



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TCV VI, L.P., TCV MEMBER FUND, L.P., and )  
CONTINENTAL INVESTORS FUND LLC, )

Plaintiffs, )

v. )

C.A. No. 10164-VCN

TRADINGSCREEN INC., PHILIPPE BUHANNIC, )  
PIERO GRANDI, and PIERRE SCHROEDER, )

Defendants. )

MEMORANDUM OPINION

Date Submitted: November 25, 2014

Date Decided: February 26, 2015

*Redacted: March 27, 2015*

Gregory V. Varallo, Esquire, Richard P. Rollo, Esquire, Kevin M. Gallagher, Esquire, and Christopher H. Lyons, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorneys for Plaintiffs TCV VI, L.P. and TCV Member Fund, L.P.

Kevin G. Abrams, Esquire and Daniel R. Ciarrocki, Esquire of Abrams & Bayliss LLP, Wilmington, Delaware, Attorneys for Plaintiff Continental Investors Fund LLC.

Kenneth J. Nachbar, Esquire, Megan Ward Cascio, Esquire, and Brendan W. Sullivan, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Defendants.

NOBLE, Vice Chancellor

This case deals with the tension between a charter provision providing for the mandatory redemption of preferred stock and Delaware’s statutory and common law restrictions on redemption. Plaintiffs hold preferred stock in Defendant TradingScreen, Inc. (“TradingScreen” or the “Company”). When Plaintiffs attempted to exercise their rights under TradingScreen’s charter to require TradingScreen to purchase their shares, TradingScreen claimed that it could only fund a partial redemption because fully meeting Plaintiffs’ demands would threaten the Company’s ability to continue as a going concern. Plaintiffs have moved for judgment on the pleadings that TradingScreen has breached its charter obligations. At issue is the scope of the limitations on TradingScreen’s obligation to redeem Plaintiffs’ stock.

## **I. BACKGROUND**

TradingScreen is a Delaware corporation providing electronic trading solutions.<sup>1</sup> TradingScreen was founded by Defendant Philippe Buhannic (“Buhannic”), the Company’s current Chief Executive Officer and Chairman of its Board of Directors (the “Board”). Defendants Piero Grandi (“Grandi”) and Pierre Schroeder (“Schroeder”) are TradingScreen directors.

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<sup>1</sup> The facts set forth herein are drawn from the pleadings and the documents incorporated therein.

### A. *The Series D Purchase Agreement*

Plaintiffs TCV VI, L.P., TCV Member Fund L.P. (collectively, the “TCV Funds”), and Continental Investors Fund LLC (“Continental”) have held TradingScreen stock since 2007. On August 7 of that year, Plaintiffs and TradingScreen entered into the TradingScreen Inc. Series D Convertible Preferred Stock Purchase Agreement (as amended, the “Series D Purchase Agreement”).<sup>2</sup> The TCV Funds purchased 4,340,398 shares of Series D Preferred Stock (“Preferred Stock”) for a total purchase price of \$65,931,947.74. Continental purchased 425,663 shares for a total price of \$6,465,948.67.

As a result, the TCV Funds acquired 60.43%, and Continental 5.97%, of TradingScreen’s Preferred Stock, which was created on September 12, 2007, when TradingScreen filed an amended and restated certificate of incorporation (the “Charter”) with the Delaware Secretary of State.<sup>3</sup> Section 7 of the Charter governs redemption of that stock.

Section 7.1 provides that beginning three months prior to the fifth anniversary of the issuance of the Preferred Stock, if the holders of a majority of the Preferred Stock (the “Majority Holders,” *i.e.*, the TCV Funds) so request, then TradingScreen must assist the requesting Preferred Stockholders in selling their

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<sup>2</sup> Compl. ¶ 17.

<sup>3</sup> *See* Pls.’ Opening Br. in Supp. of their Mot. for J. on the Pleadings (“Pls.’ Opening Br.”) Ex. A (Charter).

shares on satisfactory terms and conditions. If no buyer will purchase the Preferred Stock on acceptable conditions during the following nine months, then the Majority Holders may require TradingScreen to purchase all or a portion of their shares by delivering written notice identifying the number of shares they wish redeemed. All other Preferred Stockholders can participate in the redemption by delivering similar written notice.

