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Transaction ID 40724229
Case No. 5110-VCG

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ELAINE COUGHLAN, as Stockholders' Representative of the former GloNav, Inc. Stockholders,	)	
Plaintiff,	)	
v.	)	*Civil Action No. 5110-VCG*
NXP B.V.,	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: September 27, 2011
Date Decided: November 4, 2011

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GLASSCOCK, Vice Chancellor

This case involves the interpretation of two provisions in a merger agreement between the Defendant corporation and a company whose former stockholders are represented by the Plaintiff. The two provisions at issue deal with contingent payments due in certain circumstances from the Defendant to those stockholders. The Plaintiff argues that the Defendant's establishment of a joint venture with a third party accelerated the obligation to pay some of the contingent payments, while the Defendant argues that its obligations under its merger agreement with the Plaintiff were assumed by the joint venture, thus avoiding acceleration. I find that the language of the merger agreement is unambiguous, and that per its provisions, the Defendant's obligations under the merger agreement were assumed by the acquiring company, thus avoiding the acceleration of the remaining revenue contingent payments. I therefore deny the Plaintiff's motion for summary judgment and grant summary judgment in favor of the Defendant.

I. BACKGROUND

The Plaintiff, Elaine Coughlan, is the Stockholder's Representative of GloNav, Inc. ("GloNav"), a developer of GPS-related semiconductors. The Defendant, NXP b.v. ("NXP"), is a semiconductor company based in the Netherlands.

A. The Merger Agreement Between NXP and GloNav

On December 20, 2007, NXP and GloNav executed a merger agreement[1] whereby GloNav would merge with Jeep Acquisition Corp ("Jeep"), a subsidiary of NXP formed for the purpose of the acquisition. The Merger Agreement was structured as an exchange of cash for GloNav shares.[2] The transaction closed on January 23, 2008, when Jeep merged into GloNav, with GloNav surviving as a subsidiary of NXP.[3] The Merger Agreement designated Coughlan as the Stockholders' Representative "authorized to act on behalf of the GloNav Stockholders and to take any and all actions required or permitted to be taken by the Stockholders' Representative under this Agreement."[4]

In addition to the cash payment made at closing, the Merger Agreement provided in § 2.4 for contingent payments to be made to the former GloNav Stockholders upon the achievement of certain revenue and product development targets ("Revenue Contingent Payments" or "RCPs" and "Product Development Contingent Payments" or "PDCPs"; collectively, "Contingent Payments").

[1] Compl. Exs. A, B [hereinafter "Merger Agreement"].
[2] Merger Agreement § 1.5.
[3] *Id.* § 1.1.
[4] *Id.* § 9.4(a).

Section 2.4 also included several protections for the former GloNav Stockholders to enable the Stockholders to earn the Contingent Payments. For instance, § 2.4(g) required NXP to develop an operating plan for the GloNav business that was "aligned with the achievement of the Product Development Target" and to provide GloNav with the tools, libraries, intellectual property, and other support needed to achieve the targets.

Finally, the Merger Agreement contained acceleration provisions requiring that in the event of certain transactions resulting in a particular change in control of NXP or the GloNav business, any remaining Contingent Payments would be accelerated or, in some cases, the obligations associated with the Contingent Payments would be assumed by the acquirer.[5] I will now discuss these contractual provisions in greater detail.

1. The Product Development Contingent Payments

The PDCPs entitled the former GloNav Stockholders to payments upon the achievement of each of five engineering milestones to be met during 2008 and 2009.[6] The five PDCPs totaled $20 million.[7]

[5] *Id.* § 2.4(h). As described in Def.'s Opening Br. at 12-16, these change-of-control provisions were heavily negotiated and did not contain boilerplate language. Both parties were represented in the negotiation process by experienced and sophisticated counsel, and I have no doubt that the parties were informed and aware of the exact nature of the provisions upon which they agreed. Because I find the language of the acceleration provisions to be unambiguous, I do not rely on the details of the negotiation process nor do I discuss that process at length here.

[6] Merger Agreement § 2.4(c).

2. The Revenue Contingent Payments

The RCPs entitled the former GloNav Stockholders to payments when the GloNav business reached certain revenue targets in 2008 and 2009 recognized from (i) third-party sales of certain GloNav assets and (ii) GloNav licensing agreements (collectively, "GPS Revenue").[8] The 2008 RCP was to be 25% of the excess of GPS Revenue over $5 million for the year ended December 31, 2008, but not to exceed $5 million.[9] The 2009 RCP was to be 25% of the excess of GPS Revenue over $25 million for the year ended December 31, 2009.[10] The sum of the 2008 and 2009 RCPs could not exceed $5 million.[11]

3. The Acceleration Provisions

Section 2.4(h) of the Merger Agreement contained two provisions that required, in the event of a specified change in control of GloNav or NXP (a "Triggering Event"), full payment of the contingent amounts remaining to be earned or, in certain circumstances, the assumption by the acquiring company of the obligations associated with the Contingent Payments.

