EFiled: Mar 5 2007 7:18PM EST
Transaction ID 14016512
Case No. 2690-N

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

OPENWAVE SYSTEMS INC. and BERNARD PUCKETT, Plaintiffs, v. HARBINGER CAPITAL PARTNERS MASTER FUND I, LTD., HARBINGER CAPITAL PARTNERS SPECIAL SITUATIONS FUND, L.P., JAMES L. ZUCCO and ANDREW BREEN, Defendants.	PUBLIC VERSION FILED MARCH 5, 2007 C.A. No. 2690-N

REPLY BRIEF IN SUPPORT OF OPENWAVE'S MOTION FOR SUMMARY JUDGMENT

DATED: February 28, 2007

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PRELIMINARY STATEMENT

From the beginning, Openwave has maintained that discovery was unnecessary in to order resolve the central, and case-dispositive, issue in this case: Whether Harbinger complied with Openwave's bylaws relating to the advance nomination of directors for election. The discovery record created over the past two weeks supports Openwave's view and does not change the fact that Harbinger failed to comply with either deadline imposed by these provisions. Harbinger has done its best to complicate things by asserting several claims of alleged "manipulation" and wrongdoing, based primarily on speculation about documents or misstatements of testimony. The record, however, reveals the fallacy of this approach – buried beneath Harbinger's inflammatory rhetoric are key *undisputed* facts, including scores of Harbinger admissions, that warrant summary judgment being granted in favor of Openwave. For example:

- Harbinger is a *$5 billion* hedge fund with experience in other proxy contests and director elections. (Breen Ex. 8)

- Harbinger hired a consulting firm, Treyex LLC ("Treyex"), in September 2006 to assist it with identifying "better board members" for Openwave, and that Harbinger and Treyex had an "ongoing conversation" for the next few months about the possibility of nominating directors to the Openwave board. (Kagan Dep. at 161-62)

- On November 8, 2006, Hal Covert, Openwave's Chief Financial Officer, informed 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. (Anto Ex. 2)

- On December 1, 2006, Joseph Anto read an Openwave press release issued that same day, and learned that the Annual Meeting would be held on January 17, 2007. Andrew Breen, one of Harbinger's purported nominees, also

observed that this information would be "important" if Harbinger "wants to do something via proxy." (Breen Ex. 9)

- Harbinger nominee James Zucco candidly admitted that Openwave's advance notice bylaws provide "two opportunities to file" director nominations (Zucco Dep. at 79), and that Harbinger failed to "meet the first deadline and did not meet the second deadline." (Zucco Dep. at 82-83)

- Specifically, Harbinger "could have filed by November 2nd" and "[t]hey didn't do that." (Zucco Dep. at 82) Nor did Harbinger meet the December 11 deadline. (Zucco Dep. at 82-83)

- When Harbinger finally decided on December 22, 2006, to nominate directors, they were able to file their preliminary proxy materials and provide notice to Openwave *within five days* of making that decision. (Kagan Dep. at 103-04)

In short, Harbinger was contemplating director nominations for months in advance of the Annual Meeting and had the ability to move quickly to make them within ten days from when the Annual Meeting was announced – but for reasons known only to Harbinger, failed to do so. Harbinger is left with claiming that the Openwave board somehow "manipulated" the Annual Meeting date in an attempt to thwart the Harbinger proxy contest. (Am. Compl. ¶ 1) However, it is undisputed that the Openwave board did not know, and had no reason to know, that Harbinger intended to nominate directors and run a proxy contest when it set the Annual Meeting date on November 29, 2006. (Breen Dep. at 85; Kagan Dep. at 103-104, 150; Anto Dep. at 79-80, 144) In fact, Harbinger did not decide to nominate directors until late December – almost a month after the Openwave board set the Annual Meeting date. (*Id.*, Breen Ex. 8) Thus, Harbinger's claim of manipulation is illogical – to accept Harbinger's claim of "manipulation," the Court must conclude that Openwave knew Harbinger would be running a proxy contest *weeks before* Harbinger itself decided to run a proxy contest.

As James Zucco, one of Harbinger's nominees, freely admitted at his deposition, Harbinger *could have* met either the November 2 deadline under Section 2.2(c) *or* the December 11 deadline under Section 2.5, but failed to do so. (Zucco Dep. at 82-83) As a result, Harbinger's nominations were 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 without merit. To the extent the Court considers these collateral issues, as explained further below, they are without merit.

Ultimately, discovery revealed that Harbinger is a hedge fund willing to disregard Openwave's bylaws and play by its own rules in order to bully its way into a contested election for the two open seats on the Openwave board. It is also clear that Harbinger's counsel was similarly willing to engage in bullying tactics in order to defend the depositions of two key Harbinger witnesses – Kagan and Anto – but even that harsh and improper conduct could not prevent them from making numerous key admissions in Openwave's favor.

For these reasons, and the reasons expressed below, Openwave respectfully requests the Court to grant its motion for summary judgment.

