IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PIERRE SCHROEDER and PIERO GRANDI, Plaintiffs, v. PHILIPPE BUHANNIC, PATRICK BUHANNIC, and LUC BUHANNIC, Defendants.	)	C.A. No. 2017-0746-JTL

ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

1. On October 9, 2017, defendants Philippe and Patrick Buhannic executed a Written Consent of Holders of the Majority of Common Stock of TradingScreen Inc. (the "Consent," and the "Company," respectively). The Consent purports to make a series of changes to the composition of the management and board of directors (the "Board") of the Company.

2. On October 19, 2017, the plaintiffs filed a Verified Complaint for Relief Under 8 *Del. C.* § 225 (the "Complaint"). The Complaint seeks a declaratory judgment that the Consent is ineffective in light of the Company's governing documents: the Amended and Restated Certificate of Incorporation (the "Charter"), the operative By-Laws, and a Stockholders Agreement executed by all of the Company's preferred and common stockholders (the "Stockholders Agreement"). The plaintiffs moved for judgment on the pleadings.

3. Section 225 of the Delaware General Corporation Law (the "DGCL") empowers the Court of Chancery to "hear and determine the validity of any election,

appointment, removal or resignation of any director or officer of any corporation." 8 *Del. C.* § 225. Its purpose "is to provide a quick method for review of the corporate election process to prevent a Delaware corporation from being immobilized by controversies about whether a given officer or director is properly holding office." *Box v. Box*, 697 A.2d 395, 398 (Del. 1997). "[I]t is common in Section 225 cases for this court to address the consequences that stockholder voting agreements have on the outcome of director elections or removal efforts." *Levinhar v. MDG Med., Inc.*, 2009 WL 4263211, at *9 (Del. Ch. Nov. 24, 2009) (Strine, V.C.).

4. "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Ct. Ch. R. 12(c). "A motion for judgment on the pleadings may be granted only when no material issue of fact exists and the movant is entitled to judgment as a matter of law." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993). When ruling on a motion for judgment on the pleadings, "a trial court is required to view the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Id.* "The Court need not, however, 'blindly accept as true all allegations,' nor must it draw unreasonable inferences in the non-moving party's favor." *Graulich v. Dell Inc.*, 2011 WL 1843813, at *4 (Del. Ch. May 16, 2011) (quoting *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2011)). "In addition to the factual allegations contained in the complaint . . . , the Court may consider the exhibits attached to the pleadings without converting the motion into a Rule 56 summary judgment motion." *Id.*

5. "[J]udgment on the pleadings . . . is a proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact." *Chi. Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 925 (Del. 2017) (internal quotation marks omitted) (quoting *NBC Universal v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)). A contract is ambiguous "when we may reasonably ascribe multiple and different interpretations" to it. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). "An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract." *Id.* In interpreting contracts, "[w]e give words their plain meaning unless it appears that the parties intended a special meaning. . . . [W]e construe them as a whole and give effect to every provision if it is reasonably possible." *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013).

6. The Consent purports to remove plaintiff Pierre Schroeder as the Company's CEO and appoint Philippe Buhannic as CEO and Chairman of the Board. Without reaching or considering any other arguments relating to the Consent, the By-Laws render the changes ineffective.

a. Under the DGCL, "[o]fficers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body." 8 *Del. C.* § 142(b). Article IV, Section 1 of the Company's By-Laws governs the appointment of officers. It states, in relevant part:

> The officers of the Corporation shall be elected annually by the board of directors at the first meeting of the board held after each annual meeting of the stockholders, or as soon thereafter as possible. The board of directors

> shall elect from among its numbers a Chairman of the Board. The board of directors shall also elect a Chief Executive Officer, President, a Secretary and a Treasurer, who need not be directors.

b. Article IV, Section 3 of the By-Laws governs the removal of officers. It states: "Any officer of the Corporation may be removed, either with or without cause, at any time, by the board of directors at any meeting thereof, but such removal shall be without prejudice to the contract rights, if any, of the person so removed."

c. Under the By-Laws, the power to hire and fire officers rests solely with the Board. The Consent purports to be the action only of a majority of the Company's common stockholders. The removal of Schroeder as CEO and appointment of Philippe Buhannic as CEO and Chairman of the Board are therefore ineffective.

