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

ATHENIAN VENTURE PARTNERS I, L.P. and ATHENIAN VENTURE PARTNERS II, L.P.,	)	**C.A. No. 08C-04-084 DCS**
Plaintiffs,	)	
v.	)	
GMG CAPITAL INVESTMENTS, LLC, a Delaware Limited Liability Company, GMG CAPITAL PARTNERS III, L.P., a Delaware Limited Partnership, GMG CAPITAL PARTNERS III COMPANION FUND, L.P., a Delaware Limited Partnership, and GMS CAPITAL PARTNERS II, L.P.,	)	
Defendants.	)	

Submitted: January 10, 2011
Decided: March 14, 2011

On Remand from the Supreme Court of the State of Delaware.

Upon Plaintiff, Athenian Venture Partners I, L.P.'s Motion for Summary Judgment on its Breach of Contract Claim - **GRANTED**

SUPPLEMENTAL WRITTEN OPINION

Appearances:

R. Judson Scaggs, Jr., Leslie A. Polizoti, Karl G. Randall, Morris Nichols Arsht & Tunnell, Wilmington, Delaware, Attorneys for Plaintiffs-Below/Appellees.

Brian P. Fagan, Keevican Weiss Bauerle & Hirsch, Pittsburgh, Pennsylvania, William W. Erhart, Wilmington, Delaware, Attorneys for Defendants-Below.

Brian P. Fagan, Keevican Weiss Bauerle & Hirsch, Pittsburgh, Pennsylvania, Michael D. Goldman, Timothy R. Dudderar, Abigail M. LeGrow, Matthew D. Stachel, Potter Anderson & Corroon, Wilmington, Delaware, Attorneys for Appellants.

STREETT, Judge.

The present matter is before the Court on remand from the Supreme Court of the State of Delaware with instructions to explicitly express, in a written supplemental opinion, the Court's reasons for granting summary judgment in favor of Plaintiffs (Appellees) following oral argument and a bench ruling on June 9, 2010. At that ruling, the Court held that the provisions of a contract between the parties were unambiguous and that Plaintiffs' interpretation of the relevant provisions was the correct construction as a matter of law. The Court issued its final order and judgment on July 15, 2010, followed by a revised order concerning computation of attorney's fees on July 28, 2010. Consistent with the instructions of the Supreme Court, the following are the Court's reasons for granting summary judgment in Plaintiffs' favor.

FACTS

Plaintiffs Athenian Venture Partners I, L.P. and Athenian Venture Partners II, L.P. (collectively "AVP") sought monetary damages, attorney's fees, and a declaratory judgment against GMG Capital Investments, LLC; GMG Capital Partners III, L.P.; GMG Capital Partners III Companion Fund, L.P.; and GMS Capital Partners II, L.P. (collectively "GMG") arising from a promissory note and related documents signed in 2005. The events giving rise to the dispute began when AVP and GMG (both venture capital funds) each invested in Alloptic, Inc. ("Alloptic"), an information technology business, during Alloptic's "Initial

Funding Period" between June 1999 and June 2004. GMG invested $70 million in Alloptic and was Alloptic's majority shareholder with controlling voting power.[1] AVP invested $8.5 million in Alloptic, becoming a minority shareholder with a seat on Alloptic's board.

In 2005, Alloptic, while seeking new capital, considered bankruptcy. GMG decided to further invest in Alloptic. Another potential investor, Ritchie Capital Management ("Ritchie"), offered to invest $16 million in Alloptic conditioned upon AVP leaving Alloptic's board. AVP refused to give up its board seat unless GMG agreed to completely buy AVP out of Alloptic.

GMG negotiated a deal to purchase AVP's Alloptic stock for $4.25 million but did not have the cash to purchase the stock outright from AVP. Over the course of several weeks and with the assistance of attorneys, GMG and AVP reached an agreement (the "Agreement") whereby GMG could defer payment to AVP in exchange for an increased price of $6 million plus interest.

The 2005 Agreement consisted of four interrelated documents – a Term Sheet, a Letter Agreement, a Pledge Agreement, and a Note. The Letter Agreement stated that should there be any conflict between the Letter Agreement, the Pledge Agreement and the Note, on the one hand, and the Term Sheet, on the other hand, then the provisions of the Letter Agreement, the Pledge Agreement and

[1] Deposition of Leo A. Keevican, Jr. at 22-23.

the Note "shall control" the Term Sheet, which had been created one day before the other three documents.[2]

The Note required that GMG pay AVP all outstanding principal and interest on the earlier of either (1) a liquidation of Alloptic or (2) the seventh anniversary of the (2005) Note[3] and stated that, with exceptions, payment of principal and interest under the Note was limited to the Alloptic secured stock.[4]

The Note carved out two exceptions, mandatory monthly payments and if otherwise provided in the Pledge Agreement.[5]

The Note stated:

> [The Note] is a limited recourse obligation and, *except as otherwise provided in the Pledge Agreement and except as otherwise provided herein with respect to the Mandatory Payments*, payment of principal and interest under this Note is limited to the Pledged Property and proceeds thereof …[6]

The Note also provided that GMG would make mandatory monthly payments ($15,000 per month) on the principal if one of two events occurred.[7] The two conditions that would trigger GMG's obligation to make the mandatory

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[2] Letter Agreement at 3.

