UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREENLIGHT CAPITAL, LP, GREENLIGHT CAPITAL QUALIFIED, LP, GREENLIGHT CAPITAL (GOLD), LP, GREENLIGHT CAPITAL OFFSHORE PARTNERS, and GREENLIGHT CAPITAL OFFSHORE MASTER (GOLD), LTD.,

Plaintiffs,

-against-

APPLE INC.,

Defendant.

Civil Action No. 13-CIV-900(RJS)
(ECF Case)

MEMORANDUM OF LAW IN OPPOSITION TO THE GREENLIGHT ENTITIES' MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Several Greenlight Capital entities, hedge fund investors in Apple Inc., have sued in an attempt to prevent Apple's shareholders from voting on an undeniably pro-shareholder proposal. Proxy Proposal No. 2 would give shareholders the unqualified right to approve the issuance of preferred shares—stock that carries greater rights and privileges than Apple common stock—by eliminating the "blank check" authority of Apple's Board to issue preferred shares without shareholder approval. The proposal, in the same form as it has been presented to shareholders, was submitted for review to the Securities and Exchange Commission, which raised no comments or concerns. The proposal, also in its present form, has received endorsements from large institutional shareholders, such as the California Public Employees Retirement System ("CalPERS"), and from independent proxy advisors Institutional Shareholder Services ("ISS") and Glass, Lewis & Co.

Plaintiffs' ultimate goal, as their principal David Einhorn made clear in a letter to Apple shareholders, is to induce Apple to issue a novel form of perpetual preferred stock that plaintiffs believe would benefit them substantially. Before Einhorn proposed his concept to Apple, however, the company had already initiated Proposal No. 2 in response to an ISS report on Apple's corporate governance. This report reflected a view widely held by shareholder advocates that corporate boards should not have "blank check" authority to issue preferred shares. Apple agrees with this concern and strongly believes that the issuance of preferred shares, which can dramatically subordinate the rights of common shareholders, should be subject to approval by those common shareholders. Thus, as Apple informed Einhorn, regardless of Proposal No. 2, the Apple Board would not issue Einhorn's proposed perpetual preferred stock without first obtaining shareholder approval. Proposal No. 2 would formalize this commitment.

Plaintiffs' attempt to interfere with the orderly consideration of proposals at Apple's February 27, 2013 shareholders' meeting should be denied for any one of four reasons. First, Proposal No. 2 does not present a question of "bundling" as plaintiffs argue. Bundling occurs when discrete, *material* proposals are combined in a manner that puts shareholders to an unfair choice. That is not the case here. Proposal No. 2 is a single proposal: to amend and restate the Apple Articles in the manner set forth in the redlined form attached to the proxy statement. Because the proposed changes to the Articles all favor common shareholders, Proposal No. 2 does not attempt to bind a matter that is unfavorable to shareholders to another that is favorable. Indeed, the proposed changes are not material to shareholders because they do not affect Apple's existing practices. The directorial-term change conforms the Articles to Apple's existing formal policy and to California law regarding the term of directors elected under a majority voting standard. The par value provision reduces the Company's expenses in some jurisdictions. And removing the Board's "blank check" authority to issue preferred shares merely formalizes a good corporate policy of submitting the question of whether to issue preferred shares to Apple shareholders. There are numerous examples of proxy proposals that combine multiple changes to a single corporate document, including elimination of the "blank check" authority to issue preferred stock. Presenting to shareholders technical changes to a company's articles of incorporation in a single amendment both makes sense and is consistent with SEC rules. Accordingly, plaintiffs cannot show a likelihood of success on the merits.

Second, plaintiffs cannot show irreparable harm. The removal of the "blank check" provision neither requires nor prohibits the issuance of preferred shares. It mandates only that Apple seek shareholder approval for any issuance of preferred shares—approval that Apple would seek anyway as a matter of good corporate governance. That is not irreparable injury, and

plaintiffs can cite no case suggesting that giving shareholders the right to approve the issuance of a class of securities constitutes harm in any form. Notably, this is not a case where a corporation is planning to take an action that would harm shareholders, such as issuing shares, or that cannot be easily reversed, such as a merger. Apple's proposal only formalizes Apple's stated commitment to seek shareholder approval if it wants to issue preferred shares. Plaintiffs will suffer no injury, much less irreparable injury, absent the preliminary injunction.

Third, the balance of hardships tilts in Apple's favor, not plaintiffs'. If the preliminary injunction is denied and Proposal No. 2 is approved but plaintiffs ultimately prevail on their claim, the Court could order Apple to ask shareholders to amend the Articles to restore the "blank check" provision. Plaintiffs could also propose an amendment to reinstate the "blank check" provision. On the other hand, if the preliminary injunction issues improvidently, Apple would not be able to hold a vote on Proposal No. 2 at the upcoming meeting or implement the Proposal if shareholders approve it. Apple would have to delay consideration of the Proposal until the 2014 shareholders' meeting, postpone the upcoming meeting, or schedule a special shareholders' meeting later this year. The latter two options would require Apple to pay the enormous cost of preparing, printing, and distributing additional/new proxy materials. Apple's shareholders would also lose the benefit of the reduction in expenses from the par value change until the amendment to the Articles is approved.

