IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FGC HOLDINGS LIMITED,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 883-N
	)	
TELTRONICS, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: May 12, 2005
Decided: September 14, 2005

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PARSONS, Vice Chancellor.

This action stems from the purchase of preferred stock in Teltronics, Inc., ("Teltronics") by FGC Holdings Limited ("FGC"). FGC purchased 12,625 shares of Teltronics' Series B Preferred Convertible Stock (the "Series B") and presented the stock to Teltronics for registration on October 5, 2004. Teltronics refused to register the transfer. On November 24, 2004, FGC filed this litigation to compel Teltronics, among other things, to (i) register the transfer of stock to FGC; (ii) issue stock certificates in FGC's name; and (iii) recognize FGC's election of a Series B director. On February 2, 2005, Teltronics and FGC entered into a Consent to Judgment, whereby Teltronics agreed to register FGC's shares. This Court held trial on February 2, 2005 to determine if FGC's Series B director designee had an immediate right to sit on Teltronics' board of directors.

Teltronics argues that the Certificate of Designations for the Series B limits the size of the board to five directors and, because five directors currently sit on the board, FGC's designee cannot become a board member until the next annual stockholders meeting. FGC counters that the Certificate of Designations vests the Series B stockholder with an unconditional right to elect a Series B director at any time. For the reasons explained in this memorandum opinion, I conclude that FGC is entitled to a declaratory judgment that its Series B director has an immediate right to sit on Teltronics' board.

I. BACKGROUND

Teltronics is a publicly traded company incorporated in Delaware with headquarters in Sarosota, Florida. It sells various telephone switches. The company's capital structure consists of the following outstanding stock: 7,861,539 shares of

common, 100,000 shares of Series A Preferred, 12,625 shares of Series B Preferred Convertible, and 40,000 shares of Series C Preferred Convertible.

FGC is incorporated, and has its principal place of business, in Ontario, Canada. FGC operates as a holding company. Peter Friedmann is the sole stockholder and President of FGC.[1]

A. The Series B Stock and Teltronics' Board of Directors

Teltronics first issued 25,000 Series B shares to Sirrom Capital Corporation ("Sirrom") in order to raise capital to repurchase a portion of its debt.[2] The Series B stock gave its holder the right, among others, to elect a Series B director.[3] In 1998, Sirrom exercised that right and elected Craig Macnab as the Series B director.[4]

In April 1999, FINOVA Mezzanine Capital, Inc., ("FINOVA") acquired Sirrom along with the Series B stock and certain Teltronics debt. After the acquisition, Macnab resigned as the Series B director. The remainder of Teltronics' board consisted of two inside common directors—Ewen Cameron and Norman Dobiesz—and one outside

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1 Friedmann Dep. (Joint Ex. ("JX") 69) at 5–6.

2 JX 4.

3 For simplicity in the context of the issues in this case, I will refer to the holders of Common Stock and Series A Preferred Stock as the "common stockholders," those directors elected by the "common stockholders" as the "common directors," and the director elected by the Series B stockholders as the "Series B director."

4 Tr. at 50 (Cameron). Citations in this form are to the trial transcript ("Tr.") and indicate the page and, where applicable, the witness testifying.

common director—Carl Levine.[5] FINOVA chose not to appoint a Series B director, believing that its position as a creditor of Teltronics would create a conflict of interest.[6] Over time, FINOVA converted all but 12,625 shares of Series B stock into common stock.

From 1999 to 2004, FINOVA never elected a Series B director, and no Series B director sat on the board.[7] At the 1999 and 2000 annual meetings, the common stockholders elected four common directors to the board—Cameron, Dobiesz, Levine, and Gregory Barr.[8] At the 2001 annual meeting, the common stockholders elected five common directors—adding Richard Stevens. The same five common directors were re-elected in 2002 and 2003.[9]

In August 2004, the board mailed a proxy to the company's stockholders (the "Proxy").[10] The Proxy nominated five common directors—Cameron, Dobiesz, Levine, Barr and Stevens—for a vote by the common stockholders.[11] It did not mention the election of a Series B director or indicate that the Series B stockholders had a right to

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5 *Id.* at 52–53; Teltronic's Proxy Statement of Aug. 27, 2004 (JX 16) at 4739 [hereinafter JX 16].

