UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

December 6, 2024

Brian K. Feezel
Bryan Cave Leighton Paisner LLP

Re: Energizer Holdings, Inc. (the "Company")
Incoming letter dated September 23, 2024

Dear Brian K. Feezel:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the North Atlantic States Carpenters Pension Fund for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal asks the Company to adopt a new director election resignation governance policy in the Company's corporate governance principles.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(2) or Rule 14a-8(i)(6). We are unable to conclude that the Proposal, if implemented, would cause the Company to violate Missouri law.

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: David Minasian
North Atlantic States Regional Council of
Carpenters

BCLP
Bryan Cave Leighton Paisner

September 23, 2024

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Securities Exchange Act of 1934 / Rule 14a-8

VIA ELECTRONIC SUBMISSION

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, NE
Washington, DC 20549

Re: Energizer Holdings, Inc. - Notice of Intent to Omit Shareholder Proposal Submitted by the North Atlantic States Carpenters Pension Fund Pursuant to Rule 14a-8

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), our client, Energizer Holdings, Inc., a Missouri corporation ("Energizer" or the "Company"), hereby notifies the Staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission (the "Commission") of its intention to exclude a shareholder proposal (the "Proposal") submitted by Joseph Byrne, as Trustee on behalf of the North Atlantic States Carpenters Pension Fund (the "Proponent") from Energizer's proxy materials for its 2025 Annual Meeting of Shareholders (the "2025 Proxy Materials") for the reasons stated below. The Company requests confirmation that the Staff will not recommend any enforcement action if the Company omits the Proposal from the 2025 Proxy Materials for the reasons detailed below.

In accordance with the Staff guidance, we are submitting this letter electronically to the Staff through the Commission's online shareholder proposal form. Pursuant to Rule 14a-8(j), this letter is being submitted more than 80 calendar days before the date on which the Company expects to file the definitive 2025 Proxy Materials. A copy of this letter and the attachments are being sent on this date to the Proponent advising of Energizer's intention to omit the Proposal from its 2025 Proxy Materials. We respectfully remind the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should be furnished concurrently to the undersigned pursuant to Rule 14a-8(k).

Bryan Cave Leighton Paisner

I. The Proposal

The Proposal includes the following resolution:

> Resolved: The shareholders of Energizer Holdings, Inc. (the "Company") request that the Board adopt a new Director Election Resignation Governance Policy ("Resignation Policy") provision in its corporate governance principles to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Policy shall provide that each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Resignation Policy shall provide that the Board is expected to accept a tendered resignation absent a finding of a compelling reason or reasons to reject the resignation, as determined by the Board in the exercise of its business judgment. The Resignation Policy shall further stipulate that if a director's resignation is rejected and the director remains as a holdover director but is not re-elected at the next annual meeting of shareholders, that director's second tendered resignation shall be effective ninety days after the vote certification.

A copy of the Proposal, together with the Proponent's supporting materials and related correspondence are attached to this letter as Exhibit A.

II. Basis for Exclusion of The Proposal

As discussed more fully below, the Company respectfully requests that the Staff concur with the Company's view that the Proposal may be excluded from the 2025 Proxy Materials in reliance on:

- Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Missouri law; and
- Rule 14a-8(i)(6) because the Company lacks the power and authority to implement the Proposal.

III. Analysis

a. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because the Implementation of the Proposal Would Cause the Company to Violate Missouri Law.

Rule 14a-8(i)(2) permits a company to exclude a proposal if its implementation would cause the company to violate state, federal or foreign law applicable to the company. As discussed below and for the reasons set forth in the legal opinion attached hereto as Exhibit B (the "Missouri Law Opinion"), implementation of the Proposal would cause the Company to violate Missouri law. Accordingly, the Proposal is excludable under Rule 14a-8(i)(2) as a violation of state law.

The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(2) of proposals that would cause companies to violate state law, including by impermissibly infringing on the managerial authority of the board of directors and preventing directors from discharging their fiduciary duties to the company. For example, in *Verizon Communications Inc.* (Mar. 15, 2024), the Staff permitted exclusion under Rule 14a-8(i)(2) of a proposal to adopt specific revisions to the director election resignation provisions in the company's bylaws, noting that "in the opinion of Delaware counsel, implementation of the [p]roposal would cause the [c]ompany to violate state law").

