IN THE SUPREME COURT OF THE STATE OF DELAWARE

TALBOT, INC., TIMOTHY GUNNISON, FRANCOIS PAYARD, NAOMI ROTHMAN, ROSARIA GABRIELLI, MARSHALL CANNON, AJEET GUTPA, DANIEL LEMON, CLARE LEONARD and PATRICK RHANEY,	:	No. 162, 2015
Defendants Below, Appellants,	:	Court Below: The Court of Chancery of the State of Delaware,
V.	:	
ALPHA FUND MANAGEMENT L.P.,	:	Civil Action No. 10428-CJ
Plaintiff Below, Appellee.	:	

APPELLANTS' OPENING BRIEF

Team Q
Counsel for the Defendants below, Appellants

Dated: February 6, 2015

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Nature of Proceedings

This Interlocutory Appeal comes before the Supreme Court of Delaware upon application of the defendants below: Talbot, Inc., Timothy Gunnison, Francois Payard, Naomi Rothman, Rosaria Gabrielli, Marshall Cannon, Ajeet Gupta, Daniel Lemon, Clare Leonard, and Patrick Rhaney. Appellants challenge the Court of Chancery's Order issuing a Preliminary Injunction in favor of the plaintiff below, Alpha Fund Management L.P. In substance, the Preliminary Injunction enjoined the exercise of the "Proxy Fee-Shifting Bylaw" enacted by the Appellant directors. Appellants timely filed their Notice of Interlocutory Appeal on January 22, 2015, seeking review of the Preliminary Injunction Order by Chancellor Gary Junge on January 15, 2015. Pursuant to its authority under Supreme Court Rule 42, this Court accepted the Petition for Interlocutory Appeal on January 29, 2015. Del. Sup. Ct. R. 42.

Summary of Argument

1. The Fee-Shifting Bylaw is facially valid because it is authorized by § 109 of DGCL, consistent with the Talbot's certificate of incorporation, and is not prohibited under Delaware common law. A bylaw is facially valid if it is authorized under DGCL, consistent with the corporation's certificate of incorporation, and not otherwise prohibited by statutory or common law. Here, the Board's adoption of a bylaw that allocates the potential risks among parties in a proxy contest satisfies the DGCL requirement that bylaws relate to the business of the corporation. Because Bylaws are considered a contract between the corporation and its shareholders, the Board is able to use the bylaw to contract around the traditional American Rule of each party paying its own litigation. Finally, Alpha has not provided any evidence that the Fee-Shifting Bylaw cannot operate lawfully or equitably under any circumstances.
2. The Fee-Shifting Bylaw was not the product of an inequitable purpose and is thereby enforceable. A facially valid bylaw is enforceable as long as the circumstances and manner under which it was invoked were not the product of inequitable purpose. In this case, the Board's primary purpose of implementing the Fee-Shifting Bylaw was not to disenfranchise Alpha but rather to mitigate the exorbitant costs that accompany frivolous proxy contests. The Board also intended the Fee-Shifting Bylaw protect Talbot from detrimental, corporate insurgents. Moreover, Alpha's right and ability as a shareholder to engage in a proxy contest is not precluded by the adoption of the Fee-Shifting Bylaw.

Statement of Facts

Talbot, Inc. ("Talbot") is a publicly-traded Delaware corporation with approximately 75 million outstanding shares of common stock. Mem. Op. 2. Through the end of 2013, Alpha Fund Management L.P. ("Alpha") began to acquire large amounts of Talbot shares. Id. at 3. Leading this acquisition of Talbot shares was Alpha's founder and Chief Executive Officer, Jeremy Womack. Id. at 2. Womack was known within the Delaware corporate community for routinely engaging Alpha as an activist stockholder, in conjunction with causing those companies to restructure their business models to support his short-term profit schemes. Id. at 3,5,6.

In the summer of 2014, Womack made a pitch to Talbot's CEO, Timothy Gunnison, advancing a restructuring proposal (the "Restructuring Proposal") for Talbot. Id. at 3. Womack proposed that Talbot could generate more profit by discontinuing two of Talbot's three divisions, and focusing only on the remaining division. Id. After hearing Womack's entire proposal, Gunnison expressed his concerns to Womack that these theories failed to take into account the synergy that makes Talbot's current business model more worthwhile and cost effective. Id. at 4.