6 Agnetta Dep. (JX 65) at 10–12.

7 *Id.*

8 Tr. at 52–53 (Cameron); JX 16 at 4739.

9 Tr. at 53; JX 16 at 4739.

10 JX 16.

11 JX 16 at 4664.

elect a Series B director, but not to vote for the common directors. The Proxy, however, did state that:

> The holders of the Preferred Convertible Stock have the right to elect a majority of the Board of Directors of the Company if and whenever four quarterly dividends (whether or not consecutive) payable on the Preferred Convertible Series B Stock shall be in arrears.[12]

In September 2004, the five nominated common directors were elected.

B. The Transfer

Hargan-Global Ventures, Inc. ("Hargan"), a venture capital company, became aware of FINOVA's ownership interest in Teltronics after due diligence by Hargan's president, Sam Ifergan, as part of an asset sale between Teltronics and a company associated with Hargan.[13] Hargan entered into discussions with FINOVA about purchasing their interest in the Series B stock. Friedmann owns a thirty percent interest in Hargan.[14] After Hargan decided not to purchase the Series B, FGC purchased the stock from FINOVA on September 21, 2004.

FGC informed FINOVA that it wanted to determine how to advise Teltronics about the transfer.[15] Before FGC informed Teltronics about the purchase, Teltronics held its 2004 annual meeting on September 28, 2004. The record date was August 6, 2004. As of that date, FINOVA held the Series B stock, entitling it to attend and vote at the

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12 JX 16 at 4742.

13 Ifergan Dep. (JX 67) at 10.

14 Friedmann Dep. at 7–9.

15 JX 67 ex. 12.

annual meeting. The FINOVA-FGC purchase agreement, however, permitted FGC to direct FINOVA to act on FGC's behalf at the annual meeting.[16] Nevertheless, FGC did not direct FINOVA to take any action regarding the 2004 annual meeting.[17]

On October 5, 2004, FGC presented the Series B stock to Teltronics for transfer from FINOVA to FGC.[18] Teltronics initially rebuffed FGC's request, raising various objections to the transfer. In a consent order entered in February 2005, however, Teltronics agreed to register the stock.[19]

Attempting to exercise its rights as a Series B stockholder, FGC purported to elect Peter Friedmann as a Series B director through a written consent in November 2004.[20] Teltronics never responded to FGC's written consent or notified FGC that it objected to Friedmann's directorship because the board was at its limit of five members.[21]

On November 24, 2004, FGC filed this action to compel Teltronics to register the transfer. Teltronics moved to dismiss the Complaint in favor of a claim related to bankruptcy proceedings involving FINOVA in Federal Court.[22] After FGC moved to

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16 JX 18 § 12.

17 Tr. at 33–34 (Friedmann).

18 JX 21; Tr. at 32–33.

19 *FGC Holdings Ltd. v. Teltronics, Inc.*, C.A. No. 883-N (Del. Ch. Feb. 3, 2004) (Consent to Judgment) (order requiring Teltronics to issue a Series B certificate and register its transfer in FGC's name).

20 JX 46.

21 Tr. at 73–74 (Cameron).

22 Ans. at 6, ¶¶ 1–11.

dismiss the federal claim and briefed Teltronics' motion to dismiss this action, Teltronics dismissed its federal complaint and withdrew the motion to dismiss.[23] Teltronics also sought to introduce a counterclaim against FGC,[24] but eventually withdrew that, too.

Teltronics Answer in this action raised ten affirmative defenses.[25] By the time of trial, though, Teltronics had abandoned all but one of those arguments. It continues to argue that no vacancy exists on the board for Friedmann to fill and thus he cannot sit as the Series B director until the next annual meeting.