Fourth, the proposed injunction would harm the public interest. Proposal No. 2 gives common shareholders greater power—the right to approve issuance of preferred shares. ISS and other shareholder-rights proponents have advocated for such a change and endorse this one. The SEC has not offered any comments or raised any concerns about Proposal No. 2. The public interest is in increased shareholder suffrage, not less. A party seeking to constrain such a public

interest should be required to make a strong showing to justify its equitable relief. Plaintiffs fall far short of such a showing.

BACKGROUND

Proposal No. 2 asks shareholders to vote on one thing: whether to amend and restate Apple's Restated Articles of Incorporation. It is common to present to shareholders amendments to corporate documents—whether it be articles of incorporation or a stock option plan—in a single proxy proposal.

I. Blank-Check Authority To Issue Preferred Stock.

A "blank check" preferred stock provision, such as the one currently in the Apple Articles, gives a company's board the right to issue preferred shares without shareholder approval. *See CWIE, LLC v. Bandwidth Consulting, Inc.*, 2009 WL 1110479, at *5 n.3 (C.D. Cal. Apr. 20, 2009) (defining "blank check" shares as "stock whose powers, designation, preferences and other rights . . . can be fixed by the board of directors"). As the name suggests, preferred stock is characterized by rights that take priority to the rights of common shareholders. *See, e.g.*, *Co-Investor, AG v. Fonjax, Inc.*, 2009 WL 2390227, at *1 n.1 (N.D. Cal. Aug. 3, 2009) ("Preferred stock is entitled to priority over common stockholders in the event of a dissolution, liquidation or winding up of the company."); *Burton v. Exxon Corp.*, 583 F. Supp. 405, 411 (S.D.N.Y. 1984) (explaining priority of preferred stock over common stock). A company may issue preferred shares to raise money for a particular project or to meet capital requirements. *See, e.g.*, *McBride v. PLM Int'l, Inc.*, 179 F.3d 737, 745 (9th Cir. 1999) (preferred stock issued to fund employee plan); *Citizens Fed. Bank v. U.S.*, 474 F.3d 1314, 1317 (Fed. Cir. 2007) (company issued preferred stock to meet capital requirements). In addition to granting priority in receipt of dividends over common shareholders, some corporations grant preferred shareholders the ability to elect a majority of the company's board or obtain a premium payout in the event of

liquidation. *See, e.g.*, *Baron v. Allied Artists Pictures Corp.*, 337 A.2d 653, 658 (Del. Ch. 1975) (noting preferred stockholders' ability to elect majority of board); *Rothschild Int'l Corp. v. Liggett Group, Inc.*, 474 A.2d 133, 136 (Del. 1984) (discussing liquidation premium for preferred shareholders). Preferred shareholders may also be granted special voting rights to appoint board members who will issue dividends. *See Baron*, 337 A.2d at 658.

"Blank check" preferred stock is typically viewed as an anti-takeover defense that can be used by a board to frustrate a merger or acquisition that might otherwise be viewed favorably by shareholders. *See, e.g.*, *Lewis v. Chrysler Corp.*, 949 F.2d 644, 646 n.2 (3d Cir. 1991) ("A 'poison pill' refers generally to preferred stock, rights, warrants, options, or debt instruments that an actual or potential target company distributes to its security holders . . . to deter nonnegotiated takeovers."); *MacFadden Holdings, Inc. v. John Blair & Co.*, 1986 WL 1171567, at *11 (D. Del. May 5, 1986) (company could issue "two million 'blank check' preferred shares . . . as 'poison pills'"). "Blank check" preferred stock can also be an avenue for management entrenchment. *See Newell Co. v. Vermont Am. Corp.*, 725 F. Supp. 351, 378 n.15 (N.D. Ill. 1989) (describing blank check preferred shares as an "entrenchment" mechanism).

Given the potential for abuse of "blank check" authority, shareholder rights proponents, such as ISS, have long favored elimination of such provisions. Regarding Proposal No. 2, ISS has declared that "ISS policy supports the elimination of 'blank check' preferred shares, because of their potential to be misused in a takeover defense." (Declaration of Gene D. Levoff (hereinafter "Levoff Decl.") ¶ 4 & Ex. E at 10.)[1] Glass, Lewis has likewise recommended that

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[1] ISS is a proxy advisory service whose influence over corporate governance matters is well-recognized *See Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 357–58 (Del. Ch. 2010) ("[O]ne of the key factors in the outcome of a proxy contest will be the recommendation of the firms that provide institutional investors with recommendations about how to vote . . . and in particular . . . Risk Metrics Group Inc. [now known as "ISS"]."

Apple shareholders vote in favor of Proposal No. 2, in part because "blank check" provisions' "broad discretion should be of concern to common shareholders, since blank-check preferred stock could be used as an antitakeover device or in some other fashion that adversely affects the voting power or financial interests of common shareholders." (*Id.* ¶ 4 & Ex. F at 9.)[2] Shareholders of many companies have overwhelmingly approved proposals to eliminate this "blank check" authority from corporate charters and by-laws. (*See* Declaration of Abby F. Rudzin (hereinafter "Rudzin Decl.") ¶ 4.)