Subsequently, on December 10, 2014, while still acquiring shares of Talbot, Alpha filed a Schedule 13D with the Securities and Exchange Commission (SEC), disclosing its ownership of seven percent of Talbot's total outstanding shares. Id. Alpha included its intentions to nominate four directors for election to Talbot's Board of Directors at the next annual stockholder meeting in May 2015. Id.

On December 18, 2014, Talbot's entire board of directors (the "Board") convened for a special meeting to more thoroughly review Womack's Restructuring Proposal. Id. at 5. At the outset of the meeting, Mack Rosewood, the Vice President for Finance and Operations of Talbot, gave a comprehensive and in-depth presentation regarding the terms of the Restructuring Proposal. Id. Rosewood concluded his presentation by evaluating the current business model of the Talbot divisions attacked in the Restructuring Proposal. Id. At this time, the Board unanimously agreed that the Restructuring Proposal was not in the best interest of the company and its stockholders. Id. Specifically noting that Talbot's current business model offered greater, long term and present values for the company and its stockholders when compared to Womack's short-term Restructuring Proposal. Id. at 5-6.

Next, the board heard presentations from Talbot's General Counsel, Rhee Stone, and outside counsel, Sandra Ellsworth, regarding the feasibility of implementing a Proxy Fee-Shifting Bylaw (the Fee-Shifting Bylaw). Id. at 6. Ellsworth disclosed evidence illustrating the vast expenses incurred by corporations during Proxy contests, estimating the current contest expenses at approximately $8 million. Id. Alpha's proxy solicitor, who was not present at the special meeting, also estimated the current contest expenses "in excess of $12 million." Id. Ellsworth advised the Board of the benefits the Fee-Shifting Bylaw may have on the corporation and its shareholders collectively. Id. Stone supplemented Ellsworth's advice, clarifying the terms and mechanics of the suggested Fee-Shifting Bylaw. Id.

After considering the totality of information collected and presented during the special meeting, that lasted over two hours, the Board chose to deliberate further amongst themselves. Id. at 8. Talbot's Lead Director, Francois Payard, expressed his support of the Fee-Shifting Bylaw because it protects the company from exorbitant costs incurred in proxy contests. Id. at 9. Talbot Director Marshall Cannon offered further support of the Fee-Shifting Bylaw, stating that it "might get Alpha to think twice" about bringing a frivolous proxy contest. Id. at 8. Consequently, the Board unanimously agreed to adopt the Fee-Shifting Bylaw. Id. at 8-9.

In its terms, the Fee-Shifting Bylaw obligates a dissident party to reimburse Talbot for all reasonable fees and expenses Talbot may incur in defending against that dissident party's proxy contest. Id. at 6-7. This potential obligation to reimburse Talbot is only triggered when the dissident party is unsuccessful in electing at least half of its nominated individuals to the Board. Id. In addition, the Board retains the right to waive any obligations of a dissident group due to the Fee-Shifting Bylaw at any point in time. Id.

Finally, on December 22, 2014, Alpha formally notified Talbot of its intention to nominate four individuals for election to the Talbot Board of Directors at the May 2015 annual stockholder meeting. Id. at 9. This act was accompanied by Alpha instituting the pending action. Id. at 10.

Argument

Under Delaware General Corporate Law (DGCL), a board of directors owes fiduciary duties of loyalty and care to the corporation and its shareholders. E.g., Polk v. Good, 507 A.2d 531, 536 (Del. 1986); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). When acting or making decisions on behalf of the corporation, directors enjoy the protection of the business judgment rule. Frantz Mfg. Co. v. EAC Ind., 501 A.2d 401, 408 (Del. 1985); see also Boilermakers Local 154 Ret. Fund v. Chevron Corp.(Chevron), 73 A.3d 934, 950, (Del. Ch. 2013). This bedrock of Delaware law creates a presumption that a board of directors acts independently, with due care, in good faith, and in the honest belief that its actions were taken in the corporation and stockholders' best interest. Gantler v. Stephens, 965 A.2d 695, 705-06 (Del. 2009). Board decisions are also presumed proper if the decision was deliberate, disinterested, and made in good faith. See e.g. Omnicare, Inc. v. NCS Healthcare, Inc., 81 A.2d 914 (Del. 2003). Judicial relief is only appropriate when a plaintiff establishes sufficient facts that the board violated its fiduciary duties. See Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1162 (Del. 1995). Where a plaintiff fails to meet this burden, the business judgment rule protects the board's decisions in that courts defer to a board's expertise and knowledge in managerial decisions. Id.

