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Case No. 7265-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GREENMONT CAPITAL PARTNERS I, LP,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 7265-VCP
	)	
MARY'S GONE CRACKERS, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: June 18, 2012
Decided: September 28, 2012

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PARSONS, Vice Chancellor.

This case presents a question about the interpretation of a Delaware corporation's certificate of incorporation. The corporation had authorized and issued common stock and two series of preferred stock, series A and series B. The plaintiff, an investor, purchased series B preferred stock. Series B stockholders have special rights under the certificate of incorporation. Among other things, the series B preferred have the right to a majority vote to validate any action that would "alter or change" the series B preferred stockholder's rights under the certificate. The certificate also grants series B preferred stockholders the right to a majority vote on any amendment to the certificate of incorporation. One action permitted by the certificate is an automatic conversion of the preferred stock into common stock upon a majority vote of the preferred shares. This certificate provision requires a majority vote of the series A and series B preferred voting together and does not afford the series B any special rights.

The corporation decided to seek an automatic conversion. Holders of a majority of the preferred shares, but not a majority of the preferred series B, voted in favor of the automatic conversion. After the purported conversion, the corporation's board voted to amend its certificate to eliminate reference to preferred stock. The plaintiff disputes the validity of the conversion and the subsequent certificate amendment. It maintains that a majority vote from the series B was required to validate the conversion because the conversion of the preferred stock into common stock effectively would deprive the series B preferred of the special rights they enjoyed under the certificate. According to the plaintiff, this action, therefore, would "alter or change" its rights and the certificate requires a majority series B vote to validate such an action. Hence, the question before

the Court is whether, under the terms of the certificate and Delaware law, the corporation had the power to implement the automatic conversion and the certificate amendment without the consent of the series B preferred.

Having considered the parties' arguments, Delaware case law on preferred shareholders' rights, and the language of the certificate of incorporation, I find that the execution of the challenged action, which was allowed under the certificate, did not alter or change the rights of a shareholder whose rights are defined by the certificate. For this reason, I rule in favor of the corporation and hold as a matter of law that the challenged conversion of preferred stock into common stock was a valid corporate action. I further conclude that the subsequent certificate amendment was valid because it occurred when no preferred shares remained outstanding and, thus, its validity was not contingent on a majority vote of the outstanding shares of series B preferred.

I. BACKGROUND

A. Parties[1]

Plaintiff, Greenmont Capital Partners I, LP ("Greenmont"), is a Colorado limited partnership. Greenmont invests in companies in the natural products industry. One of Greenmont's investments is in Series B Preferred shares in Mary's Gone Crackers ("MGC" or the "Company").

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[1] Unless otherwise noted, the facts recited in this Memorandum Opinion are drawn from the Verified Complaint for Declaratory and Injunctive Relief (the "Complaint") and the exhibits to the Complaint.

Defendant, MGC, is a Delaware corporation. MGC produces and distributes organic and gluten-free baked goods. MGC was formed as a California limited liability company in 2004. In 2007, MGC converted to a Delaware corporation upon filing a certificate of incorporation (the "Charter") with the Delaware Secretary of State. The Charter authorizes two classes of stock, Common and Preferred, and two series of the Preferred class, Series A and Series B. MGC authorized 65,000,000 shares: 37,522,485 Common; 15,028,444 Series A Preferred; and 12,449,071 Series B Preferred. The Common stock represents 58% of the total number of authorized shares and the Preferred represents 42%. Of the Preferred, Series A accounts for 55% and Series B accounts for 45%.

B. Facts

On September 21, 2007, Greenmont purchased five million shares of MGC Series B Preferred for $1 million. At the time of the transactions in question here, Greenmont owned 7,430,503 shares of the Series B Preferred. The Series B Preferred holders enjoy unique rights under the Charter. Article IV, Section D.2(b) lists twelve actions that must be approved by a majority of the Series B Preferred to have effect or to be valid.[2] This Section, entitled Separate Vote of Series B Preferred (the "Voting Provision"), begins as follows:

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[2] The primary Charter provisions at issue in this litigation are contained in Article IV. Unless otherwise noted, the Charter sections referred to in this Memorandum Opinion are sections in Article IV.

