IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

<u>Answering Brief For the Appellees</u>

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February 11, 2011

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NATURE OF PROCEEDINGS

This is an appeal from the entry of the January 12, 2011 Order in the Court of Chancery, written by Chancellor Jamie K. McCloskey. The Court of Chancery issued a 21-page memorandum opinion ("Op."). Plaintiff Edward Miller ("Miller") applied for interlocutory appeal pursuant to Supreme Court Rule 42 on January 14th, and the appeal was granted by this Court on the 18th of January.

On appeal, Miller asserts that the Court of Chancery incorrectly denied his Motion to Stay the Consolidated Civil Action No. 4952-VCM, *In re Pinpoint Bearings, Inc. Shareholders Litigation* ("Consolidated Action"). Miller further appeals the Court of Chancery's decision to enjoin his fiduciary oversight action previously filed in the United States District Court for the Southern District of Texas. Miller argues that the Court of Chancery incorrectly determined that Pinpoint's Exclusive Forum Bylaw, which limited jurisdiction to hear intra-entity lawsuits to the Court of Chancery, was valid as a matter of law and equity.

The Court of Chancery was correct in its decision to uphold Pinpoint's Exclusive Forum Bylaw by preventing Miller from litigating his fiduciary oversight claims in any jurisdiction besides the Court of Chancery. The Court of Chancery correctly applied Delaware General Corporate Law principles in arriving at its decision to maintain exclusive jurisdiction over the Consolidated Action.

This is the appellees' answering brief.

SUMMARY OF ARGUMENT

1. The Court of Chancery correctly upheld Pinpoint's Exclusive Forum Bylaw by denying Miller's attempt to stay the Delaware actions in favor of his previously filed Texas action. The principles elicited in *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 263 A.2d 281 (Del. 1970), which support the "first-filed" rule, do not apply when the parties have contractually agreed to a forum selection provision. Pinpoint's board had the statutory right to unilaterally amend the corporation's bylaws to include the Exclusive Forum Bylaw, and such an amendment is contractually binding on all Pinpoint shareholders under Delaware law. Thus, the Exclusive Forum Bylaw is binding on Miller, and he can only bring his shareholder derivative action in the Delaware Court of Chancery.

2. This court should enforce Pinpoint's Exclusive Forum Bylaw as an equitable amendment because the Board did not act in their own self-interest in adopting the bylaw. The business judgment rule is the appropriate standard of review to assess the equitable validity of Pinpoint's Exclusive Forum Bylaw because Miller has not presented sufficient evidence to show the Board violated their fiduciary duties of loyalty, good faith, and due care. This court should not use the *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), standard to review Pinpoint's Exclusive Forum bylaw because it does not raise issues of control. The entire fairness standard should not apply to the Exclusive Forum Bylaw because the Board did not violate their duty of loyalty. Thus, the Exclusive Forum Bylaw is valid as a matter of equity.

STATEMENT OF THE FACTS

Nominal Defendant Pinpoint Bearings, Inc. ("Pinpoint") is a manufacturer of rolling and ball bearings. (Op. 4). The company is incorporated in the State of Delaware and maintains its principal place of business in Houston, Texas. (Op. 4).

Following the March 16, 2010 Court of Chancery Opinion, *In re Revlon, Inc. Shareholders* Litigation, 990 A.2d 940 (Del. 2010), the Board of Directors ("Board") of Pinpoint consulted with their lawyers from Jackson and Sheehan LLP to discuss the efficacy of enacting an Exclusive Forum Selection Bylaw ("Exclusive Forum Bylaw"), making the Delaware Court of Chancery the exclusive jurisdiction for shareholders to bring derivative actions against the corporation or the Board. (Op. 2 and 17 n. 39). On June 10, 2010, the Board adopted the Exclusive Forum Bylaw because of the perceived convenience, efficiency, relative predictability the provision would provide in the corporation's management of intra-entity litigation. (Op. 17).

