



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

BROADCOM CORPORATION,
Plaintiff,

v.

FRED B. COX, MICHAEL P. DOWNEY,
BRUCE C. EDWARDS, PAUL F. FOLINO,
ROBERT H. GOON, DON M. LYLE, JAMES
M. MCCLUNEY, DEAN A. YOOST, AND
EMULEX CORPORATION,

Defendants.

C.A. No. ____ - ____

COMPLAINT

Plaintiff, Broadcom Corporation (“Broadcom”), by and through its undersigned attorneys, upon knowledge as to itself and upon information and belief as to all other matters, alleges for its complaint against Emulex Corporation (“Emulex”), and Fred B. Cox, Michael P. Downey, Bruce C. Edwards, Paul F. Folino, Robert H. Goon, Don M. Lyle, James M. McCluney, and Dean A. Yoost (the “Individual Defendants” or the “Emulex Board”) as follows:

NATURE OF THE ACTION

1. In late December 2008, Broadcom approached Paul F. Folino, a director on the Board of Emulex regarding the potential for a friendly strategic transaction between Broadcom and Emulex. On January 7, 2009, Broadcom learned

that the Individual Defendants, who comprise the Emulex Board, had decided to reject Broadcom's friendly overture.

2. The Individual Defendants, however, did not stop there. On January 14, 2009, the Emulex Board amended various provisions of the Amended and Restated Bylaws of Emulex Corporation (the "Bylaws") and adopted various draconian provisions designed to ward off any further overtures from Broadcom or any other suitor, and to purposefully interfere with the ability of Emulex's stockholders to exercise their franchise rights.

3. In particular, the Individual Defendants unilaterally amended the Bylaws, *without stockholder approval*, to adopt a new Section 6.4, which now provides that the Bylaws "may be altered, amended or repealed and new by-laws made, (i) by the Board, or (ii) by the stockholders, subject to the provisions of these By-Laws, by the vote or written consent of *not less than sixty-six and two-thirds percent (66 2/3%) of the outstanding shares*" (the "Supermajority Bylaw") (emphasis added).

4. On the same day, the Emulex Board authorized and implemented a new preferred stock purchase rights plan (the "Amended Poison Pill"), replacing Emulex's prior shareholder rights agreement (the "Former Poison Pill"), which expired on January 19, 2009. The Emulex Board also amended the bylaws in order to make it more difficult for stockholders to present alternative views regarding a potential transaction with Broadcom or any other suitor.

5. At that time, no threat existed to Emulex. The Supermajority Bylaw is a blatant and undisguised effort by the Individual Defendants to disenfranchise Emulex's stockholders. The Supermajority Bylaw, together with the Amended Poison Pill, the other amendments to the Bylaws, and revisions to certain change of control agreements (described further herein), are components of a disproportionate, draconian, preclusive, and coercive defensive response to a non-existent threat, and the Individual Defendants have breached their fiduciary duties in making that response.

6. The Supermajority Bylaw is also *per se* unlawful and invalid as a matter of law because it violates Section 109 of the Delaware General Corporation Law (the "DGCL") and other applicable Delaware law and public policy, and is void *ab initio*.

7. This action seeks declaratory relief invalidating the Supermajority Bylaw and injunctive relief barring the Individual Defendants from relying on, implementing, applying or enforcing the Supermajority Bylaw. This action also seeks to enjoin the Individual Defendants from taking any other improper action to defeat the proposed transaction with Broadcom announced today, or to thwart the Emulex stockholder franchise.

8. As described further herein, this relief is necessary in order to remedy ongoing irreparable harm, and because Broadcom has no adequate remedy at law.

THE PARTIES

9. Plaintiff Broadcom is a California corporation, with its headquarters in Irvine, California. Broadcom owns Emulex common stock. Broadcom is a major technology innovator and global leader in semiconductors for wired and wireless communications.

10. Defendant Fred B. Cox ("Cox") is a founder of Emulex and has served as an Emulex director since 1979. Cox was Emulex's Chief Executive Officer at its inception, and served in that capacity until he retired in 1990. Cox served as Chairman of the Board until July 2002, when he became Chairman Emeritus.

11. Defendant Michael P. Downey ("Downey") has been an Emulex director since February of 1994. Downey is also Chairman of the Audit Committee.

12. Defendant Bruce C. Edwards ("Edwards") has been an Emulex director since May 2000.

13. Defendant Paul F. Folino ("Folino") has been the Executive Chairman of the Emulex Board since September 2000. From May 1993 until 2006 he served as Chief Executive Officer of Emulex, and was the President of Emulex from May 1993 to July 2002. In July 2002, he was appointed Chairman of the Board.

