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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' OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Through this appeal, Defendants Below-Appellants Hill International, Inc. ("Hill" or the "Company") and the members of the Company's board of directors seek relief from the Court of Chancery's June 5 and 16, 2015 Orders which (i) adopted Plaintiff Below-Appellee's facial challenge to the Company's advance notice bylaws and entered partial final judgment in Plaintiff's favor on its claim that it complied with those bylaws; (ii) preliminarily enjoined the Company from holding its Annual Meeting as scheduled; and (iii) entered mandatory injunctive relief requiring the Company to permit Plaintiff to present its untimely nominations and proposals at the Company's adjourned Annual Meeting.

The Company's advance notice bylaws, like those of numerous Delaware corporations, require that stockholders deliver notice to the Company of any stockholder proposals or nominations at least 60 and no more than 90 days prior to the Company's Annual Meeting. On April 30, 2014, the Company publicly disclosed—more than one calendar year in advance, and in the same manner that it had publicly disclosed its Annual Meetings in each of the prior six years—that the Company would hold its 2015 Annual Meeting "on or about June 10, 2015." From this public disclosure, any stockholder could readily calculate a specific 30-day window—at least 60 and no more than 90 days prior to June 10, 2015—for delivery of any nominations or proposals. On April 30, 2015, consistent

with this prior public disclosure, the Company provided statutory notice in its proxy materials that the 2015 Annual Meeting would be held on June 9, 2015.

This is not a case in which Defendants are alleged to have manipulated the timing or scheduling of the Annual Meeting for any improper purpose. Nor are Defendants alleged to have tactically changed the date of the Company's Annual Meeting such that a timely stockholder notice would be rendered untimely. Rather, the parties' fundamental dispute in this action is whether the Company's public disclosure that the 2015 Annual Meeting would be held "on or about June 10, 2015" triggered the Company's advance notice bylaws and required Plaintiff to timely submit any stockholder proposals or nominations, while also satisfying such bylaws' disclosure requirements.

Plaintiff has not presented a particularized factual allegation, much less a scintilla of evidence, suggesting that it was incapable of calculating the 30-day window arising from the Company's prior public disclosure that the Annual Meeting would be held on or about June 10, 2015, or that Plaintiff's compliance with that 30-day window, as well as the substantive requirements of the Company's advance notice bylaws, was somehow impossible. Nor could it. Plaintiff's own conduct demonstrates otherwise. Plaintiff delivered a letter to the Company in mid-April 2015 purporting to provide advance notice of its two director nominations and a since-abandoned stockholder proposal. The Company

rejected that letter as both out of time and facially noncompliant with the disclosure requirements of the advance notice bylaws.

Realizing that its April letter was indisputably deficient, Plaintiff lobbed in a second untimely letter on May 7, 2015. In that letter, Plaintiff argued for the first time that the June 10, 2015 date previously disclosed by the Company was a nullity, and could not give rise to any notice obligation, because it used an "on or about" formulation. Despite having purported to provide notice in mid-April 2015, Plaintiff now contends that it would be "outlandish" to expect any stockholder to "divine" or calculate the 30-day notice window until the Company provided statutory notice of the "exact" date of the 2015 Annual Meeting, which the Company provided on April 30, 2015. Despite the Company's public disclosure of the 2015 Annual Meeting date more than one year in advance, Plaintiff contends that such disclosure was without legal effect and that Plaintiff is permitted to rely upon a back-up provision in the Company's bylaws that affords stockholders an opportunity to present proposals or nominate directors within ten days when the Annual Meeting is scheduled on short notice.

