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.	:	
ALPHA FUND MANAGEMENT L.P.,	:	
Plaintiff Below, Appellee.	:	Court Below: Court of Chancery of the State of Delaware
	:	C.A. No. 10428-CJ

Appellant's Opening Brief

Team P
Attorneys for Appellants
February 6, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

Delaware Supreme Court Cases

Delaware Court of Chancery Cases

Delaware Statutes

Other

NATURE OF PROCEEDINGS

Appellees, Plaintiffs below, brought suit seeking injunctive relief against Appellants, Defendants below, in the Court of Chancery of Newcastle County based on claims that Talbot's Proxy Fee-Shifting Bylaw was facially invalid and inequitable. Chancellor Junge granted a preliminary injunction against the Appellants, enjoining them from "taking any action to effectuate or enforce those terms and provisions of the bylaw," on January 15, 2015.

Appellants filed a notice of appeal on January 22, 2015, which was certified by the Court of Chancery, and this Court accepted expedited appeal on January 29, 2015.

Appellants request that this Court reverse the order of the Chancery Court. Furthermore, Appellants request that this Court hold that the Proxy Fee-Shifting Bylaw is both facially valid and equitable under Delaware law.

SUMMARY OF THE ARGUMENT

1. This Court should hold that the Proxy Fee-Shifting Bylaw (the "Bylaw") is facially valid because it is authorized by the Delaware General Corporation Law (the "DGCL"), was properly enacted, and can be enforced consistently with Delaware common law.

The Bylaw is statutorily valid under the DGCL because the statute does not prohibit fee-shifting bylaws, and it addresses the subject matter requirements of the statute. The Bylaw does not obstruct or prevent shareholders from exercising any of their rights. Only after the conclusion of a policy-oriented proxy contest, with particular results, can the Bylaw be triggered. The fee-shifting bylaw allocates risk between contracting parties, which is part of the rights and obligations between the parties, as well as the business of the corporation and the conduct of its affairs.

Alpha Fund Management, L.P. ("Alpha") has not satisfied its burden on a facial validity claim to prove that the Bylaw, though statutorily valid, will always violate Delaware law. The Board properly adopted the Bylaw after becoming fully informed of its function and application, and Talbot's shareholders were properly notified. Finally, the Bylaw can be enforced equitably and consistently under Delaware law. Alpha only presents claims that the Bylaw has potential to prevent shareholders from nominating directors, but Delaware courts do not consider hypotheticals on claims for facial invalidity. Alpha cannot satisfy its burden because the Bylaw is unambiguous, and reasonable, on its face and in application, and can always be waived if its application would be unfair or unreasonable.

2. This Court should hold that the Board's enactment of the Bylaw is valid under the Business Judgment Rule (the "BJR"). The Board here acted only after hearing from directors and executives of Talbot, as well as multiple attorneys, regarding the Plaintiff's business plan, and the Bylaw in question. The Board did not violate the fiduciary duty of care, because it acted only after hearing, and considering, all relevant information. The Board acted in good faith because the its passing of the Bylaw was in the best interest of Talbot's shareholders and only seeks to recuperate Talbot's reasonable expenses in fighting a proxy battle. Because the Board did not violate a fiduciary duty they should prevail under a BJR analysis.

If this Court elects to apply an enhanced Scrutiny here, which the Appellants do not concede should be done, the Board will nonetheless prevail. The Board should prevail under a *Unocal* analysis because it can overcome *Unocal's* two-prong analysis. The Board's response was reasonable because it was made by a majority of independent directors and was well informed. The Board's Bylaw was not draconian because it did not coerce any shareholder into voting a certain way, and did not preclude any shareholder from voting. The Bylaw fits *Unocal's* range of reasonableness test because it is facially valid and limited in degree and magnitude. Because the Board can satisfy each portion of *Unocal* the Bylaw should be deemed acceptable on the merits.

The *Blasius* scrutiny should not be applied, but if it is, the Board should prevail, because the Board does not act for the sole or primary purpose of thwarting the shareholder vote.

STATEMENT OF FACTS

In December 2014 the board of directors (the "Board") of Talbot, Inc. ("Talbot"), a Delaware corporation, acted legally and within its discretion when it enacted the Proxy Fee-Shifting Bylaw ("Bylaw"). (Op. at 9). On December 22, 2014, Alpha Fund Management L.P. ("Alpha" or the "Plaintiff"), a shareholder of Talbot, filed suit for a preliminary injunction challenging the facial validity and equitability of the Bylaw. (Op. at 9).

