IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LEHMAN BROTHERS HOLDINGS INC. and T. ROWE PRICE HIGH YIELD FUND, INC., *et al*.,	)	
Plaintiffs,	)	
	)	CONSOLIDATED
v.	)	*Civil Action No. 8321-VCG*
SPANISH BROADCASTING SYSTEM, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: December 19, 2013
Date Decided: February 25, 2014

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GLASSCOCK, Vice Chancellor

In this case, the Plaintiffs, equity holders in the Defendant company, invested in preferred stock that accrued dividends daily, which dividends were payable quarterly as and if declared by the company's board of directors. If the dividend was not paid for four consecutive quarters, the Certificate of Designation in connection with the stock provided that a "Voting Rights Triggering Event" (a "VRTE") had occurred, conferring upon the Plaintiffs certain rights, including a right to fill seats on the company board, and to constrain the company from acquiring certain additional debt during the period the dividend arrearage continued. In 2009, the company began to fail to make dividend payments, and—under the Plaintiffs' reading of the Certificate of Designation—a VRTE occurred no later than July 2010. Nonetheless, the Plaintiffs did not assert their rights under the Certificate of Designation at that time. Moreover, when the company's board determined that it needed additional capital and acquired debt in separate, publically-announced transactions in May 2011 and January 2012, the Plaintiffs stood mute. Finally, on February 14, 2013, one of the Plaintiffs filed this suit, contending that a VRTE had occurred in 2010, and therefore the debt transactions of 2011 and 2012 were in breach of its contract rights under the Certificate of Designation. The Plaintiffs seek damages as a result of the breach.

The Defendant contends that the Plaintiffs misread the Certificate of Designation, and that no VRTE occurred in 2010. I need not reach that issue,

however, because I find that, assuming that a VRTE did occur, the Plaintiffs, with at least imputed knowledge of both that fact and that the board nonetheless intended to incur additional debt, made no objection to that action, and instead stood by and allowed the breach to occur. Under the particular facts set out below, I find that the Plaintiffs acquiesced to the actions of the company during the time of any VRTE resulting from the failure of the company to pay dividends through July 2010, and the Plaintiffs are therefore not entitled to the relief they seek.

I. FACTS

A. The Preferred Stock Offerings

Defendant Spanish Broadcasting System, Inc. ("SBS," or the "Company") is a Delaware corporation that owns and operates Spanish-language radio and television stations in the United States, generating most of its revenue from the sale of advertising airtime on its twenty-one radio stations and through its television group.[1] Though SBS "is well-positioned to benefit from favorable market demographics," the Company experienced net losses in 2008 and 2009, and generated only "modest" net income of $15 million in 2010 and $23.7 million in 2011.[2]

SBS currently has two classes of common stock and two classes of preferred stock. SBS initiated a public offering of its first class of preferred stock—Series A

[1] Lehman Compl. ¶ 9.
[2] *Id.* at ¶¶ 9, 11.

Preferred Stock ("Series A")—in 2003, as a way of financing its acquisition of radio station KXOL-FM without incurring additional debt.[3] At that time, SBS, represented by legal counsel Kaye Scholer LLP and financial advisor Sterling Advisors LLC, worked with underwriters Merrill Lynch and Lehman Brothers Inc. ("LBI"), a former affiliate of Plaintiff Lehman Brothers Holdings Inc. ("Lehman"), to organize the Series A offering. The offering was structured such that Series A preferred stock would initially be placed with qualified institutional buyers, and then pursuant to a Registration Rights Agreement, Series A shares would eventually be exchanged for shares of Series B Preferred Stock ("Series B") in a registered offering, with Series B trading in the secondary market. Though an equity offering, SBS and its underwriters approached the offering as a debt alternative, "described in debt-like terms," marketed to SBS's existing bondholders and providing what essentially functioned as a maturation date on which date the preferred stockholders could require SBS to repurchase the preferred shares.[4]

The terms of the Series A offering were initially set out in drafts of the offering memorandum, created by LBI and modified by SBS's legal counsel, and ultimately delineated in the Series A Certificate of Designation. The SBS board approved the filing of the Series A and Series B Certificates of Designation on October 15, 2003, and those Certificates were authorized by resolution via a

[3] Lehman's Mem. of Law in Support of its Mot. for Summ. J. at 5.
[4] *Id.* at 7.

unanimous written consent dated October 28, 2003.[5] On October 30, 2003, LBI, Merrill Lynch, and Deutsche Bank, acting as underwriters, acquired 75,000 shares of Series A to place with qualified institutional buyers, including with Plaintiff T. Rowe Price. The underwriters did not retain any of the Series A shares.

In February 2004, SBS filed a registration statement with the Securities and Exchange Commission in connection with its plan to permit investors to exchange shares of Series A for freely-transferable shares of Series B. The T. Rowe Price funds that had acquired Series A shares fully participated in the conversion to Series B shares, and between 2004 and 2008, T. Rowe Price acquired additional shares of Series B on the secondary market totaling 13,200 shares, or roughly 14% of shares outstanding.[6] In addition, LBI acquired over 35,000 shares of Series B on the secondary market; as of September 2012, that stake represented roughly 38% of the 92,349 total shares of Series B outstanding.[7] In September 2008, LBI entered bankruptcy, and its shares of Series B were held by JP Morgan Chase as security for clearing and settlement services. In March 2010, Plaintiff Lehman became subrogated to JP Morgan's rights in the Series B shares, and in March 2012, Lehman emerged from bankruptcy.[8]

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[5] *Id.* at 10-11.
[6] T. Rowe Compl. ¶¶ 22-23.
[7] Lehman Compl. ¶ 16.
[8] Lehman's Mem. of Law in Support of its Mot. for Summ. J. at 12-13.

