Harbinger nominating directors (Tr. 47-49, 53-54); (4) several e-mails that mention a meeting in November between Kagan and Breen at which Breen explained that Zucco would be "great for a board seat" (JX 51, JX 52); and (5) e-mails sent between Kagan and Breen on the morning of December 1, in which Kagan is setting up a meeting with Zucco to discuss the potential of Zucco being a board nominee, which were sent *earlier* in the day *before* Kagan received the e-mail from Anto (at 4:19 p.m.) telling him about the December 1 Press Release. (JX 51, JX 54)

C. On November 1, 2006, The Openwave Board Reduces Its Size From Seven To Six.

On November 1, 2006, the Openwave board decided to reduce the number of seats on the board from seven to six, to eliminate a board seat that had been left vacant for nearly a year. (Tr. 283-284, 609-610; JX 6, JX 131) For months, the board had been searching for potential candidates to fill an open board seat that resulted from Covert leaving the board as Chairman of the Audit Committee to become Openwave's CFO. (Tr. 610-611, 284) Bernard Puckett, the Chairman of the Board, was then forced to step in as Audit Committee Chairman. In order to reduce the burden on Puckett, the board began searching for a candidate to fill the vacancy left by Covert's departure. (*Id.*) However, the board was unable to locate a candidate willing to fill the Audit Committee Chairman role. The board was interested in having Steve McGowan, a highly qualified, former Chief Financial Officer from Sun Microsystems, fill this position. However, McGowan was unable to give the board any assurances because of a conflict due to a non-compete agreement with his former company.[4] (Tr. 286-289, 611-612) Faced with not having anyone to fill the vacant board seat, the Openwave board decided on November 1, after receiving a recommendation from the Nominating and Corporate Governance Committee (JX 6, JX 131), that it would be good corporate governance to eliminate the open seat. (Tr. 288, 609-612) This decision was disclosed in a Form 8-K filed with the SEC on November 7, 2006. (JX 43)

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[4] McGowan recently informed the Openwave board that due to personal reasons, he is unable to serve on the Openwave board. (Tr. 289-290, 613)

At the time that the Openwave board reduced the number of board seats, it was not aware that any shareholder—including Harbinger—intended to nominate director candidates at the 2006 Annual Meeting. (Tr. 150-151, 198-199) Indeed, Harbinger concedes that it did not form an intent to nominate candidates to the board until *more than a month and a half later*, when it filed its 13-D on December 27, 2006. (Tr. 150, 198-200, 203-205) Moreover, Harbinger admitted at trial that it is aware of no *facts* establishing that Openwave reduced the number of board seats to thwart a potential proxy contest from Harbinger, or any other stockholder. (Tr. 202-203)

D. In Early November 2006, Openwave Notifies Harbinger That It Is Making Every Effort To File Its Form 10-K Before December 3, 2006.

Openwave has historically held its annual meetings in November—for example, last year's annual meeting was held on November 22, 2005. (JX 32) Because of an internal investigation of the Company's historic stock options granting practices, Openwave was forced to delay filing its Form 10-K and postpone its traditional November meeting date in 2006. (Tr. 260, 613) Harbinger understood that Openwave was forced to deviate from its historic practice because it had not yet filed its Form 10-K, and that Openwave intended to announce the Annual Meeting as soon as it was filed. (Tr. 217-221, 572-579; JX 50)

In fact, by early November, Harbinger was on notice that the Form 10-K would be filed in the first week of December, and that the Annual Meeting would be announced shortly thereafter. Anto admitted that he had a conversation with Covert on November 8 that put Harbinger on notice that: (1) the Form 10-K was "basically done;" (2) Openwave's accountants had approved the pre-clearance letter; (3) Openwave was

making every effort to have the Form 10-K filed before December 3 to avoid the bond default; (4) Skadden had contacted the SEC to explain the situation about the potential bond default; and (5) the only thing left was getting SEC approval. (Tr. 217-221, 573-575; JX 50) Thus, as Anto admitted at trial, Harbinger was not "surprised" when Openwave filed its Form 10-K on December 1. [5] (Tr. 221) Nor was Harbinger "surprised" when Openwave announced its Annual Meeting date the same day it filed its Form 10-K because Harbinger understood that one event was tied to the other. (*Id.*)

E. Openwave Issues Its December 1 Press Release Announcing The Annual Meeting Date, Which Harbinger Read And Understood.

On November 29, 2006, after learning that the SEC had cleared the Company to file its Form 10-K, the Openwave board met and set the Annual Meeting date for January 17, 2007. (Tr. 614; JX 126) At that time, the Openwave board did not know, and had no reason to know, that Harbinger intended to nominate directors and run a proxy contest. [6] In fact, Harbinger did not decide to nominate directors until late December – almost a month after the Openwave board set the Annual Meeting date – and did not file a 13-D with the SEC until December 27, 2006. (Tr. 203-205; JX 40A)[7]

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[5] Similarly, Kagan testified that he understood that Openwave hoped to file its 10-K by November 30. (Tr. 531)

