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Case No. 2601-CC

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CARLO MATULICH, Plaintiff, v. AEGIS COMMUNICATIONS GROUP, INC, WORLD FOCUS, ESSAR INVESTMENTS LIMITED, ANSHUMAN RUIA, PRAMOD SAXENA, RAJIV AGARWAL, KANNAN RAMASAMY, MADHU VUPPULURI, RICHARD FERRY, JOHN-MICHAEL LIND, RASHESH SHAH, KAMALNAYAN AGARWAL Defendants.	Civil Action No. 2601-CC

REPLY BRIEF OF DEFENDANTS WORLD FOCUS AND ESSAR INVESTMENTS LIMITED IN SUPPORT OF THEIR MOTION TO DISMISS

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PRELIMINARY STATEMENT

After failing to pursue his only remedy (a statutory appraisal pursuant to 8 *Del. C.* § 262), Plaintiff[1] brought this action seeking to obtain entire fairness review of a short form merger consummated pursuant to 8 *Del. C.* § 253. As Plaintiff's claims lack merit entirely, all defendants ("Defendants") moved to dismiss this action on January 16, 2007, and filed their opening briefs in support of their motion to dismiss on February 2, 2007. Plaintiff filed his answering brief in opposition to Defendants' motions to dismiss ("AB") on March 5, 2007. This is World Focus and Essar's reply brief in support of their motion to dismiss.

As set forth herein, and in World Focus and Essar's opening brief, Plaintiff cannot avoid dismissal. The substance of this case focuses upon whether the holders of Aegis's Series B Preferred Stock[2] had a right to vote on the Merger. The Series B Certificate of Designation unambiguously states that holders of the Series B Preferred Stock had "no voting rights." Accordingly, Defendants are entitled to a dismissal for Plaintiff's failure to state a claim upon which relief can be granted.

The essence of Plaintiff's opposition can be found on page 23 of his answering brief, where he states: "The fact that the certificate of designations says that the Series B Preferred has 'no voting rights' is of no moment...." AB at 23. Only through his tortured

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[1] All capitalized terms not defined herein are taken from World Focus and Essar's opening brief ("OB") in support of their motion to dismiss.

[2] At the time of the Merger, only 29,778 shares of Series B Preferred Stock remained outstanding. 2006 Petition ¶ 5.

interpretation can Plaintiff assert that the holders of Series B Preferred Stock have voting rights. Plaintiff's aspiration, his end game, is to create voting rights where none exist.

Delaware courts have never taken the issue of stockholder franchise lightly; in fact, quite the opposite is true: "[a] stockholder's vote is one of the most fundamental rights of owning stock." *Perlegos v. Atmel Corp.*, 2007 WL 475453, at *28 (Del. Ch. Feb. 8, 2007). Because stockholder franchise is so important (*to those stockholders actually entitled to vote*), any action that interferes with a stockholder's right to vote must be supported by a compelling justification. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660-661 (Del. Ch. 1988). The necessary corollary to the protection afforded to each stockholder's right to vote is that only holders of voting stock may actually vote, and they do so to the exclusion of those who are not entitled to vote.

Here, the Series B Certificate of Designation expressly provides that the holders of the Series B Preferred Stock have no voting rights. Instead, the holders of Series B Preferred Stock have a "right of approval and consent" for certain corporate actions. In light of the express language of the Series B Certificate of Designation, and the fundamental importance of the right to *vote*, Plaintiff's attempt to create a right to vote where one does not exist should not be allowed.

Furthermore, none of Plaintiff's arguments to treat the Series B Preferred Stockholders' approval and consent right as a voting right pass muster. As set forth below, each of Plaintiff's arguments is fundamentally flawed and does not overcome the clear and unambiguous language of the Series B Certificate of Designation.

In addition, assuming *arguendo* that Plaintiff's novel, unsupportable position survives a motion to dismiss under Court of Chancery Rule 12(b)(6), Plaintiff faces insurmountable hurdles with regard to his unreasonable delay in challenging the Merger, and in the case of Essar, ineffective service of process and lack of *in personam* jurisdiction.

Accordingly, for the reasons stated in World Focus and Essar's opening brief and herein, Defendants' motions to dismiss should be granted.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO DISMISSAL BECAUSE PLAINTIFF HAS FAILED TO STATE A COGNIZABLE CLAIM.

A. Legal Standard.

The standards that apply on a motion to dismiss are well-settled. Court of Chancery Rule 12(b)(6) requires dismissal if it appears to "a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action." *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985). Furthermore, in applying this standard, unsupported factual inferences and conclusions of law "will not be accepted as true." *In re Wheelabrator Techs. Inc. S'holders Litig.*, 1992 WL 212595, at *2 (Del. Ch. Sept. 1, 1992).

