

**FORUM SELECTION BYLAW—WHETHER A BOARD-ADOPTED
FORUM SELECTION BYLAW CHOOSING NORTH CAROLINA
COURTS AS THE FORUM SHOULD BE UPHELD BY THE COURT OF
CHANCERY OF DELAWARE**

By Harrison Tatum*

City of Providence v. First Citizens Bancshares, Inc., 99 A.3d 229 (Del. Ch. 2014).

SUMMARY

In *City of Providence v. First Citizens Bancshares, Inc.*, the defendant, First Citizens Bancshares, a Delaware corporation (“FC North”), is a bank holding company headquartered in North Carolina that proposed to acquire by merger a bank holding company based in South Carolina, First Citizens Bancorporation, Inc., a South Carolina corporation (“FC South”).¹ On the same day as the proposed merger was announced, the board of directors of FC North (the “Board”) made various revisions to the corporate bylaws, one of which was the addition of a forum selection bylaw (the “Forum Selection Bylaw”).² In FC North’s corporate charter, the Board was given the power to make, adopt, or change the bylaws.³ After the revisions, the new bylaw designated as the forum for intra-corporate disputes “the United States District Court for the Eastern District of North Carolina, or, if that court lacks jurisdiction, any North Carolina state court with jurisdictionFalse”⁴ The Forum Selection Bylaw is identical to the one found facially valid in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation* (“*Chevron*”), except that the Forum Selection Bylaw designates a court other than the state or federal courts of Delaware.⁵

The plaintiff, City of Providence (“Providence”), is a minority shareholder of FC North.⁶ Providence’s first complaint (the “Bylaw Complaint”) challenges the facial validity of the Forum Selection Bylaw and asserts breach of fiduciary duty for its adoption.⁷ The second complaint (the “Merger Complaint”) is against FC North’s board of directors in connection with the merger.⁸ In the Bylaw Complaint, Providence claims that the Forum Selection Bylaw is invalid under Delaware law and public policy (Count I) and seeks a declaratory judgment.⁹ In the alternative of a declaratory judgment, Providence claims that the court can exercise jurisdiction over any claim related to the merger (Count III).¹⁰ Providence further claims that the adoption of the Forum Selection Bylaw was “*ultra vires* and a breach of fiduciary duty”

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¹ *City of Providence v. First Citizens Bancshares, Inc.* 99 A.3d 229, 231 (Del.Ch. 2014).

² *Id.* at 231.

³ *Id.* at 233.

⁴ *Id.* at 230.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 232.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

(Count II).¹¹ The Merger Complaint essentially claims that the majority shareholders forced FC North to overpay for FC South in order to gain an advantage by diluting the minority shareholders interest.¹²

Following Providence's complaints, the defendants filed a 12(b)(6) motion for failure to state a claim.¹³ In regards to Count II and the Merger Complaint, the defendants filed a 12(b)(3) motion for improper venue since the Forum Selection Bylaw designated North Carolina as the proper venue.¹⁴

ANALYSIS

The Court of Chancery of Delaware begins by analyzing Count I of the Bylaw Complaint. The court's analysis is guided by its previous analysis of Delaware law in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* ("*Chevron*").¹⁵ Under *Chevron*, the fact that FC North's charter grants the board the power to amend the bylaws puts the shareholders "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 subjects."¹⁶ In *Chevron*, the court found that the forum selection bylaws addressed the subject of the shareholders' "rights" under 8 Del. C. § 109(b).¹⁷ The court in *Chevron* concluded that the "rights" of the shareholders were addressed because forum selection bylaws regulate where a shareholder can exercise their right to bring claims against a corporation or its directors and officers.¹⁸ The court in *Chevron* further stated that bylaws are part of a binding contract between Delaware corporations and its shareholders, and that under this contractual framework the shareholders "assent to not having to assent to board-adopted bylaws."¹⁹

The court in the present case did note that the distinction between the Forum Selection Bylaw and the bylaw in *Chevron* initially created an issue since the bylaw in *Chevron* selected Delaware as the forum but the Forum Selection Bylaw designated North Carolina as the forum.²⁰ However, the court declared that this distinction does not call into question the facial validity of the Forum Selection Bylaw because nothing in *Chevron* prohibits a Delaware corporation from designating an exclusive forum outside of Delaware.²¹ Further, the court points out that North Carolina is the second most reasonable forum since most of FC North's operations and its headquarters are there.²²

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del.Ch. 2013).

