IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

DONALD L. ROBERTS, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

TRIQUINT SEMICONDUCTOR, INC., A Delaware corporation, et al.,

Defendants.

Case No: 1402-02441 (Lead Case)

OPINION

MARINA LAM, Individually and On Behalf of All Others Similarly Situated

Plaintiff,

v.

STEPHEN J. SHARP, et al.,

Defendants.

Case No: 1403-02757

Before the court are Defendants' motions to dismiss pursuant to ORCP 21 A(1) for lack of subject matter jurisdiction (SMJ); pursuant to ORCP 21 A(3) based on the doctrine of *forum non conveniens*; and pursuant to ORCP 21 A(8) for failure to state a claim.

When considering motions to dismiss pursuant to ORCP 21 A(1) and (3), a court may rely on "facts drawn both from the complaint and 'matters outside the pleading, including affidavits, declarations and other evidence," but must be careful "to insure that its determination of the facts on a motion to dismiss does not interfere with a party's right to a trial on disputed

questions of material fact."[1] *Black v. Arizala*, 337 Or 250, 265 (2004). Decisions regarding motions to dismiss pursuant to ORCP 21 A(8), on the other hand, may not be based on facts that do not appear on the face of the complaint. *Id.* In making its decision, the court "assume[s] the truth of all allegations in plaintiff's pleadings and view[s] all reasonable inferences in the light most favorable to plaintiff." *O'Neal v. Martin*, 258 Or App 819, 822–23 (2013); *see also Levasseur v. Armon*, 240 Or App 250, 253–54 (2010). In the present case, this court has appropriately limited its consideration of the facts alleged in conformity with the standards set by the rule.

I. DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS DENIED

Regarding Plaintiffs' assertion that the forum-selection clause in this case violates Oregon contract law, an important preliminary question is to resolve the parties' dispute as to two cases: *Galaviz v. Berg*, 763 F Supp 2d 1170 (ND Cal 2011), and *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A3d 934 (Del Ch 2013).

In *Galaviz*, shareholders of the Oracle corporation alleged that over the course of approximately eight years, the defendant "through a variety of fraudulent and improper practices . . . failed to apply certain discounts to which the government was contractually and legally entitled, resulting in millions of dollars of overcharges." *Galaviz*, 763 F Supp 2d at 1171–72. Following that alleged misconduct, the defendant's "Board of Directors adopted a resolution amending the corporate bylaws to add a forum-selection provision for derivative suits." *Id.* at 1172. Oracle relied on contract principals to defend enforcement of the bylaw, namely that forum-selection clauses ought to be enforced unless to do so would be unfair or unreasonable,

[1] Of particular note for Defendants' SMJ claim, while ORCP 21 A(1) does authorize dismissal when the parties have in essence contracted to litigate elsewhere, the court's discretion to do so may not be effected if the underlying contract is for any reason unenforceable. *See Black*, 337 Or at 266. For reasons that shall be explained more fully below, the forum selection provision enacted by TriQuint's board of directors is unenforceable, and therefore this court's discretion to exercise its ORCP 21 A(1) powers in that regard have not been activated.

id.; *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 US 1 (1972); *R.A. Argueta v. Banco Mexicano, S.A.*, 87 F3d 320 (9th Cir 1996), but relied on principals of corporate law to defend the bylaw's enactment, *Galaviz*, 763 F Supp 2d at 1174. The court indicated that "Oracle cannot persuasively contend that its bylaws are like any other contract—and that therefore the *Argueta* factors control here—while simultaneously arguing that it was permitted under corporate law to amend those bylaws in a manner that it could not have achieved under contract law." *Id.* Thus, in a case where "the bylaw was adopted by the very individuals who are named as defendants, and after the alleged wrongdoing took place, there is no mutual consent to the forum choice at all, at least with respect to shareholders who purchased their shares prior to the time the bylaw was adopted." *Id.* at 1171. While *Galaviz* limited itself to contractual principals, *Chevron* addressed contract law through the lens of corporate law.

