IN THE SUPREME COURT OF THE STATE OF DELAWARE

TALBOT, INC., TIMOTHY GUNNISON, FRANCOIS PAYARD, NAOMI ROTHMAN, ROSARIA GABRIELLI, MARSHALL CANNON, AJEET GUPTA, DANIEL LEMON, CLARE LEONARD AND PATRICK RHANEY,	)	
Defendants Below, Appellants	)	No. 162, 2015
v.	)	Court Below: Court of Chancery of the State of Delaware
ALPHA FUND MANAGEMENT, L.P.,	)	
Plaintiff Below, Appellee	)	C.A. No. 10428-CJ

APPELLEE'S ANSWERING BRIEF

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Date Submitted: February 6, 2015

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NATURE OF THE PROCEEDINGS

Appellee, Plaintiff below, brought suit seeking injunctive relief against Appellants, Defendants below, in the Court of Chancery on January 12, 2015 questioning the validity of a Proxy Contest Fee-Shifting Bylaw. At the preliminary injunction hearing held on January 14, 2015, Chancellor Junge enjoined Talbot, Inc., and the Board of Directors from taking any action to enforce the Proxy Contest Fee-Shifting Bylaw in connection with any proxy contest for the election of directors to the Board at the May 2015 annual stockholders meeting. The interlocutory order was signed on January 15, 2015. Chancellor Junge did not rule on Appellee's claim that the Proxy Fee-Shifting Bylaw is facially invalid.

Appellants filed a 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 Talbot, Inc.'s Proxy Contest Fee-Shifting Bylaw is facially invalid and was adopted for an inequitable purpose.

SUMMARY OF THE ARGUMENT

1. Talbot's Bylaw is facially invalid because it contravenes the DGCL, which requires any provisions that shift the corporation's debts to its shareholders to be placed in the certificate of incorporation. Talbot has shifted the debt via a bylaw, thus it is improper. Additionally, though Alpha is contractually bound by Talbot's bylaws because it assented to them when it bought stock, it is only bound to the extent the bylaws are not in derogation of public policy. Because the Bylaw dispossesses the shareholders of their franchise rights, it contravenes the public policies of this state, and is therefore facially invalid. Finally, the Delaware General Assembly is trying to limit a corporation's ability to adopt fee-shifting bylaws, thus any ruling of facial validity will likely be overruled legislatively.

2. The Proxy Contest Fee-Shifting Bylaw, even if facially valid, is equitably unenforceable because it was adopted by Talbot's Board of Directors for the inequitable purpose of thwarting corporate democracy. Although Delaware law provides directors with flexible authority, there is a public policy interest in defending the legitimate expectations of stockholders when directors exploit statutory flexibility for inequitable ends. Accordingly, inequitable action does not become permissible simply because it is legally possible. Thus, the Bylaw, despite having a waiver provision, should not be given any effect by this Court since it was adopted for the purpose of thwarting the shareholder franchise by preventing shareholders' legitimate opportunity to wage a proxy contest.

COUNTERSTATEMENT OF THE FACTS

This appeal and the underlying action arise because Defendant Talbot, Inc.'s ("Talbot") Board of Directors (the "Board") unanimously adopted a Proxy Contest Fee-Shifting Bylaw (the "Bylaw"). Mem. Op. at 1. The Bylaw imposes upon any unsuccessful proxy contestant the financial obligation to reimburse Talbot for all reasonable expenses it might incur resisting an anticipated proxy contest. Mem. Op. at 6. The Bylaw defines a proxy contest as "not successful" if less than half of the dissident group's nominees win election to the Board. Id.

Defendant Talbot is a publicly traded Delaware corporation with roughly 75 million outstanding shares of common stock and a market capitalization of approximately $2.25 billion, with the protection of a poison pill rights plan in place with a 15% flip-in trigger. Mem. Op. at 4. Talbot engages primarily in the manufacture of highly engineered fasteners for industrial markets. Mem. Op. at 2. It also has small Components and Software Divisions. Id. The Board is composed of one inside director: Chairman and Chief Executive Officer Timothy Gunnison, and eight outside directors: Francois Payard, Naomi Rothman, Rosaria Gabrielli, Marshall Cannon, Ajeet Gupta, Daniel Lemon, Clare Leonard and Patrick Rhaney. Mem. Op. at 3. Talbot does not have a classified Board, thus all directors stand for election annually. Id.

Plaintiff Alpha Fund Management L.P. ("Alpha") is a small but exclusive investment manager founded by Jeremy Womack. Mem. Op. at 2. At present, Alpha holds about 5.25 million shares, or 7% of the total Talbot outstanding shares. Mem. Op. at 4. In July 2014, Womack reached out to Gunnison, suggesting a restructuring proposal (the "Proposal")

in which Womack argued Talbot could create immediate shareholder value by shedding its Components and Software Divisions, thereby cutting overall expenses to focus on the Fasteners Division. Mem. Op. at 3. Gunnison expressed immediate skepticism to the Proposal. Id.

On December 10, 2014, Alpha filed a Schedule 13D ("13D") with the Securities and Exchange Commission, disclosing that it held 7% of Talbot's shares and that it would advance the Proposal by nominating four directors for election to the Board at the May 2015 stockholders meeting. Mem. Op. at 4. In response, Gunnison called a special meeting of the Board on December 18, devoted exclusively to Alpha's filing. Mem. Op. at 5. All Board members were present and agreed that their current business plan provided greater value for the company. Id. The Board heard presentations from legal counsel about the terms of the Bylaw and later unanimously approved it because they believed the Bylaw would be beneficial in stopping Alpha's proxy contest. Mem. Op. at 9.

The Bylaw also contains a waiver provision allowing the Board to waive the fee-shifting obligation. Id. However, the Board resolved not to waive the obligation for Alpha. Id. There is also some dispute as to the amount of reasonable expenses Talbot might incur in resisting Alpha's proxy campaign. Talbot estimates $8 million, while Alpha estimates the cost is likely in excess of $12 million. Mem. Op. at 8.