[6] In fact, Openwave originally hired Georgeson to aid it with a "non-contested" annual meeting. (O'Hara at 118; JX 97) However, in early January, after Harbinger began its proxy contest, the parties revised their retention agreement to provide Georgeson with a substantially higher solicitation fee. (O'Hara at 118-119; JX 97, JX 98)

[7] Thus, Harbinger's claim of "manipulation" is illogical; to accept it, the Court must conclude that Openwave knew Harbinger would be running a proxy contest *nearly a month* before Harbinger itself decided to run a proxy contest. The record does not support such a conclusion. (Tr. 131-133, 198-199, 266, 563-564, 615)

On December 1, 2006, Openwave issued a press release announcing that the Annual Meeting would be held on January 17, 2007. The headline, in large bold letters, conspicuously declared: "**Annual Meeting Scheduled for January 17, 2007.**" (JX 53) The record is clear that Harbinger received this press release on December 1, read it, and fully understood that the annual meeting date was set for January 17, 2007. (Tr. 196-197, 509-510) Anto testified that he sent an e-mail to Kagan on December 1 communicating this information. (Tr. 196-197; JX 54) In fact, the evidence and the corroborating testimony demonstrate that, not only was Harbinger on actual notice on December 1 that Openwave's annual shareholders' meeting would be held on January 17, 2007, but that Harbinger, who at the time was discussing with both Treyex and Zucco about nominating candidates to the Openwave board, fully understood that the December 1 announcement was important in case Harbinger wanted to "do something via proxy." (Tr. 122-124, *see also* Tr. 56, 196-197; JX 54, JX 57) According to Breen, this included making director nominations at the Annual Meeting. (Tr. 124-125) Even Kagan admitted that he understood that the December 1 Press Release was significant if Harbinger wanted to nominate directors to the Openwave board and run a proxy contest. (Tr. 509-512)

In addition, on the same day that Harbinger received the December 1 Press Release, Breen contacted Zucco to discuss the possibility of Harbinger specifically nominating him to the Openwave board. (JX 51, JX 52) Zucco then met with Harbinger in the first week of December to discuss the possibility of him serving as Harbinger's

nominee for an Openwave board seat. (Tr. 13-14; JX 52, JX 59)[8] However, as explained below, Harbinger did not decide to nominate directors until on or about December 22 – *nearly two weeks after* the December 11 advance notice deadline and *over a month and a half after* the November 2 advance notice deadline had passed. (Tr. 562-565)

F. Harbinger Decides To Nominate Directors On December 22, 2006, And Provides Notice To Openwave Five Days Later.

Although Openwave's advance notice bylaws required shareholders to provide notice of their intention to nominate candidates by either November 2, 2006 or December 11, 2006, Harbinger ignored these deadlines and decided in mid-to-late December to ask Zucco whether he would like to be its nominee at the Annual Meeting. (Tr. 15, 114, 562-563) Critically, during these discussions, Harbinger told Zucco that the windows to nominate him as a director to the board of Openwave had already closed under Openwave's bylaws. (Tr. 21-30) The record is clear that Zucco had discussions with Anto and Kagan in December around the time that he was asked to be a nominee in which "[t]hey stated that, because of the late filing, that the filing was after the period in which they could make nominations." (Tr. 25-32, 63)[9]

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[8] Breen explained at trial that these discussions were in the context of placing someone on the board in a "friendly manner," not in the context of running a proxy contest. (Tr. 112-113, 128-129)

[9] At trial, Zucco tried to run from his admissions by attempting to "clarify" that he was referring to "Openwave's position," and not what Anto and Kagan had told him. (Tr. 18-30) Zucco's attempt to dodge the significant admissions made at his deposition, less than three weeks earlier, is extraordinary given that: (1) Zucco testified at the deposition that "the discussion was with, you know, Anto, Kagan, et al;" and (2) Openwave could not possibly have formed a "position" at that time since it was unaware that Harbinger intended to run a proxy contest until December 28, when Harbinger first publicly announced its intent to run a proxy contest. (Tr. 18-30, 63, 132-133, 150, 198-199, 207)

Missing the deadlines imposed by Openwave's bylaws did not matter to Harbinger because it decided to ignore them, and set its own deadline for making nominations—December 28.[10] (Tr. 158, 207) And, Harbinger had no problem meeting its own deadline in less than the ten-day period envisioned by Section 2.5. On this point, Anto and Breen testified that they were responsible for pulling together the information that would ultimately be used in Harbinger's proxy materials, and that they started this process on the Friday before Christmas (which was on a Monday), and worked over the weekend so that Harbinger could file its proxy materials *five days later* on December 27, 2006. (Tr. 114-115, 131-132, 207-208; JX 67) For this reason, Harbinger cannot possibly claim in good faith that it could not have complied with Section 2.5 of Openwave's bylaws by providing notice to the Company within 10 days of the announcement of the annual meeting date.

