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ARGUMENT

I. THE FIRST CERTIFIED QUESTION SHOULD BE ANSWERED “YES”

The first certified question asks whether Delaware law authorizes nonstock corporations to adopt fee-shifting bylaws like the one underlying ATP’s fee application in federal district court. The answer to that question (which was certified by the federal district court over the opposition of the appellee Federations) will enable the district court to comply with the Third Circuit’s mandate, which requires it to decide whether the bylaw affords a valid basis under Delaware law for a fee recovery before reaching the question whether, if Delaware law permits the application, federal law somehow forbids it.

ATP demonstrated in Point I of its brief that the answer to the first question should be “yes,” by citing and relying on statutory text, precedents applying that text, and the reasoning previously applied in those precedents. Notwithstanding that showing, the Federations’ answering brief cites virtually no pertinent law, ignores virtually all the authorities cited by ATP, and addresses the certified question only glancingly and with ipse dixit.

On the merits of the first certified question – whether nonstock corporations may adopt fee-shifting bylaws – the Federations say virtually nothing. They do not even attempt to argue that the text of 8 *Del. C.* §109(b) does not easily cover such bylaws. Nor do they cite any case remotely suggesting that such bylaws are

beyond its scope. Instead, starting from various phrases used to characterize the kinds of bylaws that Delaware corporate law generally authorizes, they conclusorily announce (Response 5) that fee shifting bylaws are impermissible because they are not “procedural or process-oriented in nature,” but rather “govern[] 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” *See also* Response 18 (“the Bylaw affects substantive, rather than just procedural issues and because it applies to extra-corporate issues, including issues between members”).

But that misstates the law and mis-describes Article 23.3. Contrary to the Federations’ ipse dixit, which is entirely unsupported by authority or analysis (and makes no sense), Article 23.3 does *not* say “whether a member may file suit,” and says nothing about “the kinds of remedies available when litigation occurs.” *See* Response 12. To the contrary, Article 23.3 leaves ATP and its members free to institute litigation against each other as regards ATP business. Further, Article 23.3 deprives the Federations of none of the state and federal law damage and injunctive remedies to which they would have been entitled had their claims been successful (including possible treble damages).

What Article 23.3 *does* do is to channel disagreement and internal dispute resolution into the board room, and deter all the enterprises’ participants – ATP

itself and its members alike – from instituting meritless litigation and from pressuring ATP’s members to take or rescind Board action by imposing on them the heavy defense costs caused by meritless litigation. Providing for the internalization of external costs is not “punishment,” as the Federations charge, but good sense and a path to reasonable decisions and economic efficiency. The Federations’ Response entirely ignores ATP’s extensive showing on that point. *Compare ATP Opening Br. 13-17 with Response 16-18.* It pretends that the Federations had genuine antitrust claims as if they were outsiders seeking to protect competition, and plays ostrich with the reality that ATP is a complex sports enterprise, whose members must work together cooperatively under agreed-on rules so as to create the superior product (mens’ professional tennis) that the members can create only by working with each other for the common good of the members as a whole.

The Federations’ contention that a valid bylaw must concern only “internal affairs” is, in any event, impossible to square with §§109 and 114, which provide that bylaws may relate “to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its members, directors, officers or employees.”

The Federations’ complaint (Response 17) that “antitrust claims do not relate to matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders,” misstates the issue, which would

broadly be whether the bylaw's subject – shifting attorneys' fees, costs, and expenses of meritless litigation from those victimized by it to those who institute it – relates to internal affairs, not whether antitrust claims do. Moreover, even if relating to internal affairs were the test, Article 23.3 meets it. The Federations' claims were rooted in ATP's bylaws and decision-making: they complained of the restructuring; they claimed that the directors breached their fiduciary duties; they asserted claims for conversion of their property rights as tournament members because ATP's Board took steps under the bylaws to restructure. In short, it is beyond doubt that the Federations' litigation – in which the only defendants they sued were ATP and its Board members – addressed ATP internal affairs directly.

In lieu of explaining why fee-shifting bylaws adopted by nonstock corporations are beyond the authority circumscribed by 8 *Del. C.* §109 – a hurdle the Federations could not clear since such bylaws so clearly relate “to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of” members – the Federations' response to the First Certified Question tries to divert the Court with an entirely different issue: whether a post-trial motion under Rule 54(d)(2)(A), Fed. R. Civ. P., is the correct vehicle for asserting the fee applications authorized by Article 23.3.¹ *See* Response 13-15.