> For so long as any shares of a series of Series B Preferred remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding shares of the Series B Preferred shall be necessary for effecting or validating the following actions (whether by merger, recapitalization or otherwise): . . . .[3]

Two of the twelve enumerated actions are important to this litigation:

> (i) Any amendment, alteration, repeal or waiver of any provision of the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation);
>
> (ii) Any agreement or action that alters or changes the voting or other powers, preferences, or other special rights, privileges or restrictions of the Series B Preferred (including by way of a merger or consolidation); . . . .

The second Charter provision at issue in this dispute is Section D.5, entitled Conversion Rights. Subsection (*l*) to Section D.5 outlines procedures for an "Automatic Conversion." This subsection states:

> Each share of Series Preferred shall automatically be converted into shares of Common Stock, based on the then-effective applicable Series Preferred Conversion Price, (A) at any time upon the affirmative election of the holders of at least fifty-one percent (51%) of the then-outstanding shares of Series Preferred . . . .

On February 8, 2012, MGC solicited certain holders of Preferred to elect an automatic conversion of the Preferred into Common Stock under Section D.5. The Company limited its solicitation to holders of Preferred who indicated that they would support an automatic conversion; it did not solicit Greenmont. On February 17, 2012,

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[3] Compl. Ex. B, Charter, art. IV, § D.2(b).

MGC received written consent from at least 51% of the Preferred to convert Preferred into Common Stock. Later that same day, the MGC board voted to amend the Charter and filed an amended and restated Charter with the Delaware Secretary of State. The amended and restated Charter eliminates the provisions related to the Preferred.

C. Procedural History

Greenmont filed this action on February 20, 2012 seeking a declaratory judgment that the automatic conversion and the related Charter amendment are unlawful, void, and prohibited. MGC filed its answer on March 13. On April 9, 2012, Greenmont moved for judgment on the pleadings and on April 30, MGC cross-moved for the same. Both parties assert that the Charter is plain and unambiguous and that there are no material facts in dispute. They ask the Court to declare as a matter of law whether the automatic conversion and subsequent Charter amendment violate the Charter or Delaware law.

D. Parties' Contentions

Greenmont maintains that, in addition to the 51% Preferred class vote required by the Automatic Conversion provision, the Voting Provision required a majority vote of the Series B Preferred holders for the automatic conversion to be valid. Plaintiff bases this argument on Section D.2(b)(ii) of the Voting Provision. This subsection requires a majority vote of Series B shares to effect "[a]ny agreement or action that alters or changes [the Series B Preferred's] voting or other powers, preferences, or other special rights, privileges or restrictions."[4] Greenmont argues that the automatic conversion

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[4] Charter art. IV, § D.2(b).

altered its rights, indeed completely eliminated them, and as such, was invalid without a Series B Preferred majority vote.

Plaintiff further disputes the validity of the purported Charter amendment because Section D.2(b)(i) requires approval by a Series B Preferred majority for any Charter amendment.

Defendant, MGC, argues that the automatic conversion did not trigger the Voting Provision and, thus, that the automatic conversion was valid as executed. Because the Automatic Conversion provision was one of the Series B Preferred shareholders' rights under the Charter, MGC argues, the exercise of that provision did not "alter or change" those rights. Rather, the Company asserts that the conversion constituted the exercise of a Charter term that always had been a right of the Series B Preferred under the Charter.

Defendant also maintains that the Charter amendment was valid as executed. MGC concedes that the Voting Provision provided for a Series B majority vote to validate a Charter amendment. Under MGC's reading of the Charter, however, upon receiving written consent of 51% of the Preferred to convert the Preferred into Common Stock, the Preferred automatically was converted into Common Stock and, thus, ceased to exist. The Voting Provision, however, only applies "[f]or so long as any shares of a series of Series B Preferred remain outstanding." Because no Series B Preferred remained outstanding after the automatic conversion, MGC contends that the subsequent Charter amendment was valid even without a Series B Preferred majority vote.

