SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DARWIN DEASON, Plaintiff, v. XEROX CORP., JEFF JACOBSON, GREGORY Q. BROWN, JOSEPH J. ECHEVARRIA, WILLIAM CURT HUNTER, ROBERT J. KEEGAN, CHERYL GORDON KRONGARD, CHARLES PRINCE, ANN N. REESE, STEPHEN H. RUSCKOWSKI, and SARA MARTINEZ TUCKER, Defendants.	Index No. 650988/2018 (Ostrager, J.) **CONTAINS INFORMATION DESIGNATED HIGHLY CONFIDENTIAL**

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiff, a long-term and presently the third-largest shareholder of Xerox Corp. ("Xerox" or the "Company"), submits this supplemental memorandum of law in support of his motion for a preliminary injunction enjoining the enforcement of Xerox's advance notice bylaw deadline for the nomination of directors to be elected at the upcoming 2018 Xerox annual shareholder meeting and permitting Plaintiff to notice a full slate of competing directors for election at that meeting, and in opposition to the Xerox board of directors' ("Defendants'") motion to dismiss.[1] As demonstrated below in more detail, Plaintiff has adequately stated claims for breach of fiduciary duty and satisfied the prerequisites for a preliminary injunction.[2]

This action arises from the Xerox board of directors' (the "Board's") breaches of its fiduciary duties in preventing Plaintiff and other Xerox shareholders from nominating a slate of directors to be elected at the upcoming 2018 annual shareholder election meeting. Xerox's bylaws contain an advance notice deadline for shareholders who wish to nominate persons for election to the board of directors at the Company's annual meeting. The deadline with respect to board candidate nominations for the 2018 annual shareholder meeting was December 11, 2017, approximately six months before the anticipated June annual meeting date.

As described below and in Plaintiff's Complaint and soon-to-be-filed Amended Complaint,[3] more than six weeks *after* the December 11 nomination deadline, Defendants made a series of very significant decisions and disclosures that were highly material to the shareholders' decisions concerning potential nomination of directors. Specifically, Defendants disclosed that they had approved a change of control transaction, the most important type of

[1] In further support of this Memorandum of Law, Plaintiff submits the Affirmation of Israel Dahan and the Exhibits attached thereto, including the Expert Report of John C. Coffee, Jr.
[2] Plaintiff is pursuing this cause of action only against the Xerox board of directors and not against Xerox.
[3] Per the Court's March 27, 2018 order, Plaintiff has until April 13, 2018 to file his Amended Complaint.

decision that a corporation can face, with Fujifilm Holdings Corp. ("Fuji"). Defendants—a majority of whom have secured for themselves officer or director positions with the new combined entity—pursued the transaction despite knowing that it was not in the best interests of Xerox's shareholders, dramatically undervalues Xerox, provides a wholly inadequate control premium, if any, and disproportionately favors Fuji. Moreover, Defendants revealed for the first time the existence of a preemptive "crown jewel" lock-up right Fuji has under the Fuji Xerox joint venture agreements, which allows Fuji to control Xerox's intellectual property and manufacturing rights in the $36 billion Asia-Pacific market if Xerox sells to another suitor, and makes it "virtually impossible" for Xerox to sell itself to anyone other than Fuji. Had Plaintiff known of these material facts prior to the nomination deadline, he would have timely filed a proposed competing slate of directors to be considered for election at the upcoming Xerox 2018 annual shareholder meeting. It is well-settled law that shareholders are entitled to seek and obtain a waiver of the nomination deadline date if there is a "material" change in circumstances caused by the current directors of the corporation *after* the deadline.

After discovering all of those material changes, Plaintiff, in an effort to protect the interests of Xerox shareholders and provide them with a legitimate voice in determining the future direction of the Company at the upcoming 2018 annual shareholder meeting, sent a letter to Defendants on February 26, 2018 demanding that the Board waive the Company's advance notice bylaw deadline for nomination of directors and allow Plaintiff to nominate a full slate of directors for election at the annual election meeting. In breach of their fiduciary duties to Plaintiff and other Xerox shareholders, and acting contrary to well-established precedent, Defendants refused to grant Plaintiff's legitimate waiver request. Defendants' wrongful refusal to waive the advance notice bylaw director nomination deadline will cause

immediate and irreparable harm to Plaintiff and all other Xerox shareholders. Indeed, Defendants are preventing Plaintiff and all Xerox shareholders from exercising their most fundamental corporate right—the right to exercise their franchise and have a say in the future direction of the Company, which is especially necessary at this critical juncture for Xerox.

Accordingly, the Court should grant Plaintiff's request to enjoin the enforcement of Xerox's advance notice bylaw deadline for the nomination of directors and permit Plaintiff to submit a full slate of directors for election at the upcoming 2018 annual shareholder meeting.

