NOTE

Shareholder Nomination Restrictions: A Corporate Governance Mystery

St. Denis J. Villere & Co. v. Epiq Systems, Inc., No. 1516-CV26509 (Mo. Cir. Ct. Jackson Cty. Apr. 5, 2016)

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I. INTRODUCTION

Envision a citizen registered to vote in his or her state's gubernatorial election. Further suppose that in the months leading up to the general election, that citizen is denied the right to vote in any of the primaries for that governorship. Effectively, the citizen is permitted to vote for whomever he or she chooses in the general election but lacks the power to help select who ultimately participates in that race. Now, hypothesize the reason that person is prevented from voting in the primary is to ensure that those promulgating the rule can hand-select the candidates.

When electoral rights such as these "are subjected to 'severe' restrictions," the United States Supreme Court has held that "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"[1] It has further held that "[c]asting a ballot in a primary election established and regulated by state law is an act of voting . . . and the immunity against discrimination on account of race or color which is guaranteed by [the Constitution] protects the plaintiff in his right to vote in such primary, where the only obstacle interposed is that he is a negro."[2]

So, what does this have to do with corporate governance? In *Nixon v. Herndon*, the discriminatory nomination restrictions were held unconstitutional because they created a suspect classification that prevented African Americans from having any real choice in selecting their elected officials.[3] Corporate governance in a publicly held corporation is analogous. To effec-

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1. Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)) (applying strict scrutiny, the Court's most stringent standard of review reserved specifically for rights deemed *fundamental* to the exercise of liberty).

2. Nixon v. Herndon*,* 273 U.S. 536, 536–37 (1927).

3. *See id.* at 541.

tively participate in the maximization of their investment, shareholders in a company have the right to vote and to nominate candidates for director. Absent the right to nominate, the right to vote in the ultimate election becomes severely watered down. Despite corporate governance existing for decades, the area of nomination restrictions has gone largely without judicial analysis.

This Note first introduces the facts and judgment of a recent case in the Circuit Court of Jackson County, Missouri: *St. Denis J. Villere & Co. v. Epiq Systems, Inc*.[4] It then examines the origins of shareholders' right to nominate candidates for director, the purpose of that right, and the background for analyzing restrictions of that right. It next discusses the judgment of the court. To be clear, the holding of the actual case is largely insignificant for the purposes of this Note. Its facts, however, do present an important example of shareholder nomination restriction issues, which are the focus of this Note. Finally, this Note concludes by evaluating the nomination restrictions in the case, as well as other possible restrictions; addressing what should be the source of shareholders' right to nominate; and proposing the appropriate legal framework within which such restrictions should be reviewed.

II. FACTS AND HOLDING

St. Denis J. Villere & Company, L.L.C. ("Villere"), a Louisiana investment management firm, and George Young, Chief Compliance Officer for Villere, were the plaintiffs in this shareholder nomination action.[5] Epiq Systems, Inc. ("Epiq"), a Missouri publicly held legal services and technology provider,[6] and its board of directors ("Board") were the defendants.[7] Villere owned 5,255,524 shares of Epiq common stock.[8] These shares, like most

4. St. Denis J. Villere & Co. v. Epiq Systems, Inc., No. 1516-CV26509 (Mo. Cir. Ct. Jackson Cty. Apr. 5, 2016).

5. Petition at 5–6, St. Denis J. Villere & Co. v. Epiq Systems, Inc., (Mo. Cir. Ct. Jackson Cty. Dec. 11, 2015) (No. 1516-CV26509).

6. The company's emphasis is in providing electronic software to "law firms, corporations, financial institutions and government agencies – helping them streamline the administration of business operations, class action and mass tort, court reporting, eDiscovery, regulatory[] compliance, restructuring, and bankruptcy matters." *The Epiq Difference: About Epiq*, EPIQ, http://www.epiqsystems.com/the-epiq-difference/about-epiq (last visited Feb. 3, 2018).

7. Petition, *supra* note 5, at 6. The Board is composed of the following members: Tom W. Olofson, CEO; Brad D. Scott, President and Chief Operating Officer; W. Bryan Satterlee, Lead Independent Director; Edward M. Connolly, Jr., Director; Charles C. Connely, IV, Director; James A. Byrnes, Director; Joel Pelofsky, Director; and Douglas M. Gaston, Director (collectively, "Defendant Directors"). *Id.* at 1–2, 6–7.

8. *Id.* at 20. Common stock is "[a] class of stock entitling the holder to vote on corporate matters, to receive dividends after other claims and dividends have been paid (esp. to preferred shareholders), and to share in assets upon liquidation." *Stock*, BLACK'S LAW DICTIONARY (10th ed. 2014).

publicly traded stock, were held in "street name."[9] This means the shares on Epiq's stock ledger are registered under the name Cede & Company ("Cede & Co."), which serves as Villere's nominee, or stock steward.[10] Young is also an Epiq shareholder and was nominated to serve as a member of Epiq's Board.[11]

Epiq has been a publicly traded company since February of 1997.[12] The company is traded on the NASDAQ stock exchange and currently has 37,513,009 outstanding shares of common stock.[13] Epiq consistently fell short of its declared financial goals over the ten years prior to the suit.[14] In particular, Epiq failed to meet its revenue guidance in five of the last seven years and missed its earnings per share guidance in all seven of those years.[15] Moreover, Epiq stock has largely underachieved for the greater part of a decade.[16] During that time, the disparity between Epiq's underperformance and the general performance of the market grew increasingly farther apart.[17]

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9. Petition, *supra* note 5, at 21.

> [R]ecord holders are frequently depository companies (Depository Trust Company, for example, holding through its nominee, Cede & Co.). They hold for brokers or other institutions, who in turn hold for beneficial owners. The institutions sometimes contract with Independent Election Company of America (IECA) which distributes voting materials for brokers to their customers and which, as agent, receives back proxy cards or consent cards from beneficial owners, collects them and makes out one or more cards for each broker or bank for which it acts. IECA then physically sends voting cards to the corporation or the judges of election. The depository companies (the actual record holders) will have given blanket proxies to *their* customers – the institutional record holders, who will then act themselves or through IECA.

Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 664 (Del. Ch. 1988).

10. Petition, *supra* note 5, at 21.

> A nominee is a person or firm into whose name securities or other properties are transferred to facilitate transactions, while leaving the customer as the actual owner. A nominee account is a type of account in which a stockbroker holds shares belonging to clients, making buying and selling those shares easier.

Nominee, INVESTOPEDIA, http://www.investopedia.com/terms/n/nominee.asp (last visited Feb. 3, 2018); *see also Nominee*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others.").

11. Petition, *supra* note 5, at 6.
12. *Id.*
13. *Id.*
14. *Id.* at 9.
15. *Id.*
16. *Id.*
17. *Id.* This gap is reflected within the total shareholder returns for the previous annualized periods of ten, five, three, and one years. *Id.*; *see infra* Table I.

As Epiq continued to struggle economically, Villere and its other investors vocalized their discontent with the Board's actions.[18] In June of 2010, the Board amended Epiq's Bylaws to include an advance notice provision (the "Notification Bylaw"),[19] which modified the eligibility requirements for shareholder director nominations,[20] the informational disclosures required of both nominees and nominating shareholders,[21] and the deadline for submitting the information to the company.[22]

On October 9, 2015, the Board again amended Epiq's Bylaws (the "2014 Amendment").[23] The most significant addition of the 2014 Amendment was the eligibility requirement that nominating shareholders must "have been in compliance with their obligations (including with respect to timing, filing and disclosure) under 17 C.F.R. § 240.13d-l through 240.13d-7 under the Securities Exchange Act of 1934 ('Exchange Act') for a period of at least twelve months prior to such time as a notice is delivered."[24]

Villere, remaining unsatisfied with Epiq's progress, prepared a slate of nominees to stand for election to the company's Board (the "Nomination").[25] Since its shares amounted to at least a seven percent beneficial ownership in Epiq over the previous two years, Villere instructed Cede & Co. to make the Nomination official prior to the notification deadline.[26] Villere maintained it complied with all other requirements of the Notification Bylaw.[27] Despite

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18. Petition, *supra* note 5, at 10.