[3] Note at 1.

[4] *Id.* at 2.

[5] *Id.*

[6] *Id*. (emphasis added).

[7] *Id*.

payments were whenever investment subscriptions in GMG Capital Partners IV, L.P. reached $200 million or the final closing of all investments in GMG Capital Partners IV, L.P.. The mandatory payment provision stated, in pertinent part:

> *Notwithstanding anything to the contrary in this Note*, Makers [GMG] shall make monthly payments of Fifteen Thousand Dollars ($15,000) of principal on this Note (the "Mandatory Payments") beginning on the first full month following the earlier to occur of (i) the date upon which there are subscriptions for $200,000,000 for investments in GMG Capital Partners IV, L.P. (as defined below) or (ii) the date of the final closing of all investments in GMG Capital Partners, IV, L.P.[8]

The Note also contained a provision for AVP to receive "Make-Whole Payments," a portion of any excess proceeds, if Alloptic thrived after the sale of AVP's stock.[9]

Notably, the provisions of the Note also directed that the rights of AVP were cumulative in that the right to one remedy did not preclude the exercise of AVP's other rights under the contract.[10] That provision stated:

> [A]ll of the rights and remedies of [AVP] or any subsequent holder hereof shall be cumulative. … [N]o single or partial exercise of any such right or remedy shall preclude any other or further exercise thereof or the exercise of any other right or remedy.[11]

[8] *Id.* (emphasis added).

[9] *Id.* at 1.

[10] *Id.* at 2.

[11] *Id.*

The Note was secured by GMG's Alloptic Stock, including the stock that GMG purchased from AVP.[12]

The Term Sheet provided that mandatory monthly payments would cease upon the liquidation of Alloptic.[13]

The Pledge Agreement provided that, if a default under the Note or Agreement occurred, then AVP could execute on GMG's secured stock in Alloptic by adhering to a specific procedure (delivering a certificate certifying that an "Event of Default" had occurred).[14] The Pledge Agreement stated, in relevant part:

> At any time after a breach or default occurs under the Note or this Agreement (an "Event of Default"), the Secured Parties *may* deliver to the Pledge Agent and Pledgors a certificate which certifies that an Event of Default has occurred and describes the nature of the Event of Default.[15]

The four interrelated documents created one Agreement and specifically precluded AVP from collecting the monthly payments in the event that AVP delivered a certificate certifying default to GMG.[16] If a default certifying certificate was delivered, then the Pledge Agreement dictated that AVP's sole

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[12] *Id.* at 1.

[13] "[M]onthly payments shall continue until such time that there is a Liquidation (as defined in the August 11, 2005 draft Third Amended and Restated Certificate of Incorporation (the "Certificate") of the Company." Term Sheet at 1.

[14] Pledge Agreement at ¶1(e).

[15] *Id.* (emphasis added).

[16] *Id.* at ¶1(g).

remedy would be to accept the proceeds from GMG's secured stock.[17] The Pledge Agreement read:

> The proceeds of any such disposition or other action by the Secured Parties or their nominee shall be applied as follows: … it being understood that *the Secured Parties' or their nominee's sole remedy for payment of the Secured Obligations is the Pledged Securities* pledged under this Agreement.[18]

Both parties agree that a triggering event occurred that activated the mandatory monthly payments. Specifically, GMG concedes that its formation of GMG Upside Fund, another venture capital fund which received its first capital contributions in December 2005, was the triggering event.[19] Consequently, both parties agree, AVP became entitled to monthly payments beginning in January 2008.[20] On February 27, 2008, AVP demanded that GMG make monthly payments for January and February 2008.[21] GMG did not make any payments.[22] GMG asserted that GMG had decided and elected to surrender GMG's secured stock to AVP instead.[23] As a result, AVP filed the instant action against GMG on

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[17] *Id.*

[18] *Id.* (emphasis added).

[19] GMG formed GMG Upside Fund, L.P., which, GMG admitted, satisfies the definition of "GMG Capital Partners IV, L.P." as referenced in the mandatory monthly payments provision of the Note. Defendant's Answer at ¶ 11-13; Plaintiff's Opening Brief, Exh. E at 46.

[20] Plaintiff's Complaint at ¶ 13; Defendant's Answer at ¶ 13.

[21] Plaintiff's Complaint at ¶ 14; Defendant's Answer at ¶ 14.

[22] Plaintiff's Opening Brief, Exh. G.

[23] Plaintiff's Opening Brief, Exh. D at 53.

April 10, 2008 seeking damages based on GMG's failure to make monthly payments.

