

# Notes

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## The Implications of Oregon’s *TriQuint* Decision for Enforcing Forum Selection Bylaws

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## INTRODUCTION

The significant increase in multi-forum litigation of intra-corporate disputes over the last decade has imposed considerable monetary costs on stockholders and raised uncertainty in outcomes.<sup>1</sup> Forum selection bylaws, unilaterally adopted by corporate boards of directors and generally restricting the forum for intra-corporate lawsuits to the state of incorporation, have emerged as a popular solution to this costly problem.<sup>2</sup> In 2013 and early 2014, courts both inside and outside of Delaware rendered favorable decisions for corporations on these bylaws, signaling general acceptance of their validity and enforceability.<sup>3</sup> However, an Oregon court's contrary decision has thrown this general acceptance into question.

In August 2014, an Oregon circuit court held in *Roberts v. TriQuint Semiconductor, Inc. (TriQuint)* that a forum selection bylaw, unilaterally adopted by a corporate board of directors and without the vote of the corporation's stockholders, was unenforceable under Delaware law.<sup>4</sup> This holding appears to directly conflict with the

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<sup>1</sup> Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325, 328–29, 333 (2013).

<sup>2</sup> Alison Frankel, *New Data Suggests Corporate Forum-Selection Bylaws Are Working*, WESTLAW J. DEL. CORP., Mar. 2, 2015, at \*1, 29 No. 17 WJDEC 11.

<sup>3</sup> Victor Lewkow, *Forum Selection Clauses in the "Foreign" Court*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 29, 2014), <http://corpgov.law.harvard.edu/2014/03/29/forum-selection-clauses-in-the-foreign-court/>.

<sup>4</sup> *Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, 2014 WL 4147465, at \*5 (Or. Cir. Ct. Aug. 14, 2014).

Delaware Court of Chancery's 2013 decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp. (Chevron)*. In *Chevron*, the court held that forum selection bylaws are valid and enforceable contract provisions under Delaware law.<sup>5</sup> Since the *Chevron* decision, multiple courts in jurisdictions outside of Delaware have also considered the validity and enforceability of forum selection bylaws and the reasoning provided in *Chevron*. Unlike *TriQuint*, however, all of these courts have upheld the bylaws as enforceable provisions.<sup>6</sup>

*TriQuint* has shaken the previous unanimity in foreign courts' application of the *Chevron* decision. Although not expressly contradicting *Chevron*, the *TriQuint* court found a forum selection bylaw to be unenforceable as-applied for public policy reasons.<sup>7</sup> However, strong policy considerations weigh against the *TriQuint* court's decision. Instead, Oregon courts and courts in all other jurisdictions should enforce forum selection bylaws for policy considerations of consistency, efficiency, and judicial expertise.

Furthermore, based on the outcome in *TriQuint*, corporations looking to prevent multi-forum intra-corporate litigation may have more difficulty enforcing their forum selection bylaws in Oregon, as well as in states that have not yet evaluated a forum selection bylaw. Therefore, corporations should consider additional factors when adopting forum selection bylaws. A corporation that has not yet adopted a forum selection provision should adopt its bylaw on a "clear day"—before the corporation is engaged in activity that will likely result in an intra-corporate lawsuit—to increase the likelihood the bylaw will be enforced. If a corporation has already adopted a forum selection bylaw, but did not do so on a clear day, and has had an intra-corporate claim brought against it outside of its selected forum, the corporation should first file a motion to dismiss in the forum hearing the action.<sup>8</sup> If that motion is denied, the corporation may still be able to halt the action in the other forum through an anti-suit injunction in the Delaware Court of Chancery.

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<sup>5</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013).

<sup>6</sup> *E.g.*, *North v. McNamara*, 47 F. Supp. 3d 635, 647 (S.D. Ohio 2014); *Groen v. Safeway Inc.*, No. RG14716641, 2014 WL 3405752, at \*2 (Cal. Super. Ct. May 14, 2014).

<sup>7</sup> *TriQuint*, 2014 WL 4147465, at \*5.

<sup>8</sup> Transcript of Telephonic Hearing on Plaintiff's Motion for Expedited Proceedings and for Temporary Restraining Order and Rulings of the Court at 36–37, *Edgen Group Inc. v. Genoud*, No. 9055-VCL, 2013 WL 6409517 (Del. Ch. Nov. 5, 2013) [hereinafter Transcript of Hearing for Temporary Restraining Order].

Part I of this Note introduces the relevant background, briefly summarizing the emergence of forum selection bylaws, pre-*Chevron* treatment of forum selection clauses and bylaws, and relevant precedents in Oregon contract law and Delaware corporate law. Part II discusses the *Chevron* decision in more detail, looking at the Delaware Court of Chancery's discussion of the validity and enforceability of forum selection bylaws. This Part also explores how other courts outside of Delaware have treated the *Chevron* decision, focusing on *Groen v. Safeway Inc.*<sup>9</sup> and *North v. McNamara*.<sup>10</sup> Part III examines the facts and reasoning of the *TriQuint* decision and its aftermath in the Oregon Supreme Court. Part IV offers a critique of the *TriQuint* decision, presenting legal and policy reasons why the court should have enforced the bylaw. This Part compares *TriQuint's* discussion of *Chevron* to that of the *Groen* and *North* courts, looking to Oregon contract law to explain the difference. Additionally, it explains why the policy considerations of consistency, efficiency, and judicial expertise weigh in favor of enforcing forum selection bylaws and against the holding reached in *TriQuint*. Part V concludes by exploring the implications of the *TriQuint* decision for forum selection bylaw challenges in light of *TriQuint's* writ of mandamus petition pending before the Oregon Supreme Court. It also provides recommendations for how corporations can increase the likelihood that courts outside of Delaware will enforce their forum selection bylaws.

## I

### THE HISTORICAL AND LEGAL BACKGROUND OF FORUM SELECTION BYLAWS

Forum selection bylaws developed as a corporate response to the upsurge in multi-forum litigation during the 2000s and the costs associated with such litigation.<sup>11</sup> However, the emergence of these bylaws was met with some speculation from legal scholars regarding the bylaws' enforceability.<sup>12</sup> Relevant background for a discussion of

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<sup>9</sup> *Groen*, 2014 WL 3405752.

<sup>10</sup> *North*, 47 F. Supp. 3d 635.

<sup>11</sup> Dominick T. Gattuso & Meghan A. Adams, *Delaware Insider: Forum Selection Provisions in Corporate Charters and Bylaws: Validity vs. Enforceability*, BUS. L. TODAY, Dec. 2013, at 1, [http://www.americanbar.org/publications/blt/2013/12/delaware\\_insider.html](http://www.americanbar.org/publications/blt/2013/12/delaware_insider.html).

<sup>12</sup> See, e.g., Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1952–53 (2013).

bylaw enforceability with respect to the *TriQuint* decision includes treatment of forum selection clauses and bylaws prior to the *Chevron* decision, Oregon contract law, and Delaware corporate law.

*A. Multi-forum Litigation and the Emergence of Forum Selection  
Bylaws*

The increased prevalence of multi-forum litigation in intra-corporate disputes of publicly traded corporations is a relatively new development.<sup>13</sup> Historically, most intra-corporate lawsuits were brought in the state of incorporation, typically Delaware.<sup>14</sup> Parties preferred to litigate disputes in Delaware because of a perceived “comparative advantage both in the resolution of complex business disputes and in the interpretation of Delaware law.”<sup>15</sup> Over the last ten years, however, plaintiff-stockholders have increasingly brought additional suits in other fora,<sup>16</sup> resulting in multi-forum litigation of identical or nearly identical claims.<sup>17</sup> This trend is particularly prominent in stockholder challenges to corporate mergers, where, in 2011, more than “90 percent of merger transactions were challenged by stockholders,”<sup>18</sup> and each transaction faced an average of six lawsuits.<sup>19</sup> Some scholars and practitioners have speculated that this increase in multi-forum litigation has been incentivized by the economic advantage it provides plaintiffs’ counsel.<sup>20</sup> For example, most merger challenges result in settlements where “[c]ompanies typically agree to pay plaintiffs’ lawyers fees,” averaging \$1.2

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<sup>13</sup> Grundfest & Savelle, *supra* note 1, at 334.

<sup>14</sup> *Id.*; Holly J. Gregory, *The Elusive Promise of Reducing Shareholder Litigation Through Corporate Bylaws*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 9, 2014), <http://corpgov.law.harvard.edu/2014/06/09/the-elusive-promise-of-reducing-shareholder-litigation-through-corporate-bylaws/>.

<sup>15</sup> Grundfest & Savelle, *supra* note 1, at 334.

<sup>16</sup> *Id.*; Thomas, *supra* note 12, at 1927.

<sup>17</sup> Michael O’Bryan, *Exclusive Forum Provisions: A New Item for Corporate Governance and M&A Checklists*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 14, 2014), <http://corpgov.law.harvard.edu/2014/07/14/exclusive-forum-provisions-a-new-item-for-corporate-governance-and-ma-checklists/>.

