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; 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.,

Defendants-Relators,

And

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

Multnomah County Circuit Court
No. 1403-02757

MANDAMUS PROCEEDING

SC S062642

FEB 2015

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

Defendants.

PLAINTIFFS-ADVERSE PARTIES' ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

From an Order of the Circuit Court of Multnomah County,
Honorable Michael A. Greenlick, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. Nature of the Action and Order Subject to Review

Plaintiffs Donald L. Roberts and Marina Lam (together, "Plaintiffs") filed this action on behalf of themselves and the public shareholders of TriQuint Semiconductor, Inc. ("TriQuint" or the "Company") against TriQuint and the members of its Board of Directors (the "Board")[1] for breaches of fiduciary duty in connection with the proposed merger (the "Transaction") between TriQuint and RF Micro Devices, Inc. ("RFMD").

The TriQuint Defendants moved to dismiss Plaintiffs' action, arguing, *inter alia*, that the trial court lacked jurisdiction over Plaintiffs' claims because the Board unilaterally adopted an amendment to the Company's bylaws in connection with the approval of the Transaction to include a forum selection provision in favor of the Delaware Court of Chancery for claims against the Board for breach of fiduciary duty. The trial court denied the motion. The TriQuint Defendants now seek a peremptory writ of mandamus in connection with the trial court's decision.

B. Mandamus Jurisdiction and Timeliness

Plaintiffs do not contest the TriQuint Defendants' statement of jurisdiction or the timeliness of the petition.

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[1] The members of the Board include defendants Ralph G. Quinsey, Steven J. Sharp, Charles Scott Gibson, David Ho, Nicolas Kauser, Roderick Nelson, Walden R. Rhines and Willis C. Young. Together, TriQuint and the Board are referred to herein as the "TriQuint Defendants." The "Board" refers to TriQuint's Board of Directors.

C. Question Presented

Whether the trial court utilized the proper analytical framework when determining whether the forum selection provision adopted by the Board and contained in TriQuint's bylaws may be enforced?

D. Summary of Arguments

A writ of mandamus is '"an extraordinary remedy' and serves a limited function." *Lindell v. Kalugin*, 353 Or 338, 347, 297 P3d 1266, 1271 (2013).[2] Only when the trial court's decision amounts to "fundamental legal error" or is "outside the permissible range of discretionary choices" will the remedy of mandamus be available. *State ex rel. Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241, 245 (1993). As this Court has explained, "[i]t has become hornbook law in this state that the writ of mandamus cannot be used as a means of controlling judicial discretion." *State ex rel. Ricco v. Biggs*, 198 Or 413, 422, 255 P2d 1055, 1059 (1953).

Here, in determining whether a forum selection provision contained in the corporate bylaws of TriQuint may be enforced, the trial court utilized the exact analytical framework set forth by the Delaware Court of Chancery (the "Chancery Court") in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A3d 934 (Del Ch 2013). There, the Chancery Court articulated two related forms of analysis, either of which may be applied when a plaintiff challenges a facially valid forum

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[2] Unless otherwise noted, internal citations are omitted and emphasis is added.

selection provision. *Id.* at 939. "If a plaintiff faces a motion to dismiss because it filed outside the forum identified in the forum selection clause, the plaintiff can argue under *Bremen* [407 US 1 (1972)] that enforcing the clause in the circumstances of that case would be unreasonable." *Id.* at 941. Alternatively, "[t]he plaintiff may also argue that, under *Schnell*, the forum selection clause should not be enforced because the bylaw was being used for improper purposes inconsistent with the directors' fiduciary duties." *Id.* at 958 (citing *Schnell v. Chris-Craft Indus., Inc.*, 285 A2d 430, 432 (Del Ch 1971), *rev'd on other grounds*, 285 A2d 437 (Del 1971)). In applying *Schnell*, the trial court determined that TriQuint's forum selection provision cannot be enforced because doing so would allow a potential defendant anticipating imminent litigation to unilaterally restrict the plaintiff's choice of forum and violate public policy concerning contract formation. Not only is this analysis consistent with the TriQuint Defendants' own legal authority, but it is the type of discretionary decision that should not be disturbed through a writ of mandamus.