On December 22, Alpha sent a certified letter to Talbot formally giving notice of its intent to place the names of four persons as its stockholder nominees for election to the Board at the May 2015 meeting. That same day, Alpha filed suit in The Court of Chancery.

ARGUMENT

I. THE CHANCERY COURT WAS CORRECT IN GRANTING ALHPA'S PRELIMINARY INJUNCTION BECAUSE TALBOT, INC.'S FEE-SHIFTING BYLAW IS FACIALLY INVALID UNDER DELAWARE LAW

A. Question Presented

Whether a corporate bylaw is facially invalid when it requires a dissident shareholder group who launches an ultimately unsuccessful proxy contest to reimburse the corporation for reasonable expenses incurred by the corporation in resisting the dissident group's unsuccessful challenge.

B. Scope of Review

A preliminary injunction shall issue when (1) the movant establishes there is a reasonable probability of success on the merits, (2) there is an imminent threat of irreparable harm, and (3) a balancing of equities tips the case in its favor. SI Management L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998). Appellants concede that if Appellee can demonstrate a probability of success on the merits, a preliminary injunction is appropriate. Mem. Op. at 10-11. The grant of a preliminary injunction is reviewed for abuse of discretion, without deference to the legal conclusions of the lower court. Kaiser v. Matheson, 681 A.2d 392, 394 (Del. 1996) (citations omitted). However, the Court of Chancery's legal conclusions are subject to de novo review. Lawson v. Meconi, 897 A.2d 740, 743 (Del. 2006). Thus, the Court of Chancery's order granting the preliminary injunction is subject to de novo review. Id.

C. Merits of Argument

Corporate bylaws are presumed valid. Frantz Mfg. Co. v. EAC Indus., 502 A.2d 401, 407 (Del. 1985). However, in order to be facially valid a bylaw must meet three general requirements: (1) it must be authorized by the Delaware General Corporation Law ("DGCL"); (2) it must not contravene the corporation's certificate of incorporation; and (3) it must not be otherwise prohibited. ATP Tour, Inc. v. Deutscher Tennis Bund, 921 A. 3d 554, 557-558 (Del. 2014). Because Talbot's fee-shifting bylaw does not satisfy these three requirements, it is facially invalid.

> 1. Talbot's Proxy Contest Fee-Shifting Bylaw contravenes the DGCL because it imposes the debts of the corporation on the shareholders, which can only be done in the company's certificate of incorporation, and because it has an improper chilling effect on the shareholder franchise.

Expenses incurred in defending proxy contests are a debt of the corporation. The Bylaw at issue effectively shifts the corporation's debts to one of its shareholders — Alpha. If the Bylaw is triggered, Alpha will be required to pay that debt, instead of the corporation itself. The DGCL provides that a company's certificate of incorporation may contain a

> Provision imposing personal liability for the debts of the corporation on its stockholders to a specified extent and upon specified conditions; otherwise, the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts

8 Del. C. § 102(b)(6). In short, a corporation's debts cannot be shifted to the shareholders unless such shifting is provided for in the certificate of incorporation. It cannot be done, as Talbot did, through the adoption of a bylaw. Id.

This requirement is based on the fundamental principal that stockholders have limited liability because they are passive investors. Bird v. Lida, Inc., 681 A.2d 399, 402 (Del. Ch. 1996). When an investor is held liable for the debts of the corporation, such action is "in derogation of the fundamental premise of limited entity liability." State v. Preferred Florist Network, Inc., 791 A.2d 8, 21 (Del. Ch. 2001). The Bylaw is contrary to this right because it shifts the corporation's debts to Alpha, a shareholder, and Talbot's certificate of incorporation does not authorize such action.

Additionally, as a shareholder, Alpha has the right to engage in proxy contests. In fact, Delaware law notes that the "shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests." Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988). The shareholder franchise occupies a special place in Delaware corporate law, and therefore Delaware courts are "vigilant in policing fiduciary misconduct that has the effect of impeding or interfering with the effectiveness of a stockholder vote." In Re MONY Group, Inc. Shareholder Litigation, 853 A.2d 661, 673 (Del. Ch. 2004). Alpha's primary right as a shareholder is to challenge the Board's actions through corporate democracy.

The Bylaw is essentially imposing personal liability on a shareholder for exercising its fundamental right to challenge corporate conduct. As Alpha asserted to the Chancery Court, the Board has unilaterally and improperly imposed substantial costs on Alpha as the price of exercising its right to participate in corporate democracy. The Bylaw thus has an improper chilling effect on not only

Alpha's efforts, but on any shareholder who may consider challenging the Board's decisions in the future.

Based on the foregoing, the Bylaw violates Del. Code Ann. tit. 8, § 102(b)(6)(2011) because any fee-shifting provision must be placed in Talbot's certificate of incorporation. In addition, it contravenes the fundamental principles of Delaware corporate law that shareholders have limited liability, and that they have the primary right to challenge corporate action through corporate democracy.

2. While Talbot's certificate of incorporation authorizes the Board to adopt bylaws consistent with Delaware law, it does not permit the Board to adopt provisions that strip the shareholders of their power in the corporate paradigm.

The second requirement for establishing the facial validity of a corporate bylaw is that it must not contravene the corporation's certificate of incorporation. ATP Tour, Inc., 921 A.3d at 557-58. The record notes that Talbot's certificate grants the Board the authority to adopt bylaws consistent with the DGCL. Mem. Op. at 11. However, those bylaws must honor the rights and powers of shareholders. 8 Del. C. § 109(b). As was demonstrated in Part 1, supra, and as will be shown in Part 3, this Bylaw is clearly in derogation of those rights. Therefore the certificate does not authorize the adoption of the Bylaw.

3. Talbot's Bylaw contravenes Delaware law because it thwarts the shareholder franchise, and it has no jurisprudential or statutory basis.

The third and final requirement espoused by this Court in ATP is that the bylaw must "not be otherwise prohibited." ATP Tour, Inc., 921 A. 3d at 557-558. This analytical inquiry examines principles of common law. Id. Because the facial validity of a fee-shifting bylaw in

the realm of proxy contests is one of first impression, it is necessary to examine analogous cases that raise similar issues of public policy. Those cases demonstrate that this Bylaw is contrary to the public policy of Delaware and is unsupported by the common law.

