IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEVITT CORP., a Florida corporation, Plaintiff, v. OFFICE DEPOT, INC., a Delaware corporation, Defendant.	)	Civil Action No. 3622-VCN

REPLY BRIEF IN SUPPORT OF LEVITT CORP.'S MOTION FOR JUDGMENT ON THE PLEADINGS AND IN OPPOSITION TO OFFICE DEPOT'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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Dated: April 8, 2008
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PRELIMINARY STATEMENT

Nothing contained in Office Depot's Answering Brief ("Opp. Br.") changes the obvious answer to the straightforward issue presented by this action: Office Depot's advance notice provision, which makes no mention at all of the nomination of directors and lacks the typical requirement to provide information about potential nominees, cannot be read to restrict the right of Office Depot shareholders to nominate directors. Nor can Office Depot's series of half-hearted excuses and justifications overcome the fact that its Bylaws once contained a clear and unambiguous advance notice provision applicable to the nomination of directors, but that provision was intentionally deleted by the Office Depot Board. For all the reasons articulated in Levitt's Opening Brief ("Levitt Br."), and as detailed herein, Levitt's Motion[1] should be granted and Office Depot's attempt to disenfranchise its shareholders should be rejected.

The tone and content of Office Depot's Answering Brief is disappointing, but hardly surprising. Consistent with its repeated personal attacks on Levitt's Nominees in the media, Office Depot's brief puts a greater focus on irrelevant, *ad hominem* accusations than it does on the legal issues Levitt has raised. If Office Depot was going to reach outside of the record for something truly relevant, it might have pointed out that Levitt, as a holder of over three million shares, constituting 1.1% of the Company, (i) purchased nearly 3 million *more* shares than the entirety of the 12-person Office Depot Board has acquired in the open market in the last ten years (which *total* 69,000 shares) and (ii) holds almost *three times* the amount of shares owned outright by the members of the Board. Office Depot's legal arguments suffer from a similar irrelevance. Rather than responding directly to the arguments made by Levitt, Office Depot

[1] The defined terms as set forth in Levitt's Opening Brief are used herein.

debunks curiously constructed straw men and offers never before disclosed explanations about a "phantom" version of its Bylaws that conveniently match its litigation strategy.

Reduced to its core, Office Depot's primary argument is that the term "business" is so broad that there is presumably nothing that cannot fall within its ambit. But this argument proves too much, and Office Depot's interpretation of "business" is, at best, ambiguous. Although "business" is a general term that could conceivably include many different things, it does not, as used in the Office Depot Bylaws, clearly and unambiguously refer to the nomination of directors such that it can restrict the fundamental shareholder right to nominate directors for election. Office Depot fails to cite a single case that supports its interpretation, and the series of statutes that it cites instead lend it no assistance. Indeed, in the almost eight years since its Bylaws were amended, Office Depot concedes that it has never publicly advised its shareholders that it believes that its Bylaws require advance notice for the nomination of directors. It cannot credibly make this claim now.

Citing no public disclosure and having sought no shareholder approval for its amendments, Office Depot is left to invent irrelevant justifications *post facto* for why it removed a specific advance notification provision in 2000. Office Depot starts by referencing its "phantom" 1999 Bylaws, which cannot save its argument. In the height of hubris (or maybe irony), Office Depot accuses Levitt of "ignor[ing]" its 1999 Bylaws, which is not only wrong (*see* Levitt Br. at 10 n.1), but remarkable, because Office Depot acknowledges that, due to a claimed "oversight" (Opp. Br. at 16 n.7), the 1999 Bylaws were *never* publicly disclosed or incorporated by reference in any Office Depot public filing. Thus, Office Depot's 1999 Bylaws can play no role in this analysis. In any event, it is truly irrelevant whether the Bylaws were amended in 1999 or 2000. The fact remains that Office Depot went from having specific

requirements for advance notice for director nominations to the general term "business" with no reference to director nominations.

Office Depot's argument is that by making its Bylaws *less specific*, it was making them more clear. But this is contrary to logic, common sense and Delaware law. The only reasonable interpretation of Office Depot's deletion of every reference to the nomination of directors contained in the 1996 Bylaws is that Office Depot no longer intended to impose such a restriction on its shareholders. Any other interpretation would require construing ambiguous terms against shareholders, and thereby disenfranchising them. In short, under bedrock Delaware law, Office Depot was required to provide "clear and convincing" evidence to restrict Levitt's franchise rights, and it has failed to meet that burden. As a result, Office Depot has no advance nomination requirement for directors, the Delaware default rule applies, and Levitt's Nominees should not be wrongfully denied their right to stand for election at the Annual Meeting on April 23.

