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Case No. 9770-CB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT STROUGO, on behalf of himself and all others similarly situated, Plaintiff, v. AARON P. HOLLANDER, STANLEY J. HILL, JOSEPH J. LHOTA, ITSIK MAARAVI, and FIRST AVIATION SERVICES, INC., Defendants.	C.A. No. 9770-CB

DEFENDANTS' ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Strougo's motion amounts to an attempt to resurrect the long-rejected "vested rights doctrine." Stripped to its essence, Strougo argues that the bylaws in effect at the time of his ownership vested rights in him that cannot be subsequently changed or amended by the board without his approval. This is not the law in Delaware, and Strougo cannot cite any controlling Delaware authority to support his position. Indeed, this Court has repeatedly rejected the position advanced by Strougo and has made clear that, if permitted by the articles of incorporation, as in this case, the board has the authority to amend and adopt bylaws at any time without stockholder approval.

A contrary result would wreak havoc in mixed derivative and direct suits. If accepted, Strougo's argument would potentially result in two different versions of the same company's bylaws applying: one to direct claims and the other to derivative claims. Further, in a class action, one would have to determine stockholder rights based on the date that the stockholder sold or was otherwise divested of his shares, potentially creating multiple sets of bylaws governing the same action.

Strougo's argument that the adoption of bylaws applicable to suits filed by a former stockholder divests that stockholder of his power to amend or repeal bylaws fails as well. While Strougo's sale of stock terminated his power to amend, it did

not affect the board's right to amend or adopt bylaws. Moreover, Strougo knew when he purchased his shares that First Aviation was under the control of a majority stockholder. Thus, even had he banded together every other minority stockholder, Strougo still would not have had the voting power to amend or repeal the bylaw.

Moreover, Strougo could have perfected his claim before the bylaw was adopted, but he did not. As he admits in his opening brief ("Op. Br."), First Aviation announced the May 30, 2014, reverse stock split on May 16, (Op. Br. at 4), providing Strougo fourteen days to object to the transaction by filing a suit for injunctive relief. He chose not to do so. Instead, he waited for the transaction to be effected. He did not file his suit until June 16, 2014, thirteen days after the bylaw at issue was adopted.

The bylaw at issue here applies to litigation instituted after its adoption. On May 8, 2014, the Delaware Supreme Court, in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), held that fee-shifting bylaws were permissible under Delaware law. On May 19, Aaron Hollander, First Aviation's CEO, learned of the *ATP* decision in a news article, and, that same day, requested that his counsel, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, draft a bylaw amendment for First Aviation modeled on the bylaw that was found to be valid in

ATP.[1] Although the reverse stock split was effectuated in the time between the CEO's request to First Aviation's counsel and a bylaw being presented for adoption by First Aviation's board, the decision to adopt the contested bylaw was prompted by the Delaware Supreme Court recognizing for the first time that such bylaws were permissible.

Although the bylaw at issue in this case may result in fee-shifting, the more limited and nuanced timing issue addressed in this motion has much wider application, and relates to any bylaw provision, such as a forum selection bylaw, that was adopted after a stockholder sold his stock but before that stockholder filed his lawsuit against the company. For these reasons, First Aviation urges the Court to reject Strougo's challenge to Delaware's well-established law on the vested rights doctrine, and to avoid the far-reaching and unsettling implications of the result he seeks.

[1] A timeline reflecting the sequence and timing of events surrounding the adoption of the bylaw and the reverse stock split is attached as Exhibit A.

Nature and Stage of Proceedings

The original complaint was filed in this matter on June 16, 2014. (D.I. 1). Before the answer was filed, First Aviation's counsel informed Strougo's counsel that a fee-shifting bylaw was in effect.

Strougo subsequently amended his complaint to challenge the fee-shifting bylaw, and, at Strougo's request, this Court allowed bifurcation of the issues; staying the fiduciary duty issues and proceeding only on the claims related to the validity and applicability of the fee-shifting bylaw. The issues were further narrowed when, again at Strougo's request, this Court allowed a trifurcation of the issues to focus only on the narrow issue of whether the bylaw could be applied to Strougo's lawsuit when the bylaw was adopted prior to the institution of the suit but after Strougo sold his stock.

Strougo filed his Opening Brief in Support of his Motion for Partial Judgment on the Pleadings on December 23, 2014. This is Defendants' Answering Brief in Opposition to Plaintiff's Motion for Partial Judgment on the Pleadings. Oral argument is scheduled for February 19, 2015.