B. The Series B Certificate of Designation

According to the Certificate of Designation, Series B stockholders receive dividends "when, as and if declared by the Board of Directors," accruing at an annual rate of 10.75%.[9] These dividends accrue on a daily basis and are "payable quarterly in arrears on October 15, January 15, April 15, and July 15 of each year."[10]

This action involves a disagreement about the interpretation of a provision included in the Series B Certificate of Designation (the "Certificate"), which defines a Voting Rights Triggering Event: the VRTE. That provision states:

> If . . . at any time, dividends on the outstanding Series B Preferred Stock are in arrears and unpaid (and in the case of dividends payable after October 15, 2008, are not paid in cash) for four (4) consecutive quarterly dividend periods . . . the number of directors constituting the Board of Directors of the Company will be adjusted to permit the holders of the majority of the then outstanding Series A Preferred Stock and Series B Preferred Stock, voting together as one class, to elect two directors.[11]

Where a VRTE has occurred such that the preferred stockholders' voting rights have vested, "a proper officer of the Company shall, upon the written request of holders of record of 10% or more of the then-outstanding Series A Preferred Stock and Series B Preferred Stock . . . call a special meeting of holders" in order to fill

[9] Series B Cert. of Designation § 4(a).
[10] *Id.*
[11] *Id.* § 9(b); *see also id.* § 4(a) ("If at any time dividends on the Series B Preferred Stock are in arrears and unpaid for four consecutive quarterly dividend periods, holders of Series B Preferred Stock will be entitled to the voting rights specified in Section 9 of this Certificate of Designations.").

the two board seats due to the preferred stockholders upon the occurrence of a VRTE.[12] If, after 30 days of receipt of the written request, the Company fails to hold a special election, then preferred stockholders owning 10% or more of the outstanding shares may themselves "call such meeting at the expense of the Company."[13]

In addition, where a VRTE has occurred, SBS is prohibited from incurring certain additional debt, and if SBS wishes to incur new debt, it must either pay its arrearages or obtain a waiver. Specifically, the Certificate provides:

> The Company shall not, and shall not permit any of its Restricted Subsidiaries to, directly or indirectly, create, incur, issue, assume, guarantee or otherwise become directly or indirectly liable, contingently or otherwise, with respect to (collectively, "incur") any Indebtedness (including Acquired Debt) . . . [if] the Company's Debt to Cash Flow Ratio at the time of incurrence of such Indebtedness . . . would have been no greater than 7.0 to 1.0.
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> So long as no Voting Rights Triggering Event shall have occurred and be continuing or should be caused thereby, the provisions of the first paragraph of this Section 11(b) will not apply to the incurrence of any [Permitted Debt].[14]

While the Certificate does not expressly provide a mechanism whereby the Preferred Stockholders may waive the Company's limitations on incurring debt

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[12] *Id* § 9(d).
[13] *Id.*
[14] *Id* § 11(b); *see also id.* § 2 ("'Voting Rights Triggering Event' has the meaning set forth in Section 9(b)."); *id.* § 9(b)(v) ("[E]ach of the events described in clauses (i), (ii), (iii), (iv) and (v) being referred to herein as a 'Voting Rights Triggering Event'").

while a VRTE is in effect,[15] the Certificate states that "[w]ithout the consent of each Holder affected, an amendment or waiver of . . . this Certificate of Designations may not (with respect to any shares of Series B Preferred Stock held by a non-consenting Holder): . . . (iv) waive the consequences of any failure to pay dividends on the Series B Preferred Stock . . . ."[16]

The parties dispute the circumstances under which a VRTE comes into effect under the language of Section 9(b) cited above; that is, what constitutes dividends "in arrears and unpaid . . . for four (4) consecutive quarterly dividend periods." Specifically, the Plaintiffs argue that a VRTE occurs when an arrearage persists through four consecutive quarters, while SBS contends that a VRTE occurs only if the Company fails to make four consecutive quarterly dividend payments.

Section 9(b) also provides SBS with an option to "pay in kind" ("PIK"); accordingly, until October 15, 2008, SBS retained an option to pay dividends in cash or in additional preferred stock.[17] The PIK option thus provided SBS with the flexibility to pay dividends in additional stock if the Company faced liquidity problems, although such preferred stock issued in PIK payments would later accrue dividends themselves. In addition, the Certificate provides that after

[15] *But see id.* § 9(f) (permitting the Company to enter into a merger transaction or sell substantially all of its assets with the consent of a majority of the preferred stockholders).
[16] *Id.* § 9(h).
[17] *Id.* § 4(a).

October 15, 2008, the Series B shares are redeemable at SBS's option for a premium,[18] and that after October 15, 2013, holders of Series B shares may require SBS to repurchase their shares for $1000 per share in addition to all accumulated and unpaid dividends.[19] The latter right is limited by SBS's liquidity, and although on October 15, 2013, the Plaintiffs exercised the right to the maximum extent they could, of the $140 million worth of preferred shares outstanding, SBS redeemed only $2.5 million; as a result, both Plaintiffs still hold a position in the Company.[20]

C. SBS Suffers a Liquidity Crisis and Stops Paying Dividends

From the issuance of Series B in 2004 through April 2009, SBS paid the Series B stockholders quarterly dividends. SBS explains that during that period, "SBS chose to pay 12 dividends in cash as a result of the company's healthy financial position and the general state of the economy, and did not need to consider deferring any dividends at all."[21] In light of the financial crisis in 2008, however, SBS "embarked on a cash preservation program in response to declining financial conditions which, if allowed to continue, may have left [SBS] out of cash by the end of the year."[22] By the spring of 2009, SBS "had exhausted almost all available means of cash conservation, but was still not on track to maintain healthy

[18] *Id.* § 6. That right expired without being exercised. Oral Arg. Tr. 19:17.
[19] Series B Cert. of Designation § 7.
[20] Oral Arg. Tr. 20:3-16.
[21] Def.'s Op. Br. in Support of its Mot. for Summ. J. at 10.
[22] *Id.* at 12.

cash flows in the future."[23] As a result, on May 15, 2009, SBS publically announced:

> On May 12, 2009, our Board of Directors under management's recommendation determined that, based on, among other things, the current economic environment and future cash requirements, it would not be prudent to declare or pay the July 15, 2009 cash dividend of approximately $2.5 million.[24]

