IN THE SUPREME COURT FOR THE STATE OF OREGON

MURRAY L. BLACK; MELRHEA E. BLACK; JACK BOERSMA and BARBARA J. BOERSMA as Trustees for the Boersma Family Trust; J.K. (KELLY) HOLA; JEANNIE HOLA; ALBERT F. LAURIE and MARLENE D. LAURIE as Trustees of the A.F. Laurie Trust; DONALD J. MEIS and NADINE E. MEIS, as Trustees for the Meis Family Trust UTA 8/22/95, JOEL E. COLLEY; MICKELL A. COLLEY; RICHARD MELOY; SEATTLE ATC PARTNERSHIP, a partnership consisting of DAVID ANDREWS, JOHN MITCHELL, THOMAS PARKS, DONALD STOBIE, and GERALD TRAYNOR;

Plaintiffs,

and

JOHN J. LENAHAN, MARILYN S. LENAHAN, WILLOWRUN, L.P., an Oregon limited partnership,

Plaintiffs-Appellants and RESPONDENTS ON REVIEW,

vs.

GARY H. ARIZALA, QUENTIN L. BREEN; BREEN FAMILY TRUST; JOHN DUFFY; ANTHONY EASTON; FRANK R. GOLDSTEIN; ED JANOWSKI; JAVIER O. LAMOSO; MORGAN, LEWIS & BOCKIUS, LLP, a limited liability partnership; FRED H. MARTINEZ; THERESA MILLER; MARGARET W.M. MINNICH; LAWRENCE ODELL; JAMES T. PERRY; MOHAMMAD RAHMAN; ROMULUS CORPORATION, a Delaware corporation; ROMULUS TELECOMMUNICATIONS, INC., a Puerto Rico corporation; ROMULUS

Multnomah County Circuit Court Case Nos. 9611-09017

Court of Appeals Case No. CA A104791

Supreme Court Case No. S49774

RESPONDENTS' BRIEF

March 2003

ENGINEERING, INC., a Delaware corporation; UNICOM CORPORATION, a Puerto Rico corporation; SUPERTEL COMMUNICATIONS CORPORATION, a Puerto Rico corporation; and CLEARCOMM L.P., a Delaware limited partnership, formerly known as PCS 2000, L.P.,

Defendants-Respondents, and PETITIONERS ON REVIEW,

and

SUSAN D. EASTON, SDE TRUST, and GARY NORTH,

Defendants-Respondents.

BROWN AND BOSTON PCS 2000, a partnership consisting of CONRAD BROWN and NIXON RAY BOSTON; KENNETH BROWN as Trustee for the Brown Family Trust; WILLIAM SEAN CONWAY; LISA M. CONWAY; GREG DOWNING; DONALD F. ESCHER and SHIRLEY P. ESCHER, Trustees for the Escher Daughters Trust; HARVEY A. GILBERT and DEANNE E. GILBERT, as Trustees for the Gilbert Family Trust; KURT GRUEN; REYNA GRUEN; JOSEPH M. HA; JOHN F. JOHNSON and ANNE R. JOHNSON, Trustees for the John F. and Anne R. Johnson Trust; HAROLD E. JONES as Trustee for the Harold E. Jones Profit Sharing Trust; VIRGINIA J. JONES; CAROLINE B. KAZMANN, Trustee for the Belle M. Beem Trust; HOLLIS KAZMANN; INGRID KLUCK; KNOXVILLE IVDS GROUP, a partnership consisting of ROBERT SEAMAN and others; DONALD C. LINKEM; DONALD J. MEIS; NADINE E. MEIS; EDMUND J. MOONEY, Trustee for the Edmund J. Mooney Trust; J. RAY O'CONNOR and

Multnomah County Circuit Court Case No. 9708-06851

MAURINE O'CONNOR, Trustees for the J. Ray O'Connor Revocable Family Trust; BILL OHMAN; COLLEEN OHMAN; JAMES POPA; RPM2 GROUP LIMITED PARTNERSHIP, a partnership consisting of MICHAEL SUENRAM, PAMELA SUENRAM, MELBURN E. SUENRAM, and ROSE M. SUENRAM; NANCY L. RYAN; THE ESTATE OF ARTHUR J. RYAN; S&L PROPERTIES, a partnership consisting of DOUGLAS A. SHINSTINE and ERIC A. LUTHER; ELIZABETH J. SEAMAN; SHELLEY A. MCCOY; RALPH L. STEAN, Trustee for the Ralph L. Stean Revocable Living Trust U/A April 14, 1992; JAMES F. STENGEL, Trustee for the James F. Stengel Living Trust Dated 9/28/94; GRETCHEN B. STENGEL, Trustee for the Gretchen B. Stengel Living Trust Dated 9/28/94; and RUSSELL W. WUNSCHEL,

Plaintiffs,

v.

GARY H. ARIZALA; QUENTIN L. BREEN; BREEN FAMILY TRUST; JOHN DUFFY; ANTHONY EASTON; SUSAN D. EASTON; SDE TRUST; FRANK R. GOLDSTEIN; ED JANOWSKI; JAVIER O. LAMOSO; MORGAN, LEWIS & BOCKIUS, LLP, a limited liability partnership; FRED H. MARTINEZ; THERESA MILLER; MARGARET W.M. MINNICH; GARY NORTH; LAWRENCE ODELL; JAMES T. PERRY; MOHAMMAD RAHMAN; ROMULUS CORPORATION, a Delaware corporation; ROMULUS TELECOMMUNICATIONS, INC., a Puerto Rico corporation; ROMULUS ENGINEERING, INC., a Delaware corporation; ROMULUS ENGINEERING (MAS), INC., a Delaware corporation; DATALINK NETWORK, INC., a purported corporation; ROMULUS

ENGINEERING (IVD), INC., a Delaware corporation; WIRELESS EXPRESS LIMITED PARTNERSHIP, a Delaware limited partnership fka IVDS Auction Consortium Limited Partnership; IVDS MANAGEMENT, INC., a Delaware corporation; UNICOM CORPORATION, a Puerto Rico corporation; SUPTERTEL COMMUNICATIONS CORPORATION, a Puerto rico corporation; and CLEARCOMM L.P., a Delaware limited partnership, formerly known as PCS 2000 L.P.,

Defendants.