FACTUAL BACKGROUND[4]

A. Xerox's Advance Notice Bylaw For Nomination Of Directors

Xerox's bylaws require that shareholders who wish to nominate persons for election as directors, or to bring business before any meeting of the shareholders of the Company, provide notice in the manner stated in Article I, Section 6 of the Company's bylaws. *See* Dahan Affirmation Ex. 1 (hereinafter, "Ex. __"). That section provides certain notice procedures with which a stockholder must comply, including that timely written notice must be given to the Secretary of the Company and that notice must include various enumerated information (the "Advance Notice Bylaw"). *Id.* For a notice to be timely, the bylaws require as follows:

> To be timely, a shareholder's notice shall be delivered or mailed and received at the principal executive offices of the Company not less than 120 days nor more than 150 days in advance of the date which is the anniversary of the date the Company's proxy statement was released to security holders in connection with the previous year's annual meeting . . . .

Id. (Bylaws, Article I, Section 6).

[4] To reduce the burden on the Court of duplicative factual recitations, Plaintiff incorporates by reference the Factual Background section in his Supplemental Memorandum of Law in Index No. 650675/2018, which was consolidated with this action and filed simultaneously.

Xerox's last annual meeting of its shareholders was held on May 23, 2017, and the proxy for that meeting was released to shareholders on April 10, 2017 (the "2017 Proxy"). Ex. 2. Although the Company has yet to announce the date for its 2018 annual meeting of shareholders, upon information and belief, that meeting must be held before the end of June 2018. Thus, pursuant to the Advance Notice Bylaw, any stockholder who wished to nominate persons for election to Xerox's Board or otherwise present a proposal at the next annual meeting had to comply with the Advance Notice Bylaw requirements, including by providing notice to the Secretary of the Company no later than December 11, 2017, the 120th day prior to the one year anniversary of the 2017 Proxy. Ex. 1. Carl Icahn, Xerox's largest shareholder, submitted a slate of four director nominees by the December 11, 2017 deadline. Ex. 3.

B. The Occurrence Of Material And Dramatic Changes At Xerox After The Director Nomination Deadline

On January 10, 2018—approximately one month after the deadline in the Advance Notice Bylaw—the Wall Street Journal reported *rumors* of deal talks between Xerox and Fuji. Ex. 4. On January 17, 2018, after being ignored for months, Plaintiff wrote a public letter to the Xerox Board, *see* Ex. 5, which stated, in part, as follows:

> As you well know, shareholders and potential shareholders have been perplexed and put off of the Company by the venture with Fuji, *speculating at the incredible materiality of its secret terms, from change of control provisions to manufacturing most of Xerox's products to all manner of potential terms that incredibly in 2018 are not disclosed by the Company at all. In this era of corporate governance, to omit disclosures of this magnitude and materiality is breathtaking.*
>
> *Furthering the harm, we read with interest that Xerox is now in discussions with Fuji to substantially alter its relationship with Fuji, which was material enough to warrant front page news in many of the most prominent financial news services, but left shareholders and potential shareholders guessing as to how to evaluate a change to a bedrock agreement guiding the Company's future that is nowhere disclosed in its voluminous public filings.*
>
> It is now on record in a recent Wall Street Journal article that the venture has raised serious doubts in the minds of many Xerox investors and has moved

> overwhelmingly in Fuji's favor over time (see Wall Street Journal, "*In Talks, Fujifilm Outshines Xerox*"). At a time when the Board should be aggressively pursuing our shareholder rights to terminate the Fuji venture and liberate the Company globally, to instead plot in secret in violation of the law to cook up a short term band-aid is insufficient and unwise in the extreme and warrants shareholder action.
>
> *All shareholders deserve to know now what Xerox's rights are under the central existing agreement governing the Company's future so that they can engage the Company, provide their views and make their investment and voting decisions with at least the minimum cards on the table*. At a time when the Company appears to be bellying back up to a bar that has been unforgiving to Xerox that is doubly so.

(Emphasis added.)

On January 31, 2018—*more than six weeks after the expiration of the Advance Notice Bylaw director nomination deadline*—Defendants finally disclosed the existence of a definitive agreement to combine Xerox into Fuji Xerox and the dramatically one-sided terms of such change of control transaction (the "Transaction"). Ex. 6. To this end, Defendants disclosed for the first time that Fuji Xerox will become a wholly-owned subsidiary of Xerox, with Fuji acquiring a 50.1% ownership interest in Xerox and Xerox's current shareholders owning the remaining 49.9% of the Company. *Id.* Fuji will acquire its majority of shares of Xerox by giving Xerox its ownership interest in Fuji Xerox. In other words, as Fuji's CEO boasted to the Nikkei Asian Review, the "scheme will allow [Fuji] to take control of Xerox without spending a penny." Ex. 7.