G. Harbinger First Discloses Its Intention To Run A Proxy Contest On December 27, 2006.

Although Harbinger was considering whether to nominate director candidates as early as September, Harbinger did not tell anyone from Openwave – or anyone outside of Harbinger and its advisors for that matter – that it planned to nominate candidates to Openwave's board or run a proxy contest in connection with the Annual Meeting. (Tr. 108-109, 132-133, 150, 198-199, 206-207, 564) Openwave first learned of Harbinger's intention to run a proxy contest on December 27, 2006, when Harbinger publicly announced its nominations, and sent letters to Openwave purporting to serve as written

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[10] Breen also testified that in mid-December, around the second or third week of December, Harbinger told him that all the documents had to be prepared and would be submitted on December 28. (Tr. 114-115, 131)

notice. (Tr. 268, 579, 600-601; JX 16, JX 17, JX 18) In fact, it was not until December 27, 2006, that Harbinger filed its 13-D and put Openwave on notice that it intended to run a proxy contest.[11] (JX 40A; Tr. 203-205) The next day, Harbinger filed its preliminary proxy materials over the Christmas holiday, approximately two weeks before the Annual Meeting. (Tr. 158; JX 41)

H. Harbinger Agrees To Pay Its Nominee, Breen, A Success Fee Potentially Worth "Millions."

In addition, after Harbinger decided in late December to nominate Breen, the Treyex consulting agreement was revised in order to include a "success fee" (on top of the $50,000 a month consulting fee), which was potentially worth millions to Breen if certain contingencies relating to his candidacy were met. (JX 40A; Tr. 109-111, 139-140) This unusual financial arrangement, and the fact that Breen had never served as an executive officer or on the board of a public company, led ISS and Glass Lewis to recommend *against* Breen. (Tr. 133-134, 137-140, 147-149; JX 76, JX 135, JX 136) As ISS explained, "concerns about potential conflict of interest faced by Mr. Breen due to Treyex's consulting agreement with Harbinger makes us wary of his election to the board." (JX 135)

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[11] Harbinger filed its initial 13-G on October 5, 2006, and then amended it the following month on November 3, 2006, certifying that it did not acquire Openwave securities for the purpose of or with the effect of changing or influencing the control of the issuer of the securities. (JX 112A, JX112B)

I. Openwave's January 12 Press Release Was True And Accurate When Issued.

On January 12, 2007, Openwave issued a press release that stated, among other things, that Proxy Governance, Inc. ("PGI") had recommended that shareholders vote in favor of Openwave's nominees, David Peterschmidt and Dr. Gerald Held (the "January 12 Press Release"). (Tr. 278-279, 582-583; JX 79) On January 16, 2007, the day before the Annual Meeting, both Openwave and Harbinger learned for the first time, through a Reuters press release, that PGI had, at some point during the Martin Luther King Day weekend, updated its report and changed its recommendation in favor of Harbinger's nominees. (Tr. 91-92, 180, 280, 584; JX 37)

There is no evidence in the record to establish when in fact PGI's revised report was issued or made available to its subscribers. Even Shirley Westcott, PGI's 30(b)(6) witness, admittedly could not confirm when either of PGI's reports were placed on its platform because she did not write the reports, did not know who put them on the platform and, most significantly, never accessed the platform herself.[12] (Westcott 30, 72-75, 77, 96-97, 99, 115) More importantly, no one at Openwave or Harbinger accessed

[12] The only other piece of evidence that purports to speak to the timing of the updated PGI report is an e-mail sent by Sherry Dones at PGI to Chris Cinek at Georgeson on January 13, 2007, which is inadmissible on hearsay grounds. (JX 133) Westcott testified that she was not familiar with the e-mail or the form of the e-mail, had no knowledge as to whether the e-mail was accurate, and explained that it was not within the normal business practice for PGI to send out such e-mails. (Westcott 18-20) Moreover, this document is also irrelevant because it is undisputed that both Openwave and Harbinger did not learn of the updated PGI report until January 16, the day before the Annual Meeting. (Tr. 180, 280, 584)

PGI's updated report until, at the earliest, January 16, 2007. [13] (Tr. 181, 280, 584) Moreover, Breen and Anto admitted that they were unaware of any facts to support the claim that Openwave knew on January 12 when it issued the January 12 Press Release that PGI would update its report. (Tr. 151-152, 185-186)

LEGAL ARGUMENT

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

A. Harbinger Neglected To Read Openwave's Advance Notice Bylaws Or Attempt To Comply With Them Until After Both Of The Deadlines Had Passed.

Sections 2.2(c) and 2.5 of Openwave's bylaws offer two separate opportunities for shareholders to provide advance notice of director nominations. (JX 36) The plain language of these provisions provide that any shareholder who wished to nominate directors for election at the Annual Meeting had to provide written notice to Openwave's Corporate Secretary by either November 2, 2006 or December 11, 2006.

*Firs*t, 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 the 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. (Tr. 274, 601-602; JX 36) Thus, because last year's annual meeting took place on November 22, 2005 (and the date of this year's

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[13] In fact, when an employee of Openwave's proxy solicitor attempted on January 16, 2007 to access the revised PGI report, he was initially unable to do so because of technical problems. (O'Hara 99-100; JX 95, JX 96)

meeting –January 17, 2007– is not 30 days prior to or more than 60 days after such date), a shareholder had the opportunity to provide notice of its director nominees by November 2, 2006.