19. *Id.*

20. "[E]xcept as otherwise required by applicable law, nominations of persons for election to the Board of Directors shall only be given by shareholders who own *at least five percent (5%) of the Corporation's outstanding common stock* and (x) who have held such shares *for at least twenty-four months* . . . ." *Amended and Restated Bylaws of Epiq Sys., Inc.,* https://www.sec.gov/Archives/edgar/data/1027207/000119312514366924/d802037dex31.htm (last visited Feb. 3, 2018) [hereinafter *Amended and Restated Bylaws*] (emphasis added) (art. II, § 2.3(a)(iii)) (amended Oct. 8, 2014).

21. *Id.* (art. II, § 2.3(c)) (providing a comprehensive list of disclosures required by all parties); *see also infra* Appendix A (providing the full text of § 2.3(c)).

22. "To be timely, a shareholder's notice shall be delivered to the Secretary at the principal executive offices of the Corporation *not less than one hundred eighty* (180) *calendar days . . . prior* to the first anniversary of the date the proxy statement was released to the shareholders in connection with the preceding year's annual meeting . . . ." *Amended and Restated Bylaws*, *supra* note 20 (emphasis added) (art. II, § 2.3(b)).

23. Petition, *supra* note 5, at 14.

24. *Amended and Restated Bylaws*, *supra* note 20 (art. II, § 2.3(a)).

25. Petition, *supra* note 5, at 20.

26. *Id.* at 20–21.

27. *Id.* at 21. Villere asserted that Cede & Co. is a record holder of greater than five percent of Epiq stock, that it has been for more than two years, and that both Cede & Co. and Villere meet the requirements of the Exchange Act. *Id.*

Villere's compliance and the candidates being adequately qualified, the Board rejected the Nomination.[28]

In December of 2015, Villere filed a complaint with the Jackson County Circuit Court alleging that Epiq's Bylaws directly infringed upon valid shareholder rights.[29] Particularly, Villere asserted that the following illicitly constrained shareholder nomination and voting rights: "(a) the Defendant Directors' adoption and application of the invalid [Notification Bylaw] and 2014 Amendment[] to the Notification Bylaw; (b) Defendants' refusal to honor Villere's valid termination of the Director Appointment Agreement; and (c) Defendants' invalid rejection of the Nomination."[30]

Villere further contended that the Board's refusal to accept the Nomination was improper where: (1) the Agreement was validly terminated; (2) the Nomination complied with all requirements in Epiq's Bylaws; (3) the Notification Bylaw and 2014 Amendment served as "a pretext to reject an otherwise valid Nomination" and were thus invalid; and (4) the amendments were "facially invalid" because their sole purpose was to entrench the incumbent Board by dampening shareholders' ability to act effectively.[31] Villere posited that the Board's enforcement of the Notification Bylaw further limited the already minimal group of shareholders eligible to make nominations.[32]

Villere requested the court issue a declaratory judgment holding the Agreement was validly terminated, the Nomination complied with all of Epiq's Bylaws, and the bylaw amendments violated Missouri law.[33] The complaint likewise requested Epiq be enjoined from meddling with Villere's nomination to the Board.[34] Epiq's Answer and Counterclaim sought to enjoin both Villere and Cede & Co. "from continuing to violate the Director Appointment Agreement and . . . Bylaws by attempting to nominate directors for the 2016 Annual Meeting of Shareholders."[35] The Board asserted that Villere did not qualify as an "owner" of at least five percent under the Bylaws be-

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28. *Id.* at 21–22. This was Villere's second attempt at nominating candidates to Epiq's Board. *Id.* at 4. Its first attempt resulted in a Director Appointment Agreement (the "Agreement") in which Epiq assented to expand the size of the board from seven to nine members, create a committee that would be responsible for reviewing its "business strateg[ies] and alternatives," and allow Villere to appoint its own member of the Board. *Id.* at 18. In exchange, Villere consented to a standstill period wherein it would refrain from seeking proxies and other shareholders' consent without first terminating the Agreement. *Id.* However, notice of Villere's termination had to precede Epiq's inclusion of Mr. Robert on its own slate for election at the next annual meeting. *Id.*; *see infra* Appendix B (Director Appointment Agreement).

29. Petition, *supra* note 5, at 1, 23, 28.

30. *Id.* at 23.

31. *Id.* at 25.

32. *See id.* at 27.

33. Judgment at 2, St. Denis J. Villere & Co. v. Epiq Systems, Inc., (Mo. Cir. Ct. Jackson Cty. Apr. 5, 2016) (No. 1516-CV26509).

34. *Id.*

35. *Id.*

cause it was not a shareholder of record.[36] They further contended that Cede & Co. did not qualify as an owner because it was a conglomeration of shareholders and not a single shareholder as the term intended.[37] Epiq additionally asked the court to issue a declaratory judgment stating that Villere's nomination was unlawful.[38]

Subsequently, the parties agreed to permit the court to rule on all preliminary issues deemed purely legal in nature.[39] After two days, the court issued its Judgment.[40] The Jackson County Circuit Court began its analysis by examining the construction and termination of the Agreement under the general principles of contract law.[41] In reaching its conclusion, the court cited the "plain, unambiguous language" of Section 2(c) of the Agreement.[42] The court then proceeded to analyze Villere's nomination, which the court held was compliant with all of Epiq's Bylaws.[43] In particular, the court pronounced that "Cede, through Villere," is a beneficial owner and registered shareholder of Epiq and, as such, is qualified to nominate a slate of directors.[44] Accordingly, the court ruled that precluding Villere from presenting its slate of nominees at the 2016 Annual Meeting, when it had properly complied with all nomination requirements, would cause it to suffer irreparable harm.[45] Unfortunately, the court did not have occasion to address the validity of the shareholder nomination restrictions, which is the focus of this Note.[46]

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36. *Id.* at 7.

37. *Id.*

38. *Id.* at 2.

39. *Id.* The parties agreed that consenting to have the court determine many of the preliminary legal issues would eliminate the need to present "some, if not all, evidence." *Id.*

40. *Id.*

41. *Id.* at 2–3.

42. *Id.* at 6.

43. *Id.* at 6–8.

44. *Id.* at 8.

45. *Id.*

46. Epiq and Villere entered a settlement agreement on June 6, 2016, wherein Villere agreed to terminate the remainder of the litigation. The agreement provides that three of the Villere nominees will be appointed to the Board, expanding its size to twelve members; three incumbent directors will withdraw from the board prior to January 1, 2017, reducing the Board's composition back to nine members; Epiq will amend its Bylaws to remove the changes of the 2010 Amendment and the timing of the Annual Meeting; and Villere will be subject to a Standstill Period as long as any of its appointees is a member of the Board. Epiq Sys., Inc., Current Report (Form 8-K) (June 7, 2016).

III. LEGAL BACKGROUND

A corporation is a type of business organization[47] "established in accordance with legal rules into a *legal* . . . person that has[:] a *legal* personality distinct from the natural persons who make it up[;] exists indefinitely apart from them[;] and has the legal powers that its constitution gives it."[48] The United States Supreme Court has described corporations as "artificial being[s], invisible, intangible, and existing only in contemplation of law . . . . [with] only those properties which the charter of [their] creation confers . . . either expressly, or as incidental to [their] very existence."[49]

In Missouri, a publicly held corporation is one having "a class of voting stock registered with the [S]ecurities and [E]xchange [C]ommission under Section 12 of the Exchange Act and . . . incorporated under the laws of the state of Missouri."[50] The natural persons who make up a publicly held corporation are its board of directors, officers, employees, and stockholders (or "shareholders" as they are colloquially known).[51] Publicly held corporations are unique in that ownership and control are separated.[52] The corporation's owners are its shareholders; however, the board of directors is responsible for managing its resources and governing operations.[53] This division creates an environment susceptible to agency costs.[54] Fundamentally, managers have an incentive to position other people's money to their own benefit, but the shareholders want them to do whatever will generate the greatest return on

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47. Business organizations can accurately be described as a group of people, related to each other via contract, working together in the pursuit of profit, where resources are allocated by fiat. Thomas A. Lambert, Wall Chair in Corp. Law and Governance and Professor of Law, Univ. of Mo. Sch. of Law, Lecture in Publicly Held Corporations (Aug. 23, 2016).

48. *Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

49. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 636 (1819).

50. MO. REV. STAT. § 351.015(10) (2016). A point of clarification: Missouri statute is used as a reference in this Note due to the subject case's origin. In fact, it is common knowledge that the great majority of corporations are incorporated in the state of Delaware. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007), http://corp.delaware.gov/pdfs/whycorporations_english.pdf.