A preliminary injunction is only appropriate when the moving party establishes: (1) that there is a substantial likelihood of ultimate success upon the merits of the claim, (2) that an imminent threat of irreparable harm exists, and (3) that a balancing of the

equities weighs in the moving party's favor. SI Mgmt. L.P. v. Wininger, 707 A.2d 37, 40 (Del. 1998).

Here, the chancery court erred in issuing the Preliminary Injunction. Of the three preliminary injunction requirements, only the first prong is at issue in this interlocutory appeal. Accordingly, Alpha is not substantially likely to succeed on the merits because the Fee-Shifting Bylaw is facially valid under Delaware corporate law, and the bylaw was not the product of an inequitable purpose, and thereby enforceable. For these reasons, the Appellee's challenge to the facial validity and enforceability of the Fee-Shifting Bylaw holds no merit, and their request for permanent injunction denied.

I. The Court of Chancery passed on the issue of whether fee-shifting bylaws are facially valid leaving the law uncertain.

A. Question Presented

Does DGCL authorize a fee-shifting bylaw when the bylaw is consistent with a corporation's certificate of incorporation and not otherwise prohibited by law?

B. Scope of Review

This Court reviews a grant or denial of a preliminary injunction for abuse of discretion, while reviewing the legal conclusions of the Court of Chancery de novo. See e.g. SI Management L.P., 707 A.2d at 40. Although this Court might reach different conclusions, if the findings of the Chancellor are supported by the record and are the result of an orderly and logical deductive reasoning process, this Court will accept the findings. See e.g. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1278 (Del. 1989).

C. Merits of Argument

The Talbot Proxy Fee-Shifting Bylaw is facially valid because it is authorized by § 109 of DGCL, consistent with Talbot's certificate of incorporation, and is not prohibited under Delaware common law.

In adopting a fee-shifting bylaw, the Talbot's board acted within its powers while fulfilling its duties to the shareholders and corporation by instituting risk-allocating measures against harmful corporate insurgents. A bylaw is facially valid if it is authorized under DGCL, consistent with the corporation's certificate of incorporation, and not otherwise prohibited by statutory or common law. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014); see also 8 Del. C. § 109 (2014).

Cornerstone to Delaware corporate law is the notion that a

corporation's management and operation decisions are traditionally left to the discretion of a board. See e.g. Omnicare, Inc., 81 A.2d at 927; Smith, 488 A.2d 858. Due to the unique positions of directors, their experience and knowledge, their actions are protected by the business judgment rule. Id. Accordingly, board decisions made concerning the management of a company are reviewed under the deferential standard of the business judgment rule, whereby there must be a breach of fiduciary duty or conflict of interest for the courts to intervene in the affairs of a corporation. Id.

Common to any organization, the need for a defined purpose, internal bylaws and the selection of leaders are essential to the basic functions of any corporation. See Mary Sarah Builder, The Corporate Origins of Judicial Review, 116 YALE L.J. 502, 515 n.51 (2006) (discussing ancient Roman legal principles and statutes). The creation of bylaws is one of the most basic and fundamental tools of corporate governance, and this power to issue self-governing rules is considered an inherent power of a corporation. Id. at 517-18. Bylaws allow boards to exercise their managerial authority in circumstances where inaction might otherwise be a breach of duty. See 8 Del. C. § 141(a), (f) (2014); CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 240 (Del. 2008). The Delaware legislature's codification of this power additionally aids directors in fulfilling their duties. See 8 Del. C. § 109.

However, bylaws are not limitless in their power. 8 Del. C. § 109, 113 (2014). They are contingent upon the law and fiduciary duties expected of a board. Id. So long as bylaws do not violate the law or act against public policy, they are accepted as necessary to the

governance and betterment of corporations. See 1 WILLIAM BLACKSTONE, COMMENTARIES 463.

