ORIGINAL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE 43

IN AND FOR NEW CASTLE COUNTY

CHRISTINE ROHE and CONSTANCE ROHE SAXMAN,	)	
Plaintiffs,	)	
	)	Civil Action No. 17992
v.	)	
RELIANCE TRAINING NETWORK, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: July 12, 2000
Date Decided: July 21, 2000

William E. Manning, Esquire, Wilmington, Delaware; Christine L. Donohue, and David W. Snyder, Esquires, Pittsburgh, Pennsylvania, of KLETT ROONEY LIEBER & SCHORLING; OF COUNSEL: Robert J. Valihura, Jr., Esquire, Wilmington, Delaware, Attorneys for Plaintiffs.

Craig B. Smith, Robert J. Katzenstein, David A. Jenkins, Joelle E. Polesky, Esquires, of SMITH, KATZENSTEIN & FURLOW, Wilmington, Delaware; OF COUNSEL: Charles A. DeMonaco, Esquire, of DICKIE, MCCAMEY & CHILOTE, Pittsburgh, Pennsylvania, Attorneys for Defendant.

STRINE, Vice Chancellor

In this action pursuant to 8 Del. C. § 225, plaintiffs Christine Rohe and Constance Rohe Saxman (collectively the "Rohes") seek restoration to their seats on the board of directors of defendant Reliance Training Network, Inc. ("RTN"). Rohe and Saxman were putatively removed "for cause" from the RTN board at a stockholders' meeting held on May 2, 2000.

The Rohes contend that their removal was accomplished in violation of the RTN certificate of incorporation and a voting agreement between the Rohes and non-party Gilat Communications, Ltd. According to the Rohes, a series of interrelated corporate and shareholder instruments makes clear that the Rohes could not be removed from the RTN board during the period during which Gilat was obligated to maintain its investment in RTN, which expires on January 12, 2002. At the very least, the Rohes argue, the instruments bar Gilat from voting to remove the Rohes and because the Gilat votes were critical to unseating the Rohes, the Rohes contend that they remain directors of RTN.

As the reader will soon learn, this case turns on the interpretation of ambiguous and arguably discordant instruments, whose terms hardly leave the court a clear sense of what the parties intended to accomplish. Nor do the complicated questions raised by this case lend themselves to a synoptic paragraph. But the best reading of the various instruments is that the RTN

stockholders possessed the voting power to remove any director for cause, including the Rohes, and that Gilat was contractually and statutorily empowered to participate with free will in such a removal vote.

In so concluding, I rely on a few fundamental premises. First, I have given greater weight to the express terms of the instruments than to arguments based on what the parties intended but did not explicitly state in the instruments. Second, I have preferred a reading of the instruments that would be consistent with the requirements of the applicable corporate law governing RTN to a reading that would conflict with that law. Finally, in accordance with well-reasoned precedent, I have refused to interpret the relevant instruments in a manner that would disenfranchise the RTN stockholders in the absence of clear evidence that such a restriction on stockholder action was intended. Using these major premises and deploying the other traditional tools of contractual and statutory interpretation, I have come to the conclusion that the Rohes' claim must be denied.

I. The Procedural Posture Of The Case

The case comes before me in an unusual posture. The parties have agreed to submit the Rohes' claims to a final resolution by me on a stipulated paper record. That is, they have agreed that the only relevant evidence to my decision is that contained in the stipulated record and that I

may draw findings of fact and make conclusions of law based on that record in the same manner and with the same binding effect as after a trial.

In view of the ambiguity of the relevant instruments, it was my strong preference to decide this case based on a full record that would include testimony by the parties to and drafters of the relevant instruments. To that end, I invited the parties to conduct discovery and scheduled an expedited trial that would have given me an opportunity to hear all the relevant evidence. Ultimately, the parties decided to forego that opportunity and to proceed in this streamlined manner. As a result, I must discern the parties' intent from a paper record that is devoid of the context that can often be critical in determining why parties to unclear documents wrote them as they did. Nonetheless, I take my task as given and turn to whether the Rohes have met their burden to demonstrate that their removal was improper. Thus I proceed to address the parties' claims on that basis.'

II. Factual Background

A. The Owners Of RTN Before Gilat's Investment

RTN produces and broadcasts multi-disciplinary educational seminars. It is headquartered in Pittsburgh, Pennsylvania. The company

[1] Critically, I do not apply the summary judgment standard under Court of Chancery Rule 56. Rather, the parties have asked me to render a final ruling based on the stipulated record and that is what I will do. The record is clear that the parties have made an informed choice to proceed in this fashion and that the court had expected to hold and had scheduled a trial in this matter.

was founded by the Rohes and Darrell Meador, another director and officer of RTN.[2] Collectively, I refer to the Rohes and Meador as the "Founders."

As of late 1998, the Rohes controlled nearly 75% of the stock of RTN. Meador held almost all of the remaining stock. Thus the Rohes had firm voting control over the corporation.

At that time, RTN was a Texas corporation.

B. Gilat Acquires Control Of 30% Of RTN's Stock

In late 1998, RTN negotiated a capital infusion with Gilat. Gilat purchased 416,429 shares of Series A Convertible Preferred Stock ("Series A Preferred") for $4,000,000. The purchase gave Gilat control over approximately 30% of the company's equity. Gilat's investment was for a period of three years, at which time RTN, absent certain non-germane circumstances, was required to mandatorily redeem Gilat's shares (the "Mandatory Redemption Date"). At any time, Gilat could convert its Series A Preferred into RTN common stock.

The Gilat investment was implemented through a series of related corporate and stockholder instruments designed to delineate the respective power that Gilat, on the one hand, and the Founders, on the other, would

[2] RTN was formerly called Rehab Training Network, Inc. For the sake of simplicity, I use RTN throughout regardless of whether that was the actual name of RTN at the time of the events described.

wield in RTN (the "Instruments"). Indeed, the Purchase Agreement was conditional on the restatement of RTN's certificate of incorporation,[3] and the RTN stockholders adopted that restated certificate plus new bylaws on the date of closing of the Gilat purchase (the "Closing"). Each of these related Instruments therefore bears on the resolution of this case and thus it is useful to identify and define them:

- A Series A Convertible Preferred Purchase Agreement dated as of December 31, 1998 and entered into by Gilat, RTN, the Rohes, and Darrell Meador, hereinafter the "Purchase Agreement";

- An Investor Rights Agreement entered into by Gilat, RTN, the Rohes, and Darrell Meador as of January 12, 1999, hereinafter the "Investor Rights Agreement";

- A new certificate of incorporation of RTN, which incorporated the same terms that would later be filed in Delaware as a certificate of incorporation (the "Certificate of Incorporation") and a certificate of designation regarding the Series A Preferred (the "Certificate of Designation"). Under Delaware law, the Certificate of Designation is considered an integral part of the Certificate of Incorporation.[4] The parties have not burdened me with an actual copy of the Texas certificate, but agree that its terms were identical to RTN's current Certificates of Incorporation and Designation and that it became effective contemporaneously with the other Instruments. For the sake of simplicity, I will not refer to the Texas certificate of incorporation separately from the Delaware Certificate of Incorporation and Certificate of Designation unless the distinction is necessary to my analysis;

---

[3] Apparently, all of the stockholders of RTN consented to the new certificate, even those stockholders who held extremely small blocks and who were not otherwise parties to the Instruments.

[4] 8 Del. C. § 104.

- Finally, the bylaws of RTN. These bylaws were later re-adopted when RTN re-domiciled into Delaware (the "Bylaws"). As with the Texas certificate of incorporation, I will not refer to the Texas bylaws separately from the Delaware bylaws unless the distinction is material (the "Bylaws").

As will soon become apparent, this case turns on the meaning of these Instruments. Nonetheless, because of the numerous provisions of the Instruments that are relevant, it is clearer for the reader to set them forth after discussing RTN's move to Delaware and identifying the basic conflict between the Rohes and the other RTN stockholders, including Gilat.

