IN THE SUPREME COURT OF 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; NICHOLAS KAUSER; RODERICK NELSON; WALDEN C. RHINES; and WILLIS C. YOUNG,

Defendant-Relators

Supreme Court No. S062642

Multnomah County Circuit Court No. 1402-02441 Lead Case

Multnomah County Circuit Court No. 1403-02757

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; NICHOLAS KAUSER; RODERICK NELSON; WALDEN C. RHINES; WILLIS C. YOUNG; and TRIQUINT SEMICONDUCTOR, INC.,

Defendants-Relators,

And

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

Defendants.

OREGON TRIAL LAWYERS ASSOCIATION'S AND PUBLIC JUSTICE'S *AMICI CURIAE* BRIEF ON THE MERITS

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INTRODUCTION

The trial court correctly declined to enforce TriQuint's director-enacted forum selection bylaw. As explained in Part I of the Argument below, the trial court was correct to review the bylaw for consistency with fundamental public policies. Second, as explained in Part II, it correctly concluded that enforcement would force the shareholders to accept the bylaw earlier than Delaware corporate law allows. For those reasons, as explained in Part III, the trial court also was correct that the bylaw offends fundamental public policy regarding contract formation.

STANDARD OF REVIEW

In reviewing the trial court's decision denying defendants' motion to dismiss, this Court must take plaintiffs' allegations as true and "give plaintiffs the benefit of all favorable inferences that may be drawn from those facts." *Kilminster v. Day Mgmt. Corp.*, 323 Or 618, 621 (1996). The Court may consider materials outside the pleadings to determine the enforceability of the forum selection clause, but questions of fact material to the ultimate legal issues in the case must be left for the jury. *Black v. Arizala*, 337 Or 250, 264 (2004). The trial court examined the allegations and evidence consistently with that standard, and as described below, its factual summary was supported by the record. Defendants' factual disagreements with the trial court's decision do not apply that standard and

therefore should be disregarded. "In a mandamus proceeding, '[this Court's] function is to decide whether there was *any evidence* to substantiate the [trial] court's ruling.'" *State ex rel Kafoury v. Jones*, 315 Or 201, 212 (1992) (quoting *State ex rel Ware v. Hieber*, 267 Or 124, 127 (1973)) (emphasis added).

FACTUAL RECORD ON THE BYLAW'S TIMING

The TriQuint directors adopted the forum selection bylaw because they "expected not just litigation in the abstract, they expected this exact litigation" challenging the concurrently-proposed merger. Trial Ct. Opinion at 9. The bylaw was enacted "at the very same meeting that [the board] officially recommended the merger," and the board's action left plaintiffs without "ample time … to accept or reject the change." *Id.*

The record makes that clear. TriQuint shareholders may take action only "at a duly called annual or special meeting." ER-63 at Sec. 2.11. But only the Board of Directors can call a special meeting of the shareholders. *See* ER-61 at Sec. 2.3 ("A special meeting of the stockholders may be called at any time by the board of directors.").

The shareholders' first opportunity to challenge the forum selection bylaw at an annual meeting was more than a year after the bylaw was enacted. The board enacted the bylaw on February 22, 2014. Plaintiffs' Brief at 7. The bylaws require shareholders to give notice of an agenda item for the annual meeting more than

120 days in advance of that meeting. ER-83 at Sec. 2.2(b).[1] TriQuint's 2014 annual meeting was scheduled for May. *See* Declaration of Mark A. Friel in Support of Plaintiffs' Joint Opposition to Defendants' Motion to Dismiss, Ex. F. This is less than 120 days after the board enacted the exclusive forum bylaw on February 22, 2014. Plaintiffs' Brief at 7. So the plaintiffs could not have challenged the bylaw until the 2015 annual meeting, well after the merger.[2]

The record therefore supports the trial court's findings: the bylaw was enacted without "ample time for the shareholders to accept or reject the change." Trial Court Opinion at 9.

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[1] Section 2.2(b) of the bylaw provides, in relevant part:

> To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the corporation not less than one hundred twenty (120) calendar days in advance of the estimated mailing date *from* the proxy statement relating to the corporation's next annual meeting . . . .

