IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEVITT CORP., a Florida corporation,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 3622-VCN**
	:	
OFFICE DEPOT, INC., a Delaware corporation,	:	
	:	
	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: April 10, 2008
Date Decided: April 14, 2008

Michael D. Goldman, Esquire and Stephen C. Norman, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware and David B. Hennes, Esquire, Susanna J. Gray, Esquire, and Michael F. Savicki, Esquire of Fried, Frank, Harris, Shriver & Jacobson LLP, New York, New York, Attorneys for Plaintiff.

Gregory P. Williams, Esquire, Richard P. Rollo, Esquire, John D. Hendershot, Esquire, and Scott W. Perkins, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware and Andrew C. Houston, Esquire and Jonathan Goldin, Esquire of Wachtell, Lipton, Rosen & Katz, New York, New York, Attorneys for Defendant.

NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiff Levitt Corp. ("Levitt") seeks a declaration that it may nominate two candidates for election to the board of directors of Defendant Office Depot, Inc. ("Office Depot"), a Delaware corporation, at the company's 2008 annual stockholders meeting (the "Annual Meeting"), scheduled for April 23, 2008. Office Depot relies upon the "advance notice" provision of its bylaws (the "Bylaws") to justify its rejection of Levitt's nominations. Both parties have moved for judgment on the pleadings in accordance with Court of Chancery Rule 12(c). For the reasons that follow, Levitt's motion is granted and Office Depot's motion is denied.

II. BACKGROUND

Levitt has historically been a real estate development company. Looking to the future, Levitt intends to expand the range of its investments. As of March 3, 2007, the record date for the Annual Meeting, Levitt was the beneficial owner of 200 shares of Office Depot common stock. When Levitt filed this action on March 17, 2008, it beneficially owned more than 3,000,000 shares of Office Depot common stock through Woodbridge Equity Fund, LLLP, an entity wholly-owned by Levitt. These holdings comprise just over one percent of Office Depot's outstanding common stock.

Office Depot is a global supplier of office products and services. Because of what it perceives as Office Depot's "performance problems," Levitt wants to replace two members of Office Depot's twelve member board with its own nominees at the Annual Meeting.

Office Depot announced the logistical information for its stockholders meeting, as well as its agenda, in a Notice of Annual Meeting of Shareholders (the "Notice"), dated March 14, 2008.[1] The first three sections of the Notice provide the date, time, and location of the meeting. Of more importance to the resolution of this controversy, the Notice contains an agenda under an "items of business" heading; the first entry reads: "1. To elect twelve (12) members of the Board of Directors for the term described in this Proxy Statement."[2]

In the Proxy Materials that accompanied the Notice, Office Depot's Board further elaborated on the Annual Meeting. In a section entitled "Purposes of the Meeting," the Board informed its stockholders that the "Annual Meeting will consider important matters outlined in the Notice of this Meeting."[3] Later, the Board reported that the twelve individuals now serving as Office Depot's directors

[1] Affidavit of Andrew C. Houston, Ex. F (hereinafter "Proxy Materials"), at 5 (the "Notice").
[2] The other items of business listed in the Notice include approving Office Depot's bonus plan for executive management; ratifying the audit committee's appointment of Deloitte & Touche as the company's independent accounting firm; and transacting any other business that may properly come before the meeting.
[3] Proxy Materials, at 8. Office Depot's annual report was also included in this transmittal to its stockholders.

had been nominated for election at the Annual Meeting.[4] In addition to identifying those candidates, Office Depot's stockholders were told that substitute nominations would be proposed in the event that any named nominee would be unable to serve. The voting procedures for both contested and uncontested elections were set forth. In a contested election, where the number of candidates exceeds the number of positions to be filled, the nominees receiving the greatest number of votes are to be elected. In an uncontested election, each nominee is elected by receiving a majority of the votes cast.[5]

Levitt filed its own preliminary proxy statement soliciting proxies in support of its two nominees with the SEC on March 17, 2008. Levitt did not, however, attempt to give advance notice of its intention to propose these nominees, as Office Depot argues was required by Article II, Section 14 of the Bylaws ("Section 14"), which provides in pertinent part:

> Section 14. Stockholder Proposals. At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting. To be properly brought before an annual meeting, business must be (i) specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors, (ii) otherwise properly brought before the meeting by or at the direction of the Board of Directors or (iii) otherwise properly brought before the meeting by a stockholder of the corporation who was a stockholder of record at the time of giving of notice provided for in this Section, who is entitled to vote at the meeting and who complied with the notice procedures set forth in