Talbot is engaged primarily in business related to industrial manufacturing. (Op. at 2). Talbot's business is divided among three distinct, but related, divisions. (Op. at 2).

In late 2013, Alpha began rapidly acquiring shares of Talbot. (Op. at 3). By mid-2014, Alpha had acquired approximately three million shares in Talbot and immediately sought to implement its own restructuring proposal (the "Restructuring Proposal") that would eradicate two-thirds of Talbot's divisions. (Op. at 3). The following month, Timothy Gunnison, ("Gunnison") chairman and CEO of Talbot, met with Jeremy Womack ("Womack"), Alpha's CEO, to hear the Restructuring Proposal's details. (Op. at 3). At the meeting, Gunnison expressed his concerns about the Restructuring Proposal to Womack. (Op. at 4). Gunnison explained that the Restructuring Proposal was short-sighted because it did not sufficiently account for either the synergy among Talbot's three divisions or the significant cost cutting measures already under way. (Op. at 4).

Despite hearing these reservations, Alpha continued its rapid accumulation of Talbot shares, to the tune of seven percent, or 5.25

million total outstanding shares. (Op. at 4). This decision has been fortuitous for Alpha as it earned more than $25 million in a single year on this investment. (Op. at 4).

On December 10, 2014, Alpha filed a Schedule 13D, disclosing its holdings in Talbot. (Op. at 4). Alpha disclosed that, although it would not seek direct control over Talbot, it would attempt to force the Restructuring Proposal by nominating four new directors for election the next shareholders meeting. (Op. at 4). Various news sources immediately reported on Alpha's 13D filing, which highlighted Alpha's recent history of aggressively pushing restructuring plans on other companies. (Op. at 5). Given this development, Gunnison called a special meeting of the Board. (Op. at 5).

All nine members of the Board attended the special meeting held on December 18, 2014. (Op. at 5). This meeting focused exclusively on Alpha's Restructuring Proposal. (Op. at 5). In a detailed presentation, Mack Rosewood ("Rosewood"), Talbot's Vice President for Finance and Operations, reported on the Restructuring Proposal's terms as originally presented by Womack and as set forth in the Schedule 13D. (Op. at 5). For balance, Rosewood also presented Talbot's ongoing cost cutting plans for the three divisions. (Op. at 5). The Board unanimously agreed that the current business plan is superior in both long-term and short-term value for Talbot and its shareholders. (Op. at 5-6).

Recognizing the potential cost Talbot may incur in opposing a policy-oriented proxy contest, the Board next heard presentations from both in-house counsel (Stone) and outside counsel (Ellsworth), who has

considerable experience with Delaware corporations. (Op. at 6). Stone and Ellsworth counseled the Board on the particulars of the Bylaw, which included the potential adverse financial cost to Talbot in opposing a proxy contest, and its ability to waive any fee-shifting obligations in an appropriate exercise of its fiduciary duties. (Op. at 6). In enacting the bylaw, Ellsworth explained that the Board could, in good faith, consider the potential cost to the company in contesting a proxy contest. (Op. at 6). The Bylaw would only be triggered if shareholders did not elect at least fifty percent of a contesting party's nominees, and limit liability to fees reasonably incurred by Talbot in opposing a proxy contest. (Op. at 7).

After the presentations, Rosewood, Stone, and Ellsworth were all simultaneously excused. (Op. at 8). The nine members of the Board continued to express their concerns and illustrate flaws in both Alpha and the Restructuring Proposal. (Op. at 8). The Board then unanimously enacted the Bylaw as described by Stone and Ellsworth and preliminarily determined not to waive the obligations if Alpha was unsuccessful. (Op. at 9). Stone then immediately drafted and distributed a press release to shareholders, which described the adoption and terms of the Bylaw, and the reversible decision to not waive any potential obligations if Alpha engaged in a proxy-contest. (Op. at 9).

Alpha subsequently nominated four directors for election in Talbot's next shareholder meeting. (Op. at 9). The Board considered Alpha's nominees before deciding to proceed with nominating the nine unclassified incumbents. (Op. at 10 n.10).

ARGUMENT

I. THE PROXY FEE-SHIFTING BYLAW IS FACIALLY VALID UNDER BOTH THE PROVISIONS OF DELAWARE GENERAL CORPORATION LAW AND THE UNDERLYING PRINCIPLES OF DELAWARE COMMON LAW.

A. Questions Presented

1. Whether a proxy fee-shifting bylaw that allocates risk during a policy-based proxy contest is facially valid under the provisions of the DGCL?

