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

APPELLANT'S OPENING BRIEF

Filed by Team **M**
Counsel for Appellant

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NATURE OF PROCEEDINGS

This appeal follows a January 12, 2011 Court of Chancery decision (McCloskey, J.) denying Edward Miller's ("Appellant") motion to stay the pending action ("Delaware Action") in favor of, and enjoining Appellant from litigating his claims filed in the District Court for the Southern District of Texas ("the Texas Action") on December 1, 2010, alleging fiduciary duty and federal securities law violations by the defendants, directors of Pinpoint Bearings, Inc. (the "Directors;" "Pinpoint" or "the Corporation"). Other Pinpoint shareholders (the "Delaware Plaintiffs") filed separate actions on December 2, 2010, alleging identical derivative oversight claims to the Texas Action, which were subsequently consolidated into this action.

In the January 12, 2011 opinion the Chancery Court upheld, as a matter of law, the validity of a Pinpoint bylaw ("the Bylaw"), which was unilaterally adopted by the Directors, designating Delaware as Pinpoint's sole forum for fiduciary duty violation claims, thus finding an equitable review of this forum unnecessary. It is to this judgment Appellant now appeals, seeking reversal of the injunction and grant of the stay in favor of the first-filed Texas Action.

SUMMARY OF THE ARGUMENTS

1. The Chancery Court erred because the Bylaw is invalid under Delaware law on grounds that it: (1) ignores the clear distinction between the charter and bylaws under In re Revlon, Inc. S'holder Litig., 990 A.2d 940, 960 (Del. Ch. 2010), requiring forum selection clauses be adopted by a shareholder vote in the charter, not a bylaw; (2) violates 8 Del. C. § 109(b) by depriving appellant of his voting right as a shareholder, and destroying Appellant's vested right to bring suit in any competent jurisdiction, and (3) was invalidly passed by the Director Defendants in breach of their fiduciary duty of loyalty, oversight, and good faith.

2. The Chancery Court erred in applying Ingres Corp. v. CA, Inc., 8 A.3d 1143 (Del. 2010), which does not apply to the case at bar, as the Bylaw is both non-mutual and unreasonable. Thus, in balancing the equity in allowing plaintiffs to litigate in either Delaware or Texas, this court must permit shareholders to bring their derivative claims in Texas.

3. This Court should reverse the Chancery Court's injunction of Appellant's Texas action, as well as the stay of the consolidated Delaware Action in favor of the first-filed Texas Action.

STATEMENT OF FACTS

For twenty years, Appellant served as a Pinpoint employee in Houston, Texas, where he has lived and worked for his entire life, until retiring in 2004. (R. 4). Appellant acquired most of his 5,000 shares in Pinpoint's common stock, worth about $230,000, during his twenty years of service to the Corporation. (R. 3).

Pinpoint manufactures roller and ball bearings for aerospace applications. (R. 3, 4). Pinpoint is publicly traded on the New York Stock Exchange, with a current market capitalization of four billion dollars, eighty eight million shares outstanding, and 28,000 record shareholders living in every state. (R. 4). Seven directors serve on the Board of Directors. (R. 5). Pinpoint employs 8,000 Texas residents and its headquarters and manufacturing operations are located in Houston, Texas. (R. 4).

Between 2007 and 2010, Pinpoint derived more than sixty percent of its annual revenue from contracts with the United States military.[1]

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[1] In its government contracts, the Corporation must certify that they conducted various tests on their products before shipment ("Testing Certification"), or else be subject to an investigation for violations of the False Claims Act. 31 U.S.C. § 3729. (R. 5). The Directors may be held personally liable for damages arising from the failure to disclose contingent liabilities in connection with a False Claims Act investigation, pursuant to the Securities Exchange Act Section 10(b). 15 U.S.C § 78j (2000).

(R. 5). During that time, management, without disclosure, improperly cut costs pursuant to those government contracts, and falsified mandatory Testing Certifications to the military. (R. 5, 6).