> a. Though Alpha assented to the terms of Talbot's bylaws when it purchased stock, this particular bylaw contravenes Delaware's strong public policy in favor of the shareholder franchise, thus it cannot be upheld as a contractual provision between the parties.

This Court upheld a fee-shifting bylaw that required an unsuccessful shareholder to reimburse the company for any litigation expenses incurred in defending a suit brought by the shareholder. ATP Tour, Inc., 921 A. 3d 554. In addition, both this Court and the Court of Chancery have upheld exclusive forum bylaws. See Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934 (Del. Ch. 2013); City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229 (Del. Ch. 2014).

All three of these decisions were based on the fact that the bylaws of a corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL. Boilermakers Local 154 Retirement Fund, 73 A.3d at 939. Because the shareholders are deemed to assent to the provisions found in the bylaws when they purchase stock, they are bound by those provisions, whether they are adopted before or after the shareholder invests in the company. ATP Tour, Inc., 921 A. 3d at 558.

In general, Delaware courts seek to promote freedom of contract. Related Westpac, LLC v. JER Snowmass, LLC, Del. Ch., C.A. No. 5001,

Strine, V.C. (July 23, 2010)(Mem. Op.). However, courts will interfere to dishonor a contract when it is necessary to vindicate public policy. Libeau v. Fox, 880 A.2d 1049, 1056-57 (Del. Ch. 2005). In short, Delaware promotes the American tradition of freedom of contract, but it will not allow contracting parties to include provisions that are contrary to public policy.

In this case, the Bylaw cannot be held valid because the parties are bound by it due to their contractual relationship because, unlike the bylaws in ATP, Boilermakers, and City of Providence, it is clearly contrary to the public policy of Delaware for multiple reasons.

i. The Bylaw dispossesses shareholders of their fundamental right to respond to directors' actions through the shareholder franchise and renders fiduciary obligations illusory.

As noted in Part 1, supra, shareholders' primary method of involvement in a corporation is by exercising their voting rights, and the state of Delaware has a strong public policy in favor of protecting that right. In Re MONY Group, Inc. Shareholder Litigation, 853 A.2d at 673. In fact, aside from litigation, the shareholder franchise is the shareholders' only way of expressing discontent over the board's actions. The court in Blasius noted that "generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock . . . or they may vote to replace incumbent board members." 564 A.2d at 659.

Talbot's Bylaw thus thwarts the shareholder franchise in two significant ways: first, it makes it incredibly difficult for the shareholders to challenge this fee-shifting Bylaw itself, and second, it has a substantial chilling effect on any proxy contests in the

future. The Bylaw makes it arduous to remove any Board member. Indeed, Alpha has noted that if the Bylaw is found valid, it will abandon its proxy contest, thus allowing the incumbent Board members to further entrench themselves. Mem. Op. at 12. Unless Talbot's shareholders decide to sell their stock, the only recourse they have against disenfranchising bylaws is to repeal them. The requirements necessary to achieve this repeal only further demonstrate how helpless this Bylaw renders shareholders. Contesting these bylaws would require the shareholders to obtain unanimous written consent from all shareholders entitled to vote on the issue, or, assuming it is provided for in the articles of incorporation, call a special meeting to repeal it. 8 Del. C. § 211. Since, the articles were not provided, it is safe to assume that the default rule applies, and that shareholders have not been given the right to pursue this option. Thus, requiring shareholders to satisfy these burdensome procedural requirements every time a bylaw is passed in violation of the board's fiduciary duties without allowing shareholders to address the root of the problem, clearly demonstrates that this Bylaw unduly impedes shareholder rights and renders the fiduciary obligations of the Board illusory.

Moreover, the Chancery Court noted in its opinion that it was troubled by the fact that the Bylaw "would prevent any otherwise robust proxy contest for the composition of the Talbot board from going forward and would result in an uncontested election of the incumbents." Id. The incumbents would remain in office, and the shareholders would have no opportunity to exercise corporate democracy. As such, the Bylaw cannot be deemed facially valid because

it contravenes this state's policy of protecting the shareholder franchise.

b. Talbot cannot rely on ATP in support of its argument because ATP's incomplete holding is limited to a hypothetical bylaw that was adopted by a non-stock corporation.

In 2014, this Court accepted four certified questions from the US District Court for the District of Delaware in ATP Tour, Inc., 921 A. 3d 554. All of the questions concerned a bylaw that required a shareholder who brought suit against the corporation to reimburse the company for litigation expenses if the suit was "unsuccessful." Id. The District Court asked this Court to determine the facial validity of the bylaw, and whether it was enforceable under Delaware law. In its ruling, this Court only provided limited and incomplete answers to four abstract, hypothetical questions.

The opinion clearly states that this Court could not "directly address the bylaw at issue." Id. at 555. As such, the Court did not rule that the terms of the bylaw were valid. Rather, the only holding in ATP is that unspecified "fee-shifting provisions in a **non-stock corporation's** bylaws **can** be valid and enforceable under Delaware law." *Id.* at 555 (emphasis added). The fact that a bylaw can be facially valid does not mean that all similar bylaws are necessarily valid.

Furthermore, the facts of ATP are distinguishable from the instant matter. Initially, it should be noted that the corporation at issue in ATP was a non-stock membership corporation, while Talbot is a stock corporation. There is simply no precedent to extend ATP's limited ruling to validate fee-shifting bylaws in stock corporations.

Finally, and perhaps most importantly, the bylaw in ATP is wholly different from Talbot's. ATP's provision requires stockholders to reimburse the company for litigation expenses, not expenses incurred in defending a proxy contest. As the Court in ATP noted, "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." Id. at 558. There is endless jurisprudence demonstrating that contracting parties are able to stipulate to details such as forum and fees in advance. However, there is no statutory law or precedent that allows a board to strip its shareholders of the ability to engage in corporate democracy, either prospectively or retrospectively. On the contrary, Delaware courts encourage and protect the shareholder franchise at every opportunity. See Blasius Industries, Inc., 564 A.2d 651. Based on the foregoing, this Court cannot determine that Talbot's Bylaw is "not otherwise prohibited."