[4] Proxy Materials, at 11.
[5] *Id.*

> this Section. For business to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely notice thereof in writing to the Secretary . . . .
>
> To be timely, a stockholder's notice shall be received at the company's principal office . . ., not less than 120 calendar days before the date of Company's proxy statement released to shareholders in connection with the previous year's annual meeting. . . .
>
> Such stockholder's notice shall set forth as to each matter the stockholder proposes to bring before the annual meeting (i) a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the meeting and any material interest in such business of such stockholder and the beneficial owner, if any, on whose behalf the proposal is made; and (ii) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the proposal is made (A) the name and address of such stockholder . . . , (B) the class and number of shares of the corporation which are owned of record and beneficially . . . , and (iii) in the event that such business includes a proposal to amend either the Articles of Incorporation or the Bylaws of the corporation, the language of the proposed amendment.
>
> . . . .
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> Nothing in these Bylaws shall be deemed to affect any rights of the stockholders to request inclusion of proposals in the corporation's proxy statement pursuant to Rule 14a-8 under the Exchange Act.[6]

Neither Section 14 nor any other provision of the Bylaws expressly mandates advance notice of competing director nominations.

In order for an item of business to be considered at an annual meeting, it must be "properly brought before the meeting." The Bylaws prescribe three means by which an item of business can appear on the agenda for consideration at the

[6] Compl., Ex. A (the Bylaws), Art. II, § 14 (emphasis added).

Annual Meeting. First, one path is through inclusion in the notice of the meeting issued at the Board's behest. Second, the item may be "otherwise properly brought before the meeting by or at the direction of the Board of Directors." Third, an item may "otherwise [be] properly brought before the meeting by a stockholder of the corporation who was a stockholder of record at the time of giving of notice provided for in this Section, who is entitled to vote at the meeting and who complied with the notice procedures set forth in this Section."

For a stockholder to bring business before an annual meeting, the stockholder must give timely notice to the Secretary of the corporation. Timely notice is defined in Section 14 as notice received "not less than 120 days before the date of the Company's proxy statement released to shareholders in connection with the previous year's annual meeting . . . ."[7] In this instance, compliance would have required Levitt to give its notice 141 days before the Annual Meeting.[8]

Unlike Section 14, earlier versions of Office Depot's Bylaws had explicitly required advance notice of director nominations. Specifically, Article II, Section 5 of Office Depot's 1996 Bylaws provided:

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[7] Earlier versions of the Bylaws tied the time for submission of shareholder proposals to the date of the previous annual meeting (and not to the release of the prior year's proxy statement). *See* Compl., Ex. C (Office Depot's 2000 Bylaws), at Art. II, § 14.

[8] Office Depot's 2007 proxy statement was released on April 7, 2007. Given that the Annual Meeting is scheduled for April 23, 2008, Levitt would have needed to give advance notice 120 days prior to April 7, 2008, which is a date 141 days prior to the Annual Meeting's scheduled date.

> At an annual meeting of stockholders, only such business shall be conducted, and only such proposals shall be acted upon, as shall have been brought before the annual meeting, . . . by any stockholder of the corporation who complies with the requirements of this Article II, Section 5 . . . . For a proposal to be properly brought before an annual meeting by a stockholder, the stockholder must have given timely advance notice thereof in writing to the Secretary of the corporation . . . A stockholder's notice to the Secretary shall set forth, . . . if such proposal includes the nomination of directors, the information required by Article III, Section 3.[9]

Article III, Section 3 of the 1996 Bylaws required the stockholder to provide certain information about the nominee, such as her name, age, and address;[10] "timely advance notice" required a stockholder to deliver notice not less than 90 days before the date of the previous year's annual meeting.[11]

III. CONTENTIONS

In support of its motion for judgment on the pleadings, Levitt advances four principal arguments. First, Levitt observes that the Bylaws do not include an express advance notice restriction on director nominations by stockholders; it emphasizes that the current Bylaws, in contrast to earlier versions, say nothing about the nomination of directors. This, according to Levitt, is evidence that the Bylaws do not require advance notice of nominations. Second, Levitt asserts that the term "business" in Section 14 does not "clearly and unambiguously" include the nomination of directors, and, given the special prominence of the shareholder

[9] Compl., Ex. B (the "1996 Bylaws"), at Art. II, § 5.
[10] *Id.*, at Art. III, § 3.
[11] *Id.*, at Art. II, § 5.