Reviewing *de novo*, this Court should reject Plaintiff's self-serving and unsound construction of the Company's advance notice bylaws and reverse and vacate the Court of Chancery's June 5 and 16, 2015 Orders. The Court of Chancery construed the Company's advance notice bylaws as requiring disclosure

of the date on which stockholders should "show up" at an Annual Meeting, rather than disclosing an anticipated Annual Meeting date that can be used to calculate 60 and 90 day ranges for compliance. That construction is legally and logically unfounded and runs contrary to the Company's consistent prior practice, as well as the fundamental purposes served by advance notice bylaws.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in determining that the Company violated its bylaws. *First*, as a threshold matter, the Court of Chancery should have rejected Plaintiff's facial challenge to the Company's advance notice bylaws. *Second*, the Court of Chancery erred in interpreting the "plain language" of the Company's advance notice bylaws. The Court of Chancery erroneously held that the Company's public disclosure that the Annual Meeting would occur on or about June 10, 2015 did not provide "prior public disclosure" of the Annual Meeting for purposes of triggering the bylaws' advance notice requirements. *Finally*, the Court of Chancery erred in ruling that Plaintiff complied with the Company's advance notice bylaws. Because the Company provided more than one year's notice of the Annual Meeting, Plaintiff's letters delivered on April 14 and May 7, 2015 were both untimely. The Court of Chancery should have rejected Plaintiff's attempt to seek a do-over and restart the advance notice clock.

2. The Court of Chancery also erred in entering preliminary and mandatory injunctive relief. The Court of Chancery's incorrect construction of the bylaws caused it to err in concluding that Plaintiff had established a reasonable likelihood of success on the merits of its claim that the Company incorrectly interpreted its bylaws. The Court of Chancery further erred by failing to condition its entry of injunctive relief upon the posting of any security whatsoever.

STATEMENT OF FACTS

A. The Parties

Defendant Hill is a Delaware corporation headquartered in Philadelphia, Pennsylvania and is one of the largest construction management firms in the United States. (A84.) Hill became publicly traded in 2006. (*Id*.) Defendants David L. Richter, Camille S. Andrews, Brian W. Clymer, Alan S. Fellheimer, Irvin E. Richter, Steven M. Kramer, and Gary F. Mazzucco are members of the Company's board of directors (the "Board"). (A85-86.) Irvin E. Richter is the Chairman of the Board, and David L. Richter is the Company's President and Chief Executive Officer. (A85.)

Plaintiff Opportunity Partners L.P. is an Ohio limited partnership that owns shares of the Company's common stock. (A84.) Plaintiff is an affiliate of Bulldog Investors, LLC (collectively with Plaintiff, "Bulldog"), which beneficially owns approximately 5.53% of the Company's stock. (A116-18.) Bulldog's three owners include Plaintiff's two nominees to the Company's Board: Phillip Goldstein and Andrew Dakos. (A118.) Bulldog is a sophisticated activist stockholder. Since 1997, it has been involved in 169 contests involving 139 different entities. (A185 (citing A216-17).)

B. The Company's Advance Notice Bylaws

Sections 2.2 and 3.3 of the Company's Amended and Restated Bylaws (the "Bylaws," and Sections 2.2 and 3.3 collectively, the "Advance Notice

Bylaws") set forth the procedure that stockholders must follow if they wish to submit stockholder proposals or nominate candidates to the Company's Board. (A6-7, A10.)

Section 2.2 of the Bylaws, which governs stockholder proposals, provides, in relevant part, as follows:

> In addition to any other applicable requirements, for business to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely notice thereof in writing to the Secretary of the Corporation. To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the meeting; provided, however, that in the event that less than seventy (70) days notice or prior public disclosure of the date of the annual meeting is given or made to stockholders, notice by a stockholder, to be timely, must be received no later than the close of business on the tenth (10th) day following the day on which such notice of the date of the annual meeting was mailed or such public disclosure was made, whichever first occurs.

(A7.) Section 3.3 of the Bylaws, which governs stockholder nominations, similarly provides as follows:

> [N]ominations by any stockholder shall be made pursuant to timely notice in writing to the Secretary of the Corporation. To be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive offices of the Corporation not less than sixty (60) days nor more than ninety (90) days prior to the meeting; provided, however, that in the event that less than seventy (70) days notice or prior public disclosure of the date of the meeting is given or made to stockholders,

> notice by the stockholder, to be timely, must be received no later than the close of business on the tenth (10th) day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made, whichever first occurs.