RESPONDENTS' BRIEF

Respondents' Brief on Petition to Review of the Decision of the Court of Appeals
On Appeal from the Judgment of the Circuit Court
for the County of Multnomah
The Honorable Nely L. Johnson, Judge

Decision filed:	June 5, 2002
Author of Opinion:	Walter I. Edmonds, Presiding Judge
Joined by:	Rives Kistler, Judge
Concurrence by:	Rex Armstrong, Judge

Roger K. Harris, OSB #78046
HARRIS BERNE CHRISTENSEN LLP
104 Executive Centre
12725 S.W. 66th Ave.
Portland, OR 97223
(503) 968-1475
Of Attorneys for Plaintiffs-Appellants John J. Lenahan, Marilyn S. Lenahan, and Willowrun, L.P.

List of Counsel is attached to the Certificate of Service

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Background

Plaintiffs appealed from the trial court's dismissal of their complaint based on enforcement of a venue provision in the Agreement. Plaintiffs also appealed the trial court's determination that certain amendments to ORS 166.725 (part of ORICO) should be applied retroactively to divest plaintiffs of their accrued cause of action.

The court of appeals agreed with plaintiffs that defendants were not entitled to dismissal based on the venue provision because defendants had not proven that the provision applied as a matter of law to plaintiffs' tort and securities law claims. The court of appeals also agreed with plaintiffs that, where the legislature is silent on retroactivity, a court should not create retroactivity especially if to do so would "impair existing rights, create new obligations, or impose additional duties with respect to past transactions". Black v. Arizala, 182 Or App 16 at 32, 48 P3d 843 (2002)

Defendants appealed to this court, asserting for the first time that the trial court should have invented a procedure to handle defendants' ORCP 21 motion challenging venue. Defendants also challenge the court of appeals' refusal to retroactively apply a legislative amendment to ORICO that is not on its face retroactive.

Question 1A: Did Petitioners preserve their argument that the trial court should have applied ORS 1.160 to create a modified procedure under ORCP 21 for resolving the validity of a forum selection clause?

Proposed Rule of Law 1A: Where petitioners brought their original motion as a motion to dismiss, "[p]ursuant to the contractual agreement between the parties" and where petitioners argued to the court of appeals that the motion was an ORCP 21A(3) motion based on personal jurisdiction, petitioners waived any reliance on ORS 1.160 by never citing or relying on it until their Petition for Review to this court.

Question 1B: Where a party asks a court not to exercise its jurisdiction over a case but instead to enforce a venue selection provision, does ORS 1.160 even apply?

Proposed Rule of Law 1B: ORS 1.160 authorizes a trial court to create a procedure that is necessary "in the exercise of [the court's] jurisdiction" and thus would not apply where a party seeks to have the trial court decline to exercise its jurisdiction by sending the case elsewhere.

Question 2: Does a venue clause that governs "any legal action arising from this Agreement" control venue for tort claims and statutory securities claims based on pre-investment misrepresentations and omissions which induced plaintiffs to make their investment decision and to enter into the Agreement?

Proposed Rule of Law 2: Under Delaware law which controls the issue, a contractual provision governing legal actions "arising from" the contract would not include tort claims that do not "implicate any of the rights and obligations provided for in the [] Agreement" and therefore the tort claims may be litigated. Parfi Holding AB v.

Mirror Image Internet, Inc., 2002 Del. LEXIS 679, 2002 WL 3147725 (Nov 4 2002 Delaware Supreme Court)(Attached as Appendix A)[2]. Under Oregon law, the result would be the same because claims alleging misrepresentations occurring prior to signing of the Agreement do not "arise from" the Agreement.

Question 3: Should a statutory amendment to the ORICO statutes that adds an element to plaintiffs' burden of proof be applied retroactively where the legislature expressed no intent to make the amendment retroactive?

Proposed Rule of Law 3: Under Oregon law, statutory amendments are presumed to be prospective only in the absence of legislative declaration of retroactivity. If a statutory amendment would "impair existing rights, create new obligations, or impose additional duties with respect to past transactions", this court will not construe the amendment to apply retroactively. Therefore the ORICO amendment applies prospectively only and plaintiffs state a viable ORICO claim.

Nature of the Action, Relief Sought and Nature of the Judgment

Petitioner's statement is accurate with the following supplementation. The relief sought by plaintiffs was rescission of the Agreement which they signed with defendants based on the misrepresentations and omissions occurring many months or years before plaintiffs signed the Agreement. (Amended Complaint ¶¶ 76, 85, 88, 94, 104 ("plaintiffs have a right to rescind and recover the consideration paid for the securities and hereby elect to rescind"), 108, 114, 134; A-35-41)

[2] On March 11, 2003, plaintiffs' counsel, Ms. Dziuba confirmed with the Delaware Supreme Court that the decision in Parfi Holding is final. The mandate issued December 11, 2002.

Summary of Plaintiffs' Argument

The court of appeals correctly ruled that defendants were not entitled to judgment as a matter of law based on the venue provision contained in the Agreement, either because defendants did not prove that the provision unambiguously requires a change of venue or because plaintiffs' tort claims and securities claims do not "arise from" the investment Agreement. The court of appeals also correctly ruled that the 1995 ORICO amendment would not apply retroactively where the legislature did not declare it so and where applying the amendment would divest plaintiffs of their accrued cause of action.

In their brief to this court, defendants raise for the first time an argument under ORS 1.160 and assert that the trial court could invent a procedure for resolving the applicability of the venue selection clause. Defendants' argument is not preserved because defendants never raised the issue to the trial court. In the trial court, defendants asked for dismissal based on interpretation of the contract language and did so in the context of their Rule 21 motions. However, by appending and relying on additional documents and affidavits, defendants converted their motion to a motion for summary judgment. In the court of appeals, defendants characterized their motion as one under ORCP 21A(3)(challenging personal jurisdiction). Defendants never relied on ORS 1.160 and do so now apparently because of the discussion of ORS 1.160 in the concurring opinion. Defendants' reliance on the statute and on the trial court's prerogative to create a new procedure for their motion is thus waived. Even if the argument is not waived, it lacks merit because ORS 1.160 applies only "in the exercise of" a court's jurisdiction not where a court declines to exercise its jurisdiction by changing venue.

