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Appellate Court Records

IN THE SUPREME COURT FOR THE STATE OF OREGON

DONALD L. ROBERTS, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Adverse Party,

v.

TRIQUINT SEMICONDUCTOR, INC.; RALPH G. QUINSEY; STEVEN J. SHARP; CHARLES SCOTT GIBSON; DAVID HO; NICOLAS KAUSER; RODERICK NELSON; WALDEN C. RHINES; and WILLIS C. YOUNG,

Defendants-Relators,

And

RF MICRO DEVICES, INC.,

Defendant.

MARINA LAM, Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Adverse Party,

v.

STEVEN J. SHARP; RALPH G. QUINSEY; CHARLES SCOTT GIBSON; DAVID HO; NICOLAS KAUSER; RODERICK NELSON; WALDEN C. RHINES; WILLIS C. YOUNG; and TRIQUINT SEMICONDUCTOR, INC.,

Multnomah County Circuit Court
No. 1402-02441 (Lead Case)

Multnomah County Circuit Court
No. 1403-02757

MANDAMUS PROCEEDING

SC S062642

Continued . . .

Defendants-Relators,

And

RF MICRO DEVICES, INC.;
ROCKY MERGER SUB, INC.;
TRIDENT MERGER SUB, INC.;
and ROCKY HOLDING, INC.,

Defendants.

DEFENDANTS-RELATORS' OPENING BRIEF ON THE MERITS AND APPENDIX

From an Order of the Circuit Court of Multnomah County,

Honorable Michael A. Greenlick, Judge

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I. STATEMENT OF THE CASE

A. Nature of the Action

Plaintiffs-Adverse Parties Donald L. Roberts and Marina Lam (together, "Plaintiffs"), purporting to act on behalf of a class of stockholders of Defendant-Relator TriQuint Semiconductor, Inc. ("TriQuint"), allege that TriQuint and Defendants-Relators Ralph G. Quinsey, Steven J. Sharp, Charles Scott Gibson, David Ho, Nicolas Kauser, Roderick Nelson, Walden C. Rhines and Willis C. Young (collectively, the "TriQuint Directors" or the "TriQuint Board," and together with TriQuint, the "TriQuint Defendants") breached fiduciary duties in approving a proposed merger between TriQuint and Defendant RF Micro Devices, Inc. ("RFMD").

The TriQuint Defendants moved to dismiss Plaintiffs' complaints on multiple grounds. Pertinent to this mandamus proceeding, the TriQuint Defendants argued that the trial court lacked jurisdiction over Plaintiffs' claims because TriQuint's Second Amended and Restated Bylaws (the "Bylaws") establish the Delaware Court of Chancery as the exclusive venue for litigating intra-corporate disputes. The trial court denied the TriQuint Defendants' motion. The TriQuint Defendants now seek a peremptory writ of mandamus to correct the trial court's fundamental legal errors regarding jurisdiction and venue.

B. Nature of Order Being Reviewed

The order on review is the trial court's Order Regarding Motions to Dismiss and to Stay entered on September 4, 2014 (the "Order"), which denied

the TriQuint Defendants' motion to dismiss notwithstanding the binding provision in the Bylaws that establishes the Delaware Court of Chancery as the exclusive jurisdiction and venue for this litigation. ER 513-33.[1]

C. Basis for Mandamus Jurisdiction

This Court has original jurisdiction under section 2 of amended Article VII of the Oregon Constitution and ORS 34.120(2).

D. Timeliness of Petition

The Order was entered in the trial-court register on September 4, 2014. The TriQuint Defendants timely served and filed their "Petition for Writ—Mandamus" and supporting papers on October 3, 2014, which was 29 days after entry of the Order. *See State v. Peekema*, 328 Or 342, 346, 976 P2d 1128 (1999) ("The time period within which a party must file a petition for mandamus relief is governed by laches, [which] generally requires that a mandamus proceeding be filed within the statutory time limitation required for the filing of an appeal." (citation omitted)); ORS 19.255(1) (generally requiring that notice of appeal be served and filed within 30 days after judgment appealed from is entered in trial-court register).

[1] References to "ER __" are to Defendants-Relators' Excerpt of Record filed on October 3, 2014. Pages 1-47 of the Appendix ("App") were submitted with the TriQuint Defendants' Memorandum in Support of Petition for Writ – Mandamus, filed on October 3, 2014. Pages 48-89 of the Appendix are submitted with this Brief. (There are no references to the "TCF" because the Multnomah County Circuit Court docket no longer identifies documents by reference number.)

E. Questions Presented

1. Whether the trial court committed fundamental legal error by not recognizing the enforceability of an exclusive-forum provision contained in the bylaws of a Delaware corporation, where the corporation's board of directors adopted that provision pursuant to powers granted by the corporation's certificate of incorporation?

2. Whether the trial court committed fundamental legal error in not dismissing these consolidated cases based on TriQuint's exclusive-forum bylaw, on grounds that enforcement of the bylaw would be unfair, unjust and contrary to Oregon public policy insofar as (i) TriQuint's Board adopted the bylaw on the day that it approved the proposed merger with RFMD and in anticipation of legal actions like the ones filed by Plaintiffs, and (ii) TriQuint's stockholders allegedly did not have "ample time" to challenge the bylaw before Plaintiffs filed their lawsuits and the TriQuint Defendants sought to enforce the bylaw in these actions?

3. Whether the trial court committed fundamental legal error in considering and analyzing Oregon public policy under the "*Bremen* test," where that test has not been adopted in Oregon and the trial court's analysis of Oregon public policy ignored important public policies long recognized in Oregon that support enforcement of TriQuint's exclusive-forum bylaw?

F. Summary of Argument

TriQuint, a Delaware corporation, adopted a bylaw that vests the Delaware Court of Chancery with exclusive jurisdiction over all the claims asserted in these purported class actions. Under Delaware corporate and contract law, this bylaw is part of a binding contract between TriQuint and its stockholders, including Plaintiffs.

Where parties to a dispute have agreed to litigate that dispute in a forum other than Oregon, "the specific, private law established by the parties' valid agreement supersede[s] the general jurisdiction of the Oregon courts" and requires dismissal. *Black v. Arizala*, 337 Or 250, 264, 95 P3d 1109 (2004) (citing *Reeves v. Chem Indus. Co.*, 262 Or 95, 101, 495 P2d 729 (1972)). Under these authorities, the trial court should have dismissed these consolidated cases, but it did not and thereby committed fundamental legal error.

Since the Delaware Court of Chancery's decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A3d 934 (Del Ch 2013)—the first decision by a Delaware court to address the enforceability of an exclusive-forum bylaw adopted by a Delaware corporation—every court, other than the trial court here, that has considered a Delaware corporation's exclusive-forum bylaw has found the bylaw valid and enforceable. Here, however, the trial court refused to enforce TriQuint's exclusive-forum bylaw on grounds that enforcement would be unfair and unjust and would violate Oregon public policy,

including the purported policy that stockholders must have "ample time" to challenge new bylaws before they become effective. This reasoning demonstrates that the trial court, contrary to Delaware and Oregon law and Oregon public policy, and despite acknowledging the validity of exclusive-forum bylaws, rejected the fundamental principles on which such bylaws are based.

Within days of the Order, the Delaware Court of Chancery specifically rejected the Order and its rationale, explaining that "to the extent [the Order] purport[s] to apply Delaware law, [it is] based on a misapprehension of Delaware law regarding the facial validity and as-applied analysis of forum selection bylaws." *City of Providence v. First Citizens Bancshares, Inc.*, 99 A3d 229, 242 n 54 (Del Ch 2014). Less than two weeks later, a federal court applying Delaware law rejected the Order's determination that the amendment of a bylaw after alleged wrongdoing has occurred, and without time for the stockholders to challenge the bylaw prior to its enforcement, can be a basis not to enforce an exclusive-forum bylaw. *North v. McNamara*, ___ F Supp 3d ___, 2014 WL 4684377, at *6 (SD Ohio, Sept 19, 2014). Indeed, no other court has adopted the trial court's analysis.

Contrary to the trial court's conclusion that enforcement of TriQuint's exclusive-forum bylaw would violate Oregon public policy, there is no Oregon statute, regulation or court decision articulating a public policy that requires or

even supports non-enforcement of that bylaw. Rather, it is the Order that conflicts with Oregon public policies providing that: (1) corporate boards may unilaterally enact bylaw changes without obtaining prior stockholder approval; (2) Oregon courts should not interfere with the internal affairs—including the relationship between a corporation and its stockholders—of non-Oregon corporations; and (3) contracts, including contracts establishing the forum for future litigation, should be enforced.

Accordingly, this Court should direct the trial court to dismiss the consolidated cases based on TriQuint's exclusive-forum bylaw both to correct the trial court's fundamental legal errors and to protect the TriQuint Defendants from the very harm that exclusive-forum bylaws are enacted to avoid, *i.e.*, the need to simultaneously defend in multiple jurisdictions the same claims, against the same parties, on behalf of the same purported class.

G. Summary of Material Facts

TriQuint, a Delaware corporation, provides "innovative radio frequency ('RF') solutions and foundry services for the world's top communications, defense and aerospace companies." ER 2. Headquartered in Hillsboro, Oregon, TriQuint has operations in Asia, Europe, North America and Central America, with its principal design and manufacturing facilities located in Oregon, Texas and Florida. ER 5, 9, 22, 253.

On February 22, 2014, TriQuint's board of directors adopted Article XI to the Bylaws, establishing the Delaware Court of Chancery as the exclusive forum for intra-corporate disputes. ER 22, 47. The TriQuint Board adopted Article XI pursuant to TriQuint's Amended and Restated Certificate of Incorporation (the "Certificate"), *see* ER 53 (art. NINTH), and the Bylaws, *see* ER 83 (art. X).

On February 24, 2014, TriQuint and RFMD jointly announced that they had entered into a definitive agreement for a stock-for-stock "merger of equals" (the "Merger Agreement"). ER 2, 11-13; *see also* ER 84-191 (copy of Merger Agreement). The boards of directors of both companies unanimously approved the transaction. ER 11.

