

FILED

APR 30 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30389-6-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

WASHINGTON TRUST BANK TRUSTEE DELAY, JOSEPH P. DELAY,
PAUL J DELAY, MICHAEL J. DELAY,
Plaintiffs/Respondents,

v.

TRIGEO NETWORK SECURITY INC.,
Defendant/Appellant

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR.....1

 1. The trial court was wrong as a matter of law that the Certificate of Designation did not supply and govern the substantive rights of the preferred shareholders of TriGeo.....1

 2. The trial court erred as a matter of law when it refused to apply the relevant statute of limitation to the Delays’ breach of contract claim.....2

 3. The trial court was wrong as a matter of law that the Delays did not waive their right to bring this suit by exercising their rights as *common* shareholders of TriGeo since 2004.2

III. STATEMENT OF THE CASE2

 A. Factual Background2

 B. Procedural History6

IV. ARGUMENT8

 A. Standard of Review.....8

 B. The Certificate of Designation governs the substantive terms of the Delay Shares.10

 C. Under the plain terms of the Certificate of Designation, the Delay Shares converted to Common Stock on August 1, 2004.....13

 D. The trial court erred by compelling arbitration under the Subscription Agreement.16

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1.	The Delays' Complaint arises under the Certificate of Designation, not the Subscription Agreement, and the Certificate of Designation does not contain an arbitration clause.....	16
2.	The Delays' alleged cause of action against TriGeo accrued on August 1, 2004 and is therefore time-barred by the five year statute of limitations in Idaho Code § 5-216.	16
V.	CONCLUSION.....	19

TABLES OF AUTHORITIES

Cases

<i>Airstream v. CIT Fin. Servs.</i> , 111 Idaho 307, 723 P.2d 851 (1986)	18
<i>Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.</i> , 971 F.2d 272 (9th Cir. 1992)	10
<i>Brown v. Perkins</i> , 129 Idaho 189, 923 P.2d 434 (1996)	9
<i>D’Amato v. Lillie</i> , 401 Fed. Appx. 291 (9th Cir. 2010).....	18
<i>Fisher v. Intermountain Building & Loan Assoc.</i> , 55 Idaho 326, 42 P.2d 50 (1935)	8
<i>Fletcher Int’l, Ltd. v. Ion Geophysical Corp.</i> , No. 5109-VCS (Ch. Del. Mar. 29, 2011).....	10
<i>Gerling Global Reinsurance Corp. of Am. v. Fremont Gen. Corp.</i> , 287 Fed. Appx. 3 (9th Cir. 2008).....	18
<i>Hayden Lake Fire Protection Dist. v. Alcorn</i> , 141 Idaho 388, 111 P.3d 73 (2005)	17
<i>In re Parentage of M.F.</i> , 168 Wn.2d 528, 228 P.3d 1270 (2010).....	8
<i>In re Sunstates Corp. Shareholder Litig.</i> , 788 A.2d 530 (Del. Ch. 2001)	9, 10
<i>Kamen v. Kemper Fin. Services, Inc.</i> , 500 U.S. 90 (1991).....	8
<i>Kirschner Brothers Oil, Inc. v. Natomas Co.</i> , 185 Cal. App. 3d 784 (Calif. Ct. App. 1986).....	9
<i>Madrid v. Roth</i> , 134 Idaho 802, 10 P.3d 751 (Ct. App. 2000).....	10
<i>Nordstrom v. Guindon</i> , 135 Idaho 343, 17 P.3d 287 (2000)	9

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<i>Orrock v. Appleton</i> , 147 Idaho 613, 213 P.3d 398 (2009)	8
<i>Page v. Pasquali</i> , 150 Idaho 150, 244 P.3d 1236 (2010)	9
<i>Riverside Dev. Co. v. Ritchie</i> , 103 Idaho 515, 650 P.2d 657 (1982)	19
<i>Rothschild Int'l Corp. v. Liggett Grp. Inc.</i> , 474 A.2d 133 (Del. 1984)	9
<i>Wylie v. State</i> , --- Idaho ---, 253 P.3d 700 (2011)	9

