

FILED

MAY 18 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 303896-III

Spokane County Superior Court Cause No. 11-203116-5

WASHINGTON TRUST BANK, Trustee of Joseph P.
Delay, IRA Account; JOSEPH P. DELAY; PAUL J.
DELAY; and MICHAEL J. DELAY,

Respondents,

v.

TRIGEO NETWORK SECURITY, INC., an Idaho
Corporation, formerly TRIGEO, INC.,

Appellant.

RESPONDENTS' BRIEF

Joseph P. Delay
WSBA No. 02044
Delay Curran Thompson Pontarolo & Walker, P.S.
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Attorneys for Respondents

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I. STATEMENT OF THE CASE

This appeal involves the interpretation of a Stock Subscription Agreement involving an Arbitration clause (CP 172) (CP 241) and stock certificates (CP 191, 258, 265). The shares involved Series A Preferred Stock (CP 241). They were originally issued for \$2.50 a share by TriGeo in September 2000 (CP 167). TriGeo issued 320,000 shares of Series A Preferred Stock (CP 241). This round of financing was closed on January 31, 2001 (CP 241). The Stock Subscription Agreement bestowed special rights on the Series A Preferred shareholder, granting the preferred shareholder the sole and exclusive right to convert the preferred stock to common stock (CP 180). The Stock Subscription Agreement could only be amended with the written consent of the shareholder; the agreement was binding on successors and required arbitration for any disputes (CP 183). In February 2001, TriGeo issued a stock certificate to each Series A Preferred Shareholder that similarly followed the Stock Subscription Agreement and conferred the exclusive right to convert the preferred stock with the Preferred Shareholder (CP 191, 258, 265).

In April, 2001, the five board of directors adopted a resolution (the "Resolution"). The Resolution fundamentally changed the rights of the Series A Preferred Shareholders (CP 293-298). The Resolution ignored

and violated the express terms of the Stock Subscription Agreement (CP 556 par f). The Resolution eliminated both the Series A Preferred shareholder's exclusive right to convert the stock and in effect diluted the original shares of Series A Preferred Stock. The Resolution converted one share of preferred into one share of common stock without the Preferred Shareholder's consent. This alleged conversion was without consideration, as of August 1, 2004 (CP 94-99). This mandatory and unilateral conversion combined the Series A Preferred shares with common stock. TriGeo went on to issue millions of additional shares of common stock at a lesser value. TriGeo diluted the common stock. Series A Preferred shareholder no longer maintained the same ownership percentage in TriGeo due to the conversion and subsequent dilution. By fundamentally changing who could convert and when, this substantially diluted and devalued the original shares of Series A Preferred Stock.

Subsequently, TriGeo issued a new class of Preferred shares at .12 cents a share that was to be converted into one share of common stock. By issuing more shares at a lower price, this further and wrongfully diluted the original Series A Preferred shares. All of this was contrary to the Subscription Agreement and TriGeo's conduct adversely impacted the Series A Preferred Shareholder.

TriGeo's stock has been illiquid and privately held with no market for any shares until the board of directors announced the sale of the company in July of 2011 (CP 243-254). At that time, TriGeo announced it was being purchased for \$35.5 million and the number of common and preferred shares issued had increased dramatically (CP 300-304). The board of directors collectively held 92% of the company's issued shares of all classes of stock (CP 210, 303).

Based on the stock price negotiated by the TriGeo board of directors, these 5 board members collectively received \$28.5 million of the sale proceeds in 2011 (CP 303). At the time of the merger in July 2011 there were 62,000,000 issued shares of common preferred stock after taking into consideration, options, warrants and preferred stock that was converted to common stock (CP 195).

This action is brought to enforce the Subscription Agreement including the Arbitration provision and the rights of the Series A Preferred shareholder (CP 236). TriGeo's Subscription Agreement was signed by all the Delays. The Resolution adopted by the TriGeo board was not signed by the shareholders/Delays.

II. STATEMENT OF THE FACTS

TriGeo Network Security, Inc., formerly TriGeo, Inc, ("TriGeo") is an Idaho corporation in the business of network security and event

management software (CP 114). In 2000, as a start-up company in an effort to raise capital, TriGeo solicited a number of investors in the State of Washington, including the Delays, for the potential sale and purchase of Series A Preferred Stock in TriGeo (CP 114). TriGeo issued 320,000 shares of Series A Preferred Stock with a stated value of \$2.50 per share. The closing date of TriGeo's offering of preferred stock was January 31, 2001 (CP 241).

