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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| THE ORCHARD ENTERPRISES, INC., Respondent Below, Appellant, v. MERLIN PARTNERS LP Petitioner Below, Appellee. -and- THE ORCHARD ENTERPRISES, INC., Respondent Below, Appellant, v. MATTHEW GIFFUNI, CHRISTOPHER YEAGLEY and QUADRE INVESTMENTS LP, Petitioners Below, Appellees. | § | No. 470, 2012 |
| IN RE: APPRAISAL OF THE ORCHARD ENTERPRISES, INC. | § | On Appeal From The Court of Chancery of the State of Delaware, Consolidated C.A. No. 5713-CS |

**REPLY BRIEF OF APPELLANT THE ORCHARD ENTERPRISES, INC.**

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Appellant The Orchard Enterprises, Inc. ("Orchard") respectfully submits this Reply to Appellees' Answering Brief.

## I. PRELIMINARY STATEMENT

This appeal concerns a single issue: whether the Appraisal statute, 8 *Del. C.* § 262, as construed by this Court, precludes the Court of Chancery from taking into account the value of the $25 million change of control preference held by Orchard's preferred shareholders, when it is undisputed that the preference was the single most important factor impacting the value of common shares prior to the merger at issue. The answer is as plain as the language of § 262(h):

> Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.

The Court of Chancery's task in an appraisal, then, is to assess the fair value of the common shares, including all elements of value that exist exclusive of the accomplishment or expectation of the merger, and taking into account all relevant factors. The preference was inarguably a valuable right that the preferred stockholders had pre-merger. It inarguably was an obligation of the company to its preferred shareholders. The preference overhung the common shares and there was no way for the common to receive any greater value than the low trading prices in a sporadic market. Thus the change of control preference was an "element of value" in determining the value of the

common shares, albeit a negative element of value with respect to those shares. This element of value existed before "the accomplishment or expectation of the merger." The legislature did not leave the Court of Chancery the option of disregarding the preference.

Yet that is what the court below did, acknowledging that "Orchard's premise may be grounded in market realities," but that "it runs into the problem that the appraisal remedy exists to a large extent to address the potential that majority power such as Dimensional wielded will be abused at the expense of the minority."[1] Orchard respectfully submits that the words of the statute are the best reflection of the General Assembly's intention -- and that there was *no* evidence adduced at trial to suggest that Dimensional was wielding majority power or abusing the minority in this merger.

The Appellees would have this Court create a bright-line rule, untethered from the statutory mandate, that Orchard's liability to the preferred shareholders cannot be considered because it is embodied in a contingent preference and the preference has not yet been "triggered." Accounting for the preference, in Appellees' view, is prohibited because it is a "speculative element of value" and would violate the requirement to value the shares in the company as a "going concern." The Appellees thereby misapprehend Orchard's position. The preference was a contractual liability that had a constant, pre-merger, measurable and tangible effect on the value of appellees'

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[1] Memorandum Opinion of the Court of Chancery, July 18, 2012, at 17 (attached to Orchard's Opening Brief as Exhibit B, and cited as "Op.")

common shares. As the record on appeal plainly reflects, Orchard presented ample and uncontradicted evidence of those effects, including the depressed stock price prior to the merger, the response to the "go shop" provision and the "Bidder B" offer touted below by Appellees, all of which fully accounted for the $25 million liquidation preference.

Like all of the shares of common stock, including the shares held by Dimensional and the other preferred shareholders, the Appellees' shares were burdened by the liquidation preference. The common shareholders knew that when they purchased the shares. Their purchase prices were lower because of the liquidation preference. The task of the court below was to appraise the fair value of the common shares taking all relevant factors into account, including this factor. The task was not to value the company excluding any liabilities that had not already been "triggered."

Orchard recognizes that the court below may have been trying to streamline and simplify the appraisal process when it decided to value the company solely based on its discounted cash flow analysis while giving no weight to the company's obligation under the preference. But as the Court has observed, "[d]etermining 'fair value' through 'all relevant factors' may be an imperfect process, but the General Assembly has determined it to be an appropriately fair process." *Golden Telecom, Inc. v. Global GT LP*, 11 A.3d 214, 219 (Del. 2010). Orchard respectfully requests the Court to reverse and remand this case, so that an appropriately fair appraisal process can be had.

