IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

BENCHMARK CAPITAL PARTNERS IV, L.P.,

Plaintiff,

v.

C.A. No. 19719

RICHARD VAGUE, JAMES STEWART, JOHN TOLLESON, DAVID MARSHALL, JOHN ORR, CHRISTINE CROUCHER, MOYA GREENE, RICHARD VENN, CHRISTOPHER GREENE, JUNIPER FINANCIAL CORP., CIBC DELAWARE HOLDINGS, INC. and CANADIAN IMPERIAL BANK OF COMMERCE,

Defendants.

MEMORANDUM OPINION

Date Submitted: July 11, 2002
Date Decided: July 15, 2002

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NOBLE, Vice Chancellor

I. Introduction

This is another one of those cases in which sophisticated investors have negotiated protective provisions in a corporate charter to define the balance of power or certain economic rights as between the holders of junior preferred stock and senior preferred stock. These provisions tend to come in to play when additional financing becomes necessary. One side cannot or will not put up more money; the other side is willing to put up more money, but will not do so without obtaining additional control or other diminution of the rights of the other side. In short, these cases focus on the tension between minority rights established through the corporate charter and the corporation's need for additional capital.

In this case, Plaintiff Benchmark Capital Partners IV, L.P. ("Benchmark") invested in the first two series of the Defendant Juniper Financial Corp.'s ("Juniper") preferred stock. When additional capital was required, Defendant Canadian Imperial Bank of Commerce ("CIBC") was an able and somewhat willing investor.[1] As a result of that investment, Benchmark's holdings were relegated to the status of junior preferred stock and CIBC acquired a controlling interest in Juniper by virtue of ownership

[1] CIBC invested in Juniper through a subsidiary, Defendant CIBC Delaware Holdings, Inc. For purposes of this memorandum opinion, I do not distinguish between CIBC and its subsidiary.

of senior preferred stock. The lot of a holder of junior preferred stock is not always a happy one. Juniper's Fifth Amendment and Restated Certificate of Incorporation (the "Certificate") contains several provisions to protect the holders of junior preferred stock from abuse by the holder of senior preferred stock. Two of those provisions are of particular importance here. The Certificate grants the junior preferred stockholders a series vote on corporate. actions that would "[m]aterially adversely change the rights, preferences and privileges of the [series of junior preferred stock]."[2] In addition, the junior preferred stockholders are entitled to a class vote before Juniper may "[a]uthorize or issue, or obligate itself to issue, any other equity security . . . senior to or on a parity with the [junior preferred stock]."[3]

The Certificate provides that those provisions protecting the rights of the junior preferred stockholders may be waived by CIBC.[4] CIBC may not, however, exercise this power "if such amendment, waiver or modification would . . . diminish or alter the liquidation preference or other financial or

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[2] Certificate, Article IV, Sections C.6.c(ii) & C.6.d(ii). All references to the Certificate are to its Article IV.

[3] *Id.* at Section C.6.a(i).

[4] *Id.* at Sections C.6.a., C.6.c., C.6.d. & C.4.c. The protective rights at issue here may be waived by a majority vote of a class consisting of the holders of the Series A, Series B and Series C Preferred shares on an as-converted to common stock basis. Because of CIBC's holdings of Series C Preferred Stock, it is able to cast a majority of the votes of this class on its own. Thus, the waiver is referred to as the "Series C Trump." Benchmark has invested in the two series of junior preferred stock, the Series A Preferred and Series B Preferred.

economic rights" of the junior preferred stockholders or would shelter breaches of fiduciary duties.'

Juniper now must seek more capital in order to satisfy regulators and business requirements, and CIBC, and apparently only CIBC, is willing to provide the necessary funds. Juniper initially considered amending its charter to allow for the issuance of another series of senior preferred stock. When it recognized that the protective provisions of the Certificate could be invoked to thwart that strategy, it elected to structure a more complicated transaction that now consists principally of a merger and a sale of Series D Preferred Stock to CIBC. The merger is scheduled to occur on July 16, 2002 with a subsidiary merging with and into Juniper that will leave Juniper as the surviving corporation, but with a restated certificate of incorporation that will authorize the issuance of a new series of senior preferred stock and new junior preferred stock with a reduced liquidation preference and will cause a number of other adverse. consequences or limitations to be suffered by the holders of the junior preferred. As part of this overall financing transaction, Juniper, after the merger, intends to issue a new series of preferred, the Series D Preferred Stock, to CIBC in exchange for a $50 million capital

[5] Certificate, Section C.4.c. Registration rights and shareholder liability and indemnification obligations are also beyond the reach of the Series C Trump.

contribution. As the result of this sequence of events, the equity holdings of the junior preferred stockholders will be reduced from approximately 29% to 7%. Juniper will not obtain approval for these actions from the holders of the junior preferred stock. It contends that the protective provisions do not give the junior preferred stockholders a vote on these plans and, furthermore, in any event, that CIBC has the right to waive the protective provisions through the Series C Trump![6]

Benchmark, on the other hand, asserts that the protective provisions preclude Juniper's and CIBC's heavy-handed conduct and brings this action to prevent the violation of the junior preferred stockholder's fundamental right to vote on these corporate actions as provided in the Certificate and to obtain interim protection from the planned evisceration of its equity interest in Juniper. Because of the imminence of the merger and the issuance of the new senior preferred stock, Benchmark has moved for a preliminary injunction to stop the proposed transaction. This is the Court's decision on that motion.

II. The Parties

Benchmark, a Delaware limited partnership based in Menlow Park, California, is a venture capital firm specializing in preferred stock

[6] Juniper concedes that CIBC does not have the power to waive any junior preferred

investments. It manages more than $2 billion and has made approximately 50 preferred stock investments in the preceding 5 years.

Juniper is a Delaware corporation with its principal place of business in Wilmington, Delaware, where it has more than 300 employees. It is a financial services enterprise with the issuance of credit cards as its core business. Juniper Bank is Juniper's wholly-owned state-chartered banking subsidiary.

CIBC is a Canadian bank based in Toronto and controls Juniper through a subsidiary as the result of a $145 million investment in 200 1.

The individual defendants are directors of Juniper. Defendants Richard Vague and James Stewart are founders and officers of Juniper. Defendant John Tolleson is a member of the special committee appointed by the board of Juniper to review the Series D Preferred financing.

III. Factual Background

A. Benchmark and CIBC Invest in Juniper

Benchmark became the initial investor in Juniper when in June 2000, it invested $20 million and, in exchange, was issued Series A Preferred Shares. Juniper raised an additional $95.5 million in August 2000 by issuing its Series B Preferred Shares. Benchmark contributed $5 million in this

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stockholder's right to vote with respect to a diminished liquidation preference.

effort. It soon became necessary for Juniper to obtain even more capital. Efforts to raise additional funds from existing investors and efforts to find new potential investors were unavailing until June 2001 when CIBC and Juniper agreed that CIBC would invest $27 million in Juniper through a mandatory convertible note while CIBC evaluated Juniper to assess whether it was interested in acquiring the company. CIBC also agreed to provide additional capital through a Series C financing in the event that it chose not to acquire Juniper and if Juniper's efforts to find other sources for the needed funding were unsuccessful.

