IN THE SUPREME COURT OF THE STATE OF DELAWARE

TALBOT, INC., TIMOTHY GUNNINSON, 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.	:	Court Below: Court of Chancery of the State of Delaware
	:	C.A. No. 10428-CJ

Appellee's Brief

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February 6, 2015

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NATURE OF PROCEEDINGS

Appellee, Plaintiff below, brought suit seeking injunctive relief against Appellants, Defendants below, in the Court of Chancery on claims of Talbot, Inc.'s directors' adoption of a facially invalid proxy fee-shifting bylaw and breach of fiduciary duties on December 22, 2014. Chancellor Junge ordered a preliminary injunction against the adoption of the fee-shifting bylaw by the Talbot, Inc. directors on January 15, 2015.

Appellants filed notice of appeal on January 22, 2015, and this Court accepted expedited appeal on January 29, 2015.

Appellee requests that this Court affirm the Order of the Chancery Court. Specifically, Appellee asks this Court to hold that the fee-shifting bylaw was facially invalid and adopted for an inequitable purpose.

SUMMARY OF ARGUMENT

1. Delaware General Corporation Law and Delaware common law confer authority to a board of directors to adopt bylaws containing provisions not inconsistent with either said statutory or common law. Talbot, Inc.'s board of directors adopted a proxy fee-shifting bylaw that attempts to subvert the legislative intent of the General Assembly of providing stock corporation shareholders with a role in corporate governance. Additionally, the bylaw violates the established Delaware common law principle of prohibiting board manipulation of a prospective directorial election. Thus, this Court should affirm the injunction below.

2. Even an otherwise legally permissible bylaw will be found invalid if adopted for an inequitable purpose. Talbot, Inc.'s proxy fee-shifting bylaw was not motivated by a good faith concern for the welfare of the corporation and its stockholders, but rather a desire to thwart Alpha Fund Management L.P.'s attempt to exercise its right of corporate democracy by engaging in a proxy contest. No compelling justification exists for the adoption of the bylaw, thereby rendering it unreasonable. As such, even if the bylaw survives the test for facial validity, the circumstances under which it was adopted remain inequitable. For these reasons, this Court should affirm the Court of Chancery's Order of injunctive relief.

STATEMENT OF FACTS

Appellant Talbot, Inc. ("Talbot") is a publicly traded Delaware corporation headquartered in Chestertown, Maryland. Op. at 2. Talbot's Board of Directors (the "Board") consists of nine members, one of whom is the Chairman and Chief Executive Officer, Timothy Gunnison ("Gunnison"). Op. at 3. Each member stands for election annually and will do so at the annual stockholders meeting in May 2015. Op. at 3. Appellee Alpha Fund Management L.P. ("Appellee") is an investment manager formed as a limited partnership under the laws of Delaware and headquartered in New York City. Op. at 2. Jeremy Womack ("Womack") is the founder and Chief Executive Officer of Appellee and is consistently an activist stockholder in the companies in which Appellee has invested. Op. at 3.

In late 2013, Appellee began acquiring shares of stock in Talbot under the direction of Womack. Op. at 3. Subsequent to acquiring 4% of outstanding shares in June 2014, Womack, with Gunnison, suggested a detailed restructuring proposal ("Restructuring Proposal"), which he asserted would significantly improve value for Talbot stockholders. Op. at 3. Gunnison criticized the Restructuring Proposal, stating that Womack failed to account for substantial cost reducing measures already undertaken by Talbot. Op. at 4. Between July and December, Appellee continued to acquire shares in Talbot, and on December 10, 2014, Appellee filed Schedule 13D with the Securities and Exchange Commission ("SEC"), in which Appellee disclosed its ownership of 7% of Talbot's outstanding shares and the intention to advance the

Restructuring Proposal by nominating four directors for election to the Board at the annual stockholders meeting in May 2015. Op. at 4.