This Court held trial on February 2, 2005 and heard arguments on May 10, 2005. The parties agreed to a stipulated order preserving aspects of the status quo pending the final judgment of this Court.[26] That order required Teltronics to provide Friedmann written notice of any meeting of the board of directors and a list of topics expected to be acted or voted on at such meeting. In late June, a dispute arose regarding Teltronics' compliance with the interim order. Roughly contemporaneously, I concluded that FGC had demonstrated a high probability of success on the merits of its claim to elect a Series B director to the board immediately. Accordingly, I caused a further order to be entered on August 16, 2005, directing Teltronics to allow Friedmann to participate in board

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23 JX 58.

24 Mot. to Amend Ans. Ex. C.

25 Ans. at 6-9, ¶¶ 1–20.

26 *FGC Holdings Ltd. v. Teltronics, Inc.*, C.A. No. 883-N (Del. Ch. Mar. 17, 2005) (Stipulated Order requiring Teltronics to provide FGC with notice of any board meeting held before a final judgment in this action or applicable order).

meetings to the same extent as its five common directors.[27] FGC now seeks, among other things, an order compelling Teltronics to immediately recognize Friedmann as the Series B director.

C. Series B Stock

Teltronics' Certificate of Designations for the Series B (the "CD") is central to the issues in this case. In February 1998, Teltronics amended its Certificate of Incorporation through the CD, establishing the rights and preferences of the Series B stock. Section 4(b) of the CD provides:

> The holders of the Series B Preferred Stock, voting separately as one class, shall have the exclusive and special right at all times to elect one (1) director ("[the Series B director]") to the Board of Directors of the Corporation provided, however, that so long as any shares of Series B Preferred Stock are outstanding, the Board of Directors shall not consist of more than five (5) members. The [Series B director] shall be elected by the vote of the holders of a majority, and removed by the vote of the holders of two-thirds (2/3), of the shares of Series B Preferred Stock then outstanding. The right of holders of the Series B Preferred Stock contained in this Section 4(b) may be exercised either at a special meeting of the holders of Series B Preferred Stock or at any annual or special meeting of the stockholders of the Corporation, or by written consent of such holders in lieu of a meeting. Upon the written request of the holders of record of at least a majority of the Series B Preferred Stock then outstanding, the Secretary of the Corporation shall call a special meeting of the holders of Series B Preferred Stock for the purpose of (i) removing any [Series B director] elected pursuant to this Section 4(b) and/or (ii) electing a director to fill a vacancy of the directorship authorized to be filled by the holders of Series B Preferred Stock pursuant to this Section 4(b). Such meeting shall be held at the earliest practicable date.

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[27] *FGC Holdings Ltd. v. Teltronics, Inc.*, C.A. No. 883-N (Del. Ch. Aug. 16, 2005).

* * * *

> A vacancy in the directorship to be elected by the holders of Series B Preferred Stock pursuant to this Section 4(b) may be filled only by vote or written consent in lieu of a meeting of the holders of a majority of the shares of Series B Preferred Stock then outstanding and may not be filled by the remaining directors.[28]

Section 4(c) of the CD further provides:

> If and whenever four (4) quarterly dividends (whether or not consecutive) payable on the Series B Preferred Stock shall be in arrears . . . the number of directors then constituting the Board of Directors shall be increased to a number which allows for holders of the Series B Preferred Stock to elect a majority of the entire Board of Directors at a special meeting of stockholders called as hereinafter provided . . . . At any time after such additional voting power shall have been so vested in the holders of the Series B Preferred Stock, the Secretary of the Corporation may, and upon the written request of any holder of the Preferred Stock . . . shall, call a special meeting of the holders of the Series B Preferred Stock for the election of the additional directors to be elected by them as herein provided . . . .[29]

Section 4(a) also provides:

> [T]he holders of the Series B Preferred Stock shall have full voting rights and powers, and the holders of shares of Series B Preferred Stock shall vote together with the holders of the Common Stock and Series A Preferred Stock as a single class on all matters submitted to a vote of the stockholders of the Corporation; provided, however, that solely with respect to the right to elect and remove directors, the holders of Series B Preferred Stock shall not be entitled to vote pursuant to this Section 4(a), but the provisions of Section 4(b) and (c) shall

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[28] CD (JX 5).

