Welcome!

Important Updates on Issues Affecting Corporate Governance in N.C.

Presented by:

Amy Batten

Chris Smith

Don Tucker

Senate Bill 853

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Streamlined process of holding company reorganization.

Amy Batten

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Don Tucker

The way to adopt a North Carolina venue bylaw.

Amy Batten

QUESTIONS?

Amy Batten
Partner
919.821.6677
abatten@smithlaw.com

Chris Smith
Partner
919.821.6745
csmith@smithlaw.com

Don Tucker
Partner
919.821.6681
dtucker@smithlaw.com

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Important Update on Issues Affecting Corporate Governance in North Carolina

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2014-110
SENATE BILL 648

AN ACT TO CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY GENERAL AND PRIVATE ATTORNEYS, TO PREVENT THE ABUSE OF PATENTS, TO ALLOW FOR SHAREHOLDER ASSENT TO EXCLUSIVE FORUM, AND TO LIMIT ASBESTOS-RELATED LIABILITIES FOR CERTAIN SUCCESSOR CORPORATIONS.

The General Assembly of North Carolina enacts:

PART I. CREATE TRANSPARENCY IN CONTRACTS BETWEEN THE ATTORNEY GENERAL AND PRIVATE ATTORNEYS

SECTION 1.1. Chapter 114 of the General Statutes is amended by adding a new Article to read:

"Article 2A.

"Transparency in Third-Party Contracting by Attorney General.

"**§ 114-9.2. Title.**

This Article shall be known and may be cited as the "Transparency in Private Attorney Contracts Act (TIPAC)."

"**§ 114-9.3. Definitions.**

The following definitions apply in this Article:

(1) Contingency fee contract. – A contract entered into by a State agency to retain private counsel that contains a contingency fee arrangement, including, but not limited to, pure contingency fee agreements and hybrid agreements, including a contingency fee aspect.

(2) Government attorney. – An attorney employed by the State as a staff attorney in a State agency.

(3) Private attorney. – An attorney in private practice or employed by a private law firm.

(4) State. – The State of North Carolina, including State officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of State government and any of its agents.

(5) State agency. – Every agency, institution, department, bureau, board, or commission of the State of North Carolina authorized by law to retain private counsel.

"**§ 114-9.4. Procurement.**

(a) A State agency may not enter into a contingency fee contract with a private attorney unless the Attorney General makes a written determination prior to entering into the contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:

(1) Whether there exist sufficient and appropriate legal and financial resources within the Attorney General's office to handle the matter.

(2) The time and labor required; the novelty, complexity, and difficulty of the questions involved; and the skill requisite to perform the attorney services properly.

(3) The geographic area where the attorney services are to be provided.

(4) The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.

(b) If the Attorney General makes the determination described in subsection (a) of this section, the Attorney General shall request proposals from private attorneys to represent the State agency on a contingency fee basis and draft a written request for proposals from private attorneys, unless the Attorney General determines that requesting proposals is not feasible under the circumstances and sets forth the basis for this determination in writing. A request for proposals under this provision is not subject to Article 3 of Chapter 143 of the General Statutes. Until the conclusion of the legal proceeding or other matter for which the services of the private attorney were sought, all proposals received shall be maintained by the Attorney General and shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes. All proposals maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(c) A private attorney who submits a proposal under this section shall simultaneously pay a fee in the amount of fifty dollars ($50.00). All fees collected under this subsection shall be used for the maintenance of the Attorney General's Web site.

"**§ 114-9.5. Contingency Fees.**

(a) The Attorney General may not give permission under G.S. 114-2.3 for a State agency to enter into a contingency fee contract that provides for the private attorney to receive an aggregate contingency fee, exclusive of reasonable costs and expenses, in excess of:

(1) Twenty-five percent (25%) of any damages up to ten million dollars ($10,000,000); plus

(2) Twenty percent (20%) of any portion of such damages between ten million dollars ($10,000,000) and fifteen million dollars ($15,000,000); plus

(3) Fifteen percent (15%) of any portion of such damages between fifteen million dollars ($15,000,000) and twenty million dollars ($20,000,000); plus

(4) Ten percent (10%) of any portion of such damages between twenty million dollars ($20,000,000) and twenty-five million dollars ($25,000,000); plus

(5) Five percent (5%) of any portion of such damages exceeding twenty-five million dollars ($25,000,000).

(b) In no event shall the aggregate contingency fee exceed fifty million dollars ($50,000,000), exclusive of reasonable costs and expenses, and irrespective of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.

(c) A contingency fee shall not be based on penalties or civil fines awarded or any amounts attributable to penalties or civil fines.

"**§ 114-9.6. Control.**

(a) Decisions regarding disposition of the case are reserved exclusively to the discretion of the State agency in consultation with a government attorney.

(b) The Attorney General shall develop a standard addendum to every contract for contingency fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the State agency, including, without limitation, the requirement listed in subsection (a) of this section.

"**§ 114-9.7. Oversight.**

(a) Until the conclusion of the legal proceeding or other matter for which the services of the private attorney have been retained, the executed contingency fee contract and the Attorney General's written determination pursuant to G.S. 114-9.4 shall not be deemed a public record within the meaning of Chapter 132 of the General Statutes. All records maintained under this subsection shall be made available to the State Auditor for oversight purposes, upon request.

(b) The amount of any payment of contingency fees pursuant to a contingency fee contract subject to this Article shall be posted on the Attorney General's Web site within 15 days after the payment of those contingency fees to the private attorney and shall remain posted on the Web site for at least 365 days thereafter.

(c) Any private attorney under contract to provide services to a State agency on a contingency fee basis shall maintain all records related to the contract in accordance with the Revised North Carolina Rules of Professional Conduct.

(d) By February 1 of each year following a year in which a State agency entered into a contingency fee contract with a private attorney, the Attorney General shall submit a report to the President Pro Tempore of the Senate and the Speaker of the House of Representatives

describing the use of contingency fee contracts with private attorneys in the preceding calendar year. To the fullest extent possible without waiving the evidentiary privileges of the State in any pending matters, the report shall:

(1) Identify each new contingency fee contract entered into during the year and each previously executed contingency fee contract that remains current during any part of the year.

(2) Include the name of the private attorney with whom the department has contracted in each instance, including the name of the attorney's law firm.

(3) Describe the nature and status of the legal matter that is the subject of each contract.

(4) Provide the name of the parties to each legal matter.

(5) Disclose the amount of recovery.

(6) Disclose the amount of any contingency fee paid.

(7) Include copies of any written determinations made under G.S. 114-9.4.

"**§ 114-9.8. No expansion of authority.**

Nothing in this Article shall be construed to expand the authority of any State agency or officer or employee of this State to enter into contracts for legal representation where no authority previously existed."

SECTION 1.2. G.S. 114-2.3 reads as rewritten:

"**§ 114-2.3. Use of private counsel limited.**

(a) Every agency, institution, department, bureau, board, or commission of the State, authorized by law to retain private counsel, shall obtain written permission from the Attorney General prior to employing private counsel. This section does not apply to counties, cities, towns, other municipal corporations or political subdivisions of the State, or any agencies of these municipal corporations or political subdivisions, or to county or city boards of education.

(b) Article 2A of this Chapter applies to any contract to retain private counsel authorized by the Attorney General under this section."

SECTION 1.3. Sections 1.1 and 1.2 of this act are effective when they become law and apply to any contract to retain private counsel authorized by the Attorney General entered into on or after that date.

PART II. PREVENT THE ABUSE OF PATENTS

SECTION 2.1. Chapter 75 of the General Statutes is amended by adding a new Article to read:

"Article 8.

"Abusive Patent Assertions.

"**§ 75-136. Title.**

This Article shall be known and may be cited as the "Abusive Patent Assertions Act."

"**§ 75-137. Purpose.**

(a) The General Assembly finds the following:

(1) North Carolina is home to a growing high-technology, knowledge-based economy. With its top-tier research universities and active technology sector, North Carolina is poised to continue its growth. To continue growing, North Carolina must attract new, small, and mid-sized technology companies. Doing so will help provide jobs for North Carolina's residents and boost North Carolina's economy. North Carolina also is home to companies in retail, manufacturing, and other industries, many of whom are customers of technology companies. Those other businesses are more likely to succeed if not inhibited by abusive and bad-faith demands and litigation.

(2) Patents encourage research, development, and innovation. Patent holders have legitimate rights to enforce their patents.

(3) The General Assembly does not wish to interfere with good-faith patent litigation or the good-faith enforcement of patents. The General Assembly also recognizes that North Carolina is preempted from passing any law that conflicts with federal patent law.

(4) Patent litigation can be technical, complex, and expensive. The expense of patent litigation, which may cost millions of dollars, can be a significant burden on companies. North Carolina wishes to help its businesses avoid

these costs by encouraging the most efficient resolution of patent infringement claims without conflicting with federal law.

(5) In order for North Carolina companies to be able to respond promptly and efficiently to patent infringement assertions against them, it is necessary that they receive specific information regarding how their product, service, or technology may have infringed the patent at issue. Receiving this information at an early stage will facilitate the resolution of claims and lessen the burden of potential litigation on North Carolina companies.

(6) Abusive patent litigation, and especially the assertion of bad-faith infringement claims, can harm North Carolina companies. A business that receives a letter asserting such claims faces the threat of expensive and protracted litigation and may feel that it has no choice but to settle and to pay a licensing fee even if the claim is meritless. This is especially so for small- and medium-sized companies and nonprofits that lack the resources to investigate and defend themselves against infringement claims.

(7) Not only do bad-faith patent infringement claims impose a significant burden on individual North Carolina businesses, they also undermine North Carolina's efforts to attract and nurture technology and other companies. Funds used to avoid the threat of bad-faith litigation are no longer available to invest, produce new products, expand, or hire new workers, thereby harming North Carolina's economy.

(8) North Carolina has a strong interest in patent matters involving its citizens and its businesses, including protecting its citizens and businesses against abusive patent assertions and ensuring North Carolina companies are not subjected to abusive patent assertion by entities acting in bad faith.

(9) In lawsuits involving abusive patent assertions, an accused infringer prevailing on the merits may be awarded costs and, less frequently, fees. These awards do not serve as a deterrent to abusive patent assertion entities who have limited liability, as these companies may hold no cash or other assets. North Carolina has a strong interest in making sure that prevailing North Carolina companies sued by abusive patent assertions entities can recover what is awarded to them.

(b) The General Assembly seeks, by this narrowly tailored act, to strike a balance between (i) the interests of efficient and prompt resolution of patent infringement claims, protection of North Carolina businesses from abusive and bad-faith assertions of patent infringement, and building of North Carolina's economy and (ii) the intentions to respect federal law and be careful to not interfere with legitimate patent enforcement actions. Except as specifically set forth in this act regarding bad-faith patent assertions, nothing in this act is intended to alter current law concerning piercing the corporate veil or otherwise concerning personal liability of principals in business entities.

"**§ 75-138. Definitions.**

The following definitions apply in this Article:

(1) Affiliate. – A business establishment, business, or other legal entity that wholly or substantially owns, is wholly or substantially owned by, or is under common ownership with another entity.

(2) Demand. – A letter, e-mail, or other communication asserting or claiming that a target has engaged in patent infringement or should obtain a license to a patent.

(3) Institution of higher education. – Defined in 20 U.S.C. § 1001(a).

(4) Interested party. – A person, other than the party alleging infringement, that (i) is an assignee of the patent or patents at issue; (ii) has a right, including a contingent right, to enforce or sublicense the patent or patents at issue; or (iii) has a direct financial interest in the patent or patents at issue, including the right to any part of an award of damages or any part of licensing revenue. A "direct financial interest" does not include either of the following:

a. An attorney or law firm providing legal representation in the civil action alleging patent infringement if the sole basis for the financial interest of the attorney or law firm in the patent or patents at issue

arises from the attorney or law firm's receipt of compensation reasonably related to the provision of the legal representation.

b. A person whose sole financial interest in the patent or patents at issue is ownership of an equity interest in the party alleging infringement, unless such person also has the right or ability to influence, direct, or control the party alleging infringement.

(5) Operating entity. – A person primarily engaged in, when evaluated with its affiliates over the preceding 24-month period and when disregarding the selling and licensing of patents, one or more of the following activities:

a. Research and technical or experimental work to create, test, qualify, modify, or validate technologies or processes for commercialization of goods or services;

b. Manufacturing; or

c. The provision of goods or commercial services.

(6) Target. – A North Carolina person that meets one or more of the following:

a. The person has received a demand or is the subject of an assertion or allegation of patent infringement.

b. The person has been threatened with litigation or is the defendant of a filed lawsuit alleging patent infringement.

c. The person has customers who have received a demand asserting that the person's product, service, or technology has infringed a patent.