<sup>18</sup> Gattuso & Adams, *supra* note 11, at 1.

<sup>19</sup> Robert M. Daines & Olga Koumrian, *Merger Lawsuits Yield High Costs and Questionable Benefits*, N.Y. TIMES: DEALBOOK (June 8, 2012, 10:38 AM), [http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/?\\_r=0](http://dealbook.nytimes.com/2012/06/08/merger-lawsuits-yield-high-costs-and-questionable-benefits/?_r=0).

<sup>20</sup> *See, e.g.*, Grundfest & Savelle, *supra* note 1, at 333; Gregory, *supra* note 14. Further discussion of the causes of the increase in multi-forum litigation is beyond the scope of this Note.

million.<sup>21</sup> Whatever the reason, having to defend identical or similar lawsuits in multiple fora has resulted in significant increases in time and money devoted by corporations to litigating intra-corporate claims,<sup>22</sup> ultimately harming the stockholders collectively.<sup>23</sup>

In response to the rise in multi-forum litigation, corporations began to add forum selection provisions to their bylaws.<sup>24</sup> Commentators speculate this increase is the result of dicta from *In re Revlon, Inc. Shareholders Litigation*,<sup>25</sup> a Delaware Court of Chancery decision where Vice Chancellor Laster expressed support for corporations' power to adopt forum selection provisions, potentially as bylaws.<sup>26</sup> The possible use of bylaws to add forum selection provisions provided a key tool to corporations concerned with exposure to multi-forum litigation: it allowed corporate boards of directors to unilaterally adopt forum selection provisions.<sup>27</sup> The increase in forum selection bylaws has been met with controversy over the validity and enforceability of these provisions.<sup>28</sup>

### *B. Pre-Chevron Treatment of Forum Selection Clauses and Bylaws*

The *Chevron* court was not the first to rule on the enforceability of forum selection bylaws; rather, the original challenge was heard in *Galaviz v. Berg* in 2011.<sup>29</sup> In *Galaviz*, the District Court for the Northern District of California addressed the contractual enforceability of a forum selection bylaw unilaterally adopted by a corporate board of directors.<sup>30</sup> The defendant Delaware corporation adopted the bylaw "after the alleged wrongdoing took place."<sup>31</sup> When the stockholders filed an intra-corporate claim in the Northern District

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<sup>21</sup> Daines & Koumrian, *supra* note 19.

<sup>22</sup> O'Bryan, *supra* note 17.

<sup>23</sup> Daines & Koumrian, *supra* note 19.

<sup>24</sup> O'Bryan, *supra* note 17.

<sup>25</sup> *E.g.*, Gattuso & Adams, *supra* note 11, at 1. The Delaware Court of Chancery often uses dicta to guide corporate parties on unresolved legal issues. Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35, 54 (2013).

<sup>26</sup> *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) ("[I]f boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes.").

<sup>27</sup> *See* Grundfest & Savelle, *supra* note 1, at 370.

<sup>28</sup> *Id.* at 326.

<sup>29</sup> *Galaviz v. Berg*, 763 F. Supp. 2d 1170, 1172 (N.D. Cal. 2011).

<sup>30</sup> *Id.* at 1171.

<sup>31</sup> *Id.*

of California, the corporation moved to dismiss pursuant to the bylaw's forum designation.<sup>32</sup> The court denied the motion,<sup>33</sup> finding that, at least for the stockholders who purchased stock before the bylaw was adopted, "there [was] no element of mutual consent to the forum choice at all."<sup>34</sup> The court found the corporate board's unilateral adoption of the forum selection bylaw determinative.<sup>35</sup> While federal law generally favored enforcement of forum selection clauses, courts were simply "giv[ing] effect to a bilateral agreement between the parties" in those circumstances.<sup>36</sup> Because the bylaw at issue was unilaterally adopted by the board of directors without stockholders' consent, "there [was] no basis for the [c]ourt to disregard the plaintiffs' choice of forum."<sup>37</sup>

An earlier United States Supreme Court case, *Bremen v. Zapata Off-Shore Co.*,<sup>38</sup> provided relevant context for the *Galaviz* court's forum selection bylaw analysis.<sup>39</sup> Prior to the emergence of forum selection bylaws, the Court in *Bremen* established a test for the as-applied enforceability<sup>40</sup> of forum selection clauses.<sup>41</sup> The Court was presented with a forum selection clause included in a contract between two corporations.<sup>42</sup> While American courts had not historically favored forum selection clauses,<sup>43</sup> the Court found that a forum selection clause "made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason . . . should be honored by the parties and enforced by the courts."<sup>44</sup> To determine whether a compelling and countervailing reason existed, the Court established the following test: a forum selection clause is enforceable unless (1)

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1175.

<sup>34</sup> *Id.* at 1171.

<sup>35</sup> *See id.* at 1174.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

<sup>39</sup> *See Galaviz*, 763 F. Supp. 2d at 1172–73.

<sup>40</sup> For the purposes of this Note, "as-applied enforceability" concerns whether a court would enforce the bylaw in an as-applied challenge, based on the specific facts and circumstances surrounding the bylaw adoption and the intra-corporate claim. *See As-Applied Challenge*, BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>41</sup> *See Bremen*, 407 U.S. at 15.

<sup>42</sup> *Id.* at 2–3.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 12.

“enforcement would be unreasonable and unjust,”<sup>45</sup> (2) “the clause [is] invalid for such reasons as fraud or overreaching,”<sup>46</sup> or (3) “enforcement would contravene a strong public policy of the forum in which the suit is brought.”<sup>47</sup> Because the forum selection clause at issue was freely negotiated and any inconvenience from enforcement of the clause “was clearly foreseeable at the time of contracting,” the Court held that the clause was enforceable.<sup>48</sup> Forty years later, the *Bremen* doctrine would emerge as a key test for as-applied enforceability in forum selection bylaw challenges.<sup>49</sup>

### C. Oregon Contract Law

Like the United States Supreme Court in *Bremen*, Oregon state courts also generally enforce forum selection clauses.<sup>50</sup> In *Reeves v. Chem Industrial Co.*, the Oregon Supreme Court first recognized the enforceability of forum selection clauses.<sup>51</sup> Prior to *Reeves*, forum selection clauses were considered void under Oregon contract law because the stipulation of an exclusive forum violated Oregon public policy.<sup>52</sup> However, the national trend in courts’ treatment of forum selection clauses was changing.<sup>53</sup> The Oregon Supreme Court found the change persuasive and held that forum selection clauses are presumptively enforceable.<sup>54</sup> Nonetheless, the court still needed to reconcile its decision with existing Oregon precedents.<sup>55</sup> The court refused to overrule *State ex rel. Kahn v. Tazwell*, the leading Oregon precedent against forum selection clauses.<sup>56</sup> Instead, the court distinguished the clause in *Reeves* from the clause in *Tazwell*, reasoning that the *Tazwell* clause was held to be unenforceable because it was unfair and unreasonable.<sup>57</sup> In distinguishing *Reeves*

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<sup>45</sup> *Id.* at 15.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Hereinafter, this test will be referred to as the “*Bremen* doctrine.”

<sup>48</sup> *Id.* at 17–18.

<sup>49</sup> See, e.g., *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 959 (Del. Ch. 2013); *Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, 2014 WL 4147465, at \*3 (Or. Cir. Ct. Aug. 14, 2014).

<sup>50</sup> *Nike USA, Inc. v. Pro Sports Wear, Inc.*, 145 P.3d 321, 324 (Or. Ct. App. 2006).

<sup>51</sup> *Reeves v. Chem Indus. Co.*, 495 P.2d 729, 730 (Or. 1972).

<sup>52</sup> *Id.* (citing *State ex rel. Kahn v. Tazwell*, 266 P. 238, 243 (Or. 1928)).

<sup>53</sup> *Id.* at 730–31 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1969)).

<sup>54</sup> *Id.* at 732.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

from *Tazwell*, the court clarified the meaning of unfair or unreasonable: if the forum selection clause (1) is contained in a contract of adhesion and (2) “[is] the product of unequal bargaining power,” then the clause is unfair and unreasonable under Oregon contract law.<sup>58</sup> Forum selection clauses offered on a take-it-or-leave-it basis are included in this category and, consequently, are unenforceable under *Reeves*.<sup>59</sup>

Since *Reeves*, Oregon courts have elaborated on the meaning of “unfair or unreasonable” when enforcing forum selection clauses. In *Colonial Leasing Co. v. McIlroy*, the Oregon Court of Appeals held that a forum selection clause was enforceable, even though it was included in the boilerplate conditions provided on the back of a one-page equipment lease.<sup>60</sup> The front page contained the signature line and directed the lessee to consult the other side for additional terms and conditions.<sup>61</sup> The court enforced the clause, after determining it was not offered on a take-it-or-leave-it basis.<sup>62</sup> The court reasoned that the unfairness and unreasonableness determinations “must be made in the light of the evidence and the facts of particular cases.”<sup>63</sup> Highly relevant to the court was the opportunity the lessee had voluntarily foregone to negotiate the forum selection clause.<sup>64</sup>

Conversely, in *Nike USA, Inc. v. Pro Sports Wear, Inc.*, the Oregon Court of Appeals affirmed the unenforceability of a similarly placed forum selection clause when the opposing party never signed the document containing that clause.<sup>65</sup> The defendant had purchased goods “for which invoices containing an Oregon forum selection clause were sent,” but the defendant did not sign any of those invoices and the credit agreement that the defendant did sign did not contain a forum selection clause.<sup>66</sup> The court affirmed the unenforceability of the clause after it found the record supported the lower court’s finding of insufficient evidence to show the parties’ intent to include a forum

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<sup>58</sup> *Id.* (quoting in part Willis L. M. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187, 188 (1964)).