STATEMENT OF UNDISPUTED FACTS

The bulk of Harbinger's assertions in its answering brief are based entirely on speculation and suspicion and are not sufficient to defeat Openwave's motion for summary judgment. *See, e.g., Geier v. Meade*, C.A. No. 1328, 2004 WL 243033 at *8 (Del. Ch. Jan. 30, 2004) ("This Court's Rules require more than mere denials and speculation to defeat a motion for summary judgment."); *Kilmon v. Community Servs., Inc.*, C.A. No. 96-159-GMS, 2000 WL 1728300 at *11 (D. Del. Mar. 24, 2000) ("[A]rgument or theories advanced by attorneys, which are not supported by anything other than mere conjecture or speculation, fail to constitute the type of evidence which will defeat a motion for summary judgment.").

In addition to the undisputed facts set forth in Openwave's opening summary judgment brief, Openwave offers the following undisputed facts – based primarily on admissions from Harbinger's witnesses – in support of its motion for summary judgment.

A. Harbinger Is A Sophisticated Hedge Fund, And Began Researching Openwave In March 2006.

Harbinger is a sophisticated New York-based hedge fund that manages in excess of $5 billion of capital and invests in a range of companies across a broad array of industries. (Anto Dep. at 71, Zucco Dep. at 5-6, Kagan Dep. at 99). In the past,

Harbinger has, as part of its normal business practices, nominated directors to the boards of public companies and engaged in proxy contests. (Zucco Dep. at 6).[1]

As early as March 2006, Harbinger began to intensely research Openwave, and to consider whether to make a significant investment in the Company. (Kagan Dep. at 95). To this end, Harbinger reviewed, among other things, Openwave's public disclosures, including its Form 10-Ks and 10-Qs, materials posted on Openwave's website (including press releases), as well as Openwave's prior year proxy statements. (Kagan Dep. at 95, 158, Anto Dep. at 78, 107-10, 154). Harbinger also began speaking with research analysts who follow the company and several other consultants and industry experts. Indeed, Harbinger concedes that it was part of its normal business practice before making an investment in a Company to educate itself by reviewing all of the publicly available information about the Company. (Anto Dep. at 108). Kagan and Anto spent a significant portion of their time evaluating Openwave prior to Harbinger making its initial investment. (Kagan Dep. at 95, 158, Anto Dep. at 78, 107-10, 154).

It is also undisputed that during this time, neither Kagan nor Anto reviewed Openwave's bylaws, despite the fact that the bylaws were publicly available to them and they could have easily gotten them at any time off Openwave's website.

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[1] For example, in early January 2007, Harbinger nominated seven directors to the board of Ryerson, Inc. (Kagan Dep. at 32-33, Kagan Ex. 1). Kagan also testified that he had a lot of experience with public company bylaws, and knew that all of these bylaws contained advance notice requirements for nominating directors to the board. (Kagan Dep. at 20).

(Kagan Dep. at 21, Anto Dep. at 116, Zucco Dep. at 72).[2] Instead, Kagan recalls asking Harbinger's counsel, Milbank, Tweed, to look at Openwave's bylaws sometime between August and October, as part of due diligence before Harbinger decided to invest in the Company. (Kagan Dep. at 9-12). Kagan asked Milbank (at that time) to let him know if they saw anything "interesting" or "unusual" about the bylaws. (Kagan Dep. at 10). This testimony, however, was quickly cut short when his counsel (who was from Milbank) interrupted in the middle of his testimony and instructed him not to respond any further. (Kagan Dep. at 10-12).

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 focus intensely on Openwave's board. (Kagan 157-158, 164-165). Anto conducted an analysis of the composition of Openwave's board members for Kagan and informed him that two of the board seats were up for reelection at the 2006 Annual Meeting. (Anto Ex. 4). 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, depending on the document one reviews, is either an advisor, partner or employee of Treyex. (Breen Exs. 2, 4; Breen Dep. at 5, 22-24, 28-30). According to Kagan, one of the reasons that Harbinger hired Treyex, and agreed to pay it a consulting fee of $50,000 per month, was because it was very concerned about whether Openwave's board was doing a good job. (Kagan Dep. at 161-

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[2] Breen admitted that he has *never* read Openwave's bylaws, even after his lawsuit was filed. (Breen Dep. at 61-62)

65). In fact, part of Treyex's initial business pitch to Harbinger was that it could assist Harbinger in identifying "better board members" if Harbinger decided to run a proxy contest. (Kagan Dep. at 162).

Thereafter, throughout the Fall of 2006, there was an "ongoing conversation" between Harbinger and Treyex about the possibility of Harbinger nominating directors to the Openwave board. (See Kagan Dep. at 161, Kagan Exs. 13, 18). On this point, Kagan testified that:

> *Again, I think it was just an ongoing conversation about the quality of management, the shareholders were dissatisfied with the board, when and if a meeting was scheduled, we might choose to pursue nominating directors.* Treyex was continually looking at people, talking to people about qualifications for any number of things relating to the company, more advisory work, CEO position, board seats, if and when we thought it would be appropriate to start pursuing that.
>
> (Kagan Dep. at 161-162) (emphasis added).