II. ANALYSIS

Under Court of Chancery Rule 12(c), any party may move for judgment on the pleadings after the pleadings are closed, but within such time as not to delay the trial. A motion for judgment on the pleadings will be granted if no material issue of fact exists and the moving party is entitled to judgment as a matter of law.[5] "If a contract's meaning is unambiguous and the underlying facts necessary to its application are not in dispute, judgment on the pleadings is an appropriate procedural device for resolving the dispute."[6] In this case, no material facts are in dispute. Further, both parties contend that the Charter is unambiguous and that the Court, therefore, can rule as a matter of law.

In interpreting a corporate charter, the Court applies general principles of contract construction.[7] A certificate should be construed in its entirety and the court "must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, must reconcile all provisions in the instrument."[8] The existence and extent of special stock rights are contractual in nature and are determined by the issuer's certificate of

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5 *See Credit Suisse Sec. (USA) LLC v. W. Coast Opportunity Fund, LLC*, 2009 WL 2356881, at *3 (Del. Ch. July 30, 2009).

6 *CorVel Enter. Comp, Inc. v. Schaffer*, 2010 WL 2091212, at *1 (Del. Ch. May 19, 2010).

7 *Benchmark Capital P'rs IV, L.P. v. Vague*, 2002 WL 1732423, at *6 (Del. Ch. 2002); *see also Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012) (noting that certificates of incorporation are regarded as contracts between shareholders and the corporation and are interpreted as such).

8 *Omneon, Inc.*, 41 A.3d at 386.

incorporation.[9] The certificate must expressly and clearly state any rights, preferences, and limitations of the preferred stock that distinguish preferred stock from common stock.[10] This principle equally applies to construing the relative rights of holders of different series of preferred stock.[11] In interpreting an unambiguous certificate of incorporation, the court should determine the document's meaning solely in reference to its language without resorting to extrinsic evidence.[12] Contract language is not ambiguous in a legal sense merely because the parties dispute what it means.[13] To be ambiguous, a disputed contract term must be fairly or reasonably susceptible to more than one meaning.[14]

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9 *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 966 (Del. Ch. 1989).

10 *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843, 852 (Del. 1998) (citing 8 *Del. C.* § 151(a)).

11 *Benchmark*, 2002 WL 1732423, at *10 n.44; *see also Avatex*, 715 A.2d at 852–53 ("Stock preferences must clearly be stated and will not be presumed."). The *Avatex* Court noted its disapproval of the continued use of the term "strict construction" in the interpretation of contractual preferences in certificates of incorporation. *Id.* at 853 n.46. It instructed that the appropriate articulation of that analysis is set forth in *Rothschild Int'l Corp. v. Liggett Gp. Inc.*, 474 A.2d 133, 136 (Del. 1984), which states: "Preferential rights are contractual in nature and therefore are governed by the express provisions of a company's certificate of incorporation. Stock preferences must also be clearly expressed and will not be presumed." *Id.*

12 *Harrah's Entm't, Inc. v. JCC Hldg. Co.*, 802 A.2d 294, 309 (Del. Ch. 2002).

13 *E.I. duPont de Nemours & Co., Inc. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

14 *GMG Cap. Invest., LLC v. Athenian Venture Part. I, L.P.*, 36 A.3d 780 (Del. 2012); *see also Rhone–Poulenc Basic Chem. Co. v. Am. Motor. Ins. Co.*, 616 A.2d

A. Series B Preferred Shareholders' Right to Vote on the Conversion

For the reasons outlined below, I find that the Charter is unambiguous and that its language does not entitle the Series B Preferred holders to a series vote on the conversion of Preferred Stock into Common Stock. Under the Voting Provision, two elements must be present for Series B Preferred holders to have rights to a majority vote on a matter: (1) Series B Preferred must be outstanding; and (2) an enumerated action must be at issue.[15] After the execution of the automatic conversion, I conclude that no enumerated action was at issue.