SBS made the decision to defer cash dividends despite its contention that "declaring and paying a cash dividend is in most circumstances better for the company than deferring the dividend, as the reputational damage to SBS resulting from deferral hurts its standing in the market and can both depress the price of its stock and make it harder for the company to secure financing."[25] Subsequently, SBS declared one dividend per year, payable on April 15 each year, and declined to pay dividends for the three quarters in between. Under SBS's reading of the Certificate, such a dividend payment practice does not trigger a VRTE. The Plaintiffs disagree. They now allege that in April or July 2010,[26] a VRTE occurred, since at that point dividends had been in arrears for four consecutive quarters; however, despite public announcements of SBS's intent to defer dividend payments, the Plaintiffs never voiced an objection, exercised rights available to

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[23] *Id.* at 14.
[24] Lehman's Mem. of L. in Support of its Mot. for Summ. J. at 8.
[25] Def.'s Op. Br. in Support of its Mot. for Summ. J. at 15.
[26] T. Rowe Price alleges that a VRTE occurred on April 15, 2010. T. Rowe Compl. ¶ 4. Lehman believes a VRTE occurred in July 2010. Lehman Compl. ¶ 1.

them upon the happening of a VRTE, or even informed SBS that they believed a VRTE had occurred, until they filed this lawsuit, almost three years later.[27] Notably, each Plaintiff held more than 10% of the outstanding preferred stock at the time the VRTE allegedly occurred; each, therefore, independently had the right to demand election of board members on behalf of the preferred stockholders. Nevertheless, neither made the demand to exercise that right as contemplated by the Certificate.

The Plaintiffs argue that four continuous quarters of dividend arrearages trigger a VRTE under Section 9(b), and that this was SBS's understanding as well, at least until SBS sought to escape its obligations under that Section in 2009. Specifically, the Plaintiffs point to the way in which SBS has altered its description of a VRTE in various disclosures: prior to March 2009, SBS "closely paraphrased" the language of Section 9(b), but in its March 31, 2009 Form 10-Q stated that "[u]nder the Series B preferred stock certificate of designations, failure to make four consecutive quarterly cash dividend payments will result in the right of the holders of the Series B preferred stock to elect two directors to the board."[28] Then, in 2012, in a prospectus for the issuance of new notes, SBS stated that a VRTE

[27] Def.'s Op. Br. in Support of its Mot. for Summ. J. at 17. SBS did receive a letter from Goodwin Procter on behalf of "holders of the 10-3/4% Series B Preferred Stock," *after* both debt incurrences, on February 14, 2012, stating an intent to "investigate and pursue their claims against the Company . . . for breaches of [the board's] fiduciary duties . . . ." Def.'s Op. Br. in Support of its Mot. for Summ. J. Ex. 54.

[28] Lehman's Mem. of L. in Support of its Mot. for Summ. J. Ex. 15 at 22.

would occur if SBS "fail[ed] to pay at least one of every four consecutive quarterly dividends on the Series B preferred stock in cash."[29] The Plaintiffs suggest that this change in describing a VRTE tracks how SBS has changed its own interpretation of Section 9(b).

On the other hand, SBS contends that it is the Plaintiffs who have recently manufactured their interpretation of Section 9(b). SBS points to communications between Lehman's investment banks, Torque Point Advisors and BlackRock, Inc., which indicate that Lehman was looking for "leverage" and "opportunities" that might arise if Lehman was "successful in arguing that there [had] been [a VRTE]."[30]

D. SBS Incurs Additional Debt

SBS contends that, "[s]ecure in the knowledge that no VRTE had occurred,"—having received from holders of Series B stock no request for a special meeting to fill director seats—"SBS conducted its business as usual after 2010."[31] Accordingly, on May 6, 2011, SBS publically announced that it planned to purchase a Houston, Texas television station by issuing an $8 million promissory note. Despite the purported existence of a VRTE under what the Plaintiffs contend is the clear, unambiguous language of Section 9(b), the Plaintiffs

[29] *Id.* Ex. 22 at 15.
[30] Def.'s Op. Br. in Support of its Mot. for Summ. J. Ex. 55.
[31] Def.'s Op. Br. in Support of its Mot. for Summ. J. at 17.

did not voice objections to the incurrence of debt at that time, and the transaction closed nearly three months later, on August 1, 2011. The Plaintiffs now contend, under their reading of the Certificate, that the 2011 debt incurrence constituted a breach of contract.

On January 27, 2012, SBS publically announced that it planned to issue senior secured notes, paying 12.5% on $275 million, in order to refinance existing debt that was coming due.[32] SBS contends that, had it failed to refinance, the Company would have become insolvent. The indenture agreement governing those notes contained a covenant "prohibiting [SBS] from making more than one out of every four quarterly dividend payments to holders of Series B Preferred Stock, unless certain debt leverage ratios are satisfied, in which case [SBS] can only make two out of every four quarterly dividends."[33] The notes offering closed on February 7, 2012, again without objection from the Plaintiffs, who now claim that this debt incurrence also breached the terms of the Certificate.

E. The Plaintiffs Determine a VRTE has Occurred

The Plaintiffs contend that a VRTE occurred in April or July 2010, the fourth quarter in which a dividend arrearage persisted. T. Rowe Price avers,

[32] In addition to the public announcement, representatives at Lehman had actual knowledge of the notes offering "a few weeks" before the announcement. *Id.* Ex. 4 at 199-201.
[33] Def.'s Op. Br. in Support of its Mot. for Summ. J. at 10.

however, that it "understood for the first time that a VRTE might have occurred" more than two years later, in November 2012.[34]

Lehman contends it was also unaware of any VRTE until late 2012. Lehman became subrogated to the rights of JP Morgan in LBI's Series B shares in March 2010.[35] A few months later those shares were returned to Lehman. Throughout 2012, "internally at [Lehman], it was believed that SBS had been continuing to exercise PIK rights,"[36] although the source of that misapprehension, if any, is not disclosed in the record. It was therefore not until November of that year that Lehman began investigating "SBS, its history, and its financial condition," and eventually concluded that a VRTE had been in effect since July 2010.

Since this lawsuit was initiated, all parties agree that a subsequent event has caused a VRTE to go into effect. Accordingly, this action will not determine the Plaintiffs' current rights with respect to their position as preferred stockholders, other than their entitlement to damages in connection with the debt incurred in August 2011 and February 2012.