Bylaws are "presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws." Frantz Mfg. Co., 501 A.2d at 407; see also 8 Del. C. § 109(a). As a result, a plaintiff must show there is no possibility, under any circumstances, that a bylaw can operate lawfully or equitably for the bylaw to be found facially invalid. Chevron, 73 A.3d at 948-49. Thus, a claimant must prove the bylaw does not cover proper subject matter as specified in §109(b) and that the bylaw can never operate in agreement with the law. Id.

Subject only to the limitations of the law or certificate of incorporation, a bylaw may contain any provision addressing "permissible subjects" of bylaws. See ATP Tour, Inc., 91 A.3d at 558; City of Providence v. First Citizens BancShares, Inc., 99 A.3d 229, 233-35 (Del. Ch. 2014); Chevron, 73 A.3d at 948; see also 8 Del. C. § 109. All bylaw provisions must relate to the business or affairs of a corporation. 8 Del. C. § 109(b); ATP Tour, Inc., 91 A.3d at 558.

"In an unbroken line of decisions dating back several generations," this Court has established the well-settled principle that "bylaws constitute a binding part of the contract between a Delaware corporation, [a board of directors], and its stockholders." Chevron, 73 A.3d at 955-56; see also CA, Inc., 953 A.2d at 234-5, 240; Airgas, Inc. v. Air Products & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("[Bylaws are] contracts among a corporation's shareholders."); Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del. 1990) ("[G]eneral rules of contract interpretation are held to

apply" in such instances.). Boards may adopt bylaws unilaterally when the certificate of incorporation authorizes the board to do so. See ATP Tour, Inc., 91 A.3d at 560; see also Chevron, 73 A.3d at 955-56 (stating a change in the bylaws is not "extra-contractual" due to its unilateral nature, but rather the type of change stockholders agree to when buying into a corporation and the body of statutory and contractual law accompanying it). Stockholders are also on notice under § 109(b) that a board may unilaterally adopt bylaws which relate to the corporate management. City of Providence, 99 A.3d at 234.

Because a party may contract around the traditional Delaware and American Rules of each party paying its own litigation costs, a board of directors may likewise contract around this rule on behalf of a corporation. Id. at 558, 560 ("But it is settled that contracting parties may agree to modify the American Rule and obligate the losing party to pay the prevailing party's fees."); Mahani v. Edix Media Grp., Inc., 935 A.2d 242, 245 (Del. 2007); see also Sternberg v. Nanticoke Mem'l Hosp., Inc., 62 A.3d 1212, 1218 (Del. 2013) ("An exception to [the American R]ule is found in contract litigation that involves a fee shifting provision.").

Bylaws determining liability for litigation costs have consistently been held facially valid by this Court. Accord ATP Tour, Inc., 91 A.3d at 560; City of Providence, 99 A.3d at 233; Chevron, 73 A.3d at 948. Common law does not prohibit, nor restrict, parties from contracting for the costs of attorney's fees and similar fee-shifting arrangements. Id.; see 8 Del. C. §109. Section 109 of the DGCL also confers such a power. Id. Bylaws which allocate risks of litigation costs, or fee-shifting bylaws, satisfy the business relation

requirement of § 109(b). Id.

Fee-shifting bylaws deter unjustified and expensive litigation, rather than a corporation enduring the financial burden of internal defenses. ATP Tour, Inc., 91 A.3d at 560 ("Fee-shifting provisions, by their nature, deter litigation."). Still, directors are permitted to adopt fee-shifting bylaws even if solely to mitigate frivolous litigation. Id. Warding off improper and ill-advised proxy contests is to protect a corporation from ill-informed, injurious parties taking control. See Fee-Shifting Bylaws: The Current State of Play (June 20, 2014), available at http://www.skadden.com/newsletters/Fee-Shifting_Bylaws_The_Current_State_of_Play.pdf. In addition, proxy contests are an internal procedure which this Court defers to boards in managing the cost of defending contests. See id.

Stockholders are privy to the benefits of fee-shifting contracting amongst a corporation too. See Carlson v. Halliman, 925 A.2d 506 (Del. Ch. 2006). Most always, a successful stockholder will be awarded reasonable fees determined by the court because of "equity's desire to assure that persons who benefit from a lawsuit without contributing to its costs are not unjustly enriched at the successful litigant's expense." Id.; see also AFSCME v. AIG, Inc., 462 F.3d 121 (2d Cir. 2006) (finding shareholders that requested costly access to proxies could amend corporate bylaws to permit shareholders nominees to be on the proxy card).