Thus, Harbinger admits that it was considering the possibility of nominating director candidates to the Openwave board at the 2006 Annual Meeting as early as September 2006 – well before both the November 2 deadline and the December 11 deadline, and that it had hired Treyex, at least in part to assist it with this endeavor. (Kagan Dep. at 161-65; Kagan Ex. 13; Anto Ex. 4).

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

On November 1, 2006, the Openwave board of directors decided to reduce the number of Openwave board seats from seven to six. (Peterschmidt Ex. 6 at 4). It is undisputed that, at the time Openwave made this decision, Harbinger had not decided to nominate directors for the Annual Meeting, let alone publicly disclose such an intention

to Openwave or anyone else. (Breen Dep. at 85; Kagan Dep. at 103-04, 150; Anto Dep. at 79-80, 144). Before making this decision, Openwave engaged in discussions with about bringing him on as the seventh board member.[3] Despite the Openwave board's interest in he was restricted from joining the board because of a non-competition agreement (Peterschmidt Dep. at 20-22) – a fact conspicuously overlooked by Harbinger in its answering brief. As a result, and in accordance with what the board believed was good corporate governance, the board reduced the number of board seats from seven to six. (Peterschmidt Dep. at 20; Puckett Dep. at 38-39) To date, the Openwave board has still made no determination to add to the board, and has made no determination to serve if requested to do so. (Peterschmidt Dep. at 22-26)

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 shareholders' meetings in November – for example, last year's meeting was November 22, 2005. However, because of a stock options review, Openwave was forced to delay filing its Form 10-K, and thus, was forced to postpone its traditional November meeting date. (O'Hara Dep. at 120-21, Peterschmidt Dep. at 7, Puckett Dep. at 60). Of course, the timing of the Company's Form 10-K was of great interest to Harbinger, who began to engage in an

[3] At the time, Covert had resigned from his position as an independent director and chair of the board's Audit Committee to become Openwave's Chief Financial Officer. (Puckett Dep. at 35) Therefore, the board sought another independent director with financial knowledge and experience in the industry to replace Covert on the board and as Audit Committee Chair. (*Id.*) was an obvious pick to fill the seat vacated by Covert.

"active dialogue with [Openwave] management" about this issue. (Anto Dep. at 82; Kagan Ex. 5). Harbinger understood that Openwave was forced to deviate from its historic practice of having the annual shareholders' meeting in November because it had not yet filed its Form 10-K, and that Openwave intended to announce its Annual Meeting as soon as it was filed. (Anto Dep. at 94-95, Kagan Dep. at 35, Zucco Dep. at 62).

Harbinger's two witnesses admitted that they had no reason to be surprised when the Company announced the date of the annual meeting in conjunction with the filing of the Form 10-K. Kagan testified that "in the summer" and "[t]hroughout the fall, especially in November," Openwave was making "public statements" that they planned to file the Form 10-K "as quickly as possible" to avoid a default event in a bond indenture, which according to Kagan, was a "very serious thing," and was hoping to have it filed by December. (Kagan Dep. at 37-39). On November 8, 2006, Covert and Anto had a telephone conversation, wherein Covert explained to Anto that: (1) Openwave had to file its Form 10-K by December 3, 2006 to avoid triggering a possible default in its indenture agreement with its bondholders; (2) that the Form 10-K was "basically done" and would be filed as soon as the SEC approves its pre-clearance letter that it received from its auditors; and that (3) Openwave's lawyers were communicating with the SEC to tell them about the situation with the bondholders to assure that the Form 10-K gets approved before December 3, 2006. (Anto Ex. 2; Anto Dep. at 98-106).

Moreover, Anto testified that he was not surprised that Openwave announced the annual meeting in the first week of December:

> Q. I mean, one is tied to the other, right? The 10-K has to be filed before the annual meeting takes place, correct?

A. Correct, correct.

Q. So does it come as a surprise they announce the annual meeting date at the same time they file the Form 10-K?

A. Does it come as a surprise that they would announce the date of the annual meeting? No.

Q. On the same date that they announced the filing of the Form 10-K?

A. As far as my knowledge of these things, no, that's not surprising. (Anto Dep. at 106-07).

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

On December 1, 2006, Harbinger received the December 1 Press Release, read it, and fully understood that the Annual Meeting date was set for January 17, 2007. (Kagan Dep. at 8, 175; Kagan Exs. 26, 27; Anto Dep. at 158-59; Zucco Dep. at 73; Zucco Ex. 6). In fact, the record is so clear on this point, it is difficult to conceive of the non-frivolous basis that prompted Harbinger's claim – on the very first page of its answering brief –that the Annual Meeting date might not have been announced on December 1, 2006. (Ans. Br. at 1) In addition to the numerous Harbinger witness admissions on this point, there are two emails that clearly demonstrate that Harbinger not only read the December 1 Press Release on that date, but that Harbinger was on actual notice at that time that the Annual Meeting was scheduled for January 17, 2007:

- On December 1, 2006, Anto sent an e-mail to Kagan stating that the "[a]nnual shareholders meeting will be held on January 17, 2007. Proxy will come out around December 15." (Kagan Ex. 26).
- On December 5, 2006, Breen sent an email to Sanford Cohen, of Treyex, in response to an e-mail sent by Cohen that attached the December 1 press release. Breen wrote that he had seen the press release and "thought it [would] probably be important for Howard in case he wants to do *something via proxy*." (Kagan Ex. 27; Breen Dep. at 97-98, Breen Ex. 9). (emphasis added).

