IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JANA MASTER FUND, LTD., a Cayman Islands exempted company,	)	
Plaintiff,	)	
v.	)	Civil Action No. 3447-CC
CNET NETWORKS, INC., a Delaware corporation,	)	
Defendant.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF
ITS MOTION FOR JUDGMENT ON THE PLEADINGS

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PRELIMINARY STATEMENT

There is a "through the looking glass" quality to CNET's Answering Brief: CNET's director nomination bylaw does not apply to "director nominations"; director nominations by stockholders are not nominations, but are instead "stockholder proposals"; and CNET's purported "Notice Bylaw" falls "equally" on all stockholders, but only so long as they are not deemed "minimally invested" or "short term." While the Answering Brief is filled with such illogical contentions, CNET does not dispute that stockholders have the fundamental right under Delaware law to nominate and elect directors and conduct other business once a year at an annual meeting. Faced with the reality that JANA intends to offer the CNET stockholders a choice at the upcoming 2008 annual meeting between an incumbent board that has presided over a dramatic long-term financial decline and an alternative slate of highly qualified nominees committed to rebuilding stockholder value, the incumbent board has chosen to attempt to thwart the free exercise of the stockholder franchise through a strained interpretation of its bylaws and Delaware law. CNET is wrong on its bylaw interpretation argument and wrong on the law.

ARGUMENT

I. JANA HAS THE FUNDAMENTAL RIGHT AS A STOCKHOLDER TO PRESENT NOMINEES FOR DIRECTOR ELECTION AT THE 2008 ANNUAL MEETING.

Delaware law grants stockholders the absolute right to vote for the election of directors once a year at an annual meeting. 8 *Del. C.* § 211(b). As this Court recognized in *Hoschett v. TSI International Software, Ltd.*, 683 A.2d 43, 44-45 (Del. Ch. 1996):

> The critical importance of shareholder voting both to the theory and to the reality of corporate governance, may be thought to justify the mandatory nature of the obligation to call and hold an annual meeting. The annual election of directors is a structured occasion that necessarily focuses attention on corporate performance. Knowing that such an occasion is necessarily to be faced annually may itself have a marginally beneficial effect on managerial attention and performance. Certainly, the annual meeting may in some instances be a bother to management, or even, though rarely, a strain, but in all events it provides a certain discipline and an occasion for interaction and participation of a kind. Whether it is welcome or resented by management however, is in the end, irrelevant under Section 211(b) and (c) of the DGCL and similar statutes in other jurisdictions.

By definition, the right of stockholders under Delaware law to vote on the election of directors at an annual meeting includes the right to nominate candidates for election as directors and to choose between alternative nominees. *See, e.g., Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 311 (Del. Ch. 2002) ("Put simply, Delaware law recognizes that the right of shareholders to participate in the voting process includes the right to nominate an opposing slate. And, the unadorned right to cast a ballot in a contest for [corporate] office . . . is meaningless without the right to participate in selecting the contestants.") (internal quotations omitted); *see also Hubbard v. Hollywood Park Realty Enters.*, 1991 WL 3151, at *6 (Del. Ch.) (Ex. A) (same).

In its Answering Brief, CNET is forced to reconcile its effort in this litigation to thwart the presentation of JANA's nominees at the annual meeting with the fundamental

franchise right granted under Delaware law and the actual, unambiguous language of its Bylaws, which place no restrictions on the right of stockholders to nominate directors. As a result, CNET now concedes that Article III, Section 6 of its Bylaws (the "Nomination Bylaw") does not impose any restrictions on JANA's right to present its nominees for election to the two Class III directorships up for election. AB at 10 n.6. Nevertheless, CNET continues in its effort to thwart a fair and open election by asserting an entirely new argument in its Answering Brief: that director nominations constitute "other business" at the annual meeting and Article II, Section 3 of its Bylaws (the "14a-8 Bylaw") should be read to bar JANA's nominees.[1] AB at 19-21. CNET's latest attempt to deny JANA's right to present its nominees for consideration by the stockholders at the upcoming annual meeting is contrary to the language of Section 211 of the Delaware General Corporation Law (the "DGCL"), contrary to the language of CNET's own Bylaws, and must be summarily rejected.

