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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HILL INTERNATIONAL, INC., DAVID L. RICHTER, CAMILLE S. ANDREWS, BRIAN W. CLYMER, ALAN S. FELLHEIMER, IRVIN E. RICHTER, STEVEN M. KRAMER and GARY F. MAZZUCCO, Defendants Below, Appellants, v. OPPORTUNITY PARTNERS L.P., Plaintiff Below, Appellee.	No. 305, 2015 Court Below: Court of Chancery of the State of Delaware C.A. No. 11025-VCL

DEFENDANTS BELOW-APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

In its Answering Brief,[1] Bulldog does not dispute that its April 14 Letter was untimely and substantively deficient under the Company's Advance Notice Bylaws, regardless of whether the 30-day notice window for nominations and proposals is calculated from June 9 or 10. Nor does Bulldog dispute that it was fully capable of complying with the Bylaws, and that its failure to do so did not result from any confusion on its part. It nevertheless asks this Court to repeat the Court of Chancery's clear error by ruling that the Back-Up Bylaw was triggered, and that a special 10-day short-notice window sprang into existence, when the Company mailed statutory notice of its Annual Meeting on April 30, 2015, in accordance with 8 *Del. C.* § 222.

Bulldog's argument should be squarely rejected. The Advance Notice Bylaws have two subparts—the 30-Day Window Bylaw and the Back-Up Bylaw—which must be construed together and read in harmony. The Court of Chancery should have understood that the 30-Day Window Bylaw governs the provision of advance notice in the ordinary course, while the Back-Up Bylaw is an exception that applies to extraordinary circumstances involving short notice. There is no basis to apply the Back-Up Bylaw here, given the Company's public disclosure—

[1] Capitalized but undefined terms have the meaning set forth in Defendants Below-Appellants' Opening Brief, filed on June 19, 2015, which is referred to herein as the "Opening Brief" and cited as "OB." Plaintiff Below-Appellee's Answering Brief, filed on June 26, 2015, is referred to herein as the "Answering Brief" and cited as "AB."

more than a year beforehand, in the same manner as in each of the prior six years—that the Annual Meeting would be held "on or about June 10, 2015."

As explained in Defendants' Opening Brief and confirmed by Bulldog's Answering Brief, this Court should reverse the Court of Chancery's erroneous construction of the Advance Notice Bylaws and reverse and vacate the Court of Chancery's Partial Final Judgment Order and Injunction Order for the following reasons:

First, Bulldog's lawsuit constitutes an improper facial challenge to the Company's Advance Notice Bylaws. Bulldog's fundamental argument is that the disclosure that the Annual Meeting would be held "on or about June 10, 2015" was too imprecise to trigger the 30-Day Window Bylaw, and that the Back-Up Bylaw, intended for short-notice situations, was triggered and the advance notice clock first started when Bulldog received statutory notice of the 2015 Annual Meeting. To the extent June 9 and "on or about June 10" could ever be regarded as materially distinct in some way, that distinction *makes no difference* in this case because Bulldog's April 14 Letter was untimely either way. Bulldog's facial challenge to the Company's use of an "on or about" formulation—and the use of such formulations by any Delaware corporation with similar bylaws—is thus grounded in hypothetical, imagined scenarios of no relevance here, and should not have been adopted by the Court of Chancery.

Second, the Court of Chancery erred in adopting Bulldog's construction of the Advance Notice Bylaws, and thereby derived an unsound construction that runs contrary to their plain meaning, as well as the Company's consistent prior practice and the fundamental purposes served by advance notice bylaws. Bulldog cannot rescue its flawed construction of the Advance Notice Bylaws by attempting to graft the concept of a "fixed" date into the Advance Notice Bylaws, mischaracterizing inapposite legal authority and ignoring the Company's consistent prior practice in publicly disclosing its Annual Meetings.