(Emphasis added.) The emphasized "from" appears to be a typo; read as "for," the sentence has a much clearer meaning. In any case, notice is due at least 120 days before a mailing date related to the next annual meeting.

[2] The passage of time would have affected the equities of the case, the parties' legal positions, and plaintiffs' available remedies. *See In re Orchard Enters., Inc.*, 88 A3d 1, 41 (Del. Ch. 2014) (discussing effect of passage of time from merger to lawsuit on available remedies) (citing cases).

ARGUMENT

I. Oregon courts will not enforce contracts that are unfair, unreasonable, or violate public policy.

"[A] contractual clause agreeing on an exclusive forum will not be enforced if it is determined to be unfair or unreasonable." *Reeves v. Chem Indust. Co.*, 262 Or 95, 100-01 (1972).[3] Although this Court has not applied *Reeves* in the context of corporate bylaws, its cases on the enforceability of bylaws are consistent with *Reeves* and specifically rely on considerations of procedural and substantive fairness. *McCallum v. Gray*, 273 Or 617, 625-27 (1975) (upholding bylaw amendment absent any allegation it was procured by wrongful conduct); *Dentel v. Fidelity Sav. & Loan Assoc.*, 273 Or 31, 38 (1975) (holding a bylaw "amendment was valid because it was not unfair;" noting that the outcome may be different where there is evidence of improper motive). The decision in *Reeves* followed "the obvious trend in the law" at the time and enforced the forum-selection agreement at issue "because there [was] no evidence the clause was unfair or its enforcement would be unreasonable." *Id.* at 100-01.

More recently, questions whether a contract is so unfair or unjust that it cannot be enforced have been described in terms of procedural and substantive

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[3] A Delaware corporation's bylaws are considered a contract between the shareholders and the corporation. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A3d 934, 957 (Del Ch 2013).

fairness. *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 553 (2014). Relatedly, a contract may be "illegal because it violates public policy," which is often subsumed in the analysis of substantive fairness. *Id.* at 553-54.

Oregon's enforceability analysis—looking to fairness, reasonableness, and public policy—is consistent with federal case law, which has been adopted by the Delaware courts. *See Ingres Corp. v. CA, Inc.*, 8 A3d 1143 (Del 2010) (adopting *Bremen v. Zapata Off-Shore Co.*, 407 US 1, 92 S Ct 1907, 32 L Ed2d 513 (1972)). Under Delaware and federal law, an exclusive-forum provision is unenforceable if "unreasonable and unjust," a result of "fraud or overreaching," or if enforcement would violate a strong public policy. *Bremen*, 407 US at 5, 15; *see also Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A3d 934, 940 (Del Ch 2013) ("[T]his court will enforce the forum selection bylaws … in accordance with the principles set down by the United States Supreme Court in *Bremen*.").

The "[o]bvious parallels" between *Bremen* and *Reeves* were correctly noted by the trial court. Trial Court Opinion at 6. Defendants provide no authority for their position that an agreement that would otherwise be illegal would be enforceable merely because it addresses forum selection, and they do not explain how such an agreement could be considered reasonable or fair. At least for purposes of the issues in this case, there is no conflict between Oregon law and

Delaware law on the proper analysis for enforceability of a forum selection agreement, and the trial court did not err in considering relevant public policies.[4]

II. The bylaw violates public policy protecting shareholder rights.

"To discern whether, in the context of a particular transaction, substantive concerns relating to unfairness or oppression are sufficiently important to warrant interference with the parties' freedom to contract as they see fit, courts frequently look to legislation for relevant indicia of public policy." *Bagley*, 356 Or at 556. Here, the Court does not need to look far: the Delaware General Corporation Law ("DGCL"), which governs the parties' corporate conduct, provides an "indefeasible right of the stockholders to adopt and amend bylaws themselves." *Boilermakers*, 73 A3d at 956.[5]

Section 109 of the DGCL provides that a "corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the

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[4] Where this is no conflict of laws, the law of the forum applies. *Erwin v. Thomas*, 264 Or 454, 459-60 (1972). Therefore, Oregon law governs the initial analysis of determining whether the forum selection clause is enforceable.