Section 211(b) of the DGCL states that "[a]n annual meeting of stockholders shall be held for the election of directors . . . . Any other proper business may be transacted at the annual meeting." 8 *Del. C.* § 211(b); *cf.* Model Bus. Corp. Act § 7.01, Official Comment (2008) ("The principal action to be taken at the annual meeting is the election of directors pursuant to section 8.03, but the purposes of an annual meeting are not limited and all matters appropriate for shareholder action may also be considered at that meeting."). Consistent with the requirements

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[1] Despite claims to the contrary, CNET never asserted prior to filing its Answering Brief that director nominations constituted "other business." In fact, CNET even acknowledged the distinction between director nominations and "other business" in its January 15, 2008 letter to the Court: "Consistent with the SEC's proxy rules, the Company's bylaws provide that a stockholder may not nominate directors *or seek to transact other business* at the Company's Annual Meeting unless the stockholder has been the beneficial owner of at least $1,000 of common stock of the Company for at least one year." Letter dated January 15, 2008 to The Honorable William B. Chandler, III from Donald J. Wolfe, Jr., Esquire (emphasis added) (footnote omitted).

of Delaware law, CNET's Bylaws similarly require that an annual meeting shall be held each year for the election of directors and recognize that other business may be presented at the meeting:

> An annual meeting of stockholders shall be held on such day in each fiscal year of the Corporation and at such time and place as may be fixed by the Board of Directors, at which meeting the stockholders shall (i) elect directors to fill the class of directors whose terms are expiring at such meeting and (ii) transact such other business as may properly be brought before the meeting.

(Art. II, Section 2). Thus, both Delaware law and CNET's Bylaws make a clear distinction between the "election of directors," which is a single item of "business" that takes place at every annual meeting, and "other" business, which may be presented at any given annual meeting.

Consistent with this distinction, the Nomination Bylaw, which is entitled "Nominations for Directors," addresses the election of directors at the annual meeting. The 14a-8 Bylaw, however, addresses the situation in which a stockholder seeks to "**transact other corporate business at the annual meeting**," which ties directly to the language of Article II, Section 2 quoted above. CNET's argument that the nomination of directors, which is the only item of business that is required by the Bylaws and Delaware law to occur at each annual meeting, constitutes "other business" referred to in the 14a-8 Bylaw not only finds no support in the language of the Bylaws or Delaware law, but is in fact expressly contrary to the Bylaw's terms.[2] Indeed, CNET's reading of the 14a-8 Bylaw would lead to the nonsensical result where the annual meeting notice and ballot would include the election of the Company's nominees as

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[2] CNET's new interpretation is also inconsistent with a prior version of its own Bylaws. In fact, the version of CNET's Director Nomination Bylaw adopted prior to CNET's initial public offering expressly required advance notice of director nominations by stockholders. *See* Ex. A to LeGrow Decl. at p. 6. Clearly the drafters of the 14a-8 Bylaw understood the difference between the advance notice of director nominations, which relate to the "business" of director elections, and advance notice of all "other business" presented for stockholder action. CNET deleted this provision in 2004.

one item of business at the meeting and the election of the stockholders' nominees as a separate item of business.

Throughout its Answering Brief, CNET and its incumbent board repeatedly protest that they are not motivated by entrenchment in taking the position that stockholders should not be given the opportunity to vote for JANA's nominees at the annual meeting. However, such protests ring hollow in the face of their current attempt to strain the language of the Rule 14a-8 bylaw to limit the stockholders' choice to a choice of one: the incumbent nominees. Quite simply, taking a position that is so clearly contrary to the language of the Bylaws and Delaware law cannot be viewed as anything other than an attempt by an incumbent board to prevent a fair and open election at any cost.

II. JANA HAS THE FUNDAMENTAL RIGHT AS A STOCKHOLDER TO PRESENT ITS OTHER PROPOSALS TO EXPAND THE BOARD AND TO NOMINATE ADDITIONAL DIRECTORS AT CNET'S ANNUAL MEETING.

A. The 14a-8 Bylaw Does Not Restrict JANA's Right To Present Bylaw Amendments And Additional Nominees At The Annual Meeting.

1. The 14a-8 Bylaw Does Not Impose Restrictions On The Stockholders' Right Directly To Make Proposals At The Annual Meeting.

Despite seven pages of convoluted analysis in its Answering Brief, CNET has failed to demonstrate that the 14a-8 Bylaw plainly and unambiguously applies to any stockholder proposals other than Rule 14a-8 proposals. Specifically, CNET fails to resolve the tension between the second sentence of the 14a-8 Bylaw, which, according to CNET, applies to all stockholder business proposals, and the third sentence of the Bylaw, which states that the stockholder's notice of business "must also comply with any applicable federal securities laws *establishing the circumstances under which the Corporation is required to include the proposal*

in its proxy statement or form of proxy." (emphasis added). Because no distinction is made in the 14a-8 Bylaw between Rule 14a-8 proposals and other proposals, the second and third sentences can only be read to either apply to Rule 14a-8 proposals, or to require *all* stockholder proposals (both Rule 14a-8 and other proposals) to satisfy the requirements of Rule 14a-8, which, as noted in JANA's Opening Brief, would lead to absurd results in the case of proposals that stockholders do not submit under Rule 14a-8. *See* OB at 28-29.