14. Defendant Robert H. Goon ("Goon") has been an Emulex director since 1979, and is Chairman of the Nominating/Corporate Governance Committee.

15. Defendant Don M. Lyle ("Lyle") has been an Emulex director since February 1994. Lyle serves as Chairman of the Compensation Committee.

16. Defendant James M. McCluney ("McCluney") joined Emulex in November 2003 as President and Chief Operating Officer. In September 2006 he was named a director and CEO and President of Emulex. In 2008, McCluney received a total of \$3,542,472 in compensation, consisting of salary, stock awards, option awards, non-equity incentive plan compensation, and other compensation.

17. Defendant Dean A Yoost ("Yoost") became an Emulex director in August 2005.

18. Defendants Cox, Downey, Edwards, Folino, Goon, Lyle, McCluney, and Yoost are collectively referred to herein as the "Individual Defendants" or the "Emulex Board."

19. Defendant Emulex is a Delaware corporation with its principal place of business in Costa Mesa, California. Emulex is in the business of designing, developing and supplying products that connect storage, servers and networks.

BACKGROUND

Broadcom Approaches Emulex To Propose A Friendly Transaction.

20. In late December 2008, Broadcom's CEO, Scott McGregor, contacted Mr. Folino to discuss a potential transaction. Broadcom noted that although Broadcom was not making a formal offer at that time, Broadcom's inquiry was serious and Broadcom would like to engage in exploratory talks.

21. On January 7, 2009, Mr. Folino contacted Dr. Henry Samueli, a co-founder of Broadcom (who is no longer an officer of Broadcom), and relayed the

message that the Emulex Board was not interested in discussing a potential transaction with Broadcom.

The Emulex Board Unilaterally Adopts The Invalid Supermajority Bylaw.

22. On January 14, 2009, Emulex's Board unilaterally amended the Bylaws, without consulting or informing the Emulex stockholders, and without a stockholder vote of approval. In particular, the Board voted to revise Section 6.4, which implemented the Supermajority Bylaw.

23. Previously, Section 6.4 followed the default rule of Section 109 of the DGCL and permitted a simple majority of a quorum of Emulex stockholders present at an annual or special meeting to amend the Bylaws. The Emulex Board amendment to Section 6.4 not only implemented a supermajority requirement for amending the bylaws, but also increased the denominator of total shares from which that sixty-six and two-thirds percent must be calculated, from a quorum of shares present at the meeting to all outstanding shares of the corporation. Thus, a stockholder seeking to amend the bylaws must obtain the approval of two thirds of all outstanding shares, rather than a simple majority of a quorum.

24. The Emulex Board's amendment to Section 6.4 is reflected as follows:
"These By-laws, or any of them, may be altered, amended or repealed and new by-laws may be made, (i) by the Board, or (ii) by the stockholders, subject to the provisions of these By-Laws, ~~at any annual meeting of stockholders or special meeting of stockholders~~ by the vote or written consent of not less than sixty-six and two-thirds percent (66 2/3%) of the outstanding shares. Any by-laws made or altered

by the stockholders may be altered or repealed by either the Board or the stockholders, in the manner provided for amendment in the foregoing sentence, except a ~~bylaw~~by-law amendment adopted by the stockholders which specifies the votes that shall be necessary for the election of directors shall not be amended or repealed by the Board.”

25. The Individual Defendants purported to adopt the Supermajority Bylaw on their own initiative, by their own vote, and without obtaining a vote of approval of the Emulex stockholders. The Emulex Board offered no explanation in any of its publicly-filed materials for this dramatic change to the stockholder franchise. Indeed, Emulex's Form 8-K filed on January 16, 2009 (the “8-K”) offers only a bare summary of the Bylaw amendments without an explanation for the reasons behind the amendments or any discussion of their effect on stockholders.

26. The Supermajority Bylaw is *per se* invalid because it violates 8 *Del. C.* § 109 by impermissibly limiting the Emulex stockholders’ power to amend the Bylaws. The Supermajority Bylaw is also invalid because it is an ill-disguised attempt to change the rules of the stockholder voting process and deprive stockholders of rights they enjoyed and to which they are entitled under the corporate contract. The Supermajority Bylaw is also an enormously disproportionate response to a non-existent threat. As a practical matter, it makes it extremely difficult for the Emulex stockholders to ever amend the Bylaws and helps thwart advantageous strategic combinations, such as a potential transaction with Broadcom. The

Supermajority Bylaw is therefore an invalid, draconian defensive measure, and is void *ab initio*.

Emulex's Other Preclusive And Coercive Bylaws And Defense Mechanisms.

