

# Client Alert

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## Delaware Court Enforces Exclusive Forum Provision Adopted Concurrently with Announcement of Merger Agreement

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Public companies are increasingly enacting “exclusive forum” bylaws — designating a single forum for intra-corporate disputes — as a way to limit the risk and burden of multi-jurisdictional stockholder litigation. This trend emerged from the Delaware Chancery Court’s 2013 *Chevron* decision, which held that forum selection bylaws generally are permissible under Delaware law.<sup>1</sup>

The Delaware Chancery Court’s recent decision in *City of Providence v. First Citizens Bancshares, Inc.*<sup>2</sup> provides further support for the flexibility of companies in adopting such provisions, holding that (under Delaware law):

- A board can adopt a forum selection provision during a transaction process — even on the day the merger agreement is announced — and the provision generally will be enforced, absent some particular factual allegations demonstrating that it was enacted for an improper purpose.
- A corporation with headquarters in another state may designate its headquarters state, rather than Delaware, as the exclusive forum.

Exclusive forum provisions are still relatively new and some questions remain, particularly as to their reception by courts outside of Delaware, where provisions designating Delaware courts as exclusive forums will need to be enforced. With few exceptions, however, other courts that have addressed the question have enforced these provisions, recognizing that their effect is not to preclude stockholder litigation against boards but simply to limit it to a specified jurisdiction.

### THE DISPUTE

*First Citizens* arose from a challenge to the agreement of First Citizens BancShares, Inc. (“FC North”), a Delaware corporation based in North Carolina, to acquire by merger First Citizens Bancorporation, Inc. (“FC South”), a company incorporated and based in South Carolina. Both FC North and FC South are controlled by the same family, the Holdings.

On the day the merger was announced, FC North’s board also amended the company’s bylaws to, among other things, adopt a forum selection clause designating North Carolina courts as the exclusive forum for most intra-

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<sup>1</sup> See *Boilermakers Local 154 Ret. Fund v. Chevron Corp.* (Del. Ch. June 25, 2013). We discussed exclusive forum provisions as an item for boards’ corporate governance and M&A checklists in a prior client alert here [link to <http://www.mofo.com/-/media/Files/ClientAlert/140625ExclusiveForumProvisions.pdf>].

<sup>2</sup> Del. Ch. Sept. 8, 2014.

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corporate disputes, which would cover the types of stockholder claims typically expected following a merger announcement.

The City of Providence, an FC North stockholder, filed suit in Delaware Chancery Court challenging the validity of the forum selection clause and asserting various class and derivative claims in connection with the announced merger. The parties stipulated that the validity of the forum selection bylaw should be decided before any other issue.

## THE DELAWARE COURT'S DECISION

The court upheld the forum selection bylaw and dismissed the stockholders' action. The court noted, as it had in prior opinions, that corporate bylaws are generally interpreted as part of a binding broader contract between the corporation and its stockholders. The court also noted that the forum selection provision would not insulate FC North's board from judicial review; rather, it would simply require that such review take place in a North Carolina court.

### Adoption of Bylaw Concurrent with Merger Agreement

The court rejected the stockholders' argument that enforcing the forum selection bylaw would be unjust because it was adopted simultaneously with the announcement of the merger. The court found that the stockholders did not call into question the integrity of North Carolina's courts or otherwise explain how the board would improperly advance its own self-interests by having challenges to the merger agreement adjudicated in North Carolina. According to the court, without "well-pled allegations . . . demonstrating any impropriety in [the] timing," the fact that the board adopted the forum selection provision "on an allegedly 'cloudy' day when it entered into the merger agreement with FC South rather than on a 'clear' day is immaterial."

In so holding, the Delaware court reached the opposite conclusion from the Oregon circuit court, which recently declined to enforce a forum selection bylaw adopted by a company's board the same day it announced a merger, in part on the basis that the bylaw appeared to have been adopted after the "alleged wrongdoing" had occurred.<sup>3</sup> The Delaware court noted the Oregon decision and explained that, to the extent it rested on an interpretation of Delaware law, the decision was "based on a misapprehension of Delaware law regarding the facial validity and as-applied analysis of forum selection bylaws."

### Choice of North Carolina Forum

While then-Chancellor Strine expressed his view in *Chevron* that Delaware was "the most obviously reasonable forum" for litigation involving a Delaware corporation, Chancellor Bouchard in this case found that nothing in *Chevron* precluded the board from selecting "North Carolina — the second most obviously reasonable forum given that NC North is headquartered and has most of its operations there."

Chancellor Bouchard noted this conclusion was supported by "important interests of judicial comity" — if Delaware corporations expect foreign courts to enforce bylaws designating Delaware as the exclusive forum for

<sup>3</sup> *Roberts v. TriQuint Semiconductor, Inc.* (Or. Cir. Ct. Aug. 14, 2014). Our client alert describing the *TriQuint* decision can be found here [link: <http://www.mofo.com/~media/Files/ClientAlert/2014/09/140909ForumSelectionBylaws.pdf>].

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intra-corporate disputes, then Delaware courts should uphold forum selection bylaws designating states other than Delaware.

## DISCUSSION

Forum selection provisions can be an important tool for companies and boards to consider when seeking to reduce the burden and uncertainty of multi-jurisdictional shareholder litigation. Since the 2013 *Chevron* decision, several courts outside Delaware have followed *Chevron* and upheld the validity of Delaware forum selection bylaws.<sup>4</sup> However, *Chevron* also noted that forum selection bylaws, in certain cases, may be invalid if they produce some “fundamentally inequitable result.”

*First Citizens* addresses two important outstanding issues that will provide companies and boards with greater clarity in adopting forum selection bylaws.

- *First Citizens* makes clear that a forum selection provision will not be found to be invalid under Delaware law merely because it was adopted during the transaction process—even if it is adopted on the day the transaction is announced.
- Delaware corporations generally prefer to litigate intra-corporate disputes in Delaware. But, for reasons of convenience and familiarity, among others, a corporation might instead prefer to litigate in the state where its headquarters, operations, and senior employees are located. *First Citizens* makes clear that Delaware courts will enforce forum selection bylaws that select their headquarter forum for resolving intra-corporate disputes as long as that forum is a reasonable choice.

Companies should be cautious, however, in waiting until the eve of a transaction to adopt such bylaws. Like the court in *Chevron*, Chancellor Bouchard stressed that, “[i]n the appropriate case, a foreign forum selection provision may not withstand . . . scrutiny.” While we expect that courts in other jurisdictions should recognize *First Citizens* as persuasive precedent on these points, there remains some uncertainty about whether some states, like the Oregon circuit court, may decline to enforce forum selection provisions enacted as part of the transaction being challenged in the underlying suit.

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<sup>4</sup> See *Groen v. Safeway Inc.* (Cal. Sup. Ct. May 14, 2014); *Miller v. Beam Inc.* (Ill. Ch. Ct. Mar. 5, 2014); *Hemg Inc. v. Aspen Univ.* (N.Y. Sup. Ct. Nov. 14, 2013); *In re MetroPCS Commc'ns, Inc.* (Tex. App. 2013); but see *TriQuint Semiconductor Inc.*, referenced above.

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