

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE PINPOINT BEARINGS, INC.) No. 17, 2011
SHAREHOLDERS LITIGATION)

EDWARD MILLER,)
)
Plaintiff Below,)
Appellant,)
)
v.)
)
MICHAEL SANCHEZ, CLARE MITCHELL,)
BRENDAN ELLSWORTH, TIMOTHY)
FLETCHER, MARSHA FRANKLIN,)
DAPHNE KEYES AND ERIC LAM,)
)
Defendants Below,)
Appellees,)
)
and)
)
PINPOINT BEARINGS, INC.,)
)
Nominal Defendant Below,)
Appellee.)

Court Below:
Court of Chancery of the
State of Delaware in and
for New Castle County
Civil Action No. 4958-VCM

ANSWERING BRIEF OF THE APPELLEE, RESPONDENT BELOW

TEAM H
ATTORNEYS FOR APPELLEES

DATED: FEBRUARY 11, 2011

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NATURE OF PROCEEDINGS

This is an appeal from a decision of the Court of Chancery (McCloskey, Ch.) by Edward Miller ("Appellant" or "Miller"), Plaintiff below. Miller holds 5,000 shares of common stock in nominal Defendant Pinpoint Bearings, Inc. ("Pinpoint"). Miller alleged a breach of a fiduciary duty of oversight by the directors (collectively, the "Director Defendants" or the "Board") of Pinpoint. Miller filed a motion to be added to the Consolidated Delaware Action, which had been previously filed by Plaintiffs Webb, Patrick, and Kohn. Miller also moved to stay all fiduciary litigation in Delaware arising out of the same matter in favor of Miller's Federal Action in Texas.

In support of Miller's Delaware motion to stay, he argued that Pinpoint's Exclusive Forum Bylaw is invalid as a matter of law and as an equitable matter. The Defendants argued that the Exclusive Forum Bylaw is valid under Delaware Corporation Law. The Director Defendants and Pinpoint moved to enjoin Miller from prosecuting any derivative or other fiduciary claims against the Director Defendants in any forum other than the Delaware Court of Chancery.

The Court of Chancery denied Miller's motion to stay these proceedings, and granted Defendants' motion to enjoin Miller from prosecuting any derivative or other fiduciary claims in the Federal Action in Texas or any forum other than the Delaware Court of Chancery (the "Injunction Motion"). Furthermore, the Court of Chancery consolidated Miller's Delaware action (Civil Action No. 4958-VCM) with the three other identical derivative actions filed in the Court of Chancery by the other Plaintiffs, as *In re Pinpoint Bearings, Inc.*

Shareholders Litigation, Consolidated Civil Action No. 4952-VCM. On January 18, 2011, the Supreme Court of Delaware accepted Miller's interlocutory appeal from the Court of Chancery's Opinion and Order.

SUMMARY OF ARGUMENT

1. Appellee argues that the Court of Chancery was correct in holding that the Exclusive Forum Bylaw, adopted by the Board of Directors, is legally valid. First, the Board of Directors was within its authority to adopt the Bylaw under Delaware statutory law. Second, the Exclusive Forum Bylaw is a contractual agreement between shareholders and the corporation, which is presumed valid unless it is found to be substantially unreasonable or a product of overreaching by the Board of Directors. The Bylaw does not seriously impair a Shareholder's ability to pursue a cause of action, nor does it in anyway limit the board of directors' accountability as fiduciaries. Finally, the appellant's argument that the "First to File" rule should apply in this case has been found to be inapplicable by the courts when involving contracts created through a Bylaw in a corporation's certificate of incorporation.
2. Appellee argues that the Court of Chancery was correct in holding that the Business Judgment Rule is the only applicable standard to the facts of this case. The Business Judgment Rule standard applies because there has been no showing of a breach of fiduciary duty or gross negligence by the Board of Directors and the implementation of the Bylaw has a rational business purpose. The Heightened Judicial Scrutiny standard does not apply because it has not been shown that the Board of Directors acted in self-interest or in breach of their fiduciary duty of loyalty. Implementation of the Bylaw was reasonable, proportional and not

reactionary or defensive in nature, as it was not implemented in response to any action. Furthermore, even if the implementation of the Bylaw was found not to be reasonable under a heightened Judicial scrutiny, it still holds valid under the Entire Fairness Test, as it is neither preclusive nor coercive to the shareholders.