<sup>59</sup> *Id.*

<sup>60</sup> *Colonial Leasing Co. v. McIlroy*, 765 P.2d 219, 220 (Or. Ct. App. 1988).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 221.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

<sup>65</sup> *Nike USA, Inc. v. Pro Sports Wear, Inc.*, 145 P.3d 321, 325 (Or. Ct. App. 2006).

<sup>66</sup> *Id.* at 324.

selection clause by effectively modifying the credit agreement through the unsigned invoices.<sup>67</sup>

Together, *Reeves*, *Colonial Leasing*, and *Nike USA* represent the current approach to forum selection clauses in Oregon. Forum selection clauses are treated as prima facie valid,<sup>68</sup> but courts will not enforce a clause if the evidence proves the clause is unfair or unreasonable.<sup>69</sup> A take-it-or-leave-it provision offered in a contract of adhesion is presumptively unfair and unreasonable.<sup>70</sup> However, boilerplate conditions may be enforceable if an opportunity to negotiate the clause existed.<sup>71</sup> Based on these cases, Oregon contract law supports the enforcement of forum selection clauses, but only to the extent the clause is supported by evidence of an opportunity to negotiate the term or of mutual intent to add the term.

#### D. Delaware Corporate Law

To understand the impact of the *Chevron* decision, it is necessary to first comprehend the weight given to Delaware corporate law outside of Delaware. Under the internal affairs doctrine, courts outside of the state of incorporation must apply the substantive law of the state of incorporation to intra-corporate claims.<sup>72</sup> Because the forum selection bylaws in question only apply to intra-corporate disputes, bylaw challenges are subject to the internal affairs doctrine.<sup>73</sup> Therefore, Delaware law on bylaw validity and enforceability is binding upon other courts when deciding intra-corporate lawsuits involving Delaware corporations.<sup>74</sup>

Delaware statutory corporate law shapes the contractual framework between corporations and stockholders. The framework for Delaware corporations to adopt, modify, and delete bylaws is provided by title 8, section 109 of the Delaware General Corporate Law (DGCL).<sup>75</sup> Under DGCL section 109, bylaws may be “adopted, amended or

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<sup>67</sup> *Id.* at 324–25.

<sup>68</sup> *Id.* at 324.

<sup>69</sup> *Reeves v. Chem Indus. Co.*, 495 P.2d 729, 732 (Or. 1972).

<sup>70</sup> *Id.*

<sup>71</sup> *See Colonial Leasing Co. v. McIlroy*, 765 P.2d 219, 221 (Or. Ct. App. 1988).

<sup>72</sup> 36 AM. JUR. 2D *Foreign Corporations* § 72 (2015); *see also* Thomas, *supra* note 12, at 1926–27.

<sup>73</sup> *See Grundfest & Savelle*, *supra* note 1, at 330.

<sup>74</sup> *Cf.* Thomas, *supra* note 12, at 1927 (discussing multijurisdictional litigation of M&A deals under the internal affairs doctrine).

<sup>75</sup> DEL. CODE ANN. tit. 8, § 109 (2014).

repealed” by a corporation’s board of directors prior to the sale of stock.<sup>76</sup> Once stock has been sold and payment received, however, that power shifts to voting stockholders.<sup>77</sup> Nonetheless, section 109(a) provides an important exception:

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.<sup>78</sup>

Therefore, Delaware corporations may confer upon their boards of directors the power to unilaterally adopt bylaws, but voting stockholders still retain the concurrent power to amend or repeal those bylaws.<sup>79</sup> The scope of these bylaws extends to “the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.”<sup>80</sup> DGCL section 109 is implicated heavily in the validity of forum selection bylaws because of the power and subject matter at issue. It also plays a role in determining whether there is mutual assent upon which to enforce such clauses.<sup>81</sup>

Delaware corporate law also recognizes situations where bylaws unilaterally adopted under section 109 are unenforceable. In *Schnell v. Chris-Craft Industries, Inc.*, the Delaware Supreme Court provided a limit to the enforcement of unilaterally adopted bylaws when enacted through “fraud or inequitable conduct.”<sup>82</sup> At issue in *Schnell* was the directors’ decision to hold the annual stockholders’ meeting thirty-four days earlier than the date set by the bylaws.<sup>83</sup> The change was made through a bylaw amendment executed unilaterally by the directors less than two months prior to the new stockholders’ meeting date.<sup>84</sup> The amendment was allegedly a response to stockholders’

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<sup>76</sup> *Id.* § 109(a).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* § 109(b).

<sup>81</sup> See *infra* Part II.A for discussion of the facial enforceability of forum selection bylaws.

<sup>82</sup> *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971).

<sup>83</sup> *Id.* at 438.

<sup>84</sup> *Id.* at 438–39 (quoting the lower court’s decision, 285 A.2d 430, 434 (Del. Ch. 1971)).

express hostility toward the directors.<sup>85</sup> The court found that the board “ha[d] attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and . . . for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights.”<sup>86</sup> Consequently, the court held that the use of Delaware law for such “inequitable purposes, contrary to [the] established principles of corporate democracy . . . may not be permitted to stand.”<sup>87</sup> While the change was within the scope of the directors’ powers to amend bylaws under the DGCL, the court clarified that “inequitable action does not become permissible simply because it is legally possible.”<sup>88</sup> However, the court was careful to note that, absent evidence of “fraud or inequitable conduct,” the bylaw amendment would have been enforced.<sup>89</sup>

## II

### THE *CHEVRON* DECISION

Until recently, only one court had considered the enforceability of a unilaterally adopted forum selection bylaw; that court refused to enforce the bylaw.<sup>90</sup> In 2013, however, the Delaware Court of Chancery rendered the first decision enforcing a unilaterally adopted forum selection bylaw.<sup>91</sup> This decision has profoundly impacted other jurisdictions, setting a binding precedent that has shifted the tide on judicial treatment of these bylaws.<sup>92</sup>

#### *A. The Delaware Court of Chancery’s Decision*

The case before the court in *Chevron* involved two corporate boards of directors that unilaterally passed forum selection bylaws.<sup>93</sup> Both were empowered to adopt bylaws by their corporations’ respective certificates of incorporation, pursuant to DGCL section 109(a).<sup>94</sup> The boards argued that they adopted the bylaws “to address

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<sup>85</sup> *See id.* (quoting the lower court’s decision, 285 A.2d at 434).

<sup>86</sup> *Id.* at 439.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *See supra* Part I.B for discussion of the *Galaviz* decision.

<sup>91</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013).

<sup>92</sup> *See infra* Part II.C.

<sup>93</sup> *Chevron*, 73 A.3d at 937.

<sup>94</sup> *Id.*

what they perceive[d] to be the inefficient costs of defending against the same claim in multiple courts at one time.”<sup>95</sup> Stockholders sued, alleging, among other claims, that the forum selection bylaws were contractually invalid because the corporations’ directors unilaterally adopted them.<sup>96</sup> Therefore, the stockholders contended, the forum selection bylaws were unenforceable.<sup>97</sup> In response, the corporations moved for a judgment on the pleadings.<sup>98</sup> The court granted the motion,<sup>99</sup> holding the bylaws were both valid and enforceable.<sup>100</sup>

The court first considered the validity of the bylaws under Delaware corporate law.<sup>101</sup> Beginning with an explanation of the flexible design of stockholder contracts under the DGCL, the court emphasized the corporations’ certificates of incorporation as the source of the power to add the bylaw.<sup>102</sup> Focusing on DGCL section 109, the court explained that “[t]he DGCL allows the corporation, through the certificate of incorporation, to grant the directors the power to adopt and amend the bylaws unilaterally.”<sup>103</sup> Furthermore, the court found the forum selection bylaws’ subject matter was within the scope allowed under DGCL section 109(b), regulating “where stockholders can exercise their right to bring certain internal affairs claims” and “the conduct of the corporation by channeling internal affairs cases into the courts of the state of incorporation.”<sup>104</sup> Therefore, the court concluded that the bylaws at issue were within the scope of section 109 and statutorily valid under the DGCL.<sup>105</sup>

The court next considered the facial enforceability<sup>106</sup> of the unilaterally adopted forum selection bylaws as contract terms.<sup>107</sup> The court began by noting that the Delaware Supreme Court had

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<sup>95</sup> *Id.* at 943.