Three months after Pinpoint adopted the Exclusive Forum Bylaw, the company was investigated by the Office of the Inspector General of the United States. (Op. 5). The investigation followed a September 2010 whistleblower complaint by one of Pinpoint's engineers, Roland Thompson ("Thompson"). (Op. 5). Thompson reported that, in 2009, he witnessed three Pinpoint mid-level managers purposely omitting to conduct certain tests required by Pinpoint's contracts with the U.S. military in order to cut costs. (Op. 5). The managers believed that the tests were redundant because the failure to test the bearings did

not adversely affect their performance. (Op. 5). However, Pinpoint continued to falsely represent that the tests had been completed in their invoices to the Military. (Op. 6).

The board took immediate action to mitigate the damage caused by the situation after the OIG gave Pinpoint formal notice of the pending investigation on September 8, 2010. (Op. 6). The Board appointed independent directors to a special investigative committee to look into the merits of Thompson's allegations. (Op. 6). After determining that the Thompson had correctly identified previously undisclosed cost-cutting measures by the mid-level manager, the Board engaged the law firm Venner and Lee LLP to negotiate a settlement between Pinpoint and the OIG. (Op. 6). The parties finalized the settlement on November 30, 2010. (Op. 6). In accordance with the agreement, Pinpoint (1) entered into a consent decree acknowledging the violations of the False Claims Act, (2) agreed to pay $500 million in fines and penalties, and (3) promptly fired the mid-level managers who were responsible for the violations. (Op. 6). The Board's immediate willingness to cooperate prevented Pinpoint from losing its status as an eligible contractor with the U.S. Military, the corporation's primary customer. (Op. 7).

The day the settlement was finalized, Pinpoint issued a press release, placing the market on notice, about its investigation and settlement with OIG. (Op. 7). The next day, December 1, 2010, Plaintiff Edward Miller ("Miller"), a Houston, Texas resident and Pinpoint shareholder, filed a federal action in the United States

District Court for the Southern District of Texas, against Pinpoint and the Board, alleging a violation of federal securities law requiring corporate disclosure of pending government investigations that could adversely affect the company's financial position. (Op. 7). Miller's Complaint also contained a state law breach of fiduciary oversight claim asserting that the Board and Pinpoint lacked a compliance system to track fulfillment of the U.S. Military testing requirements. (Op. 7).

On December 2, 2010, three other Plaintiffs filed separate, but nearly identical breach of fiduciary oversight actions in the Delaware Court of Chancery, in accordance with the Exclusive Forum Bylaw. (Op. 7). Those Plaintiffs stipulated to a Consolidation Order on December 8, 2010, combining their complaints under the caption *In re Pinpoint Bearings, Inc. Shareholders Litigation* ("The Consolidated Action"). (Op. 8).

Five days later, on December 13th, Pinpoint and the Board filed a Motion to Stay Miller's fiduciary oversight action in the Texas Federal Court because of the pending litigation in Delaware and Miller's failure to comply with the Exclusive Forum Bylaw. (Op. 8). On December 18th, Miller responded by filing an identical fiduciary oversight claim in the Court of Chancery in an effort to join his claim in the Consolidated Action and sway the Court of Chancery into staying its disposition of the entire matter pending the completion of his Texas federal action. (Op. 8-9).

In support of his Motion to Stay the Consolidated Action, Miller argued that Pinpoint's Exclusive Forum Bylaw should be invalidated as a matter of law or be found inequitable. (Op. 9). In order to uphold the validity of its Exclusive Forum Bylaw, Pinpoint moved to enjoin Miller from pursuing his Texas fiduciary oversight action. (Op. 10).

The Court of Chancery ruled that the Exclusive Forum Bylaw is valid as a matter of law and equity. (Op. 3). Thus, the Court of Chancery denied Miller's Motion to Stay and enjoined him from continuing to litigate his fiduciary oversight action in the Texas federal court. (Op. 3).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE COURT OF CHANCERY'S DETERMINATION THAT MILLER WAS LEGALLY BOUND TO ABIDE BY PINPOINT'S VALID FORUM SELECTION BYLAW AND THAT ENFORCEMENT OF THE BYLAW PRECLUDED THE NEED TO CONDUCT A *MCWANE* ANALYSIS.

A. Question Presented

Was the Court of Chancery correct in refusing to stay the Delaware fiduciary oversight action and enjoining Miller's continued prosecution of the Texas fiduciary oversight action after determining that Pinpoint's Exclusive Forum Bylaw was legally valid and binding on Plaintiff Miller?