Second, Section 2.5, which is entitled "Advance Notice of Stockholder Nominees," 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. (Tr. 274-275, 601-602; JX 36) Because the December 1 Press Release was issued less than 60 days before the Annual Meeting, there was a re-opening of the nomination window, and shareholders 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).

Accordingly, by simply applying the dates of Openwave's last year's annual meeting and this year's annual meeting (November 22, 2005 and January 17, 2007), and the date of the public announcement (December 1, 2006), Sections 2.2(c) and 2.5 offered two separate deadlines by which Harbinger, or any other Openwave stockholder, could have made director nominations. This interpretation is consistent with the "well-settled principle that contracts should be construed, wherever possible, to harmonize and give effect to all of their provisions." *Minn. Invco of RSA #7, Inc. v. Midwest Wireless*

Holdings LLC, 903 A.2d 786, at 794 (Del. Ch. 2006). The record supports the conclusion that Harbinger did not comply with either advance notice bylaw, *or even attempt to comply*, until after the deadlines had already passed.

In fact, Harbinger neglected to consider Openwave's advance notice bylaws throughout the time it was identifying potential candidates for the Openwave board and then showed a remarkable disregard for the Company's bylaws when it purported to nominate candidates at the Annual Meeting based on its own unilateral determination about when notice was due. (Tr. 131, 158, 193-196) Indeed, Openwave's Form 8-K, which was filed on November 7, 2006, contained Openwave's bylaws, and Openwave's proxy for its 2005 meeting also referenced the November 2 deadline in the context of submitting stockholder proposals. (Tr. 81-82; JX 32, JX 43) Thus, even though Harbinger was reviewing Openwave's public filings as early as March, it neglected to read Openwave's bylaws. (Tr. 66-67, 157-158, 191-193, 416, 541)

Breen, Anto, and Zucco all testified that neither they, nor anyone at Harbinger, even thought to read the bylaws until mid-to-late December after both advance notice deadlines had passed. (Tr. 18, 66-67, 115-119, 126, 131-132, 165, 193-196) In fact, both Zucco and Breen, the latter of whom was paid $25,000 a month to advise Harbinger about Openwave, including assisting Harbinger in identifying potential director candidates, *never read the bylaws*. (Tr. 18, 108, 115-120, 126, 138) When asked why, Breen offered several excuses, such as: (i) he was not worried about the details of the bylaws; (ii) he did not think it was appropriate for him to read the bylaws; and (iii) "it was not something I thought to do." (Tr. 117-119)

Anto, who was the Senior Analyst and one of only two people principally responsible for overseeing Harbinger's $80 million investment in Openwave, testified that he too did not think to read Openwave's bylaws until December 22, after Kagan, *for the first time*, asked him to send him the bylaws. (Tr. 165, 191-193, 195-196; JX 65) Anto attempted to excuse away the failure to read the bylaws before December 22 on the theory that it was not within his "scope of responsibilities." (Tr. 165) However, in the same breath, he acknowledged that his job "entails doing fundamental research on companies that we are potentially making investments in." (*Id.*) Apparently, Harbinger did not consider the bylaws to be part of the fundamental research of a company. In any event, Anto testified that Kagan never spoke to him about Openwave's bylaws until December 22, and that he did not know of anyone at Harbinger who was reviewing Openwave's bylaws prior to this time. Specifically, Anto testified that:

> Q. … And in fact, Mr. Kagan never even spoke about Openwave bylaws before he asked you to send them to him on December 22nd; right? That was the first time?
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> A. That's correct.
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> Q. … To your knowledge, you're not aware whether anyone at Harbinger reviewed or read the bylaws before November 2nd, 2006; right?
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> A. That's correct, to my knowledge.
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> * * * * *
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> Q. And the same goes for before December 11, 2006; right?
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> A. That's correct. (Tr. 195-196)

This is also supported by the documentary evidence. Other than Anto's December 22 e-mail that transmitted Openwave's bylaws to Kagan (JX 65), there is no other

documentary evidence that suggests that Harbinger considered the bylaws at any time before December 22.[14] It simply cannot be a coincidence that the same late December time period when Kagan asked Anto for the bylaws for the first time is also the same time period when Harbinger asked Zucco to be a nominee and decided to run a proxy contest. (Tr. 14-15, 50, 562-563) Accordingly, the testimony of Zucco, Breen and Anto, the documentary evidence (or lack thereof), and the timing of events all support a finding that Harbinger neglected to pay attention to Openwave's bylaws, or comply with the bylaws, until *after both advance notice deadlines had passed.* (Tr. 68-69, 114-115, 130-131, 158, 195-198)

The only evidence to the contrary is Kagan's self-serving testimony about his attempts to comply with Openwave's bylaws before December 11. This testimony is both unreliable and not credible, due to the blatant inconsistencies in his testimony and his litigation counsel's cynical manipulation of the judicial process. At trial, Kagan testified that he looked at the bylaws "very briefly" for the first time in the first week of December, and that he "did not spend very much time on them at all," but instead "flip[ped] that to our law firm." (Tr. 422-423)[15] When the Court asked Kagan when he reached a conclusion about the deadlines imposed by Openwave's advance notice bylaws, Kagan