In response, Gunnison held a special meeting of the Board on December 18, 2014 to discuss the recent Schedule 13D filing. Op. at 5. In addition to the Board, also present was Talbot's Vice President for Finance and Operations ("Rosewood"), general counsel ("Stone"), and a partner with Talbot's regular outside law firm ("Ellsworth"). Op. at 5. Following a presentation regarding the terms of the Restructuring Proposal and a review of the cost reducing plans for Talbot's three divisions, the Board's members concluded that Talbot's current business plan promised greater long term value for Talbot and its stockholders than the Restructuring Proposal. Op. at 5,6. The attorneys present at the meeting explained the terms and mechanics of a proxy contest fee-shifting bylaw ("Proxy Fee-Shifting Bylaw"), which would require a dissident shareholder group who launched an unsuccessful proxy contest to reimburse the corporation for reasonable professional expenses incurred by the corporation in resisting the unsuccessful campaign. Op. at 1, 6. According to the Proxy Fee-Shifting Bylaw, an unsuccessful contest is defined as one in which less than half of the dissident group's nominees win election to the board at the annual meeting of stockholders. Op. at 1. Therefore, if Appellee were to bring a proxy contest and just one or none of the Appellee's four nominees won election to the Board in May 2015, Appellee would be obligated to reimburse Appellant for its costs. Op. at 7. Also presented was evidence demonstrating that proxy contests impose on corporations expenses ranging from $800,000 to $3 million in

fees for small firms, and $4 million to $14 million for larger firms. Op. at 6. Rosewood estimated that Talbot's costs could approximate $8 million. Op. at 8. Conversely, Appellee's proxy solicitor estimated that the anticipated cost of a proxy contest would be in excess of $12 million. Op. at 8.

Testimony by the Board reveals that during the meeting, Gunnison urged the adoption of the Proxy Fee-Shifting Bylaw, disparaging the Restructuring Proposal as an "ill-conceived short-term plan" that would lead Talbot toward a flawed short-term business model. Op. at 8. The Proxy Fee-Shifting Bylaw also solicited expressions of strong support among the other board members, who believed the Bylaw would deter Appellee from bringing a proxy contest, making them "think twice." Op. at 8. One member stated that if the Bylaw prevents Appellee from bringing a contest, then he was "for it." The Board then unanimously approved a resolution adopting the Proxy Fee-Shifting Bylaw and decided not to waive the fee-shifting obligation for Appellee's proxy contest. Op. at 9.

On December 22, 2014, Appellee sent a letter notifying Talbot of its intention to place the names of its nominees for election to the Board at the May 2015 stockholder's meeting, and, later that day, filed suit in the Court of Chancery. Op. at 9. During litigation, but prior to the Court's ruling, the Board met on January 9, 2014 to consider Appellee's four nominees. Op. n.10 at 10. The Board refused to support the nominees and unanimously decided to nominate the nine incumbent directors of Talbot for reelection at the annual stockholder's meeting in May 2015. Op. n.10 at 10.

ARGUMENT

I. THE COURT OF CHANCERY'S IMPOSITION OF INJUNCTIVE RELIEF WAS PROPER BECAUSE THE PROXY FEE-SHIFTING BYLAW IS FACIALLY INVALID UNDER DELAWARE LAW.

A. Question Presented

Whether a bylaw shifting the fees incurred by an incumbent board of directors in a contested directorial election via proxy contest to the losing challengers is facially invalid under Delaware law.

B. Scope of Review

Courts have the ability to grant a preliminary injunction when a plaintiff can prove: (1) a reasonable probability of success on the merits of the underlying claim; (2) that there is an imminent threat of irreparable harm; and (3) that a balancing of the equities of the case tips in its favor. SI Management L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998); In re Micromet, Inc. Shareholders Litig., 2012 Del. Ch. LEXIS 1, *13-14 (Del. Ch. Feb. 29, 2012). Defendants do not contest the second or third elements. Op. at 10-11. The grant of a preliminary injunction shall be reviewed for abuse of discretion. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987). This Court reviews the Court of Chancery's legal conclusions *de novo*. In re Unitrin, Inc., 651 A.2d 1361, 1385 (Del. 1995).