[29] *Id.*

> govern the rights of the holders of Series B Preferred Stock with respect to the election or removal of directors . . . .[30]

D. Dispute

FGC argues that the CD vests FGC with the right to elect a Series B director at any time. Relying upon the language of Section 4(b) that the Series B holder "shall have the exclusive and special right at all times to elect one (1) director," FGC seeks to have its designee appointed immediately to the board of directors.

Teltronics admits that FGC may elect a Series B director at the next annual meeting. According to Teltronics, however, FGC may not immediately elect a Series B director, because the board already has the maximum number of directors. Teltronics focuses on the clause in Section 4(b) "that so long as any shares of Series B Preferred Stock are outstanding, the Board of Directors shall not consist of more than five (5) members." Teltronics argues that FGC, therefore, may only elect a Series B director if the board consists of fewer than five members or in connection with an annual meeting. Finally, Teltronics argues that, even if FGC has the immediate right to appoint a Series B director, it waived that right at the last annual meeting.

II. ANALYSIS

The only question before the Court is whether Friedmann, FGC's designee, has an immediate right to sit as a Series B director. To answer this question, I must construe the

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[30] *Id.*

CD as it relates to the election of a Series B director.[31] Section 4(b) of the CD provides that:

> The holders of the Series B Preferred Stock, voting separately as one class, shall have the exclusive and special right at all times to elect one (1) director ([Series B director]) to the Board of Directors of the Corporation provided, however, that so long as any shares of Series B Preferred Stock are outstanding, the Board of Directors shall not consist of more than five (5) members.

Each party relies on different interpretations of Section 4(b) to support their respective positions.

A. Interpretation of the CD

"A certificate of incorporation is viewed as a contract among shareholders, and general rules of contract interpretation apply to its terms."[32] This rule similarly applies to certificates of designation.[33] The first step, then, in interpreting the CD is to determine if its terms are ambiguous.[34] "A contract is not rendered ambiguous simply because the

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[31] *See HB Korenvaes Inv., L.P. v. Marriott Corp.*, 1993 Del. Ch. LEXIS 90, at *14 (Del. Ch. June 9, 1993) ("The special rights, limitations, etc. of preferred stock are created by the corporate charter or a certificate of designation which acts as a amendment to a certificate of incorporation.").

[32] *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) (*citing Rothschild Int'l Corp. v. Liggett Corp.*, 474 A.2d 133, 136 (Del. 1984); *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 937 (Del. 1979)).

[33] *NBC Universal, Inc. v. Paxson Communications Corp.*, 2005 Del. Ch. LEXIS 56, at *11 (Del. Ch. Apr. 29, 2005).

[34] *Cantera v. Marriott Senior Assisted Living Servs., Inc.*, 1999 Del. Ch. LEXIS 26, at *11 (Del. Ch. Feb. 18, 1999).

parties do not agree upon its proper construction."[35] "Ambiguity does not exist where the court can determine the meaning of a contract 'without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends.'"[36]

Neither party contends that the contract is ambiguous nor seeks to rely on extrinsic evidence to support their interpretation. I agree that the language of the CD is unambiguous. Therefore, I will interpret the CD using the applicable rules of contract interpretation.

Where a contract is unambiguous, it is a well-settled principle of contract interpretation that "[c]ontracts must be construed as a whole, to give effect to the intentions of the parties."[37] Additionally, "[a] court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."[38] Under the modern view

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35 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

36 *Id.* (*quoting Holland v. Hannan*, 456 A.2d 807, 815 (D.C. App. 1983)).

37 *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996) (*citing E.I. duPont de Nemours and Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985)).