I start by considering the Charter language. The first clause of Section D.2(b) states: "For so long as any shares of a series of Series B Preferred remain outstanding." The parties do not dispute that when the Series Preferred were solicited to vote in favor of an automatic conversion, Series B Preferred was outstanding. Section D.2(b), therefore, is implicated. The second clause reads: "in addition to any other vote or consent required herein or by law." This language indicates that the provision grants Series B Preferred holders rights beyond any voting rights either found in the agreement or required by law. The next clause indicates what additional rights Series B Preferred holders have beyond their voting rights arising under the agreement or required by law. This clause provides that a majority vote of the outstanding Series B Preferred shares "shall be necessary for

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1192, 1196 (Del. 1992) ("[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." (citation omitted)).

[15] Charter art. IV, § D.2(b).

effecting or validating the following actions (whether by merger, recapitalization or otherwise)." Read together, these clauses compel the conclusion that what starts out broadly ("in addition to *any* other vote") finishes narrowly ("for effecting or validating the following actions"). Only the actions specified in the list of twelve enumerated actions require a majority vote of Series B Preferred in order to be valid.

Greenmont asserts that Section D.2(b)(ii) provides the enumerated action that grants it voting rights as to the automatic conversion. Section D.2(b)(ii) incorporates the following action into the Voting Provision: "Any agreement or action that alters or changes the voting or other powers, preferences, or other special rights, privileges or restrictions of the Series B Preferred (including by way of a merger or consolidation)." Notably, the drafters of the Charter included for a second time a reference incorporating action by merger. This presumably is in response to the Delaware Supreme Court's decision in *Elliott Associates, L.P. v. Avatex Corp*.[16] In *Avatex*, the Court provided a "path for future drafters."[17] The Court held that language granting the right to vote on an "amendment, alteration, or repeal" is not enough to provide preferred stockholders with the right to a class vote on a merger that leads to an amendment, alteration, or repeal of the certificate. A drafter must additionally indicate that the class vote applies when a merger *results in* an amendment, alteration, or repeal. One way to satisfy this

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16 715 A.2d 843 (Del. 1998).

17 *Id.* at 855.

requirement is by including the words "whether by merger, consolidation, or otherwise" in the appropriate provision in the certificate.[18]

Here, the drafters appear to have attempted to take advantage of the safe harbor offered by *Avatex*.[19] They included language in the introductory provision to incorporate actions by "merger, recapitalization or otherwise" and additionally in Section D.2(b)(ii) to include an alteration or change "by way of a merger or consolidation." While this language signals the intent to include the circumstance where a merger results in one of the enumerated actions, it does not touch on the disputed action here.[20]

As noted, Section D.2(b)(ii) applies to "[a]ny agreement or action that alters or changes" the Series B Preferred's "voting or other powers, preferences, or other special rights, privileges or restrictions." The issue, therefore, is whether the automatic conversion of Series B Preferred into Common Stock "alter[ed] or change[d]" the Series B Preferred's powers, preferences, rights, privileges, or restrictions. This issue, in turn, requires a determination of what constitutes the Series B Preferred's "voting or other

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18 *Id.*

19 *See Benchmark Capital P'rs IV, L.P. v. Vague*, 2002 WL 1732423, at *10 n.44 (Del. Ch. 2002) ("As a general matter, drafting guidance, such as that provided in *Avatex*, may be read as creating a 'safe harbor' or as a prudential suggestion and is not typically to be read as the exclusive means of achieving the desired goal.").

20 At least one Delaware court has construed the term "or otherwise" narrowly in a similar context. *See Sullivan Money Mgmt., Inc. v. FLS Hldgs. Inc.*, 1992 WL 345453, at *4 (Del. Ch. Nov. 20, 1992). Greenmont has not argued that "or otherwise" would include a conversion in this case, and the language of the Charter does not support such an interpretation.

powers, preferences, or other special rights, privileges or restrictions." To answer this question, we look again to the language of the Charter. One group of rights provided for in the Charter is found in Section D.5 entitled Conversion Rights.