Finally, as a last resort, Bulldog raises equitable and policy-based arguments to excuse its untimeliness. None have merit. Bulldog cannot shift the blame for its own failure to comply with the Advance Notice Bylaws to the Company and cites no authority for its contention that the Company was required to issue an interim notice after fixing the exact date of the Annual Meeting. Bulldog also fails to offer any support in law or logic for its contention that the adjournment resulting from the Court of Chancery's improvidently-granted injunction excuses its untimeliness under the Advance Notice Bylaws. The undisputed facts of this case bear no resemblance to the authorities Bulldog marshals in a footnote, in which Delaware courts invalidated board action that constituted an actual—rather than hypothetical and counterfactual—abuse of an advance notice bylaw.

For the reasons set forth below and in Defendants' Opening Brief, this Court should reject Bulldog's self-serving and unsound construction of the Company's Advance Notice Bylaws and reverse and vacate the Court of Chancery's Partial Final Judgment Order and Injunction Order.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN DETERMINING THAT THE COMPANY VIOLATED ITS BYLAWS.

A. The Court of Chancery Should Have Rejected Bulldog's Facial Challenge To The Advance Notice Bylaws.

Bulldog's facial challenge to the sufficiency and effectiveness of the Company's public disclosure of the 2015 Annual Meeting should be rejected. (OB at 16-18.) Bulldog's sole retort is to contend that it has made "no facial challenge" (AB at 14), but that contention is belied by its own Answering Brief.

1. Bulldog Was Not Affected By The Advance Notice Bylaws Or The "On Or About" Formulation.

As a threshold matter, Bulldog makes no effort whatsoever to defend its April 14 Letter as timely or substantively compliant with the express requirements of the Company's Advance Notice Bylaws. (AB at 3 n.3, 8 n.5.) Bulldog concedes, as it must, that it was in no way "blindsided" by the announcement that the 2015 Annual Meeting would be held on June 9, 2015 (*id*. at 18), given that the Company publicly disclosed one year earlier that the Annual Meeting would be held on or about June 10, 2015.

Nor does Bulldog contend that it was unable to timely and substantively comply with the Advance Notice Bylaws, or that its failure to do so resulted from any confusion on its part. To the contrary, Bulldog now insists that it has "never contended it was confused." (*Id*.) Although Bulldog did in fact claim

confusion below (*see, e.g.*, A89, 156), that claim was never credible given Bulldog's own failed attempt to comply with the 30-Day Window Bylaw. The existence of Bulldog's April 14 Letter itself demonstrates Bulldog's understanding that the 30-Day Window Bylaw was to be calculated relative to June 10, 2015.

Significantly, Bulldog also does not dispute that whether the Annual Meeting was noticed for June 9 rather than June 10 in no way alters the untimeliness of its substantively deficient April 14 Letter. (AB at 19-20.) There was no bait-and-switch here. Whether the measuring point is June 10 or June 9 *makes no difference* in this case. Bulldog's April 14 Letter was untimely either way. *See Openwave Sys. Inc.* v. *Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 240-41 (Del. Ch. 2007).

2. Bulldog's Challenges Are Purely Hypothetical.

Although Bulldog admittedly was *not* affected in any way by the one-day difference in the Company's Annual Meeting date, it brings this facial challenge to the hypothetical abuse of "on or about" formulations by the Company and other Delaware corporations with similar bylaws. (AB at 19-20.) It presents a counterfactual argument that the Company "***potentially . . . could assert***" that a notice is untimely, despite having been provided 60 days prior to the publicly disclosed meeting date, if it is not disclosed 60 days prior to the actual meeting date. (*Id*. at 19.) It is well settled, however, that "Delaware law does not permit