[5] A clause may be invalid and unenforceable for any number of procedural and substantive reasons related to contract's formation or the effect of its enforcement. *Bagley*, 356 Or at 553. Where the parties are corporate actors in a foreign corporation, as here, the law of the state of incorporation is relevant to the validity of the clause because it governs their corporate actions and forms their expectations as contracting parties. A bylaw of a Delaware corporation that is inconsistent with the governing Delaware statute is invalid, and this Court should not enforce it. *See Jones v. Wallace*, 291 Or 11, 18 (1981) (holding that a bylaw of an Oregon corporation that is invalid under the Oregon corporation statute cannot be enforced, regardless of whether the bylaw was a contract).

directors," but "[t]he fact that such power has been so conferred upon the directors … shall not divest the stockholders … of the power, nor limit their power to adopt, amend or repeal bylaws." 8 Del. C. § 109(a).[6] That section "vests in the shareholders a power to adopt, amend or repeal bylaws that is *legally sacrosanct*, *i.e.*, the power cannot be non-consensually eliminated or limited by anyone other than the legislature itself." *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A2d 227, 232 (Del 2008) (emphasis added).

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[6] Section 109(a) provides in full:

> The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors of a corporation other than a nonstock corporation or initial members of the governing body of a nonstock corporation if they were named in the certificate of incorporation, or, before a corporation other than a nonstock corporation has received any payment for any of its stock, by its board of directors. After a corporation other than a nonstock corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

In *Boilermakers*, the court relied on that "indefeasible right" of shareholders as a basis for upholding the facial validity of a director-enacted bylaw. 73 A3d at 956. The shareholder rights in the DGCL provide foundation for any contractual analysis of the bylaws: "[A] corporation's bylaws are part of an inherently flexible contract between the stockholders and the corporation under which the stockholders have powerful rights they can use to protect themselves if they do not want board-adopted forum selection bylaws to be part of the contract between themselves and the corporation." *Id.* at 957. Under the plain text of the DGCL, those "powerful rights" shall not be limited by the fact the directors also have the power to enact bylaws. 8 Del. C. § 109(a).[7]

The record here shows, as the trial court found, that the TriQuint directors knowingly forced plaintiffs to make a choice between proceeding with this litigation or exercising their power to challenge enactment of the bylaw. That is a meaningful limit on plaintiffs' power, and the trial court correctly concluded that the "flexible contract" described in *Boilermakers* is not so one-sided that plaintiffs can be bound by a bylaw they had no opportunity to accept or reject.

Defendants fail to account for the text of the statute when they argue that "[a]s long as TriQuint's stockholders have the right to challenge and attempt to

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[7] *See also Scattered Corp. v. Chi. Stock Exch., Inc.*, 671 A2d 874, 877 (Del Ch 1994) ("A determination of the General Assembly's intent must, where possible, be based on the language of the statute itself. In divining the legislative intent, statutory language, where possible, should be accorded its plain meaning." (citations omitted)).

repeal amendments to TriQuint's Bylaws *at some time* … it is irrelevant whether [p]laintiffs had an opportunity to challenge TriQuint's exclusive-forum bylaw before they filed the Oregon consolidated cases." Defendants' Brief at 44 (emphasis added).[8] Defendants argue as if the statute prohibited only divestment of shareholder power; but the statute prohibits a conferral of power to the directors from divesting *or limiting* plaintiffs' power. 8 Del. C. § 109(a). The trial court correctly recognized an impermissible limitation in this case.

Under the totality of the circumstances, enforcement of the bylaw would be inconsistent with the policy of shareholder protection spelled out in the DGCL. The DGCL provides the foundation for the parties' "flexible contract," shapes their expectations, and governs the permissibility of their actions. This Court should deny the writ requiring enforcement of a bylaw that runs contrary to express policy of the law at the heart of the parties' contractual relationship.

