EFiled: Aug 27 2014 04:05PM EDT
Filing ID 55949149
Case Number 343,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY SALAMONE, MIKE DURA, and ROBERT W. HALDER,	)	
Defendants Below-Appellants.	)	
v.	)	No. 343,2014
JOHN J. GORMAN, IV,	)	On Appeal from the Court of Chancery, Consol. C.A. No. 8845-VCN
Plaintiff Below-Appellee,	)	

APPELLEE'S SECOND CORRECTED ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANT'S SECOND CORRECTED OPENING BRIEF ON CROSS-APPEAL

BAYARD, P.A.

Neil B. Glassman (No. 2087)
Stephen B. Brauerman (No. 4952)
Vanessa R. Tiradentes (No. 5398)
Sara E. Bussiere (No. 5725)
222 Delaware Avenue, Suite 900
P.O. Box 25130
Wilmington, Delaware 19899
(302) 655-5000

Attorneys for Plaintiff Below-Appellee John J. Gorman, IV

Dated: August 27, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

On August 27, 2013, Appellee John J. Gorman, IV ("Gorman" or "Appellee") filed a Complaint against Defendants Gary Salamone ("Salamone"), Mike Dura ("Dura"), and Robert Halder ("Halder," and together with Messrs. Salamone and Dura, "Appellants") seeking (i) a declaration pursuant to Section 225 of the Delaware General Corporation Law ("DGCL") that the board of directors of Westech Capital Corporation ("Westech" or the "Corporation") consists of Salamone, Ford, Gorman, Olsen, Sanditen, Williamson, and Woodby (the "Gorman Slate"); (ii) injunctive relief to prevent Appellants from wrongfully damaging the Company;[1] and (iii) alternatively, the appointment of a receiver pending resolution of this action (the "Gorman Action"). (A1, D.I. 1.) Minutes before Gorman initiated the Gorman Action, Halder, a defendant in the Gorman Action, filed his own action pursuant to Section 225 of the DGCL to determine the board of directors of Westech ("Halder Action"). (*Halder v. Gorman, et al.*, C.A. No. 8844-VCN, D.I. 1.) The Court consolidated the Gorman and Halder Actions on October 21, 2013. (A12, D.I. 68.)

[1] Given their ability to prevent the Company's board from functioning, Appellants have now succeeded in looting and destroying one of the Company's principal assets – Tejas Securities Group, Inc. ("Tejas"), a regulated broker-dealer. (*See* B1-B2.)

On October 29, 2013, the parties filed cross-Motions for Judgment on the Pleadings. (A16-A21, D.I. 90, 96, 99, 109, 118.) On December 12, 2013, the Court denied the parties' Motions for Judgment on the Pleadings. (A37, D.I. 194, 196.) The parties proceeded to trial on a stipulated record on January 24, 2014. (*See generally* A37, D.I. 202, 203.) On May 29, 2014, the Court issued its Memorandum Opinion ("Opinion"). (A39, D.I. 218.) The Court issued its Order and Final Judgment on June 24, 2014. (A40, D.I. 220, 222, 223.) On June 25, 2014, Appellants appealed the Court's Memorandum Opinion.[2] (*Salamone, et al. v. Gorman*, C.A. No. 343,2014, D.I. 1.) On June 26, 2014, Gorman filed his Cross-Notice of Appeal. (*Id.* at D.I. 5.) Appellants filed their Opening Brief and Appendix on July 21, 2014. (*Id.* at D.I. 14-15.) This is the Answering Brief on Appeal and Opening Brief on Cross-Appeal of Gorman.

[2] After they filed their Notice of Appeal, Halder and Salamone, along with others, initiated two new actions related to Westech: *Salamone, et al. v. Gorman, et al*., C.A. No. 9870-VCN under Section 225 of the General Corporation Law of the State of Delaware (the "DGCL") and *Halder, et al. v. Gorman, et al.*, C.A. No. 9859-VCN for the appointment of a custodian. Before the parties could agree on a scheduling order to govern the two actions, but after Gorman filed a motion to disqualify Greenberg Traurig, LLP as counsel, Plaintiffs dismissed both actions. But for the delay occasioned by a disqualification motion, Gorman would have moved to disqualify Greenberg Traurig, LLP in this appeal as well. Gorman reserves all rights with respect to Greenberg Traurig LLP's numerous conflicts of interest in this matter.

SUMMARY OF ARGUMENT

1. Denied. Appellants' interpretation of Section 1.2(b) of the Voting Agreement ignores logic and a century of Delaware precedent. The trial court properly interpreted that the Series A Designees are designated by a majority of the holders of Series A Stock measured on a per share, rather than per capita basis.

2. Denied. The Court of Chancery erred by holding that Section 1.2(c) contained a per capita voting structure. The Court of Chancery properly determined how the removal provisions of the Voting Agreement apply with respect to Section 1.2(c).

3. Denied. Section 7.17 of the Voting Agreement is irrelevant to and has no bearing on the proper interpretation of Sections 1.2(b) and 1.2(c).

4. Section 212(a) of the General Corporation Law of the State of Delaware (the "DGCL") renders Appellants' interpretation of Sections 1.2(b) and 1.2(c) of the Voting Agreement invalid. The Court of Chancery erred by finding that a per capita voting scheme does not violate Section 212. (*See* A67 ("Gorman next contends that Defendants' per capita voting theory would be invalid as a matter of law because the DGCL requires corporations to specify their election to use per capita voting in their charters . . . The Court rejects his argument."); *see also* B1213-1218.). Contrary to the Trial Court's ruling, there is no conflict or tension between Sections 212(a) and 218 of the DGCL.

STATEMENT OF FACTS

This dispute arises from a fight for control over Westech between Gorman, who owns more than fifty-percent (50%) of the Company and Appellants, who collectively own less than two percent (2%) of the Company. Westech is a publicly-traded Delaware corporation with its principal place of business in Austin, Texas. (B4.) Until its recent delisting (after Appellants allowed it to fall below regulatory capital requirements by distributing assets and allowing Halder to violate his restrictive covenants and abscond along with other employees to a competitor), Westech's primary operating subsidiary, Tejas Securities Group, Inc. ("Tejas"), was a broker dealer regulated by the Exchange Act of 1934 and the Financial Industry Regulatory Authority ("FINRA"). (B4.) Westech has two (2) classes of stock authorized and outstanding: 4,031,722 shares of Common Stock, $0.001 par value per share (the "Common Stock") and 338 shares of Series A Preferred Stock, $0.001 par value per share (the "Series A Preferred Stock"). (B4.) The Series A Preferred Stock votes together with the Common Stock on an as-converted basis, with each share of Series A Preferred Stock receiving 25,000 votes. (B19-B30.) On an as-converted basis, Westech stockholders could cast a total of 12,481,722 votes on any relevant matter at all relevant times. (*Id.*)

A. The Parties

Gorman holds or controls through affiliates, either directly or indirectly, approximately 2,447,934 shares of common stock of Westech and approximately 173 shares of Series A Preferred Stock of the Company. (B25-B26.) On an as-converted basis, Gorman could vote, either directly or indirectly, 6,772,934 shares of Westech stock (approximately fifty-four percent (54%)). (*Id.*) Gorman's 173 shares represent more than fifty percent (50%) of all outstanding shares of the Series A Preferred Stock of the Company. (A612, A616.) Gorman is a member of the Westech board of directors and formerly served as an employee of Tejas. (A76; A1106:15-20, A1259:1-12.)

Salamone was the Chief Executive Officer of Westech and a member of Westech's Board of Directors pursuant to the Opinion. Salamone does not own any Westech stock. (B4.)

Dura served as a member of the Westech board of directors prior to and during the Gorman Action pursuant to the September 4, 2013 *Status Quo* Order. (B31.) He also does not own any Westech stock. (B4.)

Halder served as President and acting Chief Operating Officer of Westech, and Interim Chief Operating Officer of Tejas. (B5.) In its Opinion, the Court of Chancery found Gorman validly removed Halder from the Board of Directors on August 14, 2013. (A68.) Halder owns, directly or indirectly, approximately 6

shares of Series A Preferred Stock (approximately one percent (1%) of Westech's voting stock), and his family members own an additional 3 shares of Series A Preferred Stock. (B5.) Halder controls less than two percent (2%) of the Company's voting stock. (*Id.*) Shortly before the new Delaware actions were dismissed and in violation of the restrictive covenants contained in his employment agreement, Halder effectively misappropriated Tejas as a going concern when he resigned from the Company and went, along with nearly all of Tejas' employees, to work for a competitor.

