IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALTA BERKELY VI C.V.,	)	
ALTA BERKELEY VI S BY S C.V.,	)	
and KIWI II VENTURA	)	
SERVICOS DE CONSULTORIA S.A.,	)	
	)	
Plaintiffs,	)	C.A. No. N10C-11-102 JRS CCLD
	)	
v.	)	
	)	**COMPLEX COMMERCIAL**
OMNEON, INC.,	)	**LITIGATION DIVISION**
	)	
	)	
Defendant.	)	

Date Submitted: May 3, 2011
Date Decided: July 21, 2011

MEMORANDUM OPINION
Upon Consideration of Defendant's Motion for Summary Judgment.
GRANTED
Upon Consideration of Plaintiffs' Cross Motion for Partial Summary Judgment.
DENIED.

Norman M. Monhait, Esquire, Jeffrey S. Goddess, Esquire and Jessica Zeldin, Esquire, ROSENTHAL MONHAIT & GODDESS, Wilmington, Delaware. Attorneys for Plaintiff.

Peter J. Walsh, Jr., Esquire and Tye C. Bell, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware. Douglas J. Clark, Esquire, Thomas J. Martin, Esquire and Bryan J. Ketroser, Esquire, WILSON SONSINI GOODRICH & ROSATI, Palo Alto, California. Attorneys for the Defendants.

SLIGHTS, J.

I.

Plaintiffs, Alta Berkeley VI C.V., Alta Berkeley VI S By S. C.V. (together "Alta Berkeley"), and Kiwi II Ventura Servicos de Consultoria S.A. ("Kiwi II" and together with Alta Berkeley, "Plaintiffs"), bring this action for breach of contract against Defendant, Omneon, Inc. ("Omneon"), alleging that Omneon has breached certain provisions of its Certificate of Incorporation ("COI") by denying Plaintiffs a liquidation preference for their Omneon Series C-1 Preferred Stock ("C-1 Preferred Stock"). They allege that the liquidation preference was due upon the occurrence of a so-called "Liquidation Event" triggered by Omneon's agreement to merge with Harmonic, Inc. ("Harmonic") and others. In response, Omneon contends that Plaintiffs are not entitled to any liquidation preference because, pursuant to the clear and unambiguous terms of the COI, their C-1 Preferred Stock automatically converted to common stock immediately prior to the merger taking effect (and prior to any Liquidation Event) thereby extinguishing Plaintiffs' liquidation preference. On this basis, Omneon has moved for summary judgment. Plaintiffs have cross moved for summary judgment on the ground that the unambiguous terms of the COI reveal that their right to a liquidation preference accrued prior to the automatic conversion of Omneon's preferred stock to common stock.

Under settled Delaware law, the rights of preferred stockholders as set forth

in a certificate of incorporation are contractual rights. Thus, the Court's task in deciding Omneon's motion is to view the applicable provisions of the COI as contractual provisions and to determine: (1) whether the terms are, as both parties contend, clear and unambiguous and, if so, (2) whether Plaintiffs' alleged right to a liquidation preference can be found within those terms. Having carefully considered these questions, the Court is satisfied that the COI unambiguously called for a conversion of Plaintiffs' C-1 Preferred Stock to Omneon common stock *prior to* any Liquidation Event that may have been occasioned by Omneon's merger with Harmonic. Plaintiffs' contractual right to a liquidation preference, therefore, was never triggered. Accordingly, Omneon's motion for summary judgment must be **GRANTED.**

II.

Omneon, a Delaware corporation, provides digital content storage and processing systems for use by media companies in the production of high quality digital video and audio. As of September, 2010, Omneon had issued and outstanding common stock and nine series of preferred stock. Prior to September 10, 2010, Plaintiffs collectively owned more than 310,000 shares of Omneon Series C-1 Preferred Stock.