Also during that time, the Directors conducted a meeting on June 10, 2010. (R. 2). Nothing in the record indicates that the Directors discussed any monitoring techniques for the required Testing Certifications that would prevent wrongful activity by Pinpoint managers. Instead, in the presence of counsel, the Directors passed bylaw Amendment 12 ("the Bylaw").[2] (R. 2, 3). The Bylaw limits all

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[2] Amendment 12 to Pinpoint's bylaws states:

> Forum. The Court of Chancery of the state of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of Pinpoint, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of Pinpoint to Pinpoint or Pinpoint's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law or Pinpoint's certificate of incorporation or bylaws, or (iv) any other action asserting a claim governed by the internal affairs doctrine. (R. 3).

In addition, Pinpoint's charter and bylaw Amendment 14 expressly confer power upon the directors to amend bylaws:

> Amendments. These bylaws may be made, altered, amended or repealed by vote of a majority of the directors in office or by vote of a majority of the stock outstanding and entitled to vote. Any bylaw, whether made, altered, amended or repealed by the stockholders or directors, may be altered, amended or reinstated, as the case may be, by either the stockholders or by the directors as hereinbefore provided. (R. 14).

28,000 Pinpoint shareholders, living in all fifty states, to Delaware as the sole forum to exercise their right to bring fiduciary duty violation claims against the Directors. (R. 2). According to Director Daphne Keyes, the Directors passed the Bylaw in the interest of "convenience, efficiency, and relative predictability." (R. 17).

Between October 2010 and November 2010, upon notice to Pinpoint of an investigation by the Office of the Inspector General ("the OIG"), a Board-appointed Special Investigation Committee ("SIC") investigated alleged violations of the False Claims Act by Pinpoint mid-level managers, which the SIC verified as meritorious. (R. 5, 6). During that time, the Directors did not disclose to shareholders any information concerning the month-long SIC investigation.

On October 28, 2010, the Directors approved a settlement with the OIG (the "Settlement"), assessing Pinpoint with five hundred million dollars in fines and penalties and acknowledging five separate violations of the False Claims Act. (R. 6). During the entire month between the Director's approval of the settlement and its finalization, the Directors did not disclose any information to shareholders. (R. 6).

On November 30, 2010, after the close of the stock market, the Directors issued the Press Release with details of the month-long

investigation and the Settlement terms. (R. 6, 7). The following day, Pinpoint's stock price fell from fifty-one dollars per share to forty-six dollars per share. (R. 7). As a result, Pinpoint lost about four hundred forty million dollars in market capital. (R. 7). Pinpoint's stock has continued to trade below fifty dollars per share. (R. 7).

After the Press Release, Appellant filed the Texas Action on December 1, 2010 naming the Directors defendants, and Pinpoint nominally.[3] (R. 7). Next, the Delaware Plaintiffs individually filed actions in Chancery Court on December 2, 2010, alleging the same fiduciary duty claims as the Texas Action, consolidated as the Delaware Action on December 8, 2010. (R. 3, 8).

On December 13, 2010, relying on the Bylaw, the Directors moved the district court to stay only the fiduciary duty claims in favor of the Delaware Action and moved the Chancery Court to enjoin the Appellant from pursuing the Texas Action. (R. 8, 9). The Directors envision concurrent litigation with the federal securities law claims

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[3] Appellant's derivative claims alleged that by consciously failing to establish and/or maintain a meaningful compliance system to ensure Pinpoint's compliance with its military contract obligations, the Directors breached their fiduciary duty to Pinpoint. (R. 7).

Appellant's federal securities law claims alleged the Directors knowingly failed to disclose the pending OIG investigation and its foreseeable adverse financial consequences in violation of Section 10(b) of the Securities Exchange Act. (R. 7).

proceeding in federal court and simultaneous state law fiduciary duty claims proceeding in Delaware. (R. 8).

On December 15, 2010, Appellant filed the Miller Delaware Action and simultaneously moved to consolidate that action into the Delaware Action. (R. 8, 9). On the same day Appellant moved to stay the Delaware Action in favor of the Texas Action, claiming that the Texas Action involves the same parties and issues, and that the Texas District Court is the only court capable of doing "prompt and complete justice" by simultaneously adjudicating the state law fiduciary duty claims and the federal securities law claims in one proceeding. (R. 9).[4]

The Chancery Court's January 12, 2010 decision, which denied Appellant's motion to stay the Delaware Action and granted the Director's motion to enjoin Appellant from derivative litigation outside Delaware, was based on its decision to uphold the validity and enforceability of the Bylaw against Appellant. (R. 19).