7. The Consent purports to remove Schroeder as a director and appoint defendant Luc Buhannic to fill Schroeder's seat.

a. Article III, Section 10 of the By-Laws governs removal of directors. It states:

> Subject to the rights of holders of any series of preferred stock then outstanding, any director of the Corporation may be removed, at any time, with or without cause, by the affirmative vote of the holders of record of a majority of the outstanding shares of stock entitled to vote at a meeting of stockholders.

b. Article IV, Section C.5 of the Charter states that "the holders of shares of the Series D Preferred Stock and the Common Stock shall vote together (or render written consents in lieu of a vote) as a single class on all matters submitted to the stockholders of the Corporation."

c. Under the Charter and By-Laws, the Consent only can remove Schroeder if it represents the voting power of a majority of the outstanding shares, including both the common stock and the Company's Series D Preferred Stock. The Consent does not purport to represent the voting power of a majority of the outstanding shares, only a majority of the common stock. This, however, is not a basis to grant judgment on the pleadings in favor of the plaintiffs. It is possible, as a factual matter, that the Consent does represent a majority of both the voting power of the common stock and the voting power of a majority of the outstanding shares. That is not clear, one way or another, from the pleadings.

d. Nonetheless, there is a separate reason why, as a matter of law, the Consent cannot effectively remove Schroeder: He is the CEO, and under Section 7.2(b) of the Stockholders Agreement, the common stockholders agreed to nominate the CEO as one of their three designees.

e. Section 7.2 of the Stockholders Agreement states:

> The Board shall consist of seven (7) directors. At any time at which stockholders of the Company will have the right to or will vote shares of capital stock of the Company or consent in writing to the election of directors, the Stockholders shall vote all Shares presently owned or hereafter acquired by them to cause and maintain the election to the Board of the following persons:
>
> (a) two (2) representatives designated by the holders of a majority of the Series D Preferred Stock; provided however, that each such director so designated shall certify to the Company that he does not serve as an officer or on the board of directors of any company which directly competes with the Company;

(b) three (3) representatives designated by the holders of a majority of the Common Stock, one of whom shall be the Chief Executive Officer of the Company; and

(c) two (2) independent, non-employee representatives nominated by the holders of a majority of the Common Stock, and subject to the approval of the holders of a majority of the Series D Preferred Stock.

The Company shall cause the nomination for election to the Board of the individuals set forth above.

f. The parties disagree on the meaning of Section 7.2(b). The plaintiffs contend that Section 7.2(b) constrains the common stockholders' options by requiring that they fill one of their seats with the Board-selected CEO. The defendants contend that they are free to nominate whomever they please and that Section 7.2(b) constrains the Board's ability to choose a CEO by limiting the pool of potential CEO candidates to the three directors appointed by a majority of the common stockholders.

g. Read in isolation, both sides have advanced a reasonable interpretation of Section 7.2(b). When viewed in the context of other parts of Section 7.2, however, only the plaintiffs' interpretation is reasonable. The structure of Section 7.2(b) tracks the structure of Sections 7.2(a) and (c). Each clause identifies the number of directors that a group of stockholders can appoint, then modifies that authority with language limiting who the nominees can be. Under Section 7.2(a), the nominees must be able to make a required certification. Under Section 7.2(c), the nominees must be approved by the holders of a majority of the Series D Preferred Stock. Under Section 7.2(b), one of the nominees must be the CEO of the Company. The defendants' reading would violate this parallel structure and read Section 7.2(b) as restricting who the Board can appoint as the

CEO, rather than who the nominee can be. In this sense, the defendants' reading is also inconsistent with the purpose of the passage as a whole, which only deals with nominees for election to the Board and not with the selection of the CEO.

h. When Section 7.2(b) is read in the context of the Company's other corporate documents, again only the plaintiffs' reading is reasonable. Article IV, Section 1 of the By-Laws authorizes the Board to select the CEO and states that the CEO need not be a director. The plaintiffs' reading would constrain the Board by limiting its choice to one of three candidates identified by a subset of the stockholders. It also would require that the CEO already be a director. The plaintiffs' reading harmonizes both documents by recognizing that the Board selects the CEO, who need not be a director at the time of selection, but then the common stockholders must nominate the CEO to serve as a director.

i. Finally, when Section 7.2(b) is read against the backdrop of Delaware law, only the plaintiffs' interpretation is reasonable. "A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (subsequent history omitted). "Often it is said that a board's most important task is to hire, monitor, and fire the CEO." *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *15 (Del. Ch. Nov. 7, 2013) (collecting authorities). Appointing the CEO is thus a core board function that only can be limited in the certificate of incorporation (pursuant to Section 141(a) of the DGCL) or bylaws (pursuant to Section 142(b) of the DGCL). So fundamental is the board's power to determine management, that one decision of this court has gone so far as to elevate the board's power even over a bylaw adopted

pursuant to Section 142(b) of the DGCL. *See Gorman v. Salamone*, 2015 WL 4719681, at *6 (Del. Ch. July 31, 2015).