27. At the same time it adopted the Supermajority Bylaw, Emulex's Board also adopted several other amendments to the existing bylaws without seeking stockholder approval, including Section 2.7(c) (requiring stockholders seeking action by written consent to request a record date from the Board), Section 3.18 (imposing notice and disclosure requirements for stockholders to nominate director candidates), and Section 2.14 (which requires stockholders to give "advance notice" between 90 and 120 days prior to the first anniversary of the previous year's annual meeting regarding any business to be brought before such meeting) (the "Bylaw Amendments").

28. Taken together with the Supermajority Bylaw, and given the timing of the amendments, the Bylaw Amendments are evidence of unreasonable and disproportionate defensive posturing to a non-existent threat. They are also clearly designed to ward off potential suitors for Emulex and undermine the Emulex stockholder franchise.

29. Further, on January 15, 2009, after the Individual Defendants flatly rejected Broadcom's friendly overture, the Individual Defendants also amended and restated existing Key Employee Retention Agreements (the "Amended Change of Control Agreements") with Defendants Folino and McCluney, effective January 16, 2009. The stated purpose of the Amended Change of Control Agreements is to

assure the Board of "both present and future continuity of management in the event of any Change of Control." If either Folino or McCluney is terminated without cause or resigns for good reason within the period beginning twelve (12) months prior to and ending twenty-four (24) months after a change in control, he will be entitled to, among other benefits: (i) a lump sum cash payment equal to twenty-four (24) months salary, inclusive of target bonus level with respect to the fiscal year prior to the officer's termination date; and (ii) full vesting acceleration of equity awards and the right to exercise stock options for a period of twelve (12) months following his termination date. The Individual Defendants made these changes only days after Broadcom approached Emulex regarding a potential transaction.

The Emulex Board Adopts The Amended Poison Pill.

30. In addition, on January 15, 2009, the Emulex Board adopted the Amended Poison Pill to replace the Former Poison Pill which expired on January 19, 2009. The Amended Poison Pill permits stockholders to purchase 1/1000 of a share of Preferred Stock (with supervoting power) for \$35 if an acquiring person becomes the beneficial owner of 15% of the corporation's common stock without prior board approval. The Emulex Board is permitted to rescind Emulex's poison pill without stockholder agreement.

31. The Amended Poison Pill differs in important ways from the Former Poison Pill that make it more difficult for a potential bidder to acquire the company. Most significantly, the Amended Poison Pill lowers the threshold for triggering the

rights from 20% to only 15% ownership of Emulex common stock. Thus, the Amended Poison Pill triggers earlier in the acquisition process.

32. The only public disclosure by Emulex explaining the Amended Poison Pill was a line in the 8-K that the Emulex Board adopted the Amended Poison Pill to "protect shareholders from coercive, unfair or inadequate tender offers or other abusive takeover tactics and to preserve for the stockholders the long term value of their investment in the corporation."

33. The Amended Poison Pill, combined with the Supermajority Bylaw and the Bylaw Amendments, are further components of unreasonable defensive posturing and a grossly disproportionate response to a non-existent threat. Together, all of these improper defensive measures are designed to ward off potential suitors from Emulex, and thwart the Emulex stockholder franchise.

Broadcom Makes A Proposal To Emulex

34. Today, Broadcom sent a letter to the Emulex Board c/o Paul Folino containing Broadcom's proposal to acquire Emulex (the "Proposal"). Contemporaneously, Broadcom issued a press release including the terms of the Proposal, and furnished the Proposal to the U.S. Securities and Exchange Commission in a filing under Form 8-K and Schedule TO.

IRREPARABLE HARM

35. The Individual Defendants' implementation of the improper defensive devices discussed above is preventing Emulex stockholders from receiving the benefits of a value-maximizing strategic transaction. The Emulex stockholders

cannot rely on the Emulex Board to act in their best interests regarding any potential transaction.

36. Until the Individual Defendants adopted the Bylaw Amendments, Emulex's stockholders had the unfettered right under Delaware law, the Charter, and the former Bylaws to amend the Bylaws by a simple majority of a quorum of stockholders present at a meeting, to permit the stockholders to call a special meeting for the purpose of removing the Individual Defendants and electing independent nominees who would have fulfilled their fiduciary duties to Emulex's stockholders and considered, subject to their fiduciary duties, a possible transaction with Broadcom. Now, as a result of the Individual Defendants' improper action, Emulex stockholders will be frustrated in their efforts to utilize the voting process by the *per se* invalid Supermajority Bylaw. This type of interference with the stockholder franchise, which is ongoing, constitutes irreparable harm. In addition, due to the Individual Defendants' conduct, Emulex's stockholders cannot receive the benefits of any potential transaction with Broadcom or with any other potential suitor. This also constitutes irreparable harm.