"Under Delaware law, the proper interpretation of language in a contract is a question of law. Accordingly, a motion to dismiss is a proper framework for determining the meaning of contract language." *See Majkowski v. Am. Imaging Mgmt. Svcs., LLC*, 2006 WL 3627111, at *6 (Del. Ch. Dec. 6, 2006) (footnote omitted). Therefore, the Court can appropriately determine the meaning of the provisions of the Series B Certificate of Designation in deciding the Defendants' motion to dismiss, and where there is no ambiguity -- as is the case here -- a court "must give effect to the clear language" of the certificate of designation. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).

B. Plaintiff Has Not Stated A Claim Upon Which Relief May Be Granted.

1. General Contentions.

As set forth in World Focus and Essar's opening brief, the Delaware General Corporation Law ("DGCL") provides that holders of preferred stock have, by default, the same voting rights as holders of common stock. OB at 22. The default rule does not apply, however, where the instrument establishing the terms of the preferred stock -- here, the Series B Certificate of Designation -- expressly addresses the issue of voting rights. *Id.* at 22-23.

The Series B Certificate of Designation states:

> (B) The holders of shares of Series B Preferred Stock are subject to the following ***qualifications, limitations and restrictions***:
>
> (i) ***no voting rights***;
>
> (ii) ***except as provided in (A)(vi) above, no right of consent to or approval of***, except, as may then be required by law, prior to or upon amendment of or repeal of provisions attaching to the Series B Preferred Stock[.]

Series B Certificate of Designation § (B) (emphasis added). The elimination of voting rights of the holders of the Series B Preferred Stock could not be more clear and unambiguous. The Court need look no further, as the contract between Aegis and the holders of the Series B Preferred Stock directly and expressly eliminated any right to vote on any matter.

The Series B Certificate of Designation does grant the holders of the Series B Preferred Stock limited consent and approval rights. The "right of approval and consent" provided for in Section (A)(vi) states as follows:

> (A) Shares of Series B Preferred Stock shall entitle their registered owners to the following preferences and rights...
>
> > (vi) ***right of approval and consent*** (represented by the consent of the majority of the Series B Preferred Stock then outstanding) prior to any of the following events...
> >
> > > (d) ***merger*** or consolidation of [Aegis] with any other entity or sale of all or substantially all the assets of the Corporation.

Id. § A(iv)(d) (emphasis added). Of paramount importance (and which Plaintiff repeatedly ignores) is the fact that the Series B Certificate of Designation recognizes, on its face, that the right to vote is different and distinct from the consent and approval right provided for in Section (A)(vi). Series B Certificate of Designation §§ (B)b(i)-(ii); (A)(vi).

In his answering brief, Plaintiff states that "[c]lause (B) is expressly made subject to the voting rights contained in Clause (A) ('except as provided by (A)(vi) above')." AB at 5. In making this misstatement, Plaintiff elects not to reveal that: (1) Clause (A)(vi) does not provide voting rights, it provides a right of "approval and consent;" and (2) that the "except as provided by (A)(vi) above" carve-out applies only to Clause (B)(ii) which addresses the right to "consent and approve," not to Clause (B)(i) that addresses the right to "vote." Series B Certificate of Designation, §§ (A)(vi), (B)(ii).

That Plaintiff has to change the terms of the Series B Certificate of Designation to reach his interpretation should end the inquiry, because what matters are the *actual* express terms of the *actual* Series B Certificate of Designation, not Plaintiff's unilaterally amended version. Furthermore, the terms Plaintiff seeks to insert into the Series B

Certificate of Designation would render the distinction between "voting rights" in (B)(i) and "consent to or approval of" in (B)(ii) meaningless, which is impermissible under Delaware law. *See Delta & Pine Land Co. v. Monsanto Co.*, 2006 WL 1510417, at *4 (Del. Ch. 2006) (stating courts will not construe contracts to render a provision "'illusory or meaningless'").

2. The "Prior Admissions" Of Aegis Cannot Change The Voting Rights Of The Holders Of The Series B Preferred Stock.

Plaintiff argues that a few inaccuracies in public statements and the 2003 Petition demonstrate that the holders of the Series B Preferred Stock had voting rights. AB at 15-18. Simply put, the so-called "prior admissions" of Aegis have no application here because the language of the Series B Certificate of Designation is unambiguous.[3] The Series B Certificate of Designation is a contract between Aegis and holders of the Series B Preferred Stock. It is a fundamental principal of contract law that the Court should first look within the four corners of a contract to determine the meaning of its provisions. *See Interactive Corp. v. Vivendi Universal, S.A.*, 2004 WL 1572932, at *9 (Del. Ch. 2004); *Universal Studios Inc. v. Viacom Inc.*, 705 A.2d 579 (Del. Ch. 1997). Only when a contract is ambiguous on its face is a Court permitted to look to extrinsic evidence. *See*

[3] Plaintiff primarily relies on the 2003 Petition as a "prior admission" by Aegis to demonstrate that the Series B Preferred Stockholders had voting rights. As set forth in World Focus and Essar's opening brief, the 2003 Petition was filed for a different purpose than the 2006 Petition. The AllServe Merger that was the impetus for the 2003 Petition was structured as a long form merger to be consummated pursuant to 8 *Del. C.* § 251. Thus, the difference between the right to "vote" and the right of "approval and consent" was not at issue and, therefore, Aegis had no reason to draw a distinction in the 2003 Petition. Importantly, the use of the term "vote" in connection with the Series B Preferred Stock in the 2003 Petition did not impact detrimentally any of the other classes of stock or other interests.