> c. The Delaware General Assembly is currently investigating how to best limit or overrule the holding in ATP thus this Court cannot rely on ATP's findings.

This Court ruled on ATP on May 8, 2014. On June 18, 2014, the Delaware State Senate passed Joint Resolution No. 12., entitled "Calling for Continued Examination of Important Proposed Amendments to the Delaware General Corporation Law Relating to Fee-Shifting Bylaws and Other Aspects of Corporate Litigation."

Therein, the Senate expresses concerns about the implications of the holding in ATP, and notes that it should be either overruled or limited in order to protect shareholders. Id. In fact, it notes concerns "regarding the potential unintended consequences of

permitting stock corporations to adopt such bylaws and the chilling impact it could have in deterring meritorious claims." Id. It is also indicative that the Assembly noted a legislative proposal that was adopted by the Executive Committee of the Delaware State Bar Association which was "intended to limit the applicability of the ATP Tours decision to non-stock corporations and to make clear that liabilities such as a fee-shifting bylaw may not be imposed on holders of stock in stock corporations." Id.

Finally, the Resolution notes that both the Governor and the Delaware General Assembly "strongly support a level playing field" and believe that "broad fee-shifting bylaws for stock corporations will upset the careful balance that the State has strived to maintain between the interests of the directors, officers, and controlling stockholders, and the interests of other stockholders." Id.

The Resolution continues, providing that a vote on the matter is postponed until early 2015, pending further investigations. The Senate has not resolved the issue, but the language of this Act clearly demonstrates the concerns about the potential consequences of ATP. Once that holding came down, the Assembly responded immediately to limit or overrule it. Thus, this Court cannot rely on ATP in ruling on this matter because it is likely to be overturned legislatively.

Based on the foregoing, the Bylaw is contrary to the DGCL, the common law, and the public policy of this state. Thus, it is facially invalid.

II. THE PROXY CONTEST FEE-SHIFTING BYLAW, EVEN IF FACIALLY VALID, IS EQUITABLY UNENFORCEABLE BECAUSE IT WAS ADOPTED BY TALBOT'S BOARD FOR THE INEQUITABLE PURPOSE OF THWARTING CORPORATE DEMOCRACY.

A. Question Presented

Whether a proxy contest fee-shifting bylaw is adopted for an inequitable purpose when the bylaw is adopted in a special meeting called in direct response to a dissident shareholder's Schedule 13D filing, disclosing that it would seek to advance a restructuring proposal by nominating four directors for election to the company's board.

B. Scope of Review

The Court of Chancery's decision that the Proxy Fee-Shifting Bylaw was adopted for an inequitable purpose involves a mixed question of law and fact. Frantz Mfg. Co.,501 A.2d at 407. Absent findings that are "clearly wrong and the doing of justice requires their overturn," the reviewing court will not set aside the findings of a trial court. Id. (citing Levitt v. Bouvier, 287 A.2d 671, 673 (Del. Supr. 1972)). Even if the reviewing court would have ruled differently than the trial court on the facts, it is not their duty to replicate the role of the trial court. Anderson v. Bessemer City, N.C., 470 U.S. 564, 573-74 (1985). Because this court is reviewing the manner in which a bylaw was adopted and the circumstances under which it was invoked, the standard of review must rise to the level of "clearly wrong" to overturn the Court of Chancery's findings relating to the inequitable purpose for which the Bylaw was adopted.

C. Merits of Argument

1. Schnell and its progeny bar directors from adopting bylaws that deny stockholders a legitimate opportunity to wage proxy contests.

In general, there are two types of corporate law claims. The first is a legal claim, grounded in the argument that the corporate action is improper because it violates a statute, the certificate of incorporation, a bylaw or other governing instrument, as argued supra. Hollinger Int'l v. Black, 844 A.2d 1022, 1078 (Del. Ch. 2004). The second is an equitable claim, founded on the premise that the directors have breached an equitable duty that they owe to the corporation and its stockholders. Id.

While the DGCL is intentionally designed to provide directors with flexible authority, Delaware's public policy interest in defending "the legitimate expectations stockholders have of their corporate fiduciaries requires courts to act when statutory flexibility is exploited for inequitable ends." Id. at 1080. In the case at hand, if facially valid, the statutory flexibility of permitting the Board to adopt a fee shifting Bylaw has been exploited to allow Talbot's Board to avoid proxy contests, thus entrenching themselves in power and thwarting the shareholder franchise.

Most recently, the Delaware Supreme Court articulated in ATP that the enforceability of a fee shifting bylaw in a given case will depend on the manner in which it was adopted and the circumstances under which it was invoked. ATP, Tour, Inc., 91 A.3d at 558 (Del. 2014). This Court observed that an intent to deter litigation would not necessarily render the bylaw unenforceable in equity, but suggested

that an improper purpose might exist when: (1) there is evidence of entrenchment; (2) obstruction of the shareholder franchise; (3) oppression of minority shareholders; or (4) other ulterior motives that could be deemed inequitable under the circumstances of a given case. Id. Whether board action is inequitable turns on a very fact intensive inquiry. Id.

It is a long-settled principle of Delaware law that, "inequitable action does not become permissible simply because it is legally possible." Schnell v. Chris-Craft Indus., Inc. 285 A.2d 437, 439 (Del. 1971). In Schnell, insurgent shareholders of Chris-Craft Industries waged a proxy fight. Id. In an attempt to thwart the insurgent's efforts, the directors moved both the date and location of the corporation's annual meeting in order to give the insurgents less time to prepare and solicit proxies. Id. at 432-434. Since corporate statutes and Chris-Craft's charter permitted the directors to take these actions, the Chancery Court upheld the board's action. Id.

This Court reversed, holding that the 34-day reduction in time to wage a proxy contest resulted in the directors manipulating the corporate machinery "for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights." Id. at 439. The Court explained that directors may not adopt or amend bylaws "in order to obtain an inequitable advantage in the contest." Id. The Court reserved the power to intervene if the fiduciary's conduct was unfair despite its legality. Id.