2. Whether a proxy fee-shifting bylaw, which is part of a contractual framework, enacted by an authorized board of directors can be enforced consistently under Delaware common law?

B. Scope of Review

The lower court certified the interlocutory appeal for this Court to decide a question of first impression that substantially affects the legal rights of the parties. (Order). "The Court of Chancery's legal conclusions are subject to *de novo* review by this Court." *Unitrin, Inc. v. Am. Gen. Corp. (In re Unitrin, Inc.)*, 651 A.2d 1361, 1386 (Del. 1995) (citing *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992). This Court will determine the issue of the Bylaw's facial validity *de novo* because the lower court declined to address this issue. (Op. at 12).

C. Merits of Argument

When determining the facial validity of bylaw, this Court has consistently held that the bylaws of a corporation are "presumed to be valid, and the courts will construe bylaws in a manner consistent with the law rather than strike [them] down." *ATP Tour Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 557-58 (Del. 2014) (quoting *Frantz Mfg. Co.*

v. EAC Indus., 501 A.2d 401, 407 (Del. 1985). In *ATP*, this Court explained that a bylaw's facial validity depends on whether the bylaw is 1) permitted by the DGCL; and 2) is a properly enacted contract under the certificate of incorporation and Delaware common law. *Id.*

1. The Bylaw is Facially Valid Because it Addresses the Subject Matters of Bylaws and is not Otherwise Prohibited by the DGCL.

There are two inquiries a court makes when determining whether a bylaw is authorized by the DGCL; i) whether the bylaw addresses the subject matter requirement of the bylaw provision at section 109(b) of the DGCL; and ii) whether any other DGCL provision prohibits the bylaw. *Id.* at 558. As this Court explained in *Unocal*, "[m]erely because the General Corporation Law is silent as to a specific matter does not mean it is prohibited." *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 957 (Del. 1985) (interpreting *Providence and Worcester Co. v. Baker*, 378 A.2d 121, 123-124 (Del. 1977)). Therefore, bylaws that i) address the DGCL's bylaw subject matter requirements; and ii) are not prohibited by any other statutory provision are statutorily valid.

i. The Bylaw addresses the subject matter requirements of bylaws under the DGCL.

The DGCL sets limitations on the proper subject matters of bylaws requiring that all bylaws, "relate to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." Del. Code Ann. tit. 8 §109(b). In *ATP*, this Court reasoned that fee-shifting bylaws are a means of "allocat[ing] risk among parties," which satisfies the subject matter requirement of the DGCL. *ATP*, 91 A.3d at 558. In Delaware, it is well-established that incumbent

directors are entitled to use corporate funds, or to reimbursement, for reasonable expenses incurred opposing a policy-oriented proxy contest. *CA, Inc. v. AFSCME Emp. Pension Plan*, 953 A.2d 227, 240 (Del. 2008); *Hall v. Trans-Lux Daylight Picture Screen Corp.*, 171 A. 226, 227 (Del. Ch. 1934). By allocating risk in a policy-oriented proxy contest, the Bylaw here addresses the conduct of Talbot's affairs, as well as the rights and obligations of Talbot and its shareholders. *ATP*, 91 A.3d at 558.

It is undisputed that Alpha's interest in waging this proxy-contest is policy-oriented. In its Schedule 13D filing, Alpha disclosed its intention to advance the Restructuring Proposal by subsequently nominating four directors for election to Talbot's board of Talbot. (Op. at 4). In such cases, Talbot, and in turn its shareholders, would incur the cost of the incumbent director's proxy-contest expenses. *Hall*, 171 A. at 227.

The Bylaw protects the corporation from unnecessary loses by allocating this risk onto dissident shareholders who advance policies that are ultimately rejected by the majority of Talbot's shareholders. (Op. at 7 n.6).

Another touchstone of a bylaw that addresses the DGCL subject matter requirement is its process-oriented effect. *AFSCME*, 953 A.2d at 234-35; *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d, 934, 951 (Del. Ch. 2013). A rule that regulates how an action should function without mandating such actions is indicative of a process-oriented bylaw. *Boilermakers*, 73 A.3d at 951-52.

The court in *Boilermakers*, reasoned that forum selection bylaws are process-oriented because they regulate "*where* stockholders may file suit, not *whether* the stockholder may file the suit." *Id.* (emphasis in original). Similarly, the Bylaw here does not control whether a stockholder may initiate a proxy-contest, or that the Board must oppose it. Instead, the Bylaw contemplates how proxy-contests will be financed. (Op. at 7 n.6).

ii. The DGCL permits bylaws that allow a corporation to recoup reasonable expenses incurred when opposing unsuccessful policy-oriented proxy contests.

