

March 19, 2008

## *JANA Master Fund, Ltd. v. CNET Networks, Inc.*

---

### **Delaware Chancery Court Rules That Company's Advance Notice Bylaw Applies Only to 14a-8 Proposals, and Not Independently Financed Proxy Solicitations**

---

#### **SUMMARY**

In a decision issued on March 13, 2008, the Delaware Chancery Court in *JANA Master Fund, Ltd. v. CNET Networks, Inc.* held that CNET's advance notice bylaw applied only to shareholder proposals that are sought to be included in the company's proxy materials pursuant to Rule 14a-8 under the Securities and Exchange Act of 1934, as amended, and therefore did not apply to independently financed shareholder proxy solicitations. The decision is based upon the somewhat unusual wording of the CNET advance notice bylaw, the relevant portion of which is quoted below. Chancellor Chandler cited three principal reasons based on the specific language for limiting the bylaw's applicability: (i) the language that "any stockholder...may seek to transact other corporate business at the annual meeting (emphasis added)" does not make sense outside of the context of Rule 14a-8 because shareholders using their own proxy materials do not need management approval; (ii) the bylaw's deadline for shareholder notice to the company is tied to the mailing date of the company's prior year's proxy materials, as is the deadline under Rule 14a-8 and unlike most advance notice bylaws; and (iii) in the Court's view, most importantly, the final sentence of the bylaw (which states that "such notice must also comply with any applicable federal securities law establishing the circumstances under which [CNET] is required to include the proposal in its

## SULLIVAN & CROMWELL LLP

proxy statement...”) makes it clear that the scope of the bylaw is limited to proposals that shareholders seek to have included in the company’s proxy materials.<sup>1</sup>

---

### BACKGROUND

JANA Master Fund, Ltd., an investment fund, acquired, beginning in October of 2007, approximately 11% of CNET Networks, Inc.’s outstanding common stock. JANA, by means of an independently financed proxy contest, sought to gain control of CNET’s eight-member classified board by (i) replacing the two CNET directors up for re-election at the 2008 annual meeting; (ii) seeking to expand the size of the CNET board to thirteen directors; and (iii) nominating five individuals to fill the newly created positions.

On December 26, 2007, JANA wrote to CNET to advise the board of its intention to solicit proxies in favor of its nominees and proposals and to request inspection of CNET’s shareholder list pursuant to §220 of the Delaware General Corporation Law. On January 3, 2008, CNET notified JANA that it refused to provide the shareholder materials on the basis that JANA failed to state a proper purpose for the inspection of the stockholder list. CNET took the position that JANA’s proposed proxy solicitation failed to comply with CNET’s advance notice bylaw because JANA would not have held its CNET stake for at least a year at the expected time of CNET’s annual meeting in June 2008, which was a requirement of the bylaw.

On January 7, 2008, JANA filed a complaint seeking an expedited declaration that either the bylaws were inapplicable to JANA or that CNET’s interpretation of the bylaws was invalid, and the Court heard oral arguments on March 3, 2008.

---

### THE CHANCERY COURT DECISION

The Court analyzed the wording of CNET’s advance notice bylaw, which CNET argued governs all shareholder nominations and other shareholder proposals. In turn, JANA argued that CNET’s advance notice bylaw applied solely to proposals made under Rule 14a-8 pursuant to which shareholder proponents sought to include their proposals in CNET’s proxy materials.

In ruling that the bylaw applies solely to proposals that are intended to be included in a company’s proxy materials pursuant to Rule 14a-8, the Court examined closely the language contained in Article II, Section 3 of CNET’s bylaws, which provides, in part:

Any stockholder of the Corporation that has been the beneficial owner of at least \$1,000 of securities entitled to vote at an annual meeting for at least one year may seek to transact other corporate business at the

---

<sup>1</sup> The opinion also refers to nominations being made under Rule 14a-8; directors’ nominations by a shareholder are one of the enumerated grounds for exclusion under Rule 14a-8.

## SULLIVAN & CROMWELL LLP

annual meeting, provided that such business is set forth in a written notice and mailed by certified mail to the Secretary of the Corporation and received no later than 120 calendar days in advance of the date of the Corporation's proxy statement released to security holders in connection with the previous year's annual meeting of security holders (or, if no annual meeting was held in the previous year or the date of the annual meeting has been changed by more than 30 calendar days from the date contemplated at the time of the previous year's proxy statement, a reasonable time before the solicitation is made). Notwithstanding the foregoing, such notice must also comply with any applicable federal securities laws establishing the circumstances under which the Corporation is required to include the proposal in its proxy statement or form of proxy.