These e-mails, and the corroborating testimony, demonstrate that, not only was Harbinger aware on December 1 that the Annual Meeting would be held on January 17, 2007, but that Harbinger, who at the time was considering and having "ongoing conversations" 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." (Anto Dep. at 158-59, Kagan Dep. at 8, 175; Kagan Exs. 26, 27, Zucco Dep. at 68, 73; Breen Dep. at 97-98).

In fact, 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. (Kagan Ex. 20; Zucco Ex. 3). 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. (Kagan Dep. at 103-104, Kagan Ex. 5).

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 its intention to nominate candidates by either November 2 or December 11, 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. (Kagan Dep. at 75) 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. At his deposition, Zucco testified:

> Q. Did they indicate to you in words or substance that the dates for nominations of candidates under the bylaws, under the advance notice provisions of the bylaws had already closed, had already passed by?
>
> A. They stated that, because of the late filing, that the filing was after the period in which they could make nominations.
>
> * * * * *
>
> Q. Is the upshot of what they were saying, Mr. Zucco, that in essence the windows for nominations had already closed?
>
> A. Windows were, by definition, closed because of the announcement at the annual meeting was within that period. (Zucco Dep. at 38-39).

Missing the deadlines imposed by Openwave's bylaws did not matter to Harbinger because it had hatched a plan to get around this dilemma – they would just ignore them, and set their own deadline for making nominations. Anto testified that Harbinger filed its proxy materials on "December 27th or 28th because that was the deadline that *we had decided on* whenever we started the process." (Anto Dep. at 127) (emphasis added). And significantly, Harbinger had no problem meeting its own deadline in less than the ten day period envisioned by Section 2.5. On this point, Anto testified that he was responsible for pulling together all of the information that was ultimately going to be used in Harbinger's proxy materials, and that he 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 by December 27, 2006. (Anto Dep. at 181-82).

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

It is also undisputed that, although Harbinger was considering whether to nominate candidates to the board of Openwave 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. (Anto Dep. at 79-80, 144-145; Kagan Dep. at 103-04, 150, Breen Dep. at 85). In fact, Openwave first learned of Harbinger's intention to run a proxy contest on December 27, 2006, when Harbinger publicly announced its nominations, and sent Openwave letters purporting to be written notice of its nominations. (Zucco Ex. 9, Kagan Exs. 14, 15; Kagan Dep. at 149-50) The next day, Harbinger filed its preliminary proxy materials, approximately two weeks before the Annual Meeting. (Anto Dep. at 80-81, 138; Breen Dep. at 22-23; Kagan Dep. at 150).[4]

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

To make matters worse, at the same time it was deciding to run a proxy contest, Harbinger revised its consulting agreement with Treyex in order to pay Treyex and Breen a "success fee" worth millions if certain contingencies relating to Breen's candidacy were met.[5] (Breen Dep. at 129; Breen Ex. 4, at 17-18) This unusual financial

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[4] In fact, Openwave originally hired Georgeson to aid it with a "non-contested" annual meeting. (O'Hara Dep. at 118; O'Hara Ex. 19) However, in light of Harbinger's announcement that it intended to run a proxy contest, the parties revised their retention agreement in early January to provide Georgeson with a substantially higher solicitation fee. (O'Hara Dep. at 118-119; O'Hara Ex. 20)

[5] According to Harbinger's Schedule 13D, Breen's right to receive success fee payments is contingent upon, among other things, Breen being available to serve on the Board and implement "*any other reasonable request made by the Master Fund or the Special Fund.*" (Breen Ex. 4) (emphasis added). In addition, the agreement stated that the success fee is contingent in part on Harbinger changing its status from a "passive investor" to one that "actively seeks to influence or change management or other elements of the operation of Openwave's business." It then goes on to state that "[a]s long as Mr. Breen is on the board of

(cont'd)

arrangement led ISS and Glass Lewis to recommend *against* Breen. (Zucco Ex. 15; Zucco Ex. 16) For example, in declining to recommend Breen for the Openwave board, ISS noted that, "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." (Breen Ex. 13)

I. One Day Before the Annual Meeting, Harbinger and Openwave Discover That Proxy Governance Revised Its Recommendations.

On January 12, 2007, Openwave issued a press release that stated, among other things, that Proxy Governance, Inc. ("Proxy Governance") had recommended voting in favor of Openwave's nominees, Peterschmidt and Held. (Zucco Ex. 11; Peterschmidt Dep. at 88). Four days later, on January 16, Openwave learned through a Reuters news article that Proxy Governance had, at some point over the Martin Luther King Day weekend, changed its recommendation and was now supporting Harbinger's nominees. (Kagan Ex. 8; Peterschmidt Dep. at 86-87) Harbinger also concedes that it learned about Proxy Governance's change of recommendation on January 16 from the same Reuters article. (Zucco Dep. at 105-06; Breen Ex. 15; Westcott Ex. 12; Kagan Dep. at 133; Anto Dep. at 49) When Openwave's proxy solicitor attempted on January 16 to access Proxy Governance's client platform to review the revised report, it was not immediately available due to technical problems. (Westcott Exs. 10, 11; O'Hara Dep. at

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directors of Openwave, the Master Fund and the Special Fund will not change their status to that of a passive investor." (Breen Exhibit 4; Breen Dep. at 120-124).