Defendants sought dismissal as a matter of law based on interpretation of the contract. Both this court and the court of appeals review contract interpretation as a matter of law. Yogman v. Parrott, 325 Ore. 358, 361, 937 P.2d 1019 (1997). Therefore, by applying applicable Delaware law, this court should decide that, as a matter of law, a venue selection provision that governs claims "arising from" an investment Agreement is not applicable to tort and securities claims based on misrepresentations that predated signing the Agreement. Parfi Holding v. Mirror Image, 2002 Del LEXIS 679. Under Oregon law, the result would be the same based on common sense and on the dictionary definitions of "arising from".

Under Delaware law, a contract provision that applies to claims "arising out of or in connection with this Agreement" does not govern claims for breach of fiduciary duty because tort claims "do not bear on the duties and obligations under the Agreement" and must be evaluated separately. Parfi Holding, 2002 Del. LEXIS 679 at *17-18. A court examining a contractual provision like the one at issue here must examine the "separate rights pursued by plaintiffs under both the contract" and the tort claims. Id. at * 19.

Using both common sense and the dictionary definitions of the terms chosen by defendants who drafted the Agreement, the majority and concurring opinions correctly concluded that misrepresentations occurring many months before signing of the investment Agreement do not "originate from" or "have their source in" the Agreement. Plaintiffs sought to rescind the Agreement based on written and oral misrepresentations occurring before plaintiffs invested in PCS. This court should also conclude that the tort claims alleged in plaintiffs' complaint do not "arise from" the Agreement and therefore

venue is proper in a Multnomah County Circuit Court. The case should be remanded for trial.

The court of appeals correctly held that amendments to the ORICO statutes that added to plaintiffs' burden of proof should not be applied retroactively where:

1) the legislature did not declare retroactivity; and
2) applying the amendment retroactively would divest plaintiffs of their accrued claim under ORICO, i.e. would "impair existing rights".

This case should be remanded for trial on the merits of all plaintiffs' claims.

Statement of the Facts

Plaintiffs, two individual residents of Oregon and an Oregon limited partnership are the only remaining plaintiffs in a case entitled Black v. Arizala. Plaintiffs' Amended Complaint alleges claims for relief, including Oregon and other state security law violations, federal securities violations, common law fraud and Oregon RICO based on defendants' misrepresentations that induced plaintiffs to invest in PCS. (Amended Compl, ¶¶ 49-67; A-30-33) On remand, because the only remaining plaintiffs are Oregon residents, plaintiffs will amend the complaint to delete any non-Oregon state law claims.

Defendants moved to dismiss the complaint on eight separate grounds. This appeal concerns two grounds, improper venue and failure to state a claim under Oregon RICO. Defendants characterized their motions as ORCP 21 motions to dismiss both at trial and in briefing to the court of appeals. ("Defendants Arizala, * * * Clearcomm, Supertel and Unicom Rule 21 Motions" dated Dec. 1, 1997; Supp Ab A-2; Red brief, pp. 7, 10) After the trial judge granted their motion to dismiss, defendants prepared and

submitted for the court's signature an "Order on Defendants' Rule 21 Motions". (Supp Ab 1-16) In the court of appeals, however, defendants argued that the trial court should have treated their motion like an ORCP 21A(3) motion based on personal jurisdiction. (Red Brief, pp. 10-11; "ORCP 21A authorizes the trial court to determine facts relating to personal jurisdiction on a motion to dismiss.") Defendants' memorandum in support of their ORCP 21 motions does not cite ORCP 21A(3) as a basis for dismissal.

At the hearing on February 19, 1998, the trial court orally granted defendants' ORCP 21 motion against the ORICO claim and took the remaining motions under advisement.

On March 30, 1998, several weeks after the hearing on defendants' motion, the trial court requested a copy of signature pages from the PCS Agreement and defendants supplied the signature pages defendants could locate. (Supp Ab A-5) The signature page relied on by defendants appears to be partially signed by plaintiffs but is undated and is not signed by defendants. (Id.)

In moving to dismiss for improper venue, defendants relied on the following paragraph contained in the PCS investment contracts:

> "This Agreement shall be construed and enforced in accordance with and governed by the law of the state of Delaware, excluding the body of law relating to conflict of laws. Any dispute under this Agreement shall be submitted to binding arbitration in San Juan, Puerto Rico under the rules of the American Arbitration concerning commercial disputes, and the parties shall be bound by any decision reached under such rules. * * *. Venue for any legal action arising from this Agreement, including enforcement of any arbitration award, shall be in San Juan, Puerto Rico."
>
> Section 16.5, Agreements of Limited Partnership of PCS 2000, LP

The trial court agreed with defendants' argument and ordered the case dismissed for improper venue. However, the court also dismissed all of plaintiffs' Oregon RICO claims.

When it became apparent to plaintiffs' counsel that the trial court intended to dismiss for improper venue based on the conclusion that paragraph 16.5 was valid, plaintiffs moved to abate the action (without entry of judgment) so that the matter could be resolved in arbitration. (Ab-8) The trial court refused. Instead, the trial court entered a judgment of dismissal because it concluded: "I have decided that the case should be dismissed because there is no jurisdiction. There is no jurisdiction here based on the forum selection clause." (Tr. 246)

Argument

I. Procedure applicable to defendants' Rule 21 motion

Defendants brought several ORCP 21 Motions, including the motion to dismiss based on venue and to dismiss based on retroactive application of ORICO amendments. Defendants entitled their pleading "Defendants' * * * Rule 21 Motions" and the Order drafted by defendants for the trial judge's signature described all of the motions as ORCP 21 Motions. (Supp Ab A-16-17) However, defendants necessarily relied on documents outside the pleadings because the contractual venue provision does not appear on the face of the pleadings. Therefore, the motion should be treated like an ORCP 47 motion for summary judgment as the court of appeals held. 182 Or App at 27-28.