¹ Rule 54(d)(2)(A), Fed. R. Civ. P., provides as follows:

The procedural question whether, in federal court, a motion under Rule 54(d)(2)(A) is the correct vehicle to seek fees under a contract was not one of the questions certified by the district court to this Court, and not one of the questions this Court agreed to review. It is not a question of Delaware law, and therefore certification could not have been appropriate. Moreover, the Federations already argued this Rule 54(d) point unsuccessfully in the district court and again in the Third Circuit. On the motion for certification, the Federations devoted nearly five pages to arguing that “ATP waived its right to seek attorneys’ fees because it never pled them” A96-101. This Court accepted certification of four questions of Delaware state law, not any federal Rule 54(d) issue, and the Federations’ effort to re-argue an issue already presented to and decided adversely by the federal district court is both improper and speaks volumes. That is particularly so when the Third Circuit – in the face of the Federations’ lengthy argument that the fee application was procedurally improper under Rule 54(d)(2)(A) – held that “ATP timely filed a post-trial motion, pursuant to Federal Rule of Civil Procedure 54(d), seeking

(2) *Attorney’s Fees.* (A) *Claim to be by Motion.* A claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

attorneys' fees, costs, and expenses arising from the litigation" thereby implicitly but necessarily rejecting the Federations' defense. A51.²

² If the question were properly here and still open, which it is not, the great weight of authority confirms that Rule 54(d)(2)(A) provides that fee applications, for fees that arose during litigation, are properly made *only* by motion (and not in the pleadings). Rule 54(d)(2)(A) plainly states: "A claim for attorney's fees and related nontaxable expenses *must be made by motion* unless the substantive law requires those fees to be proved at trial as an element of damages" (emphasis added). It is well settled that fees incurred *during* litigation are distinct from fees as damages, which typically include fees that arose *prior to* litigation. *See White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 452 (1982); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) ("a claim for attorneys' fees is not part of the merits of the action to which the fees pertain. Such an award does not remedy the injury giving rise to the action"). The Fifth, Seventh, Eighth, and Eleventh Circuits, and district courts in the First, Fourth, Sixth, Ninth, Tenth, and D.C. Circuits, have all held that a request, such as ATP's, for fees and other expenses incurred during litigation is not a claim for damages that must be pled and tried as part of the case. *See, e.g., Rissman v. Rissman*, 229 F.3d 588 (7th Cir. 2000) ("Fees for work done during the case should be sought after decision, when the prevailing party has been identified and it is possible to quantify the award."). *See also Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268 (11th Cir. 2000); *Engel v. Teleprompter Corp.*, 732 F.2d 1238, 1241 (5th Cir. 1984) (defendant entitled to fees under "prevailing party" agreement regardless of whether the defendant "plead[ed] for such an award"); ATP's briefing on the point to the Third Circuit can be found in Reply Brief of Appellant (Mar. 18, 2011), at 23-30, *Deutscher Tennis Bund v. ATP Tour, Inc.* (3d Cir. No. 09-4361).

II. THE SECOND CERTIFIED QUESTION SHOULD BE ANSWERED “YES”

The Second Certified Question asked a question of general Delaware law: whether a fee-shifting bylaw could be lawfully enforced against a member that obtains *no relief at all* on its claims against the corporation, even if it might be unenforceable as against a member that obtains “some relief” (but not substantially all the relief sought). ATP demonstrated that the answer to that question should be “yes,” relying on the long line of cases in which Delaware courts hold that they will not invalidate bylaws “upon some hypothetical abuse,” or “invoke some hypothetical risk of harm,” because “[i]t is not an overstatement to suggest that every valid by-law is always susceptible to potential misuse.” Opening Br. 21-22 (citing cases).

The Federations’ Response ignores both the question presented and ATP’s argument, preferring an entirely different, fact-laden discussion, namely whether Article 23.3 is unconscionable and therefore unenforceable: (i) because ATP allegedly provided the Federations inadequate notice of the bylaw prior to filing their suit (notwithstanding that the Federations cited it in their initial and amended complaints, a fact that they omit to mention) (Response 21, 24-27); (ii) because Article 23.3 “favors” ATP (Response 21); (iii) because Article 23.3 violates federal and state antitrust policy (Response 21-23); or (iv) because ATP was equitably estopped from seeking fees (Response 25-27, which is simply the notice argument

in different clothes). The Federations' response thus leaves ATP's answer to the Second Certified Question unrefuted, and the four arguments it does make are inapposite to the Second Certified Question, inappropriate on certification, an attempt to re-litigate issues that were unsuccessfully raised in the district court, and in all events meritless.