Statutes

Idaho Code Section 30-1-602(3).....	12
Idaho Code Section 5-216.....	17

Other Authorities

12 Fletcher Cyclopedia of Corporations § 5443, p. 77 (rev. ed. 2004)	8
17A C.J.S. Contracts § 324 (1999)	10
4 Fletcher Cyclopedia of Corporations § 1363, pp.23-24 (rev. ed. 2005)	11
4 Fletcher Cyclopedia of Corporations § 1415, pp. 101-02 (rev ed. 2005)	11
4 Fletcher Cyclopedia of Corporations § 1485, pp. 186 (rev ed. 2005)	11
Black's Law Dictionary, 9th Ed., p. 1565.....	11
RCW 4.16.040	17
Restatement of Contracts § 236(c) (1932).....	10

Rules

Court Rule 12.....	8
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I. INTRODUCTION

This case is about the effect of a Certificate of Designation under Idaho law regarding the rights of preferred shareholders in an Idaho corporation, and whether Respondents claims are time barred.

According to the plain, unambiguous terms of the Certificate of Designation that governed the Respondents' preferred shares of TriGeo, the Respondents' preferred shares converted to common shares automatically on August 1, 2004. Consistent with the Certificate of Designation, TriGeo treated the Respondents as common shareholders when TriGeo was sold in July 2011. The Respondents then filed this suit because their common shares were worth less than their preferred shares had the preferred shares not been automatically converted. The trial court erroneously ruled that the Certificate of Designation was "void *ab initio*" and ruled in effect that the Subscription Agreement signed by the parties was the only valid contract between TriGeo and Respondents regarding the Respondents' share of TriGeo. The trial court's decision was wrong as a matter of law and failed to find that Respondents contract claims are time barred. Therefore, TriGeo respectfully requests that this Court reverse the trial court's denial of TriGeo's motion to dismiss.

II. ASSIGNMENTS OF ERROR

- 1. The trial court was wrong as a matter of law that the Certificate of Designation did not supply and govern the substantive rights of the preferred shareholders of TriGeo.**

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2. **The trial court erred as a matter of law when it refused to apply the relevant statute of limitation to the Delays' breach of contract claim.**
3. **The trial court was wrong as a matter of law that the Delays did not waive their right to bring this suit by exercising their rights as *common* shareholders of TriGeo since 2004.**

III. STATEMENT OF THE CASE

A. Factual Background

TriGeo is an Idaho corporation that specializes in network security software. As part of its efforts to raise capital in 2000, TriGeo entered into a number of Subscription Agreements with investors in Idaho and Washington, in which the investors agreed to purchase Series A Preferred Stock ("Preferred Stock") in TriGeo. CP 48. Plaintiffs Washington Trust Bank, as trustee of Joseph P. Delay, IRA Account; Joseph P. Delay; Paul J. Delay; and Michael J. Delay (together, the "Delays") each signed such Subscription Agreements. CP 48, 53-93. The Delays paid for and received shares of Preferred Stock (the "Delay Shares") according to the terms of the Subscription Agreements. CP 49.

The Delays were each mailed a copy of the Certificate of Designations, Preferences and Other Rights and Qualifications of Series A Preferred Stock (the "Certificate of Designations") in or around April 2001. CP 49, 94-100. The Certificate of Designations states that it "fixes the designations, powers, preferences and rights, and the qualifications, limitations or restrictions thereof, of the shares of such Series A Preferred Stock" CP 94. Section 5 of the

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Certificate of Designations is entitled “Conversion of Series A Preferred Stock.” CP 95. Section 5(a) states: “The holders of Series A Preferred Stock shall have the right, at such holders’ option, at any time or from time to time, to convert each share of Series A Preferred Stock into Common Stock at a conversion formula of one share of Common Stock for each share of Series A Preferred Stock presented.” CP 95. The Subscription Agreement contains a similar provision. CP 48, 56.

Section 5(g) of the Certificate of Designations states:

If any Series A Preferred Stock is issued and outstanding on August 1, 2004](sic), such Series A Preferred Stock thereon through such date shall; or if the Company has initiated a public offering of securities under the Securities Act of 1933 and/or State “Blue Sky” laws, then without any action on the part of the holder thereof, the Series A Preferred Stock shall be automatically converted into Common Stock on that date as at the then Conversion Formula.

CP 98.