"**§ 75-139. Abusive patent assertions.**

(a) It is unlawful for a person to make a bad-faith assertion of patent infringement. A court may consider the following factors as evidence that a person has made a bad-faith assertion of patent infringement:

(1) The demand does not contain all of the following information:

a. The patent application number or patent number.

b. The name and address of the patent owner or owners and assignee or assignees, if any.

c. Factual allegations concerning the specific areas in which the target's products, services, and technology infringe the patent or are covered by specific, identified claims in the patent.

d. An explanation of why the person making the assertion has standing, if the United States Patent and Trademark Office's assignment system does not identify the person asserting the patent as the owner.

(2) Prior to sending the demand, the person failed to conduct an analysis comparing the claims in the patent to the target's products, services, and technology, or the analysis was done but does not identify specific areas in which the products, services, and technology are covered by the claims in the patent.

(3) The demand lacks the information described in subdivision (1) of this subsection, the target requests the information, and the person fails to provide the information within a reasonable period of time.

(4) The person demands payment of a license fee or response within an unreasonably short period of time.

(5) The person offers to license the patent for an amount that is not based on a reasonable estimate of the value of the license, or the person offers to license the patent for an amount that is based on the cost of defending a potential or actual lawsuit.

(6) The claim or assertion of patent infringement is meritless, and the person knew or should have known that the claim or assertion is meritless; or the claim or assertion relies on an interpretation of the patent that was disclaimed during prosecution, and the person making the claim or assertion knows or should have known about the disclaimer, or would have known about the disclaimer if the person reviewed the patent's prosecution history.

(7) The claim or assertion of patent infringement is deceptive.

(8) The person or its subsidiaries or affiliates have previously or concurrently filed or threatened to file one or more lawsuits based on the same or similar claim of patent infringement and (i) those threats or lawsuits lacked the

information described in subdivision (1) of this subsection or (ii) the person attempted to enforce the claim of patent infringement in litigation and a court found the claim to be meritless.

(9) The person making the claim or assertion sent the same demand or substantially the same demand to multiple recipients and made assertions against a wide variety of products and systems without reflecting those differences in a reasonable manner in the demands.

(10) The person making the claim or assertion is aware of, but does not disclose, any final, nonfinal, or preliminary postgrant finding of invalidity or unpatentability involving the patent.

(11) The person making the claim or assertion seeks an injunction when that is objectively unreasonable under the law.

(12) Any other factor the court finds relevant.

(b) A court may consider the following factors as evidence that a person has not made a bad-faith assertion of patent infringement:

(1) The demand contains the information described in subdivision (1) of subsection (a) of this section.

(2) Where the demand lacks the information described in subdivision (1) of subsection (a) of this section and the target requests the information, the person provides the information within a reasonable period of time.

(3) The person engages in a good-faith effort to establish that the target has infringed the patent and to negotiate an appropriate remedy.

(4) The person makes a substantial investment in the use of the patent or in the production or sale of a product or item that the person reasonably believes is covered by the patent. "Use of the patent" in the preceding sentence means actual practice of the patent and does not include licensing without actual practice.

(5) The person is either (i) the inventor or joint inventor of the patent or, in the case of a patent filed by and awarded to an assignee of the original inventor or joint inventor, is the original assignee or (ii) an institution of higher education or a technology transfer organization owned or affiliated with an institution of higher education.

(6) The person has demonstrated good-faith business practices in previous efforts to enforce the patent, or a substantially similar patent, or has successfully enforced the patent, or a substantially similar patent, through litigation.

(7) Any other factor the court finds relevant.

(c) This Article does not apply to any of the following:

(1) A demand letter or assertion of patent infringement arising under any of the following:

a. 7 U.S.C. § 136, et seq.
b. 7 U.S.C. § 2321, et seq.
c. 21 U.S.C. § 301, et seq.
d. 35 U.S.C. § 161, et seq.
e. 35 U.S.C. § 271(e)(2).
f. 42 U.S.C. § 262.

(2) A demand letter or assertion of patent infringement by or on behalf of (i) an institution of higher education incorporated under the laws of and with its principal offices in North Carolina or (ii) a technology transfer organization owned by or affiliated with the institution of higher education.

(3) A demand letter or assertion of patent infringement by or on behalf of a nonprofit research organization recognized as exempt from federal income tax under 26 U.S.C. § 501(c)(3) incorporated under the laws of and with its principal offices in North Carolina, or a technology transfer organization owned by or affiliated with the organization.

(4) A demand letter or assertion of patent infringement made by an operating entity or its affiliate.

(d) Subject to the provisions of subsections (a) and (b) of this section, and provided the activities are not carried out in bad faith, nothing in this section shall be construed to deem it an

unlawful practice for any person who owns or has the right to license or enforce a patent to do any of the following:

(1) Advise others of that ownership or right of license or enforcement.
(2) Communicate to others that the patent is available for license or sale.
(3) Notify another of the infringement of the patent.
(4) Seek compensation on account of past or present infringement or for a license to the patent.

"**§ 75-140. Bond.**

(a) Upon motion by a target and a finding by the court that a target has established a reasonable likelihood that a person has made a bad-faith assertion of patent infringement in violation of this Chapter, the court shall require the person to post a bond in an amount equal to a good-faith estimate of the target's fees and costs to litigate the claim and amounts reasonably likely to be recovered under G.S. 75-141, conditioned upon payment of any amounts finally determined to be due to the target. A hearing shall be held if either party so requests. A bond ordered pursuant to this section shall not exceed five hundred thousand dollars ($500,000).

(b) The court may waive the bond requirement of subsection (a) of this section if it finds the person has available assets equal to the amount of the proposed bond or for other good cause shown.

(c) If the person asserting patent infringement fails within 30 days to pay any fee or cost ordered by a court in a matter related to the asserted patent infringement, the amount not paid shall be paid out of the bond posted under subsection (a) of this section without affecting the obligation of the person asserting patent infringement to pay any remainder of those fees or costs not paid out of the bond.

"**§ 75-141. Enforcement; remedies; damages.**

(a) The Attorney General shall have the same authority under this Article to make rules, conduct civil investigations, bring civil actions, and enter into assurances of discontinuance as provided under this Chapter. In an action brought by the Attorney General pursuant to this section, the court may award or impose any relief available under this Chapter.

(b) A target or a person aggrieved by a violation of this Article or by a violation of rules adopted under this Article may bring an action in superior court against a person who has made a bad-faith assertion of patent infringement. A court may award to a plaintiff who prevails in an action brought pursuant to this subsection one or more of the following remedies:

(1) Equitable relief.
(2) Damages.
(3) Costs and fees, including reasonable attorneys' fees.
(4) Exemplary damages in an amount equal to fifty thousand dollars ($50,000) or three times the total of damages, costs, and fees, whichever is greater.

(c) A court may award to a defendant who prevails in an action brought pursuant to this section costs and fees, including reasonable attorneys' fees, if the court finds the action was not well-grounded in fact and warranted by existing law or was interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) Joinder of Interested Parties. – In an action arising under subsection (a) or (b) of this section, the court shall grant a motion by the Attorney General or a target to join an interested party if the moving party shows that the party alleging infringement has no substantial interest in the patent or patents at issue other than making demands or asserting such patent claim in litigation.

(e) In an action arising under subsection (a) or (b) of this section, any person who has delivered or sent, or caused another to deliver or send, a demand to a target in North Carolina has purposefully availed himself or herself of the privileges of conducting business in this State and shall be subject to suit in this State, whether or not the person is transacting or has transacted any other business in this State. This Article shall be construed as a special jurisdiction statute in accordance with G.S. 1-75.4(2).

(f) If a party is unable to pay an amount awarded by the court pursuant to subsection (a) or (b) of this section, the court may find any interested party joined pursuant to subsection (d) of this section jointly and severally liable for the abusive patent assertion and make the award recoverable against any or all of the joined interested parties.

(g) This Article shall not be construed to limit rights and remedies available to the State of North Carolina or to any person under any other law and shall not alter or restrict the

Attorney General's authority under this Article with regard to conduct involving assertions of patent infringement."

SECTION 2.2. Section 2.1 of this act is effective when it becomes law and applies to causes of actions commenced on or after that date and demands made on or after that date.

PART III. SHAREHOLDER ASSENT TO EXCLUSIVE FORUM

SECTION 3. Article 7 of Chapter 55 of the General Statutes is amended by adding a new section to read:

"**§ 55-7-50. Exclusive forum or venue provisions valid.**

A provision in the articles of incorporation or bylaws of a corporation that specifies a forum or venue in North Carolina as the exclusive forum or venue for litigation relating to the internal affairs of the corporation shall be valid and enforceable."

PART IV. LIMIT SUCCESSOR ASBESTOS-RELATED LIABILITIES

SECTION 4.1. Chapter 99E of the General Statutes is amended by adding a new Article to read:

"Article 5.

"Successor Asbestos-Related Liability.

"**§ 99E-40. Definitions.**

The following definitions apply in this Article:

(1) Asbestos claim. – Any claim, wherever or whenever made, for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos, including any of the following:
   a. The health effects of exposure to asbestos, including a claim for personal injury or death, mental or emotional injury, risk of disease or other injury, or the costs of medical monitoring or surveillance.
   b. Any claim made by or on behalf of any person exposed to asbestos or a representative, spouse, parent, child, or other relative of the person.
   c. Any claim for damage or loss caused by the installation, presence, or removal of asbestos.

(2) Corporation. – Any corporation established under either domestic or foreign charter and includes a corporate subsidiary and any business entity in which a corporation participates or is a stockholder, a partner, or a joint venturer.

(3) Successor. – A corporation that assumes or incurs or has assumed or incurred successor asbestos-related liabilities through operation of law, including, but not limited to, a merger or consolidation or plan of merger or consolidation related to such consolidation or merger or by appointment as administrator or as trustee in bankruptcy, debtor in possession, liquidation, or receivership and that became a successor before January 1, 1972. Successor includes any of that successor corporation's successors.

(4) Successor asbestos-related liability. – Any liabilities, whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, which are related in any way to asbestos claims and were assumed or incurred by a corporation as a result of or in connection with a merger or consolidation, or the plan of merger or consolidation related to the merger or consolidation with or into another corporation, or that are related in any way to asbestos claims based on the exercise of control or the ownership of stock of the corporation before the merger or consolidation. The term includes liabilities that, after the time of the merger or consolidation for which the fair market value of total gross assets is determined under G.S. 99E-43, were or are paid or otherwise discharged or committed to be paid or otherwise discharged, by or on behalf of the corporation or by a successor of the corporation, or by or on behalf of a transferor, in connection with settlements, judgments, or other discharges in this State or another jurisdiction.

(5) Transferor. – A corporation from which successor asbestos-related liabilities are or were assumed or incurred.

"**§ 99E-41. Applicability.**

The limitations in G.S. 99E-42 shall apply to any successor but shall not apply to any of the following:

(1) Workers' compensation benefits paid by or on behalf of an employer to an employee under the provisions of Chapter 97 of the General Statutes, or a comparable workers' compensation law of another jurisdiction.

(2) Any claim against a corporation that does not constitute a successor asbestos-related liability.

(3) Any obligation under the National Labor Relations Act, 29 U.S.C. § 151, et seq., as amended, or under any collective bargaining agreement.

(4) A successor that, after a merger or consolidation, continued in the business of mining asbestos or in the business of selling or distributing asbestos fibers or in the business of manufacturing, distributing, removing, or installing asbestos-containing products which were the same or substantially the same as those products previously manufactured, distributed, removed, or installed by the transferor.

"**§ 99E-42. Limitation on successor asbestos-related liability.**

(a) Except as further limited in subsection (b) of this section, the cumulative successor asbestos-related liabilities of a successor corporation are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The successor corporation does not have responsibility for successor asbestos-related liabilities in excess of this limitation.

(b) If the transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior merger or consolidation with a prior transferor, then the fair market value of the total assets of the prior transferor determined as of the time of the earlier merger or consolidation shall be substituted for the limitation set forth in subsection (a) of this section for purposes of determining the limitation of liability of a successor corporation.

"**§ 99E-43. Establishing fair market value of total gross assets.**

(a) A successor corporation may establish the fair market value of total gross assets for the purpose of the limitations under G.S. 99E-35 through any method reasonable under the circumstances, including either of the following:

(1) By reference to the going concern value of the assets or to the purchase price attributable to or paid for the assets in an arms-length transaction.

(2) In the absence of other readily available information from which the fair market value can be determined, by reference to the value of the assets recorded on a balance sheet.

(b) Total gross assets include intangible assets.

