

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BAY CAPITAL FINANCE, LLC,	:
	:
Plaintiff,	:
	:
v	: C. A. No.
	: 2019-0539-KSJM
BARNES AND NOBLE EDUCATION, INC.,	:
MICHAEL P. HUSEBY, EMILY CHIU, DANIEL	:
DEMATTEO DAVID GOLDEN, JOHN RYAN,	:
JERRY SUE THORNTON, and DAVID WILSON,	:
	:
Defendants.	:

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Wednesday, August 14, 2019
1:30 p.m.

- - -

BEFORE HON. KATHALEEN St.J. McCORMICK, Vice Chancellor

- - -

RULINGS OF THE COURT ON PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0523

1 APPEARANCES:

2 SEAN J. BELLEW, ESQ.
3 Bellew LLC

4 -and-

5 DAVID A. FELICE, ESQ.
6 Bailey & Glasser, LLP
7 for Plaintiff

8 KEVIN M. GALLAGHER, ESQ.
9 ROBERT L. BURNS, ESQ.
10 Richards, Layton & Finger, P.A.

11 -and-

12 ADAM H. OFFENHARTZ, ESQ.
13 ARIC H. WU, ESQ.
14 DAVID F. CROWLEY-BUCK, ESQ.
15 PETER M. WADE, ESQ.
16 LUKE A. DOUGHERTY, ESQ.
17 of the New York Bar
18 Gibson, Dunn & Crutcher LLP
19 for Defendants

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1 THE COURT: We're back. Any
2 settlement during the recess? If not, I'm prepared to
3 deliver a ruling on the motion for preliminary
4 injunction.

5 Plaintiff, Bay Capital Financial, LLC,
6 or "Bay Capital," as I'll refer to it, filed this
7 lawsuit seeking relief in connection with the 2019
8 annual meeting of defendant Barnes and Noble
9 Education, Inc., which I'll refer to simply as "the
10 company."

11 On June 27, 2019, Bay Capital noticed
12 the nomination of a slate of director candidates for
13 election at the company's annual meeting. Bay
14 Capital's notice was timely, as June 27, 2019, was the
15 notice deadline under the company's bylaws, but as of
16 June 27, Bay Capital was just a beneficial owner of
17 company stock and not a record holder. Under the
18 company's bylaws, a stockholder must be a record
19 holder as of the notice deadline in order to nominate
20 directors. Because Bay Capital had not met this
21 requirement, the company rejected Bay Capital's
22 nomination.

23 Bay Capital's complaint, filed on July
24 15, 2019, seeks injunctive relief to permit Bay

1 Capital to run its slate of directors at the 2019
2 annual meeting. Bay Capital moved to expedite its
3 claims toward a preliminary injunction hearing.

4 On its motion to expedite, Bay Capital
5 acknowledged that it was not a record holder as of
6 June 27, 2019, but argued that the company should not
7 be permitted to enforce that deadline, given a
8 conflict between the company's August 2018 proxy
9 statement and the advance notice bylaw at issue.
10 Specifically, the method set forth in the bylaws for
11 computing the relevant deadline conflicts with the
12 method disclosed in the 2018 proxy for computing that
13 deadline.

14 The company's bylaws peg the relevant
15 deadline to the prior year's annual meeting, requiring
16 notice and corresponding record holder status "not
17 less than 90 days nor more than 120 days prior to the
18 first anniversary of the date of the immediately
19 preceding annual meeting." By contrast, the company's
20 August 2018 proxy statement pegs the deadline to the
21 forthcoming annual meeting, requiring notice not less
22 than 90 days nor more than 120 days prior to that
23 meeting. The proxy does not mention the record holder
24 requirement.

1 According to Bay Capital, the 2018
2 proxy creates the impression that a stockholder need
3 not submit notice until after the meeting date is
4 announced. Because, as of June 27th, the company had
5 not yet announced to its stockholders the date of the
6 2019 meeting, Bay Capital did not believe that
7 deadline applied, I was told.

8 Bay Capital made other arguments at
9 the expedition phase, but it was on this theory that I
10 deemed Bay Capital's claims colorable and on which I
11 granted the motion to expedite toward a preliminary
12 injunction hearing. At the company's request, I set
13 today, August 14, as the hearing date to permit the
14 company to maintain its plan to hold its annual
15 meeting on September 25, 2019, regardless of the
16 outcome of Bay Capital's motion.