B. Gorman Initiates the 2011 Capital Raise

In late 2010 or early 2011, Gorman approached several investors to raise capital and expand the sales base of Tejas. (A1106:15-20, A1259:1-12; A1209:16-A1210:1; A656:19-22; A1005:1-6.) Gorman first reached out to James J. Pallotta ("Pallotta"), to lead the capitalization in Westech and to execute his growth plan. (A1002:9-16; A826:11-A827:5; A959:13-23.) Gorman then reached out to James B. Fellus ("Fellus"), who wanted to invest in a broker dealer and previously served as a consultant to Westech. (A827:7-15; A654:11-24.)

To effect the capital raise, the Corporation issued a new series of stock – Series A Preferred Stock (the "Series A Transaction"). (A827:16-23; *see also* A538-A621.) Pallotta purchased 80 shares of Series A Preferred stock for an aggregate purchase price of $2,000,000. (A612; A958:5-24; A1020:8-10;

A1158:13-A1159:1.) Fellus and his family members purportedly acquired 62 shares of Series A Preferred Stock in exchange for $1,600,000, with Fellus directly acquiring 40 of such shares for $1,000,000.[3] (A612; A655:24-A656:15; A834:8-12.) Gorman purchased 72 shares of Series A Preferred Stock for $1,800,000. (A612.) Halder purchased, directly or indirectly, nine shares. (A612-A613.) In addition to Halder, other Tejas employees purchased small amounts of shares. (*See generally* A612-A617.)

C. The Parties Negotiate and Execute the Series A Transaction

With Pallotta and Fellus's commitment to the capital raise, Westech and its three primary investors (Fellus, Gorman, and Pallotta) began negotiating the terms of the Series A Transaction. (A694:23-A695:9; A879:6-18.) Darrell Windham, Esquire ("Windham"), then at Fulbright & Jaworski LLP and now a shareholder at Greenberg Traurig, LLP, served as Westech's primary outside counsel and drafted the Series A Transaction documents. (A882:22-A883:6.). Rosemary McCormack, Esquire ("McCormack") and Peter Monaco ("Monaco") represented Pallotta's interest in the negotiations. (A961:18-A962:6.)

[3] Fellus could not fund this acquisition in cash and instead provided a promissory note, upon which he never made a single payment and subsequently defaulted. (A836:17-21; A707::22-25). As such, a FINRA arbitration recently found that Fellus owes the Corporation $1,092,780.00 as a result of his default. (B35-B41.)

On September 23, 2011, the parties effected the Series A Transaction. In connection with the Series A Transaction, the parties executed a number of documents, including a Voting Agreement, which sets forth the process by which Westech's stockholders' would elect the directors of the Corporation. (A539-A540.) The proper interpretation of Section 1.2 of the Voting Agreement is the central issue in this appeal. (*Id.*)

The purpose of the Voting Agreement was to set forth the parties' agreements concerning the size and composition of the Board and to protect Pallotta's two million dollar investment. (A539 (Recitals); A1183:13-A1184:21.) As Gorman explained:

> Mr. Pallotta's requirements were that if I was going to own less than 50 percent of the company that he wanted to make certain between the two of us that we owned more than 50 percent and that he would have his representative have a seat. And that between me and him we would own a majority of the fully diluted shares.

(A1184:15-21.)

1. Section 1.2 of the Voting Agreement

Based in large part on Pallotta and Gorman's agreement, Section 1.2 of the Voting Agreement provided that Westech was to be governed by a seven-member board of directors (the "Board") consisting of the following directors:

> (a) One person designated by Mr. James J. Pallotta ("Pallotta") "(the "Pallota [sic] Designee"), for so long as Pallotta or his Affiliates continue to own beneficially at least ten percent (10%) of the shares of Series A Preferred Stock issued as of the Initial Closing (as defined in

> the Purchase Agreement) [the "Pallotta Designee" or "Pallotta Director")];
>
> (b) One person who is an Independent Director and is designated by the majority of the holders of the Series A Preferred Stock (together with the Pallota [sic] Designee, the "Series A Designees") [the "Series A Designee" or "Series A Director"];
>
> (c) Two persons elected by the Key Holders, who shall initially be John J. Gorman IV and Robert W. Halder (the "Key Holder Designees") [the "Key Holder Designees" or "Key Holder Directors"];
>
> (d) The Company's Chief Executive Officer, who shall initially be James Benjamin Fellus (the "CEO Director"), provided that if for any reason the CEO Director shall cease to serve as the Chief Executive Officer of the Company, each of the Stockholders shall promptly vote their respective Shares (i) to remove the former Chief Executive Officer from the Board if such person has not resigned as a member of the Board and (ii) to elect such person's replacement as Chief Executive Officer of the Company as the new CEO Director [the "CEO Director"]; and
>
> (e) Two individuals with applicable industry experience not otherwise an Affiliate . . . of the Company or of any Investor and who are Independent Directors mutually acceptable to the Series A Designees and the Key Holder Designees of the Board. [the "Industry Designee[s]" or "Industry Director[s]"].

(A540 at § 1.2.) Pursuant to Section 1.2, the signatories to the Voting Agreement agreed to vote their shares in accordance with the persons designated or elected pursuant to Sections 1.2(a) – (e) of the Voting Agreement. (*Id.*)

The drafts of the Voting Agreement and other Series A Transaction documents, exchanged between April 5, 2011 and July 21, 2011, provide the only documentary evidence regarding the intent of the parties and demonstrate that the

parties did not spend a significant amount of time negotiating Section 1.2. (*See generally* B42-B879.) The earliest available draft of the Voting Agreement is undated, but Windham's colleague, Katy Livingston ("Livingston"), attached it to an e-mail on March 21, 2011 (the "First Draft"). (B42-B65.) The language contained in Sections 1.2(b) of the First Draft is nearly identical to the language set forth above in the Voting Agreement; the language of Section 1.2(c) is identical. (*Compare* B48 at § 1.2(b)-(c), *with* A540 at § 1.2(b)-(c).) The only differences between the language of Section 1.2(b) contained in the First Draft and the language contained in the Voting Agreement are that (i) references to Series B were replaced with references to Series A,[4] (ii) the Voting Agreement introduces an independence requirement for the designated director, and (iii) a blank for identifying the initial designee under Section 1.2(b) was removed. (*Id.*)

None of the drafts of the Voting Agreement identified the Key Holders. (*Id.*) In a June 28, 2011 email circulating a draft of the Voting Agreement, Livingston writes, "[w]e are contemplating including Fellus, Gorman, Pallotta (and perhaps Ira Lampert and any other significant investor from the Pallotta group as

[4] Westech had shares of Series A Preferred Stock issued and outstanding prior to the Series A Transaction that is the subject of this litigation. Using the proceeds from this Series A Transaction, the Company redeemed its then-existing Series A Preferred Stock. (A883:21-A884:11, A891:9-A892:25.)

the Key Holders). In Gorman's group, the next biggest investor is at $250,000." (B411.) Halder also invested $250,000 in the Series A Transaction – below Livingston's threshold for a Key Holder. (*Compare id., with* A612-A613; A875:8-22, A898:5-A901:11.)

The July 12, 2011 draft of the Co-Sale Agreement associated with the Series A Transaction similarly listed Fellus, Gorman, and Pallotta, the three largest investors in the deal, as the Key Holders. (B743.) Although he appeared as a Key Holder in an earlier draft of the Co-Sale Agreement, the parties did not appear to have considered Halder a Key Holder during the negotiations of Section 1.2(c) of the Voting Agreement. (B42-B879.) No contemporaneous documents explain how Halder became a Key Holder.[5]

D. Gorman's Acts to Regain Control of the Corporation

As of August 1, 2013, the Westech Board consisted of five directors and two vacancies: Dura (the "Industry Director"), Gorman and Halder (the "Key Holder Designees"), Salamone (the "CEO Director") and Monaco (the "Pallotta

[5] Halder claimed at his deposition that he and Fellus were always Key Holders. However, the documentary evidence and conflicting testimony from Gorman and the Series A Preferred Stockholders contradicts Halder's testimony. (*Compare* A900:14-A911:16 *and* A742:25-A743:22, *with* B42-B879; *see also* A1190:1-26; B880-B905.) The trial court also rejected Halder's claims in this regard. (*See generally* A57-A75.)