On June 23, 2008, AVP moved for a Judgment on the Pleadings but it was denied. The parties then conducted fact discovery, and GMG unsuccessfully sought to prevent AVP from deposing the GMG attorney who had negotiated the Agreement. GMG filed a Motion for Protective Order which the Court also denied.

Following the conclusion of discovery, AVP filed the instant Motion for Summary Judgment on December 4, 2009. On December 14, 2009, GMG filed its response opposing AVP's motion as well as a Motion to Strike portions of the testimony and discovery materials that AVP submitted with its motion. AVP filed a Reply Brief in support of its Motion for Summary Judgment on December 18, 2009 and an opposition to GMG's Motion to Strike on January 4, 2010.

The Court heard oral argument on AVP's Motion for Summary Judgment and GMG's Motion to Strike on June 9, 2010. The Court issued its order granting summary judgment on July 15, 2010 and amended its order (concerning counsel's fees) on July 28, 2010.[24]

[24] The Motion to Strike was deemed to be moot.

THE PARTIES' CONTENTIONS

The parties agree that GMG's formation of a new venture capital fund in December 2005 triggered AVP's entitlement to payment set forth in the four document Agreement. The parties dispute the form of payment to which AVP is entitled.

AVP contends that it is entitled to the mandatory monthly payments until the principal is repaid. It asserts that the Agreement between the parties is not ambiguous and, relying on the Note, AVP argues that it has the choice between two distinct remedies: (1) a right to collect mandatory monthly payments of principal from GMG *or* (2) accept the secured stock as its sole remedy *if* it exercised its option to execute on the stock. AVP asserts that this was AVP's option and that, because AVP did not choose to execute on the secured stock, GMG continues to owe the mandatory monthly payments.[25] Thus, AVP contends

[25] AVP further asserts, and GMG has not disputed, that, pursuant to the Pledge Agreement and the Note, GMG must pay all of the attorneys' fees and legal expenses that AVP has incurred in enforcing the Pledge Agreement and the Note. Complaint at ¶28; Plaintiff's Opening Brief at 8, n.4; Plaintiff's Reply Brief at 20. The Pledge Agreement states, in pertinent part, "[N]otwithstanding anything to the contrary in this Agreement, [GMG] shall be liable for all accrued and unpaid fees and expenses of the Pledge Agent hereunder, including reasonably attorneys' fees and legal expenses and all of the fees and expenses of the Secured Parties arising under the Note or this Agreement including reasonably attorneys' fees and legal expenses … arising after the date of this Agreement." Pledge Agreement at ¶1(g). The Note states, in pertinent part, "[GMG] agree[s] to pay all costs and expenses incurred by [AVP] or any holder hereof in enforcing this Note or the Pledge Agreement, including [AVP's] or holder's attorneys' fees and expenses." Note at 2.

that it is entitled to mandatory payments of $15,000 per month from GMG until the Note's principal, $6 million, is paid.[26]

Relying on the Pledge Agreement, GMG contends that AVP's sole remedy is to accept the secured stock. GMG asserts that AVP does not have a choice because GMG has elected to default and stands ready to surrender its Alloptic stock upon receipt of a certificate of default. GMG further contends that AVP's insistence on the mandatory monthly payments provided for in the Note would change the limited recourse note into a full recourse note, which would be contrary to the Agreement. Therefore, GMG asserts, it is not required to make mandatory monthly payments because GMG's construction of the contract is the only reasonable construction. GMG further posits that AVP's pursuit of mandatory monthly payments is irrational, monthly payments to reduce the principal of the Note plus interest would be "forever",[27] and that the contract was the product of "deceit."[28]

[26] AVP is not seeking interest on the loan, although it is seeking interest on the overdue monthly payments. See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 49:12–50:8 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

[27] Defendant's Response at 6, 32.

[28] *Id.* at 7.

STANDARD OF REVIEW

It is settled law that summary judgment is appropriate only where there is no genuine issue of material fact in dispute.[29] AVP, as the moving party, bears the burden of establishing that no such genuine issue of material fact exists.[30] Furthermore, all facts are viewed in the light most favorable to GMG, the non-moving party.[31] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[32]

The Court may not grant summary judgment if the record indicates that a material fact is in dispute or if there is a need to inquire more thoroughly into the facts in order to clarify the application of law to the specific circumstances.[33] "Summary Judgment must also be denied if there is a dispute regarding the inferences which might be drawn from the facts".[34] When the issue before the Court involves the interpretation of a contract, summary judgment should be

[29] Del. Super. Ct. Civ. R. 56(c); *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009); *Snyder v. Baltimore Trust Co.*, 532 A.2d. 624, 625 (Del. Super. 1986).

[30] *Hart v. Resort Investigations & Patrol*, 2004 WL 2050511, at *6 (Del. Super. Sept. 9, 2004).

[31] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

[32] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Wootten v. Kiger,* 226 A.2d 238, 239 (Del. 1967)).

[33] Del. Super. Ct. Civ. R. 56(c).