<sup>96</sup> *Id.* at 938.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 941.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 939.

<sup>101</sup> *Id.* at 950.

<sup>102</sup> *Id.* at 939.

<sup>103</sup> *Id.* (citing DEL. CODE ANN. tit. 8, § 109(a) (2012)).

<sup>104</sup> *Id.* at 951.

<sup>105</sup> *Id.* at 954.

<sup>106</sup> For the purposes of this Note, “facial enforceability” concerns whether a court would enforce the bylaw in a facial challenge without consideration of the specific facts and circumstances surrounding the bylaw adoption and the intra-corporate claim. *See Facial Challenge*, BLACK’S LAW DICTIONARY, *supra* note 40.

<sup>107</sup> *Chevron*, 73 A.3d at 954.

consistently “made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders.”<sup>108</sup> Furthermore, the court found the stockholders had assented to the unilateral adoption of binding bylaws and that they were on notice that the directors may take such action: “[T]he . . . stockholders have assented to a contractual framework established by the DGCL and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards. Under that clear contractual framework, the stockholders assent to not having to assent to board-adopted bylaws.”<sup>109</sup>

Therefore, the court held that the forum selection bylaws were presumptively enforceable, like all other contractual forum selection clauses.<sup>110</sup> After finding that the bylaws in question were facially enforceable under Delaware law, the court noted two options available to stockholders.<sup>111</sup> First, stockholders still had the right to modify or repeal the bylaws.<sup>112</sup> Second, stockholders could sue in their preferred forum and challenge the as-applied enforceability of the bylaws under the doctrines established in *Bremen* and *Schnell*.<sup>113</sup>

The court concluded by addressing the as-applied enforceability of forum selection bylaws under the *Bremen* and *Schnell* doctrines.<sup>114</sup> The court explained that if stockholders filed in their preferred forum and provided sufficient proof that the forum selection bylaw was unreasonable under *Bremen* or was adopted for improper purposes under *Schnell*, then the other court could refuse to enforce the bylaw.<sup>115</sup> The plaintiffs in *Chevron*, however, sued in the selected forum and only presented hypotheticals for why enforcement of the bylaws would be unreasonable.<sup>116</sup> The court was not persuaded by these arguments, finding them more similar to a solicitation of advisory opinions than a legitimate as-applied challenge.<sup>117</sup> As a

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<sup>108</sup> *Id.* at 955.

<sup>109</sup> *Id.* at 956 (footnote omitted). The court explained that it reached a different conclusion than the court in *Galaviz* because the *Galaviz* decision rested “on a failure to appreciate the contractual framework established by the DGCL for Delaware corporations and their stockholders.” *Id.*

<sup>110</sup> *Id.* at 957.

<sup>111</sup> *Id.* at 958.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 959.

result, the court upheld the bylaws as enforceable provisions.<sup>118</sup> In its closing remarks, the court reiterated that if the actual circumstances demonstrate that a bylaw “is operating in a situationally unreasonable or unlawful manner,” the enforceability of that bylaw might be successfully challenged.<sup>119</sup>

### *B. The Aftermath*

While the stockholders initially appealed the Delaware Court of Chancery’s *Chevron* decision to the Delaware Supreme Court, they withdrew their appeal four months later.<sup>120</sup> At the time, it was widely expected that the Delaware Supreme Court would affirm the decision.<sup>121</sup> Less than three months after the withdrawal, the judge who presided over *Chevron*, then-Chancellor Leo E. Strine Jr., was nominated for Chief Justice of the Delaware Supreme Court.<sup>122</sup> He was confirmed unanimously by the end of January 2014.<sup>123</sup> Chief Justice Strine has positively cited *Chevron* in a subsequent Delaware Supreme Court decision,<sup>124</sup> solidifying *Chevron*’s status as stable precedent in Delaware. The stability of *Chevron* was reaffirmed and further strengthened in June 2015, when the Delaware General Assembly codified *Chevron* in DGCL section 115.<sup>125</sup> DGCL section 115 provides:

The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in [Delaware], and no provision of the

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<sup>118</sup> *Id.* at 963.

<sup>119</sup> *Id.* For the purposes of this Note, “as-applied” and “situationally” are used interchangeably.

<sup>120</sup> Theodore N. Mirvis, *Surrender in the Forum Selection Bylaw Battle*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 28, 2013), <http://corpgov.law.harvard.edu/2013/10/28/surrender-in-the-forum-selection-by-law-battle/>.

<sup>121</sup> *Id.*; Anne M. Tucker, *The Short Road Home to Delaware: Boilermakers Local 154 Retirement Fund v. Chevron*, 7 J. BUS. ENTREPRENEURSHIP & L. 467, 467 (2014).

<sup>122</sup> Liz Hoffman, *Leo Strine Nominated to Head Delaware Supreme Court*, WALL ST. J. (Jan. 8, 2014, 7:34 PM), <http://www.wsj.com/articles/SB10001424052702304347904579308432948927494>.

<sup>123</sup> Tom Hals, *Leo Strine Confirmed as Chief Justice of Delaware's Supreme Court*, REUTERS (Del.), (Jan. 29, 2014 7:05 PM), <http://www.reuters.com/article/2014/01/30/delaware-court-strine-idUSL2N0L32MZ20140130>.

<sup>124</sup> See *United Technologies Corp. v. Treppel*, 109 A.3d 553, 561 n.41 (Del. 2014).

<sup>125</sup> See S.B. 75, § 5, 148th Gen. Assemb., Reg. Sess. (Del. 2015).

certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of [Delaware].<sup>126</sup>

As a result of the well-established validity and enforceability of forum selection bylaws under Delaware law, commentators have recommended corporations consider adopting these bylaws.<sup>127</sup> A substantial number of Delaware corporations have done so post-*Chevron*.<sup>128</sup> However, while Delaware law may be settled on the enforceability of forum selection bylaws, the efficacy of the *Chevron* decision in promoting forum selection bylaw enforcement and limiting multi-forum intra-corporate litigation is constrained to the extent that “judges in states other than Delaware enforce such bylaws.”<sup>129</sup> The *TriQuint* decision presents a clear example of this constraint.

### C. Other Courts' Treatment of the Chevron Decision

After the *Chevron* decision, all courts that have faced forum selection bylaw challenges, except *TriQuint*, have upheld the bylaws as enforceable,<sup>130</sup> relying on the *Chevron* reasoning.<sup>131</sup> The discussions of the *Chevron* reasoning in two 2014 decisions, *Groen* and *North*, are particularly instructive.

In *Groen*, a California superior court considered unilaterally adopted forum selection bylaws that made Delaware the “sole and exclusive forum” for derivative lawsuits against the directors.<sup>132</sup> The defendant-corporations relied primarily on the *Chevron* decision to support the enforceability of the bylaws, while the stockholders relied on the pre-*Chevron* precedent, *Galaviz*.<sup>133</sup> Pursuant to the internal affairs doctrine, the court applied the *Chevron* court’s reasoning

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<sup>126</sup> DEL. CODE ANN. tit. 8, § 115 (2015).

<sup>127</sup> E.g., Mirvis, *supra* note 120.

<sup>128</sup> Glen T. Schleyer et al., *California Superior Court Enforces Exclusive Forum Bylaw*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 12, 2014), <http://corpgov.law.harvard.edu/2014/06/12/california-superior-court-enforces-exclusive-forum-bylaw/>.

<sup>129</sup> Andrew J. Noreuil, *Will Recent Delaware Court Decisions Curb Excessive M&A Litigation?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 18, 2013), <http://corpgov.law.harvard.edu/2013/09/18/will-recent-delaware-court-decisions-curb-excessive-ma-litigation/>; see also Gattuso & Adams, *supra* note 11, at 3.

<sup>130</sup> See *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 242 n.54 (Del. Ch. 2014); O’Bryan, *supra* note 17; Schleyer et al., *supra* note 128.

<sup>131</sup> E.g., *Hemg Inc. v. Aspen Univ.*, No. 650457/13, 2013 WL 5958388, at \*2–3 (N.Y. Sup. Ct. Nov. 4, 2013); see also O’Bryan, *supra* note 17; Schleyer et al., *supra* note 128.

<sup>132</sup> *Groen v. Safeway Inc.*, No. RG14716641, 2014 WL 3405752, at \*1 (Cal. Super. Ct. May 14, 2014).