## II. ARGUMENT[2]

### A. The *De Novo* Standard Applies To This Appeal.

Appellees acknowledge that the facts on this appeal are undisputed. Br. at 5. The preference was set forth in the Certificate of Designations and the preference was amended prior to consummation of the Merger. There is no dispute regarding the language of the liquidation preference. There is no dispute that the preferreds' preference affected the market value of the common shares and that the preferreds would receive the full preference amount before the common received anything (after all, the company was worth well more than $25 million and the preferred stockholders controlled the timing of the preference if they had chosen to use it).

Nonetheless, Appellees attempt to recast the appeal as concerning "a dubious claim that the Chancellor did not give sufficient weight to [the] liquidation preference," arguing that therefore the abuse of discretion standard should apply. Br. at 10. But the Court of Chancery explicitly did not "weigh evidence" to determine the weight to be given the liquidation preference in determining the value of the common shares. To the contrary, the court below concluded that *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989), "categorically excludes" consideration of the preference, either because payment of the preference was "speculative" or because valuing

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[2] Orchard fails to see how footnote 1 to Appellees' Answering Brief ("Br."), a characterization of the organization of Orchard's opening brief, assists the Court in any way. Orchard does not find the footnote worthy of response. The Court may judge for itself whether Orchard's brief is unintelligible, incoherent or fails to comply with Rule 14.

the liquidation preference would be inconsistent with valuing the Company on a "going concern" basis. Op. at 16, 18.

The exclusion for "speculative elements" and the requirement that the Company be appraised as a "going concern" both "emerge from the statutory scheme." *Rapid-American Corp. v. Harris*, 603 A.2d 796, 805 (Del. 1992). In *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), this Court determined that Section 262's requirement that the Court determine the "'fair' value [of the Company] based upon 'all relevant factors'" dictated the exclusion of "speculative elements" from the appraisal. 457 A.2d at 713. In *Cavalier Oil* the Court concluded that the statute "require[d] that the company be viewed as a 'going concern.'" 564 A.2d at 1145.

In rendering its decision here, the Court of Chancery was explicitly attempting to extend these statutory principles to the facts of this case. That decision "implicates the statutory construction of DGCL § 262." *Golden Telecom,* 11 A.3d at 216-17. The Court therefore reviews that determination *de novo*. *Id.*

### B. There Is No Requirement That A Liquidation Preference Must Be Triggered In Order To Be Accounted For In A § 262 Proceeding.

Appellees' argument centers on the mistaken notion that the liquidation preference is automatically excluded from the appraisal valuation unless that preference has been triggered and is payable at a set date and time. Under Delaware law, however, the question is not whether an obligation of a company has a "trigger" date set on the day of the merger; the statutorily-mandated inquiry is whether the obligation is an economic reality of the company and an element of value in determining the value of the common shares. Doing so does not mean, as the Appellees contend, that the shares are being valued based on a liquidation valuation of the company. It merely means that value will be determined based on the day-to-day valuation consequences attendant upon the *existence* of the preference, just as the value is determined based on the going concern impacts of all of the company's other obligations.

#### 1. The Existence Of The As Yet Unpaid Preference Is Highly Relevant To The "Going Concern" Analysis Of The Company.

Appellees contend that, because Orchard is to be valued as a "going concern," a Change of Control event under the certificate of designations will by definition never occur, and therefore "the liquidation preference would *never* be paid." Br. at 13. Thus, Appellees conclude, the liquidation preference cannot be considered in the appraisal analysis. This analysis ignores the economic consequences attendant to the mere *existence* of the preference at

issue here. The preference governed any change of control as well as a liquidation. A21-c.

The preference indisputably was the single most important factor in the value of the common shares before the merger. The market value of the shares fully accounted for the $25 million preference right. A797 at 283:24-284:23, A779 at 211:8-23. The preferred stockholders' preference overhung the common stock and there was no way for the common to receive any greater value than the low trading prices in a sporadic market. A784 at 229:3-16; A779 at 210:15-19. The share prices in the trading market reflected the preferreds' $25 million overhang: the shares of Orchard never traded above $2.00 in the year preceding the Merger. A304. Nobody would make a credible bid for Orchard, despite two extensive solicitation processes, in significant part because the liquidation preference had to be paid prior to completing a transaction. A378; A784-785 at 230:5-233:4. The Special Committee and its advisors also valued the preferred stock at the $25 million preference value. A306-307 at 2 § 8; A794-795 at 272:19-274:6. The company's 10-K reflected the full amount of the preference on the face of its balance sheet. A168. Even the "Bidder B" offer, relied on by Appellees' expert, accorded a $25 million value to the preferred stock. A779-780 at 212:5-214:4; A529-533.