Defendants' cited legal authority and attacks on the trial court, although voluminous, ignore that the as-applied analysis of *Chevron* requires a fact-intensive inquiry by the forum court. *Chevron*, 73 A.3d at 958. The trial court assumed that a forum selection bylaw is facially proper under Delaware law, but it correctly decided that the allegations in Plaintiffs' complaint demonstrate gross overreaching and the forum selection provision could not be enforced. Although

Delaware does permit "flexibility in its corporate bylaws," *id.* at 957, '"inequitable action does not become permissible simply because it is legally possible.'" *City of Providence v. First Citizens Bancshares, Inc.*, 99 A3d 229, 238 (Del Ch 2014). Here, the actions of the TriQuint Defendants were uniquely improper, as recognized by the careful, fact-specific analysis of the trial court.

Accordingly, for these reasons and those discussed herein, Plaintiffs respectfully request that the TriQuint Defendants' petition be denied.

E. Statement of Facts and Procedural Background

1. Summary of Relevant Facts and Allegations

Headquartered in Hillsboro, Oregon, TriQuint is a leading provider of innovative RF solutions and foundry services for the world's top communications, defense and aerospace companies. ER 2, 9. TriQuint's products help reduce the cost and increase the performance of connected mobile devices and the networks that deliver critical voice, data and video communications. *Id.* at 9. RFMD is a global leader in the design and manufacture of high-performance RF solutions. *Id.* RFMD's products enable worldwide mobility, provide enhanced connectivity, and support advanced functionality in the mobile device, wireless infrastructure and wireless local network markets, among others. *Id.*

On February 24, 2014, TriQuint and RFMD announced that they had entered into an Agreement and Plan of Merger (the "Merger Agreement") through which RFMD would acquire TriQuint for consideration valued at just $9.73 per share at

the time of the announcement the Transaction. *Id.* at 2, 10. Pursuant to the Merger Agreement, RFMD would: (i) form a new holding company ("HoldCo"); (ii) merge a newly-formed direct subsidiary of HoldCo with and into RFMD, with RFMD surviving such merger as a wholly-owned direct subsidiary of HoldCo; and (iii) merge a newly-formed direct subsidiary of HoldCo with and into TriQuint, with TriQuint surviving such merger as a wholly-owned direct subsidiary of HoldCo. *Id.* at 2. Each share of common stock of RFMD would convert into the right to receive 0.25 of a share of HoldCo common stock, and each share of common stock of TriQuint will be converted into the right to receive 0.4187 of a share of HoldCo common stock. *Id*.

Rather than protecting the interests of TriQuint's public shareholders, the Board pursued the Transaction in order to serve their unique financial interests. In abandoning the Company's strong prospects as a standalone company in favor of a combination with RFMD, the Board caved in to pressure from Starboard Value LP ("Starboard"), an activist investor that owned approximately 7.9% of the outstanding common stock of TriQuint. *Id.* at 2-3. On December 2, 2013, Starboard delivered a letter to the Board, which, according to a Starboard press release, advocated for changes to the current management team and the Board:

> [In the letter, Starboard] reiterated its beliefs, as previously outlined in detail in Starboard's October 29, 2013 letter to TriQuint, that the Company is deeply undervalued and that significant opportunities exist to unlock value based on actions within the control of management and the Board. Starboard stated in the letter that it is

> seriously concerned with TriQuint's prolonged underperformance under the direction of the current management team and Board, and that Starboard believes substantial change is needed on the Board to ensure that appropriate actions are taken to improve execution, drive better financial performance, and create value for all shareholders. To that end, Starboard has nominated a slate of highly qualified candidates for election to the TriQuint Board at the Company's 2014 Annual Meeting. Starboard remains open to reaching a mutually agreeable resolution to re-constitute the Board in a manner that is in the best interests of all shareholders.

Id.

In the face of a proxy contest and to avoid potential damage to their professional reputations by being forcibly stripped of directorships, the Board pursued a change-of-control transaction that would disarm Starboard's leverage and influence. *Id.* at 3. Pursuant to the Merger Agreement, five of TriQuint's eight current Board members will be named as board members of the surviving company, including defendant Ralph G. Quinsey, TriQuint's President and Chief Executive Officer, thereby maintaining highly lucrative board seats. *Id.* at 2, 11-12.