In July 2001, CIBC advised Juniper that it would not seek to acquire Juniper. After reviewing its options for other financing, Juniper called upon CIBC to invest the additional capital. The terms of the Series C financing were negotiated during the latter half of the summer of 2001. A representative of Benchmark, J. William Gurley, and its attorney were active participants in these negotiations. Through the Series C Transaction, which closed on September 18, 200 1, CIBC invested $145 million (including the $27 million already delivered to Juniper).[7] With its resulting Series C Preferred holdings, CIBC obtained a majority of the voting power in Juniper on an as-converted basis and a majority of the voting power of Juniper's

[7] **Mr. Vague also invested $5 million through the Series C Transaction.**

preferred stock. CIBC also acquired the right to select six of the eleven members of Juniper's board. As required by Juniper's then existing certificate of incorporation, the approval of the holders of Series A Preferred and Series B Preferred Stock, including Benchmark, was obtained in order to close the Series C Transaction.*

B. The Certificate's Protective Provisions

In the course of obtaining that consent, CIBC had extensive negotiations regarding the provisions of Juniper's charter designed to protect the rights and interests of the holders of Series A Preferred and Series B Preferred Stock.[9] For example, CIBC had sought the power to waive, modify or amend certain protective provisions held by the Series A Preferred and Series B Preferred stockholders. As the result of those discussions, the Certificate was adopted. CIBC obtained the right to waive certain protective voting provisions, but the right was not unlimited. A review of the

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[8] The facts giving rise to this dispute are generally uncontested. One exception is the assertion of Mr. Gurley, who, as noted, was actively involved on Benchmark's behalf in negotiating the Series C Transaction, that Jumper and CIBC promised that the Series C financing would provide Juniper with sufficient funding to implement its business plan and that no additional capital would be needed in order to achieve profitability. See Gurley Aff. ¶ 5. Others, however, dispute that recollection. See Orr Aff. ¶ 18; Vague Aff. ¶ 21.

[9] The Certificate may be found at Ladig Aff., at Ex. J; the proposed post-merger certificate of incorporation appears at Ladig Aff., at Ex. P.

Certificate's protective provisions directly involved in the pending dispute follows.

Juniper's Certificate protects the holders of Series A Preferred and Series B Preferred from risks associated with the issuance of any additional equity security that would be senior to those shares by requiring their prior approval through a separate class vote as prescribed in Section C.6.a(i):

> So long as any shares of Series A Preferred Stock or Series B Preferred Stock remain outstanding, the Corporation shall not, without the vote or written consent by the holders of at least a majority of the then outstanding shares of the Series A Preferred Stock and Series B Preferred Stock, voting together as a single class; provided, however, that the foregoing may be amended, waived or modified pursuant to Section C.4.c: (i) Authorize or issue, or obligate itself to issue, any other equity security (including any security convertible into or exercisable for any equity security) senior to or on a parity with the Series A Preferred Stock or Series B Preferred Stock as to dividend rights or redemption rights, voting rights or liquidation preferences (other than the Series C Preferred Stock and Series C Prime Preferred Stock sold pursuant to, or issued upon the conversion of the shares sold pursuant to, the Series C Preferred Stock Purchase Agreement . . .)

Under Section C.6.a(ii), Juniper also must provide the holders of the junior preferred stock with a class vote before it may proceed to dispose of all or substantially all of its assets or to "consolidate or merge into any other Corporation (other than a wholly-owned subsidiary Corporation)." Furthermore, this right to a class vote also applies to efforts to increase the number of Juniper's directors.

Because CIBC was investing a substantial sum in Juniper, it insisted upon greater control than it would have obtained if these voting provisions (and other comparable provisions) could be exercised without limitation by the holders of Series A Preferred and Series B Preferred shares as a class. Thus, it sought and obtained a concession from the Series A Preferred and Series B Preferred holders that it could amend, waive, or modify, ***inter alia,*** the protective provisions of Section C.6.a.[10] The right of CIBC to waive the voting rights of the Series A Preferred and Series B Preferred holders was limited by excluding from the scope of the waiver authority any action that "would (a) diminish or alter the liquidation preference or other financial or economic rights, modify the registration rights, or increase the obligations, indemnities or liabilities, of the holders of Series A Preferred Stock, Series A Prime Preferred Stock or Series B Preferred Stock or (b) authorize, approve or waive any action so as to violate any fiduciary duties owed by such holders under Delaware law."

Another protection afforded the holders of both the Series A Preferred and Series B Preferred Stock was set forth in Sections C.6.c(ii) & C.6.d(ii) of the Certificate. Those provisions require a vote of the holders of each series, provided that the requirement for a series vote was not amended or

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[10] **See Certificate, Section** C.4.c.

waived by CIBC in accordance with Section C.4.c, if that corporate action would "[m]aterially adversely change the rights, preferences and privileges of the Series A Preferred [and Series B] Preferred Stock."

C. Additional Financing Becomes Necessary

By early 2002, Juniper was advising its investors that even more capital would be necessary to sustain the venture.'[1] Because Juniper is in the banking business, the consequences of a capital shortage are not merely those of the typical business. Capital shortfall for a banking entity may carry the potential for significant and adverse regulatory action. Regulated not only by the Federal Reserve Board and the Federal Deposit Insurance Corporation but also by the Delaware Banking Commissioner, Juniper is required to maintain a "well-capitalized" status. Failure to maintain that standard (or to effect a prompt cure) may result in, among other things, regulatory action, conversion of the preferred stock into a "senior common stock" which could than be subjected to the imposition of additional security through the regulatory authorities, and the loss of the right to issue Visa

[11] The parties' views on the severity of the need for additional capital and its causes differ somewhat. While Benchmark hints at ineffective management, Juniper points to general economic conditions as exacerbated by the events of September 11, 2001. It emphasizes three areas of significant deviation from the projections upon which its business plan had been premised: greater costs in obtaining new accounts, smaller account balances, and a higher rate of default.

cards and to have its customers serviced through the Visa card processing system.

Juniper, with the assistance of an investment banking firm, sought additional investors. The holders of the Series A Preferred and Series B Preferred Stock, including Benchmark, were also solicited. Those efforts failed, thus leaving CIBC as the only identified and viable participant available for the next round of financing, now known as the Series D Transaction.[12]

D. The Series D Preferred Transaction

Thus, Juniper turned to consideration of CIBC's proposal, first submitted through a term sheet on March 15, 2002, to finance $50 million through the issuance of Series D Preferred Stock that would grant CIBC an additional 23% of Juniper on a fully-diluted basis and reduce the equity

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[12] Juniper has sought to improve its financial position by cutting costs, as urged by many of its investors, including Benchmark. Those efforts, which were partially successful, were not adequate to redress the capital shortfall. Juniper also evaluated a number of other options, such as deferring the raising of additional capital and more aggressively cutting costs. Those options were rejected when both management and the board concluded that achieving profitability under those options was even more problematic. I recognize, of course, that the board that reached this conclusion was dominated by directors designated by the investor of last resort, CIBC, whose conduct lies at the core of Benchmark's challenge here.

Benchmark, as do other holders of the junior preferred stock, holds preemptive rights that entitle it to participate in the Series D financing.

interests of the Series A Preferred and Series B Preferred holders from approximately 29% to 7%.[13]

The board, in early April 2002, appointed a special committee to consider the CIBC proposal.[14] As the result of the negotiations among Juniper, the special committee, and CIBC, the special committee was able to recommend the Series D Transaction with CIBC. The terms of the Series D Transaction are set forth in the "Juniper Financial Corp. Series D Preferred Stock Purchase Agreement"[15] and the "Agreement and Plan of Merger. and Reorganization by and Between Juniper Financial Corp. and Juniper Merger Corp."[16]

In general terms, the Series D Transaction consists of the following three steps:

1. Juniper will carry out a 100-l reverse stock split of its common stock.[17]

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[13] Benchmark asserts that this percentage reduction understates the true scope of the adverse impact of the proposed transaction upon the Series A Preferred and Series B Preferred holders because of changes to attributes of the shares they will receive from the financing transaction.

[14] The special committee consisted of Mr. Tolleson, who Benchmark challenges as a friend and colleague of Mr. Vague, and two directors who were appointed to the board by the Series A Preferred and the Series B Preferred stockholders in accordance with the Prior Investors' Rights Agreement. Benchmark has not challenged the independence of these two directors. Benchmark, however, does challenge the authority and the performance of the special committee, but Benchmark has not advanced those arguments in support of its pending application for a preliminary injunction.