38 *Council of Dorset Condo. Apts. v. Gordon*, 801 A.2d 1 (Del. 2001) (citations omitted).

of contract interpretation, I also may consider undisputed background facts to place the contract in its historical setting.[39]

The primary question raised by the parties' conflicting interpretations of the CD, and specifically Section 4(b), is what the interrelationship is between the seemingly unconditional right of the Series B stockholders to elect a Series B director and the maximum limit of five directors on the Teltronics board. An ancillary issue is whether, in the absence of a Series B director, the common stockholders may elect a fifth common director. Teltronics answers the latter question in the affirmative, and FGC in the negative. I turn now to those issues.

The CD explains that its purpose is to define the relative rights and preferences of the Series B stock.[40] Section 4 strongly suggests that the CD gives the holders of the Series B stock an unconditional right to elect a Series B director. Section 4(b) provides that the Series B stockholders "voting separately as one class, shall have the exclusive and special right at all times to elect one (1) director . . .," the right to remove a Series B director, and the exclusive right to fill any vacancy in that directorship. The Series B stockholders can exercise those rights at any annual meeting, a special meeting which they can cause the corporate secretary to call, or by written consent. Except for the limitation of five directors discussed below, Teltronics has not cited anything in the CD,

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39 *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.7 (Del. 1997).

40 CD at 3.

or the context in which it was created, that even arguably limits the right of the holders of Series B stock to elect a Series B director.

Teltronics bases its refusal to recognize FGC's Friedmann as the Series B director until at least the next annual meeting entirely on the proviso in Section 4(b) "that so long as any shares of Series B Preferred Stock are outstanding, the Board of Directors shall not consist of more than five (5) members" and the fact that, at this time, Teltronics already has five common directors. According to Teltronics, the five director proviso qualifies the Series B's "exclusive and special right" to elect a Series B director, and thereby renders that right conditional. Because Teltronics' position appears to be inconsistent with other provisions of the CD that refer, without qualification, to a right to elect a Series B director at any time, I am reluctant to adopt that interpretation without clear evidence that the CD, when considered in context, requires it.

The CD does not state the rationale for the five director limit or describe its genesis. Teltronics issued the Series B stock in 1997. Before that time, Teltronics had three directors[41] and its corporate charter did not limit the size of the board.[42] In its 1997 Annual Report, the first major filing after issuance of the Series B stock, Teltronics reported that along with the issuance of the Series B stock "the Company's Board of Directors [was] expanded to five members, including a nominee to be selected by [the

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41 1997 Annual Report (JX 2) at 19–21.

42 *Id.* at 60.

Series B stockholder]."[43] Based on the contemporaneous creation of both the Series B directorship and the five-member limit, it is reasonable to infer that those actions were related.

The circumstances surrounding the creation of the CD support the inference that the purpose of the five-member limit was to prevent the Series B voting power on the board from being diluted below twenty percent. The fact that Section 4(b) explicitly provides that the limit on the size of the board only applies "so long as any shares of Series B Preferred Stock are outstanding" reinforces this inference.[44] In the context of such a purpose, it seems incongruous to employ the five-member limit as a basis to deny the Series B stockholders their right to elect a Series B director at any time.

Teltronics has not cited anything in the CD or the circumstances surrounding its creation that would suggest any other purpose for the five-member limit. Nevertheless, Teltronics contends that because, as of the time of the 2004 annual meeting, FGC's predecessor in interest had not exercised its right to elect a Series B director, the common stockholders properly elected all five directors and that those directors are entitled to serve until the next annual meeting. Under this construction of the CD, however, the

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43 *Id.* at 21.

44 The inference that the five-member limit was intended to support the effectiveness of the Series B stockholders' right to board representation is further supported by Section 4(c) of the CD. That section grants the Series B stockholders the right to elect a majority of the board if Teltronics is in arrears on four quarterly dividends. Limiting the number of directors to five ensures that the Series B stockholders would not need to expand the board beyond nine members, at most, which is still a manageable number.

common stockholders could eliminate the Series B stockholders' right to elect a director for an entire year. This effectively would render nugatory the Series B right to elect such a director "at any time."