With the Board's self-interest preventing an objective evaluation of the Company's strategic alternatives, the Board ignored the Company's intrinsic value and agreed to the Transaction at an unfair price. *Id.* at 3, 14. The implied consideration of $9.73 per share represented a premium of only 5.4% based on TriQuint's closing price on February 24, 2014. *Id.* 3, 11, 14. That premium is

substantially below the average one-day premium of nearly 51% for comparable semiconductor transactions in the past three years. *Id.* at 3, 14.

Compounding the flawed sales process, the Board took steps to ensure the sale of TriQuint to one buyer, and one buyer only – RFMD – by agreeing to preclusive deal protection devices in connection with the Merger Agreement. *Id.* at 3, 15. These provisions, which collectively deter any competing offers for the Company, include: (i) a no-solicitation provision that precludes the Company from providing confidential Company information to, or even communicating with, potential competing bidders except under extremely limited circumstances; (ii) a matching rights provision that allows RFMD to match any competing superior proposal; and (iii) a termination fee provision that obligates the Company to pay RFMD a $66.7 million termination fee in the event the Transaction is terminated in favor of a superior proposal. *Id*. at 3-4, 15. These provisions tied the hands of the Board by restricting its ability to act with respect to pursuing superior proposals and prevented a topping bid despite an undervalued price.

With the threat of litigation on the horizon as the result of their self-interested actions, the Board took preemptive steps in an attempt to have any legal battles concerning the Transaction be fought in its preferred forum. On February 22, 2014, contemporaneously with the Board's approval of the Merger Agreement and inherently after the flawed sales process, the Board adopted a change to its bylaws to insert a forum selection provision. *Id.* at 5. The provision reads:

> 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.

Id. at 47. The provision does not bind the Board or the Company to litigate in Delaware; instead, the Company may unilaterally decide on a different forum. *Id.* at 5. The Board did not seek shareholder approval of this change to TriQuint's bylaws. *Id.*

In short, the Board's actions in pursuing the Transaction, including the adoption of the forum selection provision, were designed to unlawfully divest TriQuint public shareholders of their holdings in the Company. Plaintiffs intend to pursue money damages in order to remedy the Board's breaches of fiduciary duty.

2. Procedural History

On April 4, 2014, the TriQuint Defendants moved to dismiss Plaintiffs' actions, arguing that: (1) the trial court lacked subject-matter jurisdiction because of the forum selection provision adopted in connection with the Merger Agreement; (2) Oregon was an inconvenient forum and comity favored parallel proceedings taking place in the Chancery Court; and (3) plaintiffs failed to allege facts that supported a claim on which relief could be granted. ER at 513. Following briefing and oral argument from the parties, the trial court issued an

opinion on August 14, 2014 that denied the TriQuint Defendants' motion to dismiss in its entirety. *Id.* at 513-33.

The TriQuint Defendants now assert the trial court committed fundamental error in finding that TriQuint's forum selection provision was unenforceable. For the reasons discussed herein, the TriQuint Defendants' petition lacks merit and should be denied.

II. RESPONSE TO DEFENDANTS-RELATORS' ASSIGNMENT OF ERROR

The trial court properly denied the TriQuint Defendants' motion to dismiss on the basis that the forum selection provision unilaterally adopted by the Board through an amendment to the Company's bylaws should not be enforced.

A. Preservation of Error

Plaintiffs agree that the issues presented herein were fully briefed and argued before the trial court.

B. Standard of Review

Mandamus is '"an extraordinary remedy' and serves a limited function." *Lindell*, 353 Or at 347. As this Court has repeatedly explained, "[i]t has become hornbook law in this state that the writ of mandamus cannot be used as a means of controlling judicial discretion." *Ricco*, 198 Or at 422; *see also State ex rel. Douglas Cnty. v. Sanders*, 294 Or 195, 198 n.6, 655 P2d 175, 176 n.6 (1982) ("Mandamus is not available to review the exercise of trial court discretion."). Only if the trial court's decision amounts to "fundamental legal error" or is

"outside the permissible range of discretionary choices" will the remedy of mandamus be available. *Keisling*, 317 Or at 623. "Based upon the nature of mandamus and the relation of mandamus to appeal, [the Court's] function is to decide whether there was any evidence to substantiate the circuit court's ruling. [The Court] should not conduct a de novo review of the facts." *State ex rel. Ware v. Hieber*, 267 Or 124, 127, 515 P2d 721, 722-23 (1973); *State ex rel. Kafoury v. Jones*, 315 Or 201, 212, 843 P2d 932, 938 (1992) (the standard of review concerning factual findings in mandamus proceedings is '"whether there was ***any evidence*** to substantiate the circuit court's ruling'").