[15] Ladig Aff., at Ex. Q.

[16] *Id. at* Ex. R

[17] This aspect of the Series D Transaction is not challenged by Benchmark.

2. Juniper Merger Corp., a subsidiary of Juniper established for these purposes, will be merged with and into Juniper which will be the surviving corporation. The certificate of incorporation will be revised as part of the merger.

3. Series D Preferred Stock will be issued to CIBC (and, at least in theory, those other holders of Series A, B and C Preferred who may exercise preemptive rights) for $50 million.

Each share of existing Series A Preferred" and each share of existing Series B Preferred will be converted into one share of new Series A Preferred or Series B Preferred, respectively, and the holders of the existing junior preferred will also receive, for each share, a warrant to purchase a small fraction of a share of common stock in Juniper and a smaller fraction of a share of common stock in Juniper.[19] A small amount of cash will also be paid. Juniper will receive no capital infusion as a direct result of the merger. Although the existing Series A Preferred and Series B Preferred shares will cease to exist and the differences between the new and distinct

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[18] I acknowledge that there is also a Series A Prime Preferred. For convenience, I have not addressed it separately.

[19] Benchmark asserts that both the warrants and the common stock are essentially worthless at this time, a contention which Juniper does not dispute. Juniper seeks to justify the warrants and the common stock as providing the Series A Preferred and Series B Preferred holders with an opportunity to participate in the future success of Juniper.

Series A Preferred and Series B Preferred shares will be significant,*' the resulting modification of Juniper's certificate of incorporation will not alter the class and series votes required by Section C.6.[21] The changes to Juniper's charter as the result of the merger include, *inter alia*, authorization of the issuance of Series D Preferred Shares, which will be senior to the newly created Series A Preferred and Series B Preferred Stock with respect to, for example, liquidation preferences, dividends, and as applicable, redemption right? Also the Series D Stock will be convertible into common stock at a higher ratio than the existing or newly created Series A Preferred and Series B Preferred Stock, thereby providing for a currently greater voting power. In general terms, the equity of the existing Series A Preferred and Series B Preferred holders will be reduced from approximately

[20] For example, the holders of the newly created Series A Preferred and Series B Preferred Stock will have an aggregate liquidation preference of $15 million as compared to the liquidation preference of the existing Series A Preferred and Series B Preferred holders of approximately $115 million. See Juniper Financial Corp.'s June 26, 2002 Proxy Statement, at 2. Moreover, "[t]he dividend payable . . . to the holders of the New Series A Stock will be reduced from $0.1068 per share to $0.020766 per share and the dividend payable . . . to the holders of the New Series B Preferred Stock will be reduced from $0.23 per share to $0.030268 per share." *Id.* at 46. The redemption rights and other preferences of the existing Series A Preferred and Series B Preferred holders will similarly be compromised by the conversion to the New Series A Preferred and New Series B Preferred Stock as a result of the merger. See *id.* at 47-48. Finally, the New Series A Preferred and New Series B Preferred Stock will be subordinate to another series of preferred stock, the Series D Preferred Stock.

[21] Any changes to the voting rights provisions at issue here are not material to the pending issues.-

[22] *See supra* note 20.

29% before the merger to approximately 7% after the Series D financing, and CIBC will hold more than 90% of Juniper's voting power.

Juniper intends to proceed with the merger on July 16, 2002 and to promptly thereafter consummate the Series D financing. It projects that, without the $50 million infusion from CIBC, it will not be able to satisfy the "well-capitalized" standard as of July 3 1, 2002. That will trigger, or so Juniper posits, the regulatory problems previously identified and business problems, such as the risk of losing key personnel and important business relationships. Indeed, Juniper predicts that liquidation would ensue and, in that event (and Benchmark does not seriously contest this), that the holders of Series A Preferred and Series B Preferred Stock would receive nothing (or essentially nothing) from such liquidation.

IV. Contentions of 'the Parties

Benchmark begins its effort to earn a preliminary injunction by arguing that the junior preferred stockholders are entitled to a vote on the merger on a series basis under Sections C.6.c(ii) & C.6.d(ii) because the merger adversely affects, ***inter alia***, their liquidation preference and dividend rights and on a class basis under Section C.6.a(i) because the merger, through changes to Juniper's capital structure as set forth in its revised certificate of incorporation, will authorize the issuance of a senior preferred

security.[23] Benchmark also invokes its right to a class vote to challenge the Series D Purchase Agreement under Section C.6.a(i) because that agreement obligates Juniper to issue a senior preferred security. Similarly, Benchmark challenges the issuance of the new Series D Preferred Stock after the merger because it will be issued without a class vote by the holders of either the old or the new Series A Preferred Stock and the new Series B Preferred Stock.

In response, Juniper and CIBC argue that the junior preferred stockholders are not entitled to a class or series vote on any aspect of the Series D financing, particularly the merger. The adverse effects of the transaction arise from the merger and not from any separate amendment of the certificate of incorporation, which would have required the exercise of the junior preferred stockholders' voting rights.[24] Juniper and CIBC

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[23] While the Verified Complaint asserts general fiduciary duty and disclosure claims relating to the alleged scheme to dilute wrongfully the interests of the junior preferred stockholders, Benchmark has not relied upon these claims in pursuing its application for a preliminary injunction.

[24] Juniper focuses on the separate statutory regimes for amendments of certificates of incorporation and for mergers. A corporation may amend its certificate of incorporation to reclassify its authorized stock, 8 ***Del.*** C. § 242(a)(3), or to create a new class of stock with rights and preferences superior to other classes of stock, 8 ***Del. C.*** § 242(a)(S). By 8 ***Del.*** C. § 242(b)(2), "[t]he holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely." Mergers, by contrast, are accomplished in accordance with 8 ***Del.*** C. § 25 1. A merger agreement, in accordance with 8 ***Del.*** C. § 251(b)(3), and a certificate of merger, in accordance with 8 ***Del. C.*** § 253(c)(4), shall state: "[I]n the case of a merger, such amendments or changes in the

emphasize that none of the junior preferred stock protective provisions expressly applies to mergers. Finally, Juniper and CIBC assert that the Series C Trump allows for the waiver of all of the voting rights at issue (except for the diminishment of the liquidation preference accomplished by the merger). Benchmark, as one might expect, maintains that the exercise of the Series C Trump is precluded because the "economic or financial rights" of the holders of the junior preferred will be adversely affected and, therefore, the limitation on CIBC's right to exercise the Series C Trump is controlling.

Juniper and CIBC also vigorously contest the issuance of a preliminary injunction by arguing that a balancing of the equities (or balancing of the relative harms from granting or not granting the preliminary injunction) heavily counsels against its issuance. They point out that, in the absence of the proposed financing, Juniper would encounter severe regulatory and business problems, that liquidation would be likely, and that, with liquidation, Benchmark and the other junior preferred shareholders would receive little or nothing from their interests in Juniper.

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certificate of incorporation of the surviving corporation as are desired to be effected by the merger. . . ."

V. Analysis

A. Preliminary Injunction Standard

The familiar standard for a preliminary injunction places the burden on the movant to demonstrate "(1) a reasonable probability of success on the merits, (2) irreparable harm if the injunction is not granted, and (3) a balance of equities in favor of granting the relief."[25] Because a preliminary injunction is an extraordinary remedy, such relief will not be granted "where the remedy sought is excessive in relation to, or unnecessary to prevent, the injury threatened."[26] With this framework in mind, I will first consider the reasonable probability of success of each of Benchmark's arguments.