Interactive Corp., 2004 WL 1572932, at *9. As explained above, the Series B Certificate of Designation clearly provides that the Series B Stockholders do not have voting rights. Thus, the analysis stops with the Series B Certificate of Designation and there is no reason to consider the 2003 Petition or the 1999-2001 SEC filings hand-picked by Plaintiff.[4]

Furthermore, to the extent Plaintiff argues that the so-called "prior admissions" somehow modified the Series B Certificate of Designation, that argument also fails as a matter of law. As with all certificates of designation, the Series B Certificate of Designation became part of Aegis's Certificate of Incorporation. *See In re Nantucket Island Assoc. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351, 363-64 (Del. Ch. 2002). A certificate of incorporation may only be modified in accordance with 8 *Del. C.* § 242, which requires a board resolution to amend the charter, followed by stockholder vote approving the resolution to amend the charter. 8 *Del. C.* § 242(b) (stating that "***Every amendment...shall*** be made and effected in the following manner" and requiring a board resolution followed by submission to stockholders for a vote).[5]

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[4] Not surprisingly, the few SEC filings selected by Plaintiff and quoted in Plaintiff's answering brief (AB at 17-18) are the only SEC filings that refer to the Series B Preferred Stock as a voting stock. Although absent from Plaintiff's answering brief, the majority of Aegis's public filings do not refer the Series B Preferred Stock as a voting stock. A chart listing all references to the Series B Preferred Stock dating back to 1995 is attached hereto as Exhibit 1.

[5] The only exception to this amendment process, not applicable here, is the creation of preferred stock pursuant to a blank check provision, which requires board action but is not submitted to stockholders for a vote. *See* 8 *Del. C.* § 151(g).

A certificate of incorporation (or a certificate of designation, which is part of a certificate of incorporation) cannot be modified by inaccuracies in SEC filings, nor inaccuracies in court filings.[6] Despite Plaintiff's misguided references to the 2003 Petition, as well as excerpts from selected public filings which mistakenly refer to the Series B Preferred Stock as "Series B Voting Convertible Preferred Stock"[7] (AB at 17-18), no mistaken or inaccurate characterization of the Series B Preferred Stock can change the fact that such stock was non-voting stock by its express terms and as a matter of law. *See Lions Gate Ent. Corp. v. Image Ent. Inc.*, 2006 WL 1668051, at *7 (Del. Ch. June 5, 2006) (explaining that a charter amendment requires both board action and a stockholder vote). Much to Plaintiff's dismay, the universe of rights and limitations of the Series B Preferred Stock are as set forth in the express terms of the Series B Certificate of Designation -- no other document, public filing, court filing, etc. can amend, by implication or otherwise, the Series B Certificate of Designation without the requisite board action and a stockholder vote. *See* 8 *Del. C.* § 242(b)(1).[8]

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[6] A thorough review of the interim and final orders issued in connection with the 2003 Petition reveals that the Court never made a determination that the holders of the Series B Preferred Stock had voting rights. In the final order, the Court ordered the "unanimous approval" of the holders of the Series B Preferred Stock given in favor of the AllServe Merger. *In re Aegis Communications Group, Inc.*, C.A. 20482-NC (Del. Ch. Sept. 16, 2003) (ORDER).

[7] The Series B Certificate of Designation refers to the Series B Preferred Stock as "Series B Preferred Stock" throughout the Series B Certificate of Designation -- there is no reference to the Series B Preferred Stock as "Series B Voting Convertible Stock." *See generally* Series B Certificate of Designation. Any reference to "Series B Voting Convertible Stock" was inaccurate, and likely just copied into future filings.

[8] Assuming *arguendo* that Plaintiff is correct and statements contained in SEC filings have the ability to amend a corporate charter, the Schedule 13E-3 filed in connection with the [footnote cont'd]

Based on the foregoing, Plaintiff's argument that the holders of the Series B Preferred Stock were entitled to vote on a merger based solely on Aegis's "prior admissions" is not sufficient to overcome Defendants' motion to dismiss. Rather, the law is well settled that the rights of holders of preferred stock to vote are governed by the certificate of incorporation, which in this case, provides that the holders of the Series B Preferred Stock shall have "no voting rights." Because the language of the Series B Certificate of Designation is unambiguous in eliminating the voting rights of the Series B Preferred Stock, Defendants are entitled to dismissal.