On January 18, 2011 this Court, pursuant to Supreme Court Rule 42, granted Appellant's petition to accept an appeal from the Chancery Court's January 12, 2011 decision.

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[4] The Original Delaware plaintiffs opposed Appellant's Delaware Motion to Stay, but elected not to take a position on validity of bylaw. (R. 10).

QUESTIONS PRESENTED

I. WHETHER THE CHANCERY COURT ERRED IN UPHOLDING THE EXCLUSIVE FORUM BYLAW ON THE GROUNDS THAT IT IS INCONSISTENT WITH 8 DEL. C. § 109(B), BECAUSE THE BYLAW VIOLATES REVLON, IT DESTROYS THE SHAREHOLDERS' VESTED RIGHT, AND THE DIRECTORS VIOLATED THEIR DUTY OF LOYALTY TO PINPOINT'S SHAREHOLDERS.

II. WHETHER THE BYLAW IS NON-MUTUAL AND UNREASONABLE SUCH THAT INGRES IS INAPPLICABLE AND THIS COURT SHOULD ANALYZE THE EQUITABLE INTERESTS OF COMITY AND EFFICIENCY.

ARGUMENT

QUESTION PRESENTED

WHETHER THE CHANCERY COURT ERRED IN UPHOLDING THE EXCLUSIVE FORUM BYLAW ON THE GROUNDS THAT IT IS INCONSISTENT WITH 8 DEL C. § 109(B), BECAUSE THE BYLAW VIOLATES REVLON, IT DESTROYS THE SHAREHOLDERS' VESTED RIGHT, AND THE DIRECTORS VIOLATED THEIR DUTY OF LOYALTY TO PINPOINT'S SHAREHOLDERS.

SCOPE OF REVIEW

This Court should review the construction of a corporate certificate or bylaw de novo. Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 926 (Del. 1990). This review is "plenary and requires no deference" to the Chancery Court. Kahn v. Lynch Commc'n Sys. Inc., 669 A.2d 79, 84 (Del. 1995). Further, this court must review forum selection clauses for entire fairness, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 633 (1991), which requires scrutiny of the process and substance of directorial action. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). A bylaw that is inconsistent with any statute or rule of common law, or is not reasonable in application is void. Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985).

MERITS OF THE ARGUMENT

The Bylaw is invalid because it is inconsistent with Revlon, which requires that exclusive forum provisions be included in a

corporation's charter, not its bylaws. Revlon, 990 A.2d at 960. The Bylaw also deprives Appellant of his vested right to bring fiduciary duty claims against Pinpoint in his preferred forum. Additionally, the Directors violated their fiduciary duty of loyalty owed to Pinpoint shareholders by adopting the Bylaw.

A. The Bylaw is inconsistent with Revlon because the exclusive forum provision was amended to Pinpoint's bylaws rather than the charter.

The Chancery Court erred in enforcing the Bylaw because its adoption violates Revlon and title 8, section 109(b) of the Delaware General Corporation Law ("DGCL"). In Revlon, the Chancery Court noted that a board and its shareholders can define an exclusive forum for intra-entity disputes when the directors and shareholders mutually agree to that forum, and when that agreement is placed in the charter. 990 A.2d at 960. Further, in Galaviz v. Berg, the Ninth Circuit suggested that the effect of an exclusive forum bylaw on shareholder rights is such that only a charter amendment, approved by the majority of shareholders, can properly limit venue in derivative actions against the corporation. Galaviz v. Berg, 2011 U.S. Dist. LEXIS 1626, at *4 (N.D. Cal.).

Title 8, section 242(b)(1) of the DGCL provides that charter amendments are subject to approval by the "affirmative vote of a

majority of the outstanding stock entitled to vote." Williams v. Geier, 671 A.2d 1368, 1373 (Del. 1996); see also 8 Del. C. § 242(b)(1). While corporate bylaws may be unilaterally adopted, amended or repealed by shareholders, and where the charter provides, by the board of directors, CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227, 231 (Del. 2008); 8 Del. C. § 109(a), a corporation's bylaws may not infringe on Delaware law or the corporate charter. 8 Del. C. § 109(b).