STATEMENT OF FACTS

The named Plaintiffs in the originally filed derivative actions in the Court of Chancery, Eileen Webb, Richard Patrick, and Harold Kohn, were minority shareholders in Pinpoint at all relevant times prior to the assertion of the derivative claims. Plaintiff Edward Miller owns 5,000 shares of Pinpoint common stock. Miller is a resident of Texas, and a former employee of Pinpoint.

Nominal Defendant Pinpoint is a Delaware corporation, with corporate headquarters and manufacturing operations in Texas. It is traded on the New York Stock Exchange. Pinpoint specializes in manufacturing of aerospace components, primarily for the U.S. military and commercial aircraft manufacturers. The Director Defendants consist of seven directors: Michael Sanchez, Clare Mitchell, Brendan Ellsworth, Timothy Fletcher, Marsha Franklin, Daphne Keyes, and Eric Lam. (collectively, the "Director Defendants")

On June 10, 2010 the Pinpoint Board adopted an Exclusive Forum Bylaw that requires that any derivative action brought on behalf of Pinpoint of any other claim of breach of fiduciary duty be litigated exclusively in the Delaware Court of Chancery.

In September of 2010, an engineer at Pinpoint contacted the Office of the Inspector General of the United States (the "OIG") to report improper cost-cutting techniques involving contracts with the U.S. military. The engineer, Roland Thompson, alleged that three mid-level managers were regularly omitting some of the testing contractually required by the U.S. Government. The OIG launched an official investigation on September 8, 2010. On September 10, the CEO

of Pinpoint called a meeting of the Board of Directors, and appointed Keyes and Lam to a special investigation committee (the "Special Committee"), who retained outside counsel Venner and Lee LLP to aid in the investigation.

The Special Committee determined that the complaint to the OIG was meritorious. With the Board of Directors' approval, Venner and Lee negotiated a settlement between Pinpoint and the OIG on November 30, 2010. The details of the settlement included Pinpoint's acknowledgement of five separate violations of the False Claims Act, payment of \$500 million in fines and penalties, and firing of the three managers who had adopted the improper measures. Pinpoint was able to keep its status as an eligible contractor with the U.S. military and also avoided any criminal liability. On the same day, Pinpoint issued a press release disclosing the terms of the settlement.

On December 1, Miller filed a Federal Action in Texas, claiming that the Director Defendants breached their fiduciary duty under Delaware law. Miller alleged that the Director Defendants breached their fiduciary duty of oversight by consciously failing to establish and/or maintain a meaningful compliance system. Miller also alleged claims under federal securities law, claiming that Pinpoint and the Director Defendants knowingly failed to make timely disclosure of the Company's violation of the contractual requirements, the OIG investigation, and the foreseeable financial consequences.

On December 2, Plaintiffs Webb, Patrick, and Kohn each filed separate complaints in Delaware, alleging the same derivative oversight claim as Miller's Texas complaint. On December 8, the Court

entered the proposed Order of Consolidation to create *In Re Pinpoint Bearings, Inc. Shareholders Litigation*.

On December 15, Miller filed the *Miller Delaware Action* in the Delaware Court of Chancery. Miller alleged the same claims as he had in the first-filed federal action, which in turn was identical to the consolidated derivative action in the Delaware Court of Chancery. Miller additionally filed a motion to be included within the Consolidated Delaware Action. Miller also filed a motion to stay the Consolidated Delaware Action in favor of his earlier filed Federal Action in Texas.