franchise under Delaware law, restrictions that are not clear and unambiguous should not be interpreted to limit shareholder democracy. Third, Levitt argues in the alternative that if the term "business" does encompass director nominations, no additional notice is required because Office Depot has already properly made director nominations an item of business before the Annual Meeting through the Notice's general reference to the election of directors. Fourth, Levitt argues that, if applicable, the advance notice period prescribed by Section 14 is unreasonably long.[12]

In response, Office Depot contends that the plain and unambiguous language of Section 14, as supported by its history, governs director nominations by stockholders and requires advance notice. It also argues that Levitt's claim regarding the length of the notice period is not properly before the Court.[13]

IV. ANALYSIS

The parties have cross-moved for judgment on the pleadings under Court of Chancery Rule 12(c). If no material facts are in dispute and a party is entitled to a judgment as a matter of law, a court may grant a motion for judgment on the

[12] Levitt also suggests that the advance notice provision, with its notice period measured by reference to the date of the release of proxy statements, should be limited to only those stockholder proposals that are to be included in Office Depot's proxy materials.

[13] This claim, which first appeared in Office Depot's opening brief, was not set forth in the Complaint.

pleadings.[14] "Corporate charters and by-laws are contracts among the shareholders of a corporation,"[15] and the proper interpretation and construction of a contract is a question of law.[16] Because determining the meaning of a contractual provision is a question of law, and because the parties have entered a stipulation limiting and agreeing upon the universe of relevant facts implicated by the current controversy, judgment on the pleadings is appropriate in this case.[17]

A. *Section 14's Application to Stockholders' Nomination of Directors*

Under Delaware law, no advance notice of a stockholder's intent to nominate directors at an annual meeting need be given, unless the corporation has duly imposed such a requirement.[18] Levitt urges that Section 14 has no application to director nominations. Chiefly, Levitt argues that, because Section 14 makes no explicit reference to director nominations, it cannot serve to exclude Levitt's intended nominations, especially given the solicitude shown by Delaware courts for the shareholder franchise.[19] Levitt posits that a shareholder's right to vote

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[14] *JANA Master Fund Ltd. v. CNET Networks, Inc.*, 2008 WL 660556, at *3 (Del. Ch. Mar. 13, 2008), *expedited appeal granted*, No. 141, 2008 (Del. Mar. 19, 2008).
[15] *Centaur P'ners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del.1990).
[16] *E.g.*, *JANA*, 2008 WL 660556, at *3.
[17] Notwithstanding the parties' stipulation, both have gone, to a limited extent, beyond the agreed-upon set of facts. Those excursions, however, have not involved facts material to the Court's analysis.
[18] *JANA*, 2008 WL 660556, at *6 (citing 8 *Del. C.* § 222(a)).
[19] *See, e.g.*, *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); *id.* at 659 n.2 ("Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights.").

includes the right to nominate opposing candidates,[20] and, because of the importance of shareholder nomination rights, any restriction of those rights must be "clear and unambiguous."[21] Levitt offers that Section 14 contains no such clear and unambiguous restriction and that the Court should not impose one. Comparing the 1996 Bylaws, which had made explicit reference to director nominations, with the current Bylaws, Levitt argues that had Office Depot intended to include such a restriction, it knew how to do so. Further, Levitt notes that after eliminating the provisions explicitly governing advance notice of director nominations, Office Depot did not disclose that it intended for Section 14 to apply to director nominations by stockholders. As a result, Levitt contends that the only conclusion a reasonable stockholder could draw from comparing those two documents is that Office Depot intended to eliminate the advance notice requirement for director nominations.[22]

Levitt also argues that because the timing of the advance notice is linked to the release date of Office Depot's proxy statement, advance notice would be necessary, if at all, only for the stockholder who seeks inclusion of a proposal in Office Depot's proxy materials and not where, as here, the proposal or nomination

[20] *E.g.*, *Linton v. Everett*, 1997 WL 441189, at *9 (Del. Ch. July 31, 1997).
[21] *See, e.g.*, *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002); *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *16 (Del. Ch. July 21, 2000).
[22] The information typically sought from the advance notice of director nomination, *e.g.*, the name of the candidate, is not required by Section 14. This, as Levitt points out, is consistent with its contention that Section 14 does not apply to director nominations.