Designee"). (B7.) Frustrated with the direction of the Corporation he founded nearly twenty years prior, and concerned about exposure for unresolved regulatory violations by Salamone, Gorman determined to regain control of the Corporation, restructure the Board, and move the Corporation in a new direction.

1. Gorman's August Actions Change the Composition of the Board

By letter dated August 14, 2013 (the "August 14, 2013 Letter"), Gorman removed Halder from the Board, and elected Williamson and Woodby to fill the vacancies in the seats held by the Key Holder Designees. (A635; A1246:22-A1247:2, A1251:1-5.) Halder's removal was effected pursuant to Section 1.4 of the Voting Agreement, which provides that any of the directors elected pursuant to Section 1.2 of the Voting Agreement may be removed from office "by the affirmative vote of the Person, or the holders of more than fifty percent (50%) of the then outstanding Shares entitled under Section 1.2 to designate that director." (A541 at § 1.4(a).) Section 1.4(b) of the Voting Agreement provides that any vacancies on the Board created by the removal of a director pursuant to Section 1.4(a) of the Voting Agreement shall be filled pursuant to Section 1 of the Voting Agreement. (A541 at § 1.4(b).) Following the delivery of the August 14, 2013 Letter, the Board consisted of Dura, Monaco, Salamone, Williamson and Woodby.

On August 21, 2013, Gorman acquired 80 shares of Series A Preferred Stock from Pallotta (the "Pallotta Shares"). (A636-A641; A1103:16-18; A970:9-24.)

Pending recognition by the Company of the Pallotta sale, and for purposes of the Annual Meeting, Pallotta issued a proxy to Gorman which has permitted Gorman to vote the Pallotta Shares. (A642; A1244:22-23; A972:19-A973:1.) The proxy is undated, but is effective as of August 21, 2013.[6] (A642.) Contemporaneously with the execution of the Stock Purchase Agreement, Monaco resigned as the Pallotta Director, leaving a new vacancy on the Board. (A642; A1028:20-23.)

By written consents dated August 21, 2013, Arch Aplin and Ford, Gorman, Williamson, and Woodby, as the holders of more than fifty percent (50%) of the issued and outstanding Series A Preferred Stock and the common stock, voting together as a single class, appointed Gorman to fill the Pallotta Designee vacancy and designated Barry A. Sanditen to fill the vacant Series A Directorship. (A623-A634.) These written consents were delivered to the Corporate Secretary of the Company on August 23, 2013. (*Id.*; A1248:10-14.) Therefore, as of August 21, 2013, the Board consisted of Dura, Gorman, Salamone, Sanditen, Williamson and Woodby.

2. Appellants Refuse to Recognize Gorman's August Actions

On August 23, 2013, Gorman, Sanditen, Williamson and Woodby, acting as a majority of the Board pursuant to Section 4.3(b) of the Bylaws, directed Craig

[6] Record evidence demonstrates that Gorman received this proxy on September 5, 2013 and had the right to vote it at the Annual Meeting. (*See* A644-A648; B906-B973.)

Biddle, Westech's Secretary, to call a meeting of the Board at 9:00 a.m. on August 26, 2013, at Westech's offices located at 8226 Bee Caves Road in Austin, Texas (the "August 26 Board Meeting"). (B974-B1006.) On August 24, 2013, Biddle noticed the August 26 Board Meeting. (*Id.*)

Despite this notice, Salamone, Halder, and Dura locked Westech's offices and prevented Gorman, Sanditen, Williamson and Woodby from attending the meeting as noticed. (B9.) After Appellants prevented them from entering Westech's offices, Gorman, Sanditen, Williamson and Woodby proceeded to conduct the meeting at a nearby location and notified Dura and Salamone of the meeting's new location. (*Id.*) Dura and Salamone did not attend the meeting. (B9.) During the August 26 Board Meeting, the Key Holder Designees (Williamson and Woodby) and the Series A Designees (Gorman and Sanditen), acting pursuant to Section 1.4(a) of the Voting Agreement, advised the Board that they had determined to remove Dura from the Board and had filled that vacancy and the existing Industry Designee vacancy with Daniel Olsen and T.J. Ford pursuant to Section 1.4(b) of the Voting Agreement. (*Id.*; *see also* A1247:13-A1248:3.) Following the August 26 Board Meeting, the Board consisted of Ford, Gorman, Olsen, Salamone, Sanditen, Williamson and Woodby.[7]

[7] The actions taken by the August 14, 2013 Letter, the August 21, 2013 written consents, and at the August 26 Board Meeting collectively are referred to herein as the "August Actions."

E. The Westech Stockholders Vote Ford, Gorman, Olsen, Salamone, Sanditen, Williamson and Woodby to the Board at the September 17, 2013 Annual Meeting

On September 17, 2013, Westech held its annual meeting of stockholders (the "Annual Meeting") at the Core Club in New York City. (B10.) In advance of the Annual meeting, Gorman and Westech each distributed proxy materials in support of their respective slates.[8] (B906-B973; B1007-B1063.) At the Annual Meeting, Gorman nominated the Gorman Slate, which consisted of Ford and Gorman (the Series A Designees), Woodby and Williamson (the Key Holder Designees), Salamone (the CEO Director), and Olsen and Sanditen (the Industry Designees) for election as directors. (B10.) Appellants purported to cause Westech to nominate a slate consisting of Salamone, Halder, Dura, Michael Wolf, and Mark McMurray (the "Management Slate") for election as directors at the Annual Meeting. (*Id.*)

An independent inspector of elections (the "Inspector") oversaw the stockholder vote. (*Id.*) The Westech stockholders overwhelmingly voted to elect the Gorman Slate as the Board of Directors of Westech. (*Id.*) The Preliminary Tabulation Report prepared by the Inspector demonstrated the Gorman Slate soundly defeated the Management Slate by a final tally of 5,969,288 votes in favor

[8] In violation of the *Status Quo* Order, Defendants interfered with the distribution of Gorman's proxy materials, which prevented all Westech shareholders from receiving them.

of the Gorman Slate and 3,375,000 votes in favor of the Management Slate. (*Id.*) Appellee and Appellants subsequently conducted a review and challenge session (the "Review and Challenge") at the offices of Bayard, P.A. on October 3, 2013. (B11.) At the Review and Challenge, the Inspector reaffirmed the Preliminary Tabulation Report and certified the election results. (*Id.*) As a result of the election at the Annual Meeting, Westech's Board of Directors consists of Ford, Gorman, Olsen, Salamone, Sanditen, Williamson and Woodby.

F. The Court of Chancery Action

Following a one-day trial on a stipulated record, the Court of Chancery issued its Opinion, finding that the Corporation's current directors consist of Salamone, Gorman, Ford, and Dura. (A57.) Having already found Sections 1.2(b) [governing Series A Designees] and (c) [governing Key Holder Designees] ambiguous, Vice Chancellor Noble found that Section 1.2(b) "is not clearly and unambiguously a per capita voting mechanism and thus our law's presumption in favor of majority voting applies." (*Id.* at 46.) Based on its interpretation of Section 1.2(b), the trial court found that Gorman properly designated Ford as the Series A Designee, and himself as the Pallotta Designee, and the stockholders validly elected both of them to the Board at the Annual Meeting. (A57 at 47.) Gorman also validly removed Halder via the August 14, 2013 Letter. (*Id.*)

Notwithstanding his previous finding of ambiguity in Section 1.2(c), Vice Chancellor Noble found that Section 1.2(c) provides for a per capita voting mechanism by the Key Holders "based on the plain meaning of 'elect,' when decided by three natural persons, and the conclusion that a majority of shares interpretation would render Schedule B meaningless." (*Id.* at 46-47.) Based on this finding, the Court held that Gorman's actions prior to the Annual Meeting were invalid, and the Key Holders failed to properly designate the Key Holder Designees at the Annual Meeting. (*Id.* at 44-46.) The Court also found that in the absence of a validly seated Key Holder Designee, Dura was not properly removed as an Industry Director. Thus, the Court determined that there were currently only four directors—Gorman, Ford, Dura, and Salamone (whose CEO seat was not contested below). Shortly after the Court issued its Final Judgment and Order, Appellants appealed, and Appellee cross-appealed. (*Salamone, et al. v. Gorman*, C.A. No. 343,2014, D.I. 1, 5.)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN FINDING THE VOTING AGREEMENT AMBIGUOUS, AND PROPERLY HELD THAT SECTION 1.2(B) CONTAINS A PER SHARE, RATHER THAN PER CAPITA VOTING STRUCTURE.