<sup>133</sup> *Id.* at \*2.

regarding both Delaware's statutory corporate framework and "contractual principles at play."<sup>134</sup> The court held that the bylaws were valid and facially enforceable after finding the stockholders had not provided sufficient evidence for an as-applied enforceability challenge.<sup>135</sup> The stockholders failed to prove the unreasonableness of enforcing the forum selection bylaws in the situation at hand, and "[t]heir argument that the forum selection bylaws were adopted after wrongdoing had already occurred [was] not supported by the record."<sup>136</sup> Consequently, the court granted the corporations' motion to dismiss.<sup>137</sup>

Likewise, a United States district court upheld a forum selection bylaw the same year in *North*, again relying on the *Chevron* decision.<sup>138</sup> The corporation's directors added a forum selection bylaw three years after the plaintiff-stockholders had originally purchased the stock.<sup>139</sup> After considering *Galaviz* and *Chevron*, the court determined that *Chevron* was the "most persuasive" authority for the bylaw at issue.<sup>140</sup> The court found that the stockholders had "consented to the Delaware corporate framework by buying shares in a Delaware corporation and agreeing to the certificate of incorporation that allowed the board to unilaterally adopt bylaws."<sup>141</sup> Therefore, the bylaw was facially enforceable.<sup>142</sup> Upon consideration of the as-applied enforceability of the bylaw, the court concluded that the bylaw was not unreasonable "simply because it was adopted after the purported wrongdoing."<sup>143</sup> Rather, the court reasoned that a corporation may enact a reasonable and fair forum selection bylaw, even after alleged wrongdoing, for legitimate efficiency and consistency considerations.<sup>144</sup> Furthermore, because the stockholders knew of the unilateral adoption provision in the certificate of

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *North v. McNamara*, 47 F. Supp. 3d 635, 642, 647 (S.D. Ohio 2014).

<sup>139</sup> *Id.* at 639.

<sup>140</sup> *Id.* at 642. Further discussion of why the *North* court treated *Chevron* as persuasive authority, rather than binding authority under the internal affairs doctrine, is outside the scope of this Note.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 642–43.

<sup>143</sup> *Id.* at 644.

<sup>144</sup> *Id.*

incorporation, the court concluded that enforcement of the bylaw would be neither unreasonable nor unjust.<sup>145</sup>

### III

#### THE *TRIQUINT* DECISION

In 2014, an Oregon circuit court refused to enforce a unilaterally adopted forum selection bylaw after holding that the bylaw was unenforceable as-applied.<sup>146</sup> This court was the first to refuse to enforce a forum selection bylaw post-*Chevron*, and it is the only court to have done so to date.<sup>147</sup>

##### A. *The Facts and Holding*

The case involved a group of stockholders who were unhappy with TriQuint's board of directors.<sup>148</sup> They believed TriQuint was undervalued because of the board's underperformance.<sup>149</sup> The stockholders publicly announced their plan to oust the directors and delivered a letter to the board on December 2, 2013, expressing the same intent.<sup>150</sup> Soon thereafter, the directors began negotiating a merger with another corporation.<sup>151</sup> At a board meeting on February 22, 2014, the directors approved the merger and recommended it to their stockholders.<sup>152</sup> At the same meeting, the directors unilaterally adopted a forum selection bylaw,<sup>153</sup> designating Delaware, TriQuint's state of incorporation, as the forum for resolution of all intra-corporate claims.<sup>154</sup> TriQuint publicly announced the merger agreement two days later.<sup>155</sup>

Spurred by the merger agreement, the stockholders filed multiple lawsuits against the directors in two jurisdictions, Oregon<sup>156</sup> and

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<sup>145</sup> *Id.*

<sup>146</sup> *Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, 2014 WL 4147465, at \*5 (Or. Cir. Ct. Aug. 14, 2014).

<sup>147</sup> Frankel, *supra* note 2, at \*1.

<sup>148</sup> *TriQuint*, 2014 WL 4147465, at \*4.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at \*5.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at \*4.

<sup>155</sup> *Id.* at \*5.

<sup>156</sup> *Id.* The Oregon suits were filed on February 28, 2014, and March 13, 2014. *Id.* All references to the *TriQuint* decision in this Note refer to the first suit filed in Oregon, unless otherwise designated.

Delaware.<sup>157</sup> The allegations focused on two facets of the merger: the appointment of TriQuint's current directors to the new corporation's board of directors upon consummation of the merger and the stockholders' relative power over the new corporation through a "merger of equals."<sup>158</sup> The stockholders alleged "that the proposed agreement was an effort by the board of directors to keep their lucrative positions as board members, and presumably shield themselves from ouster by diluting original stockholder voting power."<sup>159</sup> In response to the claims, TriQuint filed several motions in the Oregon circuit court, including a motion to dismiss for lack of subject matter jurisdiction.<sup>160</sup>

TriQuint's motion to dismiss for lack of subject matter jurisdiction was based on the forum selection bylaw passed during the February 2014 board meeting.<sup>161</sup> Because the bylaw obligated the parties to litigate in a different forum, TriQuint argued, Oregon courts did not have subject matter jurisdiction to hear the stockholders' claims.<sup>162</sup> In response, the plaintiff-stockholders asserted that the forum selection bylaw was unenforceable because it violated Oregon contract law.<sup>163</sup> Therefore, according to the stockholders, the bylaw did not preclude the court's subject matter jurisdiction over the intra-corporate claim.<sup>164</sup> The court chose to first address the enforceability of the forum selection bylaw because the court was not required to dismiss if the bylaw was unenforceable for any reason.<sup>165</sup> After holding the bylaw was unenforceable, the court denied the corporation's motion to dismiss for lack of subject matter jurisdiction.<sup>166</sup>

### *B. The Reasoning*

The court began its analysis of the bylaw by considering *Chevron's* discussion of the statutory validity and facial enforceability of forum

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<sup>157</sup> *Id.* The Delaware suits were filed on March 5, 2014, March 7, 2014, and March 10, 2014. *Id.*

<sup>158</sup> *Id.* at \*4. The merger of equals resulted in a fifty percent decrease in TriQuint stockholders' relative control. *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at \*1.

<sup>161</sup> *See id.* at \*1 n.1.

<sup>162</sup> *See id.*

<sup>163</sup> *Id.* at \*1.

<sup>164</sup> *See id.*

<sup>165</sup> *Id.* at \*1 n.1.

<sup>166</sup> *Id.* at \*5.

selection bylaws.<sup>167</sup> The *TriQuint* court applied *Chevron*'s reasoning, confirming that unilaterally adopted forum selection bylaws are valid under Delaware statutory corporate law and Delaware contract law.<sup>168</sup> However, the *TriQuint* court also emphasized the scope of the *Chevron* decision, focusing on the limitation of the decision to the validity and facial enforceability of forum selection bylaws: "*Chevron* addressed a factual scenario where, absent any other allegations of wrongdoing, the board of directors of a corporation unilaterally adopted a forum-selection bylaw . . . . This, on its own and as a matter of law, is insufficient to warrant a contract-formation problem under Delaware law."<sup>169</sup> The *TriQuint* court drew attention to *Chevron*'s discussion of the plaintiff-stockholders' failure to provide sufficient facts for an as-applied challenge and to *Chevron*'s instruction that as-applied challenges should be evaluated using the *Bremen* doctrine.<sup>170</sup>

In evaluating the as-applied enforceability of the bylaw, the *TriQuint* court looked to *Galaviz* and *Reeves* to reinforce the applicability of the *Bremen* doctrine to as-applied enforceability challenges in Oregon courts.<sup>171</sup> The court quoted *Galaviz*'s enunciation of the *Bremen* doctrine to show the Ninth Circuit's persuasive use of the precedent.<sup>172</sup> Furthermore, the court noted that under *Reeves* and other Oregon precedents, forum selection provisions are generally given effect under Oregon contract law, unless they are unfair or unreasonable.<sup>173</sup> Because Oregon, unlike Delaware, "ha[d] not expressly adopted the *Bremen* doctrine,"<sup>174</sup> the court pieced together the three prongs of *Bremen*<sup>175</sup> by finding support for the first and second prong in the Restatement (Second) of Conflict of Laws and support for the third prong in other persuasive

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<sup>167</sup> See *id.* at \*2.

<sup>168</sup> *Id.* at \*2, \*5. "As *Chevron* holds, there is nothing inherently wrong with unilaterally enacting forum selection bylaws." *Id.* at \*5.

<sup>169</sup> *Id.* at \*2.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at \*3.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (citing *Reeves v. Chem Indus. Co.*, 495 P.2d 729, 730 (Or. 1972)).

<sup>174</sup> *Id.* at \*3 n.2 (italization added).