Four days later, on February 28, 2014, Plaintiff Roberts filed suit in Multnomah County Circuit Court, *Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, as the putative representative of a proposed class of TriQuint stockholders. ER 1-20. Plaintiff Roberts alleges that the TriQuint Directors breached fiduciary duties in approving the Merger Agreement and that TriQuint and RFMD aided and abetted the alleged breach. Specifically, Plaintiff Roberts claims that the interests of the TriQuint Directors conflicted with the interests of TriQuint's other stockholders, causing the TriQuint Directors to conduct an unfair process and to agree to consideration for the merger that protected their

interests but was unfair to, and did not adequately protect the interests of, TriQuint's other stockholders. ER 13-16.

Making similar allegations, Plaintiff Lam filed a putative class action in the Multnomah County Circuit Court on March 6, 2014, *Lam v. Sharp*, No. 1403-02757. ER 250-66. Neither Plaintiff alleges fraud or overreaching by the TriQuint Board in adopting the exclusive-forum bylaw.

The trial court consolidated the *Roberts* and *Lam* actions (together, the "Oregon consolidated cases") by an order entered on May 13, 2014. ER 489-92. Plaintiffs have not filed a consolidated complaint.

Around the same time that Plaintiffs Roberts and Lam filed their respective actions, three other TriQuint stockholders filed putative class action lawsuits related to the proposed merger in the Delaware Court of Chancery on behalf of the same purported class of TriQuint stockholders. The claims in these Delaware actions are virtually identical to those that Plaintiffs assert here. *See Philemon v. TriQuint Semiconductor, Inc.*, Civ. A. No. 9415-VCN (Del Ch filed Mar 5, 2014) (ER 192-209); *Schmitz v. TriQuint Semiconductor, Inc.*, Civ. A. No. 9427-VCN (Del Ch filed Mar 7, 2014) (ER 210-28); *Wallace v. TriQuint Semiconductor, Inc.*, Civ. A. No. 9429-VCN (Del Ch filed Mar 10, 2014) (ER 229-49). By an order dated April 29, 2014, the Delaware Court of Chancery consolidated the three actions (the "Delaware consolidated cases"),

and on May 1, 2014, the plaintiffs in those actions filed a Verified Consolidated Amended Class Action Complaint. ER 412-66.

The TriQuint Defendants moved to dismiss both the *Roberts* and *Lam* actions on April 4, 2014, before the cases were consolidated. Pertinent to this proceeding, the motions asserted that jurisdiction and venue in Multnomah County are improper because of TriQuint's exclusive-forum bylaw.[2] On September 4, 2014, the trial court entered the Order denying the TriQuint Defendants' motions to dismiss on all grounds, including the jurisdictional and venue grounds based on the exclusive-forum bylaw. ER 513-33.

While the motions to dismiss were pending in the trial court, the plaintiffs in the Delaware consolidated cases moved for court permission to conduct expedited discovery in support of a motion to preliminarily enjoin a vote of TriQuint's stockholders on the proposed merger. As the Court of Chancery explained, to obtain expedited preliminary injunction proceedings in Delaware, a plaintiff stockholder must "articulate[] a sufficiently colorable claim and show[] a sufficient possibility of a threatened irreparable injury * * * ." *In re TriQuint Semiconductor, Inc. S'holders Litig.*, C.A. No. 9415-VCN, 2014 WL 2700964, at *2 (Del Ch, June 13, 2014) (internal

[2] The motions also asserted as alternative grounds for dismissal: (1) the inconvenient forum doctrine; (2) comity interests that counsel dismissal of the Oregon consolidated cases in favor of the parallel proceedings in the Delaware Court of Chancery; and (3) Plaintiffs' failure under Delaware substantive law (which applies to all of Plaintiffs' claims) to allege ultimate facts that support a claim on which relief can be granted.

quotation marks omitted) (ER 503). The Court of Chancery denied the plaintiffs' motion, concluding that their consolidated complaint—which asserts claims virtually identical to the Delaware law claims asserted in the Oregon consolidated cases—failed to satisfy the "colorable claim" standard required to obtain authorization to expedite the proceedings. *Id.* at *5 (ER 508).[3]

II. ASSIGNMENT OF ERROR

The trial court committed fundamental legal error in denying the TriQuint Defendants' motions to dismiss because a properly adopted bylaw mandates that TriQuint's stockholders litigate intra-corporate disputes exclusively in the Delaware Court of Chancery.

A. Preservation of Error

The TriQuint Defendants filed motions to dismiss the *Roberts* and *Lam* complaints on April 4, 2014, arguing *inter alia* that TriQuint's exclusive-forum bylaw deprived the trial court of jurisdiction over Plaintiffs' claims. The TriQuint Defendants further supported their arguments in a single reply brief filed on May 9, 2014, and at oral argument held on July 1, 2014.

[3] "[T]he standard for expedition, colorability, which simply implies a non-frivolous set of issues, is even lower than the 'conceivability' standard applied on a motion to dismiss [for failure to state a claim under Delaware law]." *In re BioClinica, Inc. S'holder Litig.*, C.A. No. 8272-VCG, 2013 WL 5631233, at *1 n 1 (Del Ch, Oct 16, 2013).

The trial court entered its Order denying the motions to dismiss on September 4, 2014. ER 513-15. The trial court based its Order on an opinion that it had rendered on August 14, 2014, in which it stated, among other things:

> "Ultimately, 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 keeping in mind that its enforcement will have the effect—and Defendants knew it would have the effect—of forcing the shareholders to accept the bylaw, this court finds that enforcing the unilaterally enacted bylaw by dismissing this case would be unfair and unjust. Enforcement would violate the public policy supporting contract formation and would allow a potential defendant anticipating imminent litigation to, also unilaterally, restrict the plaintiff's choice of forum. The portion of the Defendants' motion to dismiss pursuant to the forum-selection bylaw is therefore denied."

Order, Ex A at 9-10 (ER 524-25).

B. Standard for Issuing Writ of Mandamus

Issuance of a writ of mandamus is appropriate "when the trial court's decision amounts to fundamental legal error or is outside the permissible range of discretionary choices available." *Longo v. Premo*, 355 Or 525, 531, 326 P3d 1152 (2014) (internal quotation marks omitted). Whether a venue agreement is valid and enforceable is a legal determination. *Black*, 337 Or at 264.

III. ARGUMENT

The trial court should have enforced TriQuint's exclusive-forum bylaw which, under Delaware law, is a valid contract provision binding on all

TriQuint stockholders. Because the bylaw is valid and there is no basis under Oregon or Delaware law not to enforce it, this Court should issue a peremptory writ of mandamus directing the trial court to enforce the exclusive-forum bylaw, to vacate the Order and to dismiss the Oregon consolidated cases.

A. Oregon Courts Enforce Valid Exclusive-Forum Provisions and Dismiss Actions Brought in the Wrong Forum

In *Reeves v. Chem Industrial Co.*, this Court held that contract clauses providing for an exclusive forum in which to resolve disputes should be enforced unless the clause is unfair or unreasonable. 262 Or at 100-01. In *Reeves*, a contract established Cleveland, Ohio, as the exclusive forum in which to litigate all disputes arising out of the contract. *Id.* at 96-97. This Court concluded that this contract provision was valid and should be enforced "because there is no evidence that the clause is unfair or enforcement would be unreasonable." *Id.* at 101. Thus, when parties have "an enforceable agreement to litigate the action in a different venue," the Oregon lawsuit should be dismissed under ORCP 21 A(1) for lack of jurisdiction over the subject matter. *Black*, 337 Or at 266.[4]

In an analogous situation, the Court of Appeals recognized that a contract provision mandating arbitration in lieu of litigation, and which does not

[4] In determining whether it has subject-matter jurisdiction, a trial court may consider evidence regarding a venue agreement. *Black*, 337 Or at 265-66.

unreasonably impair a party's rights, is enforceable. In holding that an arbitration clause should not be stricken as unconscionable, the court said:

> "Equally relevant, however, is what the arbitration clause does not do. Most importantly, the arbitration clause does not impose any limits on the type or amount of recovery that can be awarded by the arbitrator. It does not exclude punitive or statutory damages or preclude an award of attorney fees when otherwise provided by law. The arbitration clause does not impose any limits on discovery or admissible evidence, apart from those limitations that apply in federal district court, nor does it impose tight deadlines on the filing of claims. In effect, plaintiff is entitled to all of the same remedies—and most of the same procedural protections—as defendant; she simply must bring her claims in a different forum."

Motsinger v. Lithia Rose-FT, Inc., 211 Or App 610, 626, 156 P3d 156 (2007) (emphasis in original; footnotes omitted).

If an exclusive-forum provision is valid and enforceable, the trial court has no discretion; it must dismiss an action wrongly filed in Oregon. *Black*, 337 Or at 264 ("[A] conclusion of an Oregon court that the parties' venue agreement is valid and enforceable is a legal determination that requires the court to dismiss the action in response to a timely motion to dismiss for lack of jurisdiction over the subject matter."). Because the trial court has no discretion to deny a motion to dismiss an action filed in contravention of a valid exclusive-forum provision, "a defendant may proceed by mandamus to enforce the right to change venue" if the trial court does not dismiss the action. *Kohring v. Ballard*, 355 Or 297, 301, 325 P3d 717 (2014).

B. The Trial Court Committed Fundamental Legal Error by Failing to Enforce TriQuint's Exclusive-Forum Bylaw

Despite acknowledging the validity of TriQuint's exclusive-forum bylaw under Delaware law, *see* Order, Ex A at 9 (ER 524) ("As *Chevron* holds, there is nothing inherently wrong with unilaterally enacting forum selection bylaws.")—and contrary to Oregon law established in *Reeves* and *Black*—the trial court refused to enforce this valid contract establishing Delaware as the exclusive forum for Plaintiffs' claims. This was a fundamental legal error.