(A10.) The Advance Notice Bylaws thus require stockholders to submit proposals and nominations during the 30-day window that is 60 to 90 days before the announced date of the Company's Annual Meeting (the "30-Day Window Bylaw"). The Bylaws also provide a back-up provision (the "Back-Up Bylaw") that affords stockholders an opportunity to present proposals or nominate directors within ten days when the Annual Meeting is scheduled on short notice.

The Advance Notice Bylaws identify certain information that must be disclosed in a stockholder's notice of proposals or nominations. This information includes, among other required items, the name and record address of the nominating stockholder and "the class and number of shares of capital stock of the Corporation which are beneficially owned by [that] stockholder." (A7, A10.)

C. The Company Publicly Discloses Its 2015 Annual Meeting Date.

On April 30, 2014, the Company filed its proxy statement for the 2014 Annual Meeting (the "2014 Proxy"), which publicly disclosed that the Company would hold its 2015 Annual Meeting "on or about June 10, 2015." (A52.) This notice tracked advance notice language within the Company's proxy statements for each of the six years before the 2014 Proxy. (*See* A26, A30, A34, A39, A43,

A48.) Each of those proxy statements publicly disclosed, more than one year in advance, that the following year's Annual Meeting would be held "on or about" a specified date in the first two weeks of June (*id*.), and thereby allowed the Company's stockholders to readily calculate a specific 30-day window for delivery of any nominations or proposals.

D. Bulldog Attempts To Comply With The Advance Notice Bylaws, But Submits A Deficient And Untimely Letter.

On April 14, 2015, Bulldog delivered a short and sloppily-prepared letter to the Company (dated April 13, 2015) purporting to nominate Andrew Dakos and Phillip Goldstein to the Company's Board (the "April 14 Letter"). (A56; A89.) Bulldog's April 14 Letter was delivered to the Company fewer than 60 days prior to the Annual Meeting date publicly disclosed in the 2014 Proxy, and was thus untimely under Section 3.3 of the Bylaws. Although Bulldog now claims to have sent its April 14 Letter "without knowing the actual annual meeting date" (A89), no evidence whatsoever suggests that Bulldog was unaware that it was required to provide notice no later than 60 days before June 10, 2015, or that Bulldog was in any way incapable of providing such notice.

In addition to being untimely, the April 14 Letter did not come close to complying—and, on its face, reflected no effort to comply—with the substantive requirements of Section 3.3 of the Bylaws. The April 14 Letter purported to incorporate by reference a proxy statement filed by an unrelated company. (A56.)

It defined Hill as the "Company" but also included passing reference to a "Fund." (*Id*.) It included a header for "Opportunity Partners L.P.," email addresses for "bulldoginvestors.com," and a signature block for "Kimball & Winthrop LLC." (*Id*.) The April 14 Letter failed to identify the age or employment background of either of Bulldog's nominees. (*Id*.) Even if Bulldog were afforded the benefit of incorporating by reference the contents of an unrelated proxy filing made by another company, the April 14 Letter failed to provide record or residential addresses or identify the series or number of shares beneficially owned by Plaintiff or either of Bulldog's nominees, instead stating only that Plaintiff is a member of an unidentified group that beneficially owns "approximately 2 million shares . . . ." (*Id*.)

Bulldog's April 14 Letter also contained a proposal requesting that the Board "establish a 'turnaround committee' whose goal will be to explore ways to improve the Company's financial performance." (*Id*.) Bulldog's April 14 Letter provided no explanation as to the composition or function of such a committee or why Bulldog believed it would be necessary or prudent. (*Id*.) Regardless, Bulldog quickly abandoned its stockholder proposal as "outdated." (A93; *see also* A73 (purporting to provide notice of two proposals, neither of which concerns a turnaround committee).)[1]

[1] The 2014 Proxy stated that stockholders were required to submit proposals for the 2015

Based upon the foregoing defects, the Company rejected Bulldog's April 14 Letter as noncompliant with the Advance Notice Bylaws. (A69.) In its Verified Shareholder Complaint and briefing before the Court of Chancery, Bulldog never even attempted to argue that the April 14 Letter included the information required by the Bylaws.