CNET, however, offers a third and untenable reading which seeks to create a distinction between Rule 14a-8 proposals and other proposals, a distinction that is wholly absent from the language of the Bylaws, by emphasizing the word "applicable" and asserting that Rule 14a-8 only applies when Rule 14a-8 would, absent the Bylaws, apply. AB at 15. But this reading ignores the balance of the sentence, which provides that all notices must satisfy any applicable securities laws "establishing the circumstances under which the Corporation is required to include the proposal in its proxy statement or form of proxy." Moreover, if the Bylaw applies to proposals other than Rule 14a-8 proposals, it is impossible to determine how the $1,000 and one-year holding restrictions would apply without reference to the federal securities laws that specify how the ownership and holding periods are calculated for Rule 14a-8 proposals (*see* OB at 11, n. 4), further demonstrating that this Bylaw either applies only to Rule 14a-8 proposals or is hopelessly ambiguous.[3]

Rather than present a clear interpretation of the 14a-8 Bylaw that accounts for all of its language, CNET resorts to makeweight arguments to essentially claim that the Bylaw

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[3] In seeking further support for the missing distinction between 14a-8 proposals and other proposals in the 14a-8 Bylaw, CNET states that the holding requirements in the 14a-8 bylaw are "similar, albeit less onerous" than those contained in Rule 14a-8 (*see* AB at 25). However, the 14a-8 Bylaw tracks the holding requirements of Rule 14a-8 as it existed in 1996, when the Bylaw was adopted.

means something it clearly does not say. CNET first argues that the 14a-8 Bylaw must be read to apply to notice of non-Rule 14a-8 proposals because otherwise no notice of such proposals would be required under the Bylaws, and this result would be "senseless," "patently unreasonable" and "absurd." AB at 12 & 17. However, under Delaware law, a stockholder is not required to provide a company advance notice of other business to be brought at an annual meeting. *See* 8 *Del. C.* § 222(a) (requiring advance notice of business to be transacted at a *special* meeting of stockholders, but requiring no such notice of business to brought an annual meeting); AB at 28 n. 4 (conceding that "Delaware . . . has not enacted statutes or regulations that require advance notice by stockholders of business that they seek to present at an annual meeting . . . ."). Thus, CNET is essentially arguing, without support, that the default rule under Delaware law is "senseless," "patently unreasonable" and "absurd." Clearly, JANA's interpretation of the Bylaws cannot be "unreasonable" or "absurd" as CNET suggests because JANA's interpretation does nothing more than provide CNET stockholders the same ability to nominate directors and bring proposals at the annual meeting as they would enjoy under the default rule of Delaware law.

CNET next argues that the 14a-8 Bylaw cannot be read to apply only to Rule 14a-8 proposals because such a reading would mean that the Bylaw does nothing more than summarize applicable law and would therefore render the Bylaw "meaningless." AB at 15. However, it is hardly unusual for a public company's bylaws to contain summaries of applicable law. Indeed, CNET fails to acknowledge that several of its own Bylaws do nothing more than summarize applicable legal requirements. *See, e.g.*, CNET Bylaws, Article II, Section 7 (summarizing the stocklist provisions of Section 219 of the DGCL); Article II, Section 10 (summarizing the form of proxy provisions of Sections 212(b) through (e) of the DGCL); Article

II, Section 12 (summarizing the stockholder written consent provisions of Section 228 of the DGCL).

Finally, CNET relies heavily on prior disclosures in proxy statements where it claims it has asserted that the 14a-8 Bylaw applies to both Rule 14a-8 proposals and other stockholder proposals. AB at 13-14. However, those prior disclosures only demonstrate that CNET could have drafted a bylaw that clearly differentiated between Rule 14a-8 proposals and other proposals, but failed to do so in its Bylaws.[4] Indeed, CNET's proxy materials first set forth the applicable requirements for Rule 14a-8 proposals and then set forth the purported requirements for proposals not meant to be included in the Company's proxy materials under Rule 14a-8. *See* AB at 14; Ex. B. to LeGrow Decl. (CNET Proxy Statement for 2007 Annual Meeting of Stockholders, dated April 30, 2007, p. 5-6) The 14a-8 Bylaw contains no such delineation between Rule 14a-8 proposals and other proposals. Given that CNET must look to its proxy statements to find such delineation anywhere in writing, and more generally to explain its interpretation of the 14a-8 Bylaw, it has essentially conceded that the scope of the Bylaw cannot be ascertained from its plain language. Accordingly, as explained in more detail below, any ambiguity must be resolved in favor of JANA and the other public investors who played no role in drafting the Bylaw.