1. The exclusive-forum bylaw is part of a valid, binding contract between TriQuint and its stockholders, regardless of when the stockholders acquired their TriQuint stock

Courts interpret a corporation's bylaws in accord with the law of the state of incorporation. *See, e.g.*, *Supreme Council of the Royal Arcanum v. Green*, 237 US 531, 542, 35 S Ct 724, 59 L Ed 1089 (1915) ("[A]s the charter was a Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, * * * [Massachusetts'] laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws."); *Nat'l Bank of Canada v. Interbank Card Ass'n*, 507 F Supp 1113, 1124 (SDNY 1980) ("[I]t is clear that [a Delaware corporation's] bylaws are to be interpreted in accordance with Delaware law."), *aff'd*, 666 F2d 6 (2d Cir 1981).

Under Delaware law, and consistent with Oregon law, the bylaws of a Delaware corporation are part of a contract between the corporation and its

stockholders. *Allen v. El Paso Pipeline GP Co.*, 90 A3d 1097, 1107 (Del Ch 2014); *accord Dentel v. Fidelity Savings & Loan*, 273 Or 31, 33, 539 P2d 649 (1975) ("The bylaws of the corporation have been termed a contract between the members of the corporation, and between the corporation and its members."). TriQuint's Bylaws, therefore, constitute part of a valid and binding contract between TriQuint and its stockholders, including Plaintiffs. As explained below, under this contract all disputes related to TriQuint's internal affairs—including stockholder claims alleging breach of fiduciary duty by the TriQuint Directors—can be litigated only in the Delaware Court of Chancery.

TriQuint's properly adopted Bylaws are binding on all TriQuint stockholders whether any particular bylaw was adopted before or after the stockholders purchased their TriQuint stock. Where a Delaware corporation's certificate of incorporation grants its board of directors the authority to enact or amend bylaws, the corporation's stockholders are on notice when they purchase their stock that the board may enact or amend the bylaws without first obtaining stockholder approval, and they are bound by this contractual provision. *See United Technologies Corp. v. Treppel*, ___ A3d ___, ___ (Del, Dec 23, 2014) (slip op at 12-13 n 41) (App 88-89) ("United Technologies' bylaws empower the board to amend the bylaws 'by an affirmative vote of a majority of the whole Board.' Accordingly, Treppel cannot now contend that he was not 'on notice' that 'the board itself may act unilaterally to adopt bylaws addressing'

issues 'that are [the] subject of regulation by bylaw under 8 Del. C. § 109(b).'" (citation omitted; alteration in original)); *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A3d 554, 560 (Del 2014) ("The fourth certified question asks whether a fee-shifting bylaw provision is enforceable against members who joined the corporation before the provision's enactment and who agreed to be bound by rules 'that may be adopted and/or amended from time to time' by the board. Assuming the provision is otherwise valid and enforceable, as a statutory matter the answer is yes." (footnote omitted)).

In *Chevron*, the Delaware Court of Chancery employed this analysis in upholding a corporate board's enactment of a bylaw that required litigation by stockholders against the company to be filed in a particular court:

> "The certificates of incorporation of Chevron and FedEx authorize their boards to amend the bylaws. Thus, when investors bought stock in Chevron and FedEx, they knew (i) that consistent with 8 *Del C.* § 109(a), the certificates of incorporation gave the boards the power to adopt and amend bylaws unilaterally; (ii) that 8 *Del C.* § 109(b) allows bylaws to regulate the business of the corporation, the conduct of its affairs, and the rights or powers of its stockholders; and (iii) that board-adopted bylaws are binding on the stockholders. In other words, an essential part of the contract stockholders assent to when they buy stock in Chevron and FedEx is one that presupposes the board's authority to adopt binding bylaws consistent with 8 *Del C.* § 109."

73 A3d at 939-40. The court roundly rejected arguments that the adoption of an exclusive-forum bylaw without stockholder approval is "invalid as a matter of

contract law because it does not require the assent of the stockholders who will be affected by it." *Id.* at 955. Citing an "unbroken line of decisions dating back several generations," the court ruled that the modification of a company's bylaws "is the kind of change that the overarching statutory and contractual regime the stockholders buy into explicitly allows the board to make on its own." *Id.* at 955-56. The court also rejected any argument that corporate bylaws result from "overweening bargaining power," noting that "[u]nlike cruise ship passengers, who have no mechanism by which to change their tickets' terms and conditions, stockholders retain the right to modify the corporation's bylaws." *Id.* at 957-58 (citation omitted).[5]

The Delaware Supreme Court recently corroborated the *Chevron* court's conclusion that enforceability of an exclusive-forum bylaw does not depend on whether a stockholder acquires the company's stock before or after the bylaw is enacted. *United Technologies*, ___ A3d at ___ (slip op at 12) (App 88) ("Treppel's argument that United Technologies' forum selection bylaw did not

[5] Stockholders of Delaware corporations have a statutory right to amend or repeal bylaws adopted by the corporation's board of directors. *See* 8 Del Code § 109(a). TriQuint's Bylaws likewise expressly empower the company's stockholders to amend or repeal bylaws adopted by the TriQuint Board. ER 83 (art. X). The *Chevron* court's discussion of "cruise ship passengers" referred to *Carnival Cruise Lines, Inc. v. Shute*, 499 US 585, 587-88, 594-95, 111 S Ct 1522, 113 L Ed 2d 622 (1991), in which the United States Supreme Court held that a cruise line's exclusive-forum provision was reasonable and enforceable, even though it was not subject to negotiation and was found in fine print on a ticket that passengers did not receive until after purchasing passage on the ship. *See Chevron*, 73 A3d at 957-58.

apply to him because it was adopted after he bought his shares is inconsistent with the plain operation of the [Delaware General Corporate Law]." (footnote omitted)).

TriQuint's Certificate, consistent with 8 Del Code § 109(a), grants its Board of Directors the power unilaterally to enact and amend the company's Bylaws. ER 53 ("In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the Board of Directors is expressly authorized to adopt, alter, amend or repeal the Bylaws of the Corporation."). Exercising that power, the TriQuint Board enacted the following bylaw:

> "Unless the corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or employee of the corporation to the corporation or the stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, the certificate of incorporation or these bylaws or (iv) any action asserting a claim governed by the internal affairs doctrine."

ER 47 (art. XI). This bylaw is virtually identical to the bylaws deemed statutorily and contractually valid in *United Technologies* and *Chevron*. *See United Technologies*, ___ A3d at ___ (slip op at 4 n 12) (App 80); *Chevron*, 73 A3d at 942. As discussed below, Oregon law required the trial court to enforce

this valid bylaw and the trial court should have dismissed the Oregon consolidated cases.

2. Since *Chevron*, every court to consider an exclusive-forum bylaw—except the trial court here—has deemed the bylaw valid and enforceable, even when the bylaw was adopted after the alleged wrongdoing occurred and after the prospect of litigation had become apparent

In light of *Chevron* and *United Technologies*, there can be no dispute that the board of directors of a Delaware corporation with the appropriate charter provision may enact a bylaw requiring that all internal-affairs legal disputes be resolved in one forum. Indeed, from *Chevron* through its confirmation in *United Technologies*, every court—except the trial court here—that has considered the validity of an exclusive-forum bylaw enacted by a Delaware corporation has concluded that the bylaw is statutorily and contractually valid.

For example, as here, the plaintiff in *Genoud v. Edgen Group, Inc.*, No. 625,244 (La Dist Ct, Jan 17, 2014), filed a shareholder class action challenging a proposed merger. ER 326. The court dismissed for lack of subject-matter jurisdiction based on a provision in the company's charter that established the Delaware Court of Chancery as the exclusive forum for the plaintiff's breach of fiduciary duty claims. *Genoud*, slip op at 1 (ER 338) . In granting the defendants' motion to dismiss, the court rejected arguments that the plaintiff did not consent to the exclusive-forum provision because he "did not consider" the charter when purchasing his stock and the provision was

"unilaterally" imposed by the company and thus "unenforceable for lack of mutual obligation." ER 325, 329.

In *Hemg Inc. v. Aspen University*, No. 650457/13, 2013 WL 5958388, at *1 (NY Sup Ct, Nov 4, 2013), the plaintiffs asserted 12 causes of action, including six derivative causes of action for breach of fiduciary duties by the Aspen Group's directors. The court dismissed all the derivative claims, holding that the company's bylaws and certificate of incorporation mandated that those claims "be brought in the Court of Chancery in Delaware." *Id.* In doing so, the court concluded that there was "no merit to [plaintiffs'] position" and "no legal theory which supports plaintiffs' argument" that the venue provisions in these corporate documents were invalid because "they were adopted unilaterally by the Board of Directors, without the consent or vote of the plaintiffs or other shareholders." *Id.*

In *Miller v. Beam, Inc.*, No 2014 CH 00932 (Ill Cir Ct, Mar 5, 2014), the Illinois Circuit Court for Cook County similarly dismissed breach of fiduciary duty claims against corporate directors pursuant to a bylaw that designated the Delaware Court of Chancery as the proper and exclusive forum, rejecting arguments that the bylaw required shareholder approval and concluding that *Chevron* is "more persuasive" than *Galaviz v. Berg*, 763 F Supp 2d 1170 (ND Cal 2011),[6] the principal authority on which the plaintiff relied. *Miller v. Beam,*

[6] The TriQuint Defendants discuss *Galaviz* in Section III.B.4.a below.

Inc., Hr'g Tr at 44 (ER 313). "It's entirely reasonable," the court concluded, "for a corporation like Beam in this case, incorporated in Delaware and headquartered in Illinois, to want to limit litigation to one venue so that the corporation does not have to pass the cost of litigation onto the shareholders by litigating in multiple venues." *Id.* (ER 313).