Bulldog's April 14 Letter concluded by stating that it was "willing to have substantive discussions with representatives of the Company with the goal of enhancing shareholder value and avoiding a proxy contest." (A56.) The Company's CEO and director, David Richter, accepted this apparent olive branch and contacted Bulldog to set up a meeting (A57), which took place on April 30, 2015. (A90.)

E. The Board Responds To An Unsolicited Takeover Proposal

On May 4, 2015, the Company received an unsolicited takeover proposal from DC Capital Partners, LLC ("DC Capital"). (A62-63.) The next day, May 5, 2015, the Company announced that the Board had unanimously rejected DC Capital's proposal because it "substantially undervalue[d]" the Company and was not in the best interests of the Company or its stockholders. (A66-68.) The

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Annual Meeting "no earlier than March 15, 2015 and no later than April 15, 2015." (A52.) Because Plaintiff has withdrawn the sole proposal contained within its April 14 Letter (A93), the Court need not consider or address whether such language in the 2014 Proxy would somehow excuse the untimeliness of the April 14 Letter under Section 2.2 of the Bylaws, or whether the April 14 Letter otherwise complied with the substantive requirements of Section 2.2 of the Bylaws (which it did not).

Board also unanimously adopted a stockholder rights plan with a 15% ownership threshold. (A67.) On June 9, 2015, the Company announced that it had terminated this rights plan based upon feedback from its stockholders. (A214-15.)

F. Recognizing The Deficiencies In Its April 14 Letter, Bulldog Makes A Second Attempt To Provide Notice

On April 30, 2015, the Company issued its definitive proxy statement for the 2015 Annual Meeting (the "2015 Proxy"). (A58-61.) In accordance with 8 *Del. C.* § 222, the 2015 Proxy provided statutory notice of the date, location and time of the 2015 Annual Meeting, which, entirely consistent with the Company's prior public disclosure, would be held on June 9, 2015. (A60.) Under Section 222, this formal notice could not have been issued more than 60 days before the Annual Meeting. The Board chose June 9, 2015 for the Annual Meeting at a March 12, 2015 Board meeting (A53-55), well before receiving Bulldog's April 14 Letter (A89) or the filing of Bulldog's May 15, 2015 Form 13D (A114-19).

On May 7, 2015, only 33 days before the 2015 Annual Meeting and after the Company had already issued its 2015 Proxy, Bulldog sent a second letter to the Company (the "May 7 Letter") (A71-76) again purporting to nominate Messrs. Dakos and Goldstein to the Board. The May 7 Letter stated that it "supersedes" Bulldog's previous April 14 Letter. (A72.) Despite being delivered fewer than 60 days before June 10, 2015, Bulldog asserted that the May 7 Letter was timely under the Advance Notice Bylaws because the Company's statutory

notice of the Annual Meeting, made on April 30, 2015, was the first announcement of the June 9 date. (*Id*.) Bulldog contended that the statutory notice somehow triggered the Back-Up Bylaw and concomitantly its special ten-day window for stockholder nominations and proposals. (*Id.*)

In stark contrast to Bulldog's April 14 Letter, which comprised less than a page and on its face made no effort to comply with the Advance Notice Bylaws, the May 7 Letter included considerable additional information concerning Bulldog's nominees. The May 7 Letter included, among other items, the nominees' ages, residential addresses, employment backgrounds and the class and number of shares of the Company's stock held by each. (A73-76.) The May 7 letter also purported to include "[a]ny other information relat[ed] to each nominee that is required to be disclosed" under the SEC's rules and regulations. (A75-76.)