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[14] Moreover, Anto and Kagan are the only two Harbinger employees overseeing the Openwave investment. Anto, who sits across from Kagan on a trading desk with no walls, testified that he could hear all of Kagan's phone conversations, and that the first time he heard Kagan or anyone else at Harbinger discussing Openwave's bylaws was on December 22. (Tr. 158, 195-196, 232-233; JX 65)

[15] When Kagan was asked why he had not looked at the bylaws before the first week in December, he stated "[t]here was no need to." (Tr. 422)

responded that "[w]e made the decision we needed to get it done by that date probably the *middle of December*." (Tr. 434) Kagan then went on to testify that he sought legal advice during the first week of December following the press release "[a]nd it took some time to get the advice back." (Tr. 435) The Court then asked Kagan when he got the advice, and Kagan responded "[*t]he middle of the month.*" (*Id.*) (emphasis added).

It was not until Kagan's counsel explained (in an attempt to impeach his own witness and improperly lead Kagan on direct examination) that "I have an e-mail from the firm [Milbank] that is dated December 7th," which "may be important as to whether this advice was conveyed before or after December 11th," that Kagan changed his testimony. (Tr. 435-442) This e-mail, in redacted form, was then placed in front of Kagan to "refresh his recollection," and in stark contrast to the testimony that he gave in response to questions *asked by the Court,* Kagan now remembered receiving "prompt" advice from his counsel with respect to Openwave's advance notice bylaws on or about December 7. (Tr. 463-465) This sudden and complete reversal on a critical issue, coupled with several other inconsistencies between Kagan's testimony and that of Breen and Anto as discussed above, show that Kagan's testimony is not credible and unreliable, and the Court should give it very little weight, if it is given any weight at all.

Nevertheless, regardless of whether Kagan received legal advice at this time, the record demonstrates that neither Kagan, nor anyone at Harbinger, considered Milbank's

advice or attempted to comply with Openwave's bylaws until mid-to-late December, well after the advance notice deadlines had passed.[16] (Tr. 131, 158, 195-198, 207, 212-213)

B. Harbinger Could Have Easily Complied With Openwave's Bylaws.

Harbinger has not demonstrated why it could not have made nominations, pursuant to Section 2.2(c) of Openwave's bylaws, by November 2, 2006. In fact, the date of the 2005 annual meeting was publicly available, this November 2 deadline was specifically referenced in Openwave's 2005 proxy materials,[17] and Harbinger was contemplating nominating directors as early as September 2006. (Tr. 67, 81-82, 108-109, 112-113; JX32) Similarly, Harbinger has not shown why it could not have made nominations, pursuant to Section 2.5 of Openwave's bylaws, by December 11, 2006. Harbinger admits that it: (1) read the December 1 Press Release on that day; (2) understood that the 2006 Annual Meeting would be held on January 17, 2007; (3)

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[16] There is absolutely no evidence in the record besides Kagan's unreliable testimony to show when Harbinger received legal advice about Openwave's advance notice bylaws or when it read or responded to such advice. In fact, when Openwave asked Harbinger's witnesses at their depositions about anything regarding their counsel's advice, they were instructed by counsel not to answer. (Tr. 122, 158-164, 428) Openwave filed a Motion to Compel to gain access to this advice, which Harbinger strongly opposed, and the Court denied the Motion. Therefore, it was a quite an extraordinary manipulation of the judicial process when Harbinger's counsel attempted to put the very privileged documents sought by Openwave's Motion into evidence and rely on them at trial. Nevertheless, even if the Court concludes (which Openwave contends it should not) that Kagan received and considered counsel's advice in the first week of December, then that advice either: (1) erroneously provided that Harbinger had until December 28 to submit notice (pursuant to a reading of Section 2.2(c) that ignores the actual meeting date); or (2) accurately provided that Harbinger had until December 11 under Section 2.5 to provide notice, and Harbinger failed to do so.

[17] Harbinger misconstrues Openwave's reference to its proxy materials issued in connection with the 2005 Annual Meeting. Openwave referenced those materials by analogy to show that Openwave stockholders were provided with actual notice about the November 2, 2006 deadline for making shareholder proposals (as required by federal securities laws), which is the same deadline under Section 2.2(c) for making director nominations. (Tr. 81-82; JX 32)

recognized that it was important for Harbinger in case it wanted to run a proxy contest, and yet, despite all of this, (4) failed to provide proper written advance notice by December 11 pursuant to Section 2.5 of Openwave's bylaws. (Tr. 122-125, 196-197, 509-510; JX 54, JX57)

In *Accipiter Life Scis. Fund, L.P. v. Helfer*, this Court interpreted an analogous advance notice bylaw provision, and determined that the stockholder (Accipiter) failed to comply with the requirements of that provision. 905 A.2d 115, 127 (Del. Ch. 2006). This Court held that plaintiff could easily have preserved its rights with reasonable diligence by providing 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.* Here, unlike in Accipiter, Harbinger admits that it read the December 1 Press Release announcing the Annual Meeting on the day it was issued and understood that it was important in case Harbinger wanted to run a proxy contest. (Tr. 123-125, 196-197, 509-510) Therefore, Harbinger, a sophisticated hedge fund, could have easily preserved its rights with reasonable diligence by providing advance notice pursuant to Section 2.5 by December 11 – but failed to do so.