Other courts to address exclusive-forum bylaws adopted by Delaware corporations prior to the trial court's Order likewise concluded that such provisions are statutorily and contractually valid. *See, e.g.*, *Groen v. Safeway Inc.*, No RG14716641 (Cal Super Ct, May 14, 2014) (slip op at 2) (ER 510) ("The court finds that Delaware law applies, and that Plaintiffs are contractually obligated [by the company's bylaws] to bring their claims against Defendants only in the Delaware Court of Chancery"); *Daugherty v. Ahn*, No. CC-11-06211-C1 (Tex Cnty Ct, Feb 15, 2013) (slip op at 1) (ER 411) (granting Motion to Dismiss Because of Mandatory Forum Selection Clause).

The trial court's Order interrupted the unbroken string of cases that followed *Chevron*, but the trial court's decision rejecting *Chevron* has found no followers. Every court asked to enforce an exclusive-forum bylaw since entry of the trial court's Order on September 4, 2014, has followed *Chevron* and rejected arguments based on the trial court's Order and reasoning. For example, on September 9, 2014, the Delaware Court of Chancery rejected a challenge to the bylaw of a Delaware corporation that required all intra-corporate disputes to

be resolved in courts in North Carolina, concluding that "nothing in the text or reasoning of *Chevron* can be said to prohibit directors of a Delaware corporation from designating an exclusive forum other than Delaware in its bylaws." *First Citizens*, 99 A3d at 235. The court found unpersuasive arguments almost identical to ones on which the trial court relied in support of its Order, including that: (i) the exclusive-forum bylaw "was motivated by a desire to protect the interests of the individual members of the Board," *id.* at 237; (ii) the board of directors approved the bylaw on the same day the proposed merger was announced, *id.* at 240; and (iii) the stockholders effectively lacked the ability to repeal the bylaw, *id.* at 241-42.

Then, on September 19, 2014, a state trial court in Alabama likewise granted a motion to dismiss based on a Delaware corporation's virtually identical exclusive-forum bylaw, notwithstanding the plaintiff's specific and heavy reliance on the Order in urging the Alabama court not to enforce the bylaw. *Edelman v. Protective Life Corp.*, No. CV-2014-902474.00 (Ala Cir Ct, Sept 19, 2014) (slip op at 1) (App 47; *see also* App 56, 64-65, 66). On the same day, a federal district court in Ohio specifically endorsed the *Chevron* approach:

> "[C]ontrary to the *Galaviz* court's reasoning, general contractual principles permitted the board to act as it did in this case and bound the shareholders to the bylaws adopted pursuant to that action. The fact that the shareholders are unsatisfied with the consequences of the application of the terms to which they agreed is an insufficient basis upon which to find that bylaw so inequitable that it should not be enforced. Nor does

> the fact that the shareholders were unable to negotiate for a specific forum negate the consent provided to the board to adopt such a bylaw."

North, 2014 WL 4684377, at *5. The district court also expressly rejected the discussion in the trial court's Order stating that the amendment of bylaws after wrongdoing allegedly occurred may provide a basis not to enforce an exclusive-forum bylaw:

> "[T]he Court concludes that the forum-selection bylaw does not become unenforceable simply because it was adopted after the purported wrongdoing. The Court agrees with the *Boilermakers* court that a corporation may enact a forum-selection bylaw that is reasonable and fair, even in circumstances such as those presented here, for the purpose of consolidating litigation—particularly litigation brought on behalf of the corporation—into a single forum to reduce costs and prevent duplication. Not only would such consolidation be in the interests of the corporation, it also would be in the interests of shareholders to have the issues resolved efficiently and consistently. Moreover, as discussed above, binding a shareholder to such a bylaw is not unreasonable or unjust given that the shareholders were on notice at the time they purchased their shares in the Delaware corporation of the broad powers conferred upon the board to make, adopt, alter, amend, or repeal the bylaws from time to time. As such, the Court does not find the fact that the claims arose primarily before the adoption of the bylaw to render that bylaw unenforceable."

Id. at *6 (footnote omitted).

Finally, the Delaware Supreme Court recently held that it is appropriate, in determining whether to restrict where a stockholder may file litigation based on information received pursuant to a statutory corporate records request, to

consider an exclusive-forum bylaw that the company's board adopted after the stockholder requested the corporate records and after the board learned that the plaintiff intended to file internal-affairs litigation in a non-Delaware forum. *United Technologies*, ___ A3d at ___ (slip op at 10-11) (App 86-87).

Thus, since *Chevron*, not a single court—other than the trial court in this case—has concluded that a Delaware corporation's bylaw that establishes an exclusive forum for breach of fiduciary duty or other internal affairs-type claims is not valid and enforceable. And every court that has considered the reasoning of the trial court's Order has specifically rejected it.

Based on the *Chevron* analysis, courts also have upheld exclusive-forum provisions adopted by governing bodies of non-corporate entities, such as real estate investment trusts ("REIT") and limited partnerships, even when Delaware law was not controlling. For example, in *Katz v. Commonwealth REIT*, No. 24-C-13-001299 (Md Cir Ct, Feb 19, 2014), the court rejected the challenge by stockholders of a publicly traded REIT to a unilaterally enacted bylaw that required stockholders, on demand, to arbitrate disputes against the REIT and its trustees. Consistent with *Chevron*, the court explained that in purchasing their shares the stockholders "assent to a contractual framework that explicitly recognizes that they will be bound by bylaws adopted unilaterally pursuant to Maryland REIT law." *Id.*, slip op at 29 (App 29). Accordingly, the court held, the stockholders were bound by the mandatory-arbitration bylaw regardless of

whether it was adopted before or after they purchased their shares. *Id.* at 42-44 (App 42-44); *see also Delaware County Employees Retirement Fund v. Portnoy*, No. 13-10405-DJC, 2014 WL 1271528, at *12 (D Mass, Mar 26, 2014) (following *Katz* and holding a mandatory-arbitration bylaw enforceable, regardless of whether the plaintiffs purchased their interests in a REIT before or after the board adopted the bylaw).

Similarly, in *Melissa's Trust v. Seton*, No. 14 C 02068, 2014 WL 3811241 (ND Ill, July 31, 2014), the plaintiffs in a post-merger derivative action challenged the provision in a revised partnership agreement that required derivative actions to be filed only in Delaware. The plaintiffs argued that the exclusive-forum provision was unenforceable because not all the limited partners had approved the merger and this provision of the revised partnership agreement. Analogizing to *Chevron*, the court ruled that the plaintiffs and the other minority limited partners were bound by this provision because the pre-merger partnership agreement authorized the general partner, with approval of a majority of the limited partners, to take actions that were binding on the whole partnership:

> "Similar to *Boilermakers* and *O'Brien*, although holders of a minority of the limited partnership interest in this case did not vote to put the forum selection clause in place, they are bound by the terms of the Original Partnership Agreement. They assented to the Original Partnership Agreement and the actions and amendments by certain parties described therein

> through their purchase or assignment of the limited partnership interests."

Id. at *7.

3. The trial court committed fundamental legal error in holding that enforcement of TriQuint's exclusive-forum bylaw would be "unfair and unjust"

Despite acknowledging that "there is nothing inherently wrong with unilaterally enacting forum selection bylaws," the trial court refused to dismiss the Oregon consolidated actions because it would be "unfair and unjust" to do so. Order, Ex A at 9, 10 (ER 524, 525). The trial court committed fundamental legal error in so ruling.

a. Enforcing TriQuint's exclusive-forum bylaw is neither unfair nor unjust because (i) Plaintiffs were on notice that the TriQuint Board had authority to adopt the bylaw and (ii) the bylaw serves important corporate needs and does not adversely impact pecuniary or other substantive rights of TriQuint's stockholders

Contrary to the trial court's conclusion, it is neither unfair nor unjust to enforce the corporate contractual framework that permits the TriQuint Board to unilaterally adopt bylaws and that TriQuint's stockholders consented to by choosing to purchase TriQuint stock. "[B]inding a shareholder to [an exclusive-forum] bylaw is not unreasonable or unjust given that the shareholders were on notice at the time they purchased their shares in the Delaware corporation of the broad powers conferred upon the board to make, adopt, alter, amend, or repeal the bylaws from time to time." *North*, 2014 WL 4684377, at *6.

As discussed above, *see supra* Section III.B.1, TriQuint's stockholders (including Plaintiffs) were on notice of the TriQuint Board's authority to adopt or amend TriQuint's Bylaws. Moreover, it is indisputable under Oregon law that where, as here, the adoption of a bylaw is motivated by a legitimate business purpose and causes no pecuniary harm to the corporation's stockholders, as a matter of law, it is not unfair or unreasonable to enforce that bylaw. *See Dentel*, 273 Or at 38 (holding that unilateral amendment of a savings and loan association's bylaws to eliminate the voting rights of certain non-stockholder members "was not unfair" because it was motivated by a legitimate business purpose and there was no financial damage to the members).

There is no question that the adoption of the exclusive-forum bylaw by the TriQuint Board serves a legitimate business purpose. Indeed, the trial court did not state otherwise. The bylaw was a valid and reasonable response to the threat of lawsuits that plague virtually every merger or similar transaction.[7] Its

[7] *See* Olga Koumrian, Cornerstone Research, *Shareholder Litigation Involving Mergers and Acquisitions* 1-3 (2014) (stating that, in 2013, stockholder lawsuits challenged 94 percent of proposed corporate mergers valued at $100 million or more, with nearly two-thirds of those transactions challenged in more than one court), *available at* http://www.cornerstone.com/getattachment/73882c85-ea7b-4b3c-a75f-40830eab34b6/Shareholder-Litigation-Involving-Mergers-and-Acqui.aspx; *see also Edgen Group, Inc. v. Genoud*, Civ. No. 9055-VCL (Del Ch, Nov 5, 2013) (Hr'g Tr at 19) (ER 373) ("This case really exemplifies the interforum dynamics that have allowed plaintiff's counsel to extract settlements in M&A litigation and that have generated truly absurdly high rates of litigation challenging transactions.").

adoption was a proper effort to mitigate the potential harm to TriQuint and its stockholders of being forced to defend against the same claims in more than one forum, and thereby to avoid duplication of costs and the potential for inconsistent rulings. *See, e.g.*, *United Technologies*, ___ A3d at ___ (slip op at 11) (App 87) (discussing United Technologies' "legitimate concern * * * that it and its stockholders could face excessive costs and the risk of inconsistent rulings if Treppel were to file suit elsewhere"); *Chevron*, 73 A3d at 953 ("[T]he boards of Chevron and FedEx have the statutory authority to adopt a bylaw to protect against what they claim is a threat to their corporations and stockholders, the potential for duplicative law suits in multiple jurisdictions over single events.").[8] These are the same salutary purposes, recognized in Oregon, that underlie the doctrine of claim preclusion (res judicata), *see Aguirre v. Albertson's, Inc.*, 201 Or App 31, 48, 117 P3d 1012 (2005), and the rule against splitting causes of action, *see Fuentes v. Tillett*, 263 Or App 9, 25-26, 326 P3d 1263 (2014).