Here, contrary to Revlon and Galaviz, Pinpoint's Directors unilaterally adopted the provision and circumvented shareholder approval by amending Pinpoint's bylaws instead of its charter. In Revlon, by requiring that exclusive forum provisions be contained in a corporation's charter, the Chancery Court ensured that the adoption of an exclusive forum provision would be a bilateral agreement between directors and shareholders. Sections 109(a) and 242(b) of the DGCL provide different amendment procedures for the corporate bylaws and the charter. The process set out by the Delaware legislature requiring shareholder approval for charter amendments ensures that the board of directors cannot make unilateral changes to the company's corporate structure. The process for amending bylaws provides no such protection. In Revlon, the Chancery Court recognized the charter as

the proper locus for exclusive forum provisions, carefully considering the importance of maintaining that distinction.

Next, by upholding the Bylaw, the Chancery Court failed to recognize that the Bylaw violates Delaware corporate law. Regardless of who may amend Pinpoint's bylaws, they must be consistent with Delaware law. See 8 Del. C. § 109(b). Revlon states that exclusive forum provisions must be contained in the charter. Here, Pinpoint's exclusive forum provision is contained in a bylaw. Therefore, Pinpoint' exclusive forum bylaw is invalid under section 109(b) of the DGCL by unlawfully circumventing the shareholder vote through a unilateral amendment to the bylaws.

B. The Bylaw is invalid because Appellant owned stock prior to the Bylaw's adoption and during the ongoing misconduct, thereby destroying his vested right to bring litigation in any competent jurisdiction.

The Bylaw also violates section 109(b) of the DGCL by destroying the vested right of shareholders who owned Pinpoint stock prior to June 10, 2010 to bring fiduciary duty claims in any competent jurisdiction of their choosing. A charter amendment must not take away or impair any remedy against any corporation for liabilities previously incurred by its officers. Kidsco, Inc. v. Dinsmore, 674 A.2d 483, 492 (Del. Ch. 1995). Further, the power to amend bylaws "cannot confer authority to make [] amendment[s] [that] amount to the

destruction [] of vested or contract rights." Salaman v. Nat'l Media Corp., 1992 Del. Super. LEXIS 564, at *17 (Del. Super. Ct.).

Here, the Bylaw illegally and retroactively limits the forum in which Pinpoint shareholders owning shares before the Director's wrongdoing may bring claims for harms suffered prior to the adoption of the Bylaw. The Director misconduct began in early 2009, (R. 5), at which time Pinpoint shareholders' right to bring fiduciary duty claims in any competent jurisdiction vested. The Directors adopted the Bylaw on June 10, 2010. (R. 2). Allowing a bylaw to retroactively limit where plaintiffs can exercise their right to litigate director misconduct offers directors a perverse incentive to act in bad faith.

Further, exclusive forum provisions contained in bylaws are inefficient. In corporations where the charter allows directors to unilaterally amend the bylaws, shareholders and directors have equal ability to adopt, amend, and repeal bylaws without the other's consent. The Revlon court recognized the potential deadlock arising from an unending cycle of unilateral amendments. To prevent tension between shareholders and the board, exclusive forum provisions must be limited to the charter. In sum, the Chancery court erred in upholding the Bylaw because it directly infringes Delaware law.

C. The Bylaw is invalid because the Directors violated their duty of loyalty to the Pinpoint shareholders by passing the Bylaw in a bad faith effort to limit their liability.

The Chancery Court erred in enforcing a bylaw that the Directors adopted in bad faith. "[T]here is no safe-harbor for divided loyalties in Delaware." In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 751 (Del. Ch. 2005). Any director-authorized transaction that intentionally fails to further the corporation's best interest, violates positive law, or intentionally fails to act where there is a duty to act is bad faith, and thus a violation of the duty of loyalty a director owes to its corporation. Id.; see also In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 972 (Del. Ch. 1996) (a sustained failure to implement a corporate monitoring system adequate to satisfy the directors' duty of oversight constitutes bad faith). In Galaviz, the Ninth Circuit did not enforce a forum selection clause that was unilaterally adopted by the director defendants, in part because the directors adopted the bylaw after being accused of False Claims Act violations. Galaviz, 2011 U.S. Dist. LEXIS 1626, at *4. Wary of director's self-interest in passing a bylaw in order to limit their liability, the court found "no basis [] to disregard the [plaintiffs'] choice of forum," at least with respect to shareholders who purchased shares prior to the bylaw amendment. Id.