In 2014, when answering a certified question regarding the facial validity of a fee-shifting bylaw, this Court explicitly ruled that "[n]either the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws." *ATP*, 91 A.3d at 558. In *ATP*, the board of directors of a non-stock corporation unilaterally enacted a fee-shifting bylaw. *Id.* at 556. The *ATP* bylaw stated that any member or owner who was a party to any claim against *ATP* which did not "substantially achieve" the full remedy sought shall be "obligated jointly and severally to reimburse [*ATP*][.]" *Id.*

Similarly, the Bylaw here requires any stockholder who does not achieve the election of "at least half" of its nominees to the Board shall be "obligated jointly and severally to reimburse the Corporation[.]" (Op. at 7 n.6).

This Court was unequivocal in ruling that the DGCL does not forbid fee-shifting bylaws. *ATP*, 91 A.3d at 558. Therefore, even though the fee-shifting bylaw in *ATP* applied to intra-corporate

litigation expenses of a non-stock corporation, the holding should not be limited to the facts of that case.

The DGCL protects shareholders by prohibiting a corporation from unfairly obstructing a shareholder's ability to nominate and elect directors to the board. For example, subject to certain exceptions, a corporation must; allow shareholders to nominate individuals for the board of directors, title 8, section 112 of the Delaware Code; annually provide a time and place for shareholders to elect directors, section 211; allow shareholders to solicit proxies of other shareholders, section 212; and, upon request, provide access to shareholder lists for the solicitation of proxies, section 219. These provisions properly ensure shareholder protection from corporate actions designed to obstruct shareholder participation in nominating and electing directors of their choice. However, a corporation is not responsible for ensuring that each shareholder has the financial ability to exercise all of their shareholder rights. *Id.* § 113.

Pursuant to these freedoms shareholders are always free to amend or repeal bylaws enacted by a board of directors. *Id.* § 109(a). However, if this type of bylaw is the type that is intended to be prohibited by the DGCL, that decision is for the legislature. *Lehrman v. Cohen*, 222 A.2d 800, 807 (Del. 1966). Indeed, the Delaware legislature has already committed to exploring this issue. S.J. Res. 12, 147th Gen. Assemb. (Del. 2014).

By applying the well-established framework for determining a bylaw's statutory validity, this Court should rule that the Bylaw is

valid because: i) the Bylaw addresses the subject matter requirements; and ii) the DGCL's provisions permit fee-shifting bylaws.

2. The Bylaw is Facially Valid Under Delaware Common Law Because it is Part of a Contractual Framework and can Operate Consistently with the Law.

In addition to authorization by the DGCL, this Court in *ATP* explained that "the bylaws may contain any provision, not inconsistent with law." *ATP*, 91 A.3d at 557-58. Bylaws are considered "contracts among shareholders" and their validity is determined according to the rules of construction. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). According to the rules of construction, bylaws, like statutes and contracts, will be enforced in a manner that is "consistent with the law rather than striking [them] down." *Frantz*, 501 A.2d at 407. Therefore, if a bylaw can be enforced in a manner that is consistent with the DGCL, the corporate charter, and Delaware common law, it will survive a facial validity challenge. *ATP*, 91 A.3d at 557-58.

i. The Bylaw is a valid contract among shareholders.

Bylaws may only be amended according to the requirements of the corporation's charter. *ATP*, 91 A.3d at 557-558. A board of directors may, when authorized, unilaterally amend the corporate bylaws that are enforceable against stockholders who will, or have already, purchased stock in the corporation. *Id.* at 560; *Boilermakers*, 73 A.3d at 955-56. Without evidence to the contrary, there is little reason to doubt that Talbot's charter delegates the right to amend the bylaws to the Board. Indeed, at no time does Alpha contend that this right has not been delegated to the Board. Therefore, the only remaining question

is whether the contractual obligations of the Bylaw can be enforced consistently with Delaware law. *ATP*, 91 A.3d at 558.

ii. The Bylaw does not unreasonably harm Talbot's shareholders and can be enforced consistently with Delaware law.

A plaintiff challenging the facial validity of a bylaw, which is statutorily valid under the DGCL, has the burden of proving that the bylaw will always operate unlawfully or inequitably. *Boilermakers*, 73 A.3d at 948-49. (facial validity challenge "cannot be satisfied by pointing to some future hypothetical application").