Should the Court deem it necessary to reach the issue, and we believe it need not, Office Depot's 141-day advance notice period is unreasonable as a matter of law and, accordingly, must be stricken. Notwithstanding Office Depot's various and largely unsupported arguments about why Levitt cannot assert this claim, Levitt's Complaint, in its very first paragraph, clearly raises a facial challenge to the validity of Office Depot's unreasonably lengthy notice provision which is confirmed by Office Depot's Answer and its public disclosures. Levitt's facial challenge raises no factual issues, and Office Depot has identified none, thus rendering this argument appropriate for resolution on motion for judgment on the pleadings. Office Depot's only substantive attempt to defend its over-length bylaw provision ─ that it is reasonable because it contains the same time period as in SEC Rule 14a-8 ─ also misses the point. It makes perfect

sense that an SEC Rule would provide for a company to have more notice if it is required to include a shareholder proposal on its own proxy statement, but that Delaware law would reject unreasonable attempts to restrict the shareholder franchise.

Finally, far from a "makeweight" argument, there can be no doubt that Office Depot has already specified in its proxy statement that the business of the Annual Meeting is to "elect (12) members of the Board of Directors." There is no support in the language of the proxy for Office Depot's argument that its notice only applies to electing its *own* nominees, as Office Depot now claims. In any event, contrary to its position in this litigation, Office Depot has publicly notified its shareholders that Levitt's nominees were "timely nominated." On March 24, 2008, Office Depot's supplemental proxy statement announced that:

> *Because the number of nominees timely nominated for the Annual Meeting exceeds the number of directors to be elected at the Annual Meeting*, the election of directors is a contested election under Office Depot's bylaws. As a result, directors will be elected by a plurality of the votes cast at the Annual Meeting, meaning the 12 nominees receiving the most votes will be elected. Only votes cast 'FOR' a nominee will be counted.

Supplemental Declaration of David B. Hennes, dated April 8, 2008 ("Hennes Supp. Decl.") Exh. L (March 24, 2008 Form DEF 14-A Definitive Additional Materials ("Supp. Proxy") at 5 (emphasis added)). No additional notice is now required and Levitt's Nominees are entitled to stand for election.

ARGUMENT

I. OFFICE DEPOT'S BYLAWS ARE CLEAR AND UNAMBIGUOUS – NO ADVANCE NOTICE RESTRICTION APPLIES TO SHAREHOLDER NOMINATIONS

Office Depot cannot meet its burden of demonstrating, by clear and convincing evidence, that its Bylaws clearly and unambiguously apply to the nomination of directors. Indeed, Office Depot does not dispute that: (i) its Bylaws are entirely silent with respect to the nomination of directors, (ii) it deliberately struck the provisions that required a stockholder to provide detailed information about its nominees, and (iii) it has never publicly disclosed its belief that its Bylaws currently require advance notice for director nominations. Because Office Depot's Bylaws contain no clear and unambiguous restriction of its shareholders' right to nominate directors, no advance notice requirement may now be imposed. *See* Levitt Br. at 13-14 (citing cases). Office Depot's argument to the contrary must be rejected.

A review of the history of Office Depot's publicly available Bylaws supports Levitt's position, not Office Depot's.[2] Office Depot acknowledges that its 1996 Bylaws contained an explicit provision (Article III, Section 3) that required advance notice to be given for the nomination of directors. *See* Opp. Br. at 3-4. Article III, Section 3 of the 1996 Bylaws, titled "Nomination of Directors," clearly and unambiguously required shareholders to provide advance

[2] By citing to the history of its Bylaws (*see* Opp. Br. at 15-17), Office Depot concedes that such analysis is appropriate in interpreting its Bylaws. *See, e.g., Centaur Partners, IV v. Nat'l Intergroup, Inc*., 582 A.2d 923, 928 (Del. 1990) (considering the circumstances under which the charter and bylaws were amended in determining the "intended result of the proposed combined change in the charter and by-laws"); *FGC Holdings Ltd. v. Teltronics, Inc*., 2005 WL 2334357, at *3, *6 (Del. Ch.) (same). Likewise, standard rules of contract interpretation permit courts to consider undisputed background facts "to place the contractual provision in its historical setting." *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 & n.7 (Del. 1997); *see also FGC Holdings*, 2005 WL 2334357, at *5 ("Under the modern view of contract interpretation, I also may consider undisputed background facts to place the contract in its historical setting").

notice for the nomination of directors. *See* Hennes Decl., Exh. B ("Nominations of persons for election to the Board of Directors may be made at a meeting of the stockholders at which directors are to be elected . . . To be timely in connection with an annual meeting, a stockholder's notice shall be delivered . . . not less than 90 days prior to the date of the previous year's annual meeting"); *see also* Article II, Section 5. Article III, Section 3 also required detailed information about the nominees, including (i) the name, age, business address and residence address, (ii) the principal occupation or employment, (iii) the number of shares beneficially owned, (iv) a written consent to being nominated and serving as a director, and (v) any other information required by SEC Rule 14a-8, 17 C.F.R. § 240.14a-8(e)(2); and, with respect to the stockholder giving the notice, (i) name and address, and (ii) information regarding share ownership. *See id.* It is undisputed that this language was removed by the Office Depot Board, and no longer appears in the Bylaws.