[34] *84 Lumber Company v. Derr, 2010 WL 2977949, a *3 (Del. Super. July 29, 2010) (citing Myers v. Nicholson, 192 A.2d 448, 451 (Del. 1963).*

denied if the contract provisions at issue are reasonably or fairly susceptible to different interpretations.[35]

Summary judgment is appropriate, however, "if the contract in question is unambiguous…To succeed in its Motion for Summary Judgment, [a movant] must establish that its construction of the … agreement is the *only* reasonable interpretation".[36]

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

[36] *United Rentals Inc. v. Ram Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007)(denying summary judgment and finding Merger Agreement ambiguous where the language presented a direct conflict between two provisions on remedies and both parties' interpretations were reasonable); see also *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43-44 (Del. 1996) (finding the language of a hold harmless agreement clear and unambiguous and Defendant's interpretation untenable where Defendant's interpretation added a limitation not found in the contract language and where the agreement required Defendant to indemnify Plaintiff when interpreted as written).

DISCUSSION

Based on the parties' contentions, the sole issue concerns AVP's remedy for payment after the triggering event occurred – whether AVP is entitled to monthly payments or whether, as GMG asserts, it must accept GMG's Alloptic stock because GMG defaulted on those payments. In order to determine the remedy, the Court will first address whether the language of the contract is ambiguous, whether the four interrelated documents are ambiguous, and whether three of the documents in the contract are rendered ambiguous by the fourth document. The Court will also address whether AVP's interpretation of the contract provisions is the only reasonable construction as a matter of law.

MOTION FOR SUMMARY JUDGMENT

AVP argues that it is entitled to summary judgment because the Agreement is not ambiguous and, under the Note's plain language, GMG must make monthly payments of $15,000 until the principal of the note is paid.[37] AVP further asserts that the Pledge Agreement gives AVP the *option* to execute on the secured stock once a default occurs, but it is not required.[38] Additionally, AVP contends that its construction of the Note is consistent with the other three documents of the Agreement and that the Note, in conjunction with the Letter Agreement and the

[37] Plaintiff's Opening Brief at 23.

[38] *Id.* at 26.

Pledge Agreement, ultimately controls. Thus, under the plain language of the Letter Agreement, the Note trumps the Term Sheet (which states that monthly payments end upon liquidation of Alloptic).[39] Finally, AVP argues that GMG's interpretation of the Agreement is unreasonable because it ignores the plain language of the Agreement, rigidly adheres to certain provisions, and "reads out" other provisions altogether, and that AVP's interpretation is the only reasonable interpretation of the Agreement.[40] Alternatively, should the Court find ambiguity in the Agreement, AVP asserts that extrinsic evidence supports its entitlement to the monthly payments.[41]

GMG agrees that the Agreement is neither contradictory nor ambiguous.[42] Indeed, GMG argues that the contract unambiguously states, in the Pledge Agreement, that GMG will surrender its Alloptic stock if AVP files a certificate certifying default and that stock surrender is the sole remedy. GMG posits that GMG elected to default on the payments and, therefore, it is ready to surrender the stock to AVP whenever AVP files a default certificate. GMG, at oral argument,

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[39] *Id.* at 26-28.

[40] *Id.* at 29-31.

[41] *Id.* at 32-34.

[42] "The deal documents do not contradict one another or contain contrary terms. Plaintiffs' irrational and improbable interpretation of the deal documents is the sole root of any perceived inconsistency … Here, the documents comprising the parties' entire agreement are susceptible of only one reasonable interpretation." Defendant's Response at 28-29. However, GMG changed its position during oral argument. See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 39:2–42:12 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

however, was unable to direct the Court to any provisions in any of the documents that would give GMG such an election. When asked by the Court to cite a provision of the contract, GMG responded "…it's not that any of the documents provide specifically that GMG has the right to an election to make them. I'm saying that's what GMG elected to do. GMG elected not to pay the Note …"[43]

GMG also argues that the Note is a limited recourse obligation that limits AVP's remedy to the secured stock[44] because the "sole remedy" clause of the Pledge Agreement provides a clear expression of the parties' intent regarding AVP's limited remedy in the event of a default under the Note.[45] According to GMG, "[t]he parties negotiated the Mandatory Payments as a means for providing GMG, in the event that Alloptic was not sold or otherwise liquidated by the date GMG had raised a new [venture capital] fund … an option, by electing to make the payments, to retain ownership of the Alloptic Stock until Alloptic was sold or otherwise liquidated … Making these payments was exclusively at the option of GMG."[46]

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[43] See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 19:14–18 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

[44] Defendant's Response at 28.

[45] *Id.* at 32-33.

[46] *Id.* at 35 (citing Deposition of Joachim Gfoeller at 78; Affidavit of Joachim Gfoeller at ¶14; Answer at ¶¶ 3, 21; Deposition of Leo A. Keevican, Jr. at 21; Deposition of David Hirsch at 22).