C. Rules Of Statutory And Contractual Construction Support Defendants' Motion to Dismiss.

In support of his position, Plaintiff sets forth five "reasons" why the holders of the Series B Preferred Stock had a right to vote. AB at 19-25. As detailed below, none of Plaintiff's five "reasons" is sufficient to overcome the plain meaning of the Series B Certificate of Designation.

First, Plaintiff cites cases in which the words "vote" and "approval" are used in conjunction with one another to refer to a stockholder's right to vote. AB at 21-22. None of the cases cited by Plaintiff address the issue of the distinction between a voting right and a consent and approval right, nor do they even involve the voting rights of holders of preferred stock, or present any issue which turns on a distinction created in a certificate of designation between a right to "vote" and a right to approve and consent. These cases

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Merger states that the Series B Preferred Stock does not have a right to vote on the Merger, and is therefore dispositive of this issue. See Schedule 13E at 1.

are, therefore, completely inapposite and do nothing to advance Plaintiff's position that a right of approval and consent is a right to vote.

In addition, as this Court recently observed, "words may change in legal significance depending on their context." *Louisiana Mun. Police Employees' Retirement Sys. v. Crawford*, 2007 WL 582510, at *3 n.6 (Del. Ch. Feb. 23, 2007). Plaintiff cannot credibly rely on the use of "approval" and "voting" in various inapposite opinions where the issue for judicial determination had nothing to do with the meaning of those terms in the same preferred stock instrument. The use of "approval" and "vote" interchangeably in one context does not make them synonymous in all other contexts, particularly where a certificate of designation draws a clear distinction between the two. In that context, "vote" and "approval" cannot mean the same thing -- to hold otherwise would be to render Section (B)(i) ("no voting rights") meaningless in contradiction to Delaware law. *See, e.g., Delta*, 2006 WL 1510417, at *4 (stating courts will not construe contracts to render a provision "'illusory or meaningless.'") (citations omitted).

While "approve" can, at times, refer to a "vote," the meaning of "vote" in the stockholder context means a stockholder's right to vote by person or proxy at a meeting of stockholders. *See Amtower v. Hercules Inc.*, 1999 WL 167740, at *8 (Del. Super. Feb. 26, 1999) ("A majority vote, when unqualified, means: 'more than half the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called ***meeting*** at which a quorum is present.'") (emphasis added); *see also* 8 *Del. C.* § 141(b) ("The vote of the majority of the directors present at a meeting at which a

quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.") (emphasis added).

The contract between the holders of the Series B Preferred Stock and Aegis expressly and clearly distinguished between the terms "approve" and "consent" on one hand, and "vote" on the other. To ignore this critical distinction would be to rewrite the contract, which is an impermissible result under Delaware law. *See, e.g. McAllister v. Kallop*, 1993 WL 104626, at *3 (Del. Ch. Mar. 19, 1993) ("court will not rewrite the plain language of a contract provision"). Here, "approve" and "consent," as utilized in the Series B Certificate of Designation do not mean "vote."[9]

Second, Plaintiff contends that Section 253 was "not intended to empower a controlling stockholder to implement a short form merger ... where the controlling stockholder does not own a single share of one or more classes of stock who could otherwise block the merger." AB at 21 (emphasis omitted). Section 253 of the DGCL expressly states that a parent corporation must own at least 90% of each class of stock entitled to vote. 8 *Del. C.* § 253. Inherent in that requirement is the recognition of the existence of classes of stock which are not entitled to vote, such as the Series B Preferred Stock.

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[9] Neither Plaintiff nor Defendants contend that the Series B Preferred Stockholders' right to consent is to be interpreted as action by written consent in lieu of a vote pursuant to 8 *Del. C.* § 228. By its express terms, action by written consent under 8 *Del. C.* § 228 is action taken in place of a vote at a stockholders' meeting. Holders of the Series B Preferred Stock had no such right to vote.

Plaintiff ignores the reality that preferred stock has characteristics of both debt and equity, and that the rights and limitations of preferred stock, to the extent they vary from common stock, are contractual in nature. *See In re Appraisal of Ford Holdings, Inc. Preferred Stock*, 698 A.2d 973, 977 (Del. Ch. 1997). Plaintiff argues that the holders of Series B Preferred Stock had the right to block a merger and that such blocking right must be deemed a right to "vote." This incorrect formulation ignores the contractual nature of preferred stock, which is subject to the terms of its governing instrument.[10]

Subject to the limitations imposed by the DGCL, the contractually defined preferences and limitations of preferred stock are wide-ranging. Thus, it is not inherently wrongful or unusual that the holders of the Series B Preferred Stock had no voting rights, either generally or in the event of a merger. Granting voting rights to the holders of the Series B Preferred Stock in the face of express contractual provisions to the contrary, would, however, be contrary to the law of this state. Plaintiff's attempt to do just that should be halted, lest Defendants find themselves in the most unusual position of wrongful reliance on the plain language of the governing document, the Series B Certificate of Designation, and a Court order validating World Focus and Essar's interpretation of that governing document.