17 The parties engaged in expedited
18 discovery. That discovery revealed Bay Capital's
19 factual allegations to lack foundation. Bay Capital
20 is thus not reasonably likely to prevail on the merits
21 of its claims, and I am denying the motion.

22 Now I'm going to go back and fill in
23 the relevant events prior to June 27 that result in
24 this outcome.

1 The company operates physical and
2 virtual bookstores for educational institutions, sells
3 textbooks wholesale, and provides digital educational
4 solutions. The company was spun off from Barnes &
5 Noble, Inc. in August of 2015 and is publicly traded.
6 The company's current board of directors comprises the
7 seven individuals named as directors in this action.
8 Michael Huseby, the company's CEO, is the only inside
9 director. The other six members are independent
10 outside directors.

11 Bay Capital was formed in 2018 to make
12 investments on behalf of its principal, Sunil Suri.
13 We do not know much about Bay Capital. It has no
14 website, no SEC registration or filings or other
15 publicly available information about its team or
16 history, and candidly, Mr. Suri obstructed discovery
17 into Bay Capital in the course of this litigation.
18 For example, during his deposition, in response to a
19 straightforward question asking the value of assets
20 controlled, held, or owned by Bay Capital, Mr. Suri
21 responded, "between one dollar and as much as a
22 billion dollars." This sort of response went on for
23 pages. He also purported to lack the ability to
24 narrow that range.

1 At a social lunch in mid-2018,
2 Mr. Suri told Mr. Huseby that he desired to buy the
3 company. Mr. Huseby instructed Mr. Suri that if he
4 were interested, he should hire advisors, review
5 publicly available information, and contact the board.
6 Mr. Huseby repeated this message at a later meeting
7 with Mr. Suri.

8 Mr. Suri did not take this advice but,
9 instead, embarked on a course of conduct that -- to
10 Mr. Huseby, at least -- diminished Mr. Suri's
11 credibility. Mr. Huseby recounts that Mr. Suri texted
12 him to obtain information about the company and advice
13 on how to approach the shareholders, among other
14 things. This caused the company's general counsel to
15 write Mr. Suri's counsel on February 1, 2019, stating
16 that Mr. Suri's unsolicited outreach was concerning,
17 requesting that Mr. Suri refrain from any further
18 communications with Mr. Huseby, and requesting that
19 further communications be directed to counsel.

20 After receiving the general counsel's
21 February 1, 2019, communication, Mr. Suri, on behalf
22 of Bay Capital, then submitted three unsolicited
23 proposals to purchase the outstanding equity in the
24 company. Those proposals were submitted on February

1 7, June 7, and June 27, 2019.

2 In response to the first offer, the
3 company's board of directors engaged in diligence and
4 consulted with advisors. On March 8, 2019, the board
5 rejected the proposal, primarily for two reasons.
6 First, the board determined the financial
7 consideration to be inadequate. Second, the board
8 believed that Mr. Suri was not a credible potential
9 acquirer. The board based its determination in part
10 on Mr. Huseby's interaction with Mr. Suri.

11 The board also had concerns about
12 Mr. Suri's professional background based on a report
13 from an independent third-party investigator that
14 identified lawsuits and outstanding judgments against
15 Mr. Suri and his companies, among other things. The
16 investigator was also unable to find anything
17 connecting Mr. Suri to the education publishing or
18 education technology sectors in which the company
19 operates.

20 The board further had doubts about
21 Mr. Suri's ability to finance an acquisition of a
22 public company. Mr. Suri's February 7 offer letter
23 was vague on this point. The June 7 and June 27
24 offers were each for less financial consideration than

1 the ones that preceded them, and the board rejected
2 them for the same reasons that the board rejected the
3 initial proposal.

4 In the same time period that Mr. Suri
5 was submitting the proposals to acquire the company,
6 Mr. Suri was being advised on other potential
7 acquisition strategies, including possibly nominating
8 a slate of directors. The company's bylaws establish
9 requirements for nominating director candidates. The
10 bylaws require that a stockholder's notice of
11 nomination of director candidates be delivered "not
12 less than 90 days ... prior to the first anniversary
13 of the date of the immediately preceding annual
14 meeting."