51. Lambert, *supra* note 47.

52. *Id.*

53. *Id.* "A board of directors shall consist of one or more individuals with the number specified or fixed in accordance with the articles of incorporation or bylaws." MO. REV. STAT. § 351.315(1) (2016).

54. Plaintiff's Expert Designation: Professor Thomas A. Lambert at 13, St. Denis J. Villere & Co. v. Epiq Systems, Inc., (Mo. Cir. Ct. Jackson Cty. Mar. 7, 2016) (No. 1516-CV26509) [hereinafter Plaintiff's Expert Designation: Lambert] ("[L]osses . . . occur when an agent (director) fails to put the resources of the principal (the shareholders) to their highest and best use.").

their investment.[55] Whenever a corporation's resources are not put to their best ends, an agency cost – social waste – occurs.[56]

To prevent social waste, directors are subjected to certain fiduciary duties – namely, a duty of care and a duty of loyalty.[57] The duty of care requires directors to act in a manner they reasonably believe to be in the best interests of the corporation.[58] Similarly, "[t]he duty of loyalty requires that the best interests of a corporation and its shareholders take precedence over any self-interest of a director, officer, or controlling shareholder that is not shared by the stockholders generally."[59] Managers are also constrained by the potential for corporate takeovers and the nomination process for directors.[60]

With this basic structure in mind, Part A briefly discusses the framework under which courts evaluate corporate documents and the intent of their drafters. Part B then examines the nature of shareholder nominations, and Part C evaluates directors' ability to control that process.

A. Interpreting Corporate Documents

It is commonplace in Missouri for corporate documents, including any agreements, articles of incorporation, and bylaws, to "be construed according to [the] general rules governing contracts."[61] The construction of contracts is a question of law to be determined by the courts.[62]

Where parties to a dispute disagree as to the effect of a provision in a corporate document, "[t]he cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent."[63] The contract's terms are "read as a whole to determine the intention of the parties

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55. *See id.* (In the corporate context, "managers may squander assets of their shareholder principals by acting negligently or with self-interest."). Corporate waste is "an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 759 (Del. Ch. 2005). "In other words, waste is [an] . . . unconscionable case[] where directors irrationally squander or give away corporate assets." *Id.* at 749 (second alteration in original) (internal quotation marks omitted) (quoting Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000)).

56. *See* Plaintiff's Expert Designation: Lambert, *supra* note 54, at 13.

57. *Id.*

58. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d at 751.

59. HCI Inv'rs, LLC v. Fox, 412 S.W.3d 424, 431 (Mo. Ct. App. 2013) (quoting Becker v. Knoll, 239 P.3d 830, 834 (Kan. 2010)).

60. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 13.

61. DCW Enters., Inc. v. Terre du Lac Ass'n, Inc., 953 S.W.2d 127, 130 (Mo. Ct. App. 1997).

62. Schneidler v. Feeder's Grain & Supply, Inc., 24 S.W.3d 739, 742 (Mo. Ct. App. 2000).

63. Dunn Indus. Grp., Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. 2003) (en banc) (per curiam).

and are given their plain, ordinary, and usual meaning."[64] Further, the court interprets the terms of the document in such a way as to "avoid rendering other terms meaningless."[65] This is because "[a] construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense."[66]

A contract is not to be found ambiguous "merely because the parties disagree as to its construction."[67] Rather, the language of a contract "is ambiguous when there is uncertainty as to its meaning and it is fairly susceptible to more than one meaning so that reasonable persons may fairly and honestly differ on construction of its terms."[68] Ambiguity also exists where the terms are marred by "duplicity" or "indistinctness."[69] In the case of an unambiguous contract, "the intent of the parties is determined from the contract alone."[70] Moreover, a court does not opt for its own construal of the parties' intent where it is "expressed in [the] clear, unambiguous language" of the contract.[71] A court may not fabricate an ambiguity or draw upon extrinsic evidence "to vary or contradict the terms of an unambiguous agreement."[72]

B. Shareholder Nominations

Within the corporate governance of a publicly held company, it is the responsibility and the right of shareholders to elect the company's directors.[73] Shareholders have been held to be "the ideological underpinning upon which the legitimacy of directorial power rests."[74] Allowing shareholders to elect a corporation's directors is essential "as [a] . . . disciplinary tool to limit agency

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. DCW Enters., Inc. v. Terre du Lac Ass'n, Inc., 953 S.W.2d 127, 130 (Mo. Ct. App. 1997).
69. Taylor v. Bar Plan Mut. Ins. Co., 457 S.W.3d 340, 344 (Mo. 2015) (en banc).
70. Schneidler v. Feeder's Grain & Supply, Inc., 24 S.W.3d 739, 742 (Mo. Ct. App. 2000).
71. *Dunn Indus. Grp*., 112 S.W.3d at 429.
72. *Id.*
73. MO. REV. STAT. § 351.315(2) (2016) ("The articles of incorporation may confer upon holders of any class or series of stock the right to elect one or more directors who shall serve for such term and shall have such voting powers as shall be stated in the articles of incorporation."). Moreover, Congress has explicitly recognized a right to vote in federally regulated industries such as national banks. 12 U.S.C. § 61 (2012) ("In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected . . . .").
74. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

costs and to facilitate beneficial changes in corporate control."[75] In order to exercise control over a corporation through its board, shareholders must be able to either elect new directors or vote to remove incumbent directors.[76] It has become an "[i]nternationally accepted corporate governance principle[]" that the right to elect directors rests with shareholders[77] and that "[s]hareholder voting rights are sacrosanct."[78]

The right to nominate, while related, is "conceptually and chronologically distinct from the right to vote on the election of such candidates."[79] A nomination, as it pertains to corporate democracy, "involves formally placing the name of a candidate for office before the electorate at a meeting of the electorate to elect members of the governing body."[80] The intent of the nomination is to draw the attention of the voters to the nominee's candidacy and to "facilitate[] the election of the nominee over any candidate not nominated but who might otherwise be eligible for election through a write-in or equivalent mechanism."[81]

What then is the legal source of shareholders' right to nominate? Unlike the right to vote, the right of shareholders to nominate candidates for director is largely nonexistent in corporate statutes.[82] Absent the express grant of a right to nominate in a corporation's articles of incorporation or bylaws, the source of shareholders' right to nominate is largely amorphous.[83] It is common practice for articles or bylaws to place limitations on shareholders' ability to nominate; however, "a provision affirmatively conferring that right . . .

75. Lawrence A. Hamermesh, *Director Nominations*, 39 DEL. J. CORP. L. 117, 118 (2014).

76. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 14. Epiq, with the inclusion of its shareholder nomination restrictions, has made a removal vote practically impossible. *Id.* Missouri corporate law provides that a removal vote has to happen at a meeting specifically designated for such voting. MO. REV. STAT. § 351.315(3) (2016). Epiq's Bylaws preclude shareholders themselves from being able to convene "special meetings," and "provide for no alternative procedure [to] . . . pursue director removal." Plaintiff's Expert Designation: Lambert, *supra* note 54, at 14. It stands to reason that no authorized member of the Board would call such a meeting voluntarily. Consequently, shareholders only hope to use their voting rights to exercise control in the electoral process.

77. Hamermesh, *supra* note 75, at 119.

78. Icahn Partners LP v. Amylin Pharms., Inc., No. 7404-VCN, 2012 Del. Ch. LEXIS 85, at *11 (Del Ch. Apr. 20, 2012).

79. Hamermesh, *supra* note 75, at 126.

80. *Id.*

81. *Id.* at 127.

82. The lone exception being the state of Maryland. MD. CODE ANN., CORPS. & ASS'NS § 2-504(f) (West 2017) (stating "[t]he charter or bylaws may require any stockholder *proposing a nominee for election as a director* or any other matter for consideration at a meeting of the stockholders to provide advance notice of the nomination or proposal to the corporation before a date or within a period of time specified in the charter or bylaws" (emphasis added)).