(c) To the extent total gross assets include any liability insurance that was issued to the transferor whose assets are being valued for purposes of this section, the applicability, terms, conditions, and limits of such insurance shall not be affected by this statute nor shall this statute otherwise affect the rights and obligations of an insurer, transferor, or successor under any insurance contract and/or any related agreements, including, without limitation, preenactment settlements resolving coverage-related disputes, and the rights of an insurer to seek payment for applicable deductibles, retrospective premiums, or self-insured retentions or to seek contribution from a successor for uninsured or self-insured periods or periods where insurance is uncollectible or otherwise unavailable. Without limiting the foregoing, to the extent total gross assets include any such liability insurance, a settlement of a dispute concerning any such liability insurance coverage entered into by a transferor or successor with the insurers of the transferor before the effective date of this act shall be determinative of the total coverage of such liability insurance to be included in the calculation of the transferor's total gross assets.

"**§ 99E-44. Adjustment.**

(a) Except as provided in subsections (b), (c), and (d) of this section, the fair market value of total gross assets at the time of the merger or consolidation shall increase annually at a rate equal to the sum of the following:

(1) The prime rate as listed in the first edition of the Wall Street Journal published for each calendar year since the merger or consolidation, unless the prime rate is not published in that edition of the Wall Street Journal, in which case any reasonable determination of the prime rate on the first day of the calendar year may be used.

(2) One percent (1%).

(b) The rate defined in subsection (a) of this section shall not be compounded.

(c) The adjustment of the fair market value of total gross assets shall continue as provided in subsection (a) of this section until the date the adjusted value is first exceeded by the cumulative amounts of successor asbestos-related liabilities paid or committed to be paid by or on behalf of the successor corporation or a predecessor or by or on behalf of a transferor after the time of the merger or consolidation for which the fair market value of total gross assets is determined.

(d) No adjustment of the fair market value of total gross assets shall be applied to any liability insurance that may be included in the definition of total gross assets by subsection (c) of G.S. 99E-43.

"**§ 99E-45. Scope of Article; application.**

(a) This Article shall be liberally construed with regard to successors.

(b) This Article shall apply to all asbestos claims filed against a successor on or after the effective date of this act."

SECTION 4.2. Section 4.1 of this act becomes effective January 1, 2015.

PART V. SEVERABILITY AND EFFECTIVE DATE

SECTION 5.1. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

SECTION 5.2. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 1st day of August, 2014.

s/ Neal Hunt
Presiding Officer of the Senate

s/ Thom Tillis
Presiding Officer of the House of Representatives

s/ Pat McCrory
Governor

Approved 5:09 p.m. this 6th day of August, 2014

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2014-102
SENATE BILL 853

AN ACT TO MODERNIZE THE BUSINESS COURT BY MAKING TECHNICAL, CLARIFYING, AND ADMINISTRATIVE CHANGES TO THE PROCEDURES FOR COMPLEX BUSINESS CASES, TO STREAMLINE THE PROCESS OF CORPORATE REORGANIZATION UTILIZING HOLDING COMPANIES, AND TO ESTABLISH A BUSINESS COURT MODERNIZATION SUBCOMMITTEE OF THE JOINT LEGISLATIVE ECONOMIC DEVELOPMENT AND GLOBAL ENGAGEMENT OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 7A-27 reads as rewritten:

"**§ 7A-27. Appeals of right from the courts of the trial divisions.**

(a) Appeal lies of right directly to the Supreme Court in any of the following cases:

(1) ~~all~~ All cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.

(2) From any final judgment in a case designated as a mandatory complex business case pursuant to G.S. 7A-45.4 or designated as a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

(3) From any interlocutory order of a Business Court Judge that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

(b) Appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.

(2) From any final judgment of a district court in a civil action.

(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding ~~which~~ that does any of the following:

a. Affects a substantial right.

b. In effect determines the action and prevents a judgment from which an appeal might be taken.

c. Discontinues the action.

d. Grants or refuses a new trial.

e. Determines a claim prosecuted under G.S. 50-19.1.

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute."

SECTION 2. G.S. 7A-45.3 reads as rewritten:

"**§ 7A-45.3. Superior court judges designated for complex business cases.**

The Chief Justice may exercise the authority under rules of practice prescribed pursuant to G.S. 7A-34 to designate one or more of the special superior court judges authorized by G.S. 7A-45.1 to hear and decide complex business cases as prescribed by the rules of practice.

Any judge so designated shall be known as a Business Court Judge and shall preside in the Business Court. If there is more than one business court judge, the Chief Justice may designate one of them as the Senior Business Court Judge. If there is no designation by the Chief Justice, the judge with the longest term of service on the court shall serve as Senior Business Court Judge until the Chief Justice makes an appointment to the position. The presiding Business Court Judge shall issue a written opinion in connection with any order granting or denying a motion under G.S. 1A-1, Rule 12, 56, 59, or 60, or any order finally disposing of a complex business case, other than an order effecting a settlement agreement or jury verdict."

SECTION 3. G.S. 7A-45.4 reads as rewritten:

"**§ 7A-45.4. Designation of complex business cases.**

(a) ~~A mandatory complex business case is~~ Any party may designate as a mandatory complex business case an action that involves a material issue related ~~to:~~to any of the following:

(1) ~~The law governing corporations, except charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose, partnerships, limited liability companies, and limited liability partnerships, including issues concerning governance, involuntary dissolution of a corporation, mergers and acquisitions, breach of duty of directors, election or removal of directors, enforcement or interpretation of shareholder agreements, and derivative actions.~~Disputes involving the law governing corporations, except charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose, partnerships, and limited liability companies, including disputes arising under Chapters 55, 55A, 55B, 57D, and 59 of the General Statutes.

(2) ~~Securities law, including proxy disputes and tender offer disputes.~~Disputes involving securities, including disputes arising under Chapter 78A of the General Statutes.

(3) ~~Antitrust law, except claims based solely on unfair competition under G.S. 75-1.1.~~Disputes involving antitrust law, including disputes arising under Chapter 75 of the General Statutes that do not arise solely under G.S. 75-1.1 or Article 2 of Chapter 75 of the General Statutes.

(4) ~~State trademark or unfair competition law, except claims based solely on unfair competition under G.S. 75-1.1.~~Disputes involving trademark law, including disputes arising under Chapter 80 of the General Statutes.

(5) ~~Intellectual property law, including software licensing disputes.~~Disputes involving the ownership, use, licensing, lease, installation, or performance of intellectual property, including computer software, software applications, information technology and systems, data and data security, pharmaceuticals, biotechnology products, and bioscience technologies.

~~(6) The Internet, electronic commerce, and biotechnology.~~

~~(7) Tax law, when the dispute has been the subject of a contested tax case for which judicial review is requested under G.S. 105-241.16 or the dispute is a civil action under G.S. 105-241.17.~~

(8) Disputes involving trade secrets, including disputes arising under Article 24 of Chapter 66 of the General Statutes.

(9) Contract disputes in which all of the following conditions are met:

a. At least one plaintiff and at least one defendant is a corporation, partnership, or limited liability company, including any entity authorized to transact business in North Carolina under Chapter 55, 55A, 55B, 57D, or 59 of the General Statutes.

b. The complaint asserts a claim for breach of contract or seeks a declaration of rights, status, or other legal relations under a contract.

c. The amount in controversy computed in accordance with G.S. 7A-243 is at least one million dollars ($1,000,000).

d. All parties consent to the designation.

(b) ~~Any party may designate a civil action or a petition for judicial review under G.S. 105-241.16 as a mandatory complex business case by filing a Notice of Designation in the Superior Court in which the action has been filed and simultaneously serving the notice on each opposing party or counsel and on the Special Superior Court Judge for Complex Business~~

~~Cases who is then the senior Business Court Judge. A copy of the notice shall also be sent contemporaneously by e-mail or facsimile transmission to the Chief Justice of the Supreme Court for approval of the designation of the action as a mandatory complex business case and assignment to a specific Business Court Judge.~~The following actions shall be designated as mandatory complex business cases:

(1) An action involving a material issue related to tax law that has been the subject of a contested tax case for which judicial review is requested under G.S. 105-241.16, or a civil action under G.S. 105-241.17 containing a constitutional challenge to a tax statute, shall be designated as a mandatory complex business case by the petitioner or plaintiff.

(2) An action described in subdivision (1), (2), (3), (4), (5), or (8) of subsection (a) of this section in which the amount in controversy computed in accordance with G.S. 7A-243 is at least five million dollars ($5,000,000) shall be designated as a mandatory complex business case by the party whose pleading caused the amount in controversy to equal or exceed five million dollars ($5,000,000).

(3) An action involving regulation of pole attachments brought pursuant to G.S. 62-350 shall be designated as a mandatory complex business case by the plaintiff.

(c) A party designating an action as a mandatory complex business case shall file a Notice of Designation in the Superior Court in which the action has been filed, shall contemporaneously serve the notice on each opposing party or counsel and on the Special Superior Court Judge for Complex Business Cases who is then the senior Business Court Judge, and shall contemporaneously send a copy of the notice by e-mail to the Chief Justice of the Supreme Court for approval of the designation of the action as a mandatory complex business case. The Notice of Designation shall, in good faith and based on information reasonably available, succinctly state the basis of the designation and include a certificate by or on behalf of the designating party that the civil action meets the criteria for designation as a mandatory complex business case pursuant to subsection (a) or (b) of this section.

(d) The Notice of Designation shall be filed:

(1) By the plaintiff, the third-party plaintiff, or the petitioner for judicial review contemporaneously with the filing of the complaint, third-party complaint, or the petition for judicial review in the action.

(2) By any intervenor when the intervenor files a motion for permission to intervene in the action.

(3) By any defendant or any other party within 30 days of receipt of service of the pleading seeking relief from the defendant or party.

(4) By any party whose pleading caused the amount in controversy computed in accordance with G.S. 7A-243 to equal or exceed five million dollars ($5,000,000) contemporaneously with the filing of that pleading.

(e) Within 30 days after service of the Notice of Designation, any other party may, in good faith, file and serve an opposition to the designation of the action as a mandatory complex business case. The opposition to the designation of the action shall assert all grounds on which the party opposing designation objects to the designation, and any grounds not asserted shall be deemed conclusively waived. Within 30 days after the entry of an order staying a pending action pursuant to subsection (g) of this section, any party opposing the stay shall file an objection with the Business Court asserting all grounds on which the party objects to the case proceeding in the Business Court, and any grounds not asserted shall be deemed conclusively waived. Based on the opposition or ~~ex mero motu,~~ on its own motion, the Business Court Judge ~~may~~ shall rule by written order on the opposition or objection and determine ~~that~~ whether the action should ~~not~~ be designated as a mandatory complex business case. If a party disagrees with the decision, the party may appeal ~~to the Chief Justice of the Supreme Court.~~in accordance with G.S. 7A-27(a).

(f) Once a designation is filed under subsection (d) of this section, and after preliminary approval by the Chief Justice, a case shall be designated and administered a complex business case. All proceedings in the action shall be before the Business Court Judge to whom it has been assigned unless and until an order has been entered under subsection (e) of this section ordering that the case not be designated a mandatory complex business case or the Chief Justice revokes approval. If complex business case status is revoked or denied, the action shall be

treated as any other civil action, unless it is designated as an exceptional civil case or a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

(g) If an action required to be designated as a mandatory complex business case pursuant to subsection (b) of this section is not so designated, the Superior Court in which the action has been filed shall, by order entered sua sponte, stay the action until it has been designated as a mandatory complex business case by the party required to do so in accordance with subsection (b) of this section.

(h) Nothing in this section is intended to permit actions for personal injury grounded in tort to be designated as mandatory complex business cases or to confer, enlarge, or diminish the subject matter jurisdiction of any court."

SECTION 4. G.S. 7A-305 reads as rewritten:

"**§ 7A-305. Costs in civil actions.**

(a) In every civil action in the superior or district court, except for actions brought under Chapter 50B of the General Statutes, shall be assessed:

…

(2) For support of the General Court of Justice, the sum of one hundred eighty dollars ($180.00) in the superior court and the sum of one hundred thirty dollars ($130.00) in the district court except that if the case is assigned to a magistrate the sum shall be eighty dollars ($80.00). ~~If a case is assigned to a special superior court judge as a complex business case under G.S. 7A-45.3, upon assignment the party filing the notice of designation pursuant to G.S. 7A-45.4 or the motion for complex business designation shall pay an additional one thousand dollars ($1,000) for support of the General Court of Justice; if a case is assigned to a special superior court judge as a complex business case under G.S. 7A-45.3 by a court on its own motion, upon assignment the plaintiff shall pay an additional one thousand dollars ($1,000) for support of the General Court of Justice.~~ If a case is designated as a mandatory complex business case under G.S. 7A-45.4, upon assignment to a Business Court Judge, the party filing the designation shall pay an additional one thousand one hundred dollars ($1,100) for support of the General Court of Justice. If a case is designated as a complex business case under Rule 2.1 and Rule 2.2 of the General Rules of Practice for the Superior and District Courts, upon assignment to a Business Court Judge, the plaintiff shall pay an additional one thousand one hundred dollars ($1,100) for support of the General Court of Justice. Sums collected under this subdivision shall be remitted to the State Treasurer. The State Treasurer shall remit the sum of one dollar and fifty cents ($1.50) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.4, and ninety-five cents ($.95) of each fee collected under this subdivision to the North Carolina State Bar for the provision of services described in G.S. 7A-474.19.