First, the Court of Chancery granted Miller's motion to be included in the Consolidated Delaware Action. Next, the Court of Chancery concluded that because the Exclusive Forum Bylaw was valid and enforceable against Miller and all other Pinpoint stockholders, the motion to stay proceedings in Delaware, in favor of his earlier filed Texas Federal claim, was denied. Finally, the Court of Chancery granted Defendants' motion to enjoin Miller from prosecuting his derivative or other fiduciary claims in any forum other than the Delaware Court of Chancery, which effectively enforced the Pinpoint's Exclusive Forum Bylaw.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE COURT OF CHANCERY'S DECISION AND HOLD THAT THE EXCLUSIVE FORUM BYLAW IS VALID AS A MATTER OF DELAWARE LAW BECAUSE IT WAS VALIDLY ADOPTED BY BOTH THE BOARD OF DIRECTORS AND THE SHAREHOLDERS.

A. Question Presented

Whether the Court of Chancery was correct in holding the Exclusive Forum Bylaw valid because bylaws of this nature are presumptively valid, the Board of Directors was within their power to adopt the bylaw, and there was no showing that the bylaw was unreasonable.

B. Standard and Scope of Review

This Court reviews questions regarding the construction or interpretation of a corporate bylaw de novo. *Centaur Partners, IV v. Nat'l. Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990) (citing *Gilbert v. El Paso*, 575 A.2d 1131, 1141-42 (Del. 1990)). The Delaware Supreme Court should only reverse the findings of the lower court if the findings are clearly wrong and the doing of justice requires their overturn. *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972). If the findings are sufficiently supported and are the product of an orderly and logical deductive process, the Supreme Court will accept them, even if it may have reached contrary conclusions itself. *Id.*

C. Merits of Argument

As a matter of law, bylaws of a corporation are presumed to be valid. *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985). Furthermore, these bylaws should be construed in a manner in harmony with the law as opposed to being struck down because of

inconsistencies. *Id.* Additionally, the Delaware Supreme Court has held that a contractual choice of forum clause is presumptively valid but for a clear showing of unreasonableness or unjustness; and has held such clauses to be valid in limited liability corporations. *Elf Atochem N. Am. Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999); See 6 Del. C. § 18-201(b); See 8 Del. C. § 106. In the present case, the Exclusive Forum Bylaw is a bylaw of Pinpoint, and is a contractual clause between shareholders of Pinpoint and the company itself. Moreover, a limited liability company agreement is similar to corporate bylaws, in that neither is filed with the Delaware Secretary of State but each has contractual force in defining the investors' governance expectations. See *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281, 284 (Del. 1970). Because the Exclusive Forum Bylaw is legally valid and enforceable, an application of the *McWane* doctrine is inappropriate. *Id.*

1. The Director Defendants Were Within Their Authority to Adopt the Bylaw

The Directors of Pinpoint were well within their authority under Delaware law to adopt the Exclusive Forum Bylaw. *Section 109(a) of Delaware General Corporation Law* ("DGCL") vests power in the stockholders to adopt, amend, or repeal bylaws and further permits the certificate of incorporation to confer this power concurrently upon the directors. 8 Del. C. § 109(a). Furthermore, the bylaws of a corporation may contain any provision relating to the business of the corporation, the conduct of its affairs, or the rights of power of the company, stockholders, directors, officers, or employees; provided

that the bylaw is not inconsistent with Delaware law or the company's certificate of incorporation. *Id.*

In the case at hand, Pinpoint's charter clearly confers the power to adopt, amend, or repeal bylaws upon Pinpoint's directors.¹ Moreover, the bylaw relates to the rights of power of Pinpoint stockholders in that it changes and limits their right to bring fiduciary litigation in any court other than the Delaware Court of Chancery. Because the bylaw relates to the rights of the stockholders, and because the certificate of incorporation allows the Directors to adopt, amend, or repeal bylaws of the company, the Board was well within its power to adopt the Exclusive Forum Bylaw. As such, the Board's decision in adopting an Exclusive Forum Bylaw was valid and should be upheld.