III. ARGUMENT

A. The Trial Court Properly Applied the Analysis Set Forth in *Chevron* to Determine Whether the Forum Selection Provision May Be Enforced

The trial court utilized the proper legal framework to assess whether to enforce TriQuint's forum selection provision. Under Delaware law, bylaws that are otherwise valid will be unenforceable if they were adopted for an improper purpose or have an inequitable effect. *Black v. Hollinger Int'l*, 872 A2d 559, 564 (Del 2005) (affirming the Chancery Court ruling that "ByLaw Amendments were not *per se* invalid" but rather "were invalid in equity and of no force and effect, because they had been adopted for an inequitable purpose and had an inequitable effect"); *Schnell*, 285 A2d at 439 (bylaw amendment moving forward the date of a stockholder meeting in order to perpetuate the board in office and prevent a proxy

fight found invalid because "[t]hese are inequitable purposes, contrary to established principles of corporate democracy").

In *Chevron*, the Chancery Court articulated two related forms of analysis, either of which may be applied to a plaintiff's challenge to a facially valid forum selection provision contained in a corporation's bylaws. 73 A3d at 939. Under the standards set forth by the United States Supreme Court in *Bremen*, "as-applied challenges" can be made by "a real plaintiff whose real case is affected by the operation of the forum selection clause." *Id.* at 941. "If a plaintiff faces a motion to dismiss because it filed outside the forum identified in the forum selection clause, the plaintiff can argue under *Bremen* that enforcing the clause in the circumstances of that case would be unreasonable." *Id.*

Alternatively, "[t]he plaintiff may also argue that, under *Schnell*, the forum selection clause should not be enforced because the bylaw was being used for improper purposes inconsistent with the directors' fiduciary duties." *Id.* at 958.[3]

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[3] The TriQuint Defendants' attacks on the trial court's discussion of *Bremen* are misplaced. First, Oregon law reconciles with the principles of *Bremen*, even if that decision has not been expressly adopted. *See, e.g., Murphy v. Schneider National, Inc.*, 362 F3d 1133, 1140 (9th Cir 2003) (reviewing the ruling of a District of Oregon court sitting in diversity and citing all three *Bremen* factors as applicable to a forum selection clause included in an employment contract); *Colonial Leasing Co. of New England, Inc. v. Best*, 552 F Supp 605, 607 (D Or 1982) ("Thus, the analysis under Oregon law is essentially similar to the analysis of the United States Supreme Court in [*Bremen*]."). Second, *Chevron* provides that a trial court may assess whether to enforce a forum selection provision under both *Bremen* and *Schnell*. 73 A3d at 941, 958. Here, the trial court relied upon *Schnell* in

In *Schnell*, 285 A2d at 432, the company's board of directors was facing a forthcoming proxy fight wherein certain shareholders intended to seek the election of new directors and, thereafter, install a new management team. In an attempt to diffuse that threat, the board amended the company's bylaws with the effect of "advancing the date of [the company's] annual meeting by over a month and by the selection of an allegedly isolated town in up-state New York as the place for such meeting." *Id.* By doing so, the board "utilize[d] the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and, to that end, for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management." *Schnell* at 439. Accordingly, the Delaware Supreme Court reversed the trial court's decision and ordered injunctive relief to prevent the advancement of the shareholders' meeting. *Id*. at 440. As recently explained in *First Citizens*, *Schnell* "teach[es] that 'inequitable action does not become permissible simply because it is legally possible.'" 99 A3d at 238.

The underlying facts in this matter are similar to *Schnell*. Starboard, an activist investor, publicly announced its plan to attempt to nominate a dissident slate of director nominees at the next shareholder meeting and delivered a letter to the Company on December 2, 2013 declaring its intentions. ER 523. Starboard

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determining that the enforcement of TriQuint's forum selection provision would be unfair and unjust.

claimed that TriQuint had been underperforming due to the poor stewardship of the current Board, which had resulted in the Company being undervalued by the market. *Id.* In response, the Board re-engaged in merger negotiations with RFMD – which it had previously terminated – and ultimately accepted the Merger Agreement. *Id.* As part of the Transaction, the Board secured the placement of several of TriQuint's directors on the board of the combined company, which allowed them to keep their lucrative directorships and shielded the Board from ouster by diluting Starboard's voting power. *Id*. On the same day that it approved the Merger Agreement, the Board also approved the amendment to TriQuint's bylaws to adopt a forum selection provision in favor of the Chancery Court, which was specifically intended to affect litigation concerning the Transaction. ER 524-25.