C. Merits of Argument

Section 109(a) of the Delaware General Corporation Law ("DGCL") permits stockholders and – as here, when a company's certificate of incorporation expressly confers such power on the board – the directors, to adopt, amend, or repeal bylaws. 8 Del. C. § 109(a). Section 109(b) of the DGCL further provides that, "the bylaws may

contain any provision, not inconsistent with law or with the certificate of incorporation, relating 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." 8 Del. C. § 109(b).

Based on the preceding statutory and common law rules, an interpretation of their relevant langue is necessary in framing the analysis of the Proxy Fee-Shifting Bylaw adopted by the Board. Delaware cases interpreting the meaning of, "not inconsistent with law" as used in Section 109(b) make it clear that the law referred to is both the common law as well as statutory law. See e.g., State ex rel Brumley v. Jessup & Moore Paper Co., 24 Del. 379 (Del. 1910) (invalidating a bylaw purporting to restrict what was then the stockholders' common law right to inspection of books and records); Datapoint Corp. v. Plaza Securities Co., 496 A.2d 1031, 1032 (Del. 1985) (invalidating a bylaw which the Delaware Supreme Court found was unduly restrictive of the stockholders' statutory right under Section 228 to conduct a consent solicitation for the removal of directors); Lawson v. Household Finance Corp., 147 A. 312 (Del. Ch. 1929) (holding that a bylaw purporting to restrict a stockholder's right to transfer his stock was unreasonable and hence invalid).

This Court, in ATP Tour, Inc. v. Deutscher Tennis Bund, established a test for the validity of bylaw. 91 A.3d 554, 557-58 (Del. 2014). ATP held that, to be facially valid, a bylaw must (1) be authorized by the DGCL, (2) be consistent with the corporation's certificate of incorporation, and (3) not be otherwise prohibited. Id.

As such, the Proxy Fee-Shifting Bylaw adopted by Talbot must neither violate any provision of the DGCL nor run afoul of any established Delaware common law rights conferred on stockholders in order to survive the test for facial validity.

1. Talbot's Proposed Proxy Fee-shifting Bylaw Violates Delaware General Corporation Law By Effectively Preventing Appellee From Exercising Its Right of Corporate Democracy to Undertake a Proxy Contest.

   a. The Delaware Legislature Grants Stockholders The Ability to Check A Corporation's Board of Directors' Power Via The Directorial Election and Proxy Process.

The DGCL provides stockholders with a right of corporate democracy in that they may vote for the candidate of their choosing in an annual election of the board of directors. 8 Del. C. § 211(b). Section 211(b) of the DGCL mandates that, "unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws." Id. The DGCL also provides stockholders with voting rights and the ability to authorize another to vote for them by proxy in the election of directors. Id. Section 212(b) of the DGCL permits "each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting" to "authorize another person or persons to act for such stockholder by proxy..." Id.

Although a board of directors does possess a broad mandate, the DGCL ensures that it is not absolute. Jonathan Shub, *Shareholder Rights Plans -- Do they Render Shareholders Defenseless Against Their Own Management?*, 12 Del. J. Corp. L. 991, 1014 (1987). In enacting

these two statutes, the Delaware Legislature confers upon shareholders a role in corporate governance and the ultimate destiny of the corporation, a reflection of legislative intent to permit shareholders to participate in decisions which affect their ownership rights. Id. at 1014-15. As owners of the corporation in name only, shareholders lack the ability to manage the corporation's business or affairs, making their financial stake in the corporation vulnerable. Id. While shareholders' primary concern is their economic interest, ownership rights are no less important as they allow shareholders to protect and advance that [economic] interest. Id. at 1015. Naturally, shareholders may liquidate their ownership of the corporation's stock when they no longer believe their economic interest stands a viable chance of improving, but Delaware statutory law provides shareholders with voting rights as an additional mechanism of advancing their interests. The impingement of this right only serves to reduce what little protection shareholders possess over their investment.

b. The Proposed Proxy Fee-Shifting Bylaw Serves to Deter Potential Contestants to The Incumbent Board of Directors at Talbot.