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[4] Similarly, in a failed effort to uphold its interpretation, CNET relies on the fact that no stockholder has objected to the application of the 14a-8 Bylaw to all stockholder proposals. AB at 14-15. This means only that either no stockholder has ever had cause to object to the Bylaw or no stockholder has been willing to subject itself to the litigation that JANA is now undertaking.

2. Any Ambiguity In The Rule 14a-8 Bylaw Must Be Resolved In Favor Of The Stockholder's Nomination And Proposal Rights.

At best, CNET's reading of the 14a-8 Bylaw demonstrates only that the Bylaw is hopelessly ambiguous. When this Court is confronted with a provision that could reasonably be interpreted as either restricting or not restricting a stockholder's right to nominate director candidates or present other proposals, the Court will choose the interpretation that imposes no restriction on such rights. *Harrah's*, 802 A.2d at 310 (finding that an ambiguous charter provision could be read to restrict a stockholder's nomination rights, but instead interpreting the provision in the manner least restrictive to the stockholder because any "residual doubt . . . must be resolved in favor of permitting [the stockholder] to exercise [its] electoral rights" to nominate director candidates). To avoid this result, CNET argues that, if the 14a-8 Bylaw is ambiguous and susceptible to either JANA's or CNET's interpretation, the case must proceed to discovery to determine the "intent of the parties." AB at 18. However, discovery is inappropriate here because, as CNET concedes, the 14a-8 Bylaw was unilaterally drafted by CNET and its insider, pre-IPO stockholders. AB at 23. Because the public stockholders had no role in drafting CNET's Bylaws, discovery is unnecessary. *See SI Management L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998) ("A court considering extrinsic evidence assumes that there is some connection between the expectations of contracting parties revealed by that evidence and the way contract terms were articulated by the parties. Therefore, unless extrinsic evidence can speak to the intent of *all* parties to a contract, it provides an incomplete guide with which to interpret contractual language.").[5] Rather, where, as here, the provision is unilaterally drafted by one party, the

[5] The cases CNET relies on to assert that this case must proceed to discovery to divine the "intent" of drafters involved contracts that were bilaterally negotiated between two parties and therefore are inapposite here. AB at 18 (relying on *BAE Sys. N. Am. Inc. v.*

doctrine of *contra proferentem* applies, and all ambiguities must be construed against the drafter. *Id.* As Vice Chancellor Strine stated in *Harrah's*, parole evidence should not be considered in cases like the one currently before this Court "because it is inequitable to burden the rights of public stockholders based on an obscure drafting history to which they were not a party."[6] *Harrah's*, 802 A.2d at 311.

B. CNET's Purported Reading Of The Rule 14a-8 Bylaw To Impose Holding Restrictions On Direct Stockholder Proposals Would Be Invalid Under Delaware Law.

Even assuming, *arguendo*, that the Rule 14a-8 Bylaw could be read as expressly and unambiguously applying to non-Rule 14a-8 proposals made directly by stockholders (which it cannot), the discriminatory $1,000 and one-year holding restrictions on the stockholder

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Lockheed Martin Corp., 2004 WL 1739522 (Del. Ch.) (Ex. C) (involving a contract negotiated between two airplane manufacturers) and *Rag. Am. Coal Co.*, 1999 WL 1261376 (Del. Ch.) (Ex. D) (involving a negotiated stock purchase agreement between sophisticated parties)). Similarly, CNET's argument that its prior disclosures in its proxy materials somehow bind the stockholders to CNET's interpretation of the Bylaws is misplaced. AB at 14. Rather, these cases stand only for the proposition that a party's pre-litigation conduct is helpful in determining the intent of parties' who negotiated a bilateral contract. *See Bd. Of Educ. of the Appoquinimick Sch. Dist. v. Appoquinimick Educ. Ass'n*, 1999 WL 826492 (Del. Ch.) (Ex. E) (involving a collective bargaining agreement negotiated by an employee union and the employer); *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513 (Del. 2005) (involving an "intensely negotiated stock purchase agreement").

[6] CNET argues that discovery would be necessary here because the *Harrah's* case was decided only following discovery. AB at 18 n. 16. However, CNET fails to mention that *Harrah's* involved charter and bylaw provisions that the stockholder-plaintiff actively participated in drafting. *Harrah's*, 802 A.2d at 312-13. The *Harrah's* Court pointed out that discovery into parole evidence would have been unnecessary if the stockholder had not participated in drafting the document. *Id.* at 312.