<sup>175</sup> Under the *Bremen* doctrine, a forum selection clause is enforceable unless (1) "enforcement would be unreasonable and unjust," (2) "the clause [is] invalid for such reasons as fraud or overreaching," or (3) "enforcement would contravene a strong public policy of the forum in which the suit is brought." *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). For further discussion of *Bremen*, see *supra* Part I.B.

authority.<sup>176</sup> The court then disposed of the first and second *Bremen* prongs, which were not at issue given the circumstances, focusing the remainder of its evaluation on the third prong.<sup>177</sup>

The court struck down TriQuint's forum selection bylaw after finding enforcement of the bylaw would violate Oregon's public policy interests and, consequently, would violate the *Bremen* doctrine's third prong.<sup>178</sup> The court found that, while Oregon also statutorily affords corporate boards the right to unilaterally amend corporate bylaws,<sup>179</sup> enforcement of the forum selection bylaw in question "would be unfair and unjust" and "would violate the public policy supporting contract formation."<sup>180</sup> The court based its assessment in part on a Delaware precedent, *Schnell*, which the *TriQuint* court found to be "quite informative."<sup>181</sup>

According to the *TriQuint* court, "*Schnell* suggests that if it is alleged that a board of directors is attempting to infringe upon the [stockholder's] right to amend or repeal unilaterally enacted bylaws, then that same action infringes upon the public policy of both Oregon and Delaware."<sup>182</sup> The timing of the bylaw adoption was critical for the court's analysis: "Enforcement of the bylaw would not be an issue had the board, at the very least, adopted it prior to any of its alleged wrongdoing, and with ample time for the [stockholders] to accept or reject the change."<sup>183</sup> Therefore, without time for the stockholders to amend or repeal the bylaw, enforcement would be contrary to "the flexible nature . . . a Delaware [stockholder] contract necessarily allows."<sup>184</sup> Consequently, the court held that the forum selection bylaw was unenforceable as-applied and denied TriQuint's motion to dismiss for lack of subject matter jurisdiction.<sup>185</sup>

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<sup>176</sup> *TriQuint*, 2014 WL 4147465, at \*3. The persuasive authorities cited to support the *Bremen* doctrine's third prong were *Murphy v. Schneider National, Inc.*, 362 F.3d 1133 (9th Cir. 2003) and *Colonial Leasing Co. of New England, Inc. v. Best*, 552 F. Supp. 605 (D. Or. 1982). *Id.*

<sup>177</sup> *Id.* at \*4.

<sup>178</sup> *Id.* at \*5.

<sup>179</sup> *Id.* at \*4.

<sup>180</sup> *Id.* at \*5.

<sup>181</sup> *Id.* at \*4.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at \*5.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

### C. *The Aftermath*

After the circuit court's decision, TriQuint petitioned the Oregon Supreme Court for a writ of mandamus compelling enforcement of the forum selection bylaw; the supreme court allowed consideration of the writ.<sup>186</sup> The parties submitted opening and answering briefs in January and February 2015,<sup>187</sup> the Oregon Trial Lawyers Association submitted an amicus curiae brief opposing the writ in March 2015,<sup>188</sup> and oral argument was held on June 16, 2015.<sup>189</sup> As of the date of submission of this Note to the editors of *Oregon Law Review*, the Oregon Supreme Court had not yet rendered a decision on the writ.<sup>190</sup>

## IV

### CRITIQUE OF THE *TRIQUINT* DECISION

*TriQuint* was incorrectly decided. The circuit court misapplied the relevant forum selection bylaw precedents when it refused to enforce TriQuint's bylaw. The circuit court also should have enforced TriQuint's forum selection bylaw for public policy reasons. Therefore, the Oregon Supreme Court should grant TriQuint's writ of mandamus, reversing the circuit court's decision. Further, other jurisdictions should disregard the circuit court's *TriQuint* decision when evaluating forum selection bylaws.

#### A. *Precedent Supports Forum Selection Bylaw Enforcement*

The circuit court in *TriQuint* misapplied *Chevron* and related precedents. Comparing *TriQuint*'s reasoning to that of other courts' forum selection bylaw cases illuminates the *TriQuint* court's departures. Oregon contract law provides a possible explanation for the *TriQuint* reasoning.

One notable difference between *TriQuint* and other forum selection bylaw cases is *TriQuint*'s treatment of *Galaviz*. The *Groen* and

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<sup>186</sup> Roberts v. TriQuint Semiconductor, Inc., 356 Or. 576 (2014) (No. S062642) (disposition on mandamus proceedings).

<sup>187</sup> Defendant-Relators' Opening Brief on the Merits & Appendix, Roberts v. TriQuint Semiconductor, Inc., No. S062642 (Or. filed Jan. 14, 2015); Plaintiffs-Adverse Parties' Answering Brief in Opposition to Petition for Writ of Mandamus, Roberts v. TriQuint Semiconductor, Inc., No. S062642 (Or. filed Feb. 11, 2015).

<sup>188</sup> Oregon Trial Lawyers Association's and Public Justice's Amici Curiae Brief on the Merits, Roberts v. TriQuint Semiconductor, Inc., No. S062642 (Or. filed Mar. 4, 2015).

<sup>189</sup> *Supreme Court Calendar*, OR. JUDICIAL DEP'T, <http://www.ojd.state.or.us/sclist> (last visited May 25, 2015).

<sup>190</sup> This Note was submitted to the editors of *Oregon Law Review* on June 30, 2015.

*TriQuint* courts took different positions on the continued value of *Galaviz*.<sup>191</sup> *Groen* included only a short mention of *Galaviz*, dismissing its applicability and importance to the case at hand: “Plaintiffs rely primarily on *Galaviz v. Berg*, a case that was decided before [*Chevron*] and that involved forum selection bylaws that were adopted after the majority of alleged wrongdoing had already occurred.”<sup>192</sup> In this statement, the *Groen* court signals the inapplicability of *Galaviz* post-*Chevron*. In contrast, the *TriQuint* court treated *Galaviz* as good precedent, only limiting its applicability because *Galaviz* was decided solely on contract principles, without consideration of Delaware corporate law.<sup>193</sup> This difference, while subtle, is telling in the greater context. Because *Galaviz* is the only precedent where a forum selection bylaw has been found to be unenforceable other than *TriQuint*,<sup>194</sup> it provides some support for the outcome reached in *TriQuint*. Without *Galaviz*, *TriQuint* is the sole outlier where other courts have unanimously enforced forum selection bylaws.

Another area where *TriQuint* departed from other decisions is the role of timing. In both *TriQuint* and *North*, the courts addressed forum selection bylaws passed after the alleged wrongdoing.<sup>195</sup> The *TriQuint* court weighed the timing of bylaw adoption heavily in its evaluation because the close temporal proximity of the bylaw adoption and the alleged wrongdoing disrupted “the flexible nature of a Delaware [stockholder] contract.”<sup>196</sup> Further, enforcement of such a term “would allow a potential defendant anticipating imminent litigation to . . . unilaterally, restrict the plaintiff’s choice of forum.”<sup>197</sup> In contrast, the *North* court held that a forum selection bylaw “does not become unenforceable simply because it was adopted after the purported wrongdoing.”<sup>198</sup> Rather, the *North* court

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<sup>191</sup> *Groen v. Safeway Inc.*, No. RG14716641, 2014 WL 3405752, at \*2 (Cal. Super. Ct. May 14, 2014); *Roberts v. TriQuint Semiconductor, Inc.*, No. 1402-02441, 2014 WL 4147465, at \*1, \*3 (Or. Cir. Ct. Aug. 14, 2014).

<sup>192</sup> *Groen*, 2014 WL 3405752, at \*2 (internal citation omitted).

<sup>193</sup> See *TriQuint*, 2014 WL 4147465, at \*1.

<sup>194</sup> See *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 242 n.54 (Del. Ch. 2014).

<sup>195</sup> *North v. McNamara*, 47 F. Supp. 3d 635, 644 (S.D. Ohio 2014); *TriQuint*, 2014 WL 4147465, at \*5.

<sup>196</sup> *TriQuint*, 2014 WL 4147465, at \*5.

<sup>197</sup> *Id.*

<sup>198</sup> *North*, 47 F. Supp. 3d at 644.

offered numerous legitimate reasons for adopting a forum selection bylaw concurrent with or after the alleged misconduct:

[A] corporation may enact a forum-selection bylaw . . . for the purpose of consolidating litigation . . . 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 [stockholders] to have the issues resolved efficiently and consistently.<sup>199</sup>

The comparison of these decisions highlights the *TriQuint* court's focus on the opportunity of the stockholders to repeal the bylaw, rather than the motivation behind the bylaw adoption, in its as-applied enforceability evaluation.<sup>200</sup>

The *TriQuint* court's focus on the stockholders' opportunity to repeal speaks to one of the main issues where the *TriQuint* court diverged from the majority of courts: mutual assent. The court found that the close timing between the board's adoption of the bylaw and the alleged wrongdoing denied the stockholders an opportunity to repeal the bylaw and violated Oregon's public policy in favor of mutual assent in contract formation.<sup>201</sup> A likely source of this emphasis on mutual assent is Oregon's strong presumption that take-it-or-leave-it provisions are unfair and unreasonable.<sup>202</sup> However, this interpretation is contrary to Delaware's interpretation of the mutual assent involved in Delaware stockholder contracts.<sup>203</sup> Under Delaware law, the stockholders assent to the terms of the certificate of incorporation, which authorize the directors to unilaterally adopt forum selection bylaws.<sup>204</sup> An inherent risk a stockholder accepts when forming that contract is that the directors will unilaterally adopt bylaws at inopportune or inconvenient times. This timing makes the bylaw unenforceable only if it is sufficiently egregious to render enforcement of the bylaw unreasonable or unjust, not solely because of when it occurred.<sup>205</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> See *TriQuint*, 2014 WL 4147465, at \*5.