The Transaction gives Fuji a majority ownership and control over Xerox without having to provide any realistic control premium to current Xerox shareholders. It also leaves Xerox shareholders hostage and subject to abuse by Fuji. The Transaction is highly unusual and it is not the market norm for the board of a target company to approve a change of control transaction where the buyer corporation only owns 50.1% of the combined entity as opposed to buying out all of the shareholders in the deal. Indeed, Xerox previously rejected this type of arrangement

when Fuji offered it in 2007 because it would have given Fuji effective control over Xerox without paying a control premium to Xerox shareholders. Exs. 8, 9.

Additionally, Defendants revealed that Defendant Jeff Jacobson, the current CEO of Xerox and a member of the Xerox Board (and who the Board unanimously decided should not be the future leader of Xerox and, therefore, sought to replace), will serve as the CEO of the new combined entity. Exs. 34, 35. The board of the new combined entity will have twelve members, seven appointed by the Fuji board (one of whom will be Defendant Jacobson) and five independent directors from the current Xerox Board. Thus, a majority of the current ten members of Xerox's Board who approved the proposed Transaction will obtain executive or board positions in the new Fuji Xerox.

Also, on January 31 and in connection with the announcement of the Transaction, Defendants decided to disclose for the first time copies of the Joint Venture Agreements[5] and their material terms. Ex. 10. As a result of these disclosures, Plaintiff and Xerox shareholders discovered for the first time the existence of Fuji's "crown jewel" lock-up right under the Joint Venture Agreements. Exs. 11, 12, 13, 14. Specifically, Plaintiff and all other Xerox shareholders discovered that, under the JEC, if Xerox engages in a transaction with a competitor for just over 30% of Xerox, Fuji has the right to terminate the JEC, which would then completely eliminate Xerox's governance and decision-making power with respect to the Fuji Xerox joint venture. Exs. 11, 13. Thus, Fuji effectively had a blocking position on Xerox's ability to sell itself to anyone other than Fuji. *Id.* Shockingly, Defendants concealed this material fact from shareholders and other investors for almost 17 years, *and did not reveal it until six weeks after the December 11 nomination deadline.* Ex. 10.

[5] Capital terms not defined herein shall have the same meaning as in Plaintiff's Supplemental Memorandum of Law in Index No. 650675/2018, which was consolidated with this action and filed simultaneously.

But even more disturbing, prior to the January 31 date, Defendants had never even met to discuss or consider whether to disclose publicly the JEC to Xerox's shareholders. *See* Ex. 15, at 90:8-92:12. The alleged reason why the Board disclosed the JEC on January 31 was because of Plaintiff's request that they do so in his January 17, 2018 letter. *Id.* 92:13-93:7. There are no meeting minutes, however, which indicate what exactly the Board discussed and considered in determining to disclose the Joint Venture Agreements. *Id.* 91:17-95:19.

Then, on February 5, 2018, Defendants disclosed further new, material changes at Xerox. Specifically, Defendants filed a copy of the Share Subscription Agreement entered into between Fuji and Xerox in connection with the Transaction and an accompanying XC Disclosure Letter. *See* Exs. 16, 17. Notably, the XC Disclosure Letter lists the JEC as a *material Xerox contract*. Ex. 17. Additionally, in the Share Subscription Agreement, Defendants agreed to make Fuji's preemptive "crown jewel" lock-up right permanent going forward. Ex. 16. By making Fuji's asset lock-up permanent, Defendants made it impossible for the Company to engage in any true market check prior to the closing of the Transaction.

And it was not until February 9, 2018—*more than one week after announcing the Transaction and nearly two months after the December 11 director nomination deadline*—that Xerox publicly admitted that Fuji's "crown jewel" lock-up rights under the Joint Venture Agreements prevented the Company from entering into a change of control transaction with anyone other than Fuji. Ex. 18. As Xerox stated in a recent presentation to shareholders: *"Existing Joint Venture Agreements Limit Xerox's Strategic Flexibility." Id.* And, as Director Defendant Charles Prince stated more bluntly, the Joint Venture Agreements "locked out" Xerox from the growing Asia market and it was "practically impossible for Xerox to sell to anyone else." Ex. 32.

Had Plaintiff been aware *before* the Advance Notice Bylaw director nomination deadline of any, let alone all, of the foregoing material and dramatic facts and change of circumstances at Xerox, he would have nominated a full slate of competing director candidates by the December 11 nomination deadline date. Ex. 20, at 102:7-23. By consciously deciding to disclose highly significant information about the Transaction after the Advance Notice Bylaw deadline lapsed, Defendants enabled themselves to pass control of the Company without permitting Xerox shareholders to organize effectively.