C. Harbinger's Excuses For Failing To Comply With Openwave's Advance Notice Bylaws Should Be Rejected.

Harbinger offers several excuses for why it failed to comply with either of the two advance notice bylaw deadlines. All are without merit.

First, Harbinger claims that the bylaws are "confusing" and "misleading." However, as explained above, and conceded by Zucco, Openwave's advance notice

bylaws can (and should) be read together to provide two opportunities for shareholders to give advance notice to Openwave. (Tr. 67-68, 84)[18] *See Midwest Wireless*, 903 A.2d at 794 (holding that contracts should be construed to harmonize and give effect to all of their provisions); *Bayless v. Davox Corp.*, C.A. No. 17560, 2000 WL 268310, at *5 (Del. Ch. Mar. 1, 2000) (accord) (Ex. A). Openwave's advance notice bylaws work in harmony under the circumstances actually presented in this case. *See Hibbert v. Hollywood Park, Inc*., 457 A.2d 339, 343 (Del. 1983) (holding that the Court will not search for the parties' intent behind the bylaw, but will construe the bylaw as it is written, giving its language the force and effect required); *see also Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001) (holding that "[i]t is a fundamental principle that the rules used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws").

In contrast, Harbinger's interpretation—which fails to harmonize Section 2.2(c) with Section 2.5, and effectively reads out Section 2.5—leads to a wholly illogical result that: (1) applies the "20-day" proviso in Section 2.2(c) which, as the Court noted at the summary judgment hearing, clearly does not on its face apply to the facts and circumstances in this case; and (2) restricts Openwave shareholders from using the 10-

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[18] Harbinger's reliance on Kagan's testimony that he had a conversation with Puckett in January 2007, during settlement negotiations, where Puckett purportedly told him that the bylaws were confusing and that the board knew this since the summer but chose not to change them, should not be credited by the Court. (Tr. 479-481). Puckett has a different, and more reliable, recollection of this conversation. He testified that he never told Kagan that the bylaws were confusing or hard to understand. Rather, in response to Kagan's suggestion during settlement talks to change the bylaws, Puckett responded that it would not be appropriate at this time because any update would make the bylaws more restrictive. (Tr. 602-605)

day "fail-safe" method for making director nominations built into Section 2.5. The Court should not construe the bylaws in such a manner that 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 instrument's meaning in favor of, and against a reading that would limit, shareholders' fundamental electoral rights).[19]

Indeed, Harbinger has never attempted to distinguish the authority, including *Midwest Wireless*, that supports this construction. Instead, Harbinger bases its argument on a number of self-serving hypothetical situations where, under much different circumstances, the bylaws "might" contradict themselves and be difficult or "impossible" to comply with. That the bylaws may contradict each other in some theoretical scenario is completely irrelevant to the circumstances at hand. (Tr. 106) In *Stroud v. Grace*, the Delaware Supreme Court addressed this very issue and held that there was no basis to invalidate a bylaw upon some "hypothetical" abuse of that bylaw. 606 A.2d 75, 96 (Del. 1992). The Court explained that "[i]t is not an overstatement to suggest that every valid by-law is always susceptible to potential misuse;" however, without a showing of abuse based on the facts and circumstances of a particular case, the Court must uphold the validity of the bylaw. (*Id.*). Here, Harbinger has made no showing of abuse by the

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[19] In addition, discovery revealed that other Openwave shareholders were not "confused" about Openwave's advance notice bylaws. Charles Penner (the General Counsel of Jana Partners) informed Harbinger that he had "checked [Openwave's] bylaws again and while there are two notice provisions, they both seem to require an earlier notice date." (Tr. 209-211; JX 68).

Openwave board. This is because all the Openwave board did was select an annual meeting date, announce the annual meeting, and apply the plain language of its bylaws. (Tr. 69-70)

Second, Harbinger claimed that they could not comply with the nomination deadlines because of an "abnormal circumstance," which was revealed to be Openwave's delay in its filing of its Form 10-K. However, Harbinger anticipated that the Annual Meeting would be announced in the first week in December when the Form 10-K was filed. Anto admitted that he was not "surprised" when Openwave announced its Annual Meeting on December 1 after it filed its 10-K because he understood that one event was tied to the other. (Tr. 220-221) In fact, no one at Harbinger could have legitimately been "surprised" because the record reveals that (1) Covert informed Harbinger in early November that the Form 10-K was "basically done" and Openwave was making every effort to file the Form 10-K by December 3 to avoid a potential default with its bondholders; and (2) Harbinger understood that, once the Form 10-K was filed, Openwave would hold the annual shareholders' meeting. (Tr. 217-221, 573-575; JX 50) That is exactly what occurred. Openwave filed its Form 10-K on December 1 and publicly announced the annual meeting date that same day. Therefore, Harbinger has not offered any rational reason why it could not have provided written notice to Openwave, pursuant to Section 2.5, within 10 days from that announcement. In fact, as explained above, Harbinger was able to meet its own shorter 5-day deadline when it finally decided that it wanted to nominate directors to the Openwave board. (Tr. 131-132, 207-208)