<sup>201</sup> *Id.*

<sup>202</sup> See, e.g., *Reeves v. Chem Indus. Co.*, 495 P.2d 729, 732 (Or. 1972).

<sup>203</sup> *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 242 n.54 (Del. Ch. 2014) (“[T]he *Galaviz* and *TriQuint* decisions, to the extent they purport to apply Delaware law, are based on a misapprehension of Delaware law regarding the facial validity and as-applied analysis of forum selection bylaws.”).

<sup>204</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013); see also *North*, 47 F. Supp. 3d at 642.

<sup>205</sup> See *North*, 47 F. Supp. 3d at 644.

Additionally, the *TriQuint* court's use of precedents in its as-applied enforceability evaluation and its finding that enforcement would violate Oregon public policy are in conflict with the internal affairs doctrine. While the *TriQuint* court appeared to have accepted the validity and facial enforceability of the bylaw pursuant to DGCL section 109 and *Chevron*, the court relied on Ninth Circuit and Oregon precedents in part of its as-applied evaluation.<sup>206</sup> However, under the internal affairs doctrine, Delaware law is the applicable law for the as-applied challenge.<sup>207</sup> Only one Delaware precedent, *Schnell*, was cited in *TriQuint's* as-applied evaluation,<sup>208</sup> and it is unclear whether the *TriQuint* court treated *Schnell* as binding authority or as merely persuasive authority. Furthermore, the court's conclusion that enforcement would violate Oregon's public policy interest in contract formation<sup>209</sup> is at odds with the court's earlier application of *Chevron* in its facial enforceability finding. If unilaterally adopted forum selection bylaws are valid and facially enforceable under DGCL section 109 and *Chevron*, then enforcement of the bylaws should not violate a public policy interest in favor of contract formation absent other evidence of unreasonableness or wrongdoing. The *TriQuint* court inserts Oregon contract law into its as-applied enforceability evaluation where, under the internal affairs doctrine, contrary Delaware law is binding.

*B. Policy Considerations Support Forum Selection Bylaw  
Enforcement*

*TriQuint's* forum selection bylaw also should have been enforced because of public policy considerations. Forum selection bylaws serve the values of consistency across judgments, efficiency in litigation, and use of the judicial expertise provided by the courts of the state of incorporation. While some policy considerations weigh against enforcement, such as stockholders' rights to select the forum and the potential for abusive behavior by the directors, the policy considerations ultimately favor enforcement because stockholders are harmed by duplicative lawsuits and must absorb the costs of expensive multi-forum litigation.

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<sup>206</sup> See *TriQuint*, 2014 WL 4147465, at \*3.

<sup>207</sup> See *supra* Part I.D for discussion of the internal affairs doctrine.

<sup>208</sup> See *TriQuint*, 2014 WL 4147465, at \*4.

<sup>209</sup> *Id.* at \*5.

Enforcing forum selection bylaws enhances consistency in resolution of intra-corporate disputes. Multi-forum litigation has increased the risk that corporations will be subject to multiple, potentially inconsistent, judgments from different courts.<sup>210</sup> One of the main benefits of forum selection bylaws is they eliminate this risk by providing corporations with a basis to move to dismiss actions in alternative fora, consolidating litigation in the selected forum.<sup>211</sup> Consolidation allows identical or similar claims to be reviewed by the same court, resulting in greater consistency in the resolution of claims and in the outcomes for plaintiff-stockholders.<sup>212</sup>

Forum selection bylaws also increase efficiency in litigating intra-corporate disputes. Adjudicating identical or similar claims in multiple jurisdictions is costly, and those costs are ultimately borne by the stockholders.<sup>213</sup> Consolidating claims in the selected forum allows for efficient litigation, resolving all identical or similar claims arising out of the same facts at the same time.<sup>214</sup> Furthermore, the forum selected in many bylaws, Delaware,<sup>215</sup> resolves intra-corporate disputes based on the DGCL and Delaware precedents more efficiently.<sup>216</sup> Refusal to enforce a forum selection bylaw in one court decreases the efficiency gains from enforcement in other courts because the enforceability of these bylaws becomes less settled, resulting in continued litigation expenditures to determine enforceability.<sup>217</sup> Therefore, consistent enforcement across jurisdictions is necessary to reap the full efficiency benefits of forum selection bylaws.

Finally, forum selection bylaws leverage the judicial expertise available in resolving intra-corporate disputes, particularly in Delaware. Pursuant to the internal affairs doctrine, the law of the state

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<sup>210</sup> Victor I. Lewkow, *Should Your Company Adopt a Forum Selection Bylaw?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 2, 2013), <http://corpgov.law.harvard.edu/2013/07/02/should-your-company-adopt-a-forum-selection-bylaw/>.

<sup>211</sup> Thomas, *supra* note 12, at 1951; Lewkow, *supra* note 210.

<sup>212</sup> Thomas, *supra* note 12, at 1951.

<sup>213</sup> Daines & Koumrian, *supra* note 19.

<sup>214</sup> See Richard J. Sandler, *Exclusive Forum Provisions: Is Now the Time to Act?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 7, 2013), <http://corpgov.law.harvard.edu/2013/11/07/exclusive-forum-provisions-is-now-the-time-to-act/>.

<sup>215</sup> Grundfest & Savelle, *supra* note 1, at 326. Because many corporations choose to incorporate in Delaware and because the forum selected in most bylaws is the state of incorporation, Part IV.B assumes Delaware will be the selected forum.

<sup>216</sup> See *id.* at 354.

<sup>217</sup> *Id.* at 358–59.

of incorporation governs intra-corporate disputes.<sup>218</sup> For Delaware corporations, Delaware chancellors have significant expertise in interpreting the DGCL and resolving corporate governance issues.<sup>219</sup> Leveraging the chancellors' expertise in evaluating intra-corporate disputes leads to greater predictability in the application of Delaware corporate law.<sup>220</sup> In contrast, when other jurisdictions, inexpert in Delaware law, attempt to interpret and apply Delaware precedents, they are more likely to misapply the law and render erroneous decisions.<sup>221</sup> Further, hearing intra-corporate disputes in Delaware allows Delaware courts the opportunity to "advance and refine legal principles that govern the affairs of corporations and stockholders of Delaware companies."<sup>222</sup> This advantage does not arise when non-Delaware courts adjudicate these disputes because non-Delaware precedents do not bind Delaware courts.

Some policy considerations also weigh against enforcing forum selection bylaws. One such consideration is stockholders' rights. A common critique of forum selection bylaws is they infringe upon stockholders' rights,<sup>223</sup> preventing them from choosing the forum.<sup>224</sup> This restriction inhibits the "value in letting plaintiffs bring suit against defendants in jurisdictions with which they have significant contacts."<sup>225</sup> While it is true that forum selection bylaws do curtail stockholders' rights to choose the forum, stockholders agreed to this restriction when they purchased stock in a corporation whose certificate of incorporation grants the directors the power to unilaterally adopt bylaws.<sup>226</sup> Additionally, stockholders have not lost the right to bring the claim itself: forum selection bylaws do not prevent stockholders from choosing the type of claim or from bringing claims altogether.<sup>227</sup> Rather, forum selection bylaws simply

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<sup>218</sup> Thomas, *supra* note 12, at 1926.

<sup>219</sup> See Grundfest & Savelle, *supra* note 1, at 354 n.137.

<sup>220</sup> Thomas, *supra* note 12, at 1951; Sandler, *supra* note 214.

<sup>221</sup> See *City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 242 n.54 (Del. Ch. 2014).

<sup>222</sup> Mirvis, *supra* note 120.

<sup>223</sup> Claudia H. Allen, *Delaware Corporations Seek to Counter Forum Shopping*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 14, 2012), <http://corpgov.law.harvard.edu/2012/02/14/delaware-corporations-seek-to-counter-forum-shopping/>.

<sup>224</sup> Thomas, *supra* note 12, at 1953.

<sup>225</sup> *Id.*

<sup>226</sup> *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 956 (Del. Ch. 2013).