C. The Xerox Board Wrongfully Refused To Waive The Advance Notice Bylaw Deadline For Director Nominations Despite The Occurrence Of Material And Radical Changes At Xerox After The Deadline

After learning all of the foregoing new, material changes in circumstances at Xerox, Plaintiff sent an open letter to Defendants requesting that the Board waive the December 11, 2017 Advance Notice Bylaw deadline for director nominations so that Plaintiff and other Xerox shareholders can take action at the upcoming 2018 annual meeting. Ex. 19; Ex. 20, at 77:11-16, 79:9-13; *see also* Ex. 21, at 100:8-15. Specifically, Plaintiff requested that the Xerox Board respond by no later than March 1, 2018, whether it would reopen the nomination period for him and other shareholders to nominate a full slate of directors for election at the upcoming 2018 annual meeting. *See* Ex. 19. On March 1, 2018, in a two sentence letter, Defendants rejected Plaintiff's legally justified and legitimate request for a waiver of the nomination deadline without providing any explanation. *See* Ex. 22. Defendants rejected Plaintiff's request even though they had no evidence that Plaintiff was aware of the Transaction, had seen the Joint Venture Agreements or was aware of all of their terms as of the December 11, 2017 nomination deadline. *See* Ex. 23, at 305:25-307:4, 309:10-310:2. When asked at their depositions about the Board's decision to deny Plaintiff a waiver of the Advance Notice Bylaw deadline, Director Defendants Robert Keegan and Cheryl Krongard could not recall any of the circumstances surrounding the

decision, including where and when the decision was made, what the process was or whether it happened at an official Board meeting, despite the fact that the Board's decision was only a month and a half ago. Ex. 15, at 292:24-297:12; Ex. 23, at 296:16-303:11.

Defendants' refusal to waive or adjust the timing of the Advanced Notice Bylaw director nomination deadline is, under the circumstances, a breach of their fiduciary duties to Plaintiff and all other Xerox shareholders, and the Xerox Board's inequitable conduct is harming the fundamental right of its shareholders to exercise their franchise.

ARGUMENT

I. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

To obtain a preliminary injunction under CPLR § 6311, a plaintiff must demonstrate: (i) a probability of success on the merits; (ii) danger of irreparable injury in the absence of the injunction; and (iii) a balancing of the equities in its favor. *See Collateral Loanbrokers Ass'n of N.Y., Inc. v. City of New York*, 148 A.D.3d 133, 135 (1st Dep't 2017). As demonstrated below, Plaintiff has satisfied each of these requirements.

A. Plaintiff Is Likely To Succeed On The Merits Of His Claim For Breach Of Fiduciary Duty Against Defendants and Defendants' Motion To Dismiss Should Be Denied

"[A] likelihood of ultimate success must not be equated with a final determination on the merits." *Time Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 278 (4th Dep't 1996). To establish a likelihood of success on the merits, "a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings." *Terrell v. Terrell*, 279 A.D.2d 301, 303 (1st Dep't 2001) (internal quotation marks and citation omitted). Plaintiff has made a *prima facie* showing here.

Similarly, for a motion to dismiss under CPLR § 3211(a)(7), "the standard is whether the pleading states a cause of action." *Giunta's Meat Farms, Inc. v. Pina Const. Corp.*, 89 A.D.3d

799, 800 (2d Dep't 2011). The burden rests with the Defendants, and "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* (internal quotation marks and citation omitted); *accord Higgins v. NYSE, Inc.*, 10 Misc. 3d 257, 282 (N.Y. Sup. Ct. 2005). Moreover, "[t]he court must . . . deem the complaint to allege whatever can be reasonably inferred therefrom, however imperfectly or informally its facts may be stated." *Khalil v. State*, 847 N.Y.S.2d 390, 393 (Sup. Ct. 2007).

1. Plaintiff Is Entitled To A Waiver Of Xerox's Advance Notice Bylaw Deadline For Director Nominations Given The Occurrence Of Material Changes At Xerox After The Deadline

It is well-settled that a shareholder is entitled to seek and obtain a waiver of a corporation's advance notice bylaw deadline for nomination of directors when a "material" change in circumstances occurs by the directors of the corporation *after* the deadline. *See Hubbard v. Hollywood Park Realty Enters., Inc.*, Civ. No. 11779, 1991 WL 3151, at *12 (Del. Ch. Jan. 14, 1991); *Icahn Partners LP v. Amylin Pharm., Inc.*, No. 7404–VCN, 2012 WL 1526814, at *3 (Del. Ch. Apr. 20, 2012) (finding sufficient grounds to expedite a case regarding an advance notice bylaw where the allegation was that the board refused to engage in discussions regarding an acquisition from Bristol-Meyers Squibb after the notice deadline had passed).[6]