Section 7.1.2 prescribes the process for setting the price that TradingScreen must pay for the shares. The Majority Holders and TradingScreen must first negotiate in good faith in an attempt to determine the Preferred Stock's fair market value. If no agreement is reached for twenty days following the redemption notice, then a mutually acceptable independent financial adviser determines the stock's fair market value.

Thirty days after a determination of fair market value (the "Redemption Date"), TradingScreen must redeem all shares for which it received valid redemption notices. However, any Preferred Stockholder who had submitted redemption notices may withdraw all or a portion of its request until the business day preceding the Redemption Date. The purchase of shares remaining subject to redemption must occur in three equal installments on the Redemption Date's six month, twelve month, and eighteen month anniversaries.

Further, if TradingScreen defaults on any payments due under Section 7.1.2, then interest accrues on all amounts owed at an annual percentage rate of 13%.

*B. Plaintiffs Exercise Their Redemption Rights*

On June 12, 2012, the TCV Funds, as Majority Holders, requested TradingScreen to assist them in selling all of their Preferred Stock. TradingScreen's Board formed a special committee (the "Special Committee") to handle this request and related matters. The TCV Funds subsequently could not find a satisfactory buyer; thus, on March 14, 2013, they delivered written notice to TradingScreen demanding that the Company purchase their stock. On March 19, 2013, Continental delivered a similar written notice.

Because the TCV Funds and TradingScreen were unable to agree on the Preferred Stock's fair market value, they engaged [REDACTED] [REDACTED] to make that determination. On February 5, 2014, [REDACTED] concluded that TradingScreen was worth \$ [REDACTED] million and the fair market value per share of Preferred Stock was \$ [REDACTED].

After [REDACTED]'s valuation, the TCV Funds decided, consistent with the Charter, to withdraw a portion of their shares from their redemption request. After these withdrawals, 4,030,398 shares remained subject to redemption. At the determined price of \$ [REDACTED], in order to redeem fully the TCV Funds's shares,

TradingScreen would need to pay them \$ [REDACTED] in three equal installments of \$ [REDACTED].

On September 5, 2014, Plaintiffs delivered to TradingScreen stock certificates for the shares they wished redeemed. In response, Buhannic, TradingScreen's CEO, informed them that

On September 4, 2014, the Special Committee of the Board of Directors of TradingScreen met in order to determine the amount of funds legally available for the redemption of shares of Series D Preferred Stock that have been the subject of redemption notices. At the meeting, the Special Committee received a presentation from AlixPartners, LLP, the Special Committee's financial advisor in connection with the redemption ("AlixPartners"), to assist it in determining the funds legally available for redemption.<sup>4</sup>

The Special Committee had retained AlixPartners "to, among other things, provide analyses of TradingScreen's current and projected financial condition to assist the Special Committee in its determination of the extent to which the Company may make a payment to preferred stockholders without impairing the Company's ability to continue as a going concern."<sup>5</sup> AlixPartners had presented the Special Committee with a 52-page report and

After hearing and reviewing the presentation, asking questions and deliberating, the Special Committee determined that TradingScreen currently has \$7,200,000 legally available for a partial redemption of shares of the Series D Preferred Stock, and therefore approved a

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<sup>4</sup> Compl. ¶ 45. The Special Committee consisted of Buhannic, Grandi, and Schroeder.

<sup>5</sup> Aff. of Kevin M. Gallagher in Supp. of Pls.' Opening Br. Ex. B ("AlixPartners's Presentation"), at 4.

resolution for the Company to redeem at this time \$7,200,000 worth of shares of Series D Preferred Stock that have been noticed for redemption at the redemption price of \$[REDACTED] per share . . . . The Special Committee also determined that it will meet on a regular basis, and no less than quarterly, to determine the amount of funds legally available for TradingScreen to make an additional payments [sic] in partial redemption of the shares of Series D Preferred Stock that have been the subject of redemption notices.<sup>6</sup>

Based on its conclusion that it only had \$7,200,000 legally available for redemption, TradingScreen proposed to make pro rata redemptions, and sent checks payable to the Plaintiffs in accordance with that determination.