TriGeo provided each Plaintiff with a Term Sheet (CP 241), a Subscription Agreement (CP 177-186), a Stock Purchase Agreement (CP 242-255) and a Preferred Stock Certificate (CP 191, 258, 265). Based on this information, Washington Trust Bank, as trustee of the Joseph P. Delay, IRA Account; Joseph P. Delay and Helen Delay, husband and wife; Michael J. Delay; and Paul J. Delay (collectively, the "Delays"), each entered into a Subscription Agreement with TriGeo for the purchase of Series A Preferred Stock (CP 14-22) (CP 53-62). In total, the Delays purchased 12,000 shares of TriGeo Series A Preferred Stock for \$30,000.00 (CP 158, 225, and 259). The Delays relied on the Subscription Agreement and the Stock Purchase Agreement provided by TriGeo in exchange for the monetary consideration of \$30,000.00.

A review of each of the TriGeo documents shows the intent of the parties. The written Term Sheet TriGeo provided each investor summarized the pertinent aspects with representations made by TriGeo at the time of the Preferred Stock offering (CP 241):

- **TYPE OF SECURITY:** Series A Preferred Stock at \$2.50 per share. All shares issued will bear a restrictive legend (CP 241).
- **SUBORDINATION:** Series A Preferred Stock shall rank senior to all classes and series of capital stock of the Corporation now or hereafter authorized, issued or outstanding (CP 241).
- **CAPITALIZATION:** 320,000 shares Series A Preferred (CP 241).
- **ANTI-DILUTION:** Anti dilution provision protect Series A Preferred holders from dilution in cases in which Common Stock is increased by a stock split, stock dividend, combination, reclassification or other similar event, (excluding the issuance of Excluded Stock) (CP 241).

On August 1, 2000, TriGeo issued a total of 1,021,367 shares outstanding (CP 322). A Certificate of Amendment to the Articles of Incorporation was subsequently filed with the Secretary of State of Idaho (CP 317).

The Subscription Agreement, drafted by TriGeo was entered into between TriGeo and each of the Delays. It contained the following provisions:

- 1. Stock Subscription (CP 74-83).
 - a. (i) The Offering will continue until ... a date not later than October 1, 2000 (the “Closing Date”) ... (CP 75).
- b. Closing: ... The Series A Preferred Stock subscribed for herein will not be deemed issued to, or owned by, the Subscriber until the Subscription Agreement has been executed by Subscriber and countersigned by the Company and Closing has occurred (CP 76).
- c. Issuance of Securities: At the Closing Date, TriGeo Incorporated will deliver the certificates representing the Series A Preferred Stock to the Subscriber ...(CP 76).

- f. Conversion Rights: Subject to applicable federal and/or state securities laws, *Subscriber, shall have the right, at such Subscriber's option, at any time or from time to time to convert each share of Series A-1 Preferred Stock into Common Stock, one share of Common Stock for each share of Series A-1 converted* (emphasis added). (CP 77, 169, 180, 233, 270).

Other relevant provisions of the Subscription Agreement:

Arbitration: *Any controversy arising out of, connected to, or relating to any matters herein of the transactions between Subscriber and Company* (including for purposes of arbitration, officers, directors, employees, promoters of the company, ...) on behalf of the undersigned, or this Agreement, or the breach thereof, *including but not limited to any claims of ... fraud, negligence, negligent misrepresentation, and/or conversion shall be settled by arbitration; ...* (emphasis added) (CP 80).

Miscellaneous: This Subscription Agreement shall be binding upon the parties hereto, their heirs, executors, successors, and legal representatives. The laws of the State of Idaho shall govern the rights of the parties to this Agreement (CP 81).

(CP 173, 184, 237, and 274).

Entire Agreement: This instrument contains the entire agreement among the parties with respect to the acquisition of the shares and the other transactions contemplated hereby, and there are no representations, covenants or other agreements except as stated or referred to herein (CP 81).

(CP 173, 184, 237, and 274). And,

Amendment: This Agreement may be amended or modified only by a writing signed by the party or parties to be charged with such amendment or modification (CP 81).

(CP 173, 184, 237, and 274).

Each of the Delays signed their Subscription Agreements between September 19 and September 21, 2000. The President of TriGeo countersigned on September 22, 2000, (CP 174, 185, 239, and 275). The Subscription Agreement has never been amended or modified.

TriGeo issued each Delay a certificate of Series A Preferred stock. The following restrictive language was contained on the face of each certificate issued to the Delays (CP 189, 191, 258, 265):

- This certifies that Paul J. Delay is the owner of Two thousand Shares of the Preferred Capital Stock of TriGeo, Incorporated *transferable only on the Books of the Corporation by the holder* in person or by duly authorized

Attorney on surrender of this Certificate properly endorsed
(emphasis added) (CP 265).

- ...The securities represented by this certificate may not be transferred, sold, offered for sale or otherwise disposed of unless there is an effective registration statement or other qualification relating to such securities under the Securities Act of 1933 ...(CP 189).