Third, Plaintiff is correct in stating that "[v]oting is ***a*** means to obtain approval" (AB at 22) but, as Plaintiff acknowledges, it is only ***one*** method of obtaining approval,

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[10] As set forth in World Focus and Essar's opening brief, the consent and approval right given to the holders of the Series B Preferred Stock is similar in nature to that of a senior lender, who by contract, has a right to consent to a merger prior to its occurrence. *See* OB at 22.

and it does not follow that every approval (and consent) must be obtained through a vote. Nor are the consent and approval rights of holders of preferred stock, debt instruments, lenders, etc. "votes" in the sense in which holders of common stock vote.[11]

Plaintiff acknowledges that World Focus and Essar point out the different definitions of the words "approve" and "consent" on one hand, and "vote" on the other (AB at 21-22), but Plaintiff does nothing to address the differences in their meaning, arguing instead that "vote" and "approval" are the same. Plaintiff argues that "when § 253 uses the word "vote" clearly what it is referring to is stock whose approval is required before a merger can be implemented," yet again Plaintiff neglects to address the use of the word "vote" and the omission of "approval" in Section 253. AB at 21-22. In reality, Section 253 requires only that a parent corporation own "90% of the outstanding shares of each class of the stock of the corporation ... of which class there are outstanding shares that, absent this subsection, would be entitled to ***vote*** on such merger." 8 *Del. C.* § 253 (emphasis added). Accordingly, Plaintiff's attempt to once again insert his own terms, this time into the DGCL, should be seen for what it is -- an attempt to create a voting right in favor of the holders of the Series B Preferred Stock where none exists.

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[11] Apparently in support of his position, Plaintiff offers a hypothetical example in which a 51% stockholder would be able to consummate a short form merger by executing a written consent pursuant to 8 *Del. C.* § 228. Defendants fail to see the applicability of this example, because: (1) stockholders neither vote nor consent in writing in favor of a short form merger; and (2) assuming even just one class of stock outstanding, Section 253 requires ownership of 90% of that class of stock to consummate a short form merger, but again, there would be no vote. Accordingly, the use of this example is puzzling at best.

Strategically, Plaintiff argues first that "approve" means vote in the Series B Certificate of Designation, and now that "vote" means approve in Section 253 of the DGCL. The fact remains that the Series B Preferred Stock was never entitled to ***vote*** on a merger by the express terms of the Series B Certificate of Designation, and that Section 253, by its express terms, requires ownership of only those classes of stock entitled to ***vote***. In arguing otherwise, Plaintiff ignores the plain language of both the Series B Certificate of Designation and Section 253.

Fourth, Plaintiff argues that Section (B)(i)'s outright rejection of voting rights ("no voting rights") "is of no moment" (AB at 23) because "specific provisions control over general [provisions]." *Id.* But, affording all of the *specific provisions* of the Series B Certificate of Designation their due consideration over general provisions results in the conclusion that holders of the Series B Preferred Stock did not have a right to vote on the Merger. It is only by disregarding the express language of the Series B Certificate of Designation that one can arrive at the wrong conclusion that holders of the Series B Preferred Stock had a right to vote on the Merger -- Plaintiff does this repeatedly. First, he substitutes "vote" for the "right of approval and consent" contained in (A)(vi). *See, e.g.*, AB at 23 ("The Series B Preferred generally has no voting rights, except for four particular situations identified in section (A)(vi)."). The word "vote" does not appear in Section (A)(vi). Next, Plaintiff unilaterally and wrongfully adds words to the Series B Certificate of Designation to aid his position. *See, e.g.*, AB at 5 ("[c]lause (B) is expressly made subject to the voting rights contained in Clause A ('except as provided by (A)(vi) above')."). Section (B) really states:

(B) The holders of shares of Series B Preferred Stock are subject to the following ***qualifications, limitations and restrictions***:

(i) ***no voting rights***;

(ii) ***except as provided in (A)(vi) above, no right of consent to or approval of***, except, as may then be required by law, prior to or upon amendment of or repeal of provisions attaching to the Series B Preferred Stock[.]

Series B Certificate of Designation § (B) (emphasis added). When quoted in its entirety, it is clear that only Section (B)(ii) is subject only to the *consent and approval* rights contained in Section (A)(vi). The restriction on *voting* rights is absolute and without limitation. *Compare* Series B Certificate of Designation, § (B)(i) *with id.* at § (B)(ii).