Taking exception to the Special Committee's conclusions, the TCV Funds sent TradingScreen a letter on September 9, 2014, asserting that the Company had defaulted on its obligation under the Charter to pay the full one-third installment for the shares submitted for redemption. The TCV Funds demanded immediate payment and threatened legal action if TradingScreen did not comply within ten days. They also claimed that, pursuant to the Charter, interest would accrue at an annual rate of 13% on any unpaid amounts due. Because they viewed TradingScreen's failure to pay in full as a default under the Charter, the TCV Funds demanded that the Company make adequate assurances that it would make full redemptions on the second and third installment dates.

TradingScreen responded that it was acting in compliance with the Charter and Delaware law. According to TradingScreen, Delaware law imposes

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<sup>6</sup> Compl. ¶ 46.

limitations “which require that any redemption of shares be made only out of legally available funds.”<sup>7</sup> The Special Committee had determined that \$7,200,000 was the maximum amount available for redemption without jeopardizing the Company’s ability to continue to operate as a going concern. TradingScreen argues that redemptions beyond this amount would violate Delaware law. Therefore, TradingScreen asserts that it has not defaulted on its obligations and that the Charter’s interest provision is inapplicable. It has “assured [the TCV Funds] that TradingScreen will continue to redeem shares of its Series D Preferred Stock in accordance with the [Charter] and consistent with its obligations under applicable law.”<sup>8</sup>

### *C. Current Proceedings*

Plaintiffs have moved for judgment on the pleadings on the first two of their six counts. Count I alleges that TradingScreen breached the Charter by failing to honor its redemption provision. According to Plaintiffs, the Charter is an unambiguous, binding, and enforceable contract. They followed its detailed procedure to require TradingScreen to redeem their shares. The first redemption installment of \$ [REDACTED] was due on September 7, 2014. However, TradingScreen failed to pay in full, claiming that it only had \$7.2 million of “funds

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<sup>7</sup> Compl. Ex. B, at 1.

<sup>8</sup> *Id.*



legally available.” A provision limiting redemption to “funds legally available” is found nowhere in the Charter.

Plaintiffs contend that Section 160 of the Delaware General Corporation Law (the “DGCL”), which limits a corporation’s ability to purchase shares of its own capital stock to the corporation’s statutory surplus, is the only restriction on TradingScreen’s obligation to comply with the Charter’s explicit language. TradingScreen supposedly has more than sufficient statutory surplus and readily available cash to redeem all of Plaintiffs’ tendered shares. By refusing to do so, it has allegedly breached its obligations under the Charter.

In response, Defendants argue that the common law restricts TradingScreen’s ability to redeem the Preferred Stock. According to them, TradingScreen cannot redeem shares if doing so would threaten its ability to continue operating as a going concern. Because the Special Committee exercised its business judgment in determining the maximum value of shares that TradingScreen can redeem without threatening its business operations, Defendants contend that the Company has not defaulted on its payment obligations. By extension, the 13% annual interest rate has not been triggered.

However, Plaintiffs believe that TradingScreen must pay interest on all amounts overdue, regardless of whether TradingScreen's failure to pay constitutes a contractual breach.<sup>9</sup> Count II requests a declaratory judgment to this effect.

## II. ANALYSIS

### A. *The Procedural Standard of Review*

This Court will grant a motion for judgment on the pleadings only when no material issue of fact exists and the moving party is entitled to judgment as a matter of law.<sup>10</sup> The Court “view[s] the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party.”<sup>11</sup> Questions of reasonableness rarely can be resolved on the pleadings because of their inherently factual nature.<sup>12</sup>

### B. *Limitations beyond Section 160 Restrict TradingScreen's Ability to Redeem the Preferred Stock*

Plaintiffs' main argument rests on the inaccurate premise that Section 160 of the DGCL provides the only limitation on TradingScreen's obligation to redeem their shares. While Section 160 prohibits corporations that are balance-sheet insolvent from making redemptions, a corporation can satisfy Section 160's test

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<sup>9</sup> Pls.' Opening Br. 44 (“[T]he Court does not have to find that TradingScreen has contractually breached the Charter for interest to run at 13%.”).