In an increasing phenomenion, shareholder litigation has grown drastically in recent years, and these realities are before boards regularly. See Joseph A. Grundfest & Kristen A. Savelle, The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic,

and Political Analysis, 68 BUS. LAW. 325, 339 (2013) (discussing the nature and growing number of corporate, duplicative litigation). Judicial discipline prevents such frivolous spending and allows for a merit-based approach to claims and contests, rather than promoting expensive and unjustified litigation. Fee-Shifting Bylaws: The Delaware Supreme Court Decision in ATP Tour, Its Aftermath and the Potential Delaware Legislative Response (May 22, 2014), available at http://skadden.com/insights/fee-shifting-bylaws-delaware-supreme-court-decision-atp-tour.pdf ("In 2013, stockholder plaintiffs filed lawsuits challenging approximately 94 percent of all announced deals, versus 54 percent in 2008.").

Simultaneously, the Delaware legislature recognized this growing problem. In Senate Joint Resolution No. 12, legislators "recognize [] the need to maintain balance, efficiency, fairness and predictability in protecting the legitimate interests of stakeholders, and to ensure that the laws do not encourage meritless litigation or impose unnecessary costs on Delaware entities to their detriment." Supra Fee-Shifting Bylaws: The Current State of Play.

Finally, there is a growing concern about corporations being left without sufficient funds to defend against proxy fights, effectually leaving a corporation at the mercy of insurgent groups. See Levin v. Metro-Goldwin-Mayer, Inc., 264 F. Supp. 797 (S.D.N.Y. 1967) ("Incumbent directors are better able to defend corporate positions and policies."). Still, directors are required to determine and defend beneficial policies of the corporations, thereby acting in the corporation's best interest. Id. Conversely, an insurgent group is

not required to honor same duties or susceptible to the same scrutiny as an incumbent board of directors. Id.

Here, the Court of Chancery failed to recognize the potential harm to Talbot and its shareholders caused by proxy contests and detrimental, activist shareholders. There are no past instances of legal conclusions allowing this Court to intervene into a board's decision to institute a valid bylaw. Thereby, it is long held in this state that without a colorable breach of duty, this Court will not intervene into the realm of corporate directors.

The language of the Fee-Shifting Bylaw closely tracks the language of the bylaw at issue in ATP Tour, Inc. v. Deutscher Tennis Bund. 91 A.3d 554. As such, coupled with the statutory requirements of determining the validity of a bylaw, that Court's analysis applies here equally.

Talbot's unanimously-adopted Fee-Shifting Bylaw requires an unsuccessful dissident group to reimburse Talbot for reasonable professional fees and expenses incurred by the corporation in resisting the dissident's proxy contest. Mem. Op. at 7. Such bylaws signal concern by the directors for the governance of a corporation due to uncertain outcomes with activist stockholders.

Moreover, the bylaw is within the board's power and valid under DGCL as it meets the three requirements of facial validity. First, the adoption of the Fee-Shifting Bylaw is authorized by §109 of the DGCL, which grants the Talbot's directors the power to adopt bylaws as an integral managerial function of the board. The bylaw additionally satisfies § 109 by relating to the business of the corporation in allocating the potential risks among parties in a proxy contest. Id.

at 7 n.6. This is done without limiting any rights of the shareholders to do the same. See id. Second, the Talbot's certificate of incorporation expressly confers the power to the Board of directors to adopt and institute any bylaws for the corporation. Id. at 11. Third, the bylaw is not otherwise prohibited by statutory or common law.

The board identified and investigated this concern of the corporation being bled dry by an unjustified and meritless proxy contest. Id. at 6. Further, this contest had a chilling effect on the board's behavior. As Delaware law leaves governance decisions to a board, those boards are unable to focus on the long-term profitability and best interests of a corporation under constant considerations of staving off internal insurgents. Rather, Talbot's board would better serve its shareholders by making determinations on constructive and purposeful measures furthering corporate goals.