Statement of Facts

Only a portion of the facts alleged in the Complaint are relevant for the very narrow, nuanced issue in this motion. First Aviation announced on May 16, 2014, that it would be effecting a 10,000 to 1 reverse stock split at $8.40 per share on May 30, 2014. Answer at ¶5. On May 19, 2014, Aaron Hollander, CEO of First Aviation, learned of the Delaware Supreme Court's seminal *ATP* decision of May 8, 2014, upholding fee-shifting bylaws, and contacted his counsel to request a bylaw modeled on the bylaw found to be valid in *ATP*. On June 3, 2014, the company adopted a fee-shifting bylaw modeled on the bylaw recently upheld by the Delaware Supreme Court in *ATP*. *Id.* at ¶12. During the intervening time, First Aviation effected the reverse stock split. *Id.* at ¶5.

First Aviation has been a non-SEC reporting company for more than seven years. *Id.* at ¶17. While it is not clear whether Strougo purchased his shares before or after First Aviation ceased reporting, the company has been under no obligation to publish its bylaws since it ceased reporting. First Aviation had no obligation to provide its organizational documents to the public. Strougo's counsel was informed of the bylaw's existence shortly after this lawsuit was filed.

Issues Presented

1. Is the application of First Aviation's fee-shifting bylaw to Strougo consistent with previous decisions of Delaware courts allowing application of amended bylaws to pre-adoption conduct?

2. Is Strougo's contractual argument an impermissible attempt to reinvent the rejected vested rights doctrine?

3. Is First Aviation's fee-shifting bylaw authorized by §109 and First Aviation's Articles of Incorporation?

4. Is the application of First Aviation's fee-shifting bylaw to Strougo consistent with Delaware's public policy?

ARGUMENT

I. STANDARD OF REVIEW

In determining a motion under Court of Chancery Rule 12(c) for judgment on the pleadings, "a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1205 (Del. 1993) (citations omitted). "A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Id.* (citing *Warner Communications, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 965, (Del. Super. Ct. 1989) *aff'd without opinion*, Del. Supr., 567 A.2d 419 (Del. 1989); 5A Wright & Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1368 at 518).

II. DELAWARE COURTS HAVE CONSISTENTLY AFFIRMED THE BOARD'S AUTHORITY TO APPLY AMENDED BYLAWS TO STOCKHOLDERS OR CORPORATE OFFICERS EVEN WHERE SUCH AMENDMENT RELATES TO PRE-AMENDMENT CONDUCT.

In arguing that the First Aviation's amended bylaws cannot be applied to him because he was no longer a stockholder when they were enacted, Strougo is attempting to have it both ways. On the one hand, he is attempting to assert rights as a stockholder, yet, on the other hand, he does not want to be bound by the bylaws the same way all other stockholders are bound.

While not describing it as such, Strougo is essentially advocating in favor of the "vested rights doctrine," which states that "boards cannot modify bylaws in a manner that arguably diminishes or divests pre-existing shareholder rights absent stockholder consent." Edward P. Welch, Andrew Turezyn, and Robert S. Saunders, FOLK ON THE DELAWARE GENERAL CORPORATION LAW, § 109.03[C] (2015).

This doctrine has long been rejected in Delaware. *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) ("This Court has held that where a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment."); *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) (noting the vested rights doctrine "is inconsistent with the fundamental structure of Delaware's corporate law."); *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229, 241 (Del. Ch. 2014) ("This argument is simply a dressed-up version of the 'vested right' doctrine that was soundly rejected in *Kidsco Inc. v. Dinsmore* and *Chevron*.").

Indeed, contrary to Strougo's position, in varied contexts, numerous Delaware decisions have upheld a company's right to amend its bylaws and apply them against stockholders or corporate officers, even where doing so, as here, may

impact pre-amendment conduct.[2] In *Kidsco*, for example, the plaintiff announced its intention to conduct a tender offer. In response, the board amended its bylaws to extend the notice requirement for a meeting from 30 to 60 days. *Kidsco*, 674 A.2d at 485. In challenging the lengthier notice provision, the plaintiff argued that its right to proceed under the prior bylaws (and the shorter notice period) had vested prior to the amendment because the plaintiffs had detrimentally relied on those bylaws by seeking a stocklist, preparing proxy materials and soliciting stockholder support. *Id*. at 492. The Court ultimately rejected plaintiff's arguments, however, observing that Delaware courts have rejected the vested rights doctrine outside the indemnification context. *Id*. at 493.