This Section contains subsection (*l*) which allows for an automatic conversion. As noted above, the Automatic Conversion provision provides that the Preferred automatically may be converted into shares of Common Stock at any time upon the vote of 51% of the Preferred. The plain language of the Charter compels the conclusion that this automatic conversion is one of the "special rights, privileges or restrictions" created by the Charter. When contract language is plain and clear on its face, the Court will determine its meaning based on the writing alone.[21] Because the Automatic Conversion provision exists on equal footing with the Voting Provision, an action taken under the Automatic Conversion provision cannot be seen to "alter or change" any of the Series B Preferred's "voting or other powers, preferences, or other special rights, privileges or restrictions." Rather than "alter or change" a right, the execution of an automatic conversion effectuates an existing right.

Greenmont asserts that this interpretation undermines the rights it bargained for in the Voting Provision. Notably, the Series A shareholders appear to account for a majority of the Preferred shareholders. Further, the Series A enjoy few benefits under the Charter and, therefore, could be expected to be more likely than the holders of Series B to

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[21] *E.I. duPont de Nemours & Co., Inc. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

vote for an automatic conversion of Preferred Stock into Common Stock under Section D.5(*l*).[22] The Series B's rights under the Charter, therefore, are somewhat dependent on the Series A's desire to remain holders of Preferred stock. Greenmont avers that it would not have bargained for such contingent rights and that an interpretation along those lines would be wrong.[23] While Greenmont's interpretation makes sense, "its interpretation is not *reasonable* in light of the indisputably clear language of the contract."[24] Instead, the plain language of the Charter indicates that the exercise of an automatic conversion would not alter or change the Series B Preferred's rights as those rights are defined in the Charter.

Greenmont further argues that this interpretation cannot be correct because an act that extinguishes the powers of the Series B Preferred cannot be interpreted as a "right" of that series. But, Greenmont cites no authority in support of its position. MGC

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22 The Charter grants the Series A Preferred Stock preference over the Common Stock in receiving dividends and in receiving payment upon liquidation. Charter art. IV, § D.1(b), D.3. The Series A also can elect one board member. *Id.* art. IV, § D.3.

23 Opening Br. in Supp. of Pl. Greenmont's Mot. for J. on the Pleadings 7 ("[MGC's interpretation] renders meaningless the Original Charter's special rights, privileges, and protection—especially voting rights—for Series B Preferred stockholders.").

24 *Seidensticker v. Gasparilla Inn, Inc.*, 2007 WL 4054473, at *3 (Del. Ch. Nov. 8, 2007) ("Defendants' interpretation makes rational sense (in that it is rational to think that the drafters may not have wanted to allow these shares to get away from the Sharp family), but its interpretation is not *reasonable* in light of the indisputably clear language of the contract.").

counters that a conversion provision is indeed a "right" of preferred stock.[25] Delaware corporate law recognizes that the ability of holders of preferred stock to convert their shares into shares of common stock is a "right" of the preferred shareholders.[26] Nothing in the language of the Charter indicates that the Preferred shareholders' ability to convert their shares of Preferred Stock into shares of Common Stock under the Automatic Conversion provision is not a "right" of the Preferred shareholders. Indeed, the Automatic Conversion provision is contained in Section D.5 entitled "Conversion Rights."

This conclusion is consistent with the principle of Delaware corporation law that any rights or preferences of preferred stock must be expressed clearly.[27] For example, in *Warner Communications, Inc. v. Chris-Craft Industries, Inc.*,[28] the Court held that

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[25] MGC's Reply Br. in Supp. of Its Mot. for J. on the Pleadings ("Def.'s Reply Br.") 5 (citing 8 *Del. C.* § 151(e), Delaware case law, a law review article, and a corporate law treatise). Section 151(e), entitled "Classes and series of stock; redemption; rights," provides: "Any stock of any class or of any series thereof may be made convertible into, or exchangeable for, at the option of either the holder or the corporation or upon the happening of a specified event, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation, at such price or prices or at such rate or rates of exchange and with such adjustments as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided."