The Proxy Fee-Shifting Bylaw creates a chilling effect for Talbot shareholders. Concerned shareholders lose one of their few checks on directorial power with the Proxy Fee-Shifting Bylaw's adoption. The reasonableness of the fees incurred by the incumbent directors is irrelevant. As Ellsworth reported in her presentation to the Board, proxy contests impose expenses ranging from $800,000 to $3 million in fees for small firms and $4 million to $14 million for larger firms. Op. at 6. Rosewood estimated to the Board and subsequently testified

in deposition, that such costs may approximate $8 million, including legal and proxy consulting fees, printing, and other costs. Op. at 8. Appellee's proxy solicitor, estimates this anticipated cost as likely in excess of $12 million. Op. at 8. Clearly the expenses, however reasonable or unreasonable with respect to the nature of the contest, will amount to at least $8 million.

The ominous threat of these added costs, as the price of exercising the right of corporate democracy to engage in a proxy contest against management and the incumbent board, facially violate the General Assembly's intention of providing shareholders with one of their few avenues of protecting their investment. Appellee will abandon, as it has represented to this Court and stated publicly in its press releases and SEC filings, the upcoming proxy contest if judicial relief invalidating the enforcement of the Proxy Fee-Shifting Bylaw is not obtained. Op. 12. If a bylaw with this specific provision is deemed valid, robust proxy contests for the composition of a board of directors will be struck down in favor of uncontested elections of incumbents.

2. The Proxy Fee-Shifting Bylaw Violates Delaware Common Law by Seeking to Manipulate The Directorial Voting Process.

a. The Delaware Courts Maintain A Policy of Protecting Stockholders from Director Manipulation of Proxy Contests.

Just as the DGCL indicates that the proxy contest exists as a vitally important check in the balance of power between directors and stockholders, the Delaware courts have vigilantly protected that check on directorial power. Management control over the voting machinery in

public corporations arises from the board's control of the corporate purse strings. Generally in directorial elections, the corporate treasury pays the expenses of incumbents, win or lose, and insurgents can hope for reimbursement only by winning. See e.g., CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 239-40 (Del. 2008) (holding that directors must be allowed to exercise their fiduciary duties in evaluating an insurgent's right to reimbursement in a contested directorial election). Inherent in this discretionary role is a conflict of interest.

Incumbent directors possess broad voting-related powers and may seek to preserve their incumbency via a manipulation of the voting process or by erecting barriers to the voting process. Delaware courts have a history of scrutinizing board manipulation of the voting process, especially during a pending contest. See e.g., Schnell v. Chris Craft Industries, Inc., 285 A.2d 437, 438-40 (Del. 1971) (holding that the advancement of the annual meeting date in a way that burdened insurgents in a pending proxy contest was invalid); Aprahamiam v. HBO & Co., 531 A.2d 1204, 1208-09 (Del. 1987) (invalidating the postponement of the annual meeting date where opposing proxies already gathered by an insurgent would expire by the time of the rescheduled meeting); Allen v. Prime Computer, Inc., 540 A.2d 417, 422-23 (Del. 1988) (holding that bylaws that imposed waiting periods, advance-notice requirements, inspection, and record-date procedures for shareholder action by written consent when the unnecessarily delayed shareholder action were invalid).

Therefore, Board actions that undermine shareholder voting rights during a voting contest, even when those actions do not manipulate or interfere specifically with the actual process of voting, remain invalid as affronts to the Delaware common law right of access to the statutorily created proxy mechanism.

b. The Validation of The Bylaw at Issue in ATP Does Not Extend to Stock Corporations Engaged in Proxy Contests.

In ATP, two tennis federations, both members of the ATP Tour, an international tennis association, brought antitrust and violation of fiduciary duty claims against ATP. 91 A.3d 554, 556 (Del. 2014). After the federations lost on the merits of those claims, ATP brought suit in the United States District Court for the District of Delaware to recover its expenses under a fee-shifting bylaw unilaterally adopted by the ATP board after the federations had joined ATP, but before the events giving rise to the lawsuit. Deutscher Tennis Bund v. ATP Tour, Inc., 2013 U.S. Dist. LEXIS 120041 (D. Del. 2013). The District Court certified four questions to this Court, each related to the enforceability of the fee-shifting bylaw. ATP at 557. The first certified question asked specifically whether the board of a Delaware non-stock corporation may lawfully adopt a bylaw that shifts all litigation expenses to a plaintiff in intra-corporate litigation who does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought. Id. at 557. Justice Berger indicated that although the Court could not directly address the bylaw at issue, the Court held that intra-corporation litigation fee-shifting provisions in a non-stock corporation's bylaws can be valid and enforceable under Delaware law. Id. at 555. The key details