See also *Lowe's Companies, Inc.* (Apr. 8, 2024), *Ingersoll Rand Inc.* (Apr. 17, 2024) and *MetLife, Inc.* (Apr. 22, 2024) for similar permitted exclusions under Rule 14a-8(i)(2). The Staff also allowed exclusion of the proposal to *Oshkosh Corp.* (Nov. 21, 2019), which requested that the company amend its bylaws to require that a director who received less than a majority of the votes cast be removed from the board "immediately." In its no-action decision, the Staff concurred with the proposal's exclusion under Rule 14a-8(i)(2) because implementation of the proposal would cause the company to violate state law because the immediate and unilateral removal of a director was not a prescribed method of director removal under Wisconsin corporate law. See also *Johnson & Johnson* (Feb. 16, 2012) (permitting exclusion under Rule 14a-8(i)(2) of a proposal that would have required adoption of a bylaw that would disqualify directors from service on the company's compensation committee if they received "no" or "withhold" votes in excess of 10% of the votes cast. where the supplied legal opinion opined that the proposal violated state law by interfering with the exclusive grant of authority given to the board of directors to appoint directors to committees of the board); *Sigma Designs, Inc.* (Jun. 9, 2015) (permitting the exclusion of a proposal requesting the board of directors to amend the company's governance documents to provide for majority voting where the company submitted that, under California law, a majority vote standard could only be adopted if a company first eliminated cumulative voting, which the company had not done); *Gillette Co.* (Mar. 10. 2003) (permitting exclusion under Rule 14a-8(i)(2) of a proposal seeking a board policy establishing procedures for implementing shareholder proposals that receive majority support, where the supplied legal opinion argued the proposal would force the board of directors to implement shareholder proposals without considering their merit and that to do so would remove from the board of directors the judgment required to satisfy its duties under Delaware law).

Here, implementation of the Proposal would cause the Company to violate Missouri law because the Proposal impermissibly seeks to limit the decision-making authority of the Company's Board of Directors (the "Board") in contravention of its fiduciary duties. The Company's existing Corporate Governance Principles include a Director Resignation Policy (the "Policy"), requiring an incumbent director to promptly tender a conditional resignation to the Board, subject to acceptance by the Board, if the director does not receive the required vote for election in an uncontested election. The Policy further provides that the Nominating and Governance Committee of the Board (the "Governance Committee") will make a recommendation to the Board as to whether to accept or reject the resignation. The Governance Committee, in making its recommendation, and the Board, in making its determination, are specifically permitted to take into consideration any factors or other information that they deem appropriate or relevant. The Proposal requests that the Board adopt a new Director Election Resignation Governance Policy to require each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Proposal, if implemented, would require the Board to accept such pre-tendered resignation "absent a finding of a compelling reason or reasons to reject the resignation." The Director Election Resignation Governance Policy contemplated by the Proposal would impose a "compelling reason or reasons" standard on the decision made by the Board without any exception for compliance with the Board's fiduciary duties. The Proposal further requires that if such "holdover" director is not reelected at the next annual meeting of shareholders, that director's resignation will be automatically effective 90 days after the certification of the election vote, with no ability of the Board to exercise their fiduciary duties to reject the resignation in the event that it is not in the best interests of the Company and its shareholders.

As discussed in detail in the Missouri Law Opinion, Section 351.310 of the Revised Statutes of Missouri ("RSMo") provides that "[t]he property and business of a corporation shall be controlled and managed by a board of directors." In making business decisions consistent with this authority, directors owe fiduciary duties of care and loyalty to the Company and all of its shareholders, which requires them to base their decisions on what they reasonably believe to be in the best interests of the Company and its shareholders. As a result, the directors are