TriGeo issued and delivered these preferred stock certificates to the Delays. Delays are in possession of and maintain the original certificates and have never surrendered their Preferred Stock Certificate (CP 191, 258, 265). Nor have the Delays taken any steps to convert their Series A Preferred Shares. Prior to the merger, TriGeo never issued a new or replacement stock certificate substituting common stock for the preferred stock. Therefore, at the time the merger was announced, since Delays had never converted nor surrendered their preferred stock certificates, they were each still in possession of their Series A Preferred stock certificate of the corporation (CP 191, 258, 265).¹

¹ **The Subscription Agreements for the Series A Preferred Stock were designated as follows:**

- **Washington Trust Bank, as trustee of the Joseph P. Delay, IRA Account, purchased 4,000 shares at \$2.50 per share (CP 158-59).**

On or about October 4, 2000, TriGeo filed with the Idaho Secretary of State an amended Articles of Incorporation (CP 317-321). The amended document listed that TriGeo had outstanding shares of 1,021,367. The 1,010, 702 shares voted for the passage of the amendment (CP 322).

On or about December 27, 2001, fourteen months later, TriGeo again amended its Articles of Incorporation (CP 323-325). A copy of the Certificate of Designation was attached to the document (CP 326-331). However, these articles were filed pursuant to Idaho Code 30-1-602, 30-1-1002 and 30-1-1006.

Idaho Code 30-1-602 is attached in the Appendix herein.

The total purchase price for said shares was \$10,000.00. On February 5, 2001, The Joseph Delay, IRA was issued Stock Certificate No. 1011-A (CP 191);

- **Joseph and Helen Delay purchased 4,000 shares at \$2.50 per share (CP 158-59). The total purchase price for said shares was \$10,000.00. On January 5, 2001, Joseph and Helen Delay were issued Stock Certificate No. 1012-A (CP 188);**
- **Michael J. Delay purchased 2,000 shares at \$2.50 per share (CP 225). The total purchase price for said shares was \$5,000.00. On January 5, 2001, Michael Delay was issued Stock Certificate No. 1013-A (CP 258); and**
- **Paul J. Delay purchased 2,000 shares at \$2.50 per share (CP 259). The total purchase price for said shares was \$5,000.00. On January 5, 2001, Paul Delay was issued Stock Certificate No. 1053-A. (CP 265).**

This statute deals only with unissued shares or shares not issued to the public for consideration. By contrast, here the shares owned by the Delays involved issued and preferred shares that had been purchased from TriGeo. TriGeo used the preferred status of the preferred shares as an inducement to sell to the Delays.

In April 2001, 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") (CP 293-298). The Certificate of Designations stated:

The Board of Directors hereby "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 Certificate of Designations is entitled "Conversion of Series A Preferred Stock". Section 5(a) stated (CP 95):

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 16 par f).

Section 5(g) of the Certificate of Designations was contrary to the contractual terms of the Subscription Agreement and unilaterally modified the Subscription Agreement to permit TriGeo to convert Delays' preferred shares to common stock without the Delays' consent or approval (CP 297, 180 par f). Section 5(g) of the Certificate of Designations contained entirely new language and provided for mandatory and automatic conversion into common stock of all issued Series A Preferred Stock that was outstanding as of August 1, 2004 (CP 297):

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 297) (emphasis added).

(CP 98).

On August 1, 2004, TriGeo contends all Series A Preferred Stock was converted to Common Stock (including Delay's shares), pursuant to Section 5(g) of the Certificate of Designations (CP 297). On August 2,

2004, TriGeo contends it mailed to all preferred shareholders, including to each of the Delays a letter referencing Section 5(g) and indicating 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 101).

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 102). As with the Waivers of Notice, TriGeo indicated the total number of shares held by the recipient shareholder and below the signature line the designation of those shares as common or preferred. TriGeo mailed similar ballots for the annual meeting of shareholders in 2005 and 2006. Joseph Delay individually completed, signed, and returned the ballots in 2004, 2005, and 2006 (CP 102, 104, 112). Joseph and Helen Delay, jointly, completed, signed, and returned the ballot in 2006. 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 104-113). Paul Delay never signed nor mailed in any ballots or Waiver of Notice of Meeting.

On July 1, 2011, TriGeo was merged into a subsidiary of SolarWinds, Inc., a Delaware corporation ("SolarWinds") (CP 25-35). SolarWinds paid TriGeo \$35,000,000 and provided for TriGeo to retain its cash on hand and its receivables (CP 300-304). 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 Preferred and common stock (CP 195). As a result of the merger, each share of common stock will be entitled to a minimum of .44 cents and possibly .50 cents depending on receivables collected by the company at the time of the merger (CP 302).

The Delays in total own 12,000 shares of common stock for which they paid \$30,000.00, TriGeo contends Delays are entitled to approximately \$6,000 as a result of the merger. Delays contend that the Series A Preferred had not been converted on August 1, 2004, to common stock and that each share of Series A Preferred would have been worth substantially more than \$2.50 per share as a result of the merger in 2011 (CP 142-304).

On July 1, 2011, the Delays appeared at the Special Meeting of TriGeo shareholders. At this meeting the merger was approved despite the Delays' objection to the merger (CP 228). At that time the Delays made

TriGeo aware of their assertion that they should be should paid at least \$2.50 per share (CP 228).

