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**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: May 1, 2007
Decided: May 31, 2007

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Re: *Matulich v. Aegis Comm'ns Group, Inc., et al.*
Civil Action No. 2601-CC

Dear Counsel:

Before me is a motion to dismiss plaintiff's complaint involving the validity of a merger executed pursuant to 8 *Del. C.* § 253. Plaintiff asserts that World Focus, the parent and controlling shareholder of Aegis Communications Group, did not possess the requisite shareholdings necessary to execute a short form merger under Delaware law. For the reasons set forth below, I conclude that the complaint fails to state a claim on which relief may be granted and must be dismissed with prejudice.

I. STATEMENT OF FACTS

A. Shareholding structure of Aegis before the 2006 merger

By 2003, Aegis had issued several classes of stock: Common Stock, Series B Preferred Stock, Series D Preferred Stock, Series E Preferred Stock, and Series F Preferred Stock. Each series of preferred stock granted shareholders different rights and benefits, particularly with respect to voting rights. Over the next three

years, most of these series of shareholdings were converted into common stock or otherwise eliminated, leaving only the Common Stock and 29,778 outstanding shares of Series B Preferred Stock. Although almost all of the Series B shares originally issued had been converted to Common Stock, the remaining 29,778 shares were on Aegis' books as the record holdings of Freiburghaus & Partners, S.A., a firm that was liquidated at some point in the 1990s. Aegis has been unable to locate the current owner of these shares.

The heart of this conflict lies in the contradictory nature of the rights granted to the Series B shareholders by their certificate of designation. On the one hand, the certificate provides that:

> (B) The holders of shares of Series B Preferred Stock are subject to the following qualification, limitations and restrictions:
>
> (i) no voting rights
>
> (ii) except as provided in (A)(vi) above, no right of consent to or approval of, except as may then be required by law, prior to or upon amendment of or repeal of provisions attaching to the Series B Preferred Stock . . . .[1]

On the other hand, (A)(vi) specifically grants Series B shareholders, in relevant part:

> (vi) right of approval and consent (represented by consent of the majority of the Series B Preferred Stock then outstanding) prior to any of the following events:
>
> . . . .
>
> (d) merger or consolidation of the Corporation with any other entity or sale of all

[1] Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. A at 4.

> or substantially all of the assets of the corporation . . . .[2]

By its terms, the certificate of designation for the Series B Preferred shares denies Series B stockholders any voting rights, but grants them a right of "approval and consent,"—this latter right of approval and consent to be expressed through some form of majoritarian decision-making mechanism. Plaintiff maintains that this right to approve of a transaction is, contrary to the explicit statement of (B)(i), a *voting* right.

The other series of preferred shares contained different mechanisms by which their shareholders would approve or reject a proposed merger. Series D and Series E shareholders, for example, were promised that "the Corporation shall not, and shall not permit any Subsidiary to, *without the prior vote or written consent by the holders of a majority of the Series D and E Preferred Stock* . . . merge or consolidate the Corporation with any other entity or sell all or substantially all of the assets of the Corporation . . . ."[3] Series F Preferred Stock, on the other hand, possessed explicit, if limited, voting rights.[4]

B. Aegis petitions the Court for equitable relief

In 2003, Aegis found itself in financial difficulty and entered into a merger agreement with AllServe Systems, PLC, whereby AllServe would pay $22,750,000 for Aegis. Common shareholders were to receive no payment for their shares, but certain preferred shareholders (including Series B shareholders) were to receive a liquidation preference plus accrued but unpaid dividends. The merger was to be conducted pursuant to 8 *Del. C.* § 251, and would have required the consent of the Series B shareholders. After attempting to locate the owners of the few Series B shares still outstanding, Aegis petitioned the Court for equitable relief. The Court instructed Aegis to attempt to notify holders of Series B Preferred Stock by publication in two European newspapers, and after that failed, the Court entered an

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[2] *Id*. at 2.