Section 2.4(h)(i) addressed a change in control primarily involving the GloNav assets. That section reads, in relevant part:

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[7] *Id.* Sched. 2.4(c).
[8] *Id.* § 2.4(a)-(b).
[9] *Id.* § 2.4(a).
[10] *Id.* § 2.4(b).
[11] *Id.*

> In the event that prior to the end of the Contingent Amount Period NXP sells or transfers *(other than pursuant to a transaction contemplated by clause (ii) below)* either (x) a majority of the outstanding capital stock of or other equity interests in [GloNav], (y) all or substantially all of the assets of [GloNav] or (z) a portion of the assets of NXP in which all or substantially all of such assets consist of all or substantially all of the assets of [GloNav], in each case to a Person (other than a Permitted Holder), then upon the occurrence of any such event, the Holders shall be entitled to receive the full amount of that portion of the Contingent Amount that remains available at such time to be earned by the Holders on or after such date.[12]

The above italicized language refers to Section 2.4(h)(ii), which dealt with a change in control of the GloNav assets as a part of a more significant transaction, such as certain changes in control of NXP. That section reads, in relevant part:

> Notwithstanding any other provision of this Agreement, in the event that prior to the end of the Contingent Amount Period a Person (other than a Permitted Holder) (an "Acquiring Person") acquires (x) a majority of the outstanding capital stock of or other equity interests in NXP, (y) all or substantially all of the assets of NXP or (z) a portion of the assets of one or more business units or other operating units of NXP of which [GloNav] does not comprise [sic] all or substantially all of the assets, then within 30 days of the occurrence of any such event, such Acquiring Person shall elect, to either (A) pay to the Holders the maximum Contingent Amount available to be earned by the Holders as of and after such date, or (B) assume all of NXP's remaining obligations under the terms of this Section 2.4.[13]

[12] *Id.* § 2.4(h)(i) (emphasis added). The Merger Agreement defines "Permitted Holder" to be "NXP and any of its Subsidiaries," as well as an enumerated group of NXP's equity owners. *Id.* § 10.2.
[13] *Id.* § 2.4(h)(ii).

Section 2.4 also provides that "[a]ny Contingent Amounts payable hereunder . . . shall be delivered by NXP by wire transfer to an account designated in writing by the Stockholders' Representative or other delivery of immediately available funds to the Stockholders' Representative."[14]

B. NXP's Joint Venture with STMicroelectronics

In December 2007, in addition to entering the Merger Agreement, NXP began discussing a joint venture with STMicroelectronics ("ST"), a French semiconductor company.[15] The lead attorney negotiating the joint venture with ST for NXP was Guido Dierick, NXP's General Counsel based in the Netherlands.[16] Although Dierick was aware of the GloNav transaction, he was not involved in it.[17] Additionally, the internal and outside lawyers handling the GloNav transaction had no involvement in the ST transaction.[18]

On April 10, 2008, NXP and ST executed a Sale and Contribution Agreement (the "JV Agreement"),[19] and the transaction closed around July 28, 2008.[20] The new joint venture, ST-NXP Wireless (the "ST Joint

[14] *Id.* § 2.4(h)(iv).
[15] Dierick Dep. 13:3-14, Feb. 16, 2011.
[16] *Id.* at 14:13-18.
[17] *Id.* at 7:4-17.
[18] Casey Dep. 11:10-15, Feb. 3, 2011; Miller Dep. 43:24-44:9, Jan. 5, 2011.
[19] Rohrer Aff. Ex. 2 [hereinafter "JV Agreement"].
[20] Dierick Dep. 20:1-5.

Venture"), combined the companies' wireless businesses, including the operations of GloNav.[21]

1. The Series of Transactions Forming the ST Joint Venture

The formation of the ST Joint Venture was accomplished through a series of transactions that would ultimately result in ST owning 80% of the Joint Venture and NXP owing the other 20% and receiving a payment of approximately $1.52 billion in cash. ST created the ST Joint Venture as its wholly-owned subsidiary.[22] ST then contributed its relevant wireless businesses, $1.52 billion in cash, and an additional $350 million in cash for working capital.[23]

NXP accomplished its side of the transaction through two steps. First, before closing, NXP created two wholly-owned subsidiaries, denoted WH1 and WH2 in the JV Agreement.[24] To these two subsidiaries, NXP contributed its wireless businesses, with the non-Dutch businesses, including GloNav, going to WH2.[25] Second, at closing, NXP transferred all of the shares of WH1 and WH2 to the ST Joint Venture in return for 20% of the shares of the Joint Venture and $1.52 billion in cash.[26] It is obvious that

[21] Rohrer Aff. Ex. 18.
[22] JV Agreement § 2.1.
[23] *Id.*
[24] *Id.*
[25] *Id.* § 2.2.
[26] *Id.* § 2.3.

GloNav formed a small fraction of NXP's wireless businesses: NXP purchased GloNav for between 85 and 110 million dollars; its near-contemporaneous sale of the wireless businesses, including GloNav, netted $1.52 *billion*, plus an interest in the resulting Joint Venture.

2. The JV Agreement Allocates NXP's Merger Agreement Obligations

In addition to addressing the assets contributed by NXP to the Joint Venture, Schedule 3 of the JV Agreement identified which liabilities NXP retained and which liabilities were assumed by the ST Joint Venture. Among NXP's retained liabilities was

> any Liability to pay an amount in respect of earn-out obligations under previous acquisitions (the "Earn-out Payments"), comprising: (i) the obligations of NXP under section 2.4 of [the Merger Agreement].[27]

NXP thus retained its obligation to continue to make Contingent Payments as it was originally required to do under § 2.4(h)(iv) of the Merger Agreement.

Although NXP retained the payment obligations, the JV Agreement assigned to the ST Joint Venture the responsibility of "meet[ing] all the Earn-Out Obligations assumed by the relevant Group Company in respect of

[27] *Id.* Sched. 3 § 3.4(d).

the Earn-Out Payments."[28] Schedule 1 of the JV Agreement defined "Earn-Out Obligations" as "the non payment obligations under the agreements referred to in Paragraphs 3.4(d)(i) and 3.4(d)(ii) of Schedule 3."[29] These agreements included the Merger Agreement. Thus, the ST Joint Venture assumed the Earn-Out Obligations (or "Performance Obligations"), and NXP retained any payment obligations owed to the GloNav stockholders (the "Payment Obligations").