This restrained approach to a facial validity challenge, such as Alpha presents here, is grounded in the long-standing policy that corporate freedom should not be chilled by invalidating otherwise authorized bylaws based on the bylaw's potential effects. *Stroud v. Grace*, 606 A.2d 75, 78-79 (Del. 1992). In the present case, Alpha cannot satisfy its burden to prove that the Bylaw will always operate inequitably because; a) it has only presented a potential harm; and b) the Bylaw's terms and application are unambiguous and reasonable.

a. An allegation of the Bylaw's potential to harm is insufficient to succeed on a facial invalidity claim.

Alpha alleges that the Bylaw is facially invalid because the Board has unfairly threatened to impose added costs on it as the price of exercising its right to participate in the selection of the Board. (Op. at 11-12). However, this interpretation is not represented by a plain reading of the Bylaw, which according to its own terms, can only be applied according to limited results following the conclusion of a proxy-contest. (Op. at 7 n.6). Even still, under *Frantz* and *Stroud*,

potentially imposing added costs is a potential harm, and is inadequate to satisfy Alpha's burden on its facial validity claim. *Boilermakers*, 73 A.3d at 949 (citing *Frantz*, 501 A.2d at 407 and *Stroud*, 606 A.2d at 79).

In *Stroud*, this Court found valid a bylaw that enhanced the qualification requirements for dissident shareholder nominees, and gave the board of directors the power to disqualify nominees as late as the date of the annual shareholder meeting. *Stroud*, 606 A.2d 75. Despite allegations of harm because a nominee's eligibility was dependent on the incumbent board, this Court found no evidence that the bylaw "caused or will continue to cause injury" to the shareholders. *Id.* at 95. Specifically, this Court noted that the board of directors respected the dissident nominees and appropriately circulated a list of candidates to the shareholders. *Id.* Thus, the plaintiff had alleged only a potential harm. *Id.* at 96.

Similarly, Alpha's argument that the Bylaw could potentially prevent a shareholder from nominating their directors is insufficient to invalidate an otherwise authorized bylaw. (Op. at 11-12). As in *Stroud*, there is no evidence that the Bylaw has "caused or will continue to cause" injury to Talbot's shareholders. In adopting the Bylaw, the Board was informed of its components, made suitable announcement of its adoption to Talbot's shareholders, and after its adoption, considered Alpha's four nominees before committing to opposing the proxy-contest. (Op. at 9, 10 n.10).

Of course, Alpha presented that it will not engage in a proxy-contest with the incumbents if the Bylaw is not invalidated. (Op. at

12). However, this result is not commanded by the Bylaw. Instead, this decision reflects a recalibration of Alpha's risk analysis in attempting to engage in a policy-oriented proxy contest. Again, the Bylaw does not impose any additional costs or requirements on Alpha prior to the completion of the proxy contest. (Op. at 7 n.6) ("*then in such event*" the Contesting Party will be required to "reimburse the Corporation") (emphasis in original). Furthermore, the Bylaw will not affect shareholder decisions on whether to support the incumbent board or the opposing party. (Op. at 15).

b. The Bylaw is unambiguous and reasonable in its application.

The Bylaw defines successful dissident shareholders as those achieving at least fifty-percent success in electing its nominees to the Board. (Op. at 7 n.6). The Bylaw would not be triggered if shareholders elect just two of Alpha's four nominees. (Op. at 9). Because all nine members of the Board are up for re-election each year, Alpha can be successful by acquiring enough shareholder votes to replace just two of the nine incumbents. (Op. at 3).

The narrow application of the Bylaw reflects the Board's recognition that shareholders may have different views, and when shareholder voting demonstrates that sentiment, dissident shareholders should not be prevented from presenting such alternatives. *See generally Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (invalidated a defensive act by the board that could never permit shareholders to achieve a different view).

Furthermore, despite the parties' disagreement on the estimated cost of waging a proxy contest, (Op. at 6), the obligation will always

be limited to "reimbursing the *Corporation* for fees *reasonably incur[ed]*" in opposing a proxy contest. (Op. at 7 n.6) (emphasis added). Not only does this provision limit the obligations to reasonable costs, but it clearly dictates that only Talbot may receive reimbursement. Thus, because corporate funds cannot be expended unreasonably or be used to conduct personally motivated proxy contests, the Bylaw will only shift reasonable expenses incurred opposing a policy-oriented proxy contest. *See AFSCME*, 953 A.2d at 240; *Hall*, 171 A. at 227. Finally, the Board always has the ability to waive the fee-shifting obligations if the application would be unreasonable. (Op. at 7 n.6).

This Court should find that the Bylaw is facially because it is a contract that binds Talbot and its shareholders and by its plain terms can be fairly and reasonably enforced according the principles of Delaware common law.