[3] Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. H at 15. The language describing the voting rights of D and E shareholders is less limiting. *Compare* Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. A at 4 ("The holders of shares of Series B Preferred Stock [have] no voting rights") *with id*. Ex. H at 11 ("Except as otherwise expressly provided herein or required by law, neither the Series D Preferred Stock nor the Series E Preferred Stock shall have voting rights.")

[4] *See* Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. I at 13-14 (providing holders of Series F shares with voting rights equivalent to the number of shares of Common Stock holder would possess if shares were converted).

Order on September 16, 2003, declaring the unanimous approval of the Series B shareholders and reserving for them their appraisal rights.

It now appears that Aegis' original request for equitable relief was somewhat inartfully drafted. In describing its difficulty to the Court, Aegis maintained that:

> To effectuate the [AllServe] Merger, the Company must obtain the affirmative votes of the holders of a majority of the outstanding shares in each of three different categories of stock: (i) the outstanding shares of the Company's common stock and the outstanding shares of Series F Preferred Stock (of which the holder of each share will be entitled to cast that number of votes that he would have had if the Series F Preferred Stock had been converted into common stock), voting together as one class; (ii) *the outstanding shares of Series B Preferred Stock, voting as a separate class*; and (iii) the outstanding shares of Series D and E Preferred Stock, voting together as a class. Before *each class vote can be held*, it must be determined, for purposes of establishing a quorum, that the holders of at least a majority of the respective class of stock, as described above, are present at the Special Meeting, in person or by proxy.[5]

Neither party disputes that had a vote on the AllServe merger ever taken place, the Series B Preferred shareholders, had they suddenly revealed themselves, would have been allowed to vote on whether to approve the merger. Defendants insist, however, that this drafting is merely an oversight, and that no distinction was made between "approval and consent" and "voting" because it would make no difference to the outcome of a merger under 8 *Del. C.* § 251.

In any event, no vote was ever cast. Before the AllServe merger could be consummated, Aegis received a financing proposal from Essar Infrastructure Holdings Limited ("EIHL") and Deutsche Bank AG, who invested over $28 million in Aegis in return for promissory notes and warrants to purchase up to 80% of Aegis' outstanding stock. Deutsche Bank later sold some of its interest in Aegis to EIHL, which in turn transferred its entire interest in Aegis to World Focus, an entity formed and existing under the laws of Mauritius. Plaintiff asserts that this major financial restructuring has resulted in significant improvement in Aegis' performance.

[5] Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. F at 2-3 (the "2003 Petition") (emphasis added).

C. The going-private transaction and the second Aegis petition

In the summer of 2006, World Focus decided to take Aegis private by consummating a short form merger pursuant to 8 *Del. C.* § 253. Still unable to locate the remaining Series B shareholders, the Company again petitioned the Court seeking a declaration that would deem the Series B shareholders to have approved and consented to the merger. Unlike their previous effort, this new petition was careful to avoid suggesting that the Series B Preferred Stock granted any voting rights to the shareholders. Once again, the Court ordered World Focus to place notices in two European newspapers, and after receiving no reply, the Court entered an Order on October 26, 2006. World Focus consummated the merger on November 3, 2006. Plaintiff challenges the legitimacy of this transaction.[6]

II. CONTENTIONS

Plaintiff owns no Series B shares. Instead, he comes before the Court as a former minority holder of Common Stock disgruntled with the short-form merger. In Count I, plaintiff contends that the right of approval and consent held by Series B shareholders constitutes a right to vote on the merger. If the Series B shareholders possessed such a right, then World Focus could not have executed a short-form merger under 8 *Del. C.* § 253, as it owned far less than the 90% of outstanding Series B shares required by that statute.

