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CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

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Re: *Coughlan v. NXP B.V.*
Civil Action No. 5110-CC

Dear Counsel:

I have carefully reviewed the briefs in support of and in opposition to NXP's motion to dismiss. I find that the Agreement and Plan of Merger (the "Agreement"), dated December 20, 2007, gives Elaine Coughlan standing to pursue this litigation on behalf of all former GloNav stockholders (the "GloNav Stockholders"). Accordingly, NXP's motion to dismiss is denied.

The Agreement was executed to effectuate NXP's acquisition of GloNav. The merger consideration received by GloNav Stockholders was comprised of cash and certain contingent payments. Section 2.4 of the Agreement addresses the contingent payment rights of GloNav Stockholders. The complaint in this action alleges that NXP breached Section 2.4(h) of the Agreement by refusing to make a $5 million contingent payment that Coughlan alleges is due. The Agreement

named Coughlan the "Stockholders' Representative," and it is on that basis that she brings this action on behalf of the GloNav Stockholders.[1]

NXP's motion to dismiss challenges Coughlan's standing to pursue this action as Stockholders' Representative. NXP asserts that Coughlan is not the real party in interest to this action and that the action should therefore be dismissed without prejudice under Court of Chancery Rule 17 so that the GloNav Stockholders may be joined as plaintiffs. NXP's theory is that while the Agreement permits Coughlin to act as Stockholders' Representative in certain instances, it does not permit her to bring this suit.

The scope of Coughlin's authority as the Stockholders' Representative is governed by the Agreement.[2] Resolution of this dispute, therefore, turns on the proper interpretation of the Agreement. Questions of contract interpretation are generally questions of law that are appropriate to consider on a motion to dismiss.[3] It is only where the relevant contract provision is ambiguous that a question of fact is raised necessitating a trial.[4] In this case, no ambiguity exists.

Section 2.4 of the Agreement provides for two types of contingent payments to GloNav Stockholders: product contingent payments and revenue contingent payments. For two years after the Agreement was executed (the "Contingency Period"), NXP was required to monitor the progress of GloNav to determine if the contingencies underlying the contingent payments had been met. The product contingent payments were due when certain product development milestones were achieved and the revenue contingent payments were due if certain sales levels were achieved. The revenue contingent payments were capped at $5 million.

Sections 2.4(a) through (c) required NXP to provide formal reports to the Stockholders' Representative outlining the calculation of the contingent payments and provided that the contingent payments were to be made to the Stockholders' Representative for the benefit of GloNav Stockholders. Sections 2.4(d) and (e) outlined a detailed dispute resolution mechanism that explicitly gave the Stockholders' Representative the authority to act on behalf of GloNav

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[1] *See* Agreement Preamble; Compl. ¶ 3.

[2] *Ballenger v. Applied Digital Solutions, Inc.*, 2002 WL 749162, at *10 (Del. Ch. Apr. 24, 2002) (noting that the authority of the stockholders' representatives was provided for in the merger agreement).

[3] *BASF Corp.* v. *POSM II Properties P'ship, L.P.*, 2009 WL 522721, at *4 (Del. Ch. Mar. 3, 2009).

[4] *See VLIW Tech., LLC* v. *Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003).

Stockholders to privately resolve disputes about contingent payment amounts. These sections were applicable so long as GloNav remained a functioning subsidiary of NXP, with substantially all of its assets intact, during the Contingency Period.[5]

Section 2.4(h) addresses the treatment of the contingent payments in the event NXP sells or transfers GloNav or GloNav's assets during the Contingency Period. Section 2.4(h) requires the acquiring party to either (1) pay the GloNav Stockholders the maximum possible amount of contingent payments that could be realized under the terms of the Agreement or (2) assume all of NXP's obligations related to the contingent payments for the remainder of the Contingency Period. Coughlan asserts that during the Contingency Period, NXP transferred its GloNav assets to a third party that did not assume responsibility for the contingent payments. According to Coughlan, $5 million in revenue contingent payments (the maximum amount) are now due to the GloNav Stockholders under Section 2.4(h).[6] Coughlan's suit seeks to enforce this right.

NXP argues that Section 2.4(h) does not give Coughlan the authority to represent the GloNav Stockholders. According to NXP, if the parties intended to give the Stockholders' Representative authority to represent the GloNav Stockholders in a suit for breach of Section 2.4(h), they would have included an explicit provision to that effect in Section 2.4(h). NXP points out that Sections 2.4(d) and (e) explicitly grant detailed authority to the Stockholders' Representative over contingent payment disputes where GloNav remains a functioning subsidiary of NXP with substantially all of its assets intact.[7] Section

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[5] These sections are also applicable where an acquirer of GloNav assumes NXP's obligations under the Agreement.

[6] Apparently, the product contingent payments have been paid in full.