Chevron dealt generally with the legality of unilaterally adopted corporate bylaws. The boards of two Delaware corporations, Chevron and FedEx, adopted forum-selection bylaws virtually identical to the one present in this case. *See Chevron*, 73 A3d at 941–42. Shareholders sued, alleging first that "the bylaws are statutorily invalid because they are beyond the board's authority under the Delaware General Corporation Law ('DGCL')," but also that "the bylaws are contractually invalid, and therefore cannot be enforced like other contractual forum selection clauses under the test adopted [in *Bremen*], because they were unilaterally adopted by the . . . boards." *Id.* at 938 (alteration added). However, because the *Chevron* plaintiffs did not allege actual facts relating to reasonableness or fairness, the Court concerned itself only "with the facial statutory and contractual validity of the bylaws," and was "expressly not concerned with how the bylaws might be applied in any future, real-world situation." *Id.* at 948. The *Chevron* court made several conclusions.

First, the court determined that forum-selection bylaws are appropriate bylaw fodder, and are thus statutorily valid under Delaware law. *Id.* at 950–54; *see also* 8 Del. C. § 109. One important caveat was noted. Forum-selection clauses are appropriate subjects of corporate bylaws "because they regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation." *Chevron*, 73 A3d at 951–52 (emphasis in original). The power to unilaterally adopt bylaws is always tempered though, as the granting of such power "shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws." 8 Del. Ch. C. §109(a). Therefore, "board-adopted forum selection bylaws are subject . . . to the most direct form of attack by stockholders who do not favor them: stockholders can simply repeal them by majority vote." *Chevron*, 73 A3d at 954.

Second, *Chevron* held that board-adopted forum-selection bylaws are not contractually invalid simply because they were adopted unilaterally. *Id.* at 954–58. Again citing 8 Del. C. § 109, the court concluded that "stockholders assent to not having to assent to board-adopted bylaws." *Id.* at 956. The court noted the same caveat as before regarding the "indefeasible right of the stockholders to adopt and amend bylaws themselves." *Id.* Plaintiff's argument that *Chevron* did not address *any* specific factual scenario thus errs slightly. *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 that the shareholders retained the right to repeal should they amass the necessary collection of 'nays.' This, on its own and as a matter of law, is insufficient to warrant a contract-formation problem under Delaware law.

Chevron bolsters its own narrow holding by specifically pointing to what its plaintiffs failed to do, which was to allege any actual facts suggesting that the enforcement of a unilaterally adopted bylaw would somehow be untoward, i.e.—to make an as-applied challenge. *Id.* at 958–63. Instead, the *Chevron* "plaintiffs tr[ied] to show that the forum selection bylaws [were] inconsistent with law and thus facially invalid by expending much effort on conjuring up hypothetical as-applied challenges in which a literal application of the bylaws might [have] be[en] unreasonable." *Id.* at 958 (alterations added). This "parade of horribles" was nothing more than a request by the plaintiffs for an advisory opinion. *See id.* at 959. *Chevron* repeatedly advises that when "a plaintiff believes that a forum selection clause cannot be equitably enforced in a particular situation," *id.* at 958–60; *see also id.* at 954, 957, the proper challenge is through *Bremen* and its progeny, which exist "precisely to ensure that facially valid forum selection clauses are not used in an unreasonable manner in particular circumstances," *id.* at 958–59.

Underlying the *Bremen* doctrine[2] is the notion that a "forum clause should control absent a strong showing that it should be set aside." *Bremen*, 407 US at 15. The Ninth Circuit has determined that the application of *Bremen* requires

> that a contractual forum clause must be given effect unless there is a showing that, "(1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court; or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought."

Galaviz, 763 F Supp 2d at 1173 (quoting *Argueta*, 87 F3d at 325).

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[2] Presently, Oregon, unlike Delaware, has not expressly adopted the Bremen doctrine. *PNC Multifamily Capital Institutional Fund XXIV Ltd. P'Ship v. AOH-Regent Ltd. P'Ship*, 262 Or App 503, 517 n16 (2014) ("Although both plaintiffs and defendants seem to tacitly accept that the principles announced in MS/Bremen (and other federal cases following it) apply here, neither explains why this is the case, nor is it readily apparent to us. In any event, that, too, would be a question for the trial court to confront in the first instance."); *Chevron*, 73 A3d at 940 (noting that *Ingres Corp. v. CA, Inc.*, 8 A3d 1143 (Del 2010), explicitly adopted Bremen's reasoning).