99-100) Proxy Governance's 30(b)(6) witness confirmed that this report was not accessible. (Westcott Dep. at 95).

It is also undisputed that Proxy Governance's revised recommendation entered the total mix of available information before the Annual Meeting. Wescott testified that Reuters was a "pretty good" means of news distribution (Westcott Dep. at 89), and that when Proxy Governance attempted to disseminate its recommendation, it did not call Openwave, Harbinger, or their proxy solicitors directly, but rather issued it to its public relations firm to "get the Openwave report and rec out to the wire services." (Jacobs Aff. Ex. 51; Westcott Dep. at 112-13).

ARGUMENT

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

A. Openwave's Advance Notice Bylaws Provide Two Opportunities For Making Director Nominations, And Harbinger Missed Them Both.

As explained in Openwave's opening brief, Section 2.2(c) and 2.5 of Openwave's bylaws provide two separate opportunities for shareholders to provide advance notice of director nominations. (Op. Br. at 12). The plain language of these provisions provided that any shareholder who wished to nominate directors for election at the Annual Meeting had to give written notice to the Corporate Secretary by either November 2, 2006 or December 11, 2006. (Kagan Ex. 2; Op. Br. at 12-14) Throughout this litigation, Harbinger has *never* even argued that it complied, or even attempted to comply, with either deadline or that it was unaware of them.

James Zucco – a named party, and the only Harbinger nominee that is not being compensated by Harbinger as a result of his nomination (and thus, the Harbinger witness with the most independent and unbiased view) – admitted that: (1) Openwave's bylaws provided two opportunities to give notice of an intent to nominate directors at the annual meeting; (2) that Section 2.2(c) of the bylaws provided for a November 2 deadline and that Section 2.5 of the bylaws provided for a December 11 deadline, and that; (3) Harbinger failed to meet both of these deadlines. Relevant excerpts from his testimony are reproduced below:

> Q. Now you know from Kagan Exhibit 6, the notice of the meeting was given, publicly announced December 1st, 2006 for a meeting to be held on the 17th, right, and you have told me that's less than 60 days, and therefore, under the allegations of your compliant construing section 2.5, you should give it in 10 days, should give notice in 10 days right?
>
> A. That's what the bylaws say.
>
> Q. Why didn't you or anyone on your behalf or Harbinger, for that matter, give notice by December 11th? That's all you had to do, right?
>
> A. I don't know. (Zucco Dep. at 56).
>
> * * * * *
>
> Q. What happened?
>
> A. The filing happened and the SEC filing happened and the meeting was then announced.
>
> Q. Sure it was. And under the allegations in your complaint it says that when it's announced nominations are to be made within that 10 day period. It was announced on December 1st and the nomination should have been in by December 11th, right?
>
> A. That's what the bylaws suggest.
>
> Q. And that's what your complaint says?

A. The complaint quotes the bylaws.

Q. Sure. And it didn't happen, right?

A. It did not happen. (Zucco Dep. at 64).

* * * * *

Q. Do you see where it says, in the fourth line down, it says, in the case of Openwave, the 2005 annual meeting was held on November 22, 2005, so under normal circumstances stockholder notice would have been due on November 2nd, 2006, right?

A. Mm-hm.

Q. So that was an opportunity that Harbinger could have used to get notice in, right, that was an opportunity to do it, you've alleged that?

A. According to the bylaws, that is an opportunity.

Q. Say that again, please.

A. I said, according to the bylaws, that's an opportunity. (Zucco Dep. at 78).

* * * * *

Q. So you would allow and agree that Harbinger had, in fact, two opportunities, one that you allege in 13 and one that you allege in 14?

A. I think Openwave's bylaws provide for two opportunities to file in accordance with the bylaws.

Q. And anybody who got the bylaws would know that, right?

A. It's right there. (Zucco Dep. at 79).

* * * * *

Q. No. So my question is all Harbinger has to do was look at last year's proxy materials and know that they had to file by November 2nd. That's it, right?

A. They could have filed by November 2nd.

Q. And they didn't bother to do that, did they?

A. They didn't do that.

Q. They had a second opportunity that they could have invoked had they been prepared when the press release on December 1st was announced, right? You told me there is a second opportunity, the bylaws provide for two.

A. They tried to meet those deadline and they didn't.

Q. Sure. They weren't prepared for the first deadline and they weren't prepared for the second deadline. That was the problem, right?