B. Scope of Review

The Court of Chancery's decision to exercise its jurisdiction and not to stay a Delaware action is typically viewed under the abuse of discretion standard of review. *See ANR Pipeline Co. v. Shell Oil Co.*,

525 A.2d 991, 992 (Del. 1987). However, the Court of Chancery decided to deny Miller's Motion to Stay the Consolidated Action and granted Pinpoint's Motion to Enjoin the Texas fiduciary oversight action after determining that Pinpoint's Exclusive Forum Bylaw was valid and binding on Miller as a matter of law. Thus, this Court should review those legal conclusions under the *de novo* standard. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1994).

C. Merits of Argument

1. Pinpoint's Bylaws Are Binding Contracts Between Pinpoint's Shareholders and the Corporation, Which the Board Has the Power to Unilaterally Amend.

Under Delaware law, corporate charters and bylaws are contracts between shareholders and the corporation. *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990). *See also CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 239 (Del. 2008) (a corporate bylaw is an internal governance contract of the corporation). "Bylaws, by their very nature, set down rules and procedures that bind a corporation's board and its shareholders." *Id.* at 234. Section 109(b) of the Delaware General Corporation Law specifically provides 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 it rights or powers or the rights or powers of its stockholders, directors, officers or employees.
>
> 8 *Del. C.* § 109(b).

The Chancery Court Opinion, *In re Revlon, Inc. Shareholders Litigation*, 990 A.2d 940, 960 (Del. Ch. 2010), inferred that a provision selecting an exclusive forum for intra-entity disputes is a valid exercise of a board of directors' power to conduct the affairs of the corporation.

In his memorandum opinion, Chancellor McCloskey agreed with his *Revlon* colleague in finding that Pinpoint's Exclusive Forum Bylaw is an appropriate method of managing the corporation's intra-entity litigation. (Op. 12). The plain language of § 109(b) also supports such an interpretation. Managing litigation is an important business issue for corporations, and the ability of shareholders to bring derivative suits against the corporation is a right that appropriate bylaws can and should regulate.

Miller contests that the Exclusive Forum Bylaw is invalid because the Board unilaterally adopted the provision. Miller argues that because of the bylaw's effect upon shareholders' rights to bring derivative lawsuits against the Board and the corporation, the Exclusive Forum Bylaw required shareholder consent to be valid and contractually binding.

Miller's argument ignores the Delaware Corporations Law stating that a corporation can expressly confer the power to adopt and amend bylaws upon the corporation's board of directors. 8 *Del. C.* § 109(a); *CA, Inc.*, 953 A.2d at 231; *Kidsco, Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995), *aff'd,* 670 A.2d 1338 (Del. 1995). "[W]here 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." *Kidsco*, 674 A.2d at 492 (citing *Roven v. Cotter,* 547 A.2d 603, 608 (Del. Ch. 1988). Thus, if a Delaware corporation's certificate of incorporation confers the power upon the Board to amend the bylaws, the Board can make amendments without obtaining shareholder approval. *Kidsco*, 674 A.2d at 492.

Kidsco involved a decision by the board of directors to amend the corporate bylaws to extend the required waiting time to schedule a special shareholders meeting from a minimum of 35 days to a minimum of 60 days after the meeting was requested. *Id.* at 489. The board of directors unilaterally amended the bylaw to prevent a special shareholders meeting to discuss a hostile takeover bid from being held only days after a special shareholders meeting regarding a board-supported merger. *Id.* The Chancery Court held that the board of directors' unilateral amendment of the special meeting bylaw was valid because the corporation's bylaws expressly empowered the board to make such changes. *Id.* at 493.

Miller's arguments for challenging Pinpoint's Exclusive Forum Bylaw fail for the same reasons that caused the plaintiffs in *Kidsco* not to succeed in contesting their board of directors' unilateral amendment of the corporation's bylaws. As in *Kidsco*, Pinpoint's charter expressly conferred the power to amend the bylaws upon the Board. Moreover, the decision to adopt the Exclusive Forum was related to the efficient handling of intra-entity litigation, which is an important business consideration. As the Court of Chancery did not

find that the Exclusive Forum Bylaw was inconsistent with the Delaware law or Pinpoint's charter, the bylaw is presumptively valid. Miller has not successfully rebutted that presumption.

