IN THE SUPREME COURT OF THE STATE OF DELAWARE

TALBOT, INC., TIMOTHY GUNNISON, FRANCOIS PAYARD, NAOMI ROTHMAN, ROSARIA GABRIELLI, MARSHALL CANNON, AJEET GUTPA, DANIEL LEMON, CLARE LEONARD, and PATRICK RHANEY,	:	No. 162, 2015
Defendants Below, Appellants,	:	
v.	:	
ALPHA FUND MANAGEMENT L.P.,	:	
Plaintiff Below, Appellee.	:	

ON APPEAL FROM
THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
Civil Action No. 10428-CJ

APPELLANTS' OPENING BRIEF

TEAM B
ATTORNEYS FOR DEFENDANT-APPELLANT

FILED: FEBRUARY 6, 2015

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NATURE OF PROCEEDINGS

Appellees, Plaintiffs below, sought injunctive relief against Appellants, Defendants below, in the Chancery Court on December 22, 2014 concurrent with its filing of suit for breach of fiduciary duty. On January 15, 2015, Chancellor Junge granted the interlocutory order preventing Appellants from taking any action to enforce the Bylaw in connection with any proxy contest at the May 2015 annual stockholders meeting.

Appellants filed a timely notice of appeal on January 22, 2015. This Court granted the expedited appeal on January 29, 2015. Appellants request that the Order of the Chancery Court be reversed. Specifically, Appellants urge this Court to find that its Bylaw is both a product of equitable conduct and valid on its face.

SUMMARY OF ARGUMENT

1. Defendants' adoption the Proxy Fee-Shifting Bylaw was responsive to Plaintiff's myopic Restructuring Proposal that accompanies its impending proxy contest. Defendants' conduct therefore warrants review under the deferential business judgment rule. Having acted not to impair the shareholder franchise, but rather to protect the financial best interests of the Talbot Company and its shareholders, Defendants are not in breach of their fiduciary duties. Alternatively, even if the Court determines that Defendants acted with the improper purpose of entrenching themselves in office, their conduct still satisfies the *Schnell* test since the Bylaw does not defeat Plaintiff's, or any other shareholder's, exercise of its rights.
2. The Court of Chancery declined to rule on the facial validity of the Board Adopted Proxy Fee-Shifting Bylaw when determining whether issuing a preliminary injunction was valid. The Court's refusal to rule was improper and thus the facial validity of the Proxy Fee-Shifting Bylaw should be reviewed de novo.

STATEMENT OF FACTS

Talbot, Inc. ("Talbot") is a publicly traded company incorporated in Delaware and headquartered in Maryland. (Op. 2). Led by Chief Executive Officer ("CEO"), Timothy Gunnison ("Gunnison"), the Talbot Board of Directors ("the Board") has nine total members. (Op. 3). Talbot's primary source of revenue is through its Fasteners Division, which manufactures fasteners for aerospace and other industrial markets, but it has two smaller divisions as well – the Components Division and the Software Division (Op. 2). Traded on the New York Stock Exchange, Talbot has 75 million shares of common stock, which currently sell at $30 per share. (Op. 2). It has a market capitalization of approximately $2.25 billion, net earnings of $120 million in its most recent fiscal year, and revenues of $1.1 billion. (Op. 2).

Alpha Fund Management L.P. ("Alpha") is a small investment fund headquartered in New York City and formed under Delaware law. (Op. 2). Primarily investing in public equity, Alpha has an equity portfolio of $1.1 billion mainly in consumer goods, manufacturing and service stocks. (Op. 2). Alpha's Chief Executive Office ("CEO"), Jeremy Womack ("Womack"), has led the company since its inception nine years ago. *Id.* Womack has become regularly active in the companies in which Alpha purchases stock, and has gained a reputation as a "determined activist investor" in the media. (Op. 2, 5). Womack has successfully caused other companies to adopt its restructuring proposals and has persuaded two recent boards to nominate Alpha's own nominees. (Op. 5).

Alpha began purchasing shares in Talbot in late 2013 and acquired about 4% of its total outstanding stock in roughly half a year. (Op. 3).