For now, what bears emphasis is that the board of RTN after the Gilat investment consisted of seven members. Three were appointed by Gilat. The four others were the Founders plus RTN's Chief Operating Officer, George Merrick (collectively, the "non-Gilat directors"). Under the Investor Rights Agreement and the Certificate of Designation, Gilat and a majority of the non-Gilat directors were required to approve most extraordinary transactions.[5] As a matter of mathematics, therefore, as long as the Rohes were on the board, none of the listed actions could be taken without at least one of their votes.

[5] Cert. of Desig., Art. 6(a); Investor Rights Agreement, Art. 10.2.

Likewise, it is important that Gilat's investment divested the Rohes of majority voting control. On any matter where the Series A Preferred and the common stock are eligible to vote together, the Rohes now hold fewer than 50% of the votes. Thus, if Meador and Gilat vote together against the Rohes, they hold over 50% of the votes and will prevail. But if the Founders stick together, the Founders, and not Gilat, have majority voting control.

C. RTN Reincorporates In Delaware

On August 10, 1999, RTN merged with a subsidiary in order to redomicile into Delaware. As noted, the company's Texas certificate of incorporation was then divided into the Certificate of Incorporation and the Certificate of Designation.

Of great significance is the fact that the Rohes agreed to this merger, as did Gilat. Indeed, Christine Rohe executed the merger agreement as CEO of RTN and its merger subsidiary. It thus appears that the merger decision was non-controversial and approved by the entire RTN board, without dissent. The merger appears to have had no other purpose other than to have RTN governed by the Delaware General Corporation Law ("DGCL") rather than Texas corporate law.

D. The Founders' Alliance Breaks Up And The Rohes Are Fired From Their Management And Officer Positions

Some time after RTN moved to Delaware, Meador and the Gilat directors accused the Rohes of serious breaches of fiduciary duty. Specifically, they alleged that the Rohes had used company credit cards to finance purely personal expenditures; that the Rohes had given themselves, friends, and family members improper raises and bonuses; and that Christine Rohe had attempted to usurp business opportunities belonging to RTN. The truth of these allegations is not directly at issue in this case. For present purposes, it suffices to say that the allegations are serious and would constitute "cause" for removal if true.[6]

In reliance on these allegations, the three Gilat directors, Meador, and George Merrick voted on February 14, 2000 to remove the Rohes from their positions as officers of RTN. That decision is the subject of an action in the Court of Common Pleas in Pennsylvania, wherein RTN seeks declaratory relief that the removal of the Rohes from their officer positions was proper and affirmative relief for harm the Rohes allegedly caused RTN. As one

[6] R.F. Balotti & J. A. Finkelstein, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS, § 4.4 at 4-12 (3d ed. 1999, 2000 Supp.) (hereinafter, "*Balotti & Finkelstein*") ("Generally, the following have been held to constitute cause for removal: malfeasance in office, gross misconduct or neglect, false or fraudulent misrepresentation inducing the director's appointment, willful conversion of corporate funds, a breach of the obligation to make full disclosure, incompetency, gross inefficiency, and moral turpitude.").

might expect, the Rohes have contested the suit and filed counterclaims of their own. None of the parties, however, has asked the Pennsylvania court to expedite that action's procession.

E. The Rohes Are Removed From The RTN Board For Cause

Apparently not satisfied that the removal of the Rohes from their officer positions was sufficient to protect the corporation, the other directors of RTN scheduled a stockholders' meeting to consider removing the Rohes from the board for cause. This led the Rohes to seek expedited injunctive relief from this court.

I declined to enjoin the stockholders' meeting, reasoning that any harm to the Rohes could be rectified by a prompt decision after an actual vote to remove them. I did, however, grant an injunction requiring the RTN board to give the Rohes notice of any action that, if the Rohes were still on the board, could be taken only with the assent of at least one of them.

On May 2, 2000, the RTN stockholders met. All of the stockholders, including Gilat, were permitted to vote their common and Series A Preferred shares on the "Removal Resolution," As was anticipated, the Removal Resolution was successful because Meador and Gilat voted their shares to remove the Rohes. To the extent that the Gilat shares were ineligible to vote on the Removal Resolution, however, the Resolution would have failed.

F. Summary Of The Parties' Basic Positions

In order to help the reader focus on the key aspects of the Instruments, it is useful to summarize, in very simplistic terms, the basic arguments of the parties. I will spell out the parties' arguments in fuller detail later.

The Rohes claim that the Instruments, when read together, guarantee them seats on the RTN board for at least the three years until Gilat's Mandatory Redemption right is triggered. Likewise, the Rohes say, the Instruments make clear that Gilat is forbidden to vote its shares in any election of or removal vote regarding the four directors Gilat does not appoint. At the very least, if Gilat has the right to participate in any vote regarding the non-Gilat seats, then it has contractually bound itself to vote for the Rohes. Under any of these theories, of course, the Rohes win.

For its part, RTN argues that the Instruments do not provide the Rohes with any vested entitlement to sit on the RTN board. To the contrary, says RTN, the Instruments should be construed in accordance with black-letter Delaware corporate law. Under such law, RTN directors are elected on an annual basis and may be removed for cause by the stockholders entitled to vote at any election of RTN directors. Furthermore, the Instruments, argues RTN, nowhere divest Gilat of the right to vote for the election or removal of the non-Gilat directors and nowhere obligate Gilat to vote for the Rohes. As

such, Gilat's votes in favor of removal were properly counted and the Rohes were legally removed from the RTN board.

G. The Provisions Of The Instruments Bearing On The Composition Of The RTN Board Of Directors

Several provisions of the Instruments touch on the proper composition of the RTN board of directors.

First, the Purchase Agreement states as follows:

> (j) **Board of Directors.** *Upon the Closing, the authorized size of the Board of Directors of the Company shall be seven (7) members of which three (3) members shall be appointed by Purchaser.* Upon Closing, the Board of Directors shall appoint an Executive Committee chaired by the Chief Executive Officer, with three members, one a representative of the Purchaser, which Executive Committee will be delegated certain authority by the Board of Directors to guide operations between scheduled meetings of such Board of Directors.[7]

Consistent with the Purchase Agreement, Article 4.5 of the Investor Rights Agreement states:

> **4.5 Board of Directors.** *(a) Subject to Section 4.5(b) below, the Board of Directors of the Company shall consist of seven (7) members of which three (3) will be appointed by the Investor. The other members of the Board of Directors shall be elected as provided in the Restated Articles of Incorporation of the Company.* Upon Closing, the Board of Directors shall appoint an Executive Committee chaired by the Chief Executive Officer, with three members, one a representative of the Purchaser, which Executive Committee will be delegated

[7] Purchase Agreement, § 5.1 (j) (emphasis in italics added).

certain authority by the Board of Directors to guide operations between scheduled meetings of such Board of Directors.'

Following the lead of the Investor Rights Agreement to look to the Certificate of Incorporation for guidance as to how the directors will be elected, one finds that the Certificate of Incorporation states the following:

Article VIII.

> The number of Directors serving on the Board of Directors shall be seven *and the individuals serving on the Board shall be* Christine A. Rohe, Constance A. Rohe, Darrell G. Meador, George Met-rick, Noam Fink, Shlomo Tirosh and Todd J. Miller."

Likewise, the Certificate of Designation states:

> c. Board of Directors Renresentation and Redemption.
>
> (i) *Prior to the Mandatory Redemption Date, the holders of the Series A Preferred Shares shall have the right to appoint a total of three (3) representatives to the Board of Directors of the Company.* If prior to the Mandatory Redemption Date the holders of the Series A Preferred Shares shall have converted all of such Shares to Common Stock, such holders shall be entitled to appoint a total of three (3) representatives to the Board of Directors of the Company. *The Board of Directors shall consist of seven (7) members in total, the remaining four (4) of which shall be those employees of the Company who are parties to the Investor Rights Agreement by and among the Company, Christine Rohe, Darrell Meador, Constance Rohe and Gilat Communications Ltd. dated as of January 12, 1999 (the*

[8] Investors' Rights Agreement, Art. 4.5. (emphasis in italics added)

[9] Cert. of Inc.. Art. VIII (emphasis added).