of both the first certified question and the holding are that they specifically relate to intra-corporate litigation and non-stock corporations. These details are relevantly distinguishable a proxy contest being waged over the election of a stock corporation's directors.

ATP Tour, Inc. (ATP) is a Delaware membership, non-profit corporation whose members include professional men's tennis players and entities that own and operate professional men's tennis tournaments. Id. at 555. Talbot is a publicly traded Delaware corporation whose share's are traded on the New York Stock Exchange and it presently has outstanding approximately 75 million shares of common stock. Op. at 2. The differences are striking. Non-stock corporations such as ATP hold no shareholders, but rather are member-owned and as such do not suffer the same implications as stock corporations when faced with a fee-shifting bylaw of this nature.

Another distinction between ATP and the instant case is that ATP was decided under the circumstance of intra-corporate litigation, not a directorial election. Justice Berger commented that, "Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys' fees and costs. But it is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees." ATP, at 558. Justice Berger's considerations are operating exclusively within the realm of intra-corporate litigation, a significantly different process than a proxy contest. The instant case involves one party's exercise

of their corporate right to participate in the governance and direction of their investment.

The factual circumstances giving rise to the lawsuit in ATP are too far removed from those of the instant case to give ATP's holding deference with respect to the facial validity of a fee-shifting bylaw. See ATP at 229-231. The rules of equity may naturally be judged on similar grounds as the factual circumstances are of the most important consideration in such determinations. The facial validity of a bylaw adopted within those circumstances, however, must reflect the specific legal considerations applicable such bylaws. The legal considerations applicable to non-profit, membership corporations engaged in intra-corporate litigation do not resemble the legal considerations applicable to for-profit stock corporations engaged in a proxy contest for the election of a board of directors.

II. THIS COURT SHOULD AFFIRM THE COURT OF CHANCERY'S ORDER OF PRELIMINARY INJUNCTION BECAUSE APPELLANTS ADOPTED THE PROXY FEE-SHIFTING BYLAW FOR AN INEQUITABLE PURPOSE AND WERE NOT MOTIVATED BY A GOOD FAITH CONCERN FOR THE WELFARE OF THE CORPORATION AND ITS STOCKHOLDERS.

A. Question Presented

Whether the directors of Talbot, Inc. violated their fiduciary duties to shareholders and the corporation when they adopted the Proxy Fee-Shifting Bylaw for an inequitable purpose, namely, to obstruct the legitimate efforts of Plaintiff to undertake a proxy contest.

B. Scope of Review

The Delaware Supreme Court reviews the grant or denial of a preliminary injunction order by the Court of Chancery at the abuse of discretion standard. Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392,

394 (Del. 1996). To establish the propriety of a preliminary injunction, plaintiff must: (1) show a reasonable likelihood of success on the merits;(2)that, if the preliminary injunction is not granted, plaintiff will suffer imminent irreparable harm; and (3) the damage plaintiff will incur will exceed that of defendant. Revlon Inc. v. MacAndrews & Forbes Hldgs., Inc., 506 A.2d 173, 179 (Del. 1986)(citing Gimbel v. Signal Cos., 316 A.2d 599, 602 (Del. Ch. 1974), aff'd, 316 A.2d 619 (Del. 1974). Defendant has ceded the second and third elements of these prongs. Op. at 11.

C. Merits of Argument

1. Talbot's Action of Adopting The Proxy Fee-Shifting Bylaw Was An Unreasonable Response to Appellee's Proxy Contest And Unsupported by A Compelling Justification.

