Client Alert

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Recent Decision Confirms That Forum Selection Bylaws Are Best Considered on a Clear Day

By Michael G. O'Bryan, Kevin A. Calia, and James J. Beha II

"Exclusive forum" bylaws and charter provisions are a powerful tool for managing the risk of parallel corporate governance litigation against a company and its directors in multiple forums, allowing stockholders to bring such litigation but requiring that they bring it in one specified jurisdiction, typically the company's state of incorporation. The Delaware Chancery Court, in its 2013 *Chevron* decision, held that such provisions are generally enforceable,[1] and courts in several other states have dismissed stockholder litigation based on Delaware forum selection provisions.[2] As a result, more companies are adopting such provisions.

In our June alert we noted that public companies may wish to consider adopting such provisions, either as part of their general corporate governance regime or when they see events on the horizon — such as a potential M&A process — that may spur intra-corporate litigation, and reviewed several of the factors, including potential stockholder reaction, that companies might want to take into account. This alert highlights a recent development in the enforceability of exclusive forum provisions that may be affected by the timing of their adoption.

OREGON COURT DECLINES TO ENFORCE AN EXCLUSIVE FORUM PROVISION ADOPTED CONCURRENTLY WITH BOARD APPROVAL OF MERGER AGREEMENT

Bucking the general trend towards enforcement of exclusive forum bylaws, an Oregon court, in *Roberts v. TriQuint SemiConductors, Inc.*, refused to enforce a corporate bylaw designating Delaware as the exclusive forum for intra-corporate litigation.[3] In February 2014, TriQuint (a Delaware corporation headquartered in Oregon) announced a merger agreement with RF Micro Devices, and on the same day adopted by action of the board the exclusive forum bylaw. As the court noted, before agreeing to the merger, TriQuint had (in December 2013) received from an activist shareholder a letter announcing the activist's intent to nominate a competing slate of directors at the next shareholder meeting.

Following announcement of the merger agreement, TriQuint shareholders filed suits in both Delaware and Oregon. In Delaware, the court declined the shareholders' request to expedite the litigation, finding that the plaintiffs had failed to state sufficiently a claim for those purposes, though the litigation continued.[4] In Oregon, TriQuint moved to dismiss the suit based on its exclusive forum provision, but the Oregon court refused to enforce the provision.

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[1] *Boilermakers Local 154 Retirement Fund and Key West Police & Fire Pension Fund v. Chevron Corp*. (Del. Ch. 2013).

[2] See *Groen v. Safeway Inc.* (Cal. Sup. Ct. May 14, 2014); *Miller v. Beam Inc.* (Ill. Ch. Ct. Mar. 5, 2014); *Hemg Inc. v. Aspen Univ*. (N.Y. Sup. Ct. Nov. 14, 2013); and *In re MetroPCS Commc'ns, Inc*. (Tex. App. 2013).

[3] *Roberts v. TriQuint SemiConductors, Inc.* (Or. Cir. Ct. Aug. 14, 2014).

[4] *In re TriQuint Semiconductor, Inc. S'holders Litig.* (Del. Ch. June 9, 2014).

While the Oregon court acknowledged the Delaware Chancery Court's decision in *Chevron*, the court held that TriQuint's bylaw should not be enforced because the bylaw was enacted at the same board meeting during which the board approved the merger that was the subject of the underlying suit. The court suggested that the bylaw would have been enforced "had the board . . . adopted it prior to any alleged wrongdoing, and with ample time for shareholders to accept or reject the change." As a result, TriQuint must now defend against virtually identical allegations in two different courts, unless it can convince one of the courts to stay the litigation in deference to the other.

The *Roberts* decision is now the outlier — the only post-*Chevron* decision of which we are aware that refused to enforce a forum selection bylaw — and should not call into question more generally the validity of exclusive forum provisions enacted in connection with M&A transactions. Nonetheless, the case highlights the potential significance, in the view of some courts, of the timing of the enactment of such provisions.

CONCLUSION

The *Roberts* decision shows that enacting an exclusive forum provision on a clear day, before a company sees the storm clouds of litigation on the horizon, may support the enforceability of the provision. Failing that, in a transaction context, sell-side boards should consider enacting such provisions (and buyers should consider discussing the issue with potential sellers) as early in the transaction process as is practical to minimize the potential that a court will decline to give effect to the forum selection provision.

For companies that are unable to do so and find themselves in a transaction process or on the cusp of entering into a transaction without an exclusive forum provision in place, it is still worth considering whether to adopt such a provision. The *TriQuint* decision notwithstanding, courts may enforce the provision. Indeed, the majority of courts facing the question have enforced exclusive forum provisions even when they were enacted during a transaction process. On the other hand, even if the court declines to enforce the provision, the company is likely no worse off for having enacted it. TriQuint, for example, likely would have faced duplicative litigation over the transaction in the same two forums even if its board had not enacted an exclusive forum bylaw.

Contact:

Michael G. O'Bryan
(415) 268-6352
mobryan@mofo.com

Kevin A. Calia
(415) 268-7519
kcalia@mofo.com

James J. Beha II
(212) 336-4079
jbeha@mofo.com

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