B. Reasonable Probability of Success on the Merits

1. General Principles of Construction

Certificates of incorporation define contractual relationships not only among the corporation and its stockholders but also among the stockholders.[27] Thus, the Certificate defines, as a matter of contract, both the relationship between Benchmark and Juniper and the relative relationship between Benchmark, as a holder of junior preferred stock, and

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[25] *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1201 (Del. Ch. 2001); *see also SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 40 (Del. 1998).
[26] *Aquila, Inc. v. Quanta Servs., Inc.*, Del. Ch., C.A. No. 19497, mem. op. at 13, Lamb, V.C. (May 10, 2002).
[27] *In re: Explorer Pipeline Co.*, Del. Ch., C.A. No. 18749, mem. op. at 15, Noble V.C. (July 16, 2001).

CIBC, as the holder of senior preferred stock. For these reasons, courts look to general principles of contract construction in construing certificates of incorporation.[28]

> [A court's function in ascertaining the rights of preferred stockholders] is essentially one of contract interpretation against the background of Delaware precedent. These precedential parameters are simply stated: Any rights, preferences and limitations of preferred stock that distinguish that stock from common stock must be expressly and clearly stated, as provided by statute. Therefore, these rights, preferences and liquidations will not be presumed or implied.[29]

These principles also apply in construing the relative rights of holders of different series of preferred stock.[30]

2. Challenges to the Merger

Benchmark presents two distinct challenges to the merger. First, it argues that Section C.6.c(ii), which protects the rights of the holders of

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[28] These principles, of course, include: the Court must first determine if the intent of the parties can be ascertained from the words chosen by the parties; unless the contract is ambiguous, extrinsic evidence may not be considered; and the document should be construed "as a whole" to reconcile, if possible, all of its provisions. See *generally id.* at 15-16. I note in passing that the record before me does not allow application of the principle that any ambiguity should be construed against the drafter of the document because it appears that Benchmark, Juniper and CIBC all actively participated in negotiation of the Certificate's protective provisions resulting from the authorization of the Series C Preferred Stock. *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392 (Del. 1996).

[29] *Elliot Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852-53 (Del. 1998) (footnotes omitted). See 8 Del. C. § 151. The Supreme *Court* in *Avatex* further noted that "strict construction" as an analytical methodology is "problematic" in interpreting such provisions in corporate charters. See *id.* at 853 n.46.

[30] R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, 1 THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 5.4, at 5.7 (3d ed. 2002).

Series A Preferred, and Section C.6.d(ii), which protects the rights of the holders of Series B Preferred, preclude the merger without a series vote because the merger "[m]aterially adversely changes the rights, preferences and privileges" of those classes of preferred stock. Second, Benchmark asserts that the merger cannot go forward, without a class vote by the holders of the Series A Preferred and Series B Preferred Stock combined, because of Section C.6.a(i), which precludes the authorization of a senior preferred stock without such a vote. The Series D Preferred Stock, when issued, will have rights superior to the Series A Preferred and Series B Preferred Stock, either in existing form or in the post-merger form. Because the merger agreement provides the mechanism for the authorization of the Series D Preferred Stock through the accompanying restatement of Juniper's certificate of incorporation, it falls within the reach of Section C.6.a(i), or so Benchmark argues.

a. Merger as Changing the Rights, Preferences and Privileges

Benchmark looks at the Series D Preferred financing and the merger that is integral to that transaction and concludes that the authorization of the Series D Preferred Stock and the other revisions to the Juniper certificate of incorporation accomplished as part of the merger will materially adversely affect the rights, preferences, and privileges of the junior preferred shares.

Among the adverse affects to be suffered by Benchmark are a significant reduction in its right to a liquidation preference, the authorization of a new series of senior preferred stock that will further subordinate its interests in Juniper, and a reduction in other rights such as dividend priority." These adverse consequences will all be the product of the merger. Benchmark's existing Series A Preferred and Series B Preferred shares will cease to exist as of the merger and will be replaced with new Series A Preferred Stock, new Series B Preferred Stock, warrants, common stock, and a small amount of cash. One of the terms governing the new junior preferred stock will specify that those new junior preferred shares are not merely subordinate to Series C Preferred Stock, but they also will be subordinate to the new Series D Preferred Stock. Thus, the harm to Benchmark is directly attributable to the differences between the new junior preferred stock, authorized through the merger, and the old junior preferred stock as evidenced by the planned post-merger capital structure of Juniper.

Benchmark's challenge is confronted by a long line of Delaware cases[32] which, in general terms, hold that protective provisions drafted to

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[31] *See supra* note 20.

[32] *See Avatex*, 715 A.2d *842; Warner Communications, Inc. v. Chris-Craft Indus., Inc., 583* A.2d *962* (Del. Ch. 1989), *aff'd, 567* A.2d 419 (Del. 1989); *Sullivan Money Mgmt., Inc. v. FLS Holdings, Inc.,* Del Ch, C.A. No. 1273 1, mem. op., Jacobs, V.C. (Nov. 20, 1992), *aff'd, 628* A.2d *84* (Del. 1993); *Starkman v. United Parcel Service of America, Inc.,* Del. Ch., C.A. No. 17747, Lamb, V.C. (Oct. 18, 1999) (transcript of oral ruling).

provide a class of preferred stock with a class vote before those shares' rights, preferences and privileges may be altered or modified do not fulfill their apparent purpose of assuring a class vote if adverse consequences flow from a merger and the protective provisions do not expressly afford protection against a merger. This result traces back to the language of 8 Del. C. § 242(b)(2), which deals with the rights of various classes of stock to vote on amendments to the certificate of incorporation that would "alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely." That language is substantially the same as the language ("rights, preferences and privileges") of Sections C.6.c(ii) & C.6.d(ii). Where the drafters have tracked the statutory language relating to charter amendments in 8 ***Del.*** C. § 242(b), courts have been reluctant to expand those restrictions to encompass the separate process of merger as set forth in 8 ***Del. C.*** § 25 1, unless the drafters have made clear the intention to grant a class vote in the context of a merger.

For example, in ***Warner Communications Inc., v. Chris-Craft Industries, Inc.,*** where Warner stock through merger was converted into Time stock, this Court was confronted with a provision in the certificate that accorded preferred stockholders a class vote on corporate action to "'amend, alter or repeal any of the provisions of the Certificate of Incorporation or By-

laws of the Corporation so as to affect adversely any of the preferences, rights, powers or privileges of the Series B Stock or the holders thereof. . . .'"[33] The Court, nonetheless, determined that the merger was not subject to a class vote by the preferred stock holders.

> The draftsmen of this language-the negotiators to the extent it has actually been negotiated-must be deemed to have understood, and no doubt did understand, that under Delaware law (and generally) the securities whose characteristics were being defined in the certificate of designation could be converted by merger into "shares or other securities of the corporation surviving or resulting from [a] merger or consolidation" or into "cash, property, rights or securities of any other corporation." ***8 Del. C.* § *25*** 1(b); ***Federal United Corporation v. Havender,*** Del. Supr., 11 A.2d 33 1 (1940) . . . .
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> I can only conclude that it is extraordinarily unlikely that the drafters of Section 3.3(i), who obviously were familiar with and probably expert in our corporation law, would have chosen language so closely similar to that of Section 242(b)(2) [providing for a class vote where a charter would "alter or change" the powers, preferences or special rights" of a class or series of stock] had they intended a merger to trigger the class vote mechanism of that section.[34]

The range of Sections C.6.c(ii) and C.6.d(ii) is not expressly limited to changes in the Certificate. However, given the well established case law construing the provisions of certificates of incorporations and the voting

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[33] *Warner, 583* A.2d at 965 (quoting the pertinent charter provision).
[34] *Id.* at 969-70.