In addition to Bulldog's nominations, the May 7 Letter set forth two new stockholder proposals. (A73.) Referencing DC Capital's unsolicited takeover proposal, the first proposal requested that the Board "hire an investment banker to investigate the possibility of a liquidity event to maximize shareholder value." (*Id*.) The second proposal recommended that the Board rescind the Company's stockholder rights plan in the event a cash tender offer was made for all shares of the Company. (*Id*.) The Company's termination of the rights plan on June 9, 2015 (A214-15) has effectively mooted the latter proposal.

On May 11, 2015, the Company notified Bulldog that its May 7 Letter was untimely under the Advance Notice Bylaws. (A77-80.)

G. Bulldog Files This Action

On May 14, 2015, Bulldog filed its Verified Shareholder Complaint (A81-101) and Motion for Preliminary Injunction (A102-113), in which it argued that the Company breached its Bylaws by construing them to require advance notice of stockholder proposals and nominations at least 60 days before June 10, 2015, and consequently rejecting the May 7 Letter as untimely. In its briefing below, Bulldog argued that—notwithstanding the 2014 Proxy, which stated plainly that the 2015 Annual Meeting would be held on or about June 10, 2015 (A52)—it would be "outlandish" to expect stockholders to have "divine[d]" that stockholder proposals and nominations were due no later than 60 days prior to June 10, 2015. (A156.) Bulldog argued that the public disclosure of the 2015 Annual Meeting was without any legal effect under the Company's Advance Notice Bylaws—even if the Company had held its 2015 Annual Meeting on exactly June 10, 2015 (A178, A209)—and therefore the 2015 Proxy triggered the Back-Up Bylaw. (A96-97.)

H. The Court Of Chancery's Orders

In an Order dated June 5, 2015 (the "Injunction Order"), the Court of Chancery (i) adopted Bulldog's facial challenge to the Advance Notice Bylaws; (ii) preliminarily enjoined the Company from conducting any business at its

scheduled 2015 Annual Meeting, "other than convening the meeting for the sole purpose of adjourning it for a minimum of 21 days"; and (iii) entered mandatory injunctive relief requiring the Company to permit Bulldog to present "the items of business and nominations" set forth in its May 7 Letter at the adjourned Annual Meeting. (Ex. A ¶¶ 10, 13.) The Injunction Order purports to base these rulings upon the "plain language" of the Advance Notice Bylaws (*id*. ¶¶ 5, 10), which the Court held can be triggered only by a notice or public disclosure setting forth the "actual" or "specific" date—rather than the "anticipated" date—of the Company's Annual Meeting (*id*. ¶¶ 3, 5-8). The Court of Chancery declared that Bulldog's May 7 Letter was thus timely and that the Company failed to correctly interpret its Bylaws by contending otherwise. (*Id*. ¶¶ 9-10.) On June 16, 2015, the Court of Chancery entered an Order (dated as of June 15, 2015) directing the entry of the Injunction Order as a partial final judgment on Count I of Bulldog's Verified Shareholder Complaint (the "Partial Final Judgment Order"). (Ex. B ¶ 8.)

On June 9, 2015, in accordance with paragraph 13 of the Injunction Order (Ex. A ¶ 13), the Company convened its 2015 Annual Meeting for the sole purpose of adjourning it until August 7, 2015. (A214-15.)

This is Defendants' appeal from the Partial Final Judgment Order and Injunction Order.

ARGUMENT

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

A. QUESTION PRESENTED:

Did the Court of Chancery err in adopting Plaintiff's erroneous construction of the Advance Notice Bylaws and in determining that the Company violated its Bylaws? This issue was preserved for appeal. (A134-45; A184-203.)

B. SCOPE OF REVIEW:

This Court reviews the construction of corporate bylaws *de novo*. *See Centaur Partners, IV* v. *Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990).

C. MERITS OF THE ARGUMENT:

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

Seeking to rely on the Company's short-notice Back-Up Bylaw, rather than the general 30-Day Window Bylaw, Bulldog contends that the Company's prior public disclosure that the 2015 Annual Meeting would be held "on or about June 10, 2015" did not effectively trigger any advance notice obligation under the Bylaws. The Court of Chancery should have flatly rejected Bulldog's facial challenge to the sufficiency and effectiveness of the Company's public disclosure of the 2015 Annual Meeting—and, by extension, its public disclosures of each of its six prior Annual Meetings.