[34] Mot. for Summ. J. of T. Rowe Price at 16.
[35] Lehman's Mem. of L. in Support of its Mot. for Summ. J. at 22.
[36] *Id.* at 23.

F. Procedural History

On February 14, 2013, Lehman filed its Verified Complaint in this Court seeking a declaratory judgment that a VRTE had occurred and damages for breach of contract. SBS subsequently moved to dismiss that action, and Lehman moved for partial summary judgment. I heard oral argument on those motions on May 20, 2013, and found that Section 9(b) was ambiguous on its face. Accordingly, I permitted SBS to convert its Motion to Dismiss into a Motion for Summary Judgment, and deferred the cross Motions for Summary Judgment pending further supplementation of the record.

Plaintiff T. Rowe Price then filed its Verified Complaint on June 17, 2013, seeking a declaration that a VRTE had occurred, and damages for breach of contract and breach of the implied covenant of good faith and fair dealing. I granted the Plaintiffs' Motion to Consolidate on July 3, 2013. Lehman filed an Amended Complaint on October 9, 2013, including an additional claim for breach of the implied covenant of good faith and fair dealing. At this juncture, Lehman, T. Rowe Price and SBS have all moved for summary judgment. SBS has also moved for judgment on the pleadings as to the Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing.

II. STANDARD OF REVIEW

The parties have filed cross Motions for Summary Judgment.[37] A motion for summary judgment will be granted where there exist no genuine issues of material fact and the moving party has demonstrated entitlement to judgment as a matter of law; thus, "[t]he moving party bears the initial burden and the Court must view the evidence in the light most favorable to the nonmoving party."[38] However, where the parties have cross moved and have not represented that an issue of material fact is in dispute, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[39]

III. ANALYSIS

Together, the Plaintiffs in this action have requested the following relief: a declaratory judgment determining that a VRTE was in effect in April or July 2010 and that the incurrence of debt on two separate occasions after that date breached the Certificate; contract damages arising from those breaches; and damages for breaching the implied covenant of good faith and fair dealing. SBS, in addition to disputing the Plaintiffs' interpretation of the Certificate provision at issue, argues

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[37] Defendant SBS has also separately moved for judgment on the pleadings as to Plaintiff T. Rowe Price's claim for breach of the implied covenant of good faith and fair dealing. Because that claim is subject to the same analysis under which I dismiss the Plaintiffs' other claims, I need not address that Motion for Judgment on the Pleadings separately.

[38] *Graven v. Lucero*, 2013 WL 6797566, at *2 (Del. Ch. Dec. 20, 2013).

[39] Ct. Ch. R. 56(h).

that the Plaintiffs' claims are barred by the doctrines of laches, acquiescence, ratification, and unclean hands.

Below, I address SBS's affirmative defenses of laches and acquiescence. Because I find that the Plaintiffs' claims for relief are barred by the doctrine of acquiescence, I need not address the substantive arguments the parties have raised regarding the interpretation of the contractual provision in dispute, which I previously found to be ambiguous. Accordingly, the Defendant's Motion for Summary Judgment is granted, and the Plaintiffs' Motions for Summary Judgment are denied.

A. Laches

Laches, in our Court, has two applications; one by analogy to the legal statute of limitations, and one purely equitable. As a court of equity, this Court is not bound by the statute of limitations, which applies to actions at law; "[a] statute of limitations period at law does not automatically bar an action in equity because actions in equity are time-barred only by the equitable doctrine of laches."[40] Under most circumstances, however, a limitations period analogous to the statute of limitations will presumptively bar equitable relief,[41] and conclusively bar legal

[40] *Whittington v. Dragon Grp., L.L.C.*, 991 A.2d 1, 9 (Del. 2009) (internal citations omitted).
[41] *See U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996) ("Absent some unusual circumstances, a court of equity will deny a plaintiff relief when suit is brought after the analogous statutory period.").

relief. Here, the analogous three-year limitations period for contract actions has not yet run.[42]

Though the analogous statute of limitations effectively applies presumptively, in this Court, "he who seeks equity must do equity": in accordance with that maxim, a court of equity will not permit one who sits on his rights to then receive equitable relief.[43] Thus, equity encompasses the doctrine that if a plaintiff seeking equitable relief unreasonably delays in bringing her claim, and that delay unfairly prejudices the defendant, laches will bar the equitable relief the plaintiff seeks.[44] By contrast, as the maxim "he who seeks equity must do equity" does not apply to a plaintiff seeking *legal* relief, a plaintiff who unreasonably delays will not be barred from seeking legal relief if the action is brought within the analogous limitations period.[45] Such a result is intuitive, as it would make little sense for a

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[42] I note that, with respect to T. Rowe Price's claim for a declaratory judgment that a VRTE has occurred, three years have passed; however, the breach of contract action arising out of the incurrence of debt while a VRTE was in effect is not barred. In addition, SBS argues that Lehman's claim for breach of the implied covenant of good faith and fair dealing is barred by the analogous statute of limitations, since the Amended Complaint in which that count was raised was filed more than three years after SBS implemented its alleged plan to avoid a VRTE. Because these claims are barred under the reasoning articulated in Section III.B of this Memorandum Opinion, I need not address those arguments.

[43] *See* 2 Pomeroy's Equity Jurisprudence § 418 (5th ed. 1941) (explaining that the maxim "equity aids the vigilant, not those who slumber on their rights"—the equitable basis for the doctrine of laches—"may properly be regarded as a special form of the yet more general principle, He who seeks equity must do equity").

[44] *Whittington*, 991 A.2d at 8.