> *"Investor Rights Agreement") and the Chief Operating Officer of the Company."*

Thus, neither the Certificate of Incorporation nor the Certificate of Designation spells out the election process for directors. To the contrary, each just flatly identities the seven members of the board.

This is in contrast to the last of the Instruments, the Bylaws, which state in pertinent part as follows:

> 2.11 NUMBER OF DIRECTORS
>
> *The number of Directors of this Corporation shall be SEVEN* (7). No Director need be a Shareholder or a resident of Delaware. The number of Directors may be increased or decreased from time to time by amendment to these Bylaws. Any decrease in the number of Directors shall not have the effect of shortening the tenure which any incumbent Director would otherwise enjoy.
>
> * * *
>
> 2.13 TERM OF OFFICE
>
> Directors shall be entitled to hold office until their successors are elected and qualified. *Election for all Director positions, vacant or not vacant, shall occur at each annual meeting of the Shareholders and may be held at any special meeting of Shareholders called specifically for that purpose.*
>
> ARTICLE THREE – SHAREHOLDERS MEETINGS
>
> * * *

[10] Cert. of Desig. § 4(c)(i) (emphasis added).

3.06 VOTES PER SHARE

Each outstanding share, regardless of class, shall be entitled to one (1) vote on each matter submitted to a vote at a meeting of Shareholders, except to the extent that the voting rights of the shares of any class or classes are limited or deniedpursuant to the Certificate of Incorporation, A Shareholder may vote in person or by proxy executed in writing by the Shareholder, or by the Shareholders' duly authorized attorney-in-fact.

3.07 NO CUMULATIVE VOTING

Shareholders shall not be entitled to cumulate their votes in any election of Directors. *Directors shall be elected pursuant to and in accordance with the Certificate of Incorporation and Section 5. 1(j) of the Series A Convertible Stock Purchase Agreement by and among the Corporation, Christine Rohe, Darrell Meador, Constance Rohe and Gilat Communications, Ltd. dated December 31, 1998.*

* * *

3.12 ANNUAL MEETINGS

The time, place, and date of the annual meeting of the Shareholders of the Corporation, for the purpose of electing Directors and for the transaction of any other business as may come before the meeting, shall be set from time to time by a majority vote of the Board of Directors. If the day fixed for the annual meeting shall be on a legal holiday in the State of Delaware, such meeting shall be held on the next succeeding business day. *If the election of Directors is not held on the day thus designated for any annual meeting, or at any adjournment thereof the Board of Directors shall cause the election to be held at a special meeting of the Shareholders as soon thereafter as possible.*

3.13 FAILURE TO HOLD ANNUAL MEETING

If, within any 13-month period, an annual Shareholders' Meeting is not held, any Shareholder may apply to a court of competent jurisdiction in the county in which the principal office of

the Corporation is located for a summary order that an annual meeting be held. [11]

H. The Provisions Of The Instruments Addressing. The Removal Of RTN Directors

Only one of the Instruments explicitly addresses the removal of RTN directors. Article 2.14 of the Bylaws states:

2.14 REMOVAL OF DIRECTORS

The Board of Directors, in whole or in part, shall not be removed, except in accordance with the articles of incorporation (or any restatement or amendment thereof) or any shareholders agreement in effect at the time of the proposed action.'*

The Certificate of Incorporation, which is referenced in Article 2.14, makes no provision for the removal of directors nor do any of the other Instruments.

The Bylaws do contain a vacancy provision, which the Rohes contend bears on the question before the court because, they argue, it provides the sole legitimate basis through which one of the seven named directors can be divested of office until the Mandatory Redemption Date. That provision states:

2.15 VACANCIES

Vacancies on the Board of Directors shall exist upon the occurrence of any of the following events: (a) the death, resignation,

[11] Bylaws, Arts. 2.11 & 2.13 & 3.06-07 & 3.12-3.13 (emphasis in italics added).

[12] Bylaws, Art. 2.14.

or removal of any Director; (b) a declaration of vacancy under Section 2.15(a) of these Bylaws; (c) an increase in the authorized number of Directors; or (d) the failure of the Shareholders to elect the full authorized number of Directors to be voted for at any Shareholders' meeting at which any Director is to be elected.

2.15(a) DECLARATION OF VACANCY

A majority of the Board of Directors *may* declare vacant the office of a Director if the Director: (a) is adjudged incompetent by a court order; (b) is convicted of a crime involving moral turpitude; (c) or fails to accept the office of Director, either by written acceptance or by attendance at a meeting of the Board of Directors, within thirty (30) days of notice of election.

2.15 (b) FILLING VACANCIES

Any vacancies, *including those caused by the removal of directors by the shareholders* but which are not filled by the affirmative vote of a majority of the remaining shareholders, may, subject to any existing shareholder rights agreements, be filled by the affirmative vote of a majority of the remaining directors. Subject to any limitations imposed by the GCL, any directorship to be filled by reason of an increase in the number of Directors (which would also require a change in these Bylaws) may be filled by election at an annual meeting or at a special meeting of shareholders called for that purpose.[13]

I. The Provisions Of the Instruments Addressing Gilat's Voting Rights

The Instruments make clear that Gilat could appoint three directors. As to its right to vote its Series A Preferred on other matters, Article l(a) of the Certificates of Designation states:

(a) Voting Subject to any provision hereof conferring upon the holders of Series A Preferred Shares special rights as to voting,

[13] Bylaws, Art. 2.15 (emphasis added)

> every holder of Series A Preferred Shares shall have one vote for each share of Common Stock into which the Series A Preferred Shares held by him of record could be converted (as provided in this Article), on every resolution, without regard to whether the vote thereon is conducted by a bona fide, written ballot or by any other means.

Article 10.1 of the Investor Rights Agreement[14] and Article 3.06 of the Bylaws also support the proposition that the Series A Preferred could vote with the common stockholders on any matter, and they do not exclude the elections of the non-Gilat directors.

III. Legal Analysis

A. Choice of Law Concerns

The task of interpreting the Instruments is complicated by the fact that they implicate the laws of three different jurisdictions. As noted, RTN was a Texas corporation at the time of Closing. As a result, the question of how the Certificate of Incorporation (which at that time also contained the text of the Certificate of Designation) and the Bylaws would have operated under Texas law is arguably of relevance as a matter of determining what the parties to the Instruments intended.[15]

---

[14] This Article states "Except as specified in 10.2 below and as otherwise provided by law, the shares of Preferred Stock and the Common Stock shall vote as a single class. The holder of each share of Preferred Stock shall have the right to one vote for each share of Common Stock into which such share of Preferred Stock could then be converted (with any fractional share determined on an aggregate conversion basis being rounded to the nearest whole share)."

[15] *Trader* v. *Jester, Constable*, Del. Super., 1 A.2d 609, 613 (1938) ("The rule is well established that the laws in force at the time and place of making the contract enter into, and form a part of it as if they had been expressly referred to, or incorporated in, its terms. The obligation of the

Even though they were entering into agreements involving a Texas corporation, the parties also chose to have the Purchase and Investor Rights Agreements governed by New York law.[16] As a matter of litigation efficiency or strategy (I know not which), neither the Rohes nor RTN has chosen to provide the court with case law from New York bearing on the proper construction of the two Agreements. Apparently, they are content that New York law regarding the interpretation of contracts is sufficiently similar to Delaware law as to permit this case to be fairly decided solely with reference to Delaware contract and corporate cases. I construe this decision as a waiver of the parties' right to claim that the case turns on a material difference between New York and Delaware contract law.[17] Moreover, as Chancellor Chandler recently noted, New York and Delaware

---

contract is measured by the standard of the laws existing at the time of the making of the contract,"); *Dolman v. United States Trust Company of New York, 2* N.Y.2d 110, 116 (N.Y. 1956) ("Nevertheless, it is basic that, unless a contract provides otherwise, the law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein, for it is presumed that the parties has such law in contemplation when the contract was made and the contract will be construed in the light of such law.")