83. Hamermesh, *supra* note 75, at 131.

is surely rare at best."[84] In what little discussion of the source of the right to nominate candidates for director exists, two leading theories emerge: (1) it is intrinsically tied to the right to vote, and (2) it is within the shareholders' right to participate in matters of proper business.[85]

1. The Right to Nominate Is Included in the Right to Vote

Missouri is one of few jurisdictions that recognizes the right to nominate director candidates as being equally important as voting rights.[86] In a 1995 decision, it was determined that "the rights to nominate director candidates and propose business are integral components of a shareholder's right to vote."[87] The court drew its reasoning from an earlier Third Circuit opinion, *Durkin v. National Bank of Olyphant*. In *Durkin*, the court stated:

> We rest our holding as well on the common sense notion that the unadorned right to cast a ballot in a contest for office, a vehicle for participatory decisionmaking and the exercise of choice, is *meaningless* without the right to participate in selecting the contestants. 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. This is as true in the corporate suffrage context as it is in civic elections, where federal law recognizes that access to the candidate selection process is a component of constitutionally-mandated voting rights . . . . And there is no more justification for precluding shareholders from nominating candidates for their board of directors than there would be

84. *Id.* at 127. "Perhaps rarer or even non-existent is a charter or bylaw provision conferring upon the board of directors the right to nominate candidates for election to that body." *Id.* at 127–28.

85. *See id.* at 128, 131–32; *see also* Levitt Corp. v. Office Depot, Inc., C.A. No. 3622-VCN, 2008 Del. Ch. LEXIS 47 (Del. Ch. Apr. 14, 2008) (exemplifying that nominations are matters of proper business). A third theory espouses that the right to nominate is present in the more general right to participate in the electoral process. *See* Hamermesh, *supra* note 75, at 131; Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 310–11 (Del. Ch. 2002). Nonetheless, the notion that such an integral right exists merely in the penumbra of such a vague entitlement is not considered in this Note. *See* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 263 (1974).

86. *See* AHI Metnall, L.P. v. J.C. Nichols Co., 891 F. Supp. 1352, 1357 (W.D. Mo. 1995) (stating "[p]laintiff claims that Section 351.245(1) gives Missouri corporate shareholders an implicit right to nominate directors" and adopting that interpretation).

87. *Id.* at 1358.

> for public officials to deny citizens the right to vote because of their race, poverty or sex.[88]

More recently, decisions in other jurisdictions have advanced the notion that the right to vote contains the right to nominate, as well.[89] In 2002, the Court of Chancery in Delaware asserted the "right of shareholders to participate in the voting process includes the right to nominate an opposing slate."[90] That court also cited *Durkin*, reaffirming the view that the right to vote is meaningless without a coinciding right to nominate.[91] Limitations of this view are addressed in Part V below.

2. Right to Nominate as a Matter of Proper Business

Alternatively, the source of the right to nominate may be its necessity as a proper procedural requirement for conducting a meeting.[92] "[A]t a meeting at which an election is to occur, a motion to place a candidate before the body for election can readily be considered to be business properly conducted . . . . "[93] Under this supposition, the right to nominate draws upon statutory prescriptions indicating that "all proper business may be transacted" at an annual shareholder meeting, where director elections take place.[94] The idea is that "a nomination is a piece of 'proper' meeting business, distinct from the vote, which facilitates the subsequent exercise of collective choice in the form of voting."[95]

The idea that a right to nominate directors is a matter of proper business has been accepted by at least two courts.[96] In *Goldstein v. Lincoln National Convertible Securities Fund, Inc.*, a federal court applying Maryland's corporation law pertaining to shareholder nominations found that "the general statutory 'policy [is] to allow any business at annual meetings regardless of whether that business is specified in the notice.'"[97] Several years later, in *Levitt Corp. v. Office Depot, Inc.*, the Delaware Court of Chancery asserted that the nomination of a candidate "for election as a director is an 'affair' or

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88. Durkin v. Nat'l Bank of Olyphant, 772 F.2d 55, 59 (3d Cir. 1985) (emphasis added) (citations omitted).

89. *Harrah's Entm't*, 802 A.2d at 310.

90. *Id.* (quoting Linton v. Everett, No. 15219, 1997 WL 441189, at *9 (Del. Ch. July 31, 1997) (unpublished opinion)).

91. *Id.* at 311 (quoting *Durkin*, 772 F.2d at 59).

92. *See* Hamermesh, *supra* note 75, at 131.

93. *Id.*

94. *Id.* (internal quotation marks omitted).

95. *Id.*

96. *Id.* at 131–32.

97. *Id.* at 132 (quoting Goldstein v. Lincoln Nat'l Convertible Sec. Fund, Inc., 140 F. Supp. 2d 424, 439 (E.D. Pa. 2001), *vacated as moot*, No. 01-2259, 2003 WL 1846095 (3d Cir. 2003)).

'matter' . . . [of] 'business' – to be considered at the stockholders' meeting."[98] This perception of the right to nominate may afford greater protection than the previously ascribed source because it is grounded in a statutory policy less susceptible to board restriction.[99]

C. Limiting Shareholders' Right to Nominate

As is the case with most rights in the corporate setting, the right to nominate directors is alienable.[100] It is widely accepted that corporations can adopt bylaws or articles directly limiting the ability of shareholders to nominate.[101] However, an important question remains largely unanswered: to what degree can shareholders' right to nominate be restricted? Put differently, to what extent can a corporation's board of directors control shareholder nominations?

Due to the "obvious importance of the nomination right in our system of corporate governance, . . . courts have been reluctant to approve measures that impede the ability of stockholders to nominate candidates."[102] It has been repeatedly asserted 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."[103] Nomination restrictions,[104] specifically, "must not infringe upon the exercise of those rights in an unreasonable way."[105]

An inquiry into whether a bylaw unduly restricts shareholders' opportunity to nominate candidates will likely turn on two factors: proportionality and neutrality.[106] Proportionality revolves around a balancing of the "negative impact of the limitation on the right to nominate against the positive impact on the interests of the corporation and its stockholders."[107] Neutrality focuses on the similarities between requirements of board nominations for

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98. Levitt Corp. v. Office Depot, Inc., C.A. No. 3622-VCN, 2008 Del. Ch. LEXIS 47, at *18–19 n.33 (Del. Ch. Apr. 14, 2008).

99. *See* Hamermesh, *supra* note 75, at 132.

100. *See id.* at 133–34.

101. *Id.* at 136.

102. Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 310 (Del. Ch. 2002).

103. Int'l Banknote Co. v. Muller, 713 F. Supp. 612, 623 (S.D.N.Y. 1989).

104. It is important here to understand that there exists a distinction between nomination restrictions contained in a bylaw amendment approved by shareholders and an amendment enacted solely by directors. *See* Hubbard v. Hollywood Park Realty Enters., Inc., No. CIV. A. 11779, 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991) (unpublished opinion). The latter is the focus here and should be of greater concern due to the lack of shareholders' consent to limit their nomination authority.

105. *Id.*

106. Hamermesh, *supra* note 75, at 139.

107. *Id.*

director and those of shareholders.[108] Professor Lawrence Hamermesh,[109] a renowned business and corporate law scholar, suggests that a court would view a provision making the process more cumbersome for shareholders but not directors with much greater skepticism.[110] Where this is the case, a board necessarily "should be prepared to articulate a legitimate basis for it, grounded in proper corporate interests – and should be comfortable that the differentiation does not overstep the bounds of public policy."[111]

Additionally, bylaws should be interpreted and applied so they "do[] not operate inequitably in the circumstances."[112] In other words, their intent should dictate their actual effect. Absent proof that both requirements are satisfied, non-enforcement will result.[113] To maintain fairness, a "corporate election process, if it is to have any validity, must be conducted with scrupulous fairness and without any advantage being conferred or denied to any candidate or slate of candidates."[114] "Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority."[115] Review of this type of issue "involves a determination of the legal and equitable obligations of an agent towards his principal."[116] Delaware courts have held that such a determination by the agent must be done "honestly and competently."[117]

In sum, the permissibility of limitations on the shareholder nomination process remains an unsettled area of the law. The sparse material available on the subject suggests the source of the right to nominate and the nature of the restriction being employed must both be considered in any analysis. Where a company includes the right to nominate in its bylaws, the issue be-

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108. *Id.* at 140.