challenges to bylaws based on hypothetical abuses . . . ." *Openwave*, 924 A.2d at 240; *see AB Value Partners, LP* v. *Kreisler Mfg. Corp*., 2014 WL 7150465, at *7 (Del. Ch. Dec. 16, 2014) ("This Court cannot grant the extraordinary relief of enjoining a Company's facially valid advance notice bylaw on the basis of hypothetical future events.") (citation omitted); *Boilermakers Local 154 Ret. Fund* v. *Chevron Corp.*, 73 A.3d 934, 949 (Del. Ch. 2013) (explaining that plaintiff's burden in making a facial challenge is to "show that the bylaws do not address proper subject matters of bylaws . . . and can never operate consistently with [the] law" and that plaintiff "cannot satisfy it by pointing to some future hypothetical application of the bylaws that might be impermissible"); *see also XI Specialty Ins. Co.* v. *WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014) ("Delaware courts do not render advisory or hypothetical opinions.") (citation omitted).

Bulldog's invented scenarios cannot mask the facts that this case involves no such scenarios and no "showing of abuse." *Stroud* v. *Grace*, 606 A.2d 75, 96 (Del. 1992). As this Court observed more than two decades ago:

> There [i]s no basis to invoke some hypothetical risk of harm rather than an examination of the board's proven, and entirely proper, conduct. It is not an overstatement to suggest that every valid by-law is always susceptible to potential misuse. Without a showing of abuse in this case, we must reverse the trial court's decision and uphold the validity of [the bylaw].

Id. (internal citations omitted). Bulldog's suggestion that an "on or about" formulation might serve as a "tool for incumbent boards to keep the opposition off of the ballot" (AB at 20) is irrelevant under the undisputed facts of this case.

Because Bulldog had every opportunity to comply with the Company's 30-Day Window Bylaw and chose not to, the Court of Chancery should have rejected its facial challenge. *See Openwave*, 924 A.2d at 236, 241; *Accipiter Life Scis. Fund, L.P.* v. *Helfer*, 905 A.2d 115, 122 (Del. Ch. 2006).

B. The Court of Chancery Erroneously Construed The Advance Notice Bylaws.

The Advance Notice Bylaws each contain two subparts which must be construed together and read in harmony: a primary 30-Day Window Bylaw, which governs the provision of advance notice in the ordinary course, and a secondary Back-Up Bylaw, which applies in extraordinary circumstances when short notice is given of an Annual Meeting. (A7, 10.) *See Minn. Invco of RSA #7, Inc.* v. *Midwest Wireless Holdings LLC*, 903 A.2d 786, 794 (Del. Ch. 2006) ("[C]ontracts should be construed, wherever possible, to harmonize and give effect to all of their provisions.") (citation omitted). The Court of Chancery erroneously adopted Bulldog's self-serving construction of the Advance Notice Bylaws, and thereby derived an unsound construction that runs contrary to their plain meaning, as well as the Company's consistent prior practice and the fundamental purposes served by advance notice bylaws. (OB at 18-21.)

Advance notice bylaws operate "to permit orderly meetings and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations." *Openwave*, 924 A.2d at 239; *see also Hubbard* v. *Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *13 (Del. Ch. Jan. 14, 1991) (advance notice bylaws "serve[] the proper purpose of assuring that stockholders and directors will have a reasonable opportunity to thoughtfully consider nominations and to allow for full information to be distributed to stockholders"). Delaware courts routinely uphold advance notice provisions as valid.[2] In assessing Bulldog's challenge, the relevant inquiry is whether the Advance Notice Bylaws, "on [their] face and in the particular circumstances, afford the shareholders a fair opportunity to nominate candidates." *Hubbard*, 1991 WL 3151, at *11. The Company need not ignore its advance notice requirements simply because Bulldog "unilaterally and belatedly . . . decided to nominate a slate of candidates for director." *Id*. at *12.