Hubbard is directly on point. In that case, shareholders of Hollywood Park Realty Park Enterprises requested an extension of the company's advance notice bylaw deadline for

[6] As Defendants acknowledge in their motion to dismiss, Defs. Class Br. 13 n.5, in the absence of controlling New York law on an issue, New York courts regularly look to Delaware law for guidance. *See, e.g.*, *Barry v. Clermont York Assocs. LLC*, 50 Misc. 3d 1203(A), at *10 (N.Y. Sup. Ct. 2015) (New York views Delaware law "as persuasive in the absence of controlling precedent"); *W. Palm Beach Police Pension Fund v. Gottdiener*, No. 650144/2013, 2014 WL 5454671, at *3 (N.Y. Sup. Ct. Oct. 22, 2014) (Delaware law "provides useful guidance," even where it is not directly applicable to a case).

nomination of directors so that they could nominate an opposing slate of directors at the company's upcoming annual shareholder meeting. *Hubbard*, 1991 WL 3151, at *4. The shareholders claimed that they were entitled to the extension in light of material, unanticipated changes in circumstances at the company since the nomination deadline date. *Id.* After the company and its board refused to grant the requested extension, the shareholders filed a motion for a preliminary injunction seeking to enjoin the enforcement of the bylaw's director nomination deadline. *Id.* The Delaware Chancery Court granted the shareholders' motion and enjoined the enforcement of the nomination deadline. *Id.* at *13. In doing so, the court stated that it is inequitable for directors to refuse to waive an advance notice bylaw requirement if: (1) a material change in circumstances occurs; (2) that is caused by the directors; and (3) the change occurs after the advance notice deadline. *Id.* at *12.

Plaintiff has satisfied the three-part *Hubbard* test and should be entitled to a waiver of the Advance Notice Bylaw deadline. As described above, ***the Xerox Board*** made a series of very significant decisions and disclosures more than six weeks ***after*** the director nomination deadline in Xerox's bylaws. *See, e.g.*, Exs. 6, 11-14, 16-18. Those decisions and disclosures were ***highly material*** to the shareholders' decisions concerning a potential nomination of directors. Specifically, on January 31, 2018, Xerox announced for the first time that the Board unanimously approved a sale of the Company. Ex. 6. There is no more important decision that a corporation can face than its own sale.[7] Under the terms of the sale, Fuji would obtain 50.1% of Xerox thereby gaining effective control over the Company, *see* Ex. 6, while providing virtually no control premium to Xerox shareholders. These terms are eerily similar to a transaction Fuji had previously offered and Xerox rejected, *see* Exs. 8, 9,

[7] Ex. 24, ¶ 17.

and are contrary to the longstanding view held by Xerox and its Board on the types of deals they wanted to pursue to maximize Xerox shareholder value. As Director Defendant Krongard and Centerview, Defendants' financial consultant, noted, the Transaction is not in Xerox's shareholders' best interest. Exs. 23, 31. At the same time, the Transaction entrenches a majority of the Defendants with board and executive positions with the new combined Fuji Xerox entity post-closing. Exs. 26-29.

As Defendants acknowledge, Plaintiff did not and could not possibly have known that a Transaction between Xerox and Fuji was pending as of the date of the Advance Notice Bylaw deadline. *See* Ex. 23, at 306:7-307:4 (no evidence that Plaintiff knew as of December 11, 2017 that Fuji and Xerox were going to enter into an agreement). Moreover, Plaintiff did not and could not have known the specific terms of the awful change of control Transaction ultimately approved by the Xerox Board six weeks *after* the Advance Notice Bylaw deadline. *See id.*

Along with the January 31, 2018 announcement of the Transaction, Defendants also revealed to Plaintiff and all other Xerox shareholders *for the very first time* the Joint Venture Agreements, including the JEC. Ex. 10. Significantly, Xerox admitted in its publicly-filed XC Disclosure Letter that the JEC is a *material contract*. Ex. 17. Additionally, by disclosing the Joint Venture Agreements, Xerox's shareholders became aware for the first time of the existence of the deal-restrictive "crown jewel" lock-up right in favor of Fuji. Exs. 10-14. Indeed, the existence of the "crown jewel" lock-up was kept hidden from Xerox shareholders for the past 17 years and the past 17 annual shareholder meetings, and was only finally disclosed in response to Plaintiff's January 17 letter to the Board. Ex. 19. Five days later, on February 5, 2018, Defendants disclosed for the first time that, pursuant to the Share Subscription

Agreement entered into in connection with the Transaction, the "crown jewel" lock-up and other rights under the Joint Venture Agreements were becoming permanent, thereby blocking the possibility of any realistic market check on the proposed Transaction. Ex. 16. Finally, on February 9, 2018—nearly two months after the nomination deadline—Defendants disclosed and admitted to Xerox shareholders for the first time that the "crown jewel" lock-up "limited" Xerox's ability to pursue strategic alternatives with anyone other than Fuji. Ex. 18.