In the court of appeals, defendants asserted (for the first time) that their motion was based on ORCP 21A(3), a challenge to the court's jurisdiction. The court of appeals correctly rejected that contention because the venue clause does not "implicate subject

matter jurisdiction" and is "qualitatively different from the issue of subject matter jurisdiction". 182 OR App at 25

By belatedly casting their motion as one under ORCP 21A(3), personal jurisdiction, defendants asked the court of appeals to assume that the trial court made factual findings sufficient to support dismissal and this court review those factual findings for "any competent evidence" and review the court's legal conclusions for errors of law. (Red Brief, pp. 10-11) In their brief on the merits to this court, defendants ask this court to treat their motion as an ORCP 21 motion, but with the trial court being free to develop any procedure it chooses for evaluating that motion. (Pet. Br., pp. 7-13)

Because defendants' argument for the applicability of ORS 1.160 was never raised before, it is not preserved. The purpose of the preservation rule is to make sure the trial judge had an opportunity "to understand and correct any error." State v. Brown, 310 Ore. 347, 356, 800 P.2d 259 (1990). Here, defendants never invited the trial judge to employ ORS 1.160 to create a new procedure so the trial judge never had the opportunity to "get it right" under defendants' theory.

Defendants' dissatisfaction with the court of appeals treatment of their motion as an ORCP 47C is based on defendants' assertion that it "is inconsistent with the conclusion reached by every other court to examine the issue." (Pet. Br., pp. 11-12) No citation is offered for this bold statement. Oregon procedure is governed by ORCP so whether the applicable procedures are or are not consistent with other jurisdictions seems irrelevant. ORCP is intended to provide notice and guidance to Oregon litigants and as such provides the required degree of predictability in proceedings before Oregon trial

courts. Because defendants offer no cited cases, it is impossible to evaluate whether procedures applied elsewhere should be of concern to this court.

Without citation, defendants also assert: "every jurisdiction that has considered the appropriate method for enforcing forum selection clauses has provided for resolution by an early pre-trial motion." (Pet. Br., pp.12-13) The Concurring Opinion, also without citation, states: "Every other jurisdiction that has considered the question provides a method for resolving the issue by an early pre-trial motion; none relegates that resolution to summary judgment or trial." 182 Or App at 35 However, Parfi Holding, the recent case in the Delaware Supreme Court, treated the motion as a motion for summary judgment:

> "Xcelera responded with motions to dismiss based on lack of personal jurisdiction and failure to submit the fiduciary duty claims to mandatory arbitration as provided in the Underwriting Agreement. The **Court of Chancery granted Xcelera's motion for summary judgment and dismissed Parfi's claims**, holding that the broad arbitration clause in the Underwriting Agreement required Parfi to submit for arbitration all claims related to the series of transactions that were challenged in Sweden. With respect to the central issue, the court held that the fiduciary duty claims were 'in connection with' the Underwriting Agreement and were, therefore, mandatorily arbitrable thereunder."
>
> Parfi Holding, 2002 Del. LEXIS 679 at * 11

Defendants erroneously characterize the court of appeals' decision as resting on the existence of fact issues regarding the venue clause. The court of appeals actually held that the venue clause was at least ambiguous as to whether it applied, so defendants were not entitled to judgment as a matter of law. 182 Or App at 30. The issue was decided by the court of appeals as a matter of contract interpretation which is reviewed as a matter of law by an appellate court. Yogman v. Parrott.

The interpretive underpinning of the court of appeals' decision is its conclusion that a venue provision governing claims "arising from" an investment Agreement does not, as a matter of law, control disputes arising from conduct (fraudulent misrepresentations in the sale of securities) that occurred before plaintiffs became parties to the Agreement. 182 Or App at 29. Whether that issue is decided under ORCP 21 or under ORCP 47, the result is correct.

It should be noted that at the time this motion was argued, the applicable version of ORCP 47C did not contain the requirement that the party opposing summary judgment produce evidence on any issue as to which that party would bear the burden of persuasion at trial. Plaintiffs defended this motion based on the plain meaning of the contract and on review, under whatever standard this court chooses, the result should be the same. Because defendants never proved that the venue provision applied to plaintiffs' tort and securities claims, dismissal was error.

Even if defendants had timely made an argument under ORS 1.160, the statute would not have aided them. ORS 1.160 provides:

> "When jurisdiction is, by the Constitution or by statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the procedural statutes."

By its terms, ORS 1.160 does not apply here for two reasons:

1) The statute only applies when the court is acting "in the exercise of the jurisdiction". Defendants successfully asked the court to refrain from exercising jurisdiction based on the venue provision. Therefore, ORS 1.160 does not authorize the court to adopt a procedure; and

2) ORS 1.160 only applies when there is no existing procedure. Amer. Timber/Bernard v. First Nat'l, 263 Or 1, 10, 500 P2d 1204 (1972). Here, ORCP 21(A) and (B), ORCP 47, ORCP 53 B (permitting bifurcated trials) and ORCP 61 B (permitting special interrogatories) all provide existing means for raising a challenge to venue.

In Oregon, the correct way to add procedural rules is by application in the first instance to the Council on Court Procedures. This approach assures uniformity and aids parties in understanding what the procedural rules will be. Under the *ad hoc* approach advocated by defendants, two different trial judges in the same courthouse could be simultaneously applying different procedures to decide these motions.

Late last year, the Council on Court Procedures considered a new type of ORCP motion to apply to contractual forum-selection clauses. A copy of the proposed rule appeared in Volume 22 of the 2002 Advance Sheets issued October 28, 2002 and is attached as Appendix B. The proposed rule would have validated the argument made by defendants here, that the defendant can rely on affidavits and documents outside the pleadings to establish the facts essential to their defense but remain under the umbrella of ORCP 21. However, proposed ORCP 21A(10) was not in effect in December 1997 when defendants brought their motion and has never been recommended to the legislature by the Council on Court Procedures.