GMG further argues that AVP's interpretation would unfairly change a limitation of recourse into a perpetual payment plan, thereby giving AVP full recourse.[47] GMG ultimately abandoned this particular line of reasoning at oral argument when AVP represented and assured GMG that it only sought interest on the monthly payments.[48]

Alternatively, should the Court find ambiguity in the Agreement, GMG asserts that the extrinsic evidence supports that AVP's construction of the Agreement is unreasonable and absurd.[49] GMG asserts that its interpretation is the only reasonable one and that AVP is not entitled to summary judgment because AVP's interpretation of the Agreement is unreasonable.[50]

[47] *Id.* at 32. Specifically, GMG argues, "Although the Limited Recourse Note provides for mandatory payments of principal, it also requires interest at 7% for the first two years and 10% thereafter. Thus, while any Mandatory Payment would reduce principal, interest would continue to accrue on the $6,000,000 balance, the interest far exceeding a $15,000 per month payment – thus payments on the Limited Recourse Note at $15,000 extend into perpetuity." *Id.* at n.8.

[48] See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 49:12–53:21 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

[49] Defendant's Response at 36.

[50] *Id.* at 28-29.

It is undisputed that contract interpretation is a question of law.[51] When interpreting a contract, a court looks within the four corners of the contract[52] and construes it as a whole so as to give full effect to all provisions.[53] Delaware courts attempt to ascertain the parties' objectively manifested intent by looking to the plain language of the agreement.[54] "The language of the Agreement must therefore be the starting point," and "[o]nly when there are ambiguities may the court look to collateral circumstances."[55]

Moreover, "[t]he presumption that the parties are bound by the language of the agreement they negotiated applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations."[56] Here, the parties are sophisticated and experienced venture capital funds engaged in multi-million dollar investments.[57] Furthermore, both AVP and GMG were assisted by

[51] *Motorola, Inc. v. Amkor Tech., Inc.,* 958 A.2d 852, 859 (Del. 2008).

[52] *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 547 (Del. Super. 2005); see also *E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. Super. 1997).

[53] *E.I. duPont de Nemours & Co. v. Shell Oil Co.,* 498 A.2d 1108, 1113 (Del. 1985).

[54] *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992); see also *Seaford Golf and Country Club v. E.I. duPont de Nemours and Co.*, 925 A.2d 1255, 1260 (Del. 2007).

[55] *Citadel*, 603 A.2d at 822.

[56] *Caldera Properties-Lewis/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2008 WL 3323926, at *12 (Del. Super. June 19, 2008) (quoting *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007)).

[57] Plaintiff's Opening Brief at 2-4; Defendant's Response at 6.

their own counsel who were experienced in negotiating and drafting contracts.[58] AVP's interests in the negotiation of the Agreement were represented by Karl O. Elderkin, founder of AVP with over 20 years of venture capital experience; Francois Helou, Principal of the general partners of AVP and former board member of Alloptic who had more than 10 years of venture capital experience; and Louis G. Hering, a transactional attorney and partner at Morris, Nichols, Arsht & Tunnell LLP.[59] GMG's interests in the negotiation were represented by Joachim Gfoeller, GMG's managing partner; Steve Norris, chairman of Alloptic; and Leo A. Keevican, Jr. and David J. Hirsch, transactional attorneys at Keevican, Bauerle & Hirsch LLC.[60] Together, they "painstakingly" negotiated the four interrelated agreements that comprise the contract over the course of three weeks.[61]

The Court will first consider whether the contract was ambiguous. Both parties agree that the contract was unambiguous (although GMG contradicted itself during oral argument).[62] The Court will nevertheless review the relevant provisions.

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[58] *Id.*

[59] Plaintiff's Opening Brief at 2-3.

[60] *Id.* at 3-4.

[61] Defendant's Response at 7.

[62] See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 39:2–42:12 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

Where contract language is ambiguous, the court may consider extrinsic evidence to determine the meaning the parties intended.[63] However, if the language is clear and unambiguous, the ordinary and usual meaning of chosen words establishes the parties' intent[64] and "extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."[65]

A contract is not rendered ambiguous merely when the contracting parties disagree as to a provision's meaning.[66] A contract is ambiguous only when the provision at issue is reasonably or fairly susceptible to different interpretations.[67] The Court will consider the agreement as a whole. The Court will not interpret a contract in such a way as to render any of its provisions illusory or meaningless,[68] nor should any section be taken in isolation.[69] Specific provisions of a contract control over more general provisions, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general

[63] *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008); see also *Chakov v. Outboard Marine Corp.*, 429 A.2d 984, 985 (Del. 1981).

[64] *Nw. Nat'l*, 672 A.2d at 43.

[65] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

[66] *Rhone-Poulenc*, 616 A.2d at 1196.

[67] *Id.*

[68] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183, (Del. 1992)).

[69] *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001).

one.[70] Ultimately, the Court looks not to what the parties to the contract intended a provision to mean, but rather what a reasonable person in the parties' position would have thought it to mean.[71]

Here, the Court considers the contract as a whole, considering the Term Sheet, the Note, the Letter Agreement, and the Pledge Agreement together. Both parties agree that the contract consists of four documents. Furthermore, both parties agree that the triggering event for the mandatory monthly payments has occurred.