Continuing his string of unavailing rationales, Plaintiff argues that (A)(vi) must be read to track the language of 8 *Del. C.* § 242(b)(2). AB at 23. Plaintiff is wrong because the mandatory voting provisions of Section 242(b)(2) exist as a matter of law, and need not be restated in the certificate of designation. *See, e.g., In re LJM2 Co-Investment, L.P.*, 866 A.2d 762, 779 (Del. Ch. 2004); AB at 23 (citing 8 *Del. C.* § 394, which provides that the provisions of the DGCL are automatically part of the charter). It is as if the DGCL is attached to every charter and therefore need not be restated expressly therein. *See In re LJM2*, 866 A.2d at 779 ("'[t]he substantive effect of [8 *Del. C.*] § 394 is to engraft the statutory rules provided in the DGCL onto every charter, to relieve drafters of charters of the burden of explicitly specifying every single one of those rules that they wish to adopt.'") (footnote omitted). Section (A)(vi) should be read according to its plain meaning, without reference to Section 242(b)(2).

Furthermore, Section (A)(vi) provides something more than Section 242(b)(2) provides -- a separate right of approval of and consent to a proposed charter amendment which adversely impacts the Series B Preferred Stock. This right of approval and consent is in addition to the class vote provided in Section 242(b)(2), a vote which may or may not reflect the wishes of the holders of the Series B Preferred Stock, depending on the other series of preferred stock comprising the class vote.[12] Section (A)(vi) ensures that the holders of the Series B Preferred Stock approve and consent prior to a charter amendment which affects them adversely. Because Section (A)(vi) provides a distinct consent and approval right, Plaintiff's claim that "[s]ince these provisions basically just copy the language of [§ 242(b)(2)] they were clearly intended to track the basic "voting" rights referred to in § 242(b)(2)" can be disregarded in its entirety.

Furthermore, Plaintiff's claims regarding the relationship between Section 242(b)(2) and Section (A)(vi) do nothing to address the specifics of the Series B Certificate of Designation, which both draws a distinction between a right of "approval

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[12] By way of example, assume that Aegis had three series of preferred stock outstanding: 1,000 shares of Series A, 100 shares of Series B, and 1,000 shares of Series C. In the event of a charter amendment which adversely impacted only the Series B and Series C, but not the Series A, Section 242(b)(2) provides that the holders of the Series B and Series C would vote together as one class. It would not, however, provide a separate series vote to each of the Series B and the Series C. 8 *Del. C.* § 242(b)(2) ("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.") (emphasis added). In this example, the vote of the Series C would authorize the charter amendment, even if all of the holders of Series B voted against the charter amendment. Section (A)(vi) however, prevents this from happening by providing the holders of the Series B a separate right of approval and consent -- this is different from the class vote provided by Section 242(b)(2).

and consent," and a right to "vote," and unequivocally states that holders of Series B Preferred Stock have "no voting rights." At best, the approval and consent rights of the holders of the Series B Preferred Stock provided for in (A)(vi)(a)-(b) are satisfied by the affirmative vote of those holders in connection with their Section 242(b)(2) vote, but the holders of the Series B Preferred Stock have no such vote with respect to a merger. Based on the foregoing, Plaintiff's fourth "reason" fails as well.

Fifth, contrary to Plaintiff's assertions otherwise, the Series C Certificate of Designation does not render the provisions of the Series B Certificate of Designation meaningless. The relevant provisions of the Series C Certificate of Designation provide as follows:

> (vi) ***right of approval and consent*** (represented by the consent of the majority of the Series C Preferred Stock then outstanding) prior to either of the following events;
>
> (a) Change or alteration of the rights, preferences, privileges or limitations of the Series C Preferred Stock so as to adversely affect such stock; or
>
> (b) Increase in the authorized number of shares of Series C Preferred Stock.

Series C Certificate of Designation, § (A)(vi). As to voting rights, the Series C Certificate of Designation provides:

> (ix) At every meeting of stockholders of the Corporation, every holder of Series C Preferred Stock shall be entitled to that number of votes for each share of Series C Preferred Stock standing in his name on the books of the Corporation that is then equal to the number of shares of Common Stock into which such share of Series C Preferred Stock is then convertible under Section (A)(vii) above. The Series C

> Preferred Stock, the Common Stock and any other stock having voting rights shall vote together as one class, except as set forth in Section (A)(vi) above or as provided by law.

Id. at § (A)(xi).

According to Plaintiff, these two provisions somehow conclusively establish that the holders of the Series B Preferred Stock had a right to vote on a merger transaction. AB at 24-25. Again, Plaintiff's position is without merit. First, the obvious: although certain provisions of the Series B Certificate of Designation and the Series C Certificate of Designation are similar, the fact that the Series B Preferred Stock is non-voting stock and the Series C Preferred Stock is voting stock must be kept in mind in determining the effect of such provisions.