Defendants waived their ORS 1.160 argument because they raised it for the first time in their Petition for Review. Under existing and applicable rules, the motion which relied on documents outside the pleadings should be treated like a motion for summary judgment. Whatever procedural approach is taken, the court of appeals was correct that

defendants did not establish that, as a matter of law, the venue provision unambiguously precluded plaintiffs from litigating their tort and securities claims in an Oregon court.

II. On the merits, the venue provision for legal actions "arising from" the contract does not control venue for pre-contract tort and securities claims.

Defendants drafted the venue provision in the PCS contract with much narrower language than is sometimes used in such contract provisions: "Venue for any legal action **arising from** this Agreement * * * shall be in San Juan, Puerto Rico." (Section 16.5) Contrast this narrow language with the language interpreted in the cases relied on by defendants and the trial court.

As defendants acknowledged, Section 16.5 also provides that the contract is governed by Delaware law. (Defs' ORCP 21 Motions, page 8, lines 1-3: "Applying Delaware law, such a forum selection clause is valid if the clause was freely entered into and if its enforcement would not 'seriously impair the plaintiff's ability to pursue his cause of action.' Elia Corporation v. Paul N. Howard Company, 391 A2d 214 (Del Sup Ct 1978)". Under Delaware law, a contract term governing disputes "arising out of or in connection with" the contract would not encompass tort claims like the ones plaintiffs assert here. Parfi Holding v. Mirror Image, 2002 Del. LEXIS 679, 2002 WL 3147725.

In Parfi, the Delaware Supreme Court reversed a lower court application of a contractual provision requiring arbitration of claims "arising out of or in connection with" the agreement to plaintiffs' companion tort claim for breach of fiduciary duty. The Delaware Supreme Court concluded that "arising out of or in connection with" was a broad provision, broader than "arising out of" by itself, but that it nonetheless did not

govern plaintiffs' tort claims. The court reasoned that because the tort claims could be resolved without reference to any contractual rights or obligations, the contractual arbitration clause would not compel arbitration of the tort claim. 2002 Del. LEXIS 679 at *17. Recognizing the policy that favors arbitration, the court nonetheless concluded:

> "An arbitration clause, no matter how broadly construed, can extend only so far as the series of obligations set forward in the underlying agreement. Thus, **arbitration clauses should be applied only to claims that bear on the duties and obligations under the Agreement.** The policy that favors alternate dispute resolution mechanisms, such as arbitration, does not trump basic principles of contract interpretation."
>
> 2002 Del. LEXIS 679, at * 17-18. (footnotes omitted)(emphasis added).

The court continued:

> "When [the parties] agreed to the arbitration provision in the Underwriting Agreement they did not commit to bring into arbitration every possible breach of duty that could occur between the parties. The arbitration clause signals only an intent to arbitrate matters that touch on the rights and performance related to the contract. The term "arising out of or in connection with" must be considered in that light. The Court of Chancery should have concentrated on the similarity of the separate *rights* pursued by plaintiffs under both the contract and the independent fiduciary duties rather than the similarity of the conduct that led to potential claims for both contract and fiduciary breaches of duty."
>
> 2002 Del. LEXIS 679, at *19 (footnotes omitted)(emphasis original)"

Like many other states and like the federal courts, Oregon recognizes a policy favoring arbitration. Concurring Opinion, 182 Or App at 42, citing Snow Mountain Pine, Ltd v. Tecton Laminates Corp., 126 Or App 523, 869 P2d 369 *rev den* 319 Or 36, 876 P2d 782 (1994). If this were an arbitration provision rather than a venue provision, an Oregon court would give great deference to the provision. Even so, it is clear that under Delaware law, although arbitration is favored, a clause like the one at issue would still not apply to tort claims because the policy favoring arbitration "does not trump basic

principles of contract interpretation". 2002 Del LEXIS 679, at * 18. Because the clause governs only claims that "arise from" the Agreement, plaintiffs' tort claims are excluded and may be litigated in the Circuit Court.

In its analysis in Parfi Holding, the Delaware Supreme Court cited with approval Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F2d 1458 (9th Cir 1983) and Gregory v. Electro-Mechanical Corp., 83 F3d 382 (11th Cir 1996), two cases cited by plaintiffs in their brief to the court of appeals. Plaintiffs also cited and relied on Tracer Research Corp. v. National Environmental Services Company, 42 F3d 1292 (9th Cir 1994) where the court examined the specific language of the challenged provision and compared it to those contractual clauses with broader language. In Tracer, the complaint contained seven claims for relief including misappropriation of trade secrets. The Ninth Circuit interpreted the contractual language "arising out of this Agreement" to exclude the misappropriation claim even though defendants argued the misappropriation claim would not have arisen "but for" the licensing agreement. 42 F3d at 1295. The court concluded:

> "If proven, defendants' continuing use of Tracer's trade secrets would constitute an independent wrong from any breach of the licensing and nondisclosure agreements. * * *. Therefore, it does not require interpretation of the contract and is not arbitrable under *Mediterranean Enterprises*. On remand, that claim should be tried in the district court."
>
> 42 F3d at 1295.

In Mediterranean Enterprises, the court examined the phrase "arising under" and determined that the district court had correctly separated plaintiffs' claims for breach of contract and breach of fiduciary duty from other claims for conspiracy to induce the breach of another contract, conversion and *quantum meruit*. Concluding that claims for

breach of contract and breach of fiduciary duty "arise under" the contract, the district court ordered those claims sent to arbitration while the remaining claims were abated pending the results of the arbitration. The Ninth Circuit affirmed the district court determination.

Under Oregon law, the result would be the same. Defendants' argument that "arising from" the contract encompasses claims based on misrepresentations made prior to signing the contract is contrary to Oregon law because it requires the court to insert additional language other than what defendants themselves chose to insert in the Agreement. ORS 42.230; Yogman v. Parrott, 325 Or at 361 (A court may not "insert what has been omitted, or [] omit what has been inserted.") For defendants to prevail, this court would have to interpret "arising from" in the same way that other courts have interpreted much broader provisions. Further, the court would have to conclude that plaintiffs intended to contract away their right to litigate their tort and securities claims which they didn't know they had when they signed the Agreement. This is contrary to contract principles because venue, like arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Tracer, 42 F3d at 1294.