The Supreme Court's recent decision in *United Technologies Corp. v. Treppel*, 2014 Del. LEXIS 608 (Dec. 23, 2014), is also instructive. In *Treppel*, the plaintiff, Treppel, filed a § 220 demand for books and records. In response, United Technologies asked him to sign a confidentiality agreement containing a provision

[2] The leading Delaware corporate law treatises and general corporate law encyclopedia do not support Strougo's arguments. None discuss the nuanced question of whether a facially valid bylaw should be applied to a former stockholder's suit when the bylaw was adopted after the stockholder sold his shares but prior to his suit. *See* R. Franklin Balotti & Jesse A. Finkelstein, DELAWARE LAW OF CORPS. & BUS. ORGS, 3D ED. §1.10 (2015); David A. Drexler, Lewis S. Black, Jr. & A. Gilchrist Sparks, III, DELAWARE CORPORATION LAW AND PRACTICE §9.03 (2014); Edward P. Welch, Andrew Turezyn, and Robert S. Saunders, FOLK ON THE GENERAL CORPORATION LAW §327.11[F] (2015); Donald J. Wolfe and Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY (2014); and William Meade Fletcher, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6 (2006).

requiring that any suit arising from the inspection be brought in the State of Delaware. Refusing to do so, Treppel ultimately filed a § 220 action in the Court of Chancery, seeking the same records without any associated forum restrictions. After Treppel filed his claim, the board formally adopted a bylaw provision establishing Delaware as the proper forum for disputes. *Treppel*, 2014 Del. LEXIS 608, at *5.

Ultimately rejecting Treppel's argument that the forum selection bylaw should not apply to him because it was adopted after he purchased his shares (and even after the litigation ensued), the Court reiterated the basic principle that 8 *Del. C.* § 109 permits a corporation to confer upon its board the power to amend or adopt bylaws, and that "the bylaws may contain any provision, not inconsistent with the 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…." *Id.* at *21, n. 41.

Therefore, according to the *Treppel* Court, the stockholder could not "now contend that he was not on notice that the board itself may act unilaterally to adopt bylaws addressing issues that are the subject of regulation by bylaw under 8 *Del. C.* §109(b)." *Id*. (quoting *Chevron*, 73 A.3d at 955-56) (internal quotations omitted). Similarly, in *ATP v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), members of a tennis federation brought suit in the United States District Court for

the District of Delaware. After judgment was entered in favor of ATP, it sought to recover its litigation expenses pursuant to a fee-shifting bylaw providing that any plaintiff who "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought" must reimburse ATP "for all fees, costs and expenses of every kind and description." *ATP*, 91 A.3d at 557. The fee-shifting bylaw at issue in *ATP* was adopted "as an internal dispute was brewing." *Deutscher Tennis Bund v. ATP Tour Inc.*, 480 Fed. Appx. 124, 127 (3rd Cir. 2012).[3]

The *ATP* plaintiffs challenged the application of the fee-shifting bylaw to them because, among other reasons, it was adopted after the plaintiff members joined the federation but before the litigation was instituted. The District Court subsequently certified certain questions of law to the Delaware Supreme Court, including the question of "whether a fee-shifting bylaw provision is enforceable against members who joined the corporation before the provision's enactment and who agreed to be bound by rules 'that may be adopted and/or amended from time to time' by the board." *ATP*, 91 A.3d at 560. Answering that question in the affirmative, the Court ultimately held that the bylaw was statutorily permissible inasmuch as the members implicitly "agreed to be bound by rules that may be

[3] This decision that preceded the certification of the bylaw issue to the Delaware Supreme Court provides facts not recited in the later decision of the Delaware Supreme Court.

adopted and/or amended from time to time by the board." *ATP*, 91 A.3d at 560; *see also* R. Franklin Balotti & Jesse A. Finkelstein, DELAWARE LAW OF CORPS. & BUS. ORGS, 3D ED. §1.10 (2015) ("despite the fact that by-laws are interpreted as a contract between the corporation and its stockholders the contract was subject to the board's power to amend the by-laws unilaterally.").