<sup>10</sup> *McMillan v. Intercargo Corp.*, 768 A.2d 492, 499 (Del. Ch. 2000).

<sup>11</sup> *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

<sup>12</sup> *Id.* at 1207.

despite being cash-flow insolvent (or at risk of becoming cash-flow insolvent), *i.e.*, unable to pay its debts as they come due. In such a case, law extraneous to Section 160 limits the scope of permissible redemptions.

### 1. Section 160's Limitation on Stock Redemption

Section 160 prohibits a corporation from “[p]urchas[ing] or redeem[ing] its own shares of capital stock for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation.”<sup>13</sup> “A repurchase impairs capital if the funds used in the repurchase exceed the amount of the corporation’s ‘surplus,’ defined by 8 *Del. C.* § 154 to mean the excess of net assets over the par value of the corporation’s issued stock.”<sup>14</sup> Net assets are calculated by subtracting total liabilities from total assets.<sup>15</sup>

Section 160 thus limits a corporation’s ability to purchase shares of its own capital stock to its surplus.<sup>16</sup> This test prohibits certain distributions to stockholders, “but instead of using insolvency as the cut-off, the line is drawn at the amount of the corporation’s capital.”<sup>17</sup> Section 160 protects a corporation’s

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<sup>13</sup> 8 *Del. C.* § 160(a)(1).

<sup>14</sup> *Klang v. Smith’s Food & Drug Ctrs., Inc.*, 702 A.2d 150, 153 (Del. 1997).

<sup>15</sup> 8 *Del. C.* § 154.

<sup>16</sup> *SV Inv. P’rs, LLC v. ThoughtWorks, Inc.*, 7 A.3d 973, 982 (Del. Ch. 2010), *aff’d*, 37 A.3d 205 (Del. 2011). The calculation may be affected by a reduction in capital resulting from the redemption and retirement of shares.

<sup>17</sup> *Id.*

creditors— while preferred stock possesses characteristics of both debt and equity, the rights of all stockholders, including preferred, are subordinate to the rights of the creditors.<sup>18</sup>

Plaintiffs argue that TradingScreen’s net asset value is at least \$ [REDACTED] million, and after deducting for the par value of issued stock, the Company’s statutory surplus is more than sufficient to redeem their shares. Having supposedly established that Section 160 is no impediment to redemption, Plaintiffs assert that they are entitled to judgment on the pleadings because the explicit language of TradingScreen’s Charter sets no further limitation on their redemption rights.<sup>19</sup>

## 2. Common Law Limitations on Stock Redemption

Whether Plaintiffs would be entitled to judgment on the pleadings if Section 160 were the only restriction on TradingScreen’s ability to redeem their shares is irrelevant; “[o]utside the DGCL, a wide range of statutes and legal doctrines [can] restrict a corporation’s ability to use funds.”<sup>20</sup> Case law spanning

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<sup>18</sup> *Id.* at 986.

<sup>19</sup> While Defendants dispute the amount of TradingScreen’s statutory surplus, this issue need not (and will not) be considered on this motion because Section 160 is not the only limitation on a company’s ability to redeem its stock. Because Defendants raise factual issues relating to TradingScreen’s ability to redeem Plaintiffs’ shares under common law restrictions extraneous to Section 160, Plaintiffs’ motion must be denied.

<sup>20</sup> *ThoughtWorks*, 7 A.3d at 985. *See also* William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815, 1866 n.216 (2013) (observing that the view “that ‘legally available’ derived its exclusive meaning

the last century makes clear that “*in addition* to the strictures of Section 160, the undoubted weight of authority teaches that a corporation cannot purchase its own shares of stock when the purchase diminishes the ability of the company to pay its debts, or lessens the security of its creditors.”<sup>21</sup>

*ThoughtWorks* dealt with a preferred stock redemption provision that explicitly provided that redemptions could only be made “out of any funds legally available therefore.”<sup>22</sup> This Court rejected the argument that the term “funds legally available” equates to statutory surplus.