Using the plain text of the contract and the dictionary definitions of "arising" and "from", this court should reach the same conclusion as both opinions in the court of appeals. On the merits, the court of appeals majority and the concurrence correctly conclude that a venue provision governing legal action "arising from" the Agreement does not encompass tort and securities law claims that predated the Agreement and which culminated in the signing of the Agreement:

"Those definitions allow at least a reasonable inference that the forum selection provision in the Agreement was intended to apply only to legal actions that flow directly from the terms and requirements of the agreement itself."

"In addition, **the record shows that plaintiffs were not parties to the Agreement at the time that defendants allegedly made the representations about which plaintiffs complain**. Also, the Agreement does not contain representations or other inducements that might lead a person to invest in the partnership. Rather, it describes the structure of the partnership, the relationships between the limited partners and the general partner, management of the business, capital contributions, responsibility for expenses, distribution of profits, and other similar matters that one would expect such an agreement to cover. **It is inferable in light of those facts that the parties contemplated that the forum selection clause in the Agreement would govern disputes over matters that arose after the Agreement was signed but that section 16.5 is unrelated to pre-agreement representations.**"

Majority Opinion, 182 Or App at 29 (Emphasis added).

The concurrence reached the same result:

"**Plaintiffs were not parties to the Agreement at the time that defendants allegedly made the representations about which plaintiffs complain, so it is difficult to see how the Agreement could be the point of origin of this legal action**. In addition, the Agreement does not contain representations or other inducements that might lead a person to invest in the partnership. * * * . Defendants do not assert that any aspect of the Agreement, other than the forum selection clause, is relevant to any party's claim or defense. Thus, the context of the Agreement as a whole does not provide any broader scope to the forum selection clause than do the words themselves."

"**I do not see how the Agreement can be the source or origin of plaintiffs' claims. The purpose of the representations about which they complain was to induce them to invest in the overall enterprise;** the Agreement is simply part of the package that came with the decision to invest. **It was the end point of the representations, not their source.** * * *. I would hold that the forum selection clause is unambiguous and does not apply to plaintiffs' claims."

Concurring Opinion, 182 Or App at 41(Emphasis added).

Because the venue provision does not apply to plaintiffs' securities, ORICO and common law fraud claims seeking rescission of the Agreement, the trial court erred in dismissing the complaint. The case should be remanded for trial on plaintiffs' claims.

Defendants' fraud preceded any contract formation and the harm to plaintiffs occurred when they relied on the written and oral solicitations (which were false and intentionally misleading) to decide to invest in PCS. To try this case, plaintiffs will be proving the misrepresentations and false inducements that led them to commit to PCS. No contract term or clause will need to be interpreted in order for plaintiffs to recover. Under Delaware law, the contractual choice of venue provision would not apply on these facts. Parfi Holding, 2002 Del. LEXIS 679 at * 23. Plaintiffs can establish the falseness of the defendants' offering materials, of the oral representations (via a 1-800 telephone number) and of Mr. North's statements, and thus their right to rescind the Agreement without reference to any provision of the Agreement.

Defendants cite and rely on Roby v. Corporation of Lloyd's, 996 F2d 1353 (2nd Cir 1993), but Roby is a very different case. Beginning with the contract language, Roby is not this case. Lloyd's of London chose broad language in their contract:

> "Each party hereto irrevocably agrees that the courts of England **shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the** [membership in Lloyd's]"
>
> 996 F2d at 1359 (emphasis added).

By contrast, the language chosen by defendants in this case is narrow:

> "Venue for any **legal action arising from this Agreement**, including enforcement of any arbitration award, shall be in San Juan, Puerto Rico."
>
> (Section 16.5, Agreements of Limited Partnership of PCS 2000, LP)

Roby supports plaintiffs' argument that venue for tort claims, including common law fraud, securities fraud and ORICO are not subject to the narrow venue provision recited in Section 16.5 and chosen by defendants. Defendants' interpretation would require rewriting the agreement, which is contrary to both Delaware and Oregon law. Parfi Holding; ORS 42.230; Yogman v. Parrott, 325 Or at 361

Roby is also factually a very different case because the sole issue in Roby was whether the "Roby Names"[3] disputes with Lloyd's of London and Lloyd's entities "should be litigated in the United States despite a host of contract clauses that appear to bind them to arbitrate in England under English law." 966 F2d at 1356-67. Here, in contrast, there is a single contractual provision establishing venue (and not even exclusive venue) for only those claims that "arise from" the contract. Factually, the cases are not even close.

Plaintiffs' claims are: 1) governed by a much narrower contract provision; and 2) more like the claims in Parfi Holding because they do not depend upon an interpretation of any contract provision.

Defendants' emphasis on protecting the "benefit of the bargain" (Pet. Brief, pp. 9-10) supports plaintiffs' argument that the venue provision would not apply to the preceding misrepresentations. Plaintiffs could not have knowingly bargained away the right to litigate claims they didn't know they had when they signed the Agreement. It was not part of their bargain and therefore there is no compelling reason for the court to

[3] The Second Circuit opinion explains that "Names" are participants in the markets created by Lloyd's governing bodies and operated through syndicates who compete for insurance underwriting business. Roby, 996 F2d at 1357.

enforce a bargain that would force plaintiffs to take their Oregon securities law and common law claims to Puerto Rico.

The fallacy of defendants' argument is that a person could pursue an active campaign of securities and common law fraud and then, cut off a plaintiff's rights by crafting the right contractual language to narrow or destroy plaintiffs' rights and remedies. Oregon should choose a more reasonable interpretation like the interpretation chosen by a majority of courts, and apply the phrase "arising from" to only those claims that actually require interpretation of the contract to determine whether plaintiff would prevail. Parfi Holding.