In this litigation, Office Depot claims that it removed these clear provisions during a "general cleanup" of its Bylaws in February 1999 because they were "somewhat redundant." *See* Opp. Br. at 16. This newly invented explanation finds no actual support in any of Office Depot's public filings or other disclosures. As Office Depot concedes, the Office Depot Board never publicly commented on the meaning or intent of this "cleanup" and did not even bother to reference the 1999 Bylaws in its subsequent public filings. *See, e.g.,* 1998 Form 10-K at 24-25 (filed March 22, 1999); 1999 Form 10-K at 23-24 (filed March 22, 2000); 2000 Form 10-K at 18-19 (filed March 27, 2001) (excerpts attached at Hennes Decl., Exhs. F-H) (incorporating 1996 Bylaws); *see also* Opp. Br. at 16 n.7.

Nor was this language actually "redundant" as Office Depot now claims. At no time does Office Depot point to any provision that made Article III, Section 3 "redundant" such that it

needed a "general cleanup." That this is a litigation position is confirmed by the fact that this 1999 "cleanup" resulted in the removal of the advance notice provision from the Office Depot Bylaws *in its entirety*. *See* Opp. Br. at 15; *see also* Hennes Decl., Exh. E (1999 Bylaws, Article II, Section 4, entitled "Notice" contains no advance notice requirement). Moreover, it was only in August 2000, when Office Depot revised its Bylaws again, that an advance notice provision reappears. *See* Hennes Decl., Exh. C (Article II, Section 14).

Office Depot now claims that "an objective reader" comparing the 2000 or current Bylaws with the 1996 Bylaws "would most reasonably conclude" that Office Depot has a "general Bylaw providing for advance notice for all business to be conducted at the annual meeting" and that only the "extra information requirements" of Article III, Section 3 of the 1996 Bylaws were "dropped." Opp. Br. at 16-17. Tellingly, Office Depot offers no citation or support for its wholly conclusory statement and, in fact, just the opposite is true. The far more reasonable conclusion to be drawn from the removal of Article III, Section 3 (with its highly specific and clear requirements for the nomination of directors) and the deletion of any reference to the nomination of directors (such as in Article II, Section 5) is that Office Depot intended to remove the advance notice requirement it previously imposed on its shareholders' right to nominate directors, and that no such restriction currently exists. *See* Levitt Br. at 15 (citing cases); *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 221 (1979) ("It makes no sense to assume that the parties thought the new language subsumed the deleted provision. Had that been their intention, there would have been no reason to alter the contract"); *Wilmington Trust Co. v. Tropicana Entm't, LLC*, 2008 WL 555914, at *7 (Del. Ch.) ("When the parties omit a provision that seems obvious and could easily have been included, courts are loathe to impose such a provision by implication").

Finally, Office Depot simply cannot rely upon the 1999 Bylaws in order to support its interpretation of events. *See* Opp. Br. at 15-16. Despite having never publicly disclosed the 1999 Bylaws ─ blaming an "oversight" ─ Office Depot nonetheless contends that Levitt was "misleading and wrong" to ignore them because "the 1999 Bylaws were provided to Levitt during the negotiation of the Stipulation regarding scheduling in this matter." *See id*. But it is undisputed that Levitt only received these Bylaws *after* it had reviewed the publicly available Office Depot Bylaws and decided to initiate a proxy contest. *See id*. at 15. There is simply no merit to Office Depot's argument that Levitt, and all other Office Depot shareholders, must be bound by "phantom" Bylaws that were never disclosed due to a recurring "oversight" by Office Depot because counsel for Office Depot provided those Bylaws after the filing of the Complaint in this matter.

Because the 1999 Bylaws were never disclosed, they cannot be binding on Office Depot shareholders or play a role in the construction of Office Depot's current Bylaws. *See, e.g., Dousman v. Kobus,* 2002 WL 1335621, at *5 (Del. Ch.) (complaint stated a claim that the company was equitably estopped from relying on the supermajority provision in its bylaws because it "never disclosed or explained the applicability or effect of the supermajority voting requirement to [its] shareholders"); *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1259 (Del. Ch. 2003) ("[T]he Court [] has concerns that the . . . non-disclosure of the [advance notice provision in the] bylaws (and certain changes thereto) would be material to a stockholder"). As a result of their nondisclosure, the 1999 Bylaws simply cannot manifest "the parties' shared intent." *Sassano v. CIBC World Markets Corp.*, 2008 WL 152582, at *5 (Del. Ch.). As far as

Office Depot's shareholders are concerned, the 1999 Bylaws (which remain, to this day, publicly undisclosed) do not exist and never existed, and cannot be used to Levitt's detriment.[3]

In any event, the 1999 Bylaws shed no new light on the meaning of "business" in Office Depot's current Bylaws. The fact that the Office Depot Board, behind closed doors, eliminated the 1996 Bylaws' advance notice requirement in its entirety for director nominations in 1999 rather than in 2000 does not change the fact that Office Depot used to have an explicit advance notice requirement for director nominations but chose to remove it. The removal of the explicit advance notice provision relating to director nominations is the critical and dispositive issue – not the year the explicit language was removed. Therefore, even if the Court were to consider the 1999 Bylaws in its analysis, they offer no support to Office Depot's position.