No question exists as to the ability of World Focus to execute the merger in one form or another. Plaintiffs do not challenge the decision of this Court to deem the Series B shareholders to have approved this transaction, howsoever they may have actually done so, and defendants controlled far more than a majority of the Common Shares. Nevertheless, the choice of the short-form technique is critical to the duties owed by defendants, as controlling stockholders of Aegis, to their

[6] Plaintiff correctly notes that no notice of these proceedings were provided to holders of Common Stock, nor was the Court presented with argument on the issue of whether Series B Preferred stockholders were entitled to vote. Nevertheless, I respectfully disagree with plaintiff's contention that "[T]o the extent that the Court's Final Order is based on a determination that the Series B is 'non-voting' stock, the order is of no effect and is not binding on Aegis' minority stockholders." Compl. at ¶ 32. The issue of notice may bear upon the Court's consideration of the equitable defense of laches, which I assume is plaintiff's purpose in raising this point, but it does not bear upon the authority or effect of the Order itself. Unless appealed and reversed, the order of *any* Delaware Court is binding, particularly upon litigants appearing before the Court that issued the Order.

minority colleagues. In general, a merger between a controlling parent and a subsidiary will implicate issues of fiduciary duty, and a parent company and its directors will be liable to minority shareholders unless they can demonstrate the entire fairness of the transaction, including fair price and fair dealing.[7] Under the Supreme Court's holding in *Glassman v. Unocal Exploration Corp*., however, a minority shareholder forced out by short-form merger has no alternative but to seek appraisal for the shares.[8] A parent company executing a short-form merger often does so precisely to avoid transaction costs (negotiating committees, independent financial and legal experts, etc.) required to prove entire fairness, and the Supreme Court has ruled that it would frustrate the purpose of the General Assembly to require of a parent company the additional procedural burdens necessary to establish fairness.

Plaintiff's claim that defendants breached their fiduciary duties—the subject of Count II of the complaint—therefore hangs upon the outcome of a decision with respect to Count I. If the Court determines that Series B shareholders were not entitled to vote on the merger, then plaintiff's only remedy is appraisal. Defendants' motion to dismiss rests heavily upon this presumption, although they also insist that plaintiff's claims are barred by laches, and that the Court does not have *in personam* jurisdiction over Essar Investments Limited.

III. ANALYSIS

The Court will grant a motion to dismiss only if it appears to "a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action."[9] Review is limited to the well-pled allegations in the complaint,[10] although the Court may take notice of publicly available documents such as SEC filings.[11] In the matter before the Court, however, the parties agree to almost all the relevant facts. There is no dispute over the language of the certificate of designation for the Series B Preferred Stock, for instance; nor is there a dispute over the process or timing by which World Focus executed a short-form merger. For the reasons set forth below, I conclude that, as

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[7] *Glassman v. Unocal Exploration Corp*., 777 A.2d 242, 247 (Del. 2000).
[8] *Id.* at 248.
[9] *Rabkin v. Philip A. Hunt Chem. Corp*., 498 A.2d 1099, 1104 (Del. 1985).
[10] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).
[11] *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d 168, 189 n.58 (Del. Ch. 2006); *In re Wheelabrator Tech., Inc. S'holders Litig.*, 1992 WL 212595, at *11-12 (Del. Ch. Sept. 1, 1992).

a matter of law, the Series B shareholders possessed no right to vote on the merger. Accordingly, plaintiff's complaint must be dismissed under Court of Chancery Rule 12(b)(6) for failure to state a claim.

The principles of contractual construction are applicable to certificates of designation,[12] while the principles of statutory construction apply to the interpretation of 8 *Del. C.* § 253. The rules for statutory and contractual interpretation are, in general, quite similar. Statutes are to be considered as a whole, and each section should be read in light of every other, while contracts should be read as integrated documents and interpreted so as to reconcile their provisions.[13] Words and phrases in statutes are to be read in context and given their ordinary and common usage in the English language, although terms that have acquired peculiar and appropriate meaning in the law are to be interpreted as such.[14] One critical difference, however, arises from the fact that when a Court interprets a statute, it seeks to "ascertain and give effect to the intent of the legislature."[15] In interpreting a contract, on the other hand, the Court strives to determine the intent of the parties, looking first at the relevant document, read as a whole, in order to divine that intent.[16] A Court considers extrinsic evidence of intent only if the terms of the contract are ambiguous;[17] nor is a contract rendered ambiguous merely because the parties before the Court disagree upon its construction.[18]