On July 14, 2011, Delays demanded Arbitration to determine the value of their Series A Preferred Stock under the Stock Subscription Agreement (CP 218-223). Delays further contended only the subscriber of the Preferred Stock had the right to convert to common stock. TriGeo could not under the Subscription Agreement convert the subscriber's stock unilaterally (CP 169, 180, 233, 270).

On July 20, 2011, the Delays filed their Complaint to Compel Arbitration (CP 3-35). A Summons was issued on July 25, 2011. TriGeo's counsel accepted service on its behalf on July 28, 2011. Delays' Motion for Order to Show Cause, Order to Show Cause, and Joseph Delay's Affidavit in Support of Delays' Motion and Order to Show Cause were filed with the Trial Court (CP 36-43).

TriGeo filed a motion to dismiss pursuant to CR 12, (CP 114-126). Delays filed their Reply to the Motion to Dismiss (CP 142-304).

The Trial Court filed her written opinion October 13, 2011 (CP 344-345). An Order Denying TriGeo's Motion to Dismiss and to compel Arbitration was entered November 3, 2011 (CP 346-348). The Trial Court did state that TriGeo's Subscription Agreement was a binding and enforceable contract under Idaho (and Washington) law (CP 345). It was

signed by the parties and consideration was paid and received for the Subscription Agreement (CP 345).

III. STANDARD OF REVIEW

The Standard of Review on a Motion to Dismiss if denied is not appealable. If the Motion to Dismiss is granted, review is de novo. *Parrilla v. King County*, 138 Wn.App. 427, 157 P.3d 879 (2007). A question of Arbitrability is reviewed de novo. *Kamaya Co. v American Property*, 91 Wn.App. 703, 713, 959 P.2d 11 401 (1998).

An Order compelling Arbitration is not a final order and is not appealable. *Teufel Constr. V. American Arbitr.* 3 Wn.App. 24, 472 P.2d 572 (1990). *American States v. Chun*, 127 Wn.2d 249, 254, 897 P.2d 362 (1995). An Order to proceed with Arbitration is not appealable. *All-Rite Contracting Co. v. Omey*, 27 Wn.2d 898, 901, 181 P.2d 636 (1947).

IV. ARGUMENT

- A. The trial court did not err, as a matter of law, when it decided that the Certificate of Designation did not supply and govern the substantive rights of the preferred shareholders of TriGeo.**

The trial court, in a letter to both parties dated October 12, 2011, stated:

The question is whether the [Certificate of Designation] supersedes the [Subscription Agreement]. The short answer to that question is no it does not supersede the [Subscription Agreement]. The [Subscription Agreement] ***is a valid and enforceable contract between the parties.***

The Defendant argues that the Board had the authority to issue the [Certificate of Designation] under [Idaho law] . . . it is my view that the Defendant did not have the authority to unilaterally convert Plaintiffs' stock to common stock.

(CP 345).

The Trial Court's Order entered November 3, 2011, to compel Arbitration was proper (CP 346-348). The trial court held that the Subscription Agreement was a binding contract and controlled because the Certificate of Designation applied only to unissued stock. Delays' shares are not unissued (CP 345). Delays paid TriGeo the stated price for the preferred shares as represented by TriGeo (CP 241). In return TriGeo issued preferred stock certificates to each of the Delays (CP 191, 258, 265).

On or about October 4, 2000, TriGeo filed with the Idaho Secretary of State an amended Articles of Incorporation dated August 1, 2000 (CP 317). The amended document revealed that TriGeo now had over 1,021,367 voting shares participating in the passage of the

amendment (CP 322). On or about May 24, 2002, TriGeo again amended its Articles of Incorporation (CP 323).

Idaho Code 30-1-620(5) provides that:

[a] subscription agreement entered into after incorporation is a contract between the subscriber and the corporation subject to Section 30-1-621, Idaho Code.

Likewise, in Washington subscription agreements are binding contracts. RCW 23B.06.200. In this case, the Subscription Agreement executed by the parties provides that Series A Preferred Stock will be deemed issued and owned by the Subscriber once it has been executed by the Company and the subscriber (CP 178-179). Here all parties had executed the Subscription Agreement as of September 22, 2000. Under Idaho (and Washington) law, it was a binding contract.

Idaho Code 30-1-621 expressly provides that it pertains to the issuance of shares and it does not modify or diminish TriGeo's contractual obligations especially as to shares already issued by TriGeo under certain terms and conditions such as here, namely, under a Stock Subscription Agreement. TriGeo was incorporated on or around 2000 (CP 322). TriGeo entered into Stock Subscription Agreements signed by the parties in September, 2000 (CP 166, 177, 231, 263). Preferred Stock was then

issued by TriGeo to the Delays pursuant to the terms and conditions of the Subscription Agreement (CP 188, 191, 258, 265).