Consistent with Section 5(g), all Preferred Stock was converted to Common Stock on August 1, 2004. CP 49. On August 2, 2004, TriGeo mailed to all preferred shareholders, including to each of the Delays, a letter referencing Section 5(g) and clearly indicating that “as of August 1, 2004, all Series A

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Preferred Stock is now converted to Common Stock at a ratio of one share of Common Stock for each share of Preferred Stock held.” CP 49, 101.

In approximately November 2004, TriGeo mailed to all shareholders a Waiver of Notice of Meeting of the Shareholders of TriGeo Network Security, Inc. (“Waiver of Notice”), in connection with a shareholders meeting to be held on December 13, 2004. CP 49, 102. TriGeo sent virtually identical Waivers of Notice for meetings to be held on December 12, 2005. CP 49. On each Waiver of Notice, TriGeo identified in bold text the total number of shares that the recipient shareholder had in TriGeo. Immediately below the total number of shares, TriGeo identified whether those shares were common or preferred. CP 49, 102-105. On November 21, 2004, Joseph Delay signed and returned a December 13, 2004 Waiver of Notice. CP 49, 102. On the Waiver of Notice bearing Joseph Delay’s signature, TriGeo identified that Joseph held a total of 4,000 shares. TriGeo also indicated that all 4,000 shares were common shares. CP 103. Also on November 21, 2004, Joseph Delay and Helen Delay signed and subsequently returned a December 13, 2004 Waiver of Notice for their jointly held shares. CP 102. As with Joseph Delay’s individual shares, all of Joseph and Helen Delay’s 4,000 shares were identified as being common shares. CP 102. Joseph, individually, and Joseph and Helen jointly, also signed and submitted December 12, 2005 Waivers of Notice. CP 104-05. Their shares were all identified as common shares. CP 104-05. There are no notations on any of the Waivers of Notice indicating that the Delays disagreed with TriGeo’s designation of their shares as common shares, or indicating that the Delays were voting their common shares under protest. CP 102-05.

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Also in approximately November 2004, and in connection with the December 13, 2004 annual shareholders meeting, TriGeo mailed to all of its shareholders a ballot to reelect board members and adopt business transacted at the annual meeting. CP 49. As with the Waivers of Notice, TriGeo indicated the total number of shares held by the recipient shareholder and the designation of those shares as common or preferred. CP 50, 106-13. TriGeo mailed similar ballots for the annual meeting of shareholders in 2005 and 2006. CP 49. Joseph Delay individually completed, signed, and returned the ballots in 2004, 2005, and 2006. CP 50, 106-13. Joseph and Helen Delay, jointly, completed, signed, and returned the ballot in 2006. CP 112-13. Michael Delay completed, signed, and returned the ballots in 2004 and 2005. CP 108, 111. In both years, Michael Delay made correction to his name and address. He did not, however, make any changes or edits to the designation of his 2,000 shares as common shares. CP 108, 111.

On July 1, 2011, TriGeo was merged into a subsidiary of SolarWinds, Inc., a Delaware corporation (“SolarWinds”). SolarWinds paid TriGeo \$35,000,000 and provided for TriGeo to retain its cash on hand and receivables. At the time of the merger, TriGeo had outstanding in Preferred Stock, common stock, and rights to receive common stock through options and convertible notes and warrants the equivalent of approximately 62,000,000 shares of common stock. As a result of the merger, each share of common stock was entitled to approximately \$.50. The Delays in total own 12,000 shares of common stock, thus entitling them to approximately \$6,000 as a result of the merger. If the

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Preferred Stock had not been converted on August 1, 2004, each of the Delay Shares would have been worth \$2.50 as a result of the merger. CP 50.

The Delays appeared at the meeting of TriGeo shareholders at which the merger was approved. At that time the Delays made TriGeo aware of their assertion that they should be should be paid \$2.50 per share. CP 50.

On July 6, 2011, counsel to TriGeo sent the Delays a letter advising them that their claim for payment of \$2.50 per share based upon the alleged continued existence of the Preferred Stock was without merit and barred by the statute of limitations. CP 135.

Because the Delays asserted their rights under the appraisal rights provisions of the Idaho corporate law, on July 8, 2011, TriGeo sent a letter to each shareholder, including the Delays, giving notice of the merger and outlining certain of the shareholders' rights under Idaho law. CP 50.