A. The Federations knew about and relied on Article 23 when they filed suit

In various formulations, the Federations complain that Article 23.3 was “promulgated in confidence by the ATP Board and not timely or accurately disclosed to its members.” Response 20; *see also id.* at 24-26. The Federations presented that issue to the Third Circuit (A123-26) without success. A60-61. Moreover, they *never* assert (nor could they) that they did not have a true copy (or full knowledge) of Article 23.3 prior to their institution of their lawsuit in the federal district court in Delaware, or deny that they were provided with a copy in November 2006, six months before they filed their Complaint; or deny that their own counsel had faxed Appellant Deutscher Tennis Bund a copy in February 2007, before the lawsuit was filed (A119 & n.2); or deny that their own federal court complaint quoted from Article 23 (all three of whose parts, covering fee-shifting and venue, were enacted together well before commencement of this action).

A119.³ Under those facts, particularly the Federations’ quotation from Article 23 in their own Complaint (*id.*), there is no factual or legal basis for holding Article 23.3 unenforceable. This Court, quoting a Delaware statute in the landlord-tenant context, has stated that “a person has actual notice of a fact if . . . [t]he person has actual knowledge of it.” *Sanchez-Castillo v. Chirico*, 2010 WL 4869101, at *1 (Del. Nov. 24, 2010). In this case, the Federations’ actual knowledge of the bylaw defeats any pretextual argument that they lacked formal notice of its existence.

B. Article 23.3 does not favor ATP

Beyond the fact that this argument too is irrelevant to the certified question, there is no possible basis for a charge of “favoritism” here. Indeed, the text of Article 23 itself refutes that charge: it creates an entirely bi-lateral rule – the same rule applies, and shifting of fees for defending against meritless litigation can be sought, whether a member sues ATP or ATP sues a member. *See* Opening Br. 7-8. *All* parties are put on notice that they may be responsible for the fees imposed on their ATP co-participants if they institute meritless litigation.

Moreover, the Federations cite nothing– and there is no evidence whatever – to support their assertion (at 21) that Article 23.3 “unreasonably favors ATP because it was meant specifically to deter a legal challenge by its members to

³ The Federations’ assertion (on 8) that they got notice in November 2007 may be a typo, but in any event is clearly contrary to the record. A119.

implementation of the restructuring Plan.” They point to no textual basis for such a charge, and cite no authority for declining to enforce a bilateral fee-shifting rule on the grounds of “favoritism.”

C. Article 23.3 does not violate public antitrust policy

The Federations’ argument that Article 23.3 violates public policy simply restates the district court’s original holding (which the Third Circuit vacated and reserved for possible later determination after resolution of the state law issues). It has nothing whatever to do with the Second Certified Question, which asked whether a fee-shifting bylaw could be enforced against a member obtaining no relief at all, even if it would be overbroad where some relief (but not all sought) was obtained. The Federations’ argument is nonsensical, and not at all supported by the cases cited, even if it were properly considered here.

The Federations place their principal reliance on *Byram Concretanks, Inc. v. Warren Concrete Prods. Co.*, 374 F.2d 649, 651 (3d Cir. 1967), which is completely inapposite, holding only that the text of the antitrust statutes themselves creates fee entitlements only for antitrust plaintiffs, not antitrust defendants. The other cases cited (at 22-23) likewise hold only that antitrust statutes themselves give courts no authority to award fees to prevailing antitrust defendants. Nothing in *Byram* or the other cases addresses contractual fee provisions, or has the slightest bearing on the permissible scope for nonstock corporations to adopt fee-

shifting bylaws in furtherance of organizing and channeling disagreements among members by encouraging more internal discussion and discouraging meritless litigation.

The Federations' paean to the virtues of "competition" is wholly off the mark. The Federations are not outsiders whose attempt to compete with ATP in presenting men's tennis tournaments was squelched by an antitrust conspiracy, but members of ATP, whose agreement is not a violation of antitrust law but a lawful agreement binding them in a joint enterprise which competes (as a whole) against other providers of premium sports content (the PGA, the NFL, Major League Baseball, the NBA, and the like). There is no national or state policy that prevents the members of such a nonstock enterprise (such as ATP or The Red Cross) from adopting and enforcing fee-shifting rules so as to reduce the amount of meritless litigation and arrange for its costs to be borne by those who initiate it. And as the record here demonstrates, the Federations' litigation was without merit, a failed attempt to secure from the courts the reversal of the ATP's tournament restructuring that they had unsuccessfully sought from ATP's Board.