These were actual, specific, concrete impacts on the value of Appellees' shares on every single day they owned those shares before the merger. The preference was an element of value that did not arise from the accomplishment or expectation of the merger. The very existence of the preference burdened the common stock, and would have

continued to burden the common stock had the appellees retained their shares. The Court of Chancery recognized that this premise was "grounded in market realities." Op. at 17. The statute required the court to consider the market realities bearing on the price of the common shares.

Nonetheless Appellees contend that "market realities" are irrelevant, focusing their argument almost exclusively on the stock price. In Appellees' view the stock price should be ignored entirely because, they claim, "a stock price is not representative of a stockholder's pro rata share in the Company on a going-concern basis." Br. at 13. The statute says otherwise, of course -- "*all* relevant factors" "*shall*" be taken into account -- and the very authorities the Appellees rely upon consider pre-merger announcement per share price in valuing the shares. Certainly a court may not premise its appraisal on "exclusive reliance upon market value,"[3] but it can and *must* examine the stock price as one indicia of the value of the shares. In *Weinberger*, this Court held:

> Thus, *market value*, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of the merger and which throw any light on *future prospects* of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholder's interest, but *must be considered* by the agency fixing the value.

457 A.2d at 713(emphasis in original) (*quoting Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950)). *Cede & Co. v. Technicolor,*

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[3] *Rapid-American Corp.*, 603 A.2d at 806.

*Inc.*, 684 A.2d 289 (Del. 1996), relied on by Appellees for this very point, *confirmed* the admissibility of evidence of the "stock market price" of the company's shares, observing that the petitioners' objection was relevant only to "the weight" to be accorded that evidence. *Id.* at 301.

*Cavalier Oil* also supports this notion. In *Cavalier Oil*, the Court held: "***When there is no objective market data available***, the appraisal process is not intended to reconstruct a *pro forma* sale but to assume that the shareholder was willing to maintain his investment position." 564 A.2d at 1145 (emphasis added). Curiously, the Appellees omit the italicized clause when quoting this passage to the Court. Br. at 14.

Orchard does not contend, as the Appellees claim, that "the value of the Petitioners' shares should be based upon their market value." Br. at 13. To the contrary, Orchard asserts that all relevant factors, *including* "market realities" which includes the depressed stock price and other factors mentioned above, are elements of the value of the common shares that must be considered when appraising "the fair value of the shares." *Cf.* 8 *Del. C.* § 262(h). The undisputed evidence was that the preferred stock's preference largely dictated the market value of the common shares prior to the merger. Accounting for the "liquidation preference," then, is not equivalent to valuing Orchard or its common shares on a liquidation basis.

The preferred shareholder's preference not only had a real effect on the value of Appellees' shares throughout the period prior to the merger and without regard to whether a Change of Control event was

foreseeable, but it was the predominant factor in determining the value of the common shares. The preference recognized a $25,000,000 debt the company owed to the preferred shareholders. No value could come out of the company to anybody under any scenario without the preferred shareholders first receiving the return of their seed money. The "Bidder B" analysis relied on by Appellees' expert recognized as much, according full value to the preference in offering a price for the common stock. Section 262 does not permit the Court to ignore the actual factors determining the value of the common shares of Orchard as it actually operated as a going concern. Nor is there any reason that the Delaware courts would desire to depart from the legislative mandate in this particular. Ignoring the $25 million debt represented by the preference means ignoring the key fact in the real-life value of the common shares of the company when it was operating pre-merger as a going concern.

**2. The Preference Is Not A "Speculative Element Of Value."**

The court below concluded that the change of control preference was too "speculative" to include in the valuation because it was not triggered by the merger. But the preference is a contractual obligation of Orchard, fixed and specific in amount. Other obligations of the company were considered in the valuation. Why not this one? The court below relied on two other Court of Chancery decisions in explaining its determination that the litigation preference is too speculative for no reason other than that actual payment has not yet been triggered. But this Court has instructed that this is supposed to be a "very narrow exception to the appraisal

process, designed to eliminate use of *pro forma* data and projections of a speculative variety" that requires that the Court not account only for "speculative elements of value that may arise from the 'accomplishment or expectation' of the merger." *Weinberger*, 457 A.2d at 713; *see also Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357, 362 (Del. 1997) ("While speculative elements of value should be excluded from the valuation calculus, the purpose of such restriction is to eliminate '*pro forma* data'"). Except for this narrowly constrained exception, the Court has an "obligation to consider 'all relevant factors' in the valuation process." *Weinberger*, 457 A.2d at 713.