109. Professor Hamermesh is a professor emeritus and former Ruby R. Vale Professor of Corporate and Business Law at Delaware School of Law. Professor Hamermesh teaches several topics including corporate finance, mergers and acquisitions, securities regulation, business organizations, and corporate takeovers. *Lawrence Hamermesh*, WIDENER U. DEL. L. SCH., http://delawarelaw.widener.edu/current-students/faculty-directory/faculty/112 (last visited Feb. 3, 2018). Additionally, he has been a member of the American Law Institute since 1999 and served as senior special counsel in the Office of Chief Counsel of the Division of Corporation Finance at the Securities and Exchange Commission in Washington, D.C. in 2010 and 2011. *Id.*

110. Hamermesh, *supra* note 75, at 140.

111. Peter A. Atkins, Richard J. Grossman, & Edward P. Welch, *Rethinking Director Nomination Requirements and Conduct in an Era of Shareholder Activism*, SKADDEN (July 1, 2013), https://www.skadden.com/insights/rethinking-director-nomination-requirements-and-conduct-era-shareholder-activism.

112. Hamermesh, *supra* note 75, at 149–50.

113. *Id.*

114. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (quoting Aprahamian v. HBO & Co., 531 A.2d 1204, 1206–07 (Del. Ch. 1987)).

115. *Id.* at 660.

116. *Id.*

117. *Id.*

comes much narrower. A company being challenged over the validity of a restriction on the nomination process must be prepared to demonstrate the intent of the provision and how it operates to achieve that effect in practice.

IV. INSTANT DECISION

Judge Joel P. Fahnestock set forth the judgment of the court, which readily concluded that Epiq's rejection of the Villere Nomination was wrongful.[118] However, the court declined to reach the shareholder nomination restriction issue because it determined that the extreme eligibility requirements had been satisfied.[119]

A. Termination of the Agreement

Judge Fahnestock's judgment began with an analysis of whether the four corners of the Agreement were ambiguous.[120] The court concluded the terms in the Agreement were unambiguous, reasoning that the language provided was not susceptible to multiple meanings nor did it create any uncertainty as to its meaning.[121] Because no ambiguity existed in the terms of the document, the court assessed the Agreement using the plain language of its text.[122] Consequently, the court found that Villere's termination of the Agreement was valid.[123]

B. Validity of the Villere Nomination

After finding that Villere properly terminated the Agreement, the court shifted its focus to the Epiq nomination process and Villere's purported compliance.[124] In particular, the court assessed the meaning of a shareholder entitled to vote – by virtue of owning at least five percent of Epiq's outstanding stock – under Epiq's Bylaws.[125] The court, again using the general principles of contract law, determined the language to be unambiguous and rejected Epiq's contention that the term was intended to apply only to a single shareholder.[126]

Upon examining the entirety of Epiq's Bylaws and articles of incorporation, the court stated that the term "shareholder" was not designated as a sin-

118. Judgment, *supra* note 33, at 8.
119. *See id.* at 8 & n.7.
120. *Id.* at 4.
121. *Id.*
122. *Id.* at 4–5.
123. *Id.* at 6.
124. *Id.*
125. *Id.* at 7.
126. *Id.*

gle owner.[127] In fact, the court elaborated that the company's articles require that the company treat any registered holder of shares as its owner.[128] Moreover, the court stated that the Bylaws mandate whomever is the shareholder of record on its ledger is deemed to be the owner entitled to all rights regarding the corporation.[129] Therefore, the court deemed Cede & Co. both an owner and shareholder capable of and entitled to nominating a slate of directors at Villere's direction.[130] The court left unclear the likelihood of the shareholders' success on their claims as to the validity of the Notification Bylaw.

V. COMMENT

While the court in *Villere* did not reach a conclusion on the validity of Epiq's Notification Bylaw, its inaction provides an opportunity to explore the realm of shareholder nominations, as statutes are practically silent and court precedent outlining the ability to restrict that right is effectively nonexistent. Guided by the interpretation of the corporate documents and the determination of Villere's compliance with the Bylaws, the court avoided addressing the conduct of the Board as it attempted to entrench itself. Although the court's holding and the subsequent settlement provide relief to Villere, they deprive shareholders generally of a concrete determination as to the limits on a board of directors' ability to restrict their right to nominate. Epiq's Notification Bylaw contains multiple restrictions. In addition to an advance notice, Section 2.3 contains eligibility and disclosure requirements.

A. Establishing a Framework

Under Missouri corporate law, incumbent directors that have not been re-elected are entitled to maintain their position on the board until their replacement has been elected and qualified.[131] Missouri also mandates that a director be approved by majority vote to be elevated to the board.[132] Without the ability to nominate a replacement director, it is conceivable that an incumbent director could indefinitely remain on a corporation's board, despite its shareholders' wishes.[133] For example, an incumbent director who fails to garner majority support could nevertheless remain on the board so long as the incumbent board nominates the same number of candidates as there are vacant positions.[134] Should a board renominate its incumbent directors each

127. *Id.*
128. *Id.*
129. *Id.* at 7–8.
130. *Id.* at 8.
131. MO. REV. STAT. § 351.315(1) (2016).
132. MO. REV. STAT. § 351.265 (2016).
133. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 15.
134. *Id.* at 14.

year while denying shareholders the authority to nominate replacements, these directors would remain on the board indefinitely with or without shareholder approval.[135]

Epiq's Notification Bylaw, in conjunction with Missouri corporate law, unnecessarily frustrates the attempts of its shareholders to procure representation on the Board. Moreover, it undermines the policy justifications of a majority voting standard: that "directors should enjoy the support of shareholders owning the bulk of the company's stock."[136] Such a practice is in serious conflict with corporate governance principles. It is also precisely the type of situation shareholders' right to nominate is intended to counteract.

First, it is necessary to determine which source of shareholder nomination rights makes the most sense based on the protections afforded to both shareholders and the corporation. While it may seem well-settled that the right to vote includes the right to nominate, Professor Hamermesh points out several holes in this theory. Many corporate statutes allow a company to alter the default rules. For voting, this means that the typical one vote per share can be altered or limited in a way that requires a threshold number of shares to be entitled to vote.[137] Professor Hamermesh posits that this linkage could allow corporations to stipulate in their articles or bylaws that a share does *not* entitle the holder to nominate director candidates since it is permissible to limit the right to vote.[138] It is entirely possible for a company's articles or bylaws to "create different classes or series of shares, and any class or series of shares may be granted multiple or fractional votes per share."[139] The right to vote then may be circumscribed completely for at least some classes of shares. Nothing in such scenarios indicates that the right to nominate would also not be eliminated completely. This cuts against the notion that the right to nominate should be tied to the right to vote because that right could be eliminated completely in certain contexts. Construing the right to nominate this way fails to safeguard shareholders' ability to protect their own investments and to influence firm control through turnover.

Further, "the right to vote can exist and be fully exercised without any subsumed right to nominate."[140] For example, elections held solely by ballot or roll call (while hypothetical, are possible) would allow shareholders to

135. Petition, *supra* note 5, at 14–15. In fact, this exact situation occurred at Epiq in 2014. *Id.* at 17. By Epiq's own admission, Mr. Connolly did not receive a majority vote and was not re-elected. *Id.* In spite of this, Mr. Connolly remained on the board as a "holdover director." *Id.*

136. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 15.

137. Hamermesh, *supra* note 75, at 129.

138. *Id.*

139. ABA PUBLISHING, HANDBOOK FOR THE CONDUCT OF SHAREHOLDERS' MEETINGS 72 (2d ed. 2010).

140. Hamermesh, *supra* note 75, at 130; *see also* DEL. CODE ANN. tit. 8, § 211(b) (West 2017) (providing "[s]tockholders may, unless the certificate of incorporation otherwise provides, act by written consent to elect directors").

exercise their right to vote without ever having employed their coinciding right to nominate.[141] In light of these concerns, Professor Hamermesh concludes that the right to nominate is best "viewed not as a form or element of the right to vote, but as a means to make voting rights more useful by limiting the informational and transaction costs of evaluating candidates."[142]

Given that the nomination process is essential to corporate democracy, the right of shareholders to nominate candidates for director should be grounded in a much stronger source. At the very least, it should be afforded as a proper matter of business to be conducted at a meeting of the shareholders. This approach still provides a company the ability to place restrictions on that right, such as an advance notice requirement, but precludes the right to remove it entirely. Nevertheless, Professor Hamermesh's suggested approach is not without issue. As indicated by Vice Chancellor John W. Noble in *Levitt*, a colorable argument can be made that "business," as it pertains to an annual meeting, refers only to those actions taken by the shareholders as a group.[143] Thus, voting would be a matter of business because it involves an action of the entire group, but a nomination would fall short of "business" since it "is not an official action of the stockholders as a whole."[144] A semantic problem remains in concluding that the right to vote is part of business to be conducted at an annual meeting.[145] It suggests that in the instance of a corporation without an advance notice bylaw, shareholders could simply make nominations at the annual meeting itself.[146] Surely this would fall short of providing the information necessary to inform shareholders in a corporate democracy.