Since the Exclusive Forum Bylaw is valid, then it must be binding upon Miller as a shareholder of the corporation. Miller breached the internal governance contract by filing his derivative shareholder action in the Texas federal court. Thus, the Court of Chancery correctly enforced Pinpoint's Exclusive Forum Bylaw by denying Miller's Motion to Stay and enjoining him from pursuing the fiduciary oversight action in Texas or any other jurisdiction besides the Court of Chancery.

2. A *McWane* Analysis Is Inappropriate Because Miller's Disregard of the Exclusive Forum Bylaw Prompted the Jurisdiction Issue.

Even where a prior action, involving the same parties and issues, is pending in a court capable of doing prompt and complete justice, *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970), a Delaware court should enforce a legally valid forum selection clause expressly agreed upon by the parties. *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145-46 (Del. 2010) (citing *Elf Atochem North Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999)).

"A Delaware action will not be stayed as a matter of right by reason of a prior action pending in another jurisdiction involving the same parties and the same issues." *McWane*, 263 A.2d at 283. *McWane* gives a Delaware judge liberal discretion to stay a Delaware action in favor of a prior action pending elsewhere if the facts and

circumstances indicate that the defendant is attempting to defeat the plaintiff's choice of forum by commencing a retaliatory action involving the same issues as the first-filed action. *McWane*, 263 A.2d at 283. *McWane* reflects the Delaware courts' values of "comity and the necessities of an orderly and efficient administration of justice." *Id.*

The facts of this case do not merit a *McWane* analysis by the Court. The Defendants did not attempt to defeat Miller's choice of forum in the Texas federal court by filing a retaliatory suit in Delaware. All of the Delaware actions contributing to the Consolidated Action were plaintiff-initiated. In fact, Miller voluntarily made himself a party to the Consolidated Action, which he now seeks to stay. Had Miller acted like the other Delaware Plaintiffs and filed his original suit in accordance with Pinpoint's Exclusive Forum Bylaw, the courts could have avoided this jurisdictional battle and could proceed with the efficient disposition of this case. The Court should not apply the *McWane* analysis when the Plaintiff's own actions instigated the comity debate.

Further, "[t]he *McWane* principle is a default rule of common law, which the parties to the litigation are free to displace by a valid contractual agreement." *Ingres*, 8 A.3d at 1146. The *McWane* decision predated the United States Supreme Court decision *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1974), which held that "in light of present-day commercial realities…the forum clause should control absent a strong showing that it should be set aside." The Supreme

Court opined that unless the party opposing the enforcement of the forum selection clause clearly shows that the clause is unreasonable, unjust, or invalid due to fraud or overreaching, the court should enforce the parties' agreement to the specific forum. *M/S Bremen*, 407 U.S. at 15. Therefore, a party claiming that the forum selection clause in a contract is unjust must "bear a heavy burden of proof." *Id.* at 17.

To satisfy its burden of proving that a forum selection agreement is unreasonable a plaintiff must show more than mere inconvenience or additional expense. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991); *Ingres*, 8 A.3d at 1146 n.9 (quoting *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *3 (Del. Super. Jan. 16, 2007)). "Such an agreement is only unreasonable when its enforcement would, under the circumstances then existing, seriously impair the plaintiff's ability to pursue his cause of action." *Ingres,* 8 A.3d at 1146 n.9 (quoting *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 216 (Del. Super. 1978)).

Miller has not met his burden of proof. He asserts that the Pinpoint Exclusive Forum Bylaw should not be binding on him because the agreement was not a product of a bargained-for exchange. Miller attempts to distinguish this case from the many cases that have upheld forum selection clauses involving clauses that the parties negotiated as part of a larger agreement. *See M/S Bremen*, 407 U.S. at 17 ("freely negotiated international commercial transaction between a German and an American corporation for towage of a vessel); *Ingres*, 8

A.3d at 1145 (contracts negotiated between software companies); *Elf Atochem*, 727 A.2d at 288 (series of agreements to create a joint venture LLC). Miller believes that the courts should be reluctant to uphold a forum selection clause that was not subject to negotiations between parties of similar bargaining strength.