This Court should hold that Alpha has not met its burden on the facial validity claim because the Bylaw is statutorily valid and Alpha has not proven the Bylaw cannot be enforced consistently with Delaware law.

II. THE BOARD'S ADOPTION OF THE PROXY FEE-SHIFTING BYLAW WAS BOTH VALID AND EQUITABLE UNDER ANY APPROPRIATE LEVEL OF SCRUTINY.

A. Questions Presented

1. Whether the Business Judgment Rule should be applied to an independent board of directors' decision to enact a proxy fee-shifting bylaw that is in the best interest of the corporation?

2. Whether, if arguendo this Court holds that the *Unocal* standard applies, a proxy fee-shifting bylaw made by an independent board of directors, in response to inevitable corporate expenses, is reasonable and proportional?

B. Scope of Review

"The threshold question is the applicable standard by which the defendants' conduct is to be judged. This is a legal question and therefore is subject to *de novo* review by this Court." *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1992). All legal issues are reviewed *de novo* to determine whether the lower court "erred in formulating or applying legal precepts." *Stroud*, 606 A.2d at 85 (citing *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1145 (Del. 1990)). "The Court of Chancery's legal conclusions are subject to *de novo* review by this court." *Unitrin*, 651 A.2d at 1385.

C. Merits of Argument

1. The Business Judgment Rule Should be Applied here Because the Decision to Implement the Bylaw was Made by an Informed Board and Did Not Violate a Fiduciary Duty.

The lower court erred in not applying the business judgment rule ("BJR") to the Board's decision here. The BJR is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in an honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). If the BJR is applied, the plaintiff has the burden to show that the directors' decisions cannot be "attributed to any rational business purpose." *Cede & Co. v. Technicolor*, 634 A.2d 345, 361 (Del. 1993) (quoting *Sinclair Oil Corp.*

v. Levien, 280 A.2d 717, 720 (Del. 1971)). Under the BJR "neither the courts nor the stockholders should interfere with the managerial decision[s] of the directors." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003) (quoting *Paramount Communications v. QVC Network*, 637 A.2d 34, 42 (Del. 1994).

Only in rare situations should a court go beyond the BJR and apply an enhanced level of scrutiny. *See Paramount*, 637 A.2d at 42. The Board's decision here does not give rise to an enhanced level of scrutiny. *See Blasius*, 564 A.2d 651 (holding that enhanced scrutiny is justified when a board acts for the purpose of thwarting a shareholder vote); *Unocal*, 493 A.2d 946 (holding that heightened scrutiny is required when a board acts in a defensive manner); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that enhanced scrutiny is justified in a sale of control to ensure that the best value for shareholders is attained).

Because the Board's Bylaw does not fit any of the prescribed categories of heightened scrutiny a presumptive BJR should be applied. This Court should find that Talbot's Board prevails under the BJR analysis for two reasons. First, the Board made an informed decision to amend Talbot's bylaws and thus did not violate its fiduciary duty of care. Second, the Board acted in good faith, and in Talbot's interest, when it created the Bylaw and thus did not act in bad faith.

i. The Board's amendment of the Bylaw was informed and therefore does not violate the duty of care.

The informational prong of the BJR requires that the board consider all material facts reasonably available to it, not every fact. *See Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000). When coming

to decisions directors may rely on opinions by the corporation's officers, even if said opinions are not in an official report. Del. Code Ann. tit. 8, § 141(e) (2013).

On December 18, 2014 Talbot's Board had a special meeting ("Meeting"). (Op. at 3-5). This meeting focused on Alpha's 13D filing and Restructuring Proposal. (Op. at 5). At the meeting Mack Rosewood, the Vice President for Finance and Operations, gave a detailed presentation regarding Alpha's Restructuring Proposal. (Op. at 5). The Board unanimously agreed that Talbot's current business plan is best. (Op. at 5-6).

Following Rosewood's presentation, the Board heard from Talbot's General Counsel, Stone, and outside counsel, Ellsworth, regarding the Bylaw. (Op. at 5). Ellsworth told the Board that it was within its good faith business judgment to consider the adverse impacts of such proxy contests on the corporation, when deciding whether to adopt the Bylaw. (Op. at 6).

The board considered information from each of the persons above before coming to a consensus on Talbot's best course of action. (Op. at 5, 9). Because the board came to a decision after hearing all the relevant facts, and opinions, of professionals, this court should find that the board's decision was well informed and therefore did not violate the fiduciary duty of care.

ii. The Board acted in good faith because it believed the Bylaw was in Talbot's best interest.