A. Question Presented

Whether the Court of Chancery properly held that Section 1.2(b) is ambiguous and provides for a traditional, rather than per capita voting structure?

B. Scope of Review

A question of contract interpretation is a "question of law that this Court reviews *de novo* for legal error." *AT&T Corp. v. Lillis*, 953 A.2d 241, 251 (Del. 2008). "To the extent the trial court's interpretation of the contract rests upon findings of extrinsic evidence . . . or upon inferences drawn from those findings, our review requires us to defer to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." *Id.* at 252.

C. Merits of Argument

On appeal, Appellants identify several alleged sources of error in the Court of Chancery's Opinion. First, Appellants argue the Court of Chancery "[i]gnored" the plain language of Section 1.2(b), which they say calls for per capita voting. Second, Appellants argue that the structure of the Voting Agreement supports their interpretation of Section 1.2(b). Third, Appellants argue the Court of Chancery

erred in holding that Appellants' interpretation of Section 1.2(b) violates significant Delaware precedent construing "majority of the holders" to mean a majority of the voting power of the Corporation. For the reasons that follow, the Court properly considered and rejected Appellants' arguments.

1. The Court of Chancery Did Not Err in Finding the Voting Agreement Ambiguous.

"Contract language is ambiguous if it is 'reasonably susceptible of two or more interpretations or may have two or more different meanings.'" *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."). "A trial judge must review a contract for ambiguity through the lens of 'what a reasonable person in the position of the parties would have thought the contract meant.'" *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010). In doing so, the Court will consider the contract as a whole and "give each provision and term effect, so as not to render any part of the contract mere surplusage." *Id.*

The disputed language in Section 1.2(b) provides: "One person who is an Independent Director and is ***designated by the majority of the holders of the Series A Preferred Stock***." (A540 (Emphasis added).) The Court of Chancery

found both parties provided reasonable interpretations of Section 1.2(b).[9] At the pretrial conference, the trial court denied the parties' cross-Motions for Judgment on the Pleadings and determined Section 1.2(b) was susceptible to more than one reasonable interpretation and therefore ambiguous. The Court explained:

> [O]ne possible interpretation is that per capita was intended here and nowhere else. On the other hand, much of the agreement suggests that the majority of shares interpretation, that includes the overall scheme of the agreement, the risk of transaction arbitrage to bypass Section 1.2(b), and the perhaps frivolous answer of dividing one's holding of the shares into a series of entitles with each having a separate per capita vote. Arguably, that is the type of potentially absurd result which is suggested by my second reading. . . In short, I cannot conclude that Section 1.2(b) is not ambiguous.

(B1068:3-18.) As the Vice Chancellor did, an objective third party reasonably could interpret Section 1.2(b) as permitting either voting scheme.

Even if the Voting Agreement is not ambiguous, the plain language of Section 1.2(b) calls for per-share voting. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195-96 (Del.1992) (noting a contract is not ambiguous, and thus proper for summary judgment, if the contract is susceptible only to one reasonable interpretation). Contrary to Appellants' arguments, the

[9] Gorman believes, as he argued to the trial court, that his interpretation of Sections 1.2(b) and 1.2(c) of the Voting Agreement is the only interpretation that complies with Delaware law. (*See* A16 at D.I. 92.) However, the Court of Chancery did not agree and found the Voting Agreement ambiguous. Gorman does not appeal the Court's decision on the ambiguity issue.

parties' dispute does not focus on the meaning or use of the term "holders," but rather on how to measure a "majority" of such holders. Gorman contends that "majority" is measured by the number of shares voted while Appellants argue that "majority" is measured by the number of unique stockholders voting. (A1159:17-21, A1173:24-A1174:22, A1190:5-11; A852:11-A854:17.) Delaware law dictates that only the former may be true.

Appellee's interpretation of Section 1.2(b) is the only interpretation that complies with the parties' intent and Delaware law. For nearly a century, Delaware courts have defined the "majority of the holders" language employed in Section 1.2(b) to mean a majority of the voting power of the company. *See, e.g.*, *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5739680, at *25 (Del. Ch. Oct. 11, 2013) ("The first exception permits a party to the Stockholders' Agreement to act to remove a director without cause if 'such removal is directed or approved by . . . *the holders of a majority* of the shares of Capital Stock, entitled under Section 9.2 to designate that director.' Thus if *a majority of the holders* of the Series A Preferred directed or approved the removal of one or more Series A Directors, or if *the holder of a majority* of the common stock directed or approved the removal of the Common Director, then any party to the Stockholders' Agreement could exercise the right it otherwise held . . ."") (emphasis added, internal citations omitted); *Dawson v. Pittco Capital Partners, L.P.*, 2012 WL 1564805, at *11 &

*19 (Del. Ch. April 30, 2012) (using "majority of the holders" and "holders of a majority" interchangeably); *Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505, at *6 & n.20 (Del. Ch. September 7, 2001) (listing "[r]ights of the holders of Series A Preferred Stock that may be compromised upon a *majority vote of the holders* or otherwise upon collective equity positions in Series A Preferred Stock . . ."") (emphasis added); *Solomon v. Armstrong*, 747 A.2d 1098, 1127 (Del. Ch. 1999) ("The consummation of the split-off of EDS was contingent upon obtaining the approval of a *majority of the holders* of each of (1) GM 1–2/3 stock, voting separately as a class, (2) GM Class E common stock, voting separately as a class, and (3) all classes of common stock, voting together.") (emphasis added); *Margolies v. Pope & Talbot, Inc.*, 12 Del. J. Corp. L. 1092, 1097 (1986) ("The Board of Directors of Pope & Talbot conditioned the implementation of the Plan of Distribution upon the approval of *a majority of the holders* of the company's outstanding shares of common stock.") (emphasis added); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 490 (Del. Ch. 1923) (citing then operative version of the DGCL, which used "*holders of a majority* of the stock issued" synonymously with "*majority of the holders* of the voting stock issued and outstanding") (emphasis added). Delaware courts' historical interpretation, and the parties' subsequent use, of "majority of the holders" supports the parties' intent to provide for per share, not per capita, voting.

Conversely, Appellants' interpretation finds no support in Delaware law. After a thorough search, Gorman could not find (and Appellants did not cite) *any* instance where a Delaware court viewed "majority of the holders" language as referring to stockholders on a per capita basis distinct from their stockholdings. Thus, to the extent this Court finds the language of Section 1.2(b) is clear and unambiguous, it should find that the holders of a majority of Series A Stock require the majority voting power to designate the Series A Designee.

2. Having Found Section 1.2(b) Ambiguous, the Court of Chancery Properly Applied Extrinsic Evidence to Hold that Section 1.2(b) Contains a Per Share, rather than Per Capita, Voting Structure.

Because the Court of Chancery properly found Section 1.2(b) ambiguous, the Court appropriately applied extrinsic evidence to determine the intent of the parties. The standard for interpreting ambiguous contracts is well settled:

> If the contract is ambiguous, a court will apply the parol evidence rule and consider all admissible evidence relating to the objective circumstances surrounding the creation of the contract. . . After examining the relevant extrinsic evidence, "a court may conclude that, given the extrinsic evidence, only one meaning is objectively reasonable in the circumstances of [the] negotiation."

In re Mobilactive Media LLC, 2013 WL 297950, at *15 (Del. Ch. Jan 25, 2013) (internal citations omitted). In construing ambiguous contracts, Delaware courts give "greater weight to the express terms of the instruments than to arguments based on what the parties intended but did not explicitly state in the instruments,"

"prefer a reading of the instruments that would be consistent with the requirements of the applicable corporate law governing [the corporation] to a reading that would conflict with the law." *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *1 (Del. Ch. July 21, 2000) Applying these principles, the Court of Chancery properly considered extrinsic evidence to determine that Section 1.2(b) of the Voting Agreement does not validly effect per capita voting.

The *undisputed* evidence demonstrates Section 1.2 was designed to establish the size and composition of the board and to protect the investments of Pallotta and Gorman, the Company's largest investors. (*See* A540; B42-B879; A960:22-A961:1; A1184:15-21.) The parties, sophisticated investors with access to expensive counsel, did not articulate any desire to deviate from Delaware's long established one-share one-vote governance principle (as required by Delaware law) in favor of per capita voting. *See Rohe*, 2000 WL 1038190, at *16. There is no evidence in the record that supports Appellants' theory of intent. The trial record does not contain a single contemporaneous document that supports Appellants' interpretation of Section 1.2(b) of the Voting Agreement. The record does not contain any documents that demonstrate that any Westech stockholder intended to deviate from the one-share, one-vote principle, either to limit Gorman's control of the Company or otherwise by giving every Series A Preferred Stockholder an equal vote regardless of the number of shares he holds. (B1094-B1162.) Appellants

argue that the Court improperly applied extrinsic evidence because it is fatal to their case. As the Court of Chancery noted, "[Appellants'] inability to support their conclusions with any contemporaneous negotiating history undermines their account . . . [Appellants'] inability to provide any contemporaneous supporting documentation that favors their position is curious." (A64; A73 n.66.)