is shareholder-funded.[23] Finally, Levitt contends that because Office Depot was solely responsible for drafting the Bylaws, any ambiguous terms must be construed against it under both the *contra preferentem* principle of contract construction[24] and Delaware law teaching that ambiguous terms limiting shareholders' default electoral rights are to be construed in favor of shareholder democracy.[25]

On the other hand, Office Depot notes that the same rules governing contract construction are applicable to the interpretation of bylaws, and that if the Bylaws are unambiguous, they are to be enforced according to their terms. Office Depot considers the Bylaws unambiguous and contends that Section 14, by its plain language, applies to all "business" that a stockholder may wish to conduct at (or bring before) the Annual Meeting. According to Office Depot, this plain meaning finds support in the Delaware General Corporation Law, decisions of this Court, and in other provisions of the Bylaws themselves. The Court agrees.

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[23] This line of argument touches on Rule 14a-8, a rule promulgated under the Securities Exchange Act of 1934. *See* 17 C.F.R. § 240.14a-8. Rule 14a-8 allows shareholders to include their own proposals in management proxy materials under certain circumstances, thus reducing the costs borne by the shareholder in a proxy fight. *See JANA*, 2008 WL 660556, at *4. Because the Court concludes that Levitt was not required to give advance notice in this case, it need not resolve Levitt's argument that Section 14 is inapplicable to shareholder-funded proposals. Nevertheless, the Court notes in passing that Section 14 requires that any "business" conducted at the annual meeting to have been properly brought before it; there is no effort to distinguish between (i) a shareholder-funded and shareholder-proposed item and (ii) a company-funded but shareholder-proposed item.

[24] Under this principle, the ambiguous terms of a contract drafted solely by one party should be construed against that party. *E.g.*, *S.I. Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42-43 (Del. 1998).

[25] *E.g.*, *Openwave Sys., Inc. v. Harbinger Capital P'ners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. 2007).

Ascertaining the parties' shared intent is the goal of contract interpretation.[26] "Because Delaware adheres to the objective theory of contract interpretation, the court looks to the most objective indicia of that intent: the words found in the written instrument."[27] If the language is "clear and unambiguous," the plain and ordinary meaning of the words chosen by the parties will generally establish their intent,[28] but where a contract is "reasonably susceptible of different interpretations or may have two or more different meanings, it is ambiguous."[29] The parties' mere disagreement over the meaning of contract terms, however, does not by itself create ambiguity.[30] When ambiguity is encountered in interpreting a corporation's bylaws, "doubt is resolved in favor of the stockholders' electoral rights."[31]

Turning to the text of Section 14, the first sentence reads, "At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting." The plain meaning of the term "business" in this context is an "affair" or "matter."[32] Accordingly, Section 14's first sentence, roughly paraphrased, provides that, for any affair or matter to be conducted or considered at the Annual Meeting, it must have been properly

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[26] *E.g.*, *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007), *interlocutory appeal denied*, 2007 WL 4857667 (Del. Ch. Dec. 6, 2007).
[27] *Sassano v. CIBC World Mkts. Corp.*, 2008 WL 152582, *5 (Del. Ch. Jan. 17, 2008).
[28] *E.g.*, *West Willow-Bay Court*, 2007 WL 3317551, at *9.
[29] *JANA*, 2008 WL 660556, at *3 (quotation omitted).
[30] *West Willow-Bay Court*, 2007 WL 3317551, at *9.
[31] *Openwave Sys.*, 924 A.2d at 239. *See also Harrah's Entm't, Inc.*, 802 A.2d at 310.
[32] WEBSTER'S THIRD INT'L DICTIONARY 302 (3d ed. 1993).

brought before the meeting. As Levitt argues and Office Depot recognizes, the sweep of the term "business" is broad, encompassing almost anything that could transpire at an annual meeting. But as Office Depot suggests, there is a difference between breadth and ambiguity, and, although broad, the term "business" is not ambiguous in this context. Because of the common meaning of "business," any affair or matter to be conducted or considered at an annual meeting must be properly brought before the meeting, and because the nomination of directors is an affair or matter,[33] it follows that Section 14 requires the nomination of directors to be "properly brought." Contrary to Levitt's contention, this interpretation does not require the Court to imply or impose terms; instead, it merely affords the section's words their plain meaning.