CNET also misstates the facts in *Openwave Systems, Inc. v. Harbinger Capital Partners Master Fund I, Ltd.* by implying that the *Harbinger* Court proceeded to trial to conduct fact-finding on a bylaw interpretation issue. AB at 18 n. 16. However, that case proceeded to trial so the Court could make factual determinations about the "overall equities of the parties' conduct" in question, *not* because discovery was necessary to ascertain the meaning of an ambiguous bylaw provision. 2007 WL 704943, at *2 (Del. Ch.) (Ex. F).

franchise right that it seeks to impose still would not take away JANA's right to present its platform to the stockholders because those restrictions are invalid as a matter of Delaware law. CNET's numerous attempts to side-step the illegality of these restrictions in its Answering Brief fail.

1. The Discriminatory Ownership Restrictions Cannot Be Held Valid Solely Because They Were Adopted By Pre-IPO Stockholders Or Potentially Could Be Circumvented.

Throughout its Answering Brief, CNET implies that the Court need not test the validity of the $1,000 and one-year holding restrictions because a group of pre-IPO stockholders purportedly adopted these restrictions. CNET's argument fails both as a matter of law and as a matter of fact.

There is no rule of law that validates an otherwise invalid bylaw simply because it was adopted by the stockholders.[7] To the contrary, whether the provisions at issue were adopted by the Board or the stockholders has no effect on their validity. Section 109(b) of the DGCL specifies that no bylaw may be inconsistent with Delaware law.[8]

In its Answering Brief, CNET also implies that it would somehow be unfair for the Court to invalidate the holding restrictions because they were adopted by pre-IPO

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[7] CNET states that the Supreme Court's decision in *Centaur Partners, IV v. National Intergroup, Inc.* 582 A.2d 923 (Del. 1990) supports its assertion that stockholder-approved bylaws warrant "judicial deference" from the court. CNET is mistaken. *Centaur* dealt only with the interpretation of certain charter and bylaw provisions, *not* the validity of those provisions.

[8] Similarly, the fact that the 14a-8 Bylaw was in effect when JANA purchased its stock has no effect on the validity of the Bylaw. If the 14a-8 Bylaw is invalid, it does not matter if JANA purchased its stock with notice of that Bylaw. The case CNET relies on for this novel proposition simply has nothing to do with the validity of a bylaw provision. *See* AB at 29 (citing *Serlick v. Pennzoil Co.*, 1984 WL 8267 (Del. Ch.) (Ex. G) (case involving whether a stockholder was estopped from challenging the fairness of a merger because the stockholder accepted the consideration offered in the merger)).

stockholders. However, the best spin CNET can put on this "equities" argument is a post hoc rationale that the founding stockholders of the Company decided to adopt the 14a-8 Bylaw as a means to discourage proxy contests. Under Delaware law, stockholder approval, whether pre- or post-IPO, does not save an otherwise invalid bylaw.

Similarly, CNET's suggestion that the discriminatory $1,000 and one-year holding restrictions should be upheld because it believes JANA could have taken actions to circumvent these restrictions is irrelevant:

- CNET suggests that JANA could have evaded the $1,000 and one-year holding restrictions by acting by written consent. AB at 30. However, CNET has not demonstrated how the right to act by written consent justifies an infringement on the stockholders' fundamental right to nominate candidates and propose business at an annual meeting or how it bears on the reasonableness of the one-year and $1,000 restrictions. Furthermore, acting by written consent is hardly equivalent to acting at a meeting because the vote required to act by written consent is much higher than the vote required to approve action at a meeting. *See* Article XII of CNET's Bylaws.

- CNET also suggests that JANA could have avoided the holding restrictions by simply finding another CNET stockholder who has owned $1,000 of stock for more than one year and then convincing that stockholder to nominate JANA's candidates and make JANA's proposals. This notion is not only beside the point (since the issue in *this case* is *JANA's* right to present nominees and proposals), but also is a poor substitute for JANA's right to make unilateral nominations and proposals. For example, the straw man that CNET urges JANA to find could announce an intention to present JANA's nominees and proposals and later withdraw them after striking a deal with management. Clearly, the "piggyback" procedure CNET suggests is no substitute for JANA's right to make its nominations and proposals directly.

In any event, as discussed below, such discriminatory ownership restrictions would be invalid as a matter of Delaware law regardless of whether a stockholder would be able to circumvent such restrictions.

2. The Discriminatory Holding Restrictions Do Not Serve A Proper Corporate Purpose Under Delaware Law.

In its Answering Brief, CNET claims that the 14a-8 Bylaw is valid because it is intended only to discriminate against "short-term" and "minimally invested" stockholders. AB at 27. However, CNET cites to no Delaware authority, nor is there any Delaware authority, that supports this notion that a company may through a bylaw provision discriminate against purported "short-term" or "minimally invested" stockholders by using ownership restrictions to infringe upon the stockholders' fundamental right to nominate directors and present other corporate business at an annual meeting. Nor has CNET offered any legitimate and valid policy reason why this Court should recognize the validity of such bylaw provisions that discriminate against purported "short-term" or "minimally invested" stockholders in this case. Accordingly, CNET's effort to prevent its stockholders from having the right to vote for JANA's nominees and proposals at the annual meeting fails.