In this case, the Directors should have known of management misconduct. Just like Galaviz, this Court should not enforce a bylaw that the Directors unilaterally adopted in light of alleged False Claims Act violations. From early 2009 until October 2010, while managers falsified Testing Certifications, (R. 5, 6), the record shows no attempt of directors to monitor Pinpoint's contract compliance. However, during that same time period, in June 2010, the directors drastically limited the fora for litigation by unilaterally adopting the Bylaw, (R. 2), instead of implementing a requisite monitoring system. The directors admit they passed the Bylaw for the "convenience, efficiency, and relative predictability," of future litigation. (R. 17).

Further, the Directors failed to disclose the OIG investigation to Pinpoint's shareholders for an entire year. As a result, Pinpoint shareholders lost four hundred million dollars. (R. 7). Given the practical difficulties of appearing in Delaware, the Directors effectively dissuaded 8,000 potential shareholders in Texas, and thousands more across the country, from seeking redress for the Director's wrongs. The Director's self-interested choice to limit their liability instead of properly monitor corporate contracts is blatant bad faith.

QUESTION PRESENTED

WHETHER THE BYLAW IS NON-MUTUAL AND UNREASONABLE SUCH THAT INGRES IS INAPPLICABLE AND THIS COURT SHOULD ANALYZE THE EQUITABLE INTERESTS OF COMITY AND EFFICIENCY.

SCOPE OF REVIEW

Where the grant or denial of equitable relief, such as an injunction or stay, turns on a question of law, such as the construction of a corporate charter or bylaw, the court reviews the merits of the lower court decision de novo. Vantagepoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005); Kaiser Aluminum Corp. v. Matheson, 681 A.2d 392, 394 (Del. 1996). de novo review is "plenary and requires no deference" to the Chancery Court. Kahn v. Lynch Commc'n Sys. Inc., 669 A.2d 79, 84 (Del. 1995).

MERITS OF THE ARGUMENT

"Inequitable action does not become permissible simply because it is legally possible." Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971), including the unilateral enactment of a bylaw amendment. Hollinger Int'l v. Black, 844 A.2d 1022, 1080 (Del. Ch. 2004). In Ingres Corp. v. CA, Inc., this Court held that analyzing the equity of a selected forum is displaced only when that choice is both mutual and reasonable. 8 A.3d 1143, 1146 (Del. 2010). Ingres, however,

does not apply to this case. The shareholders did not vote for the exclusive forum Bylaw, thus there was no mutual assent between shareholders and directors. In addition, after Pinpoint lost millions of dollars post-Settlement, and in light of a competent jurisdiction near Pinpoint's principal place of business, it is unreasonable to demand that shareholders across the country redress wrongs done in Texas exclusively in Delaware. In sum, the equity of efficiency requires this litigation proceed in Texas.

A. The Bylaw is non-mutual and unreasonable, thus Ingres is inapplicable.

It is well accepted that courts may view the validity of bylaws according to the rules governing contracts. See Salaman, 1992 Del. Super. LEXIS 564, at *17. While one's consent to a written contract serves as consent to the terms therein, a contracting party may not unilaterally add or modify contractual provisions without mutual assent. Tunney v. Hilliard, 2008 Del Ch. LEXIS 119, at *21 (Del. Ch.). In addition, though prima facie valid, forum selection clauses are not enforced when they are unreasonable, such as when the clause lacks mutual assent, or is affected by fraud, undue influence, or overwhelming bargaining power. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972). In Bremen, the Supreme Court enforced a forum

selection clause because it was agreed upon by two sophisticated parties. Id. at 7. Additionally, ex-ante forum selection was reasonable due to the international scope of the venture that would have otherwise subjected the parties to innumerable jurisdictions. In Carnival Cruise Lines, Inc. v. Shute, the Supreme Court upheld a forum selection clause because the parties had notice, based on an opportunity to reject the contract "with impunity." 499 U.S. 585, 595 (1991). However, the Supreme Court suggested it would not enforce a forum selection clause adopted by the corporation to discourage pursuit of legitimate claims, evidenced by the lack of notice, or a forum chosen other than the corporation's principal place of business. Id.