In July 2014, Womack approached Gunnison with a Restructuring Proposal which seeks to eliminate Talbot's Components and Software Divisions, focusing solely on the Fasteners Division. (Op. 3). Implementing the Proposal, Womack urged, would create immediate shareholder value and cut the operating expenses associated with managing Talbot's two divisions which have lower profit margins and offer no synergy. *Id.* Gunnison expressed initial doubt as to the merits of the Proposal because he believes that the divisions do offer synergy and because Talbot already has cost cutting measures in place. (Op. 4). Despite his skepticism, however, Gunnison did not formally reject the Proposal at this meeting. (Op. 4).

In December 2014, Alpha filed its Schedule 13D with the Securities and Exchange Commission ("SEC") and made several disclosures. First, that it had acquired 7% of Talbot's total outstanding shares, equaling a $157.5 million stake in the company; second, that the Restructuring Proposal had been rejected by Gunnison; third, that it planned to undertake a proxy contest and nominate four directors for election to the Talbot board at the May, 2015 annual stockholders meeting; fourth, that should the proxy contest succeed, the new board members would plan to implement Womack's Restructuring Proposal; and fifth, that Alpha would not try to acquire a controlling share of Talbot, or attempt to acquire the Company outright, and that it had only purchased stock for investment purposes. (Op. 4).

About a week after the filing, the Board held a special meeting devoted exclusively to address these disclosures. (Op. 5). The meeting featured all nine of Talbot's board members, its Vice President for

Finance and Operations, Mack Rosewood, its Vice President and General Counsel, Renee Stone, and one of its outside lawyers, Sandra Ellsworth. *Id*. After two hours, the Talbot Board came to the determination that its current business plan promised greater long term value for the company and its stockholders than the Restructuring Proposal. (Op. 5-6). Specifically, Gunnison later described the Proposal as an "ill-conceived short term plan at best" which would, at most, create short term gains. (Op. 8). Other Board members seemed more concerned with Womack personally, stating that it would be in Talbot's best interests to "raise the stakes" for him, and that imposing the Bylaw might force him to "think twice" about undertaking this costly venture. *Id*.

The Board then considered adoption of the Proxy Fee-Shifting Bylaw ("the Bylaw") at issue. (Op. 6-7). It heard presentation from both in-house and outside counsel that proxy contests can cost anywhere from $800,000 to $14 million depending on the size of the firm and that Alpha's impending contest might cost anywhere between $8 and $12 million. (Op. 8). As such, the Bylaw would impose reimbursement costs on any unsuccessful proxy challenger – meaning that fewer than half of the nominees are ultimately elected - and included an optional waiver, should Talbot choose to exercise it. (Op. 6-7). After more deliberation, the Board unanimously adopted the Bylaw with the optional waiver. (Op. 9).

Approximately one week after adoption of the Bylaw, Womack submitted his intent to nominate four board members, including himself, at the upcoming annual meeting. (Op. 9). The other three nominees are experienced in the areas of finance and economics. (Op. 9). On the same

day, Plaintiff filed its suit and moved for a preliminary injunction against Defendants. (Op. 10).

ARGUMENT

I. GRANT OF THE PRELIMINARY INJUNCTION SHOULD BE REVERSED AND THE BYLAW SHOULD BE ENFORCED BECAUSE IT WAS NOT ADOPTED INEQUITABLY, IT DOES NOT DEFEAT SHAREHOLDER RIGHTS AND IT WAS ADOPTED WITH A COMPELLING JUSTIFICATION

A. Question Presented

Whether the Proxy Fee-Shifting Bylaw, which after careful deliberation was adopted responsive to Plaintiff's disclosure of its intent to implement a myopic business plan through pursuit of a proxy contest, was adopted inequitably and is therefore unenforceable.

Whether adoption of the Bylaw satisfies the "inequitable purpose" test of *Schnell* and the "compelling justification" standard of *Blasius*, even if the Court determines that it was adopted inequitably.

B. Scope of Review

A preliminary injunction may only be granted when the moving party has established a reasonable probability of success on the merits, an imminent threat of irreparable harm, and a balance of the equities that tips in favor of issuance of the relief requested. *SI Management LP v. Wininger,* 707 A.2d 37, 40 (Del. 1998). Defendants have conceded the first two prongs. (Op. 10). With respect to the Chancery Court's factual findings, this Court must trust that they are sufficiently supported in the record and are the "product of an orderly and logical deductive process." *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1341 (Del. 1987). With respect to its legal conclusions, this Court reviews

grant of a preliminary injunction *de novo*. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Determinations of the facial validity of a bylaw present question of law, which is typically reviewed de novo. *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

C. Merits of Argument

1. The Bylaw was Adopted Primarily to Avoid Implementation of the Restructuring Proposal and Thus Warrants Review Under the Business Judgment Rule.

a. The Restructuring Proposal was Myopic.