However, a reasonable forum selection clause is enforceable even when the clause was not the subject of arms-length bargaining between the parties. *Carnival Cruise Lines*, 499 U.S. at 593. In *Carnival Cruise Lines*, the United States Supreme Court upheld a forum selection clause in a cruise line's form passenger ticket designating Florida courts as the exclusive fora for passenger's suits against the cruise line even though the plaintiff, a resident of the State of Washington, was unaware of the clause prior to purchasing the ticket. *Id.* The Court reasoned that the forum selection clause was permissible absent negotiation between the parties because: (1) "the cruise line ha[d] a special interest in limiting the fora in which it potentially could be subject to suit," (2) the forum selection clause could "dispel[] confusion about where suits arising from the contract must be brought, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions," and (3) the passengers "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." *Id.*

Many of the same considerations held to be reasonable in *Carnival Cruise Lines* influenced Pinpoint's decision to enact its Exclusive Forum Bylaw. Like Carnival, Pinpoint has a reasonable interest in limiting the fora in which shareholders can bring derivative actions because Pinpoint has over 28,000 shareholders in all fifty states. The exclusive forum also eliminates forum shopping by shareholders to achieve a strategic advantage in the litigation, which can lead preemptive settlements without considering the merits of their claims. Shareholders also stand to benefit from derivative actions consolidated into one forum because fewer lawsuits against the company and more efficient litigation can stabilize the stock value of the corporation.

Miller also contends that by limiting jurisdiction of shareholder derivative action to the Court of Chancery, the Exclusive Forum Bylaw impermissibly denies him the right to "complete justice." Since the Court of Chancery cannot hear cases based on federal law, Miller argues that he will necessarily have to bring two lawsuits against Pinpoint and its directors based on the same core of operative facts.

Miller's ability to bring his state law fiduciary oversight claim in federal court is not an entitlement, but a product of the federal supplemental jurisdiction rules codified in 28 U.S.C.A. § 1367(a). However, 28 U.S.C.A. § 1367(c) makes clear that the granting of supplemental jurisdiction is a discretionary choice by the federal district judge. *See* 13 Charles Allan Wright, et al., Fed. Prac. & Proc. Juris. § 3523.1 (3d ed. 2010). As the district court judge in

the Texas has yet to rule on whether to proceed on Miller's fiduciary oversight claim, Miller cannot be heard to complain that the enforcement of the Exclusive Forum Bylaw unreasonably denies him of a fundamental right.

Lastly, Miller and other shareholders assented to bylaws by continuing to purchase and hold stock after the Board adopted the Exclusive Forum Bylaw. Pinpoint's shareholders had notice that the Board could unilaterally change the bylaws, and such amendments would be binding on all stakeholders in the corporation. If the shareholders opposed such an amendment, they could have expressed their dissatisfaction by selling their stock or by asserting their own power under 8 *Del. C.* § 109(a) to repeal the Exclusive Forum Bylaw. Miller did not have the vested right, however, to ignore the bylaw and bring his derivative action in the Texas Federal Court.

The Court of Chancery correctly analyzed the facts and determined that it should maintain jurisdiction over this case. The Court of Chancery recognized that the *McWane* analysis is inapplicable in this situation because the Board sought to avoid issues of duplicative litigation and concerns about comity when it adopted the Exclusive Forum Bylaw. Miller's decision not to abide by the bylaw was the impetus for this ancillary litigation of a procedural issue. This Court should affirm the lower court's decision, so that all parties involved can proceed efficiently to addressing the merits of this derivative action.

II. THIS COURT SHOULD ENFORCE PINPOINT'S EXCLUSIVE FORUM BYLAW AS AN EQUITABLE AMENDMENT BECAUSE THE BOARD DID NOT ACT IN THEIR OWN SELF-INTEREST IN ADOPTING THE AMENDMENT.

A. Question Presented

Was the Court of Chancery correct in denying Miller's Motion to Stay the Delaware Consolidated Action and enjoining his Texas fiduciary oversight because Pinpoint's Exclusive Forum Bylaw is valid as an equitable matter?