The Board did not violate its fiduciary duty to act in good faith. To prove a violation of good faith a plaintiff must show that the Board acted in bad faith, which requires "proof of subjective bad

motive or intent." *Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.)*, 906 A.2d 27, 62 (Del. 2006). Subjective bad faith requires that the Board act either with an intent to harm the corporation, or consciously disregarded its responsibilities. *Id.* at 64-66.

Talbot's Board did not act in bad faith. The Board enacted the Bylaw after hearing all the pertinent information, both regarding the Restructuring Proposal, and also regarding the Bylaw itself. (Op. at 5). The Board acted after it had determined that its decision was in the best interest of the corporation. (Op. at 5, 9).

The Plaintiff may attempt to highlight the depositions of Directors Gabrielli, Cannon, and Leonard to suggest that the Board exhibited subjective bad faith in reaching its decision. (Op. at 8-9). These partial depositions do make derogatory remarks towards Alpha's short-term Restructuring Proposal, but do not suggest the Board's decision would be bad for Talbot or any subjective intent to harm the corporation. The Board unanimously agreed that this course of action was in Talbot's shareholders' best interest. (Op. at 5, 9).

Because the Board here acted in the interest of Talbot, and its stockholders, and did not violate any fiduciary duty, its decision should be upheld under the BJR.

2. If Arguendo This Court Applies the *Unocal* Standard, the Board Should Nonetheless Prevail because the Bylaw was both a reasonable and proportional response to the perceived threat.

"A *Unocal* analysis should be used only when a board unilaterally adopts defensive measures in reaction to a perceived threat." *Williams v. Geier*, 671 A.2d 1368, 1377 (Del. 1995). While the Board does not concede that its actions constituted a defensive measure, if

this court finds as much, the Board still prevails on the merits. Under a *Unocal* analysis the board in question must pass a two-prong test. *Unitrin*, 651 A.2d at 1373. *Unocal's* first prong consists of a reasonableness test, requiring that the Board of directors exhibit reasonable grounds for believing a danger to corporate policy and effectiveness existed. *Id.* *Unocal's* second prong consists of a proportionality test, which weighs whether the directors' response was a reasonable response to the perceived threat. *Id.*

If this Court applies a *Unocal* analysis, it should hold that the Board prevails under a *Unocal* scrutiny for two reasons. First, the Board acted in a reasonable manner. Second, the Board's enactment of the bylaw was a proportionate response to the perceived threat.

i. The Board can demonstrate that the decision to implement the Bylaw was reasonable.

The Board's enactment of the Bylaw was a reasonable decision. The Board can satisfy the reasonableness prong of *Unocal* by demonstrating good faith and reasonable investigation. *Unocal*, 493 A.2d at 955. A majority of independent directors materially enhances the reasonableness of directors' actions under the *Unocal* analysis. *Id.*; *Unitrin*, 651 A.2d 1375. In deciding reasonableness, the Courts "should be deciding whether the directors made a reasonable decision, not a perfect decision." *Paramount*, 637 A.2d at 45.

At the Meeting, Talbot's Board, consisting of 9 members (8 of whom are independent directors), informed themselves of Alpha's 13D filing and Restructuring Proposal. (Op. at 5-6). At the Meeting, Rosewood gave a detailed presentation regarding the Plaintiff's Restructuring Proposal. (Op. at 5). All members of the Board agreed

that Talbot is best served by its current business plan, and not Alpha's plan. (Op. at 5-6).

Following Rosewood's presentation, the Board heard from legal counsel, Stone and Ellsworth, regarding the Bylaw. (Op. at 5). Ellsworth told the Board that it was within its good faith business judgment to consider whether to adopt the Bylaw. (Op. at 5).

The Board here used the available information and unanimously agreed that the Bylaw was the best way to recuperate the costs Talbot would incur in contesting Alpha's policy-oriented proxy contest, and therefore the Board's decision was reasonable.

ii. The Board's Bylaw was a proportional response to the threat of incurring unnecessary costs from opposing Alpha's proxy contest.

In order to satisfy the second prong of *Unocal* the defensive measure must be proportional in relation to the threat posed. *Unocal*, 493 A.2d at 955. In evaluating whether a measure is proportional courts have adopted a two-part subtest. *Unitrin*, 651 A.2d at 1387. Courts first look to whether the measure is draconian in nature. *Id.* If the court finds that the defensive measure is not draconian, the focus switches to a second, "range of reasonableness," test. *Id.* at 1387-88. Talbot's Board satisfies both subparts of the second prong.

a. The Board's actions are not draconian because they are neither coercive nor preclusive.