A. The Omneon COI

Several provisions of the COI governed the rights of Omneon preferred shareholders. For instance, Article FOURTH, Section (B)(3)(a) provided that "[a]t the option of the holder thereof, each share of Preferred Stock shall be convertible ... into fully paid and nonassessable shares of Common Stock as provided herein at the then effective Conversion Rate (as defined below) for such share." The COI, at Article FOURTH, Section (B)(3)(b), provided for an "automatic conversion" of preferred stock to common stock upon:

> with respect to all series of Preferred Stock, the election of the holders of a majority of the outstanding shares of such Preferred Stock voting together as a single class on an as-converted to common stock basis and not as separate series; **provided, however,** in the event that such conversion is conditioned upon or follows consummation of a Liquidation Event whereby the holders of Series A-2.2 Preferred Stock would receive distributions or consideration in an aggregate amount valued at $1,513,032.40 in respect of their ownership of the Series A-2.2 Preferred Stock pursuant to Section 4(B)(2)(a)(I) hereof absent conversion of Series A-2.2 Preferred Stock, the election of the holders of majority of the outstanding shares of the Series A-2.2 Preferred Stock (and the holders of all other series of Preferred Stock would then vote together excluding the Series A-2.2 Preferred Stock). (emphasis supplied)

The carve-out of Series A-2.2 Preferred Stock from the automatic conversion described in Article FOURTH, Section (B)(3)(b) reflects the significant liquidation preference enjoyed by holders of Series A-2.2 Preferred Stock in the event of a

"Liquidation Event," as defined in the COI.[1] Indeed, all Omneon preferred shareholders were entitled to a liquidation preference upon the occurrence of a Liquidation Event, albeit at drastically different values. Holders of Series A-1 Preferred Stock were to receive a liquidation distribution of $2.20 per share; holders Series A-6 Preferred Stock were to receive $4.10 per share; and holders of Series C-1 Preferred Stock (like Plaintiffs) were to receive $28.78 per share. In contrast to these relatively modest liquidation preferences, the holder of Series A-2.2 Preferred Stock had negotiated a liquidation preference of $1,513,032.40 per share.[2] It is not surprising, therefore, that the holder of Series A-2.2 Preferred Stock negotiated a carve out from the automatic conversion provision of the COI given that, for this shareholder, a conversion from preferred to common stock prior to a Liquidation Event would extinguish its extraordinary liquidation preference.

As stated, the liquidation preferences were triggered by a Liquidation Event. Article Fourth, Section (B)(3)(b) defined "Liquidation Event," *inter alia*, as "the acquisition of [Omneon] by any person or entity by means of any transaction or series of related transactions ... in which the stockholders of [Omneon] immediately prior

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[1] *See* Article FOURTH, Section (B)(2)(a)(i) (setting forth the "Liquidation Preferences" for the various series of preferred stock); Article FOURTH, Section (B)(3)(b) (defining "Liquidation Event").

[2] *See* Article FOURTH, Section (B)(2)(a)(i).

to such transaction or series of related transactions own less than 50% of [Omneon's] voting power immediately after such transaction or series of transactions (including, without limitation, any reorganization, merger or consolidation...)."

B. The Omneon/Harmonic Merger

On May 6, 2010, Omneon entered into an Agreement and Plan of Reorganization By and Among Harmonic, Inc., Orinda Acquisition Corporation ("Orinda"), Orinda Acquisition, LLC ("Orinda LLC") and Shareholder Representative Services, LLC (the "Reorganization Agreement") pursuant to which Harmonic was to acquire Omneon for approximately $190 million in cash and $120 million in Harmonic stock. The Reorganization Agreement contained several conditions and provided for a sequence of transactions pursuant to which the merger would occur. The basic form of the merger is revealed in three transactions:

1. a Preferred Stock conversion in which each share of Preferred Stock (other than Series A-2.2)[3] would automatically be converted into Omneon common stock upon the vote of the majority of Omneon preferred shareholders (other than Series A-2.2 holders) as per Article FOURTH, Section (B)(3)(b) of the COI;

2. a "First Step Merger" in which Orinda would be merged with and into Omneon with Omneon emerging as the surviving entity; and

[3]The record reflects that at the time of the merger there was one share of Series A-2.2 Preferred Stock issued and outstanding. *See*, Reorganization Agreement §3.2(a)(iii).