This Fee-Shifting Bylaw is an important tool for the Talbot's board by discouraging meritless and costly proxy contests against the corporation by Womack, an activist, insurgent shareholder. Id. at 2. This bylaw effectively mitigates the cost of proxy contests, rather than the shareholders baring the cost of an unsuccessful campaign by other shareholders. Therefore, instituting such a bylaw allows Talbot to recoup the cost of defending an effective and responsible board against detrimental parties. When merged, the extensive costs of litigation and defensive measures since Womack's initial attempt at insurgency will injure Talbot and its shareholders due to Talbot being responsible for all costs. Id. at 6. It was the Talbot board's duty to investigate and evaluate the Restructuring Proposal, and further, to protect the corporation upon determining that the Restructuring

Proposal was detrimental to the corporation after a comprehensive assessment. Id.

Further, Talbot's shareholders retain the ability to amend bylaws at any time. Id. at 7 n.6. Still, the bylaw here does not bind the ability of shareholders to exercise their right to bring additional nominations and consequently presents minimal motivations for amendment. Id. In conjunction, each proxy contest reduces the profitability for all shareholders at the cost of approximately $12 million each contest. Id. at 2. Through the bylaw and for the benefit of shareholders collectively, the board seeks to avoid placing the cost of defending frivolous proxy contests on the back of the corporation. Id. at 7 n.6.

In conclusion, nothing in DGCL or Talbot's certificate of incorporation bars the board from adopting the new bylaw. Furthermore, this Court has specifically recognized the legitimacy and applicability of contractual fee-shifting as permissible and not prohibited under the Delaware common law.

II. Talbot's Fee-Shifting Bylaw is enforceable.

A. Question Presented

Is a facially valid bylaw enforceable when its primary objective was to protect the corporation from exorbitant costs incurred defending against frivolous proxy contests?

B. Scope of Review

This Court reviews a grant or denial of a preliminary injunction for abuse of discretion, while reviewing the legal conclusions of the Court of Chancery de novo. See e.g. SI Mgmt. L.P., 707 A.2d at 40. Although this Court might reach different conclusions, if the findings of the Chancellor are supported by the record and are the result of an orderly and logical deductive reasoning process, this Court will accept the findings. See e.g. Mills Acquisition Co., 559 A.2d at 1278.

C. Merits of Argument

The Fee-Shifting Bylaw adopted by the Talbot board was not the product of an inequitable purpose and is thereby enforceable.

The Board's primary purpose of implementing the Fee-Shifting Bylaw was not to disenfranchise Alpha but rather to minimize the costs of frivolous proxy contests, and was thereby not based on an inequitable purpose. An otherwise facially valid bylaw is enforceable as long as the circumstances and manner under which it was invoked were not the product of inequitable purpose. ATP Tour, Inc., 91 A.3d at 558.

Primarily, the board of directors of a corporation has a fiduciary duty to protect and enhance the interests of the corporation. Smith, 488 A.2d at 872 (rev'd on other grounds) (ruling

the board of directors has a duty of loyalty to the shareholders). The presumption of enforceability of a board's action remains unless a dissident party can establish sufficient evidence that the board of directors acted for an inequitable purpose. Schnell v. Chris-Craft Industries, Inc., 285 A.2d 437, 439 (Del. 1971); Blasius Ind., Inc. v. Atlas Corp., 564 A.2d 651, 660 (Del. Ch. 1988) (rev'd on other grounds). Mere allegations, without concrete facts establishing a breach of fiduciary duties, are not sufficient to demonstrate an inequitable purpose. City of Providence, 99 A.3d at 237. Enforceability of the board's action is determined on a case by case basis. Accipiter Life Sciences Fund, L.P. v. Helfer (Helfer), 905 A.2d 115, 125 (Del. Ch. 2006).

A board's ability to act without violating the law is not the focal point of an enforceability inquiry. Schnell, 285 A.2d at 439. Inequitable action is not "permissible simply because it is legally possible." Id. Rather, enforceability of a board's action is determined by the "manner in which it was adopted and the circumstances under which it was invoked." See ATP Tour, Inc., 91 A.3d at 558. Actions of a Board, like the adoption of bylaws, are enforceable so long as they do not infringe on a shareholder's equitable rights. Stroud v. Grace, 606 A.2d 75, 96 (Del. 1992); Chevron, 73 A.3d at 949 (asserting a unilaterally adopted forum-selection bylaw was enforceable because it did not infringe on shareholder's right to bring a derivate suit). Similar to the fee-shifting bylaws, the intent to deter litigation is not automatically an improper purpose because "by nature fee-shifting bylaws are

deterrents of litigation." ATP Tour, Inc., 91 A.3d at 560. In addition, actions of a board are enforceable when they are not attempts by the board to retain directorial control. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1985)(rev'd on other grounds); Frantz Mfg Co., 501 A.2d at 408 (Del. Ch. 1985).