A similar result occurred in *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229 (Del. Ch. 2014). In *City of Providence*, a forum selection bylaw was adopted at the same time a notice of merger was filed. Certain stockholders argued that it was unjust to enforce the forum selection bylaw because its adoption occurred simultaneously with the announcement of the merger. *Id*. at 240. Rejecting the stockholders' arguments, this Court held that the application of the bylaw was not inequitable, and that "the reasonable expectation a stockholder [] should have is that its Board may adopt" such a forum selection bylaw. *Id.*

Finally, in *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316 (Del. Ch. May 30, 2008) ("*Underbrink I*"), this Court found valid and enforceable a bylaw that granted mandatory retroactive advancement rights. The bylaw was adopted in anticipation of a secondary public offering, and, in connection with that transaction, Underbrink ceased to be a director. He was subsequently named as a defendant in a Texas action challenging the transaction, and sought advancement. Warrior sought to avoid paying Underbrink's fees and challenged the bylaw on

several grounds, including that it was impermissibly retroactive, but the Court found that the adoption of the bylaw was a permissible exercise of the board's business judgment. *Id*. at *13.

Consistent with this long line of authority, Strougo's challenge to the fee-shifting bylaw must be rejected. Delaware does not support the position he asks this Court to adopt, and in fact, a ruling in Strougo's favor would be contrary to well-settled Delaware law.

III. STROUGO'S CONTRACTUAL ARGUMENT FAILS.

Because no cases in the corporate context support his position, Strougo argues that, under contractual principles, the newly-enacted bylaws cannot be applied to him because he was no longer a party to the contract (i.e., the bylaws), at the time they were enacted. Op. Br. at 11-12. Strougo's position is misplaced.

In an analogous context, Delaware courts have made clear that "no 'contractual' right to maintain an existing by-law has ever been recognized, except in the compelling (and quite different) context of a directors' individual indemnification rights that became perfected before the board amended its by-laws to eliminate those rights." *Kidsco*, 674 A.2d at 492 n.6.

Moreover, by becoming a stockholder of a Delaware corporation, Strougo implicitly consented to the board's authority to unilaterally amend those bylaws at

any time. This Court's decision in *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229 (Del. Ch. 2014), is particularly instructive:

> In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders … A change by the board to the bylaws pursuant to 8 *Del. C.* §109(a) is not extra-contractual simply because the board acts unilaterally; rather it is the kind of change that the overarching statutory and contractual regime the stockholders buy into explicitly allows the board to make on its own. In other words, the [] stockholders have assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards. Under that clear contractual framework, the stockholders assent to not having to assent to board-adopted bylaws.

Id. at 234-35 (quoting *Chevron*, 73 A.3d at 955-56) (internal quotations omitted).

Even if we look to the broader body of contract law outside of the corporate context, Strougo's argument fails. Contrary to the position taken by Strougo, this Court has bound non-signatories to a contract, and has held that a non-signatory should be estopped from asserting that portions of a contract do "not apply when the non-signatory [has] consistently maintain[ed] that other provisions of the same contract should be enforced to benefit him." *Aveta v. Cavallieri*, 23 A.3d 157, 182 (Del. Ch. 2010) (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (internal quotation omitted)). *See also Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745, at *4 (Del. Ch. Nov. 9, 2004) ("Equity will not allow a party to sue to

enforce the provisions of a contract that it likes while simultaneously disclaiming the provisions that it does not."); *Seaport Village Ltd. v. Seaport Village Operating Co.*, 2014 WL 4782817, at *2 (Del. Ch. Sep. 24, 2014) (binding members to a limited liability company agreement, whether or not they had signed the document, based on the provisions of the limited liability company statute). For all of these reasons, Strougo's argument that application of the fee-shifting bylaw would violate Delaware contract law must be rejected.

IV. SECTION 109 DOES NOT PRECLUDE APPLICATION OF THE FEE-SHIFTING BYLAW.

In his Opening Brief, Strougo asserts that the fee shifting bylaw runs afoul of 8 *Del. C.* § 109(a), which prohibits a bylaw from divesting stockholders of the right to amend or repeal bylaws. Op. Br. at 15. However, the bylaw in question had no effect on Strougo's ability to amend or repeal bylaws. Rather, it was the *sale of shares* associated with the transaction that divested Strougo of his right to amend or repeal bylaws. Indeed, taken to its extreme, Strougo's argument would mean that every time a cash-out merger occurred, it would run afoul of §109(a) to the extent that, according to Strougo, the company could no longer amend or repeal bylaws.

Aside from being misplaced, Strougo's argument rings hollow as a factual matter as well. First Aviation's bylaws provide that repealing a bylaw requires the

approval of two thirds of the stockholders entitled to vote.[4] At the time Strougo purchased his shares, First Aviation was controlled by a majority stockholder who continues to control First Aviation to this day. Even if Strougo had gathered together every other stockholder entitled to vote to repeal the bylaw, Strougo's efforts would have fallen short.