In that regard, the best authority CNET can muster to support the validity of the discriminatory holding restrictions are the cases upholding advance notice bylaws. However, as JANA pointed out in its Opening Brief, Delaware courts have upheld the validity of "reasonable" advance notice bylaws based upon the express finding that they benefit stockholders by providing them reasonable notice of nominees and business proposals so that they may cast an informed vote at the annual meeting without impermissibly impeding the stockholders' nomination and voting rights. OB at 26-27. In other words, the Delaware courts have concluded that "reasonable" advance notice bylaws enhance the stockholders' fundamental franchise right under Delaware law. In stark contrast, the holding restrictions urged by CNET in this case do not enhance the stockholders' voting rights, but rather greatly diminish those rights by restricting

the ability of stockholders to consider and vote on alternatives to the incumbent management based upon arbitrary restrictions.[9] OB at 20-21.

In fact, the advance notice bylaw cases undermine, rather than support, CNET's argument. The case law upholding advance notice bylaws consider the right to present nominees and proposals to be part of the stockholders' voting rights. *Hubbard*, 1991 WL 3151, at *11. For that reason, the courts have consistently warned that an advance notice bylaw would be invalidated if the notice requirements are too onerous. *Id.* (noting that an advance notice bylaw must be reasonable both "on its face" and in application to specific cases). Indeed, in analogous circumstances, the Court of Chancery has cautioned that corporations should be wary of requiring more than 90 days' advance notice for nominees and proposals. *Mentor Graphics Corp. v. Quickturn Design Systems, Inc.*, 728 A.2d 25, 43 n. 70 (Del. Ch. 1998) (noting with respect to a mandatory delay between a stockholder's request for a special meeting and the date of the meeting that even a 90-day notice period may not be reasonable in all instances). Yet, the $1,000 and one-year holding restrictions would have the same limiting effect as a bylaw requiring more than a year's notice of nominees and proposals. Certainly, no one would assert that such a long advance notice bylaw is valid. The $1,000 and one-year holding restrictions must be invalidated for the same reason.

Equally meritless is CNET's attempt to rely upon cases in which the Delaware courts have upheld *charter* provisions that discriminate against the franchise rights of certain

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[9] CNET suggests that somehow JANA has conceded the validity of the ownership restrictions and their applicability to JANA simply because JANA provided advance notice of its nominees and proposals to CNET. That argument is absurd. JANA provided advance notice of its nominees primarily to allow stockholders sufficient time to learn about JANA's nominees and its other proposals. Indeed, in its notice to CNET, JANA expressly reserved the right to challenge both the application of CNET's Bylaws to JANA's nominees and proposals and the validity of those bylaws. *See* Ex. A to Verified Complaint.

holders of the same class of stock. AB at 28 n. 26 (citing *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977); *Sagusa, Inc. v. Magellan Petroleum Corp.*, 1993 WL 512487 (Del. Ch. 1993), *aff'd* 650 A.2d 1306 (Del. 1994) (Ex. B) (affirming by order without separate opinion)). As JANA noted in its Opening Brief, a company may discriminate against the stockholders' voting rights, which include the right to nominate and propose business, only pursuant to a provision adopted in the *charter*, in accordance with Section 212 of the DGCL. OB at 23. However, Section 212 of the DGCL does not permit such discrimination in the bylaws. Tellingly, CNET fails to even cite to Section 212 in its Answering Brief.

Similarly, CNET's claim that the Court should uphold the arbitrary $1,000 and one-year holding restrictions because they help deter burdensome proxy contests is repugnant to Delaware law and the fundamental recognition of the stockholders' franchise right. In that regard, CNET's justification for the restrictions is premised on the faulty idea that proxy contests for director elections are somehow inherently bad or not worth the disturbance to incumbents, and therefore, some distinction must be made among the stockholders to discourage proxy contests by denying nomination and proposal rights to some stockholders but not others.[10] However, the fundamental underpinning of the Delaware corporate law is that director elections are the primary means by which the stockholders can affect company management. 8 *Del. C.* § 211 (granting stockholders the right to elect directors once a year at an annual meeting);

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[10] CNET seeks to legitimatize its purpose by noting that proxy contests can be "expensive, burdensome, and disruptive to the corporation." However, nothing requires the incumbents to tax the Company's treasury by going far beyond just making their case for the status quo but rather using lawyers, proxy solicitors and public relations experts to fight a vehement campaign against JANA, or any other new investor wishing to field nominees to compete with the incumbents. Indeed, were the incumbents confident with their own job performance, they need not spend an extraordinary amount of time to solicit proxies: their management record would speak for itself and the stockholders could simply elect the best candidates and vote on whether to accept or reject JANA's proposals.