B. Procedural History

- On July 20, 2011, the Delays filed their Complaint to Compel Arbitration. CP 1-35.
- The Summons was issued on July 25, 2011 and TriGeo's counsel accepted service on its behalf. CP 1-35.
- On July 28, 2011, the Delays' Motion for Order to Show Cause, Order to Show Cause, and Joseph Delay's Affidavit in Support of Plaintiffs' Motion and Order to Show Cause were filed with the Court. CP 36-39, 42-43.

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- On August 9, 2011, the Delays submitted their Brief in Support of Order to Compel Arbitration and Stay All Legal Proceedings and Affidavit in Support. CP 44-47.
- That same day, TriGeo filed its Motion to Dismiss pursuant to CR 12 and Affidavits of Ray Seely and Nicholas Miller in Support, as well as its Response to Respondents' Show Cause Motion. CP 114-127 (Motion), 48-113 (Seely Affidavit), 135-37 (Miller Affidavit), 128-34 (Response).
- On August 15, 2011, TriGeo filed its Response to Respondents' Brief in Support of Order to Compel Arbitration. CP 138-40.
- Respondents filed their Reply to TriGeo's Motion to Dismiss on August 26, 2011, along with the Declarations of Paul and Joseph Delay and Affidavit of Michael Delay in support of their Motion to Compel Arbitration. CP 142-157, 158-223, 259-304.
- TriGeo filed its Reply on its Motion to Dismiss on September 12, 2011. CP 305-10.
- The trial court heard oral argument on the Motion to Compel Arbitration and TriGeo's Motion to Dismiss on September 16, 2011. CP 141.
- As requested by the Court at the argument on September 16, 2011, TriGeo submitted a Citation of Authority on September 21, 2011. CP 312-38.
- Respondents filed their response to TriGeo's Citation of Authority on September 27, 2011. CP 339-43.

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- The Court issued a letter decision on October 13, 2011, denying TriGeo’s Motion to Dismiss and granting Respondents’ Motion to Compel Arbitration. CP 344-45.
- The parties’ stipulated to an Order Denying Defendant’s Motion to Dismiss and Order to Compel Arbitration, which the trial court entered on November 3, 2011. CP 346-48.
- TriGeo filed its Notice of Appeal on November 10, 2011.

IV. ARGUMENT

A. Standard of Review

The court of appeals conducts a *de novo* review of legal questions raised in a motion to dismiss under CR 12. *In re Parentage of M.F.*, 168 Wn.2d 528, 531, 228 P.3d 1270, 1272 (2010). TriGeo does not contest the venue of this Court, but the Delays’ rights as shareholders are governed by Idaho law, the state of TriGeo’s incorporation. *See Orrock v. Appleton*, 147 Idaho 613, 617, 213 P.3d 398, 402 (2009) (citing *Kamen v. Kemper Fin. Services, Inc.*, 500 U.S. 90, 101 (1991)). In Idaho, the rights of preferred stock are contractual in nature, and the terms of any preference is supplied by the articles of incorporation and certificates of designations. *See Fisher v. Intermountain Building & Loan Assoc.*, 55 Idaho 326, 332-37, 42 P.2d 50, 52-54 (1935) (construing the plain terms of the stock certificate, articles of incorporation, and bylaws to determine the rights of a preferred shareholder); *see also* 12 Fletcher Cyclopedia of Corporations § 5443, p. 77 (rev. ed. 2004) (citing *Fisher* for the proposition of law that preference rights “are contractual in nature with the articles of incorporation or bylaws serving as the terms of the contract”). Other states similarly refer to the articles of

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incorporation and certificates of designation to determine the rights of preferred shareholders. *See, e.g., Kirschner Brothers Oil, Inc. v. Natomas Co.*, 185 Cal. App. 3d 784, 795 (Calif. Ct. App. 1986) (“In this state, the articles of incorporation and the certificate of determination define the rights, preferences, and privileges granted to preferred shareholders.”); *Rothschild Int’l Corp. v. Liggett Grp. Inc.*, 474 A.2d 133, 136 (Del. 1984) (“Preferential rights are contractual in nature and therefore are governed by the express provisions of a company’s certificate of incorporation.”).