Nor does enforcement of the exclusive-forum bylaw cause pecuniary harm to TriQuint's stockholders (including Plaintiffs) or deprive them of any substantive rights—including the right to pursue claims against the TriQuint Directors for alleged breaches of fiduciary duty. Far from barring TriQuint's

[8] As is common, TriQuint is not only responsible for the cost of defending itself, but also has an obligation to indemnify its directors for the cost of defending claims against them. *See* ER 53 (art. TENTH).

stockholders from pursuing such claims, the exclusive-forum bylaw only requires stockholders to pursue those claims in the Delaware Court of Chancery. Requiring Plaintiffs to pursue their class-action claims arising under Delaware law in the Delaware Court of Chancery does not impose an unfair burden on Plaintiffs. Even the trial court recognized that enforcement of the bylaw would not deprive Plaintiffs of substantive rights, stating: "Delaware is not so gravely difficult and inconvenient a forum that the Plaintiffs will for all practical purposes be deprived access to the courthouse." Order, Ex A at 6-7 (ER 521-22). And Plaintiffs themselves have not alleged in their complaints or argued in papers that they filed either in the trial court or this Court that litigating in Delaware would deprive them of any fundamental rights.[9]

Rather than harming the interests of TriQuint's stockholders, dismissing the Oregon consolidated cases based on the exclusive-forum bylaw will protect the interests of the proposed class (including Plaintiffs). Because the putative

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[9] In an analogous setting, moreover, the United States Supreme Court recently held that federal courts "should not consider arguments about the parties' private interests" when deciding a motion to transfer under 28 USC § 1404 or the *forum non conveniens* doctrine if the motion is premised on an exclusive-forum provision:

> "When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum."

Atlantic Marine Constr. Co. v. United States Dist. Court for Western Dist. of Tex., ___ US ___, ___, 134 S Ct 568, 582, 187 L Ed 2d 487 (2013).

class members are TriQuint stockholders, they would ultimately absorb the duplicative litigation costs that TriQuint would incur if forced to defend multiple lawsuits over the same issues in multiple jurisdictions. *See North*, 2014 WL 4683477, at *6 (observing that consolidation of cases in a single forum "would be in the interests of shareholders to have the issues resolved efficiently and consistently"); *Miller v. Beam, Inc.*, Hr'g Tr at 44 (ER 313) (finding it "entirely reasonable" for a corporation "to want to limit litigation to one venue so that the corporation does not have to pass the cost of litigation onto the shareholders by litigating in multiple venues"); *Edgen Group, Inc. v. Genoud*, Civ. No. 9055-VCL (Del Ch, Nov 5, 2013) (Hr'g Tr at 20) (ER 374) ("[T]he ability of plaintiffs' counsel to sue in multiple forums is a factor that imposes materially increased costs on deals and effectively disadvantages stockholders as a whole. The people that the stockholder plaintiff firms purport to represent end up picking up the tab for these types of litigations.").[10]

Because the exclusive-forum bylaw serves legitimate business purposes and does no harm to either the financial interests or the substantive legal rights of TriQuint's stockholders, its enactment was neither unfair nor unreasonable as a matter of Oregon law. Therefore, the trial court was obligated to enforce that

[10] Enforcing the exclusive-forum bylaw is also consistent with the interests of the judicial system. *See, e.g.*, *North River Insurance Co. v. Mine Safety Appliances Co.*, ___ A3d ___, 2014 WL 5784588, at *13 (Del, Nov 6, 2014) ("Initiating multiple actions in different fora inevitably results in duplication of effort and compounding of litigation expenses—not to mention the inefficient use of judicial resources.").

bylaw and dismiss the Oregon consolidated cases for lack of subject-matter jurisdiction. *See Black*, 337 Or at 264; *Reeves*, 262 Or at 100-01. Its failure to do so was fundamental legal error.

b. *Schnell v. Chris-Craft* does not support the trial court's Order because the TriQuint Board did not adopt the exclusive-forum bylaw for unfair or inequitable purposes

In concluding that it would be unfair and unjust to enforce TriQuint's exclusive-forum bylaw, the trial court found *Schnell v. Chris-Craft Industries, Inc. ("Schnell I")*, 285 A2d 430 (Del Ch), *rev'd by Schnell v. Chris-Craft Industries, Inc. ("Schnell II")*, 285 A2d 437 (Del 1971), to be "quite informative." Order, Ex A at 7 (ER 522). But there is nothing in either *Schnell* decision that supports the trial court's conclusion that it would be unfair and unjust to enforce TriQuint's facially valid exclusive-forum bylaw.

Schnell did not involve forum-selection issues. It concerned the propriety of a corporate board's decision, in the face of a proxy contest that sought to replace incumbent directors, to advance the date of the stockholder meeting by over a month and to move the meeting to a remote location. *Schnell I*, 285 A2d at 432. Presumably, the trial court found the *Schnell* cases "informative" because Plaintiffs allege that an activist group of stockholders (Starboard) announced, before the TriQuint Board adopted the exclusive-forum bylaw, its intention to challenge some of the directors at the next stockholder meeting. *See* Order, Ex A at 8 (ER 523). But whereas the bylaw amendment at

issue in *Schnell* directly impacted the efforts of the activist stockholders, TriQuint's adoption of an exclusive-forum bylaw did not.

In *Schnell II*, the Delaware Supreme Court cited two conclusions of law drawn by the Delaware Court of Chancery that supported its own conclusion that Chris-Craft's board had amended its bylaws for "inequitable purposes, contrary to established principles of corporate democracy." 285 A2d at 439. The first was that Chris-Craft's board changed the date of the stockholder meeting "for the purpose of cutting down on the amount of time which would otherwise have been available to plaintiffs and others for the waging of a proxy battle." *Schnell I*, 285 A2d at 434.[11] Reducing the time until the meeting would impair the ability of stockholders challenging the incumbent directors to clear required materials with regulatory agencies and to convince enough other stockholders to vote for their candidates to defeat the incumbents. *See id.* The second conclusion was that the Chris-Craft board voted to amend the bylaw at issue *after* the challenging stockholders had publicly filed notice of their intention to wage a proxy contest. *Id.* In these circumstances, the Delaware Supreme Court found that Chris-Craft's board adopted the bylaw amendment for the unfair and inequitable purposes of obstructing the efforts of the challenging stockholders to wage a proxy fight and perpetuating themselves in office. *Schnell II*, 285 A2d at 439. Solely on this basis, the court held the

[11] The Delaware Supreme Court did not address the change in location of the stockholder meeting. *See Schnell II*, 285 A2d at 439.

amended bylaw unenforceable and directed the Court of Chancery to reinstate the original date for the stockholder meeting. *Id.* at 440.

The concerns that led the Delaware Supreme Court in *Schnell* to reject the company's bylaw amendment do not apply here. First, TriQuint's adoption of the exclusive-forum bylaw did not and could not impede any effort by Starboard to wage a proxy contest, and there are no allegations that it did. The new bylaw, requiring that internal-affairs litigation be pursued in the Delaware Court of Chancery, had nothing to do with, and would not affect, anything Starboard may have planned.

Second, and in part for the same reasons, adoption of the exclusive-forum bylaw did nothing to secure the positions of incumbent directors or otherwise promote the TriQuint Directors' interests over the interests of TriQuint's other stockholders.[12] In particular, there are no allegations that the TriQuint Directors adopted the bylaw to insulate themselves from liability to TriQuint's stockholders—and even if there were, such allegations would make no legal sense because the bylaw does not shield the TriQuint Directors from any claims but only requires that internal-affairs claims be litigated in Delaware. *See*

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[12] Unlike the allegations of self-interest in *Schnell*, Plaintiffs' assertions that the TriQuint Directors adopted the exclusive-forum bylaw to preserve their positions in the face of a proxy challenge are purely conclusory. As the Delaware Court of Chancery concluded in denying a motion for expedited proceedings based on virtually identical allegations against the TriQuint Defendants, these allegations of director self-interest are not even colorable. *In re TriQuint Semiconductor*, 2014 WL 2700964, at *5 (ER 508).

Chevron, 73 A3d at 951-52 (observing that exclusive-forum bylaws "are process-oriented, because they regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation" (emphasis in original)). Thus, the TriQuint Board's adoption of the exclusive-forum bylaw took away no affirmative rights of TriQuint's stockholders, did not adversely impact their ability to assert claims against the TriQuint Directors, and did not protect any interests of the TriQuint Directors.

The conflation of Plaintiffs' allegations of director self-interest with the issue of fairness in enforcing the exclusive-forum bylaw is erroneous. Indeed, in *First Citizens*, the Delaware Court of Chancery rejected the identical argument that an exclusive-forum bylaw should not be enforced because it "was motivated by a desire to protect the interests of the individual members of the Board and [others]":

> "The Forum Selection Bylaw plainly does not insulate the Board's approval of the proposed merger from judicial review. It simply requires that such review take place in a court based in North Carolina. In that regard, Providence has not provided any well-pled facts to call into question the integrity of the federal and state courts of North Carolina or to explain how the defendants are advancing their 'self-interests' by having claims arising from their approval of the proposed merger adjudicated in those courts as opposed to the courts of Delaware."