Applying either Washington or Idaho law, the Subscription Agreement is a valid contract and constitutes the entire agreement. It is binding on TriGeo and its successor, SolarWinds LLC, and the Delays.

The Certificate of Designation was passed by a Board Resolution on December 17, 2001 (CP 323-325). It being subsequent in time it cannot amend the Subscription Agreement because the Certificate of Designation was not agreed to by the preferred shareholders, or by the subscribers, the Delays. The Subscription Agreement is the controlling document because it has never been modified in writing nor has consideration been provided to the preferred shareholder to support any modification, nor the Certificate of Designation. The Subscription Agreement can only be amended by written mutual agreement of all parties (CP 274 par 10).

When a purchaser of preferred securities establishes in writing that he agreed at the time of the sale that he relies solely on specific written material about the securities in making the purchase, the courts will strictly enforce the terms of the written materials relied on. *See Stewart v. Estate of Steiner*, 122 Wash. App. 258, 93 P.3 919 (2004), where the court

strictly enforced the terms of the Subscription Agreement and did not allow subsequent oral representations or written memorandums to amend the documents. In the *Estate of Steiner*, the investor, Dr. Steward executed and delivered to the company his Subscription Agreement together with his check for the purchase of shares. The Agreement stated that he had relied solely on the information contained in the memorandum and was not relying on any oral representations. The *Steiner* court strictly enforced the terms of the Subscription Agreement and dismissed the claims made against the stockbroker and his employer, Prudential, who had promoted the shares.

TriGeo issued Preferred Stock Certificates, Series A shares to each shareholder (CP 188, 191, 258, 265). Consistent with the Subscription Agreement, the Preferred Stock Certificate only allows the Shareholder (or Shareholder's attorney) the right to transfer the shares. TriGeo does not have that right. TriGeo has never recalled, cancelled nor replaced the preferred stock certificate of the parties herein with a common stock certificate. Nor have any of the shareholders surrendered the preferred stock certificates. Each Certificate issued to Delays, as preferred shareholders stated that the certificate is:

“transferable only on the Books of the Corporation by the holder in person or by

duly authorized Attorney on surrender of this Certificate properly endorsed.” (CP 191)

The Certificate of Designation only has an “Acknowledgement of Receipt” line for signature, and does not contain the shareholders’ consent to convert to common stock (CP 298). Under these circumstances, the Preferred Stock Certificate is clear and unambiguous. It must be read in harmony with the Stock Subscription Agreement that expressly provides that only the shareholder has the right to convert or transfer their preferred stock (CP 169, 180, 233, 270).

While not often discussed in case law, Courts have held that unless expressly stated otherwise, only the individual holder of a preferred share may exercise their option to convert to common stock. *Rea Express, Inc. v. Interway Corp.*, 410 F.Supp. 192, 202 (SDNY, 1976) *rev'd on other grounds*, 538 F.Supp. 953 (2d Cir. 1976) (“*Conversion can occur only when the holders of the preference shares exercise their option to convert.*”).

No language contained in Delays’ Stock Purchase Agreement, Term Sheet, Subscription Agreement or Series A Preferred Stock Certificate provided TriGeo with the unilateral ability or authority to redeem or convert the preferred shares of stock to common stock (CP 174,

185, 239, and 275). A shareholder must agree in writing in order to convert the preferred stock (CP 270 par 2f).

No consideration for Certificate of Designation.

The Certificate of Designations in these proceedings was issued by the Board of Directors without any negotiations or discussion with the shareholders, approximately eight months after the Subscription Agreement. There is no consideration for the Certificate of Designation (CP 293-298). The instant case is similar to the case of *Dragt v. Dragt/Detray, LLC*, 139 Wn.App. 560, 571, (2007) a valid contract modification requires a meeting of the minds and there must be consideration separate from that of the original contract. There was no new promise, no exchange given, and no action or forbearance to support separate consideration for the modification. *See also Huberdeau v. Desmarais*, 79 Wn.2d 432, 486 P.2d 1074, wherein Desmarais purchased a hop farm on an executory contract from Huberdeau. Several years later the hop farm Buyer signed an agreement that, in the event of forfeiture, the Buyer would transfer to the hop farm Seller their hop allotment base. Subsequently Seller declared forfeiture and the Defendant Buyer refused to transfer the allotment base, claiming that the Agreement was unenforceable for want of consideration. The lower Court ordered the transfer of the hop allotment base to the Seller. The Court of Appeals

concluded that the Agreement was without consideration and reversed the lower Court. The Supreme Court affirmed the Court of Appeals holding that there was no consideration for the Agreement. *Id.* at 442.

In this proceeding, the Certificate of Designations that was issued approximately eight months following the Stock Subscription Agreement was without consideration.