In the alternative, if the meaning of the venue provision is ambiguous the trial court erred in determining the meaning as a matter of law. Yogman v. Parrott, 325 Or at 363; Steele v. Mount Hood Meadows Ltd., 159 Or App 272, 280, 974 P2d 794 (1999)(If a contract term is ambiguous, its meaning becomes a matter for the trier of fact). Instead, the trial court should have left the interpretation for the jury. Steele v. Mount Hood Meadows, 159 Or App at 280.

This court should review the interpretation given the contract by the trial court and reverse the judgment because, by its terms, the venue selection clause does not apply to this case. In the alternative, this court should remand for taking of evidence on the "contracting parties' intent". Yogman v. Parrott.

III. The ORICO amendment is not retroactive

The trial court erred in dismissing plaintiffs' ORICO claim by importing a subsequent amendment to ORS 166.725 that increased plaintiff's' burden of proof. The

1995 amendments to ORICO made significant changes including the newly imposed requirement that plaintiff prove defendant had been convicted of a crime. Prior to the amendment, these plaintiffs had a fully accrued cause of action based on the alleged misrepresentations without proof of a defendant's criminal conviction. Because the legislature did not provide for retroactivity and because retroactivity "impairs existing rights", the amendment should not be made retroactive and plaintiffs' claims should not have been dismissed.

All statutes are presumed to apply prospectively only unless the legislature expressly provides otherwise. Hall v. Northwest Outward Bound School, 280 Or 655, 660, 572 P2d 1007 (1977); Kempf v. Carpenter and Joiners Union, 229 Or 337, 341, 367 P2d 436 (1961); Henderson v. State Tax Commission, 182 Or 519, 522, 188 P2d 630 (1948). This rule is important because the rights and liabilities of the parties to an event should be "defined and measured by the statutes in effect at the time of the event." Barnes v. City of Portland, 120 Or App 24, 27, 852 P2d 265 (1993).

An illustration of this rule follows. In Bergstad v. Thoren, 86 Or App 70, 738 P2d 223 (1987), the court of appeals applied this rule to decide whether the 1981 amendment to the Oregon Tort Claims Act shortening the statute of limitations should be applied to a plaintiff's accrued cause of action. The court held it should not apply the amendment:

> "In the absence of legislative direction to the contrary, however, a statute that affects 'legal rights and obligations arising out of past actions' is applied only prospectively. * * *. We have held that when an amendment to a Statute of Limitations reduces or decreases the time in which an action may be brought, 'the change will not cut off rights which have accrued under the old law prior to the change."

86 Or App at 73, citing Joseph v. Lowery, 261 Or 545, 495 P2d 273 (1972)(other citations omitted).

Legislative silence on retroactivity is critical because pursuant to ORS 174.010, a court may not insert what has been omitted but may only declare what is contained in the statute. Rhodes v. Eckelman, 302 Or 245, 249, 728 P2d 527 (1986):

> "The legislature knows how to direct retrospective application; it knows how to write emergency clauses. In this case, it did neither. Because it did not, the Court of Appeals correctly concluded that the present notice of appeal was insufficient."

It is undisputed that prior to the legislative amendment, plaintiffs had a right to bring an action under ORICO and, assuming the truth of plaintiffs' allegations, they could recover. By importing the subsequent amendment to ORICO and dismissing the claim based on plaintiffs' failure to allege defendants' criminal conviction, the trial court did what ORS 174.010 prohibits – it imported terms (retroactivity) that the legislature had not declared. See also Whipple v. Howser, 291 Or 475, 486, 632 P2d 782 (1981)(Court should not read into a statute what the legislature has omitted).

The majority plaintiffs' brief in the court of appeals at page 22, fn 5 collects a solid body of Oregon law where courts have refused to create retroactivity where none was provided by the legislature.

During the same legislative session that passed the ORS 166.725 amendment, the legislature declared several other acts retroactive:

1. SB 447, 1995 Or Laws ch. 55 changed the products liability statute of limitations for sidesaddle gas tanks and made it retroactive and even declared that the act would thus revive any actions which would otherwise be time-barred;

2. SB 385, 1995 Or Laws ch. 618 expressly provided that certain ORCP amendments applied to all actions regardless whether they were commenced before, on, or after the effective date of the act; and
3. SB 385, 1995 Or Laws ch. 618 also provided that an amendment to the attorney fee provisions of ORICO applied to actions commenced after the effective date.

There are other examples but these illustrate the point that the legislature is capable of creating retroactivity and when it doesn't this court should not "insert what has been omitted". ORS 174.010.

Requiring plaintiffs to comply with the amended statute would also violate this court's rule that retroactivity will not be used to "impair existing rights * * * with respect to past transactions", Kempf, 229 Or at 343, or to "affect legal rights and obligations arising out of past transactions". Joseph v. Lowery, 261 Or at 548-49.

Defendants argue that the legislature's choice of verb tense should be relied on to infer intent to impose retroactivity. However, as is clear from the above examples, the legislature is capable of dictating retroactivity and need not "signal its intent through verb tense". Defendants' verb tense argument was properly rejected by the court of appeals. The cited phrase, a conviction "has been obtained" refers to the additional element plaintiff must prove (a completed conviction), not to the timing of the legislative amendment. By its nature, a "criminal conviction" will always be in the past tense, it either happened or it did not. The use of the past tense in this limiting phrase does not overcome the presumption against retroactive application of statutory amendments, nor

does it indicate a legislative intent to oust plaintiffs of their right to recovery under ORICO.

In the same body of amendments, the legislature declared that plaintiff's cause of action accrues "when the criminal conviction for the underlying activity is obtained". 1995 Or Laws, ch 619, amending ORS 166.725 (11)(b), App-43. As shown above, the legislature is capable of declaring retroactive application and its silence on this issue within the same statute where it made some provisions retroactive is dispositive.

Defendants also urge retroactive application of the amendment because they assert the statute is "remedial". This label does not assist the court, Joseph v. Lowery, 261 Or 545, and further is not accurate with respect to the **amendment** to ORS 166.725. ORICO is itself a remedial statute intended to deter conduct that the legislature has identified as violating Oregon public policy. The amendment placing conditions on ORICO recovery and restricting a plaintiff's remedy is not remedial because it takes away accrued rights from injured plaintiffs and gives greater latitude to defrauders.