The evidence Orchard offered below, which was not disputed, made clear that the liquidation preference was embodied in the Certificate of Designations, was disclosed in the Company's SEC filings and was considered an integral element of the Company's value by potential suitors. The liquidation preference therefore is not "speculative." It was a concrete and significant factor affecting the Company's value, and the court's failure to consider that preference in appraising Appellees' shares granted Appellees a windfall, freeing their common stock from the effects of the $25 million debt that burdened the stock while Appellees held it.

Appellees respond by emphasizing the two Court of Chancery decisions emphasized by the court below. Appellees rely on *In re Appraisal of Metromedia Int'l Group, Inc.*, 971 A.2d 893 (Del. Ch. 2009), for the proposition that liquidation preferences are speculative *per se* if they have not been triggered. Br. at 12. But

as noted in the Opening Brief, the Court of Chancery did not announce a per se rule in *Metromedia* and in fact did not deem the liquidation preference at issue in *Metromedia* "speculative" merely because it had not been triggered. Rather, the preference was "speculative" in the context of the preferred stockholder who sought the benefit of the preference in valuing its shares because that private investor had "various exit strategies . . . that would not require redemption of the preferred shares." 971 A.2d at 905. Unlike the preferred shareholder in *Metromedia*, there was no exit strategy available to the common shareholders here to avoid the impact of the preference.[4]

Appellees also seek support for their bright-line test requiring a trigger event before giving any weight to a liquidation preference in *Shiftan v. Morgan Joseph Holdings, Inc.*, 2012 WL 120196 (Del. Ch.). The Appellees argue that *Shiftan* weighed the preference because the preferred stockholders had "a put right on a specific date in the future." Br. at 19. Actually the trial court in *Shiftan* accounted for the preference at issue there because it was a "specific, non-speculative, contractual right that was inarguably an important economic factor bearing on the value of the [shares] as of the Merger date that any reasonable investor or market participant would have taken into account." 2012 WL 120196, at *9. That is exactly the case here.

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[4] While addressing this point, the Appellees again evade Orchard's actual argument, claiming that Orchard contends that "the ruling in *Metromedia* had something to do with available exit strategies to common stockholders that are not available to the Company's common stockholders here." Br. at 18.

Certainly, however, neither *Metromedia* nor *Shiftan* require "a put right on a certain day" to account for the most significant obligation of a corporation when valuing its common shares. To the extent they could be read to impose such a bright-line test requiring the court to ignore the most relevant factor in the pre-merger value of the common stock, they are contrary to the statute and to this Court's teachings in *Cavalier Oil, Weinberger, Golden Telecom* and elsewhere.

The Appellees also contend that the preference can be ignored because elements of value "not 'known or susceptible of proof as of the date of the merger' . . . may not be considered in an appraisal proceeding." Br. at 12 (quoting *Weinberger*, 457 A.2d at 713). Appellees argue that because the liquidation preference was not certain to be paid on a particular day at the time of the merger, it was not "known or susceptible of proof." Once again they seek to erect a hurdle that is neither logical nor found in the statute. The statute does not require a "trigger" or a "trigger date." The liquidation preference was "known" and "susceptible of proof" at the time of the merger. The terms of the preference were set forth expressly in the Certificate of Designations. The amount of the preference was specific and fixed, $24,992,980 to be exact. This amount and preference are not only susceptible of proof, but were proved. *See* A21-a through A21-c; A168; A783-A784; A797 at 282:7-12; A779-780 at 212:5-214:4.

### C. **<u>Assigning Value To The Contractual Preference Is Not Equivalent To Awarding A Control Premium.</u>**

Appellees contend that *Cavalier Oil* precludes consideration of the liquidation preference, asserting that such consideration is tantamount to "application of a discount at the shareholder level." Br. at 20. It is not. As Orchard explained in its Opening Brief, it is not seeking a share-specific discount of the sort prohibited by *Cavalier Oil*. Rather, it is merely seeking to have *all* of the corporation's obligations, including its obligations to *all* of the other stockholders, fairly accounted for when valuing *all* of the common shares.