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[2] *See, e.g.*, *Stroud*, 606 A.2d at 95 (rejecting challenge to facial validity of bylaw containing advance notice requirements); *Goggin* v. *Vermillion, Inc.*, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (upholding 150-day advance notice requirement contained in proxy statement); *Mentor Graphics Corp.* v. *Quickturn Design Sys., Inc.*, 728 A.2d 25, 43 (Del. Ch. 1998), *aff'd sub. nom. Quickturn Design Sys., Inc.* v. *Shapiro*, 721 A.2d 1281 (Del. 1998) (upholding validity of advance notice bylaw); *Nomad Acquisition Corp.* v. *Damon Corp.*, 1988 WL 383667, at *8 (Del. Ch. Sept. 20, 1988) (finding no reasonable probability of success on the merits to a claim that bylaw requiring 60 days advance notice of director nomination was invalid). *See also Boilermakers*, 73 A.3d at 952 (upholding validity of forum selection bylaws, relying in part upon the settled validity of advance notice bylaws, noting that "[t]he similar purpose of the advance notice bylaws and the forum selection bylaws reinforce[s] that forum selection bylaws have a proper relationship to the business of the corporation and the conduct of its affairs . . .").

As discussed in the Opening Brief, the Court of Chancery committed clear error by focusing on the Back-Up Bylaw, to the exclusion of the 30-Day Window Bylaw, rather than harmoniously construing the Advance Notice Bylaws together as a whole. Specifically, the Court of Chancery erred in ruling that a "prior public disclosure" under the Advance Notice Bylaws "must state the actual date of the meeting" because "[t]he stockholders must know when to show up so that a specific range of dates for compliance with the Advanced Notice Bylaws can be calculated." (OB at 20 (quoting Ex. A ¶ 5).) Although the Court of Chancery's construction of the "plain language" of the Advance Notice Bylaws was based upon this reasoning (Ex A ¶ 5), the Answering Brief does not even attempt to defend this "when to show up" rationale. Any stockholder can calculate a specific range of dates 60 and 90 days before an announced meeting date. Knowing "when to show up" is irrelevant.

Advance notice bylaws are not designed to provide notice of "when to show up." Indeed, a common form of advance notice bylaw is tied to the anniversary of the prior year's annual meeting date. *See* 3 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* (2015), Form 1.18.1 (form advance notice bylaw requiring notice within a 30-day window "prior to the first anniversary of the preceding year's annual meeting"); *see also Openwave*, 924 A.2d at 235 (upholding advance notice

bylaw tied to "the first anniversary of the preceding year's annual meeting"). Stockholders do not learn when to "show up" from the Advance Notice Bylaws or the prior public disclosure contemplated thereunder. They learn when to "show up" through statutory notice of an annual meeting under 8 *Del. C.* § 222.[3]

Bulldog raises three additional arguments in its Answering Brief, each of which lacks merit:

First, Bulldog contends that, for a prior public disclosure of an Annual Meeting date to be effective, the Company's Bylaws require that the Company "fix" the date of the Annual Meeting beforehand. (AB at 8 (quoting A6); *see also* A204-05, 209.) Bulldog incorrectly conflates the first paragraph of Section 2.2 of the Bylaws—which affords the Board discretion to designate the "fixed" time and date of the Annual Meeting set forth in "the notice of the meeting," *i.e.*, the statutory notice under 8 *Del. C.* § 222 (A6)—with Section 3.3 and the third paragraph of Section 2.2, which do not reference a fixed date and are instead triggered by "notice or prior public disclosure of the date of the annual meeting . . . ." (A7, 10.)

[3] Bulldog contends that Defendants are somehow "confused" about whether the 30-Day Window Bylaw is calculated by reference to the anticipated meeting date set forth in a prior public disclosure or the fixed meeting date set forth in a statutory notice. (AB at 18.) Bulldog distorts the clear import of Defendants' counsel's remarks: that any such confusion is "totally irrelevant in this case." (*Id*. (quoting A188).) Bulldog cannot excuse its total failure to comply with the 30-Day Window Bylaw by concocting hypothetical scenarios. *See* Section I.A, *supra*.