The Bylaw in this case did not entail the mutual assent of all 28,000 shareholders. First, the Bylaw lacked assent from Appellant and all shareholders who owned shares prior to the adoption of the bylaw. Further, it is highly doubtful that all 28,000 shareholders across the country, which the Bylaw purports to bind, are as sophisticated as the two parties were in Bremen. In addition, the forum selection clause in the cruise passage contracts at issue in Carnival Cruise Lines is "routine[ly]" included. In contrast, forum selection clauses are far from routine in corporate bylaws, which belies any notion of

constructive notice. See Joseph A. Grundfest, Choice of Forum Provisions in Intra-Corporate Litigation (Rock Center for Corporate Governance at Stanford University, Working Paper No. 91, 2010) available at http://ssrn.com/abstract=1690561 (stating that as of October 8, 2010, only thirty eight publicly traded entities – fewer than 0.4% of all publicly traded entities – had such provisions).

Next, under the Carnival Cruise Lines standard, the Bylaw is unreasonable. In Carnival Cruise Lines, the corporation reasonably selected its principal place of business as the forum for dispute resolution in good faith. 499 U.S. at 595. In contrast, the directors in this case acted in bad faith by unilaterally limiting Delaware to the exclusive dispute resolution forum. Not only did the directors circumvent shareholder rights under § 109(b), but Texas, not Delaware, is where Pinpoint's 8,000 employees, corporate headquarters, and manufacturing facilities are all located. (R. 4). Thus, the Corporation's interest in efficient dispute resolution is outweighed by the Pinpoint shareholders' greater interest in an accessible forum for redress of director misconduct.

B. This Court should reverse the injunction and grant a stay of the Consolidated Action in favor of the first-filed Texas Action in the equitable interest of comity and efficiency.

The lower court erred by failing to consider the interests of comity when enjoining Appellant from proceeding with the Texas Action. Litigation should be confined to the forum in which it is first commenced. McWane v. Cast Iron Pipe, Inc., 263 A.2d 281, 283 (Del. 1970). In McWane, the Supreme Court of Delaware held that when a prior action involving the same parties and issues is pending in a court capable of doing prompt and complete justice, the Chancery Court should freely exercise its discretion in favor of a stay. Id. Though the movant always bears the burden of convincing the court to stay an action, failure to consider the principles of comity constitutes error. Hurst v. Gen. Dynamics Corp., 583 A.2d 1334, 1337 (Del. Ch. 1990).

Under McWane, the lower court should have deferred to the Texas District Court because Appellant filed the Texas Action before the Delaware Action. Appellant filed the Texas action on December 1, 2010. (R. 4). The Delaware Plaintiffs filed the Delaware Action an entire day after Appellant filed the Texas Action. (R. 7). Further, the Delaware Plaintiffs alleged virtually the same fiduciary duty claims as Appellant's first-filed Texas Action. (R. 7). Thus, Delaware's express interest in comity mandates that this court defer to the Texas Action.

The Chancery Court should also have considered the inefficiency arising from litigating this dispute in Delaware. When a plaintiff represents all shareholders in a derivative suit, the Chancery Court should balance all relevant factors that bear on which forum is most efficient in an analysis akin to the doctrine of forum non conveniens. Biondi v. Scrushy, 820 A.2d 1148, 1159 (Del. Ch. 2003); Freidman v. Alcatel Alsthom, 752 A.2d 544, 555 (Del. Ch. 1999); see also Azurix Corp. v. Synagro Tech., Inc., 2000 Del. Ch. LEXIS 25, at *16 (Del. Ch.) (the Chancery Court similarly balances the forum non conveniens factors to determine where litigation of "contemporaneously filed" lawsuits would best proceed). Comity and the efficient administration of justice are still of paramount importance in Delaware under the doctrine of forum non conveniens, Friedman, 752 A.2d at 566, and this Court has an express interest in avoiding duplication of time, effort, and expenses during simultaneous adjudications of the same cause of action in two courts. McWane, 263 A.2d at 283. In this derivative suit this court should analyze the efficiency of each forum, despite plaintiffs' competing preferences.

To determine the most efficient forum, this Court should balance the relevant factors in the case at bar, including but not limited to whether there are similar actions pending in other jurisdictions, the

relative ease of access to proof, the applicability of Delaware law, and other practical considerations that would make the trial easy, expeditious, and inexpensive. Azurix, 2000 Del. Ch. LEXIS 25, at *13; In re Chambers Dev. Co., Inc., 1993 Del. Ch. LEXIS 79, at *21 (Del. Ch.); Gen. Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 685 (Del. 1964).