The Court of Chancery has held that "corporate charters and bylaws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply." *CA Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 239 (Del. 2008); *see also Centaur Partners*, 582 A.2d at 928. The Court in *CA Inc. v. AFSCME* stated that when the bylaws of a corporation explicitly state that they can be amended from time to time, by either the stockholders or the board, the contract among the shareholders is subject to the power of the board to amend the by-laws unilaterally. *CA Inc.*, 953 A.2d at 239. In the case before this Court, Pinpoint's bylaws expressly provided that they may be amended either by the Board or the Company's stockholders.² Because the Board used its validly given power to

¹ This point is not disputed by either party

² Article 14 of Pinpoints bylaws

unilaterally adopt the Exclusive Forum Bylaw, it cannot be said that the Board lacked the power to adopt the bylaw in question.

Additionally, it cannot be said that Plaintiff Miller has a "vested right" to bring fiduciary litigation in any Court holding jurisdiction outside of Delaware, as this right was contractually changed when the board validly adopted the Exclusive Forum Bylaw. See *Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995).

2. A Contractual Exclusive Forum Bylaw Is Presumptively Valid In Delaware

The Exclusive Forum Bylaw adopted by the Board should be found to be presumptively valid in Delaware. Recently, there has been a judicial trend towards presuming the validity of contractual choice of forum clauses. See *Bremen v. Zapata Off Shore Co.*, 407 U.S. 1 (U.S.C. 1972). These clauses should control company dealings absent a strong showing that it should be set aside. *Id.* In *Zapata*, the Court of Chancery dealt with a choice of forum clause between two experienced and sophisticated business corporations: an American company and an international company. *Id.* In the *Pinpoint* case, the Exclusive Forum Bylaw is a choice of forum clause similar to that in *Zapata*. As such, the Court should find it to be presumptively valid.

The Plaintiff may argue that the contractual agreement between Miller and Pinpoint is distinguishable from *Zapata* in that it is not an agreement between two sophisticated companies but rather one between a sophisticated company and a stockholder. However, the Court in *Zapata* cited the Court in *Carnival Cruise Lines*, which emphasized that "forum selection clauses contained in form passage contracts are subject to judicial scrutiny for fairness." *Carnival Cruise Lines v.*

Shute, 499 U.S. 585, 595 (1991). The Court in *Carnival Cruise Lines* rejected the argument that the choice of forum clause was unenforceable because it was not the subject of bargaining as had occurred in *Zapata*, declaring that it must “refine the analysis of [*Zapata*] to account for the realities of form passage contracts.” *Id.* at 593. Accordingly, this Court should analyze the realities of each situation for fairness in deciding whether a contractual choice of forum bylaw should be held as valid. The Exclusive Forum Bylaw was made within the accepted powers of the Board, through normal procedure and as discussed below, was fair to the stockholders. Because corporate charters and bylaws are contractual agreements between shareholders of a corporation, similar to the contractual agreement between companies in *Zapata*, the realities of the case at hand dictate that the Exclusive Forum Bylaw should be presumed valid.

Though the Delaware Courts have not addressed exclusive forum selection provisions contained in corporate bylaws, this Court has enforced such provisions in limited liability corporations. *Elf Atochem N. Am. Inc.*, 727 A.2d 286 at 287. In *Elf Atochem*, this Court enforced an LLC agreement requiring all intra-entity disputes to be resolved exclusively by arbitration or court proceedings in California. *Id.* As the Court of Chancery in the present case stated, “one could analogize a limited liability company agreement to corporate bylaws” in that neither is filed with the Delaware Secretary of State and yet each has contractual force in defining the investors’ governance expectations. *Edward Miller v. Pinpoint Bearings, Inc.*, Del. Ch. No. 4958-VCM, 2011, McCloskey (Jan. 12 2011); See 6 Del C. § 18-201(b); 8

Del. C. § 106. As such, this Court should hold that, as in limited liability corporations, the Exclusive Forum Bylaw adopted by Pinpoint is presumptively valid.