Based on the language in the Voting Agreement, the negotiation of the Series A Transaction, the absence of any documents supporting Appellants' "control" or "triumvirate" theories, and the testimony of some of the signatories to the Voting Agreement, the only objectively reasonable interpretation of Section 1.2(b) is that supplied by Gorman. *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 835 (Del. Ch. 2007) ("Restated, the extrinsic evidence may render an ambiguous contract clear so that an 'objectively reasonable party in the position of either bargainer would have understood the nature of the contractual rights and duties to be.' In such a case, the Court would enforce the objectively reasonable interpretation that emerges.") (internal citations omitted). Appellee's interpretation of Section 1.2(b) is the only reasonable interpretation of the provision.

3. The Structure of the Voting Agreement does not Support Appellant's Per Capita Theory.

Every analogous and interrelated provision of the Voting Agreement contradicts Appellants' interpretation of Section 1.2(b) and therefore, the Court of

Chancery properly rejected their interpretation in favor of per capita voting.[10] "[T]he Court must view the contracts as a whole and interpret them in a manner that gives a reasonable, lawful, and effective meaning to all the terms. This is preferred over an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Segovia v. Equities First Holdings, LLC*, 2008 WL 2251218, at *9 (Del. Super. Ct. May 30, 2008); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981); 24 CORBIN ON CONTRACTS § 24.22 (1998).

For example, Section 1.4(a) of the Voting Agreement permits the removal of the Series A Designees by "the *holders of fifty percent (50%) of the then outstanding Shares* entitled under Section 1.2 to designate that director." (A541 at § 1.4(a) (emphasis added).) There is no dispute that Gorman himself controls enough shares to remove any Series A Designee. (B4.) As a result, Appellants' interpretation of Section 1.2(b) creates a situation where Gorman unilaterally and immediately can remove (in perpetuity) any Series A Designee of which he does

[10] Appellants cite to various other provisions in the Voting Agreement to support their argument that the parties "understood the difference between the words 'holders' and 'shares.'" (D.I. 14 at 23-34.) Gorman does not argue that the drafters could not distinguish between "holder" and "shares," but rather, that the phrases "majority of the holders" and "holders of the majority" have the same meaning in this context. Appellants also misconstrue these provisions as supportive and try to take advantage of sloppy drafting. In reality, these provisions (aside from Sections 1.4(a) and 7.8(e) as discussed above) have no bearing on the interpretation of Section 1.2(b).

not approve. Appellants contend that the parties intended such a deadlock to promote "cooperation,"[11] but offer no rational explanation as to why the parties would measure a "majority" of the holders in an unconventional fashion (by number of unique holders) when designating a Series A Designee, but utilize a different calculation of "majority" (number of shares) to remove the same director. Nor do Appellants explain how deadlock would promote cooperation. The Court should reject Appellants' interpretation – especially without any evidence that they intended such a bizarre scheme.

Appellants also suggest that the Voting Agreement utilizes per capita voting to protect Westech's minority shareholders from Gorman's heavy hand. (D.I. 14 at 14.) Even if Appellants interpretation is correct, Section 1.2(b) cannot possibly provide any such protection because Section 1.4(a) undeniably allows Gorman to remove any Series A Designee designated by the other holders – thereby defeating any value of the protective device. (A864:19-A865:22; *compare* A540 at § 1.2(b), with *id.* at § 1.4(a).) The only logical conclusion one can draw from the interplay between Sections 1.2(b) and 1.4(a) is that "majority of the holders" and "holders of the majority" have the same meaning under the Voting Agreement. Appellants'

[11] This argument is nonsensical. The Westech board has been "deadlocked" since the Opinion issued (because Salamone and Dura refuse to attend or notice meetings) and the parties have not cooperated at all.

contention that the provisions were specifically designed to create a never ending sequence of election and removal is illogical and unsupported by the evidence.

Likewise, the Voting Agreement's termination and amendment procedures demonstrate the flaws in Appellants' interpretation. Section 7.8(c) permits "the holders of two-thirds of the Shares of Series A Preferred Stock . . ." to terminate the Voting Agreement (together with the consent of the Company and the holders of a majority of the Shares held by the Key Holders). (A541 at § 7.8(c).) Section 7.8(e) provides that Section 1.2(b) of the Voting Agreement may be amended by the "written consent of the holders of a majority of shares of Series A Preferred Stock." (*Id.* at § 7.8(e).) Appellants cannot, and do not, argue that the "holders of a majority" (or the "holders of two-thirds") means anything other than a majority (or two-thirds) of the voting power of the Series A Preferred Stock. Thus, the holders of a majority of shares of Series A Preferred Stock (*i.e.* Gorman) could amend the Voting Agreement to clarify that Appellants' interpretation of Section 1.2(b) is wrong. Similarly, the holders of two-thirds of the Series A Preferred Stock (together with the consent of the Company and the holders of a majority of the Shares held by the Key Holders (i.e., Gorman)), could terminate the Voting Agreement in its entirety. As a result, this Court should affirm the Court of Chancery's findings as to the interpretation of Section 1.2(b) and reject Appellants' interpretation.

II. THE COURT OF CHANCERY ERRED IN HOLDING SECTION 1.2(C) CONTAINS A PER CAPITA, RATHER THAN A PER SHARE, VOTING STRUCTURE.

A. Question Presented

Whether the Court of Chancery erred in finding Section 1.2(c) ambiguous, but interpreting Section 1.2(c) as providing for per capita voting rather than per share voting?

B. Scope of Review

A question of contract interpretation is a "question of law that this Court reviews *de novo* for legal error." *AT&T Corp. v. Lillis*, 953 A.2d 241, 251 (Del. 2008). However, "[t]o the extent the trial court's interpretation of the contract rests upon findings of extrinsic evidence to the contract, or upon inferences drawn from those findings, our review requires us to defer to the trial court's findings, unless the findings are not supported by the record or unless the inferences drawn from those findings are not the product of an orderly or logical deductive reasoning process." *Id.* at 252.

C. Merits of Argument

Notwithstanding its earlier finding that Section 1.2(c) is ambiguous, the Court of Chancery found that based on the plain text and structure of the agreement, the parties more likely than not intended Section 1.2(c) to contain a per capita voting structure. (A65-A68.) Appellants argue the Court's holding as it

pertains to Section 1.2(c) is correct, but erred in finding that directors who are Key Holder Designees may be removed by a majority of stock of the Key Holders. Though the Court of Chancery properly determined that Section 1.2(c) is ambiguous and that Key Holder Designees may be removed by a vote of the majority of stock of the Key Holders under Section 1.4(a), the Court improperly held that Section 1.2(c) provides for a per capita rather than a per share voting structure.

1. Having Found Section 1.2(c) Ambiguous, the Court of Chancery Erred in Holding that Section 1.2(c) Contains a Per Capita, Rather than a Per Share Voting Structure.

First, similar to the reasoning above, the Court of Chancery properly found Section 1.2(c) ambiguous.[12] (B1069:8-19.) Section 1.2(c) defines the "Key Holder

[12] The Court stated, "[on] the one side is the argument that if this were a majority vote provision, if Gorman controlled a majority of the shares as between Key Holders, it would convert the provision into essentially a 'Gorman designee provision.' It seems unlikely that's what was actually intended. Similarly, it might be that a majority vote as between the Key Holders would allow for a waiver of Section 1.2(c) or an option to revoke the provision which could also effectively invalidate it. Also, there's a question as to whether the usage of elect elsewhere in the agreement can help to explain its usage here." (B1069:8-19.) This analysis ignores that until the final version of the Voting Agreement, the three Key Holders were Pallotta, Gorman and Fellus, all substantial investors and none of whom, acting alone, could elect or remove the Key Holder Designees. When Pallotta ceased to be a Key Holder, the last minute replacement of him

Designees" as "two persons elected by the Key Holders, who shall initially be John J. Gorman IV and Robert W. Halder," and does not contain the "majority of the holders" language. (A540 at § 1.2(c).) The parties dispute what the drafters intended by the word "elected." As set forth below, Delaware law and Westech's governing documents resolve this dispute.