[26] *See HB Korenvaes Invs., L.P. v. Marriott Corp.*, 1993 WL 257422, at *6 (Del. Ch. July 1, 1993) (considering the preferred shareholder plaintiffs' conversion rights).

[27] *See Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 967 (Del. 1989).

[28] *Id.*

because the act of a merger, and not the subsequent act of a certificate amendment, was the act that adversely affected the plaintiffs, the following language in the certificate of designation did not provide the plaintiffs, a group of Series B Preferred stockholders, with the right to vote on the merger as a separate class: "[W]ithout first obtaining the consent or approval of the holders of at least two-thirds of the number of shares of the Series B Stock . . . the Corporation shall not (i) amend, alter or repeal any of the provisions of the Certificate . . . so as to affect adversely any of the preferences, rights, powers or privileges of the Series B Stock or the holders therof . . . ."[29] In *Warner*, the surviving corporation's certificate of incorporation would be amended in the merger.[30] Also pursuant to the merger agreement, the plaintiffs' Warner Series B Preferred shares would be converted into new Time Series BB Preferred.[31] Chancellor Allen found that the merger and the amendment were separate events: "Given that the merger itself [wa]s duly authorized, the conversion of the Series B Preferred Stock could occur without any prior or contemporaneous amendment to the certificate."[32] He concluded, therefore, that the conversion of shares, not the certificate amendment, caused the adverse effect on the rights of the Series B stock.[33] Because the certificate only provided for a Series B

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29 *Id.* at 965.

30 *Id.* at 967.

31 *Id.* at 965. The parties stipulated for the purpose of the motion before the Court that this conversion would adversely affect the Warner Series B Preferred. *Id.*

32 *Id.* at 968.

33 *Id.* at 967.

shareholder vote when an *amendment* adversely affected the Series B shareholder's rights, the Court held that the series was not entitled to a separate class vote on the merger.

This conclusion is further supported by the fact that the drafters of the MGC Charter explicitly included one action identified elsewhere in the Charter as an enumerated action requiring a majority Series B Preferred vote under the Voting Provision. Specifically, Section B of Article IV states that the number of authorized shares of Common Stock may be increased or decreased only after a vote of a majority of the stock of the Company. The Voting Provision includes a requirement for a majority Series B Preferred vote in Section D.2(b)(iii) as to: "Any increase or decrease in the authorized number of shares of Common Stock or Preferred Stock."[34] Had the drafters intended for the Automatic Conversion provision to be subject to an additional vote of a majority of the Series B Preferred, they could have listed it expressly in the Voting Provision as they did with the provision regarding an increase or decrease in authorized Common Stock. By expressly including Section B as an enumerated action under the Voting Provision, but not including Section D.5, the drafters implicitly excluded Section D.5.[35]

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[34] Charter art. IV, § D.2(b)(iii).

[35] *Laster v. Waggoner*, 1989 WL 126670, at *11 & n.11 (Del. Ch. Oct. 13, 1989) (noting that the principle of statutory construction *expressio unius est exclusio alterius* applies with equal force in interpreting certificates of incorporation).

Greenmont correctly emphasizes that the addition of the words "automatic conversion" to one of the twelve enumerated actions in Section D.2(b) is merely one way the drafters could have granted the Series B Preferred the right to a majority vote on any proposed automatic conversion. If the intent of the drafters was to include automatic conversion as an act requiring a majority Series B Preferred vote, however, then it was incumbent upon the drafters to make the Charter language precise in that regard and to indicate such an intent clearly.[36] As drafted, the Voting Provision does not grant this right. The dispositive question is not whether as a *result* of the vote in favor of automatic conversion the Series B Preferred's rights were altered or changed, but whether the *act* of the vote altered or changed their rights. The Automatic Conversion provision was included in the Series B Preferred's bundle of rights, privileges, and restrictions under the Charter and, thus, the act of at least 51% of the then-outstanding shares of Preferred in voting under Section D.5 to effect an automatic conversion did not alter or change those rights, privileges, and restrictions.