III. For these reasons, the bylaw is contrary to public policy regarding contract formation.

The trial court was also correct in concluding that the bylaw amendment

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[8] A different issue was decided by the case defendants rely on, *City of Providence v. First Citizens Bancshares, Inc.*, 99 A3d 229 (Del Ch 2014) (concluding that the fact "there is currently a controlling stockholder who may favor a board-enacted forum selection clause … does not make it *per se* unreasonable to enforce the bylaw"). Under *First Citizens*, there is no guaranty that shareholders all agree, or that minority shareholders be successful in exercising their powers. Here, there was no opportunity for shareholders to exercise shareholder powers.

violates Oregon's "public policy supporting contract formation." *See* Order Ex A at 9-10 (ER 524-25). TriQuint takes issue with that conclusion, arguing that the trial court's order violates "Oregon's 'strong policy favoring the validity and enforcement of contracts." Defendants' Brief at 55 (quoting *Lilienthal v. Kaufman*, 239 Or 1, 12-15, 395 P2d 543 (1964)). In so arguing, defendants ignore the basic principles of contract laws in effect throughout the country. As explained below, under the circumstances, TriQuint's unilateral amendment offends textbook contract law: specifically, the prohibition against illusory contract terms and the rule against unilateral addition of material contract terms without the agreement of the other party.

A. Contract law prohibits as "illusory" provisions allowing one party to unilaterally change material contract terms without the other party's consent.

It is basic hornbook contract law that contractual agreements involve *binding* promises between two parties, and cannot be rewritten after-the-fact by one side. If one party claims the power to unilaterally amend a contract to add new terms, without providing the other party with clear notice and an opportunity to reject the proposed amendments, such an arrangement is illusory. There is no binding promise and therefore no contract.

This principle is enshrined in the most venerable and established treatises on contract law. *See* 3 Richard A. Lord, *Williston on Contracts* § 7:7 (4th ed. 2013)

(an illusory promise, "that is, a promise merely in form, but in actuality not promising anything, ... cannot serve as consideration."); *Restatement (Second) of Contracts* § 77 cmt. a (1981) ("Where the apparent assurance of performance is illusory, it is not consideration for a return promise."); *id.* § 2 cmt. E ("Words of promise which, by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise."); 2 *Corbin on Contracts* § 5.28 (2003) ("[A]n illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise.").

In keeping with these basic precepts, a host of federal courts of appeals have held that contracts that permit unilateral, retroactive amendment of a material term are illusory and do not constitute consideration to create an enforceable contract. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F3d 1165, 1179 (9th Cir 2003) ("[W]e conclude that the provision affording Circuit City the unilateral power to terminate or modify the contract is substantively unconscionable."); *Dumais v. American Golf Corp.*, 299 F3d 1216, 1219 (10th Cir 2002) ("We join other circuits in holding that an . . . agreement allowing one party, the unfettered right to alter the...agreement's existence or its scope is illusory.").[9]

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[9] *See also Penn v. Ryan's Family Steak Houses, Inc.*, 269 F3d 753, 759 (7th Cir 2001) (refusing to enforce contract that specifically grants the employer "the sole, unilateral discretion, to modify or amend" its terms); *Floss v. Ryan's Family*

A number of state courts have similarly found agreements that are subject to unilateral modification or revocation to be illusory and unenforceable. *See, e.g., Baker v. Bristol Care, Inc.*, No SC93451, 2014 Mo LEXIS 207, 2014 WL 4086378, at *5 (Mo. Aug. 19, 2014) (refusing to enforce agreement as "illusory" and lacking "consideration" where one party had the unilateral "right to amend, modify or revoke this agreement upon thirty (30) days' prior written notice to the Employee."); *Salazar v. Citadel Communications Corp.*, 135 NM 447, 451, 90 P3d 466, 470 (2004) (refusing to enforce agreement that gave employer the unilateral right to modify terms; noting that "[t]he party it reserves the right to change the agreement unilaterally, and at any time, has not really promised anything at all and should not be permitted to bind the other party.").[10]

Steak House, Inc., 211 F3d 306, 315-16 (6th Cir 2000) (finding contract "illusory" where "[one party] has reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from, [the other party]"); *Hooters of America v. Phillips,* 173 F3d 933, 939 (4th Cir 1999) (finding that employer's ability to modify rules "in whole or in part" renders agreement illusory).