[45] *See, e.g.*, *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 169-70 (Del. 1976) ("Generally speaking, an action in the Court of Chancery for damages or other relief which is legal in nature is subject to the statute of limitations rather than the equitable doctrine of laches."); *CertainTeed Corp. v. Celotex Corp.*, 2005 WL 217032 (Del. Ch. Jan. 24, 2005)

plaintiff in the Court of Chancery, under the clean-up doctrine, or, as here, by statute,[46] to be placed in a worse position than if she had filed in a Delaware court of law where laches would not bar suit.[47]

The parties dispute whether the relief that the Plaintiffs seek here is equitable or legal in nature, and consequently, whether laches may bar their claims. As noted above, the Plaintiffs seek a declaratory judgment that a VRTE and breach have occurred, and contract damages. Because the issues involved in considering the Plaintiffs' request for a declaratory judgment must necessarily be addressed in determining whether the Plaintiffs are entitled to contract damages, the declaratory judgment claims must be subject to the same analysis as the claims for contract

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(analyzing claims for contract damages and specific performance under the doctrines of laches by analogy to the statute of limitations and equitable laches, respectively, though the claims arose under the same set of facts); 2 Pomeroy's Equity Jurisprudence § 419e (5th ed. 1941) ("It is frequently held that where a legal right is involved, and, upon ground of equity jurisdiction, the courts have been called upon to sustain the legal right, the mere laches of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defense. As has been expressed, 'if a legal right gets into equity, the statute [of limitations] governs.'") (internal citations omitted); 3 Pomeroy's Equity Jurisprudence § 817 (5th ed. 1941) ("[Laches] does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone.").

[46] *See* 8 *Del. C.* § 111 (vesting the Court of Chancery with jurisdiction to interpret, apply, enforce or determine the validity of corporate instruments).

[47] Similarly, the "unclean hands" doctrine bars equitable, but not legal, relief. *See, e.g.*, *USH Ventures v. Global Telesystems Grp., Inc*., 796 A.2d 7, 20 n.16 (Del. Super. 2000) ("The defense of 'unclean hands' is generally inappropriate for legal remedies."); *In re Estate of Tinley*, 2007 WL 2304831, at *1 (Del. Ch. July 19, 2007) (explaining that "a litigant seeking equitable relief who appears with unclean hands will find that relief barred to her," but that the doctrine will not bar legal relief).

damages.[48] Because I find, for the reasons that follow, that the relief requested by the Plaintiffs is legal in nature, the doctrine of laches is not applicable.

The Plaintiffs contend that because they seek legal relief in the form of contract damages, such relief is not subject to a laches analysis. SBS, on the other hand, suggests that the measure of contract damages the Plaintiffs have put forward—namely, compelling the dividend payments SBS would have been required to pay before it could incur debt;[49] estimating the results of a hypothetical consent fee; or determining the liquidation value of the preferred shares, assuming their refusal to consent to the refinancing would have forced the Company into insolvency—are in reality forms of equitable, and not legal, relief.

The Chancellor's recent decision in *Fletcher International, Ltd. v. ION Geophysical Corp.*,[50] at least with respect to the second measure supported by the Plaintiffs, suggests that the Defendant's position is incorrect. In that case, the preferred stockholder-plaintiff sought a preliminary injunction preventing the defendant-corporation from issuing a $40 million bridge loan in violation of the preferred stockholders' contractual right to consent to the issuance; the Court denied the application on the partial basis that the threat of injury was not

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[48] *See, e.g.*, *Certainteed Corp.*, 2005 WL 217032, at *16 ("CertainTeed has pled counts for declaratory judgment that track the [claims for contract damages]. The parties shall also include in the implementing order language that dismisses those counts to the extent that the related counts for damages have not survived . . . .").

[49] The Defendant disputes the Plaintiffs' methods of computing damages. Because I grant the Defendant's Motion on other grounds, I need not reach those arguments.

[50] 2013 WL 6327997 (Del. Ch. Dec. 4, 2013).

irreparable, but was compensable with damages.[51] After trial, Chancellor Strine then addressed the appropriate measure of damages to which the plaintiff was entitled: expectation damages, as determined based on a hypothetical negotiation between the parties over the consent.[52]

As *Fletcher* demonstrates, at least one measure of damages supported by the Plaintiffs—a hypothetical consent fee—is a proper measure of contract, rather than equitable, damages. So too are the other measures of damages suggested by the Plaintiffs. They are simply a method to express the loss suffered by the Plaintiffs in monetary terms, then award that amount as damages to make the Plaintiffs whole. Such a request for damages is *not* equitable relief, as would be, for instance, specific performance. That this Court has the discretion to determine what measure of damages is appropriate for breach of contract[53] does not convert such legal relief into equitable relief. Since such damages, if I were to calculate them, would be legal, rather than equitable, recovery is not precluded under a laches analysis.

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[51] *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2010 WL 1223782, at *4 (Del. Ch. Mar. 24, 2010).

[52] *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2013 WL 6327997, at *1 (Del. Ch. Dec. 4, 2013).

[53] *See Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, 2007 WL 2142926, at *29 (Del. Ch. July 20, 2007) ("In Delaware, the traditional method of computing damages for a breach of contract claim is to determine the reasonable expectations of the parties. Expectation damages are calculated as the amount of money that would put the non-breaching party in the same position that the party would have been in had the breach never occurred. Moreover, when a contract or agreement is silent as to the remedy for a breach, *the Court of Chancery has the discretion to award any form of legal* or equitable *relief* . . . .") (emphasis added).

B. Acquiescence

Unlike the doctrine of laches—comprehensibly explained in our case law—the doctrine of acquiescence has been inconsistently applied and has rarely been addressed in a thorough, doctrinally-satisfying manner. I will not attempt to so address it here.[54] It should suffice for purposes of this Memorandum Opinion to note that inaction or silence on the part of a plaintiff, in certain circumstances, can bar a plaintiff from relief both equitable and legal.[55] The doctrine of acquiescence

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[54] "Acquiescence" as a doctrine has been applied in at least three separate iterations. First, our case law explains that stockholders who informedly accept the benefit of a merger transaction by accepting the merger consideration acquiesce in the transaction and cannot then challenge it. *See, e.g.*, *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 848 (Del. 1987) ("Since Bershad tendered his shares and accepted the merger consideration, he acquiesced in the transaction and cannot now attack it."); *Wechsler v. Abramowitz*, 1984 WL 8244, at *2 (1984) ("Acquiescence, also an equitable defense, is based upon the rule that equity will not permit a complainant to stultify himself by complaining against acts in which he participated or in which he has demonstrated his approval by sharing in the benefits—even though the suit might otherwise be meritorious. The doctrine has been applied in various situations but in corporate suits it is generally held that a stockholder who, with knowledge of all the pertinent facts, has concurred in acts of the directors or majority stockholders cannot afterwards attack such acts."). Second, the doctrine of acquiescence is, at times, used nearly synonymously with the doctrine of laches; in other words, where a plaintiff delays unreasonably in silence and thereby unfairly prejudices the defendant, she is said to have acquiesced in his conduct. 3 Pomeroy's Equity Jurisprudence § 817 (5th ed. 1941). In those circumstances, acquiescence works a "quasi estoppel"—the plaintiff is estopped from seeking equitable, but not legal, relief. *See id.* ("This effect of delay is subject to the important limitation that it is properly confined to claims for purely equitable remedies to which the party has no strict legal right. Where an injunction is asked in support of a strict *legal* right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself."). Third, the doctrine of acquiescence has been used in the sense applied here, as a species of estoppel, estoppel by silence.