II. Proxy Proposal No. 2.

Proposal No. 2 is an amendment to Apple's Articles to:

- Eliminate the Board's "blank check" authority to issue preferred stock, thus requiring shareholder approval for any Apple preferred stock issuance. (*See* Levoff Decl. ¶ 2(a).)

- Remove a provision concerning replacement of directors that is inconsistent with Apple's formal policy of allowing directors to remain on the Board only if they are re-elected by a majority of shareholders. At Apple's 2011 shareholders' meeting, shareholders approved a non-binding resolution calling for majority voting of new directors. Apple announced at its 2012 shareholders' meeting that it would adopt the proposal. (*See id.* ¶ 2(b); Declaration of D. Bruce Sewell (hereinafter "Sewell Decl.") ¶ 2.) The change in Proposal No. 2 would conform the Articles to what shareholders have already approved and Apple's current policy. (*See* Levoff Decl. ¶ 2(b).) And it would bring Apple's majority voting rules in-line with California law, specifically California Corporation Code § 708.5(c), regarding the term of directors elected under a majority-vote standard. (*See id.*)

- Establish a par value for the Company's common stock. This change would benefit shareholders by reducing corporate expenses because in certain states qualification rates and licensing fees differ depending on whether a corporation's shares have a par value. (*See id.* ¶ 2(c).)

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[2] Glass, Lewis noted its concern about the "bundling" quality of the proposed amendment, but nevertheless recommended that Apple shareholders vote in favor of the amendment. (*Id.* Ex. F at 9.)

The proposal also empowers the Apple Board to make other conforming changes to the Articles, including eliminating obsolete provisions. (*Id.* ¶ 2(d).) These changes were presented to shareholders in a redlined annex to the proxy statement. (*See* Compl. Ex. A.)

Plaintiffs have no quarrel with conforming the term of directors to established policy and state law or establishing a common stock par value, changes that could not be deemed material under any standard. (*See* Compl. ¶¶ 14–15.) The only aspect of Proposal No. 2 that plaintiffs contend harms shareholders and supposedly makes the amendment coercive is eliminating the Board's "blank-check" authority to issue preferred shares without shareholder approval. (*See id.*) Plaintiffs argue that this change would limit the Board's capital management options and disserve shareholders. (*See* Plaintiffs' Memorandum of Law (hereinafter "MOL") at 4.) Plaintiffs are wrong. If the amendment were adopted, Apple would retain the power to issue preferred stock, so long as Apple common shareholders approve. Far from harming shareholder interests by tying the Board's hands, this amendment would empower shareholders to determine for themselves whether a particular preferred stock issuance is in the best interests of Apple and its shareholders. In this regard, the proposed change is consistent with Apple's commitment to seek shareholder approval before issuing preferred stock.

As the Declaration of General Counsel and Secretary Bruce Sewell makes clear, Apple proposed the elimination of the "blank check" provision in response to a corporate governance report from ISS. At Apple's request, on March 15, 2012, ISS issued a report about Apple that identified as governance issues "blank check" authority to issue preferred stock and a "plurality vote standard without a director resignation policy." (Sewell Decl. ¶¶ 3–4.) Less than two months later, on May 9, 2012, Apple management discussed the ISS report with the Chair of the Apple Board's Nominating and Corporate Governance Committee. (*Id.* ¶ 5.) They noted that

the Board had already addressed the director voting issue ISS identified. (*Id.*) The Chair then agreed to propose eliminating the "blank check" provision for preferred stock at the Committee's next meeting on May 18, 2012. (*Id.*) At that meeting, the Committee unanimously agreed to recommend to the Board that the Articles be amended to eliminate the "blank check" authority. At its May 24 meeting, the Board agreed. (*Id.* ¶¶ 6–7.) At its November 13 meeting, the Board unanimously voted to recommend that shareholders approve the amendment to the Articles at Apple's next annual meeting. (*Id.* ¶ 8.) Accordingly, Proposal No. 2 was included in the proxy statement mailed on January 7, 2012. (*Id.* ¶ 9.)

Investors and institutions that promote shareholder rights have endorsed Proposal No. 2. ISS and Glass, Lewis have recommended that Apple shareholders vote in favor of Proposal No. 2. (*See* Levoff Decl. ¶ 4 & Ex. E at 11 & Ex. F.) CalPERS, one of Apple's shareholders and a known leader for shareholder rights, and Trillium Asset Management, an active social responsibility investor, have also announced that they support Proposal No. 2. (*See id.* ¶ 4 & Exs. C, D.) The Marco Consulting Group, Inc., which serves as proxy voting agent for several institutional investors in Apple, has said that it will be voting its 1,966,007 shares in favor of Proposal No. 2, "because all of its elements strengthen shareholder rights and are in their best interests." ("Declaration of The Marco Consulting Group, Inc." (hereinafter "Marco Consulting Decl.") ¶ 3.)