The Proxy Fee-Shifting Bylaw should be found unenforceable because, although legal, the adoption was an unreasonable response to Appellee's impending proxy contest and Talbot has failed to provide a compelling justification for the action. See MM Cos. V. Liquid Audio, Inc., 813 A.2d 1118, 1130(Del. 2003).

According to DGCL, Section 141(a), the board of directors of a corporation retains the power to manage the business and affairs of their company. 8 Del. C. §141(a). However, a board of directors' power to act is tempered by the inherent duty and obligation to protect the corporate enterprise, including stockholders, from ascertainable harm. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985). Under the business judgment rule, there is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in honest belief that the action

taken was in the best interests of the company. Unocal, at 954 (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)). Thus, courts will remain deferential to the decisions of a corporation's board of directors unless it appears that the board has acted in bad faith and for a dishonest purpose. Unocal, at 955. Any defensive measure must be proportionate and reasonable in relation to the threat imposed. Unocal, at 954.

In Blasius Industries, Inc. v. Atlas Corp., the Court of Chancery discussed under what circumstances a board of directors may claim protection under the business judgment rule. 564 A.2d 651, 661 (Del.Ch. 1988). There, the Chancellor declined to grant the protection of the business judgment rule and scrutinized defendant company and its Board of Directors' action according to a heightened standard of review where, despite the Board's subjective view that their decision to add two new members to the board was in the best interests of the corporation, the action constituted an offense to the relationship between the corporate directors and shareholder. Id.

In Blasius, plaintiff stockholder filed a Schedule 13D with the SEC, disclosing that it owned 9.1% of defendant's stock and planned to encourage management of defendant to consider a restructuring of the company. Id. The Board of Directors then met with plaintiff to discuss the Schedule 13D filing. Id. at 653. The Board considered the restructuring to be infeasible due to the financial status of defendant. Id. After an emergency meeting, the Board decided to add two new members. Id. The effect of adding these members was to preclude holders of a majority of defendant's shares from placing new

directors on the Board. Id. at 654. The case addressed two issues: (1) Whether, under the business judgment rule, the reasonable exercise of good faith and due care validates the exercise of legal authority even if the act inters with the effectiveness of stockholder vote; and (2) Whether a per se invalidity rule should apply where the business judgment rule is inapplicable. Id. at 652,660.

As to the first issue, the court held that, although electing the new members was prudent in nature, the facts of the case demonstrated that the elections were for the chief purpose of impeding majority shareholders from effectively adopting the plan proposed by plaintiff. Id. at 656. Ordinarily, the business judgment rule applies where action involves an exercise of the corporation's power over its property, or with respect to its rights and obligations. Id. at 660. In contrast, the Board's action was related to the governance of the corporation; thus, the court refused to apply the business judgment rule. Id. at 659.

Discussing the second issue, the court decided against a per se rule of invalidity, but rather imposed on defendant the heavy burden of demonstrating a "compelling justification" for its action. Id. at 661. Though plaintiff's restructuring proposal was not sound, there were alternative methods defendant could have employed without restricting shareholder vote. Id. at 662. Therefore, defendant failed to demonstrate a sufficient justification for their action. Id. at 662. The court concluded that, although the action was taken in good faith, it was still a violation of the duty of loyalty the Board owed to shareholders. Id. at 663.

In cases where defensive actions by a corporation's board of directors touches upon issues of control and appears to purposefully disenfranchise shareholders, Delaware courts apply the compelling justification standard of Blasius within the reasonableness standard of Unocal. See MM Cos, 813 A.2d at 1130(Del. 2003)(citing Stroud v. Grace, 606 A.2d 75, 92 (Del. 1992)). Where a defensive measure interferes with efforts of the stockholder's power to exercise their voting rights, the action is held inequitable. Id. at 1132; see also Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 260 (Del. Ch. 2013)(granting plaintiffs' petition for preliminary injunction where defendant board of directors decided they were more fit to run the company than plaintiff and failed to present any evidence that plaintiff's proposed slate was unqualified to competently serve or that plaintiff's plans would be harmful to the company); but see Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1122-1123 (Del. Ch. 1990)(declining plaintiff shareholder's petition for preliminary injunction, finding that defendant board of director's decision to delay the annual shareholder's meeting, which had not been set, was not inequitable because the decision was a reasonable response to the combination of plaintiff's proposed proxy contest and tender offer, which could potentially result in a change in board control and sale of the company).