In sum, both individually and jointly, the facts that: (i) Office Depot's advance notice provision contains no mention of director nominations, and (ii) the Office Depot Board removed a clear and unambiguous requirement for such notification, conclusively determines that no such notice is required.

II. OFFICE DEPOT'S INTERPRETATION OF "BUSINESS" IS UNCLEAR AND AMBIGUOUS

Although Office Depot claims that "business" is a "general term" that must "be taken in its broadest sense" to subsume director nominations (Opp. Br. at 11-12), it does not explain how

[3] Office Depot's argument that Levitt must "explain why" the phantom 1999 Bylaws should not be ignored (Opp. Br. at 16 & n.7) is wrong as a matter of law. Setting aside whether Levitt is even required to cite authority for such a proposition (Office Depot cites no case law), under Delaware law, directors would have been duty bound to advise its shareholders of the amendments to its Bylaws. *See Malone v. Brincat,* 722 A.2d 5, 10 (Del. 1998) (directors have a duty to speak honestly). Because the directors chose to remain silent, Office Depot cannot rely on an interpretation that was never hinted at in its disclosure to shareholders. Further, under an applicable SEC rule adopted in 2004, corporations are required to disclose amendments of their bylaws. *See* 17 C.F.R. 249.308 (a company with publicly traded securities must disclose any amendment to its articles of incorporation or bylaws if the amendment was not disclosed in a proxy or information statement filed by the company).

such an admittedly general term is not ambiguous. Rather than drafting clear and unambiguous Bylaws, as it must do if it wants to restrict shareholder rights, Office Depot claims, in essence, that the general and ambiguous term "business" encompasses everything. But Office Depot cites no cases to support this interpretation and only relies on a hodge-podge of irrelevant statutes, none of which bear on this analysis.

The statutes cited by Office Depot are either irrelevant or generally support Levitt's position that Office Depot's proffered reading of "business" is confusing and ambiguous. *See* Opp. Br. at 12-15 (citing 8 Del. C. §§ 211(b), 215(c), 216, 222(c), and 229). No Delaware court has ever interpreted those code sections in a manner supporting Office Depot's position, and Office Depot cites to none. *See* Opp. Br. at 12-14. "Business" as set forth in Article II, Section 14 is neither clear nor unambiguous — is it the election and voting process, *see, e.g.,* 8 Del. C. § 211(b) ("an annual meeting of stockholders shall be held for the election of directors"), the ability to vote, *see* § 216 (number of shares having "voting power" necessary to establish a quorum in order for the "transaction of any business" to occur), the nomination of directors, as urged by Office Depot, or something else? Even Office Depot confuses itself on this issue. *See* Opp. Br. at 13 ("'business' means any matters to be conducted or transacted at a meeting, including *election of directors*") (emphasis added).

In short, a shareholder should not need to embark on a quixotic journey through Delaware statutes in order to determine the meaning of something that Office Depot claims is clear. *See Harrah's Entm't Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002) ("When a corporate charter is alleged to contain a restriction on the fundamental electoral rights of stockholders under default provisions of law . . . the restriction must be 'clear and unambiguous' to be enforceable") (internal citation omitted); *Stengel v. Rotman,* 2001 WL 221512, at *6 (Del.

Ch.) ("As a general matter [ ] ambiguities in corporate bylaws will be resolved against the reading that would disenfranchise the stockholders") (footnote omitted).[4]

Office Depot's sophistry that "'business' is general, but in no way ambiguous" (Opp. Br. at 13) does not make its current Bylaws any clearer. There is simply no "common and plain" meaning to the word "business" given its various definitions and uses. *See, e.g., McMillan v. State Mut. Life Assurance Co.*, 922 F.2d 1073, 1075-76 (3d Cir. 1990) ("the word 'business' is certainly not self-clarifying. . . . *Indeed, it is hard to imagine a word with more varied uses in our society* . . . Webster's Dictionary contains no less than ten definitions of the word 'business'") (emphasis added). Office Depot has cited no case which holds that the nomination of directors is subsumed by the term "business," and there is none.