…

(d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:

…

(12) The fee assessed pursuant to subdivision (2) of subsection (a) of this section upon assignment of a case to a special superior court judge as a complex business case.

…."

SECTION 5. G.S. 7A-343 reads as rewritten:

"**§ 7A-343. Duties of Director.**

The Director is the Administrative Officer of the Courts, and the Director's duties include all of the following:

…

(8) Prepare and submit an annual report on the work of the Judicial Department to the Chief Justice, and transmit a copy to each member of the General Assembly. The annual report shall include the activities of each North

Carolina Business Court site, including the number of new, closed, and pending cases, the average age of pending cases, and the annual expenditures for the prior fiscal year.

(8a) Prepare and submit a semiannual report on the activities of each North Carolina business court site to the Chief Justice and to each member of the General Assembly. The semiannual report required under this subdivision shall be separate from the report required under subdivision (8) of this section and shall include the total number of civil cases pending in each business court site over three years after being designated as a mandatory complex business case, motions pending over six months after being filed, and civil cases in which bench trials have been concluded for over six months without entry of judgment, including any accompanying explanation provided by the Business Court.

…."

SECTION 6.(a) Article 11 of Chapter 55 of the General Statutes is amended by adding a new section to read:

"**§ 55-11-11. Merger to effect a holding company reorganization.**

(a) The following definitions apply in this section:

(1) "Company official" has the same meaning as in G.S. 57D-1-03.

(2) "Constituent corporation" means the original corporation incorporated under the laws of this State or limited liability company organized under the laws of this State that is a party to a merger that is intended to create a holding company structure under a plan of merger that satisfies the requirements of this section.

(3) "Holding company" means a corporation incorporated under the laws of this State or limited liability company organized under the laws of this State that from its incorporation or organization until consummation of a merger governed by this section was at all times a direct or indirect wholly owned subsidiary of the constituent corporation and whose capital stock is issued in the merger.

(4) "Manager" has the same meaning as in G.S. 57D-1-03.

(5) "Organizational documents" means the articles of incorporation of a corporation or the articles of organization of a limited liability company.

(6) "Surviving entity" means the corporation incorporated under the laws of this State or limited liability company organized under the laws of this State that is the surviving entity in a merger of a constituent corporation with or into a single direct or indirect wholly owned subsidiary of the constituent corporation, which immediately following the merger is a direct or indirect wholly owned subsidiary of the holding company.

(b) Notwithstanding the requirements of G.S. 55-11-03, unless expressly required by its articles of incorporation, no vote of shareholders of a constituent corporation is required to authorize a merger with or into a single direct or indirect wholly owned subsidiary of the constituent corporation if all of the following conditions are satisfied:

(1) The constituent corporation and the direct or indirect wholly owned subsidiary of the constituent corporation are the only constituent entities to the merger.

(2) Each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of a share of capital stock of a holding company having the same designations, rights, powers, and preferences, and the qualifications, limitations, and restrictions thereof, as the share or fraction of a share of the capital stock of the constituent corporation being converted in the merger.

(3) The holding company and the constituent corporation are both corporations of this State and the direct or indirect wholly owned subsidiary that is the other constituent entity to the merger is a corporation or limited liability company of this State.

(4) The articles of incorporation and bylaws of the holding company immediately following the effective time of the merger contain provisions

identical to the articles of incorporation and bylaws of the constituent corporation immediately prior to the effective time of the merger other than provisions, if any, regarding any of the following:

a. The incorporator or incorporators.
b. The corporate name.
c. The registered office and agent.
d. The initial board of directors and the initial subscribers for shares.
e. Any provisions contained in any amendment to the articles of incorporation that were necessary to effect a change, exchange, reclassification, subdivision, combination, or cancellation of stock, if the change, exchange, reclassification, subdivision, combination, or cancellation has become effective.

(5) As a result of the merger the constituent corporation or its successor becomes or remains a direct or indirect wholly owned subsidiary of the holding company.

(6) The directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger.

(7) Except as provided in subsections (c) and (d) of this section, the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the articles of incorporation of the constituent corporation immediately prior to the effective time of the merger other than provisions, if any, regarding any of the following:

a. The incorporator or incorporators.
b. The corporate or entity name.
c. The registered office and agent.
d. The initial board of directors and the initial subscribers for shares.
e. References to members rather than stockholders or shareholders.
f. References to interests, units, or other similar terms rather than stock or shares.
g. References to managers, managing members, or other members of the governing body rather than directors.
h. Any provisions contained in any amendment to the articles of incorporation that were necessary to effect a change, exchange, reclassification, subdivision, combination, or cancellation of stock, if the change, exchange, reclassification, subdivision, combination, or cancellation has become effective.

(8) The shareholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the constituent corporation.

(c) Notwithstanding the provisions of subdivision (7) of subsection (b) of this section, if the organizational documents of the surviving entity do not contain the following provisions, they shall be amended in the merger to contain provisions requiring all of the following:

(1) Any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members, or other members of the governing body of the surviving entity, that requires for its adoption under this Chapter or its organizational documents the approval of the shareholders or members of the surviving entity shall, by specific reference to this subsection, require, in addition, the approval of the shareholders of the holding company, or any successor by merger, by the same vote as is required by this Chapter or by the organizational documents of the surviving entity. For purposes of this subdivision, any surviving entity that is not a corporation shall include in the amendment a requirement that the approval of the shareholders of the holding company be obtained for any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members, or other members of the governing body of the surviving entity, which would require the approval of the shareholders of the surviving entity if the surviving entity were a corporation subject to this Chapter.

(2) Any amendment of the organizational documents of a surviving entity that is not a corporation that would, if adopted by a corporation subject to this Chapter, be required to be included in the articles of incorporation of the corporation shall, by specific reference to this subsection, require, in addition, the approval of the shareholders of the holding company, or any successor by merger, by the same vote as is required by this Chapter or by the organizational documents of the surviving entity.

(3) The business and affairs of a surviving entity that is not a corporation shall be managed by or under the direction of a board of directors, board of managers, or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of those duties to the same extent as, directors of a corporation subject to this Chapter.

(d) Notwithstanding the provisions of subdivision (7) of subsection (b) of this section, the organizational documents of the surviving entity may be amended in the merger to reduce the number of classes and shares of capital stock or other equity interests or units that the surviving entity is authorized to issue and to eliminate any provision authorized by G.S. 55-8-06.

(e) Neither subsection (c) of this section nor any provision of a surviving entity's organizational documents required by this section shall be deemed or construed to require approval of the shareholders of the holding company to elect or remove directors or managers, managing members, or other members of the governing body of the surviving entity.

(f) From and after the effective time of a merger adopted by a constituent corporation by action of its board of directors and without any vote of shareholders pursuant to this section, the following provisions apply:

(1) To the extent the restrictions of Articles 9 and 9A of this Chapter applied to the constituent corporation and its shareholders at the effective time of the merger, such restrictions shall apply to the holding company and its shareholders immediately after the effective time of the merger as though it were the constituent corporation.

(2) If the corporate name of the holding company immediately following the effective time of the merger is the same as the corporate name of the constituent corporation immediately prior to the effective time of the merger, the shares of capital stock of the holding company into which the shares of capital stock of the constituent corporation are converted in the merger shall be represented by the stock certificates that previously represented shares of capital stock of the constituent corporation.

(3) To the extent a shareholder of the constituent corporation immediately prior to the merger had standing to institute or maintain derivative litigation on behalf of the constituent corporation, nothing in this section limits or extinguishes that standing.

(g) If a plan of merger is adopted by a constituent corporation by action of its board of directors and without any vote of shareholders pursuant to this section, but otherwise in accordance with G.S. 55-11-01, the secretary or assistant secretary of the constituent corporation shall certify on the plan of merger that the plan has been adopted pursuant to this section and that the conditions specified in subsection (b) of this section have been satisfied. This certification on the plan of merger is not required if a certificate of merger or consolidation is registered in lieu of filing the plan of merger. The plan so adopted and certified shall then be filed and become effective, in accordance with G.S. 55-11-05. That filing is a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to the filing.

(h) Except as otherwise provided in this section:

(1) The provisions of G.S. 55-11-06(a) and G.S. 55-11-06(c) shall apply to any merger effected pursuant to this section.

(2) The provisions of Article 13 of this Chapter shall not apply to any merger effected pursuant to this section."

SECTION 6.(b) G.S. 55-11-06(a) reads as rewritten:

"**§ 55-11-06. Effect of merger or share exchange.**

(a) When a merger pursuant to G.S. 55-11-01, 55-11-04, 55-11-07, ~~or~~ ~~55-11-09~~55-11-09, or 55-11-11 takes effect:

…."

SECTION 7. G.S. 1A-1, Rule 8(a)(2) reads as rewritten:

"**Rule 8. General rules of pleadings.**

…

…

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. In all actions involving a material issue related to any of the subjects listed in G.S. 7A-45.4(a)(1), (2), (3), (4), (5), or (8), the pleading shall state whether or not relief is demanded for damages incurred or to be incurred in an amount equal to or exceeding five million dollars ($5,000,000). In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000). However, at any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought, and the claimant shall, within 30 days after such service, provide such statement, which shall not be filed with the clerk until the action has been called for trial or entry of default entered. Such statement may be amended in the manner and at times as provided by Rule 15."

SECTION 8.(a) A Subcommittee on Business Court Modernization ("Subcommittee") is created within the Joint Legislative Economic Development and Global Engagement Oversight Committee ("Committee").

SECTION 8.(b) The Subcommittee shall consist of no fewer than six members, with an equal number of Senate and House members appointed by the President Pro Tempore of the Senate and the Speaker of the House of Representatives from among their respective chambers' membership on the Committee. The President Pro Tempore of the Senate and the Speaker of the House of Representatives shall each designate one member to serve as co-chairs of the Subcommittee. The Subcommittee may meet at any time upon the call of either co-chair. A co-chair or other member of the Subcommittee continues to serve until a successor is appointed. Members of the Subcommittee serve at the pleasure of the appointing officer.

SECTION 8.(c) The Subcommittee may study the implementation of this act and its efforts to modernize complex business cases and legislative improvement to the operations and management of the General Court of Justice.

SECTION 8.(d) A quorum is a majority of members of the Subcommittee. No action may be taken except by a majority vote at a meeting at which a quorum is present.

SECTION 8.(e) The Subcommittee, while in the discharge of its official duties, may exercise all powers provided for under G.S. 120-19 and Article 5A of Chapter 120 of the General Statutes. The Subcommittee may contract for professional, clerical, or consultant services, as provided by G.S. 120-32.02.

SECTION 8.(f) Members of the Subcommittee shall receive per diem, subsistence, and travel allowance as provided in G.S. 120-3.1, 138-5 and 138-6, as appropriate.

SECTION 8.(g) All expenses of the Subcommittee shall be paid from the Legislative Services Commission's Reserve for Studies. Individual expenses of five thousand dollars ($5,000) or less, including per diem, travel, and subsistence expenses of members of the Subcommittee, and clerical expenses shall be paid upon the authorization of a co-chair of the Subcommittee. Individual expenses in excess of five thousand dollars ($5,000) shall be paid upon the written approval of the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

SECTION 8.(h) The Legislative Services Officer shall assign professional and clerical staff to assist the Subcommittee in its work. The Director of Legislative Assistants of the House of Representatives and the Director of Legislative Assistants of the Senate shall assign clerical support staff to the Subcommittee.

SECTION 8.(i) The Subcommittee may submit an interim report on the results of its study, including any proposed legislation, to the Committee at any time. The Subcommittee

shall submit a final report on the results of its study, including any proposed legislation, to the Committee prior to the convening of the 2015 General Assembly. The Committee shall submit a final report of its findings and recommendations to the 2015 General Assembly by filing the report with the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Legislative Library. The Subcommittee shall terminate upon the convening of the 2015 General Assembly or upon the filing of its final report with the Committee, whichever occurs first.

