



Via Email

November 25, 2014

Norman M. Monhait
Chair
Section of Corporation Law
Delaware State Bar Association
Rosenthal, Monhait & Goddess, P.A.
919 N. Market Street
Suite 1401
Wilmington, DE 19899

Dear Mr. Monhait:

I am writing on behalf of the Council of Institutional Investors (CII) to call upon the Section of Corporation Law of the Delaware State Bar Association (Section) to formulate and recommend to the Delaware General Assembly (DGA) amendments to Delaware General Corporation Law (DGCL) that would overturn or narrow the Supreme Court of Delaware decision in *ATP Tour, Inc. v. Deutscher Tennis Bund (ATP Tour)*¹

CII is an association of corporate, union, and public employee benefit plans, foundations, and endowments, with combined assets exceeding \$3 trillion.² As long-term investors with a significant investment in Delaware corporations, CII members share the view that corporate governance structures and practices should protect and enhance a corporation's accountability to shareowners.³

As you well know, Delaware has a well-deserved reputation for fair principles of corporate law. Much of that reputation is based on the fact that its courts are "widely recognized as the nation's preeminent forum for the determination of disputes involving the internal affairs of the thousands upon thousands of Delaware corporations and other business entities through which a vast amount of the world's commercial affairs is conducted."⁴ We note that since 2011, 18 of 20 Russell 3000 companies with management proposals to adopt Delaware as the exclusive forum for resolving certain disputes have had those proposals approved by the companies' shareowners.⁵

¹ *ATP Tour, Inc. v. Deutscher Tennis Bund*, No. 534, 2013 (Del. May 8, 2014), http://scholar.google.com/scholar_case?case=6215383868028509797&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

² Council of Institutional Investors, About Us, http://www.cii.org/about_us.

³ CII Policies, **§ 1.4 Accountability to Shareowners** (last updated Oct. 1, 2014), [http://www.cii.org/files/policies/10_01_14_corp_gov_policies\(1\).pdf](http://www.cii.org/files/policies/10_01_14_corp_gov_policies(1).pdf).

⁴ Delaware State Courts, <http://courts.delaware.gov/chancery/> (last visited Nov. 25, 2014).

⁵ ISS link database (last visited Nov. 21, 2014) (on file with Council of Institutional Investors). *But see* CII Policies, **§ 1.9 Judicial Forum** ("Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum.").

November 25, 2014

Page 2 of 2

We believe that if corporations are allowed to continue to unilaterally adopt fee-shifting provisions under the authority of the *ATP Tour* decision, the Delaware judiciary's leadership role will diminish over time as fewer important business disputes will be brought before Delaware courts.⁶ Moreover, the accountability of corporations to long-term shareowners would decline as corporate officials who breach their fiduciary duties or commit other wrongdoing would become more insulated from meritorious legal challenges to those often value-reducing behaviors.⁷

Simply put, the *ATP Tour* decision is bad for Delaware and bad for long-term investors. We, therefore, respectfully request that the Section promptly formulate and recommend to the DGA amendments to the DGCL that would overturn or narrow the decision.⁸

Thank you for your consideration of our views on this important matter. Please feel free to contact me at 202.261.7081 or jeff@cii.org if you wish to discuss this matter further.

Sincerely,



Jeff Mahoney
General Counsel

⁶ See, e.g., Gretchen Morgenson, Op-Ed., *Shareholders, Disarmed by a Delaware Court*, N.Y. Times, Oct. 25, 2014, at 3 ("Lawrence A. Hamermesh, professor of corporate and business law at the Widener Institute of Delaware Corporate and Business Law, said he was concerned that shareholders, as a result of fee-shifting, would be reluctant to bring important lawsuits related to breaches of fiduciary duties."), http://www.nytimes.com/2014/10/26/business/shareholders-disarmed-by-a-delaware-court.html?_r=0.

⁷ *Id.* at 4 ("Shareholders are already at a severe disadvantage when trying to hold corporate executives and directors accountable . . . [l]imiting their options even further is a giant step in the wrong direction.").

⁸ The Council of Institutional Investors would also strongly support the formulation and recommendation to the Delaware General Assembly amendments to Delaware General Corporation Law that would require majority voting in the uncontested election of directors at public companies. By letter of October 25, 2012, we provided you with a detailed explanation of why those amendments are necessary and how those amendments might be drafted. As a reminder, our letter and the related attachment are accessible at http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_25_12_cii_delaware_majority_voting_letter.pdf and http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_25_12_cii_delaware_majority_voting_attachment.pdf, respectively.