Beyond the basic and dispositive principles of contract interpretation outlined above, this result also finds support elsewhere in Delaware law and in the Bylaws themselves. This Court has said that "[t]he business of an annual meeting

[33] The Court reaches this conclusion after some consideration. Admittedly, a tenable argument could be advanced that "business," as used in Section 14, refers only to actions to be taken by the stockholders as a whole at the annual meeting. Under such a view, the result of a shareholder vote on an individual director candidate would constitute "business" because it was an action of the group as whole, but a nomination would not be "business" as that term is used in Section 14 because the act of nominating a candidate is not an official action of the stockholders as a whole. Ultimately, however, the Court concludes that the broad, but plain, meaning of the term is controlling. The act of nominating someone as a candidate for election as a director is an "affair" or "matter"—or, in the wording of Section 14, "business"—to be considered at the stockholders' meeting.

is the election and voting process."[34] Moreover, the Delaware General Corporation Law, in Section 211(b), provides that "an annual meeting of stockholders shall be held for the election of directors" and that "[a]ny other proper business may be transacted at the annual meeting."[35] This language strongly implies that "business," as used in the Delaware General Corporation Law, encompasses the election of directors. Although the statutory use of a term is not necessarily determinative in interpreting a private contract, the Bylaws mirror this language in Article II, Section I, which states, "The annual meeting of stockholders for the election of directors and the conduct of such other business as may come before the meeting . . . ."[36] Here again, the use of the term "other business" in conjunction with "election of directors" indicates that the election of directors is itself a form of "business." If an election is business, then the related act of nomination is also business to be accomplished at the Annual Meeting.

For these reasons, the Court concludes that the nomination of directors is unambiguously within the purview of the term "business," and thus stockholder director nominations implicate Section 14's advance notice provision. Having found the term "business" unambiguous in this application, the Court declines to

[34] *JANA*, 2008 WL 660556, at *5.
[35] 8 *Del. C.* § 211(b).
[36] Bylaws, Art. II, § 1.

consult the extrinsic evidence or invoke any principle of statutory construction applicable to the interpretation of ambiguous terms.[37]

B. *Section 14's Operation in this Case*

With the conclusion that director nominations are within the scope of Section 14, the Court must now determine whether Levitt was required to give advance notice of its intention to nominate two directors. Levitt argues that it was not required to give notice because Office Depot had already specified in the Notice that the business of the meeting would include electing directors.[38] Office Depot answers that the Notice provided only for the business of voting for or

[37] Because the Court holds the term "business," as used in Section 14, unambiguous, it need not consult extrinsic evidence or utilize rules of construction designed for determining the meaning of ambiguous contracts. For example, the rule that doubt surrounding the meaning of corporate charter and bylaw provisions should be resolved in favor of shareholder democracy is not implicated by an unambiguous contract. *See Harrah's Entm't*, 802 A.2d 294, 310 (applying this rule of construction after finding the pertinent contract language ambiguous); *Rohe*, 2000 WL 1038190, at *16 (same). Similarly, the principle of *contra preferentem* is not implicated where a contract's terms are unambiguous. *See S.I. Mgmt.*, 707 A.2d at 42-43 (applying this rule of construction after finding ambiguity).

Although both parties have relied upon the amendment history of the Bylaws to a degree, particularly by way of comparing the 1996 Bylaws with the current Bylaws, the Court does not find this vein of analysis particularly helpful. Apart from the question of whether or not the amendment history constitutes extrinsic evidence, *cf. Centaur P'ners*, 582 A.2d at 927-29, comparing the current Bylaws to the 1996 Bylaws is not of great assistance because of the wide range of changes that have been made to the Bylaws over the years, although it does provide some limited support to Levitt's interpretation.

[38] Levitt also argues that because Office Depot has announced that the Levitt candidates were "timely nominated," it cannot to seek to repudiate that disclosure in this litigation. In a Form Def. 14A, dated March 24, 2008, Office Depot provided the following additional information about the Annual Meeting: "Because the number of nominees timely nominated for the Annual Meeting [necessarily referring to the Levitt nominees because there are no others] exceeds the number of directors to be elected at the Annual Meeting, the election of directors is a contested election under Office Depot's bylaws." Supplemental Declaration of David B. Hennes, Ex. L. Although Levitt argues that Office Depot, with this disclosure, has conceded the debate, the Court does not rely upon this in reaching its decision.

against its slate of 12 nominees and that Levitt's interpretation would render the advance notice provision of little effect in regard to the nomination of directors because every annual meeting will involve the election of directors and the company's notice will always state that fact.[39]

Section 14 provides, "At an annual meeting of the stockholders, only such business shall be conducted as shall have been properly brought before the meeting." Continuing, the section states that one way business may be properly brought before a meeting is for it to be "specified in the notice of the meeting (or any supplement thereto) given by or at the direction of the Board of Directors . . . ."