3. a "Second Step Merger" in which Omneon would be merged with and into Orinda LLC with Orinda LLC emerging as the surviving entity.

The automatic preferred stock conversion called for in the Reorganization Agreement was effected upon the majority vote of all series of Omneon preferred shareholders (accept Series A-2.2) on September 15, 2010, "immediately prior" to the initiation of the "First Step Merger," as per section 2.7(d) of the Reorganization Agreement. Thereafter, the "First Step Merger" occurred pursuant to which each share of Omneon Common Stock, including those recently converted from Preferred Stock, received a mix of cash and Harmonic stock valued at approximately $11.10 per share. The holder of the outstanding Series A-2.2 Preferred Stock received its liquidation preference of $1,513,032.40. For reasons not relevant to the dispute *sub judice*, the "Second Step Merger" did not take place.

As a result of the First Step Merger, Harmonic became the sole owner of all of Omneon's issued and outstanding stock. Thus, the stockholders of Omneon immediately prior to the transaction "owned less than 50% of [Omneon's] voting power immediately after [the merger]."[4] A Liquidation Event had occurred. The question raised by the cross motions is *when* did the Liquidation Event occur - - before or after the automatic conversion of Omneon's preferred stock into Omneon

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[4]Article FOURTH, Section (B)(3)(b) (defining "Liquidation Event").

common stock. If before the conversion, as Plaintiffs contend, then Plaintiffs are entitled to their liquidation preference of $28.78 per share. If after, as Omneon contends, then Plaintiffs were holders of Omneon common stock at the time of the Liquidation Event and are entitled only to the merger consideration of approximately $11.10 per share.

III.

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist.[5] Summary judgment will be granted only if the court determines, after viewing the record in a light most favorable to the non-moving party, that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[6] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record *sub judice*, then summary judgment will not be granted.[7]

"Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the

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[5] *Oliver B. Cannon & Sons, Inc.* v. *Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

[6] *Id.*

[7] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

disposition of either motion, 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."[8] Neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[9] "The mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion."[10]

In this case, both parties submit that no material issues of fact exist and that the matter is ripe for "decision on the merits" per Rule 56(h). The Court agrees.

IV.

The cross motions implicate the following issues: (A) whether provisions of the COI are clear and unambiguous; and (B) if so, whether the COI, when read alongside the Reorganization Agreement, clearly addresses Plaintiffs' entitlement to recover a liquidation preference for the C-1 Preferred Stock. The Court will address these issues *seriatim*.

A. The COI Is Clear And Unambiguous

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[8]Del. Super. Ct. Civ. R. 56(h).

[9]*Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

[10]*United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

Delaware law mandates that the rights of preferred shareholders, expressed as contractual terms within a certificate of incorporation, must "be strictly construed."[11] The Court may not, "by judicial action, broaden the rights obtained by a preferred stockholder at the bargaining table."[12] Given that "[a] certificate of incorporation is viewed as a contract among shareholders,"[13] it is well settled that canons of contract construction must be applied when construing the rights of preferred stockholders as provided in the certificate.[14]

The Court's primary goal in matters of contract interpretation is to "'attempt to fulfill, to the extent possible, the reasonable shared expectations of the parties at the time they contracted.'"[15] In attempting to discern the intent of parties, the Court initially must confine its review to the "four corners" of the contract and "must apply the meaning [to disputed terms] that would be ascribed to the language by a reasonable third party."[16] Only if the court finds the contract language to be

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[11] *Fletcher Int'l, Ltd. v. ION Geophysical Corp.*, 2011 WL 1167088, *4 (Del. Ch. Mar. 29, 2011).

[12] *Id*. at *1.