required to exercise their management power in respect of the acceptance of director resignations consistent with their fiduciary duties of loyalty and care, which require the Board to act in the best interests of the Company and its shareholders. As further discussed in the Missouri Law Opinion, while Missouri courts have not directly addressed the issue, Delaware courts —which Missouri courts routinely rely on— have interpreted corresponding provisions of Section 141(a) of the Delaware General Corporation Law, which is substantively similar to Section 351.310 of the RSMo and held that a bylaw, policy or other agreement that purports to mandate a substantive decision on the part of the board of directors without regard to the application of the directors' fiduciary duties is invalid as a matter of law. The Proposal purports to do just that by imposing a "compelling reason or reasons" standard that mandates a substantive decision on the part of the Board without regard to the application of the directors' fiduciary duties. The Proposal further requires that if such "holdover" director is not reelected at the next annual meeting of shareholders, that director's resignation will be automatically effective 90 days after the certification of the election vote, with no ability of the Board to exercise its fiduciary duties to reject the resignation in the event that they determine that it is not in the best interests of the Company and its shareholders. Accordingly, the Missouri Law Opinion concludes that the Proposal violates Missouri law because it requires the Board to adopt a "compelling reason or reasons" standard that does not permit the Board to consider its fiduciary duties and eliminates the Board's decision-making authority entirely in the event that a director fails to receive majority support two years in a row. Furthermore, as noted in the Missouri Law Opinion, the Proposal also violates Missouri law because it seeks to establish a new procedure for shareholders to remove a director, one that would permit the removal of a director without cause and without the required vote at a special meeting of shareholders called expressly for such purpose, all of which is in violation of the removal requirements set forth in the Company's Articles of Incorporation and Missouri law. Accordingly. just as in *Verizon Communications*, *Lowe's Companies, Inc.*, *MetLife, Inc.*, *Oshkosh*, *Johnson & Johnson*, and the other precedents cited above, the Proposal may properly be excluded under Rule 14a-8(i)(2) because, as supported by the Missouri Law Opinion, implementing the Proposal would cause the Company to violate state law.

b. The Proposal May Be Excluded Under Rule 14a-8(i)(6) Because the Company Lacks the Power to Implement the Proposal

Rule 14a-8(i)(6) allows a company to exclude a proposal if the company would lack the power or authority to implement the proposal. As described above, the Proposal would, if implemented, cause the Company to violate Missouri law. The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(6) of proposals that would cause the company to violate the law of the jurisdiction of its incorporation. See *Arlington Asset Investment Corp.* (Apr. 23, 2021) (permitting exclusion of proposal that would violate Virginia law); *eBay Inc.* (Apr. 1, 2020) (permitting exclusion of proposal that would violate Delaware law); *Trans World Entertainment Corp.* (May 2, 2019) (permitting exclusion of proposal that would violate New York law); *IDACORP, Inc.* (Mar. 13, 2012) (permitting exclusion of proposal that would violate Idaho law); *NiSource Inc.* (Mar. 22, 2010) (permitting exclusion of proposal that would violate Delaware law); *Schering-Plough Corp.* (Mar. 27, 2008) (permitting exclusion of proposal that would violate New Jersey law); *AT&T, Inc.* (Feb. 19, 2008) (permitting exclusion of proposal that would violate Delaware law); *Noble Corp.* (Jan. 19, 2007) (permitting exclusion of proposal that would violate Cayman Islands law).

IV. Conclusion

Based on the foregoing analysis, we respectfully request the Staff concur that it will take no action if Company excludes the Proposal from its 2025 Proxy Materials in reliance on Rule 14a-8. We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. If the Staff is unable to agree with our conclusions without additional information or discussions, we respectfully

BCLP.
Bryan Cave Leighton Paisner

request the opportunity to confer with members of the Staff prior to issuance of any written response to this letter. Correspondence regarding this letter should be sent to me at brian.feezel@bclplaw.com. If I can be of any further assistance in this matter, please do not hesitate to contact me at (314) 259 2467.

Sincerely,

Brian K. Feezel

Attachments

cc: Kathryn A. Dugan, General Counsel and Corporate Secretary, Energizer Holdings, Inc.
David Minasian, North Atlantic States Regional Council

Exhibit A

The Proposal

NORTH ATLANTIC STATES REGIONAL COUNCIL OF CARPENTERS

United Brotherhood of Carpenters and Joiners of America

750 DORCHESTER AVENUE
BOSTON, MA 02125-1132

[redacted]

JOSEPH BYRNE
EXECUTIVE SECRETARY - TREASURER

SENT VIA SECOND DAY DELIVERY

August 9, 2024

Ms. Kathryn A. Dugan
General Counsel and Corporate Secretary
Energizer Holdings, Inc.
533 Maryville University Drive
St Louis, MO 63141

Dear Ms. Dugan:

I hereby submit the enclosed shareholder proposal ("Proposal") on behalf of the North Atlantic States Carpenters Pension Fund ("Fund"), for inclusion in the Energizer Holdings, Inc. ("Company") proxy statement to be circulated in conjunction with the next annual meeting of shareholders. The Proposal relates to the issue of director resignations and is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission proxy regulations.