3. NXP Sells Its Stake in the Joint Venture

On August 20, 2008, Ericsson, the world's largest mobile telecommunications equipment vendor, and ST announced their intent to form a new joint venture merging their wireless businesses.[30] NXP and ST entered into an Exit Agreement to accelerate ST's call options, which allowed ST to buy out NXP's 20% share of the ST Joint Venture.[31] The sale of NXP's interest closed on February 2, 2009, after which NXP had no ownership or financial interest in the ST Joint Venture.[32]

[28] *Id.* § 6.15. The Plaintiff argues that this language, rather than indicating the Joint Venture's assumption of NXP's performance obligations, merely states that the Joint Venture will honor whatever assumptions are made by its subsidiaries, if any. As discussed below, this argument is contrary to a plain reading of § 6.15 in conjunction with Schedule 3 § 3.4(d) of the JV Agreement.
[29] *Id.* Sched. 1.
[30] Rohrer Aff. Ex. 19.
[31] Barrett Aff. Ex. 24.
[32] *Id.* Ex. 25.

C. Coughlan Writes Letters While NXP Continues to Make Contingent Payments

Before NXP and ST announced the ST Joint Venture, NXP had paid the first PDCP of $3 million, leaving $22 million left to be earned by the GloNav Stockholders if the GloNav business reached additional engineering and revenue targets. After the announcement of the ST Joint Venture, Coughlan wrote to Dierick asking that NXP either accelerate the remaining Contingent Payments or "advise [her] on how the new owners intend[ed] to ensure the continuity of [the] agreement through this M&A process."[33] James Casey, the General Counsel of NXP's U.S. business, replied that the Joint Venture would "assume all of NXP's remaining obligations as set forth in Section 2.4 of the [Merger Agreement]," and therefore "the acceleration of the contingent amount under Section 2.4(h) [would] not be triggered."[34]

Coughlan replied to Casey on June 5, 2008, requesting that Casey keep her "advised as to the status of the proposed joint venture transaction."[35] Coughlan also noted that she expected to receive confirmation from the ST Joint Venture of its "adherence to the operating plans" and of its assumption of the Contingent Payment obligations.[36]

[33] Rohrer Aff. Ex. 21.
[34] *Id.* Ex. 22. Dierick asked Casey to respond because Casey was the lead attorney on the ST Joint Venture transaction. Dierick Dep. 18:24-19:2.
[35] Barrett Aff. Ex. 22.
[36] *Id.*

Coughlan wrote to Casey again on June 19, 2008, seeking confirmation that the second PDCP was due and reaffirming her concern that the ST Joint Venture might negatively affect the GloNav Stockholders' ability to achieve the Contingent Payments.[37] Casey does not recall responding to either of these letters, and he confirmed at his deposition that he never sent Coughlan any of the information she requested.[38]

Nevertheless, NXP continued to make Contingent Payments as GloNav met the relevant milestones. NXP made the second PDCP in July 2008, shortly before the ST Joint Venture transaction closed.[39] About a month after the transaction closed, on September 3, 2008, Coughlan again wrote to Dierick asserting that the remaining $20 million in Contingent Payments had been accelerated because "the Joint Venture did not assume NXP's obligations within the 30 day period set forth in § 2.4(h)(ii) of the Merger Agreement."[40] NXP's outside counsel, Scott Miller of Sullivan & Cromwell LLP, responded to Coughlan on September 9, 2008. Miller wrote that he had "been advised that the ST-NXP Wireless joint venture, upon formation of the joint venture, assumed the obligations of NXP B.V. under

[37] *Id.* Ex. 23.
[38] Casey Dep. 24:4-25:8.
[39] Rohrer Aff. Ex. 23.
[40] Barrett Aff. Ex. 7.

Section 2.4."[41] Dierick, who had worked on the NXP-GloNav merger, had advised Casey on the provisions of Section 2.4, who in turn had advised Miller.[42] At the time of Miller's September 8 letter, Dierick's understanding was that the ST Joint Venture had assumed NXP's Performance Obligations and that the Payment Obligations remained with NXP.[43]

In October 2008, NXP paid the third PDCP.[44] This was the first Contingent Payment made by NXP following the closing of the ST Joint Venture transaction. By this time, ST and Ericsson had announced the formation of their joint venture, which required the sale of NXP's interest in the ST Joint Venture. Coughlan wrote to Dierick on December 5, 2008, asking how the new Joint Venture would affect the support provided to the GloNav business and whether NXP would continue making the Contingent Payments.[45] Apparently not having received a response, Coughlan reiterated her questions in a letter dated January 15, 2009.[46] The record is not clear as to whether anyone from NXP responded to this letter.

Between the mailing of Coughlan's December and January letters, the period for the first RCP ended. The financial crisis was underway at that

[41] *Id.* Ex. 8.
[42] Dierick Dep. 33:23-24; Casey Dep. 29:17-31:6; Miller Dep. 52:6-53:1.
[43] Dierick Dep. 33:11-34:4.
[44] Rohrer Aff. Ex. 27.
[45] *Id.* Ex. 28.
[46] *Id.* Ex. 29.

time, and, as Coughlan acknowledged at her deposition, the crisis had a significant impact on semiconductor manufacturers that lasted through 2009.[47] Unsurprisingly, Coughlan did not assert then and has not asserted in her complaint that GloNav reached the revenue milestones or could have reached them at all during the relevant period of 2008–2009.[48]

In July 2009, Coughlan and NXP disputed as to whether the final two PDCPs were due because of a delay in the providing of the required samples that were the subject of the product development milestones.[49] That dispute is not at issue here, and it is enough to say that NXP eventually agreed to pay the remaining $10 million in PDCPs on September 4, 2009.[50]

Following the payment of the final two PDCPs, the only remaining contingent amount was the $5 million RCP. On October 19, 2009, Coughlan wrote to Dierick asserting that "it has become clear . . . that in fact NXP's obligations under Section 2.4 were not assumed."[51] Coughlan also argued that NXP's continued payment of the contingent amounts was at odds with an assumption by the ST Joint Venture of NXP's obligations under the

[47] Coughlan Dep. 17:6-22, Feb. 17, 2011.
[48] *Id.* at 73:11-76:15.
[49] Barrett Aff. Ex. 10.
[50] *Id.* Ex. 13.
[51] *Id.* Ex. 14.