[13] *SV Investment Partners, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 983 (Del. Ch. 2010).

[14] *Id.*

[15] *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003) (quoting *U.S. West, Inc. v. Time Warner, Inc.*, 1996 WL 307445, at *9 (Del. Ch. June 6, 1996)).

[16] *Id* (quoting *True North Commc'ns Inc. v. Publicis, S.A.*, 711 A.2d 34, 38 (Del. Ch. 1997).

ambiguous "may [it] consider extrinsic evidence to uphold, to the extent possible, the reasonable shared expectations of the parties at the time of contracting."[17] The mere fact that parties disagree as to the meaning of contractual terms does not, alone, render those terms ambiguous.[18] Likewise, when opposing parties agree that a contract is unambiguous, but offer differing constructions of the contract, the Court need not adopt either party's construction but may, instead, construe the contract according to its own reading of the unambiguous terms, or conclude that it is ambiguous.[19] Delaware courts will deem contractual terms to be ambiguous when the terms in dispute are reasonably and objectively susceptible to two or more meanings.[20]

Having confined its review to the four corners of the COI, the Court is satisfied that the relevant provisions of the contract between the parties are unambiguous when read separately and when read together. Article FOURTH, section (B)(2)(b)(i) makes

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[17] *Id.*

[18] *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

[19] *See Guilford Transp. Indus. v. Public Utils. Comm'n.*, 746 A.2d 910, 915 (Me. 2000) ("Although both parties argued before...this Court that the agreement was unambiguous...the [] agreement is ambiguous."); *Plotkin v. Joekel*, 304 S.W.3d 455, 475 (Tex.Ct.App.2009) ("[] even when both parties agree that their contract is unambiguous and merely disagree as to its unambiguous meaning, a court may independently conclude that the contract is ambiguous.").

[20] *Twin City Fire Ins. Co. v. Delaware Racing Ass'n.*, 840 A.2d 624, 628 (Del. 2003).

clear that a Liquidation Event occurs upon consummation of an acquisition of Omneon by a third party. Article FOURTH, section (B)(2)(a) unambiguously states that the Series C-1 preferred shareholders liquidation preference is triggered upon the occurrence of a Liquidation Event. Article FOURTH, section (B)(3)(b) clearly provides that preferred shareholders may initiate an automatic conversion of preferred stock to common stock upon the vote of the majority of preferred shareholders (other than Series A-2.2). And Article FOURTH, section (B)(3)(b) provides that Series A-2.2 Preferred Shareholders may opt-out of the automatic conversion and may exercise their liquidation preference when the conversion is conditioned upon or follows the consummation of a Liquidation Event, as was the case here.[21] Each of these provisions separately and together clearly set forth the rights of Omneon preferred shareholders to receive a liquidation preference for their shares under certain circumstances, and to vote together to convert their preferred stock to common stock. Neither party appears to contest this point. As discussed below, the dispute arises from the application of these provisions to the corresponding provisions of the Reorganization Agreement.

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[21] *See* Reorganization Agreement §2.7(d)**:** "Immediately prior to the Effective Time, each of the shares of Company Preferred Stock, other than the outstanding share of Company Series A-2.2 Preferred Stock, shall be converted into shares of Company Common Stock pursuant to the approval of the Shareholders of the Company as set forth in the Shareholder Written Consent and Article IV Section B.3.b of the Company's Certificate of Incorporation."