The chancery court's adoption of the Schnell doctrine was improper as far exceeding the scope of all previous applications of the standard in Delaware. The Schnell doctrine is only applied when a dissident party is able to provide concrete facts that demonstrate an inequitable purpose. E.g., id.; Dolgoff v. Projectavision, Inc., No. CIV.A. 14805, 1996 WL 91945, at *2 (Del. Ch. 1996); see also Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990) (explaining a board unintentionally hindering shareholders' right to nominate or vote for board members was not sufficient to support a finding of an inequitable purpose). A majority shareholder does not act with an inequitable purpose when he places restrictions on the board to avoid shareholder disenfranchisement. Frantz Mfg. Co., 501 A.2d. at 407-08. In Stahl, the board never set a date for the annual shareholders meeting because the corporation was on the verge of a hostile takeover, and the board argued it needed more time to respond to the minority shareholder's tender offer. 579 A.2d at 119-20. Simply moving or canceling the annual shareholder's meeting is not in itself an inequitable activity. Id. at 1123. Schnell is only applied when the actions of the board of directors distorts shareholder rights as to cause "grave incursion into the fabric of the corporate law." Helfer, 905 A.2d at 127; see also Mary Siegel, The Illusion of Enhanced Review

of Board Actions, 15 U. PA. J. BUS. L. 599, 644 (2013) (asserting courts have only applied Schnell thirteen times since its creation in 1971).

Conversely, courts will enjoin actions of board members who act with the primary purpose of interfering or proscribing a shareholder's right to vote or to engage in a proxy contest. Schnell, 285 A.2d at 439. The application of the Schnell doctrine has left some directors unsure of whether they are acting equitably because it allows courts to retrospectively determine what is fair. See Leo E. Strine, Jr., If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft, 60 BUS. LAW. 877, 882 (2005). Consequently, this Court has ruled that Schnell must be discretionarily implemented despite attempts by dissident parties to expand the doctrine to various areas of corporate law. See e.g., Ala. By-Products Corp. v. Neal, 588 A.2d 255, 258 n.1 (Del. 1991) (stating courts must exercise "caution and restraint" when using equitable principles to overturn Delaware's established business judgment rule); STAAR Surgical Co v. Waggoner, 588 A.2d 1130, 1137 n.2 (Del. 1991).

In determining enforceability of a board's action, Delaware courts have applied the Schnell doctrine in two primary situations. Stahl, 579 A.2d at 1123. The first situation triggering the Schnell doctrine is when a board has passed an advance-notice bylaw that prevents a shareholder from starting a proxy contest. Lerman v. Diagnostic Data, Inc., 421 A.2d 906, 914 (Del. Ch. 1980)(requiring proxy candidates to provide 70 days advance notice was an inequitable

purpose because the election date was 63 days away, making it impossible to comply with the bylaw); see also Hubbard v. Hollywood Park Realty Enter. Inc., No. CIV. A. 11779, 1991 WL 3151 (Del. Ch. 1991). The Schnell doctrine is also applied is when a board has altered the corporation's bylaws to delay or accelerate an election date. E.g., Schnell, 285 A.2d at 438-40(holding that a board acted with an inequitable purpose when it expedited the election date to prevent a proxy contest from occurring, creating an unopposed election); Aprahamian v. HBO & Co., 531 A.2d 1204, 1208-09 (Del. Ch. 1987). These applications of the Schnell doctrine are often under "extraordinary facts" where the board purposely took action—such as altering a bylaw—to prevent a shareholder from winning a proxy contest. Helfer, 905 A.2d at 126; see also Stahl, 579 A.2d at 921; Portney v. Cryo-Cell Intern., Inc., 940 A.2d 43, 46-68 (Del. Ch. 2008).

Here, the Schnell doctrine does not apply because the Board's actions of implementing the Fee-Shifting Bylaw cannot be deemed inequitable when reviewed under the scope of other board's actions that have triggered Schnell.