Office Depot also argues that Chancellor Chandler's recent decision in *Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 2008 WL 660556 (Del. Ch.) construed business to mean any matter that could be brought up at a meeting, including the nominations of directors. *See* Opp. Br. at 11-12. That decision did no such thing. Rather, Chancellor Chandler found that the relevant bylaw phrase "may seek to transact other corporate business" only made sense within the context of Rule 14a-8 because he observed that the "business of an annual meeting is the election and voting process." *Jana Master Fund, Ltd.*, 2008 WL 660556, at *5 (footnote omitted). At no point did the Court define "business" to include nominations using a bylaw

[4] In its brief, Office Depot contends that Levitt "says very little about what, under [Levitt's] reading, Article II, Section 14 does provide." Opp. Br. at 17. This has it exactly backwards, as the burden is not on Levitt to provide definitions for the undefined terms found in Office Depot's Bylaws, but on Office Depot to provide clear and convincing evidence that its Bylaws restrict shareholder rights. In any event, Article II, Section 14 could apply to any number of things other than director nominations, including, but certainly not limited to, a shareholder-proposed resolution to add, delete or amend a bylaw, a shareholder-proposed precatory resolution, or a shareholder-proposed resolution to require the Company to submit executive compensation to a shareholder vote. Under no circumstance would Levitt's construction render the Bylaw mere surplusage, as Office Depot's straw man argument contends.

analogous to Office Depot's. That would not be possible, because CNET's bylaws, unlike Office Depot's, contained an explicit provision concerning the nomination of directors. *See id.* at *1 ("Article III, Section 6, entitled 'Nominations for Directors'"). *Jana* is instructive here because it once again affirmed that shareholder nominations may not be restricted absent clear and unambiguous language, which is simply not present here.

The flaw in Office Depot's argument is exposed by the fact that the bylaw at issue in *every one* of the cases it cites for the general proposition that advance notice bylaws have been upheld by Delaware courts contains a specific, clear, and unambiguous advance notice provision that explicitly *includes* director nominations. *See* Opp. Br. at 15 (citing *Accipiter Life Sciences Fund, L.P. v. Helfer,* 905 A.2d 115, 117 (Del. Ch. 2006) (under Section 11 of the relevant bylaws, a "stockholder's proposal or *nomination* of directors is timely if . . ."); *Nomad Acquisition Corp. v. Damon Corp*., 1988 WL 383667, at *8 (Del. Ch.) ("The Class Plaintiffs also attack amended Section 9 of the by-laws requiring the giving of 60 days notice prior to the submitting of a *nomination* for the Board"); *Openwave Sys., Inc. v. Harbinger Capital Partners Master Fund I, Ltd.,* 924 A.2d 228, 235 (Del. Ch. 2007) ("[o]nly persons who are *nominated* in accordance with the procedures set forth in this Section 2.5 shall be eligible for election as directors"); *Stroud v. Grace*, 606 A.2d 75, 78 (Del. 1992) (Bylaw 3 "established the procedure for *nominating* candidates . . .") (emphasis added to all parentheticals)). Likewise, Office Depot makes no attempt to explain why its "clear but general" Bylaws differ from the model bylaws published in Delaware treatises which clearly and unambiguously refer to director nominations.[5]

[5] *See, e.g.*, 3 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS, Form 1.18 Advanced Notice Bylaw (2007) ("Section ___. Notice of Stockholder Business and Nominations. (A) Annual Meetings of Stockholders. (1) Nominations of persons for election to the Board of Directors of the Corporation and the proposal of business to be considered by the stockholders may be made at an

These models more closely mirror the 1996 provisions excised by Office Depot during its purported "general cleanup."

The ambiguity here is highlighted by the fact that Office Depot ties its advance notice deadline to the release of the Company's prior-year proxy statement, leading to a logical conclusion that it only applies if a shareholder is seeking inclusion of its proposal in the Company's proxy statement, rather than if a shareholder, such as Levitt, is self-funding its proposal, or making nominations not included in the Company's proxy statement. In response, Office Depot spends more than five pages setting up and knocking down a straw man, claiming that Levitt argued that the Article II, Section 14 is, in fact, a Rule 14a-8 Bylaw. *See* Opp. Br. at 17-22. Levitt did no such thing. Levitt never argued that Article II, Section 14 applies *only* where a shareholder seeks inclusion of a proposal on the Company's proxy statement, but rather that, because it is ambiguous, it could reasonably be read in a such a manner. *See* Levitt Br. at 21. This is yet another reason that Office Depot's advance notice provision is unclear and ambiguous.

In short, because Office Depot's suggested interpretation of its advance notice provision is ambiguous at best, it cannot be found to clearly and convincingly restrict the right of Levitt's Nominees to stand for election at the 2008 Annual Meeting. *See* Levitt Br. at 21; *Chandler v. Ciccoricco,* 2003 WL 21040185, at *13 (Del. Ch.) (party arguing for restriction on voting rights "cannot prevail unless the court finds clear and convincing evidence that the agreement was intended to have that restrictive effect") (citation omitted); *Harrah's*, 802 A.2d at 312 ("there should be clear and convincing evidence in support of the restriction on electoral rights");

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annual meeting of stockholders…."); CONTEMPORARY CORPORATION FORMS, 2d ed. Form 1.44 (2000-1 Supp.) ("Section __. Notice of Stockholder Business and Nominations. . . . Nominations of persons for election to the Board of Directors of the Corporation and the proposal of business to be considered by the stockholders . . .").