Merger Agreement.[52] On these grounds, Coughlan concluded that the remaining RCP had been accelerated, and she demanded its payment.[53]

On October 23, 2009, Casey responded to Coughlan, indicating that the ST Joint Venture had "assume[d] the obligations of NXP B.V. under Section 2.4."[54] In response to Coughlan's claim that NXP's continued payment of the contingent amounts was at odds with an assumption of liabilities by the ST Joint Venture, Casey asserted that "the Merger Agreement [did] not in any way preclude NXP from making any Section 2.4 payments even though the ST-NXP Wireless Joint Venture assumed such obligations."[55]

The parties now dispute whether the RCP of $5 million was accelerated under either § 2.4(h)(i) or (ii). The Plaintiff argues that the RCP was accelerated because the ST Joint Venture failed to assume *any* of NXP's obligations under the Merger Agreement. Alternatively, the Plaintiff contends that the Joint Venture assumed only NXP's *Performance* Obligations and that the Merger Agreement required the Joint Venture to additionally assume NXP's *Payment* Obligations to avoid acceleration. The Defendant responds that the Merger Agreement only required the Joint

[52] *Id.*
[53] *Id.*
[54] *Id.* Ex. 16.
[55] *Id.*

Venture to assume NXP's Performance Obligations to avoid acceleration and that the Joint Venture did so. The parties have filed cross-motions for summary judgment.

II. STANDARD OF REVIEW

This matter is before me pursuant to 8 *Del. C.* § 111(a)(6), which confers jurisdiction on the Court of Chancery over any civil action to interpret the provisions of merger agreements. The parties have cross-moved for summary judgment, and neither side has pointed to an issue of fact material to the disposition of either motion. Accordingly, pursuant to Court of Chancery Rule 56(h), the case is deemed submitted for a decision based on the record submitted with the motions. Additionally, "[t]he proper construction of any contract . . . is purely a question of law."[56] Summary judgment is therefore "the proper framework for enforcing unambiguous contracts because there is no need to resolve material disputes of fact. A determination of whether a contract is ambiguous is a question for the court to resolve as a matter of law."[57] Nonetheless, "[a] contract is not rendered ambiguous simply because the parties do not agree upon its proper construction. Rather, a contract is ambiguous only when the provisions in

[56] *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Insr. Co.*, 616 A.2d 1192, 1195 (Del. 1992).
[57] *Hifn, Inc. v. Intel Corp.*, 2007 WL 2801393, at *9 (Del. Ch. May 2, 2007).

controversy are reasonably or fairly susceptible [to] different interpretations."[58]

III. ANALYSIS

In order to determine whether the transfer of GloNav's assets to the ST Joint Venture accelerated the Contingent Payments, the first issue is whether a Triggering Event under § 2.4(h)(i) or (ii) occurred. For the reasons stated below, I find that a Triggering Event occurred. I also find, however, that the acquiring party assumed NXP's relevant obligations pursuant to § 2.4(h)(ii), therefore preventing the acceleration of the Contingent Payments.

A. A Triggering Event Occurred

NXP begins by arguing that none of the Triggering Events in § 2.4(h)(i) or (ii) occurred. Specifically, NXP argues that the GloNav business was transferred to the ST Joint Venture through two distinct transactions, neither of which qualified as a Triggering Event. In the first step, NXP transferred GloNav's assets to WH2, a subsidiary that NXP formed for the purpose of fulfilling its obligations under the JV Agreement. NXP argues that this transfer did not trigger § 2.4(h)(i) or (ii) because those sections exempt transfers of GloNav's assets to a "Permitted Holder," which

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

§ 10.2 of the Merger Agreement defines to include "NXP and any of its Subsidiaries." WH2 was a wholly-owned subsidiary of NXP, and thus NXP is correct that its transfer of GloNav's assets to WH2, viewed in isolation, was not a Triggering Event.

NXP also argues that the second step, in which NXP transferred 100% of the shares of WH2 to the ST Joint Venture, was not a Triggering Event. NXP contends that § 2.4(h)(i)(x) does not apply because that subsection requires a sale of GloNav's stock, and NXP still holds that stock. NXP next asserts that §§ 2.4(h)(i)(y) and (z) are inapplicable because NXP transferred WH2 stock, not GloNav's assets, to the Joint Venture. Additionally, NXP argues that the transfer did not trigger § 2.4(h)(ii)(x) or (y) because there was not a sale of substantially all of the stock or assets of NXP. Finally, NXP contends that § 2.4(h)(ii)(z) does not apply because it requires a sale of assets that includes GloNav's assets.

The Plaintiff argues in response that although neither of the two transactions alone were Triggering Events, the transaction viewed together clearly resulted in a transfer of GloNav's assets from NXP to the ST Joint Venture. In reaching this conclusion, the Plaintiff asserts that the step transaction doctrine applies. I agree, and based on my analysis below, I

conclude that the two transactions that resulted in the Joint Venture's ownership of GloNav's assets were part and parcel of the same transaction.