The premise of Teltronics' argument is that, if the Series B stockholders do not elect a Series B director, the common stockholders have an unconditional right to elect all five directors. In disputing that position, FGC adopts an equally aggressive interpretation of the CD. The first prong of FGC's argument is reasonable and essentially undisputed: it contends that the CD created a Series B directorship that is distinct from the common directorships and cannot be filled by a vote of the common stockholders. FGC further argues, however, that not only is the Series B directorship one of the five provided for in the CD, but also, as a result, the common stockholders may only elect four directors to the board, even if the Series B directorship is vacant at the time of the election and has been for a number of years. Thus, according to FGC, Teltronics' filling of the fifth seat on the board at the 2004 annual meeting violated the Company's charter and is void.

In my opinion, both parties' arguments go too far. As I interpret the CD, the five-member limit ensures that the Series B stockholders will have at least twenty percent of the vote on the board of directors. This interpretation fully comports with the general purpose of the CD to establish the rights and preferences of the Series B stock. Furthermore, there is nothing in the CD that suggests that the five-member limit was intended to curtail in any way the Series B holders' "exclusive and special right at all

times to elect"[45] a Series B director. Teltronics' interpretation effectively would require the Series B stockholders to elect their director in conjunction with an annual meeting or risk having the common stockholders elect five directors and preclude the Series B from exercising their right to choose a director until the next annual meeting. Such an interpretation would not reconcile all the provisions of the CD as a whole or give effect to several aspects of Section 4, including the Series B's right to elect a director "at all times." Thus, it contravenes general principles of contract interpretation.

Similarly, I am not persuaded by FGC's argument that the CD requires that the common stockholders elect no more than four directors. Both parties agree that the common stockholders can elect four directors. The question is what rights, if any, they have to elect a fifth director in the event of a vacancy in the Series B directorship. The CD makes clear, and the parties do not appear to dispute, that only the Series B may fill a vacancy in the Series B directorship. Under FGC's interpretation of Section 4, Teltronics should have limited itself to four directors throughout the several years that the Series B directorship has been vacant. FGC, however, has cited to no provision of the CD that requires that result. In addition, there may be valid reasons why a corporation, such as Teltronics, might prefer to have five rather than four directors. One example mentioned by Teltronics in briefing is the need for more independent outside directors in recent years.

[45] CD § 4(b).

I disagree with FGC's interpretation to the extent it would preclude the common stockholders from electing a fifth director under any circumstances. If that were the parties' intention, they could have made explicit that there were to be a maximum of four common directors at all times. Instead, the CD limits the board to five members and creates a Series B directorship. Without more, the CD leaves open the possibility that if the Series B stockholders choose not to elect a Series B director, the common stockholders may elect a fifth common director—subject to the continuing right of the Series B stockholders to displace that director at any time by electing a Series B director. Thus, there is no reason to interpret the common stockholders' election of a fifth director as having improperly elected a Series B director, as FGC urges. As a practical matter, however, Teltronics would need to identify the "fifth director" in connection with the stockholders' election of directors, because the terms under which that person would be serving as a director would differ from the other common directors.

Reconciling the CD as a whole, I find its effect to be to: (i) limit the total size of the board to five directors; (ii) create one Series B directorship along with four common directorships; and (iii) allow the common stockholders to elect a provisional fifth common director in the event the Series B stockholders choose not to elect a Series B director, subject to the Series B stockholders' right to elect a Series B director at any time.

Thus, after applying the fundamental tenets of contract interpretation to the unambiguous terms of the CD, I conclude that the Series B stockholders have the right to

designate the Series B director at any time, notwithstanding the board's five-member limit.

B. Waiver

Teltronics argues that FGC waived its right to elect a Series B director by failing to do so or to object to the election of five common directors at the last annual meeting.[46] Teltronics claims that, as a result, FGC must wait until the next annual meeting before it can elect a Series B director.