Bulldog's suggestion that the word "fixed" within the first paragraph of Section 2.2 should be read into the third paragraph of Section 2.2 (and, somehow, Section 3.3 as well) not only ignores the fundamentally different purposes served by those provisions, but also ignores a fundamental principle of contractual interpretation. Where a particular term is employed in one provision, its absence in another provision will be regarded as deliberate. *See, e.g.*, *Charlotte Broad., LLC* v. *Davis Broad. of Atlanta, L.L.C.*, 2015 WL 3863245, at *5 (Del. Super. Ct. June 10, 2015) ("Reading the Agreement as a whole confirms that 'the date of filing' does not mean the 'Filing Date.' [. . .] If the parties wanted the defined term 'Filing Date' to be represented in the [relevant] Clause, they would have used that exact term with the same punctuation instead of 'the date of filing.'"); *RCM LS II, LLC* v. *Lincoln Circle Assocs., LLC*, 2014 WL 3706618, at *8 (Del. Ch. July 28, 2014) ("The fact that the parties knew how to refer to closing when they wanted to implies that they used the term 'effecting' to mean something more.") (citation omitted); *see also Active Asset Recovery, Inc.* v. *Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *11 (Del. Ch. Sept. 10, 1999) (omission of a term in a contract "speaks volumes" when compared to included terms). This construction is further supported by Section 2.3 of the Bylaws, which requires that notice of special meetings be given to stockholders a specified number of days before "the date ***fixed*** for the meeting." (A7 (emphasis added).)

Read as a whole, Section 2.2 of the Bylaws supports Defendants' construction. *See Elliott Assocs., L.P.* v. *Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998) ("It is well established that a court interpreting any contractual provision . . . must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument.") (citation omitted). The statutory notice provides stockholders with the "fixed" Annual Meeting date, while prior public disclosure under the Advance Notice Bylaws—which, as the Court of Chancery observed, "must mean something other than formal statutory notice" (Ex. A at 4-5)—provides a reference point from which stockholders can calculate a 30-day notice window. Bulldog's insistence that this Court read the word "fixed" into the Advance Notice Bylaws, where it is conspicuously absent, runs contrary to principles of contractual construction that deem such omission deliberate. *Charlotte Broad.*, 2015 WL 3863245, at *5.

Second, Bulldog contends that the Company's interpretation of the Advance Notice Bylaws runs contrary to "case law interpreting similar bylaw language." (AB at 2.) But Bulldog cites only a single inapposite case—*Sherwood* v. *Ngon*, 2011 WL 6355209 (Del. Ch. Dec. 20, 2011)—to support that proposition. (AB at 4, 16.) *Sherwood* is readily distinguishable. There, the company initially listed the plaintiff director as a nominee and recommended him for reelection to the company's board of directors. *Sherwood*, 2011 WL 6355209, at *4. On

December 8, 2011, the company postponed its annual meeting until December 21 and removed the plaintiff from its slate. *Id*. at *4-5. The company asserted that the plaintiff was required to provide notice of his intention to nominate himself on or before October 28, even though the plaintiff "had no reason to assume he needed to give notice until th[at] deadline had passed." *Id*. at *10. Unlike the *Sherwood* plaintiff, Bulldog was admittedly able to comply with the Advance Notice Bylaws. It simply did not do so.

Bulldog's distortion of *Sherwood*'s holding is unavailing. Contrary to Bulldog's contention, the *Sherwood* court did not "rul[e] that, when an annual meeting is postponed, the bylaw would be triggered using the new annual meeting date—the actual annual meeting date—rather than the original date selected." (AB at 16.) Rather, the court ruled, at the TRO stage, that there was a "fair possibility" that the plaintiff could nominate himself consistent with the company's bylaws "notwithstanding Section 3.3," which governed advance notice. *Id*. at *10-11 (emphasis added).[4]

Finally, Bulldog contends that Defendants have "offered no evidence" of the Company's consistent prior practice with respect to the public disclosures of its Annual Meeting dates. (AB at 4, 16-17.) As recited in the Opening Brief,