"The [step transaction] doctrine treats the 'steps' in a series of formally separate but related transactions involving the transfer of property as a single transaction[ ] if all the steps are substantially linked. Rather than viewing each step as an isolated incident, the steps are viewed together as components of an overall plan."[59] The purpose of the step transaction doctrine is to ensure the fulfillment of parties' expectations notwithstanding the technical formalities with which a transaction is accomplished. Indeed, "transactional creativity [ ] should not affect how the law views the substance of what truly occurred."[60]

Courts have employed three different analyses in applying the step transaction doctrine: the end result test, the interdependence test, and the binding commitment test.[61] The result of a finding that a series of actions amounts to a single step transaction dictates consideration of the series as one transaction for the purposes of a given legal analysis. Assuming for the moment that the step transaction doctrine applies, it is clear that the doctrine is satisfied here under any of the three tests.

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[59] *Noddings Inv. Group, Inc. v. Capstar Commc'ns, Inc.*, 1999 WL 182568, at *6 (Del. Ch. Mar. 24, 1999) (citing *Greene v. United States*, 13 F.3d 577, 583 (2d Cir.1994)).
[60] *Gatz v. Ponsoldt*, 925 A.2d 1265, 1281 (Del. 2007).
[61] *Noddings*, 1999 WL 182568, at *6.

First, under the end result test, a series of transactions is deemed a step transaction if the "separate transactions were prearranged parts of what was a single transaction, cast from the outset to achieve the ultimate result."[62] As laid out in the JV Agreement, NXP fulfilled its side of the transaction by first creating the WH1 and WH2 subsidiaries, then contributing its wireless businesses (including GloNav), and finally transferring the ownership of these subsidiaries to the ST Joint Venture.[63] Given that these transfers were provided for under a single agreement the purpose of which was to achieve the ultimate result of the Joint Venture's ownership of GloNav, I find that the end result test is satisfied.

Second, under the interdependence test, a series of transactions is deemed a step transaction if the steps are not independently significant and "[have] meaning only as part of the larger transaction."[64] There is no indication that, in transferring GloNav's assets to WH2, NXP intended for WH2 to operate GloNav as a separate entity. Rather, it is clear from the JV Agreement that NXP established the WH1 and WH2 subsidiaries solely for the purpose of forming the ST Joint Venture. Because the transfer of GloNav's assets to WH2 was "so interdependent on another [transaction]

[62] *Noddings*, 1999 WL 182568, at *6.
[63] JV Agreement §§ 2.1–2.3.
[64] *Noddings*, 1999 WL 182568, at *6 (internal quotation marks omitted).

that it would have been fruitless in isolation,"[65] I find that the series of transactions meets the interdependence test.

Finally, under the binding commitment test, a series of transactions is deemed a step transaction "if, at the time the first step is entered into, there was a binding commitment to undertake the later steps."[66] This test is easily met because the JV Agreement obligated NXP to transfer the GloNav business to the ST Joint Venture in two steps.[67] Thus, the binding commitment test is satisfied. Consequently, under any of the alternative tests, I find that the transaction was in fact a single step transaction for purposes of the acceleration provisions of the merger agreement.

The Defendant insists that applying the step transaction doctrine would "violate the intent of the parties."[68] To be sure, a court's role in contract interpretation is to effectuate the parties' intent,[69] and a court should refrain from applying the step transaction doctrine to interpret a contract if doing so would contravene the parties' intent. As evidence of the parties' intent in this case, the Defendant points to an early draft of the Merger Agreement in which GloNav's counsel proposed that acceleration occur if

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[65] *Liberty Media Corp. v. Bank of N.Y. Mellon Trust Co.*, 2011 WL 1632333, at *16 (Del. Ch. Apr. 29, 2011).
[66] *Noddings*, 1999 WL 182568, at *6.
[67] *See* JV Agreement §§ 2.1–2.3.
[68] Def.'s Opposing Br. at 15.
[69] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

NXP "ceases to be (either directly, or indirectly through one or more wholly owned subsidiaries) the owner of . . . substantially all of the assets of" GloNav.[70] The Defendant argues that by replacing this broad language with the current language that specifically enumerates the Triggering Events, the parties demonstrated an intent to exclude from the acceleration provision series of transactions such as the one in this case.

This argument is not convincing. Although these revisions suggest that the parties intended for acceleration to trigger only in the enumerated transactions, there is nothing in the Merger Agreement's drafting history that suggests that the acceleration was not meant to occur upon a series of interdependent transactions that, when analyzed substantively rather than hyper-technically, clearly fits within the transactions enumerated in § 2.4(h). Contrary to the Defendant's assertions, it is clear that the intent of § 2.4(h) was to ensure that the Stockholders would continue to receive their bargained-for Contingent Payments in the event that NXP sold GloNav (whether through a transaction only involving GloNav or a larger transaction of which GloNav was a part). To allow NXP to circumvent the protections of § 2.4(h) simply by using a subsidiary to transfer the assets of GloNav to the Joint Venture would render those protections meaningless. It is well-

[70] Rohrer Aff. Ex. 12 at EC10841.

settled in Delaware that our courts "will not read a contract to render a provision meaningless or illusory."[71]

The Defendant also argues that the step transaction doctrine is limited in application to tax treatment and fraudulent conveyances. Although the Defendant is correct that the step transaction doctrine originated in tax cases to "allow the substantive realities of a transaction to determine the tax consequences,"[72] the doctrine has also been applied in bankruptcy court to determine fraudulent conveyances,[73] and this Court has extended the doctrine to partnership agreements,[74] warrant agreements,[75] and recapitalization transactions.[76] The governing principle in each of these cases is the same: transactional formalities will not blind the court to what truly occurred. Indeed, "it is the very nature of equity to look beyond form to the