The following are the provisions of the Agreement at issue:

- The Term Sheet –

  > "[M]onthly payments shall continue until such time that there is a Liquidation (as defined in the August 11, 2005 draft Third Amended and Restated Certificate of Incorporation (the "Certificate") of the Company."[72]

- The Note –

  > "The Note is secured by a pledge of all shares of the capital [Alloptic] stock",[73]
  >
  > "Notwithstanding anything to the contrary in this Note, [GMG] shall make monthly payments of Fifteen Thousand Dollars ($15,000) of principal on this Note (the "Mandatory Payments")…"[74]

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[70] *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

[71] *Rhone-Poulenc,* 616 A.2d at 1196; see also *AT&T Corp.*, 953 A.2d at 253.

[72] Term Sheet at 1.

[73] Note at 1.

[74] *Id.* at 2.

"[The Note] is a limited recourse obligation and, … except as otherwise provided herein with respect to the Mandatory Payments, payment of principal and interest under this Note is limited to the Pledged Property and proceeds thereof."[75]

"A]ll of the rights and remedies of [AVP] or any subsequent holder hereof shall be cumulative. … [N]o single or partial exercise of any such right or remedy shall preclude any other or further exercise thereof or the exercise of any other right or remedy."[76]

- The Letter Agreement –

  "In the event of any conflict between this [Letter] Agreement, the Note, or the Pledge Agreement (as defined in Note), on the one hand, and the Term Sheet, on the other hand, the provisions of this [Letter] Agreement, the Note and the Pledge Agreement (as defined in the Note) shall control."[77]

- The Pledge Agreement –

  "At any time after a breach or default occurs under the Note or this Agreement (an "Event of Default"), the Secured Parties may deliver to the Pledge Agent and Pledgors a certificate which certifies that an Event of Default has occurred and describes the nature of the Event of Default."[78]

  "The proceeds of any such disposition or other action by the Secured Parties or their nominee shall be applied as follows: … it being understood that the Secured Parties' or their nominee's sole remedy for payment of the Secured Obligations is the Pledged Securities pledged under this Agreement."[79]

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[75] *Id.*

[76] *Id.*

[77] Letter Agreement at 3.

[78] Pledge Agreement at ¶1(e).

[79] *Id.* at ¶1(g).

The Court finds that the four documents became a unified and interrelated Agreement that had been carefully crafted over an extended period of time by experienced attorneys who were representing experienced venture capitalists.[80] GMG acknowledged at oral argument that the parties "absolutely did know what they were doing and [the Agreement] is the product of what they intended," [81] thereby contradicting its claim of "deceit."

The Court also finds that the Agreement was thorough and provided for a variety of scenarios and contingencies – including but not limited to securitization of stock, excess proceeds, payment of principal, specific method of payment of principal, exceptions to the Note, payment of interest, conflict between the Term Sheet and the other documents, triggering events, notification of default, methods of payment upon notification of default, and termination of monthly payments. The Court further finds that the language of each of the four documents was not internally ambiguous.

Careful consideration of the documents reveals that the Note states that it is secured by all shares of Alloptic stock, but also provides that "[n]otwithstanding anything to the contrary in this Note, [GMG] shall make monthly payments of Fifteen Thousand Dollars ($15,000) of principal on this Note (the "Mandatory

[80] See *Caldera*, 2008 WL 3323926, at *12.

[81] See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 48:1-3 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

Payments") …"[82] The Note unambiguously carves out an exception for monthly payments.

The Pledge Agreement provides that, upon default, AVP "may" execute on the secured stock by delivering a certificate of default to GMG.[83] The language is plainly permissive and does not require such action.[84] The Pledge Agreement then provides that upon such action (if AVP were to deliver a certificate of default), AVP would be limited to the stock as the sole remedy.[85] Thus, the circumstances giving rise to AVP's entitlement to the monthly payments are distinct from AVP's right to the secured stock as its sole remedy. Therefore, the monthly payments provision in the Note and the sole remedy provision in the Pledge Agreement are not ambiguous.

The language of the Letter Agreement is also unambiguous. It clearly states that if there is a conflict between the Term Sheet, on the one hand, and the Note, the Pledge Agreement and the Letter Agreement, on the other hand, the Note, the Pledge Agreement and the Letter Agreement control.[86] Indeed, the combined

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[82] Note at 2.

[83] Pledge Agreement at ¶1(e).

[84] See *Poe v. Poe*, 333 A.2d 403, 404 (Del. Super. 1975)("'Shall' signifies a mandatory requirement, while 'may evokes a discretionary reading."); see also *Kirby v. Kirby*, 1987 WL 14862, at *4 (Del. Ch. July 29, 1987)(finding the use of the word "may" in a section of corporation bylaws unambiguous and clearly permissive when taken in context with another provision in the same section which used the word "shall.").

[85] Pledge Agreement at ¶1(g).