99 A3d at 237; *accord* Joseph A. Grundfest and Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 Bus Law 325, 402-03 (2013) (hereinafter "Grundfest and Savelle") ("[A] forum selection clause that would move litigation among courts that can be equally relied upon to enforce fiduciary obligations cannot create a biased self-interest among directors in favor of one court over any other."). Of course, the parallel class-action litigation against the TriQuint Defendants in Delaware demonstrates the fallacy of any "self-interest" argument based on avoidance of litigation.

Third, the TriQuint Board adopted the exclusive-forum bylaw *before* any lawsuit was filed or even threatened. This is in contrast to *Schnell*, where the Chris-Craft board amended the bylaw at issue *after* notice of a proxy contest was filed. *Schnell I*, 285 A2d at 434. As the Delaware Supreme Court recently found, it is not improper for a company's board of directors to adopt an exclusive-forum bylaw after it becomes evident that a stockholder *intends* to file internal-affairs litigation in a state in which the company is not incorporated. *United Technologies*, ___ A3d at ___ (slip op at 10-11) (App 86-87).

There is nothing inequitable about adopting an exclusive-forum bylaw prior to the filing of litigation—and this is true even when the plaintiffs (as here) allege that the directors, before adopting the bylaw, had engaged in the

alleged wrongful acts that underlie the litigation. As Stanford Law School Professor and former SEC Commissioner Joseph Grundfest explains:

> "A board can, however, adopt an [intra-corporate forum selection ("ICFS")] bylaw provision after the occurrence of events that later give rise to litigation but prior to the filing of any claim. Under these circumstances, even if one assumes that the decision to adopt the ICFS provision was animated in part by the potential that litigation relating to those events would ensue, it does not follow that the decision to adopt or seek enforcement of an ICFS provision would violate a fiduciary duty. Because no claim has been filed, no right to pursue the claim in any forum has vested. It follows that the decision to adopt and enforce the provision cannot divest stockholders of an unvested right. Instead, to support the contention that the adoption of the ICFS provision violates a fiduciary obligation in this circumstance, it would * * * be necessary to demonstrate that Delaware courts cannot be relied upon to apply Delaware's own laws governing fiduciary duties properly. But * * * how is it a breach of a fiduciary duty to seek litigation of a matter in a court that can be relied upon to enforce the fiduciary duty properly?"

Grundfest and Savelle, 68 Bus Law at 403 (footnote omitted). Courts agree that an exclusive-forum bylaw does not "become unenforceable simply because it was adopted after the purported wrongdoing." *North*, 2014 WL 4684377, at *6; *accord First Citizens*, 99 A3d at 240 (rejecting argument that it would be unjust to enforce an exclusive-forum bylaw that was adopted simultaneously with the announcement of a proposed merger).

For all of these reasons, the concerns that led the Delaware Supreme Court in *Schnell* to hold a newly amended corporate bylaw unenforceable have no application here. The trial court's reliance on *Schnell* was misplaced.

4. The trial court also committed fundamental error by (i) employing a *Bremen* analysis and (ii) failing to enforce the bylaw based on that analysis

Rather than focusing only on whether the exclusive-forum bylaw is "unfair or unreasonable"—as this Court's precedents dictate, *Reeves*, 262 Or at 101—the trial court employed a three-part test derived from *M/S Bremen v. Zapata Off-Shore Co.*, 407 US 1, 92 S Ct 1907, 32 L Ed 2d 513 (1972), which involved additional considerations. Based on application of this test, the trial court concluded that the bylaw should not be enforced because it violates Oregon public policy.

In adopting a *Bremen* analysis, the trial court relied on a discussion of that analysis found in *Galaviz*, which was derived from a decision of the United States Court of Appeals for the Ninth Circuit. Order, Ex A at 5 (ER 520). The Ninth Circuit's summary of the *Bremen* test states:

> "In *Bremen*, the Court first held that forum selection clauses are prima facie valid and should not be set aside unless the party challenging enforcement of such a provision can show it is unreasonable under the circumstances. The Supreme Court has construed this exception narrowly. A forum selection clause is unreasonable if (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the

> complaining party will for all practical purposes be deprived of its day in court; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought."

Argueta v. Banco Mexicano, S.A., 87 F3d 320, 325 (9th Cir 1996) (internal quotation marks omitted; citations omitted).

Oregon has not adopted *Bremen* in connection with challenges to exclusive-forum agreements, *see PNC Multifamily Capital v. AOH-Regent Ltd. Partnership*, 262 Or App 503, 517 n 16, 329 P3d 773 (2014), as the trial court recognized, *see* Order, Ex A at 5 n 2 (ER 520).[13] The trial court therefore erred in conducting a *Bremen* analysis and focusing on Oregon public policy, which is not part of the appropriate analysis under *Reeves*. Rather, under *Reeves*, Oregon courts are to enforce an exclusive-forum provision unless its application would be "unfair or unreasonable." 262 Or at 101. As discussed in Section III.B.3 above, the exclusive-forum bylaw here unquestionably is both fair and reasonable, even when analyzed using the considerations identified in *Schnell*. Accordingly, a proper application of Oregon law obligated the trial court to enforce TriQuint's bylaw and dismiss the Oregon consolidated cases. *See Kohring*, 355 Or at 301 (holding that if an action subject to a valid

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[13] The trial court appears to have applied the *Bremen* test because the court in *Chevron* stated that the proper basis for an as-applied challenge to an exclusive-forum bylaw is under *Bremen*. *See* Order, Ex A at 5 (ER 520). In *Chevron*, however, the Delaware Court of Chancery was addressing how it (as a Delaware court) would assess an as-applied challenge. Unlike in Oregon, the *Bremen* test has been "adopted explicitly" in Delaware. *Chevron*, 73 A3d at 940 (citing *Ingres Corp. v. CA, Inc.*, 8 A3d 1143, 1145 (Del 2010)).

exclusive-forum provision is filed in the wrong forum, "the trial court has no discretion to deny" a motion to dismiss).

This Court should therefore disregard the trial court's discussion of the *Bremen* test, as there is no basis for its application in Oregon. However, even if *Bremen* were recognized in Oregon, the trial court committed fundamental legal error in applying it and concluding that TriQuint's exclusive-forum bylaw violates Oregon public policy. *See* Order, Ex A at 5-10 (ER 520-25).[14] Although the trial court failed to explain how the exclusive-forum bylaw supposedly violates Oregon public policy, or even identify the particular public policy on which it rested its decision, it discussed several matters that presumably led to its conclusion. With respect to each, the trial court made erroneous conclusions of law.

a. Reliance on *Galaviz* is misplaced

In deciding not to enforce TriQuint's exclusive-forum bylaw, the trial court discussed *Galaviz* at some length. *See* Order, Ex A at 2-3 (ER 517-18). But reliance on *Galaviz* was improper because *Galaviz*, which purported to determine the validity of an exclusive-forum bylaw adopted by a Delaware corporation, is not good law after *Chevron* and its progeny.

[14] The trial court correctly concluded that TriQuint's exclusive-forum bylaw passes muster under the first two prongs of the *Bremen* test, finding no indication (i) of fraud, undue influence or significant disparity in bargaining power that led to enactment of the bylaw, or (ii) that Plaintiffs would be denied their day in court if they had to pursue their claims in Delaware. Order, Ex A at 6-7 (ER 521-22).

Galaviz was decided before *Chevron* or any other court had "ruled on the enforceability of a venue provision for derivative actions contained in corporate bylaws." 763 F Supp 2d at 1172. Thus, the underlying premise that exclusive-forum bylaws are statutorily and contractually valid under Delaware law had not yet been established. Lacking guidance from a Delaware court, the federal district court in California refused to enforce the bylaw, finding it facially invalid on grounds, among others, that ordinary contracts are not subject to unilateral modification. *Id.* at 1174-75.

The *Galaviz* decision, quite bluntly, was wrong, and the Delaware Court of Chancery roundly criticized it in *Chevron*. Among other things, the Court of Chancery explained that the *Galaviz* court failed to recognize that the contract between a corporation and its stockholders is not like "any other contract," and therefore its decision "rest[ed] on a failure to appreciate the contractual framework established by the [Delaware General Corporation Law] for Delaware corporations and their stockholders." *Chevron*, 73 A3d at 956. Based on this fundamental misunderstanding of Delaware law, the court in *Galaviz* assessed neither the nature of the contract between the company and its stockholders under Delaware law, nor whether the company's certificate of incorporation vested its board of directors with the unilateral right to amend the bylaws. *See* 763 F Supp 2d at 1174.

The failure in *Galaviz* to address the special nature of the contract between a Delaware corporation and its stockholders reflected that court's erroneous conclusion that enforcement of a Delaware corporation's exclusive-forum bylaw does not derive from contract law, but rests solely on "principles of *corporate* law with respect to how [the corporation's] bylaws could be amended." *See id.* (emphasis in original). But, as *Chevron* explained, enforcement of the bylaw at issue in *Galaviz* was required by principles of Delaware *contract* law: that when a corporation's certificate of incorporation permits the board of directors to adopt or amend bylaws (as Delaware's corporate statutes allow), its stockholders are on notice of this power when they purchase their stock, and therefore the potential for unilateral adoption or amendment of bylaws by the board is part of the contract to which the stockholders consent when they choose to invest. *Chevron*, 73 A3d at 939-40.

In light of *Chevron*, no court other than the trial court here has given any weight to *Galaviz* after *Chevron.*[15] As the Delaware Court of Chancery recently explained, both the decision in *Galaviz* and the trial court's Order here, "to the extent they purport to apply Delaware law, are based on a misapprehension of

[15] The only other known decision to hold unenforceable an exclusive-forum provision in the governance documents of a Delaware corporation was *In re Facebook, Inc. IPO Securities & Derivative Litigation*, 922 F Supp 2d 445 (SDNY 2013). Like *Galaviz*, the *Facebook* decision predated *Chevron* and was issued without the benefit of a Delaware court's analysis of pertinent Delaware law.