Here, the Bylaw has far greater effects than a 34-day reduction in the time for waging a proxy contest. The Bylaw imposes financial

liability that renders it economically unfeasible for Alpha to continue with its proxy contest. As in Schnell, the Board manipulated the corporate machinery by obstructing a legitimate effort of dissident stockholders to exercise their rights to wage a proxy contest. Similarly, the Board's actions here result in an inequitable advantage to all dissident shareholder groups moving forward.

Moreover, the Board will continue to hold a decided advantage in proxy contests as a result of the financial risk inherent in future proxy contests. To this point, the expenses of defending the proxy fight will be shifted unless the proxy fight is "successful," meaning more than half of Alpha's nominees (two or more) be elected. The Bylaw gives Talbot an advantage based on the statistics alone. For example, in 2014, the average percentage of dissident victories in a proxy contest was a scant 16.5%. Anthony Garcia, FactSet, Proxy Fight Trend Analysis, Factset.com (Nov. 5, 2014.) In addition, that 16.5% includes partial wins where only one member from the dissident group was elected. Id. Thus, according to the Bylaw's terms, dissident shareholders' avoidance rate of proxy contest expense would be even less than 16.5%. Further, 33% of proxy fights settled in 2014 before reaching a vote, and it stands to reason that these settlement agreements were even less likely to include terms which required appointing more than half of an opponent's slate of directors. Id. These statistics show a clear advantage by the Board adopting this Bylaw coupled with an almost unattainable definition of success. It almost certainly diminishes the possibility of Alpha, or any other group for that matter, from actually waging a proxy contest.

The disadvantage imposed by this Bylaw is reinforced by Alpha's confirmed withdrawal if the Bylaw stands. Indeed, if a wealthy sophisticated investor like Alpha cannot justify the costs of waging a well-reasoned proxy contest, it is likely that no one will.

a. The Board's action in adopting the Bylaw frustrated the rights of stockholders and purposefully manipulated the corporate machinery in order to entrench themselves in power.

Courts have been more likely to find an action impermissible if the board acted with the intent of influencing or precluding a proxy contest. Accipiter Life Sciences Fund, L.P. v. Helfer, 905 A.2d 115, 125 (Del. 2006). Additional cases in the Schnell line also depended, in part, on the fact that the board acted with the intention of maintaining control of the corporation. Id. Intent, however, is not required for a claim under Schnell. Id. In other words, it is not required that scienter, or actual subjective intent, be shown to set aside director action on the basis of inequitable manipulation of the corporate machinery. Linton v. Everett, Del. Ch., C.A. No. 15219, Jacobs, V.C., (July 31, 1997)(Mem. Op.). It is also a well-established principle that when shareholders view matters differently than the board, they are entitled to express that view through the corporate franchise, namely, in voting to replace incumbent board members. Blasius Indus. Inc.,564 A.2d at 663.

Although the aforementioned cases established that actual intent is not required in finding an inequitable purpose, it is self-evident that the Bylaw in this case was, in fact, adopted with the intent of inhibiting Alpha's proxy contest. The potential proxy fight was predicated on Alpha's attempt to institute their Restructuring Plan,

which was shown to be economically beneficial to Talbot stockholders. In response to Alpha's Restructuring Proposal and 13D filing, Talbot CEO Timothy Gunnison called a special meeting on December 18 dedicated to disparaging the Restructuring Proposal in Gunnison's transparent attempt to maintain control of the company. Specifically, he disparaged the Proposal as "an ill conceived short term plan at best" that would "harm the company in the long run." Mem. Op. at 8.

In Accipiter, the Chancery Court noted that it is impermissible for the board to act with the purpose of influencing or precluding a proxy contest, which is precisely what the Board sought to do in this case. Accipiter, 905 A.2d 115. For example, Rosaria Gabrielli stated, "we need to raise the stakes for this guy [Womack]." Mem. Op. at 8. Marshall Cannon agreed, suggesting that the risk of added costs imposed by the Bylaw "might get Alpha to think twice about this." Mem. Op. at 8. Even more convincing, Clare Leonard criticized Womack and Alpha as "playing financial games for purely short term wins" and that "if the bylaw helps to stop Alpha, then I'm for it." Mem. Op. at 9. The Board tacitly approved of these statements by failing to raise any objections. The Board then unanimously approved a resolution adopting the Bylaw and resolved not to waive the fee-shifting obligation for the Alpha proxy contest. Mem. Op. at 10. The Board's intent was unmistakably to prevent the proxy contest altogether, making the adoption of the Bylaw inequitable.

Courts, in assessing the equity of such board action, will be more deferential to the directors' judgment if the action is taken on a "clear day." Daniel Wolf, The Advantages of Board Actions on a

"Clear Day" Law.harvard.edu/corpgov (Nov. 26, 2014). In essence, on a "cloudy day," there are dark clouds of dissident shareholders looming on the horizon. Accordingly, board action will be viewed more favorable when it is taken on a "clear day," before there is a threat the board action is meant to deter. In Goggin v. Vermillion, Inc., Del. Ch., C.A. No. 6465, Noble, V.C. (June 3, 2011)(Mem. Op.), Vice Chancellor Noble reasoned that "the record does not support an entrenching motive...because [the board's] decision was made on a proverbial 'clear day'" before any dissatisfaction was expressed.

While not a dispositive factor, the Bylaw was not adopted on a clear day, furthering the point that the purpose behind the adoption of the Bylaw was inequitable. In Lerman Diagnostic Data, Inc., the court emphasized in its decision to invalidate a bylaw that the board acted with "full knowledge of the dissidents intentions to launch a proxy contest." 421 A.2d 906, 914 (Del.Ch.1980). The same happened here: The Board acted at the December 18 meeting with full knowledge of Alpha's intention to launch a proxy contest and moved forward with the Restructuring Proposal because of the 13D filed on December 10.