A. They did not meet the first deadline and did not meet the second deadline. (Zucco Dep. at 82-83)

Zucco accurately described how Openwave's bylaws work, and conceded that Harbinger failed to comply with them. Frankly, his testimony was not surprising given that his own lawyers were able to calculate and set forth both advance notice deadlines in paragraphs 13 and 14 of the Amended Complaint. In it's answering brief, Harbinger ignores Zucco's testimony altogether, and offers little in the way of meaningful explanation for why it missed both advance notice deadlines. It is undisputed that these bylaws were publicly available and Harbinger could have easily accessed them at any time through Openwave's website. (Kagan Dep. at 24-25).

Harbinger has not offered any evidence suggesting that it could not have made nominations, pursuant to Section 2.2(c) of Openwave's bylaws, by November 2, 2006. In fact, this deadline was referenced in Openwave's 2005 proxy materials (Zucco Ex. 7; Zucco Dep. at 80-82), and Harbinger was contemplating nominating directors as early as September 2006. [6] (Anto Ex. 4; Kagan Ex. 13; Kagan Dep. at 162-65). In

[6] Harbinger misconstrues Openwave's reference to its proxy materials issued in connection with the 2005 Annual Meeting. (Ans. Br. at 35). 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

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addition, Harbinger has not offered any evidence suggesting that 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) recognized that it was "important" for Harbinger in case it "wants to do something via proxy" 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. (Kagan Exs. 26, 27; Kagan Dep. at 150, 175-76).

In *Accipiter Life Scis. Fund, L.P. v. Helfer*, this Court interpreted an analogous advance notice bylaw provision,[7] 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. Therefore, Harbinger, a sophisticated hedge fund, could have easily preserved its rights

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securities laws), which is the same deadline under Section 2.2(c) for making director nominations.

[7] Even Harbinger is begrudgingly forced to concede that the LifePoint bylaws in *Accipter* are "analogous" and "similar" to the ones of issue in *Accipiter*. (Ans. Br. 1).

with reasonable diligence by providing advance notice pursuant to Section 2.5 by December 11 – but failed to do so.

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

Harbinger raises a number of 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." (Ans. Br. 32) As explained in Openwave's opening brief, and as 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. *See Minn. Invco of RSA # 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 794 (Del. Ch. 2006).[8] Harbinger did not even attempt to explain why the Court should not interpret these provisions together, or distinguish the authority, including *Midwest Wireless* (cited in Openwave's opening brief), that supports this construction.

Instead, Harbinger offers a number of self-serving hypothetical situations in its brief where, under much different circumstances, the bylaws "might" contradict

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[8] Openwave contends that its bylaws are clear and unambiguous. Even if, *arguendo*, this Court were to find ambiguity, that should not lead, as Harbinger argues, to an automatic obviation of the ambiguous bylaw provision. Rather, as this court stated in *Harrah's,* "[i]t is better policy to read the charter in the manner most favorable to the free exercise of traditional electoral rights, in a situation in which the charter is susceptible to more than one reasonable interpretation." *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310-11 (Del. Ch. 2002). Here, the reading most favorable to the free exercise of traditional electoral rights is the reading that Openwave has adhered to throughout this case -- namely, that the bylaws provided two opportunities for shareholders under Sections 2.2(c) and 2.5 to provide advance notice. To the contrary, Harbinger's interpretation, which effectively reads out Section 2.5, is an improper construction. *See Midwest Wireless*, 903 A.2d at 794.

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. *See Stroud v. Grace*, 606 A.2d 75, 96 (Del. 1992) (holding that there was no basis to invalidate a bylaw upon some "hypothetical" abuse of that bylaw). As explained in Openwave's opening brief, Openwave's advance notice bylaws are clear and unambiguous, and work in harmony under the circumstances actually presented in this case. (Opening Br. 12). Indeed, Sections 2.2(c) and 2.5 offered two separate deadlines by which Harbinger, or any Openwave stockholder, could have made director nominations. Openwave's 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." *Midwest Wireless Holdings LLC*, 903 A.2d at 794. In contrast, Harbinger's interpretation, which fails to harmonize Section 2.2(c) with Section 2.5, should be rejected.

That Sections 2.2(c) and 2.5 can be easily harmonized under the circumstances was confirmed by Harbinger's witnesses. In fact, when both Zucco and Anto were walked through the bylaws (as set forth in paragraphs 13 and 14 of their Amended Complaint), they did not find them "confusing" or "impossible" to comply with.[9] (Zucco

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[9] Interestingly, discovery revealed that other Openwave shareholders were not confused about Openwave's advance notice bylaws. On December 28, the day after Harbinger notified Openwave of its intent to nominate director candidates, Charles Penner (the General Counsel of Jana Partners) sent an email to Larry Dennedy (of MacKenzie Partners, Harbinger's proxy solicitor) reporting that Penner had "checked [Openwave's] bylaws again and while there are two notice provisions, they both seem to require an earlier notice date." (Kagan Ex. 10). This e-mail was forwarded to Anto, who testified that Penner talked with McCullough about Openwave's bylaws, but when asked about that conversation, he was interrupted in the