As a threshold matter, the Court's finding that Section 1.2(c) ambiguous is dispositive. Under Delaware law, a limitation on the voting power of a majority of stockholders (as in the Voting Agreement) must be clear and unambiguous. *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *16 (Del. Ch.) ("Finally, although Delaware law provides stockholders with a great deal of flexibility to enter into voting agreements, our courts rightly hesitate to construe a contract as disabling a majority of a corporate electorate from changing the board of directors unless that reading of the contract is certain and unambiguous.") The Court of Chancery properly found that Section 1.2(c) is ambiguous as it is susceptible to more than one interpretation. (B1069:8-19; A540.) Having found Section 1.2(c) ambiguous, the trial court's interpretation of Section 1.2(c) cannot survive because it imposes an ambiguous and uncertain limitation on Gorman's majority voting

---

by Halder altered the practical effects of the Section 1.2(c). The Court of Chancery's analysis makes no mention of this consequence or likely explanation.

power. In reaching its conclusion, the Court of Chancery stated that "Gorman could certainly have decided it was in his best interest to raise additional capital for the Company and agreed in exchange to some dilution of his control." (*Id.*) While the Court of Chancery is correct and Gorman could have decided to dilute his control, Delaware law requires that such restrictions be clear and unambiguous to avoid precisely the type of speculation in which the trial court engaged. *Rohe*, 2000 WL 1038190, at *16. As such, the Court of Chancery erred by adopting Appellants' interpretation of Section 1.2(c), which imposed uncertain and ambiguous restrictions on Gorman's voting rights.

Thus, in the absence of clear and certain language to the contrary, the Court must interpret the Voting Agreement to allow a majority of the voting power held by the Key Holders to elect the Key Holder Designees. Because Section 1.2(c) is silent as to how such persons are elected, Delaware law fills the gap. 8 *Del. C.* § 212(a); *Standard Power & Light Corp. v. Inv. Associates*, 51 A.2d 572, 576 (1947) ("Outstanding among the democratic processes concerning corporate elections is the general rule that a majority of the votes cast at a stockholders' meeting, provided a quorum is present, is sufficient to elect Directors . . . If this rule is not to be observed, then the charter provision must not be couched in ambiguous language, rather the language employed must be positive, explicit, clear and

readily understandable and susceptible to but one reasonable interpretation, which would indicate beyond doubt that the rule was intended to be abrogated.").

The Series A Certificate of Designation provides further support for Gorman's interpretation of Section 1.2(c) of the Agreement. "A preferred shareholder's rights are defined in either the corporation's certificate of incorporation or in the certificate of designation, which acts as an amendment to a certificate of incorporation." *In re Appraisal of Metromedia Int'l Grp., Inc.*, 971 A.2d 893, 899 (Del. Ch. 2009). "If a certificate of designation is silent as to voting rights, then preferred shareholders have the same rights as common stock, and such rights may only be derogated by a clear and express statement." *Matulich v. Aegis Com'ns Grp., Inc.*, 2007 WL 1662667, at *5 (Del. Ch. May 31, 2007) *aff'd sub nom. Matulich v. Aegis Commc'ns Grp.*, Inc., 942 A.2d 596 (Del. 2008). No "clear and express statement" exists and Appellants' interpretation of Section 1.2(c) cannot survive.

Pursuant to Section 5.1 of the Series A Certificate of Designation, "[o]n any matter presented to the stockholders of the Corporation for their action or consideration at any meeting of stockholders of the Corporation (or by written consent of stockholders in lieu of meeting), each holder of outstanding share of Series A Preferred Stock shall be entitled to cast the number of votes equal to the number of whole shares of Common Stock into which the shares of Series A

Preferred Stock held by such holder are convertible as of the record date for determining stockholders entitled to vote on such matter." (B1167.) Appellants' interpretation of Section 1.2(c) conflicts directly with voting rights of Series A shareholders set forth in the Series A Certificate of Designation. Thus, this Court should reject Appellants' interpretation, and find that the Key Holder Designees are elected on a per-share basis.

Notwithstanding Section 5.1 and the Delaware gap filler, the Court of Chancery found Appellants' argument more persuasive because, the trial court found, to hold otherwise would turn Section 1.2(c) into a "Gorman Designee" provision. (A66-A67.) This interpretation ignores the contemporaneous evidence that the parties intended the Key Holders to be substantial investors, as was the case in all drafts of the Voting Agreement until Halder inexplicably replaced Pallotta as a Key Holder in the execution version. (B411; B743.) Had Pallotta remained as a Key Holder, none of Gorman, Fellus or Pallotta alone could have elected or removed any of the Key Holder Designees. The trial court distinguished its interpretation of Section 1.2(c) from that of Section 1.2(b) "because of the specificity with which the three Key Holders are identified."[13] (A66-A67.)

[13] The Court found the extrinsic evidence presented by the parties "generally not supportive of Defendants' triumvirate theory" (and in fact refutes it), but the extrinsic evidence did not provide "definitive proof" that Appellee's position is correct either. (A66.) Therefore, the Court drew its

Appellants similarly argue that Gorman's interpretation would render Section 1.2(c) meaningless.

Contrary to the trial court's ruling, adopting Gorman's interpretation of Section 1.2(c) does not create a "Gorman Designee" provision. While Gorman would have controlled the election of the Key Holder Designees when the Voting Agreement was executed, nothing in the Voting Agreement (or other Series A Transaction documents) prevented Halder and/or Fellus from acquiring more shares and utilizing Section 1.2(c) as a protective mechanism for their own investment. Similarly, nothing in the Voting Agreement prevented Gorman from diversifying his holdings and selling some of his Westech stock. Had they so chosen, which they did not, Halder and/or Fellus could have diluted Gorman's control, or gained their own unilateral control of the Key Holder Designee to protect his own investment. Therefore, Section 1.2(c) is not meaningless as each Key Holders has the same opportunity to acquire sufficient voting power to control the designation. This interpretation is consistent with the fact that Gorman, as a substantial owner of the Corporation, retained counsel to negotiate this provision and understood that this provision would provide for per-share voting. (B19-B29.)

---

conclusions solely from the text of the Voting Agreement and the structure of the Voting Agreement. (*Id.*)

That Gorman may have, as a practical matter, controlled the election of the Key Holder designees does not turn Section 1.2(c) into "a Gorman designee provision."

Finally, Appellants argue "if Gorman is correct that the words 'Key Holders' somehow are transformed into the words 'a majority of shares held by Key Holders,' then this transformation of Section 1.2(c) would violate Section 212(a) of the DGCL."[14] (D.I. 14 29.) Appellants never explain how Gorman's interpretation violates Section 212(a). (*Id.*) Quite to the contrary, a careful reading of the parties' positions proves that it is Appellants' interpretation, not Gorman's, that violates Section 212(a) of the DGCL.

Under Gorman's interpretation of Section 1.2(c), Gorman, Halder, and Fellus each vote their shares (on a one-share, one-vote basis) to elect the Key Holder Designees, for whom the other stockholders of the Corporation are obligated to vote. (A1190:5-11.) Gorman does not have any greater (or any less) voting power than any other shareholder. Under Appellants' interpretation, Gorman, Halder, and Fellus each have one vote (on a per capita basis) to elect the

[14] As discussed in more detail below, Section 212(a) provides, "Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder. If the certificate of incorporation provides for more or less than 1 vote for any share, on any matter, every reference in this chapter to a majority or other proportion of stock, voting stock or shares shall refer to such majority or other proportion of the votes of such stock, voting stock or shares . . ." 8 *Del. C.* 212(a).

Key Holder Designees, even though Gorman votes more shares than Fellus, who votes substantially more shares than Halder. As discussed below, this interpretation violates Section 212(a) of the DGCL.

Gorman does not dispute that the Westech Voting Agreement provides for a two-step election process – a vote by a subset of stockholders to designate or elect a director, followed by a vote of all stockholders (in which all Westech stockholders who executed the Voting Agreement to vote their shares in favor of the director designated or elected by the subset of stockholders identified in the Voting Agreement). Unlike Appellants, however, Gorman believes that both steps of the election process contemplated by the Voting Agreement, which both involve shareholder voting, must comply with Section 212(a). (*See* Section IV, *infra*.) Therefore, the Court should adopt Gorman's interpretation of Section 1.2(c) as the only reasonable interpretation consistent with Delaware law.