In making its determination, the Court focused on three elements in CNET's advance notice bylaw and concluded that the language of the bylaw leads to only one reasonable conclusion: it applies solely to Rule 14a-8 proposals.

First, the Court concluded that the language in CNET's advance notice bylaw, which states "a stockholder...may seek to transact other corporate business at the meeting" does not make sense outside the context of Rule 14a-8. Under Delaware law, shareholders are entitled to make proposals without seeking the approval of management. It is only where a shareholder wishes to include its proposal in management's proxy materials, and avoid the costs of a proxy solicitation, that the shareholder must seek inclusion under Rule 14a-8, which provides management with significant power as a gatekeeper—"what a shareholder may do under Rule 14a-8 is far different than what a shareholder may do on his or her own."<sup>2</sup> The Court noted that the other federal proxy rules do not give management the ability to restrict shareholder proposals or nominations. Thus, it concluded that the phrase "may seek" suggests the shareholder must ask for permission or approval to make a proposal, which only occurs under Rule 14a-8, and that because JANA intended to finance its own proxy solicitation and thus did not need management permission or approval to make a proposal, the bylaw does not apply to JANA's proposals.

Second, the Court noted that the shareholders' submission deadline for notice of proposals to CNET was tied to the mailing date of CNET's proxy. The Court surmised that the most logical explanation of such a deadline would be to give CNET's management time to include proposals in its own proxy materials. The Court noted that the deadline of 120 days prior to the release dated of the prior year's proxy materials was similar (and it is, in fact, identical) to the deadline in Rule 14a-8, and stated the Court could not find "a single example of a permissible advance notice bylaw that has set the notice required by reference to

---

<sup>2</sup> *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, No. 3447-cc, slip op. at p. 12 (Del. Ch. Mar. 13, 2008)

## SULLIVAN & CROMWELL LLP

the release of the company's proxy statement."<sup>3</sup> Interestingly enough, the Court did not comment on the fact that the eligibility requirement in the CNET bylaw, ownership of \$1,000 of the stock for one year, is very close to that of Rule 14a-8 (\$2,000 or 1% held for one year) and that such an eligibility requirement is typically missing in other advance notice bylaws as well.

A third aspect of CNET's bylaw proved most compelling to the Court. The final sentence of CNET's advance notice bylaw provides that "Notwithstanding the foregoing, such notice must also comply with any federal securities laws establishing the circumstances under which [CNET] is required to include the proposal in its proxy statement or form of proxy." The Court determined that this last sentence "purportedly grafts onto the bylaw all of the requirements of Rule 14a-8."<sup>4</sup> The Court noted that Delaware courts have long recognized the rights of shareholders to nominate an opposing slate, and that the substantial requirements of Rule 14a-8 reflect a compromise because the "corporate proxy machinery needed to be protected from abuse by self-serving shareholders."<sup>5</sup> Applying the "rule of construction in favor of franchise rights," which requires the Court to interpret bylaw provisions "in the manner most favorable to the free exercise of traditional electoral rights,"<sup>6</sup> the Court concluded that CNET's bylaw does not apply to shareholder proposals brought outside Rule 14a-8.

---

### COMMENT

It is important to note that this decision does not generally limit or call into question the applicability of advance notice bylaws. In fact, the Court noted that it had upheld advance notice bylaws in the past.<sup>7</sup> The Court was clearly influenced by the interpretive presumption in favor of the full exercise of electoral rights, the fact that it was unable to come up with a single example of an advance notice bylaw tied to a proxy mailing date and that CNET's bylaw incorporated the requirements of Rule 14a-8 by reference.

The Chancery Court's decision should provide a good catalyst for companies to review their own advance notice bylaws to ensure that they do not contain any of the deficiencies identified by the Court in the CNET bylaws. The importance of this housekeeping exercise is magnified by the Court's indifference to

---

<sup>3</sup> *Id.* at p. 15.

<sup>4</sup> *Id.* at p. 19.

<sup>5</sup> *Id.* at p. 18.

<sup>6</sup> *Id.* (citing *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002)).

<sup>7</sup> The Court has warned though that it would strike down those advance notice bylaws that "unduly restrict the stockholder franchise or are applied inequitably." *Id.* at 15 (citing *Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228 (239) (Del. Ch. 2007)).