15 The bylaw also requires that the
16 nominating stockholder be "a holder of record ... at
17 the time of giving of the notice" and "entitled to
18 vote" at the meeting at which the election takes
19 place. The company's bylaws are publicly filed and
20 available online.

21 The company's 2018 annual meeting was
22 held on September 25, 2018. Thus, to submit director
23 nominations for the 2019 annual meeting timely, a
24 stockholder must have become a holder of record and

1 provide the company with valid notice by June 27,
2 2019.

3 As it turns out, Mr. Suri was well
4 advised and aware of the bylaw requirements. On April
5 18, 2019, Citi made a presentation to Mr. Suri
6 concerning what the presentation described as friendly
7 versus hostile strategies for acquiring the company.
8 In an analysis of the company's defense profile based
9 on a review of the company's bylaws, Citi identified
10 the company's advance notice requirement as a
11 potential "Limit on Ability to Change the Board."
12 Citi explained the bylaw requirements that
13 "nominations and proposals must be received between 90
14 and 120 days prior to the first anniversary of the
15 preceding year's annual meeting."

16 Mr. Suri was deposed in this action.
17 I have reviewed the deposition transcript. Candidly,
18 it provides a good example of how a representative of
19 a corporation, particularly a corporation seeking
20 expedited aid of this Court, should not behave. At
21 his deposition, Mr. Suri testified that he received
22 Citi's presentation and recalled reviewing the factors
23 listed in its "Defense Profile" analysis.

24 In June 2019, Mr. Suri sought advice

1 from Daniel Gordon of GLD Partners, LP. On June 12,
2 after reviewing the company's bylaws, Mr. Gordon
3 suggested that Bay Capital could "nominate a
4 replacement slate of Directors to be voted on at the
5 next annual meeting. That replacement slate would
6 then presumably vote in favor of the sale of the
7 Company."

8 Mr. Gordon further explained that in
9 order to make a nomination, Bay Capital had to become
10 a stockholder of record. He wrote: "It is important
11 that we become a shareholder and instruct the
12 brokerage firm to designate us as 'record holder' of
13 the shares. Even if it is just 1,000 shares, it is
14 essential that our name appear as a shareholder on the
15 Company's shareholder registry (instead of having our
16 shares lumped in with other customers of Merrill
17 Lynch). Whichever brokerage firm you use can take the
18 steps necessary to designate us as the 'record holder'
19 for the shares if they are specifically directed to do
20 so."

21 Mr. Suri responded to this email on
22 June 12. He wrote: "Brilliant." Bay Capital did not
23 own company stock at the time, so Mr. Suri stated that
24 he was "actioning the purchase of shares" to be held

1 "in the name of Bay Capital." Bay Capital, however,
2 did not purchase company shares that day.

3 On June 16, Mr. Gordon sent Mr. Suri
4 an email flagged as high importance attaching a copy
5 of the company's bylaws in which he had "highlighted
6 certain relevant sections pertaining to the nomination
7 of directors." In the cover email, Mr. Gordon wrote
8 and emphasized that a nominating stockholder must be a
9 record holder and that the bylaws required that notice
10 of nomination be delivered to the company "not less
11 than 90 days nor more than 120 days prior to the first
12 anniversary of the date of the immediately preceding
13 annual meeting."

14 Mr. Gordon then spelled out precisely
15 what this meant for Bay Capital. He wrote: "The
16 preceding annual meeting took place on September 25,
17 2018. Therefore, our Notice would need to be served
18 on [the Company's] Secretary no later than June 25,
19 2019."

20 Note that Mr. Gordon incorrectly
21 computed the deadline, stating that the deadline was
22 June 25 instead of June 27, and thus Mr. Suri was
23 advised to become a record holder two days prior to
24 the actual deadline.

1 Mr. Suri, who testified at his
2 deposition that he recalled receiving and reviewing
3 the email, responded on June 16 indicating that he
4 agreed with the assessment and informing Mr. Gordon
5 that he would purchase company shares "this week." In
6 fact, Bay Capital did not purchase shares that week.

7 On June 19, Mr. Gordon reminded
8 Mr. Suri that in order to nominate a slate of
9 directors, Bay Capital needed to be a record holder of
10 shares in the company. Mr. Suri responded that same
11 day indicating that "the shares are being bought."
12 But Bay Capital did not purchase company shares on
13 June 19.