Third, Harbinger claims that the Openwave board somehow "manipulated" Openwave's bylaws and selected a meeting date in order to thwart Harbinger from running a proxy contest. No witness at trial was able to provide any facts in support of this allegation. (Tr. 38-39) Indeed, Openwave's advance notice bylaws have not been altered since the Company went public in 1999. (Tr. 596) No one at Harbinger even bothered to check when the advance notice bylaws were enacted or whether they had at any time been altered or amended by the Openwave board. Indeed, if anyone manipulated the electoral process, it was Harbinger, by initiating a proxy contest three weeks before the Annual Meeting over the Christmas holiday when several of the Openwave board members were on vacation and could not properly respond in such a compressed time period. (Tr. 92, 95, 207-208, 268, 579, 600-601)

Moreover, and most significant, Openwave neither knew nor had reason to know of Harbinger's intention to run a proxy contest until Harbinger sent notice and filed its preliminary proxy on December 27, 2006. Harbinger's witnesses concede this fact. (Tr. 132-133, 150, 198-199, 203-205, 564) They have to because Harbinger did not file its 13-D until December 27. (Tr. 205; JX 40A) Openwave does not have a crystal ball – as a matter of logic, it could not possibly have taken action in November 2006 designed to thwart a proxy contest that Harbinger had not even decided to launch until late December 2006. Harbinger's reliance on the Merrill Lynch presentation made to the Openwave board and the Goldman Sachs pitch made to Openwave management in November is misplaced. The Merrill Lynch presentation was a general overview of shareholder activism and takeover preparedness, while the Goldman Sachs presentation was an

unsolicited pitch by Goldman Sachs to Openwave management; Goldman Sachs was never retained by Openwave. (Tr. 256-257, 267, 322-323, 597-598) Both of these presentations were made well *over a month before* Harbinger filed its 13-D, announcing its decision to nominate directors and run a proxy contest. Therefore, Harbinger's attempt to trumpet these presentations as evidence of Openwave's intent to thwart Harbinger's proxy contest falls short. Harbinger's reliance on *Schnell* and other similar cases for the proposition that Openwave took action to thwart Harbinger's proxy contest is similarly misplaced. As this Court explained when rejecting a similar argument in *Accipter*:

> The facts in this case fall far short of the types of inequity which our courts have found determinative in the past. Most obviously, this case differs entirely from most of our previous cases on point because no one at LifePoint had reason to know of Accipiter's intention to trigger a proxy contest when [the LifePoint officer] made the decision to announce the company's annual meeting. Unlike *Aprahamian*, or *Schnell*, or *Lerman*, the defendants here did not act with the specific intent to limit the stockholder's rights to nominate and elect a dissident slate. Rather, as in *Dolgoff*, 'the board was not faced with a proxy contest or an expected proxy contest when it took action,' nor did it 'advance or delay the [annual] meeting after it had already been called.'

See, e.g., *Accipiter*, 905 A.2d at 126-27 (granting summary judgment in favor of company on the ground that insurgent failed to comply with advance notice bylaws).

II. HARBINGER'S OTHER CLAIMS ARE MOOT AND WITHOUT MERIT.

If the Court agrees with Openwave that Harbinger did not even attempt to comply and/or 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) (Ex. B).

Nevertheless, Openwave maintains that these claims are unsubstantiated by the record and lack merit, and addresses each one below.

A. Openwave's Decision To Reduce The Number Of Board Seats Was Not Intended To Thwart Harbinger's Proxy Contest.

Harbinger's claim that the Openwave board reduced the number of board seats to thwart a Harbinger proxy contest is based entirely on speculation, unsupported by the record evidence, and without merit. Harbinger's own witnesses admit as much. Anto admitted at trial that he was "not aware of any specific facts" to support the claim that Openwave's decision was made to thwart any proxy contest, including Harbinger's. (Tr. 199-203) In fact, the Openwave board's decision on November 1, 2006 to reduce the number of board seats was *more than a month and a half* before Harbinger announced its intent to run a proxy contest.[20] (Tr. 132, 198-199, 262, 564) Indeed, two days later, on November 3, 2006, Harbinger filed an amended 13-G, certifying that it had no intention to actively seek to influence or change the management of Openwave. (Tr. 203-205; JX 112(B)) Moreover, Harbinger's witnesses admitted that the elimination of the open