SECTION 9. Section 1 of this act becomes effective October 1, 2014, and applies to actions designated as mandatory complex business cases on or after that date. Sections 3 and 4 of this act become effective October 1, 2014, and apply to actions commenced or petitions filed on or after that date. Section 6 of this act becomes effective October 1, 2014, and applies to plans of merger adopted on or after that date. Section 7 of this act is effective when it becomes law and applies to actions commenced on or after that date. Unless otherwise provided by this act, the remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 2nd day of August, 2014.

s/ Chad Barefoot
Presiding Officer of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 5:05 p.m. this 6th day of August, 2014

SMITH ANDERSON

Securities Alert

August 5, 2014

MORE INFORMATION

IF YOU HAVE QUESTIONS ABOUT THIS CLIENT ALERT, PLEASE CONTACT:

Heyward Armstrong
919.821.6619
harmstrong@smithlaw.com

Robert Morris
919.821.6786
jmorris@smithlaw.com

Christopher Smith
919.821.6745
csmith@smithlaw.com

PRACTICE AREAS

Complex Contract Disputes

Corporate and Securities Litigation

Intellectual Property

Securities

Significant Legislation Affecting Business Passed by General Assembly

At the end of last week, the North Carolina General Assembly passed significant legislation affecting the State's business legal climate. With large bipartisan majorities, the Legislature adopted **Senate Bill 853** (SB 853), which is intended to improve the predictability of litigation in the Business Court and empowers companies to efficiently change their corporate structure creating new financing and disposition options. **Senate Bill 648** (SB 648), which contains the "Abusive Patent Assertions Act," makes the State a path breaking national leader in protecting the intellectual property of the innovation community against frivolous attacks by "Patent Trolls." Similarly, the bill places North Carolina in a leadership position by empowering companies to better manage their litigation risks by enabling them to specify the State as the forum for certain disputes.

Our **previous Client Alert** of July 10, addressed that both of these bills were close to passing. This update addresses the final content of both bills, which the Governor is expected to sign soon. The bills should have a significant positive impact on the State's business climate.

SB 853 "The Business Court Modernization Act"

Modernizing the Business Court

Legislators addressed the need to clarify issues around Business Court jurisdiction. For example, formerly, "internet" cases were within the Court's jurisdiction. The term "internet" was not defined in the statute and raised concerns that cases that did not require special Business Court expertise could be filed in the Business Court. Disputes regarding the "internet" alone will not qualify for Business Court jurisdiction under the new legislation; the dispute would also need to involve other covered matters such as technology licensing issues. The legislation makes a number of other adjustments including giving the Business Court jurisdiction over certain high value contract disputes.

SB 853 also establishes direct appeal for Business Court cases to the Supreme Court. Now, instead of an appeal first being heard by a randomly assigned three-judge panel of the Court of Appeals, litigants can seek review directly to the Supreme Court, with review by the full panel of seven justices. This procedure is expected to expedite resolution of business disputes and add predictability to decisions involving important business issues.

Separately, in the Budget Bill, the General Assembly provided for two more Business Court judges in 2015.

Simplifying Holding Company Reorganizations

A holding company reorganization is a transaction whereby a new parent corporation (the holding company) becomes the sole shareholder of an existing corporation (the constituent corporation) either through a merger or a share exchange. Following a holding company reorganization, the shareholders of the constituent corporation become the shareholders of the holding company, and the directors of the constituent corporation become (or remain) the directors of the holding company. Holding company structures are employed for a variety of reasons, including segregating the liabilities of separate lines of business, allowing for structured leverage, and facilitating dispositions of assets. Holding company structures are often used by publicly-traded companies, particularly ones in heavily regulated industries.

Historically, in North Carolina, an existing operating company has been required to engage in either a merger or a share exchange transaction that would require a shareholder vote and, with respect to nonpublic corporations, generally trigger statutory appraisal rights. A number of states, led by Delaware, have enacted statutes that permit holding company reorganizations without shareholder approval and without appraisal rights. New Section 55-11-11 of the North Carolina Business Corporation Act (the Holding Company Statute) is modeled on Delaware's holding company statute, and will allow holding company reorganizations in North Carolina without shareholder approval or appraisal rights, if certain statutory requirements are satisfied. The requirements protect shareholders of the constituent corporation so that they have substantially identical ownership and rights in the holding company following the merger.

The Holding Company Statute will reduce the cost and time required by North Carolina corporations to form a holding company by removing the requirement for a shareholder vote, eliminating appraisal rights in connection with the holding company reorganization and facilitating compliance with federal securities laws and regulations. Corporations that desire to adopt a holding company structure should carefully consider availing themselves of the benefits of this law.

SB 648 North Carolina Commerce Protection Act of 2014

Abusive Patent Assertions Act

Nationally, there is significant attention to the negative effects of "patent trolls" on the American economy and innovation. A "patent troll" does not research, develop technology or products related to its patents, or perform any technology transfer function. Instead, patent trolls acquire patents solely for the purpose of obtaining licensing fees from alleged infringers. Patent trolls often employ aggressive litigation tactics in the hopes that a target will pay a licensing fee rather than undertake expensive litigation.

With this legislation, our General Assembly sent a clear message, i.e., a patent troll threatens a North Carolina business at its own peril. The bill gives jurisdiction to a North Carolina court over any person or entity that sends a patent infringement demand letter to a North Carolina company, and empowers the North Carolina company to sue a troll ***in*** North Carolina, if the troll makes an unfair patent demand or files an unfair lawsuit anywhere against the North Carolina company. If the demand is found to be in bad faith, the bill provides for equitable relief, monetary damages, costs and reasonable attorneys' fees, as well as "exemplary damages" of either $50,000 or triple the total damages, costs and fees, whichever is greater.

Perhaps most importantly, the law puts the ***individuals*** who control or direct the troll on the hook for their misconduct by enabling joinder of an "interested party," i.e., a controlling stakeholder in the patent troll itself.

Subject to the court making certain legal findings, if the defendant troll isn't able to pay an award, the court could hold the interested parties jointly and severally liable and make them pay. That potential exposure to liability could provide a healthy deterrent to meritless litigation. This legislation makes North Carolina a path breaking national leader in protecting those who innovate and build our future.

Risk Management through Exclusive Venue Provisions

In another first-of-its-kind law, North Carolina now expressly confirms a corporation's right to designate North Carolina as the exclusive forum for internal corporate litigation. The law creates a new section of the North Carolina Business Corporation Act (§ 55-7-50) stating: "A provision in the articles of incorporation or bylaws of a corporation that specifies a forum or venue in North Carolina as the exclusive forum or venue for litigation relating to the internal affairs of the corporation shall be valid and enforceable." For example, a company could require shareholder derivative actions, cases alleging a breach of fiduciary duty by the company's directors, and cases arising under the Business Corporation Act to be brought in North Carolina state court (where the North Carolina Business Court would have jurisdiction) or federal court in North Carolina.

Such a provision avoids the substantial expense of fighting shareholder litigation in multiple states simultaneously and ensures that internal corporate litigation is handled by a court familiar with the governing law and is convenient for the company and employees. Absent an enabling statute, however, such provisions have been challenged in litigation. By enacting this law, the General Assembly will provide certainty to North Carolina companies and give them a valuable tool to manage risks associated with internal corporate disputes. The law also puts North Carolina in a leadership position on this issue.

Conclusion

In debate on the bills, legislators were clear that they hope these changes will improve North Carolina's business legal climate, such that businesses and shareholders can feel confident incorporating in North Carolina (as opposed to another state such as Delaware) and having their legal matters resolved by North Carolina courts. Similarly, the Anti-Patent Troll legislation will make North Carolina a better location for those working on the innovations that create jobs and our State's future.

For *Business Court and Venue Provision* questions, please contact **Christopher Smith**. For *Holding Company Statute* questions, please contact **Heyward Armstrong**. For *Abusive Patent Assertions Act* questions, please contact **Robert Joseph Morris.**

SMITH ANDERSON

Corporate Alert

September 10, 2014

MORE INFORMATION

IF YOU HAVE QUESTIONS ABOUT THIS CLIENT ALERT, PLEASE CONTACT:

Donald Tucker, Jr.
919.821.6681
dtucker@smithlaw.com

Clifton Brinson
919.821.6605
cbrinson@smithlaw.com

Gerald Roach
919.821.6668
groach@smithlaw.com

Amy Batten
919.821.6677
abatten@smithlaw.com

PRACTICE AREAS

Corporate and Securities Litigation

Corporate Governance and Compliance

Mergers and Acquisitions

Delaware Court of Chancery Upholds North Carolina "Exclusive Forum" Bylaw

In a closely-watched case with implications for corporations across the nation, Chancellor Andre Bouchard of the Delaware Court of Chancery has issued an opinion enforcing a forum-selection bylaw that requires intra-corporate disputes involving a Delaware corporation to be brought in the North Carolina courts. Both Delaware and North Carolina, which recently enacted legislation allowing North Carolina corporations to designate North Carolina as the exclusive forum or venue for intra-corporate disputes (N.C. Gen. Stat. § 55-7-50), have now broadly sanctioned forum-selection bylaw provisions.

The Court's September 8, 2014 opinion in ***City of Providence v. First Citizens BancShares, Inc.****, et al.*, Consol C.A. No. 9795-CB, dismissed a shareholder's challenge to a forum-selection bylaw enacted by the board of First Citizens BancShares, Inc. (FCB), a Delaware corporation, requiring intra-corporate disputes to be brought, to the fullest extent permitted by law, in the federal district court for the Eastern District of North Carolina or, if the federal court lacks jurisdiction, in the state courts of North Carolina.

First Citizens is the first occasion Delaware courts have had to address the validity of a forum-selection bylaw that specified the courts of a state other than Delaware as the exclusive forum for such litigation. (The Delaware Court of Chancery previously upheld a bylaw that designated Delaware as the exclusive forum of intra-corporate disputes in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).) In upholding FCB's forum-selection bylaw, *First Citizens* confirmed that the logic and reasoning of *Chevron* applies equally to the validity of bylaws that specify non-Delaware forums.

FCB, which is headquartered in Raleigh, announced in June 2014 that it had amended its bylaws to include the North Carolina forum-selection clause. At the same time, it announced that it had entered into an agreement to acquire First Citizens Bancorporation, Inc. (FC South), a South Carolina holding corporation with overlapping controlling shareholders with FCB. The shareholder plaintiff challenged both FCB's forum-selection bylaw and the fairness of FCB's proposed merger with FC South, arguing that the bylaw was invalid on its face and "as applied" to plaintiff's merger-related claims. The Court rejected both arguments.

Notably, with respect to the "as applied" challenges, the Court in *First Citizens* found that the bylaw was not unreasonable merely because it had

been enacted in connection with the proposed acquisition of FC South. “That the Board adopted it on an allegedly ‘cloudy’ day when it entered into the merger agreement with FC South rather than on a ‘clear’ day is immaterial given the lack of any well-pled allegations . . . demonstrating any impropriety in timing.”

The Court also rejected the plaintiff’s “as applied” challenge based on the existence of a controlling stockholder, which, as a practical matter, prevented the minority shareholders from repealing the forum-selection bylaw. *First Citizens* flatly states that the fact that a controlling shareholder may favor a forum-selection bylaw “does not make it *per se* unreasonable to enforce the bylaw,” and that to conclude otherwise would “be tantamount to rendering questionable all board adopted bylaws of controlled corporations.”

Chancellor Bouchard’s opinion in *First Citizens* should reassure Delaware corporations of their ability to choose forums other than Delaware for the litigation of intra-corporate disputes, as long as there is a logical connection to that other forum. Controlled corporations have the same rights in this regard as non-controlled corporations. Further, absent well-pleaded facts demonstrating some impropriety by the corporation’s board of directors, the fact that a bylaw is enacted in connection with a proposed transaction that may result in shareholder litigation is irrelevant.

With the decision in *First Citizens,* and with North Carolina’s adoption of N.C. Gen. Stat. § 55-7-50, North Carolina corporations and Delaware corporations with their headquarters in North Carolina should consider whether they wish to adopt a forum-selection bylaw specifying North Carolina as their preferred forum for any shareholder litigation.

Gerald Roach, Geoff Adams and **Jason Martinez** of Smith Anderson represented FCB’s special committee and independent directors in the proposed merger with FC South. **Donald Tucker** and **Clifton Brinson** of Smith Anderson represented FCB’s independent directors in the *First Citizens* litigation. FCB and its directors were represented by Cravath, Swaine & Moore and Richards, Layton & Finger.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CITY OF PROVIDENCE, on behalf of itself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	CONSOLIDATED
	)	C.A. No. 9795-CB
FIRST CITIZENS BANCSHARES, INC., FRANK B. HOLDING, JR., JOHN M. ALEXANDER, JR., VICTOR E. BELL, III, HOPE HOLDING BRYANT, H.M. CRAIG, III, H. LEE DURHAM, JR., DANIEL L. HEAVNER, LUCIUS S. JONES , ROBERT E. MASON, IV, ROBERT T. NEWCOMB, JAMES M. PARKER, and RALPH K. SHELTON,	)	
Defendants.	)	

OPINION

Date Submitted: September 4, 2014
Date Decided: September 8, 2014

Christine S. Azar and Ned C. Weinberger of Labaton Sucharow LLP, Wilmington, Delaware; Christopher J. Keller, Eric J. Belfi and Michael W. Stocker of Labaton Sucharow LLP, New York, New York; Jeremy Friedman and Spencer Oster of Friedman Oster PLLC, New York, New York, Attorneys for Plaintiff.