[86] Letter Agreement at 3.

efforts of the drafters of the Agreement treated the Note, the Pledge Agreement and the Letter Agreement as a cohesive unit that was drafted a day after the Term Sheet and, when combined, would subordinate the Term Sheet.[87]

Turning next to the Term Sheet, the Court also finds that the Term Sheet's provision in issue does not internally present an ambiguity. The provision succinctly states that the monthly payments would cease upon liquidation of Alloptic.[88] Moreover, any perceived conflict with the other three documents in the Agreement does not create an ambiguity in the contract itself, particularly where the contract provides a mechanism to resolve any perceived conflict. The Letter Agreement dictates that in the event of a conflict among the Term Sheet, on the one hand, and the Note, the Pledge Agreement and the Letter Agreement, on the other hand, the Note, the Pledge Agreement and the Letter Agreement would control.[89] Thus, in accordance with the spirit and scheme of the four documents, and to not render this provision of the Letter Agreement meaningless, the Court finds that the Note, the Pledge Agreement and the Letter Agreement controlling the Term Agreement prevent ambiguity.

For the foregoing reasons, the Court finds no ambiguity as to the provision in the Pledge Agreement and the provision in the Note. As such, it is not necessary

[87] *Id*.

[88] Term Sheet at 1.

[89] Letter Agreement at 3.

for the Court to consider evidence outside the four corners of the contract. Therefore, taken as a whole, the Court finds that the contract was unambiguous.

The Court will next consider whether AVP's construction of the contract concerning mandatory monthly payments as an option in the event of default is the only reasonable interpretation of the contract. For purposes of this issue, here, again, are the relevant provisions of the Agreement with emphasis added to the crucial language:

- The Term Sheet –

  > "[M]onthly payments shall continue until such time that there is a Liquidation (as defined in the August 11, 2005 draft Third Amended and Restated Certificate of Incorporation (the "Certificate") of the Company."[90]

- The Note –

  > "The Note is secured by a pledge of all shares of the capital [Alloptic] stock",[91]
  >
  > "*Notwithstanding anything to the contrary in this Note*, [GMG] *shall* make monthly payments of Fifteen Thousand Dollars ($15,000) of *principal* on this Note (the "Mandatory Payments")…"[92]
  >
  > "[The Note] is a limited recourse obligation and, … *except as otherwise provided herein with respect to the Mandatory Payments*, payment of principal *and interest* under this Note is limited to the Pledged Property and proceeds thereof."[93]

[90] Term Sheet at 1.

[91] Note at 1.

[92] *Id.* at 2 (emphasis added).

[93] *Id.* (emphasis added).

> "A]ll of the rights and remedies of [AVP] or any subsequent holder hereof shall be cumulative. … [N]o single or partial exercise of any such right or remedy shall preclude any other or further exercise thereof or the exercise of any other right or remedy."[94]

- The Letter Agreement –

  > "In the event of any conflict between this [Letter] Agreement, the Note, or the Pledge Agreement (as defined in Note), on the one hand, and the Term Sheet, on the other hand, *the provisions of this [Letter] Agreement, the Note and the Pledge Agreement (as defined in the Note) shall control.*"[95]

- The Pledge Agreement –

  > "At any time after a breach or default occurs under the Note or this Agreement (an "Event of Default"), the Secured Parties *may* deliver to the Pledge Agent and Pledgors a certificate which certifies that an Event of Default has occurred and describes the nature of the Event of Default."[96]
  >
  > "The proceeds of any such disposition or other action by the Secured Parties or their nominee shall be applied as follows: … it being understood that *the Secured Parties' or their nominee's sole remedy for payment of the Secured Obligations is the Pledged Securities* pledged under this Agreement."[97]

Interpreting the contract as a whole and giving full effect to all of its provisions, the Court finds that the Agreement intended that AVP receive its monthly payments and that, in the event of default, AVP could choose to execute on the stock. Assigning plain and ordinary meaning to the words used in the

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[94] *Id.*

[95] Letter Agreement at 3 (emphasis added).

[96] Pledge Agreement at ¶ 1(e) (emphasis added).

[97] *Id.* at ¶ 1(g) (emphasis added).

relevant provisions of the contract, [98] the Court finds that this is the only reasonable interpretation, [99] particularly when the Letter Agreement addresses conflicts between the provisions of the four documents.

Specifically, the Court looks to the plain language of the words "sole remedy," and use of "may" and "shall." Delaware Courts, considering the words "may" and "shall" within the context of an agreement, have found the terms to be unambiguous.[100] Such terms clearly mandate that, under certain circumstances, the parties are permitted to take action (i.e., they "may") while, under other specified circumstances, they are required to take action (they "shall").[101] Here, the contract (via the Note) clearly sets forth GMG's obligations. It states that GMG "shall" make monthly payments. That is mandatory. Moreover, the contract (via the Term Sheet) clearly states that GMG's "monthly payments shall continue until… a liquidation". That, too, is mandatory.[102]

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[98] See *Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008) ("When the plain, common, and ordinary meaning of the words lends itself to only one reasonable interpretation, that interpretation controls the litigation.").

