Oregon State Court Refuses to Enforce Forum Selection Bylaw

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In Roberts v. TriQuint Semiconductor, Inc., No. 1402-02441 (Cir. Ct. Or. Aug 14, 2014), an Oregon state court, breaking with state courts in California, Illinois, New York and Texas, held that the bylaw of a Delaware corporation providing for derivative actions and other intra-corporate claims to be litigated exclusively in Delaware was unenforceable. TriQuint’s board adopted the bylaw on the same day that it approved entering into a merger of equals with RF Micro Devices, Inc. In reaching its conclusion, the Oregon court focused upon the timing of the bylaw’s adoption:

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 shareholders to accept or reject the change.

The Oregon court cited Galaviz v. Berg, 763 F. Supp. 2d 1170 (N.D. Cal. 2011), a much-criticized 2011 federal District Court opinion that rejected the defendants’ motion to dismiss a derivative action on the basis of an exclusive forum bylaw. The Galaviz court highlighted that the exclusive forum bylaw was adopted after certain alleged wrongdoing occurred. In June 2013, the Delaware Court of Chancery criticized Galaviz for failing “to appreciate the contractual framework established by

The *Triquint* court sought to distinguish *Boilermakers* by emphasizing that *Boilermakers* involved a facial challenge rather than a challenge to the enforcement of an exclusive forum bylaw in a particular situation. The court then went on to deny the defendants’ motion to dismiss on the basis of public policy:

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.

Taken to its logical extreme, the timing argument would impair the ability of a board to adopt, on a timely basis and without stockholder approval, bylaws that it believes are in the best interests of the company and its stockholders. Additionally, the court’s conclusion does not take into account that: (a) Delaware law is clear that bylaw amendments bind all stockholders, regardless of when they purchase stock, (b) the Delaware Supreme Court has stated that deterring litigation is not *per se* impermissible and (c) the bylaw did not foreclose the plaintiffs’ access to the courts. Rather, it directed litigation to the courts most familiar with Delaware law and where parallel merger litigation had been filed.

Putting aside whether the opinion was correctly decided, *TriQuint* signals that the best time to adopt an exclusive forum bylaw is on a “clear day,” rather than in anticipation of or in response to specific litigation, including merger litigation.

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