III. Plaintiffs' "GO-UPs" Proposal.

Why, then, are plaintiffs intent on depriving Apple's shareholders of the opportunity to vote on the proposed amendment? The reason is this—plaintiffs have recently been attempting to persuade Apple to issue a novel type of perpetual preferred stock. Plaintiffs contend that giving common shareholders the right to vote on the issuance of their preferred stock would inhibit that plan. Plaintiffs' principal, David Einhorn, referred to the necessity for shareholder

approval as a "roadblock" to his proposal and noted that it would just "make it harder." (*See* Declaration of Peter Oppenheimer (hereinafter "Oppenheimer Decl.") ¶ 4.) He said that he wanted to "take the risk away" of a shareholder vote. (*Id.*)

In a May 31, 2012 teleconference, Einhorn first proposed to Apple his Greenlight Opportunistic Use of Preferreds ("GO-UPs"), a new perpetual preferred security that pays a dividend at a higher rate than Apple's common stock. (*Id.* ¶ 2.) This was three weeks after the Chair of the Apple Board's Nominating and Corporate Governance Committee committed to recommend the elimination of the "blank check" provision from Apple's Articles in light of the March 15, 2012 ISS report. (Sewell Decl. ¶ 5.) Apple began to evaluate Einhorn's proposal and had a follow-up discussion with him in September. (Oppenheimer Decl. ¶ 3.)

On February 1, 2013, more than four weeks after Apple filed the preliminary proxy statement with the SEC, Einhorn complained to an Apple representative about Proposal No. 2. (Declaration of David Einhorn (hereinafter "Einhorn Decl.") ¶ 10.) Einhorn suggested the proposed Articles amendment was a protective mechanism engineered to defeat his GO-UPs proposal, even though discussions about the amendment had been underway before Einhorn brought the GO-UPs proposal to Apple (Sewell Decl. ¶¶ 5–7). Einhorn demanded that Apple change the proxy statement and withdraw the proposed amendment. (Einhorn Decl. ¶ 10.) Apple reiterated that it was continuing to evaluate the GO-UPs proposal, but even if the Board agreed to Einhorn's plan, the issuance of a new preferred stock should be put to a shareholder vote. (Oppenheimer Decl. ¶ 4.) On February 6, Einhorn repeated his request that Apple drop Proposal No. 2, and Apple responded that it would not withdraw the proposed amendment but would continue to consider his GO-UPs proposal. (Einhorn Decl. ¶ 12.) This lawsuit was filed the next day.

ARGUMENT

The grant of a preliminary injunction is an "extraordinary remedy never awarded as of right," and "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal quotation marks omitted); *see also Buffalo Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981) ("[I]nterim injunctive relief is an 'extraordinary and drastic remedy' which should not be routinely granted."). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *G.B. ex rel. T.B. v. Carrion*, 486 F. App'x 886, 888 (2d Cir. 2012) (applying *Winter* standard to affirm denial of preliminary injunction). A plaintiff must make a "'clear showing'" that all the elements are satisfied. *Sussman v. Crawford*, 488 F.3d 136, 139 (2d Cir. 2007) (affirming denial of preliminary injunction) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). Plaintiffs cannot meet this heavy burden here.

I. Plaintiffs Are Not Likely To Succeed On The Merits.

Because Proposal No. 2 does not violate Rule 14a-4(a)(3), the SEC's anti-bundling rule, plaintiffs cannot show, let alone clearly demonstrate, that they will likely succeed on the merits. The Rule was adopted to address unclear or coercive proxy proposals that prevented shareholders from voting independently on potentially favorable and unfavorable matters. *See* Randall S. Thomas & Catherine T. Dixon, *Aranow & Einhorn on Proxy Contests for Corporate Control* § 9.01, at 9-23 (3d ed. 1999 Supplement) ("The SEC's informal guidance on the new 'unbundling' standards reflects an overarching concern for the potentially adverse consequences to substantive shareholder rights of discrete proposals presented to a vote on an aggregated

basis."). The Rule's language illustrates this equitable purpose: "The form of proxy . . . [s]hall identify clearly and *impartially* each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters." 17 C.F.R. § 240.14a-4(a)(3) (emphasis added). As the SEC made clear in its amicus brief in *Koppel v. 4987 Corp.*, 167 F.3d 125 (2d Cir. 1999), the purpose behind the unbundling rule is to empower shareholders and prevent unfairness:

> Rule 14a-4 implements Congress's desire to assure corporate suffrage that is both fair and informed, by forbidding management (or any other person soliciting proxy authority) to bundle several different proposed courses of action into a single yes-or-no proposition. As the Commission explained when it proposed amending Rule 14a-4 to include the requirement that there be a separate vote on each matter submitted for shareholder approval: "The purpose of the Commission's proposal is to permit shareholders to communicate to the board of directors their views on each of the matters put to a vote, and not be forced to approve or disapprove a package of items and thus approve matters they might not if presented independently." Securities Exchange Act Rel. No. 34-30849, at 12 (Jun. 24, 1992). Bundled proposals create the danger that shareholders will be coerced into accepting a proposal that they would otherwise reject, were it not attached to another, acceptable proposal.
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> . . .
>
> Bundling of shareholder proposals creates the danger that shareholders will overlook some of the bundled proposals or will mistakenly assume that the bundled proposals are contingent upon one other, when they are not. [] Requiring a separate vote serves to assure that shareholders, who may not have read the proxy statement, will consider each separate matter on the proxy card when they vote and can communicate their views to management as to which proposals they support and which they oppose.