B. Scope of Review

The Court of Chancery's holding that Miller failed to provide evidence rebutting the applicability of the business judgment rule should be viewed using the *de novo* standard. *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990). This court should overturn the Court of Chancery only if it, "erred in formulating or applying legal precepts." *Id.*

C. Merits of Argument

1. The Business Judgment Rule Is The Appropriate Standard To Use In Reviewing Pinpoint's Exclusive Forum Bylaw Because Miller Has Failed To Show The Board Violated Their Fiduciary Duties.

The court should refrain from imposing itself unreasonably on business and affairs of a corporation. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1991). The business judgment rule presumes that "in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the

honest belief that the action was in the best interest of the company [and its shareholders]." *Emerald Partners v. Berlin*, 787 A.2d 85, 90 (Del. 2001). To rebut a presumption that a business judgment was appropriate, a plaintiff/shareholder must provide evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty—good faith, loyalty, or due care. *Cede & Co.,* 634 A.2d at 361; *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). When a plaintiff shareholder fails to meet their evidentiary burden, the business judgment rule attaches to the challenged action and the court will not second-guess the corporation's business judgments. *Cede & Co.,* 634 A.2d at 361.

In *Aronson*, this court applied the business judgment rule to uphold a board of directors' decision to provide one of its former directors an annual salary in exchange for his consultation services and a loan for $250,000 because the plaintiff shareholder did not meet his evidentiary burden. 473 A.2d at 808. This Court held that the board of directors did not breach their duty of good faith because they informed themselves of all relevant material pertinent to the challenged decision. *Id.* at 812. Also, the directors did not violate their duty of care because they used the requisite care before making their business decision. *Id.* Furthermore, the board of directors did not violate their duty of loyalty because their challenged decision was not chosen to advance the directors' self-interests. *Id.*

In the case at bar, Miller has not provided evidence to rebut the presumption that the business judgment rule is the appropriate

standard of review. Miller asserts the Board violated their duty of loyalty in adopting the Exclusive Forum Bylaw because it served their interests in usurping control over all shareholder litigation to hold them accountable as fiduciaries. Miller cites to *Cede & Co.*, 634 A.2d at 362, for the proposition that a board of directors violates their duty of loyalty when any interest of the director takes precedence over the best interest of the corporation and its shareholders.

However, the Board acted with Pinpoint's and its shareholders', and not their own, interests in mind when adopting the Exclusive Forum Bylaw. Pinpoint has an estimated 28,000 shareholders across the nation. Without the Exclusive Forum Bylaw, all 28,000 shareholders could file suits against Pinpoint in their respective jurisdictions and create an undue burden on the corporation to maintain multiple suits in several jurisdictions. The Exclusive Forum Bylaw eliminates this problem and allows shareholders to adjudicate their issues in front of the Court of Chancery, which is capable of providing a proper remedy. Furthermore, Pinpoint and its shareholders benefit from the bylaw because it prevents courts costs from depleting valuable resources, which can used to embark on new business ventures that will produce revenue for the corporation. Therefore, the Exclusive Forum bylaw works in the best interest of Pinpoint and its shareholders, not the Board.

A court will not find a board to have breached its duty of care and good faith unless the directors have failed to inform themselves fully and in a deliberate manner before voting as a board upon a

transaction. *Cede & Co.*, 634 A.2d at 369. Here, prior to adopting the Exclusive Forum Bylaw, the Board sought legal advice from Jackson and Sheehan LLP and became aware of the legal benefits and consequences of adopting the provision. Only after availing themselves of the relevant information to the exclusive forum bylaw did the Board choose to adopt the bylaw. Thus, the Board properly discharged its duty of care and good faith.

2. Even Though This Court Should Not Apply Heightened Scrutiny To Pinpoint's Exclusive Forum Bylaw, The Bylaw Will Pass Equitable Muster Under Such Review.

a. The Court Should Not Use The *Unocal* Standard Because The Exclusive Forum Bylaw Does Not Raise Issues Of Control.

The *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), standard is applicable where the board "adopts any defensive measure taken in response to some threat to corporate policy and effectiveness which touches upon issues of control." *Gilbert*, 575 A.2d at 1144. In order to pass the *Unocal* standard of review, the challenged decision must meet a two-prong test: (1) The board of directors had reasonable grounds for believing a danger to corporate policy and effectiveness existed because of another person's stock ownership; and (2) The board of directors' defensive measure was reasonable in relation to the threat posed. Unocal, 493 A.2d at 955-56. Miller contends that the Exclusive Forum Bylaw should be analyzed using the *Unocal* standard because the Board cannot prove the reasonableness of the Exclusive Forum Bylaw.