14 On June 20 and 21, Mr. Gordon again
15 reminded Mr. Suri of the record holder requirement.
16 He further reminded that the nomination letter needed
17 to be delivered "by June 25, 2019 so as to be
18 considered timely under the Company's By-laws."
19 Again, Mr. Gordon included the incorrect earlier
20 deadline. Again, Bay Capital did not purchase company
21 shares on June 20 or June 21.

22 Following his June 20 and June 21
23 emails, Mr. Gordon again reminded Mr. Suri of "the
24 need for Bay Capital to be listed as a shareholder of

1 record. Without this status [the Company] can reject
2 the nomination notice."

3 The record reflects that despite being
4 reminded no fewer than four times by Mr. Gordon of the
5 record holder requirement set forth in the bylaws,
6 Mr. Suri waited until June 24, 2019, to place an order
7 for company shares. He placed that order with a
8 broker at JPMorgan. Purchasing shares through a
9 broker and then directly registering those shares in
10 the purchaser's name, such that the purchaser becomes
11 the holder of record, takes time. The settlement of a
12 trade -- that is, the official transfer of cash and
13 securities -- may take days. After a trade has
14 settled, the broker must submit a request to a
15 transfer agent through the Direct Registration System,
16 or "DRS," which then takes a number of days. Because
17 Mr. Suri waited until June 24, despite being advised
18 otherwise, to place an order for the company shares,
19 Bay Capital did not become a stockholder of record by
20 the June 27, deadline.

21 When asked for an explanation of these
22 events during his deposition, Mr. Suri testified that
23 the need to be a record holder by the deadline for
24 director nominations made "zero difference to me." He

1 explained, "I am doing the company a favor." It was a
2 contentious deposition. This statement was made
3 toward the end of what seemed like a very long day.
4 Still, the response is credible.

5 Around noon on June 27, Mr. Gordon
6 informed Mr. Suri that "we will not have shares in
7 record name prior to the close of business today."
8 Although Mr. Suri knew Bay Capital was not the
9 stockholder of record on June 27, and notwithstanding
10 Mr. Gordon's admonition that Bay Capital cannot submit
11 a timely nomination under the bylaws, Mr. Suri
12 submitted to the company on June 27 a purported
13 nomination notice which represented incorrectly that
14 as of that moment, Bay Capital was a record holder of
15 shares.

16 During his deposition, Mr. Suri did
17 testify that at the time he submitted the June 27
18 letter, he did not understand the distinction between
19 holding stock in street name versus being a record
20 holder. That might explain the inaccurate
21 representation. Nevertheless, the statement was
22 inaccurate, and the inaccuracy was no fault of the
23 company's.

24 The company received the notice of

1 nomination sometime after 3 p.m. on June 27. In
2 response, the company's general counsel consulted with
3 the company's outside counsel, the proxy solicitor,
4 and transfer agent "to determine as a legal matter
5 whether Bay Capital was the stockholder of record" as
6 of June 27, as had been represented by Bay Capital.

7 The board of directors met
8 telephonically on June 28 to discuss the issue.
9 Following consultation with its advisors, the board
10 unanimously agreed that Bay Capital's June 27
11 nomination did not comply with the company's bylaws.
12 On June 28, the company's outside counsel sent Bay
13 Capital a letter explaining the issue and writing that
14 the June 27 nomination notice was invalid under the
15 company's bylaws.

16 Having missed the deadline, Bay
17 Capital was in a bind and needed a solution. In the
18 same June 27 email informing Mr. Suri that Bay Capital
19 would not be a record holder by the close of business
20 on June 27, Mr. Gordon identified the discrepancy
21 between the company's advance notice bylaw and the
22 summary description of that bylaw in the company's
23 2018 proxy statement. Because the 2018 proxy states
24 that the deadline is 90 days prior to the next annual

1 meeting, Mr. Gordon suggested that Bay Capital "submit
2 our nomination today" -- that is, on June 27 -- "and
3 then resubmit it ... and argue that we were in
4 compliance with the proxy language."

