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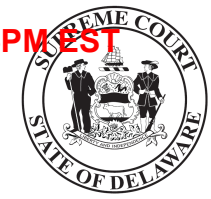

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ATP TOUR, INC., ETIENNE DE VILLIERS, CHARLES PASARELL, GRAHAM PEARCE, JACCO ELTINGH, PERRY ROGERS, and IGGY JOVANOVIC,	)	No. 534, 2013
Appellants	)	Certification of Questions of Law from the United States District Court for the District of Delaware, C.A. No. 07-178 (GMS)
v.	)	
DEUTSCHER TENNIS BUND (GERMAN TENNIS FEDERATION), ROTHENBAUM SPORT GMBH, and QATAR TENNIS FEDERATION,	)	
Appellees.	)	

RESPONSE BRIEF OF APPELLEES

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December 9, 2013

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NATURE OF PROCEEDINGS

On October 17, 2008 ATP filed its Rule 54(d) Motion for Attorneys' Fees seeking $17,720,124.11 in fees, costs and expenses. A30, 128. This figure reflects the alleged fees, costs and expenses incurred not just by ATP, but also by the Director Defendants. *Id*. at 92. This motion was supplemented on November 7, 2008 and the Defendants now collectively seek $17,865,504.51 in fees, costs and expenses. *Id*. The October 17, 2008 Motion was the first filing in which ATP sought – or indicated that it might seek – fees. *Id*.

The District Court initially denied ATP's motion holding, *inter alia*, that (i) ATP could not cite any case for the proposition that corporate bylaws adopted after a plaintiff became a member of a corporation could form the basis of fee shifting from that plaintiff to the defendant, especially in an antitrust setting (*id*. at 43); (ii) fee shifting in this matter would be "contrary both to longstanding Third Circuit precedent and to the policies underlying federal antitrust laws" (*id*.); and (iii) regardless, ATP cannot meet its "heavy burden" sufficient to overcome the presumption of awarding attorneys' fees (*id*. at 45).

The District Court further noted "the timing of the adoption of Article 23 gives the court further reason for pause. *Id*. at 45 n.4. Article 23 appears to have been first proposed at an August 2006 meeting of the ATP Tour Board of Directors, and was not formally adopted until late October of 2006, less than five

months before the complaint in this case was filed." *Id*. Further, "[s]ince the evidence at trial indicated that the changes to the ATP Tour that led to this suit were being discussed throughout the summer and fall of 2006, the court cannot ignore the possibility that Article 23 was adopted specifically to deter ATP members from challenging those changes." *Id*.

The District Court made additional findings of fact that are relevant to the Questions presented including that there was no issue that Plaintiffs' action was filed in good faith and was not frivolous: The District Court noted the fee claim was not even at issue in the suit, and was first raised by ATP after judgment. *See id*. at 42 (ATP "cites no case in which a court held that a board-adopted bylaw can form the basis for the recovery of attorney's fees from members who sue the corporation, much less in actions where the bylaws are not directly at issue in the dispute"); *Id*. at 43 n.3 (distinguishing the "only two cases" ATP cited for its claim in part because the fee-shifting provisions there were "part of the contract *directly at issue* in an action for breach of contract") (original emphasis)).

Finally, correctly and critically, the District Court held "[e]ven if the court were not to deny ATP's motion outright as it does today, that possibility and a number of other material factual issues would need to be resolved before the court could determine whether the bylaw provides a 'contractual' basis for awarding attorneys' fees to ATP. *See* Fed. R. Civ. P. 54(d)(2)(iv)." *Id*. at 45 n.4.

Additionally, "even if ATP could establish that the bylaw established such a 'contractual' basis for the fees, the court would require additional submissions from the parties before it could fashion a reasonable award." *Id*.

The Third Circuit determined that the District Court's decision that fee shifting under Delaware state law would violate the policies underlying federal antitrust laws raised constitutional preemption issues. A54. Rather than address these issues, pursuant to established federal law, the Third Circuit held: "[b]ecause a determination that Article 23.3 is invalid under Delaware law would allow us (and the District Court) to avoid the constitutional question of preemption, it is an independent state law ground. *Id*. Consequently, the by-law validity issue needs to be addressed, and a finding of validity must be made, before the constitutional issue of preemption can be considered." *Id*. at 53-54. The Third Circuit remanded this case for resolution of those state court matters. *Id*. at 55.

In doing so, the Third Circuit stated: "as the District Court points out, a 'number of other material factual issues would need to be resolved before' a determination can be made on the validity of Article 23.3 under Delaware law…. As an appellate court, we are not in a position to make factual findings and thus do not decide this issue." *Id*. at 54 (citing A45 n.4). The Third Circuit further stated "[w]e note, though, that (like the District Court) we are aware of no case in which a Delaware court has addressed the legal validity of a by-law – adopted as an

internal dispute was brewing – that requires an organization's member to pay potentially large fees to the organization if the member files suit against the organization and loses." *Id*.