rights of classes of preferred stockholders, I am satisfied that the language chosen by the drafters *(i.e.,* the "rights, preferences, and privileges") must be understood as those rights, preferences and privileges which are subject to change through a certificate of incorporation amendment under the standards of 8 *Del. C.* § *242(b)* and not the standards of 8 *Del. C.* § *25* 1.[35]

In ***Starkman*** *v. United Parcel Service of America, Inc.,* this Court concluded that a supermajority vote was not necessary to accomplish a merger in part because the existing company became a wholly-owned subsidiary of the new primary company and the old company's charter had not been amended. However, the Court went on to observe that the supermajority vote would not have been required "even if the charter of the surviving corporation in the merger amended or deleted the right of first refusal [at issue]."[36] It explained its reasoning as follows:

> I reach this conclusion because the Supreme Court in *Avatex* rested its holding on the presence of language in the *Avatex* certificate of incorporation, specifically referring to the possibility of an amendment, alteration or repeal by merger, consolidation or otherwise. The critical language, referring to merger, consolidation or otherwise, was not found in *Warner* and is not found here. *Thus, Warner,* which was reaffirmed by

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[35] "*In Warner, the* Chancellor found that the provision that conferred a class-vote right did not encompass mergers, in part because the language of the *Warner* provision tracked § 242(b)(2) of the General Corporation Law, which mandates a class vote for classes of stock that would be adversely affected by amendments to a certificate of incorporation, but does not create a class voting right in the event of merger." *Sullivan Money* ***Mgmt.,*** mem. op. at 6 (emphasis added).

[36] ***Starkman,*** tr. at 19 (emphasis added).

> the Supreme Court, requires that I read [the supermajority provision] to pertain only to charter amendments proposed in accordance with section 242 of the Delaware General Corporation Law. Because the transaction at issue is a merger proposed under the authority of Section 251 of the Delaware General Corporation Law, *Warner* requires a finding that [the supermajority provision] has no application.[37]

Finally, the corporate charter of Juniper was adopted after our Supreme Court's decision *in Avatex* and the drafters of the Certificate are charged with knowledge of its holdmg and the following:

> The path for future drafters to follow in articulating class vote provisions is clear. Where a certificate (like the Warner certificate or the Series A provisions here) grants only the right to vote on an amendment, alteration or repeal, the preferred have no class vote in a merger. When a certificate (like the First Series Preferred certificate here) adds the terms "whether by merger, consolidation or otherwise" and a merger results in an amendment, alteration or repeal that causes an adverse effect on the preferred, there would be a class vote.[38]

In short, to the extent that the merger adversely affects the rights, preferences and privileges of either the Series A Preferred or Series B Preferred Stock, those consequences are the product of a merger, a corporate

[37] *Id.* at 19-20.

[38] *Avatex,* 715 A.2d at *855; see also* ***Sullivan*** Money ***Mgmt.***, mem. op. at 9 ("Unarguably had the Certificate's drafters intended to expressly entitle the Series A Preferred Stockholders to a class vote on a merger, they knew fully well how to do so.").

event which the drafters of the protective provision could have addressed, but did not.

Accordingly, I am satisfied that Benchmark has not demonstrated a reasonable probability of success on the merits of its claim that Sections C.6.c(ii) and C.6.d(ii) require a series vote on the merger contemplated as part of the Series D Transaction.

b. Authorization of Series D Preferred Shares Through the Merger Process

Benchmark's straightforward argument that it is entitled to a class vote on the authorization of the Series D Preferred Stock through the merger can easily be set forth. By Section C.6.a(i) of the Certificate, the holders of the Series A Preferred and Series B Preferred Stock have the right, unless that right is properly waived by CIBC, to a class vote on the authorization of a senior preferred security. The Series D Preferred Stock will be on parity with the Series C Preferred Stock and, thus, will be senior to be the existing junior preferred and the newly created junior preferred that will be created as part of the merger.[39] The protective provisions of the Certificate do not distinguish between authorization through amendment of the Certificate

[39] I avoid, for the moment, consideration of Juniper's argument that the Series D Preferred shares will never be senior to the existing Series A Preferred and Series B Preferred Stock because the 'junior preferred shares will have been extinguished by the merger when the Series D Preferred Stock are authorized. *See infra* note 49.

under 8 *Del.* C. § 242(b) and those changes in the Certificate resulting from a recapitalization accompanying a merger pursuant to 8 *Del.* C. § 25 1. Thus, according to Benchmark, it matters not how the result is achieved. Moreover, Section C.6.a(i) does not track or even resemble the "privileges, preferences and special rights" language of 8 *Del.* C. § 242(b)(2) that was important to the analysis in *the Warner line* of cases. Benchmark thus argues that the clear and unambiguous words of Section C.6.a(i) guarantee (at least in the absence of an effective waiver by CIBC) it and the other holders of Series A Preferred and Series B Preferred shares a class vote before the Series D Preferred Stock may be authorized. While Benchmark has advanced an appealing and rational analysis, I conclude, for the reasons set forth below, that it has failed to demonstrate a reasonable probability of success on the merits of this argument.

In ascertaining whether a class of junior preferred stockholders has the opportunity to vote as a class on a proposed corporate action, the words chosen by the drafters must be read "against the background of Delaware precedent."[40] For example, *Sullivan Money Management, Inc. v. FLS Holdings, Inc.* involved the question of whether a class vote was required in order to change critical rights of preferred shareholders "'by amendment to

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[40] *Avatex*, 715 A.2d at 852.

the Certificate of Incorporation of [FLS Holdings, Inc.] or otherwise.'"[41] In interpreting the charter of FLS Holdings, Inc., the Court was urged to treat the phrase "or otherwise" as including mergers. The Court, in rejecting this contention, set forth the following:

> The word "merger" is nowhere found in the provision governing the Series A Preferred Stock. The drafters' failure to express with clarity an intent to confer class voting rights in the event of a merger suggests that they had no intention of doing so, and weighs against adopting the plaintiffs' broad construction of the words "or otherwise."[42]

Here, the authorization of the Series D Preferred Stock results from the merger and the restatement of Juniper's certificate of incorporation as part of that process. *Warner* and the cases following it, and *Starkman* in particular,[43] demonstrate that certain rights of the holders of preferred stock that are secured by the corporate charter are at risk when a merger leads to changes in the corporation's capital structure. To protect against the potential negative effects of a merger, those who draft protective provisions have been instructed to make clear that those protective provisions

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[41] *Sullivan* Money *Mgmt.*, mem. op. at 3 (quoting the pertinent charter language).
[42] *Id.* at 10.
[43] *Starkman* teaches that other significant changes may be made to the certificate of incorporation through the merger process and without the exercise of special voting *rights. See supra* text accompanying note 36.

specifically and directly limit the mischief that can otherwise be accomplished through a merger under 8 ***Del. C.*** § ***25*** 1 .[44]

In sum, Benchmark complains of the harm which will occur because of alterations to Juniper's capital structure resulting from modifications of the certificate of incorporation emerging from the merger. General language alone granting preferred stockholders a class vote on certain changes to the corporate charter (such as authorization of a senior series of stock) will not be read to require a class vote on a merger and its integral and accompanying modifications to the corporate charter and the corporation's capital structure.[45] To reach the result sought by Benchmark, the protective rights "'must . . . be clearly expressed and will not be presumed.'"[46] Unfortunately for Benchmark, the requirements of a class vote for

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[44] *See Avatex,* 715 A.2d at *855; Starkman,* tr. at 18-22. As a general matter, drafting guidance, such as that provided in *Avatex,* may be read as creating a "safe harbor" or as a prudential suggestion and is not typically to be read as the exclusive means of achieving the desired goal. Given what some may view as the peculiar nature of preferred stock, however, finding any safe haven may be difficult without substantial adherence to the guidance set forth in *Avatex.*

[45] Benchmark correctly points out that the "preferences, privileges and special rights" language of Section 242(b)(2) which has been significant in the ***Warner*** line of cases cannot be found in any recognizable form in Section C.&a(i). See ***Avatex,*** 715 A.2d at 854-55 (commenting on the significance of the uniformity of crucial provisions and the interplay of "boilerplate" provisions in the drafting process). However, as observed by ***this Court in Sullivan Money Mgmt, Inc.,*** mem. op. at 6, certificate language comparable to that found in 8 Del. C. § 242(b)(2) is but one consideration in concluding that the merger has separate and independent significance or function. See ***supra*** text accompanying note 42.