2. The Voting Agreement's Removal Provisions Support Gorman's Interpretation of the Voting Agreement.

The removal provisions in the Voting Agreement support Gorman's interpretation of Section 1.2(c). As discussed in the Section 1.2(b) analysis, Section 1.4(a) only supports Gorman's interpretation. Section 1.4(a) of the Voting Agreement permits the removal of the Series A Designees by "the holders of *fifty percent (50%) of the then outstanding Shares* entitled under Section 1.2 to designate that director" (A541 at § 1.4(a) (emphasis added).) Section 1.4's

reference to "the then outstanding Shares entitled under Section 1.2 to designate that director" further confirms that Section 1.2(c) contemplates an election process that measures "majority" on a per-share rather than per capita basis. If the parties intended Section 1.2(c) to require per capita voting, Section 1.4(a) would refer to "holders" not "shares" when discussing the election process. In other words, for Appellants' interpretation to prevail, Section 1.4 would have to permit removal of the Key Holder designees by "the holders of fifty percent (50%) of the then outstanding Shares *held by the holders* entitled under Section 1.2 to designate that director." Section 1.4(a)'s reference to "shares entitled under Section 1.2 to designate that director" confirms that Section 1.2(c) contemplates a per-share voting structure. Moreover, and as discussed above, it does not make any sense for the Voting agreement to allow different constituencies to elect and remove the same director. Adopting Appellants' interpretation leads to an unreasonable result, and the Court should reject this interpretation and instead find that "majority of the holders" and "holders of the majority" have the same meaning under the Voting Agreement. Therefore, the Court of Chancery properly rejected Appellants' interpretation and held "Section 1.4(a) permits the holders of more than fifty percent of the then outstanding shares (which includes the holder's common shares) entitled under Section 1.2 to designate a director to remove that director." (A68.). This Court should affirm that decision.

Appellants argue the Court of Chancery erred by inconsistently applying Section 1.4(a) to Sections 1.2(c) and 1.2(e). (D.I. 14 at 32.) Appellants reach this conclusion in a single sentence and do not explain how the trial court's application of these provisions is inconsistent. (*Id.*) A review of the Opinion and the Voting Agreement confirms that the trial court properly applied these two provisions consistently. Under Section 1.4(a), the Key Holder Designees elected under Section 1.2(c) may be removed either by "the affirmative vote of the Person, or of the holders of more than fifty percent (50%) of the then outstanding Shares entitled under Section 1.2 to designate that director" (*i.e.* a majority of shares held by the Key Holders) or if "the Person(s) originally entitled to designate or approve such director or occupy such Board seat pursuant to Section 1.2 is no longer so entitled to designate or approve such director or occupy such Board seat" (*i.e.* the Key Holders lose their status as Key Holders or the Key Holder Designees become unqualified to serve). (A541.) Similarly, the Industry Directors may be removed by "the affirmative vote of the Person, or of the holders of more than fifty percent (50%) of the then outstanding Shares entitled under Section 1.2 to designate that director" (*i.e.* the vote of Key Holder Designees and Series A Designees who approve the Industry Designee) or if "the Person(s) originally entitled to designate or approve such director or occupy such Board seat pursuant to Section 1.2 is no longer so entitled to designate or approve such director or occupy such Board seat"

(*i.e.* the Key Holder Designees and/or the Series A Designees are removed (as occurred here)[15] or the Industry Directors become unqualified to serve). As such, the application of Section 1.4(a) to Section 1.2 depends on the designation or election process for the director whose removal is sought. The only difference in the trial court's application of these provisions resulted from the variations in the process used to designate or elect such director. Appellants offer no evidence to the contrary. Thus, the Court's application of this provision to Sections 1.2(c) and (e) correctly varied based upon the varying designation and election processes for the two provisions.

[15] Upon the valid removal of any of the Key Holder Designees or the Series A Designees, Dura as an Industry Designee automatically should have been removed because the "Persons" originally entitled to approve him (*i.e.* the Series A Designees and the Key Holder Designees) are no longer entitled to approve him because they were removed by Gorman. (A541.) The trial court therefore erred by finding that Dura's removal was ineffective.

III. THE TRIAL COURT PROPERLY FOUND THAT SECTION 7.17 OF THE VOTING AGREEMENT DOES NOT SUPPORT PER CAPITA VOTING UNDER SECTIONS 1.2(B) AND 1.2(C).

A. Question Presented

Whether the Court of Chancery properly decided that Section 7.17 of the Voting Agreement does not support per capita voting under Sections 1.2(b) and 1.2(c) of the Voting Agreement?

B. Scope of Review

Contract interpretation is a "question of law that this Court reviews *de novo* for legal error." *AT&T Corp. v. Lillis*, 953 A.2d 241, 251 (Del. 2008).

C. Merits of Argument

Appellants argue Section 7.17 "is consistent with the per capita voting established by a 'plain reading' of Section 1.2(b) by aggregating stock held by any stockholder, which prevents any one stockholder from taking advantage of the 'holder' concept by transferring Series A Stock to multiple 'affiliated' persons or entities." (D.I. 14 at 33.) The Court of Chancery properly rejected this argument.

1. The NVCA Model Agreement Contains Section 7.17, But Does Not Contain the "Majority of the Holders" Language.

The evidence at trial showed that the parties did not intend Section 7.17 to support the per capita voting structure that Appellants allege is contained in Sections 1.2(b) and 1.2(c). (B1209:15-B1210:6.) Appellants argue that Section 7.17 supports their interpretation because "if Section 1.2(b) is interpreted as

suggested by Gorman and is based upon a majority of 'shares' rather than a majority of 'holders,' then Section 7.17 would be unnecessary and meaningless." (D.I. 14 at 25.) Appellants also argue that the Voting Agreement is based upon the National Venture Capital Association (NVCA) Model Voting Agreement ("Model Agreement"). (B1305; B1317-B1346.) As Appellee pointed out at trial, the Model Agreement contains Section 7.17, but does not contain the "majority of the holders" language. (*Compare* B1321-B1322 at § 1.2 *with* A540 at § 1.2; *compare* B1337 at § 7.18 *with* A550 at § 7.17; B1210:4-B1213:6.) Therefore, Section 7.17 of the Voting Agreement must have independent meaning from Section 1.2. (*Id*.)

2. Section 7.17 Conflicts With Other Provisions of the Voting Agreement and the Scheme Created by the Voting Agreement.

Section 7.17 is irrelevant to the Section 1.2 analysis. Section 7.17 provides, that "[a]ll Shares held or acquired by an Investor and/or its Affiliates shall be aggregated together for purpose of determining the availability of any rights under this Agreement, and such Affiliated persons may apportion such rights as among themselves in any manner they deem appropriate." (A550.) Appellants' reading of Section 7.17 is unreasonable because requiring all Shares held by a particular investor to be aggregated (to avoid the creation of unique holders by parking shares with various affiliated entities or individuals) while allowing such "Affiliated persons to apportion such rights among themselves" is contradictory. Affiliated

shareholdings cannot simultaneously be aggregated yet separately apportioned for purposes of satisfying the independent holder requirement Appellants attempt to impose on the Voting Agreement. The absurdity of the logical extension of Appellants' argument confirms that Section 7.17 has no bearing on the proper interpretation of Sections 1.2(b) or 1.2(c). As a result, the trial Court properly rejected Appellants' interpretation of Section 7.17.

Rather, Section 7.17, properly interpreted, permits a party to aggregate his or her shares to meet certain thresholds as set forth in the Voting Agreement while holding them through separate entities or affiliated individuals. (*See* A540 at § 1.2(a); A542-A543 at § 4.2; A547 at § 7.8.) For example, Section 7.17 enables Pallotta, who is required to hold ten percent of his shares, to hold his shares through affiliates and aggregate those votes for purposes of meeting his voting threshold and maintaining his right to designate a director, while apportioning such rights among such affiliated entities as he deems necessary or appropriate (for tax purposes, among other reasons). (A550.) It also allows Gorman, whose Westech holdings are spread among various investment accounts, retirement accounts and family members, to aggregate his holdings when necessary to obtain any rights under the Voting Agreement. Appellants do not explain how Section 7.17 has any bearing on the proper interpretation of Sections 1.2(b) and 1.2(c) of the Voting Agreement and the trial court properly rejected Appellants' arguments.