A corporation may be insolvent under Delaware law either when its liabilities exceed its assets, or when it is unable to pay its debts as they come due. . . . Although a corporation cannot be balance-sheet insolvent and meet the requirements of Section 160, a corporation can nominally have surplus from which redemptions theoretically could be made and yet be unable to pay its debts as they come due. The common law prohibition on redemptions when a corporation is or would be rendered insolvent restricts a corporation’s ability to redeem shares under those circumstances, giving rise to yet another situation in which “funds legally available” differs from “surplus.”<sup>23</sup>

TradingScreen’s Charter, unlike *ThoughtWorks*’s, does not explicitly restrict redemptions to those that can be made out of “funds legally available.” However, in *ThoughtWorks*, this Court noted that were such language omitted from a

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from reference to the legal capital rules . . . is utterly lacking in support from the cases”).

<sup>21</sup> *ThoughtWorks*, 7 A.3d at 987 (emphasis in original) (internal quotation marks omitted).

<sup>22</sup> *Id.* at 978 (internal quotation marks omitted).

<sup>23</sup> *Id.* at 987.

corporation's charter, "a comparable limitation would be implied by law."<sup>24</sup> Restrictions that are comparable, though likely not identical, to the constraints identified in *ThoughtWorks* therefore limit TradingScreen's ability to make redemptions.<sup>25</sup>

It is true that "[t]he rules of construction which are used to interpret contracts and other written instruments are applicable when construing corporate charters."<sup>26</sup> However, while Delaware stockholders "may by contract embody in the charter a provision departing from the [default] rules of the common law," they are not permitted to "transgress . . . a public policy settled by the common law or implicit in the General Corporation Law itself."<sup>27</sup> Given that stockholders cannot contravene Delaware common law by explicitly including a conflicting provision in a corporate charter, they clearly cannot do so implicitly.

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<sup>24</sup> *Id.* at 990 (dictum).

<sup>25</sup> For example, a corporation might lack funds yet have the legal capacity to redeem stock because it has a large surplus. Such a corporation could redeem shares in exchange for other corporate property. Alternatively, a corporation may have funds that are not "legally available." *Id.* at 984. While the omission of the phrase "funds legally available" from TradingScreen's Charter may broaden the sources of assets that TradingScreen could use to redeem stock, *i.e.*, no "funds" limitation applies, the stock cannot be redeemed if TradingScreen cannot do so "legally."

<sup>26</sup> *Matulich v. Aegis Commc'ns Gp., Inc.*, 942 A.2d 596, 600 (Del. 2008).

<sup>27</sup> *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 118 (1952).

By urging the Court to limit its analysis to the Charter’s contractual language, Plaintiffs fail to appreciate the hybrid legal status of preferred stock.<sup>28</sup> Plaintiffs are holders of equity, not debt, and “[a]uthority spanning three different centuries adverts to and enforces limitations on the ability of preferred stockholders to force redemption.”<sup>29</sup> Partly because of the potential restrictions on mandatory redemption, investors have developed various instruments to satisfy their investment goals.<sup>30</sup> However, Plaintiffs chose to invest in an equity instrument governed by certain common law and statutory rules.<sup>31</sup>

Accordingly, TradingScreen may only “legally” deploy funds for stock redemptions if doing so does not “violat[e] Section 160 or other statutory or common law restrictions, including the requirement that the corporation be able to continue as a going concern and not be rendered insolvent by the distribution.”<sup>32</sup>

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<sup>28</sup> See generally Bratton & Wachter, *supra* note 20 (describing how the treatment of preferred stock draws from both the corporate and contract law paradigms).

<sup>29</sup> *ThoughtWorks*, 7 A.3d at 990.

<sup>30</sup> *Id.* at 991 (“Most obviously, in lieu of preferred stock, investors can purchase convertible debt or straight debt with warrant coverage.”).

<sup>31</sup> “The primacy of the negotiated contract [*i.e.*, the Series D Purchase Agreement] should not be overstated: preferred stock . . . is equity, not debt . . . .” *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 39 n.8 (Del. Ch. 2013).