Obvious parallels exist within Oregon law. *Reeves v. Chem Industrial Co.*, 262 Or 95 (1972), found "no logical support" to not give effect to a valid forum-selection agreement, and appeared to adopt § 80 of the Restatement of the Conflict of Laws (Second), which reads "'The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable." *Id.* at 97. A comment to the Restatement as quoted in *Reeves* reads, in pertinent part, "Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action." *Id.* at 97–98; *see also Nike USA, Inc. v. Pro Sports Wear, Inc.*, 208 Or App 531, 537 (2006) ("Forum selection clauses contained in commercial contracts are *prima facie* enforceable; they will be disregarded only where the evidence shows that enforcement would be unfair and unreasonable."). The first and second *Bremen* prongs are quite evident in the Restatement and its comment, and while the third prong is not directly evident in the face of the text, persuasive authority suggests that it is an appropriate consideration. *See 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*]." (alteration added)).

Nothing thus far indicates that either the first or the second *Bremen* factors warrant much discussion here. No fraud, undue influence, or significant disparity in bargaining power appears to be alleged. Similarly, Delaware is not so gravely difficult and inconvenient a forum that the

Plaintiffs will for all practical purposes be deprived access to the courthouse. The third factor, enforcement having the effect of violating the public policies of Oregon, is a different story, but to fully examine it we must first determine which public polies, if any, may be threatened.

Plaintiffs cite ample case law indicating a strong policy in Oregon supporting the general rule that all contracts require mutual assent in order to be enforceable. Plaintiffs' Joint Opposition to Defendants' Motion to Dismiss, at 7 [*hereinafter* Opposition]. The legislature appears to have created an exception to this rule in the context of corporation-shareholder contracts. Both Oregon and Delaware allow for unilateral corporate bylaw amendments as a matter of right for any corporate board. *See* ORS 60.461(1). Thus, corporate boards of directors are statutorily granted the ability to modify existing shareholder contracts without the immediate assent of the shareholder because of the indefeasible right to later amend or repeal the modifications.

A Delaware case is quite informative. That case involved dissident stockholders who wished to wage a proxy battle against a board of directors opined by stockholders to be underperforming. *Schnell v. Chris-Craft Indus., Inc.* (*Shnell I*), 285 A2d 430, 432 (Del Ch 1971) *rev'd on other grounds by Schnell v. Chris-Craft Indus.* (*Shnell II*), 285 A2d 437. The board, aware of the inevitability of the proxy battle, used the DGCL to amend its bylaws with the effect of "advancing the date of defendant'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.* This constituted a deliberate effort by the board "to utilize 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 II*, 285 A2d at 439. *Schnell* suggests that if it is alleged

that a board of directors is attempting to infringe upon the shareholder's right to amend or repeal unilaterally enacted bylaws, then that same action infringes upon the public policy of both Oregon and Delaware.

The underlying facts here are similar to *Schnell*. A group of activist shareholders, Starboard, publicly announced their plans to attempt to oust the board at the next shareholder meeting, and delivered a letter on December 2, 2013 to TriQuint declaring their intentions. Starboard also alleged underperformance by TriQuint's board resulting in an undervaluing of the corporation. Plaintiffs allege that in response to Starboard's actions, the TriQuint board engaged in merger negotiations with RFMD—negotiations they had previously engaged in and discontinued—and ultimately agreed to merge with RFMD in a deal that the Plaintiffs argue constitutes a breach of the directors' fiduciary duties as well as self-serving to the directors at the expense of the shareholders. Part of that deal included placement of several of the directors on the board of the resulting corporation. The deal was a so called "merger of equals" in which the totality of the TriQuint shareholders would own 50% of the new corporation. The allegation is 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 shareholder voting power. The present matter differs in one significant regard from *Schnell*. Here, the board did not shift the date or the location of the next shareholder meeting, they designated Delaware as the forum for lawsuits. They did so, they said, because they anticipated litigation. TriQuint's Motion to Dismiss, at 14–16 (arguing that TriQuint "had good reason to anticipate that the merger transaction would result in multiple lawsuits because that is a common occurrence in public mergers and acquisitions," and citing to a study showing that "in 2013, 94 percent of proposed mergers valued at $100 million or more . . . drew stockholder lawsuits like