[16] Purchase Agreement, Art. 7.1; Investor Rights Agreement, Art. 11.1. In addition, the parties agreed to have any controversy relating to the meaning of those agreements resolved by arbitration. RTN has not argued that the arbitration clause divests this court of its statutory authority to determine the board of directors of RTN pursuant to 8 Del. C. § 225. I am mindful that any plenary determination of a dispute regarding those contracts is a matter for the arbitrator, absent a new agreement by all the affected contracting parties (e.g., Gilat and Meador, who are not formal parties to this motion) to the contrary.

[17] *See Eon Labs Manufacturing, Inc. v. Reliance Insurance* Co., Del. Supr., No. 417, 1999, slip. op. at 6-7, _____ A.2d _____, Veasey, C.J. (June 30, 2000) (where either New York or Illinois applied and the parties agreed that the principles of law under consideration were "general" ones that were accepted in both states, the Supreme Court followed the trial court's lead and applied general principles of insurance contract construction).

law are generally harmonious in their approach to contract interpretation,[18] and each state emphasizes the interpretive primacy of giving effect to the parties' intention as expressed by the written words of their agreements." It was also long ago decided that the validity of a voting agreement among the stockholders of a Delaware corporation is a matter governed by Delaware law.[20]

Therefore, although I have expended somewhat more effort than the parties did to research and cite to New York authority, I confess that I have decided this case largely based on the arguments presented to me and have not made an effort to perform a comprehensive search of New York contract law in order to select authorities relevant to the matter at hand.[21]

---

[18] *USA Cable v. World Wide Wrestling Federation Entertainment, Inc.,* Del. Ch., C.A. No. 17983, mem. op. at 18-19, Chandler, C. (June 27, 2000).

[19] Both New York and Delaware follow the standard hombook principles of contract construction that emphasize the importance of text. *See, e.g., Laba v. Carey, 29* N.Y.2d 302, 308 (N.Y. 1971) (stating basic principles of contract construction); *Kass v. Kass, 91 N.Y.* 2d 554, 566-67 (N.Y. 1998) (same); *Abiele Contracting, Inc., v. New York City School Construction Authority,* 91 N.Y.2d 1, 9-10 *(N.Y. 1997)* (same); *Citadel Holding Corp.* v. *Roven,* Del. Supr., 603 A.2d 818, *822 (1992)* (same); *Rainbow Navigation, Inc., Yonge,* Del. Ch., C.A. No. 9432, 1989 WL 40805, at * 2, Allen, C. (Apr. 24, 1989) (same).

[20] *Ringling v. Ringling Bros.–Barnum & Bailey Combined Shows, Inc.,* Del. Ch., 49 A.2d 603, *607* (1946), *order modified in otherpart,* Del. Supr., 53 A.2d 441 (1947). Whether such an agreement can, per agreement of the parties, be interpreted as a text in accordance with another state's rules of **contract** construction is a question I do not reach, in view of the parties' waiver.

[21] The parties have attempted to litigate this case in a manner that is proportionate to the value of RTN as an enterprise and the resources available to them to fight the dispute. I respect their decision to address the litigation in this manner and have therefore not asked them to provide me with further briefing regarding New York contract law, given that neither party thought that the case hinged on nuances of that law.

Finally, because RTN reincorporated into Delaware, the question of how the Certificate of Incorporation, the Certificate of Designation, and the Bylaws are interpreted under Delaware law is of substantial importance. The fact that these documents originated as the governing instruments of a Texas corporation, however, presents an interesting question of interpretation. It is possible, as we shall see, that the Certificates and Bylaws could be validly read in certain ways under Texas corporation law, while a similar reading would be invalid under the Delaware General Corporation Law, As a result, what weight is given to RTN's decision to reincorporate in Delaware, and the Rohes' support of that decision, is important to the resolution of this case.

B. The Contending Positions Of The Parties

To give context to my discussion of the case, it is helpful to summarize the parties' competing positions in a bit more detail at this stage. After doing so, I will then set forth my analysis and resolution of the issues.

1. The Rohes' Argument

The Rohes' argument is quite straightforward. They argue that the Certificate of Incorporation, the Certificate of Designation, and the Investor Rights Agreement could not be any clearer about the fact that the RTN board was to consist of seven specific individuals at least until the Mandatory

Redemption Date. Two of these directors were the Rohes thernselves. As such, the Rohes could not be removed from the board.

In support of this argument, the Rohes cite the fact that under Texas law, a certificate of incorporation may establish who the directors of the corporation are to be, the directors' term of office, and their manner of removal. If certain conditions are met, such a certificate provision can validly override the ordinary rules under Texas corporate law, such as the requirement that an annual directors election be held.[22] Furthermore, the right to remove directors of a Texas corporation is not statutory in nature, but may be provided for in the certificate or bylaws of the corporation.[23] As a consequence, the Rohes claim that regardless of whether the RTN Certificate of Incorporation can be validly read under the Delaware General

---

[22] Tex. Bus. Corp. Act arts. 2.30–1A(3), (5) (2000) (permitting stockholders to enter into agreements that "establish[ ] the natural persons who shall be the directors or officers of the corporation, their term of office or manner of selection or removal, or terms or conditions of employment of any director, officer, or other employee of the corporation, regardless of the length of employment;" and "govem[ ], in general or in regard to specific matter, the exercise or division of voting power by and between the shareholders, directors (if any), or other persons or by or among any of them, including the use of disproportionate voting rights or director proxies. "); & 2.30-1B (allowing stockholder agreements to prevail over inconsistent provisions of the Texas Business Corporation Act if the agreements are (1) "set forth in the articles [of] incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement .; (2) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and (3) valid for 10 years, unless the agreement provides otherwise.").

[23] Tex. Bus. Corp. Act art. 2.326. ("[T]he bylaws or the articles of incorporation may provide that at any meeting of shareholders called expressly for that purpose any director or the entire board of directors may be removed, with or without cause, by a vote of the holders of a specified portion, but not less than a majority, of the shares than entitled to vote at an election of directors, subject to any further restrictions on removal that may be contained in the bylaws.")

Corporation Law as entitling the seven named directors to continue as directors free from the threat of removal, the fact that Texas law permits such an approach is strong evidence that the parties to the Instruments intended the seven directors to remain in place.

As a result, the Certificate of Incorporation buttresses the Rohes' secondary arguments, which are two-fold. First, the Rohes argue that the Instruments limit Gilat to voting for its three appointees and prohibit Gilat from participating in the election or removal of the four non-Gilat directors.

Second, the Rohes claim that if Gilat can participate in votes regarding the non-Gilat directors, then Gilat has a contractual obligation under the Investor Rights Agreement (which references the board composition provisions in the Certificates of Incorporations and Designation) to vote its shares to support the election and continued service of the Rohes on the RTN board.

Otherwise, the Rohes contend, Gilat will be able to avoid a clear bargain it made. For its part, Gilat was to elect three directors and to be able to stop major corporate transactions. In exchange, it agreed to support the election of the Rohes and Meador (as well as RTN's COO), and to allow the Founders' substantial blocking power. In clear violation of that agreement,

the Rohes say, Gilat has violated its end of the bargain by kicking them off the board.

Gilat's obligation to vote for the Rohes, they say, extends even to removal votes. Through Article 2.15(a) of the Bylaws, the parties validly expressed the only circumstances under which one of the seven named directors could be removed from the board. Because the Rohes have not been "adjudged incompetent by a court order" or "convicted of a crime involving moral turpitude,"[24] the requisite circumstances to declare their seats vacant do not exist and Gilat does not have the right to vote to remove the Rohes, even for what would otherwise constitute good cause. The silence of the Certificate of Incorporation and the other Instruments about removal must be interpreted as limiting removal to those circumstances identified in Article 2.15(a).