Finally, the Third Circuit made two additional and relevant points. First, "[i]t is interesting to note that the by-law provision here imposes fees on a plaintiff who "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought. This is not your average fee-shifting provision. Its language seems to suggest that a plaintiff would have to pay the defendant's fees even if the plaintiff receives a favorable settlement, because the plaintiff in such a case failed to 'obtain a *judgment on the merits*.'" *Id*. at 54-55 n.4 (Emphasis added by Third Circuit). Second, "[w]e presume that if Delaware treats corporate by-laws as contracts, as ATP suggests, then the same factors that lead courts not to enforce contracts – *e.g.*, unconscionability or public policy considerations – could apply to preclude enforcement of a by-law." *Id.* (citing *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Ins. Trust*, 28 A.3d 436, 441 (Del. 2011) ("Under Delaware common law, contracts that offend public policy or harm the public are deemed void, as opposed to voidable.") (emphasis in original); *Tulowitzki v. Atl. Richfield Co.*, 396 A.2d 956, 960 (Del. 1978) (analyzing franchise agreement for unconscionability)).

SUMMARY OF ARGUMENT

First, ATP's Board lacks the authority to adopt a bylaw that (i) applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member, and (ii) pursuant to which the claimant is obligated to pay for all fees, costs, and expenses of every kind and description of the party against which the claim is made in the event that the claimant does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought. Such a Bylaw is not procedural or process-oriented in nature. Rather, it governs whether a member may file suit and the kinds of remedies available when litigation occurs and it pertains to matters unrelated to "internal affairs" or those cases central to the relationship between those who manage the corporation and the corporation's members. As such, Bylaw 23 is beyond the ATP Board's authority and is invalid as a matter of law. Accordingly, the answer to the first certified question is "no."

Second, if the Bylaw was enforceable, it is only enforceable to the same extent as other contractual clauses. Pursuant to Delaware law, therefore, the Bylaw is only enforceable to the extent it does not violate the Federations' legal *or* equitable rights, *or* violate public policy *or* create an unconscionable circumstance. Here, the events underlying the case show that enforcement of the Bylaw would

violate public policy, be unconscionable and be inequitable. Accordingly, the answer to certified question number 2 is "no."

Third, ATP's improper motive renders the Bylaw unenforceable. Director action must be taken for a proper purpose. Question 3 assumes – and the District Court found – ATP had an improper purpose: to discourage affirmative claims and challenges brought under substantive antitrust law. Accordingly, certified question 3 assumes ATP was improperly motivated, and thus the arrangement must be set aside in equity, irrespective of any technical compliance with the DGCL. The answer to certified question number 3 is "yes."

Fourth, ATP may not impose new fees totaling over $18 million on pre-existing members via a Bylaw. While Delaware corporations generally may confer upon the directors the power to adopt, amend or repeal bylaws, as set forth above, the bylaw must comport with the DGCL; it must not violate public policy or the law; it must have been passed for a valid purpose; and it must not create an inequity. The Bylaw does not comport with the DGCL, it violates public policy, it is unconscionable, it is inequitable and it was passed with an improper purpose. Finally, bylaws imposing dues, assessments or fees are and should require membership approval as a matter of law and public policy. Accordingly, the answer to certified question number 4 is "no."

STATEMENT OF ADDITIONAL FACTS

ATP's Statement of Facts does not set forth the undisputed facts regarding the creation and alleged passage of Bylaw 23.3(a) or the distribution of Bylaws and corporate governance information by ATP to its members and fails to address key procedural issues relating thereto.[1] These facts are undisputed and relevant given that the Federations bring an as applied, rather than a facial, challenge. Briefly stated:

Each summer, ATP sends its tournament members "a CD-Rom covering information that we know you will find useful" that includes ATP's current Bylaws and Articles of Incorporation. A89. The cover letter indicated that the CD-ROM was "updated … including comprehensive information about the ATP and should be a practical reference as it includes in-depth information on the ATP's organization, financial composition and historical data." *Id*. The Bylaws provided by ATP pursuant to this custom on May 26, 2006 did not contain any Bylaw Article 23, generally, Bylaw 23.3(a), specifically, or any other fee-shifting or attorney's fee provision. *Id*.

On August 26, 2006, ATP Board of Directors in a private and confidential meeting, via a 6 to 1 vote, approved a motion to amend the ATP Bylaws. *Id*.

[1] While Del.Sup.Ct.R. 41(c)(iv) provides "[t]he certification as filed shall constitute the record," this Court may consider additional allegations or facts from the pleadings "in order to provide better context." *Lincoln*, 28 A.3d at 437 n.2.

Subsequently, on October 22, 2006, the ATP Board approved the addition of and specific language of new Section 7.07 in the ATP Official Rulebook and the new Article 23 in the ATP Bylaws, which includes the fee shifting Bylaw at issue, Bylaw 23.3(a) (the "Bylaw"). *Id*. The Confidential Meeting Minutes were not provided to ATP membership, and it does not appear that any version of the amended ATP Bylaws was shared with the ATP's membership at that time. *Id*. at 89-90. Rather, on or about November 27, 2007, the ATP sent its membership a "Summary of Meetings of the ATP Board of Directors, November 12, 14, 15, 2006, Shanghai, China" which stated "[t]he Board confirmed the final language of new Article 23 of the ATP Bylaws, attached, regarding legal action among ATP and its members." *Id*. at 90. Article 23 was attached thereto. *Id*.