those filed [here]."). While it may be true that in today's corporate climate these types of mergers usually prompt lawsuits, Plaintiffs' allegations seem to be that the board expected not just litigation in the abstract, they expected this exact litigation. The board was aware of Starboard's allegations that TriQuint was undervalued and its intentions to seek ouster; and they agreed to a merger agreement netting each shareholder a value of $9.73 per share—where a majority of the board would get to keep their jobs—when other offers had been tendered for as much as $10.00 per share[3]—where no board member would remain.

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. As *Chevron* holds, there is nothing inherently wrong with unilaterally enacting forum selection bylaws. But the board in this case enacted the bylaw on February 22, 2014, at the very same meeting that they officially recommended the merger. The merger was then publicly announced on February 24, 2014. The first Oregon case ("Roberts") was filed four days after that on February 28, 2014. Actions in Delaware were filed five days ("Philemon"), seven days ("Schmitz"), and 10 days after Roberts ("Wallace"). Finally, the second Oregon case ("Lam") was filed on March 13, 2014. The causes of action that Plaintiffs have asserted accrued on the date of the board's action, on February 22, 2014.

To enforce the bylaw and to dismiss the 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

[3] Although no other offers had been forthcoming, some analysts had valued TriQuint at up to $13.00 per share.

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. The portion of the Defendants' motion to dismiss pursuant to the forum-selection bylaw is therefore denied.

II. DEFENDANT'S MOTION TO DISMISS PURSUANT TO THE INCONVENIENT FORUM DOCTRINE IS DENIED

Regarding Defendants' motion to dismiss on the grounds that Oregon is an inconvenient forum, although Plaintiff is correct to call into question whether or not Oregon has officially recognized the doctrine, *see* Opposition, at 15 and n6, the Court of Appeals of Oregon has, in dicta, suggested that it takes no issue with the balancing test established by the United States Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 US 235 (1981). *Novich v. McClean*, 172 Or App 241, 252 (2001).

The doctrine "allows a court to 'decline jurisdiction in exceptional circumstances.'" *Id.* at 251 (quoting *Gulf Oil Corp. v. Gilbert*, 330 US 501, 504 (1947)). To apply the *Piper* balancing test, a court considers, in operation of its "sound discretion, . . . all relevant public and private interest factors." *Piper*, 454 US at 257. The private interest factors include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained. . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Gulf Oil, 330 US at 508. The public interest factors to be considered are the overloading of "congested centers instead of" handling the matters at their "origin"; the burden of jury duty on members of the "community which has no relation to the litigations"; for "cases that touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country"; the "local interest in having localized controversies decided at home"; and "appropriateness . . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 508–09.

The bar for dismissal is high. Only "when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems'" will a court dismiss. *Piper*, 454 US at 241 (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 US 518, 524 (1947)) (omissions added) (alterations in original). Having carefully considered the parties arguments and after balancing the relevant public and private factors, this court finds, in its sound discretion, that Oregon is not so inconvenient a forum to Defendants as to cause "oppressiveness and vexation . . . out of all proportion to plaintiff's convenience." Defendants' motion to dismiss on the grounds of *forum non conveniens* is hereby denied.

III. DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY IS DENIED

In analyzing this motion, it is necessary to discuss whether this Court should adopt the *Revlon* standard under which the board has a duty to seek a transaction offering the best price to

stockholders, or the business judgment rule (BJR), a deferential standard of review which presumes that the board acted in good faith. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173 (Del 1986).