Talbot's adoption of the Proxy Fee-Shifting Bylaw was an unreasonable defensive measure taken against Appellee without a compelling justification. See Unocal, at 954; Blasius, at 663. Though Talbot was advised that the current business plan would yield greater

long-term gain for the Company, there was no evidence that the candidates Appellee nominated for election were unfit to serve on the Board or that the very existence of the Company was at stake. See Kallick, 68 A.3d at 260; but see Stahl, 579 A.2d at 1124; Op. at 9.

Under Blasius, Talbot should have expended corporate funds to inform shareholders of the Restructuring Proposal in order to bring them to Talbot's point of view rather than immediately adopting a bylaw that discourages proxy contests. Blasius, at 663. So, even if Talbot's adoption of the Proxy Fee-Shifting Bylaw was made in good faith to protect the Company and the effect of discouraging Appellee from bringing proxy contests was unintended, the action nevertheless constituted a breach of loyalty to shareholders. Id.

Talbot's contention that the Proxy Fee-Shifting Bylaw is equitable due to the Board's ability to waive the fee-shifting obligation for the benefit of Appellee as well as any other insurgent group does not make it reasonable. Op. at 15. The waiver option does not lessen the deterrent effect of the Bylaw on shareholders because the risk of the obligation to reimburse the Company for the substantial costs it will accumulate in the event of a proxy contest outweighs the mere possibility of waiver, especially if the shareholder has limited financial resources. Also, Talbot clearly exhibited hostility towards Appellee, rendering the chances of a waiver of the fee-shifting provision nonexistent in this situation. Op. at 15.

Talbot's defensive measure was unreasonable under the circumstances and void of a compelling justification; therefore, this

Court should uphold the Preliminary Injunction issued by the Court of Chancery.

2. The Proxy Fee-Shifting Bylaw is unenforceable because it was adopted for the inequitable purpose of thwarting Appellee's proxy contest.

Though Talbot contends that the Proxy Fee-Shifting Bylaw was adopted with the purpose to deter litigation, the facts surrounding the adoption clearly exhibit Talbot's primary purpose of preventing Appellee's proxy contest.

Returning to the holding in ATP, where the Delaware Supreme Court addressed the issue as to whether a fee-shifting bylaw is unenforceable if board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other corporate actions then under consideration, this Court found that, even where proven legally valid, a fee-shifting bylaw would be unenforceable if adopted for an inequitable purpose. 91 A.3d at 556. While expressing that the intent to deter litigation is not invariably an improper purpose, the court stated that an examination of the manner in which the bylaw was adopted and the circumstances under which it was invoked is imperative to determining enforceability. Id. at 558.

Forming the basis of the ATP Court's opinion was Schnell v. Chris-Craft Industries. 285 A.2d 437, 439(Del. 1971). In Schnell, the Delaware Supreme Court found that defendant Board of Directors' amendment of a bylaw was undertaken in order to subvert the threat of an upcoming proxy contest by an insurgent group. Id. In that case, defendant amended a bylaw in order to move up the date of the annual meeting of shareholders due to their knowledge that plaintiff

insurgent group desired to wage a proxy contest in an effort to replace incumbent management. Id. at 438. The Court of Chancery found that defendant had taken the disputed action so to reduce the time plaintiff would have had to prepare for the proxy contest. Id. at 439. Nonetheless, the Chancellor refused plaintiff's application to preliminarily enjoin defendant's action because defendant had technically complied with the law. Plaintiff thereafter appealed the decision in the Delaware Supreme Court. Id.