2. RTN's Argument That The Rohes Were Validly Removed

RTN contends that 8 Del. C. § 141(k) clearly provides a majority of the RTN shares "then entitled to vote at an election of directors" with the right to remove "[a]ny director or the entire board of directors . . . with or without cause." This statutory right of removal, RTN argues, cannot be modified by provisions in a corporation's certificate of incorporation or

[24] Bylaws, Art. 2.15(a).

bylaws. Moreover, even if Gilat can only vote at elections of the three directors it appoints to the RTN board, the plain text of § 141(k)(2) makes clear that a stockholder with the right to vote on the election of only a single class of directors nevertheless retains the right to vote for the "for cause" removal of any of the company's directors.[25]

RTN also disputes the Rohes' argument that the plain language of the Certificates of Incorporation and Designation must be read as providing for a seven person board of specific composition until the Mandatory Redemption Date. Rather, RTN argues that the identification of the seven members was simply a statement of the company's initial board of directors, which could be altered by the results at the company's annual meeting.

As a Delaware corporation, 8 Del. C. § 211 requires RTN to hold an annual meeting for the election of directors and that requirement may not be altered by a certificate provision purporting to provide a permanent tenure for directors. While 8 Del. C. § 102(a)(6) permits a certificate of incorporation to set forth the names "of the persons who are to serve as directors," those persons may serve only "until the first annual meeting of

[25] 8 Del. C. § 141(k)(2) ("Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, the subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole.").

stockholders or until their successors are elected and qualify."[26] Accordingly, RTN says, Delaware requires directors on a non-classified board to be elected annually and a charter provision that provides otherwise is invalid.[27]

Even though the Certificate of Incorporation originally was for a Texas corporation, the Rohes' agreement to reincorporate into Delaware, along with the absence of any explicit provision in any of the Instruments requiring Gilat to vote for the Rohes, supports the conclusion that the Instruments were not intended to give the Rohes any vested right to a seat on the RTN board. In addition, Article 1 (a) of the Certificate of Designation and provisions in the other Instruments state that Gilat could vote on any resolution of RTN stockholders, and do not exclude a resolution dealing with the election or removal of any of the four directors not appointed by it.

As a result, RTN argues, the Instruments are best read as ones in which each of the Founders relied upon their ability, acting together, to preserve their individual positions on the board. That is, the Founders presupposed that their alliance would persist and that this was sufficient to ensure protection for each of them. In the event that the alliance broke up,

---

[26] 8 Del. C. § 102(a)(6); see *also 8* Del. C. § 211.

[27] See 8 Del. C. § 102(b)(l) (limiting a certificate of incorporation to provisions that are "not contrary to the laws of this State").

however, the Instruments do not provide any of the individual Founders with a vested right to continued board service. To the contrary, each could be voted out at the annual meeting or in a removal vote.

Under this reading of the Instruments, the removal of the Rohes was proper.

C. The Court's Resolution Of The Case

The clearest way to get to the heart of the matter is to address several of the foundational legal issues upon which this case hinges. When that is done, it becomes clear that this case ultimately turns on whether Gilat was obligated by contract to vote for the election of and against the removal for cause of the Rohes.

1. The RTN Certificate Of Incorporation Cannot Validly Divest The RTN Stockholders Of Their Right To Elect Or Remove Directors

Under Delaware law, a certificate of incorporation cannot specify the directors of the corporation for more than an initial period.[28] And except in the case of a properly classified board, all directors must fact the electorate on annual basis at the corporation's annual stockholders' meeting.[29] As a result, RTN must hold an annual meeting for the election of directors,

[28] 8 Del. C. § 102(a)(6); 102(b)(l).

[29] 8 Del. C. §§ 141(d), 211; see *also Roven v. Cotter,* Del. Ch., 547 A.2d 603, 605 (1988) ("The stockholders elect directors for a one year term, unless the certificate of incorporation or an initial bylaw, or one later adopted by the stockholders, provides for a classified board.").

regardless of whether Article VIII of its Certificate of Incorporation was originally intended to provide a permanent tenure for the seven identified directors.

Likewise, 8 Del. C. § 141(k) makes clear that the directors of RTN may be removed with or without cause by a majority of the shares of the company. Section 14 1 (k) provides no limitation on the right of stockholders to remove a member of a non-classified board.[30] Like the right to elect directors, Delaware law considers the right to remove directors to be a fundamental element of stockholder authority.

As a result, the provision of the Bylaws, Article 2.14, that indicates that directors can be removed in accordance with the provisions of the

---

[30] See S. Samuel Arsht & Lewis S. Black, *The 1974 Amendments To the Delaware Corporation* Law, Prentice-Hall Corp. Rep., 378 (1974) (hereinafter *"Arsht & Black"):*

> Subsection (k) of Section 141 fills what was a gap in the statute. Since 1967, Section 14 1 (b) has recognized that directors may be removed, since it provides that each director shall hold office until his successor is elected and qualified 'or until his earlier resignation or removal.' However, the statute did not state who had the power to remove directors or how or under what circumstances they might be removed. While the new subsection leaves some questions unanswered, for example it does not attempt to prescribe the procedure for removal for cause, it answers the most frequently asked question *by expressly granting to stockholders broad authority to remove directors with or without cause, in most cases, and for cause in all cases.* Moreover, by negative implication intended by the draftsmen, directors do not have the authority to remove other directors.

See *also Roven,* 547 A.2d at 605, (1988) ("Prior to 1967, the General Corporation Law did not specifically address the matter [of removal]. However, Delaware courts have always recognized the inherent power of stockholders to remove a director for cause.") (citations omitted); *Nycal v. Angelicchio,* Del. Ch., C.A. No. 13053, 1993 WL 401874, at *3, Chandler, V.C. (Aug. 18, 1993) ("Section 141(k) of the Delaware corporation law guarantees the right of a majority of the shareholders to remove directors with or without cause."); *Balotti & Finkelstein,* § *4.4* at 4-9-4-12 (indicating that the stockholders' right to remove directors for cause is absolute under Delaware law).

certificate of incorporation or another stockholders' agreement is therefore best read against this Delaware law backdrop, and as incorporating an understanding that the stockholders' right to remove directors could not be impaired by either the certificate or the bylaws. Under this reading, a statutorily compliant removal vote would be "in accordance with the articles of incorporation *(or any restatement or amendment thereof)*."[31] But even if Article 2.14 is read as purporting to prohibit removal unless the removal is in accordance with explicit authority in the Certificate of Incorporation or a stockholders' agreement, it is invalid under Delaware law.

Similarly, Article 2.15(a) of the Bylaws, which purports to give the RTN directors the discretion to declare a vacancy whenever certain events occurs, cannot bar the RTN stockholders from exercising their statutory removal rights under § 141(k).[32] And even if it could so operate, the provision is much too vague to be construed as an attempt by the parties to limit the circumstances in which a director could be removed for cause to those defined therein. Had the parties wished Article 2.15 to deal with the issue of removal, one wonders why Article 2.14 of the Bylaws is titled "Removal" of Directors whereas Article 2.15 is entitled "Vacancies." Most

[31] Bylaws, § Art. 2.14 (emphasis added).

[32] 8 Del. C. § 109(b) (bylaws cannot contain any provision "inconsistent with law").

important, one wonders why the parties did not state in Article 2.14 that directors could not be removed except for a reason set forth in Article 2.15(a).

In so concluding, I do not diminish the equitable force to the Rohes' argument that the parties, by failing to provide for a removal process in any of the Instruments, meant to foreclose removals, thus giving the seven named directors an entitlement to board service unless one of the extreme conditions in Article 2.15(a) of the Bylaws existed. It is possible that that is what the parties intended.