[46] *Avatex,* 715 A.2d at 853 n.46 (quoting ***Rothschild Int 'l Corp. v. Liggett Group, 474*** A.2d 133, 136 (Del. 1984)).

authorization of a new senior preferred stock through a merger was not "clearly expressed" in the Certificate. Against this background, I am reluctant both to presume that protection from a merger was intended and, perhaps more importantly, to create uncertainty in a complex area where *Avatex* has set down a framework for consistency.[47]

This conclusion is influenced to some extent by a few other considerations.

First, the drafters of Section C.6.a contemplated mergers expressly as evidenced by the precise restriction on some mergers set forth in Section C.6.a(ii). That the potential consequences of some mergers were addressed in Section C.6.a(ii) but no reference to mergers appears in Section C.6.a(i) lends some support to the notion that Section C.6.a(i) was not intended to apply in the context of a merger.

Second, Benchmark and its representative, Mr. Gurley, had extensive experience in investing in preferred securities and Mr. Gurley was aware

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[47] "The statute does not require a separate vote of the holders of a particular class of stock for approval of an agreement of merger, absent contrary provisions in a certificate of incorporation. Since preferred stock rights must be clearly expressed, a certificate provision providing for a class vote for changes in the preferred stock rights 'by amendment to the Certificate of Incorporation of the Corporation or otherwise' does not provide for a class vote on mergers. Thus, a corporation can effect a merger between itself and a subsidiary (or a third-party) and adversely affect one class of stockholders without their approval even though a class vote would be required if the same result were attempted by an amendment of the certificate of incorporation." BALOTTI & FINKELSTEIN, *supra* note 30, § 9.15, at 9-29 (footnotes omitted).

that "specific voting rights with respect to mergers" are sometimes negotiated in preferred stockholders protective provisions.[48] Despite this awareness, Benchmark, its representative, and its counsel failed to obtain any specific protection in Section C.6.a(i) preserving class voting rights in the. face of a merger, such as the one contemplated by the Series D Transaction. Thus, I conclude that Benchmark has not demonstrated a reasonable probability of success on its contention that the authorization of the Series D Preferred Stock through the merger, but without a class vote by the holders of Series A Preferred and Series B Preferred Stock, is precluded by Section C.6.a(i).[49]

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[48] Gurley Dep., at 87.

[49] I also note Juniper's argument that Section C.6.a(i) cannot, for almost metaphysical reasons, be invoked to impede the proposed transaction. While I do not necessarily reject this argument, I find it a little too clever for significant reliance. Under Juniper's analysis, Section C.6.a(i), as it protects the current (or old) Series A Preferred and Series B Preferred Stock, cannot require the vote of the junior preferred stockholders as a class on the authorization of the Series D Preferred Stock because that stock will never be senior to the current Series A Preferred or Series B Preferred Stock since, by virtue of the merger, those series will no longer be in existence when the Series D Preferred Stock is authorized. If old Series A Preferred and Series B Preferred shares no longer exist, it cannot be said that Juniper will authorize a Series D Preferred Stock that will be senior to them. Conversely, the corresponding protection of Section C.6.a(i) in the restated charter will not protect the new Series A Preferred and Series B Preferred Stock because when those two series were established, they were already junior to the Series D Preferred Stock, all as part of the capital structure that delineated the scope of the new Series A Preferred and Series B Preferred Stock. While it may or may not be fair to characterize this argument as "too clever," it does highlight some of the difficulties, be they pragmatic or be they abstract, in applying provisions such as Section C.6.a(i) to mergers.

While I have concluded, for these purposes, that a class vote is not required for the authorization of the new Series D Preferred Stock through the anticipated merger, I do note that the subsequent discussion of the Series C Trump and the exceptions to it would generally be applicable to the class vote and the purported waiver at stake here. I do

3. Obligation to Issue and Issuance of Series D Preferred Shares

Under Section C.6.a(i), Juniper is also required to obtain class approval, unless effectively waived by CIBC, from its junior preferred holders before it can issue or obligate itself to issue a senior preferred stock. Juniper plans to issue its Series D Preferred Stock after the merger and at a time when the new Series A Preferred shares and the new Series B Preferred shares will be outstanding. The shares will not be issued as the result of the merger, but instead will be issued pursuant to the Purchase Agreement between CIBC and Juniper. Because the merger is not implicated by the issuance of the shares, there is no "background" precedent against which this act must be evaluated in the same sense as the case law addressing the consequences of mergers. These facts bring Juniper's proposed issuance of its Series D Preferred Stock squarely within the scope of the restrictions imposed by Section C.6.a(i) of the post-merger certificate.[50] Specifically, to paraphrase that provision, so long as any shares of the new Series A Preferred or Series B Preferred are outstanding, Juniper may not, without the class vote or class consent of the new Series A Preferred and Series B

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note, however, that the authorization of the Series D Preferred is more than significant than its subsequent issuance because issuance has a ministerial aura about once the new series has been authorized.

[50] The terms of Section C.6.a(i) do not change materially between the pre-merger certificate and the post-merger certificate.

Preferred stockholders, issue any senior equity security. While the restrictions of Section C.6.a(i) may be subject to the Series C Trump and, thus, may yet not prevent the issuance of the Series D Preferred Stock without the approval of the holders of the junior preferred stock, I am satisfied that Section C.6.a(i) applies, from the plain and unambiguous language of its text, to the issuance of Series D Preferred Stock when and as planned by. Juniper.

Juniper fights the plain meaning of "issue" with an argument that "issue" does not mean issue but instead means something akin to "authorization to issue." Its argument is based on the record date established for purposes shareholder approval of the transaction. The record date for shareholder approval was July 13, 2002. As of July 13, there were no new shares of Series A Preferred or Series B Preferred in existence. Thus, according to Juniper, they were not entitled to any vote at that time or any other time.

In support of this argument, Juniper cites *Berlin v. Emerald Partners*[51] and *Mariner LDC v. Stone Container Corp.*[52] Those cases both addressed the unremarkable principle that under the Delaware General Corporation

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[51] 552 A.2d 482 (Del. 1988).
[52] Del. Ch., C.A. No. 16724, op., Lamb, V.C. (Nov. 13, 1998).

Law, only voting shares, determined as of the record date, may be voted. The question, by contrast, here is: whose approval must be obtained before a preferred security senior to the new Series A Preferred and the new Series B Preferred may be issued, when the issuance occurs while the new Series A Preferred and the new Series B Preferred are outstanding? The answer, provided by the clear and unambiguous language of Section C.6.a(i), is that the class of holders of the new junior preferred is entitled to such a vote. The right to vote on the issuance of a senior preferred security springs from the creation of the new junior security as the result of the merger. The answer, thus, does not depend on a record date prior to the merger. Instead, the approval of the new junior preferred must be obtained (unless CIBC properly waives the right of the new junior preferred to a class vote) because Juniper proposes to issue (not merely to approve the issuance of) the Series D Preferred while the new junior preferred shares are outstanding. These words, when given their plain meaning, may compel a somewhat cumbersome process. The class approval, of course, may be obtained (or waived) before the issuance date, but there is no basis for reading either the

existing certificate or the new certificate to deny the Series A Preferred and Series B Preferred shareholders a class vote.[53]

Because Section C.6.a(i) will entitle the holders of the new Series A Preferred and Series B Preferred Stock to a class vote on the issuance of the Series D Preferred Stock, it becomes necessary to determine whether exercise of the Series C Trump would allow CIBC to waive the right of the junior preferred stockholders to a class vote.[54]

All of the class voting rights conferred upon the junior preferred holders by Section C.6.a(i) are subject to waiver by CIBC through the proper

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[53] Whether the approval of the holders of the existing Series A Preferred and Series B Preferred before the merger would suffice since those holders generally will not change is a question that is not presented here.