For purposes of this motion to dismiss, based on the facts alleged in the complaints filed by the plaintiffs and all reasonable inferences to be drawn from those facts, it appears that the BJR applies. Although a stock-for-stock transaction doesn't necessarily command BJR analysis, the planned merger in this case is not a "final stage transaction" as interpreted by Delaware Courts. Plaintiffs rely almost entirely on a transcript of the hearing in *Steinhardt v. Howard-Anderson*, No. 5878-VCL, Hr'g Tr. (Del Ch Jan 24, 2011). And although one might conclude from that Court's comment that strict numerical thresholds shouldn't replace a determination of whether a proposed transaction constitutes a change of control or a constructive final stage transaction, the facts in *Steinhardt* are clearly distinguishable in that 50 percent of that transaction involved cash and the stockholders ended up with only a 15 percent interest in the acquiring company. *Id.* In this case, the merger in the proposed stock-for-stock transaction is appropriately labeled a "merger of equals" in that former shareholders of RFMD and TriQuint will own 50 percent of the new company. Thus, considering current Delaware case law, the actions of TriQuint's Board should be evaluated under the BJR. *See In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076, at *12 (Del Ch 2011); *In re Synthes, Inc.S'holder Litig.*, 50 A3d 1022, 1048 (holding that *Revlon* does not apply in a deal involving 65 percent stock and 35 percent cash).

Despite the fact that Plaintiffs have not opposed Defendants' motion on BJR grounds, their complaints still adequately plead a cause of action for breach of fiduciary duty. Defendants correctly note that the BJR is a deferential standard of review which presumes that the directors

of a corporation act in good faith and with an honest belief that their actions are in the best interest of the company they serve. But such a presumption can be rebutted by a showing that the members of the board violated a fiduciary duty or engaged in self-dealing. Although rebutting this presumption may prove difficult at trial, for purposes of this motion the ultimate facts pled by the Plaintiffs are considered to be true and the Plaintiffs have pled sufficient facts to withstand a motion to dismiss.

The Plaintiffs' complaints rather specifically allege a scenario in which TriQuint's board negotiated a merger deal for an unfair price using an unfair process motivated by a desire to defeat an effort by the Starboard investor group to replace the entire board. In other words, the essence of the allegations put forth by the Plaintiffs is that the directors sought out and approved this merger plan for inadequate consideration to the detriment of shareholders for the dual purposes of maximizing their individual monetary gain and assuring the survival of five of the individual defendants in the newly formed company.

The Defendants point out at length that many of the actions of the TriQuint board related to the merger agreement involve corporate practices which, standing alone, have been determined by Delaware courts not to constitute self-dealing, entrenchment or a breach of fiduciary duty. For example, Defendants highlight the language in *Solomon v. Armstrong*, 747 A2d 1098, 1126 (Del Ch 1999), "In *most circumstances* Delaware law routinely rejects the notion that a director's interest in maintaining his office, *by itself*, is a debilitating factor." (emphasis added). But Plaintiffs have not alleged that the breach occurred simply because some of the directors survive. The essence of their complaints is that surviving the merger was a substantial motivating factor in seeking out the merger and in agreeing to a unfair process and price in the first place.

Likewise, Defendants point to this language in *Kahn v. MSB Bancorp, Inc.*, 1998 WL409355, at *3 (Del Ch July 16, 1998), "the *mere fact* that the directors receive fees for their services is not enough to establish an entrenchment motive." (emphasis added). But again, the allegations in this lawsuit do not assert that merely receiving fees is what constitutes entrenchment. Instead it is alleged that their own financial gain, rather than shareholder gain, motivated the board's actions. And of course, the fact that Delaware courts recognize that directors receiving compensation in the form of vesting stock options in a merger deal does not violate the duty of loyalty *per se* is not to say that a case should be dismissed when it is alleged that financial gain, at the expense of the fiduciary obligation, motivated director's actions.

With respect to the issue of preclusive deal protection devices, the analysis does not change. The fact that under Delaware law termination fees (for example) are not "invalid *per se*," *In re J.P. Stevens & Co. S'holders Litig.*, 542 A2d 770, 783 (Del Ch 1988), is not to say that if directors, in an effort to engage in self-dealing, agree to such terms in order to consummate a bad deal for shareholders, their actions cannot be challenged.