Womack approached Gunnison with a Restructuring Proposal which the Chancery Court failed to recognize was inferior to Talbot's current business plan and offered no long term gains. The Proposal recommended eliminating two of Talbot's three divisions, suggesting that they offered no synergy, increased operating costs and reduced immediate shareholder value. (Op. 3). Despite his investment experience, Womack was patently unaware of Talbot's current cost-cutting plans and the synergy that the three divisions did in fact share. (Op. 4). After all, at the time Womack presented the Restructuring Proposal to Gunnison, he'd only been a Talbot stockholder for half a year and could not have possibly understood every in and out of the Talbot business model (Op. 3). Alternatively, even if Womack was aware of his plan's long-term shortcomings, it is likely that the ultimate goal of the proxy contest is to enhance immediate shareholder value for his own personal benefit. After all, it is presumed that stockholders vote in furtherance of their own economic interests. See, *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1380-1381

(Del. 1995). It can therefore be assumed that Womack had his own financial well-being at heart.

The Chancery Court failed to understand that Defendants fear the proxy contest not because it challenges their incumbency, but rather because of the potentiality for corporate financial distress that will arise from implementation of the Restructuring Proposal. First, Plaintiff explicitly disclosed in its Schedule 13D filing that in undertaking the proxy contest it does not seek to acquire control of Talbot, but instead seeks to advance implementation of Womack's proposed business plan. (Op. 4). In *Stahl v. Apple Bancorp, Inc.*, this very distinction played a crucial role in the Chancery Court's finding that the Defendant Board's action was primarily motivated by the Plaintiff's inadequate tender offer which accompanied its proxy contest. 579 A.2d 1115, 1122 (Del. Ch. 1990) ("the Bancorp board…changed that plan in response to the risk that the combination of the proposed Stahl proxy contest and tender offer would result in a change in board control and the sale of the company."). Aware of Womack's reputation in the media as a "determined activist investor" who has successfully implemented restructuring in other companies, the Board held the December 18th special meeting primarily to address a Restructuring Proposal that would likely take effect if the proxy contest succeeds. (Op. 5, 8).

Second, the Chancery Court misinterpreted the testimonial excerpts of the Defendant Board Members. While the Court read their statements to unfairly target Womack personally, it failed to understand the financially-concerned underpinnings of those statements. (Op 8). Both Defendant Gunnison, the company CEO, and Defendant Leonard expressed

their concerns with the proxy contest in that it would bring about a "flawed short-term business model" at best. *Id.* Additionally, the statements made by Defendants Gabrielli and Cannon must be taken in context. Since Womack has no intention of acquiring control of the Talbot Company, it is more likely that they want to "raise the stakes" for him because of the adverse financial effects of the Restructuring Proposal. *Id.* This Court should therefore take comfort in concluding that Defendants feared the proxy contest because it threatened the financial stability of the company, and not their stability as an incumbent board.

b. Board Action Motivated by a Proper Purpose Does Not Require Enhanced Scrutiny.

Since Defendants acted primarily for the purpose of defeating Womack's Restructuring Proposal, its conduct warrants review under the deferential business judgment rule. The business judgment rule developed out of the common law in order to vest corporate management decision-making in a board of directors. See, *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003). While the rule certainly does not grant absolute discretion, only two exceptions have developed in the context of board action which affects shareholder voting, neither of which apply to the case at hand. One exception is that posed by the Chancery Court in *Blasius*, which held that enhanced scrutiny – in the form of a "compelling justification" – is required *after* the Court has concluded that the Board has acted for the primary purpose of impeding the shareholder vote. *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988); see also, *MM Companies,* 813 A.2d at 1128. Since Defendants adopted the Bylaw not to defeat the vote, but rather to

deflect the Restructuring Proposal from reaching the Board, the *Blasius* exception does not apply.