On June 1, 2007 ATP again provided "an updated CD-Rom including comprehensive information about the ATP and should be a practical reference as it includes in-depth information on the ATP's organization, financial composition and historical data." *Id*. The CD-Rom again included, *inter alia*, ATP Articles of Incorporation and Bylaws. *Id*. The Bylaws provided on June 1, 2007 by the ATP to its tournament members, including the Federations – six weeks after the filing of this litigation and three weeks after the filing of ATP's Answer – did not contain any Bylaw Article 23, generally; Bylaw 23.3(a), specifically; or any other fee-shifting or attorney's fee provision. *Id*. On June 26, 2008 – less than four weeks

prior to the trial of this matter – ATP again circulated a CD-Rom with its Articles of Incorporation and Bylaws. *Id*. This version contained Bylaw 23. *Id*.

On March 28, 2007, the German Tennis Federation filed its Complaint, and on May 4, 2007, the ATP filed its Answer. *Id*. The Complaint did not state any claim for breach of contract based on the Bylaws. *Id*. The Answer sought no affirmative relief and was completely silent as to any request for attorneys' fees in relation to Bylaw 23.3 or otherwise. *Id*. The ATP and Messrs. Etienne de Villiers and Charles Pasarell also filed an Answer to the Monte Carlo tournament's Complaint on May 4, 2007. *Id*. This Answer also sought no affirmative relief and was silent as to any request for attorneys' fees. *Id*.

ATP served their Rule 26(a)(1) Initial Disclosures on May 4, 2007 and Amended Rule 26(a)(1) Initial Disclosures on May 25, 2007. *Id*. at 99. These Initial Disclosures stated that ATP sought no affirmative relief and, again were silent as to any request for fees. *Id*. Defendants' final pretrial materials exchanged by the parties in May of 2007 and filed with the Court in June of 2007 similarly made no indication that Defendants would seek any affirmative relief or would seek or request an award of attorneys' fees. *Id*.

The Federations filed an Amended Complaint on November 7, 2007. *Id*. The Amended Complaint also did not substantively invoke the Bylaws or assert breach of contract claims based thereon. *Id*. As such, neither Federation ever

alleged any breach of contract claim based on any alleged breach of the ATP's Bylaws. *Id*.

On December 6, 2007 the ATP and each individual Director defendant – Mr. de Villiers, Mr. Pasarell, Mr. Iggy Jovanovic, Mr. Graham Pearce, Mr. Jacco Eltingh and Mr. Perry Rogers – filed a separate, independent Answer to the Amended Complaint. Each Answer reserved "the right to assert additional defenses that [the defendant] learns of through discovery or other investigation," but not one Answer sought any affirmative relief. *Id*. Not one sought or requested an award of attorneys' fees. Not one so much as mentioned Bylaw 23.3(a). *Id*.

From July 11, 2007 to January 12, 2008 over thirty fact depositions were taken in this matter. *Id*. Bylaw 23.3(a) was not discussed in a response to a single question asked in any one of these depositions. *Id*. No ATP Officer or Director testified that the ATP was seeking attorneys' fees, though this was not a focus of discovery as it had not been put at issue by any of the defendants' pleadings. *Id*.

Since that time, there has been no resolution or discovery into the "other material factual issues [that] would need to be resolved" – as identified by the Third Circuit – to determine whether Bylaw 23.3 is enforceable as a matter of Delaware contract law or equity. Rather, on August 31, 2012 ATP formally filed a Petition for Certification of Questions to Delaware Supreme Court, which is now before this Court. A37, 67.

ARGUMENT

I. The First Certified Question Should be Answered "No."

A. The First Certified Question.

May the Board of a Delaware non-stock corporation lawfully adopt a bylaw (i) that applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"?

B. Standard and Scope of Review.

Certified questions of law are reviewed *de novo*. *Lincoln Nat'l Life Ins. Co. v. Joseph Schlanger 2006 Insurance Trust*, 28 A.3d 436, 438 (Del. 2011). While Del. Sup. Ct. R. 41(c)(iv) provides "[t]he certification as filed shall constitute the record," this Court may consider additional allegations or facts from the pleadings "in order to provide better context." *Id.* at 437 n.2.

C. Merits of the Argument.

1. The Bylaw Exceeds the Scope of 8 *Del. C.* §109(b) Because It Affects Substantive Rather than Procedural or Corporate Legal Rights.

ATP's Board lacks the authority to adopt a bylaw that (i) applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member, and (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant " does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought." A40. Such a Bylaw is not procedural or process-oriented in nature. Rather, it governs whether a member may file suit and the kinds of remedies available when litigation occurs. As such, Bylaw 23 is beyond the ATP Board's authority and is invalid as a matter of law.

8 *Del. C.* §109(b) provides that the bylaws of a corporation:

> 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.

Pursuant thereto, Delaware courts have held "[t]he bylaws of Delaware corporations have a 'procedural, process-oriented nature.'" *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 951 (Del. Ch. 2013)

(hereinafter *"Boilermakers*") (quoting *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 236-37 (Del. 2008)).[2] Delaware courts, therefore, "have said that bylaws typically do not contain substantive mandates, but direct how the corporation, the board, and its stockholders may take certain actions." *Id*. Accordingly, 8 *Del. C.* §109(b) permits a "corporation to set 'self-imposed rules and regulations [that are] deemed expedient for its convenient functioning.'" *Id*. (citing *Gow v. Consol Coppermines Corp.*, 165 A. 136, 140 (*Del. Ch.* 1933)).