Delaware law regarding the facial validity and as-applied analysis of forum selection bylaws." *First Citizens*, 99 A3d at 242 n 54.

b. *Schnell v. Chris-Craft* does not support the trial court's finding of a violation of Oregon public policy

The trial court discussed the *Schnell* cases at length in support of its conclusion that Oregon public policy precludes enforcement of TriQuint's exclusive-forum bylaw. *See* Order, Ex A at 7-9 (ER 522-24). For the same reasons that the *Schnell* decisions do not support a finding that the TriQuint Defendants acted unjustly or inequitably, *see supra* Section III.B.3.b, nothing in either *Schnell* decision supports the conclusion that there is a basis in Oregon public policy not to enforce TriQuint's facially valid exclusive-forum bylaw.

c. The trial court erroneously refused to enforce the exclusive-forum bylaw on grounds that TriQuint's stockholders did not have "ample time" to repeal that bylaw

In a fundamental misapplication of the *Bremen* principles, the trial court posited that it is unfair, and therefore contrary to Oregon public policy, to enforce TriQuint's exclusive-forum bylaw before TriQuint's stockholders have had "ample time" to accept or reject this bylaw. Order, Ex A at 9 (ER 524). Although the trial court drew this conclusion as part of a supposed *Bremen* as-applied analysis, it is really an end-run around *Chevron*'s conclusion that exclusive-forum bylaws on their face are contractually valid under Delaware law. Although cloaked in the guise of a *Bremen* analysis, the trial court's

reasoning is a rejection of *Chevron* and its progeny and an effort to revert to vested rights concepts long abandoned in Delaware and Oregon.

In support of its conclusion, the trial court reasoned that Plaintiffs should not be forced to proceed in Delaware in accord with the exclusive-forum bylaw because to do so "would force them to accept the bylaw at an earlier time than the flexible nature of a Delaware shareholder contract necessarily allows." Order, Ex A at 9 (ER 524). In interpreting Delaware law—rather than assessing the fairness of this provision under Oregon law—the trial court misapprehends the nature of the "flexible" contract between a Delaware corporation and its stockholders. This contract is not flexible because it gives stockholders an *immediate* opportunity to attempt to undo changes made to that contract by the corporation's board of directors. Rather, it is flexible because, if the corporation's certificate of incorporation provides, it allows the board to amend the bylaws and change the terms of the contract without need to first obtain stockholder approval for those changes. As the court in *Chevron* explained:

> "[A]n essential part of the contract stockholders assent to when they buy stock in [a Delaware corporation] is one that presupposes the board's authority to adopt binding bylaws consistent with 8 *Del. C.* § 109. For that reason, our Supreme Court has long noted that bylaws, together with the certificate of incorporation and the broader [Delaware General Corporation Law], form part of a *flexible contract* between corporations and stockholders, *in the sense that the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-*

> *adopted bylaws when they buy stock in those corporations*."

73 A3d at 940 (emphasis added).

To preclude bylaws from taking effect until after there has been some undefined opportunity to repeal them is equivalent to saying that the stockholders must *pre-approve* them. But that is directly contrary to 8 Del Code § 109(a), which allows the boards of Delaware corporations such as TriQuint unilaterally to amend bylaws without stockholder preapproval, and is entirely inconsistent with *Chevron* and its progeny, including the Delaware Supreme Court's recent decision in *United Technologies*. It is also contrary to Oregon law which, like Delaware law, permits corporate boards to unilaterally amend bylaws and places no restriction on when an amendment to the bylaws may take effect. *See* ORS 60.461 ("board of directors may amend or repeal the corporation's bylaws" except in specific circumstances not applicable here).

As long as TriQuint's stockholders have the right to challenge and attempt to repeal amendments to TriQuint's Bylaws at some time—and they do, *see supra* footnote 5—it is irrelevant whether Plaintiffs had an opportunity to challenge TriQuint's exclusive-forum bylaw before they filed the Oregon consolidated cases or before the TriQuint Defendants filed their motions to

dismiss.[16] Indeed, after the trial court entered its Order, the Delaware Court of Chancery rejected the trial court's erroneous understanding of the "flexible" nature of the contract between a Delaware corporation and its stockholders, holding that an exclusive-forum bylaw is enforceable even if the stockholders do not have a realistic possibility of repealing that bylaw:

> "I do not interpret either the [Delaware General Corporation Law] or *Chevron* to mandate that a board-adopted forum selection bylaw can be applied only if it is realistically possible that stockholders may repeal it. In other words, that there is currently a controlling stockholder who may favor a board-adopted forum selection bylaw, as appears to be the case with FC North, does not make it *per se* unreasonable to enforce the bylaw. For me to conclude otherwise would, as the defendants note, be tantamount to rendering questionable all board-adopted bylaws of controlled corporations."

First Citizens, 99 A3d at 241 (internal quotation marks omitted).[17]

In direct violation of the logic and holding of *Chevron*, the trial court's Order effectively embraces the long-ago rejected notion that stockholders have vested rights. *See id.* at 241 ("Providence's contention that the Forum Selection

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[16] No statute of limitations or similar consideration compelled Plaintiffs to file their actions within days of the TriQuint Board's adoption of the exclusive-forum bylaw and the announcement of the proposed merger with RFMD.

[17] The trial court's conclusion that TriQuint's stockholders had inadequate time to contest the exclusive-forum bylaw also conflicts with the determination of the United States Supreme Court that a forum-selection clause is enforceable even when one party has neither a right nor an opportunity to object to the provision at any time. *See Carnival Cruise Lines*, 499 US at 587-88, 594-95 (holding that a cruise line's exclusive-forum provision, found in fine print on a ticket that a cruise ship passenger did not receive until after purchasing passage on the ship, was reasonable and enforceable).

Bylaw cannot be enforced because it seeks to regulate the forum for asserting claims that arose before it was adopted * * * is simply a dressed-up version of the 'vested right' doctrine[.]"). But the vested rights doctrine was abandoned in Delaware and in Oregon decades ago. *See id.* at 241 & nn 49-50 (explaining that the vested rights doctrine has been "soundly rejected" in Delaware); *Dentel*, 273 Or at 34 ("Section 58 of the Model Business Corporation Act has, in essence, swept away the 'vested rights' doctrine. That section was adopted as ORS 57.355 of the Oregon Business Corporation Act."). As Professor Grundfest observes, employing a vested rights analysis "would clearly be contrary to the statutory design of the corporate governance regime which, on its face, allows boards to amend bylaws without prior stockholder approval." Grundfest and Savelle, 68 Bus Law at 379.

The implications of precluding enforcement of TriQuint's exclusive-forum bylaw extend beyond the issue of where a lawsuit against corporate insiders may be filed. Professor Grundfest notes:

> "[I]f boards cannot unilaterally amend bylaws to adopt [intra-corporate forum selection] provisions, they also cannot amend bylaws for dozens of other reasons that are standard corporate practice. A material portion of the bylaws of publicly traded corporations that have been amended by unilateral board actions would thus have to be declared invalid."

Id. at 407. Accordingly, the trial court's conclusion that the exclusive-forum bylaw cannot be enforced because TriQuint's stockholders did not have "ample

time" to contest the bylaw, if upheld, would mean that "much of standard corporate law practice regarding the amendment of bylaws must fall, and much larger bodies of corporate law must be rewritten." *Id.*

Thus, in the guise of conducting an "as applied" *Bremen* analysis, the trial court rejected the very foundations of Delaware law on which *Chevron* is based and purported to create a rule in Oregon—in conflict with Oregon's own statutory regime, *see* ORS 60.461—that could make it impossible for boards of any corporation to enforce any bylaw against any objecting stockholder. Unless overturned by this Court, the trial court's conclusion, in direct contradiction of Delaware law, that stockholders of a Delaware corporation must have "ample time" to try to overturn corporate decisions, poses a threat to all corporations doing business in Oregon. Certainly, there is no public policy in Oregon that supports a decision that undermines the very foundation of both Delaware and Oregon corporate law.

d. The trial court erroneously refused to enforce the exclusive-forum bylaw on grounds that the bylaw was adopted close in time to the TriQuint Board's approval of the merger with RFMD and in anticipation of litigation related to the merger

In addition to its erroneous conclusion that TriQuint's stockholders did not have "ample time" to challenge the newly enacted bylaw, the trial court erroneously concluded that the bylaw should not be enforced because the TriQuint Board enacted the bylaw close in time to its alleged wrongdoing and

in anticipation of the exact type of lawsuit that Plaintiffs filed. Order, Ex A at 9-10 (ER 524-25). Neither of these considerations is a proper basis not to enforce the exclusive-forum bylaw, and other courts have expressly rejected them. *See North*, 2014 WL 4684377, at *6 ("[T]he forum-selection bylaw does not become unenforceable simply because it was adopted after the purported wrongdoing."); *First Citizens*, 99 A3d at 240 (rejecting argument that enforcement of an exclusive-forum bylaw would be unjust due to its adoption "simultaneously with the announcement" of an allegedly unfair proposed merger, because adoption of the bylaw is consistent with the reasonable expectations of company stockholders); *United Technologies*, ___ A3d at ___ (slip op at 3-4) (App 79-80) ("When Treppel filed his claim, the company's bylaws did not contain a forum selection clause establishing Delaware as the proper forum for disputes, but the board adopted such a provision on December 11, 2013, while Treppel's suit was pending."); *id.* at ___ (slip op at 10-11) (App 86-87) (holding that the Court of Chancery, in assessing whether it could restrict the use of documents obtained through a statutory request for corporate records to litigation in Delaware, could properly consider an exclusive-forum bylaw that the corporation adopted after a stockholder requested records and indicated his intent to use documents received pursuant to that request to support litigation in another state).

e. The trial court's Order, not TriQuint's exclusive-forum bylaw, conflicts with Oregon public policy

As discussed, TriQuint's exclusive-forum bylaw serves no unfair or inequitable purpose. It does not secure the TriQuint Directors' positions or protect them from being sued by stockholders—as is evident from the Delaware consolidated cases, in which other TriQuint stockholders are pursuing, on behalf of the same putative class, all of the same Delaware-law claims against the TriQuint Defendants that Plaintiffs are pursuing here.