j. In this case, the disputed provision appears in the Stockholders Agreement. If it unambiguously attempted to limit the Board's authority to select the CEO, the provision would be ineffective because it would conflict with the DGCL. *See Hockessin Cmty. Ctr. v. Swift*, 59 A.3d 437, 455-57 (Del. Ch. 2012) (holding that director removal provision in investor agreement was ineffective because of conflict with DGCL). Moreover, if it were an attempt to limit the Board's exercise of its authority over the business and affairs of the corporation in a manner not contemplated by statute, the provision would represent an impermissible delegation of the Board's authority. *See, e.g.*, *In re Bally's Grand Deriv. Litig.*, 1997 WL 305803, at *6 (Del. Ch. June 4, 1997); *Grimes v. Donald*, 1995 WL 54441, at *9 (Del. C. Jan. 11, 1995) (Allen, C.), *aff'd*, 673 A.2d 1207 (Del. 1996); *Abercrombie v. Davies*, 123 A.3d 893, 609-11 (Del. Ch. 1956) (Seitz, C.), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957).

k. Read in context and against the backdrop of Delaware law, Section 7.2(b) of the Stockholders Agreement unambiguously mandates that the common stockholders appoint and maintain the Board-appointed CEO as a director. Removing Schroeder would violate that obligation. Consequently, regardless of any other issues involving the Consent, the portion of the Consent that purports to remove Schroeder is ineffective. Because that leaves no section 7.2(b) seat available, the Consent's purported appointment of Luc Buhannic to the Board is likewise ineffective.

8. The Consent purports to appoint nonparty Scott Freeman as an independent director pursuant to Section 7.2(c) of the Stockholders Agreement. Section 7.2(c) requires the "approval of the holders of a majority of the Series D Preferred Stock" for any designee under that section. The preferred stockholders have not given their approval. *See, e.g.*, Compl. ¶¶ 25, 34; Answer ¶¶ 23, 32. The Consent asserts the preferred stockholders are wrongfully withholding that approval, but the defendants have not advanced that argument in this case, nor would the pleadings as presently constituted support such a claim. The appointment of Freemen is therefore ineffective.

9. Finally, the Consent asserts that plaintiff Piero Grandi's term as a director has concluded. Alternatively, it purports to remove him for cause. Grandi was designated as an independent director pursuant to Section 7.2(c) of the Stockholders Agreement. *See* Consent at 4.

a. Grandi's term has not yet concluded. Under the DGCL, "[e]ach director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal." 8 *Del. C.* § 142(b). Because Freeman's appointment is invalid, Grandi's successor has not yet been elected and qualified. Grandi has not resigned. Grandi therefore continues to serve, subject to potential removal.

b. Grandi has not been removed validly for cause. In their opening brief, the plaintiffs observed that the defendants had failed to comply with necessary procedures for removing a director for cause. *See Campbell v. Loew's, Inc.*, 134 A.2d 852 (Del. Ch. 1957) (Seitz, C.) (noting removal for cause requires "service of specific charges, adequate notice and full opportunity of meeting the accusation"). The defendants did not respond to

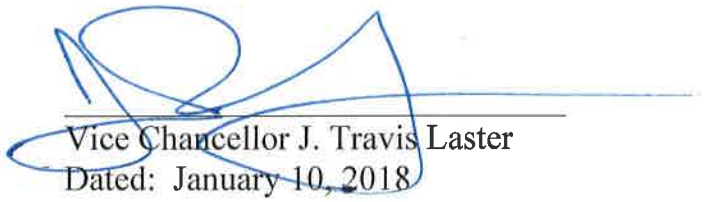
this argument, thereby conceding that a necessary step in removing a director for cause has not been taken. After conducting a hearing on the motion, the court invited supplemental submissions from the parties to address Grandi's removal. The plaintiffs filed a submission and reiterated that the defendants had not followed the necessary procedures to remove a director for cause. The defendants did not file a submission, leaving this argument unanswered. The removal of Grandi is therefore ineffective.

10. In their Answer and again in their Answering Brief, the defendants repeatedly challenge the propriety of this action. Their argument boils down to the positon that the issues raised here are properly before the Supreme Court of the State of New York in an action the defendants filed (the "New York Action").

a. A Delaware court typically will stay litigation when "there is a prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and the same issues." *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970). At the same time, however, the Delaware courts "typically will deny a motion to stay the § 225 or § 18-110 action in Delaware because the policies underlying those sections take precedence over the policies underlying *McWane*." *Choice Hotels Int'l, Inc. v. Columbus-Hunt Park Dr. BNK Inv'rs, L.L.C.*, 2009 WL 3335332, at *5 (Del. Ch. Oct. 15, 2009).

b. The legal issues raised by the Consent that this order has addressed are not at issue in the New York Action. The defendants filed the New York Action on July 11, 2016, over a year before they ever executed the Consent. For these issues, the policies underlying Section 225 take priority.

11. The court has not reached any arguments raised by the parties other than those addressed in this order. For the reasons set forth in this order, the motion for judgment on the pleadings is GRANTED.



Vice Chancellor J. Travis Laster
Dated: January 10, 2018