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[20] At trial, Harbinger relied upon an entry on Puckett's calendar for the date October 31, 2006 titled "OPWV Search Call" to indicate that Openwave was looking for board candidates the very day before it reduced the number of board seats. (Tr. 635-36) Subsequently, Puckett recalled that around that time he participated in a search for a new director of worldwide field operations for the company and that it is "more likely" that the entry refers to the search to fill that position than any search for board members. (Tr. 642)

board seat did not impact Harbinger in any way because Harbinger *never* formed an intent to run three candidates. (Tr. 150, 206) [21]

B. Openwave's January 12 Press Release Was Not False Or Misleading.

Harbinger's claim that Openwave knew at the time it issued its January 12 Press Release that PGI would issue a new recommendation is unsupported by the record evidence. (Tr. 91, 151-152, 186, 279, 584) Harbinger's witnesses admitted at trial that they were unaware of any facts to support this claim. (Tr. 151-152, 185-186) (Zucco directly admitted that the January 12 Press Release was not false and misleading) (Tr. 91) Moreover, Harbinger's attempt to place the publication of the second PGI report on the same date as the January 12 Press Release is also unsupported by the record. The only PGI witness that testified to this issue lacked any knowledge as to the timing of the report. (Westcott 18-20, 74-77, 96-97, 99, 115) The record is clear, however, that Openwave found out about PGI's change in recommendation the same way Harbinger did—through a Reuters press release issued on January 16, the day before the Annual Meeting. (Tr. 91-92, 180, 280, 584; JX 37) Accordingly, Harbinger has failed to meet the burden of proving that Openwave knew its January 12 Press Release was false or misleading when issued. *Stroud*, 606 A.2d at 84 (stating that directors disclose all material information "*within the board's control* when it seeks shareholder action") (emphasis added)

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[21] Additionally, Harbinger's claim that Openwave had a duty to disclose to stockholders its desire to add Mr. McGowan to the board of directors is equally meritless. It is well-settled that "[s]peculation is not an appropriate subject for a proxy disclosure." *Loudon v. Archer-Daniels-Midland Co.* 700 A.2d 135, 145 (Del. 1997). The prospects of McGowan joining the Openwave board are purely speculative, and McGowan has removed himself from consideration for a board seat. (Tr. 289-290, 613)

Even more significant, Harbinger has failed to establish that the January 12 Press Release prevented Breen from being elected to the Openwave board. Instead, the record overwhelmingly supports that Breen lost the election, not because of the January 12 Press Release, but for another reason entirely. Both ISS and Glass Lewis, recognized by both Georgeson and MacKenzie Partners as the two most influential proxy advisory services (JX 78, JX 80; O'Hara at 109-112), [22] declined to recommend Breen for election to the Openwave board of directors because of his connections to Harbinger, including his "success fee" arrangement potentially worth millions. (JX 135, JX 136; Tr. 140, 148-149)

In any event, to the extent that the change in recommendation was material to Openwave stockholders—and the Court should not conclude that it is material, given that two other shareholder advisory firms with greater influence had already voiced their views—that information was readily available through the Reuters news article. (JX 37) As Westcott testified, Reuters was an effective means of news distribution and the parties themselves found out about the change in recommendation through this article. (Westcott at 89; Tr. 180, 280, 584) Additionally, by the time Openwave learned about the report, only hours remained before the Annual Meeting. Indeed, Kagan admitted that a release issued by Openwave on Tuesday night would have been futile. (Tr. 506)

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[22] In addition, there was no need for Openwave to issue an updated press release about the revised PGI recommendation. Both Georgeson and MacKenzie Partners agree that PGI is significantly less influential among shareholders than ISS or Glass Lewis. (JX 80; O'Hara. at 109-112). In fact, Georgeson's representative, Sean O'Hara, testified that he considers PGI to be the least influential of the proxy services and that Georgeson does not "believe there are any significant institutional investors that subscribe to or follow it." (O'Hara 110)

Accordingly, Harbinger has not demonstrated that Openwave's press release was false or misleading, nor has it shown that the total mix of information available to Openwave's shareholders would have been materially altered if Openwave issued an additional press release *See Arnold v. Soc'y for Sav. Bancorp,* 650 A.2d 1270, 1277 (Del. 1994); *Abrons v. Marée*, 911 A.2d 805, 813 (Del. Ch. 2006) (holding that "[c]onsistent and redundant facts do not alter the total mix of information").

C. The Restricted Shares Held By Openwave Employees Were Validly Voted And, In Any Event, The Claim Is Moot.

Lastly, Harbinger's claim that 1.3 million shares of restricted stock were improperly voted at the 2006 Annual Meeting is unsupported by the record. Throughout the course of this litigation, Harbinger failed to present any evidence to support this claim. The only record evidence on this issue was supplied by Openwave, and it is uncontested. (Tr. 292-294; JX 108) In any event, neither Harbinger nominee finished within 9 million shares of any Openwave nominee, rendering the disposition of those votes moot. (JX 31)

CONCLUSION

For the foregoing reasons, the Court should enter judgment in favor of Openwave, order that Peterschmidt and Held were properly elected to the Openwave board, and grant any other relief the Court determines is just and proper.

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DATED: March 23, 2007

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