Bulldog presented neither evidence nor any well-pleaded factual allegations suggesting that it failed to understand or appreciate that the Company had publicly disclosed June 10, 2015 as the reference date for application of its 30-Day Window Bylaw. Nothing in the record suggests that Bulldog, or any other stockholder, was confused about that point or unable to calculate the 30-day window—90 and 60 days before June 10—for providing notice of stockholder proposals and nominations. Bulldog has not alleged that it was unable to comply with the 30-Day Window Bylaw or to provide the information required under the Advance Notice Bylaws. The Court of Chancery nevertheless entertained Bulldog's application and invalidated the Company's correct and consistent interpretation and application of the 30-Day Window Bylaw.

Bulldog's contention that it was somehow blindsided and could not have known to provide advance notice at least 60 days before June 10, 2015 is meritless. Bulldog has offered no support for that contention, which is belied by Bulldog's delivery of its half-baked April 14 Letter weeks before the Company issued the 2015 Proxy, which Bulldog self-servingly mischaracterizes as the "first announcement" of the 2015 Annual Meeting. (A72.)

Given the untimeliness and other deficiencies of the April 14 Letter, the Court of Chancery should have rejected Bulldog's facial challenge. Bulldog is not a bewildered rookie, but rather a sophisticated activist that has waged over 160

contests since 1997. (A185 (citing A216-17).) Delaware courts do not, and should not, excuse stockholders from their own self-inflicted failure to read and comply with corporate bylaws. Bulldog had "every opportunity to comply with" the Company's 30-Day Window Bylaw. *See Openwave Sys. Inc.* v. *Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 236, 241 (Del. Ch. 2007) (refusing to excuse late nominations despite bylaws' requirement of notice on either of two possible dates due to the activist's "complete disregard for the established deadlines" even though it had "every opportunity to comply with" either date); *Accipiter Life Scis. Fund, L.P.* v. *Helfer*, 905 A.2d 115, 122 (Del. Ch. 2006) (granting summary judgment against activist stockholder who conceded that "there was nothing confusing about" disclosure triggering time to nominate board candidates and that it would have complied with the advance notice requirements had it read that disclosure).

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

The Court of Chancery erroneously adopted Plaintiff'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.

It is well settled that Delaware courts will enforce advance notice bylaws, which are "designed and function 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. The Advance Notice Bylaws set forth the requirements that all stockholders must follow if they wish to submit stockholder proposals or nominate candidates to the Board. (A6-7, A10.) Where more than 70 days' "notice or prior public disclosure" of the Annual Meeting date is provided, stockholders are required by the 30-Day Window Bylaw to deliver notice to the Company "not less than sixty (60) days . . . prior to the meeting." (*Id.*) The Company's Bylaws thus ensure an orderly and fair election contest by imposing a reasonable and transparent date certain for stockholders to submit timely proposals and nominations.

The Court of Chancery recognized that "'prior public disclosure' must mean something other than formal statutory notice" (Ex. A ¶ 4), and therefore the Advance Notice Bylaws do not require a public disclosure as detailed as that required under 8 *Del. C.* § 222. The Court of Chancery nevertheless held, based upon the "plain language" of the Company's Advance Notice Bylaws (Ex. B ¶ 2, Ex. A ¶¶ 5, 10), that the 30-Day Window Bylaw can be triggered only by a notice or public disclosure setting forth the "actual" or "specific" date—rather than the "anticipated" date—of the Annual Meeting (Ex. A ¶¶ 3, 5-8). The Court of Chancery incorrectly reasoned that the 2014 Proxy merely provided "an indication

of a possible future date" and did not provide "prior public disclosure" of the 2015 Annual Meeting. (*Id*. ¶ 6.)