37. At the same time, Broadcom is suffering irreparable harm as a result of the Supermajority Bylaw and the Emulex Board's actions to block any potential transaction with Broadcom from the Emulex stockholders. The chance to acquire Emulex represents a unique opportunity, and the loss of that opportunity constitutes irreparable harm. Further, no other potential suitor has publicly expressed interest in Emulex.

38. Unless the Court invalidates the Supermajority Bylaw and enjoins the Individual Defendants from utilizing that and other defensive mechanisms, the Emulex stockholders will lose substantial benefits from a potential transaction with Broadcom. The injury to Broadcom and Emulex's stockholders is not compensable in money damages, and Broadcom has no other adequate remedy at law. The proper remedy is to invalidate the Supermajority Bylaw and enjoin the Individual Defendants from using the Bylaw Amendments and/or any other coercive and preclusive defensive devices so as to permit the stockholders to exercise their franchise rights in a free and uncoerced environment.

COUNT I

Declaratory Relief: The Supermajority Bylaw Is Void

39. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

40. Section 109(a) of the Delaware General Corporation Law provides that directors "shall not divest the stockholders . . . of the power, nor limit their power to adopt, amend or repeal bylaws."

41. The Supermajority Bylaw violates this provision and the public policy of this State. The Individual Defendants, acting unilaterally, have limited the Emulex stockholders' power to adopt, amend, or repeal the Emulex Bylaws, including but not limited to the Supermajority Bylaw and the Bylaw Amendments. Plaintiff is thus entitled to a declaration that the Supermajority Bylaw is *per se* invalid and void *ab initio*.

42. The Supermajority Bylaw is *ultra vires*.

43. Plaintiff has no adequate remedy at law.

COUNT II

Breach of Fiduciary Duty: The Supermajority Bylaw and the Bylaw Amendments

44. Plaintiff repeats and realleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

45. The Individual Defendants owe Emulex's stockholders the highest duties of care, loyalty, and good faith.

46. The Individual Defendants adopted the Supermajority Bylaw as a defensive response to Broadcom's inquiries and in anticipation of further offers from Broadcom. The Emulex Board did not determine in good faith after due investigation that Broadcom's overture was a threat - indeed, Broadcom's overture was not a threat, but merely an invitation to engage in friendly discussion. Since that time, Broadcom has delivered to the Individual Defendants the Proposal. By maintaining the Supermajority Bylaw and the Bylaw Amendments in the face of the fully-financed, all cash, premium Proposal, the Director Defendants are intentionally failing to act in good faith and consciously disregarding their fiduciary duties to the Emulex stockholders.

47. By maintaining the Supermajority Bylaw and the Bylaw Amendments, the Individual Defendants are also purposefully interfering with the stockholder franchise. The Supermajority Bylaw, along with the Bylaw Amendments, are components of a disproportionate, coercive and preclusive defensive response. This

response is disproportionate because there is no threat to Emulex. The Supermajority Bylaw alone is coercive because it chills the Emulex stockholders into voting in favor of the Individual Defendants or not voting at all, because the stockholders will believe their votes to be meaningless. The Supermajority Bylaw is preclusive because as a practical matter it imposes an exceedingly difficult supermajority requirement for Emulex's stockholders to amend, alter or repeal the Bylaws.

48. The Individual Defendants have not and cannot offer any justification for maintaining the Supermajority Bylaw and the Bylaw Amendments.

49. The actions of the Individual Defendants are unlawful, unreasonable, and disproportionate, and the Individual Defendants have breached the fiduciary duties they owe to Emulex's stockholders under applicable Delaware law.

50. Plaintiff has no adequate remedy at law.

WHEREFORE, Broadcom respectfully requests that this Court enter an Order:

- (a) declaring that the Supermajority Bylaw is *per se* invalid and void;
- (b) declaring that the Supermajority Bylaw is *ultra vires* and void;
- (c) declaring that the Individual Defendants have breached their fiduciary obligations to the Emulex stockholders under Delaware law by, among other things, adopting the Supermajority Bylaw and the Bylaw Amendments as a whole;

(d) enjoining the Emulex Board from relying on, implementing, applying or enforcing the Supermajority Bylaw and the Bylaw Amendments;

(e) temporarily, preliminarily and permanently enjoining the Emulex Board and all persons acting on its behalf or in concert with it from taking any improper action designed to impede, or which has the effect of impeding, the Proposal or the efforts of Broadcom to acquire control of Emulex;

(f) awarding Plaintiff its costs and disbursements in this action, including reasonable attorneys' and experts' fees; and

(g) granting Broadcom such other and further relief as the Court deems just and proper.



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