The lower court failed to consider that litigation in Texas provides easier access to proof. In Texas Instruments Inc. v. Cyrix Corp., the Chancery Court granted one Delaware corporate defendant's motion to stay an action in favor of a similar state action pending in Texas, when both corporate parties' principal places of business and corporate headquarters were in Texas, eighty percent of one corporation's employees lived and worked in Texas, and the other corporation's principal production facilities were in Texas. 1994 Del. Ch. LEXIS 31, at *31 (Del. Ch.). In Texas Instruments, litigating far from home imposed a burden on the employees, their families, and the corporation for which they worked. Id. The executives likely to testify were integral to day-to-day operations and could attend to business more easily in Texas. Id. Delaware's only connection to the dispute was that both parties were incorporated under its laws.

Here, the relative ease and access to proof weigh overwhelmingly in favor of Texas as the proper forum. Pinpoint's headquarters, manufacturing plant, and its 8,000 employees are all in Texas. (R. 4). Further, like in Texas Instruments, the key witnesses are employees and Directors that are crucial to Pinpoint's day-to-day operations. To testify in Delaware, these witnesses will be forced to leave home and both these individuals and the corporation for which they work will suffer the cost. Further, Pinpoint's sole contact with Delaware is its charter. Unnecessary expenses arising from concurrent litigation are wholly unnecessary where there is an opportunity to litigate the entire dispute in Pinpoint's own backyard.

Next, the pendency of the first-filed Texas action outweighs the applicability of Delaware law in this case. While the applicability of Delaware law should be accorded some weight, particularly with novel issues of Delaware law, that is not the most significant factor. See Chambers Dev., 1993 Del. Ch. LEXIS 79, at *11. Courts give more weight to the pendency of a similar action in another jurisdiction. Texas Instruments, 1994 Del. Ch. LEXIS 31, at *8. In Kahan v. Rosenstiel, after shareholders brought suit in federal court alleging breach of fiduciary duty and Securities Exchange Act violations, the Delaware District Court refused to stay an action pending disposition of other

similar state actions. 285 F. Supp. 61, 63 (D. Del. 1968). As the Securities Exchange Act claims could be determined only in federal court, the federal forum was the only place where all the rights of all parties could be fully litigated. Id.; see also Friedman, 752 A.2d at 555-56 (respect for articulated federal policy is a practical consideration in rendering appropriate justice where federal securities law claims are being litigated in state and federal court).

In addition, while in Monsanto Co. v. Aetna Casualty & Surety Co. the Superior Court noted that if a party possesses substantial financial resources there is less concern over burdensome litigation, 559 A.2d 1301 at 1307, this applies where there is no other obvious forum that would mitigate litigation costs. Phillips Petroleum Co. v. Arco Alaska, Inc., 1985 Del. Ch. LEXIS 414, at *20 (Del. Ch.).

Here, interpreting alleged breach of fiduciary duty claims arising from a breach of contract is not a novel issue of law in this court. On the other hand, the lower court failed to give the pending federal litigation due weight. Like in Kahan, the Texas district court will interpret Delaware fiduciary duty claims in conjunction with Securities and Exchange Act claims in the Texas Action. Although the Texas district court in this case has yet to rule on the Directors' motion to stay that action in favor of the case at bar, Kahan

indicates that the Texas district court will not grant the Directors' motion to stay the Texas Action solely because it will have to interpret Delaware law. Kahan, 285 F. Supp. at 63. The resulting duplicative litigation is ultimately borne by the shareholders. Finally, like Monsanto, despite Pinpoint's market capitalization, Pinpoint lost four hundred forty million dollars in market capital post-Settlement, (R. 7), thus this court should allow litigation to proceed in the more obvious and efficient forum. Just like Kahan, this court must recognize the most cost-effective forum is in federal court – the only court in which all of the rights of all the parties can be fully litigated.

CONCLUSION

For the foregoing reasons, this Court should deem the Bylaw invalid and therefore reverse both the Chancery Court's injunction against Appellant and denial of Appellant's motion to stay the Delaware Action.

Respectfully submitted,

Team **M**
Attorneys for Appellant