5 None of the prior communications
6 between Mr. Suri and Mr. Gordon or any other advisors
7 regarding the company's bylaws requirements mention
8 the company's 2018 proxy statement language. The
9 record reflects that this issue was first raised only
10 when Bay Capital had realized that Mr. Suri's delay in
11 purchasing company stock resulted in Bay Capital
12 missing the record holder deadline. Indeed, during
13 his deposition, Mr. Suri testified that he was not
14 aware of the discrepancy between the proxy statement
15 and the company's bylaws prior to June 27.

16 On June 29, Mr. Gordon proposed to
17 Mr. Suri that the newly discovered discrepancy between
18 the bylaws and the 2018 proxy statement be used as
19 part of a litigation strategy to "ratchet up the
20 pressure on" the company and force a settlement. Bay
21 Capital followed Mr. Gordon's plan.

22 On July 1, Bay Capital sent the
23 company a so-called "updated" notice of stockholder
24 nomination. An exhibit to that notice confirmed that

1 Bay Capital was not a record holder until June 28.
2 Shortly thereafter, on July 1, Bay Capital's outside
3 counsel sent the company's counsel a communication
4 claiming that "Bay Capital relied on the Company's
5 proxy disclosure in formulating its plans and timing
6"

7 As should be clear by now, the
8 statement was not totally accurate. Indeed, it seems
9 slightly misleading. Discovery in this action
10 reflected and revealed that Bay Capital was not aware
11 of the language in the 2018 proxy disclosure prior to
12 June 27, 2019, when it had discovered that it was
13 already untimely.

14 Bay Capital commenced this litigation
15 on July 15, repeating this inaccurate statement of
16 reliance.

17 Before turning to the analysis, it
18 bears mention that the company set a date for the 2019
19 annual meeting back in October of 2018. It was
20 described as tentative, for sure, and in June 2019,
21 the company's board of directors passed resolutions
22 firming down the September 25, 2019, date. That date,
23 and the timing of the company's actions to
24 preliminarily and then finally select that date, were

1 consistent with the company's historical practice.
2 Bay Capital contends otherwise. I have carefully
3 reviewed the documents on which Bay Capital relies to
4 argue that the setting of the date was motivated by
5 Bay Capital's actions. The evidence is unresponsive,
6 in my view.

7 With that, I'll turn now to the legal
8 analysis. Bay Capital seeks a preliminary injunction,
9 which is an extraordinary remedy. As this Court
10 explained in *Cantor Fitzgerald L.P. v. Cantor*, a
11 preliminary injunction is "granted sparingly and only
12 upon a persuasive showing that it is urgently
13 necessary, that it will result in comparatively less
14 harm to the adverse party, and that, in the end, it is
15 unlikely to be shown to have been issued
16 improvidently."

17 To obtain a preliminary injunction, as
18 this Court explained in *Next Level Communications,*
19 *Inc. v. Motorola, Inc.*, the moving party bears the
20 burden of demonstrating three things: "(1) a
21 reasonable probability of success on the merits at a
22 final hearing; (2) that the failure to issue a
23 preliminary injunction will result in immediate and
24 irreparable harm; and (3) that the harm to the

1 plaintiffs if relief is denied will outweigh the harm
2 to the defendants if relief is granted." These
3 elements are conjunctive, such that any failure of
4 proof on one of the elements will defeat the
5 application.

6 I will now turn to the first element
7 and consider whether Bay Capital has demonstrated a
8 reasonable probability of success on the merits at a
9 final hearing on its claims. In support of its
10 motion, Bay Capital advances a number of arguments for
11 why the June 27 deadline should not be enforced.

12 First, Bay Capital argues that it was
13 entitled to rely on the proxy statement and that the
14 correct deadline is 90 days before the actual meeting
15 takes place.

16 This argument fails for a few reasons.
17 For starters, there's no factual basis for the
18 assertion of reliance. As I detailed when reciting
19 the factual record, Bay Capital has not demonstrated
20 that it relied on the proxy language in planning or
21 timing its nomination. The record reflects that the
22 opposite is true and that Bay Capital relied on the
23 bylaws.

24 Bay Capital was fully aware of the

1 advance notice bylaw, was advised timely and
2 repeatedly that it must be a record holder to notice
3 its nomination, and was even advised to become a
4 record holder by June 25, two days before the actual
5 deadline. Bay Capital's representative acknowledged
6 receiving this advice. He either ignored it or simply
7 didn't understand it, the record is unclear. Either
8 way, the company cannot be faulted.