A more tenable option would be to conclude that the right to nominate is an inherent part of ownership. Placing the right to nominate within the penumbra of ownership comports with corporate governance principles. It will further the attempt to constrain agency costs, which necessarily include the director nomination process. The ability to elect and remove directors is considered "essential" for "*investor protection*."[147] It only makes sense to afford the right to nominate as fundamental to ownership because it, too, is necessary for investor protection. Shareholders' right to vote is part of the inherent right to "*control the firm*."[148] Including the right to nominate within ownership furthers the protection of this vital right of control in an essential way. This approach also avoids the pitfalls of tying the right to nominate to the right to vote (i.e., that it can be eradicated in certain scenarios). Additionally,

141. Hamermesh, *supra* note 75, at 130.

142. *Id.*

143. Levitt Corp. v. Office Depot, Inc., C.A. No. 3622-VCN, 2008 Del. Ch. LEXIS 47, at *18–19 n.33 (Del. Ch. Apr. 14, 2008).

144. *Id.*

145. *See id.* at *16–18.

146. *See id.* at *12.

147. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 13 (emphasis added).

148. *Id.* (emphasis added).

it sidesteps the semantic and group action problems of finding it is a matter of business to be conducted at annual meetings. Yet it succeeds in making voting rights more useful and protecting the shareholder franchise.

B. Considering Potential Shareholder Nomination Restrictions

Considering the importance of the right to nominate candidates for director, it is significant that shareholders know how much their voice can be muted in legitimate corporate turnover. Using the principles of proportionality, neutrality, and inequitable application, this Note now addresses various possible restrictions on the right to nominate and offers a determination of their potential validity.

1. Advance Notice

One widely-employed restriction is advance notice. Professor Hamermesh indicates that notice bylaws are "commonplace" and "frequently upheld as valid."[149] As illustrated by Epiq's Notification Bylaw, this type of restriction "typically require[s] shareholders to submit advance notice of their intent to introduce proposals at shareholder meetings . . . . [and] disclose their beneficial ownership positions as a condition for nominating directors or bringing forth other matters at a shareholder meeting."[150] The Securities and Exchange Commission ("SEC") has defined beneficial owners as anyone owning shares with "(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, such security."[151]

Based on these principles, "it may be inferred that an advance notice bylaw will be validated where it operates as a reasonable limitation upon the shareholders' right to nominate candidates for director."[152] In order for advance notice limitations to be reasonable, they must "afford the shareholders a fair opportunity to nominate candidates."[153] This means the notice period satisfies the principles of proportionality and neutrality and will not be ap-

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149. Hamermesh, *supra* note 75, at 136–37 (quoting Goggin v. Vermillion, Inc., No. 6465–V CN, 2011 WL 2347704, at *4 (Del. Ch. June 3, 2011) (unpublished opinion)).

150. Elina Khasina, Note, *Disclosure of "Beneficial Ownership" of Synthetic Positions in Takeover Campaigns*, 2009 COLUM. BUS. L. REV. 904, 921 (2009).

151. 17 C.F.R. § 240.13d–3(a)(1)–(2) (2017).

152. Hubbard v. Hollywood Park Realty Enters., Inc., No. CIV. A. 11779, 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991) (unpublished opinion).

153. *Id.*

plied inequitably.[154] "[W]hen advance notice bylaws unduly restrict the stockholder franchise or are applied inequitably, they will be struck down."[155]

Epiq's notice period of at least 180 days prior to its next annual meeting of shareholders is particularly burdensome because it "reduc[es] the shareholder's flexibility, and [makes] the marginal benefit of facilitating dissemination of additional useful information . . . considerably more attenuated."[156] Here, such an extended period advances no legitimate corporate interest.[157] Professor Thom Lambert, an expert familiar with the nomination process, concluded, "It could not possibly take more than half a year for board members to evaluate the nominees and communicate any concerns to shareholders."[158] Further, the notice period is not neutral because shareholders are required to submit (and vet) their nominees months prior to when the board members are required to submit their nominees. Thus, Epiq's bylaw creates an unfair advantage for board nominees and is applied inequitably.[159]

Epiq's notice period places an undue burden on its shareholders' right to nominate. Judging the exact cutoff point at which a notice period exceeds its usefulness is quite difficult; however, it is not impossible. SEC Rule 14a-8 allows a notice period of up to 120 days for proxy materials, suggesting that periods more than 120 days, a time intended to be the maximum necessary to ensure both shareholders and directors are reasonably informed of nominees, are unreasonable.[160]

2. Disclosure

Epiq's Notification Bylaw also includes a considerable disclosure requirement for shareholders and their nominees.[161] As a point of reference, "not a single one of the 10 largest Missouri-based public companies . . . . requires the intrusive disclosures demanded by the Director Defendants" in the instant case.[162]

To date, information disclosure requirements have garnered no judicial attention.[163] However, courts "should and would likely inquire whether the [requirement] seeks to elicit information comparable to what is available with respect to board-selected nominees, and whether the information is at least plausibly useful to shareholders in evaluating competing candidates for office

154. *See id.*
155. JANA Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335, 344 (Del. Ch. 2008) (quoting Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd. 924 A.2d 228, 239 (Del. Ch. 2007)).
156. Hamermesh, *supra* note 75, at 140.
157. Plaintiff's Expert Designation Lambert, *supra* note 54, at 16.
158. *Id.*
159. *Id.* at 17.
160. 17 C.F.R. § 240.14a–8(e)(2) (2017).
161. *See infra* Appendix A.
162. Petition, *supra* note 5, at 13–15.
163. Hamermesh, *supra* note 75, at 143.

and not unreasonably burdensome . . . to provide."[164] A good rule of thumb for boards is to view restrictions in light of the following question: "Would we, the incumbent board, be prepared to apply the requirement or rule to ourselves and to new nominees proposed in the future by us?"[165]

Nowhere do Epiq's Bylaws indicate that board-selected nominees are required to submit the same information. SEC proxy rules require a board provide shareholders with each of its nominees' name; age; a description of "any arrangement or understanding between him and any other person(s) (naming such person(s)) pursuant to which he was or is to be selected"; a five-year employment history; and a brief discussion of "the specific experience, qualifications, attributes or skills that [support why] the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure."[166] Such information is clearly not as extensive as the approximately three-page list of disclosures shareholders must make under Epiq's Notification Bylaw.

This inequitable treatment is not grounded in any legitimate corporate interest. It plainly makes the process of nominating more onerous for shareholders while maintaining the relatively minimal disclosure requirements for board-selected candidates. With such exhaustive requirements making it practically unmanageable to produce a shareholder-selected nominee, the benefit of information is moot. Thus, the disclosure requirements in Epiq's Bylaws operate inequitably and fail to achieve their purpose. Similarly constructed bylaws would likely result in non-enforcement.