Openwave, 924 A.2d at 239 ("[i]f the language is found to be ambiguous, doubt is resolved in favor of the stockholders' electoral rights"). This conclusion is most appropriate because it is undisputed that Office Depot was the sole entity responsible for drafting its Bylaws. *See* Levitt Br. at 20-21; *Tenneco Auto. Inc. v. El Paso Corp.*, 2004 WL 3217795, at *8 (Del. Ch.) ("ambiguous terms will be construed against the drafter who was exclusively responsible for the terms chosen . . . the *contra proferentem* doctrine is typically applied . . . where the non-drafting party had little or no chance to provide input as to the language contained therein") (internal citations omitted).

* * *

Because Office Depot's Bylaws are silent on nominations, the standard, default rule for nominating directors applies, and Levitt's nominations for Office Depot's Board should be accepted up to, and including, the date of the Annual Meeting. *See Jana Master Fund,* 2008 WL 660556, at *6 & n.51 ("[a]lthough this may sound daunting, it is the default rule in Delaware"); BALOTTI, § 7.63 Election of Directors (at an annual meeting, "a stockholder will nominate a person not listed in the proxy statement. Unless it is obviously a frivolous nomination, some chairmen will accept the nomination and ask the inspectors to tabulate the shares voting for the nominee").

III. LEVITT'S CHALLENGE TO THE REASONABLENESS OF THE BYLAW IS PROPERLY BEFORE THE COURT AND IT SHOULD BE STRUCK DOWN

Should the Court deem it necessary to reach the issue, and we respectfully submit that it need not in this case, then the Court should hold that Office Depot's 141-day advance notice provision is unreasonably long and, therefore, invalid as a matter of Delaware law. To avoid this result, Office Depot spends most of its brief protesting that Levitt's invalidity argument is not

properly before the Court (*see* Opp. Br. at 22-27), but none of those arguments have merit, and Levitt's claim is appropriately resolved on this motion for a number of reasons.

First, Levitt's facial invalidity argument falls squarely within the allegations set forth in Levitt's Complaint. *See* Opp. Br. at 22-23. Indeed, in the very first paragraph describing the nature of the action, Levitt frames the issue in a way that clearly and immediately calls into question the propriety of Office Depot's over-length notice provision: *"[C]an the 120-day advance notice provision* . . . impose an advance notice restriction on the fundamental right of stockholders to exercise their franchise rights and nominate directors for election at Office Depot's upcoming annual meeting . . ." Complaint ¶ 1 (emphasis added). It does not say "the advance notice provision," rather, it says "the 120-day advance notice provision," implicating its length. Moreover, Levitt seeks all such relief "as may be just and equitable in the circumstances" (Complaint ¶ 30E), which includes invalidation of the challenged bylaw. *See Forsythe v. ESC Fund Mgmt. Co. Inc.,* 2007 WL 2982247, at *13 n.75 (Del. Ch.) (where claim not explicitly stated in complaint was nevertheless briefed by the parties and "the facts pled in the complaint clearly support[ed] such a theory of relief," court treated the complaint as "implicitly raising such a claim") (citations omitted).

Further, it is readily apparent that Office Depot understood precisely the scope of Levitt's claims. In Office Depot's (i) March 24th letter distributed to its shareholders and (ii) Answer in this proceeding ─ both filed and disclosed *before* Levitt filed this Motion ─ it clearly acknowledges that Levitt is seeking to invalidate the Bylaw. *See* Hennes Supp. Decl., Exh. M (March 24, 2008 Letter to Office Depot Shareholders) ("In filing its proxy, Levitt Corp disregarded the advance notice provisions in our bylaws applicable to all of our stockholders, and *has sued us to have those provisions, which are meant to protect the interests of all of our*

stockholders, nullified") (emphasis added); Answer at 8 ("WHEREFORE, Office Depot respectfully requests that the Court enter an Order . . . B. Declaring that the Bylaws *validly impose a notice requirement* that Plaintiff has failed to satisfy . . ."") (emphasis added). Therefore, this issue is properly resolved on a motion for judgment on the pleadings. *See Sterling Prop. Holdings, Inc. v. New Castle County*, 2004 WL 1087366, at *6 (Del. Ch.) (judgment on pleadings granted for defendant when "[c]omplaint clearly challenge[d] the legality" of the regulation at issue). Office Depot cites no cases to support its argument (which is without merit), and this issue is ripe for resolution.