The *Boilermakers* court determined that forum selection clauses are such a permissible process-oriented bylaw "because they regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation." *Id*. at 952. In contrast, the Bylaw affects whether a member may file suit and the kind of remedy the stockholder may obtain.

Attorneys' fees awarded pursuant to contract are not procedural – they are special damages that must be pled both in Delaware and in federal courts. *See, e.g.*, *Kramer v. Am. Pac. Corp.*, No. C-08-167-WTQ, 1998 WL 442766 at *1-2 (Del. Super. 1998). As stated by the *Kramer* court, "[a] claim for attorneys' fees should be clearly stated in the pleadings as special damages. '[W]hen items of

[2] The Federations take no position on whether the *Boilermakers* decision is ultimately correct. The key point, however, is that even under the *Boilmermakers*' analysis, the Bylaw is invalid.

special damage are claimed, they shall be specifically stated.' Super. Ct. Civ. R. 9(g). I adhere to that view as a statement of Delaware law." *Id*. at 1.

While claims for attorneys' fees can be made under some circumstances, for example, pursuant to Fed. R. Civ. P. 54(d)(2)(A), "[t]his motion requirement 'does not, however, apply to fees recoverable as an element of damages, *as when sought under the terms of a contract*." *Private One of New York, LLC v. JMRL Sales & Services, Inc.*, 471 F.Supp.2d 216, 224 (E.D.N.Y. 2007) (citing Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 54(d)(2) (emphasis added). "Such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury." Advisory Committee Notes to 1993 Amendments to Fed. R. Civ. P. 54(d)(2).

Rule 9(g)'s pleading requirements are grounded in elemental principles of notice and fairness. As explained in *Kramer*, 1998 WL 442766 at *1-2:

> On the underlying issue, definitive notice pleading versus potential post-trial ambush, the best policy is clear. . . . [T]he Supreme Court of Florida stated the policy succinctly and well – the better view is "a claim for attorney's fees, whether based on statute or contract, must be pled."
>
> The fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. . . . Raising entitlement to attorney's fees only after judgment fails to serve either of these objectives. The existence or non-existence of a motion for attorney's fees may play an important role in decisions affecting the case. For example, the potential that one may be required to pay the opposing party's attorney fees may often be determinative in a decision whether to

> pursue a claim, dismiss it, or settle. A party should not have to speculate throughout the entire course of the action about what claims ultimately may be alleged against him.

1998 WL 442766 at *3 (quoting *Stockman v. Downs*, 573 So. 2d 835, 837-38 (Fla. 1991) (omitting citations)); *see Marshall v. First Nat'l Bank*, 622 S.W.2d 558, 560-61 (Tenn. Ct. App. 1981) (enforcing state analogue of Rule 9(g) (citing *Maidmore Realty Co., Inc. v. Maidmore Realty Co., Inc.*, 474 F.2d 840, 843 (3d Cir. 1973)).

ATP never pled or requested attorneys' fees until after the trial of this matter. ATP's failure to plead a claim for attorneys' fees "constitutes a waiver of the claim." *Kramer*, 1998 WL 442766 at *3 (internal quotations omitted); *accord United Indus. v. Simon-Hartley, Ltd*., 91 F.3d 762, 764 (5th Cir. 1996) ("Our sister circuits routinely classify attorney's fees as special damages that must be specifically pleaded" (citing *Maidmore*)).

Regardless, for purposes of the question presented, the Bylaw's fee provisions do not limit themselves to the "business of the corporation" or its "internal affairs." Rather, the Bylaw purports to create substantive rights and responsibilities relating to special damages that may be awarded against any member that brings a claim against the ATP or any other member and "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought."

The "real human events" of this matter highlight this reality. Forum selection clauses, such as those at issue in the *Boilermakers* litigations, are governed "pursuant to the internal affairs doctrine, governed by the laws of the chartering state" and as such "cannot at all influence the substantive law governing the resolution of the underlying disputes." *Boilermakers*, 73 A.3d at 960 n.129 (citation omitted). The Federations' antitrust case was not governed by the law of Delaware and could be, as set forth above, influenced directly and indirectly by the application of the Bylaw. Accordingly, the Bylaw exceeds the powers conveyed by 8 *Del. C.* §109(b) and it is invalid as a matter of Delaware law.

2. The Bylaw Exceeds 8 *Del. C.* §109(b) Because it Governs Litigation Well Beyond that Relating to the "Internal Affairs" of the Corporation.

Further, the Bylaw is unenforceable because it is not limited to "internal affairs" cases or those cases "central to the relationship between those who manage the corporation and the corporation's stockholders." The Bylaw's express language makes this abundantly clear: it applies even to claims that "a member brings a claim against another member." Such claims are not "internal" by definition.

Further, internal claims are those relating to "matters peculiar to the relationship among or between the corporation and its current officers, directors and shareholders." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). Accordingly,

internal claims are claims relating to the business of the corporation, the conduct of its affairs and the rights and powers of its shareholders under Delaware law. *Boilermakers*, 73 A.3d at 939.