In support of his argument that claims arising prior to the adoption of a bylaw are not subject to that bylaw, Strougo relies extensively on *In re Facebook, Inc., IPO Securities and Derivative Litigation*, 922 F. Supp. 2d 445 (S.D.N.Y. 2013), a New York decision Delaware courts are not bound to follow. That case, in *dicta*, declined to apply a forum selection provision contained in a certificate of incorporation based on the effective date of the amendment to the certificate of incorporation.[5] *Facebook* relies on the decision in *Galavitz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011), which was expressly rejected by this Court in *Chevron*, which observed: "the conclusion reached . . . in *Galavitz* . . . - - that board-adopted bylaws are not like other contracts because they lack the stockholders' assent - -

[4] First Aviation's bylaws are attached as Exhibit B.

[5] The plaintiffs' claims in *Facebook* were dismissed on grounds other than the timing of the charter amendment; namely that the plaintiffs did not satisfy the continuous ownership requirement for a derivative claim because they purchased their shares on the day of the IPO, which the suit challenged. Further, the *Facebook* case does not stand for the proposition that a bylaw cannot be applied to a former stockholder. The stockholder in *Facebook* was still a stockholder on the date the certificate was amended and on the date the suit was filed. The decision in *Facebook* does not support Strougo's argument because it did not bar application of a bylaw or charter amendment to a former stockholder.

rests on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and stockholders." *Chevron*, 73 A.3d at 956.

V. APPLICATION OF THE FEE-SHIFTING BYLAW TO STROUGO WOULD NOT VIOLATE DELAWARE'S PUBLIC POLICY.

In his Opening Brief, Strougo makes a number of flawed arguments in support of his position that application of the fee-shifting bylaw to him would violate Delaware's public policy. First, Strougo argues that there is a public policy against retroactivity. Next Strougo argues that because stockholders lose certain rights at the time their ownership is extinguished, they should no longer be bound by subsequent bylaw changes. Finally Strougo argues that application of the fee-shifting bylaw to him would cause "former stockholders [to] be bound by unilaterally amended bylaws in perpetuity." Op. Br. at 24. None of these positions has merit.

Strougo's first argument fails because he mischaracterizes the bylaw as "retroactive." Although the bylaw may have an effect on pre-amendment conduct, any fee-shifting permitted by the bylaw would only occur prospectively; i.e., to cases (like this one) that were filed after the bylaw was amended. Courts have deemed bylaws to be prospective rather than retroactive under analogous circumstances. *See, e.g.*, *Salaman v. National Media Corp.*, 1992 Del. Super. LEXIS 564, at *15 (Oct. 8, 1992) (stating that advancement to a former director pursuant to a bylaw that was not adopted until 41 days before the director's term

ended was not retroactive, but was prospective since it only applied to legal actions occurring after the adoption of the bylaw).

For example, the Supreme Court in *Gottlieb v. Heyden Chemical Corp.*, 91 A.2d 57 (Del. 1952), held that an amendment to a certificate of incorporation creating a stock option plan was permissible as purely prospective in application despite its effect on the existing stockholders. In holding the amendment to have prospective application, the Court stated:

> Any interpretation other than the one we feel bound to adopt would seriously impair the existing rights of the holders of a majority of the stock. They purchased their holdings under the assurance of the Delaware General Corporation Law, as well as of the terms of the particular contract of the State of Delaware with defendant, that the defendant corporation, in which they were about to buy an interest, would have the right from time to time to make amendments to its charter, at the direction and with the approval of the holders of a majority (or other specified percentage) of the stock, and would thus be in a position to adjust itself to the exigencies of changing business conditions. Similarly, the minority stockholders purchased their holdings with full notice of this same mutability. The majority, therefore, cannot now be frozen by the minority to a charter which the majority regards as out of date.

Id. at 667. Strougo's argument to the contrary should on this basis be rejected.

Even if application of the fee-shifting bylaw to Strougo is somehow considered "retroactive," which it is not, Delaware has upheld a similar application to stockholders and/or corporate officers.[6] *See*, *e.g.*, *Salaman*, 1992 Del. Super.