Seeking that fundamental fairness is not, as Appellees would have it, "an effort to obtain an unwarranted premium to the contractual rights of the preferred stockholders." Br. at 21. It is the opposite: it is an effort to stop the Appellees from obtaining a windfall. That is the issue on this appeal. In *Cavalier Oil* the question was whether the preferreds would receive a windfall from the appraisal proceeding. 564 A.2d at 1146. Here the concern is with the common. Like someone who has a winning powerball ticket blow into his lap, a dispensation from the single most relevant element depressing the value of their common shares has blown into the laps of the Appellees through the artifice of this appraisal proceeding. And there can be no dispute this is a windfall to the Appellees -- it is undisputed that Dimensional received the liquidation preference in exchange for an investment of $25,000,000 in Orchard over the course of six years. A782-783 at 223:17-225:1.

Appellees' shares were burdened by the existence of the preference obligation, but the appraisal effectively relieves them from the impact on their shares of the company's obligation to pay the first $25 million realized from any Change in Control event to the preferred shareholders. This burden manifested itself in the stock price of Appellees' shares, which were publicly traded on the NASDAQ and closed at $1.66 per share on the last trading day before announcement of the merger. A435.

In response, Appellees advance the circular argument that no windfall results from the Court of Chancery's determination because they "were appropriately awarded the value they would have received had they been allowed to maintain their interest in the going concern value of their company." Br. at 24-25. But this is precisely what the decision below does not do. The Appellees never would have, or could have, been relieved of the $25 million overhang. Appellees therefore were not "fully compensate[d] . . . for whatever their loss may be;" they were *overcompensated* below for the loss of their shares. *Cf. Weinberger*, 457 A.2d at 714.

The Appellees are entitled only to the "fair value" of their shares. While it certainly is correct that "the appraisal statute contains certain risks for the minority stockholders,"[5] that statute does not authorize the Court of Chancery or any other court to tilt the scales in favor of the petitioning minority stockholders. In an appraisal, "neither party is entitled to any preference or

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[5] *Gilliland v. Motorola, Inc.*, 873 A.2d 305, 312 (Del. Ch. 2005).

presumption." *Gilbert v. MPM Enters., Inc.*, 709 A.2d 663, 667 (Del. Ch. 2009). Appellees' suggestion that a higher "going concern" value somehow represents an "exchange" for the risks attendant to their voluntary decision to challenge the merger in an appraisal proceeding is meritless.[6]

Nor should this Court credit Appellees' apparent argument that the market price is irrelevant to the determination of whether they have received a windfall by virtue of decision below. The authority offered in support does not help Appellees. For instance, the court in *In re Emerging Communications, Inc. Shareholders Litigation*, 2004 WL 1305745 (Del. Ch.), found that the stock price was not entitled to great weight as evidence of the fair value of the petitioners' shares because "the record undermine[d] any assertion that ECM's common stock was traded in an efficient market." *Id.* at *23. That finding was based on expert and lay testimony, including, among other things, that "the market never had the benefit of any disclosed earnings or projections of future results." *Id.* Here, by contrast, there was no evidence of an "inefficient market." To the contrary, the liquidation preference overhanging Appellees' shares was fully disclosed in the Company's SEC filings and therefore the market is presumed to have knowledge of the obligation. *Cf. Next Level Commc'ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 851 n.90 (Del. Ch. 2003) (noting that

[6] Appellees offer a non-sequitur argument that "stock preferences must be clearly stated and are 'strictly construed.'" Br. at 11. There is no dispute here as to the contents of the Certificate of Designations, which "clearly stated" the terms of the liquidation preference. A21-a. Nor is this case dependent upon "construction" of those terms in a broad way.

publicly disclosed information "presumably has been incorporated into the current stock price" of the company). The stock price reflected the impact of that arrangement and demonstrates the extent of Appellees' windfall. In *Harris v. Rapid-American Corp.*, 1992 WL 69614 (Del. Ch.), the court adjusted its findings to comply with this Court's directive that the appraisal include a "control premium." *Id.* at *1; *see also Rapid-American*, 603 A.2d at 807. Neither of those decisions suggested that market value is irrelevant to determining the "going concern" value of those shares.