But several factors lead me to conclude that it is more likely that the Article 2.15(a) was not intended to have that effect. First, if the only circumstances by which a director could be removed were those mentioned in Article 2.15(a), one expects that such an important intention would have found expression in the Certificate of Incorporation or the Bylaws. But no such explicit expression is in either Instrument. Second, Article 2.15(a), by its express terms, deals only with situations of such moment that a director seat could be declared vacant by the directors acting on a discretionary basis without stockholder action at all. Delaware law, to my knowledge, does not

recognize the validity of such an approach to removing directors.[33] There is no textual basis for leaping to the conclusion that this extraordinary provision was implicitly designed to supplant the statutorily mandated right of removal, and the Rohes have submitted no parol evidence in support of such a vault. Finally, it is of significance to me in this respect (and others I will mention) that the parties all assented to the reincorporation of RTN to Delaware. Their choice to do so must be presumed to have been an informed one.[34] As such, it is hard to believe that they felt that, through the readoption of a Bylaw dealing with "Vacancies", they were silently prohibiting the RTN stockholders from voting to remove directors. Rather, it is more likely that businesspersons who consciously decided to redomicile

---

[33] See *Arsht & Black,* at 378 ("by negative implication intended by the draftsmen [of 8 Del. C. § 141(k)], directors do not have the powers to remove other directors"); *Stroud v. Milliken Enterprises, Inc.,* Del. Ch., 585 A.2d 1306, 1309 (1988) ("Generally, directors do not have power under Delaware law to remove fellow directors."); *Balotti & Finkelstein,* § 4.4 at 4-13 (indicating that it is doubtful that even a certificate provision vesting removal authority in directors would be valid under Delaware law). Unlike the situation in *Stroud*, under Article 2.15(a) a seat does not automatically become vacant when a director fails to meet certain qualifications. To the contrary, the events listed in Article 2.15(a) merely trigger a situation in which the board "may declare" a vacancy.

[34] *Lee v. Engle,* Del. Ch., C.A. Nos. 13324, 13284, 1995 WL 761222, at *7, Steele, V.C. (Dec. 15, 1995) ("Incorporation in Delaware constitutes a knowing and voluntary request for the widely recognized benefits and the advantages flowing from the application of Delaware general corporate law to the governance of the incorporator's business entity.. If Sunstates did not intend to abide by Delaware law and anticipate Delaware law governing the conduct of its affairs, the Company would have incorporated elsewhere."); *O'Malley v. Boris,* Del. Ch., C.A. No. 15735, 1999 WL 39548, at *3, Chandler, C. (Jan, 19, 1999) ("Presumably [the defendants], and hundreds of thousands of other entities, have incorporated in Delaware because they wish to be subject to Delaware corporate law"), *rev'd on other grounds,* Del. Supr., 742 A.2d 845 (1999); see *also Trader,* 1 A.2d at 613 (*supra* note 15); *Dolman, 2* N.Y.2d at 116 (*supra* note 15).

into Delaware recognized that § 14 1 (k) provided a mechanism for removing directors and that there was no need for the Certificate of Incorporation to address a subject that was adequately provided for by statute.

Admittedly, this conclusion is debatable and the parties could have been ignorant on the subject and have assumed that whatever goes in Texas goes in Delaware. Nonetheless, one hesitates to ascribe such a mindset to directors who supported a merger for the sole purpose of ensuring that the corporation could avail itself of the advantages of Delaware law, and I refuse to do so in the absence of clear textual support for the construction the Rohes advance. For all these reasons, I reject the Rohes' argument that the vacancy provision of the Bylaws sets forth the only circumstances in which directors can be removed.

Having concluded that the RTN directors are subject to election annually and may be removed with or without cause, I turn to the question of whether Gilat may cast a vote for or against removal of the four RTN directors it does not exclusively appoint. The starting and ending point for answering that question is § 14 1 (k)(2) of the DGCL, which draws an important distinction between the voting rights of the electorate in for cause and without cause removal votes. In the latter case of a "without cause"

vote, § 141(k)(2) limits participation to those stockholders entitled to vote for the class of directors whose seats are stake:

> Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, this subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole.

Logically, the failure of the statute to permit such a limitation on a vote on the "for cause" removal of a director implicitly means that a stockholder with the right to vote on the election of single member of the board of directors may participate in the vote to remove for cause any of the other members of the board of directors.[35] Otherwise, the statutory words "in respect to the removal without cause of a director or directors so elected" would be meaningless surplusage.[36] The unstated rationale for this distinction between without cause and for cause removal votes might well be that no stockholder should be forced to suffer governance by a director

[35] *See Arsht & Black,* at 378 (indicating that under § 141(k)(2) "where the holders of a class or series of stock are entitled to elect one or more directors, the power to remove a director or directors so elected *without cause* inures to the holders of that class or series only and not the holders of the outstanding shares as a whole") (emphasis added).

[36] *Keeler v. Hartford Mutual Insurance Co., Del.* Supr., 672 A.2d 1012, 1016 (1996) (in interpreting a statute, the court should generally avoid a reading that would render a portion of the statute superfluous).

whose malfeasance or neglect of duty rises to the level sufficient to justify a for cause removal.[37]

Because of § 14 1 (k)(2), Gilat had a right to vote its shares on the Removal Resolution, irrespective of anything in the Instruments to the contrary. And regardless of § 141 (k)(2), the Instruments do not limit Gilat's ability to vote in an election or removal vote regarding the non-Gilat seats. It is of course true that under the Certificate of Designation, Gilat has the right to elect three directors, But that right is not contingent on its disablement from voting in elections regarding the other four board seats. To the contrary, Article 1 (a) of the Certificate of Designation states that "every holder of Series A Preferred Shares shall have one vote for each share of Common Stock into which the Series A Preferred Shares held by him of record could be converted . . . on every resolution . . . ." Article 10.1 of the Investor Rights Agreement and Article 3.06 of the Bylaws have substantively identical language. Hence, this case presents a collision between the Instruments' explicit grant of voting authority to Gilat and the

[37] Texas corporate law appears to be to the contrary but not in exactly the way the Rohes argue. Under Texas law, "[w]henever the holders of any class or series of shares or any such group are entitled to elect one or more directors by the provisions of the articles of incorporation, only the holders of shares of that class or series or group shall be entitled to vote for or against the removal of any director elected by the holders of shares of that class or series or group." Tex. Bus. Corp. art. 2.32C. Thus, if RTN were still a Texas corporation, only Gilat could vote to remove the Gilat directors. But because the Certificate of Designations gives Gilat the right to vote with the common stockholders on any resolution, including the election of directors, Gilat would not be statutorily prohibited from participating in a removal vote on the non-Gilat directors.

Rohes' argument that the fact that Gilat has the exclusive right to elect three directors implicitly expresses the parties' intention to exclude them from participating at all in the selection of the other four directors. The explicit grant of voting authority emerges from that game of interpretative chicken as the operable, if not scratch-free, indication of the parties' intent."

A summary of the foregoing analysis indicates that: 1) the RTN board must be elected annually by the RTN stockholders; 2) majority of the RTN stockholders may remove directors with or without cause; and 3) Gilat may participate in the vote for the election or removal of all RTN directors. As a result, this case hinges on whether the Instruments can be read as imposing a contractual obligation on Gilat to vote for the continued service of the Rohes on the RTN board.

I turn to that determinative question now.

---

[38] Delaware law generally requires that the preferences and limitations of the rights of preferred stockholders be expressly stated. See, *e.g.*, Winston v. *Mandor*, Del. Ch., 710 A.2d 835, 839 (1997) (a "corporation may limit the rights (including the right to vote) of a holder of preferred or other particular class of shares by express limitation in its certificate of incorporation, a specific certificate of designations or other form or resolution"); *Jedwah v. MGM Grand Hotels, Inc.*, Del. Ch., 509 A.2d 584, 593 (1986) ("preferences and limitations associated with preferred stock exist only by virtue of an express provision (contractual in nature) creating such rights and limitations)).

B. Is Gilat Contractually Obligated To Vote Against The Removal Of The Rohes?

This question is one that I cannot answer without a certain amount of ambivalence. Given the lack of clarity and consistency in the 'terms of the Instruments, it would be hubristic to state with confidence that the parties either intended or did not intend for Gilat to be bound to vote for the election of the Rohes as directors.

Because RTN was a Texas corporation at the time the Instruments first became effective, it is possible that the parties envisioned that there would be no elections of RTN directors during the period before the Mandatory Redemption Date. It is also possible that the parties believed that the only circumstances in which one of the seven named directors could be removed from the board during that period was in the case of an event triggering § 2.15(a) of the Bylaws, a resignation, or death.