Because preference rights are contractual in nature, courts apply general rules of contract interpretation to determine the scope of preference rights. *In re Sunstates Corp. Shareholder Litig.*, 788 A.2d 530, 533 (Del. Ch. 2001). Idaho law is clear that “[c]onstruction of the meaning of a contract begins with the language of the contract. If the contract's terms are clear and unambiguous, the determination of the contract’s meaning and legal effect are questions of law and the meaning of the contract and the intent of the parties must be determined from the plain meaning of the contract’s own words.” *Wylie v. State*, --- Idaho ---, 253 P.3d 700, 706 (2011) (quoting *Page v. Pasquali*, 150 Idaho 150, 153, 244 P.3d 1236, 1239 (2010)). The court views the contract as a whole to determine the meaning of each provision. *Nordstrom v. Guindon*, 135 Idaho 343, 346, 17 P.3d 287, 290 (2000) (quoting *Brown v. Perkins*, 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). Where there are two apparently conflicting provisions in a contract, the court should reconcile them “so as to give meaning to both, rather than nullifying any contractual provision, if reconciliation can be effected by any reasonable interpretation of the entire instrument.” *Madrid v. Roth*, 134 Idaho

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802, 806, 10 P.3d 751, 755 (Ct. App. 2000) (quoting 17A C.J.S. Contracts § 324 (1999)). And “[i]t is well settled that ‘where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.’” *Brinderson-Newberg Joint Venture v. Pac. Erectors, Inc.*, 971 F.2d 272, 279 (9th Cir. 1992) (quoting Restatement of Contracts § 236(c) (1932)).

As strictly contractual creations, stock preferences should be strictly construed and all ambiguities “must be resolved against granting the challenged preferences, rights or powers.” *In re Sunstates*, 788 A.2d at 533 (internal quotation marks omitted); *Fletcher Int’l, Ltd. v. Ion Geophysical Corp.*, No. 5109-VCS (Ch. Del. Mar. 29, 2011) (“Where the language governing the preferred stockholder’s rights is clear and unambiguous, it must be given its plain meaning. Furthermore, such rights are to be strictly construed and must be expressly contained in the relevant certificates.”) (internal quotation marks and footnotes omitted).

B. The Certificate of Designation governs the substantive terms of the Delay Shares.

At the hearing on TriGeo’s Motion to Dismiss, the trial court correctly identified the crux of the dispute between TriGeo and the Delays: which document governs the substantive rights of the Delay Shares? *See* RP 31, ll. 11-12. But the trial court erred in finding that the Subscription Agreement and not the Certificate of Designation governed those rights. The Certificate of Designation is the operative document that supplies and governs the substantive terms of the Preferred Stock of TriGeo.

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By definition, the Subscription Agreement is a contract by which the Delays agreed to purchase the Delay Shares of TriGeo, and nothing more. Black's Law Dictionary, 9th Ed., p. 1565 defines a subscription as "a written *contract to purchase* newly issued shares of stock or bonds." (emphasis added); *see also* 4 Fletcher Cyclopedia of Corporations § 1363, pp.23-24 (rev. ed. 2005) ("The courts . . . have defined a subscription to the shares of a corporation as a contract by which a subscriber agrees to take a certain number of shares of a corporation, paying for the same or expressly or impliedly promising to pay for the same."). That the Subscription Agreement is limited in scope to the share purchase transaction is further supported by the fact that a subscriber's liability to the corporation is limited to the price the subscriber promised to pay in the subscription agreement. *See* 4 Fletcher Cyclopedia of Corporations § 1415, pp. 101-02 (rev ed. 2005).