The Appellees also contend that accounting for the preference somehow is akin to taking a minority discount. Br. at 20. It is not. In *Cavalier Oil*, the Court cautioned against "[d]iscounting individual share holdings" in order to avoid "speculation on the various factors which may dictate the marketability of minority shareholdings." 564 A.2d at 1146. The liquidation preference here involves no such "speculation;" there is no dispute regarding its existence. The liquidation preference is a contractual obligation of the Company, and the amount and terms of that obligation are fixed by the Certificate of Designations.

*Cavalier Oil* also expressed concern regarding the situation whereby a majority shareholder could "impose[] a penalty for lack of control" upon a dissenting shareholder and, thereby, "reap a windfall from the appraisal process." 564 A.2d at 1146. Those concerns are not present here. There is no claim that the liquidation preference was improvidently or incorrectly granted. Nor could there be, as such preferences are expressly permitted pursuant to 8 *Del. C.* § 151(d).

Indeed, the merger agreement included "majority of the minority" and "go shop" provisions to provide additional protection against any abuse of power. A372.[7]

Appellees engage in a nearly page-long diversion addressing Orchard's discussion of the Court's opinion in *Tri-Continental Corp. v. Battye*, 74 A.2d 71 (Del. 1950), claiming that Orchard presents a "new" argument that "*Tri-Continental* supports the use of a discount to devalue the Company's common stock." Br. at 22. But Orchard did not make that argument, and Appellees provide no page citation for it. Instead Orchard relied on *Tri-Continental* as an example of another instance when "the Court specifically considered the market value of the stock." Opening Brief at 18. There can be no question that, in *Tri-Continental*, the Court considered the market value.[8]

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[7] The Court of Chancery's reference to the "majority power Dimensional wielded," Op. at 7, seemingly fails to consider these protective measures.

[8] Appellees offer the self-fulfilling contention that this "new" argument -- which *they* have invented -- violates Rule 8. Br. at 22. Of course Rule 8 cannot be violated by an argument Orchard did not make.

### D. **Failing To Account For The Liquidation Preference Is Contrary To Generally Accepted Valuation Techniques.**

The Court of Chancery's failure to account for the preference is contrary to generally accepted valuation techniques. The financial community considers the existence of such contractual rights highly relevant to its analysis. Opening Brief at 29-31. Appellees do not respond to the substance of this argument. Instead, they assert that the court gave "appropriate weight" to the Company's SEC filings, which, they contend show only a $7 million liability, "not the $24.99 million that Respondent advocates." Br. at 27 (emphasis in original).

The testimony regarding Orchard's SEC filings is clear. The full amount of the liquidation preference ($24.993 million) is disclosed on the left side of the page because that "is required by the SEC and by GAAP . . . to be shown on the face of the financial, not in a footnote in the back, for the pure fact that [it] is very important to the common shareholder." A795 at 275:15-20. The approximately $7 million amounts on the right side of the page represent the "face value of the preferred stock." A795 at 275:8-11. The fact that the SEC required Orchard to disclose the preference on the face of its disclosures underscores the importance to the actual value of the publicly traded common shares.

### E. **Private Capital Rightly Expects Its Investment Protections To Be Accounted For When Shareholders Seek Appraisal.**

The use of liquidation preferences similar to that at issue here is commonplace in the venture capital community. Refusing to account for such protections in the appraisal process unless they already have been triggered could have deleterious effects on private investment in Delaware corporations. Appellees dismiss the authorities offered by Orchard on this point as "generic," without recognizing that an affirmance of the ruling below would not be limited to the construct-ion of the specific contractual language used here to grant the $25 million preference. Requiring a "trigger" in preferences for preferred shares could upend a broad range of preferred stock investment obligations. This appeal presents an important question concerning the treatment under the appraisal statute of preferences securing preferred shareholder investments. The investment community is looking to this Court to ensure that its preference rights are at least taken into consideration when common shareholders request appraisal.

## CONCLUSION

For the foregoing reasons, Appellant The Orchard Enterprises, Inc. respectfully requests that the Court reverse the judgment of the Court of Chancery in this matter, and remand this action to permit the Court of Chancery to account for the liquidation preference.

ASHBY & GEDDES

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**CERTIFICATE OF SERVICE**

I, Philip Trainer, Jr., do hereby certify that a copy of the foregoing **REPLY BRIEF OF APPELLANT THE ORCHARD ENTERPRISES, INC.** was served this 20th day of November, 2012 upon the following counsel via LexisNexis File & Serve:

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