The Fund is the beneficial owner of shares of the Company's common stock, with a market value of at least $25,000, which shares have been held continuously for more than a year prior to and including the date of the submission of the Proposal. Verification of this ownership by the record holder of the shares, State Street Bank and Trust Company, will be sent under separate cover. The Fund intends to hold the shares through the date of the Company's next annual meeting of shareholders. Either the undersigned or a designated representative will present the Fund's Proposal for consideration at the annual meeting of shareholders.

If you would like to discuss the Proposal, please contact David Minasian at [redacted] Mr. Minasian will be available to discuss the proposal on Monday, August 19, Monday, August 26, or Monday, September 9, from 1:00PM to 5:00PM (ET) each day or other mutually agreeable date and time. Please forward any correspondence related to the proposal to Mr. Minasian, North Atlantic States Regional Council, 29 Endicott Street, Worcester, MA 01610 or at the email address above.

Sincerely,

Joseph Byrne
Fund Trustee

cc. David Minasian
Edward J. Durkin

Enclosure

Director Election Resignation Governance Policy Proposal:

Resolved: The shareholders of Energizer Holdings, Inc. (the "Company") request that the Board adopt a new Director Election Resignation Governance Policy ("Resignation Policy") provision in its corporate governance principles to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Policy shall provide that each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Resignation Policy shall provide that the Board is expected to accept a tendered resignation absent a finding of a compelling reason or reasons to reject the resignation, as determined by the Board in the exercise of its business judgment. The Resignation Policy shall further stipulate that if a director's resignation is rejected and the director remains as a holdover director but is not re-elected at the next annual meeting of shareholders, that director's second tendered resignation shall be effective ninety days after the vote certification.

Supporting Statement: The Resignation Policy sets a new demanding director resignation governance guideline to reflect shareholder voting sentiment in director elections. Missouri corporate law states that a director shall hold office for the term for which he or she is elected or until his or her successor shall have been elected and qualified. An incumbent director who fails to receive the required vote for election may continue to serve as a holdover director. The Company's current director resignation policy requires incumbent directors to tender an irrevocable resignation conditioned on the failure to be re-elected in an uncontested annual election. Board members then review tendered a resignation and decide whether to accept or reject the resignation.

The proposed Resignation Policy sets a more demanding director resignation review process, requiring directors to articulate a compelling reason or reasons when they reject a tendered resignation and allow an unelected director to continue to serve. Importantly, the Resignation Policy further holds that if a holdover director again fails to be re-elected at the next annual meeting of shareholders, a new tendered resignation will be effective ninety days following the election vote certification. While the Resignation Policy provides the Board latitude to reject the initial resignation of an incumbent director who fails to receive majority vote support, it honors the shareholder vote as the final word on a holdover director's second election defeat.

Shareholder director election voting rights under Missouri corporate law are foundational rights in the governance of corporations. The majority vote director election standard adopted by the Company gives shareholders voting rights that have legal effect. It is important that corporate director resignation policies, guidelines and bylaws not undermine shareholder voting rights. The proposed Resignation Policy establishes shareholder voting in director elections as a more consequential governance right, striking a proper balance between board discretion and shareholder voting rights.

Exhibit B

The Missouri Law Opinion

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Bryan Cave Leighton Paisner

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September 23, 2024

Energizer Holdings, Inc.
533 Maryville University Drive
St Louis, MO 63141

Ladies and Gentlemen:

We have acted as special counsel to Energizer Holdings, Inc., a Missouri Corporation (the "***Company***"), in connection with a shareholder proposal (the "***Proposal***") on behalf of North Atlantic States Carpenters Pension Fund (the "***Proponent***"), dated August 9, 2024, for the 2025 annual meeting of shareholders of the Company (the "***Annual Meeting***"). In this connection, you have requested our opinion as to certain matters under the laws of the State of Missouri.