An evaluation of the Exclusive Forum Bylaw using the *Unocal* standard is inappropriate because the bylaw was not adopted as a response to a threat to the Board's control of the corporation. The Board passed the Exclusive Forum Bylaw to increase the corporation's efficiency in handling breach of fiduciary duty claims and to save Pinpoint and its shareholders from the costs of multijurisdictional litigation.

Should the court find that a *Unocal* analysis is appropriate, the Exclusive Forum Bylaw would satisfy both prongs of the test. First, the Board had reasonable grounds for believing that suits from shareholders in multiple jurisdictions could ensue because the corporation has over 28,000 shareholders in different states that have the right to file breach of fiduciary duty claims against Pinpoint or the Board. Absent the Exclusive Forum Bylaw, the courts could be inundated with multiple similar claims, and efficient consolidation of such claims would be impossible. Second, the Exclusive Forum Bylaw was a reasonable response to the threat of shareholder suits in multiple jurisdictions, because it eliminated the threat, while maintaining the shareholders' right to file breach of fiduciary duty claims. The bylaw also does nothing to affect jurisdiction for non-fiduciary duty actions, such as Miller's federal securities law claim. Thus, the Exclusive Forum Bylaw survives the heightened scrutiny of *Unocal*.

b. The Entire Fairness Standard Should Not Attach To The Exclusive Forum Bylaw Because The Board Did Not Violate Their Duty Of Loyalty.

An entire fairness analysis is only appropriate where the board breaches its fiduciary duty of loyalty to the corporation. *Stroud v. Grace*, 606 A.2d 75, 91 (Del. 1992). *See also Emerald Partners*, 787 A.2d at 94 (Defendant directors' stance on both sides as a corporate fiduciary was sufficient to require the demonstration of entire fairness). The entire fairness standard embraces two concepts: fair dealing and fair price. *Emerald Partners*, 787 A.2d at 97 (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983)). Fair dealing embraces the questions of when the transaction was timed, how it was negotiated, and how the approvals of the directors and the stockholders were obtained. *Emerald Partners*, 787 A.2d at 97. Fair price relates to the economic and financial considerations of the proposed action and any other elements that affect the intrinsic or inherent value of the company's stock. *Id.*

The entire fairness standard should not apply to the Exclusive Forum Bylaw because the Board did not act in their own interest in adopting the bylaw. The Exclusive Forum Bylaw benefited Pinpoint, the shareholders, and the judicial system, not the Board.

Assuming the entire fairness doctrine applies, the Exclusive Forum Bylaw passes the standard because it meets the standards of fair dealing and fair price. The Board adopted the Exclusive Forum bylaw on June 10, 2010, three months before OIG's investigation and five

months before Miller filed his derivative suit. The Board's foresight to adopt a bylaw before any investigations or legal suits were filed against Pinpoint is evidence of the fair dealing in the challenged action. Moreover, the Board sought legal consultation about the consequences for Pinpoint of implementing an Exclusive Forum Bylaw prior to adopting the clause. The Exclusive Forum Bylaw meets the fair price prong because it enhances the value of Pinpoint's stock. Rather than focusing on litigation in multiple jurisdictions, Pinpoint will avoid excessive litigation costs and may use its revenue to create more products for its clients, which will benefit both Pinpoint and its shareholders.

Miller contends that fair dealing was absent because the bylaw was adopted unilaterally by the Board, without negotiations with the shareholders. His argument fails because according to 8 *Del. C.* § 109(b), the Board has the power to adopt, amend or repeal the corporation's bylaws. The Board in passing the Exclusive Forum Bylaw was merely exercising a power Delaware law has granted them. Thus, the Exclusive Forum Bylaw passes the entire fairness standard.

CONCLUSION

This Court should uphold the Court of Chancery's judgment that the Exclusive Forum Bylaw is valid as a matter of law and equity. Thus, this Court should affirm the denial of Miller's Motion to Stay the Consolidated Action and the injunction of his continued fiduciary oversight litigation in the United States District Court for the Southern District of Texas.