Just as the board's decision was struck down in Lerman due to its terminal effect on the aspirations of the dissident shareholder group, the Board's conduct here had a terminal effect on Alpha. Alpha had already made it known that they would not proceed with the proxy contest if the Bylaw were upheld. Thus, Talbot's attempt to stifle shareholder dissent through the Bylaw succeeded. To this end, shareholders have the right to engage in proxy contests. 8 Del. C. § 212. There were equitable alternatives the Board could have employed

to defend against a proxy contest without resorting to such a draconian measure, such as a classified board or cumulative voting. The question before this Court does not turn on whether Talbot's decision was well informed; rather, Talbot's subjective belief does not "serve to excuse the conduct of management since that conduct was both inequitable (in the sense of being unnecessary under the circumstances) and had the accompanying dual effect of thwarting shareholder opposition and perpetuating management in office." Linton, Del. Ch., C.A. No. 15219, Jacobs, V.C., (July 31, 1997)(Mem. Op.).

2. Irrespective of whether this Court's decision is based on an application of the "inequitable purpose" analysis of Schnell as directed in ATP or the "compelling justification" standard espoused in Blasius, the Bylaw will not be given effect.

Talbot's contention that the decision to adopt the Bylaw was well informed and made in good business judgment does not comply with Schnell's "inequitable purpose," analysis or Blasius' "compelling justification" standard. In fact, the Court of Chancery has explicitly held that inequitable conduct does not necessarily require an evil, selfish, or uninformed motive. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121 (Del. Ch. 1990). This is best illustrated in Blasius. 564 A.2d 651. In Blasius, the court considered board action that was technically permitted by the law and the company's charter: the authority to expand the size of the board and appoint the new members. Id. Despite being technically permitted, the court ultimately invalidated the action on the grounds that the motivation for using that legal authority was inequitable. Id. at 660.

As noted in Part I, supra, the court emphasized that the shareholder franchise is the ideological underpinning upon which the

legitimacy of directorial power rests and that shareholders generally have only two protections against perceived inadequate business performance: (1) selling their stock, or (2) voting to replace incumbent board members. Id. at 659. Moreover, the court articulated that the board's principal motivation, in preventing insurgent shareholders from gaining a majority on the board, was key to the court's analysis. Id. The board needed a compelling justification. Id.

To date, only five cases, four by the Delaware Court of Chancery and one by the Delaware Supreme Court, have actually triggered a true Blasius test, and at best, only one passed with a compelling justification. Mary Siegel, The Illusion of Enhanced Review of Board Actions, 15 U. Pa. J. Bus. L. 599, 620 (2013). Even if Talbot can somehow argue that there was a compelling justification for adopting the Bylaw, it is still not enough to uphold the Bylaw. Delaware's public policy interest in defending the legitimate expectations stockholders have of their corporate fiduciaries requires this Court to review the adoption of this Bylaw, even if viewed under a Blasius test, through their equitable powers. Inequitable action does not become permissible simply because it is legally possible.

The Board's principal motivation behind the defensive maneuver of adopting the Bylaw was to prevent the insurgent shareholders from potentially placing new members on the board and suppressing the Restructuring Proposal. Under the "board centric" model of corporate governance in Delaware, election of directors is the stockholders place. In re CNX Gas Corp. S'holders Litig., 4 A.3d 397 (Del. Ch. 2010). The Board's attempt to control that space by using the threat

of substantial costs as a deterrent to Alpha's lawful challenge to the directors' incumbency cannot withstand a Schnell or Blasius analysis.

3. Talbot's reliance on the waiver provision reserved in the Bylaw does not cure the inequitable circumstances surrounding its adoption.

This Bylaw acts as a second poison pill to discourage takeovers through the appointment of new directors without prior board approval. The waiver provision is simply a fiduciary out included to brighten the overwhelmingly cloudy circumstances under which the Bylaw was adopted. In order to justify any use of a "poison pill" to interfere with the stockholder franchise, the directors "bear the burden of persuasion to show that their motivations were proper." Mercier v. Inter-Tel Inc., 929 A.2d 786, 810 (Del. Ch. 2007).

In Ruprecht, a defendant board of directors adopted a poison pill with a 10% ownership trigger two days after the plaintiff filed its 13D announcing that it had increased its ownership stake to 9.4%. Third Point LLC v. Ruprecht, Del. Ch., C.A. No. 9469, Parsons, V.C. (May 2, 2014)(Mem. Op.). Subsequently, the board refused to waive the 10% trigger and allow the plaintiff to acquire 20% of the company. The court noted that the waiver decision presented a "much closer question" than the decision to adopt the poison pill in the first place. Id. at 21. Further, the question of whether the board refused to grant the waiver for the purpose of interfering with stockholder franchise rights in order to affect the outcome of the proxy contest was "uncomfortably close" because the board rejected the waiver soon after it learned the plaintiffs were almost certain to prevail with an additional 10% of stock. Id. Ultimately, the court upheld the

rejection because the defendant's past aggressive conduct towards the plaintiff and a 20% control of the company would make the plaintiff the largest shareholder and give him effective negative control. Id.

As in Ruprecht, the Board adopted the Bylaw shortly after and in direct response to Alpha's 13D filing announcing that it would wage a proxy contest. Not only did incumbent management make hostile statements that demonstrate they intended to affect the outcome of an imminent proxy contest, they were armed with the knowledge that this dissident shareholder had been successful in appointing its own directors in the past. However, the saving proper motive of the defendant board in Ruprecht is absent here: Talbot itself implicitly assents that 7% is not a threatening amount of control as it already had a poison pill in place with a 15% trigger. Thus, clearly the Board is attempting to get another bite at the apple they missed with their initial poison pill, and only including a waiver provision to gloss over the improper motive behind its adoption: interference with the stockholder franchise. Based on the foregoing, the Board adopted the Bylaw for the inequitable purpose of thwarting the shareholder franchise and entrenching themselves in power in an effort to devastate any effort of advancing the Restructuring Proposal.