On the other hand, it is possible that a board could take steps to ensure its company's extensive disclosure requirements are able to overcome a challenge. To avoid the initial problem of severely limiting shareholders' ability to produce a nominee, the disclosure process could be broken into a two-step progression. At the notification stage, only the "identification of the proposed nominees and their shareholder-sponsor, and the concurrent submission of completed *preliminary* questionnaires by those parties, made available to them through the company's secretary" would be required.[167] This would be a much less arduous task to achieve within the time frame of an advance notice period.[168] By reserving the right to require additional disclosures, the company could use the already obtained information to formulate what additional information it will request and a justification for requiring it.[169] It would be much harder to successfully assert a challenge against disclosures narrowly tailored to individual or groups of shareholder nominees, so long as they are rationally related to a corporate interest.[170]

164. *Id.* at 146.
165. Atkins, Grossman & Welch, *supra* note 111.
166. 17 C.F.R. § 229.401(a), (e)(1) (2017).
167. Atkins, Grossman & Welch, *supra* note 111 (emphasis added).
168. *See id.*
169. *See id.*
170. *See id.*

3. Ownership

A requirement that shareholder nominations be buoyed by a minimum percentage of share ownership is "undoubtedly rare in the context of publicly traded corporations."[171] The "[s]everity of impact on the ability to nominate [will] depend on the individual corporation's circumstances, most notably the configuration of the holdings of its shares, and the likely ability to assemble nomination requests from holders of the specified ownership."[172] Combination with other requirements "[presents] additional questions of validity."[173]

Epiq's Notification Bylaw maintains that a nominating shareholder must own at least five percent of the outstanding shares for a period greater than twenty-four months.[174] Its stated rationale for enacting this requirement is "to make sure that only large, committed, knowledgeable shareholders [can] nominate individuals to be elected as director."[175] Epiq's securities filings indicate very few shareholders own enough shares to qualify as a nominating shareholder.[176] More concerning is that "since 2009, there have been no more than three to five 5% shareholders in any given year who also were listed as a 5% shareholder for the prior year (i.e., a 5% shareholder for 24 months)."[177] Perhaps this rare ability to meet a five percent ownership requirement is why such a threshold is "inconsistent with best practices."[178]

Because shareholders invest their own money in the acquisition of shares and thereby create a financial stake in the company's success, "shareholders with far smaller holdings than 5% and/or who have held shares for far less than two-years are [often] highly knowledgeable and committed to the companies in which they hold shares."[179] While this may not be true of all shareholders, some qualified shareholders are precluded from the nomination process.[180] Standard practice in the proxy access context is an ownership requirement of no more than three percent, which should serve as a ceiling.[181] This suggests that a five percent ownership requirement is "overly onerous in the proxy access situation . . . [so] it is certainly an unreasonable barrier to making a simple nomination."[182] Certainly, the threshold for nominating must be lower than that for proxy access.

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171. Hamermesh, *supra* note 75, at 151.
172. *Id.* at 153.
173. *Id.*
174. Plaintiff's Expert Designation: Professor Charles M. Elson at 6, St. Denis J. Villere & Co. v. Epiq Systems, Inc., (Mo. Cir. Ct. Jackson Cty. Mar. 7, 2016) (No. 1516-CV26509) [hereinafter Plaintiff's Expert Designation: Elson].
175. *Id.*
176. Plaintiff's Expert Designation Lambert, *supra* note 54, at 15.
177. Plaintiff's Expert Designation: Elson, *supra* note 175, at 4.
178. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 16.
179. Plaintiff's Expert Designation: Elson, *supra* note 175, at 6.
180. *Id.*
181. *See* 17 C.F.R. § 240.14a-4(c)(2)(i) (2017).
182. Plaintiff's Expert Designation: Lambert, *supra* note 54, at 16.

Epiq's five percent ownership requirement operates inequitably by providing board-selected nominees an obvious advantage: very few, if any, shareholders will possess the requisite number of shares to produce an opponent. Since no ownership threshold is imposed on the Board, its ownership restriction is not neutral. The negative impact of the limitation on the right of shareholders to nominate greatly outweighs the positive impact of granting only potentially committed, knowledgeable nominations to the corporation. Suggesting that the economic interest in stock results in a superior class of nominees is of "questionable validity."[183]

A five percent ownership threshold unduly restricts the right of shareholders to nominate candidates for director. Because it is possible for directors to eliminate the ability of certain shareholders to vote, allowing such large ownership requirements as a prerequisite for the ability to nominate may have the effect of eliminating shareholders' ability to control their investment. That is not to say that an ownership requirement is altogether unduly burdensome. Rather, it is only so in contexts where the threshold number of shares is proven to be exceptionally uncommon or unlikely. A case-by-case approach should be undertaken when evaluating this specific type of nomination restriction.

4. Rejection of Candidates for Failure to Satisfy Qualifications

It is generally accepted that qualification requirements to serve as a director will be set forth in a corporation's bylaws or articles of incorporation.[184] The question is then "whether . . . a director qualification could also be framed as a condition to the right to nominate, such that no nominee who fails to satisfy the qualification requirement may be nominated for election to the board."[185] For example, in *Triplex Shoe Co. v. Rice & Hutchins, Inc.*,[186] a court "concluded that stockholders were free to nominate and elect a candidate who did not at that point satisfy a share ownership qualification . . . rec-

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183. Hamermesh, *supra* note 75, at 153–54. Professor Hamermesh suggests that if an ownership requirement were instead based on the justification that nominating should rest on the level of voting power, it would be more likely to withstand scrutiny. *See id.* This is based on the theory of non-profit corporations that nominations by shareholders with "trivial . . . voting power indicates that the nomination would most likely be futile and therefore unnecessarily disruptive." *Id.* at 154. This Note disagrees with this alternative justification for two reasons: (1) publicly traded corporations are a world apart from non-profit corporations, and (2) such a justification strikes down the notion that shareholders have an inherent right to protect their investment through the corporate electoral process.

184. *See* MO. REV. STAT. § 351.310 (2016); MODEL BUS. CORP. ACT § 8.02 (2010).

185. Hamermesh, *supra* note 75, at 156.

186. Triplex Shoe Co. v. Rice & Hutchins, Inc., 152 A. 342, 351 (Del. 1930).

ognizing . . . the candidate could, before being seated, acquire the necessary shares."[187]

Such issues would certainly turn on a court's interpretation of the company's bylaws, most likely using the rules of contract. As such, it is important that a bylaw listing requirement be drafted precisely. It should define whether "a candidate who fails to meet a qualification requirement may not be nominated at the meeting unless the candidate has . . . come into compliance with the requirement *if* and *when* elected and seated as a director."[188]

5. Complete Elimination of the Right to Nominate

Ultimately, may a corporation eliminate entirely shareholders' right to nominate candidates for director? The answer to this question will likely hinge in large part on the source of that right. If the right to nominate derives from conducting proper business, "even a charter provision cannot entirely take that right away from a stockholder entitled to attend and vote on the election of directors."[189] On the other hand, if the right to nominate originates in the statutory right to vote, it likewise may not be eliminated in its entirety.[190] Moreover, as this Note maintains, the right to nominate may not be eliminated entirely because it is a core element of share ownership and to do so would strip owners of any control over their own investment.

C. Standard of Review

A board-enacted nomination restriction presents an inherent conflict of interest. Such conflicts blatantly contradict directors' duty of loyalty by making it considerably easier for directors to successfully entrench themselves. Should courts afford the protection of the business judgment rule[191] or simply

187. Hamermesh, *supra* note 75, at 156 (citing *Triplex Shoe*, 152 A. at 351).
188. *Id.* (emphasis added).
189. *Id.* at 150–51.
190. *See id.*
191. The business judgment rule is a jurisdictional doctrine applicable to transactions of directors challenged by shareholders. "[C]ourts will not interfere with or attempt to control the internal management or policy of a corporation except in cases of *fraud*, *bad faith*, *breach of trust*, gross mismanagement, or ultra vires acts on the part of the officers or directors." Leggett v. Mo. State Life Ins. Co., 342 S.W.2d 833, 851 (Mo. 1960) (en banc) (emphasis added). Such actions "may constitute ground for judicial interference, even though the act involves an exercise of the officer's discretion." *Id.*; *see also* Shlensky v. Wrigley, 237 N.E.2d 776, 779–80 (Ill. Ct. App. 1968); Kamin v. American Express, 383 N.Y.S.2d 807, 812 (NY Sup. Ct. 1976); MODEL BUS. CORP. ACT § 8.31 (2010).

use the proportional and neutral test outlined above,[192] this possibility becomes much more likely.