In applying *Schnell*, the trial court considered the allegations set forth in plaintiffs' pleadings and concluded that enforcing the forum selection provision would be unfair and unjust:

> To enforce the bylaw and to dismiss this case would have a more drastic impact than *Schnell*, where the board's bylaw merely placed barriers to shareholder objections. Forcing the plaintiffs to proceed in Delaware would force them to accept the bylaw at an earlier time than the flexible nature of a Delaware shareholder contract necessarily allows.

> 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.

Id.[4]

As the trial court also explained, although ORCP 21 A(1) does allow for dismissal when the parties have contracted to litigate a claim in a different forum, "the court's discretion to do so may not be effected if the underlying contract is for any reason unenforceable." ER 517 (citing *Black v. Arizala*, 337 Or 250, 266, 95 P3d 1109 (2004). In *Reeves v. Chem. Industrial Co.*, 262 Or 95, 495 P2d 729 (1972), the court found "no logical support" to give effect to an otherwise valid

[4] In arguing that the trial court's reliance on *Schnell* is misplaced, the TriQuint Defendants ignore the guidance set forth in *Chevron* concerning an as-applied analysis of a specific forum selection provision. As the Chancery Court explained, "[t]he situational review *Bremen* requires, and the analogous protections of fiduciary duty review under cases like *Schnell*, exist to deal with real-world concerns when they arise in real-world and extant disputes, rather than hypothetical and imagined future ones." *Chevron*, 73 A3d at 963. *Chevron* does not stand for the proposition that a corporation's forum selection provision must be enforced under all circumstances. Further, although the TriQuint Defendants' attempt to distinguish *Schnell* on immaterial factual differences, they cannot dispute *Schnell*'s fundamental holding that '"inequitable action does not become permissible simply because it is legally possible.'" *First Citizens*, 99 A3d at 238. Finally, Professor Grundfest's analysis is inapplicable, as it fails to address any as-applied factual circumstances and asserts generalities that provide no guidance to the court.

forum selection provision, relying upon § 80 of the Restatement of Conflict of Laws (Second), which provides such provisions should not be enforced when doing so would be "'unfair or unreasonable.'" *Id.* at 98, 100. A comment to the Restatement, as quoted in *Reeves*, also provides that a forum selection provides may be "'disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power[.]'" *Id.* at 97-98.

Since the trial court both used the correct analytical framework, properly applied both Oregon and Delaware law, and made corresponding factual findings that were supported by evidence, the trial court's decision should not be disturbed.

B. The TriQuint Defendants' Arguments Are Founded Upon Misleading and Incomplete Descriptions of Legal Authority that Have No Bearing Upon Whether the Trial Court Undertook the Appropriate Analysis in Reaching Its Decision

In attempting to dispute the trial court's conclusions, the TriQuint Defendants repeatedly misconstrue or ignore controlling Oregon and Delaware law. ***First***, since the trial court followed the precise analysis set forth in *Chevron*, the TriQuint Defendants' arguments are nothing more than a dispute as to the court's discretionary factual findings. As discussed herein, mandamus is not a means for controlling judicial discretion. *Douglas Cnty.*, 294 Or at 198. The trial court's factual findings may not be challenged when '"there [is] any evidence to substantiate [its] ruling.'" *Kafoury*, 315 Or at 211-12. Accordingly, the TriQuint

Defendants' dispute as to the wisdom of the trial court's factual findings is not a matter appropriate for review through a petition for writ of mandamus.