Second, the provisions of Section (A)(vi) of the Series C Certificate of Designation give the holders of the Series C Preferred Stock the same right of approval and consent as the holders of Series B Preferred Stock in connection with charter amendments.[13] In stating that "[t]he Series C Preferred Stock, the Common Stock and any other stock having voting rights shall vote together as one class, except as set forth in Section (A)(vi) above or as provided by law," the Series C Certificate of Designation

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[13] As set forth *supra* in note 11, with regard to Section (A)(vi) of the Series B Certificate of Designation, Section (A)(vi) provides the holders of the Series B Preferred Stock a consent and approval right in addition to the class vote provided by Section 242(b)(2) of the DGCL. Likewise, Section (A)(vi) in the Series C Certificate of Designation is of the same effect -- providing holders of Series C Preferred Stock with a right of approval and consent which is distinct from their Section 242(b)(2) class vote. Series C Certificate of Designation, § (A)(vi).

merely clarified that the single class vote is subject to the approval and consent rights of the holders of the Series C Preferred Stock set forth in Section (A)(vi).

Furthermore, the Series C Certificate of Designation does nothing to strengthen Plaintiff's argument that the holders of Series B Preferred Stock had a right to vote, because the holders of the Series C Preferred Stock were expressly granted that right by Section (A)(xi) of the Series C Certificate of Designation. Accordingly, if anything, the Series C Certificate of Designation proves that Aegis knew how to grant voting rights if it wanted to, and conversely knew how to eliminate voting rights, as it did in the Series B Certificate of Designation.[14] As set forth in Defendants' opening brief, the other Aegis certificates of designation support the fact that the holders of Aegis's Series B Preferred Stock did not have voting rights. OB at 29-30.

* * *

As set forth above, none of the five "reasons" argued by Plaintiff support a finding that the holders of the Series B Preferred Stock were entitled to vote on the Merger. As set forth in World Focus and Essar's opening brief, the operative certificate of incorporation at the time Aegis's predecessor issued the Series B Preferred Stock provided that the company's preferred stock shall be non-voting unless the resolution creating such preferred stock expressly indicated otherwise. OB at 7 (citing Certificate

[14] It is important to note that Plaintiff has never even attempted to explain how "voting rights" are identical to the right of "approval to and consent of" contained in the Series B Certificate of Designation, despite the distinction drawn between the two, rather he simply inserts "vote" for consent and approve where it serves his purpose.

of Incorporation of Kenneth Resources, Inc., Art. Fourth, B). Next, the plain language of the Series B Certificate of Designation provides that the holders of Series B Preferred Stock have "no voting rights." Series B Certificate of Designation, § (B)(i).

Defendants agree that the holders of the Series B Preferred Stock had a right of approval and consent prior to the Merger, but reject outright Plaintiff's position that the right to approve and consent is the same as a right to vote. The Series B Certificate of Designation is express in drawing a distinction between "voting rights" in (B)(i) and the approval and consent rights in (B)(ii), so Plaintiff's theory of the case should end there.

But Plaintiff goes further, arguing the holders of the Series B Preferred Stock had the ability to block the Merger, and that that blocking right must be equated to a vote. In so arguing, Plaintiff ignores the express intent of the Series B Certificate of Designation to deny holders of the Series B Preferred Stock any voting rights whatsoever, and disregards the contractual nature of preferred stock by claiming that the consent and approval right must be a voting right. And, of course, Plaintiff ignores the express language of Section 253, which requires ownership of only 90% of those classes of stock entitled to ***vote***.

In Delaware corporate law, a "vote" is the formal expression of one's position, either in person or by proxy, at a meeting of stockholders. *See, e.g.,* 8 *Del. C.* § 212(b) (contemplating stockholders "entitled to vote at a meeting"). Whether it is for an election of directors, or on an asset sale pursuant to 8 *Del. C.* § 271, the votes of stockholders of Delaware corporations are taken at a meeting, whether in person or by proxy. *Id.*

Obtaining consent and approval from holders of debt instruments, lenders, and holders of preferred stock with consent rights, is different from a vote entirely. As consent and approval rights are creations of contract, the method of obtaining consent and approval can be more flexible and less formalistic than a traditional vote. Regardless of how the holders of the Series B Preferred Stock would have expressed their consent, one thing is certain -- they would not have had the ***right to vote at a stockholders' meeting*** called to approve the Merger. As set forth above, Plaintiff has done nothing to overcome the Series B Certificate of Designation's express terms, which includes the outright rejection of voting rights, and as a result, Defendants are entitled to a dismissal of this action.