[71] *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).
[72] *Gatz*, 925 A.2d at 1280 n.31; *see also Smith v. Comm'r of Internal Revenue*, 78 T.C. 350, 389 (1982) ("The step transaction doctrine generally applies in cases where a taxpayer seeks to get from point A to point D and does so stopping in between at points B and C. . . . [C]ourts are not bound by the twisted path taken by the taxpayer, and the intervening stops may be disregarded or rearranged.").
[73] *See In re Foxmeyer Corp.*, 286 B.R. 546, 573 (Bankr. D. Del. 2002) (finding the step transaction doctrine applicable to disputes involving issues of fraudulent conveyances).
[74] *See Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *10 (Del. Ch. Sept. 14, 2007) ("I see no reason as a matter of law or equity why the step transaction principle should not be applied here. Indeed, partnership agreements in Delaware are treated exactly as they are treated in tax law, as contracts between the parties.").
[75] *See Noddings*, 1999 WL 182568, at *7 (applying the step transaction doctrine to combine a spin-off and subsequent merger in determining the parties' rights under a warrant agreement).
[76] *See Gatz*, 925 A.2d at 1281 (applying principles of equity that mirror the step transaction doctrine to treat two steps in a recapitalization as a single transaction, thus preventing public shareholders from losing their entitlement to seek redress in a direct action).

substance of an arrangement."[77] The Defendant has not cited any cases suggesting that this principle should not carry over to contractual arrangements outside of those already addressed by this Court and others.

Finally, the Defendant argues that the step transaction doctrine is limited to cases where the contractual provisions at issue were not the product of adversarial negotiation. None of the cases cited by the Defendant, however, support that implication. Rather, the controlling principle in applying the step transaction doctrine (or any such doctrine) in the construction of a contract is the effectuation of "the parties' intentions as expressed in, or reasonably inferred from, their agreement."[78] The inference that the Defendant essentially asks this Court to make is that the parties intended to draft an acceleration provision designed to protect the interests of the former GloNav stockholders in a sale of assets, which acceleration provision could be avoided through a simple two-step transaction. When asked at oral argument what the purpose would be of a provision so easily side-stepped, the Defendant's counsel responded that such a provision "was better protection than no protection."[79] In fact, the protection provided by the acceleration provision as construed by the Defendant would be purely

[77] *Gatz*, 925 A.2d at 1280.
[78] *Twin Bridges*, 2007 WL 2744609, at *10.
[79] Oral Arg. on Cross Mots. for Summ. J. Tr. 50:11-17, Sept. 27, 2011.

illusory. I will not, and due to precedent should not, entertain an interpretation of a contract that renders terms meaningless or illusory.[80]

The Defendant has not identified any distinctions from prior case law that convincingly suggest that the step transaction doctrine should not be applied here, nor has the Defendant pointed to any evidence in the record that suggests that the parties' intent was to draft an illusory protection for GloNav's former stockholders. Additionally, none of the principles upon which the step transaction doctrine originated dictate against applying the doctrine in other areas of contract law. I therefore find that the step transaction doctrine is applicable here and that all three tests are satisfied. Accordingly, I find that NXP's transfer of GloNav's assets to WH2 and the sale of WH2's shares to the ST Joint Venture were part and parcel of the same transaction.

Even if the step transaction doctrine did not apply in this case, I would still consider the two transactions together as a matter of equity. It is well-

[80] *See Pasternak v. Glazer*, 1996 WL 549960, at *4 (Del. Ch. Sept. 24, 1996) (finding the defendant's interpretation of a contractual provision to be deficient because "it would render that provision essentially ineffective, by the simple expedient of structuring a merger in two steps rather than one" and concluding that "[i]t cannot be supposed that the drafters . . . or the stockholders who adopted that provision[ ] would have intended for the supermajority voting protection to be so easily sidestepped").

established that "equity regards substance rather than form."[81] Here, from any practical viewpoint, NXP executed a transaction that resulted in a transfer of GloNav's assets to the ST Joint Venture, an unaffiliated acquirer. NXP characterizes its transfer of GloNav's assets to WH2 as separate and distinct from its transfer of all of WH2's shares to the ST Joint Venture, when in fact the first transaction was effected solely for the purpose of and under the same JV Agreement as the second transaction. Thus, whether viewed as an extension of the step transaction doctrine or the simple application of a bedrock principle of equity, the result is the same: the transfer of GloNav's assets to WH2 and the sale of WH2's shares to the ST Joint Venture were interdependent components of the same transaction.

B. Application of Section 2.4(h) of the Merger Agreement

1. Section 2.4(h)(ii)(z) Applies

Having determined that a sale of GloNav's assets occurred, it follows that one of the triggering transactions in § 2.4(h) also occurred. I find that § 2.4(h)(ii)(z) is directly applicable to the Joint Venture transaction. That subsection provides that if a person other than a Permitted Holder acquires

> a portion of the assets of one or more business units or other operating units of NXP of which [GloNav] does not comprise

[81] *In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at *6 (Del. Ch. Jan. 27, 2000) (quoting *Phillips Petroleum Co. v. Arco Alaska, Inc.*, 1986 WL 7612, at *13 (Del. Ch. July 9, 1986).

> [sic] all or substantially all of the assets, then . . . such Acquiring Person shall elect to either (A) pay to the Holders the maximum Contingent Amount available to be earned by the Holders as of and after such date, or (B) assume all of NXP's remaining obligations under the terms of this Section 2.4.