¹⁶ *City of Providence*, 99 A.3d at 234 (citing *Chevron*, 73 A.3d at 935–36).

¹⁷ *Id.* at 234 (citing *Chevron*, 73 A.3d at 950–51).

¹⁸ *Id.*

¹⁹ *Id.* at 235 (citing *Chevron*, 73 A.3d at 955–56).

²⁰ *City of Providence*, 99 A.3d at 234.

²¹ *Id.* at 235.

²² *Id.*

In regards to Count III, the court stated that it did not need to analyze the substantive right or exclusive jurisdiction arguments because the arguments are “purely hypothetical” since Providence did not assert a claim in its complaints under any of the statutes addressed in its argument.²³ Moreover, the claims in the Merger Complaint are all Delaware common law claims and have previously been asserted in forums outside of Delaware such as North Carolina.²⁴

Count II of the Bylaw Complaint claims that the adoption of the Forum Selection Bylaw was a breach of fiduciary duty.²⁵ Specifically, in Count II, Providence claims: (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.”²⁶ The court states that these claims are wholly conclusory since they provide no basis to infer that the Forum Selection Bylaw was a product of a breach of fiduciary duty.²⁷ Further, the Forum Selection Bylaw does not insulate the defendants from judicial review; “[i]t simply requires that such review take place in a court based in North Carolina.”²⁸ Providence fails to provide the court with any reason to question the integrity of the state and federal courts of North Carolina, nor do they provide any basis for the court to conclude that the defendants are advancing their self-interests by designating North Carolina instead of Delaware as the exclusive forum.²⁹

Lastly, the court turns its attention to whether the Forum Selection Bylaw is valid as applied which would dismiss the Merger Complaint for improper venue. Providence brings forth three “as applied” arguments to support its position that the Forum Selection Bylaw is invalid as applied.³⁰ First, Providence claims that “Delaware has an over-riding interest in resolving ‘novel and substantial’ issues raised in the Merger Complaint.”³¹ The court declared 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.”³²

Second Providence argues that the simultaneous adoption of the Forum Selection Bylaw and the merger agreement make the enforcement of the Forum Selection Bylaw unreasonable, unjust, and/or inequitable.³³ The court rejects this argument, citing to the explanation in *Chevron* “that an essential part of the contract shareholders [like Providence] assent to when they buy stock [in FC North] is one that presupposes the board’s authority to adopt binding

²³ *Id.* at 236.

²⁴ *Id.*

²⁵ *Id.* 236–37.

²⁶ *Id.* at 237.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 238.

³¹ *Id.*

³² *Id.* at 239–40 (citing *Baker v. Impact Hldg., Inc.*, 2010 WL 1931032, at *2 (Del.Ch. May 13, 2010)).

³³ *City of Providence*, 99 A.3d at 238.

bylaws consistent with 8 *Del. C.* § 109.³⁴ Further, the Court states that given the lack of any well-pled allegations in either of Providence's complaints it is immaterial that the bylaw was adopted on a "cloudy" day when it entered into the merger agreement rather than a "clear" day.³⁵

The Court disagrees with Providence's third "as applied" argument that the Forum Selection Bylaw is unjust because the Holding Group's control of the company prevents FC North's shareholders from repealing it.³⁶ The Court states that enforcement of a board-adopted forum selection bylaw is not unreasonable just because a controlling shareholder favors the adoption.³⁷ If the Court were to agree with Providence's argument it would put into question all board-adopted bylaws of controlled corporations.³⁸

³⁴ *Id.* at 240 (citing *Chevron*, 73 A.3d at 940).

³⁵ *City of Providence*, 99 A.3d at 241.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*