Second, any allegation that Levitt's actual claim is for breach of fiduciary duty is likewise meritless. *See* Opp. Br. at 23. The Delaware Supreme Court has made a distinction between claims of breach of fiduciary duty and claims of facial invalidity. *See, e.g., Stroud*, 606 A.2d at 78 ("Plaintiffs brought individual and derivative claims against Milliken and its board of directors [ ] alleging that the board breached its fiduciary duties . . . *and also challenged the validity of the amendments and a by-law* . . .") (emphasis added); *Lions Gate Entm't Corp. v. Image Entm't Inc.*, 2006 WL 1668051, at *6 (Del. Ch.) ("Facial challenges to the legality of provisions in corporate instruments are regularly resolved by this Court"); *Mesa Petroleum. Co. v. Unocal Corp*., 1985 WL 44692, at *1, *6 (Del. Ch.) (in suit claiming facial invalidity but not alleging breach of fiduciary duty, court ruled that plaintiff was likely to succeed on the merits of its claim that the company's interpretation of a provision in its bylaw amendments was facially invalid). Levitt's argument that the advance notice bylaw is facially invalid in no way depends

on allegations of breach of duty, and certainly does not require that Levitt name Office Depot's directors as individual defendants.[6]

Third, Office Depot contends that Levitt's claim is "rife with factual issues" (Opp. Br. at 24) but does not identify a single such issue. To defeat a motion for judgment on the pleadings, Office Depot must do more then offer a conclusory, non-specific statement that a factual issue exists. *See Teeven v. Kearns*, 1993 WL 1626514, at *4 (Del. Super. Ct.) ("Finally, the defendant . . . argues in his brief that his denial is sufficient to overcome a motion for judgment on the pleadings. However, an unsupported denial does not by itself raise a genuine issue of fact for the purposes of a motion [ ] for judgment on the pleadings. . . . Hence the Court need not further address the defendant's unsubstantiated denials") (internal citations omitted); *Wilmington Sav. Fund Soc., F.S.B. v. Meconi*, 1989 WL 124888, at *1, *3 (Del. Super. Ct.) ("In considering a motion for judgment on the pleadings, the Court must evaluate the legal sufficiency of the facts while ignoring wholly conclusory statements"; plaintiff was entitled to judgment on the pleadings as defendant's "mere conclusory allegations . . . [are] not enough" to raise a material issue of disputed fact) (internal citations omitted). Because it has failed to identify any disputed facts, let alone a genuinely disputed fact, Office Depot has waived any such factual argument.[7]

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[6] It is simply irrelevant that *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 728 A.2d 25 (Del. Ch. 1998) involved a breach of fiduciary duty claim. Setting aside the dubious contention that the plaintiffs' discretionary pleading decisions in that case have any applicability here, those plaintiffs claimed that the bylaws at issue involved the highly-factual inquiry mandated by *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). *See id*. at 40, 43. Unlike the plaintiffs in *Mentor*, Levitt's claim is that Office Depot's advance notice bylaw is unreasonable on its face, and this claim does not implicate and is not premised upon any issues of fiduciary duty. *See TravelCenters of Am., LLC v. Brog*, Del. Ch., C.A. No. 3516-CC, Chandler, C., at *2 (Order Denying Defendant's Motion *in Limine*) (Apr. 3, 2008) (challenge to the reasonableness and validity of a bylaw is a "question of law – not of fact").

[7] Office Depot makes the odd complaint that counsel for Levitt failed to notify it that it intended to raise this issue while negotiating the Stipulation. *See* Opp. Br. at 23-24. At no time, however, did counsel for Office Depot ask counsel for Levitt what arguments it intended to

Fourth, Office Depot's citations to undisputed principles of Delaware law cannot save its unreasonably long advance notice provision from being declared invalid. *See* Opp. Br. at 25-26. Although it is true that Delaware law requires that a company's bylaws be consistent with both the Delaware Corporation Law and the certificate of incorporation, it imposes another crucial requirement: in order to be valid, an advance notice bylaw must be *reasonable*. *See Hubbard v. Hollywood Park Realty Enters., Inc.,* 1991 WL 3151, at *11 (Del. Ch.) ("an advance notice by-law will be validated where it operates as a reasonable limitation upon the shareholders' right to nominate candidates for director").

Fifth, the fact that the advance notice provision was in place before Levitt bought its Office Depot stock (*see* Opp. Br. at 26) is irrelevant, as Levitt is clearly entitled to bring this action as a Company shareholder. Indeed, it is because Office Depot is seeking to use the Bylaws to preclude Levitt from nominating its directors that Levitt has standing to bring this challenge. Consistent with the rest of its other arguments, Office Depot cites no case to support its position; there are none ─ it is well-established that a shareholder may sue to enforce what it believes to be a proper operation of a company's bylaws no matter when it bought stock. *See, e.g., Jana Master Fund,* 2008 WL 660556, at 1-2, *7 (court considered challenge to ten-year-old bylaws even though shareholder first bought stock in company three months before bringing suit); *Omnicare, Inc. v. NCS Healthcare, Inc.,* 809 A.2d 1163, 1166 (Del. Ch. 2002) (a shareholder "will not be prevented from suing . . . to enforce what it believes is the proper

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make. Office Depot also makes the conclusory statement that it would never have "stipulated to proceed by way of motion on the pleadings" if it knew of this claim, but provides no explanation as to why. Throughout the negotiations of the Stipulation, Office Depot had a copy of Levitt's Complaint and has publicly disclosed that Levitt was challenging the validity of its Bylaws. Judgment on the pleadings is appropriate so long as the claim at issue may be fairly drawn from the complaint, which it is here, and resolution of the claim does not turn on any set of disputed facts, which it does not here. There is no merit to this claim.

operation of the corporation's charter simply because it purchased its shares after notice of the facts giving rise to this . . . claim"). Were Office Depot's argument correct (and it is not), then only those shareholders who bought shares prior to the enactment of Article II, Section 14 in the year 2000 would have standing to challenge its Bylaws. This is contrary to Delaware law and common sense.