B. Series B Preferred Shareholders' Right to Vote on the Charter Amendment

1. Under the Charter

I next must determine whether any Series B Preferred Stock remained outstanding at the time of the purported Charter amendment. If it did, then the Series B holders would have had the right to a majority vote on any Charter amendment under Section

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[36] *See Benchmark Capital P'rs IV, L.P. v. Vague*, 2002 WL 1732423, at *6–7 (Del. Ch. 2002).

D.2(b)(i). If it did not, then the Series B holders would have no such right because the Voting Provision only applies "[f]or so long as any shares of a series of Series B Preferred remain outstanding."[37] For the reasons stated below, I concur with MGC's interpretation of the Charter in this regard. At the time MGC amended the Charter, there were no Series B Preferred shares outstanding and, therefore, that series was not entitled to a separate series vote to validate the amendment.

Under the language of the Charter, a vote by a majority of the Preferred will automatically convert the Preferred into Common Stock. Section D.5(*l*)(ii) states: "Upon the occurrence of either of the events specified in Section D.5[(*l*)](i) above, the outstanding shares of Series Preferred shall be converted automatically without any further action by the holders of such shares . . . ." In contrast, Section D.5(d) sets forth the "Mechanics of Conversion" in the context of an optional conversion of Preferred into Common Stock. The latter provision requires a Preferred holder to surrender its certificate in order for the conversion of its shares into Common Stock to be deemed to have been made. Notably, an optional conversion will be deemed to have been made at the close of business on the date the certificate is surrendered and "the person entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common Stock *on such date*."[38] Because the automatic conversion provision states that the Series Preferred Stock shall be

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[37] Charter art. IV, § D.2(b).

[38] Charter art. IV, § D.5(d) (emphasis added).

converted automatically, "whether or not the certificates representing such shares are surrendered to the Company," it follows that the automatic conversion also will be deemed to have been made on the date on which the holders of 51% of the Preferred voted to convert their shares into shares of Common Stock. In this case, the holders of at least 51% of the Preferred executed written consents to convert the then-outstanding Preferred Stock into Common Stock on February 17, 2012. Under the Charter, therefore, the class of Preferred was no longer outstanding as of that date.

The automatic conversion occurred on February 17, 2012. MGC voted to amend the Charter later that same day. Therefore, as previously noted, the shareholder vote to amend the Charter took place when Common Stock was the only class of MGC stock outstanding. Because the Voting Provision only applies "[f]or so long as any shares of a series of Series B Preferred remain outstanding," that provision did not apply to the Charter amendment.[39]

Greenmont contends that this result is inconsistent with its subjective intent in purchasing its Series B Preferred stock. Indeed, Greenmont argues that the conversion and the amendment to the Charter are inextricably linked and that the conversion and amendment must be interpreted together, such that they collectively would be subject to the Voting Provision. Greenmont, however, cites no authority to support this proposition. To the contrary, Delaware case law generally requires that corporate acts be evaluated or

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[39] *Id.* art. IV, § D.2(b).

considered independently as they occur.[40] Just as the Court concluded that the stock conversion and subsequent certificate amendment in *Warner* were separate events, I consider the conversion and the Charter amendment here to have been separate and independent occurrences.

The language of the MGC Charter relevant to this dispute is unambiguous. Therefore, I must interpret that language as it was drafted and consistent with its plain and ordinary meaning.[41] Such an interpretation compels the conclusion that at the time of the challenged amendment, the automatic conversion of Preferred Stock into Common Stock had occurred and thus no Preferred Stock remained outstanding and no Series B Preferred holders had any right to vote on the Charter amendment.