Conversely, antitrust claims do not relate to matters peculiar to the relationship among or between the corporation and its current officers, directors and shareholders. *See, e.g.*, *Id*. at 960 n.129 (doctrine does not apply to securities fraud claims – though they relate to the management of a corporation and are brought on behalf of its shareholders) (citation omitted). By definition, Sherman Act, section 1 claims cannot be brought against a single economic actor and without more they cannot relate to the corporate governance of a single corporation. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). As such, by definition, the Federations' claims were not, did not and could not relate to the "internal affairs" of a single corporation, despite ATP's imputations to the contrary.[3]

None of the ATP's other arguments or citations can or do affect this analysis. The fact that fee-shifting provisions may be, generally, enforceable in other constructs does alter the scope of 8 *Del. C.* §109(b) which, by its express terms, conveys narrower express powers than those conveyed by the right to

[3] To the extent other claims existed, as held by Judge Sleet, "[t]he state law claims all related to the anticompetitive actions alleged in the four Sherman Act claims and were both incidental to and inextricably factually intertwined with the Sherman Act claims on which the parties exerted the vast majority of their energy." A46 n5.

contract. And reference to New York condominium bylaws, which are not the bylaws of a corporation and which are not governed by 8 *Del. C.* §109(b) are inapposite.

Finally, *Sternberg v. Nanticoke Memorial Hospital, Inc.*, 62 A.3d 1212 (Del. 2013) is inapplicable. *Sternberg* involved a substantially different fee-shifting provision of the Nanticoke's Medical Staff Bylaws Credentials Policy, which was not a corporate bylaw but rather a "Credentials Policy." *Id*. at 1214. The "Credentials Policy," of course, was not governed by 8 *Del. C.* §109(b) and the *Sternberg* opinion does not deal with the issues presented by Question 1. This Court did note, however, that fee shifting could be precluded by "national or state public policy," but held that Sternberg did not show that any such public policy was applicable in his circumstances under the Delaware Peer Review Act or 42 U.S.C. §11101. *Id*. Ironically, such a public policy issue exists here, was raised by the Third Circuit, is discussed *infra*, at pg. 21 to 23, but was not addressed by ATP.

Accordingly, because the Bylaw affects substantive, rather than just procedural issues and because it applies to extra-corporate issues, including issues between members that do not involve the corporation and federal antitrust claims, the Bylaw exceeds the authority conveyed by 8 *Del. C.* §109(b). The answer to the First Certified Question, therefore, is No.

II. The Second Certified Question Should be Answered "No."

A. The Second Certified Question.

May such a bylaw be lawfully enforced against a member that obtains no relief at all on its claims against the corporation, even if the bylaw might be unenforceable in a different situation where the member obtains some relief?

B. Standard and Scope of Review.

See Section I.B above.

C. Merits of the Argument.

1. The Bylaw May Not Be Enforced Under the Actual Circumstances of This Case.

If the Bylaw was enforceable, it is still enforceable only "to the same extent as other contractual … clauses." *Boilermakers*, 73 A.3d at 940. The Bylaw, even if valid, is only enforceable to the extent it does not violate the Federations' legal *or* equitable rights *Id*. (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971) and *Moran v. Household Int'l. Inc.*, 500 A.2d 1346, 1357 (Del. 1985)); *or* violate public policy (*Lincoln*, 28 A.3d at 441); *or* create an unconscionable circumstance (*Tulowitzki*, 396 A.2d at 960).

In relation thereto, ATP makes the same mistake made by the *Boilermakers* plaintiff, but in the inverse. The *Boilermakers* plaintiff attempted to turn a facial challenge into an as applied challenge by raising issues regarding "how the bylaws might be applied in any future, real-world situation." *Boilermakers*, 73 A.3d at

948. Here, ATP impermissibly asks the Court to determine its Bylaw is enforceable, as applied, without reference to this case's "real-world events."

As to those "real-world events," the Third Circuit raised at least two significant concerns: (1) the Bylaw is unconscionable; and (2) the Bylaw violates public policy. Both of these concerns are valid and dispositive if resolved in the Federations' favor, yet ATP addresses neither question. Rather, ATP seeks to avoid these issues via the manner in which it argues its certified questions.

As to the former, the Bylaw is void because it is unconscionable. This Court has held that to find a contract unfair or unconscionable, "there must be an absence of meaningful choice and contract terms unreasonably favorable to one of the parties." *Tulowitzki*, 396 A.2d at 960. "It is generally held that the unconscionability test involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other." *Id.* (citation and quotations omitted). A contract clause is unconscionable if its terms are "so one-sided as to be oppressive." *Id.* (citation and quotations omitted).

Here, the Bylaw is unconscionable because (i) it was promulgated in confidence by the ATP Board and not timely or accurately disclosed to its members, and (ii) given the timing and circumstances of its adoption, the Bylaw unreasonably favors ATP because it was meant specifically to deter a legal challenge by its members to implementation of the restructuring Plan. Further, the

Bylaw is unconscionable or otherwise violates public policy because, as the Third Circuit properly noted, the fee shifting provision (i) discourages settlement by linking success to a judgment on the merits only, and (ii) sets an ambiguous and otherwise unreasonable standard by imposing fees on a plaintiff that fails to "substantially achieve, in substance and amount, the full remedy sought." Accordingly, the Bylaw is unconscionable and should not be enforced.