Teltronics has the burden of proving its affirmative defense of waiver.[47] "Waiver is the voluntary and intentional relinquishment of a known right. It implies knowledge of

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[46] FGC claims that Teltronics cannot advance the waiver defense because Teltronics failed to properly plead it. Court of Chancery Rule 8(c) requires that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . laches . . . waiver, and any other matter constituting an avoidance or affirmative defense."

> The reason for Rule 8(c) is to put the plaintiff on notice, well before trial, that the defendant intends to pursue a defense in the nature of an avoidance. If the defendant raises the issue at a pragmatically sufficient time and the plaintiff is not prejudiced in her ability to respond, there is no waiver. Whether a defendant has waived an affirmative defense by failing to assert it timely is a matter left to the discretion of this Court.

Fletcher v. Ratcliffe, 1996 Del. Super. LEXIS 326, at *6 (Del. Super. Aug. 6, 1996) (citations omitted). Here, there has been no showing that FGC was prejudiced by Teltronics assertion of waiver in January 2005, shortly before trial. FGC failed to present any proof or persuasive argument that it was prejudiced. Therefore, I will consider the merits of Teltronics' waiver claim.

[47] *See Tusi v. Mruz*, 2002 Del. Ch. LEXIS 128, at *14 (Del. Ch. Oct. 31, 2002) (holding that the party asserting the affirmative defense of waiver bears the burden of proof).

all material facts, and intent to waive."[48] Moreover, "[t]he facts relied upon must be unequivocal in nature."[49]

Teltronics claims that FGC waived its right to elect a Series B director. It argues that the record shows the following facts which support the existence of a waiver: (1) five common directors were nominated and elected at every annual stockholders meeting since 2001; (2) FINOVA never elected a Series B director; (3) Teltronics relied on FINOVA's conduct when nominating five common directors; (4) FINOVA was the record holder of the Series B stock for the 2004 annual meeting; (5) FINOVA received the proxy for the 2004 annual meeting, which nominated five common directors; (6) FGC knew of the five-member limit; (7) FGC knew there were five common directors on the board; (8) FINOVA would act at the annual meeting as directed by FGC; (9) FINOVA did not vote at the 2004 annual meeting; (10) FINOVA did not object to the election of five common directors; (11) FINOVA did not object to the meeting; (12) FGC was the beneficial owner of the stock at the time of the 2004 annual meeting; and (13) FGC did not object to the meeting or the election of five common directors.

Even if I were to accept all of these allegations as true, they would fail to establish that FGC voluntarily and knowingly relinquished its right to elect the Series B director. These assertions can be described in three categories, none of which demonstrate that FGC waived its right to elect the Series B director.

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[48] *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982) (citations omitted).

[49] *Id.* (citations omitted).

First, assertions (1)–(5) are not related to any actions or omissions by FGC and cannot support the claim that FGC voluntarily and knowingly relinquished its right.

Second, although assertions (6) and (7) claim that FGC knew of the upcoming election and that five common directors were nominated, these assertions provide no basis for finding that FGC intentionally relinquished its right. Teltronics' argument does not rely on any actions taken by FGC, but rather on the common stockholders election of directors to prove that FGC waived its rights. FGC's rights, however, are unaffected by the election of the common directors. As discussed above, the five member board limit does not conflict with the Series B stockholders' right to elect a Series B director at any time. Therefore, FGC is not precluded from electing a Series B director simply because the common stockholders elected five common directors. Likewise, the fact that FGC may have known of the election of the common directors and remained silent is not sufficient to prove a voluntary and knowing relinquishment of its independent right to elect a Series B director.

Third, with respect to assertions (8)–(13), FGC's non-vote and lack of objection at the 2004 annual meeting have no bearing on the issue of waiver. The Series B stockholders do not vote with the common stockholders for common directors. Section 4(a) states "with respect to the right to elect and remove directors, holders of [Series B stock] shall not be entitled to vote [with the common stockholders]." Rather, Section 4(a) refers to Section 4(b) of the CD for the election of directors, which provides that the Series B stockholders "voting separately as one class" may elect a Series B director.