[6] Section 3(b) of Strougo's brief is where he most clearly attempts a back-door vested rights argument. Without any authority to support his sweeping statements

LEXIS 564, at *6 (rejecting National Media's argument that granting advancement to claims that arose prior to the adoption of the advancement bylaw was an impermissible retroactive application).

Further, in arguing that Delaware has a presumption against retroactivity, although Strougo draws a distinction between contractual and statutory retroactivity, he cites only cases discussing statutory retroactivity. As this Court's recent decision in *Bear Stearns Mortgage Funding Trust v. EMC Mortgage, LLC*, 2015 WL 139731 (Del. Ch. Jan. 12, 2015) reveals, an exception exists to the presumption against retroactivity when a statute affects remedies, such as a statute of limitations, rather than a change in substantive law. So too, in the instant case, no restriction on Strougo's substantive rights are imposed in the bylaw. *Id*. at *13. In *Bear Stearns*, a legislative change in the statute of limitations was applied, on a motion for reargument, after the case had been decided. This decision stands in direct contrast to Strougo's argument.

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that "Delaware courts have never upheld a retroactive bylaw" and that "Delaware has a history of protecting stockholders in the face of retroactive changes that may prejudice them", he proceeds to discuss correction of corporate documents. Op. Br. at 22. However, this discussion is not analogous to the bylaw adoption in this case. Filing a certificate of correction to an original certificate of incorporation is an indication that the original filing was defective in some way. Further, different rules apply to the effectiveness of amendments to certificates of incorporation and the adoption of bylaws. They are simply not the same.

Strougo's next argument is equally flawed. In his brief, Strougo argues that because a stockholder loses standing to assert claims on behalf of the corporation when the stock interest is extinguished, the corporation must reciprocally lose its ability to impose bylaws on that stockholder. Strougo's argument is misplaced. Derivative plaintiffs lose standing to bring claims on behalf of the corporation because they no longer have an interest to assert that would benefit *the corporation*.[7] In contrast, Strougo's direct claims benefit *himself*. He is asserting his own rights, not the rights of the corporation.[8] His rights are derived from the certificate of incorporation and the bylaws, which are subject to amendment at any time.[9] He did not have a vested right to a certain set of bylaws simply because his interest was extinguished.[10]

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[7] Strougo had the opportunity to seek injunctive relief to enjoin the transaction that he now complains of, before he sold his stock, but failed to do so.

[8] This argument further raises the question of whether Strougo is an appropriate class representative. If any of the other prospective class members did not sell their stock prior to the bylaw amendment, under Strougo's theory, their claims would differ, or different bylaws would apply to them, according to Strougo.

[9] A bylaw is validly adopted and is in effect as soon as it is adopted by the board, as authorized by §109 and the certificate of incorporation. *Sinchareonkul v. Fahnemann*, 2015 WL 292314, at *7 (Del. Ch. Jan. 22, 2015). *See also Kidsco*, 674 A.2d at 492. By contrast, a certificate of incorporation is only validly amended when the amendment is filed with the Secretary of State, even though previously approved by the board. 8 *Del. C.* §103(d).

[10] *See generally Salamone v. Gorman*, -- A.3d --, 2014 WL 7003889, at *12 (Del. Dec. 9, 2014) (It is "the goal of Delaware law to ensure freedom of contract and

Strougo's assertion that "former stockholders could be bound by unilaterally amended bylaws in perpetuity" is similarly off-base. (Op. Br. at 25). Not only does a statute of limitations exist that would prevent such an occurrence, but there would be no application of this particular bylaw to Strougo if he had not brought this claim against First Aviation.[11]

At their core, all of Strougo's public policy arguments amount to little more than an attempt to resurrect the vested rights doctrine, which is itself in conflict with the flexible and perpetual nature of the corporation and its bylaws. *See* William Meade Fletcher, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6 (2006) (noting that a corporation is intentionally designed by law to have continuity of existence). Strougo's arguments must be rejected accordingly.

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promote clarity in the law and thus facilitate commerce.") (internal citations and quotations omitted)

[11] First Aviation's adoption of the fee-shifting bylaw at issue here is not in the category of those bylaw amendments that Delaware courts have viewed as restricting fundamental electoral rights - - and Strougo has made no such claim. *See* Stephen A. Radin, 3 *The Business Judgment Rule*, 3401 (2009) ("when a corporate charter is alleged to contain a restriction on the fundamental electoral rights of stockholders the restriction must be clear and unambiguous to be enforceable.") (internal quotations omitted).

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion for Partial Judgment on the Pleadings.

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General Information

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