As to the latter, the Bylaw violates public policy. Delaware public policy favors competition. 6 *Del. C.* §2102, *et seq.* Pursuant to 6 *Del. C.* §2102, any contract, combinations and conspiracies in restraint of trade or commerce in Delaware are illegal. This language mirrors, and the public policy furthered thereby mirrors those of the Sherman Act Section 1, which prohibits any contract, combination or conspiracy in restraint of trade. 15 U.S.C. §1. Both of these laws work conjunctively to effectuate Delaware's – and the United States' – public policies of encouraging free and open markets.

The Sherman Act's treble damages and attorneys' fee provisions are a critical tool in effectuating these public policies: "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635, 105 S.Ct. 3346, 3358, 87 L.Ed.2d 444 (1985). Not surprisingly, therefore, no court addressing the issue has permitted fee

shifting to an antitrust plaintiff on, *inter alia*, public policy grounds. As stated by one court:

> [I]n the absence of specific legislative authorization attorneys' fees may not be awarded to defendants in private anti-trust litigation. Our conclusion is based on policy considerations reflected in the Clayton Act. It is well known that a primary objective of the private treble damage suit is to provide a means for enforcement of the anti-trust laws in addition to Government prosecutions. The incentive which the prospect of treble damages provides for instituting private antitrust actions would be dampened by the threat of assessment of defendant's attorneys' fees and other costs as a penalty for failure. We thus agree with the second ground for the court's decision in *Gillam* [*v. A. Shyman, Inc.*]: "* * * free access to the courts [in antitrust cases] must neither be denied nor penalized." 205 F. Supp. 534, 536 [(D. Alaska 1962)].

Byram Concretanks, Inc. v. Warren Concrete Prods. Co., 374 F.2d 649, 651 (3d Cir. 1967).

Other courts have followed *Byram*, quoting its holding and concluding:

> This Court is unaware of any case in which a successful defendant has been awarded attorneys' fees in a private antitrust action. In the absence of any case authority or express statutory authorization, and in view of the strong policy considerations behind the private treble damage action, the Court is of the opinion that attorneys' fees should not be awarded to prevailing defendants.

Juneau Square Corp. v. First Wis. Nat'l Bank, 435 F. Supp. 1307, 1327 (E.D. Wis. 1977). The Ninth Circuit has also approved *Byram*. *See Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 959-60 (9th Cir. 2007) (given vital policies of Clayton Act's "asymmetrical" fee-shifting provisions, only a "party that has violated antitrust laws" may be ordered "to pay attorney's fees" (citing *Byram*)).

Against this background, the District Court found the Bylaw violates the policy effectuated by the Sherman Act: "[a]llowing corporate antitrust defendants to adopt bylaws that would impose attorney's fees on members who unsuccessfully – but without bad faith – file an antitrust suit would likely have a chilling effect on the filing of meritorious actions." A45. As such, "[p]ermitting corporations accused of anticompetitive conduct to enforce bylaws with such potent deterrent potential would be antithetical to the purposes of the Sherman Act." *Id*.

Similarly, it is antithetical to Delaware's public policy in favor of competition. As such, the Bylaw is – regardless of its "validity" – unenforceable under the "real human events underlying the case" because it is violates "national and state" public policy. *Sternberg*, 62 A.3d at 1214.

Finally, even if the this Court were to find that the Bylaw is generally enforceable in response to the First Certified Question, ATP would still not be entitled to attorneys' fees for a number of dispositive reasons demonstrated by the "real world" circumstances of this litigation.

First, ATP cannot enforce Bylaw 23.3(a) because it presented Bylaws to Plaintiffs that did not contain the attorneys' fee provision subsequent to the alleged passage of Bylaw 23.3(a). Accordingly, the Federations had an absolute right to treat the bylaws handed to them as all the bylaws of the ATP.

While it is generally presumed that the members of a corporation have notice of the corporation's bylaws, "[a] member may rebut the presumption by proof that the corporation itself gave to the members bylaws other than those in force." 8 Fletcher Cyc. Corp. §4196. A member, therefore, has "the right to treat the bylaws handed to him on his becoming a member of the company as all the bylaws such company had, without further notice to the former …" *McKenney v. Diamond State Loan Ass'n*, 18 A. 905-906 (Del. Sup. 1889). In other words, where a corporation gives a copy of its bylaws to its members and represents that those are the corporations' actual and complete bylaws, the member has an affirmative right to rely upon those bylaws and the corporation may not, without further notice, enforce the bylaws not provided against that member. *Id*.

It is undisputed that both before and after the filing of the Federations' Complaints, ATP provided "comprehensive" copies of its Bylaws to the Federations, which did not include Bylaw 23.3(a) or any other fee-shifting provisions. Under long-standing Delaware law, the Federations have the affirmative right to treat these bylaws as being those of the ATP in effect and, pursuant to long-standing Delaware law, ATP may not enforce contrary bylaws, including Bylaw 23.3(a) against the Federations.

Second, ATP is estopped from enforcing Bylaw 23.3 in this matter under established Delaware corporate law. Even if one rejects *McKenney's* long-

standing holding and accepts, *arguendo*, that the Federations did not have an affirmative right to rely upon the June 1, 2007 bylaws provided by the ATP, the Defendants still, at best, provided confusing and inconsistent information regarding the ATP's Bylaws. The Federations relied upon this information and conduct and suffered a prejudicial change of position resulting therefrom. Accordingly, the Defendants are estopped from enforcing Bylaw 23.3(a) against the Federations.