Christiano v. Spokane Health District, 93 Wn.App. 90, 969 P.2d 1078 (1998), was an action where the employee sued Spokane County for breach of employment agreement. The employment agreement consisted of a written promise in an employment policy manual. The Trial Court dismissed the breach of contract action and on appeal the dismissal was affirmed. The Court quoted *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 34, 959 P.2d 1104 (1998), “*Contracts require offer, acceptance and consideration.*” *Christiano*, 93 Wn.App. at 36. This Court has held that before an act or a promise can constitute consideration, it must be bargained for and given in exchange for the promise. *Ward v. Richards*, 51 Wn.App. 423, 432, 754 P.2d 120, *Williams Fruit Co. v. Hanover Ins. Co.*, 3 Wn.App. 276, 281, 474 P.2d 577 (1970).

The Certificate of Designations was not bargained for and it was only passed by a resolution by the Board of Directors (CP 322-325). The

Preferred Shareholder did not participate. It was not sent by registered or certified mail, nor consented to in writing by the preferred shareholders (CP 184 par 15). Nor was it supported by payment or other valuable consideration so as to modify the parties bargained-for rights. See *Finley v. Curley*, 54 Wash. App. 548, 774 P.2d 542 (1989), where an action enforced a stock purchase agreement, involved the seller who had placed in trust shares of stock which the buyer could obtain upon payment. After more than 3 years, the seller cancelled the stock purchase agreement and notified the buyer. The buyer, in making a subsequent cash payment for the stock, was not timely nor supported by consideration. When the condition of the escrow was not met and the agreement failed for lack of consideration, the seller was permitted to reclaim the stock. *Id.*

Here there was no consideration for the Certificate of Designations, nor was there compliance with the Stock Subscription Agreement. Consequently, the holders of the Subscription Agreement remain Preferred Shareholders.

B. The trial court did not err, as a matter of law, when it entered its order compelling Arbitration.

The Trial Court did not err by compelling Arbitration under the Subscription Agreement (CP 346-348).

TriGeo argues that the Court erred by compelling Arbitration under the Subscription Agreement principally because the Certificate of Designation does not contain an Arbitration clause.

The Delays argue that the Certificate of Designation is not the contract dealing with subscribing to the Preferred Shares. The Subscription Agreement controls. The Arbitration clause in the Subscription Agreement is valid (CP 273 par 5). The Court did not err in entering an Order compelling Arbitration (CP 346-348). The Certificate of Designation (CP 293-298) was not agreed upon by the Delays. The Certificate of Designation did not control the remedy. The Subscription Agreement was the only agreement binding the Delays (CP 267-276). TriGeo did not have the unilateral power to modify, alter, convert or void the Subscription Agreement, as it was a binding contract (CP 270-274). The Subscription Agreement controls and it was not modified by a contract for valid consideration. The Subscription Agreement provided that only the shareholder could surrender or modify the Subscription Agreement (CP 274 par 10). The Shareholder only had the power to convert or transfer the Preferred Capital Stock in TriGeo (CP 270). The intent was that the corporation could not unilaterally dilute the stock by subsequent act on the part of the corporation. The Stock Subscription Agreement defines the relationship between the company and the

Shareholder. Under Washington law a Stock Subscription Agreement confers stock holder status and liabilities as soon as it is executed. *M/V LA Conte, Inc. v. Leisure*, 55 Wn.App. 396, 399-400, 777 P.2d 1061 (1989). Here the stock was diluted to the extent that the preferred holders who invested \$2.50 per share after 10 years would receive .44 cents per share and perhaps 7.9 cents per share additional (CP 302).

The five Board of Directors on July 1, 2011, owned 48,474,844 shares (CP 303). The Board as a group is receiving in excess of 28 million of the 35 million dollar sale price (CP 207). On July 1, 2011, there were 24,883,976 issued and outstanding common shares and 36,840,167 issued and outstanding Preferred Stock (CP 195).

TriGeo cited no legal authority in support of its claim that the Certificate of Designation supersedes the Subscription Agreement, and therefore avoiding the Arbitration clause. Agreements to arbitrate are valid and enforceable. *Lake Wash. v. Mobile Modules NW, Inc.*, 28 Wn.App. 59, 621 P.2d 791 (1980). The Trial Court's Order Compelling Arbitration was proper (CP 346-348).

C. The Trial Court did not err as a matter of law when it refused to apply the relevant Statute of Limitations to Delays' breach of contract claim.

TriGeo argues that the Statute of Limitations applies and the Subscription Agreement time barred Delays' action. Delays argue that the

Statute of Limitations did not start to run until July 1, 2011. This was the date when TriGeo refused to honor the Delays' Preferred Shareholders' Certificates and Subscription Agreement. TriGeo argues that the Statute of Limitations ran when the Certificate of Designation automatically converted the common stock on August 1, 2004. Here again TriGeo relied upon the Certificate of Designation and not the Subscription Agreement.