The Federations' "antitrust law public policy" argument also ignores the unmeritorious state law claims they litigated to total failure, including claims for conversion, tortious interference with contract, and breach of fiduciary duty. The defense costs on those hard-fought, fully independent claims are subject under

Article 23.3 to shifting, even if this Court were to hold (notwithstanding the limited certification) that antitrust law public policy precludes fee-shifting of the defense costs of antitrust claims.

D. ATP is not equitably estopped from enforcing Article 23.3

The Federations' 3-page estoppel argument (Response 24-26) is another inapposite response to the Second Question, which again asked whether a fee-shifting bylaw can be enforced against plaintiffs who obtained no relief whatever, even if it might be unenforceable against plaintiffs who obtained some relief.

Moreover, even if the Federations' estoppel argument were the kind of issue subject to certification (it is not) and had been certified (it was not), and there were evidence within the record on certification pertinent to its elements (there is not), it would still fail.

The Federations' brief correctly identifies the elements of an estoppel defense: the party claiming estoppel (i) lacked knowledge or the means of obtaining 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 as a result of reliance. Response 26; *see Dep't of Natural Res. & Env'tl. Control v. Front St. Props.*, 808 A.2d 1204, 2002 WL 31432384, at * 5 (Del. Oct. 29, 2002).

Here, the Federations’ own Complaint establishes that they had in hand the truth of the facts in question – they had a copy of what they knew to be an actual, valid copy of an already-adopted Article 23, which they knew they could rely on and did rely on in their Complaint. The Federations’ pleading of venue in express reliance on Article 23 demolishes their pretense that they lacked adequate knowledge of ATP’s fee-shifting bylaw.

Moreover, there is no evidence of reliance in the record, and could not be, since the law is settled that “An estoppel . . . may not rest upon an inference that is only one of several possible inferences.” *Id.* at *5 (citation omitted). Given their possession of Article 23 and their Complaint’s quotation from it, their purported reliance (Response 26) on “ATP’s historic conduct (in not seeking attorneys’ fees in other litigation . . .)” (*i.e.*, prior to the adoption of the by-laws) and its “conduct in this litigation (by not pleading or seeking costs or fees in any pleading)” would be unreasonable as a matter of law. There were multiple inferences (other than that they could safely ignore Article 23.3) that the Federations could have drawn from the facts that ATP had not pleaded a counterclaim for fees or previously sought fees in defending meritless litigation by members – for example, that no counterclaim was required (as indeed the cases hold), or that members had not previously instituted such meritless litigation against ATP since the bylaw’s adoption.

III. THE THIRD CERTIFIED QUESTION SHOULD BE ANSWERED “NO”

The Third Certified Question asked whether such a bylaw would be unenforceable as a matter of law if one or more Board members subjectively intended to deter legal challenges by members to other potential corporate action then under consideration. In response to ATP’s argument that the business judgment rule applies and that Article 23 easily passed muster, the Federations say (Response 29) that the business judgment rule does not apply because (i) “the challenge raised by the Third Certified Question is not process oriented,” citing only *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *10 (Del. Ch. May 30, 2008), and (ii) “ATP’s improper motive renders the Bylaw unenforceable,” citing only *Portnoy v. Cryo-Cell Int’l, Inc.*, 940 A.2d 43, 67 (Del. Ch. 2008) (Response 6, 29). Neither proposition is accurate or renders Article 23 unenforceable.

Underbrink did not state that the business judgment rule is applicable only to “process oriented decisions,” and it does not point against applying the business judgment rule here. To the contrary, it holds that the business judgment rule would not apply only if “(1) a majority of the individual directors were interested or beholden, or (2) the challenged transaction was not otherwise the product of a valid exercise of business judgment.” *Underbrink*, 2008 WL 2262316, at * 11. There is no basis here for either conclusion.

The Federations repeatedly insist (at 28) that “the premise of Question 3 assumes that ATP’s board in whole or in part subjectively intended the Bylaw to discourage antitrust challenges to ATP’s actions.” But they cite to no evidence whatever, in or out of the record, to support that glib accusation, which is refuted (among other things) by Article 23’s application to litigation generally, not just narrowly to antitrust claims. Absent any such targeting, there is no basis whatever for finding that the ATP Directors’ intent was to foreclose antitrust claims distinctively, or to chill the Federations’ claims uniquely. (And, of course, the Federations’ meritless litigation was never successfully chilled; to the contrary, they litigated their claims to destruction, with the district judge dismissing after trial the claims against all directors and the state law claims against ATP, and the jury rejecting the remaining antitrust claims against ATP. A28-29.)