CONCLUSION

In conclusion, this Court should affirm the Court of Chancery's grant of the preliminary injunction enjoining Talbot and the Board from taking any action to enforce the Proxy Contest Fee-Shifting Bylaw in connection with any proxy contest for the election of directors to Talbot's Board at the May 2015 annual stockholders meeting.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TALBOT, INC., TIMOTHY GUNNISON, FRANCOIS PAYARD, NAOMI ROTHMAN, ROSARIA GABRIELLI, MARSHALL CANNON, AJEET GUPTA, DANIEL LEMON, CLARE LEONARD AND PATRICK RHANEY,	)	
	)	No. 162, 2015
Defendants Below, Appellants	)	
v.	)	Court Below: Court of Chancery of the State of Delaware
ALPHA FUND MANAGEMENT, L.P.,	)	
	)	C.A. No. 10428-CJ
Plaintiff Below, Appellee	)	

APPENDIX TO APPELLEE'S ANSWERING BRIEF

Team K
Attorneys for Appellee
Date Submitted: February 6, 2015

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DELAWARE STATE SENATE 147th GENERAL ASSEMBLY
SENATE JOINT RESOLUTION NO. 12

CALLING FOR CONTINUED EXAMINATION OF IMPORTANT PROPOSED AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW RELATING TO FEE-SHIFTING BYLAWS AND OTHER ASPECTS OF CORPORATE LITIGATION.

WHEREAS, the legal system and the courts of this State are respected nationally for their efficiency, fairness and predictability and their leadership on issues of corporate law; and

WHEREAS, the General Assembly and the courts of this State have developed a balanced corporate law that stakes out a middle ground between the interests of directors, officers, and controlling stockholders, and the interests of other stockholders; and

WHEREAS, because its law is balanced and flexible, and protects legitimate interests of all stakeholders, the State of Delaware is the U.S. domicile favored both by most investors in and by most managers of publicly-traded companies; and

WHEREAS, Delaware's legal system and its courts have benefited from the continual study of and improvement of the State's business entity laws; and

WHEREAS, maintaining balance, efficiency, fairness and predictability requires attention to ensure that statutes, court rules, and judicial doctrine, both within the State of Delaware and in combination with the laws and rules in jurisdictions outside the State of Delaware, do not encourage meritless litigation and impose unnecessary costs, to the detriment of Delaware business entities and, ultimately, their investors; and

WHEREAS, members of the Delaware Supreme Court and the Delaware Court of Chancery have commented on the abusive nature of meritless and duplicative litigation brought both within and without the State of Delaware and its imposition of unnecessary costs upon stockholders in Delaware companies and these concerns are shared by the Governor and members of the Delaware General Assembly; and

WHEREAS, the Delaware Supreme Court on May 8, 2014 in ATP Tours, Inc. v. Deutscher Tennis Bund upheld as facially valid a so-called "fee-shifting" bylaw imposing liability for legal fees on certain members of a non-stock corporation who participated in litigation; and

WHEREAS, the members of the Council of the Corporation Law Section of the Delaware State Bar Association expressed concerns regarding the potential unintended consequence of permitting stock corporations to adopt such bylaws and the chilling impact it could have in also deterring meritorious litigation that might be brought by investors in publicly-traded or privately-held corporations; and

WHEREAS, the Executive Committee of the Delaware State Bar Association approved a legislative proposal intended to limit the applicability of the ATP Tours decision to non-stock corporations and to make clear that liabilities such as a fee-shifting bylaw may not be imposed on holders of stock in stock corporations; and

WHEREAS, the Governor and the Delaware General Assembly strongly support a level playing field that provides the ability for stockholders and investors to seek relief on its merits in the Courts of this State and believe that a proliferation of broad fee-shifting bylaws for stock corporations will upset the careful balance that the State has strived to maintain between the interests of directors, officers, and controlling stockholders, and the interests of other stockholders; and

WHEREAS, the Governor and the General Assembly recognize the complexity and importance of the issues raised herein and desire to provide all interested parties with adequate time to participate in the development of a comprehensive legislative response to the issues raised in this resolution and the ATP Tours decision.

NOW THEREFORE:

BE IT RESOLVED, by the Senate and the House of Representatives of the 147th General Assembly of Delaware, with the approval of the Governor, that the Delaware State Bar Association, its Corporation Law Section, and the Council of that Section, is called upon to continue its ongoing examination of the State's business entity laws with an eye toward maintaining balance, efficiency, fairness and predictability;

BE IT FURTHER RESOLVED, that such examination provide attention to the permissible scope of provisions of the certificate of incorporation, bylaws, or other similar business entity documents affecting the conduct of and the forum for litigation involving claims arising under Delaware's business entity laws; the operation and administration of the statutes and court rules governing the exercise of appraisal rights; and the rate of interest on any fair value determination in an appraisal;

BE IT FURTHER RESOLVED, that such examination consider whether legislation similar or in addition to or in modification, limitation or expansion of proposed Senate Bill 236 of the 147th General Assembly would be appropriate, and to submit to the 148th General Assembly for consideration any legislative proposals deemed meritorious in continuing and promoting the adoption and use of the State's business entity laws by corporations and their investors.

Delaware Code Annotated Title 8, Chapter 1, Section 102(b)

§ 102. Contents of certificate of incorporation

***

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation;

(2) The following provisions, in haec verba, (i), for a corporation other than a nonstock corporation, viz:

"Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof or on the application of any receiver or receivers appointed for this corporation under § 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under § 279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation"; or

(ii), for a nonstock corporation, viz:

"Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its members or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or member thereof or on the application of any receiver or receivers appointed for this corporation under § 291 of Title 8 of the Delaware Code or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under § 279 of Title 8 of the Delaware Code order a meeting of the creditors or class of creditors, and/or of the members or class of members of this corporation, as the case may be, to be summoned in such manner as the said court directs. If a majority in number representing three fourths in value of the creditors or class of creditors, and/or of the members or class of members of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said reorganization shall, if sanctioned by the court to which the said application has been made, be binding on all the creditors or class of creditors, and/or on all the members or class of members, of this corporation, as the case may be, and also on this corporation";