For the purpose of rendering our opinion as expressed herein, we have been furnished with and have reviewed the following documents: (i) the Third Amended and Restated Articles of Incorporation of the Company as filed with the Secretary of State of Missouri (the "Secretary of State") on January 29, 2018 (the "***Articles of Incorporation***"); (ii) the Fifth Amended and Restated Bylaws of the Company, effective as of November 6, 2023 (the "***Bylaws***"); (iii) the Corporate Governance Principles of the Company, effective as of November 6, 2023; and (iv) the Proposal, including its supporting statement.

In our examination of the foregoing documents, we have assumed the genuineness of all signatures, the legal competence and capacity of natural persons, the authenticity of documents submitted to us as originals and the conformity with authentic original documents of all documents submitted to us as copies or by facsimile or other means of electronic transmission, or which we obtained from the Securities and Exchange Commission's Electronic Data Gathering, Analysis and Retrieval system ("***Edgar***") or other sites maintained by a court or governmental authority or regulatory body and the authenticity of the originals of such latter documents. If any documents we examined in printed, word processed or similar form has been filed with the Securities and Exchange Commission on Edgar or such court or governmental authority or regulatory body, we have assumed that the document so filed is identical to the document we examined except for formatting changes. When relevant facts were not independently established, we have relied without independent investigation as to matters of fact upon statements of governmental officials and upon representations made in or pursuant to such documents and certificates and statements of appropriate representatives of the Company.

For purposes of this opinion letter, we have not reviewed any document other than the documents listed above for purpose of rendering this opinion. In particular, we have not reviewed any document that is referred to in or incorporated by reference into the foregoing documents. We have assumed that there exists no provision in any document that we have not reviewed that bears upon or is inconsistent with the opinion stated herein. We have conducted no independent factual investigation of our own but rather have relied solely upon the foregoing documents, the statements and information set forth therein and the additional matters recited or assumed herein, all of which we have assumed to be true, complete and accurate in all material respects.

BCLP
Bryan Cave Leighton Paisner

THE PROPOSAL

The Proposal states the following:

> Resolved: The shareholders of Energizer Holdings, Inc. (the "*Company*") request that the Board adopt a new Director Election Resignation Governance Policy ("Resignation Policy") provision in its corporate governance principles to address those situations when one or more incumbent Board nominees fail to receive the required majority vote for re-election. The Resignation Policy shall provide that each director upon joining the Board tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Resignation Policy shall provide that the Board is expected to accept a tendered resignation absent a finding of a compelling reason or reasons to reject the resignation, as determined by the Board in the exercise of its business judgment. The Resignation Policy shall further stipulate that if a director's resignation is rejected and the director remains as a holdover director but is not re-elected at the next annual meeting of shareholders, that director's second tendered resignation shall be effective ninety days after the vote certification.

We have been advised that the Company is considering excluding the Proposal from the Company's proxy statement for the Annual Meeting under, among other reasons, Rule 14a-8(i)(2) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." In this connection, you have requested our opinion as to whether, under Missouri law, the implementation of the Proposal, if adopted by the Company's shareholders, would violate Missouri law.

DISCUSSION

The Proposal would cause the Company to violate Missouri law because the Proposal impermissibly seeks to limit the decision-making authority of the Board without any exception for compliance with the Board's fiduciary duties.

The Proposal calls on the Company's Board of Directors (the "***Board***") to adopt a new Director Election Resignation Governance Policy ("***Resignation Policy***") that require each director to tender an irrevocable conditional resignation conditioned on the director's failure to receive the required majority vote support in an uncontested election. The Resignation Policy contemplated by the Proposal would require the Board to accept such a tendered resignation unless the Board finds a "compelling reason or reasons" to reject the resignation. The Proposal further requires a rule that if a director fails to receive majority support two years in a row, the director's tendered resignation would be automatically effective 90 days after the vote certification. Each director has agreed, and any future directors must agree, to comply with, among other things, all applicable corporate governance guidelines of the Company in order to be qualified to serve as a director under the Company's Bylaws. Accordingly, all directors would be bound by the terms of the proposed Resignation Policy, which, if implemented, would restrict the fiduciary duty of the Board to a narrow "compelling reasons" standard in the event a director fails to receive majority support and eliminates the Board's decision-making entirely in the event that a director fails to receive majority support two years in a row. We note that the preamble to the Company's Corporate Governance Principles provides that they are "are subject to modification and the Board shall be able, in the exercise of its discretion, to deviate from these Principles from time to time, as the Board may deem appropriate or as required by applicable laws and regulations." However, the Proposal does not purport to provide any such discretion, and the