It would be permissible for restrictions approved by a majority of shareholders – however uncommon – to continue to be evaluated using proportionality and neutrality, but restrictions imposed solely by a board need to be analyzed under a stricter standard. In fact, Delaware courts have previously indicated that these issues are "not [to] be left to the agent's business judgment" alone.[193] Courts should instead apply the conditional business judgment rule to board-enacted nomination restrictions. This measure appears rational because restricting the ability to nominate can, generally, be equated to a board's attempt to avert being replaced (i.e., taken over). Furthermore, heightened "scrutiny is mandated by: . . . the threatened diminution of the current stockholders' voting power . . . and . . . the traditional concern of . . . courts for actions which impair or impede stockholder voting rights."[194]

Use of a conditional business judgment rule would mean: "(a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[195] Directors are responsible for the burden of persuasion – namely, demonstrating that they were "adequately informed and acted reasonably."[196] The burden can be met with a showing that the decision was made in "good faith" after a "reasonable investigation."[197] A board will then be required to show that the imposition of the nomination restriction was reasonable in relation to the purpose for which it was enacted.[198] Nonetheless, "courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness."[199]

VI. CONCLUSION

Although the court was deprived of an opportunity to decide the validity of Epiq's Notification Bylaw, the unresolved issue provides an opportunity to fill a hole in corporate law that will inevitably be of importance in an emerging era of shareholder activism. A framework to determine the validity of

192. The proportional and neutral test appears to be a simplified construction of that rule since directors need only show the restriction is somehow in the best interests of the corporation.

193. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 660 (Del. Ch. 1988).

194. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994).

195. *Id.*

196. *Id.*

197. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

198. "If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed." *Id.*

199. *Paramount Commc'ns*, 637 A.2d at 45.

and extent to which shareholders' right to nominate can be restricted has remained largely non-existent to this point. It appears that a large reason for that absence is due to a lack of consensus as to where the right to nominate originates. Rather than continuing in uncertainty, courts should recognize that the right to nominate is an inherent right of share ownership. That right should be limited only when doing so promotes a legitimate corporate purpose. Fundamental rights have always been afforded a stricter standard of scrutiny when a restriction placed on them is challenged by those subject to the restriction. Corporate rights need not be viewed any differently. Shareholder challenges to nomination restrictions enacted by a board alone should be reviewed under a conditional business judgment rule. As shareholder activism increases and boards of directors seek to mitigate the rising risk of dysfunction caused by attempts to influence the company,[200] it is essential that courts know how to approach these matters.

Table I: Total Shareholder Returns

	Year 1	**Year 3**	**Year 5**	**Year 10**
Versus Russell 3000[201]				
Epiq Systems	(9.79%)	6.71%	3.55%	1.87%
Russell 3000	2.57%	16.00%	14.11%	7.57%
Outperformance / Underperformance	**12.36%**	**9.29%**	**9.29%**	**5.7%**

200. Atkins, Grossman & Welch, *supra* note 111.

201. Versus Russell 3000 is a stock market index, which acts as a point of reference for gauging how the overall market is performing. *Russell US Indexes,* FTSE RUSSELL, http://www.ftse.com/products/indices/russell-us (last visited Feb. 3, 2018).

APPENDIX A

Amended and Restated Bylaws of Epiq Systems, Inc. art. II, § 2.3

(c) The shareholder's notice required pursuant to Section 2.3(b) (the "Shareholder's Notice") shall, in the event it includes a nomination of persons for election to the Board of Directors, set forth the following information:

> (i) the name, address and contact information of the shareholder who owns 5% of the Corporation's outstanding common stock and has held such shares for at least twenty-four months and who intends to make the nomination of persons for election to the Board of Directors (the "Nominating Shareholder") and any Shareholder Associated Person (such Shareholder Associated Person(s) and the shareholder who intends to make the nomination, the ''Nominating Persons");
>
> (ii) in addition, the Nominating Persons shall provide the following information:
>
> > (A) the class and number of shares of stock of the Corporation which are owned and held by the Nominating Shareholder;
> >
> > (B) a detailed listing of all acquisitions or dispositions of stock of the Corporation by the Nominating Shareholder (including the number of shares acquired or disposed of in such transaction) during the twenty-four months preceding the date of the Shareholder's Notice;
> >
> > (C) the class and number of shares of stock of the Corporation which are directly or indirectly held of record or beneficially owned (as such term is defined in 17 C.F.R. § 240.13d-3 ("Ru1e 13d-3"» by each of the Nominating Persons, the date such shares were acquired and the investment intent of such acquisition;
> >
> > (D) with respect to the Corporation's securities, a detailed description of any Derivative Positions directly or indirectly held or beneficially held by each Nominating Person and the date on which such Derivative Positions were acquired;
> >
> > (E) whether and the extent to which a Hedging Transaction has been entered into by or on behalf of each Nominating Person and a detailed description of such Hedging Transaction, in-

cluding the date on which any such Hedging Transactions was entered into or materially modified;

(F) detailed disclosures (including date, substantive description of all matters discussed and participants) with respect to each direct or indirect (through any agent, representative or other person) communication, arrangement or agreement, in each case, whether written or oral (any such communication, arrangement or agreement, a "13d Communication") during the twelve months preceding the date of the Shareholder's Notice, between any Nominating Persons or any Proposed Nominees (as defined below), on the one hand, and any person or entity that was at the time of such 13d Communication, or has since become, required to file pursuant to 17 C.F.R. § 240.13d-l of the Exchange Act, on the other hand, in respect of their interests in the Corporation and, in the case of any written 13d Communication, copies thereof;

(G) detailed disclosures about any person who contacted or was contacted by the Nominating Persons regarding the Proposed Nominees during the twelve months prior to the date of the Shareholder's Notice, including in such disclosure the name and address of the contacted or contacting person and the date of contact;

(H) information detailing the investment intent or objective of each of the Nominating Persons, including in each case information verifying the date on which such investment intent was formed or changed;

(I) a representation that the Nominating Person or Nominating Persons are entitled to vote in the election of directors at the meeting and intends to appear in person or by proxy at the meeting to nominate the Proposed Nominees;

(J) a representation as to whether any Nominating Persons will solicit, directly or indirectly, a proxy from the holders of a sufficient number of the Corporation's outstanding shares required in order to elect each Proposed Nominee or otherwise to solicit proxies from shareholders in support of the nomination (such representation, a "Nomination Solicitation Statement"); and

(K) any other information required to be included in a proxy statement or other filings required to be made in connection with the solicitation of proxies or consents for a contested election of directors (even if an election contest or proxy solicitation is not involved) pursuant to Section 14 of the Exchange Act, and the rules, regulations and schedules promulgated thereunder;

(iii) in addition, the Nominating Persons shall provide the following in respect of the person or persons to be nominated for election to the Board of Directors by the Nominating Persons (the "Proposed Nominees"):

(A) the name, address and contact information of the Proposed Nominees;

(B) a statement of the Proposed Nominee's qualifications;

(C) a description of any and all historical, current or planned compensatory, payment or other financial agreement, arrangement or understanding (oral or written) between the Proposed Nominees, on the one hand, and any other person or entity (including the Nominating Persons) other than the Corporation, on the other hand, in each case in connection with candidacy or service as a director of the Corporation;

(D) the class and number of shares of stock of the Corporation which are directly or indirectly held of record or beneficially owned (as such term is defined in Rule 13d-3) by each of the Proposed Nominees, the date such shares were acquired and the investment intent of such acquisition;

(E) with respect to the Corporation's securities, a detailed description of any Derivative Positions directly or indirectly held or beneficially held by each Proposed Nominee and the date on which such Derivative Positions were acquired;

(F) whether and the extent to which a Hedging Transaction has been entered into by or on behalf of each Proposed Nominee and a detailed description of such Hedging Transaction, including the date on which any such Hedging Transaction was entered into or materially modified;

(G) the written consent signed by each Proposed Nominee evidencing a willingness to serve as a director if elected;

(H) a commitment by each Proposed Nominee to meet personally with the Corporation's nominating and corporate governance committee;

(I) the completed and executed Nominee Representation and Agreement described in Section 2.3(j) of this Article II; and

(J) any other information required to be included in a proxy statement or other filings required to be made in connection with the solicitation of proxies or consents for a contested election of directors (even if an election contest or proxy solicitation is not involved) pursuant to Section 14 of the Exchange Act, and the rules, regulations and schedules promulgated thereunder.

APPENDIX B

Director Appointment Agreement § 2(c)

At any time after the 2015 Annual Meeting, Villere may terminate the Standstill Period upon ten (10) days' written notice to the other parties to this Agreement and, following receipt of such notice, the Board may accept the resignation of the Villere Designee from the Board; provided, however, if the Villere Designee (or an alternate candidate designated by Villere and approved by the Board pursuant to Section 1(i)(B)) has been included on the Company's slate of directors for an upcoming Annual Meeting, then the Standstill Period shall not be terminable until the day following such Annual Meeting.[202]

202. *See* Petition, *supra* note 5, at 18.