Another exception, established by this Court in *Unocal Corp. v. Mesa Petroleum Co.*, applies only in the context of a corporate takeover – i.e., a tender offer or proposed merger – and imposes an enhanced duty to examine corporate conduct before the protections of the business judgment rule may come into play. 493 A.2d 946, 954 (Del. 1985); see also, *Stahl*, 579 A.2d at 1121.[1] Since neither exception applies here, the Court should feel comfortable applying the business judgment standard of review in evaluating Defendant's adoption of the Bylaw.[2]

c. Under the Business Judgment Rule, Defendants Satisfied their Fiduciary Duties of Loyalty and Care by Making an Informed Decision to Further the Best Interests of the Company and its Shareholders.

Even under a business judgment standard of review, corporate boards owe a fiduciary duty to make business decisions that further the interests of the corporation and its shareholders. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993), *modified on other grounds*, 636 A.2d 956 (Del. 1994); see also, Del. Code Ann. tit. 8, § 102(b)(7) (prohibiting a certificate of incorporation from eliminating personal liability for a director's breach of fiduciary duty). Inherent within

[1] A third exception may be considered by this Court, though it is not bound to do so. In *Stahl*, the Chancery Court adopted this Court's rationale in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) to prohibit use of the business judgment rule when the board has acted to "threaten the legitimacy of the electoral [stet] process." Since Alpha is free to continue with its proxy contest if it so chooses (and in fact has so chosen), heightened scrutiny does not apply under this exception as well. (Op. 9)

[2] This Court should also consider the longstanding notion that absent a showing of prejudice, the courts should not interfere merely because it would be beneficial to shareholders in pursuit of a proxy contest. *American Hardware Corp. v. Savage Arms Corp.*, 136 A.2d 690, 693 (Del. 1957).

that duty is a responsibility not to make decisions inequitably. See, *Stahl*, 579 A.2d at 1121; see also, *Frantz Mfg. Co. v. EAC Industries*, 501 A.2d 401 (Del. 1985) (board decisions are made inequitably absent a showing that the financially well-being of the company was considered). Lastly, the Court must consider all of the circumstances surrounding adoption of the Bylaw in determining whether there was a breach of fiduciary duty. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 921 A.3d 554, 558 (Del. 2014).

By prioritizing the financial best interests of the Talbot Company and its shareholders over their own, Defendants satisfied their duty of loyalty. See, *Stahl*, 579 A.2d at 1121; *Kidsco Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch. 1995), *aff'd and remanded*, 670 A.2d 1338 (Del. 1995) (changing the date of an annual shareholder meeting in order to give the board more time to explore superior alternatives was not inequitable); *American International Rent a Car, Inc. v. Cross*, 1984 WL 8204 (Del. Ch.). In *Stahl*, a majority shareholder group made a tender offer to the Bancorp Board seeking to purchase the remaining share of the company stock. 579 A.2d at 1117. In considering the offer, the Bancorp Board held a two day special meeting and heard presentation from its financial advisors who came to the determination that it "was inadequate and unfair to the stockholders from a financial point of view." *Id.* at 1119. Thereafter, the Bancorp Board formally rejected Stahl's offer and delayed the annual meeting through a bylaw amendment in order pursue alternatives that might enhance shareholder value. *Id.* at 1120. Stahl brought suit in the Chancery Court claiming that delay of the annual meeting was an inequitable maneuver by the Bancorp Board whose primary purpose was to

entrench itself in office. *Id*. While recognizing that changing the date of the annual meeting might negatively impact the stockholder vote, the Chancery Court could not conclude that this was the board's ultimate goal because it was more concerned with the sale of the company. *Id*. at 1122. As such, the Chancery Court could not rule that the Bancorp Bylaw was inequitable. *Id*.

The case at hand is analogous. Convinced that Womack's Restructuring Proposal could bring financial distress to the company in the long term, Defendants sought advice from their financial team and, considering all of the circumstances, concluded that allowing the proxy contest to continue unfettered was not in the company's best interests. (Op. 4). The fact that Defendants acted only after Plaintiff disclosed its intention to wage a proxy contest is only significant because Plaintiff seeks to advance the Restructuring Proposal through its nominations to the Talbot Board. (Op. 4). Just as the Bancorp Board had to act in order to pursue better alternatives, Defendants had to act in order to avoid the implementation of a corporate restructuring that might bring financial distress to a flourishing company. (Op. 4).