As described by the Defendant, the GloNav assets were only a small part of the Joint Venture transaction. Defendant bought GloNav for $85 million in cash plus a maximum earn-out of $25 million. Yet Defendant received $1.52 *billion*, in addition to a 20% ownership stake, for the assets it contributed to the Joint Venture. The only remaining issue in regards to the application of § 2.4(h)(ii)(z) is whether the ST Joint Venture assumed the relevant obligations.

2. The ST Joint Venture Assumed NXP's Performance Obligations Pursuant to the JV Agreement

Although the argument was relegated to a footnote in the Plaintiff's Answering Brief, the Plaintiff emphasized at oral argument and later in supplemental briefing that the Joint Venture had assumed *none* of NXP's Performance or Payment Obligations. Section § 6.15 of the JV Agreement provides that the ST Joint Venture "shall, and shall procure that the relevant Group Companies, meet all the Earn-Out Obligations assumed by the relevant Group Company in respect of the Earn-Out Payments." The Plaintiff interprets § 6.15 to mean merely that the ST Joint Venture would meet whatever obligations it or its relevant Group Companies (as defined in

Schedule 1 of the JV Agreement) did assume, if any. The Plaintiff's reading is flawed.

Reading Schedule 3 § 3.4 in light of Schedule 3 § 3.2 verifies the Joint Venture's assumption of NXP's Performance Obligations (called "Earn-Out Obligations" in the JV Agreement). Section 3.2 reads:

> [T]he [ST Joint Venture] . . . shall assume, pay when due, satisfy, discharge, perform and fulfill, to the extent relating to NXP's Relevant Businesses[,] all Liabilities incurred by a member of the NXP Group prior to or after Closing within the ordinary course of business.[82]

Section 3.2(c) goes on to exclude from this general assumption "any NXP Retained Liabilities." Section 3.4 then defines "Retained Liabilities" generally as those incurred "outside the ordinary course of business" and then proceeds to specify the "Earn Out *Payments*" arising from the Merger Agreement as a liability retained by NXP.[83] Thus, the ST Joint Venture has assumed the Earn-Out Obligations (§ 6.15) but not the related Payment Obligations (§§ 3.2, 3.4). If the JV Agreement meant for *all* of NXP's obligations arising from the Merger Agreement to remain with NXP, it would not have differentiated between "Earn-Out Obligations" and "Earn-

[82] JV Agreement Sched. 3 § 3.2(a).

[83] *Id.* Sched. 3 § 3.4(d)(i) (emphasis added). The Plaintiff contends that NXP incurred its Performance Obligations "outside the ordinary course of business" and that these Obligations were therefore retained by NXP pursuant to § 3.4. Yet the Plaintiff provides no evidence for her interpretation of "ordinary course," and her reading is at odds with the specific reference to "Earn-Out Payments" and the absence of any reference to "Earn-Out Obligations" in § 3.4.

Out Payments" and would not have completely omitted any reference to "Earn-Out Obligations" in the exclusions provided in § 3.4(d). Reading §§ 3.2 and 3.4 together, the clear inference to be made is that NXP's Performance Obligations (or "Earn-Out Obligations") were assumed by the Joint Venture pursuant to § 3.2(a), while NXP retained the Payment Obligations.

Though the Plaintiff jumps through many hoops and artfully twists seemingly reasonable interpretations out of various provisions of the JV Agreement, she ultimately fails to reconcile these interpretations with common sense and reason.[84] It is a "settled principle of contract interpretation that a court must give effect to every provision of the contract and, if possible, reconcile all the provisions as a whole."[85] Just as I will not allow the Defendant to read the meaning out of the acceleration provisions, I will not allow the Plaintiff's hyper-technical reading of an isolated portion of

[84] The Plaintiff essentially interprets the assumption of earn-out obligations in § 6.15 to be nothing more than a promise from the Joint Venture to honor its contractual obligations. In other words, in construing the directive of § 6.15 that the ST Joint Venture "shall, and shall procure that the relevant Group Companies, meet all the Earn-Out Obligations assumed by the relevant Group Company in respect of the Earn-Out Payments," the Plaintiff understands the Joint Venture to be saying, "We promise to do whatever we promise to do." Yet this construction reads any meaning out of § 6.15. What is the purpose of this provision if not to effect an assumption? Why would it refer to the assumption of "Earn-Out Obligations . . . in respect of the Earn-Out Payments," both of which are defined terms under the JV Agreement, if the distinction between these terms did not matter? The Plaintiff's reading of § 6.15 would render that provision a mere tautology, meaningless, or illusory.

[85] *See In re Inergy L.P.*, 2010 WL 4273197, at *13 (Del. Ch. Oct. 29, 2010) (reading one provision in a contract in light of another to satisfy this principle).

the JV Agreement to circumvent a meaning that is clear by the language of the Agreement read as a whole. Read together, § 6.15 and Schedule 3 §§ 3.2(a) and 3.4(d) plainly indicate that the ST Joint Venture assumed NXP's Performance Obligations and that NXP retained its Payment Obligations.

3. NXP's and the ST Joint Venture's Post-Transaction Behavior Also Shows that the Joint Venture Assumed NXP's Performance Obligations

Aside from the unambiguous language of the JV Agreement, the post-transaction behavior of NXP and the ST Joint Venture also evidences an assumption by the Joint Venture. Section 2.4(h)(ii)(z) provides two alternatives for the company acquiring assets from NXP. First, the Joint Venture could have paid the former GloNav Stockholders all that remained of the $25 million total Contingent Payments (i.e. what was left of the $20 million in PDCPs and the $5 million RCP). Clearly this did not happen, or the Plaintiff would not have brought this action. Alternatively, the Joint Venture could have assumed NXP's obligations under the Merger Agreement so that the Contingent Payments would be made as they were earned. It is clear that this second alternative occurred. Following the transfer of GloNav's assets upon the closing of the Joint Venture transaction, the Stockholders continued to receive Contingent Payments as the GloNav

business met the relevant milestones. The Stockholders received the third PDCP in October 2008—several months after the Joint Venture transaction closed. A year later, the Stockholders received the final two PDCPs.