[54] On the record before the Court, there is no evidence that CIBC has attempted to exercise its waiver right with respect to any vote that may become the right of the holders of the new junior preferred. It has purported to exercise its waiver right as to the existing Series A Preferred and Series B Preferred shares with respect to the Series D Preferred financing. See Hendershot Aff., at Ex. E. Without evidence that CIBC has sought to exercise its Series C Trump authority to waive the rights of the new junior preferred holders and because courts should deal only with the facts before them and not anticipate what parties may or may not do, there is good reason for me to conclude that the question of whether CIBC could properly exercise its Series C Trump is not yet ripe for judicial decision. However, I choose not to avoid addressing the efficacy of the Series C Trump in these circumstances for several reasons. First, given the ease with which the Series C Trump may be exercised, it is highly unlikely that CIBC would not do so. Second, the parties are entitled to as complete a decision from the Court as practicable in light of the time constraints. Third, all of the arguments have been made that would be helpful to the Court, at least as far as the Court can tell, and all of the relevant facts, save the formal execution and delivery of the waiver, have been identified.

I also note that under the circumstances Benchmark has standing to assert its rights as a future holder of new -Series A Preferred and new Series B Preferred Stock because its future interests in those two securities are now sufficiently specified and its ability to protect those interests would be severely jeopardized if it were required to wait for the merger to occur before asserting those rights.

exercise of its Series C Trump. The Series C Trump is broad and (for present purposes) is restricted in application only if the corporate action for which the class vote is waived would "diminish or alter the liquidation preference or other financial or economic rights" of the holders of the junior preferred stock Issuance of the Series D Preferred Stock will not "diminish or alter" Benchmark's liquidation preference-that was accomplished through the merger. The question thus becomes one of whether the issuance of a previously authorized senior preferred security "diminish[es] or alter[s]" the junior preferred shares' "financial or economic rights."

In some very general sense, when shares of a security with a higher priority are issued, the financial and economic rights of the holders of junior securities are adversely affected. On the other hand, that broad of a reading of "financial or economic rights" would make it difficult to find a valid waiver under the Certificate because all of the rights at issue-liquidation preferences, dividend rights, redemption rights, and even voting rights-in some sense implicate financial or economic rights and interests. In this analysis, the Court, of course, must seek to give meaning to all of the relevant provisions of the Certificate and to interpret the Certificate "as a whole."

One approach to interpreting the critical language can be drawn from the line of cases addressing the vexing issues associated with authorization of a new senior security without a class vote under 8 *Del. C.* § *242* such as whether that creation of a new security with priority can be construed to alter or change the preferences, special rights or powers given to any particular class of stock through the certificate of incorporation and whether that creation of a new senior security also can be deemed to affect such class adversely? Under the analytical approach suggested by these cases, the issuance of shares of a security that has priority will not adversely affect the preferences or special rights of a junior security. The argument, in general, is that the terms and powers of that particular class of junior security have not themselves been changed. That another security with priority has been issued is said to "burden" it, but its particular rights have not been modified, and thus those rights are not perceived as having been "diminished or altered." I tend toward this reading because it does interpret the preferred stock protective provisions against the "background of Delaware precedent" and because "financial and economic rights" appear in a list with other items

[55] ***See, e.g., Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co.,*** **24 A.2d** 3 15, *3* 18-19 (Del. 1942); ***see also Orban v. Field,*** Del. Ch., C.A. No. 12820, mem. **op.** at 18-20, Allen, C. (Dec. 30,1993).

such as liquidation preferences and registration rights which are more fairly viewed as technical and specific (as opposed to broad and general) rights?

On the other hand, "fmancial and economic rights" can easily be given the broad interpretation suggested by Benchmark. Moreover, if one places too much emphasis on the ***Dickey Clay*** line of cases[56a] for interpretive assistance, the carefully negotiated hierarchy here (right to class vote, but first subject to waiver which in turn is subject to exception) might not be fully acknowledged. Thus, the potential shortcoming of interpreting this language in light of the ***Dickey Clay*** line of cases is that the rights of the holders of the junior security in those cases are so limited that it is fair to question whether rights that narrow were intended by the parties here.

Therefore, the meaning to be given to the exception to Series C Trump or waiver is not free of ambiguity. There is no ambiguity in the actual grant of the Series C Trump to CIBC. Both sides agree that the Series C Trump, absent the exception, would provide CIBC with the authority it claims. Accordingly, the effectiveness of any exercise of the Series C Trump in this context depends upon the scope to be given to the

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[56] This approach is also consistent with the general perception that an exception to a broad waiver, carefully negotiated, would not be expected to consume substantially the entire scope of the waiver. However, there is little in the record to suggest what the drafters intended except that Mr. Gurley has asserted that Benchmark was relying upon the exception to the waiver for its basic protection in these circumstances. See Gurley Dep., at 89.

[56a] *See supra* note 55.

exception. Benchmark suffers, in this context, because it must rely on the exception; terms of preferred shareholders' protective provisions "must . . . be clearly expressed and will not be presumed"; and it bears the burden as the moving party on its motion for a preliminary injunction.

> No words of explicit import clearly express the voting right the plaintiffs claim exists in this case. No positive evidence supports the claim that the drafters intended to create such a right. Although one might argue (as the plaintiffs do) that that right exists by implication, it does not exist by necessary implication. To adopt the plaintiffs position would amount to presuming a preferential voting right. In the present case, however, where (at least) an ambiguity exists, our law requires that it be resolved against creating the preference.[57]

A preliminary injunction necessarily involves an initial determination on less than complete record and that limitation precludes a detailed consideration of extrinsic evidence. In light of the foregoing, I conclude that Benchmark has not demonstrated a reasonable probability of success on the merits of its claim that the waiver should not be available to CIBC.[58]

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[57] *Sullivan Money Mgmt.*, mem. op. at 14 (emphasis in original). Although the Court uses the rule of "strict construction," I do not understand its analytical methodology to be substantively different from that taught in *Avatex,* 715 A.2d at 853 n.46.

[58] A companion argument raised by Benchmark addresses the Purchase Agreement between Juniper and CIBC for the Series D Preferred Shares. The issues raised by the Purchase Agreement and the foregoing analysis regarding the right of Juniper to "issue" Series D Preferred Stock are quite similar. In this instance, CIBC has already purported to exercise its waiver rights to relieve Juniper of any obligation to conduct a class vote on the Series D Purchase Agreement. If I overlook Juniper's contention that the existing Series A Preferred and Series B Preferred Stockholders are not affected by the Purchase Agreement because the Series D Preferred Shares will not be authorized until the existing junior preferred shares are extinguished by the merger, an argument substantially similar to the one contemplated in note 49, *supra,* then by the clear and unambiguous terms of

C. Irreparable Harm

"To demonstrate irreparable harm, a plaintiff must present an injury 'of such a nature that no fair and reasonable redress may be had in a court of law' and must show that 'to refuse the injunction would be a denial of justice.""' Benchmark argues that irreparable harm will befall it should this Court fail to grant its request for a preliminary injunction because the consummation of the Series D Transaction will deprive it of its class voting rights. Benchmark further asserts that it will suffer irreparable harm because the Series D Transaction will wrongfully dilute its equity interest in Juniper.

