COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Gregory V. Varallo, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

Kenneth J. Nachbar, Esquire
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
Wilmington, DE 19801

Re: *TCV VI, L.P. v. TradingScreen Inc.*
C.A. No. 10164-VCN
Date Submitted: March 19, 2015

Dear Counsel:

Plaintiffs TCV VI, L.P. and TCV Member Fund, L.P. (the "Plaintiffs") seek certification of an interlocutory appeal of the Court's denial of their motion for judgment on the pleadings as to Count I and Count II of their Complaint. The Court's memorandum opinion of February 26, 2015 (the "Memorandum Opinion"), rejected their contention in Count I that the only limitation on Defendant TradingScreen Inc.'s ("TradingScreen") ability to redeem their stock was tied to the requirement of surplus under 8 *Del. C.* § 160. Instead, the Court recognized a common law requirement further limiting the legal ability to make a redemption. That would allow (or require) a company to refuse a redemption not only because it lacks surplus within the meaning of Section 160, but also because it must be capable of paying for the redemption without threatening the company's ability to function as a going concern.

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In order to obtain certification by this Court of an interlocutory appeal, the Plaintiffs must demonstrate, in accordance with Supreme Court Rule 42, that this Court's order denying their motion for partial judgment on the pleadings determined a substantial issue, established a legal right, and, for purposes of this application, satisfied one of the criteria of Supreme Court Rule 41, specifically that the Court resolved an unsettled question of law that "relates to the . . . construction or application of a statute of this State which has not been, but should be, settled by the Court."[1]

[1] Supr. Ct. R. 41(b)(iii).

* * *

Defendants argue that the Court's denial of Plaintiffs' motion for judgment on the pleadings did not establish a legal right.[2] They view the Court's effort as merely establishing "a standard for the breach of contract count."[3] Therefore, the Plaintiffs could still, at least theoretically, find a way to prevail on the contract count through judicial resolution in their favor of the broader question of whether redemption would jeopardize TradingScreen's future as a going concern.

The Court did not interpret a contract; instead, it applied the common law and concluded that the statute, and corollary contractual provisions, upon which Plaintiffs had relied, did not exclusively occupy the decisional space. Although the Court applied the common law, the core of Plaintiffs' position is that Section 160 frames the exclusive test for capacity to pay for redemption. "[A] legal right is established where the court determines an issue essential to the position of the

[2] Defendants concede that the Memorandum Opinion determined a substantial issue. Defs.' Corrected Br. in Opp'n to Pls.' Appl. for Certification of Interlocutory Appeal 13 n.3.
[3] *Id.* at 13.

parties regarding the merits of the case."[4] The Court, in effect, established TradingScreen's legal right to refuse redemption if its ability to continue as a going concern would be placed in jeopardy. Thus, a legal right was established.

* * *

The final hurdle for a party seeking certification of an interlocutory appeal is satisfying one of several standards. Among the available choices are the criteria set forth in Supreme Court Rule 41 for certification of questions of law. Plaintiffs have focused upon the following: the Memorandum Opinion is based upon an unsettled question of law. The question is whether, with respect to a redemption of preferred stock, Section 160 subsumes the common law and leaves no room for any limitation on a corporation's ability to redeem stock for other fiscal reasons. The statute is unambiguous; it sets forth a standard that would allow a corporation to refuse to redeem its stock. The Defendants argued, and the Court accepted, that there are grounds beyond the statute for refusing redemption. The Plaintiffs' primary countervailing argument is that Section 160 provides the only basis for

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[4] *O'Brien v. IAC/InterActive Corp.*, 2009 WL 2998531, at *2 (Del. Ch. Sept. 14, 2009) (citation omitted).

withholding the redemption payment, an argument that directly implicates the construction of Section 160.

The question of whether Section 160 is exclusive has been a topic of debate, is important to raising corporate capital, and thus, should be settled by the Supreme Court. A similar issue was presented in *ThoughtWorks*, but the Supreme Court was able to resolve that appeal without reaching the issue which this Court addressed in the context of TradingScreen's fiscal circumstances.[5] This case provides the opportunity to resolve finally this significant question of Delaware law.[6]

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[5] *SV Inv. P'rs, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973 (Del. Ch. 2010), *aff'd*, 37 A.3d 205 (Del. 2011).

[6] Plaintiffs argue that this Court considered itself bound by *ThoughtWorks*. That would be an incorrect reading of the Memorandum Opinion. *ThoughtWorks*, of course, was persuasive, but certainly not controlling, authority. That said, as set forth in footnote 47, the Memorandum Opinion recognized that there is plenty of room for debate on the scope of the corporation's ability to refuse to redeem stock. Delaware values private ordering. Perhaps Section 160 can be read to limit the effect of the common law. The common law, if it does not apply because it has been eclipsed by Section 160, should not trump the legislation enacted by the General Assembly.

* * *

Interlocutory appeals are a matter for the Court's discretion. Because they disrupt the regular flow of litigation and may unnecessarily cause the expenditure of judicial resources, they are properly viewed as both extraordinary and exceptional. Here, the requirements of Supreme Court Rule 42 for certification of an interlocutory appeal have been satisfied. Moreover, the pragmatic arguments for an interlocutory appeal may, if necessary in this rare instance, supersede a legalistic application of Supreme Court Rule 42. *ThoughtWorks* sponsored the common law notion that future insolvency (or an inability to continue as a going entity) would support withholding payment to stockholders seeking redemption. The Supreme Court, as noted, declined to address this analysis in the context of its resolving *ThoughtWorks*. This is a live argument of Delaware law—one that ought to be resolved with finality, if possible.[7]

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[7] The Court also denied Plaintiffs' motion for judgment on the pleadings with respect to Count II of the Complaint. Count II addressed TradingScreen's obligation to pay interest on the redemption payments that were otherwise due, even if common law principles justified or required the withholding of the funds. Certification of an interlocutory appeal as to this specific issue might not be justified, but it is sufficiently intertwined with the claims of Count I that separating it out for purposes of an interlocutory appeal is neither necessary nor appropriate.

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Accordingly, for the foregoing reasons, an order certifying an interlocutory appeal of the Court's Order of February 26, 2015, will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Kevin G. Abrams, Esquire
Register in Chancery-K