Given these possibilities, the parties' use of language in Article VIII of the Certificate of Incorporation that seems to indicate that the seven named individuals "shall be" the directors and that does not limit (nor clearly specify) their tenure in could have been thought sufficient to guarantee each of the seven their place on the board. Thus the parties may not have felt the need to craft specific language that would look like a traditional stock voting agreement and commit Gilat to affirmatively cast its

ballots for the Rohes, Meador, and Merrick. After all, if there were to be no elections of directors, because Texas law did not require such elections if the Certificate identified who the board members were, why bother?

It is plausible that this was how the parties to the Instruments proceeded. Although such an approach to implementing a voting agreement for board control is contrary to the meticulist inclinations of most transactional lawyers, it is not out o-f the realm of possibilities.

Ultimately, however, I find a contrary reading of the Instruments to be the more reasonable and likely intended one. Without diminishing the fact that the Certificate of Incorporation clearly states that the board "shall be" comprised of seven specific individuals, I conclude that the Instruments cannot be read as imposing upon Gilat the obligation to vote for the Rohes in director elections. Several reasons underlie this conclusion.

First, it is more likely that the parties to the Instruments named the directors of RTN with the intention that the named individuals would simply constitute the initial board of directors during the first year after Closing. It is, of course, quite common for certificates of incorporation to take this tack. Indeed, even though the fact that RTN was a Texas corporation generally operates to bolster the Rohes' argurnents, Texas law plainly states that the "names and addresses of the members of the initial board of directors *shall*

be stated in the articles of incorporation. Unless removed in accordance with the provisions of the bylaws or the articles of incorporation, such persons shall hold office until the first annual meeting of shareholders, and until their successors shall have been elected and qualified."[39] As a result, the mere fact that the seven directors are specifically named does not suffice to convince me that their tenure was to last until the Mandatory Redemption Date.[40]

Indeed, several parts of the other Instruments support such an interpretation. For example, the Certificate of Incorporation names the three Gilat appointees. Does this mean that those three individuals have an individual right to serve? Did Gilat bind itself in that manner, or was their identification simply a part of an initial slate of directors who would serve until their successors were elected and qualified? It would seem more likely that their identification was as part of an initial slate.[41] Likewise, the Bylaws

---

[39] Tex. Bus. Corp. Act art. 2.32.A (emphasis added).

[40] The fact that the first sentence **of** § 4(c)(i) of the Certificate of Designations, which also deals with the composition of the board, starts with a sentence beginning "Prior to the Mandatory Redemption Date" comes closer to the mark. But this language does **not** appear in the same sentence as the text that deals with the non-Gilat directors, which text does not appear until the third sentence of the subsection. Thus the words "Prior to the Mandatory Redemption Date" could simply be referring to the text that succeeds it in the first sentence, which deals with Gilat's right to appoint three directors. This construction also makes logical sense because Gilat's right to appoint three directors is affected in very specific ways by the arrival of Mandatory Redemption Date. These effect of the Mandatory Redemption Date on the method of electing the non-Gilat seats is, to the contrary, nowhere spelled out.

[41] In fairness, I note that the Certificate of Incorporation lists Merrick as a member, whereas the Certificate of Designation indicates that the fourth non-Gilat director "shall be the Chief

were adopted on the same date as the Certificate of Incorporation and clearly provide for an annual meeting of stockholders for the election of directors. The Bylaws have a "Term Of Office" provision that provides for one year terms.[42] As such, it seems strange that none of the Instruments state that the parties were bound to vote at such meeting for the directors identified in the Certificate of Incorporation if such a voting obligation was intended.[43]

Second, reading the Instruments as providing Gilat with the right to appoint three board members and to vote freely as to the other four seats is not economically irrational. If the Founders approached the negotiations in

---

Operating Officer of the Company." Cert. of Desig., Art. 4(c). This identification by officer **status** does provide some support to an interpretation of the Instruments as having been intended to require the parties to vote for a board comprised of three Founders plus the COO of the company.

[42] Bylaws, Art. 2.13.

[43] There are a few other features of the Agreement that tend to cut against the Rohes' position. In noting these features, I do not place too much weight on them because neither RTN nor the Rohes have dilated on them and thus my impressions of their significance lack the helpful influence of vigorous adversarial comment. Nonetheless, I note them because they highlight the difficulty the Rohes have in trying to convince me that Gilat is obligated to vote for them. First, the Purchase Agreement contains a provision entitled "Voting Agreements" that states that there are "no agreements which in any way affect any shareholder's ability or right freely to vote [the Series A Preferred] shares." Purchase Agreement, § 3.25. If the Rohes are correct about what was intended, it is odd that this section of the Purchase Agreement does not, at the very least, cross-reference those voting agreements that Gilat was supposedly entering into at Closing. Second, Article 10 of the Investor Rights Agreement is entitled "VOTING." Yet it never indicates that Gilat must vote for the Rohes' election to the board, even though by its plain terms it provides that except as provided in Article 10.2, which sets forth the Power-Sharing Arrangement, "the shares of Preferred Stock and the Common Stock shall vote as a single class." Investor Rights Agreement, Art. 10.1, Finally, the Certificate of Designation gives Gilat the right to continue to appoint three directors to the RTN board if Gilat converts all of its Series A Preferred. Cert. of Desig., Art. 4(c)(i). Under the Rohes' construction, Gilat would have common stock that would continue to have the special explicitly expressed right to elect three directors but with the implicitly expressed limitation that that stock could not participate in the election of the other four directors.

a unified fashion, they could have chosen to negotiate for protections that sheltered them so long as they continued to act as a block. Absent a crack in their alliance, the fact that Gilat could vote for the non-Gilat seats did not impair the Founders' unified ability to secure their individual board seats. Thus the Founders may have negotiated the Instruments on that basis and never considered that their alliance might in fact disintegrate, leaving Gilat with the ability to cast a swing vote. Although this possibility is by no means compelled by the language of the Instruments, it seems to me to be somewhat more plausible than the notion that the Instruments contain an *explicit* Bylaw requiring an annual meeting for the election of directors but contain an *implicit* requirement for Gilat to vote for the election of the Founders.

Third, and critically, this reading is the one that best accords with the parties' unanimous determination to have RTN redomicile into Delaware.[44] If the parties believed that it was fundamental to their original deal that RTN would not hold director elections and/or that RTN's stockholders could not remove members of the board until the Mandatory Redemption Date, it is reasonable to assume that they would have examined closely whether

[44] *See Lee v. Engle,* 1995 WL 761222, at *7, Steele, V.C. (Dec. 15, 1995) *(supra* note 34); *O'Malley v. Boris,* 1999 WL 39548, at *3 *(supra* note 34); *Trader,* 1 A.2d at 613 *(supra* note 15); *Dolman, 2* N.Y.2d at 116 (*supra* note 15).

redomestication into Delaware would affect that deal. After all, there was no purpose to the merger except to ensure that RTN would be governed by Delaware, rather than Texas, corporation law. It is therefore more consistent with how the parties proceeded to read the Certificate of Incorporation as simply providing for an initial board of seven directors, directors who could be changed by a vote of the appropriate RTN stockholders at an annual meeting[45] or a special meeting on a removal vote.[46]

Finally, although Delaware law provides stockholders with a great deal of flexibility to enter into voting agreements,[47] our courts rightly hesitate to construe a contract as disabling a majority of a corporate electorate from changing the board of directors unless that reading of the contract is certain and unambiguous. As Chancellor Allen noted in *Rainbow Navigation, Inc. v. Yonge*:[48]

> A shareholders agreement that is said to have the effect of depriving a majority of shareholders of power to elect directors at an annual meeting, or preventing such shareholders from exercising the power conferred by Section 228 to act in lieu of a

---

[45] That is, the three Gilat directors could be voted out by Gilat at the annual meeting, and the four non-Gilat directors would be elected by the common stockholders and the Series A Preferred voting together.