Sixth, Office Depot's claim that Levitt initiated the proxy contest only "five weeks before the 2008 annual meeting – long after notice periods that even it admits would be fully permissible had passed" (Opp. Br. at 27) is nonsensical.[8] As an initial matter, Office Depot yet again fails to cite any authority for its position, because there is none. Because the default rule under Delaware law permits shareholder nominations at any time up to and including the annual meeting (*see supra* at 14), there is no threshold (other than, perhaps, the record date) for when Levitt was required to purchase stock to initiate this challenge. Levitt initiated its proxy contest and filed this Complaint almost immediately after Office Depot notified its shareholders that it was nominating the same members of its existing Board of Directors for re-election. *See* Complaint at ¶ 13. Moreover, Office Depot's reading of the bylaw is also unreasonable because, without any clear notice, it would require shareholders to decide, before seeing the directors being nominated by the Company to stand for election, whether to begin a costly proxy contest. This result only serves to further suppress shareholders' franchise rights and entrench current directors.

Finally, when it ultimately addresses the merits, Office Depot raises only a solitary defense for its over-length advance notice provision. It claims that its advance notice requirement is reasonable because it "mirrors the time period provided for in SEC Rule 14a-8."

[8] Moreover, at no point has Levitt conceded that any advance notice provision is permissible, let alone one approaching five months, as Office Depot suggests.

Opp. Br. at 25. But that is no justification. It does not "strain credulity," as Office Depot suggests, to give a company and the SEC more time to process shareholder proposals for inclusion in a company's own proxy materials than where, like here, shareholders are funding their own campaign. Instead, Office Depot's bylaw is six weeks longer than the bylaw then-Vice Chancellor Jacobs identified as straining the "bounds of reasonableness" (*Mentor Graphics*, 728 A.2d at 43 n.70) and it cannot stand.[9]

IV. OFFICE DEPOT'S DISCLOSURES CONFIRM THAT NO FURTHER NOTICE IS NECESSARY AND THAT LEVITT'S NOMINATIONS ARE TIMELY

Office Depot's claim that it only notified shareholders that the business of the annual meeting would consist "of voting for or against the 12 nominees put forward by the Office Depot Board of Directors" (Opp. Br. at 22) is yet another litigation construct belied by the very documents that it cites. Office Depot's proxy statement clearly states that the first item of business at the annual meeting is "[t]o elect (12) members of the Board of Directors for the term described in this Proxy Statement." Hennes Decl., Exh. K. It says nothing whatsoever about being "put forward by the Office Depot Board," as Office Depot now claims in its brief. Contrary to Office Depot's argument, such an approach would not render its advance notice bylaw meaningless. It would just require Office Depot to more carefully draft its public disclosures. Office Depot's proxy could have said exactly what its brief in this litigation states, but it did not, and now it must live with the consequences of its draftsmanship. Because Office Depot has already listed the election of members of its Board of Directors as an item of business

[9] Indeed, by analogizing its Bylaws to Rule 14a-8, Office Depot confirms the ambiguity highlighted by Levitt in its opening brief, which supports its position that the Bylaw could be interpreted to provide that notice is only required for those proposals sought to be included in Office Depot's proxy materials.

at its 2008 Annual Meeting, no additional notice was required by Levitt. [10]

More fundamentally, Office Depot has publicly advised its shareholders that Levitt's Nominees were "*timely nominated"* and that there would be a "contested election" at the Annual Meeting. *See* Hennes Supp. Decl., Exh. L (Supplemental Proxy Statement) (emphasis added). Because Office Depot has advised its shareholders that Levitt's Nominees were timely nominated, it cannot repudiate that disclosure in this litigation.

[10] Indeed, at no point does Office Depot contend that it has been prejudiced by the lack of 141 days advance notice. Nor can it, given its actions throughout this proxy contest. Upon learning of Levitt's alternative slate of nominees, Office Depot has had ample time to, among other things: (i) expend corporate resources on private investigators to investigate Levitt's Nominees; (ii) issue at least three press releases, four letters to employees and shareholders, a supplemental proxy statement and a so-called "fact sheet"; (iii) issued an investor presentation; (iv) hold numerous interviews with the press; and (v) conduct a store tour for at least one stock analyst.

CONCLUSION

For the foregoing reasons, Levitt respectfully requests that this Court grant its motion for judgment on the pleadings, deny Office Depot's cross-motion, and issue a declaration that Levitt's Nominees are entitled to stand for election at Office Depot's 2008 Annual Meeting.

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Dated: April 8, 2008
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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2008, a copy of the within document was electronically served on the following attorneys of record in the foregoing action at the addresses indicated:

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