Plaintiff Miller may point to the recent decision in the San Francisco Division of United States District Court of California, in attempting to show that the Exclusive Forum Bylaw should not be held valid. *Galaviz v. Berg*, 2011 WL 135215 (N.D.Cal.). In *Galaviz*, the United States District Court for the Northern District of California denied motions to dismiss, for improper venue, various shareholder derivative actions. *Id.* The Court, in evaluating nominal defendant Oracle Corporation's exclusive forum bylaw, stated that there was a difference between corporate law and commercial contract law and noted that the adoption of the exclusive forum bylaw was an adoption that Oracle would not have been able to accomplish under ordinary principles of contract law. *Id.* However, *Galaviz* was decided as a matter of federal common law, not as a matter of Delaware Corporation Law, and therefore is an inappropriate comparison to the case at hand. See *Id.* Moreover, as stated in *CA Inc. v. AFSCME*, corporate charters and bylaws are contracts among the shareholders of a corporation. *CA Inc.*, 953 A.2d at 239. As a result, the contractual arrangement between shareholders of a corporation makes it so that the general rules of contract interpretation apply, thus precluding Plaintiff Miller's application of *Galaviz* to this case.

3. Plaintiff Miller Has Not Clearly Shown That the Bylaw is Unreasonable or the Product of Overreaching by the Board

In order to prove that a contractual choice of forum clause is invalid, a party must clearly show that "enforcement of the clause

would be 'unreasonable and unjust' or that the clause is 'invalid for such reasons as fraud and overreaching.'" *Edward Miller v. Pinpoint Bearings, Inc.*, Del. Ch. No. 4958-VCM, 2011, McCloskey (Jan. 12 2011) (citing *Ingres v. CA, INC.*, 8 A.3d 1143 (Del. 2010)). The Court in *In re Revlon, Inc.* stated that if a board of directors and stockholders "believe that a particular forum would provide an efficient and value promoting location for dispute resolution, corporations are then free to respond with charter provisions selecting an exclusive forum for intra-entity disputes. *In Re Revlon, Inc.*, 990 A.2d 940, 960 (Del. Ch. 2010); see also 8 Del. C. § 102 (b)(1)³. Moreover, such agreements are only unreasonable when their enforcement would, under the existing circumstances, seriously impair the plaintiff's ability to pursue his cause of action. *Elia*, 391 A.2d at 216; See also *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 345 (C.A.Pa 1966).

In the case at hand, the Exclusive Forum Bylaw ensures that all fiduciary litigation will be conducted in a single forum for the sake of efficiency and predictability in the application of corporate governance principles. The Court of Chancery found no inherent unreasonableness within these two considerations. *Edward Miller v. Pinpoint Bearings, Inc.*, at pg. 14. Furthermore, although Plaintiff Miller argues that the Board has overreached by using their positions of trust to limit their accountability as fiduciaries to shareholders,

³ (authorizing certificate to contain "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of stockholders..., if such provisions are not contrary to the laws of the state.")

the Court of Chancery found that the Exclusive Forum Bylaw imposes no substantive limitations on the Board's fiduciary accountability, as Plaintiff Miller is free to litigate all of his claims in Delaware Courts. See e.g. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."). As such, the Court appropriately found no breach of fiduciary relationship between the Board and the shareholders, and thus no overreaching by the Board in adopting the Bylaw. Because there has been no showing of unreasonableness or overreaching on the part of the Pinpoint Board, this court should uphold the Exclusive Forum Bylaw as valid.