[99] See *Rhone-Poulenc,* 616 A.2d at 1196; see also *AT&T Corp.*, 953 A.2d at 253.

[100] See *Kirby*, 1987 WL 14862, at *4 (finding the use of the word "may" in a section of corporation bylaws unambiguous and clearly permissive when taken in context with another provision in the same section which used the word "shall."); see also *Poe*, 333 A.2d at 404 ("'Shall' signifies a mandatory requirement, while 'may evokes a discretionary reading.").

[101] *Id.*

[102] GMG has neither suggested nor argued that a liquidation pursuant to the Certificate of Incorporation has occurred.

The Agreement also unambiguously sets forth AVP's role. The contract clearly states that, in the event of default, AVP "may" deliver a certificate of default to GMG.[103] That is discretionary. Moreover, the discretionary nature of this clause is even more apparent when read in the context of the entire contract, specifically the instructions that "[n]otwithstanding anything to the contrary in this Note, [GMG] shall make monthly payments"[104] and payment is limited to the Pledged Property "except as otherwise provided herein with respect to mandatory payments."[105] The contract also says that AVP's rights and remedies are "cumulative;"[106] and the Term Sheet is subordinate to the other three documents.[107] Additionally, the contract states that the "sole remedy" of Pledged Securities occurs upon other action by AVP;[108] and that monthly payments shall continue until there is a liquidation.[109]

Based on a reading of the four documents, their juxtaposition, and the mandatory and discretionary provisions within them, AVP is clearly entitled to monthly payments and these payments end only when certain preconditions have

[103] Pledge Agreement at ¶1(e).

[104] Note at 2.

[105] *Id.*

[106] *Id.*

[107] Letter Agreement at 3.

[108] Pledge Agreement ¶1(e), (g).

[109] Term Sheet at 1.

been met: if a certificate of default is delivered or if there is liquidation. Accordingly, AVP can continue to demand monthly payments unless and until it delivers a certificate of default and executes on the stock or there is a liquidation. Conversely, GMG has no option as to the monthly payments – GMG must make them unless and until it receives a certificate of default or there is a liquidation.

Here, AVP has not delivered a certificate of default to GMG or executed on the stock and there has not been a liquidation. Thus, the Pledge Agreement provision concerning stock as the sole remedy upon the action of delivery of the certificate of default has not been activated under these facts.

The Court finds that GMG's interpretation, by contrast, is not reasonable. GMG's construction, which is based largely on the Pledge Agreement's "sole remedy clause," ignores significant provisions in the Term Sheet, the Letter Agreement, and the Note.[110] GMG's construction would render meaningless several other provisions in the contract. So too, it would also require the Court to disregard the provision of the Note which states that "all of the rights and remedies of [AVP] shall be cumulative," and that "no single or partial exercise of any such

[110] See *Warner Communications Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 971 (Del. Ch. 1989), *aff'd*, 567 A.2d 419 (Del. 1989) ("An interpretation that gives an effect to each term of an agreement, instrument or state is to be preferred to an interpretation that accounts for some terms as redundant.").

right or remedy shall preclude any other or further exercise thereof or the exercise of any other right or remedy."[111]

The Court will not construe the contract to ignore the ordinary meaning of the language of the entire set of interrelated documents. The contract mandates that GMG "shall" make the monthly payments following the occurrence of the triggering events. Moreover, the Court does not find that the monthly payments provision is discretionary or an option enjoyed by GMG.

Finally, the Court finds that the Note's carve out provision for mandatory monthly payments does not transform this limited recourse note into a full recourse note. Neither the contract itself nor AVP's representations at oral argument suggest that payments would be open-ended or incalculable.[112] Rather, the Note clearly states that the mandatory monthly payments are for the $6 million principal. Mandatory monthly payments on the principal alone, no matter how long such payments would be required, do not amount to full recourse – the amount of the principal and interest combined (particularly when payments spread out over the course of many years would further diminish the value of the Note).

Thus, the only reasonable interpretation of the Agreement is that AVP may pursue monthly payments unless and until it files a certificate of default or there is

[111] Note at 2.

[112] See *Athenian Venture Partners I, LP v. GMG Capital Investments, LLC*, C.A. No. 08C-04-084 JEB, at 49:12–50:8 (Del. Super. June 9, 2010) (Streett, J.) (TRANSCRIPT).

a liquidation. Hence, GMG owes $15,000 per month until the principal of $6 million dollars is paid.

CONCLUSION

This Court finds that the integrated terms of the contract are unambiguous. The Court also finds that the only reasonable interpretation of the Agreement is that the obligation to make monthly payments on the principal continues because there has neither been a certificate of default filed nor a liquidation pursuant to the Certificate of Incorporation. Summary judgment is appropriate because there are no genuine issues of material fact. **THEREFORE**, the motion for summary judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/S/DIANE CLARKE STREETT
Diane Clarke Streett
Judge