

## Corporate Finance/M&A - USA

### Oregon court refuses to enforce Delaware exclusive forum selection bylaw

Contributed by **Ropes & Gray LLP**

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#### Facts Decision

A recent Oregon decision demonstrates the risk that non-Delaware jurisdictions may decline to enforce a Delaware forum selection bylaw, in particular where that bylaw was adopted after the stockholder plaintiff filed suit or under other circumstances that may be viewed by a court (rightly or wrongly) as an attempt to 'insulate' a board from litigation related to a transaction.

#### Facts

*Roberts v TriQuint Semiconductor, Inc*(1) was brought before the Oregon Circuit Court, challenging a merger between TriQuint Semiconductor, Inc and RF Micro Devices, Inc (RFMD). The defendant filed a motion to dismiss, which was denied, seeking to enforce a Delaware forum selection bylaw adopted at the same time the board approved the merger.

On February 24 2014 TriQuint and RFMD announced that they had entered into a merger of equals. At the meeting at which the TriQuint board of directors approved the merger, the board also adopted a Delaware exclusive forum selection bylaw. Notwithstanding that bylaw, certain stockholder plaintiffs filed suit in Oregon, where TriQuint is headquartered, to enjoin the transaction. Other stockholder plaintiffs filed a parallel Delaware action. Confronting multijurisdictional deal litigation, TriQuint moved to dismiss the Oregon action based on its forum selection bylaw.

#### Decision

An Oregon state circuit court rejected TriQuint's motion to dismiss and refused to enforce its exclusive forum selection bylaw. In so doing, the court relied heavily on the 2011 *Galaviz v Berg* decision from the US District Court for the Northern District of California. *Galaviz* invalidated a Delaware exclusive forum selection bylaw implemented by Oracle after certain stockholder plaintiffs filed a derivative action, holding that contract principles precluded enforcement because the bylaw was enacted after the alleged wrongdoing occurred and was enacted unilaterally by directors who were defendants in the derivative action.

The Oregon court's decision to follow *Galaviz* is at odds with other decisions from California, Illinois, Louisiana and New York, in which courts declined to follow *Galaviz* and elected to enforce Delaware exclusive forum selection bylaws.

Distinguishing Chancellor Strine's opinion in *Boilermakers Local 154 Retirement Fund v Chevron Corporation*, the *TriQuint* court characterised the *Chevron* opinion as a "narrow holding", and instead relied heavily on the 1971 Delaware Supreme Court decision in *Schnell v Chris-Craft Industries, Inc.* There the court rejected an attempt by the Chris-Craft board to respond to a proxy contest by amending its bylaws to accelerate the date of the corporation's annual meeting and move the meeting to a remote town, which the court held was a deliberate attempt to obstruct legitimate stockholder rights. The *TriQuint* court held that because the TriQuint board had adopted the forum selection bylaw at the same meeting in which it approved the merger, it had attempted to insulate itself from litigation and had foreclosed any stockholder attempt to repeal the new bylaw. The Oregon court did not address the fact that the TriQuint forum selection bylaw did not preclude stockholder litigation relating to the merger (indeed, identical stockholder litigation was filed in Delaware).

Ultimately, the *TriQuint* court acknowledged that exclusive forum selection bylaws can be enforceable, but only if they are adopted before the alleged wrongdoing and "with ample time for the shareholders to accept or reject" the bylaw. In focusing on those criteria, the court placed particular emphasis on whether the shareholders would be "forced to accept" the bylaw – an analysis not emphasised by more recent rulings from other courts evaluating the enforceability of a Delaware exclusive forum selection bylaw. While the *TriQuint* ruling counsels in favour of enacting a forum selection bylaw "on a clear day", the opinion deviates from the weight of current precedent on this issue by imposing this additional requirement.

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## Endnotes

(1) Case 1402-02441 (Oregon Cir Ct, August 14 2014).

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