In interpreting the certificate of designations, the Court must therefore be sensitive to two concerns. First, the Court must consider the intent of the General Assembly when it required that the shares relevant to § 253 were those "entitled to vote on a merger." Second, the Court must look to the intent of the parties who chose to be bound by the certificate of designation, and the attendant rights granted by the document. Determining the intent of the parties to the certificate presents a particular challenge in this case, in that plaintiff and defendants are, technically,

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[12] *See Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983).
[13] *See Del. Bar Surgical Servs., P.A. v. Sweir*, 900 A.2d 646, 652 (Del. 2006); *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).
[14] 1 *Del. C.* § 303; s*ee also Del. Bay Surgical Servs., P.A.*, 900 A.2d at 652.
[15] *Del. Bay Surgical Servs., P.A.*, 900 A.2d at 652, (quoting *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).
[16] *Kaiser Aluminum Corp.*, 681 A.2d at 395.
[17] *Myers v. Myers*, 408 A.2d 279, 280 (Del. 1979).
[18] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

both on the same side of the contract, and the actual beneficiaries of the rights conferred by the Series B Preferred Stock are nowhere to be found.

A. Count I: Validity of Aegis' merger under 8 Del. C. § 253

Although a parent company may merge with a subsidiary through the standard procedures outlined in 8 *Del. C.* § 251 or § 252, a controlling parent may also, in certain circumstances, avoid many of the procedural burdens of those sections if certain requirements are met. Delaware's short-form merger statute, in relevant part, provides that:

> In any case in which at least 90% of the outstanding shares of each class of the stock of a corporation or corporations . . . of which *class* there are outstanding shares that, absent this subsection, would *be entitled to vote on such merger*, is owned by another corporation . . . the corporation having such stock ownership may either merge the other corporation or corporations into itself . . . [or merge itself into the other corporation].[19]

Most of the time, the clear statutory instruction of § 253—that in order to be relevant, a class of shares must have the entitlement to vote on a merger—presents little difficulty. This case, however, highlights the fact that the entitlement described in § 253 has two components: first, a class of shares must be able to engage in a certain type of decision making (voting); and second, it must be entitled to make a decision "on such merger." For plaintiff to prevail on Count I, the Court must be able to find that the Series B Preferred Stock had both entitlements.

1. Are Series B shareholders entitled to vote?

The ability of a corporation to issue preferred stock with limited voting rights is not in doubt. "Rights of preferred stock are primarily but not exclusively contractual in nature. The special rights, limitations, etc., of preferred stock are created by the corporate charter or a certificate of designations which acts as an amendment to a certificate of incorporation. [T]o ask what are the rights of the preferred stock is to ask what are the rights and obligations created contractually

[19] 8 *Del. C.* § 253 (emphasis added).

by the certificate of incorporation."[20] If a certificate of designation is silent as to voting rights, then preferred shareholders have the same rights as common stock,[21] and such rights may only be derogated by a clear and express statement.[22]

Defendants insist that the language of the certificate of designation could not be clearer: the Series B shareholders were entitled to "no voting rights."[23] Instead, defendants insist that the Series B shareholders had a right to "consent and approve," similar to a lender's consent right. These rights are contrasted in neighboring sections of the certificate, which defendants maintain clearly embraces the distinction between "voting" and "giving consent." There is considerable weight to this argument, despite plaintiff's insistence that a right to "consent" must be a right to vote. Nevertheless, I conclude that although plaintiff's statutory arguments have no merit, the terms of the contract provide Series B shareholders with a right to vote.

a. Is there a statutory and legal distinction between a right to consent and a voting right?