supporting statement makes clear that it "sets a more demanding director resignation review process, requiring directors to articulate a compelling reason or reasons when they reject a tendered resignation and allow an unelected director to continue to serve." Further, it states that "if a holdover director again fails to be re-elected at the next annual meeting of shareholders, a new tendered resignation will be effective ninety days following the election vote certification." Accordingly, in our opinion, the Proposal seeks to limit the decision-making authority of the Board without any exception for compliance with the Board's fiduciary duties.

For the reasons set forth below, in our opinion, because the Proposal is designed to require that the Board accept resignations in circumstances where proper application of the Board's fiduciary duties would preclude it from doing so, the Proposal, if implemented, would cause the Company to violate Missouri law. First, the Proposal, if implemented, would require the Company's current and future directors to accept a director's resignation -- unless there was a compelling reason or reasons not to -- the first time a director fails to receive majority support. Further, it provides for the automatic termination of such director's services based solely on whether the director fails to receive majority support the following year. Accordingly, the Proposal would require the Board to accept a resignation, or would prohibit the Board from rejecting a resignation, even in circumstances where the Board believes, in the good faith exercise of its fiduciary duties under Missouri law, that the resignation is not in the best interests of the Company and its shareholders.

Under Section 351.310 of Revised Statutes of Missouri (the "***RSMo***") the directors of a Missouri corporation are vested with the power and authority to control and to manage the business and affairs of the corporation. Section 351.310 provides, in relevant part, that the "[t]he property and business of a corporation shall be controlled and managed by a board of directors." Missouri courts likewise recognize that the management of the business and affairs of a corporation is entrusted to its directors as the duly elected and authorized representatives of shareholders, and that, in making business decisions, directors owe fiduciary duties to the corporation and its shareholders. See *Boulicault v. Oriel Glass Co.*, 283 MO. 237, 223 S.W. 423 (Mo. 1920) (recognizing that "directors of a business corporation are vested with the control of its business" and "this power entails an obligation to exercise ordinary care"). See also *Heit v. Bixby*, 276 F. Supp. 217 (E.D. Mo. 1967) and *Saigh v. Busch*, 396 S.W. 2d 9 (Mo. App. 1965). The statutory and common law fiduciary duties imposed on corporate directors require them to base their decisions on what they reasonably believe to be in the best interests of the corporation and its shareholders. Notably, Missouri does not have any statutory law permitting directors to relinquish their obligation to fulfill this fiduciary duty. We are similarly unaware of any Missouri case law allowing directors to modify or eliminate their statutory fiduciary duties owed to the Company.

Although Missouri courts have not directly addressed the precise issue of whether governance restrictions that are designed to restrict the Board's managerial power in a manner that would cause the Board to violate their fiduciary duties violates Missouri law, Missouri courts routinely rely upon relevant decisions from other state courts to support their own reasoning and conclusions in situations where there is no relevant Missouri case law on point. See *Swope v. Siegel-Roberts, Inc.*, 74 F.Supp.2d 876, 916 (E.D. Mo. 1999); *Torchmark Corp v. Bixby*, 708 F. Supp. 1070, 1079-83 (W.D. Mo. 1988) (analyzing defendant Missouri insurance corporation's director fiduciary duties according to Delaware case law). Delaware courts have addressed this issue in interpreting corresponding provisions of Section 141(a) of the Delaware General Corporation Law, which is substantively similar to Section 351.310 of the RSMo. In the absence of direct binding authority on the issue, we are of the opinion that Missouri courts would find Delaware law persuasive on the issue of Section 351.310 powers because of the similar and expansive interpretation of directors' powers and authority in both Missouri and Delaware.