2. Under the DGCL

Plaintiff also asserts that Section 242(b)(2) of the Delaware General Corporation Law ("DGCL") requires a series vote on the Charter amendment because that amendment decreased the number of authorized shares of the Preferred class.[42] Section 242(b)(2) provides in relevant part:

> The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease

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40 *See supra* text accompanying note 27.

41 *See Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 386 (Del. 2012) ("Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.").

42 *See* 8 *Del. C.* § 242(b)(2).

> the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. If any proposed amendment would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for the purposes of this paragraph.[43]

For the reasons stated above, I conclude that no Preferred shares were outstanding at the time of the amendment.[44] Because Section 242(b)(2) only applies to the "holders of outstanding shares," it does not apply to the Charter amendment challenged in this case.

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[43] *Id.*

[44] *See Warner Commc'ns, Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 970 (Del. 1989). In *Warner*, the Court determined that Section 242(b) did not require a class vote on a charter amendment that occurred after a merger had been effectuated under Section 251. In that case, the Court considered whether Section 3.3(i) of the charter, which contained language that paralleled the language in Section 242(b) of the DGCL, was intended to incorporate changes effected through mergers. The Court stated:

> Our bedrock doctrine of independent legal significance compels the conclusion that satisfaction of the requirements of Section 251 is all that is required legally to effectuate a merger. It follows, therefore, from rudimentary principles of corporation law, that the language of 242(b)(2), which so closely parallels the language of 3.3(i), does not entitle the holders of a class of preferred stock to a class vote in a merger . . . .

Id. (citation omitted). Just as the merger in *Warner* occurred independently of the charter amendment, so too in this case, the independent event of an automatic conversion under the Charter occurred before the Charter amendment. Section 242(b)(2), therefore, does not require a class vote on the disputed Charter amendment.

C. Series B Preferred Shareholders' Rights Under the Voting Agreement

Lastly, Greenmont claims that the conversion of Preferred Stock into Common Stock and the amendment to MGC's Charter violate a voting agreement among MGC, MGC's common stockholders, and other MGC investors, including Greenmont (the "Voting Agreement"). In Plaintiff's motion for judgment on the pleadings, Greenmont moved for judgment "with respect to all claims set forth in its Verified Complaint." In the briefs in support of its motion, however, Greenmont did not present any serious argument that MGC violated the Voting Agreement. Moreover, at argument, Greenmont's counsel stated that, although the claim regarding the Voting Agreement was in the Complaint, "it's not part of [Greenmont's] motion for judgment on the pleadings."[45]

In addition, MGC cross-moved for judgment on the pleadings as to all of Greenmont's claims, including its assertion that the Voting Agreement prohibited the conversion and the Charter amendment.[46] Greenmont's sole response to that aspect of MGC's motion was in a footnote in its answering brief.[47] MGC contends that the claim relating to the Voting Agreement should be dismissed based on Greenmont's failure to

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45 Tr. 41.

46 MGC's Op. Br. in Supp. of Its Mot. for J. on the Pleadings and Answering Br. in Opp'n to Greenmont's Mot. for J. on the Pleadings 2.

47 Pl. Greenmont's Combined Reply Br. in Supp. of Its Mot. For J. on the Pleadings and Answering Br. in Opp'n to MGC's Cross-Motion for J. on the Pleadings 9 n.4.

address it in its briefs. Because it is "settled Delaware law that a party waives an argument by not including it in its brief,"[48] that argument has some appeal here. In any event, the perfunctory argument Greenmont did make as to the Voting Agreement rests largely on the points made in support of its other claims. For the reasons stated *supra*, I do not find those arguments persuasive. Accordingly, I also grant Defendant's motion for judgment on the pleadings with regard to Greenmont's Voting Agreement claim.

III. CONCLUSION

For the foregoing reasons, I deny Plaintiff's Motion for Judgment on the Pleadings and I grant Defendant's Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

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[48] *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003); *see* Tr. 41–42.