D. Defendants World Focus And Essar Are Entitled To Dismissal On The Other Grounds Set Forth In Their Opening Brief.[15]

1. Plaintiff Is Barred By Laches.

As set forth in World Focus and Essar's opening brief, the relief sought by Plaintiff is barred by laches. OB at 33-35. The mandate of the *Havendar* Court is clear: when challenging corporate action, a dissident stockholder is required, at the very least, to make his dissent known prior to the challenged action. *Fed. United Corp. v. Havender*, 11 A.2d 331, 345 (Del. Ch. 1940); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY,

[15] Plaintiff does not squarely address the argument that his only remedy after a short form merger is a statutory appraisal, OB at 32-33, so it is not addressed in this reply brief, but Defendants do wish to preserve it as an additional, self-sufficient, ground for dismissal.

§ 11-5[d] (2007 ed.) (citing to *Havender* and referring to it as a "leading case" on the issue of laches decided by the Delaware Supreme Court).

None of the arguments put forth by Plaintiff in his answering brief addressing laches make any effort to address the facts and circumstances of this case. AB at 25-26. The fact remains that Plaintiff owed a duty to Aegis and the holders of its Common Stock to challenge the Merger promptly if he thought it unfair. *See id.* (explaining that a stockholder owes a duty to a corporation and its stockholders to challenge corporate action "promptly and decisively"). Though Plaintiff now seeks money damages, the fact remains that he did not even express his dissent until over a month *after* the Merger. The facts and circumstances surrounding Plaintiff's unreasonable delay are already in the record, and the prejudice to World Focus and Essar is readily apparent; although World Focus assessed the business risk of appraisal actions in connection with the Merger, it could not have anticipated a *post hoc* class action challenge to a short form merger. *See Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001). Where as here, the facts of Plaintiff's laches are fully developed, dismissal is appropriate. *See, e.g. Flerlage v. KDI Corp.*, 1986 WL 4278, at *5 (Del. Ch. Apr. 10, 1986).

2. Essar Is Not Subject To *In Personam* Jurisdiction.

Though Plaintiff's brief does little to address Essar's personal jurisdiction defense, the facts of each case cited in support of his arguments are inapposite to the present case. In *Arnold v. Society for Savings Bancorp., Inc.*, the defendant Bank of Boston Corporation ("BoB") claimed the court lacked *in personam* jurisdiction. 1993 WL 526781, at *3-4 (Del. Ch. Dec. 17, 1993). In denying BoB's motion, the Court reasoned

that as a direct parent merging a Delaware subsidiary with another Delaware entity, BoB transacted business in Delaware. *Id.* Essar has no such contacts. In fact, the only link Essar has to Delaware is this lawsuit -- Essar does not directly own a single Delaware entity, and transacts no business here. OB at 37; B. Aff. ¶¶ 9,12-18.

Equally unpersuasive is Plaintiff's reliance on the inapposite *Deutsch v. Cogan*, which is an opinion on a motion to compel in a discovery dispute. 580 A.2d 100, 107 (Del. Ch. 1990). Rather, this Court recently reaffirmed the longstanding principle that control of a Delaware entity, in and of itself, is not a sufficient connection with Delaware to give rise to *in personam* jurisdiction under Delaware's long arm statute. *See Multi-Fineline Electronix, Inc. v. WBL Corp. Ltd.*, 2007 WL 431050, at *7 (Del. Ch. Feb. 2, 2007) (citations omitted).

Moreover, Plaintiff has failed to even *allege*, must less demonstrate, facts which would confer personal jurisdiction over Essar. In support of his argument that Essar was "responsible for causing the [Merger]," Plaintiff relies solely on paragraphs 4-5 of his Complaint which allege only that Essar is the indirect ultimate controlling stockholder of World Focus. Complaint ¶¶ 4-5. Importantly, the Complaint contains no allegations that Essar took any action with respect to the Merger, and in fact, Essar did not.

Plaintiff essentially asks this Court to pierce the corporate veil without providing a single allegation that Essar took any action in connection with the Merger. As set forth in the Essar's opening brief, the fact that Essar was the ultimate parent of World Focus at the time of the Merger is not sufficient to confer *in personam* jurisdiction over Essar under either the Delaware long arm statute or federal due process. OB at 35.

Accordingly, Essar is entitled to dismissal from this action for lack of *in personam* jurisdiction.

3. Plaintiff Has Not Properly Served Essar With Process.

Immediately prior to the filing of this brief, World Focus and Essar received copies of the Complaint and summons at their corporate headquarters. However, to the extent Plaintiff has attempted to serve Essar with process, Plaintiff's attempts at service are improper because Essar is not subject to *in personam* jurisdiction. OB at 39 n. 27.

Accordingly, Plaintiff has failed to serve Essar with process.

CONCLUSION

For all of the reasons stated in their opening brief, as well as the foregoing reasons, World Focus and Essar respectfully submit that their Motion to Dismiss pursuant to Court of Chancery Rules 12(b)(2), 12(b)(5) and 12(b)(6) be granted, or alternatively, dismissal be granted on the grounds of laches.

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