The trial court erred in dismissing plaintiffs' ORICO claim and this court should reverse that ruling. Trial should be had on all of plaintiffs' claims.

IV. If the venue provision applies, the action must be stayed

If the court of appeals is correct about the venue selection provision, plaintiffs are entitled to litigate their claims against defendants in Multnomah County Circuit Court for fraud, securities fraud and ORICO. If, instead, the trial court was correct that the venue provision applies to this case, then the remaining text of Section 16.5 also applies and the

parties are required to arbitrate their claims, but the trial court is also **required** to abate this action pending arbitration. ORS 36.315:

> "If any action, suit or proceeding is brought upon any issue arising out of an agreement which contains a provision for arbitration of the matter in controversy in such action, suit or proceeding, then, upon application, any judge of a circuit court, upon being satisfied that the issue is referable to arbitration, **shall abate** the action, suit or proceeding so that arbitration may be had in accordance with the terms of the agreement. The application shall be heard similarly to hearings on motions." (Emphasis added).

Defendants erroneously contend that, having chosen to file a lawsuit (based on plaintiffs' interpretation of the venue provision as inapplicable to their tort claims) plaintiffs have irrevocably chosen litigation, thereby waiving their right to arbitrate with defendants, and "struck out" with one strike. The more rational interpretation of what happened here is as follows:

1) If plaintiffs are correct in their interpretation of the venue provision, it does not apply and this case should go back to Multnomah County for trial; or

2) If plaintiffs are wrong, venue was not proper in Multnomah County, it must be in Puerto Rico, **but** plaintiffs also have a right to arbitrate their claims and, therefore, the trial court had no choice but to abate this action pending the outcome of arbitration. ORS 36.315

Defendants want to assert the validity of the venue provision but deny the remainder of Section 16.5 and find a waiver of arbitration by plaintiffs' assertion of a right to litigate. The trial court specifically ruled that plaintiffs had not waived their right to arbitrate by filing this action. (Order dated May 25, 1998; Ab-8; Tr. 196, 200-201)

There is no legal authority for defendants' position, and it is directly contrary to principles of contract interpretation where this court will give effect to all of the provisions of a contract. Oregon Bank v. Nautilus Crane & Equipment, 68 Or App 131, 146, 683 P2d 95 (1984)(The construction of a contract that renders any part meaningless should be avoided.), citing Moore v. Schermerhorn, 210 Or 23, 31, 307 P2d 180 (1957). Accepting defendants' argument requires this court to enforce the venue provision but invalidate the arbitration provision contained in the same paragraph. Such an interpretation is absurd and is contrary to Oregon law. Oregon Bank v. Nautiulus; Moore v. Schermerhorn.

Conclusion

The decision of the court of appeals should be affirmed. The case should be remanded for trial on all of plaintiffs' claims.

Respectfully submitted this 14th day of March, 2003

HARRIS BERNE CHRISTENSEN LLP

By:
Roger K. Harris, OSB # 78046

Helen T. Dziuba, OSB # 87210
Law Office of Helen T. Dziuba, PC
765 A Avenue
Lake Oswego, OR 97034
503-534-5020

Of attorneys for Plaintiffs-Respondents

CERTIFICATE OF FILING AND SERVICE

I certify that on March 18, 2003, I filed the original and 12 copies of RESPONDENTS' BRIEF with the State Court Administrator by United States Postal Service, first class mail, postage prepaid, addressed as follows:

State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, OR 97310

I certify that on March 18, 2003, I served two true and correct copies of the RESPONDENTS' BRIEF on Counsel for the Parties and on pro se defendants as set forth in the attached List of Counsel.

I further certify that said copies were placed in sealed envelopes addressed as indicated herein and deposited in first-class mail and that the postage was prepaid.

DATED this 18th day of March, 2003.

HARRIS BERNE CHRISTENSEN LLP

Roger R. Harris, OSB
Of Attorneys for Plaintiffs-Respondents

LIST OF COUNSEL AND PRO SE DEFENDANTS

Robert D. Newell - OSB #79091
Darleen Ortega - OSB #92274
Davis, Wright Tremaine LLP
1300 S.W. Fifth Ave., Suite 2300
Portland, OR 97201-5682
Of Attorneys for Defendants-Respondents and Petitioners for Review
Arizala, Lamoso, Martinez, Minnich, Odell, Perry, Rahman,
SuperTel, Unicom and ClearComm

Joseph C. Arellano - OSB #80151
Kennedy, Watts, Arellano & Ricks, LLP
2850 Pacwest Center
1211 SW Fifth Ave.
Portland, Oregon 97204
Of Attorneys for Defendant-Respondent and Petitioner on Review
Anthony T. Easton

Michael Kennedy - OSB #78270
Kennedy Bowles, P.C.
1500 S.W. First Ave., Suite 920
Portland, OR 97201
Of Attorneys for Defendants-Respondents and Petitioners on Review
John J. Duffy, Theresa Miller, and Ed Janowski

Thomas C. Sand - OSB #77332
Bruce L. Campbell – OSB #92537
Miller Nash Wiener et.al.
111 S.W. Fifth Ave., Suite 3500
Portland, OR 97204
Of Attorneys for Defendants-Respondents and Petitioners on Review
Morgan, Lewis & Bockius, LLP and Frank R. Goldstein

Steven K. Blackhurst - OSB #73032
Ater, Wynne, Hewitt, Dodson & Skerritt
222 S.W. Columbia St., Suite 1800
Portland, OR 97201
Of Attorneys for Defendants-Respondents and Petitioners on Review
Breen, Breen Family Trust, Romulus Corporation, Romulus
Telecommunications, Inc., Romulus Engineering, Inc.

Gary North
16488 Union Star Road, WC 224
Winslow, Arkansas 72959
(501) 839-3986
Defendant-Respondent Pro Se

SDE Trust
1949 Fifth Street, #101
Davis, California 95616-4026
Defendant-Respondent Pro Se

Susan D. Easton
785 Bowhill Road
Hillsborough, California 94010
Defendant-Respondent Pro Se