Further, Defendants' conduct should not be judged by the ultimate effect of the Bylaw. Board members will be held liable for breach of fiduciary duty only if their motivations are to perpetuate themselves in office, not because their decisions are ultimately poor or result in the forfeiture of a shareholder right. *Cheff v. Mathes*, 199 A.2d 548, 554 (Del. 1964) (ultimately poor decision does not render board action inequitable); see also, *Stahl*, 579 A.2d at 1123 (forfeiture of the vote does not render board action inequitable). Defendants recognize that

Alpha may choose to rethink its proxy contest, and that some financial repercussions might ensue from adoption of the Bylaw (Op. 6). However, because Defendants acted with the primary purpose of deflecting the Restructuring Proposal, it has satisfied its fiduciary duty of loyalty.

Defendants have also satisfied their duty of care by ensuring that their decision was well-informed. In order to invoke the protections of the business judgment rule, board directors have a duty to inform themselves of all material information reasonably available to them. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).[3] In order to make the best possible decision under the circumstances, Defendants held a meeting which lasted over two hours for the sole purpose of evaluating the merits of the Restructuring Proposal (Op. 5). Defendants convened all nine board members and requested additional business and legal advice. *Id.* Defendants heard the pros and cons of both business plans. *Id.* It was only after hearing all of the necessary information that Defendants were able to conclude that their current business plan promises greater long term value, and possibly greater short term value, for both the company and its shareholders than does the plan outlined in the Restructuring Proposal. (Op. 5-6). Defendants are therefore in satisfaction of their fiduciary obligation to make a well-informed decision which seeks to further the best interests of their company and its shareholders.

[3] *Aronson* was overruled because the Court mistakenly applied an abuse of discretion standard of review instead of *de novo*. However, the principle cited above is still persuasive.

2. Even if this Court Finds that the Board Acted for the Primary Purpose of Impairing the Shareholder Vote, its Conduct was still Permissible.

a. *Schnell*'s "Inequitable Purpose" Test Should Only Apply When Board Action Has Actually Defeated a Shareholder's Rights.

Despite the Chancery Court's reliance on *Schnell*'s apparent similarities to the case at bar, the case is materially distinguishable because of the extent to which it infringes shareholder rights. This Court has reserved application of the "inequitable purpose" test to board-action which actually deprives shareholders of their rights. *Alabama By-Products Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991).

In *Schnell*, this Court established the rule that a board-adopted bylaw is unenforceable if it was adopted with an inequitable purpose. *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437, 439 (Del. 1971). There, the board had utilized "the corporate machinery and the Delaware law for the purpose of perpetuating itself in office; and, to that [stet] end, for the purpose of obstructing the legitimate efforts of dissident stockholders." *Id.* By advancing the date of the annual meeting by one month, the Court explained, the dissident shareholder group had "little chance, because of the exigencies of time" to wage its proxy contest *at all*, because it could not have possibly submitted its paperwork in time with the SEC. *Id.* Here, however, the Bylaw only slowed Alpha's momentum, encouraging the company to think twice about undertaking a potentially $12 million incumbency challenge. (Op. 8). It can be inferred from the Chancery Court's opinion that Plaintiff's opposition to the Bylaw is primarily motivated out of a fear of undertaking this expense, not because it is no longer capable of waging its proxy challenge. With an equity portfolio of $1.1 Billion, Plaintiff can certainly withstand this

loss, though it would understandably prefer not to. (Op. 2). Talbot's imposition is therefore markedly different from the expedited deadline set by Christ-Craft Industries in *Schnell*. The Bylaw should not be held unenforceable since it does not deprive its shareholders from enjoying their rights.

Since *Schnell*, the Delaware courts have found inequitable purpose when board action sought to defeat shareholders rights entirely. See e.g., *Hubbard v. Hollywood Park Realty Enterprises, Inc.*, 1991 WL 3151 (Del. Ch.) (Company with advance notice bylaw changed annual meeting date disabling dissident shareholder group to submit its slate of nominees); *Aprahamian v. HBO & Co.*, 531 A.2d 1204 (Del. Ch. 1987) (Board's continued delay of annual meeting would cause dissident nominations to expire under recording date requirements of 8 Del. C. §213); *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906 (Del. Ch. 1980). In *Lerman*, for example, the Chancery Court invalidated two board-adopted bylaws under the "inequitable purpose" standard. *Id*. at 912. The bylaws, undisputedly adopted in response to a shareholder proxy contest, first, empowered the board to set the date of the annual meeting as it saw fit, and second, imposed a 70-day requirement for any non-board selected nominees to submit their intent to run. *Id*. The impact of these bylaws, the Court concluded, had a "terminal effect" on Lerman's right to undertake a proxy contest because it required him, or any other proxy challengers, "to remain in a constant state of readiness so as to have their materials and nominees available to go whenever management decides to drop the flag." *Id.* at 913-914. Because of this "terminal effect," the bylaws were held unenforceable. *Id*.