The exclusive-forum bylaw only limits where stockholders may assert intra-corporate claims. If enforced, the bylaw performs the laudable function of preserving TriQuint's resources and avoiding potentially inconsistent rulings by limiting internal-affairs litigation arising out of a single transaction to a single court—the Delaware Court of Chancery—which has a legitimate and longstanding interest in resolving intra-corporate disputes involving Delaware corporations such as TriQuint. *See In re Activision Blizzard, Inc. S'holder Litig.*, 86 A3d 531, 547 (Del Ch 2014) (describing Delaware's "significant and substantial interest in actively overseeing the conduct of those owing fiduciary duties to shareholders of Delaware [corporations]" and in "providing an effective forum for litigating disputes involving the internal affairs of Delaware corporations" (internal quotation marks omitted)).

Thus, even if it were proper for the trial court to address whether any Oregon public policy precludes enforcement of the exclusive-forum bylaw here,

there is no such Oregon public policy. *See Landgraver v. Emanuel Lutheran*, 203 Or 489, 491-92, 280 P2d 301 (1955) ("Generally, [public policy] is said to be that principle of law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good." (citation omitted)), *overruled on other grounds by Hungerford v. Portland Sanitarium*, 235 Or 412, 384 P2d 1009 (1963). Indeed, it is not TriQuint's bylaw that contravenes Oregon public policy; rather, it is the trial court's Order that both contradicts applicable Delaware law and violates Oregon public policy.

(i) The Order contravenes Oregon's public policy to permit boards of directors to unilaterally amend corporate bylaws

Enforcement of TriQuint's exclusive-forum bylaw is not only required by Delaware law, but is consistent with—not contrary to—Oregon public policy. Like Delaware, Oregon recognizes the right of corporate boards to adopt, amend or repeal bylaws. *See* ORS 60.461 (as a general matter, a "corporation's board of directors may amend or repeal the corporation's bylaws"). This Court has even upheld a board's unilateral amendment of bylaws where, unlike here, the amendment took away *substantive rights* and did not merely affect procedural matters.

In *Dentel*, a savings and loan association amended its bylaws to eliminate the voting rights of depositors and borrowers who, based on an Oregon statute and the association's bylaws, were considered "members" of the association

with a right to vote on corporate issues despite not owning stock. 273 Or at 32. The Court upheld the amendment, concluding that "it was not unfair" as it was motivated by a legitimate business purpose, caused no pecuniary damage to the borrower members, and was not designed to advance the interests of one group of members at the expense of the borrower members. *Id.* at 38. Just as important, the plaintiffs at all times were on notice that their voting rights could be affected by a change in the bylaws:

> "The plaintiffs have not contended they were without notice that their membership was derived from the bylaws, and the bylaws could be amended by the directors. The plaintiffs also did not contend that they relied upon their right to vote in their financial dealings with the defendant."

Id. That is the same situation as here, where TriQuint's stockholders were on notice that the TriQuint Board could unilaterally change the Bylaws, *see supra* Section III.B.1-2, and adoption of the exclusive-forum bylaw was motivated by a legitimate business purpose, caused the stockholders no pecuniary harm, and was not designed to—and did not—benefit the TriQuint Directors at the expense of other TriQuint stockholders, *see supra* Section III.B.3.

In light of the public policy reflected in ORS 60.461 and recognized in *Dentel*, the adoption of a bylaw that is "not intended to regulate *what* suits may be brought against [TriQuint and its Directors], only *where* internal governance suits may be brought," *Chevron*, 73 A3d at 943 (emphasis in original), is neither inconsistent with Oregon law nor offensive to Oregon public policy. To the

contrary, it is the trial court's failure to enforce the bylaw provision that is contrary to Oregon's public policy that permits boards of directors to adopt amendments to bylaws without first obtaining stockholder approval.

(ii) The Order contravenes Oregon's public policy that forbids interference with the internal affairs of foreign corporations

The trial court's failure to enforce the exclusive-forum bylaw on grounds that (1) it was adopted at the same time that TriQuint's board approved the proposed merger-of-equals transaction with RFMD and (2) it does not provide TriQuint's stockholders ample time to assert their rights under Delaware law to try to repeal the bylaw, is not only contrary to Delaware law, *see supra* Sections III.B.2 and III.B.4.c-d, but constitutes direct interference with the statutory and contractual relationship between a Delaware corporation and its stockholders. Therefore, the Order contravenes the Oregon public policy, embedded in statute, that prohibits any arm of Oregon's government from regulating or interfering with the internal affairs of a foreign corporation. *See* ORS 60.714(3) ("This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state."); *cf. Tripp v. Pay 'N Pak Stores, Inc.*, 268 Or 1, 7, 518 P2d 1298 (1974) (holding that Oregon statute governing the issuance of rights or options to corporate insiders did not apply to a corporation incorporated in Washington, as "Washington law governs its internal operation").

ORS 60.714(3) is consistent with the universal recognition that the contractual relationship between a corporation and its stockholders, and all matters related to that relationship, of necessity are governed exclusively by the law of the state of incorporation. *See, e.g., Edgar v. MITE Corp.*, 457 US 624, 645, 102 S Ct 2629, 73 L Ed 2d 269 (1982) ("The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.").[18] Indeed, applying Delaware law to the relationship between TriQuint and its stockholders is consistent with the reasonable expectations of stockholders—including Plaintiffs—who invested in a Delaware corporation "on the understanding that Delaware law would govern their relations with the firm." *In re Topps Co. S'holders Litig.*, 924 A2d 951, 962 (Del Ch 2007); *accord Godina v. Resinall Int'l, Inc.*, 677 F Supp 2d 560, 569 (D Conn 2009) (holding that Delaware law applies to questions of corporate governance of a Delaware corporation, as "the law of the state of incorporation determines issues relating to a corporation's internal affairs,

[18] The prohibition against interfering with the internal affairs of foreign corporations is embedded across the country in statutes substantially identical to ORS 60.714(3). *See* 4 *Model Business Corporation Act Annotated* § 15.05, at 15-76 to 15-77 (4th ed 2013) (identifying all 50 states, plus the District of Columbia and Puerto Rico, as having adopted the Model Act provision equivalent to ORS 60.714).

providing certainty and predictability while generally protecting the justified expectations of parties with interests in the corporation" (internal quotation marks omitted)).[19]

The relationship between TriQuint and its stockholders is a matter of TriQuint's internal affairs. *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A2d 1108, 1113 (Del 2005) ("The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders."). Nevertheless, in disregard of and in contravention to both ORS 60.714(3) and the internal affairs doctrine, the trial court rejected Delaware law applicable to the relationship between this Delaware corporation and its stockholders and instead imposed on that relationship its understanding of the requirements of *Oregon* contract law—such as Oregon's "strong policy * * * supporting the general rule that all contracts require mutual assent in order to be enforceable" or Oregon's "public

[19] Just as Oregon has no interest in interfering with the contractual relationship between a Delaware corporation and its stockholders, so also Plaintiffs have no special interest in having Oregon courts determine their class action claims arising under Delaware law against a Delaware corporation and its board of directors. As "[r]epresentative plaintiffs seeking to wield the cudgel for all stockholders of a Delaware corporation," Plaintiffs have "no legitimate interest in obtaining a ruling from a non-Delaware court." *Topps*, 924 A2d at 961; *see also Hoefer v. U.S. Dep't of Commerce*, No. C 00 0918 VRW, 2000 WL 890862, at *2 (ND Cal, June 28, 2000) ("Little deference * * * is given to a plaintiff's choice of forum in an action brought on behalf of a nationwide class."). The absence of such an interest is especially great where, as here, Plaintiffs do not identify themselves as Oregon residents. *See* ER 5, 253 (no mention of Plaintiffs' states of residence).

policy supporting contract formation." *See* Order, Ex A at 7, 10 (ER 522, 525). In doing so, the trial court violated the public policy reflected in both ORS 60.714(3) and the internal affairs doctrine.

(iii) The Order contravenes Oregon's public policy favoring the enforceability of contracts

Finally, and fundamentally, the trial court's Order violates Oregon's "strong policy favoring the validity and enforceability of contracts." *Lilienthal v. Kaufman*, 239 Or 1, 14-15, 395 P2d 543 (1964); *see also id.*, 239 Or at 9 ("This court and all other courts reiterate that contracts are 'sacred and shall be enforced by the courts of justice unless some other overpowering rule of public policy intervenes which renders such agreement illegal or unenforceable. * * * Without such a rule the commerce of the world would soon lapse into a chaotic state.'" (quoting *Bliss v. Southern Pacific Co.*, 212 Or 634, 646, 321 P2d 324 (1958))). Because TriQuint's exclusive-forum bylaw is valid as a matter of Delaware law and there is no basis under Delaware or Oregon law not to enforce it here, the trial court's refusal to enforce this venue agreement is in direct violation of Oregon's public policy to enforce valid contracts. *See Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 551, ___ P3d ___ (2014) ("The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations.").

IV. CONCLUSION

Plaintiffs are bound by TriQuint's bylaw which requires that they pursue the claims alleged here in the Delaware Court of Chancery. The trial court therefore should have dismissed the Oregon consolidated cases for lack of subject-matter jurisdiction. Unless this Court overturns the trial court's Order, Oregon will be the only jurisdiction in the United States where a valid bylaw of a Delaware corporation will not be enforced. Accordingly, the TriQuint Defendants respectfully request that this Court correct the trial court's fundamental legal errors by issuing a writ of mandamus commanding the trial court to vacate the Order and to enter an order dismissing Plaintiffs' complaints without prejudice to pursue their claims in the Delaware Court of Chancery.

DATED: January 14, 2015

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH, TYPE SIZE REQUIREMENTS AND PDF TRANSMISSION REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,951 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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I certify pursuant to ORAP 9.17(5)(e) that the electronic form of the Defendants-Relators' Opening Brief on the Merits has been scanned for viruses and that it is virus free.

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