Delaware courts have expressly applied Section 141(a) and related case law to invalidate intra-governance restrictions that prevent future directors from freely choosing candidates for director. For example, in *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 235-338 (Del. 2008), the Delaware

Supreme Court held that a proposed stockholder-adopted bylaw that mandated that the board of directors reimburse a stockholder for its expenses in running a proxy contest to elect a minority of the members of the board of directors would violate Delaware law because it mandated reimbursement of proxy expenses even in circumstances where a proper application of fiduciary principles would preclude doing so. Similarly, in *Quickturn Design Sys. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998), the Delaware Supreme Court has held that a board of directors cannot adopt an intra-governance restriction that would prevent a future board from "completely discharging its fundamental management duties to the corporation." Nor can a governing document other than the certificate of incorporation "limit in a substantial way the freedom of ... directors' decisions on matters of management policy." See also *Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205 (1979) (invalidating a multi-year agreement among four directors of a corporation, pursuant to which each director named a desired nominee to succeed him as a director and all of the other directors agreed to vote in favor of the successor no matter how circumstances might change in the future); *Carmody v. Toll Bros., Inc.,* 723 A.2d 1180, 1191 (Del. Ch. 1998) (refusing to dismiss claims that the "deadhand" provision in the company's rights plan which would limit a future board's ability to redeem the rights plan was invalid under Delaware law); *Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 51 (Del. 1994) (invalidating a provision in a merger agreement that prevented the directors from communicating with competing bidders); *Abercrombie v. Davies,* 123 A.2d 893, 899 (Del. Ch. 1956) (invalidating a provision in an agreement that required the directors to act as directed by an arbitrator in certain circumstances where the board was deadlocked), *rev 'd on other grounds,* 130 A.2d 338 (Del. 1957).

When considering whether to accept or reject a director's resignation, the board of directors must act in a manner consistent with each director's fiduciary duties. See *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 291 (Del. 2010) (considering, in the context of a Section 220 books and records demand under Delaware law relating to the board of directors' rejection of director resignations, that "the question arises whether the directors, as fiduciaries, made a disinterested, informed business judgment that the best interests of the corporation require the continued service of these directors, or whether the Board had some different, ulterior motivation"). Missouri courts analyze board discretion in a similar manner. "The function of the board of directors is to exercise judgment and discretion." *Saigh v. Busch*, 396 S.W.2d 9, 12 (Mo. Ct. App. 1965) ("[N]o individual stockholder has the authority to take over the duties of corporate management."). Additionally, "[t]he management and control of the corporation being vested by statute in the board of directors, as we have pointed out, is not in the stockholders and the action of the board of directors in regard to the affairs of the corporation is controlling and exclusive and the stockholders cannot control the directors in the exercise of the judgment vested in them by statute". *Id* (noting the discretion and management or control of the board as a "fundamental principle of [Missouri] statutory corporation law for many years").

There are a number of factors that need to be considered and balanced by a board of directors when deciding whether to accept a director's resignation, including, without limitation, the underlying reasons for a director's failure to receive a majority vote for their election, the tenure and qualifications of the director, the director's past and expected future contributions to the board of directors, and the overall composition of the board of directors, including whether accepting the resignation would cause the Company to fail to meet the requirements of any law, rule or regulation applicable to the Company (including stock exchange rules governing board and committee composition), and what remedial measures are in the best interests of the Company and its shareholders. Analyzed under the standards set forth above, the Resignation Policy contemplated by the Proposal unduly and improperly restricts and removes certain substantive business decisions from the board's statutorily granted powers to manage the business and property of the Company.

The Proposal, if implemented, would impermissibly mandate current and future directors of the Company to make determinations based on a "compelling reason or reasons" standard without regard to the Board's authority to manage corporate affairs or the Board's requirement to discharge its duties in a manner it reasonably believes to be in the best interests in the Company and its shareholders. Unlike the Company's current director resignation policy, which allows the Board to exercise fiduciary duties and consider "*any*

factors or other information that they determine appropriate and relevant", or the Company's policy requiring mandatory retirement at the age of 75, which allows the Board to waive such requirement "*for other business reasons that are in the best interests of the Company*", the Resignation Policy contemplated by the Proposal does not leave any kind of discretion to the Board to properly exercise its business judgment in in the best interest of the Company and its shareholders. In addition, the Proposal, if implemented, would provide for automatic termination of a director's service based solely on whether the director fails to receive majority support a second year in a row. Accordingly, as written, the Proposal inhibits the Board's ability to make a substantive business decision on whether to accept a director's resignation in violation of Missouri law by presumptively and involuntarily obligating it to accept a tendered resignation, absent a compelling reason, and eliminates the Board's decision-making ability in the event a director fails to receive majority support a second year in a row.