The Fee-Shifting Bylaw does not interfere with or disenfranchise Alpha's right to engage or vote in a proxy contest. Unlike the advance notice bylaw in Lerman the Fee-Shifting Bylaw was not created to preclude Alpha's nominees from positions on Talbot's board. 421 A.2d at 914. Instead, the Board implemented the Proxy Fee-Shifting Bylaw mitigate the exorbitant costs that accompany frivolous proxy contests

and protect against detrimental corporate insurgents. Further, this Court has held that, the intent to deter litigation is not in itself an improper purpose. ATP Tour, Inc., 91 A.3d at 560.

Even with the implementation of the Fee-Shifting Bylaw, Alpha still has the right and ability as a shareholder to produce its own proxies and have its candidate's campaign to the extent it chooses. This is distinguishable from most Schnell decisions, which typically involve board members taking action to frustrate or thwart shareholders from voting and engaging in proxy contests. Schnell, 285 A.2d at 438-40; Lerman, 421 A.2d at 914; see also Blasius Ind., Inc., 564 A.2d 651.

Similarly, the Fee-Shifting Bylaw will not be triggered if at least half of Alpha's nominees are elected to the board, and Alpha will be unaffected. Mem. Op. at 7. This supports the Board's objective of protecting Talbot and its shareholders from only ill-advised, unsuccessful proxy contests. Analogously, despite Alpha's net worth being above $1 billion, Alpha has indicated that it will abandon its proxy campaign if the Bylaw is found enforceable. Id. at 2, 12. The Talbot proxy contest is estimated to reach expenses in excess of $12 million. Id. at 8. While this is only a small percentage of Alpha's total investment in Talbot, this is an unbelievable expense for the Talbot Corporation. The Talbot board was purposeful and deliberate in electing to protect the corporation from such a blow. Furthermore, the Board declined to waive the potential effects of the Bylaw against

Alpha solely to ensure that only a genuine and rational proxy contest take place. Id. at 9.

The Board's implementation of the fee-shifting bylaw was not done for an improper purpose. The Court of Chancery improperly structured its opinion based on the Schnell doctrine. The court solely considered out of context statements of four of the nine Talbot directors (most notably Director Marshall Cannon stating that the Bylaw "might get Alpha to think twice.") to demonstrate the Board acted with an inequitable purpose. Id. at 14. The statements taken from a selected board member's deposition do not effectively portray the entire Board's mindset. The board implemented the fee-shifting bylaw not to thwart Alpha's proxy contest but protect the Corporation from losing a projected $12 million in defending against frivolous proxy context. Id. at 6, 8. Additionally, the decision to enact the Fee-Shifting Bylaw was made after internal counsel Stone and outside counsel Ellsworth presented to the Board comprehensive information regarding the enormous costs of proxy contests. Id. at 6. Lead independent director, Francois Payard, expressed his support of the bylaw for this sole purpose. Id. at 9. While several directors' statements were taken out of context by the Court of Chancery, the decision to enact the Fee-Shifting Bylaw remains primarily a business decision to save the Corporation from unnecessary expenditures.

If the Court of Chancery's decision is affirmed, this Court will have ruled on the most expansive application of the Schnell doctrine that the Supreme Court has reviewed since it was created 40 years ago.

This Court has only applied Schnell in instances with extraordinary circumstances where boards of directors (or majority shareholders) have either amended bylaws or have taken some action to jeopardize the shareholder's right to engaging in voting of proxy contests. In this case, Alpha has not lost any rights as a shareholder. Additionally, there is not sufficient to show the Board acted with an improper purpose.

Affirming the lower court's decision will allow courts to use the Schnell doctrine where shareholder rights have not been violated, ignoring this Court's warning of caution when applying equitable principles. The Board has a fiduciary duty to protect the corporation, and the business judgment rule allows directors to make decisions to achieve that end. Approving the actions below will erode that principle because directors will be unaware of what is inequitable and what is not.

In conclusion, the Board's primary purpose of implementing the Fee-Shifting Bylaw was not to disenfranchise Alpha but to minimize the costs of frivolous proxy contests, and was thereby not based on an inequitable purpose.

Conclusion

For these reasons, the Appellee's challenge to the facial validity of the new bylaw holds no merit. Appellee's request for a permanent injunction should be denied.