[4] The *Sherwood* court's dicta concerning bylaw provisions addressing the consequences of adjournments or postponements, *id*. at *11, is irrelevant, given that the dispute in this case does not involve an adjournment or postponement.

however, the Company's six proxy statements before the 2014 Proxy each stated that the next year's Annual Meeting would be held "on or about" a specified date in the first two weeks of June. (A26, 30, 34, 39, 43, 48.) These prior proxy statements are not "extrinsic evidence" directed to any purported ambiguity. Rather, they confirm that the Company's construction of its Bylaws was transparent to all stockholders and that the "on or about" formulation was in no way confusing, surprising or—under Bulldog's hypothetical challenges untethered to the facts of this case—somehow made in bad faith.

C. The Court of Chancery Erred In Ruling That Bulldog Complied With The Advance Notice Bylaws.

Bulldog makes no attempt to argue that the April 14 Letter was timely or substantively compliant under the Advance Notice Bylaws. (AB at 3 n.3, 8 n.5.)[5] Bulldog's May 7 Letter was also untimely, given the Company's "prior public disclosure" of the Annual Meeting over one year earlier, and is no more than Bulldog's attempt to secure a mulligan. As a last resort, Bulldog launches equitable and policy-based arguments to excuse its failure to comply with the Advance Notice Bylaws. None have merit.

First, Bulldog contends that Defendants "cannot be heard to complain" about the application of the Back-Up Bylaw because they "could have

[5] Bulldog references language within the 2014 Proxy concerning an April 15, 2015 deadline for proposals (AB at 19 n.12), but does not contend that such language excuses the untimeliness of its April 14 Letter. Nor could it. (*See* OB at 10 n.1, 21 n.2.)

announced the annual meeting date no later than March 31, 2015." (AB at 20.) As discussed in the Opening Brief and in Section I.B, *supra*, the Company provided prior public disclosure of the Annual Meeting on April 30, 2014—eleven months before this cut-off.

Second, Bulldog argues that the Advance Notice Bylaws' "purpose . . . has been met" because the Company has adjourned its Annual Meeting, in accordance with the Injunction Order, and therefore Defendants have "sufficient notice." (*Id*. at 20-21.) An improvidently-granted injunction does not cure a stockholder's underlying failure to comply with advance notice requirements. Were the rule otherwise, no injunction could ever be overturned in this context.

Bulldog's argument also ignores that the Company had no choice but to adjourn its meeting under the very same ruling from which it now seeks relief. Moreover, Bulldog argued below that a "delay" was necessary because the outstanding proxy information available to stockholders was "confusing." (A180.) To the extent Bulldog was dissatisfied with the scheduling of the adjourned Annual Meeting "to give time for [this] appeal to be considered" (AB at 12), it could have requested that the Court of Chancery impose a minimum and maximum date range. (*Cf.* A180-82.) *See Aprahamian* v. *HBO & Co.*, 531 A.2d 1204, 1209 (Del. Ch. 1987) (requiring annual meeting to be immediately adjourned and reconvened "not

later than June 3, 1987"). It did not do so. Even now, Bulldog's Answering Brief is silent on the date it would have preferred.