IV. THE COURT OF CHANCERY ERRED BY IGNORING THAT SECTION 212(A) OF THE DGCL INVALIDATES APPELLANTS' INTERPRETATION OF SECTION 1.2(B) OF THE VOTING AGREEMENT AND THE COURT OF CHANCERY'S INTERPETATION OF SECTION 1.2(C) OF THE VOTING AGREEMENT.

A. Question Presented

Whether the Court of Chancery erred when it found Section 212(a) of the DGCL does not invalidate Appellants' interpretation of Sections 1.2(b) and 1.2(c)? Mr. Gorman preserved this issue below at A67 and B1213-1218.

B. Scope of Review

"In an appeal from a decision in the Court of Chancery, this Court reviews conclusions of law *de novo*." *Stegemeier v. Magness*, 728 A.2d 557, 561 (Del. 1999).

C. Merits of Argument

The Court of Chancery held that although Section 212 of the DGCL requires any deviation from the one share, one vote principle to appear in the Corporation's charter, Section 218 of the DGCL permits stockholders "to construct a contractual overlay on top of that mechanism to agree to vote their shares in accordance with that more specific scheme." *See* 8 *Del. C.* § 212(a); 8 *Del. C.* § 218(c). While true, the Court of Chancery's application of Section 212(a) to the voting scheme created by the Voting Agreement is erroneous as a matter of law.

1. Section 212 of the DGCL Requires That Any Deviation From One Share One Vote Appear in the Charter.

If the parties to the Voting Agreement intended a per capita voting structure in Sections 1.2(b) and 1.2(c), the parties failed properly to implement that purported intent and this Court should reverse the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement. Section 212(a) of the DGCL requires that any deviation from the one share, one vote principle of Delaware law appear in a company's certificate of incorporation. 8 *Del. C.* § 212(a) ("Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder."); *Providence & Worcester Co. v. Baker*, 378 A.2d 121, 123 (Del. 1977) ("[V]oting rights of stockholders may be varied from the 'one share-one vote' standard by the certificate of incorporation."). Because Westech's Charter does not include such a provision, the Court of Chancery's interpretation of Section 1.2(c) (and Appellants' interpretation of Sections 1.2(b)) violates Section 2.12(a) of the DGCL.

2. The First Step of the Election Process Set Forth in the Voting Agreement Deviates From the One-Share, One-Vote Principle Without the Requisite Charter Provision.

As discussed above, the Voting Agreement provides for a two-step election process: (1) a vote by a subset of stockholders to designate (1.2(a) and (b)) or elect (1.2(c)) directors followed by (2) a constrained vote of stockholders, where all

stockholders who executed the Voting Agreement must vote (on a per share basis) for the directors designated or elected in the first step. (A540.) There is no dispute that the second step of the Westech election process complies with Section 212(a) of the DGCL. Under Appellants' interpretation of Section 1.2(b) and the Court of Chancery's interpretation of Section 1.2(c), however, the first-step of the election process violates Section 212(a). The Appellants urge this Court to interpret Section 1.2(b) to require per capita voting. The Court of Chancery interpreted Section 1.2(c) to allocate equal voting power among the three Key Holders regardless of their respective share ownership – *i.e.* per capita voting. (A66.) The per capita voting required by these interpretations of the Voting Agreement is not authorized by Westech's Certificate of Incorporation. 8 *Del. C.* § 212(a); A861:20-25; B1317-1346. As a result, the Court should reverse the Court of Chancery (with respect to its interpretation of Section 1.2(c)) and find that per capita voting in the Voting Agreement violates Section 212(a) of the DGCL.

That this per capita voting occurs in the first step of a two-step voting process does not change the validity of the analysis for two reasons. First, Section 212 is not limited to elections where all stockholders are entitled to vote, but rather applies whenever stockholders vote or act by written consent. 8 *Del C.* § 212. The first step of the election process set forth in the Voting Agreement involves *voting*, albeit by a limited subset of Westech stockholders. (A540.) The only way to elect

directors under Delaware law is to vote at an annual meeting or to act by written consent. 8 *Del C.* § 211(b). The Voting Agreement's use of the word "elect" in Section 1.2(c) confirms that Section 212 applies to both sets of *votes* contemplated by the Voting Agreement. Second, even if the first step did not involve voting, the right to nominate is inherent in the right to vote and therefore subject to Section 212's rigorous standards. *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 311 (Del. Ch. 2002). Since Westech's Certificate of Incorporation does not authorize per capita voting, the Voting Agreement cannot permit per capita voting in either step of the voting process.

3. Section 218(c) of the DGCL Cannot Excuse Compliance with Section 212(a).

The Court of Chancery erred by finding that Section 218(c) of the DGCL permits the Voting Agreement to serve as a "contractual overlay" that authorizes per capita voting without the requisite authorizing provision in the Certificate of Incorporation. Although Section 218(c) of the DGCL gives Delaware stockholders broad leeway to enter into voting agreements, it does not excuse compliance with Section 212(a) of the DGCL.[16] 8 *Del. C.* 212(a); 8 *Del. C.* § 218(c). Nothing in

[16] To the extent the Court of Chancery's decision is based on some perceived tension between Sections 212 and 218, the trial court must construe these provisions so as to avoid any such conflict. (Ex. B1069:20-22 ("I note that there is something of a tension between Section 212 and Section 218.")); *see also Newtowne Village Service Corp. v. Newtowne Road Dev. Co.,* 772 A.2d

Section 218(c) abrogates the restrictions set forth in Section 212(a) of the DGCL (or any other statutory provision). *Id.* Section 218(d) clarifies this point by expressly mandating compliance with all other statutory requirements. 8 *Del. C.* § 218(d) (permitting any voting agreement not "otherwise" illegal). Allowing per capita voting in either step of Westech's voting process, without the requisite charter provision, violates Section 212(a) of the DGCL and is "otherwise" illegal under Section 218(d).

Relying on Section 218(c) and *Klaassen v. Allegro Dev. Corp.*, the Court of Chancery found that the Voting Agreement permissibly acts as a "contractual overlay" on top of a one-share, one vote scheme. (A67.) While a voting agreement may act as a "contractual overlay that constrains the manner in which parties to that agreement" may vote, *Klaassen* does not address whether a voting agreement may authorize per capita voting where a charter provision does not. 2013 WL 5739680, at *22 (Del. Ch. Oct. 11, 2013). The stockholders' agreement at issue in *Klaassen* involved the election of three directorships – one filled by the company's chief executive officer ("CEO") and two designated by the CEO and

---

172, 175-76 (Del. 2001) (noting that Delaware courts should avoid construing a statutory provision in a manner that would place it in conflict with another provision of the same statute). Only Gorman's interpretation of the Voting Agreement removes the conflict between these two statutory provisions identified by the trial court.

approved by a class of preferred stockholders voting in the traditional manner. *Id.* at *2. Each of the *Klaassen* directors is designated by a single individual, the CEO, and per capita voting is not implicated. *Id.* Unlike *Klaassen*, the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement requires stockholders with disparate holdings to vote together on a per capita basis to elect the Key Holder Designees. (A66-A67.) This voting scheme does not "overlay" a permissible one-share, one-vote system as in *Klaassen*; rather it replaces it – and does so without the requisite authorizing provision in the Certificate of Incorporation in violation of Section 212(a). Thus, because the parties to the Voting Agreement failed to include a Section 212(a) provision in the Company's Certificate of Incorporation, the Court of Chancery erred by declining to find that Section 212(a) renders any per capita scheme in the Voting Agreement illegal. The Court should, therefore, reverse the trial court's interpretation of Section 1.2(c) of the Voting Agreement.

CONCLUSION

Mr. Gorman respectfully requests that the Court affirm the Court of Chancery's interpretation of Section 1.2(b), reverse the Court of Chancery's interpretation of Section 1.2(c) and determine that the Westech board consists of Salamone, Ford, Gorman, Olsen, Sanditen, Williamson, and Woodby.

OF COUNSEL:

Michael J.W. Rennock
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036

Daniel H. Byrne
Dale Roberts
FRITZ, BYRNE, HEAD & HARRISON, PLLC
98 San Jacinto Blvd., Suite 2000
Austin, Texas 78701

BAYARD, P.A.

/s/ Stephen B. Brauerman
Neil B. Glassman (No. 2087)
Stephen B. Brauerman (No. 4952)
Vanessa R. Tiradentes (No. 5398)
Sara E. Bussiere (No. 5725)
222 Delaware Avenue, Suite 900
P.O. Box 25130
Wilmington, Delaware 19899
(302) 655-5000

Attorneys for Plaintiff Below – Appellee John J. Gorman, IV

Dated: August 27, 2014