4. The First to File Rule is Inapplicable in Contracts Created Through a Bylaw in a Certificate of Incorporation

Under the *McWane* doctrine, this Court held that Delaware courts should exercise discretion in favor of a stay where a prior action, involving the same parties and issues, is pending elsewhere in a court capable of doing prompt and complete justice. See *McWane*, 263 A.2d at 284. However, in *Ingres*, this Court recently clarified the application of the *McWane* doctrine in stating that parties may supersede this common law doctrine through contracts such as a bylaw in a certificate of incorporation. See *Ingres*, 8 A.3d at 1146. In the present case, the parties have contracted to allow the Pinpoint board to unilaterally adopt bylaws incorporated in Pinpoint's certificate of incorporation. Further, that that contract has resulted in the

formation of an Exclusive Forum Bylaw. As such, an application of the *McWane* doctrine is inappropriate in this case.

II. THE COURT OF CHANCERY WAS CORRECT IN FINDING THAT HEIGHTENED JUDICIAL SCRUTINY OF THE PRESUMPTIVELY VALID AND ENFORCEABLE BYLAW IS INAPPROPRIATE IN THIS CASE, AS THE BYLAW AND ITS APPLICATION ARE SUBJECT TO THE BUSINESS JUDGMENT RULE AND ARE EQUITABLE AS A MATTER OF LAW

A. Question Presented

Whether the Court of Chancery was correct in finding that Exclusive Forum Bylaw should be reviewed under the Business Judgment Rule instead of with strict scrutiny under the Entire Fairness Test or with enhanced judicial scrutiny for reasonableness and proportionality.

B. Standard and Scope of Review

The standard of scrutiny to apply for the defendants is a question of law and fact and is subject to de novo review. *In re Heller*, 669 A.2d 25, 29 (Del. 1995). In determinations of rulings of fact, the court conducts a limited review of the findings of the trial court to and shall only reverse them if they are clearly wrong. *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 219 (Del. 2005); *In re Stevens*, 652 A.2d 18, 23 (Del. 1995). If the trial court has correctly applied the law, the Supreme Court review shall limit its review only to abuses of the trial court's discretion. *Id.*

C. Merits of Argument

1. Heightened Judicial Scrutiny Under the Unocal Test Is Inappropriate In This Case As There Are No Instances Of Issues Of Loyalty Or Self-Interestedness.

The Director Defendants' decision to adopt the Exclusive Forum Bylaw does not raise any cognizable interest for loyalty analysis

purposes. Plaintiff Miller alleges that the Director Defendants acted self-interestedly in adopting the Bylaw by seizing control over all shareholder litigation through requiring that such litigation occur exclusively in the Delaware Court of Chancery. However, the Bylaw does not insulate the Board from any and all claims nor does it limit the types of shareholder claims that can be brought. Rather, the Bylaw is merely procedural in that it limits the forum available to shareholders for the sake of convenience, efficiency, and relative predictability. See Affidavit of Director Defendant Daphne Keyes (summarizing legal advice provided to the Board by the Company's outside counsel, Jackson and Sheehan LLP of Houston, Texas, at a meeting of the Director Defendants on June 10, 2010 and listing the factors considered by the Board in adopting the Exclusive Forum Bylaw). Because there is no loss of fiduciary accountability for the Board, heightened scrutiny is inappropriate in this case.

The Board's decision to adopt the Exclusive Forum Bylaw is also not self-interested under the Delaware Supreme Court's definitions brought in *Unocal* or *Unitrin*. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1371 (Del. 1995). Under *Unitrin*, there are three levels of scrutiny that must be considered: the Business Judgment Rule, the *Unocal* scrutiny, and the entire fairness test. *Unitrin*, 651 A.2d at 1371. The Business Judgment Rule applies in all cases except when the action by the board of directors can be considered unreasonably defensive in nature. *Id.* Under *Unocal*, defensive actions on the part of a board of directors will subject the board's decisions to a