The parties dispute whether the Joint Venture formally assumed NXP's GloNav-related performance obligations and whether NXP or the Joint Venture was responsible for making the Contingent Payments. The Plaintiff alleges that ST denies that the Joint Venture assumed any of NXP's obligations, whereas the Defendant argues that the Joint Venture assumed the Performance Obligations while leaving the actual Payment Obligations with NXP. In assessing these competing assertions, the actual behavior of the parties is telling. The record is clear that the Joint Venture provided GloNav with the resources it needed to continue to meet the product development milestones. It is also clear and undisputed that Defendant continued to make Contingent Payments as the relevant milestones were reached. There is no evidence that the Joint Venture fell short of its obligations with respect to the revenue milestones.[86] In fact, neither party

[86] In her post-oral argument Supplemental Memorandum Concerning the Non-Assumption of NXP's Obligations to the GloNav Stockholders, the Plaintiff asserts, in brief and conclusory fashion, that "[w]hile NXP and ST argue over who is responsible for the earn-outs, neither has complied with either the operational or the payment obligations to the GloNav Stockholders." Pl.'s Suppl. Mem. at 10. It is unclear whether this assertion simply echoes the Plaintiff's contention that the contingent payments were accelerated or whether the Plaintiff is now attempting to assert a breach by the Joint Venture of the Performance Obligations it assumed. If the latter is the case, this argument was not

argues that the final revenue milestone was reached, and neither party disputes that the revenue milestone was in fact unreachable given the financial turmoil in late 2008. The Plaintiff's true objection seems to be that the payments came in on a contingent basis rather than all at once. Yet § 2.4(h)(ii) explicitly contemplates continued earn-out payments on a contingent basis when the acquiring company assumes NXP's performance obligations. Simply put, the Stockholders got exactly what they bargained for: contingent payments when the relevant milestones were reached.

The Plaintiff also argues that, even if the ST Joint Venture assumed NXP's Performance Obligations, the Contingent Payments would nonetheless be accelerated because the Joint Venture did not assume NXP's Payment Obligations. In support of this argument, the Plaintiff cites § 2.4(h)(ii), which requires the acquiring company to "assume *all* of NXP's remaining obligations under . . . Section 2.4" in order to prevent acceleration.[87] The Plaintiff asserts that this provision requires the acquiring company to assume not only the obligation to provide GloNav with the necessary resources to meet the revenue and product development milestones, but also the obligation to actually *deliver* payments to the former

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presented in any of the Plaintiff's prior briefs and is unquestionably waived at this late stage. *See Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010) (holding that the defendants waived an argument by failing to raise it until oral argument).

[87] Merger Agreement § 2.4(h)(ii) (emphasis added).

GloNav stockholders when those milestones are reached.[88] In other words, the Plaintiff has taken the position that even if, as is the case here, the acquiring company assumed the obligation to provide GloNav with the resources to which it was entitled, actually provided those resources, and consequently enabled GloNav to achieve almost all of the milestones, the Contingent Payments would still be accelerated because NXP, rather than the acquiring company, was the entity actually delivering the earned payments to the Stockholders' Representative.

Viewed in isolation from the rest of the Merger Agreement, the word "all" in § 2.4(h)(ii) could be read to require, as the Plaintiff suggests, that the ST Joint Venture assume both the Performance and Payment Obligations of NXP. My role, however, is to derive meaning from the contractual language chosen by the parties *as a whole*, through which the parties set forth their respective obligations. "[W]hen interpreting a contract, the role of a court is

[88] The Plaintiff also contends that the Performance Obligations cannot be decoupled from the Payment Obligations because doing so would leave neither NXP nor the Joint Venture with an incentive to pay the remaining Contingent Payments. This argument simply does not make sense. Even if the same entity held both the Performance and Payment Obligations, that entity's fulfillment of its Performance Obligations would in no way incentivize it to make payments to the GloNav Stockholders upon reaching the milestones. Rather, the only incentive either party has to make the Contingent Payments to the GloNav Stockholders is its contractual obligation to do so, an obligation that is preserved regardless of whether the Performance and Payment Obligations are held by the same entity or bifurcated.

to effectuate the parties' intent."[89] It is clear to me that § 2.4(h)(ii) was meant to allow for the avoidance of acceleration if an acquiring company took on NXP's responsibility to continue running GloNav with the aim of reaching the revenue and development milestones, resulting in the payment of whatever Contingent Payments were earned thereby. Section 2.4(b)(iv) of the Merger Agreement provides that the obligation to deliver payments remains with NXP.

That is exactly what happened here. The Joint Venture effectively assumed NXP's performance obligations and continued to reach product development milestones. When these milestones were reached, NXP paid the requisite Contingent Payments as it was obligated to do under § 2.4(h)(iv). I do not find it relevant which entity (the ST Joint Venture or NXP) was required by the terms of the JV Agreement to be the source of the funds that NXP was required to deliver to the Plaintiff under the terms of the Merger Agreement. The fact remains that the Contingent Payments continued to be paid to the Plaintiff following a change in control of GloNav—precisely as contemplated by the Merger Agreement.

[89] *Lorillard Tobacco*, 903 A.2d at 739.

IV. CONCLUSION

I find that Defendant complied with the Merger Agreement in continuing to make Contingent Payments upon the achievement by the Joint Venture of the specified milestones. Therefore, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

An Order has been entered consistent with this Opinion.