An equitable estoppel arises "when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment." *Waggoner v. Laster*, 581 A.2d 1127, 1136 (Del. 1990) (quotations and citations omitted), *abrogated in part on other grounds by Shiftan v. Morgan,* 57 A.3d 928 (Del. Ch. 2012). The elements are as follows: the party claiming estoppel (i) lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) relied on the conduct of the party against whom estoppel is claimed; and (iii) suffered a prejudicial change of position therefrom. *Id*.

As to these elements, the provision to stockholders (or members) of confusing and inconsistent information regarding the existence and effect of a bylaw provision establishes a lack of knowledge by those shareholders (or members) under Delaware law as to the terms and effect of the bylaw at issue, reliance thereon and a prejudicial change of position relating thereto. *See Dousman v. Kobus*, 2002 WL 1335621, *5-6 (Del. Ch. June 6, 2002). In

Dousman, the shareholder-plaintiffs were current or former board members with access to and actual possession of the company's correct bylaws. The Court held, regardless, plaintiffs lacked the means to learn of the relevant bylaw because (a) they had not been given accurate information regarding the bylaw; and (b) the corporation's conduct had previously been inconsistent with the bylaw. *Id*. at *6.

Similarly here, the Federations were not provided accurate information. Further, the ATP's historic conduct (in not seeking attorneys' fees in other litigation and in only seeking to pass attorney fee provisions previously via the vote and participation of its members); conduct in this litigation (by not pleading or seeking costs or fees in any pleading); and ongoing business conduct (circulating "updated" and "comprehensive" bylaws not containing attorneys' fee provisions) is inconsistent with the Bylaw at issue. Because of the ATP's conduct, the Federations, therefore, lacked knowledge as to the truth of whether Bylaw 23.3(a) existed or otherwise was applicable as those terms are defined by Delaware law.

Further, the Federations relied upon the ATP's conduct. The Federations, reasonably and substantively conducted all discovery in this matter; drafted all their substantive pleadings; prepared their pretrial order and exhibits thereto, including witness lists, exhibits and jury instructions; and prepared for the trial of this matter in the belief that attorneys' fees were not at issue.

Finally, the Federations suffered a prejudicial change in position. By relying on the ATP's conduct, the Federations changed their litigation strategy and analysis to their detriment. Accordingly, the ATP, whether intentionally or otherwise, lead the Federations (and all its members) to believe that there was no Bylaw Article 23, as of June 1, 2007. The Federations relied upon this conduct, thereby altering their positions to their detriment. The ATP is, therefore, estopped from enforcing Bylaw 23.3(a) even if the ATP could, generally speaking, adopt such a bylaw, or enforce it against an unsuccessful litigant.

2. Alternatively, the Federations are Entitled to Conduct Discovery and Develop the Underlying Facts.

Alternatively, at a minimum, even if the Bylaw were enforceable, in the abstract, this matter should be remanded to the district court for a full factual determination of the "real world" situation. *CA,* 953 A.2d at 238 ("The factual context in which the Bylaw was challenged would inform our analysis ….''). ATP's attempted avoidance of these issues through the use of an impartial hypothetical is unjust and improper.

Ultimately, the facts of this case demonstrate that the Bylaw cannot be lawfully enforced. It is unconscionable. It violates public policy. And, its enforcement would be inequitable as set forth above. Accordingly, the answer to the Second Certified Question is No.

III. The Third Certified Question Should be Answered "Yes."

A. The Third Certified Question.

Is such a bylaw rendered unenforceable as a matter of law if one or more Board members subjectively intended the adoption of the bylaw to deter legal challenges by members to other potential corporate action then under consideration?

B. Standard and Scope of Review.

See Section I.B above.

C. Merits of the Argument.

ATP's improper motive renders the Bylaw unenforceable. Delaware law establishes a "generalized insistence that any director action be in fact taken for a proper purpose." *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 259 (Del. Ch. 2013) (citing *Schnell*, 285 A.2d at 439). The District Court found "[s]ince the evidence at trial indicated that the changes to the ATP Tour that led to this suit were being discussed throughout the summer and fall of 2006, the court cannot ignore the possibility that Article 23 was adopted specifically to deter ATP members from challenging those changes." A45 n.4. Further, the premise of Question 3 assumes ATP's board in whole or in part subjectively intended the Bylaw to discourage antitrust challenges to ATP's actions.

As such, ATP, for purposes of Question 3, had an improper purpose – to discourage affirmative claims and challenges brought under substantive antitrust

law. Such a purpose violates public policy and is beyond the scope of 8 *Del. C.* §109(b) as set forth above. Simply stated, since the Federations prove and, regardless, Question 3 assumes ATP "was improperly motivated, then the arrangement [must] be set aside in equity, irrespective of [any] technical compliance with the DGCL." *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 67 (Del. Ch. 2008) (citing *Schnell*, 285 A.2d at 439).

ATP's arguments to the contrary are not persuasive.

