

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

DEUTSCHER TENNIS BUND, *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
)  
ATP TOUR, INC., *et al.*, )  
)  
)  
Defendants. )

Civil Action No. 07-178

**ORDER**

At Wilmington, this 20<sup>th</sup> day of August, 2013, having reviewed the defendants' Request for Certification of Questions to the Delaware Supreme Court and accompanying Opening Brief in Support (D.I. 261), the plaintiffs' Answering Brief in Opposition (D.I. 262), the defendants' Reply (D.I. 263) and the relevant law;

IT IS HEREBY ORDERED that the defendants' Request for Certification of Questions to the Delaware Supreme Court (D.I. 252) is GRANTED as detailed in this Order<sup>1</sup>;

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<sup>1</sup> The Third Circuit vacated and remanded the above-captioned action "so that [this court] can examine, in the first instance, whether Article 23.3 of ATP's by-laws creates an enforceable obligation under [Delaware] state law on Deutscher and Qatar to pay ATP's attorneys' fees." *See* 2012 U.S. App. LEXIS 9591, at \*11 (3d Cir. May 11, 2012). As noted, the defendants contend that the court should certify four questions of law to the Delaware Supreme Court to resolve the remanded question of enforceability. The court has discretion to certify questions of Delaware law to the Delaware Supreme Court. *See Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (concluding that, while certification is not obligatory, it does "in the long run save time, energy, and resources and helps build a cooperative judicial federalism"). Under Delaware Supreme Court Rule 41, certification will be accepted, in the court's discretion, "where there exists important and urgent reasons for an immediate determination" by the Delaware Supreme Court. Del. S. Ct. R. 41. Certification will "not be accepted if facts material to the issue certified are in dispute." *Id.* Rule 41 also provides, as examples of reasons for accepting certification: a question of law "of first instance" in the State; decisions of trial courts conflicting upon a question of law; or a question of law that relates "to the constitutionality, construction or application of a statute of [Delaware] which has not been, but should be, settled." *Id.* In view of the considerations set forth in Rule 41 and relevant case law, the court agrees that certification of the questions stated below is appropriate.

First, as the parties, the court, and the Third Circuit have each separately acknowledged, there is no Delaware authority definitively addressing the validity and enforceability of a bylaw like Article 23.3. (D.I. 261 at 6.) In particular, the Third Circuit noted that "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 suits against the organization and loses." 2012 U.S. App.

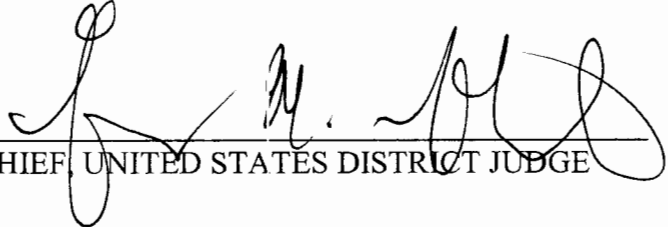
LEXIS 9591, at \*8-9. The Third Circuit also noted that there is question as to whether Article 23.3's requirement that a successful plaintiff who does not obtain a "judgment on the merits that substantially achieves, in substance and amount, the full remedy sought" is enforceable, notwithstanding the fact that, here, the Federations obtained no relief on any of their claims." *Id.* at 9 n.4. The Federations also acknowledged that "Delaware statutory and case law is silent" as to whether a "new [Bylaw] provision imposing attorneys' fees obligations is subject to [] member consent requirements under Delaware law, particularly when the provision is injected in the midst of anticipated litigation by a member." (D.I. 220 at 16-17.) Therefore, the court finds that this case presents questions "of first instance" in Delaware.

Second, the court agrees with the defendants that "resolution of the certified questions will have a broad impact on Delaware corporate governance," making them novel and important legal questions. (D.I. 261 at 7.) Specifically, as the defendants contend, answers to the certified questions will provide certainty regarding how and to what extent Delaware corporations may protect themselves and their members against "the potentially crippling impact of intra-organizational litigation through fee-shifting bylaws." (*Id.*) The court also find persuasive the defendants argument that the proposed questions are important in that they present legal issues likely to recur, because corporations increasingly adopt dispute resolution rules and procedures in response to the rising costs of litigation. (*Id.* at 8-9.) Third, the court also finds that determination of the certified questions will provide the most efficient method to resolving this litigation. In particular, and for the reasons fully detailed in the defendants' Opening and Reply, if the court were to proceed without certifying these questions, the parties would need to engage in extensive and expensive discovery, motions practice, and, potentially, evidentiary hearings on such issues as the subjective intent of the Board members who approved Article 23.3. However, depending on the Delaware Supreme Court's answers to the certified questions, the parties may not need to engage in such efforts. Finally, the court finds that there are no disputed issues of fact material to the questions to be certified. Although the court and the Third Circuit identified open factual issues concerning how and why Article 23.3 was adopted, answers to the certified questions will identify which of these issues, if any, are material to Article 23.3's validity and enforceability.

Having found certification appropriate, the court amends the defendants' proposed questions of law for certification as stated below. In amending the defendants' proposed questions, the court notes that it considered the plaintiffs' opposition to these questions and the two questions they offered, should the court conclude, as it has, that certification is appropriate. While the court does not adopt the plaintiffs' specific proposed questions, it has revised the defendants' proposed questions based, at least in part, on plaintiffs' concern that the original questions did not address Article 23.3 "as actually drafted and passed." (D.I. 262 at 17.) The court rejects the plaintiffs' specific questions, however, because they are encompassed by the defendants' proposed questions. Specifically, the court finds that the plaintiffs' question—"may a non-profit, membership corporation pass a bylaw that creates potential fees and liabilities for its members without their agreement, consent or knowledge"—is addressed by the defendants' first proposed question. The court also finds the plaintiffs' second proposed question—"is a non-profit membership corporation's Bylaw affecting its members' substantive and procedure rights enforceable when it contains an illusory promise"—to be covered by the defendants' proposed questions three and four, addressing subjective intent and whether the bylaw can apply to a member who joined the corporation after it was adopted. Moreover, to the extent that the plaintiffs argue that Article 23.3 is unenforceable as an "illusory" promise, due to the policy underlying the fee-shifting provisions of the federal antitrust laws or to federal statutory obligations under antitrust law, the court finds that these arguments: inappropriately shoehorn issues of constitutional preemption with the issues of enforceability on remand; and, in fact, support certification, as certification will narrow and/or dispose of such arguments. In view of the foregoing, the court amends the defendants' proposed questions as follow:

- (1) 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"?
- (2) 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?
- (3) 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?

IT IS HEREBY FURTHER ORDERED that, pursuant to this Order, the defendants are directed to file a Proposed Certification of Questions of Law<sup>2</sup> for the court's approval by Friday, September 13, 2013.

  
CHIEF, UNITED STATES DISTRICT JUDGE

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- (4) 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?

*See generally* D.I. 261 at 1.

<sup>2</sup> Pursuant to Delaware Supreme Court Rule 41, the defendants shall submit a proposed Certification of Questions of Law, detailing: (1) the nature and stage of the proceedings; (2) the relevant undisputed facts; (3) the reasons the questions of law should be certified; (4) the important and urgent reasons for an immediate determination by the Supreme Court of the State of Delaware; (5) the appropriate captioning of the matter if accepted; and (6) the questions of law certified to the Supreme Court of the State of Delaware in accordance with Rule 41. The court will review and accept this proposed order, or will amend it as needed, before certification.