9 Moreover, the argument misses the
10 point, because computing the deadline in accordance
11 with the proxy statement, as Bay Capital requests,
12 results in the same deadline imposed by the bylaws,
13 which is June 27, 2019. To obtain a later deadline,
14 Bay Capital would have to persuade the Court to
15 require the company to reschedule the annual meeting
16 currently set for September 25, 2019.

17 Toward this end, Bay Capital argues --
18 at least it argued in its reply brief -- that the
19 company set the annual meeting at an earlier date than
20 ever in the company's history. But as I previously
21 stated, the extensive factual record reflects that the
22 meeting date was set in accordance with the company's
23 historical practices and on a clear day before any
24 dispute arose with Bay Capital. So Bay Capital's

1 contention is simply unsupported.

2 As its next argument, Bay Capital
3 contends that the bylaws themselves are ambiguous and
4 that the advance notice provision must be read to mean
5 that Bay Capital need only be a stockholder of record
6 as of the record date for the annual meeting, which is
7 July 29, 2019. The relevant language states
8 "nominations for the election of directors may be made
9 by the Board or by any stockholder who is a holder of
10 record of shares of Common Stock ... at the time of
11 giving of the notice of nomination ... and who is
12 entitled to vote for the election of directors. Any
13 stockholder of record entitled to vote for the
14 election of directors at a meeting may nominate
15 persons for election as directors only if timely
16 written notice of such stockholder's intent to make
17 such a nomination is given."

18 Effectively, as I read it, this
19 language imposes three requirements: first, notice
20 must be given timely; second, the stockholder must be
21 a record holder at the time this notice is given; and,
22 third, the stockholder must be entitled to vote for
23 the election of directors at the annual meeting, which
24 requires that the stockholder own shares as of the

1 record date.

2 Bay Capital's feigned confusion
3 focuses on the last two requirements. As I understand
4 it, Bay Capital argues that the fact that the
5 stockholder must own shares as of the record date
6 renders ambiguous the requirement that the stockholder
7 be a record holder when giving notice, but I do not
8 see any ambiguity in the two separate requirements.
9 Read properly, they are two separate requirements, one
10 for when the nominating stockholder must be a record
11 holder and one establishing voting status. The last
12 requirement does not obviate the former.

13 As its third argument, Bay Capital
14 contends that this Court should require the chair of
15 the board of directors of the company to exercise his
16 discretion to acknowledge and accept the nomination,
17 even though the nomination was untimely. For this
18 proposition, Bay Capital relies heavily on Delaware's
19 public policy favoring the stockholder franchise,
20 liberally quoting cases articulating that policy. But
21 Bay Capital makes no effort to apply the facts or
22 holdings of those cases to this dispute.

23 Needless to say, not even Delaware's
24 strong public policy favoring the stockholder

1 franchise will save Bay Capital from its dilatory
2 conduct. Bay Capital blew the deadline. It then made
3 up excuses for doing so. No record evidence suggests
4 that the company is in any way at fault for that
5 mistake. If this Court required the company to accept
6 the nomination in these circumstances, advance notice
7 requirements would have little meaning under Delaware
8 law.

9 Belatedly, Bay Capital argued in its
10 reply brief that the defendant should be viewed as at
11 fault for Bay Capital's failure to meet the record
12 holder deadline. Bay Capital primarily contends that
13 on June 27, the company had the stock transfer
14 company, Computershare, "running around" to confirm
15 that Bay Capital was not a stockholder of record.
16 This distracted Computershare, according to Bay
17 Capital, when Computershare on that day should have
18 been undertaking Bay Capital's request to become a
19 stockholder of record.

20 In support of this theory, Bay Capital
21 points to a string of email exchanges between
22 Computershare and the company. Those emails do not
23 support Bay Capital's position. The exchanges reflect
24 that around the close of business on June 27, the

1 company asked Computershare for a list of record
2 holders. The company's request was generic, did not
3 single out Bay Capital, but rather asked generally for
4 the holder list.