On the other hand, the Certificate of Designation is the operative document that governs the Preferred Stock. On its face, the Certificate of Designation "fixes the designations, power, preferences and rights, and the qualifications, limitations or restrictions thereof, of the shares of such Series a Preferred Stock" CP 94. The provisions of a corporation's articles of incorporation or certificate of designation are incorporated into a subscription agreement to purchase shares in that corporation. *See* 4 Fletcher Cyclopedia of Corporations § 1485, pp. 186 (rev ed. 2005). Although the subscription agreement may contain a general description or summary of the terms of those shares, once those shares are actually acquired by the subscriber, it is the Articles of Incorporation, bylaws, or certificates of designation that actually supply the

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substantive terms of the acquired shares. This makes sense. Based on the trial court's decision that the Certificate of Designation was void *ab initio* and that the Delays' Subscription Agreements control the substantive terms of the Delay Shares, it yields the untenable result that every holder of Preferred Stock of TriGeo could have different rights and privileges, even though they hold the same class of shares of the company. That result flies in the face of the very concept of classifying shares and designating a uniform set of rights that accompany those shares. The Certificate of Designation, not any subscription agreement, is the document required to be placed in the public domain via filing in the corporation records of the Idaho Secretary of State to create general and uniform awareness of the provisions of a corporation's preferred stock. *See* Idaho Code Section 30-1-602(3).

TriGeo respectfully submits that the trial court's decision was erroneous and should be reversed by this Court.

As discussed more fully below, the Delays received a copy of the Certificate of Designation and initialed the same. Moreover, the Delays exercised their rights as *common* shareholders, not preferred shareholders, without objection after the conversion of the Delay Shares pursuant to the Certificate of Designations. Even if TriGeo concedes that the Subscription Agreement had continuing effect, the Delays clearly consented to a modification of the terms of the Subscription Agreement by both accepting, as evidenced by their signatures, the terms of the Certificate of Designation as well as the effect of the Certificate of Designation to convert the Delay Shares into common shares.

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C. Under the plain terms of the Certificate of Designation, the Delay Shares converted to Common Stock on August 1, 2004

Section 5 of the Certificate of Designation is entitled “Conversion of Series A Preferred Stock.” CP 94. Section 5(a) gives holders of Preferred Stock the right to convert those shares into Common Stock according to a set formula. CP 94. Section 5(g) (the “Automatic Conversion Provision”)—part of the same section of the Certificate of Designation governing the conversion of Preferred Stock—provides that:

If any Series A Preferred Stock is issued and outstanding on August 1, 2004](sic), such Series A Preferred Stock thereon through such date shall; or if the Company has initiated a public offering of securities under the Securities Act of 1933 and/or State “Blue Sky” laws, then without any action on the part of the holder thereof, the Series A Preferred Stock shall be automatically converted into Common Stock on that date as at the then Conversion Formula.

CP 98.

The Automatic Conversion Provision is unambiguous. It gives a date certain upon which the Delay Shares would automatically convert to common shares of TriGeo. Consistent with this provision, the Delay Shares in fact did convert to common shares. Although no notice to or action by the preferred shareholders was required to effect the conversion, TriGeo sent a letter to all

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preferred shareholders, including the Delays, on August 2, 2004, citing the Automatic Conversion Provision and clearly stating that “as of August 1, 2004, all Series A Preferred Stock is now converted to Common Stock at a ratio of one share of Common Stock for each share of Preferred Stock held.” CP 49, 101.

That the Delays understood this conversion had taken place is further evidenced by the fact that Joseph and Michael Delay voted as common shareholders multiple times. The Delays, along with other shareholders, were sent Ballots and Waivers of Notice of Meetings in December 2004, 2005, and 2006. Joseph voted his own and his and Helen K. Delay’s common shares on December 13, 2004, December 12, 2005, and December 4, 2006. Michael Delay voted his common shares on December 13, 2004 and December 12, 2005. Each of the ballots that the Delays cast on those dates identifies the total shares that each shareholder held, as well as whether those shares were common or preferred. Joseph’s, Joseph and Helen’s, and Michael’s shares are each clearly identified as being common shares. CP 49, 50, 102-05, 106-13. The Delays did not mark out, cross through, or otherwise edit the identification of their shares as common shares, despite the fact that there were handwritten notes on one Waiver and a correction to Michael’s name and address on each of the Ballots he returned.