Finally, a comment about Court of Chancery's opinion in *In re TriQuint Semiconductor, Inc. S'holder Litig.*, 2014 WL2700964 (Del Ch Jun 13, 2014). It is unclear to what extent the analysis conducted by the Court of Chancery in deciding whether expedited proceedings were allowed assumed all well-pled ultimate facts to be true as is required in this motion to dismiss. Regardless, the Chancery Court seems to focus on the particulars of the merger deal rather than on the broader allegation that the particulars were put into place by directors as part of the fiduciary breach and in an effort to self-deal. For example, the Chancery Court states:

> Plaintiffs have not alleged a colorable claim that the TriQuint directors were sufficiently interested in continuing as directors that they could not impartially consider the merits of the RFMD merger. "In most circumstances Delaware law routinely rejects the notion that a director's interest in maintaining his office, by itself, is a debilitating factor." Similarly,

> "the mere fact that the directors receive fees for their service is not enough to establish an entrenchment motive."

Id. at *3 (footnotes and citations omitted).

While it is true that the plaintiffs have not alleged that the directors "could not impartially consider the merits of the RFMD merger," plaintiffs have alleged that the directors **did not** impartially consider the merits of the deal, but rather agreed to the deal for improper motives contrary to their fiduciary obligations. And as discussed above, this case does not turn on whether "merely" receiving a fee establishes improper motive because it is alleged that the receiving of fees and other remuneration **was** the improper motive for negotiating and agreeing to unfavorable terms with RFMD.

Whether plaintiffs can ultimately prove the alleged breach of fiduciary duty will be decided in subsequent proceedings. But because this court must accept well-pled factual allegations as true, the TriQuint Defendants' motion to dismiss is denied.

IV. THE RFMD DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR AIDING AND ABETTING IS GRANTED

The Court has decided to grant the RFMD Defendants' motion to dismiss for failure to state an aiding and abetting claim. Plaintiffs claim that RFMD aided and abetted the TriQuint individual defendants' breach of fiduciary duty to the TriQuint Shareholders. In order to properly plead aiding and abetting, plaintiffs must plead facts establishing: (1) The existence of a fiduciary relationship; (2) A breach of the fiduciary's duty; (3) Knowing participation in that breach by the defendant; and (4) Damages caused by the breach. *Gilbert v. El Paso Co.*, 490 A2d 1050, 1057 (Del Ch 1984).

There is no dispute as whether the plaintiffs have properly alleged the first and fourth elements and I have ruled in favor of the plaintiffs with respect to the second element. So the remaining issue is whether Plaintiffs have adequately pled facts regarding element three.

Plaintiffs are not required to plead 'knowing participation' in the breach with particularity. *LA Partners, L.P. v. Allegis Corp.*, 1987 WL14531, at *8 (Del Ch Oct. 22, 1987). But still, the complaint must include "some factual allegations from which 'knowing participation' can be inferred." *Id.*

Delaware cases deciding whether aiding a abetting has properly been pled focus on facts such as whether the alleged abettor was privy to the fiduciary's deliberations, *id.*; whether the proposed transaction, by its terms, benefited the fiduciary at the expense of stockholders, *id.*; whether the allegations merely support inferences of arms-length business transaction, *In re Shoe-Town, Inc. S'holders Litig.*, 1990 WL13475, at *8 (Del Ch Feb 12, 1990); and whether the alleged abettor was present and participated in the management meetings of the fiduciary, *Dubroff v. Wren Holdings, LLC*, 2011 WL5137175, at *8 (Del Ch Oct 28, 2011).

Although Plaintiffs have alleged that RFMD defendants were knowing participants in the alleged TriQuint breaches of duty, materially aided such breaches, and rendered substantial assistance to TriQuint defendants, Plaintiffs have alleged no specific facts from which reasonable inferences of these conclusory allegations can be drawn. It is clear from the Court's review of the many cases cited by both parties, that mere conclusory statements of "knowing participation" are not sufficient to survive a motion to dismiss. *E.g.*, *In re Gen. Motors (Huges) S'holder Litig.*, 2005 WL1089021, at *29 (Del Ch May 4, 2005). As such, the complaints are dismissed without prejudice as to the RFMD defendants.

Dated this 14th day of August, 2014

Michael A. Greenlick
Circuit Court Judge