First, the business judgment rule is inapplicable. The rule "operates as *both* a procedural guide for litigants and a substantive rule of law." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (emphasis in original) (quotations and citation omitted). "The business judgment rule applies when a decision of the directors is questioned, and the analysis is primarily a process inquiry." *Underbrink v. Warrior Energy Servs. Corp.*, Civil Action No. 2982-VCP, 2008 WL 2262316, *10 (Del. Ch. May 30, 2008). The challenge raised by the Third Certified Question is not process oriented. Accordingly, the rule does not apply.

Regardless, even where the rule might apply, where a plaintiff comes forth with evidence sufficient to meet its burden that the challenged conduct was not otherwise the product of a valid exercise of business judgment, the rule is also inapplicable. *Cinerama*, 663 A.2d at 1162; *Underbrink*, 2008 WL 2262316 at *10.

Unlike the *Underbrink* plaintiffs, here the Federations have come forward with, and the Third Certified Question accepts as proven, evidence that the ATP Board had an improper subjective intent. As such, the business judgment rule does not apply and the Bylaw must be set aside in equity, irrespective of any technical compliance with the DGCL. *Portnoy*, 940 A.2d at 67 (citing *Schnell*, 285 A.2d at 439).

ATP has no evidence to support any contrary finding. The alleged "rational business purposes" claimed by ATP have no evidentiary or record basis whatsoever and are made without citation or support to the Certification Order, any federal ruling or any filing of the parties. Further, while a corporation may be able, in the abstract, to take actions to protect itself, it cannot seek to punish members or shareholders that look to challenge its conduct under federal statutes. The Bylaw is no more enforceable in this regard than would be a bylaw imposing million dollar fines on any shareholder who brought a colorable, good faith, but ultimately unsuccessful securities fraud claim though such a fine might "protect the corporation." Finally, and critically, the ATP's purported justifications are rebutted by the Question itself, which assumes – consistent with the District Court's and the Third Circuit's stated concerns – an improper motive.

Further, the *Schnell* analysis is applicable under these circumstances. As recognized by the *Boilermakers* Court, upon which ATP relies so heavily, the

Schnell analysis is applicable to as applied bylaw challenges. *Boilermakers*, 73 A.3d at 949. If a plaintiff can challenge the real-world enforcement of a forum selection bylaw in equity and in law, it can also challenge the real-world enforcement of a more egregious Bylaw in a real-world setting.

Ultimately, the Bylaw's purpose was to deter substantive challenges by members to other corporate action. Such a purpose is improper in this real-world situation. As such, the Bylaw is unenforceable. The answer to the Third Certified Question is Yes.

IV. The Fourth Certified Question Should be Answered "No."

A. The Fourth Certified Question.

Is such a bylaw enforceable against a member if it was adopted after the member had joined the corporation, but where the member had agreed to be bound by the corporation's rules "that may be adopted and/or amended from time to time" by the corporation's Board, and where the member was a member at the time that it commenced the lawsuit against the corporation?

B. Standard and Scope of Review.

See Section I.B above.

C. Merits of the Argument.

ATP may not impose new fees totaling over $18 million on pre-existing members via the Bylaw. While Delaware corporations generally may confer upon the directors the power to adopt, amend or repeal bylaws, as set forth above, the bylaw must comport with the DGCL; it must not violate public policy or the law; and it must have been passed for a valid purpose and it must not create an inequity. As set forth above, the Bylaw does not comport with the DGCL, it violates public policy, it is unconscionable, it is inequitable and it was passed with an improper purpose. For all of these reasons, the answer to the Fourth Certified Question is No pursuant to the real world situation at hand.

Further, bylaws imposing dues, assessments or fees are and should be treated differently. For example, section 6.13 of the ABA Model Nonprofit Corporation Act provides: "[A] member may become liable to the corporation for dues, assessments or fees; provided, however, that an article or bylaw provision or a resolution adopted by the board authorizing or imposing dues, assessments or fees does not, of itself, create liability." As the Official Comment explains:

> The crucial question is whether or not the member agreed or consented to the obligation or knowingly accepted something of value. A member is not obligated to the corporation in the absence of such agreement, consent, or knowing acceptance.
>
> Particularly difficult factual questions may be presented in regard to whether a member has agreed to or consented to dues, assessments and fees. Section 6.13 provides that an article, bylaw or corporate resolution authorizing dues, assessments or fees is not by itself, sufficient to impose liability. Some consent or acquiescence is necessary . . . .

Under this rule, a nonprofit corporation may not unilaterally impose new categories, types or magnitudes of fees on a member without the member's agreement, consent or knowing acceptance.

While Delaware statutory and case law is silent on this issue, its courts commonly look to Model Act guidance in such circumstances. *See, e.g.*, *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 393-94 (Del. Ch. 2008) (calling Model Business Corporation Act "the most authoritative source" on issue not addressed by Delaware authority). This Court should decide that a new provision

imposing attorneys' fees obligations is subject to such member consent requirements under Delaware law, particularly when the provision is injected in the midst of anticipated litigation by a member.

In relation thereto ATP has not met and cannot meet its burden of proving Plaintiffs' agreement, consent or knowing acceptance of Bylaw 23.3(a) or any fee shifting provision. It is, therefore, legally barred from recovery. Again, the answer to the Fourth Certified Question is No.

CONCLUSION

For the foregoing reasons and each of them, questions 1, 2 and 4 should be answered "no," and question 3 should be answered "yes."

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