At issue was whether defendant's action, which was legally sound, was nevertheless impermissible due to its inequitable purpose. Id. The court reversed the Chancellor's denial of plaintiff's application for preliminary injunction, holding that inequitable action by management in amending corporate bylaws did not become permissible because it was legally possible. Id. The Court stated that defendant had attempted to "utilize corporate machinery and the Delaware Law for the purpose of perpetuating itself in office and obstructing legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest." Id. The Court explained that when the bylaws of a corporation designate the date of the annual meeting of stockholders, it is expected that those who intend to bring a proxy contest will prepare for the contest with that date in mind. Id. Declaring the purpose of the amendment to the bylaw to be inequitable and contrary to the principles of corporate democracy, the court granted injunctive relief to plaintiff. Id. at 440.

Delaware's Court of Chancery has consistently applied Schnell's "inequitable purpose" test and granted preliminary injunctions where a

corporation's board of directors' actions deterred the shareholder voting process, regardless of whether the action taken was legal or with the specific intent to limit shareholder vote. See Aprahamian v. HBO & Co., 531 A.2d 1204, 1205-1209 (Del. Ch. 1987)(finding that defendant board of directors had violated their fiduciary duties and granting plaintiff shareholder's petition for preliminary injunction where no significant interests of the shareholders would be served by the board's postponement of the annual shareholder's meeting, the board's action was taken primarily to perpetuate themselves in office, and that postponement of the meeting would place hardship to the stockholders and corporation); see also Lerman v. Diagnostic Data, Inc., 421 A.2d 906, 914 (Del. Ch. 1980)(granting plaintiff shareholder's petition for preliminary injunction, holding that amendments to bylaws were inequitable because the amendments had the effect of deterring efforts of those who intended to contest the reelection of incumbent management even where defendant's Board had no knowledge of plaintiff shareholder's upcoming proxy contest and therefore did not intend to limit shareholder voting rights).

Though the ATP Court stated that the intent to deter litigation is not necessarily inequitable, the circumstances under which the Proxy Fee-Shifting Bylaw was adopted demonstrate that Talbot's true purpose was to thwart Appellee's proxy contest. 91 A.3d at 558. Therefore, the Proxy Fee-Shifting Bylaw is unenforceable. Id.

Analogous to Blasius, Appellee's Restructuring Proposal received extensive criticism from Talbot. See Blasius, 564 A.2d at 653-654; Op. at 3. Talbot's disdain for the Restructuring Proposal was exhibited in

the emergency meeting held immediately after Appellee's Schedule 13D filing, in which Talbot was put on notice of Appellee's intention to advance the Restructuring Proposal by seeking representation on the Board. Id. at 653; Op. at 4. Talbot contends that the purpose of adopting the Bylaw was to recoup significant costs that Talbot would incur through unsuccessful proxy contests. Op. at 14-15. However, evidence shows that this justification for the action is only a pretext to Talbot's underlying motive to thwart Appellee's proxy contest and perpetuate themselves in office. See Aprahamian 531.A.2d at 1208; Schnell, 285 A.2d at 439; Op. n.10 at 10.

Gunnison's hostile feelings toward Appellee concerning the Restructuring Proposal existed prior to the emergency meeting. See Blasius, at 656; Op. at 4. It was only during the meeting that Talbot was provided with information suggesting that Talbot's current business plan may be more financially beneficial than the Restructuring Proposal. Id.; Op. at 5-6. This information, coupled with Appellee's reputation as a determined activist investor that successfully caused other companies to undergo restructuring, incited fear in the Baord. Op. at 5,8. Testimony by the Board demonstrates their intentions to obstruct Appellee's efforts. Op. at 8. However, apprehension that an unfavorable restructuring plan may be implemented if the Board was overthrown by a specific shareholder group does not authorize Talbot to enact a bylaw that discourages proxy contests. See Blasius, at 659.

Because the circumstances surrounding the adoption of the Proxy Fee-Shifting Bylaw demonstrate that Talbot's purpose was to impede

Appellee from gaining representation on the Board, this Court should enjoin Talbot from enacting the Proxy Fee-Shifting Bylaw.

CONCLUSION

The Court of Chancery properly issued a preliminary injunction to enjoin Talbot from enacting the Proxy Fee-Shifting Bylaw because as it is facially invalid. Moreover, the Bylaw was adopted for the inequitable purpose of deterring the Appellee from bringing a proxy contest, an improper restraint of the right of corporate democracy.