The Court of Chancery cited no case law, from Delaware or elsewhere, for its novel holding. Instead, the Court of Chancery pronounced 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." (Ex. A ¶ 5.) That analysis is not merely woven from whole cloth but also a *non sequitur*, as an anticipated meeting date also permits stockholders to calculate "a specific range of dates for compliance with the Advanced Notice Bylaws . . . ." (*Id*.) No stockholder needs to "know when to show up" in order to comply with the 30-Day Window Bylaw. Stockholders learn when to "show up" when the statutory notice of the Annual Meeting is sent. The Court of Chancery's ruling that the Company's provision of such statutory notice afforded a noncompliant stockholder a second bite at the apple is without basis in law or logic.

Both Bulldog and the Court of Chancery engraft into the Advance Notice Bylaws a requirement that both "notice" and "prior public disclosure" of the date of the Annual Meeting be of an exact date. But the Advance Notice Bylaws do not so require, and this construction is at odds with the plain language

of the Bylaws, which comports with the Company's clear course of conduct. The Court of Chancery's erroneous construction effectively negates the Company's 30-Day Window Bylaw and would threaten the same result for numerous Delaware corporations that have similar bylaws. Accordingly, the Court of Chancery's Partial Final Judgment Order and Injunction Order should be reversed.

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

The Company's public disclosure that the 2015 Annual Meeting would be held "on or about June 10, 2015" tracked the Company's public disclosures for its six prior Annual Meetings. (*See* A26, A30, A34, A39, A43, A48.) 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. (*Id*.) Under the 30-Day Window Bylaw, stockholders were required to submit nominations and proposals no later than 60 days before the announced date of the 2015 Annual Meeting, or April 11, 2015.

Rather than comply with the Advance Notice Bylaws, Bulldog delivered its April 14 Letter three days late. (A89.)[2] In addition to being untimely,

[2] Bulldog contends that its April 14 Letter "complied with the 30-day period listed in the 2014 proxy statement" (A89), referring to language in the 2014 Proxy stating that stockholders were required to submit proposals for the 2015 Annual Meeting "no earlier than March 15, 2015 and no later than April 15, 2015." (A52.) As noted above, this language did not relate to nominations, but solely to proposals (*id*.), and Bulldog has withdrawn the only proposal contained within its April 14 Letter. (A93.) Accordingly, the Court need not consider or address

the April 14 Letter did not come close to substantively complying with Section 3.3 of the Bylaws because it omitted critical information required for Bulldog's proposed nominees. The omitted information included (i) the nominees' ages, (ii) their employment background, (iii) their business or personal addresses, and (iv) the series or numbers of shares beneficially owned by Plaintiff or either of Bulldog's nominees. (A56.) Even if one were to give Bulldog the benefit of incorporating the contents of its unrelated proxy filing for a different company, the April 14 Letter remained deficient because it omitted required information, including the business or personal addresses of the nominees and the series or number of shares beneficially owned by Plaintiff or Bulldog's nominees. (*Id*.)

Significantly, Bulldog did not even contend below that its April 14 Letter satisfied the requirements of Section 3.3 of the Bylaws. At most, its counsel argued that certain omitted information, which was expressly required under the Bylaws, did not "sound material or appropriate for an advance notice bylaw." (A207-208.) There is nothing immaterial or inappropriate about requiring a stockholder who intends to nominate a candidate for director to disclose how many shares of stock it beneficially owns. Regardless, Delaware courts will not rule in favor of a stockholder plaintiff making a facial challenge to a bylaw when that plaintiff "could easily have preserved its rights with reasonable diligence."

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whether this language would somehow excuse the untimeliness of the April 14 Letter under Section 2.2 of the Bylaws.

Accipiter, 905 A.2d at 127. Bulldog was not incapable of including the required information in its April 14 Letter. It just did not do so.[3]

Bulldog's May 7 Letter, which expressly "supersede[d]" the April 14 Letter (and thus independently nullified the April 14 Letter) (A72), was similarly untimely and no more than an attempt to secure a mulligan. The Court of Chancery's ruling that the advance notice clock somehow restarted (and became shorter) because the Company provided statutory notice for its 2015 Annual Meeting on April 30, 2015, and thereby triggered the Back-Up Bylaw (Ex. A ¶¶ 7-10), should be reversed because it ignores that the Company provided "prior public disclosure" of the 2015 Annual Meeting over one year earlier.