[55] *See, e.g.*, *Mizel v. Xenonics, Inc.*, 2007 WL 4662113, at *7 (Del. Super. Oct. 25, 2007) (denying a motion for summary judgment on the partial basis that acquiescence as a defense to a breach of contract claim created a triable issue of fact); *USH Ventures v. Global Telesystems Grp., Inc.*, 796 A.2d 7, 19 (Del. Super. 2000) ("Other equitable defenses are commonly recognized at law in contract as well as tort. Ripeness and mootness, which were originally equitable in nature, are commonly applied by this Court. Waiver has been, for some time, used

effectively works an estoppel: where a plaintiff has remained silent with knowledge of her rights, and the defendant has knowledge of the plaintiff's silence and relies on that silence to the defendant's detriment, the plaintiff will be estopped from seeking protection of those rights.[56] As described above, the equitable doctrine of laches focuses on *the plaintiff's* unreasonable delay, and why it would be inequitable to award *the plaintiff* the relief she seeks. Acquiescence, on the other hand, like estoppel, focuses on *the defendant's* knowledge of and reliance on the plaintiff's behavior (or lack thereof), and why the plaintiff must be adjudged complicit in the very breach for which she seeks damages. Although laches will

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at law as a valid defense to contract suits. Likewise, the equitable doctrine of acquiescence has been applied by this Court."); *In re PNC Delaware v. Berg*, 1997 WL 720705, at *4 (Del. Super. Oct. 22, 1997) ("[H]owever one characterizes the behavior of the Bank, whether it be in terms of waiver, acquiescence, estoppel, abandonment, or novation, the evidence is overwhelming that the Bank forewent its claim on the contract rights connected with the files that went to the Tighe firm."); *Mead v. Collins Realty Co*., 75 A.2d 705, 707 (Del. Super. 1950) ("Strictly speaking, then, it would appear that when a party to a contract breaches it in some minor respect and upon the tender by him of performance the other party, knowing of the defect, deliberately acquiesces, then the purported waiver of the right so accrued is not binding in the absence of consideration. . . . However, the thought of one party to a contract with full knowledge of the facts deliberately excusing some minor breach in performance and thereafter bringing an action for damages is repugnant. The Restatement bars a right of action in such case and, more importantly, the decisions of this State are in accord.").

[56] Another way this doctrine of acquiescence has been characterized is as estoppel by silence or estoppel by inaction. *See, e.g.*, 28 Romualdo P. Eclavea & Eric C. Surette, Am. Jur. Estoppel and Waiver § 57 (2d. 2013) ("The courts are especially disposed to uphold a claim of estoppel by silence or inaction where one party with full knowledge of the facts has stood by without asserting his or her rights or raising any objection while the other party, acting on the faith of such apparent acquiescence, incurred large expenditures that will be wholly or partially lost if such rights or objections are subsequently given effect."). Acquiescence in this sense is therefore not a doctrine separate from estoppel; rather, it is a subset of estoppel in which the defendant relies to her detriment on the plaintiff's silence rather than affirmative actions.

not prevent a plaintiff from receiving legal relief, where the defendant has relied on the plaintiff's silence, acquiescence may.[57]

SBS argues that the Plaintiffs acquiesced in the incurrence of additional debt at a time when a purported VRTE was in effect; that the Plaintiffs had knowledge of the VRTE and notice of the debt transactions; that the Plaintiffs remained silent despite that knowledge; and that SBS relied on that silence by incurring the additional debt. I agree, for the reasons explained below, that—assuming that the debt was incurred during a VRTE—such conduct on the Plaintiffs' part amounts to acquiescence, and must bar them from seeking contract damages in this action.

In order to prevail on a defense of acquiescence (as I use the term here), a defendant must show that (1) the plaintiff remained silent (2) with knowledge of her rights (3) and with the knowledge or expectation that the defendant would likely rely on her silence, (4) the defendant knew of the plaintiff's silence, and (5) the defendant in fact relied to her detriment on the plaintiff's silence.[58] The Plaintiffs here claim that they did not have actual knowledge of their rights prior to SBS's incurrence of debt. Our case law is inconsistent as to the quality of

[57] *See* 3 Pomeroy's Equity Jurisprudence § 818 (Acquiescence as an Estoppel to Rights of Property or of Contract) (5th ed. 1941) (explaining that the doctrine of acquiescence may act as a bar at law to the vindication of property rights and contract rights).

[58] *Id.* § 805 (Equitable Estoppel—Elements and Requisites; Generally); *id.* § 818 ("Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described.").

knowledge required for a finding of acquiescence.[59] However, I find that here, where all information necessary for the Plaintiffs' assessment of their rights was contained in publically-available documents and disclosures, and where the crucial fact in relation to a VRTE—the payment (or nonpayment) of dividends—is uniquely within the interest of the Plaintiffs as preferred stockholders with large ownership interests in the instrument, the Plaintiffs' knowledge of the circumstances affecting their rights as preferred stockholders must be imputed to them. Such a rule is not inconsistent with this Court's approach to other applications of estoppel.[60]

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[59] *See Frank v. Wilson & Co*., 32 A.2d 277, 283 (Del. 1943) ("Knowledge, *actual or imputed*, of all material facts is . . . essential . . . ."") (emphasis added); *but see, e.g.*, *Julin v. Julin*, 787 A.2d 82, 84 (Del. 2001) ("Application of the standards underlying the defense of acquiescence is fact intensive, often depending, as here, on an evaluation of the knowledge, intention and motivation of the acquiescing party."); *In re Celera Corp. S'holder Litig*., 2012 WL 1020471, at *9 (Del. Ch. Mar. 23, 2012), *rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012) ("In general, to be susceptible to an acquiescence defense, the plaintiff must: (1) have 'full knowledge of his [or her] rights and all material facts;' (2) possess a 'meaningful choice' in determining how to act; and (3) act voluntarily in a manner 'show[ing] unequivocal approval' of the challenged conduct.") (internal citations omitted).