Had Plaintiff known of any, let alone all, of these significant events and changes in the circumstances of Xerox prior to the nomination deadline, he would have sought to replace the entire current Xerox Board with a new slate of directors. Ex. 20, at 102:7-23 ("To me, it's just not proper and I thought it was illegal to have a lockup that you didn't disclose, a lockup where you couldn't buy the company with full and open access to all markets in the world, without the shareholders knowing it. And it was not disclosed to me, as a ten-year shareholder, nor to any of the other shareholders. And that is why I'm suing to have another board."). Accordingly, as in *Hubbard*, "considerations of fairness and the fundamental importance of the shareholder franchise dictate[] that [Plaintiff and all other Xerox shareholders] be afforded a fair opportunity to nominate an opposing slate, thus imposing upon the board the duty to waive the advance notice requirement of the by-law." *Hubbard*, 1991 WL 3151, at *12.

Notably, Defendants point to no New York or Delaware law to refute this point. Instead, realizing that the law is not on their side, Defendants misleadingly assert that this Court should not grant Plaintiff's injunction because "[n]o court applying New York law has ever endorsed Mr. Deason's legal theory." Defs. Deason Br. 12. But that red herring argument does not hold

water. As Defendants concede in their own brief, New York courts regularly look to Delaware law for guidance when there is no New York law on a particular issue. Defs. Class Br. 13 n.5. And, as described above, Delaware law is clear: Plaintiff is entitled to seek and obtain a waiver of the nomination deadline date because there was a "material" change in circumstances caused by the current Board after the deadline.

Defendants' attempt to distinguish *Hubbard* is equally unavailing. Defendants cite to Plaintiff's May 22, 2017 letter to Defendant Jacobson to suggest that Plaintiff "clearly could have anticipated" that the Defendants "might announce a strategic transaction with Fujifilm (or another party)" and that Plaintiff could have anticipated the "deal-prohibitive" features of the Joint Venture Agreements because he described the market's perception of Xerox being "inextricably intertwined with Fuji." Defs. Deason Br. at 13. It is nonsensical to suggest that Plaintiff should have anticipated that Defendants would approve a transaction with Fuji when there was no public announcement relating to the transaction as of December 11, 2017. *See* Ex. 23, at 306:7-307:4. Additionally, there was no way for Plaintiff to predict the terrible terms of the Transaction that heavily disfavored Xerox shareholders and which were contrary to the longstanding view held by Xerox and its Board on the types of deals they wanted to pursue to maximize Xerox shareholder value. *See* Ex. 33. Moreover, as Plaintiff has repeatedly stated, he was not aware of the "deal-prohibitive" features of the Joint Venture Agreements. Ex. 20, at 102:7-103:11; *see also* Ex. 21, at 99:16-100:3. As the court noted in *Hubbard*, it is inappropriate, as the Defendants seek here, to put "an unreasonable burden of clairvoyance" on Plaintiff. *See Hubbard*, 1991 WL 3151, at *11.

Indeed, in Plaintiff's May 22, 2017 letter to Defendant Jacobson, Plaintiff noted the "lack of clarity" regarding Xerox's and Fuji's "relative rights" and the "opaque disclosures" Xerox

provided regarding the Joint Venture Agreements. Ex. 5. However, even assuming there may have been rumors of a possible transaction between Xerox and Fuji prior to December 11, 2017, though there is no evidence indicating so, Plaintiff, as in *Hubbard*, at most only had notice of "a speculative possibility" that there would be an upcoming transaction between Xerox and Fuji, and the terms of the Transaction and the Joint Venture Agreements were "inherently unknowable until after the nomination deadline had expired." *Hubbard*, 1991 WL 3151 at *11.

Finally, Defendants point to the validity of the Advance Notice Bylaw as a last ditch effort to justify the denial of a waiver. But, a corporation's legitimate interest in advance knowledge of a proxy contest cannot justify a board of directors' inequitable use of such bylaws to block shareholders from nominating an opposing slate of candidates to challenge a critical transaction that was only disclosed to shareholders after the advance notice bylaw deadline expired. Indeed, under Defendants' theory, any corporation could delay announcing a controversial transaction and disclosing significant transaction-related documents until after the advance notice deadline expired.[8] Such an outcome would not only be unfair but would result in depriving shareholders from exercising their most fundamental corporate right—the right to exercise their franchise and have a say in the future direction of the Company.