(Rudzin Decl. Ex. R (Amicus Brief of SEC in *Koppel v. 4987 Corp.*, 167 F.3d 125 (2d Cir. 1999), 1998 WL 34088514, at *10–12).)

In adopting Rule 14a-4(a)(3), the SEC focused on the dangers of bundling in situations where a shareholder "may be obliged to vote in favor of some proposals he or she would

otherwise oppose in order to support other, more desirable proposals." (*See* Regulation of Communications Among Shareholders, Securities Exchange Act Release No. 31326 (Oct. 16, 1992) (Rudzin Decl. Ex. P).) The SEC staff has published interpretative guidance about the Rule for mergers and acquisitions. Bundling would not be permitted, for example, if a merger proposal were combined with other material proposals that, if adopted, would result in new anti-takeover protections following the merger.[3] Joining those issues in a single proposal is plainly coercive and deprives shareholders of the power to vote on the unpopular matter. The only way that shareholders can enjoy the benefit of the proposed transaction is to accede to something unfavorable, such as entrenching management in the newly formed company. Proposal No. 2, by contrast, presents a single amendment to the Apple Articles that would not cause or prevent any transaction, would not dispose of any corporate assets, and would not in any way disadvantage the substantive rights of shareholders. To the contrary, the proposal would empower shareholders.

A. Proposal No. 2 Is A Single Proposal To Amend The Company's Restated Articles Of Incorporation.

Proposal No. 2 does not constitute improper "bundling" of material issues. Although the proxy identifies separate aspects of the proposed amendment to the Articles, shareholders are only being asked one thing—whether to amend the Articles. When Apple submitted a preliminary version of the proxy statement and proxy card to the SEC and attached a cover letter specifically highlighting Proposal No. 2, the SEC raised no comments or concerns regarding this disclosure. (*See* Levoff Decl. ¶ 3.)

[3] *See* Division of Corporation Finance, U.S. Sec. & Exch. Comm'n, Manual of Publicly Available Telephone Interpretations (5th Supp. 2004), available at http://www.sec.gov/interps/telephone/phonesupplement5.htm (Rudzin Decl. Ex. Q).

Plaintiffs do not cite a single case where a court has found a proposal like Proposal No. 2 to be improper under Rule 14a-4(a)(3). The only "unbundling" decision plaintiffs cite is *Koppel v. 4987 Corp.*, 167 F.3d 125 (2d Cir. 1999). That case, which did not involve a preliminary injunction, found that the plaintiffs had stated a claim and that whether a proposal violates Rule 14a-4(a)(3) is "a question of fact to be determined in light of the corporate documents and in consideration of the SEC's apparent preference for more voting items rather than fewer." 167 F.3d at 138. *Koppel* presented a textbook example of an objectionable "bundled" proposal because it called for both the disposition of real estate assets and the disposition of the proceeds—denying shareholders the opportunity to approve the transaction but reject the proposed payout. *See id.* at 134. Beyond references to "separate votes" for "separate issues" and conclusory assertions about their claims, plaintiffs here do not explain how they could show that Proposal No. 2's amendment to the Articles constitutes three discrete, material matters worthy of three separate votes.

Many proxy statements have combined into a single proposal changes to eliminate authority to issue "blank check" preferred stock together with other charter amendments. For example:

- Ameritrans Capital Corporation proposed a single amendment to its charter to increase the aggregated number of authorized shares, fix the number of directors, and make other changes and amendments, including the elimination of the "blank check" preferred stock provision.[4]

[4] *See* Ameritrans Capital Corp. Proxy Statement (2011), available at http://www.sec.gov/Archives/edgar/data/1064015/000139843211000473/d11358.htm (Rudzin Decl. Ex. A).

- Airnet Communications proposed an amendment to the certificate of incorporation that would increase the number of authorized shares, eliminate "blank check" authority to issue preferred stock, grant voting rights to certain notes, and require directors to stand for re-election annually.[5]

- Weiner's Stores proposed a charter amendment that would reduce the number of authorized shares, eliminate the "blank check" preferred stock provision, and remove references to preferred stock in one article of the charter.[6]

In fact, there are numerous examples of permitted proposals that combined multiple charter changes into single proposals.[7] Plaintiffs have not presented any way in which Apple's single proposal to amend its Articles differs from this established practice.