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Dep. at 56, 68, 82-83; Anto Dep. at 169-72, 173-78). In fact, as Zucco explained, Section 2.5 provided Harbinger with a "second opportunity" to make timely nominations, and Harbinger failed to do so. Zucco made this extraordinary admission, despite repeated attempts by Harbinger's counsel to disrupt the examination.[10]

Second, Harbinger claimed that they could not comply with the nomination deadlines because of an "abnormal circumstance" (Ans. Br. 35-36), which was revealed to be Openwave's delay in its filing of its Form 10-K. However, the undisputed facts demonstrate that Harbinger anticipated that the Annual Meeting would be announced in the first week in December when the Form 10K was filed. It is undisputed 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) that Harbinger understood that, once the Form 10-K was filed, Openwave would hold the annual shareholders' meeting. (Anto Ex. 2, Anto Dep. at 97-105). That is exactly what occurred. Openwave filed its Form 10-K on December 1 and publicly announced the meeting date of the annual shareholders' meeting on that same date. 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. Indeed, as explained above,

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middle of his testimony and instructed by counsel not to answer the question on privilege grounds, even though the question related to a conversation took place between two non-clients. (Anto at 128-31).

[10] Throughout the depositions, Harbinger's counsel, Andrew Tomback, was very disruptive, repeatedly making inappropriate speaking objections during crucial parts of the witness's examination. (Kagan Dep. at 50-52, 72-73, 89-90, Anto Dep. at 16-17, 18-42)

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.

Third, Harbinger claims that the Openwave board somehow "manipulated" Openwave's bylaws in order to thwart Harbinger from running a proxy contest. (Ans. Br. at 22) No witness was able to provide any facts in support of this allegation. Indeed, Openwave's advance notice bylaws have not been altered since the Company went public in 1999. (Puckett Dep. at 75-76) No one at Harbinger even bothered to check when the advance notice bylaws were enacted or whether they had at anytime been altered or amended by the Openwave board. (Kagan Dep. at 117-18).

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. (Anto Dep. at 144; Kagan Dep. at 150) 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. Moreover, Harbinger's reliance on the Merrill Lynch and the Goldman Sachs presentations made to the Openwave board in November (Ans. Br. at 13, 19), 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 the board; Goldman Sachs was never retained by Openwave. (Peterschmidt Dep. at 98-99). Both of these presentations were made well over a month before Harbinger decided 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 DO NOT RAISE DISPUTED MATERIAL ISSUES OF FACT, AND ARE WITHOUT MERIT.

As explained in Openwave's opening brief, Openwave contends that all of Harbinger's remaining claims are moot because Harbinger did not properly comply with Openwave's advance notice bylaws. (Op. Br. 20) Nevertheless, it replies to each of Harbinger's points on these issues, as follows.

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

Harbinger has apparently abandoned its argument that Openwave *actually knew* that Proxy Governance would be issuing an updated report (Am. Compl. ¶ 35), and for good reason. Discovery revealed that Openwave did not know when it issued the January 12 Press Release that Proxy Governance would be issuing a revised report.

(Peterschmidt Dep. at 84; O'Hara Dep. at 83) Harbinger now claims that Openwave had "every reason to know" that Proxy Governance would be updating its report. (Ans. Br. 41) This claim is belied by the undisputed facts.

First off, both Georgeson (Openwave's proxy solicitor) and MacKenzie Partners (Harbinger's proxy solicitor) considered Proxy Governance to be "significantly less influential" with institutional investors than either ISS or Glass Lewis. (Zucco Ex. 12) Sean O'Hara, Georgeson's representative, testified that while he thought it was possible that Proxy Governance might issue an updated report, he never communicated that possibility to Openwave. (O'Hara Dep. at 82-83) In part, this was because Georgeson's focus was on ISS and Glass Lewis (and their recommendations), and not the less influential Proxy Governance, which Georgeson does not even routinely monitor. (O'Hara Dep. at 75-77) And by the time the January 12 Press Release was issued, O'Hara had concluded that no update would be forthcoming from Proxy Governance because there was only one business day left before the Annual Meeting. (O'Hara Dep. at 91-92) In fact, it is undisputed that both Openwave and Harbinger did not learn of the revised Proxy Governance report until January 16, a day before the Annual Meeting, after reading a Reuters news article on the subject. (Kagan Ex. 8; Kagan 133, Anto 49, Zucco 105-06) And Georgeson did not even receive notice of the revised report until the morning of January 13 (O'Hara Dep. at 99; Breen Ex. 19), but was unable to easily access the report on January 16. (O'Hara Dep. at 102). This account was independently corroborated by the testimony of Proxy Governance's 30(b)(6) witness, Shirley Wescott,

who testified that for a period of time on January 16, the report was unavailable on Proxy Governance's client platform. (Westcott Dep. at 95).

