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PERSPECTIVE

## Forum selection, personal jurisdiction and shareholder derivative suits

By Mohammed Elayan

When parties draft an agreement, they often include a forum selection clause. Such clauses are generally enforceable, especially when negotiated in an arms'-length transaction between sophisticated parties. But what if such a provision requires that the target forum have personal jurisdiction over the defendants? Unless the forum selection clause is specific as to timing, personal jurisdiction can be established within a reasonable amount of time after the filing of action in an alternative forum in order to enforce the forum selection provision. In *Bushansky v. Soon-Shiong*, 2018 DJDAR 5050 (May 25, 2018), the California Court of Appeal considered such a question. (Incidentally, the defendant, Patrick Soon-Shiong, became the new owner of the L.A. Times in a deal that was finalized on Monday.)

NantKwest, Inc. is incorporated in Delaware, with its headquarters in San Diego and operations in Culver City and El Segundo, California and in Woburn, Massachusetts. NantKwest's certificate of incorporation includes the following forum selection clause:

"Unless the Corporation consents in writing to the selection of an alternative forum and to the fullest extent permitted by law, the Court of Chancery of the State of Delaware (or, if such court lacks jurisdiction, any other state or federal court located within the State of Delaware) shall be the sole and exclusive forum for ... any derivative action or proceeding brought on behalf of the Corporation ... ; in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants."

A stockholder filed a deriva-

tive action in San Diego, alleging breaches of fiduciary duty by the company's directors and officers. The suit also alleged that the company's auditor committed malpractice. The auditor is incorporated in Missouri with offices in California. The company filed a motion to dismiss and the auditor joined. In addition, the auditor consented to venue in Delaware for purposes of the derivative suit less than two months after the suit was filed. The trial court dismissed the suit based on the language in the forum selection clause.

The stockholder argued that the final clause of forum selection was not met — "in all cases subject to the court's having personal jurisdiction over the indispensable parties named as defendants" — because there was no personal jurisdiction over the auditor in Delaware when the suit was filed in San Diego. He also argued that the auditor's consent to personal jurisdiction in Delaware was insufficient. The trial court disagreed and held that the later

rule in favor of the stockholder that forum in Delaware was not appropriate.

Turning to the question of *when* Delaware courts must have personal jurisdiction, the Court of Appeal noted that the provision was silent as to when the condition must be met. The court ruled that in such a case, the condition precedent (i.e., that the court have personal jurisdiction over the indispensable parties named as defendants) can be met within a reasonable time after the suit is filed. Relying on a general contract principle that if a time limit is not specified as to when performance is to be done then a reasonable time is allowed, the court further noted that defendants do not typically receive notice of a suit until after it is filed. As a result, if personal jurisdiction over a defendant is required prior to or at the time of filing, this would obviate any ability to satisfy such a condition through consent-based personal jurisdiction, as was the case here.

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consent to jurisdiction in Delaware satisfied the provision. The Court of Appeal agreed that dismissal was proper.

The court considered the stockholder's argument that the "subject to" clause is a condition precedent to the Delaware court having "sole and exclusive forum" over the suit. Interpreting "subject to" as a condition to a party's performance in a contract, the court agreed that the forum selection clause imposed a condition precedent to such an action being heard in Delaware. However, this determination was not sufficient to

The court also noted that there is the possibility that a party may unreasonably delay in consenting to personal jurisdiction. In this case, however, the timing of the auditor's consent to personal jurisdiction, taken in the full context of the case, was not unreasonable and that the auditor did not engage in any gamesmanship to unfairly prejudice the stockholder.

The court noted that there is unpublished case law cited by the stockholder that seemingly contradicted its ruling. After addressing that the case law cited is not bind-

ing, the court next addressed the substance, namely that postfiling consent cannot invalidate properly invoked jurisdiction. Characterizing such a forum selection clause as not depriving a court of jurisdiction but rather stemming from a court's ability to decline to exercise jurisdiction, the court ruled that a court simply declines to exercise jurisdiction based on a forum selection clause as in this case when postfiling consent is provided within a reasonable period of time.

The *Bushansky* case should give attorneys comfort that forum selection clauses in a company's certificate of incorporation, with personal jurisdiction over the parties as a condition precedent, can be enforceable in accordance with their terms, even if their terms do not specify when personal jurisdiction must be achieved.

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