B. Proposal No. 2 Does Not Bundle Material Matters.

Plaintiffs also cannot show that the proposed elimination of the "blank check" provision was improperly bundled with the other changes to the Articles because those changes are only technical, immaterial changes. *See* Thomas & Dixon, *supra*, § 9.01, at 9-24 ("[M]inisterial or technical matters that do not modify substantive shareholder rights may be combined with related proposals submitted to a vote."). As plaintiffs acknowledge, the goal of the anti-bundling rule is "'fair corporate suffrage.'" (*See* MOL at 6–7 (quoting *J.I. Case Co. v. Borak*, 377 U.S.

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[5] Airnet Communications Proxy Statement (2003), available at http://www.sec.gov/Archives/edgar/data/ 944163/000119312503017698/ddef14a.htm (Rudzin Decl. Ex. B).

[6] Weiner's Stores Proxy Statement (2001), available at http://www.sec.gov/Archives/edgar/data/1053316/000090951801000418/0000909518-01-000418-0001.txt (Rudzin Decl. Ex. C).

[7] *See, e.g.*, Biglari Holdings Inc. Proxy Statement (2011), available at http://www.sec.gov/Archives/edgar/data/93859/000092189511001410/def14a07428_08052011.htm#prop1 (Rudzin Decl. Exhibit D); Sun Microsystems Proxy Statement (2008), available at http://www.sec.gov/Archives/edgar/data/709519/000119312508200222/ddef14a.htm#toc80215_25 (Rudzin Decl. Exhibit E); Cenuco, Inc. Proxy Statement (2006), available at http://www.sec.gov/Archives/edgar/data/843494/000116169706000368/def14a.htm (Rudzin Decl. Exhibit F).

426, 431 (1964)).) Given that shareholders would either support or (at worst) be indifferent to the technical amendments, presenting them together does not violate the rule.

The SEC has made clear that the "anti-bundling rule" has exceptions. On September 20, 2004, the SEC Division of Corporate Finance issued the fifth supplement to its Telephone Interpretations Manual, providing specific interpretative guidance "to assist companies in determining when charter, bylaw or similar provisions need to be set out separately on the form of proxy in the context of mergers, acquisitions, and similar transactions and to establish a uniform approach by companies in applying Rule 14a-4(a)(3)."[8]

According to this guidance, in the merger or acquisition context, an affected provision of a company's charter or other corporate document need not be set out as a separate proposal if, among other things, (i) the change is immaterial (such as name changes, restatements of charters, or technical changes); or (ii) the change is to a bylaw provision that, under the company's organizational documents, is allowed to be amended by the company's board of directors without shareholder approval. In contrast, the SEC staff has specifically opined that proposals should be separated where (unlike Apple's proposal) one or more of their elements disempowers shareholders: "provisions that generally would be required to be set out as separate proposals in merger and acquisition transactions include corporate governance-related and control-related provisions (*e.g.*, classified or staggered board, limitations on the removal of directors, supermajority voting provisions, delaying the annual meeting for more than a year, elimination of ability to act by written consent, and/or changes in minimum quorum requirements)."[9]

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[8] Division of Corporation Finance, U.S. Sec. & Exch. Comm'n, Manual of Publicly Available Telephone Interpretations (5th Supp. 2004), available at http://www.sec.gov/interps/telephone/phonesupplement5.htm (Rudzin Decl. Exhibit Q).

[9] *Id.*

Proposal No. 2 does not relate to mergers or acquisitions, and the director term and par value changes are not material. Apple's shareholders already voted (in 2011) in favor of majority voting for new directors, and the Apple board unanimously agreed (in 2012) to abide by majority voting—including establishing a policy that any director not receiving a majority of votes would resign from the Board. (*See* Levoff Decl. ¶ 2(b) & Ex. A.) Apple also stated publicly at its 2012 shareholders' meeting that the Board had adopted the majority voting standard. (*See* Sewell Decl. ¶ 2.) The change to the Articles would remove a sentence concerning director terms that conflicts with California law in light of Apple's 2012 decision to transition to majority voting. (*See* Levoff Decl. ¶ 2(b).) The par value change is likewise immaterial to shareholders. It is a technical change that would not affect any shareholder's rights or the value of Apple stock. (*See id.* ¶ 2(c).)

These two changes therefore can be "bundled" with the change eliminating the Board's "blank check" authority to issue preferred stock, whether or not the latter provision is considered material. But in any event, the change to eliminate the "blank check" authority to issue preferred stock is not material to Apple shareholders because the Board has effectively said—by unanimously voting to present the proposal to shareholders—that it would seek shareholder approval before issuing preferred stock. (*See* Sewell Decl. ¶ 8.) Apple told Einhorn this directly. (*See* Oppenheimer Decl. ¶ 4.)