[10] *See also Sears Roebuck & Co. v. Avery*, 163 NC App 207, 221, 593 SE2d 424, 434 (2004) (refusing to enforce "Change of Terms" provisions in agreement that would allow stronger party to unilaterally add new terms); *Cheek v. United Healthcare of the Mid-Atlantic*, 835 A2d 656, 662-663 (Md 2003) (refusing to enforce agreement where company "reserve[d] the right to alter, amend, modify, or revoke the Policy at its sole and absolute discretion at any time with or without notice . . ."); *Demasse v. ITT Corp.*, 194 Ariz 500, 509, 984 P2d 1138, 1148 (1999) (*en banc*) (noting that "[n]othing could be more illusory" than to allow a party to unilaterally amend a contract based on a lay-off provision in an employee handbook).

For these reasons, in *Galaviz v. Berg*, 763 F Supp 2d 1170 (ND Cal 2011), the court refused to enforce a forum-selection bylaw strikingly similar to that at issue here. The court noted that, although "parties may enter into contracts—including those where elements of adhesion exist—that contain legally enforceable forum selection clauses," a bylaw that is unilaterally adopted by a corporate Board of Directors "stands on a different footing." *Id.* at 1171. The court went on to hold that "[p]articularly where, as here, the bylaw was adopted by the very individuals . . . named as defendants, and after the alleged wrongdoing took place, *there is no element of mutual consent to the forum choice at all, at least with respect to shareholders who purchased their shares prior to the time the bylaw was adopted.*" *Id.* at 1171 (emphasis added); *see also id.* at 1174.[11]

A California intermediate appellate court recently reached a similar conclusion in a case involving a bylaw amendment similar to that at issue here. *Cobb v. Ironwood Country Club*, 233 Cal App 4th 960 (2015). In *Cobb*, the

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[11] TriQuist argues that *Galaviz* is no longer good law because it was decided before *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A3d 934 (Del Ch 2013), and "[t]hus, the underlying premise that exclusive-forum bylaws are statutorily and contractually valid under Delaware law had not yet been established." TriQuint Br. at 40. As the plaintiffs explain, however, TriQuist fails to recognize that *Chevron* does not immunize such bylaws from challenge; to the contrary, it expressly authorizes as-applied challenges to facially valid forum selection provisions (*see id.* at 939, 958). In addition, to the extent the *Galaviz* court relied on basic contract law principles in determining that the bylaw amendment was invalid, that decision discredits TriQuint's reliance on contract law to defend its actions.

Ironwood Country Club was sued by several of its members in a dispute involving certain land purchases. In an effort to thwart the pending suit, the Club unilaterally amended its bylaws to mandate arbitration of "any claim, grievance, demand, cause of action, or dispute of any kind whatsoever" filed against it by one of its members. *Id.* at 964. Just as defendants do here, the Club argued that "because the plaintiffs each agreed to abide by its bylaws when they became members, including a provision which allowed those bylaws to be amended, they were automatically deemed to have 'accepted and agreed to' the arbitration amendment subsequently adopted." *Id.* The California Court of Appeals rejected this argument: "When one party to a contract retains the unilateral right to amend the agreement governing the parties' relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing, which precludes amendment that operate retroactively to impaired accrued rights." *Id.* at 963. *See also id.* at 6 (holding that "the contract Ironwood describes would qualify as illusory, and be unenforceable.").

That reasoning is squarely applicable here. Under defendants' view of things, the new forum-selection bylaw is binding on its shareholders even though they had no reasonable opportunity to amend the bylaw before it took effect against them. To the extent the shareholders can be said to have agreed to such an

arrangement in advance, the promise cannot be enforced because it was illusory as applied under the circumstances of this case.[12]

B. Contract law forbids a party from adding a material term to a contract without the express agreement of the other party.

Enforcing the bylaw amendment would also offend the equally venerable rule of contract law that material terms may not be added to an agreement by one party, without the agreement of the other party. A contract constitutes a binding agreement that contains a collection of rights and responsibilities by each party. The law is well established that if one party to a contract declares that it also wants the deal to include a material new term, the new term does not become part of the contract unless there are some valid indicia of mutual assent.