Gregory P. Williams, John D. Hendershot and Christopher H. Lyons of Richards, Layton & Finger, P.A., Wilmington, Delaware; Sandra C. Goldstein, J. Wesley Earnhardt, and Rory A. Leraris of Cravath, Swaine & Moore LLP, New York, New York, Attorneys for Defendants Frank B. Holding, Jr., John M. Alexander, Jr., Victor E. Bell, III, Hope Holding Bryant, H.M. Craig, III, H. Lee Durham, Jr., Daniel L. Heavner, Lucius S. Jones, Robert E. Mason, IV, Robert T. Newcomb, James M. Parker, Ralph K. Shelton and Nominal Defendant/Defendant First Citizens Bancshares, Inc.

Donald H. Tucker, Jr. and Clifton L. Brinson of Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., Raleigh, North Carolina, Attorneys for Defendants John M. Alexander, Jr., Victor E. Bell, III, H.M. Craig, III, H. Lee Durham, Jr., Daniel L. Heavner, Lucius S. Jones, Robert E. Mason, IV, Robert T. Newcomb, and Ralph K. Shelton.

BOUCHARD, C.

I. INTRODUCTION

This action involves a challenge by plaintiff City of Providence ("Providence") to a forum selection bylaw (the "Forum Selection Bylaw") adopted by defendant First Citizens BancShares, Inc., ("FC North"), a bank holding company incorporated in Delaware and based in Raleigh, North Carolina. The Forum Selection Bylaw is virtually identical to the ones that then-Chancellor, now Chief Justice, Strine found to be facially valid in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation* ("*Chevron*")[1] except in one respect: it selects as the forum the United States District Court for the Eastern District of North Carolina, or, if that court lacks jurisdiction, any North Carolina state court with jurisdiction, instead of the state or federal courts of Delaware.

FC North adopted the Forum Selection Bylaw the same day it announced it had entered into a merger agreement to acquire First Citizens Bancorporation, Inc. ("FC South"), a bank holding company incorporated and based in South Carolina. Providence filed two separate complaints that have since been consolidated into this action. The first complaint challenges the facial validity of the Forum Selection Bylaw and asserts a claim for breach of fiduciary duty in connection with its adoption. The second complaint asserts claims against the FC North board of directors concerning the proposed merger.

In this opinion, I conclude that Providence has not stated a claim as to the facial validity of the Forum Selection Bylaw. This conclusion is compelled by the logic and reasoning of the *Chevron* decision. I also conclude that Providence has failed to state a

[1] 73 A.3d 934 (Del. Ch. 2013).

claim for breach of fiduciary duty in connection with the adoption of the Forum Selection Bylaw and, further, that Providence has failed to demonstrate that it would be unreasonable, unjust, or inequitable to enforce the Forum Selection Bylaw here. Therefore, I grant the defendants' motions to dismiss both of the complaints in this action.

II. BACKGROUND[2]

FC North is a Delaware corporation that is headquartered in Raleigh, North Carolina. FC North is a holding company for First-Citizens Bank & Trust Company, which operates in seventeen states[3] but has most of its banking operations—over 70% of its total deposits and over 60% of its branches—in North Carolina.[4] FC North has two classes of common stock: Class A shares that are entitled to one vote per share and Class B shares that are entitled to sixteen votes per share. Providence is a holder of Class A shares.

FC South is a bank holding company incorporated and based in South Carolina. FC South has voting and non-voting common stock.

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[2] Unless otherwise noted, the facts recited in this Opinion are based on the well-pled allegations of the relevant complaint.

[3] Bylaw Compl. ¶ 9.

[4] First Citizens BancShares, Inc., Annual Report (Form 10-K), at 4 (Feb. 26, 2014). I may consider these publicly available facts at the motion to dismiss stage because they are not subject to reasonable dispute. *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006).

Both FC North and FC South are allegedly controlled by the members and affiliates of the Holding family (the "Holding Group"). The Holding Group beneficially owns shares representing approximately 52.2% of the votes of FC North and approximately 48.5% of the votes of FC South.[5] As between the two, the Holding Group's economic interests are allegedly greater in FC South than FC North.

On June 10, 2014, the FC North board adopted and approved Amended and Restated Bylaws, which revised numerous aspects of FC North's bylaws and added the Forum Selection Bylaw.[6] That same day, FC North announced that it had entered into a merger agreement to acquire FC South for a mix of stock and cash. The aggregate value of the proposed transaction is alleged to be between $636.9 million and $676.4 million.

On June 19, 2014, Providence filed a complaint (the "Bylaw Complaint") against FC North and the twelve members of its board of directors (the "Board") challenging the Forum Selection Bylaw as invalid as a matter of Delaware law or public policy (Count I) and seeking a declaratory judgment that the Forum Section Bylaw is invalid or, alternatively, that this Court "may nonetheless exercise jurisdiction over this action and

[5] Bylaw Compl. ¶¶ 24, 26; Merger Compl. ¶¶ 32, 36. Providence further alleges that, when the holdings of other entities in which members of the Holding family are stockholders and serve as directors and/or officers are included, these voting percentages increase to approximately 58.2% of votes of FC North and 60.8% of FC South. Merger Compl. ¶¶ 34, 38.

[6] Bylaw Compl. ¶ 35; *see also* First Citizens BancShares, Inc., Current Report (Form 8-K), at Item 5.03 (June 10, 2014) (summarizing material changes made in FC North's Amended and Restated Bylaws).

any action arising out of or relating to the [proposed merger]" (Count III).[7] In the Bylaw Complaint, Providence also asserts that the adoption of the Forum Selection Bylaw was *ultra vires* and a breach of fiduciary duty (Count II).

On July 10, 2014, defendants moved to dismiss the Bylaw Complaint in its entirety under Court of Chancery Rule 12(b)(6) for failure to state a claim. They also moved to dismiss Count II under Rule 12(b)(3) for improper venue.

On August 1, 2014, Providence filed its second complaint (the "Merger Complaint"). In the Merger Complaint, Providence asserts various class and derivative claims for breach of fiduciary duty against the Board, as well as for breach of fiduciary duty as a controlling stockholder and for unjust enrichment against certain directors in their capacity as members of the Holding Group. In essence, Providence contends that the Holding Group, through its controlling interest, unfairly forced FC North to overpay for FC South to its own benefit and to the dilution of FC North's minority stockholders.[8]

On August 4, 2014, the defendants moved to dismiss the Merger Complaint under Rule 12(b)(3) for improper venue. On August 7, 2014, the two cases were consolidated. Providence has not filed a consolidated complaint or designated an operative complaint. Thus, within this consolidated action, there are two complaints containing discrete claims, as described above.

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[7] Bylaw Compl. ¶ 69.

[8] There is no claim challenging the Forum Selection Bylaw in the Merger Complaint. Rather, Providence's allegations in the Merger Complaint about the Forum Selection Bylaw simply rehash its allegations in the Bylaw Complaint. *See* Merger Compl. ¶¶ 12, 100-03, 114.

On the evening of August 28, Providence filed a motion to expedite and for a preliminary injunction to enjoin a September 16 vote by FC North stockholders on several proposals related to the proposed merger, including a charter amendment to increase the number of authorized shares.[9] The parties do not dispute that the Forum Selection Bylaw purports to govern the claims Providence asserts in the Merger Complaint.[10] Were the Forum Selection Bylaw valid, then this Court would not be the proper venue to hear Providence's request for injunctive relief.

As to the timing between the preliminary injunction motion and the pending motions to dismiss, the parties previously stipulated that the motions to dismiss would be heard on or as soon as possible after September 3. They stipulated further that the validity of the Forum Selection Bylaw, including whether it may bar the claims Providence asserts in the Merger Complaint, should be resolved before any other substantive issues.[11]

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[9] Providence was aware of the September 16 stockholder meeting since at least August 6, 2014, when FC North filed an amendment to its registration statement with the Securities and Exchange Commission, but it did not file its motion for expedition until twenty-two days later (shortly before the Labor Day weekend) and just nineteen days before the date of the meeting. The timing of its filing displays a glaring lack of alacrity with which it seeks to act as class counsel.

[10] The claims against the members of the Board in their capacity as directors of FC North plainly fall within part (2) of the Forum Selection Bylaw, and, to the extent they are derivative, part (1). *See* n. 18, below. Providence did not argue that its claims against members of the Board in their capacity as members of the Holding Group (an alleged controlling stockholder) are outside the ambit of the Forum Selection Bylaw.

[11] Stip. Regarding Consolidation and Briefing on Defs.' Mots. to Dismiss ¶ 1 (Aug. 7, 2014) ("The Parties agree that the issue of the validity of the Bylaw, including as applied to the Merger Litigation, should be decided before any other substantive issue raised in

In accordance with the parties' own stipulation, before I consider the merits of Providence's motion to expedite to schedule a hearing on its preliminary injunction motion, I will address the potentially dispositive motions regarding the Forum Selection Bylaw.

III. LEGAL ANALYSIS

A. The Standard of Review under Rule 12(b)(6)

A motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim must be denied unless, assuming the well-pled allegations to be true and viewing all reasonable inferences from those allegations in the plaintiff's favor, I do not find there to be a "reasonably conceivable set of circumstances" in which the plaintiff could recover.[12] In this analysis, I do not accept as true any "conclusory allegations unsupported by specific facts."[13]

B. The Statutory Framework for Corporate Bylaws

"[T]he bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the [Delaware General Corporation Law (the "DGCL")]."[14] Under 8 *Del.*

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the Merger Litigation is decided by the Court, and that Defendants are not required to submit an opposition to any expedition or injunction motion submitted by Plaintiff before the Court rules on Defendants' motions to dismiss[.]").

[12] *See Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

[13] *Gantler v. Stephens*, 965 A.2d 695, 704 (Del. 2009).

[14] *Chevron*, 73 A.3d at 939.

C. § 109(a), a corporation may "confer the power to adopt, amend or repeal bylaws upon the directors." A corporation's bylaws, under 8 *Del. C.* § 109(b), "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating 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." I evaluate the validity of the Forum Selection Bylaw, as a bylaw of a Delaware corporation, under Delaware law.[15]

C. FC North's Forum Selection Bylaw is Facially Valid

FC North's charter grants the power to amend the bylaws to the Board.[16] *Chevron* explains the expectation that investors in corporations like FC North should therefore have: "[s]tockholders are on notice that, as to those subjects that are subject of regulation by bylaw under 8 *Del. C.* § 109(b), the board itself may act unilaterally to adopt bylaws addressing those subjects."[17]

In all but two respects, the Forum Selection Bylaw is functionally identical to the bylaws of Chevron Corporation and FedEx Corporation challenged in *Chevron*. All three seek to regulate the proper forum for lawsuits against the corporation and its directors,

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[15] *See id.* at 938.

[16] Restated Certificate of Incorporation of First Citizens BancShares, Inc., art. V ("[T]he Board of Directors shall have the power to make, adopt, alter, amend and repeal, from time to time, the Bylaws of the corporation, subject to the rights of the shareholders entitled to vote with respect thereto to alter or repeal Bylaws made by the Board of Directors."). I take judicial notice of this provision of FC North's charter because Providence does not contest its existence or authenticity. *See Malpiede v. Townson*, 780 A.2d 1075, 1090-92 (Del. 2001).

[17] *Chevron*, 73 A.3d at 955-56.

officers, and employees asserting (i) any derivative claim; (ii) any claim for breach of fiduciary duty owed by a director, officer, or employee of the corporation; (iii) any claim arising under any provision of the DGCL; and (iv) any claim governed by the internal affairs doctrine.[18] The two distinctions are as follows: first, whereas the boards of Chevron and FedEx selected Delaware courts as their exclusive forums, the Board of FC North selected North Carolina courts; and second, FC North's Forum Selection Bylaw, unlike that of Chevron or FedEx, is applicable only "to the fullest extent permitted by law." These distinctions frame an issue of first impression: whether the board of a Delaware corporation may adopt a bylaw that designates an exclusive forum other than Delaware for intra-corporate disputes.