The Delay Shareholders have never surrendered their Preferred stock certificates. The shareholders maintained possession of their Preferred Stock Certificates at all times, even as of this date. No new shares of common stock were issued and sent to the shareholders reciting that they replaced the Delays' Preferred Shares. As the Court pointed out, the Trial Court viewed the Certificate of Designations as applying to unissued stock, not as to the stock that had been previously issued and subscribed to under a Stock Subscription Agreement (CP 344-345). It is Delays' position that neither the five year Idaho Statute of Limitations, or the six year Washington Statute of Limitations had run, because the breach did not occur until July 1, 2011. This is the date when TriGeo refused to honor the Subscription Agreement. The Delays had the right to rely upon the Stock Subscription Agreement, which provided that only the Stock Subscriber could convert the stock to common stock. TriGeo did not have

that option to convert. The cases cited by TriGeo in its Brief are not relevant and are inapplicable.

The fact that voting ballots and waiver of notices of meeting were sent out indicating on the waiver and notice that it was referring to common stock does not bind the Delays, because the Delays again had the right to rely upon the Subscription Agreement and the fact that they had possession and control of the Preferred Stock Certificate which provided that only the preferred shareholder or the preferred shareholders' Attorney in Fact could surrender the certificate (CP 188, 191, 258, 265). A certificate of common shares to replace the Preferred Shares was never issued or mailed to the Delays. TriGeo has cited no legal authority for its omission or failure to issue a common certificate to replace each of the preferred stock certificates held by each of the Delays.

TriGeo cites *Airstream v. CIT Fin. Servs.*, 111 Idaho 307, 311, 723 P.2d 851, 856 (1986) **This case is not relevant as it involved the liability of an accommodation maker. Factually and legally it is inapplicable.**

TriGeo also cites the case of *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982). The parties in *Riverside Dev.* had entered into a lease agreement for the lease of a restaurant. *Id.* at 517.

Although the Defendants regularly paid the monthly rental amount, it was nearly always delinquent. *Id.*

According to the lease, if the Tenant failed to pay any rent due within ten days after the due date, the Landlord had the right to declare the lease terminated, to reenter and relet the premises, and to obtain damages. *Id.* After a dispute arose as to the amount due under the lease, the Landlord brought an action for termination of the lease and for damages. *Id.* at 518.

On appeal, the Tenant argued that the Landlord waived its right to enforce the lease by its regular acceptance of rent payments beyond the time allowed under the lease. *Id.* at 520. The Supreme Court of Idaho, in finding that the Landlord had not waived its right to terminate the lease agreement, stated that waiver is a question of intent, which may be established by conduct, each situation should be judged on a case by case basis. *Id.* at 521. Additionally, the Court stated "[t]he doctrine of waiver is an equitable doctrine based upon fairness and justice." *Id.* at 520.

TriGeo argues that Delays should have challenged the conversion from Preferred to Common Stock when they were purportedly converted in 2004. The Preferred Shares of the Delays were never converted. Delays were the only shareholders that could convert. They had a right to rely on the Subscription Agreement. The Delays maintained possession of

the preferred shares, never surrendered the preferred shares, were not asked to surrender the shares, and were not issued a new certificate of common stock reciting that the Common Stock shares replaced the Preferred Stock Shares. There was no waiver by the Delays for the reasons herein stated. If such a waiver was to be allowed as alleged by TriGeo, it would destroy the very reason for purchase of preferred shares by the Delays. Essentially, the classification of shares purchased at the time means nothing and the type of stock, preferred or common, is at the sole and unilateral discretion of TriGeo.

D. The trial court did not err, 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.

TriGeo contends that the Trial Court was wrong in deciding as a matter of law that the shareholders did not waive their right to bring these proceedings. TriGeo contends that by the Shareholders voting their shares resulted in waiving their rights. TriGeo contends that the ballots on the lower left side contained an inscription “common shares”, and that by voting each year since 2004, the Shareholders waived their rights to challenge the conversion. This inscription was not in the body of the document, but in the lower left side below the signature line (CP 112).

TriGeo correctly points out that a party’s intent to waive his right must be clear, that the intent can be established by conduct. TriGeo cites

Riverside Dev. Co. v. Ritchie, 103 Idaho 515, 520, 650 P.2d 657, 662 (1982). Delays' intent here was not to waive their rights because they maintained possession of original Preferred Stock Certificates. Further, there was no mutual modification of the Subscription Agreement.

Waiver is the voluntary relinquishment or abandonment of a known right. *Labor Hall Ass'n v. Danielsen*, 24 Wash. 2d 75, 163 P.2d 167 (1945); *Parry v. Windermere Real Estate*, 102 Wash. App. 920, 10 P.3d 506 (2000). In Parry the issue was whether a party waived insufficiency of process where the party later signed a confirmation of joinder. The Court held there was no waiver even though the joinder was signed.

Verbeek Props., LLC v. Greenco Envtl., Inc. 159 Wn.App. 82, 246 P.3d 205 (2010). This matter involved a suit by filing a summons and complaint which the opposing party asserted that such action constituted a waiver of the arbitration clause. The Court of Appeals reversed the lower Court and held there was no waiver. *Id.* At 93.