The law is clear that a shareholder is entitled to obtain a waiver of a corporation's advance notice bylaw deadline for nominating directors when there is a "material" change in circumstances caused by the corporation's directors after the deadline. *See Hubbard*, 1991 WL 3151, at *12; *Icahn*, 2012 WL 1526814, at *3. Because, as explained above, the Defendants' disclosures after the December 11, 2017 Advanced Notice Bylaw deadline were material, Plaintiff's waiver request should be granted.

[8] Ex. 24, ¶ 20.

2. Defendants' Refusal To Grant Plaintiff's Waiver Request Is Unjustified And Constitutes A Breach Of Their Fiduciary Duties

As described above, in light of the material and dramatic changes in circumstances at Xerox *after* the deadline for nominating directors passed, Plaintiff is entitled to a waiver of the Company's Advance Notice Bylaw for director nominations. On February 26, 2018, Plaintiff sent a letter to Defendants requesting a waiver of the nomination deadline so that he could nominate a competing slate of directors for election at the upcoming 2018 annual shareholder election meeting. Ex. 19. Consistent with the Xerox Board's disloyal and bad faith conduct, the Board rejected Plaintiff's waiver request. Ex. 22. By doing so, Defendants breached their fiduciary duty of loyalty to Plaintiff and other Xerox shareholders and are unjustly preventing Xerox shareholders from exercising their fundamental corporate voting rights and their ability to replace the Defendants who are responsible for approving the terrible Transaction described above.

The fiduciary duty of loyalty demands that directors must not "allow their private interests to conflict with corporate interests." *Higgins v. NYSE, Inc.*, 10 Misc. 3d 257, 278 (N.Y. Sup. Ct. 2005) (internal citation omitted). "[A]pplicability of the business judgment rule is rebutted … [where] decisions made by directors[] [were] demonstrably affected by inherent conflicts of interest." *Id.* (internal quotation marks and citation omitted); *see also In re Croton River Club, Inc.*, 52 F.3d 41, 44 (2d Cir. 1995) ("It is black-letter, settled law that when a corporate director or officer has an interest in a decision, the business judgment rule does not apply."). That is precisely what occurred here.

As described above, Defendants breached their fiduciary duty of loyalty because their primary motivation for refusing to waive the Advance Notice Bylaw deadline to allow for new nominations was entrenchment. Defendants are unjustly preventing Plaintiff from

nominating a competing slate of directors so that they can protect and secure their existing board positions. *See Int'l Banknote Co. v. Muller*, 713 F. Supp. 612, 625-26 (S.D.N.Y. 1989) (granting a preliminary injunction to prevent the enforcement of an advance notice bylaw because there was a substantial likelihood that the movant would succeed at trial in showing that the board's primary motivation for adopting the advanced notice bylaw was entrenchment). Indeed, Defendants have already been planning contingencies on what would happen if Icahn's four nominated director candidates win the proxy contest. As a February 11, 2018 text from Director Defendant Ann Reese states:

> Re governance of Newco. The path we are on now can lead to an outcome where the deal is approved and [Icahn] slate is elected. In that case the current definition of continuing directors means [Fuji] would pick from that slate plus Joe[,] Greg[,] Cheryl[,] and probably Sara. If Komori not comfortable maybe we need to amend definitions[.] This assumes all current directors will stand for election.

Ex. 30.

The only reason Defendants have provided to justify denying Plaintiff's waiver request is that "the Board had not done what was alleged [in Plaintiff's letter] and there was no reason to grant the waiver." Ex. 23, at 303:7-11. But that explanation is meritless on its face. Plaintiff requested a waiver because material changes had occurred *after* the Advance Notice Bylaw deadline, including the first time disclosure of the (i) Board's approval of the Transaction; (ii) Joint Venture Agreements and the "crown jewel" lock-up therein; and (iii) Share Subscription Agreement making the lock-up rights permanent. Ex. 19. And, Defendants concede, as they must, that there is no evidence that any of the three material items listed in Plaintiff's letter were previously disclosed. *See* Ex. 23, at 305:25-310:2. Moreover, having breached their fiduciary duty in failing to disclose the Joint Venture Agreements and waiting until after December 11, 2017, Defendants were clearly acting in bad faith by refusing to waive

the Advance Notice Bylaw with respect to matters directly implicated by their continuing nondisclosure.[9] Accordingly, Defendants' refusal to waive the nomination deadline, despite indisputably material and radical changes at Xerox after the deadline, is the height of disloyalty to Plaintiff and other Xerox shareholders, and not protected by the business judgment rule.