<sup>32</sup> *ThoughtWorks*, 7 A.3d at 988. Plaintiff erroneously contends that even if the *ThoughtWorks* limitations apply, they only prohibit a payment which itself immediately causes insolvency. However, the concept of continuing as a going concern is prospective. For example, this Court faulted the analysis of plaintiffs’ expert in *ThoughtWorks* in part for “never consider[ing] how making an eight-figure redemption payment would affect ThoughtWorks’ ability to operate and achieve the projections on which her analyses relied.” *Id.* at 989.

To continue as a going concern, a corporation needs sufficient resources to operate for the foreseeable future without the threat of liquidation.<sup>33</sup>

It should be noted that in affirming this Court's judgment in *ThoughtWorks*, the Supreme Court deemed it unnecessary to conclude whether this Court correctly found that "funds legally available" are distinct from statutory surplus.<sup>34</sup> However, this Court's rationale for distinguishing "funds legally available" from statutory surplus remains persuasive and the Court will not now depart from the thoughtful and detailed analysis laid out in that opinion. Delaware law is clear that preferred stock "remains subject to the statutory and common law limitations that apply to equity."<sup>35</sup>

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<sup>33</sup> See *supra* text accompanying note 23. "A corporation may be insolvent under Delaware law either when its liabilities exceed its assets, *or when it is unable to pay its debts as they come due.*" (emphasis added) The common law thus restricts a corporation's ability to redeem stock when it is either balance-sheet insolvent or cash-flow insolvent. See also *Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 782 (Del. Ch. 2004).

<sup>34</sup> *SV Inv. P'rs, LLC v. ThoughtWorks, Inc.*, 37 A.3d 205, 211-12 (Del. 2011) ("Because the Vice Chancellor determined that [plaintiffs] had failed to prove [their] case even under [their] own definition of 'legally available funds,' we need not reach or address the issue of whether [plaintiffs'] definition is legally correct.").

<sup>35</sup> *In re Trados*, 73 A.3d at 39 n.8. In *ThoughtWorks*, the Court did note that "[t]his is not a case where the board has had ample cash available for redemptions and simply chose to pursue a contrary course." *ThoughtWorks*, 7 A.3d at 989. There may be some reason to believe that TradingScreen could, consistent with Delaware law, make a larger redemption than it suggests it can. However, having accepted the common law limitations explicated in *ThoughtWorks*, and drawing all reasonable inferences from the facts in favor of TradingScreen (as must be done



*C. There Are Material Factual Issues Regarding TradingScreen's Legal Ability to Make a Redemption*

TradingScreen's Special Committee has concluded that the Company cannot simultaneously satisfy Plaintiffs' redemption demands in full and continue to operate as a going concern, paying its debts as they become due. TradingScreen retained AlixPartners "to assist the Special Committee in its determination of the extent to which the Company may make a payment to preferred stockholders without impairing the company's ability to continue as a going concern."<sup>36</sup> Based on AlixPartners's presentation and consultation with management and legal counsel, the Special Committee determined that TradingScreen had \$7.2 million of funds legally available for redemption. The Special Committee made these funds available for a pro rata partial redemption and "also determined . . . [to] meet on a regular basis, and no less than quarterly, to determine the amount of funds legally available for TradingScreen to make an additional payments [sic] in partial redemption of the shares of Series D Preferred Stock that have been the subject of redemption notices."<sup>37</sup>

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for purposes of this motion), it is clear that Plaintiffs are not entitled to judgment on the pleadings.

<sup>36</sup> AlixPartners's Presentation 4.