As an opening statutory gambit, plaintiff relies upon 1 *Del. C.* § 303's requirement that "Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning." Plaintiff then cites many cases in which this Court has used the term "approval" in referring to the result of shareholder voting, in an attempt to show that "approve" has acquired the meaning of "vote." The argument is unavailing. In any representative body, a vote is an act of granting or withholding consent. Nevertheless, voting is only one way in which consent may be granted. To take the most obvious example, only members of the United States Congress may vote on legislation, but such legislation becomes law through the signature of the President, or is sent back to Congress after being vetoed. The President's signature is an act of approval, but rarely, if ever, would one consider it a "vote" in the normal meaning of the term. Similarly, the Series B shareholders may have the right to approve the merger without, necessarily, having the right to vote on it.

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[20] *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, 906 A.2d 218, 224 (Del. Ch. 2006) (quoting *HB Korenvaes Inv., L.P. v. Marriott Corp.*, 1993 WL 205040, at *18 (Del. Ch. June 9, 1993)).
[21] *See Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 593-94 (Del. Ch. 1986).
[22] *See Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852-53 (Del. 1998).
[23] Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. A at 4.

Indeed, the Delaware General Corporation Law specifically contemplates that a shareholder may be granted multiple methods by which they may express an opinion:

> "Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy . . . ."[24]

Thus, a shareholder may be entitled to "express consent or dissent," and even authorize another to do so by proxy, without possessing a right to vote.

Plaintiff raises one argument with respect to statutory construction, however, which merits particular consideration. Under 8 *Del. C.* § 228, a majority shareholder may execute a merger by written consent, and the statute specifically allows for corporate action to proceed "without prior notice and without a vote." If the requirement of an entitlement to vote in § 253 is read to imply the process by which a decision is made, rather than a general right to approve a decision, then it might be argued that a shareholder with a bare majority of shares may always execute a short-form merger. After all, if a majority shareholder may execute a merger without a vote, suggests plaintiff, then those minority shares are not "entitled to vote on the merger" and, thus, are irrelevant for purposes of § 253. Although the argument is clever, it ignores the fact that the purpose of § 228, as expressed in its title, is to allow for "[c]onsent of stockholders or members *in lieu of* a meeting."[25] The purpose of written consent is not to invalidate the voting rights of minority shareholders, but rather to spare a corporation the expense of otherwise unnecessary corporate formalities. A shareholder's entitlement to vote does not disappear when a majority shareholder exercises a right to written consent. What disappears is the need for the corporation to deal administratively with that vote.

Nor need the Court give much credit to plaintiff's argument that because certain of the approval and consent rights of Section (A)(vi) of the certificate track closely the voting rights of 8 *Del. C.* § 242(b), the approval right constitutes a right to vote. Plaintiff seems astonished that, if "approval and consent" are considered separate from "voting," then an increase in the authorized shares of Series B Preferred Stock would require the company to obtain both a class vote, mandated

[24] 8 *Del. C.* § 212(b).
[25] 8 *Del. C.* § 228 (emphasis added).

by 8 *Del. C.* § 242(b), and a separate consent and approval required by the certificate. Despite plaintiff's astonishment, the two rights are distinct and afford the owners of Series B Preferred Stock different protections.[26]

b. Did the Series B shareholders have a contractual right to a vote?

Although plaintiff's statutory arguments are not compelling, I nonetheless conclude that the terms of the certificate of designation provided Series B shareholders with an entitlement to vote. I do not base this conclusion, however, on plaintiff's lengthy citations to portions of the 2003 petition or various SEC filings in which defendants referred to the necessity for Series B shareholders to vote on a merger. The SEC filings, in particular, consist mainly of scrivener's errors referring to the shares as "Series B Voting Convertible Preferred Stock."[27] Stray errors in SEC filings do not constitute grounds to estop defendants from relying upon the clear text of the certificate of designation. Nor am I convinced by the fact that in one filing defendants referred to the need for "shareholder approval" that would be expressed through a vote.[28] As mentioned above, votes

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[26] As a practical matter, the distinction between the right to vote and the right to approve will come into play only rarely, and one would imagine that both would normally be executed at the same time, via the same mechanism. Defendants provide one situation, however, in which the distinction makes a critical difference:

> By way of example, assume that Aegis had three series of preferred stock outstanding: 1,000 shares of Series A, 100 shares of Series B, and 1,000 shares of Series C. In the event of a charter amendment which adversely impacted only the Series B and Series C, but not the Series A, Section 242(b)(2) provides that the holders of the Series B and Series C would vote together as one class. It would not, however, provide a separate series vote to each of the Series B and the Series C. 8 *Del. C.* § 242(b)(2) ("If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment *shall be considered a separate class* for the purposes of this paragraph.") (emphasis added). In this example, the vote of the Series C would authorize the charter amendment, even if all of the holders of Series B voted against the charter amendment. Section (A)(vi) however, prevents this from happening by providing the holders of the Series B a separate right of approval and consent -- this is different from the class vote provided by Section 242(b)(2).

Reply Br. in Supp. of Defs.' Mot. to Dismiss at 17 n.12.

[27] Answering Br. in Opp'n to Defs.' Mot. to Dismiss at 17-18.

[28] *Id*. at 18.

generally express approval or disapproval, but plaintiff cannot from this conclude that all approval requires a vote.

Nor does defendants use of the term "vote" to describe the approval process for Series B shareholders in the 2003 petition, however imprecise, rise to such a level as to justify the Court invoking the principles of equitable estoppel and preventing defendants from now arguing that Series B shareholders had no such right. World Focus does not "appear[] to have pulled a fast one on the Court."[29] Rather, the 2003 petition appears to have been inartfully drafted in a context in which the particular distinction between approval and voting had little relevance.

Yet defendants attempt to prove too much when they contend that the Series B shareholders had absolutely no entitlement to vote. Section (A)(vi) of the certificate provides that Series B shareholders may approve of certain actions where that approval is "represented by consent of the majority of the Series B Preferred Stock then outstanding."[30] If words in a contract are to be given their normal meaning, it is difficult to conceive of a method by which the consent of a majority of shareholders may be expressed *other* than by a vote. Defendants cull selectively from dictionary definitions to support the proposition that a vote must be conducted through some formal mechanism, describing a vote as "[t]he expression of one's preference or opinion *in a meeting or election by ballot*, show of hands, or other type of communication . . . ."[31] Defendants' use of italics is telling. The definition provided by Black's does not require a particular method of expressing a preference to count as a vote. Even more revealing is defendants' alternative explanation:

> In practicality, the contractual right of consent and approval of the holders of the Series B Preferred Stock was akin to a lender's consent right, neither of which can be interpreted properly as a right to "vote" similar to that of the holders of Aegis Common Stock.[32]

A great deal hangs upon defendants' choice of "lender's" over "lenders'" in expressing this right. Even assuming that some coalition of lenders might be granted a communal right to consent and approval predicated upon the majority of

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[29] Compl. at ¶ 29.
[30] Opening Br. in Supp. of Defs.' Mot. to Dismiss Ex. A at 2.
[31] Opening Br. in Supp. of Defs.' Mot. to Dismiss at 28 (emphasis in brief) (citing *Black's Law Dictionary* 1606 (8th ed. 2004)).
[32] *Id*. at 29.

them consenting, how are those lenders to "express [their] preference or opinion" if *not* through some form of communication and, thus, a vote?

The *sine qua non* of voting is collective decision making through communication expressed to accept or reject a proposition, with the proposition carrying if a given percentage, often a majority, express their assent. By the terms of the certificate of designation, the Series B Preferred shareholders would be called upon to make precisely this expression of opinion, in exactly this decision-making process, as part of expressing the consent of the majority of the shareholders. They were, thus, called upon to *vote* upon their *consent*. The question before the Court then becomes whether this statutorily or contractually implies that they were entitled to vote upon the *merger*.