The issue facing the Court then is to determine what business was properly brought before the meeting by the Notice, a determination that will answer the question of whether Levitt was relieved of complying with the advance notice provision because the business of nominating directors for election had already been properly brought before the meeting. As described above, the Notice stated that an item of business for the Annual Meeting is to "elect twelve (12) members of the Board of Directors." Office Depot has argued that the Notice brought before the Annual Meeting only the narrow business of voting for or against its slate of directors. Such a reading does not find support in the text of the Notice, which

[39] *See* 8 *Del. C.* § 211(b) (annual meeting of stockholders will include election of directors).

broadly refers to "elec[ting] . . . members of the Board of Directors."[40] Instead, the Notice establishes that the business of electing directors, unrestricted by any limiting qualification, has been properly brought before the Annual Meeting.

The remaining question is whether the business of electing directors includes the nomination of directors. Of course, nominating candidates and voting for preferred candidates are separate steps. Levitt has recognized as much. Notwithstanding this difference, nomination is a critical part of the election process—in the absence of other nominations, the stockholder constituency has no electoral choice as between candidates; instead, the shareholders are left with only an "up or down" vote on the company sponsored candidates. Despite the role of nominations in giving substance to elections, *i.e.*, providing shareholders with a selection of candidates, neither Subchapter VII of the Delaware General Corporation Law[41] nor any provision of Office Depot's Bylaws discusses or imposes limitations on the nomination process.[42] Perhaps the best explanation for

[40] Indeed, the Proxy Materials even describe the mechanics of a contested election, an inclusion at odds with the assertion that no other nominations would be possible because of the advance notice provision. *See* Proxy Materials, at 11; *supra* text accompanying note 5. The argument could be advanced that in stating the business as "to elect twelve (12) members of the Board of Directors," the Notice's use of the word "of" limits the candidates to those directors currently serving on Office Depot's Board. The Court finds this technical reading unpersuasive.

[41] Subchapter VII addresses shareholder meetings, elections, voting, and notice.

[42] *See* 8 *Del. C.* §§ 211-233. The Bylaws make several references to nominees for candidacy for the office of director, but do not make provision for any set nomination process. *See* Bylaws, Art. II, § 9.

this silence is that the concept of nominations is included within the broader category of elections. Typically, the election process is understood as spanning from nomination to voting to vote tabulation to announcement and certification of the results. Given that the Notice speaks generally of "elect[ing] . . . Directors," an item of business that contemplates putting forth individuals for stockholder consideration, the Court can discern no persuasive reason why the business of electing directors should not include the subsidiary business of nominating directors for election, especially where no guidance on the nomination process is found in Office Depot's Bylaws or in the Delaware General Corporation Law.[43]

Consequently, the Court holds that having properly brought the business of electing and nominating directors before the Annual Meeting through the Notice, Office Depot's Board cannot prevent Levitt from nominating candidates for election to the Office Depot Board at that meeting.[44]

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[43] Because Section 14's operation is predicated, in part, on what business the Board has chosen to bring before the stockholders' annual meeting in its notice, the provision places a premium on how the Board chooses to describe or limit that business. In response to Office Depot's argument that Section 14 will be rendered a nullity in regard to director nominations, the Court notes that Office Depot, through careful drafting of the Notice, may have separated precisely the business of the election from the business of nomination. If the Notice had so provided, a different result may have obtained.

[44] Accordingly, the Court need not pass on Levitt's arguments that Section 14 does not apply to shareholder-funded proposals or that its advance notice period is unreasonably long.

Another way of viewing the outcome is to recognize that Office Depot's description of the business to come before the Annual Meeting (*i.e.*, whether "election" subsumes nomination) was not clear and unambiguous. With that, the protection afforded the shareholder franchise, *see, e.g.*, *Openwave Sys.*, 924 A.2d at 239, which includes the right to nominate competing board candidates, is properly implemented in this instance.

V. CONCLUSION

The business of electing and nominating directors was properly brought before the Annual Meeting by the Notice. Levitt's effort to nominate two candidates is within the scope of that business. Therefore, Levitt's motion for judgment on the pleadings seeking a declaration that it may nominate two directors for election at Office Depot's 2008 Annual Meeting is granted and Office Depot's cross-motion for judgment on the pleadings, seeking a contrary declaration, is denied.

Counsel are requested to confer and to submit an implementing form of order.