<sup>37</sup> Transmittal Aff. of Megan Ward Cascio in Supp. of Defs.' Br. in Opp'n to Pls.' Mot. for J. on the Pleadings Ex. 4 (September 5, 2014, Letter Re: Series D Preferred Stock Redemption). Although the Charter does not restrict TradingScreen's obligation to redeem to available "funds," TradingScreen

Decisions regarding a corporation's ability to continue as a going concern are necessarily made by a board as part of a "judgment-laden exercise."<sup>38</sup> To succeed in challenging such a decision, a plaintiff "must prove that in determining the amount of funds legally available, the board acted in bad faith, relied on methods and data that were unreliable, or made a determination so far off the mark as to constitute actual or constructive fraud."<sup>39</sup> Here, the Special Committee appropriately considered various factors that could affect TradingScreen's continuing viability. For example, Plaintiffs attack TradingScreen's decision to increase employees' salaries while refusing to fully fund the redemption. However, the Board had apparently concluded that to continue as a going concern, salary increases were necessary to retain employees.<sup>40</sup> While Plaintiffs may challenge the adequacy of the Special Committee's process and its conclusions, they cannot dismiss the Special Committee's considerations as irrelevant.

Whether or not the Special Committee validly concluded that a full redemption would destroy TradingScreen's ability to continue as a going concern is a factual question that cannot be decided on the pleadings. Plaintiffs' motion

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maintains that it cannot possibly fund the redemption and continue forward as a going concern.

<sup>38</sup> *ThoughtWorks*, 7 A.3d at 988.

<sup>39</sup> *Id.*

<sup>40</sup> An increase in cash compensation was supposedly necessary to retain employees because [REDACTED]

[REDACTED]. See Defs.' Br. in Opp'n to Pls.' Mot. for J. on the Pleadings 14-15.

must be denied as to their breach of contract claim under Count I because (i) the common law restricts TradingScreen's ability to redeem its shares when doing so would damage its ability to continue as a going concern and (ii) the Special Committee undertook a facially valid process finding that a full redemption would impair TradingScreen's continuing viability.<sup>41</sup>

*D. Plaintiffs Are Not Entitled to a Declaration That Interest Is Accruing at 13%*

Section 7.1.2 of the Charter provides: "In the event [TradingScreen] defaults on any payments due pursuant to [Section 7.1.2], interest shall accrue on all amounts then owed pursuant to [Section 7.1.2] equal to an annual percentage rate of thirteen percent (13%)." Plaintiffs argue that Section 7's interest provision is triggered whenever TradingScreen fails to make payments under that section.

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<sup>41</sup> Plaintiffs argue that TradingScreen is obligated to purchase their shares, even if limitations comparable to those in *ThoughtWorks* apply. They fault Defendants for reading any insolvency limitation too broadly. According to Plaintiffs, the argument that a full redemption will render TradingScreen cash-flow insolvent is speculative and the possibility that TradingScreen may have problems with cash flow at some future time cannot demonstrate that a redemption would leave TradingScreen insolvent. Plaintiffs cite several cases (some considered in *ThoughtWorks*, from other jurisdictions, or applying non-Delaware law) to argue that Delaware should adopt a narrow view of insolvency.

However, a redemption may destroy a company's ability to continue as a going concern, without immediately rendering it insolvent. The Court agrees that it is appropriate to look only a reasonable period of time into the future when assessing TradingScreen's ability to continue as a going concern. However, whether a redemption would affect TradingScreen's ability to continue as a going concern for the near future is a highly contested factual issue. Even accepting Plaintiffs' comparatively narrow view of insolvency, the Court cannot grant their motion when material facts are in dispute.

They argue that payments to the Preferred Stockholders are due regardless of whether TradingScreen is presently obligated to pay (or even can pay) for the Preferred Stock. According to Plaintiffs, Section 7 was negotiated to compensate them for any delay in payments, whatever the cause. In other words, the reason for the Company's nonpayment is immaterial and "Plaintiffs are entitled to interest . . . without regard to whether the Court finds that TradingScreen has breached its mandatory redemption obligations."<sup>42</sup> Plaintiffs contend that payments are clearly due pursuant to Section 7 and they have not been made. This, according to Plaintiffs, is unambiguously a "default on any payment[] due pursuant to [Section 7]."<sup>43</sup>

However, Section 7 of the Charter provides that interest shall only accrue on amounts owed pursuant to that section if TradingScreen *defaults* on any payments that are due. A default is "[t]he omission or failure to perform a legal or contractual duty."<sup>44</sup> The relevant question is therefore: Can the Court conclude on the pleadings that TradingScreen has failed to perform a legal or contractual duty?