[18] FC North's Forum Selection Bylaw provides:

> Exclusive Forum for Certain Disputes: Unless the corporation consents in writing to the selection of an alternative forum, the United States District Court for the Eastern District of North Carolina or, if such court lacks jurisdiction, any North Carolina state court that has jurisdiction, shall, to the fullest extent permitted by law, be the sole and exclusive forum for (1) any derivative action or proceeding brought on behalf of the corporation, (2) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the corporation to the corporation or the corporation's shareholders, (3) any action asserting a claim arising pursuant to any provision of the General Corporation Law of the State of Delaware, and (4) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring or holding any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this Section 8.

Bylaw Compl. ¶ 37.

After carefully interpreting the relevant Delaware statutes and case law implicated by board-adopted forum selection bylaws, then-Chancellor Strine concluded in *Chevron* that these types of bylaws are statutorily and contractually valid under Delaware law:

> As a matter of easy linguistics [in interpreting 8 *Del. C.* § 109(b) for the proper scope of corporate bylaws], the forum selection bylaws address the "rights" of the stockholders, because they regulate where stockholders can exercise their right to bring certain internal affairs claims against the corporation and its directors and officers. . . . That is, because the forum selection bylaws address internal affairs claims, the subject matter of the actions the bylaws govern relates quintessentially to "the corporation's business, the conduct of its affairs, and the rights of its stockholders [*qua* stockholders]."
>
> . . .
>
> In an unbroken line of decisions dating back several generations, our Supreme Court has made clear that the bylaws constitute a binding part of the contract between a Delaware corporation and its stockholders. . . . [A] change by the board [to the bylaws pursuant to 8 *Del. C.* § 109(a)] is not extra-contractual simply because the board acts unilaterally; rather it is the kind of change that the overarching statutory and contractual regime the stockholders buy into explicitly allows the board to make on its own. In other words, the Chevron and FedEx 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.[19]

In my opinion, the same analysis of Delaware law outlined in *Chevron* validates the Forum Selection Bylaw here. Although then-Chancellor Strine in *Chevron* commented that Delaware, as the state of incorporation, "was the most obviously reasonable forum" for internal affairs cases because those "cases will be decided in the courts whose

[19] *Chevron*, 73 A.3d at 950-51, 955-56.

Supreme Court has the authoritative final say as to what the governing law means,"[20] nothing in the text or reasoning of *Chevron* can be said to prohibit directors of a Delaware corporation from designating an exclusive forum other than Delaware in its bylaws. [21] Thus, the fact that the Board selected the federal and state courts of North Carolina—the second most obviously reasonable forum given that FC North is headquartered and has most of its operations there—rather than those of Delaware as the exclusive forums for intra-corporate disputes does not, in my view, call into question the facial validity of the Forum Selection Bylaw.[22]

Providence also challenges the facial validity of the Forum Selection Bylaw on the theory that it improperly deprives this Court of the "exclusive jurisdiction" vested upon it by the General Assembly under various provisions of the DGCL. For example, Providence argues that because 8 *Del. C.* § 203(e) vests this Court with "exclusive jurisdiction to hear and determine all matters with respect to [that] section [*i.e.*, 8 *Del. C.* § 203]," the Forum Selection Bylaw must be contrary to Delaware law and public policy

[20] *Id.* at 953.

[21] *See also In re IBP, Inc. S'holders Litig.*, 2001 WL 406292, at *9 n.21 (Del. Ch. Apr. 18, 2001) ("Delaware courts have not hesitated to enforce forum selection clauses that operate to divest the courts of this State of the power they would otherwise have to hear a dispute.").

[22] Nothing in this Opinion should be construed as taking any position on the wisdom of selecting the forums designated in the Forum Selection Bylaw. *See CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 240 (Del. 2008) ("[W]e express no view on whether the Bylaw as currently drafted, would create a better governance scheme from a policy standpoint. We decide only what is, and is not, legally permitted under the DGCL.").

because it would improperly strip this Court of that jurisdiction.[23] In addition, Providence contends that the Board's designation of an exclusive forum other than this Court was unlawful because it has a substantive right to assert in this Court certain claims arising under 8 *Del. C.* § 111 and other provisions of the DGCL.

As an initial matter, I question Providence's interpretation of these provisions of the DGCL. Vice Chancellor Laster recently, and quite thoroughly, addressed a similar jurisdictional question and concluded that a grant by the General Assembly of "exclusive" jurisdiction to this Court for claims arising under a particular statute does not preclude a party from asserting a claim arising under that statute in a different jurisdiction.[24] He further concluded that any attempt by the General Assembly to bestow,

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[23] Providence raises this or similar arguments with respect to a litany of other DGCL provisions that vest jurisdiction in the Court of Chancery, some of which use the phrase "exclusive jurisdiction" and others of which do not: 8 *Del. C.* §§ 168, 205, 211, 219, 220, 223, 225, 226, 227, 231, 262, 283, 291, 322. The primary case upon which Providence relies, *Datapoint Corp. v. Plaza Sec. Co.*, 496 A.2d 1031 (Del. 1985), is clearly distinguishable. In *Datapoint*, the Delaware Supreme Court affirmed the issuance of a preliminary injunction enjoining the board's ability to enforce a bylaw that regulated the effective time of action taken by stockholder written consent because the bylaw was "clearly in conflict with the letter and intent" of 8 *Del. C.* § 228. *Id.* at 1035-36. Nothing in *Datapoint* concerns the jurisdiction of this Court or controls the validity of a forum selection bylaw.

[24] *See IMO Daniel Kloiber Dynasty Trust*, — A.3d —, 2014 WL 4071326, at *13 (Del. Ch. Aug. 6, 2014) ("When a Delaware state statute assigns exclusive jurisdiction to a particular Delaware court, the statute is allocating jurisdiction among the Delaware courts. The state is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over that type of case. Nor, as a matter of power within our federal republic, could the State of Delaware arrogate that authority to itself. . . . In my view, Delaware also cannot unilaterally preclude a sister state from hearing claims under its laws."); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) ("For the purpose of designating a more convenient forum, we find no reason

in Providence's words, a "substantive right" to bring a claim only in this Court would conflict with the Supremacy Clause of the United States Constitution and federal diversity jurisdiction.[25]

I need not decide these questions, however. In *Chevron*, then-Chancellor Strine declined to resolve each of the plaintiffs' "hypothetical as-applied challenges" in finding the Chevron and FedEx forum bylaws to be facially valid.[26] Similarly, it is not necessary for me to resolve Providence's "exclusive jurisdiction" or "substantive right" arguments to determine the facial validity of the Forum Selection Bylaw because they are purely hypothetical. Providence has not asserted a claim in either of its complaints under any of the statutes it has identified.

Moreover, the Forum Selection Bylaw, by its terms, is only enforceable "to the fullest extent permitted by law." This qualification appears to carve out from the ambit of the Forum Selection Bylaw a claim for relief, if any, that may be asserted only in the Court of Chancery. Here, all of the claims pled in the Merger Complaint (*i.e.*, breach of fiduciary duty and unjust enrichment) are Delaware common law claims that can be (and frequently have been) asserted in non-Delaware forums, including North Carolina courts.

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why the members [of an LLC] cannot alter the default jurisdictional provisions of the statute and contract away their right to file suit in Delaware").

[25] *See Kloiber*, 2014 WL 4071326, at *13.

[26] *See Chevron*, 73 A.3d at 958-63; *see also XL Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014) ("Delaware courts do not render advisory or hypothetical opinions.").

For the foregoing reasons, I conclude that the Forum Selection Bylaw is facially valid as a matter of law and, thus, that Counts I and III of the Bylaw Complaint should be dismissed for failure to state a claim upon which relief may be granted.

D. Providence Has Failed to State a Claim for Breach of Fiduciary Duty in Connection with the Adoption of the Forum Selection Bylaw

Count II of the Bylaw Complaint asserts that "[t]he self-interested adoption of the Forum Selection Bylaw" was a breach of fiduciary duty. In this regard, Providence argues that the Board's adoption of the Forum Selection Bylaw was part and parcel of its self-interested, disloyal conduct in approving the merger with FC South. It also implies that the Board selected courts in North Carolina (as opposed to courts in Delaware or any other State) because the directors thought they might receive favorable treatment there. In support of its position, Providence cites two allegations of the Bylaw Complaint: (i) the Forum Selection Bylaw "was motivated by a desire to protect the interests of the individual members of the Board and other affiliates of the Holding Group, including officers of the Company"; and (ii) the Board adopted the Forum Selection Bylaw "to insulate itself from the jurisdiction of Delaware courts."

These allegations are wholly conclusory. They provide no basis to infer, even under the reasonable conceivability standard, that the Forum Selection Bylaw was the product of a breach of fiduciary duty.

The Forum Selection Bylaw plainly does not insulate the Board's approval of the proposed merger from judicial review. It simply requires that such review take place in a court based in North Carolina. In that regard, Providence has not provided any well-pled

facts to call into question the integrity of the federal and state courts of North Carolina or to explain how the defendants are advancing their "self-interests" by having claims arising from their approval of the proposed merger adjudicated in those courts as opposed to the courts of Delaware. Nor has Providence alleged that the relevant federal or state courts in North Carolina would not have jurisdiction over FC North, the Board, or the company's officers and employees.[27] Given the absence of any such facts and the wholly conclusory allegations upon which Count II of the Bylaw Complaint is predicated, Providence has failed to rebut the presumption of the business judgment standard of review that attaches to the Board's adoption of the Forum Selection Bylaw[28] or to show that the Board's selection of North Carolina as the exclusive forum was irrational.

Accordingly, Count II of the Bylaw Complaint fails to state a claim upon which relief may be granted.

E. The Standard of Review under Rule 12(b)(3)

A stockholder plaintiff's claims that are governed by a valid forum selection bylaw designating an exclusive jurisdiction other than this Court may be dismissed under

[27] Separately, the defendants represented that FC North's directors and executive officers all live in North Carolina. Defs.' Reply Br. 3, 7.

[28] *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Rule 12(b)(3) for improper venue.[29] The bylaw must be valid on its face and as-applied. I have already concluded that the Forum Selection Bylaw is facially valid.

F. FC North's Forum Selection Bylaw is Valid As-Applied Here

The remaining question is whether the Forum Selection Bylaw is valid as-applied. *Chevron* did not reach this question because it only considered the facial validity of Chevron's and FedEx's forum selection bylaws.[30] Here, by contrast, FC North and the Board request that I enforce the Forum Selection Bylaw to dismiss the Merger Complaint. *Chevron* is nonetheless instructive on the proper framework to consider the defendants' motion to dismiss for improper venue.[31]

My decision on whether the Forum Selection Bylaw is valid as-applied to Providence's remaining claims is guided by the United States Supreme Court's analysis in *The Bremen v. Zapata Off-Shore Company*,[32] which the Delaware Supreme Court

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[29] *See, e.g.*, *Baker v. Impact Hldg., Inc.*, 2010 WL 1931032, at *2 (Del. Ch. May 13, 2010) ("The proper procedural rubric for addressing a motion to dismiss based on a forum selection clause is found under Rule 12(b)(3), improper venue.").

[30] *See Chevron*, 73 A.3d at 940 ("In an attempt to defeat the defendants' motion, the plaintiffs have conjured up an array of purely hypothetical situations in which they say that the bylaws of Chevron and FedEx might operate unreasonably. . . . [I]t would be imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts.").

[31] *See id.* at 959 ("[T]he time for a plaintiff to make an as-applied challenge to the forum selection clauses is when the plaintiff wishes to, and does, file a lawsuit outside the chosen forum. At that time, a court will have a concrete factual situation against which to apply the *Bremen* test, or analyze, *à la Schnell*, whether the directors' use of the bylaws is a breach of fiduciary duty.").

[32] 407 U.S. 1 (1972).

explicitly adopted in *Ingres Corporation v. CA, Inc.*[33] *Chevron* cogently articulated the lessons of this case law:

> In *Bremen*, the Court held that forum selection clauses are valid provided that they are "unaffected by fraud, undue influence, or overweening bargaining power," and that the provisions "should be enforced unless enforcement is shown by the resisting party to be 'unreasonable.'" In *Ingres*, our Supreme Court explicitly adopted this ruling, and held not only that forum selection clauses are presumptively enforceable, but also that such clauses are subject to as-applied review under *Bremen* in real-world situations to ensure that they are not used "unreasonabl[y] and unjust[ly]."[34]

An additional lens through which the enforceability of the Forum Selection Bylaw may be reviewed is under *Schnell v. Chris-Craft Industries, Inc.*[35] and its teaching that "inequitable action does not become permissible simply because it is legally possible."[36]

Providence asserts several arguments in opposition to the defendants' invocation of the Forum Selection Bylaw to dismiss the Merger Complaint. These arguments can be generalized as raising three as-applied challenges under *Bremen* and, to a lesser extent, *Schnell*. First, Providence asserts that Delaware has an overriding interest in resolving what it describes as the "novel and substantial" issues raised in the Merger Complaint.