The Bylaw in the case at hand, however, had no terminal effect on Alpha's right to undertake its proxy contest and should therefore be enforced. A bylaw is not adopted inequitably just because it hinders a shareholder's exercise of his or her rights. See e.g., *Alabama*, 588 A.2d at 258 n.1; *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229 (Del. Ch. 2014) (forum selection bylaw determines where, not whether shareholders may bring suit); *Accipiter Life Sciences Fund, L.P. v. Helfer*, 905 A.2d 115 (Del. Ch. 2006) (Board announced annual meeting in press release which Plaintiff didn't fully read). The date of the annual meeting in the case at hand isn't changing and Plaintiff is fully capable of planning its proxy contest to the full extent possible. (Op. 9). In fact, Plaintiff submitted its nominations for election *after* Defendants adopted the Bylaw. *Id.* If anything, the fee-shifting risk imposed by the Bylaw should give Alpha an added incentive to bring on the strongest proxy contest possible. Therefore, nothing in Defendant's Bylaw has actually defeated Alpha's right to undertake its proxy contest.

b. The Board had a compelling justification.

Even under *Blasius*'s heightened "compelling justification" standard, the Talbot Bylaw should still be enforced. *Blasius*, 564 A.2d at 661. First, this Court has cautioned that application of the *Blasius* standard is only appropriate when the primary purpose of the board is to impair the shareholder franchise *and* the stockholders are not given a full opportunity to vote. *Williams v. Geier*, 672 A.2d 1368, 1376 (Del. 1996). Therefore, even if this Court accepts the Chancery Court's finding that Defendants acted inequitably, it must recognize that the stockholders, including Plaintiff, still have every opportunity to vote

in the upcoming election. Second, the protection of stockholders' financial best interests is an accepted compelling justification for board action in the face of a proxy contest. *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 788 (Del. Ch. 2007). For these reasons, Defendant's Bylaw should be enforced.

II. THE COURT OF CHANCERY IMPROPERLY ISSUED INJUNCTIVE RELIEF TO THE PLAINTIFF BY FAILING TO RULE ON THE FACIAL VALIDITY OF THE APPELLANT'S BOARD ADOPTED PROXY FEE SHIFTING BYLAW.

A. Question Presented

Whether on appeal the Court should rule that the Board-Adopted Proxy Fee Shifting Bylaw is facially valid.

B. Scope of Review

A preliminary injunction may only be granted when the moving party has established a reasonable probability of success on the merits, an imminent threat of irreparable harm, and a balance of the equities that tips in favor of issuance of the relief requested. *SI Management LP v. Wininger,* 707 A.2d 37, 40 (Del. 1998). Defendants have conceded the first two prongs. (Op. 10). With respect to the Chancery Court's factual findings, this Court must trust that they are sufficiently supported in the record and are the "product of an orderly and logical deductive process." *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1341 (Del. 1987). With respect to its legal conclusions, this Court reviews grant of a preliminary injunction *de novo*. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 394 (Del. 1996). Determinations of the facial validity of a bylaw present question of law, which is typically reviewed

de novo. *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

C. Merits of the Argument

1. Following past court rulings on the facial validity of fee-shifting bylaws, there is sufficient evidence for the court to determine the Talbot Bylaw is also valid.

The Board of a Delaware corporation may lawfully implement a bylaw "which the claimant is obligated to pay for all fees, costs and expenses." *ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557 (Del. 2014).* The bylaw may also be legally implemented if the claimant does not receive a favorable result from the suit. *Id.*

Talbot's Fee-Shifting Bylaw is analogous with the Fee-Shifting bylaw issued in ATP v. Deutscher. Their similarities are present in their core functions. For example, they were both implemented to regulate the procedure for unsuccessful suits by requiring the plaintiff who initiated the suit be responsible for litigation related fees. The court in ATP v. Deutscher determined that the fee-shifting bylaw was in fact facially valid. Although these two bylaws differ in certain respects, their primary function is the same. Therefore, this courts ruling should mirror that of ATP v. Deutscher.