## SULLIVAN & CROMWELL LLP

CNET's position once the Court ruled that its advance notice bylaw applied solely to Rule 14a-8 contexts.<sup>8</sup>

While, in our experience, CNET's advance notice bylaw does not represent a customary form of advance notice bylaw, companies will want to ensure in the process of review, among other things, that their advance notice bylaws clearly state that they apply to all shareholder proposals (other than those made pursuant to Rule 14a-8, because an issuer cannot exclude 14a-8 proposals other than for the enumerated reasons in that Rule) and nominations, and do not contain (i) the language reflecting the need for management approval found in CNET's advance notice bylaw (i.e., "may seek to transact other corporate business at the annual meeting..."); or (ii) language to the effect that the required notice must also comply with Rule 14a-8. Issuers may also want to consider revising any deadlines based on the release of the prior year's proxy materials, in light of the significance the Court attached to this element. Such bylaws invariably require information as to share ownership by the proponent. Issuers may also wish to consider requiring disclosure of any derivative positions held with respect to the issuer's securities. We are available to assist in the review of your bylaws and to discuss any questions or comments you may have with respect to the case and its related issues.

\* \* \*

Copyright © Sullivan & Cromwell LLP 2008

---

<sup>8</sup> "CNET is correct that it has no other advance notice provision and that if the Notice Bylaw is interpreted to apply only to 14a-8 proposals, then 'any of CNET's thousands of stockholders are free to raise for the first time and present any proposals they desire at the Annual Meeting.' Although this may sound daunting, it is the default rule in Delaware." *Id.* at 16.

# SULLIVAN & CROMWELL LLP

## ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance and corporate transactions, significant litigation and corporate investigations, and complex regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 700 lawyers on four continents, with four offices in the U.S., including its headquarters in New York, three offices in Europe, two in Australia and three in Asia.

## CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Jennifer Rish (+1-212-558-3715; [rishj@sullcrom.com](mailto:rishj@sullcrom.com)) or Alison Alifano (+1-212-558-4896; [alifanoa@sullcrom.com](mailto:alifanoa@sullcrom.com)) in our New York office.

## CONTACTS

---

### New York

Francis J. Aquila	+1-212-558-4048	<a href="mailto:aquilaf@sullcrom.com">aquilaf@sullcrom.com</a>
Joseph B. Frumkin	+1-212-558-4101	<a href="mailto:frumkinj@sullcrom.com">frumkinj@sullcrom.com</a>
Stephen M. Kotran	+1-212-558-4963	<a href="mailto:kotrans@sullcrom.com">kotrans@sullcrom.com</a>
James C. Morphy	+1-212-558-3988	<a href="mailto:morphyj@sullcrom.com">morphyj@sullcrom.com</a>
Keith A. Pagnani	+1-212-558-4397	<a href="mailto:pagnanik@sullcrom.com">pagnanik@sullcrom.com</a>
George J. Sampas	+1-212-558-4945	<a href="mailto:sampasg@sullcrom.com">sampasg@sullcrom.com</a>

---

### Washington, D.C.

Janet Geldzahler	+1-202-956-7515	<a href="mailto:geldzahlerj@sullcrom.com">geldzahlerj@sullcrom.com</a>
Daryl A. Libow	+1-202-956-7650	<a href="mailto:libowd@sullcrom.com">libowd@sullcrom.com</a>

---

### Los Angeles

Eric M. Krautheimer	+1-310-712-6678	<a href="mailto:krautheimere@sullcrom.com">krautheimere@sullcrom.com</a>
Alison S. Ressler	+1-310-712-6630	<a href="mailto:resslera@sullcrom.com">resslera@sullcrom.com</a>

---

### Palo Alto

Scott D. Miller	+1-650-461-5620	<a href="mailto:millersc@sullcrom.com">millersc@sullcrom.com</a>
-----------------	-----------------	--

---

### London

Brian E. Hamilton	+44-20-7959-8440	<a href="mailto:hamiltonb@sullcrom.com">hamiltonb@sullcrom.com</a>
John L. Hardiman	+44-20-7959-8545	<a href="mailto:hardimanj@sullcrom.com">hardimanj@sullcrom.com</a>
Richard C. Morrissey	+44-20-7959-8520	<a href="mailto:morrisseyr@sullcrom.com">morriseyr@sullcrom.com</a>
George H. White III	+44-20-7959-8570	<a href="mailto:whiteg@sullcrom.com">whiteg@sullcrom.com</a>

---