Strategic Adoption of Forum-Selection Bylaws

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It is well known that more than 90 percent of proposed mergers valued at over $100 million result in stockholder litigation. In most cases, such litigation is commenced in more than one forum, which led to the advent of the now widely adopted forum-selection bylaw. The suggestion in *In re Revlon Shareholders Litigation*, 990 A.2d 940 (Del. Ch. 2010), that forum-selection bylaws may be enforceable and the subsequent enforcement of such bylaws in *Boilermakers Local 154 Retirement Fund v. Chevron*, 73 A.3d 934, 937, 939 (Del. Ch. 2013), has resulted in the strategic adoption of forum-selection bylaws in connection with major transactions, such as mergers. For example, Consolidated Communications Holdings Inc.'s Form 8-K approved a forum-selection bylaw and merger the same day on June 30; Hittite Microwave Corp.'s Form 8-K approved a forum-selection bylaw one day before approving merger on June 8; Protective Life Corp.'s Form 8-K approved a forum-selection bylaw and merger the same day on June 3; and Material Sciences Corp.'s Form 8-K did the same on Jan. 8. The most recent non-Delaware court decision addressing the enforceability of forum-selection bylaws has brought this practice into question.

The Multnomah County Circuit Court in Oregon, in *Roberts v. TriQuint Semiconductor,* C.A. No. 1402-02441 (Cir. Ct. Or. Aug. 14, 2014), declined to grant the defendants' motion to dismiss for lack of subject-matter jurisdiction pursuant to a forum-selection bylaw. The bylaw in question was adopted by the board of directors of TriQuint Semiconductor Inc. at the same meeting as the merger between TriQuint and RF Micro Devices Inc. was recommended for adoption by the stockholders and four days prior to public announcement of the merger.

The Oregon court first distinguished the holdings in *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1174 (N.D. Cal. 2011), and *Chevron*. The forum-selection bylaw in *Galaviz* was adopted after the challenged wrongdoing and purportedly applied to such wrongdoing. The U.S. District Court for the Northern District of California declined to enforce the forum-selection bylaw based on a contract principle—the lack of a bilateral agreement between the parties, especially where the challenged wrongdoing occurred prior to the adoption of the agreement. The district court, however, did not decide whether directors of a Delaware corporation have the power to adopt such a bylaw. Subsequently, the Delaware Court of Chancery, in *Chevron*, considered the facial validity of forum-selection bylaws and held that directors of a Delaware corporation have the power to unilaterally adopt a valid forum-selection bylaw so long as such bylaw is reasonable and fair. In recognition of that holding, the Oregon court upheld the facial validity of TriQuint's forum-selection bylaw and considered it on an as-applied basis.

Relying on *Schnell v. Chris-Craft Industries*, 285 A.2d 430 (Del. Ch. 1971), rev'd on other grounds by 285 A.2d 437 (Del. 1971), and on the general contract principle of mutual assent, the Oregon court determined that dismissing the case would be unfair and unjust. The court found similarities between the facts in *Schnell*, where the defendant amended its bylaws to permit the directors to advance the date of and select a remote location for its annual meeting of stockholders to perpetuate themselves in office, and in the case at hand, where a group of activist stockholders sought to remove all of the directors at the next meeting of stockholders, in response to which TriQuint

agreed to a merger with RFMD and adopted a forum-selection bylaw. The court found that the holding in *Schnell* suggested that an attempt to infringe upon the stockholders' rights to amend or repeal a unilaterally enacted bylaw would violate the public policy of Delaware and that such a bylaw would equally violate the public policy of Oregon.

The Oregon court observed that unilaterally enacted forum-selection bylaws are enforceable but, based on the foregoing, held that it would be unfair and unjust to dismiss the case because of "the closeness of the timing of the bylaw amendment to the board's alleged wrongdoing, coupled with the fact that the board enacted the bylaw in anticipation of this exact lawsuit," and the fact that enforcement of the bylaw "will have the effect—and defendants knew it would have the effect—of forcing the shareholders to accept the bylaw." However, the court noted that "enforcement of the bylaw would not be an issue had the board ... adopted it prior to any of its alleged wrongdoing, and with ample time for the shareholders to accept or reject the change."

TriQuint makes clear that non-Delaware courts may decline to enforce a forum-selection bylaw adopted in connection with a merger on the grounds that its adoption is not fair and reasonable because stockholders challenging the merger would not have had a fair opportunity to determine whether to sell stock of the merging company prior to the alleged wrongdoing. Notwithstanding the Oregon court's reliance on *Schnell*, it is unclear whether a Delaware court would reach the same conclusion as the Oregon court reached in *TriQuint*.

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