Finally, in a footnote, Bulldog adds a string citation for the proposition that Delaware law is wary of the "potential for advance notice bylaws to be used improperly . . . so as to impede shareholder democracy." (AB at 21-22 & n.16.) Setting aside that Delaware law does not invalidate bylaws based on "potential" abuses, *see* Section I.A, *supra*, the cases cited—including *Sherwood*, *see* Section I.B, *supra*—only demonstrate by stark contrast the paucity of Bulldog's equitable argument in this case. *See Schnell* v. *Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (enjoining corporation from moving the annual meeting date up to cut short a proxy context); *Levitt Corp.* v. *Office Depot, Inc.*, 2008 WL 1724244, at *7 (Del. Ch. Apr. 14, 2008) (enjoining a corporation from requiring advance notice of a nomination because it lacked an advance notice bylaw for nominations); *Aprahamian*, 531 A.2d at 1206 (enjoining postponement of an annual meeting that would have caused the plaintiff's proxies to expire); *Lerman* v. *Diagnostic Data, Inc.*, 421 A.2d 906, 914 (Del. Ch. 1980) (enjoining a board who announced an annual meeting only 63 days prior with a 70-day advance notice deadline). In each of these cases, the court invalidated board action that was an actual, rather than hypothetical, abuse of an advance notice bylaw. The Company has committed no abuse here.

II. THE COURT OF CHANCERY ERRED IN ENTERING PRELIMINARY AND MANDATORY INJUNCTIVE RELIEF.

As demonstrated in Defendants' Opening Brief and above, the Court of Chancery improperly granted Bulldog injunctive relief based upon its erroneous construction of the Advance Notice Bylaws. Consequently, the Court of Chancery erred in concluding that Bulldog had established a reasonable probability of success on the merits.

The Court of Chancery also improperly concluded that Bulldog would suffer irreparable harm and that the balance of the equities weighed in Bulldog's favor. The only harms Bulldog has articulated are either self-inflicted ones due to its failure to comply with the Advance Notice Bylaws or imagined ones premised upon their counterfactual application. (AB at 19-20.) Bulldog also denigrates the suggestion that Defendants would be harmed by an inappropriate injunction (*id*. at 25), apparently forgetting that the Company is a named defendant in this case and would be harmed by the burden and expense of a needless and unauthorized proxy contest. The Court of Chancery recognized as much. (*See* Ex. A ¶¶ 11-12; Ex. B ¶ 6 (observing that unless the Injunction Order is reversed on appeal, the Company would be forced to permit the consideration of Bulldog's nominations and proposals and that "[i]t will not be possible to go back in time and undo that event following post-Annual Meeting appellate review.").)

Further, the Court of Chancery abused its discretion by failing to condition its entry of preliminary injunctive relief on the posting of any security in a context where it specifically recognized the potential for harm to the Company. (*See* Ex. A ¶ 12 (recognizing costs to Company imposed through Injunction Order).) As this Court held in *Guzzetta* v. *Service Corporation of Westover Hills* (on which Bulldog relies), the Court of Chancery abuses its discretion by failing (absent any supporting rationale) to set an injunction bond in an amount greater than the potential harm found to result if the injunction were improperly granted. 7 A.3d 467, 471 (Del. 2010). Here, the Court of Chancery recognized that the Company would suffer harm, but nonetheless failed to condition the entry of injunctive relief on the posting of *any* security, without any rationale or supporting explanation.[6]

The Court of Chancery's improper grant of injunctive relief should be reversed.

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[6] While Bulldog would wish it otherwise (AB at 25), in *Guzzetta*, this Court did not hold that the Court of Chancery is free to waive the bond requirement entirely without supporting rationale and in the face of its own recognition of potential costs that would arise from improvidently-granted injunctive relief. Nor should it. *See, e.g.*, *Zambelli Fireworks Mfg. Co., Inc.* v. *Wood*, 592 F.3d 412, 426 (3d Cir. 2010) (holding failure to require any security was an abuse of discretion and reasoning that "Rule 65(c) constrains a district court's authority to enter a preliminary injunction, making it contingent upon the posting of a bond. It does not impose any obligation on the parties to seek a bond."); *see also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 843-44 (Del. Ch. 2011) (Laster, V.C.) (conditioning injunction on the posting of a $1.2 million bond, even where "[t]he parties have not presented evidence on this issue").

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Opening Brief, this Court should reverse the Court of Chancery's erroneous construction of the Advance Notice Bylaws and reverse and vacate the Court of Chancery's June 5 and 16, 2015 Orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2015, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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