The Proposal would cause the Company to violate Missouri law because it impermissibly seeks to allow the removal of a director without cause and without requiring a special meeting called expressly for that purpose as required by the Company's Articles of Incorporation.

Under Missouri law, a director holds office until his or successor is elected and qualified, or until his or her earlier death, resignation or removal. Section 351.315 of the RSMo addresses how a director may be removed by shareholders prior to the end of his or her term and provides a default procedure for such removal in the event that removal is not addressed in a Company's articles of incorporation or bylaws. The Company has adopted a procedure for director removal in its Articles of Incorporation that provides that a director may be removed from office at any time prior to the expiration of his or her term only for cause, at a special meeting of shareholders called expressly for that purpose by the affirmative vote of the holders of record of outstanding shares representing a majority of all of the then outstanding shares then entitled to vote generally in the election of Directors.

The Resignation Policy contemplated by the Proposal requires each director to submit an advance irrevocable conditional resignation upon joining the Board that would provide that, if the Board finds there are compelling reasons not to accept the resignation of a director who did not receive a majority support for their election (and continues as a holdover director) and such director fails to receive a majority support for their election at the next annual meeting of shareholders, such director's resignation is automatically effective 90 days after the certification of the election vote. In effect, the Proposal would remove a holdover director from office prior to the expiration of their term. This is evidenced by the supporting statement which provides this is intended to honor the "shareholder vote as the final word on a holdover director's second election defeat." A resignation is a voluntary act; adopting a policy requiring an advance irrevocable conditional resignation while prohibiting the Board from exercising any discretion in whether to accept such a resignation is simply director removal by another name. The Resignation Policy contemplated by the Proposal is designed to establish a new procedure for shareholders to remove a director.

Because the Resignation Policy contemplated by the Proposal purports to require the removal of directors without cause and without the required vote at a special meeting of shareholders called expressly for such purpose, all of which is in violation of the requirements set forth in the Company's Articles of Incorporation and Missouri law, the Proposal, if implemented, would cause the Company to violate Missouri law.

CONCLUSION

For the reasons set forth above, and in reliance thereon, and subject to the assumptions, exceptions, limitations, qualifications and comments stated herein, the Proposal, if implemented, would, in our opinion, violate Missouri law in two respects: (i) it requires the Board to accept a resignation in circumstances where doing so would violate its fiduciary duties and (ii) it effects the removal of a director without following the prescribed procedure under the Company's Articles of Incorporation and Missouri law.

Bryan Cave Leighton Paisner

Our opinion herein reflects only the application of applicable Missouri State law (excluding (A) all laws, rules and regulations of cities, counties and other political subdivisions of such State and (B) the securities, blue sky, environmental, employee benefit, pension, antitrust and tax laws of such State, as to which we express no opinion). The opinion set forth herein is made as of the date hereof and is subject to, and may be limited by, future changes in factual matters, and we undertake no duty to advise you of the same. The opinion expressed herein is based upon the law in effect (and published or otherwise generally available) on the date hereof, and we assume no obligation to revise or supplement this opinion should such law be changed by legislative action, judicial decision or otherwise. In rendering our opinion, we have not considered, and hereby disclaim any opinion as to, the application or impact of any laws, cases, decisions, rules or regulations of any other jurisdiction, court or administrative agency.

We do not render any opinion except as set forth above. This opinion letter is rendered only to you and is solely for your benefit in connection with the Proposal. We understand that the Company may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be relied upon by you for any other purpose, or relied upon by any other person, entity, firm or corporation for any purpose, and may not be used, circulated, quoted or otherwise referred to for any other purpose, without our prior written consent. The opinion contained herein are limited to the matters expressly stated herein, and no opinion may be inferred or may be implied beyond the matters expressly stated herein.

* * *

Very truly yours,

Bryan Cave Leighton Paisner