[3] The Court of Chancery based its ruling on the May 7 Letter and therefore did not reach the question of whether the April 14 Letter was compliant. (Ex. A ¶ 9.)

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

A. QUESTION PRESENTED:

Did the Court of Chancery err in entering preliminary and mandatory injunctive relief based upon its erroneous construction of the Advance Notice Bylaws? This issue was preserved for appeal. (A134-48; A184-204.)

B. SCOPE OF REVIEW:

Although a trial court's decision to grant or refuse injunctive relief is reviewed for abuse of discretion, this Court does "not defer to the trial court on embedded legal conclusions and review[s] them *de novo*." *N. River Ins. Co.* v. *Mine Safety Appliances Co*., 105 A.3d 369, 380-81 & n.48 (Del. 2014) (citation omitted). This Court reviews the construction of corporate bylaws *de novo*. *See Centaur Partners*, 582 A.2d at 926.

C. MERITS OF THE ARGUMENT:

In its Injunction Order, the Court of Chancery preliminarily enjoined the Company from conducting any business at its scheduled 2015 Annual Meeting, "other than convening the meeting for the sole purpose of adjourning it for a minimum of 21 days," and entered mandatory injunctive relief requiring the Company to permit Bulldog to present "the items of business and nominations" set forth in its May 7 Letter at the adjourned Annual Meeting. (Ex. A ¶ 13.)

"To obtain a preliminary injunction, the plaintiffs must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable injury without an injunction; and (3) that their harm without an injunction outweighs the harm to the defendants that will result from the injunction." *C & J Energy Servs., Inc.* v. *City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1066 (Del. 2014). "A preliminary mandatory injunction will not issue unless the legal right to be protected is clearly established." *Heaco, Inc.* v. *Del. Tech. & Cmty. Coll.*, 1994 WL 110826, at *3 (Del. Ch. Mar. 21, 1994) (citation omitted).

The Court of Chancery based its entry of injunctive relief upon its erroneous construction of the Advanced Notice Bylaws and, therefore, erred in concluding that Bulldog demonstrated a reasonable probability of success on the merits. The Court of Chancery also incorrectly determined that Bulldog faced irreparable harm in the absence of an injunction and that the balance of the equities favored injunctive relief (Ex. A ¶¶ 11-12); on the contrary, any harm to Bulldog was self-inflicted due to its own failure to comply with the Advance Notice Bylaws.

The Court of Chancery compounded these errors by failing to condition its entry of injunctive relief upon the posting of any security whatsoever. (Ex. A ¶ 15.) That determination was improper under the Court of Chancery

Rules, which provide in relevant part that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant . . . for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Ct. Ch. R. 65(c); *see also Am. Gen. Hldgs. LLC* v. *Renco Grp., Inc.*, 2012 WL 6681994, at *7 (Del. Ch. Dec. 21, 2012) ("A prerequisite to the issuance of a preliminary injunction is the posting of a security pursuant to Court of Chancery Rule 65(c) . . . ."). To protect the enjoined party, "the trial court should set the bond at a level likely to meet or exceed a reasonable estimate of potential damages." *Id*. (quoting *Guzzetta* v. *Serv. Corp. of Westover Hills*, 7 A.3d 467, 469 (Del. 2010)). The Court of Chancery's failure to require *any* security was an abuse of discretion, particularly given its own acknowledgement that its entry of injunctive relief would impose costs upon the Company. (Ex. A ¶ 12.)

Because the injunctive relief entered by the Court of Chancery was improperly granted, Defendants respectfully request that it be vacated by this Court.

CONCLUSION

For the foregoing reasons, 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 19, 2015, the foregoing was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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