[60] *See, e.g.*, *Cornerstone Brands, Inc. v. O'Steen*, 2006 WL 2788414, at *3 n.12 (Del. Ch. Sept. 20, 2006) ("In order to prevail on an equitable estoppel theory, plaintiff must show (1) conduct by the party to be estopped that amounts to a false representation, concealment of material facts, or that is calculated to convey an impression different from, and inconsistent with, that which the party subsequently attempts to assert, (2) knowledge, actual *or constructive*, of the real facts and the other party's lack of knowledge and the means of discovering the truth, (3) the intention o[r] expectation that the conduct shall be acted upon by, or influence, the other party and good faith reliance by the other, and (4) action or forbearance by the other party amounting to a change of status to his detriment.") (emphasis added); *Brown v. Fenimore*, 1977 WL 2566 (Del. Ch. Jan. 11, 1977) ("[Plaintiff] was a party to the agreement to distribute the shares of B&F as reported in the minutes of the January 28 meeting, and with knowledge, actual *or imputed* of the actual contribution of the [defendants], acquiesced in the consummation of the transaction, and acquiescence and participation in an issue of stock without consideration or for an insufficient

Here, the Plaintiffs had, at a minimum, imputed knowledge that a VRTE was in existence: the Certificate, which defined a VRTE, is a publically available document that controlled by its terms the nature and value of the significant investment in SBS held by the Plaintiffs. I note that the Plaintiffs themselves contend that the pertinent language in the Certificate was clear. Further, from SBS's public statements,[61] the Plaintiffs would have known, if they had been acting as prudent investors, that SBS had deferred dividends such that, under the Plaintiffs' understanding of the Certificate, a VRTE came into existence.[62] This is particularly so since the preferred stock was created as an alternative to a debt instrument, paying investors a quarterly fixed rate of return: when SBS stopped paying that return, any prudent investor with a large stake in the instrument should immediately have realized that the benefit of her bargain was being thwarted, or, at least, deferred.[63] The Certificate itself anticipates that holders of large interests in

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consideration will bar the right of the assenting stockholder to complain against its issuance.") (emphasis added).

[61] Def.'s Op. Br. in Support of its Mot. for Summ. J. Ex. 38. Plaintiff T. Rowe Price's contention that SBS affirmatively concealed facts that would have put the Plaintiffs on notice of their claims, by removing language regarding a VRTE in its Form 10-K, is without merit. Answering Br. in Opp'n to Def.'s Mot. for Summ. J. by T. Rowe Price at 16. The Certificate, which defines a VRTE, is a public document, and the Plaintiffs should have known that, under the "clear language" reading it supports, a VRTE was in effect.

[62] The Plaintiffs contend that they initially believed that when the Company deferred dividends, it was actually paying its dividends as a PIK. This argument is unavailing, however, because the Company announced publically that it was deferring dividends, and because the Plaintiffs were on inquiry notice of the Certificate, which permitted dividends to be paid in kind only until October 15, 2008.

[63] I acknowledge that Plaintiff Lehman became subrogated to J.P. Morgan's rights in the Series B stock in March 2010, and the shares were returned to Lehman shortly thereafter. Although in

the preferred stock will monitor their investment, and accordingly places the responsibility to request a special meeting to fill director seats created upon the occurrence of a VRTE on preferred stockholders owning a 10% or greater interest in the security. Here, Plaintiffs Lehman and T. Rowe Price owned a respective 38% and 14% interest in the Series B stock, so that each independently had the right to trigger an election; nevertheless, neither pursued their resulting right to seats on the Company board or otherwise acknowledged the VRTE.

The Plaintiffs also had notice that SBS intended to take on additional debt prior to the incurrence, as the Company publically announced its intent to consummate the first debt offering on May 6, 2011, *three months* prior to the actual offering on August 1 of that year. The Plaintiffs, with notice that the VRTE was in effect and of the Company's intent to take on additional debt, did nothing. Then, on January 27, 2012, the Plaintiffs again had notice,[64] via public announcement, of SBS's intent to restructure its debt with a note offering ending on February 7, 2012, and again, did nothing. To ensure that SBS did not rely on its silence, the Plaintiffs needed only to *notify* SBS that, under what it insists is the

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bankruptcy until March 2012, Lehman acknowledges in briefing that as of March 24, 2010, it gained "possession and control of the shares of Series B Stock." Lehman's Mem. of Law in Support of its Mot. for Summ. J. at 13. It therefore should have been aware of the terms of its investment from that time forward; notably, according to Lehman, a VRTE did not come into effect until July 2010, several months after Lehman gained possession and control of its interest in the preferred stock.

[64] As noted above, the evidence indicates that at least one of the Plaintiffs, Lehman, had actual knowledge of the offering prior to the public announcement on January 27, 2012. *See supra* note 32.

clear language of the Certificate, a VRTE was in effect, and therefore a debt incurrence would constitute a breach. Instead, the Plaintiffs made no such objection; SBS was aware that all relevant information regarding a VRTE and the debt transactions was available to the preferred stockholders; was aware that, despite access to that information, no preferred stockholder requested to fill seats on the board, or objected to the incurrence of debt; and relied on the lack of objection in consummating the debt transactions. That reliance is evidenced by SBS's credible assertion that, had it known of any preferred stockholders' objections prior to the incurrence of debt, it would have acted to avoid committing the alleged breach, either by eschewing additional debt; seeking a consent from the preferred stockholders, though, admittedly, such a unanimous consent might have been difficult to obtain; or petitioning this Court for a declaratory judgment *before* incurring the additional debt.[65] The Plaintiffs themselves, in seeking a consent fee