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[33] 8 A.3d 1143, 1145 (Del. 2010).

[34] *Chevron*, 73 A.3d at 957 (citing *Bremen*, 407 U.S. at 10; *Ingres*, 8 A.3d at 1146); *see also Nat'l Indus. Gp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 381 (Del. 2013) (same).

[35] 285 A.2d 437 (Del. 1971).

[36] *Id.* at 439; *see also Black v. Hollinger Int'l Inc.*, 872 A.2d 559, 564 (Del. 2005) (affirming then-Vice Chancellor Strine's decision that found certain bylaw amendments adopted by a controlling stock to be "invalid in equity and of no force and effect, because they had been adopted for an inequitable purpose and had an inequitable effect").

Second, Providence contends that the timing of the Board's adoption of the Forum Selection Bylaw—simultaneous with the adoption of the merger agreement—renders applying the bylaw to dismiss the Merger Complaint unreasonable. Third, Providence argues that the circumstances here, in which the Forum Selection Bylaw cannot be repealed without the support of FC North's majority stockholder, the Holding Group, make enforcement of the bylaw unjust. Providence does not allege fraud or overreaching on behalf of the Board in adopting the Forum Selection Bylaw.

1. Delaware's Purported Interest in the Claims Raised in the Merger Complaint

Providence describes its challenge to the merger between FC North and FC South as a "novel" equity dilution claim under the framework of *Gentile v. Rossette*.[37] It then draws on case law resolving disputes involving multi-forum litigation (primarily under the standard of *McWane Cast Iron Pipe Corporation v. McDowell-Wellman Engineering Company*[38] or on *forum non conveniens* grounds) to assert that Delaware has strong public policy in favor of this Court deciding novel questions of Delaware corporate law

[37] 906 A.2d 91 (Del. 2006). In *Gentile*, the Delaware Supreme Court concluded that a stockholder plaintiff may have direct and derivative standing to assert a breach of fiduciary duty claim against a controlling stockholder where "(1) a stockholder having majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling stockholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." *Id.* at 100.

[38] 263 A.2d 281 (Del. 1970).

uniformly and authoritatively.[39] Although considerations of Delaware' interest in having the Court of Chancery resolve breach of fiduciary duty claims properly may be considered in a *McWane* or *forum non conveniens* analysis, that case law is inapposite to the circumstances here, where there *is* a designated forum for resolving intra-corporate disputes: a North Carolina court. The whole point of adopting the Forum Selection Bylaw was to solve the issue of multi-forum litigation such that this Court (and courts in other jurisdictions) would not need to divine the appropriate forum.[40]

The DGCL does not express any preference of the General Assembly one way or the other on whether it is permissible for boards of directors to require stockholders to litigate intra-corporate disputes in the courts of foreign jurisdictions. In contrast, in 2000, the General Assembly explicitly amended § 18-109(d) of the Limited Liability Company Act to prevent a Delaware LLC from mandating a foreign court as the exclusive forum for intra-entity disputes asserted by its non-manager members, the LLC analogue to stockholders.[41] This dichotomy led this Court to conclude, when determining the validity

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[39] *See, e.g.*, *Ryan v. Gifford*, 918 A.2d 341, 349-51 (Del. Ch. 2007); *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 956-61 (Del. Ch. 2007); *In re Chambers Dev. Co., Inc. S'holders Litig.*, 1993 WL 179335, at *3 (Del. Ch. May 20, 1993).

[40] *See Chevron*, 73 A.3d at 952 ("[F]orum selection bylaws are designed to bring order to what . . . boards . . . say they perceive to be a chaotic filing of duplicative and inefficient derivative and corporate suits against the directors and the corporations.").

[41] 6 *Del. C.* § 18-109(d). ("Except by agreeing to arbitrate any arbitrable matter in a specified jurisdiction or in the State of Delaware, a member who is not a manager may not waive its right to maintain a legal action or proceeding in the courts of the State of Delaware with respect to matters relating to the organization or internal affairs of a limited liability company.").

of a foreign forum selection clause in a stockholder agreement, that "Delaware does not have an overarching public policy that prevents the stockholders of Delaware corporations from agreeing to exclusive foreign jurisdiction of any matter involving the internal affairs of such entities."[42] Similarly here, I do not discern an overarching public policy of this State that prevents boards of directors of Delaware corporations from adopting bylaws to require stockholders to litigate intra-corporate disputes in a foreign jurisdiction.

Providence also overstates the novelty raised by its claims in the Merger Complaint. At its core, the Merger Complaint alleges that the Board of FC North, under the control of the Holding Group, overpaid for FC South because the Holding Group has greater economic interests in FC South than FC North. These claims constitute self-dealing or waste claims governed by well-established principles of Delaware law. *Gentile* and its progeny may be implicated in determining whether such claims are direct, derivative, or both in nature. The issues of Delaware law involved in that inquiry, however, are far from the type of unprecedented claims that might theoretically[43]

[42] *Baker*, 2010 WL 1931032, at *2.

[43] *Accord In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 961 n.8 (Del. Ch. 2010) ("I can envision that the Delaware courts would retain some measure of inherent residual authority so that entities created under the authority of Delaware law could not wholly exempt themselves from Delaware oversight.").

outweigh Delaware's substantial interest in enforcing a facially valid forum selection bylaw designating a federal or state court outside Delaware as the exclusive forum.[44]

FC North is based in North Carolina, most of its deposits are held there, most of its branches are located there, no contention is made that jurisdiction cannot be obtained there over FC North's directors, and no legitimate contention can be made that complete relief cannot be afforded there. Under these circumstances, and given the lack of any Delaware public policy mandating that claims of the nature asserted in the Merger Complaint be litigated in Delaware, I conclude it is not unreasonable to apply the Forum Selection Bylaw in this case.

2. The Timing of the Adoption of the Forum Selection Bylaw

Providence argues that "enforcing the Forum Selection Bylaw against [it] would be unjust because the Board's adoption of the Bylaw, which occurred simultaneously with the announcement of the unfair [proposed merger], goes well beyond [its] reasonable expectations."[45] I disagree. As explained in *Chevron*, "an essential part of the contract stockholders [like Providence] assent to when they buy stock in [FC North] is one that presupposes the board's authority to adopt binding bylaws consistent with 8 *Del. C.* § 109."[46] Thus, the reasonable expectation a stockholder of FC North should have is

[44] If a genuinely novel issue of Delaware law were to arise, the Delaware Constitution expressly provides for a United States District Court or the highest appellate court of any state, among other tribunals, to certify questions to the Delaware Supreme Court. *See* Del. Const. art. IV, § 11(8); *see also* Supr. Ct. R. 41(a)(ii).

[45] Pl.'s Ans. Br. at 30.

[46] *Chevron*, 73 A.3d at 940.

that its Board may adopt a forum selection bylaw that, subject to challenge on an as-applied basis, designates a court outside Delaware as the exclusive forum for intra-corporate disputes.

Providence also argues it would be inequitable to apply the Forum Selection Bylaw under *Schnell* because it was adopted in connection with a self-interested transaction that disproportionately benefits an alleged controlling stockholder.[47] This is a reprise of Count II of the Bylaw Complaint, discussed above, and fails for the same reason: Providence has not alleged any well-pled facts calling into question the integrity of the federal or state courts of North Carolina or explaining how the defendants have advanced their "self-interests" by having the claims in the Merger Complaint adjudicated in those courts instead of a Delaware court. The conduct of the FC North Board in approving the proposed merger will not be absolved from judicial review; that review simply must occur in a North Carolina court.

In sum, the Forum Selection Bylaw merely regulates "*where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain."[48] That the Board adopted it on an allegedly "cloudy" day when it entered into the merger agreement with FC South rather than on a "clear" day is immaterial given the lack of any well-pled allegations in either of Providence's demonstrating any impropriety in this timing.

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[47] Pl.'s Ans. Br. 34-36.

[48] *Chevron*, 73 A.3d at 952.

Separately, Providence's contention that the Forum Selection Bylaw cannot be enforced because it seeks to regulate the forum for asserting claims that arose before it was adopted is unpersuasive. This argument is simply a dressed-up version of the "vested right" doctrine that was soundly rejected in *Kidsco Inc. v. Dinsmore*[49] and *Chevron*.[50] This too is not a basis to not apply the Forum Selection Bylaw here.

3. The Alleged Inability to Repeal the Forum Selection Bylaw

In its final *Bremen* argument, Providence argues it is unjust to apply the Forum Selection Bylaw here because the stockholders of FC North effectively lack the ability to repeal it since FC North is controlled by the Holding Group. This issue was not addressed in *Chevron* because neither of the corporations whose forum selection bylaw was being challenged there had a controlling stockholder.

Then-Chancellor Strine noted in *Chevron* that a board-adopted forum selection bylaw, much like any board-adopted bylaw, is "subject . . . to the most direct form of attack by stockholders who do not favor them: stockholders can simply repeal them by a majority vote."[51] His discussion of the relationship between the ability of a board of directors and the ability of stockholders to amend a corporation's bylaws appears to

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[49] 674 A.2d 483 (Del. Ch. 1995), *aff'd*, 670 A.2d 1338 (TABLE).

[50] *See Chevron*, 73 A.3d at 955 (quoting *Kidsco*, 674 A.2d at 492) ("As then-Vice Chancellor, now [former-]Justice, Jacobs explained in the *Kidsco* case, under Delaware law, where a corporation's articles or bylaws 'put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment.'").

[51] *Chevron*, 73 A.3d at 954 (citing 8 *Del. C.* § 109(a)).

consider the statutory framework in the abstract. I do not interpret either the DGCL or *Chevron* to mandate that a board-adopted forum selection bylaw can be applied only if it is realistically possible that stockholders may repeal it. In other words, that there is currently a controlling stockholder who may favor a board-adopted forum selection bylaw, as appears to be the case with FC North, does not make it *per se* unreasonable to enforce the bylaw. For me to conclude otherwise would, as the defendants note, "be tantamount to rendering questionable all board-adopted bylaws of controlled corporations."[52]

Reaching this conclusion does not leave minority stockholders of controlled corporations without recourse. *Schnell* is a powerful lens through which this Court evaluates the as-applied validity of forum selection bylaws. In the appropriate case, a foreign forum selection bylaw may not withstand *Schnell* scrutiny. For reasons previously discussed, however, Providence has not convinced me that it would be inequitable here to require Providence to litigate the claims asserted in the Merger Complaint in the United States District Court for the Eastern District of North Carolina or in a North Carolina state court.

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For the reasons discussed above, I conclude that it is not unreasonable or unjust under *Bremen* or inequitable under *Schnell* to enforce the Forum Selection Bylaw here. FC North and the majority of its operations are based in North Carolina. It stands to

[52] Defs.' Reply Br. 21.

reason, under the presumption of Delaware law that directors will act in good faith,[53] that the Board determined that the most efficient courts in which to defend against the claims governed by the Forum Selection Bylaw, such as those raised in the Merger Complaint, are the federal and state courts in North Carolina. Under Delaware law and FC North's governing documents, the Board was entitled to designate those courts for this purpose. Providence has not sufficiently alleged or argued any grounds that give me pause in enforcing the Forum Selection Bylaw, and, accordingly, I will enforce it.

Further supporting my conclusion are important interests of judicial comity. If Delaware corporations are to expect, after *Chevron*, that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes,[54] then, as a matter of comity, so too should this Court enforce a Delaware corporation's bylaw that does not designate Delaware as the exclusive forum. In my opinion, to conclude otherwise would stray too far from the harmony that fundamental principles of judicial comity seek to maintain.

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[53] *See Aronson*, 473 A.2d at 812.

[54] *See, e.g.*, *Groen v. Safeway Inc.*, No. RG14716641 (Cal. Super. Ct. May 14, 2014); *Miller v. Beam, Inc.*, No. 2014 CH 00932 (Ill. Cir. Ct. Mar. 5, 2014); *Hemg Inc. v. Aspen Univ.*, 2013 WL 5958388 (N.Y. Sup. Ct. Nov. 14, 2013); *contra Roberts v. TriQuint SemiConductor, Inc.*, No. 1402-02441 (Or. Cir. Ct. Aug. 14 2014); *Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011). For the reasons set forth in *Chevron* and this Opinion, the *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.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the Bylaw Complaint under Court of Chancery Rule 12(b)(6) is GRANTED. Defendants' motion to dismiss the Merger Complaint under Court of Chancery Rule 12(b)(3) also is GRANTED.[55]

IT IS SO ORDERED.

[55] Based on this conclusion, Providence's motions for expedition and a preliminary injunction are moot.