(3) Such provisions as may be desired granting to the holders of the stock of the corporation, or the holders of any class or series of a class thereof, the preemptive right to subscribe to any or all additional issues of stock of the corporation of any or all classes or series thereof, or to any securities of the corporation convertible into such stock. No stockholder shall have any preemptive right to subscribe to an additional issue of stock or to any security convertible into such stock unless, and except to the extent that, such right is expressly granted to such stockholder in the certificate of incorporation. All such rights in existence on July 3, 1967, shall remain in existence unaffected by this paragraph unless and until changed or terminated by appropriate action which expressly provides for the change or termination;

(4) Provisions requiring for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by this chapter;

(5) A provision limiting the duration of the corporation's existence to a specified date; otherwise, the corporation shall have perpetual existence;

(6) A provision imposing personal liability for the debts of the corporation on its stockholders to a specified extent and upon specified conditions; otherwise, the stockholders of a corporation shall not be personally liable for the payment of the corporation's debts except as they may be liable by reason of their own conduct or acts;

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

Delaware Code Annotated Title 8, Chapter 1, Section 109

§ 109. Bylaws

(a) The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors of a corporation other than a nonstock corporation or initial members of the governing body of a nonstock corporation if they were named in the certificate of incorporation, or, before a corporation other than a nonstock corporation has received any payment for any of its stock, by its board of directors. After a corporation other than a nonstock corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

(b) 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.

Delaware Code Annotated Title 8, Chapter 1, Section 211

(a)(1) Meetings of stockholders may be held at such place, either within or without this State as may be designated by or in the manner provided in the certificate of incorporation or bylaws, or if not so designated, as determined by the board of directors. If, pursuant to this paragraph or the certificate of incorporation or the bylaws of the corporation, the board of directors is authorized to determine the place of a meeting of stockholders, the board of directors may, in its sole discretion, determine that the meeting shall not be held at any place, but may instead be held solely by means of remote communication as authorized by paragraph (a)(2) of this section.

(2) If authorized by the board of directors in its sole discretion, and subject to such guidelines and procedures as the board of directors may adopt, stockholders and proxyholders not physically present at a meeting of stockholders may, by means of remote communication:

a. Participate in a meeting of stockholders; and

b. Be deemed present in person and vote at a meeting of stockholders, whether such meeting is to be held at a designated place or solely by means of remote communication, provided that (i) the corporation shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder or proxyholder, (ii) the corporation shall implement reasonable measures to provide such stockholders and proxyholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (iii) if any stockholder or proxyholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.

(b) 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. Stockholders may, unless the certificate of incorporation otherwise provides, act by written consent to elect directors; provided, however, that, if such consent is less than unanimous, such action by written consent may be in lieu of holding an annual meeting only if all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action. Any other proper business may be transacted at the annual meeting.

(c) A failure to hold the annual meeting at the designated time or to elect a sufficient number of directors to conduct the business of the corporation shall not affect otherwise valid corporate acts or work a

forfeiture or dissolution of the corporation except as may be otherwise specifically provided in this chapter. If the annual meeting for election of directors is not held on the date designated therefor or action by written consent to elect directors in lieu of an annual meeting has not been taken, the directors shall cause the meeting to be held as soon as is convenient. If there be a failure to hold the annual meeting or to take action by written consent to elect directors in lieu of an annual meeting for a period of 30 days after the date designated for the annual meeting, or if no date has been designated, for a period of 13 months after the latest to occur of the organization of the corporation, its last annual meeting or the last action by written consent to elect directors in lieu of an annual meeting, the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director. The shares of stock represented at such meeting, either in person or by proxy, and entitled to vote thereat, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the certificate of incorporation or bylaws to the contrary. The Court of Chancery may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such meeting, the record date or dates for determination of stockholders entitled to notice of the meeting and to vote thereat, and the form of notice of such meeting.

(d) Special meetings of the stockholders may be called by the board of directors or by such person or persons as may be authorized by the certificate of incorporation or by the bylaws.

(e) All elections of directors shall be by written ballot unless otherwise provided in the certificate of incorporation; if authorized by the board of directors, such requirement of a written ballot shall be satisfied by a ballot submitted by electronic transmission, provided that any such electronic transmission must either set forth or be submitted with information from which it can be determined that the electronic transmission was authorized by the stockholder or proxy holder.

Delaware Code Annotated Title 8, Chapter 1, Section 212

§ 212. Voting rights of stockholders; proxies; limitations

(a) Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder. If the certificate of incorporation provides for more or less than 1 vote for any share, on any matter, every reference in this chapter to a majority or other proportion of stock, voting stock or shares shall refer to such majority or other proportion of the votes of such stock, voting stock or shares.

(b) Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after 3 years from its date, unless the proxy provides for a longer period.

(c) Without limiting the manner in which a stockholder may authorize another person or persons to act for such stockholder as proxy pursuant to subsection (b) of this section, the following shall constitute a valid means by which a stockholder may grant such authority:

(1) A stockholder may execute a writing authorizing another person or persons to act for such stockholder as proxy. Execution may be accomplished by the stockholder or such stockholder's authorized officer, director, employee or agent signing such writing or causing such person's signature to be affixed to such writing by any reasonable means including, but not limited to, by facsimile signature.

(2) A stockholder may authorize another person or persons to act for such stockholder as proxy by transmitting or authorizing the transmission of a telegram, cablegram, or other means of electronic transmission to the person who will be the holder of the proxy or to a proxy solicitation firm, proxy support service organization or like agent duly authorized by the person who will be the holder of the proxy to receive such transmission, provided that any such telegram, cablegram or other means of electronic transmission must either set forth or be submitted with information from which it can be determined that the telegram, cablegram or other electronic transmission was authorized by the stockholder. If it is determined that such telegrams, cablegrams or other electronic transmissions are valid, the inspectors or, if there are no inspectors, such other persons making

that determination shall specify the information upon which they relied.

(d) Any copy, facsimile telecommunication or other reliable reproduction of the writing or transmission created pursuant to subsection (c) of this section may be substituted or used in lieu of the original writing or transmission for any and all purposes for which the original writing or transmission could be used, provided that such copy, facsimile telecommunication or other reproduction shall be a complete reproduction of the entire original writing or transmission.

(e) A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power. A proxy may be made irrevocable regardless of whether the interest with which it is coupled is an interest in the stock itself or an interest in the corporation generally.