2. The court should find the Bylaw facially valid on appeal because it satisfies the Delaware General Corporation Law (DGCL) three part test. A facially valid bylaw has three requirements; the bylaw must be 1) authorized by the (DGCL); 2) consistent with the corporation's certificate of incorporation; and 3) not otherwise prohibited. *ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557-558* (Del. 2014). This court should review each of these requirements in its ruling.

After careful consideration, there is sufficient evidence for the court to determine the facial validity of Talbot's Bylaw as a matter of law. The same analysis of the Delaware law discussed in ATP v Deutscher validates the Talbot bylaw.

a. The Bylaw Must be Authorized by the DGCL

The DGCL requires that bylaws "relate to the business of the corporation, the conduct of its affairs and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." Del. Code Ann. tit. 8, § 109(b)(West 2010). "A bylaw that allocates risk among parties in intra-corporate litigation would also appear to satisfy the DGCL's requirement that bylaws must 'relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.'" *ATP v. Deutscher, 91 A.3d at 558.* There are no prohibitions for directors issuing fee-shifting bylaws under common law and DGCL. *Id.*

The adopted Bylaw requires a "dissident shareholder group who launches an ultimately unsuccessful proxy contest to reimburse the corporation for reasonable professional fees and expenses incurred by the corporation in resisting the dissident group's unsuccessful campaign."(Op. 1). The Bylaw on its' face fulfills the first facial

validity requirement authorized by the DGCL. The Bylaw is directly addressing and related to the business of the corporation and the rights of its stockholders. It was adopted to regulate the professional fees connected to a proxy contest; to "allocate risk among parties in intra-corporate litigation." *ATP v. Deutscher, 91 A.3d at 558.* The Bylaw was adopted as a defense mechanism for the business in order to protect the company against high costs of meritless suits related to proxy contest. Furthermore, the evidence of silence relating to fee-shifting bylaw prohibition can be interpreted as authorization through silence. *Id.*

b. The Bylaw must be consistent with the corporation's articles of incorporation.

"The business and affairs . . . shall be managed by or under the direction of a board of directors." Del. Code Ann. tit. 8, § 141(a) (West 2010). The corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence. *ATP v. Deutscher, 91 A.3d at 558.* Under Delaware law the Board has the power to issue the Bylaw. There is no evidence that presents any inconsistency between the articles of incorporation and the adopted bylaws. Based on the information provide the article of incorporation is silent on the implementation of fee shifting bylaws.

c. The Bylaw must not otherwise be prohibited

The third requirement is that the Bylaw "not otherwise be prohibited." Del. Code Ann. tit. 8, § 109(b)(West 2010). Fee-Shifting bylaws are not forbidden under DGCL or any other statute. ATP v. Deutscher, 91 A.3d at 558. "Under the American Rule and Delaware law,

litigants are normally responsible for paying their own litigation costs." *Mahani v. Edix Media Grp., Inc., 935 A.2d 242, 245 (Del.2007).* "An exception to [the American R]ule is found in contract litigation that involves a fee shifting provision." *Sternberg v. Nanticoke Mem'l Hosp., Inc., 62 A.3d 1212, 1218 (Del.2013).* Similarly, "Corporate charters and by-laws are contracts among the shareholders of a corporation." *Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del.1990).*

The Bylaw satisfies the DGCL prohibition requirement. First, this is a fee-shifting bylaw, and these bylaws are not prohibited under Delaware law or statute. *ATP v. Deutscher, 91 A.3d at 558*. Secondly, the Bylaw, under Delaware common law, mirrors the American rule. Although litigation costs are typically managed by the litigants, the American rule permits the parties to contract fee shifting options. *Mahani, 935 A.2d at 245; Sternberg, 62 A.3d at 1218.* Bylaw's are considered to be contracts among shareholders and corporations. Because bylaw's are interpreted as contracts, they are permitted to implement fee-shifting options under American and Delaware rules.

CONCLUSION

For the foregoing reasons, this Court should find the Proxy Fee Shifting Bylaw valid and enforceable under Delaware Law. The Defendant respectfully, requests this Court reverse the issuance of the preliminary injunction by the Court of Chancery.