[46] See 17A Am. Jur. 2d *Contracts* § 346 (1991) ("It is a general principle that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former will be adopted"); *cf. In re Opinion of the Justices,* Del. Supr., 177 A.2d 205,211 (1962) ("When, however, two constructions of **a statute** are possible and one of them is unconstitutional, the courts are bound to accept the one which is constitutional").

[47] 8 Del. C. § 218.

[48] C.A. No., C.A. No. 9432, 1989 WL 40805, at *4, Allen, C. (Apr. 24, 1989).

> meeting, is an unusual and potent document. . . . It is enough to note that an agreement, if it is to be given such an effect, must quite clearly intend to have it. A court ought not to resolve doubts in favor of disenfranchisement.[49]

Here, the reading of the Instruments that best accords with the substantive law governing RTN is that Gilat had no obligation to vote its shares for the Rohes. That same reading is also a more plausible interpretation of the text of the Instruments than the one advanced by the Rohes. As such, it cannot be said that the Rohes' interpretation rises to the

[49] The Rohes argue that the Rainbow *Navigation* case supports their interpretation of the Instruments. In that case, Chancellor Allen concluded that a shareholders agreement that stated that a board shall consist of four specific members "as of the date" of the agreement did not bar parties to the agreement from voting to remove three of the named directors. Because the Chancellor noted that the agreement in that case did not even use the language such as that "the directors of the corporation are . " in holding that the agreement did not bind the parties to vote for the same slate, 1999 WL 40805 at *3, the Rohes contend that he held or strongly implied that language like that in Article VIII of RTN Certificate of Incorporation would have been sufficiently clear to bind the signatories to vote for the named individuals.

The Rohes' reliance on Rainbow is misplaced. First, the Chancellor's use of that illustrative language was quite obviously designed to highlight the significance of the words "as of the date" of the agreement and the need to give them meaning. *Id.* Second, Chancellor Allen was interpreting a shareholders agreement in *Rainbow Navigation* and not a certificate of incorporation. This distinction is of material legal importance because stockholders can bind themselves contractually in a stockholders agreement in a manner that cannot be permissibly accomplished through a certificate of incorporation. Pertinently, in the certificate context, it is not unusual to name an initial slate of directors, whereas shareholder agreements often incorporate requirements to vote for certain individuals over a longer period of time. Read as containing merely an initial slate of directors, the RTN Certificate fits squarely within the DGCL. But read as the Rohes would have it, the RTN Certificate is invalid.

level of clarity sufficient to meet the *Rainbow Navigation* standard.[50]

---

[50] I note that even if Gilat agreed to vote for the election of the Rohes, there would remain a substantial question whether it was thereby also prohibited it from casting a good faith vote against the Rohes on the for cause Removal Resolution.

Assume, for example, that Jones agreed to vote for Edwards for election to the Acme board for four years. Further assume that three months before the second annual meeting after the voting agreement was entered Edwards steals $250,000 from the Acme treasury. Does Jones still have to vote for Edwards at the annual meeting? As this example illustrates, while a garden-variety agreement to vote for a director will, of course, be upheld under § 2 18, there may be good reason for Delaware courts to be chary about reading into such an agreement an unconditional commitment to vote for that director in a circumstance where there is a good faith basis to conclude that the director has engaged in intentional misconduct that would justify a for cause removal. Put differently, it may well be that the director's right to demand a vote was conditioned on his compliance with an implied covenant not to intentionally breach his duty of loyalty to the corporation. If the director breached that implied covenant, his prior material breach could, as a doctrinal matter, be said to excuse subsequent non-performance by the other party.

This is the law in New York, the state whose law the parties choose to govern the Investor Rights Agreement and the Purchase Agreement. As the New York Court of Appeals has put it:

> The law permits this inherent right [to remove a director for cause] to be exercised notwithstanding a contractual obligation to vote for and maintain a man in the directorate, inasmuch as a condition of faithfulness is implied in the contract, and where that is violated the contract has been broken and consequently is not a bar. Therefore, in cases of misconduct, it is not a breach of such a contract for the stockholders to remove a faithless fiduciary as a director.

In re Burkin, 1 N.Y.2d 570,572 (N.Y. 1956); *see also Fells v. Katz, 255 N.Y.* 67, 72 *(N.Y.* 1931) ("The agreement of the stockholders to continue a man in the directorate must be construed as an obligation to retain him only so long as he keeps the agreement on his part faithfully to act as a trustee for the stockholders."); *Dubin* v. *Muchnick,* N.Y. App. Div., 438 N.Y.S.2d 920,923 (N.Y. Sup. Ct., Spec. Term 1981) *("The law is clear that* provisions of an agreement guaranteeing a minority stockholders' continued participation in control as an officer and director will not protect against a discharge for cause") (emphasis added), *modified in another respect, 447* N.Y.S.2d 472 (N.Y. App. Div. 1"' Dep't 1982); *Springut v. Don & Bob Restaurants of America,* Inc., 394 N.Y.S.2d 971, 973 (N.Y. App. Div. 4th Dep't 1977) ("Notwithstanding that a shareholders' agreement requires the maintenance in the office of a particular director designated by a stockholder, that director may be removed for cause"); Wilson v. *McClenny*, 136 S.E.2d 569, 576-77 (N.C. 1964) (In a case where the defendant agreed to support the plaintiff in director elections for five years, the court held that the agreement did not require the defendant to vote for the plaintiff if the plaintiff could not perform his duties because of alcoholism, "Any agreement to employ an individual, or to promote his continued employment, contains the implied condition that the agreement may be terminated at any time for cause").

If the director believes that the other party has simply manufactured "cause" as a pretext to justify a contractual breach, then the director can seek relief for breach himself. In such a case, the party relying on the director's misconduct to justify non-compliance with a voting agreement

In so concluding that Gilat had no contractual obligation to vote for the Rohes' continued service on the RTN board, I am conscious that I may be reaching a conclusion that is contrary to the subjective expectations the Rohes had when they assented to the Instruments. In this regard, some of Chancellor Allen's other words in *Rainbow Navigation* are particularly apt:

> I cannot say what the subjective expectations of the signatories were when they signed [these] Agreement[s]. In construing a contract, a court need not do so . . . If one or more of the signatories subjectively thought that [these] Agreement[s] created a continuing right in the hands of particular shareholders to keep the board designated in [those] Agreement[s] in place despite the vote of a majority of the stock to remove them, they were, in my opinion, mistaken. Such an agreement would be easy to draw, but was not drawn in this instance."

---

bears the burden to demonstrate its defense. *Dubin, 438* N.Y.S.2d at 923; *Wilson,* 136 S.E.2d at *576-77.*

Because there are other more primary grounds to decide this case, I do not reach this interesting question. I do stress, however, that the Rohes have simply argued in passing that there is no "cause" for their removal and have been content to leave the underlying merits of the charges against them to be decided in the first-filed Pennsylvania action. Therefore, there is no basis for me to decide whether there was sufficient cause to justify Gilat's removal vote and no evidentiary basis for me to question Gilat's good faith. But in the absence of an agreement by Gilat to vote for the Rohes even at an annual meeting, I am constrained to conclude that Gilat certainly retained the authority to vote to remove them from the board for cause,

[51] *Rainbow Navigation,* 1989 WL 40805, at *5

IV. Conclusion

For all the foregoing reasons, I conclude that the Rohes have not met their burden of proof as to Counts I, II, and IV of their complaint and that those claims are hereby DISMISSED WITH PREJUDICE.[52]

[52] Count III of the complaint seeks a declaration that Gilat was issued 18,853,067 more Preferred A shares than was intended by the Instruments and that those votes cannot be counted in the Removal Vote. This is the sole remaining issue in this case. I note that the margin by which the Removal Vote prevailed exceeds the contested number of shares. In addition, this court appears to have no authority to issue a ruling on this issue that would conclusively bind Gilat because the Rohes have not even named Gilat as a defendant and because this claim would seem to be covered by the arbitration clause of the Purchase and Investor Rights Agreements. Therefore, the Rohes should report to the court within seven days whether they wish to voluntarily dismiss this Count without prejudice. That will enable the entry of a final judgment which can be appealed immediately, if the Rohes so choose.