<sup>227</sup> *Id.* at 960.

limit the adjudication of claims to a foreseeable forum, the state of incorporation.<sup>228</sup>

Another policy consideration that weighs against enforcement of forum selection bylaws is the potential for abuse on the part of corporate directors. Enforcing these bylaws marks a considerable change in power over the choice of forum from the stockholders to the directors.<sup>229</sup> This change in power, potentially increasing costs to stockholders when initiating the claim, may impact stockholders' ability to bring suits against corporate directors for breach of fiduciary duty.<sup>230</sup> General enforcement of bylaws, however, does not prevent a finding of as-applied unenforceability under the *Bremen* or *Schnell* doctrines,<sup>231</sup> preserving the stockholders' ability to bring suits. Nonetheless, such unenforceability determinations should be reserved for egregious circumstances where the diminished ability to bring suits is clear from the record. This was not the case for the plaintiff-stockholders in *TriQuint*, who filed claims in Delaware within days of filing in Oregon.<sup>232</sup> Overall, the totality of these policy considerations weighs in favor of enforcing forum selection bylaws.

## V

### IMPLICATIONS

#### *A. The Future of Forum Selection Bylaw Challenges in Oregon and Other Jurisdictions*

The full impact of the *TriQuint* decision will depend on the Oregon Supreme Court's ruling on the writ of mandamus petition. If the court grants the writ petition, the effects of the circuit court's decision will be mitigated. The only post-*Chevron* decision refusing to enforce a forum selection bylaw will be overturned and the previous unanimity across courts in enforcing bylaws will be restored.

If the Oregon Supreme Court denies the writ petition, the *TriQuint* decision will decrease forum selection bylaw enforcement in Oregon and potentially in other jurisdictions as well. Based on the circuit court's holding in *TriQuint*, forum selection bylaws appear less likely to be enforced in Oregon courts. If the Oregon Supreme Court denies

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<sup>228</sup> See Thomas, *supra* note 12, at 1951.

<sup>229</sup> *Id.* at 1955.

<sup>230</sup> *Id.* at 1954–55.

<sup>231</sup> See *supra* Parts I.B and I.D.

<sup>232</sup> Roberts v. TriQuint Semiconductor, Inc., No. 1402-02441, 2014 WL 4147465, at \*5 (Or. Cir. Ct. Aug. 14, 2014).

the petition, the difference in Oregon courts' treatment of these bylaws will be magnified and cemented. The *TriQuint* decision may also impact enforcement in the other jurisdictions that have not yet decided a forum selection bylaw challenge ("undecided jurisdictions"). Denial of the writ petition will provide undecided jurisdictions with post-*Chevron* persuasive authority against enforcement. Consequently, motions to dismiss pursuant to forum selection bylaws will be less likely to succeed in Oregon state courts and may be less likely to succeed in undecided jurisdictions.

### *B. Strategies for Increasing Enforcement of Forum Selection Bylaws*

*TriQuint's* full ramifications have yet to be seen. However, this decision has already decreased clarity on forum selection bylaw enforceability and has increased the risk of non-enforcement. Even if the Oregon Supreme Court grants the writ of mandamus petition to enforce *TriQuint's* forum selection bylaw, an undecided jurisdiction may still find the circuit court's discussion of forum selection bylaws persuasive. Therefore, corporations seeking to prevent multi-forum intra-corporate litigation through forum selection bylaws should consider two options to increase the likelihood of enforcement: (1) clear day bylaw adoption, and (2) anti-suit injunctions filed in Delaware upon denial of a motion to dismiss in a non-Delaware jurisdiction.

#### *1. Clear Day Forum Selection Bylaw Adoption*

If a corporation wants to limit the forum for intra-corporate disputes through a forum selection bylaw and has not yet adopted one, it should adopt the bylaw on a clear day.<sup>233</sup> A clear day is a time before the corporation is engaged in activity that will likely lead to an intra-corporate lawsuit.<sup>234</sup> Adoption on a clear day allows time for stockholders to be given notice and react accordingly before the bylaw impacts litigation stockholders may bring against the corporation. Consequently, if stockholders are provided time to

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<sup>233</sup> Daniel E. Wolf, *Advantages of Board Actions on a "Clear Day,"* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Nov. 26, 2014), <http://corpgov.law.harvard.edu/2014/11/26/advantages-of-board-actions-on-a-clear-day/>; see also Allen, *supra* note 223; Theodore N. Mirvis, *The Battle Against Multiforum Stockholder Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 25, 2014), <http://corpgov.law.harvard.edu/2014/08/25/the-battle-against-multiforum-stockholder-litigation/>.

<sup>234</sup> Wolf, *supra* note 233.

contest the bylaw and fail to do so, a court can more easily conclude that enforcement is reasonable and just.

Recent court decisions have signaled that adoption on a clear day increases the likelihood a forum selection bylaw will be enforced.<sup>235</sup> The *TriQuint* decision supports this connection between clear day adoption and enforceability: “Enforcement of the bylaw would not be an issue had the board, at the very least, adopted it prior to any of its alleged wrongdoing, and with ample time for the [stockholders] to accept or reject the change.”<sup>236</sup> Thus, the only court that refused to enforce a forum selection bylaw post-*Chevron* states that clear day adoption likely would have resulted in a different outcome. Therefore, if the opportunity has not yet passed, corporations interested in forum selection bylaws should adopt them early and on a clear day to increase the likelihood courts will enforce their bylaws.

## 2. *Anti-suit Injunction Upon Denial of a Motion to Dismiss*

If a corporation has already adopted a forum selection bylaw and did not do so on a clear day, filing a motion to dismiss should still be the primary course of action whenever a stockholder lawsuit is brought outside the selected forum. In *Edgen Group Inc. v. Genoud*, Vice Chancellor Laster discussed several actions a corporation can take to enforce a forum selection bylaw.<sup>237</sup> First, a corporation can file a motion to dismiss in the forum in which the stockholders originally brought the claim.<sup>238</sup> Additionally, a corporation can pursue an anti-suit injunction in the selected forum.<sup>239</sup> Vice Chancellor Laster noted that the anti-suit injunction is the more aggressive option.<sup>240</sup> He also interpreted then-Chancellor Strine’s *Chevron* opinion to have “contemplated . . . that the forum selection provision would be considered in the first instance by the other court . . . not through an anti-suit injunction in the contractually specified

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<sup>235</sup> *Id.*; see also, e.g., *Groen v. Safeway Inc.*, No. RG14716641, 2014 WL 3405752, at \*2 (Cal. Super. Ct. May 14, 2014); *TriQuint*, 2014 WL 4147465, at \*5.

<sup>236</sup> *TriQuint*, 2014 WL 4147465, at \*5; see also Wolf, *supra* note 233.

<sup>237</sup> Transcript of Hearing for Temporary Restraining Order, *supra* note 8, at 36–37.

<sup>238</sup> *Id.* at 37.

<sup>239</sup> *Id.* The vice chancellor also discussed another possible action: a corporation could bring a breach of contract action against the stockholders in the selected forum for failure to sue in that forum, obtain a default judgment in the selected forum when the stockholders do not appear, and seek enforcement of that judgment in the other forum through *res judicata*. *Id.*; Tucker, *supra* note 121, at 478. Further discussion of this option is beyond the scope of this Note.

<sup>240</sup> Transcript of Hearing for Temporary Restraining Order, *supra* note 8, at 37.

court.”<sup>241</sup> Therefore, an anti-suit injunction is unlikely to be successful unless the corporation has pursued less aggressive options, like a motion to dismiss in the other forum, and the other forum has made a determination on that motion.<sup>242</sup>

Based on *Edgen Group*, corporations should first file a motion to dismiss in the forum selected by the stockholders, wait to see if the motion is denied, and then bring an anti-injunction suit in the selected forum.<sup>243</sup> Without the initial step of filing a motion to dismiss, an anti-suit injunction attempt is unlikely to succeed. However, if a corporation's motion to dismiss is denied, the corporation can pursue the enforcement of its forum selection bylaw through an anti-suit injunction in the selected forum.<sup>244</sup>

### CONCLUSION

*TriQuint* was the first and only decision post-*Chevron* to hold a forum selection bylaw was unenforceable. Given the recent nature of this decision and the pending writ of mandamus petition before the Oregon Supreme Court, the full ramifications for future forum selection bylaw challenges in Oregon and undecided jurisdictions are yet to be seen. However, if the Oregon Supreme Court denies the writ petition, *TriQuint* provides support for courts to rely upon when declining to enforce forum selection bylaws.

The Oregon Supreme Court should grant *TriQuint's* writ of mandamus petition based on *Chevron* and related precedents. Further, courts should enforce forum selection clauses pursuant to public policy considerations of consistency, efficiency, and judicial expertise. To increase the likelihood that their forum selection bylaws will be enforced, corporations should adopt bylaws on clear days and should pursue anti-suit injunctions in the selected forum if their original motion to dismiss in the other forum is denied.

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<sup>241</sup> *Id.* at 38–39.

<sup>242</sup> *See id.* at 46, 48.

<sup>243</sup> *See Tucker, supra* note 121, at 483.

<sup>244</sup> *Id.* (“In the event that foreign jurisdictions refuse to recognize the enforceability of forum selection provisions . . . an anti-suit injunction in Delaware would become a viable alternative.”).