heightened level of scrutiny. *Unocal*, 493 A.2d at 955. As outlined in the case, defensive action is that which can be shown to have been taken in direct reaction to an event or claim taken by a shareholder. *Id.* The court then considers if the actions to detect the threat was reasonable, and if the defensive measure itself was reasonably proportional to the threat. *Id.* In analyzing the actions, a court must consider the rights of all shareholders, not just a single shareholder. *Id.* Defensive actions have been found to be present in Board actions relating to a Board's control of a company, unsolicited acquisition proposals, shareholder franchises, and others. See e.g. *Kidsco, Inc.*, 674 A.2d at 495-97. (applying *Unocal/Unitrin* enhanced scrutiny analysis to Board decision to adopt bylaw postponing date for special meeting of stockholders called by hostile bidder/stockholder to seek removal of incumbent board); see also *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (nullifying target board's bylaw amendment to advance annual shareholder meeting date in contested election where incumbent board improperly sought to thwart insurgents' electoral challenge to their control).

In the present case, there was no direct reaction to a threat involved, nor any action to deter a future threat against the company or the Board. There was also no action relating to the Board's control of Pinpoint, an unsolicited acquisition proposal, or a shareholder franchise. The Bylaw itself was not made in response to, or in preparation of an impending lawsuit. Rather, the action was taken with respect to convenience, efficiency, and relative predictability for

the Company. As such, a *Unocal* heightened scrutiny analysis is inappropriate in this case.

However, should the court find that the action by the Board in adopting the Exclusive Forum Bylaw fails the reasonableness test under *Unocal*, the Board may still meet their burden of reasonableness under the Entire Fairness test. As stated in *In Re Gaylord*, though methods for accessing a threat to a corporation may be inadequate or defensive, the actual measure taken may still be fair and equitable with respect to the situation. *In Re Gaylord Container Corp. Shareholders Litigation*, 753 A.2d 462, 477-80 (Del.Ch. 2000). The key inquiry in this situation is whether the board's actions are preclusive or coercive. *Id.* When defensive measures are neither preclusive nor coercive, they will be upheld if they fall within the range of reasonableness. *Id.* In the present case, the action by the Board, even if found to be defensive, is not preclusive or coercive. It does not preclude a shareholder from bringing full claims against the Board, nor does it coerce a shareholder into bringing or not bringing a claim. Since the Board's action in limiting the choice-of-forum is reasonable given the Affidavit of Director Defendant Daphne Keyes, the Exclusive Forum Bylaw should be found reasonable and thus upheld under the Entire Fairness Test. See Affidavit of Director Defendant Daphne Keyes.

2. The Business Judgment Rule Is the Appropriate Standard to Evaluate the Board's Adoption of the Bylaw.

Since there are no defensive actions at issue, and thus no basis for enhanced scrutiny, the appropriate standard to evaluate Pinpoint's adoption of the Exclusive Forum Bylaw is with the Business Judgment

Rule. *Unitrin*, 651 A.2d at 1371. The rule dictates that directors of a corporation are presumptively immune from liability to the corporation absent a showing of breach of fiduciary duty (good faith, loyalty, or due care) or a rational business purpose. See *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993); See Affidavit of Director Defendant Daphne Keyes. In the case at hand, the Board was fully informed in adopting the Bylaw and relied in good faith on the advice of their legal advisors. *Id.* Furthermore, for the reasons stated above (and affirmed by the Court of Chancery), there was no breach of loyalty on part of the Board. Finally, the Board showed due care in weighing and analyzing the different, but relevant, factors related to the Exclusive Forum Bylaw; which included the efficiency and convenience of having all litigation confined to the Court of Chancery, the avoidance of related litigation in multiple venues, and any benefit of predictability in the application of Delaware corporate law. *Id.* Because there can be no showing of a breach of fiduciary duty on the part of Pinpoint's Board, the presumption of immunity under the business judgment rule must apply.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's decision to deny Plaintiff Miller's Motion to Stay and to grant the motion of the Director Defendants and Pinpoint to enjoin Plaintiff Miller from prosecuting any derivative or other fiduciary claims in Texas or any forum other than this Court.

February 11, 2011

Respectfully submitted,

Team H

Attorneys for Appellees