5 The company did express urgency, which
6 is unsurprising, given the board meeting set for June
7 28. Between 5 p.m. and 8 p.m. that night, the company
8 received a list which did not identify Bay Capital as
9 a stockholder of record. The company then asked
10 Computershare to confirm the list's accuracy, which
11 Computershare did. The June 28 email chain concluded
12 with the Computershare representative stating that "it
13 turns out that this was the transaction that had
14 everyone running around yesterday."

15 Bay Capital argues that the reference
16 to "running around" described Computershare's reaction
17 to the company's request for a list of record holders,
18 which occurred 18 minutes before the close of
19 business. More likely, "running around" described
20 Computershare's efforts to respond to Bay Capital's
21 demand made on June 27. Indeed, other evidence of
22 record suggests that that is the case. In any event,
23 I do not view potential distraction for 18 minutes of
24 Computershare's day as the reason for why Bay Capital

1 blew the deadline.

2 Plaintiff also argues that the company
3 was motivated to thwart Bay Capital's efforts because
4 Mr. Huseby held what Bay Capital describes as a
5 "personal animus" toward Mr. Suri. The record
6 reflects that Mr. Huseby did not want to work for
7 Mr. Suri. We don't know why. Maybe he disliked him
8 personally, as Bay Capital suggests. Maybe there were
9 other reasons, including business reasons. Whatever
10 the reasons, there is no basis for imputing this
11 possible personal animus to the entire company, and
12 certainly no facts suggesting that this supposed
13 animus caused Bay Capital to miss the relevant
14 deadline.

15 In short, Bay Capital has not
16 demonstrated a reasonable probability of success on
17 the merits at a final hearing. And because Bay
18 Capital has not made a showing sufficient to support
19 the first element, I need not address irreparable harm
20 or a balance of the equities. Bay Capital's motion
21 for a preliminary injunction is denied.

22 There is one more order of business,
23 and that concerns Bay Capital's litigation conduct. I
24 must say, a red flag was raised at the start when,

1 after seeking expedition, Bay Capital argued against
2 the hearing date I ultimately set because it
3 conflicted with Mr. Suri's travel schedule.

4 Expedited proceedings are unique.
5 They are only ordered upon a showing of good cause.
6 They require this Court to push aside all other
7 casework and devote substantial resources to the needs
8 of the litigants that have demonstrated that good
9 cause. A plaintiff requesting this reaction from the
10 Court must be willing to undertake the same efforts.
11 I explained this in so many words during the
12 scheduling conference. The message was clear.
13 Mr. Suri needed to make himself available for
14 expedited discovery.

15 I don't think that Mr. Suri or Bay
16 Capital got the message. I reviewed Mr. Suri's
17 deposition transcript. As I stated earlier, the
18 conduct was not optimal. After making defense counsel
19 fly to London to depose him, Mr. Suri showed up a half
20 hour late, left in the middle of the deposition for
21 over two and a half hours to attend personal
22 appointments scheduled that same day, and then
23 unilaterally terminated the deposition when it suited
24 him. He was evasive and obstructive in his responses,

1 ultimately going as far as to say that the deposition
2 was an "accommodation" to the defendants. This, of
3 course, ignores the fact that it was Mr. Suri who
4 instigated this lawsuit and requested expedition in
5 the first place.

6 The defendants argue that Mr. Suri's
7 conduct supports a finding of unclean hands that
8 independently requires this Court to reject the
9 preliminary injunction motion. I do not decide that
10 issue, and I also have not been asked to determine
11 whether this litigation conduct warrants fee shifting.
12 That's still an open issue. Still I'd be remiss if I
13 didn't state that the conduct concerned me and that I
14 expect more of litigants in this Court.

15 Finally, the company has some issues
16 with the proxy language, and although Bay Capital's
17 efforts to exploit those issues failed today, the
18 company should not view this ruling as an endorsement
19 of that language.

20 With that, Counsel, are there any
21 questions?

22 MR. BELLEW: No, Your Honor.

23 THE COURT: Thank you.

24 MR. OFFENHARTZ: No, Your Honor.

1 THE COURT: Okay. I know it's hard to
2 get up to speed in a short amount of time. I
3 appreciate that it was hard work on your parts. We
4 are adjourned for the day, and I hope you have a good
5 summer; the rest of the summer anyway.

6 Thank you.

7 (Court adjourned at 5:08 p.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 29, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated, as revised by the Vice Chancellor.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 15th day of August, 2019.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public