The presence of Section 5(a), which gives preferred shareholders the right to convert their shares of Preferred Stock into shares of common stock, does not somehow render the Automatic Conversion Provision ambiguous or unclear. When those provisions are read together, as they must be, the parties’ intended meaning is clear. Preferred shareholders were to have the right to convert their shares of Preferred Stock into common shares at any time under Section 5(a) until

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August 1, 2004, when the Preferred Stock would be automatically converted into common shares under the Automatic Conversion Provision. That interpretation is compelled by a reading of the plain language of the Certificate of a Designation, as well as the rules of construction outlined above. If, as the Delays appear to argue, they could convert the Delay Shares at any time, even after August 1, 2004, then the Automatic Conversion Provision would be rendered superfluous and ineffectual. Section 5(a) cannot be interpreted to mean something that would render another provision meaningless where the two can be reconciled. Moreover, the Automatic Conversion Provision is more specific than Section 5(a) in that it provides a date certain upon which all Preferred Stock would be automatically converted into common shares; Section 5(a) purports to allow preferred shareholders to convert their shares of Preferred Stock any time. The Automatic Conversion Provision controls over the more general Section 5(a). Finally, any ambiguity created by the apparent conflict between Section 5(a) and the Automatic Conversion Provision should be resolved against granting the preferred shareholders a preference that is not explicitly and unambiguously provided for in the Certificate of Designation.

The Certificate of Designation is the operative document governing the rights and preferences of the Delay Shares, and that document clearly provided that the Delay Shares converted to common shares on August 1, 2004. There is no question that after August 1, 2004, the Delays were *common* shareholders. The trial court therefore erred by failing to grant TriGeo's motion to dismiss for failure to state a claim upon which relief can be granted.

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D. The trial court erred by compelling arbitration under the Subscription Agreement.

1. The Delays' Complaint arises under the Certificate of Designation, not the Subscription Agreement, and the Certificate of Designation does not contain an arbitration clause.

As discussed in detail above, the Certificate of Designation governs the rights of the Preferred Stock. The Delays' underlying Complaint has nothing to do with the terms and conditions of their purchase or their method of paying for the Delay Shares. Instead, the Complaint seeks to challenge the validity of the Automatic Conversion Provision contained in the Certificate of Designation. The arbitration clause in the Subscription Agreement on which the Delays rely does not cover controversies arising under the Certificate of Designation. Instead, the arbitration provision applies by its express terms only to controversies "arising out of, connected to, or relating to any matters *herein of the transactions* between Subscriber and Company . . . , on behalf of the undersigned, *or this Agreement*, or the breach thereof" CP 48, 59-60 (emphasis added). The Delays' dispute regarding the conversion of the Delay Shares into common stock can and should be resolved without making a single reference to the Subscription Agreement. Unlike the Subscription Agreement, the Certificate of Designation does not contain an arbitration provision.

2. The Delays' alleged cause of action against TriGeo accrued on August 1, 2004 and is therefore time-barred

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**by the five year statute of limitations in Idaho Code
§ 5-216.**

Even if the trial court was correct that the Subscription Agreement governs the substantive rights of the Delay Shares, the Delays' Complaint was time-barred and the trial court erred by failing to dismiss the Complaint on that ground. The essence of the Delays' complaint against TriGeo is that TriGeo breached the Subscription Agreement—that is, it did something that it should not have done pursuant to the terms of the Subscription Agreement—when it converted the Delay Shares to shares of common stock on August 1, 2004. Any right the Delays' had—whether under the Subscription Agreement or Certificate of Designation—based on the allegedly improper conversion of the Delay Shares into shares of common stock accrued on August 1, 2004 when TriGeo in fact converted the Delay Shares into shares of common stock. The Idaho statute of limitations for breach of contract actions is 5 years. I.C. § 5-216. The Delays' window for complaining about the conversion of the Delay Shares therefore closed on August 1, 2009, more than two years ago. The Delays would fair no better under Washington's six-year statute of limitation. RCW 4.16.040.