It is well established that "corporate management subjects stockholders to irreparable harm by denying them the right to vote their shares."[60] As such, had I found that Benchmark had demonstrated a

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Section C.6.a(i), the Purchase Agreement must be approved by a prior class vote of the junior preferred stockholders. This is because the Purchase Agreement obligates Juniper "itself' to issue a series of preferred stock that will be senior to the existing junior preferred. Thus, the ultimate question again becomes whether the Series C Trump may be exercised by CIBC to waive the right to a class vote. I am satisfied that the same considerations would apply to CIBC's waiver of the voting rights associated with approval of the Series D Purchase Agreement and, thus, the same analysis would apply and the same result would obtain. Accordingly, the language of the waiver limitation, as amplified by the limited record at this early stage of those proceedings, is not sufficiently clear to overcome CIBC's otherwise valid and effective effort to waive the class voting rights. (Again, it should be pointed out that this conclusion is reached without any consideration of whether any fiduciary duty obligations are implicated.)

[59] ***Aquila***, mem. op. at 26 (quoting ***Kohls v. Duthie, 765*** **A.2d** 1274, 1289 (Del. Ch. *2000)).*

[60] ***Telcom—SNI Investors, L.L.C. v. Sorrento Networks, Inc.***, Del. Ch., C.A. No. 19038, mem. op. at 24, Noble, V.C. (Sept. 7, **2001)**, ***aff'd***, 790 **A.2d** 477 (2002) (TABLE) (internal quotations omitted) (quoting ***Hubbard v. Hollywood Park Realty Enterprises,***

reasonable probability of success on the merits, its allegations as to the wrongful deprivation of its rights to a class or series vote would have supported a finding of irreparable harm.[61] That, of course, did not occur. Benchmark also argues that the Series D Transaction will, in addition to abrogating its voting rights, wrongfully cause its holdings and investment in Juniper to be diluted, another type of harm that might be irreparable. I note that the extent of Benchmark's purported harm appears to be of less significance because of Juniper's current financial condition and the minimal liquidation value that Juniper would provide its junior preferred stockholders.[62] Accordingly, the irreparable harm faced by Benchmark as the likely result of the Series D Transaction is minimal.

D. Balancing of the Equities

Turning to a balancing of the equities or relative hardships, I find that this inquiry weighs heavily in favor of Juniper.

> [A] court must be cautious that its injunctive order does not threaten more harm than good. That is, a court in exercising its discretion to issue or deny such a preliminary remedy must consider all of the foreseeable consequences of its order and

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Inc., Del. Ch., C.A. No. 11779, mem. op., Jacobs, V.C. (Jan. 14, 1991)) (quoting *Int'l Bank Note Co., Inc. v. Muller*, 713 F. Supp. 612,623 (S.D.N.Y. 1989)).

[61] Benchmark properly argues that if the Series D Transaction closes and if Benchmark should prevail on the merits eventually, subsequent efforts to reverse the transaction would be difficult. Remedying the consequences in this matter, however, might be somewhat more feasible because the burden would ultimately fall on CIBC.

[62] Because of a lack of investor prospects, CIBC through the Series D Transaction appears to be Juniper's only source of additional capital.

> balance them. It cannot, in equity, risk greater harm to defendants, the public or other identified interests, in granting the injunction, than it seeks to prevent.[63]

Benchmark argues that the financial demands faced by Juniper are minor in relation to the hardship that it will face should the Series D Transaction close, thereby depriving Benchmark of its purported rights under the Certificate to a class vote. Benchmark asserts that the Series D Transaction will undermine its core voting rights, and, in addition, it will effectively dilute its equity interests and economic rights. As noted in my discussion of irreparable harm, Benchmark's purported loss of voting power (and the related economic rights) could constitute hardship. That hardship, however, must be balanced against the potential burdens faced by Juniper and its constituents if a preliminary injunction is awarded.

Juniper will experience dire financial consequences by the end of this month, or shortly thereafter, when it will become less than well-capitalized if the Series D Transaction does not occur. As noted above, Juniper's failure to meet its capital requirements would likely result in the imposition of significant regulatory and business restrictions on the company.

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[63] ***Lennane*** *v. Ask Computer* ***Sys.*****, Inc., Del. Ch., C.A. No. 11744, mem.** op. **at 14, Allen, c. (Oct. 11, 1990).**

Benchmark tacitly acknowledges that Juniper will suffer a severe financial crisis without additional funding. Indeed, Benchmark's principal position on Juniper's need for capital does not relate to its want for capital but to the timing of when that capital will be needed and the means necessary or appropriate to obtain that capital. As to the timing of the Series D Transaction, Benchmark has failed to offer any evidence rebutting Juniper's position that the July 3 1, 2002 deadline is a steadfast one.[64] Nor has Benchmark proposed a plan through which Juniper could obtain financing other than that presented by CIBC. Instead, Benchmark argues that Juniper can solve its capital problems either by further cutting costs, a concept rejected by Juniper's board after careful study, or by obtaining financing from CIBC on terms more favorable to the holders of the Series A Preferred and Series B Preferred Stock.

Thus, there is no question as to Juniper's pressing need for capital. CIBC has come forward and is willing to invest an additional $50 million in the company. In light of Benchmark's failure to challenge effectively the evidence of Juniper's current critical need for additional capital, the lack of any alternate source for such funding, and the onerous consequences that

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[64] See Vague Aff. ¶ 43. Benchmark does speculate—and not unreasonably-that CIBC would protect it $145 million investment in Juniper and eventually provide whatever funding is needed to preserve Juniper's continued existence as a functioning financial

failure to secure such capital will cause Juniper and its constituents, Benchmark's argument that Juniper's position is a mere gloom and doom one is unpersuasive. As such, this case may be distinguished from the one before this Court in *Sorrento* where "the record before the Court indicate[d] that [the company's need for additional cash was] not imminent and that [the defendant company] ha[d] the means to sustain itself well beyond any final determination of th[e challenged] action."[65]

While loss of a shareholder's right to vote would certainly be a factor that must be given serious weight in this analysis, when viewed in light of the factual setting of this case, I am of the opinion that Benchmark's risks are minor when compared to those which would likely result from depriving Juniper of financing through the Series D Transaction. Considering that Benchmark would recover nothing (or almost nothing) if Juniper were forced into liquidation,[66] my conclusion that the equities tip in favor of Juniper is bolstered even more. Accordingly, I find that the potential for harm caused by denying Juniper the much needed financing resulting from the Series D Transaction outweighs any potential harm attributable to any

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services entity. CIBC has asserted, in response, that the proposed transaction "will not be improved upon by CIBC." Orr AK ¶ 41.

[65] *Sorrento,* mem. op. at 26-27.

[66] Benchmark concedes that Juniper has little, if any, liquidation value for it at this time because the junior preferred stockholders are subordinated to CIBC's Series C holdings. Thus, most of the proceeds from any liquidation would likely pass to CIBC.

deprivation of Benchmark's class voting rights or dilution of its equity interest.

VI. Conclusion

Because Benchmark has failed to meet any of the three criteria which should be satisfied by an applicant for a preliminary injunction, denial of its motion should easily follow. I pause to note, however, that Benchmark has ably advocated several arguments that are not easily dismissed. In addition, Benchmark seeks to preserve its voting rights and the voting rights of other Series A Preferred and Series B Preferred shareholders. Its claims to a right to vote as part of a class implicate significant issues of corporate governance. Nonetheless, as I balance the various well-known factors as I must, I conclude that Benchmark has failed to justify issuance of a preliminary injunction.

Therefore, for the foregoing reasons, Benchmark's motion for a preliminary injunction is denied. An order will be entered in accordance with this memorandum opinion.