Harbinger claims that Proxy Governance "quietly" issued its second report on the afternoon of Friday, January 12, 2007 (Ans. Br. 27), and speculates that Georgeson could have accessed it on that date. Yet, Harbinger has failed to offer *any* evidence establishing these points. Indeed, Proxy Governance's own witness, Shirley Westcott, admitted that she did not know when the report did, in fact, appear on the company's client access platform, and admitted further that she was speculating that it appeared on that day. (Westcott Dep. at 77-78). In fact, Ms. Westcott could not recall if she had ever actually seen the second Proxy Governance report appear on the company's client access platform. (Westcott Dep. at 77). Ms. Westcott does admit, however, that for a period of time after the report was allegedly issued, the revised report was unavailable on PGI's client access site. (Westcott Dep. at 95). Ms. Westcott does not have personal knowledge as to when the report was removed from the website (or, indeed, if it ever appeared there in the first place), nor when it re-appeared. (Westcott Dep. at 97).

Moreover, as Openwave's CEO testified, the initial Proxy Governance report discusses Harbinger's nominees in the section addressing nomination of directors. Indeed, the first paragraph of that section exclusively references Harbinger's nominees and their proposals. (Westcott Ex. 3 at 9). The focus on Harbinger's nominees in Proxy Governance's initial report, coupled with its tardiness in amending its recommendations relative to the date of the annual meeting and its own admitted difficulties in announcing

its recommendations,[11] clearly demonstrates that neither Georgeson nor Openwave had "every reason to expect" Proxy Governance would amend its report before the issuance of the January 12 Press Release.

The efficacy of disseminating information through a major news agency such as Reuters also is undisputed. Shirley Westcott, Proxy Governance's 30(b)(6) witness, admitted that Reuters was a "pretty good" means of news distribution (Westcott Dep. at 89). In fact, in seeking to publicly assert its revised recommendations in the wake of Openwave's January 12 press release, Proxy Governance did not call any of the parties to this litigation nor their proxy solicitors with whom Proxy Governance has a business relationship. Rather, Proxy Governance called its public relations firm, Assadi Associates, who then said they would "get the Openwave report and rec out to the wire services, noting that the press release that Openwave put out on Friday was incorrect." (Jacobs Aff. at 51).

Simply put, the total mix of available information at the time of the Annual Meeting included an article from one of the world's leading news agencies about which slate Proxy Governance was supporting. As a result, the total mix of information available to Openwave's shareholders would not have been significantly altered by Openwave issuing an additional report. *See Arnold v. Soc'y for Sav. Bancorp,* 650 A.2d 1270, 1277 (Del. 1994) (defining "materiality" as "a substantial likelihood that the

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[11] Ms. Westcott, in the wake of the January 12 press release and Proxy Governance's subsequent efforts at correcting it, penned a follow-up e-mail addressing, among other topics, how to "avoid mix-ups and relieve clients from having to check the platform all the time when they are awaiting a high-profile report." (Westcott Ex. 13)

disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); *Abrons v. Maree*, 911 A.2d 805, 813 (Del. Ch. 2006) (holding that "[c]onsistent and redundant facts do not alter the total mix of information.").

B. The Reduction Of Openwave's Board Seats From Seven To Six Was Not Intended To Thwart Harbinger's Proxy Contest.

Finally, Harbinger argues that the Openwave board reduced the number of board seats in order to thwart Harbinger's ability to run a proxy contest. (Ans. Br. 43) Most of Harbinger's rhetoric on this point is focused on the Openwave board's interest in bringing onto the board as a seventh member. Putting aside that had a conflict that prevented him from joining the board, the Openwave board's consideration of and its decision to eliminate the open board seat when it was unable to fill it, all occurred *nearly two months before* Harbinger announced its proxy contest. Harbinger is again invoking its meritless "crystal ball" argument. It is simply illogical to suggest that Openwave reduced the number of board seats from seven to six in November to thwart a proxy contest that Harbinger had not even decided to run and publicly announce until late December. Even Harbinger's witnesses had to concede this point. (Anto Dep. at 144; Kagan Dep. at 150)

For this reason, the two cases cited by Harbinger in support of its argument are misplaced. (Ans. Br. 44) In both *IBS* and *Liquid Audio*, the incumbent board adjusted the number of board seats to thwart a *known* proxy contest. Additionally, Harbinger's reliance on *Arnold* for its claim that the possibility of expanding the board

from six to seven members after the Annual Meeting in order to add to the board should have been disclosed prior to the Annual Meeting (Ans. Br. 45), is misplaced. "Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information." *Arnold*, 650 A.2d at 1280. Although Harbinger ignores this uncontested fact in its answering brief, had a conflict that prevented him from joining the Openwave board (Peterschmidt Dep. at 21-26), and it is mere speculation as to whether he will join the board at some future time. 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).[12]

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[12] Harbinger appears to have mostly abandoned its claim that the 1.3 million shares of restricted stock were improperly voted at the Annual Meeting. Harbinger does not even attempt to dispute the affidavit testimony submitted in support of Openwave's opening brief on this point and, in any event, Harbinger admits that these shares did not make a difference in the final results of the election. (Ans. Br. 7)

CONCLUSION

For all of the foregoing reasons, Openwave's motion for summary judgment should be granted.

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DATED: February 28, 2007