Second, defendants claim that declining to enforce the forum selection provision in TriQuint's bylaws would contravene public policy. *See* TriQuint Defendants' Memorandum in Support of Petition for Writ-Mandamus at 50-57. Specifically, defendants argue that: (i) directors will be impaired in their ability to unilaterally amend corporate bylaws; (ii) the trial court will be interfering with the internal affairs of a foreign corporation; and (iii) valid contracts should be upheld. *Id.*

Rather than being true public policy factors that should be assessed in an analysis under either *Bremen* or *Schnell*, defendants' argument is, in essence, that no analysis should be conducted at all. All of these factors are inherently present any time a board unilaterally amends a company's bylaws and are not unique to the facts in this action. In the face of these purported public policy concerns, the Chancery Court made clear in *Chevron* that a trial court outside of Delaware may decline to enforce a forum selection provision even if the company's directors had authority to unilaterally amend the bylaws, even if the presiding court is outside of Delaware, and even if the company's bylaws are otherwise an enforceable contract. "The answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a

concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of *Schnell v. Chris-Craft Industries.*" *See Chevron*, 73 A3d at 949.

Third, defendants' argument that the impairment of shareholders' ability to repeal a bylaw is an "end-run around" the holdings of *Chevron* and not a valid public policy concern is mistaken. The Delaware Corporations Code explicitly provides that, even when given authority to unilaterally amend the bylaws, a company's directors cannot "divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws." 8 Del C §109(a). By adopting the forum selection provision in connection with the approval of the Merger Agreement, TriQuint's shareholders were left without the opportunity to repeal the bylaw before voting on the Transaction. By contrast, in *Chevron*, plaintiffs challenged only the adoption of the bylaw, did not assert claims based on any other conduct, and were not facing a merger transaction that would terminate the corporate entity in its current form. 73 A3d at 959. Chevron's shareholders were not deprived of the opportunity to repeal the bylaw if they so desired. Consequently, *Chevron* does not stand for the broader proposition that unilaterally adopted bylaws must be upheld in all circumstances. Rather, *Chevron* stands for the proposition that a forum selection provision with a company's bylaws is generally permissible under Delaware's corporate framework. *Id.* at 939.

Further, defendants' reliance on *Carnival Cruise Lines v. Shute*, 499 US 585, 111 S Ct 1522, 113 L Ed 2d 622 (1991), is misplaced. There, even though the

forum selection provision included on the cruise ship passengers' tickets was not subject to negotiation, the passengers were still on notice of the provision prior to boarding the ship and before the actionable conduct occurred. 499 US at 587-88, 594-95. Here, TriQuint's shareholders were provided notice of the amendment to the Company's bylaws at the same time that TriQuint and RFMD publicly announced the Transaction and inherently after they purchased their shares. Consequently, the reasoning that supported upholding the forum selection provision in *Carnival Cruise Lines* is inapplicable in this matter.

Lastly, the TriQuint Defendants' attempt to support their arguments with incomplete descriptions of other trial court decisions that are based on inapposite facts or otherwise provide no guidance to the Court in ruling on the present matter. For example, the TriQuint Defendants rely heavily upon the Chancery Court's decision in *First Citizens.* However, as in *Chevron*, plaintiffs in *First Citizens* sought solely to invalidate the company's adoption of a forum selection provision and did not assert claims based on any other actionable conduct. More importantly, the *First Citizens* court utilized the same analysis set forth in *Chevron* for challenges to a board's unilateral adoption of a forum selection provision. 99 A3d at 238 (forum selection provisions are '"subject to as-applied review under *Bremen* in real-world situations to ensure that they are not used "unreasonabl[y] and unjust[ly]"'") (quoting *Chevron*, 73 A3d at 957).

The remainder of defendants' authority concerning whether a court may enforce a forum selection provision fares no better and does not support the notion that, in this matter, the trial court committed any fundamental legal error. For example, the TriQuint Defendants also rely heavily upon *Dentel v. Fid. Sav. & Loan Ass'n*, 273 Or 31, 32-33, 539 P2d 649, 650-51 (1975). However, *Dentel* concerned a dispute between a savings and loan association and its depositors and borrowers which challenged the nature of a bylaw amendment and not the circumstances under which it was adopted. *Id.*