2. Did the Series B shareholders have the right to vote on the merger?

Plaintiff's argument fails as a matter of statutory construction: nothing in the General Corporation Law suggests that a corporation may not authorize a series of shares such that those shareholders have a collective right to refuse their assent to a merger without exercising that right through a vote. So long as a corporation organizes itself within the boundaries of Delaware statutory law, it is given great flexibility in its internal governance structures, as well as great freedom to modify the rights and limitations of shareholder rights, particularly those of preferred shareholders, through private agreement. This flexibility provides particularly rich and flexible threads with which corporate actors can weave their agreements, ensuring a diversity of forms of share ownership appropriate to varying situations.

An analysis of § 253 in the context of the entire General Corporation Law provides no reason to assume that the General Assembly wished to prevent a corporation from providing a class of shareholders with a right of collective dissent without, at the same time, preventing a majority shareholder from exercising a right to employ a short form merger. As already noted, § 212(b) contemplates the ability of a shareholder both to vote and to consent. Section 253 implicates only the right to *vote* on a merger, as opposed to a general right to assent. The difference in language allows investors to agree, *ex ante*, to order their affairs the way they wish. On the one hand, investors may agree to provide preferred shareholders with a right of refusal and, at the same time, provide minority shareholders with protection against a short-form merger. If so, the preferred stock may be granted voting rights. If, on the other hand, preferred shareholders desire a collective right to block any merger, but see no advantage in granting protection to minority shareholders, those shares may bear a right to consent, but not a right to

vote on the merger itself. Although the reasons for an investor to choose one set of protections over the other is not entirely clear,[33] the law contemplates the ability to select either structure.

As there is no legal impediment to assigning rights as described above, the clear language of the certificate of designation leads to the conclusion, as a matter of law, that the parties intended for Series B shareholders to have a vote on *consent* to the merger, but not to the merger itself.[34] There is no ambiguity in the language: the Series B shares possess no voting rights, but do have rights to consent and approval. As the words are not given to inconsistent interpretation, the Court need not look beyond the four corners of the document to search for extrinsic evidence of intent.

In short, Aegis was entitled to create shares that could consent to a merger without possessing voting rights for purposes of § 253. There is no reason to suspect that it did not do so. World Focus executed its short-form merger in consonance with Delaware law, and plaintiff's allegations are wholly insufficient to challenge that procedure.

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[33] As a practical matter, it is difficult to conceive of a context in which investors in preferred shares would wish to ensure a right to vote, as opposed to a right to consent, to a merger, simply in order to grant protection to minority holders of Common Stock. There certainly is no reason to suspect, in this case, that Series B shareholders actively sought to provide this protection to minority holders of common shares. Nevertheless, the ability to do so is available to any set of investors who negotiate such a resolution.

[34] The difference between a vote on a merger and a vote to concede to a merger, although not of importance in this context, can be understood clearly by considering a company with two classes of shares: 100,000 shares of Common Stock and 10,000 shares of Preferred Stock. When the time comes to vote on a merger, suppose that the tally for the Common Stock is 49% in favor, and 51% opposed, while all Preferred shareholders are in favor of the merger. If the Preferred shareholders have voting rights (a right to vote *on the merger*), and no other provision in the certificate requires that each class and series of share approve as a class, then the merger is consummated, as a majority of the shares outstanding have approved as required by § 251(c).

If, on the other hand, the Preferred shareholders have a right to approve the merger, but merely vote on whether to exercise that approval, then their opinion is irrelevant, as there is no merger to which they may give their consent. A similar result could be reached by granting both the Common and Preferred shareholders with voting rights, but providing in the certificate that no merger could occur without a separate class vote in favor by both classes of shares.

B. Count II: Breach of fiduciary duties

The sole remedy to a minority shareholder challenging a short-form merger is appraisal.[35] As such, plaintiff's class action claims for breach of fiduciary duty are unsustainable and must be dismissed.

IV. CONCLUSION

Because the Court has determined that plaintiff's complaint fails to state a claim under Rule 12(b)(6), I need not reach defendants' arguments with respect to laches or personal jurisdiction. The complaint is dismissed with prejudice.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:aar

[35] *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 247 (Del. 2000).