Section 7.1.2 provides the only basis for TradingScreen's duty to pay for Plaintiffs' Preferred Stock. As already discussed, the Charter does not explicitly prohibit TradingScreen from purchasing the Preferred Stock when doing so would

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<sup>42</sup> Pls.' Reply Br. in Further Supp. of their Mot. for J. on the Pleadings 26.

<sup>43</sup> See Charter § 7.1.2.

<sup>44</sup> *Black's Law Dictionary* 417 (6th ed. 1990).

impair its ability to continue as a going concern.<sup>45</sup> However, Delaware law would prohibit redemption under these circumstances. If the Court were able to conclude, based on the pleadings, that TradingScreen failed to perform its contractual duty (thus defaulting), then Plaintiffs would be successful on their first count, *i.e.*, their breach of contract claim. As discussed *supra*, Section II. C., Plaintiffs cannot succeed on that claim on the pleadings. Because, on this motion, Plaintiffs cannot prove that TradingScreen failed to perform a legal or contractual duty, they cannot establish that it defaulted on any payments, even if payments are considered due under Section 7.1.2.<sup>46</sup> In the absence of a default, interest does not begin to accrue, and Plaintiffs are not entitled to judgment on their second count.<sup>47</sup>

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<sup>45</sup> At some point, a vague or speculative notion that a purchase could jeopardize a company's ability to continue as a going concern would not prevent the company from funding a redemption. Here, TradingScreen represents that it cannot pay the first installment in full and continue as a going concern. Determining the degree, extent, or imminence of the threat facing TradingScreen would require a factual analysis beyond the scope of this motion.

<sup>46</sup> Section 7.1.2 could have read "In the event the Corporation *fails to make* any payments due . . . ." However, the contract used the term "default," which implies a failure to perform a legal or contractual duty.

<sup>47</sup> One can question whether the *ThoughtWorks* reasoning pushes inadvisably the promise to pay preferred stockholders from the realm of contract law to the perhaps more uncertain domain of corporate business judgment. *See, e.g.*, Bratton & Wachter, *supra* note 20, at 1865-74. Preferred stockholders are often important contributors of capital, and they benefit from certainty regarding the rights they apparently established through negotiations. While the law as explained in *ThoughtWorks* may have worked well given its facts, which included that ThoughtWorks had no cash and could obtain none, there may be concern that the discretion apparently granted the boards of issuers of preferred stock could upset the preferred stockholders' expectations. However, it must also be remembered

### III. CONCLUSION

Most of Plaintiffs' argument rests on their mistaken belief that Section 160 of the DGCL provides the only limitation on TradingScreen's obligation to pay for its shares of Preferred Stock. However, this Court has recognized common law restrictions on stock redemptions that are independent of, and in addition to, the DGCL's explicit provisions. TradingScreen's Special Committee purports to have exercised its business judgment in determining how much stock it can purchase while continuing forward as a going concern. While Plaintiffs may question the Special Committee's process and its conclusions, they cannot successfully do so on a motion pursuant to Court of Chancery Rule 12(c). Further, because the Court cannot conclude that TradingScreen defaulted on any payments owed to the

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that those expectations include (or should include) recognition of the fact that preferred stock is an equity investment, and that our law has never treated preferred stock purely as debt.

The DGCL addresses limitations, related to concerns over insolvency, on redemptions of preferred stock. One can argue that the statutory policy choices should suffice and common law constraints should no longer interfere with the private ordering of the relationship between sophisticated parties. *See, e.g., Jones Apparel Gp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 845 (Del. Ch. 2004) (recognizing that although charter provisions cannot conflict with mandatory aspects of Delaware corporate law, our law is generally commended for "leav[ing] the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations . . . [based on a] commitment to private ordering in the charter"). Nonetheless, certainty and predictability at the negotiating table are enhanced by this Court's consistent application of our law. The same law relied upon in *ThoughtWorks* applies here, preventing a current judgment for the Plaintiffs.

Plaintiffs, a declaratory judgment that interest has begun to accrue is unwarranted.

For these reasons, Plaintiffs' Motion for Judgment on the Pleadings is denied.

An implementing order will be entered.