Harrah's, 802 A.2d at 311 n.39 (citing *PL Capital LLC v. Bonaventura*, Del. Ch. C.A. No. 19068, tr. at 27 Noble, V.C. (Sep. 28, 2001) ("Shareholders don't run the company. . . . directors do. Thus, for an ongoing corporate venture, the election of directors may be the most . . . important action[] that shareholders can take.")). The power to amend the bylaws is an equally fundamental right of the stockholders guaranteed by statute. 8 *Del. C.* § 109(a). Moreover, the fundamental right to vote for the election of directors can only be meaningfully exercised if stockholders have the concomitant right to nominate and to choose between candidates. *Id.* ("[W]ithout a choice of candidates, there can be no election or exercise of [the stockholder] franchise."); *Hubbard*, 1991 WL 3151, at *6 ("To allow for voting while maintaining a closed candidate selection process . . . renders [voting] an empty exercise. This is as true in corporate suffrage contest as it is in civic elections.") (quoting *Durkin v. National Bank of Olyphant*, 772 F.2d 55, 59 (3d Cir. 1985)). Similarly, the right to amend the bylaws must necessarily include the right to propose bylaw amendments. Although CNET characterizes proxy contests as a "burden" to public stockholders (AB, at 27), both common sense and Delaware law (*see id.*) are to the contrary: proxy contests benefit *all* stockholders by giving them an alternative platform to choose from.

Furthermore, CNET misstates Delaware law to the extent it suggests that only "long-term" investors should be entitled to conduct a proxy contest. *See* AB at 27 ("The Notice Bylaw is merely designed to ensure that the burden of a potentially costly and divisive proxy contest . . . will be undertaken only by stockholders whose investment evinces a minimal commitment to the long term interests of the enterprise."). In its Answering Brief, CNET cites to Delaware cases noting that the directors may favor long-term value over short-term value in making *board* decisions on how to manage the company. AB, at 27 & 28. However, Delaware

law is exactly the opposite when the issue involves the *stockholder* decision as to whom to elect as directors. As the Court noted in *Blasius*, stockholders are entitled to elect directors running on a slate to maximize short-term value even if the incumbent directors believe this course of action is foolish.[11] The selection of candidates is solely the prerogative of the stockholders, and they may exercise this prerogative to elect directors who will pursue either a short-term or long-term value strategy.

Finally, CNET's suggestion that the SEC's policy for adopting Rule 14a-8 supports the propriety under Delaware law of imposing discriminatory holding requirements on fundamental stockholder franchise rights through a bylaw provision is meritless. As set forth in JANA's opening brief -- and ignored in CNET's Answering Brief -- Rule 14a-8 governs *only* the federally-created right of stockholders to seek inclusion of proposals in a company's proxy materials; it does not address direct stockholder proposals or the solicitation of proxies for such actions. The holding requirements in Rule 14a-8 are intended only to act as a barrier to a stockholder attempting to force a company to incur the expense of placing frivolous stockholder proposals in its own proxy materials. *See* OB at 30-31. The SEC has never imposed these holding requirements on stockholders who are willing to bear the expense of soliciting their own

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[11] *Blasius Indus. Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (invalidating board action that would have precluded the stockholders from taking control of the board in order to pursue a restructuring that the incumbents believed was not advisable, and stating "[t]he only justification that can be offered for the action taken is that the board knows better than do the shareholders what is in the corporation's best interest. While that premise is no doubt true for any number of matters, it is irrelevant (except insofar as the shareholders wish to be guided by the board's recommendation) when the question is who should comprise the board"). *See also Coaxial Communications, Inc. v. CNA Financial Corp.*, 367 A.2d 994, 998 (Del. Ch. 1976) (noting that, with respect to the statutory right to petition the Court of Chancery to order an annual meeting, Section 211 "does not distinguish between large and small stockholders, nor between those in accord with and those in opposition to existing management [and] . . . each has the right to invoke judicial aid to compel compliance with [Section 211].").

proxies in favor of their direct proposals and director nominees. Indeed, if the SEC thought it was appropriate to place similar holding requirements on all nominations and proposals, it could easily have done so. Thus, the SEC has implicitly rejected CNET's argument that a stockholder should be forced to own a minimum amount of stock for a minimum period of time before it can solicit proxies in favor of non-Rule 14a-8 proposals and stockholder nominees. Clearly, the SEC does not have a policy or regulation that discourages stockholders from bringing proxy contests.