Idaho has not extended the “discovery rule” to breach of contract actions. *See Hayden Lake Fire Protection Dist. v. Alcorn*, 141 Idaho 388, 111 P.3d 73, (2005) (rejecting the appellant's argument based on *other* state court decisions extending the discovery rule to breach of contract actions, ultimately finding that that the discovery rule did not apply to public governmental information). The discovery rule would not save the Delays claim here because there is no question that the Delays were on notice that the Delay Shares had been converted to

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common shares far more than 5 years ago. *See Gerling Global Reinsurance Corp. of Am. v. Fremont Gen. Corp.*, 287 Fed. Appx. 3, 6 (9th Cir. 2008) (concluding that whether the discovery rule applied to breach of contract actions did not matter in that case because the statute of limitations had run from when the appellant was on inquiry notice). In *D'Amato v. Lillie*, 401 Fed. Appx. 291, 292, 294 (9th Cir. 2010), the plaintiffs sued the defendants for breach of limited partnership agreements, based at least in part on the defendants paying themselves more than they were allowed under those agreements. The Ninth Circuit affirmed the district court's dismissal of part of the plaintiffs' breach of contract claims as time-barred. *Id.* at 294. The Ninth Circuit found that "[t]he district court properly applied the mailbox rule in presuming that the [plaintiffs] received partnership financial statements mailed by the [defendants], and did not clearly err in concluding that those statements were sufficient to put a reasonable person on notice that the [defendants] were paying themselves salaries exceeding those authorized by the Agreements." *Id.* (citation omitted).

Just as the plaintiffs in *D'Amato* were on notice of the alleged breach, the Certificate of Designation, courtesy notice from TriGeo, and ballots and waivers of notice of meetings put the Delays on notice that the Delay Shares had been converted to common shares, allegedly breaching the Subscription Agreement. The Delays simply cannot be heard to argue that they were not aware the Delay Shares had been converted. Like Washington, Idaho has adopted the "mailbox rule," so the Delays are deemed to have received the courtesy notice when it was mailed on August 2, 2004. *See Airstream v. CIT Fin. Servs.*, 111 Idaho 307, 311, 723 P.2d 851, 856 (1986). Joseph and Michael Delay signed and submitted

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ballots that clearly identified their shares in the company as common shares in December 2004. And the Court need not rely on the ballots and courtesy notice because the Certificate of Designation clearly communicates that the Delay Shares would convert on August 1, 2004, and there is no evidence to indicate that the Delays were unaware of this unambiguous provision.

Furthermore, by voting as common shareholders, the Delays waived their right to challenge the conversion of the Delay Shares into shares of common stock. Although a party's intent to waive his right must be clear, that intent can be established by conduct. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 520, 650 P.2d 657, 662 (1982). The appropriate time to challenge the conversion of the Delay Shares was when those shares were converted. If they did not protest the conversion of the Delay Shares in August 2004, then certainly the Delays should have complained about the conversion when they completed, signed, and submitted Ballots that identified their shares as common shares rather than preferred shares. Instead, the Delays voted as common shareholders without protest. And they continued to do so for years. The Delays' conduct clearly establishes their intent to waive any complaint they had about the conversion of the Delay Shares, and they should not be allowed now, more than seven years later, to raise the issue.

V. CONCLUSION

This dispute is about which document controls the Delays' rights as shareholders, and regardless of which controls, whether the Delays' claims are time barred. Unfortunately, the trial court's decision to deny TriGeo's motion to dismiss and compel arbitration was based on that court's erroneous conclusion

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that the Subscription Agreement governed, and upon the mistaken belief that the court could declare a preferred stock issuance “void ab initio.” Consistent with Idaho and general corporate law and sound public policy, the Certificate of Designation supplies the substantive rights of the Preferred Stock once those shares are issued. According to the plain terms of the Certificate of Designation, the Delay Shares converted to common stock on August 1, 2004, and the Delays thereafter had no rights as preferred shareholders. The trial court failed to take the further step of considering that even if it believed the Subscription Agreement governed, that the Subscription Agreement was modified, with the consent of the Delays, by the Certificate of Designation, which, as has been argued, is by law contractual in nature.

Further, even if the Subscription Agreement controls the conversion issue, the Delays’ cause of action is one for breach of that Subscription Agreement and the statute of limitations for that action has long since expired. The Delays waived any right they had to complain about the conversion by exercising their rights as common shareholders after the conversion. TriGeo respectfully requests that this Court reverse the trial court’s denial of its TriGeo’s motion to dismiss and enter judgment in favor of TriGeo.

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DATED THIS 27th day of April, 2012.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that on this 27th day of April, 2012, I caused to be served a true copy of the foregoing APPELLANT'S OPENING BRIEF, by the method indicated below, and addressed to each of the following:

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