Whether a measure is "draconian" is determined by examining whether it was "coercive or preclusive in character." *Id.* A response is coercive if it contains features that force a shareholder to vote in a specific manner or which allow the Board to induce votes. *Third*

Point LLC v. Ruprecht, 2014 Del. Ch. 64, 65 (Del. Ch. May 2, 2014). A response is preclusive if it makes waging a successful proxy vote "mathematically impossible" or "realistically unattainable." *Versata Enters. v. Selectia, Inc.*, 5 A.3d 586, 601 (Del. 2010) (quoting *Unitrin*, 651 A.2d at 1389).

The Bylaw here was in no way coercive. Shareholders are not forced, or even suggested, to vote a certain way in any proxy contest. The Board does not levy any consequences for the way a shareholder votes. The Bylaw is in no way preclusive because no shareholder is unable to vote, or levy a proxy contest, as a result of the Bylaw. *See Id.* Because every shareholder is able to vote the way he choses there appears to be no credible argument that Alpha is unable to either propose, or be successful, in its proxy contest. The Bylaw only deals with financial reimbursement after a proxy contest concludes, and therefore this Court should find that the Bylaw was neither coercive nor preclusive.

b. The Bylaw adheres to each aspect of the reasonableness test.

Under the second subpart of the proportionality test the Board must show that its response falls within the "range of reasonableness." *Unitrin*, 651 A.2d at 1389. The "range of reasonableness" test examines whether: (1) this is a statutorily authorized business decision, which a board of directors may make; (2) is the defensive response limited in degree or magnitude; and (3) does the board recognized that not all shareholders are alike. *Id.*

The business decision to implement the Bylaw in question is statutorily authorized for the reasons stated in section I above. The

Plaintiff plans on levying a proxy vote to alter Talbot's business structure in a way the Board does not agree with. (Op. at 4-6). The Board, acting under its duty to the corporation, seeks to recuperate the costs of fighting the proxy battle, assuming the Plaintiff is unsuccessful. (Op. at 6-7). The response here is limited in degree and magnitude, which is demonstrated by the following: the Bylaw here only seeks to recover the financial cost of fighting a proxy battle; only takes place following the proper exercise of the shareholders' right to vote; and, contains a waiver that may be exercised. The third aspect of the test has been applied to repurchasing programs where shareholders may want to accept different options, such as liquidity. *See Unitrin*, 651 A.2d at 1389. Such a situation is not present here and thus the third aspect is not applicable.

Because the Board here acted in a reasonable and proportional manner in enacting the Bylaw it should overcome a *Unocal* analysis.

3. The *Blasius* Standard is Not Applicable Here Because the Directors Did Not Act With the Sole, or Primary, Purpose of Thwarting The Voting Rights of Any Shareholder.

This Court should hold that a *Blasius* scrutiny does not apply here. Nonetheless, if a *Blasius* analysis is conducted the Board will prevail on the merits. The *Blasius* standard applies an enhanced scrutiny, and shifts the burden to the defendants, in cases where the Board acted with the sole, or primary, purpose of thwarting a shareholder vote. *Blasius*, 564 A.2d at 661-62. *Blasius* is also applied if shareholders are not given a full and fair opportunity to vote. *Williams*, 671 A.2d at 1376. If applied, *Blasius* requires that defendants demonstrate a "compelling justification" for their actions.

Blasius, 564 A.2d at 661. Because of its strict criteria, "the compelling justification standard announced in *Blasius* is rarely applied either independently or within the *Unocal* standard of review." *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1130 (Del. 2003).

The Board here unanimously agreed that the enactment of the Bylaw was in the best interest of Talbot. (Op. at 9). The Board's Bylaw serves as a protective measure in the event that the shareholders find that a proxy contest goes against the corporation's interests. The Bylaw does not serve as either a punishment or a deterrent, which is demonstrated by the fact that the Bylaw: is only applied after the shareholders have cast a full and fair vote; has a waiver provision; and, is only for the amount of money reasonably spent to fight the proxy vote. Because the Board did not act with the sole, or primary, purpose of thwarting a shareholder vote and did not take away any shareholder's right to vote, this Court should hold that the Board overcomes a *Blasius* analysis.

CONCLUSION

For the above-mentioned reasons, Appellants respectfully request that this court REVERSE the Court of Chancery's grant of preliminary injunction and hold that the Bylaw is both facially valid and proper.

Respectfully submitted,

/s/ Team P

Team P
Counsel for Appellants