Contrary to CNET's assertions, JANA has *not* conceded that the ownership requirements set forth in Rule 14a-8 would be valid under Delaware law when applied to non-Rule 14a-8 proposals. *See* AB at 25-26. With respect to Rule 14a-8, the SEC rules grant stockholders mandatory access to the Company's proxy materials, subject to certain limits, including a one-year and $2,000 holding requirement. Delaware law does not grant stockholders a right of access to the Company's proxy materials, but does grant the right to make proposals. Delaware law has never allowed any type of bylaw-imposed restriction on such right based on length or amount of ownership, nor is there any need to do so given the benefits of such contests to stockholders and since the expense of presenting a stockholder proposal outside the Rule 14a-8 context serves as a sufficient barrier to prevent proxy contests for "frivolous" proposals.

3. Even If CNET's Stated Purpose For The Discriminatory Holding Restrictions Is Valid, The Restrictions Are Not Reasonably Related To That Purpose.

Even assuming CNET can validly discriminate against stockholders for its stated purpose of avoiding proxy contests by "minimally invested" stockholders (which it cannot), CNET has failed to show that the restrictions are reasonably related to that purpose.[12] Contrary

[12] Plaintiff's assertion that this case must proceed to discovery in order for the Court to assess the reasonableness of the one-year and $1,000 holding restrictions lacks merit.

to CNET's assertion, the one-year holding requirement is unnecessary to show that a stockholder such as JANA has a sufficient "minimal interest" in the Company (or "skin in the game" as CNET puts it) to present a proxy contest. To the contrary, few stockholders have more "skin in the game" than JANA:

- JANA is the second largest beneficial owner of CNET common stock according to current SEC filings;
- JANA has proposed seven, highly qualified nominees (only one of whom was affiliated with JANA prior to this proxy contest and all of whom are independent of each other) to stand for election and, if elected, to manage the Company to enhance value for *all* CNET stockholders;
- JANA has incurred the substantial costs of pursuing this litigation, as well as other costs related to such efforts, only for the chance to offer the stockholders a choice at the annual meeting, despite the vigorous entrenchment efforts of the incumbents.

Clearly how long a stockholder has owned its stock bears no relationship to its commitment to enhancing the value of the Company.[13] Accordingly, the one-year holding period is unnecessarily restrictive, as it would prevent one of CNET's largest investors from fully exercising its franchise rights to nominate and vote in director elections and to propose bylaw amendments. CNET's Answering Brief also fails to refute the fact that the $1,000 and one-year

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The Delaware courts have recognized that a bylaw can be invalidated if it is unreasonable as a matter of law, i.e., if the bylaw is unreasonable on its face. *See Hubbard*, 1991 WL 3151, at *11 (to be upheld, an advance notice bylaw must be reasonable "on its face" and as it is applied in particular circumstances). Furthermore, CNET has not, and cannot, identify any type of discovery that is necessary to determine whether the restrictions at issue are reasonable as a matter of law.

[13] *See, e.g.*, *"CNET Networks (CNET)/'Tag Team Control Contest'"*, RiskMetrics Group, (formerly ISS), M&A Edge Note, January 11, 2008 at 2-3. "Although *M&A Edge* recs are directed at long-term shareholders, it does not follow that the proposals of shorter-term investors necessarily would be detrimental to shareholder value and hence should not be heard. Indeed, we have seen many instances where ideas submitted by short-term investors helped create significant shareholder value for all shareholders, including long-term holders."

holdings restrictions are overly broad because they harm *both* short-term and long-term stockholders by preventing *all* stockholders from choosing among competing candidates in a proxy contest.

Furthermore, the costs of proxy contests alone are a sufficient barrier to entry that will prevent a stockholder from engaging CNET in a frivolous proxy contest, and a stockholder such as JANA will engage in a proxy contest only when CNET's management has underperformed to the point where a stockholder is willing to bear the costs and expense of running a proxy contest to change Board membership.

In this case, CNET under the incumbent board has fundamentally underperformed for a number of years. As a result of this underperformance, JANA seeks to give stockholders a right to choose to elect qualified new directors committed to lead the Company back to prosperity. The effort of CNET's incumbent management to deny the stockholders this choice and to infringe on the stockholders' fundamental franchise right to elect directors at the annual meeting should not be countenanced.

CONCLUSION

For all of the foregoing reasons as well as those stated in its Opening Brief, JANA respectfully requests that the Court grant its motion for judgment on the pleadings and require CNET to allow its stockholders to vote on JANA's nominees and other proposals at the 2008 annual meeting.

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