[7] Section 9.4(a) of the Agreement also contains explicit language granting the Stockholders' Representative authority to act on behalf of the GloNav Stockholders:

> Upon approval of this Agreement by the GloNav Stockholders, Elaine Coughlan . . . shall act as representative of the GloNav Stockholders, and shall be authorized to act on behalf of the GloNav Stockholders and to take any and all actions required or permitted to be taken by the Stockholders' Representative under this Agreement or the Escrow Agreement with respect to any claims . . . made by NXP Indemnified Parties for indemnification pursuant to this Article IX of the Agreement and with respect to any actions to be taken by the Stockholders' Representative pursuant to the terms of the Escrow Agreement.

2.4(h), in contrast, says very little about the Stockholders' Representative's authority where NXP transfers GloNav or its assets to a third party. According to NXP, the GloNav Stockholders, rather than the Stockholders' Representative, have standing to pursue claims for breach of Section 2.4(h) because they are the ultimate beneficiaries of the contingent payments under that section.

I disagree with NXP's argument that Coughlan lacks standing. While Section 2.4(h) says little about the Stockholders' Representative, Section 2.4(f) plainly gives the Stockholders' Representative standing to pursue actions for breach of any part of the Agreement on behalf of the GloNav Stockholders. Section 2.4(f) begins with the following language: "GloNav and the Stockholders' Representative on their own behalf *and on behalf of the [GloNav] [Stockh]olders*, each acknowledges, understands and agrees, that, *except as hereinafter provided*, after the [merger], NXP shall exercise operational control of the business and operations of [GloNav] without interference by the Stockholders' Representative."[8] Section 2.4(f) continues with a thorough acknowledgement by the Stockholders' Representative, on behalf of herself and the GloNav Stockholders, that NXP will be permitted to operate GloNav after the merger according to its own business judgment, even if this would impair the contingent payments that GloNav Stockholders could realize. The last clause in Section 2.4(f) then states:

> [T]he Stockholders' Representative agrees not to challenge in any subsequent claim or action any decision regarding [the] commercial exploitation of the business, products and projects of [GloNav] made by any director, officer, employee, or agent of NXP . . . *unless* such action (i) constitutes a breach by NXP *of any of its express obligations under this Agreement* . . . .[9]

The last clause of Section 2.4(f) plainly gives the Stockholders' Representative the right to pursue claims against NXP for breach of "any" express obligation NXP assumes under the Agreement. One such obligation is found in

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The grant of authority in Section 9.4(a) is limited to indemnification claims under Article IX of the Agreement and to actions taken pursuant to the Escrow Agreement. Thus, this section does not give Coughlan standing to pursue a claim for breach of Section 2.4(h) of the Agreement. Nor does this section limit, however, the ability of the parties to give Coughlan authority related to other matters.

[8] Section 2.4(f) (emphasis added).

[9] Section 2.4(f) (emphasis added).

Section 2.4(h), which is the section Coughlan, as Stockholders' Representative, now seeks to enforce. As noted, the Stockholders' Representative made the covenants in Section 2.4(f) on behalf of the GloNav Stockholders. On behalf of the GloNav Stockholders, the Stockholders' Representative covenanted not to pursue a claim against NXP for its business decisions unless those decisions cause NXP to breach an express obligation in the Agreement. In my view, Section 2.4(f) evinces the parties' intent to establish the Stockholders' Representative as the official representative of the GloNav Stockholders for post-merger disputes related to the Agreement. Rule 17 permits such an arrangement. Rule 17 provides:

> Every action shall be prosecuted in the name of the real party in interest. . . . [A] party with whom or in whose name a contract has been made for the benefit of another . . . may sue in that person's own name without joining the party for whose benefit the action is brought.

Coughlan, as Stockholders' Representative, is a party in whose name a contract has been made for the benefit of the GloNav Stockholders, who are admittedly the real parties in interest. Accordingly, she may bring this action without joining the GloNav Stockholders.

NXP is concerned that a failure to join the GloNav Stockholders will subject it to the risk of additional lawsuits by the GloNav Stockholders. This concern should be removed by today's ruling. Any future ruling against or in favor of Coughlan, as Stockholders' Representative, will be binding on the GloNav Stockholders.[10]

Based on the above analysis, NXP's motion to dismiss is DENIED. Coughlan will continue to prosecute this action on behalf of the GloNav Stockholders, who will be bound by any future rulings in this case.

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[10] *See Ballenger*, 2002 WL 749162, at *11 ("Because of these provisions, Applied Digital has no reason to fear inconsistent judgments, because a judgment against the Stockholders' Representatives will bind all of the former Compec stockholders."). Admittedly, the merger agreement in *Ballenger* contained much more exhaustive language than the Agreement regarding the authority of the shareholders' representative to bind the shareholders of the acquired company. But the language in the Agreement need not be as exhaustive as the merger agreement in *Ballenger* so long as the language in the Agreement is sufficient to achieve its objective of establishing the authority of the Stockholders' Representative. As I have explained above, the language in Section 2.4(f) of the Agreement is sufficient to bind the GloNav Stockholders' to any future rulings in favor of or against the Stockholders' Representative.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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