C. Proposal No. 2 Does Not Put Shareholders To An Unfair Choice.

As explained above, Rule 14a-4(a)(3)'s goal is to prevent a company from coercing shareholders to accept an unfavorable matter to obtain the benefits of a favorable one. Even if the Proposal No. 2 changes were deemed material, combining them into a single proposal cannot be coercive because they are all *pro*-shareholder. All aspects of the Proposal have been publicly supported by ISS and Glass, Lewis, proxy advisory firms, by large shareholders CalPERS and

Trillium Asset Management, and by proxy voting agent Marco Consulting. (*See* Levoff Decl. ¶ 4; Marco Consulting Dec. ¶¶ 3-6.) Apple shareholders have already voted in favor of majority voting for directors. (*Id.* ¶ 2(b).) When other companies have asked shareholders to eliminate "blank check" authority to issue preferred stock, shareholders have overwhelmingly voted in favor of it. (Rudzin Decl. ¶ 4.) Importantly, the Proposal says nothing about whether Apple will or will not issue preferred shares, much less plaintiffs' GO-UPs shares. Proposal No. 2, if passed, would simply require that any preferred share issuance be approved by shareholders. This gives shareholders more power, not less, and therefore does not adversely affect the substantive rights of shareholders.

II. Plaintiffs Have Not Made A Clear Showing That They Would Suffer Immediate and Irreparable Harm If The Shareholder Vote Proceeds.

Even if plaintiffs could show a likelihood of success on the merits, their preliminary injunction motion should still be denied because they cannot make the legally-indispensable showing of immediate, irreparable harm. *See Cedar Swamp Holdings, Inc. v. Zaman*, 472 F. Supp. 2d 591, 595 (S.D.N.Y. 2007) ("'[A] clear showing of a threat of irreparable harm is essential' to justify a preliminary injunction."). The Second Circuit has defined "irreparable harm" as "an injury that is not remote or speculative but actual and imminent, and 'for which a monetary award cannot be adequate compensation.'" *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995). Such imminent irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction." *Reuters, Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990) (internal quotation marks omitted).

Proposal No. 2 presents no such threat. Among other immaterial changes to the Articles, Proposal No. 2's amendment would mean that shareholders—rather than Apple's Board acting alone—would need to approve any preferred share issuance. Conveying this power to

shareholders does not harm plaintiffs—themselves shareholders—*at all*, much less irreparably. If plaintiffs contend that Proposal No. 2 prohibits any preferred stock issuances, they are wrong. The Proposal is neutral on issuance of such stock; its adoption would mean only that if Apple were to choose to issue such shares, shareholder approval would be necessary.

If Apple or any qualified shareholder were to decide that the "blank check" power to issue preferred shares should be restored to the Board, it could advance a new proposal asking shareholders if they want to restore the provision. Thus, Proposal No. 2 effects no permanent change. Even plaintiffs can make this request to shareholders—and can also decide whether to include their GO-UPs concept. In circumstances such as these, where a proposal could easily be reversed by subsequent shareholder or board action, there is no threat of imminent irreparable harm, and no preliminary injunction should issue. *See Deborah G. Mallow Ira SEP Inv. Plan v. McClendon*, 2012 WL 2036748, at *3 (W.D. Okla. June 6, 2012) (declining to enjoin meeting to vote on measures proposed by proxy where plaintiffs could not establish irreparable injury since proposed proxy measures could be subsequently challenged and undone); *FMC Corp. v. R.P. Scherer Corp.*, 545 F. Supp. 318, 322 (D. Del. 1982) (rejecting injunction relating to proxy statement where court could subsequently void vote and order new vote in later legal action); *Clairdale Enters., Inc. v. C.I. Realty Investors*, 423 F. Supp. 261, 264 (S.D.N.Y. 1976) (denying motion for injunction where measures proposed in proxy were not impossible to unravel absent injunction).

None of plaintiffs' cases is to the contrary. They all involve alleged harm that could never be undone, such as: copyright infringement, *see Salinger v. Colting*, 607 F.3d 68, 77 (2d Cir. 2010) (affirming preliminary injunction under Copyright Act barring publication of infringing work); merger transactions, *see MONY Grp., Inc. v. Highfields Capital Mgmt, L.P.*,

368 F.3d 138, 147 (2d Cir. 2004) (reversing denial of preliminary injunction in corporate merger context because "[i]t is well-established that a transaction—particularly a change-of-control transaction—that is influenced by noncompliance with the disclosure provisions of the various federal securities laws can constitute irreparable harm"); or the dissemination of false information that could forever injure the board's reputation, *see Lone Star Steakhouse & Saloon, Inc. v. Adams*, 148 F. Supp. 2d 1141, 1150 (D. Kan. 1991) (finding that "plaintiff [corporation] will be irreparably injured in that its shareholders will have negative impressions of the Board based upon allegedly false and misleading information disseminated by defendant"). There is no evidence that Apple's Proposal No. 2 would cause such irreparable harm.

Moreover, plaintiffs' delay of several weeks between receiving the Proposal and filing this suit weighs against a finding of irreparable harm. *See Appalseed Prods., Inc. v. Medianet Digital, Inc.*, 2012 WL 2700383, at *10 (S.D.N.Y. July 6, 2012) (denying preliminary injunction based on plaintiffs' delay in seeking injunctive relief); *see also Grout Shield Distribs., LLC v. Elio E. Salvo, Inc.*, 824 F. Supp. 2d 389, 403 (E.D.N.Y. 2011) (where plaintiff waited five months after breakdown of settlement negotiations to seek injunctive relief, the "delay in bringing its preliminary injunction motion was unreasonable and undercut plaintiff's argument that its injury was actual and irreparable"). In fact, plaintiffs had ten full days after the preliminary proxy was filed with the SEC and publicly available on the SEC's electronic filing system in late December to raise their concerns with Apple before Apple made the definitive proxy statement available to shareholders. Yet plaintiffs said nothing to Apple at that time.