B. Plaintiff Will Be Irreparably Harmed If Enforcement Of Xerox's Advance Notice Bylaw Deadline For Director Nominations Is Not Enjoined

Plaintiff will suffer irreparable harm if Defendants are not enjoined from enforcing the Advance Notice Bylaw deadline for director nominations. It is well-established that the right to vote is the "most fundamental right" of shareholders. *See, e.g.*, *Danaher Corp. v. Chi. Pneumatic Tool Co.*, No. 86 Civ. 3499 (PNL), 1986 WL 7001, at *14 (S.D.N.Y. June 18, 1986) (quoting Fletcher, Cyclopedia Corporations, vol. 11, § 717 n.1). Courts have regularly found that "corporate management subjects shareholders to irreparable harm by denying them the right to vote their shares or unnecessarily frustrating them in their attempt to obtain representation on the board of directors." *Int'l Banknote*, 713 F. Supp. at 623 (collecting cases); *see also Hubbard*, 1991 WL 3151, at *6 ("As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed candidate selection process thus renders the former an empty exercise.") (quoting *Durkin v. Nat'l Bank of Olyphant*, 772 F.2d 55, 59 (3d Cir. 1985)).

Shareholders face a threat of irreparable harm where their right to vote is wrongfully denied. *See Broadway Ass'n v. Park Royal Owners, Inc.*, No. 123531/01, 2002 WL 34452788 (N.Y. Sup. Ct. Apr. 29, 2002) ("A corporate shareholder who has been

[9] Ex. 24, ¶ 17.

wrongfully denied the fundamental right to vote their shares and gain representation on the board of directors is presumed to be threatened with irreparable harm."). In addition, shareholders are threatened with irreparable harm if the corporate electoral process is tainted. *See Bank of N.Y. Co. v. Irving Bank Corp.*, 139 Misc. 2d 665, 669 (N.Y. Sup. Ct. 1988) (taint to corporate electoral process threatens aggrieved parties with irreparable harm).

Here, as described in the Coffee report, Plaintiff and other Xerox shareholders will be irreparably harmed if Xerox's Advance Notice Bylaw deadline for director nomination is not waived because they will be unnecessarily and unfairly frustrated in their attempt to obtain representation on the Xerox Board, and the corporate electoral process will be improperly tainted. By approving the Transaction, Defendants have proven that they are acting on behalf of their own interests—with the majority of the current Board receiving executive or board positions in the new Fuji Xerox—and not the best interests of Xerox shareholders. *See, e.g.*, Exs. 26-29. Without injunctive relief, Plaintiff will not be permitted to nominate replacement board members to protect the interests of Xerox shareholders and allow them to have a say in the future direction of the Company at this critical juncture for Xerox. Ex. 19. Indeed, Xerox shareholders will not receive another opportunity to nominate board members who can adequately represent their interests in deciding, among other things, whether the Company should enter into the flawed Transaction and make the secret "crown jewel" lock-up rights granted to Fuji permanent. Now that the proposed Transaction was fully approved by the Board, only the election of a new majority to the Xerox Board can either encourage a higher bid from a third party or seek a renegotiation of the Transaction's terms.[10]

[10] Ex. 24, ¶ 18.

For these reasons, an injunction is necessary to prevent Plaintiff and all other Xerox shareholders from being irreparably harmed.

C. The Balance Of The Equities Tips In Plaintiff's Favor

The balancing of the equities favors granting the injunctive relief Plaintiff seeks. A balancing of the equities "usually requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." *Louis Foodservice Corp. v. Vouyiouklis*, Nos. 24890/02, 24888/02, 2002 WL 31663230, at *10 (N.Y. Sup. Ct. Aug. 26, 2002). A balancing of the equities favors the movant where "the irreparable injury to be sustained by the plaintiff[s] is more burdensome to [them] than the harm caused to defendant[s] through imposition of the injunction." *Id.* (quoting *Burmax Co. v. B & S Indus.*, 135 A.D.2d 599, 601 (2d Dep't 1987)).

In the absence of injunctive relief, Plaintiff and other Xerox shareholders will suffer immediate and irreparable harm if the Advance Notice Bylaw deadline for director nominations is not waived to permit Plaintiff to nominate a competing slate of directors who can protect the interests of Xerox shareholders and provide the shareholders with a legitimate voice in determining the future direction of the Company following a series of significant and dramatic changes in the Company's landscape during the past few months. Without injunctive relief, Plaintiff and Xerox shareholders will also have their most fundamental right—the right to vote—improperly constrained. By contrast, Defendants will not suffer any cognizable harm if the Court enjoins the enforcement of the Advance Notice Bylaw and allows for a brief period during which Plaintiff or other Xerox shareholders may nominate director candidates for election at the upcoming 2018 annual meeting.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court grant his application for a preliminary injunction and deny Defendants' motion to dismiss.

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