Sections 4(a) and 4(b) read together make clear that Series B stockholders have no right to vote for the election of common directors. Because neither FINOVA nor FGC had any right to vote for or against the common directors, Teltronics assertion that FGC's inaction in this regard constitutes a waiver of its right cannot stand.

Similarly, Teltronics cannot rely upon the failure of either FINOVA or FGC to object to the 2004 election to support its defense of waiver. To demonstrate a knowing and intentional relinquishment of rights, Teltronics would need to show that FGC understood that by failing to object to the election of five common directors FGC would be precluded from electing a Series B director until the next annual meeting. The language of the CD that the Series B stockholders could exercise that right at any time suggests otherwise. Furthermore, there is no evidence that Teltronics inquired of the Series B stockholders before any annual meeting since 1999 to determine whether they intended to elect a Series B director in connection with that meeting. Instead, Teltronics simply assumed that they did not and prepared the annual proxy materials on that basis. More importantly, Teltronics never advised the Series B stockholders that Teltronics interpreted the CD to mean that if they failed to elect a Series B director in conjunction with the annual meeting, they could not do so until the next annual meeting. Had they done so, perhaps FINOVA or FGC would have had an obligation to object or otherwise make known their contrary understanding. In the absence of such notice, however, FGC was entitled to rely on the unambiguous language of the CD and had no obligation to do anything more.

Teltronics failed to provide any factual, much less unequivocal, basis for finding that FGC voluntarily and intentionally relinquished a known right. Therefore, I conclude that FGC did not waive its right to elect a Series B director at any time.

C. Relief

Having concluded that the CD affords the Series B holders the right to designate the Series B director at any time, a logical means of effecting relief would be to enter an order compelling Teltronics to immediately make FGC's designee, Peter Friedmann, a director on the Teltronics board. However, because of the potential for confusion and unnecessary expense resulting from such an order, I instead will (1) enter a declaratory judgment in favor of FGC and against Teltronics that FGC had the right to elect Friedmann to the board in November 2004 and to have him promptly seated on the board; (2) continue the Order of August 16, 2005 in place;[50] and (3) order that FGC's designee take his place on the Teltronics board immediately following Teltronics' next annual meeting. At such meeting, which must be held by October 28, 2005 under 8 *Del. C.* § 211(c),[51] the common stockholders may elect no more than four common directors to the Teltronics board.

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50 The Order of August 16, 2005 will expire as soon as the Series B director takes his position on the Teltronics board.

51 Teltronics' last annual meeting was held September 28, 2004. Therefore, the 2005 meeting must take place no later than October 28, 2005. *See* 8 *Del. C.* § 211(c) (annual meeting to occur no later than thirteen months following preceding year's meeting).

In determining not to order that Friedmann formally be made a director immediately, I considered a number of factors. For example, although I have concluded that the CD language is unambiguous, I do not believe that Teltronics' contrary argument was made in bad faith. Further, although I have concluded that FGC did not waive its right to elect a Series B director, I am mindful that some of the procedural complexity engendered by the parties current situation could have been obviated had these issues been raised before the 2004 annual meeting. Yet another relevant consideration is the fact that an order compelling the immediate addition of Friedmann to the board would create a number of questions in terms of Teltronics' corporate governance that would serve only to expose the Company to unnecessary uncertainty, risk and expense during the brief period left before the 2005 annual meeting. I see no legitimate benefit to either side that would result from causing such confusion.

III. CONCLUSION

The CD does not create a condition to the appointment of a Series B director and a Series B director may be elected at any time. Moreover, FGC did not waive its right to appoint a Series B director. Thus, under the CD, FGC's Series B director designee would have an immediate right to sit on the board of directors consistent with the relief described above. Counsel are directed to confer and submit promptly a proposed form of order consistent with this memorandum opinion.