The TriQuint Defendants also repeatedly rely upon cases involving forum-selection provisions or arbitration provisions adopted or imposed well before the conduct giving rise to the litigation. *See, e.g., Katz v. Commonwealth REIT*, No. 24-C-13-001299 (Md Cir Ct Feb 19, 2014) (App 8) (involving an the arbitration provision in the company's bylaws was adopted more than three years before the alleged misconduct); *Melissa's Trust v. Seton*, No. 14 C 02068, 2014 US Dist LEXIS 104457, at *5-*6 (ND Ill July 31, 2014) (the forum selection provision was adopted seven months prior to the approval of the merger agreement and before the alleged wrongdoing); *Miller v. Beam Inc.*, No. 2014 CH 00935 (Ill Cir Ct Mar 5, 2014) (ER 313) (the court determined that the plaintiff had not sufficiently alleged that the misconduct took place following the adoption of the forum selection provision); *Groen v. Safeway, Inc.*, No. RG14716641 (Cal Super Ct Alameda Cnty May 14, 2014) (ER 510) (finding that plaintiffs' position that "the forum selection

bylaws were adopted after wrongdoing had already occurred is not supported by the record" and plaintiffs did not demonstrate that the "application of the forum selection bylaws would be unreasonable in this situation"); *Genoud v. Edgen Grp., Inc.*, No. 625,244 (19th Jud Dist Ct East Baton Rouge La Jan 17, 2014) (ER 338) (single-page order granting judgment in favor of the company "without prejudice based on forum non conveniens" without any analysis) (the company's forum selection clause contained in its charter was adopted in connection with its initial public offering).

Perhaps most tellingly, the TriQuint Defendants also repeatedly rely upon trial court decisions that provide no underlying analysis or any guidance upon the appropriate framework for assessing whether a forum-selection provision should be enforced in this matter. *See, e.g.*, *Edelman v. Protective Life Corp.*, No. CV-2014-902474.00 (Ala Cir Ct Sept 19, 2014) (App 47) (single sentence order granting defendants' motion to dismiss; the court does not articulate the basis for dismissal or undertake any analysis of the applicable law); *Daugherty v. Ahn*, No. CC-11-06211-C (Tex Cnty Ct Feb 15, 2013) (ER 411) (single sentence order granting defendants' motion to dismiss; the court does not articulate the basis for dismissal or undertake any analysis of the applicable law); *North v. McNamara*, No. 1:13-cv-833, 2014 US Dist LEXIS 131672 (SD Ohio Sept 19, 2014) (the court did not undertake a *Bremen* analysis and found that plaintiffs failed to allege that forum selection provision was adopted for an improper purpose); *Hemg Inc. v.*

Aspen Univ., No. 650457/13, 2013 NY Misc LEXIS 5199, at *4 (NY Sup Ct Nov 4, 2013) (the forum selection clause at issue was in the company's certificate of incorporation and the bylaws, and there was no attempt by the defendants to retroactively apply the bylaws to existing shareholders).

Further, the TriQuint Defendants' discussion of and positions concerning *Galavis v. Berg*, 763 F. Supp. 2d 1170 (ND Cal 2011), and *M/S Bremen v. Zapata Off-Shore Co.*, 407 US 1, 92, 92 S Ct 1907 (1972), even if accepted, have no bearing on this Court's decision. While each case is discussed in the trial court's opinion, as they were raised by the parties in the initial briefing and oral argument, they did not form the authority for the ultimate decision. As discussed above, the trial court relied upon the precise framework set forth in *Chevron*, including the analysis set forth in *Schnell* concerning whether the bylaw was used for "improper purposes inconsistent with the directors' fiduciary duties." *Chevron*, 73 A.3d at 958.[5]

[5] The TriQuint Defendants also discuss the Delaware Court of Chancery's ruling on a motion for expedited proceedings filed by plaintiffs in that action prior to the closing of the Transaction. However, they fail to identify how a motion with a different evidentiary standard, made in a different forum, and addressing wholly different legal issues should have any bearing on the Court's decision in this matter.

IV. CONCLUSION

For all the foregoing reasons, the trial court properly found that the forum selection provision unilaterally adopted by the Board should not be enforced, and the TriQuint Defendants' petition for writ of mandamus should be denied.

Respectfully submitted this 11th day of February, 2015.

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CERTIFICATE OF COMPLIANCE

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 5,350 words.

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 in ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on February 11, 2015, I filed the original of PLAINTIFFS-ADVERSE PARTIES' ANSWERING BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

All participants in this case who are registered eFilers and will be served via the electronic mail function of the eFiling system.

I further certify that I served a true copy of the foregoing by mailing a true copy by first class mail with the United States Postal Service on the following individuals at their addresses listed below:

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