B. Series C-1 Preferred Shareholders Are Not Entitled To Receive A Liquidation Preference Following the Omneon/Harmonic Merger

To reiterate, Omneon's argument is simply that the vote to convert Omneon preferred stock to common stock - - the validity of which has not been challenged by Plaintiffs - - occurred prior to any Liquidation Event such that the right to a liquidation preference for any series of preferred stock other than Series A-2.2 never accrued. Plaintiffs counter that each step of the proposed Omneon/Harmonic merger, including the vote to convert Omneon preferred stock to common stock, was part of "a series of related transactions" which, as provided by Article FOURTH, Section (B)(3)(b) of the COI, would constitute a Liquidation Event if the transactions resulted in a change in control of Omneon, as occurred here. They contend that the provision following the "provided, however" clause in Article FOURTH, Section (B)(3)(b) simply provides assurance to the Series A-2.2 Preferred Shareholders that they will receive their liquidation preference come what may. According to Plaintiffs, this contractual assurance to one series of preferred shareholders does not affect the contractual rights of other preferred shareholders. They assert that their reading of the COI is the only reading that makes sense given the sequential nature of the merger transaction as reflected in the Reorganization Agreement.[22] The Court

[22]Pls.' Answering Br. In Opp'n to Def.'s Mot. Dismiss and Opening Br. Supp. Pls.' Mot. Partial Summ. J. at 13.

disagrees.

Plaintiffs are correct that the automatic conversion of Omneon preferred stock to Omneon common stock clearly was an integral component of the Omneon/Harmonic merger. But, it is equally clear that a "reasonable third party"[23] would read the Reorganization Agreement to stage the automatic conversion as a condition, *inter alia*, to the first-step merger, not to include the conversion among the "series of related transactions" that comprised the merger itself. Once the automatic conversion occurred such that the first step merger could follow, the only series of Omneon preferred stock that remained in tact was the Series A-2.2 Preferred Stock. Thus, the only preferred shareholders entitled to recover their liquidation preference upon the consummation of the Omneon/Harmonic merger and corresponding occurrence of the Liquidation Event were the Series A-2.2 Preferred Shareholders.

To provide Plaintiffs with the same right to opt-out of the automatic conversion that Series A-2.2 Preferred Shareholders bargained for would require the Court to insert terms into the COI beyond those expressly bargained for by the Omneon preferred shareholders, in violation of Delaware law.[24] The only preferred

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[23]*See Comrie*, 837 A.2d at 13 (citation omitted).

[24]*See Elliott Associates, L.P. v. Avatex Corp.*, 715 A.2d 843, 852-53 (Del. 1998) ("Any rights, preferences and limitations of preferred stock that distinguish that stock from common stock

shareholders to bargain for a right to opt out of the automatic conversion provision of the COI were the holders of Series A-2.2 Preferred Stock. They and they alone were authorized to elect to receive their liquidation preference in lieu of merger consideration.

In reaching the conclusion that the COI must be read to preclude Plaintiffs from recovering a liquidation preference, the Court has honored the basic tenet of contract construction that requires courts to give meaning to all contractual terms and discourages courts from endorsing a construction that would render any contractual term superfluous.[25] The provision following the "provided, however" clause in Article FOURTH, Section (B)(3)(b) contemplates the exact circumstance that set the stage for the automatic conversion that occurred in this case. This provision sets the Series A-2.2 preferred shareholders apart from all other preferred shareholders by allowing that series alone to opt-out of an automatic conversion in the event of a merger. Any other reading of that provision would render the express exception for

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must be expressly and clearly stated, as provided by statute [8 *Del. C.* §151(a)].").

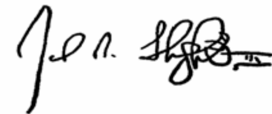
[25]*See O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 287 (Del. 2001) ("Contracts are to be interpreted in a way that does not render any provisions 'illusory or meaningless.'"); *Elliott Associates, L.P. v. Avatex Corp.*, 715 A.2d 843, 854 (Del. 1998) ("It is well established that a court interpreting any contractual provision, including preferred stock provisions, must give effect to all terms of the instrument, must read the instrument as a whole, and, if possible, reconcile all the provisions of the instrument."). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

Series A-2.2 Preferred Shareholders superfluous and would leave the Series A-2.2 Preferred Stockholder to scratch its head and wonder exactly what it had bargained for.

VI.

Based on the foregoing, Defendant's motion for summary judgment must be **GRANTED.**

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

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