III. Plaintiffs Have Not Made A Clear Showing That The Balance Of Hardships Tips in Their Favor.

While plaintiffs concede that a party seeking a preliminary injunction must make a clear showing that "the balance of hardships tips decidedly in [its] favor" (MOL at 10), they offer no

law or evidence that they will suffer any hardship. This falls far short of the requisite showing that any hardship to plaintiffs outweighs potential harm to Apple and its other shareholders. The Second Circuit has explained that "'[a] balance of hardships tipping decidedly toward the party requesting preliminary relief' *must mean real hardship* from the denial of relief Pendente lite not merely the showing of difficulty of measurement which may suffice to constitute 'irreparable damage' where a plaintiff shows probable success." *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979) (emphasis added) (vacating preliminary injunction and noting that movant would have shown sufficient hardship if there were a "significant possibility that it would be driven out of business by the [opposing party] in the period before a trial could be held"); *see also Int'l Bus. Machs. Corp. v. Johnson*, 629 F. Supp. 2d 321, 334–36 (S.D.N.Y. 2009) (denying preliminary injunction to enforce non-compete agreement where corporate information to be disclosed was not "quintessential trade secret information" and injunction would put defendant out of work for a year).

As explained above, plaintiffs will suffer no hardship if they are denied a preliminary injunction. Plaintiffs can present their own proposal to shareholders, either at a special meeting or the next annual shareholders' meeting. (*See* Levoff Decl. ¶ 7.) If the Court ultimately concludes that Proposal No. 2 was improper, the Court can order Apple to present the matter to shareholders again. Plaintiffs do not stand to lose an opportunity to implement their GO-UPs proposal without shareholder approval because, even without Proposal No. 2, Apple would not approve the GO-UPs proposal (or any other preferred stock issuance) without first obtaining shareholder approval .

By contrast, Apple would face a substantial financial burden if it were required to postpone a vote on Proposal No. 2 because it would lose the benefit of the par value change

reducing Apple's expenses. (*See id.* ¶ 5.) Shareholders should not be held hostage to plaintiffs' attempts to coerce Apple into an agreement that serves plaintiffs' financial interests.

Plaintiffs' suggestion that Apple simply amend its proxy is also unworkable because it would impose significant administrative costs. Apple would have to send a supplemental proxy to all shareholders, an exercise costing millions of dollars, and delay its annual shareholders' meeting, thereby postponing shareholder voting on several important proposals. (*See id.* ¶ 6.) In short, plaintiffs cannot show any hardship of not obtaining injunctive relief, much less hardship that is greater than the financial harm to Apple and its shareholders of not having Proposal No. 2 put to a vote.

IV. Plaintiffs Have Not Made A Clear Showing That an Injunction Would Serve The Public Interest.

Plaintiffs cannot meet their burden to show that injunctive relief is in the public interest. *See Winter*, 555 U.S. at 20. Shareholder suffrage is an important public interest. Granting a preliminary injunction would impede that public interest by leaving in place the "blank check" provision, which permits the Board to determine whether Apple issues preferred shares without shareholder input. Proposal No. 2 is in Apples' shareholders' interest, as the endorsement of the independent proxy advisory firm ISS confirms. (*See* Levoff Decl. Ex. E at 10.) On the other hand, plaintiffs' interest in having Apple issue preferred stock or agreeing to the GO-UPs idea has no public benefit at all. Nor is depriving shareholders of the right to vote on share issuances in the public interest in any way. *See Tutor Time Learning Centers, LLC v. KOG Indus., Inc.*, 2012 WL 5497943, at *6 (E.D.N.Y. Nov. 13, 2012) (denying childcare franchisor's motion for preliminary injunction because closure of childcare locations could be "costly and problematic for families"); *Psihoyos v. John Wiley & Sons, Inc.*, 2011 WL 4634172, at *3 (S.D.N.Y. Oct. 4, 2011) (denying preliminary injunction against publisher in copyright infringement action partly

because "enjoining the sale of the textbooks at issue would be highly disruptive to the universities and colleges that have already adopted them for use in classes"). Rather than citing a concrete benefit to the public, plaintiffs offer only the conclusory allegation that an injunction would "prevent violations of the securities laws," citing two SEC enforcement decisions as putative support. (MOL at 11–12.) Plaintiffs' self-interested actions here do not remotely resemble a regulatory action to enforce securities laws.

Even if an injunction might facilitate plaintiffs' efforts to gain financially from their GO-UPs proposal, that is not in the public interest. Proposal No. 2 would enhance Apple's corporate governance and empower its shareholders. Denying shareholders the opportunity to obtain these benefits does not serve the public interest, particularly without a full decision on the merits.

CONCLUSION

For the foregoing reasons, Apple respectfully requests that the Court deny plaintiffs' motion for a preliminary injunction.

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