While this rule has common law antecedents that long pre-date the Uniform Commercial Code, some of the most memorable applications of this well-established rule come in the business-to-business setting. Most lawyers probably

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[12] Although there do not appear to be any Oregon authorities directly on point, this Court recently reaffirmed that contract rights are "not absolute" and must yield to some other "overpowering rule of public policy," such as unconscionability. *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 551-52 (2014). *Bagley* reaffirmed that the doctrine of unconscionability is deeply rooted in Oregon jurisprudence and remains a vibrant force for invalidating unreasonable or unfair contracts. *See id.* at 554-55 (observing that "Oregon courts have recognized their authority to refuse to enforce unconscionable contracts since the nineteenth century.") (citing cases). Notably, a number of courts, including several listed above, have relied on unconscionability as the grounds for refusing to enforce a contract that allows one party unilaterally to terminate or modify the contract. *E.g., Ingle v. Circuit City Stores, Inc.*, 328 F3d 1165, 1179 (9th Cir 2003). It would therefore be well within this Court's power to declare an illusory contract void as against public policy.

remember law school hypotheticals about two companies that reach agreement on the essential points necessary to form a contract (*e.g.*, the sale of identified goods at a specified time for a specified price), and then one (or sometimes both) companies send documentation memorializing the agreement and also attempting to add new material terms. This is the famous "battle of the forms." For generations, courts have resolved that sort of dispute by holding that no term that would "materially alter the original bargain" will become part of the contract "unless expressly agreed to by the other party." *Southeastern Enameling Corp. v. General Bronze Corp.*, 434 F2d 330, 334 (5th Cir 1970). In a landmark case along these lines, the parties reached an agreement (a contract) over the telephone, and then one merchant sent a "confirmation form" that included a new, material term. Presented with these facts, the U.S. Court of Appeals for the Fourth Circuit concluded that "the additional terms become part of the contract *unless they materially alter it*." *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F2d 135, 136 (4th Cir 1979) (emphasis added; interior quotations and citations omitted).

This principle—that material terms may not be added to a contract without both parties' consent—has been applied repeatedly by state and federal courts in the context of common law and Uniform Commercial Code cases for decades. *E.g., Schnabel v. Trilegiant Corp.*, 697 F3d 110, 123 (2d Cir 2012) (material term sent in a "welcome email" after transaction completed did not become part of

contract); *Lima v. Gateway, Inc.*, 886 F Supp 2d 1170 (CD Cal 2012) (rejecting enforcement of an arbitration clause contained in a user's guide sent to a customer after a sale).

There is no question that the forum-selection clause at issue in this case is a material term. Basic rules of contact law dictate that, in light of its materiality, the amendment cannot be enforced unless the shareholders agree to it. It only makes sense to deviate from that approach in cases where—unlike here—the shareholders have a real opportunity to repeal the amendment. As the trial court reasonably concluded, the shareholders in this case had no such opportunity.

Because the bylaw amendment was illusory and imposes a material term without the shareholders' consent, it offends basic contract law observed throughout the United States. That is yet another reason why the lower court's decision should be affirmed and why defendants' appeal to the "strong policy favoring the validity and enforceability of contracts" should be rejected.

CONCLUSION

The TriQuint directors unilaterally enacted a bylaw in the midst of approving a merger over which they anticipated lawsuits like those brought by plaintiffs, leaving plaintiffs no opportunity to agree to the bylaw or challenge it. The timing and process of the TriQuint board simply does not withstand scrutiny. Under policies of

shareholder protection and fundamental contract law, these circumstances make the bylaw unenforceable against plaintiffs in this case.

DATED: March 4, 2015.

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CERTIFICATE OF FILING, SERVICE & COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) the size of the type in this petition is not smaller than 14 point for both the text of the petition and footnotes as required by ORAP 5.05(4)(f), and (2) this petition complies with the word-count limitation in ORAP 9.05(3)(a) because the word-count of this petition as described in ORAP 5.05(2)(a) is 4,574 words.

I further certify that on March 4, 2015, I filed the foregoing document with the State Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manner(s):

☐ **BY FIRST-CLASS MAIL:** For each party, I caused two copies of the document(s) to be placed in a sealed envelope and caused such envelope to be deposited in the United States mail at Portland, Oregon, with first-class postage thereon fully prepaid and addressed to the postal address(es) indicated below.

☒ **BY E-FILING:** For each party, I caused a copy of the document(s) to be sent by electronic mail via the court's electronic filing system to the e-mail address(es) indicated below.

/s/ Bridget Donegan
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