[65] *See, e.g.*, Def.'s Op. Br. in Support of its Mot. for Summ. J. at 49 (arguing that the Plaintiffs had a duty to mitigate damages by notifying the Company of their objections before the debt—and thus, the damage—was incurred, and noting that "[i]f Plaintiffs had notified SBS that they believed a VRTE was in effect, the parties' present dispute may have been resolved in advance of SBS's debt incurrences, thus avoiding the current lawsuit."); Oral Arg. Tr. 160:23-161:9 ("Instead, whether willfully or by ignorance—the record supports simply by ignorance—[the Plaintiffs] sat on their rights and didn't do anything about it. When, if they had acted differently, if they had said, "Wait a minute. We think a VRTE has occurred," we would have had an opportunity to come to the Court and have that question resolved. If they had said, "Wait a minute. We don't think you can incur this debt," we would have had an opportunity to come to court and get that question resolved and *avoid any breach*.") (emphasis added); *id*. 87:22-88:1, 88:16-17 (Plaintiffs' counsel acknowledging SBS's assertion that "they would have negotiated some sort of a deal had someone raised the issue with them," but declining to rebut that fact, instead contending that "[SBS] would have tried to negotiate some consent, but that's not prejudice"). I note that this action is before me on a stipulated record, which contains no

as a measure of damages, must recognize that had they voiced an objection prior to the incurrence of debt, the Company would have sought to avoid a breach. Because, as I have previously found, the language employed by the parties to define a VRTE is facially ambiguous (permitting the Company a reasonable inference that no VRTE had in fact occurred), and because preferred stockholders with a significant economic interest in the Series B shares, including the Plaintiffs, did not request that the Company hold a special meeting to fill board seats created by the happening of a VRTE, such reliance was reasonable, and thus should have been foreseeable to the Plaintiffs. Further, reliance on the Plaintiffs' silence was *detrimental* to SBS because, had SBS known of the Plaintiffs' objections to the incurrence of additional debt, it could have, at a time prior to incurring any damages, chosen its own course: it could have estimated the cost of obtaining a consent from the preferred stockholders, taking into account any possible leverage generated by the VRTE provision's facial ambiguity; taken on additional debt to pay the accrued arrearages; become insolvent and restructured; eschewed the incurrence of additional debt; or litigated a declaratory judgment action, potentially avoiding any damages at all. SBS could have thus acted to minimize or avoid any damages by choosing what it believed to be its lowest cost option for responding to the preferred stockholders' objections, had it only known of them.

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indication that SBS did not in fact rely on the Plaintiffs' silence in incurring debt while the alleged VRTE was in effect.

Now, almost three years after the alleged VRTE went into effect, and one year after the latest debt incurrence, the Plaintiffs argue that they are entitled to damages for a breach they might have prevented by exercising their rights to fill board seats, or by objecting to the purported breach. Moreover, the breaches of which they complain, the incurrence of additional debt, arose from actions taken by the board for the benefit of the corporation of which the Plaintiffs are among the equity holders, and from which actions the Plaintiffs therefore received a benefit.[66]

To be clear, the following factors form the basis for my decision that the Plaintiffs acquiesced in the debt transactions: (1) the Plaintiffs, in purchasing the Series B preferred stock, were investing in equity akin to debt instruments, the salient feature of which was the payment of quarterly dividends; (2) the Certificate's language, at least in the Plaintiffs' view, required the Company to refrain from incurring four consecutive quarters of arrearages, or trigger a VRTE, which would provide the Plaintiffs a right to place directors on the board as well as prevent the additional incurrence of debt; (3) the Plaintiffs should have known both that dividends were payable quarterly and that they had not received all quarterly dividend payments, commencing May 9, 2009; (4) thereafter, the Plaintiffs should

[66] Notably, acceptance of a benefit is not a required element of this particular application of the doctrine of acquiescence, estoppel by silence. However, the fact that the Plaintiffs benefitted from the Company's incurrence of debt—setting aside whether such benefit would have outweighed the benefit preferred stockholders might have received in liquidation, or negotiated as a consent fee—lends additional credence to my finding that SBS reasonably understood the Plaintiffs' silence to indicate an acceptance of the transactions.

have known (under their reading of the Certificate) that a VRTE was in effect as of April or July 2010; (5) the Plaintiffs had imputed, and in Lehman's case, actual, knowledge of SBS's intent to enter into the debt transactions in August 2011 and February 2012; (6) despite notice of all of these facts, the Plaintiffs did nothing, leading SBS to believe that the Plaintiffs acquiesced in the debt transactions; (7) that belief was reasonable, and thus foreseeable to the Plaintiffs, particularly in light of (a) the mechanism to fill board seats implemented in the Certificate whereby SBS would expect preferred stockholders with a large position in SBS (such as the Plaintiffs) to request the Company hold a special meeting upon the occurrence of a VRTE, (b) the facially ambiguous language of the VRTE provision, and (c) the fact that those debt transactions the Plaintiffs now challenge did at the time they were incurred confer on the Plaintiffs, as equity holders in the Company, a benefit which at that time they were apparently content to accept; (8) SBS entered into the debt transactions in reliance on the Plaintiffs' acquiescence; and (9) should the Plaintiffs be permitted to pursue damages here, such reliance will prove detrimental to SBS since, had the Plaintiffs notified SBS of their objections prior to the debt incurrence, SBS could have chosen for itself its lowest cost alternative for resolving the dispute. To hold otherwise would be to encourage substantial investors to stand by, witness a breach, and permit the accrual of damages that could have been prevented, or at least mitigated, but for

their silence. Obviously, in a case not involving the particular considerations above—for example, if an investor held only a small equity interest in a company such that it would not be expected to closely monitor that investment, or lacked the ability to protect its rights through procedural protections contained in a Certificate of Designation such that a Company could not reasonably expect that investor to notify it of objections to actions taken in potential violation of the Certificate—an analysis under the doctrine of acquiescence might produce a different result.

It is appropriate, for all the reasons above, that Plaintiffs be estopped from receiving the relief they seek here, under the doctrine of acquiescence.

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motions for Summary Judgment are denied, and SBS's Motion for Summary Judgment is granted. The parties should provide me with an appropriate Order.