There is no merit to the Federations’ repeated insistence (at 29, 30) that the very text of Question 3 necessarily implies that the district court had already made a prior finding of improper intent. Question 3 was drafted by ATP’s counsel, A57, not by the district court. It asks whether the intent by “one or more Board members” to deter legal challenges to corporate action then under consideration would render the bylaw unenforceable. There is no implicit finding in Question 3 that the intent of “one or more” such members was improper. The intent behind *all* fee-shifting legislation, bylaws, or other contractual agreements is to deter merit-

less litigation. But so long as the rule is one of general application, Board members are neither interested nor beholden, and the bylaw does not serve an inequitable purpose, the Board should be allowed to respond to what it reasonably perceives as a particular threat. In any event, there is no finding (and no evidence) of unlawful or improper intent by any Board member, much less a majority of them. The record contains no evidence that any Board member had an improper personal interest in the subject matter, or failed to act in good faith in the approval process, or was not fully informed.

Fixated on the erroneous proposition that there is something improper in any attempt to discourage meritless litigation by imposing its costs on those who initiate it, the Federations have ignored ATP's extensive showing (at 28-31) that Delaware courts have a long history of enforcing fee-shifting agreements, and that there is no basis for undertaking analysis under *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971), or for condemning Article 23.3, even if *Schnell* were applied. *Compare* Opening Br. 28-30 *with* Response 29-32.

IV. THE FOURTH CERTIFIED QUESTION SHOULD BE ANSWERED “YES”

The Federations essentially concede that bylaws are generally enforceable against members if adopted after the member joined the corporation, where, as here, members have agreed to be bound by bylaws “that may be adopted and/or amended from time to time.” Response 32. Their argument for a “no” answer to the Fourth Question rests on the substantive points (regarding claimed public policy) already addressed, and on the proposition that this Court “should decide that a new provision imposing attorneys’ fees obligations is subject to such member consent requirements under Delaware law, particularly where the provision is injected in the midst of anticipated litigation by a member.” Response 33-34.

The only authority cited for that argument is the 1987 edition of ABA Model Nonprofit Corporation Act §6.13. No Delaware court has ever cited that Model Act, and the particular provision cited not only is inapposite, but was superseded and replaced in 2008.⁴ The prior 1987 version addressed the imposition on

⁴ The 2008 version of Section 6.13 of the Model Nonprofit Corporation Act makes even clearer that it concerns basic dues, assessments, and fees applicable to categories of members, not bylaws providing for shifting fees to ensure that financial impositions of meritless litigation be borne by those who initiated and caused them:

§ 6.13. MEMBER’S LIABILITY FOR DUES, ASSESSMENTS, AND FEES

- (a) A membership corporation may levy dues, assessments, and fees on its members to the extent authorized in the articles of incorporation or bylaws. Dues, assessments, and fees may be imposed on members of the same class

individual members of additional dues, assessments, or fees – *i.e.*, payments just in respect of membership but had nothing to do with a nonstock corporation’s adoption of a general fee-shifting provision to deter meritless litigation by placing on its instigators (whether the corporation itself or its members) responsibility for the financial costs of their baseless litigation. The 2008 provision likewise has nothing to do with fee-shifting or comparable bylaws, but only with dues or other fees levied on account of membership. *See* §6.13, Official Comment (“Shareholders rarely obligate themselves to make payments to business corporations in addition to the amounts they pay to acquire their shares. Members, on the other hand . . . often agree to pay dues to support the purposes of their corporation and may make yearly or other payments”)

either alike or in different amounts or proportions, and may be imposed on a different basis on different classes of members. Members of a class may be made exempt from dues, assessments, and fees to the extent provided in the articles or bylaws.

(b) The amount and method of collection of dues, assessments, and fees may be fixed in the articles of incorporation or bylaws, or the articles or bylaws may authorize the board of directors or members to fix the amount and method of collection.

(c) The articles of incorporation or bylaws may provide reasonable means, such as termination and reinstatement of membership, to enforce the collection of dues, assessments, and fees.

(d) *See* Section 10.22(a) (bylaw amendments requiring member approval).

ABA Model Nonprofit Corporation Act § 6.13 (3d ed. 2008), *available at* <http://ali.state.al.us/docs/Nonprofit-Corp-Act-8-2008.pdf>.

CONCLUSION

For all the reasons above and in ATP's opening brief, questions 1, 2, and 4 should be answered "yes," and question 3 should be answered "no."

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