The Delays relied upon their Subscription Agreement drafted by and signed by TriGeo. Additionally, the fact that the Delays had physical control of each of their Preferred Stock Certificates. Both the Subscription Agreement and Preferred Stock Certificate provided that only the Shareholder can modify their Shareholders' rights (CP 180, 191). The

Stock Certificate indicating ownership of the preferred shares was never surrendered. On the other hand, TriGeo did not issue new common shares and deliver them to the preferred Shareholders to replace the Preferred Shares. The method of voting continued the same for the Preferred Shareholders, as it did with the Common Shareholders. Nothing changed; the parties did not change the positions, did not part with their stock certificates and were not asked to do so.

Our Court has held that a claim that a party waived a contractual right to compel Arbitration of a dispute requires proof of: (1) knowledge of the right to compel Arbitration, (2) acts inconsistent with the right, and (3) prejudice. *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn.App. 347, 35 P.3d 389 (2001). This case involved waiver of an Arbitration clause under the Federal Arbitration Act. In a more recent case of *Oregon Mutual Insurance Co. v. Barton*, 109 Wn.App. 405, 36 P.3d 1065, this case involved a misrepresentation by an insured after settlement. On appeal the Trial Court held that the insured was entitled to collect under the policy because a misrepresentation did not induce the settlement. The Court said at Page 418 that:

An implied waiver of contractual rights is not favored. *Steele v. Lundgren*, 85 Wn.App. 845, 852, 935 P.2d 671 (1997) the intention to relinquish a contractual right must therefore be proved. *Reynolds Metals*

Co. v. Elec. Smith Constr., 4 Wn.App. 695, 700, 483 P.2d 880 (1971). The party claiming waiver has a heavy burden of proof. *Steele*, 85 Wn.App. at 852.

The *Steele* Court held that whether a party waived the rights under an agreement is a question of law that is reviewed de novo. In *Steele*, the lower Court denied a Motion to Compel Arbitration under a provision of the employees' employment contract. The Trial Court held that the employer had waived the right to compel Arbitration by filing a motion late in the proceedings.

Here the Shareholders only continued to vote the shares of stock as they had previously done before the alleged conversion of the shares from Preferred to Common.

“Waiver” is an intentional and voluntary relinquishment of known right. *Jones v. Best*, 134 Wn.2ds 232, 950 P.2d 1 (1998). Here the Preferred Shareholders had the right to rely upon the Subscription Agreement and also the stock certificates. The Subscription Agreement provided that only the Shareholder could modify the Subscription Agreement and the Stock Certificate indicated that only the Shareholder could surrender the Certificate. TriGeo has failed to prove that the voting of the shares constitutes a Waiver. TriGeo has not met its burden of proof.

V. CONCLUSION

The Judgment of the Trial Court should be affirmed. The Preferred Shareholders should be awarded their costs herein incurred.

VI. DELAY'S MOTION FOR AWARD OF ATTORNEY'S FEES ON APPEAL

Delay moves the Court for an award of reasonable attorney's fees on appeal. The basis of this motion is that TriGeo's appeal is frivolous and without any legal basis. As cited in the Standard of Review, a denial of the motion to dismiss is not an appealable Order. An Order compelling Arbitration is not an appealable Order. The citations supporting this assertion is listed in the Standard of Review, herein. Delays therefore contend that they are entitled to reasonable attorney's fees and costs on appeal.

Both Idaho Appellate Rule 41(a) and Idaho Code 12-121 allow for the court to "award reasonable attorney's fees to the prevailing party". Idaho law allows for reasonable attorneys fees on appeal when the court is "left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation." *Durrant v. Christensen*, 117 Idaho 70, 74, 789 P.2d 634, 638 (1990).

Washington's Rule of Appellate Procedure (RAP) 18.9 allows an appellate court to order a party who files a frivolous appeal to pay the reasonable attorney's fees and other damages to any other party harmed by the action. RAP 18.9(a).

This Court has previously outlined a number of factors to consider in determining whether an appeal is frivolous. These considerations include:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; [and]
- (5) an appeal frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Schmerer v. Darcy, 80 Wn.App. 499, 510-511, 910 P.2d 498 (Div. III, 1996) (quoting *Streater v. White*, 26 Wn.App. 430, 613 P.2d 187 (1980)).

Washington's RAP 2.2 lists the decisions to which an appeal may be made. These include a final judgment, orders to vacate a judgment, orders for a new trial, and all final orders after judgment. RAP 2.2(a).

Generally, a "final judgment" ends litigation and leaves nothing left for the court to do except execute the judgment. *Greenlaw v. Smith*, 67 Wn.App. 755, 840 P.2d 223 (Div. II, 1992) *rev'd on other grounds* 123 Wn.2d 593, 869 P.2d 1024 (1994).

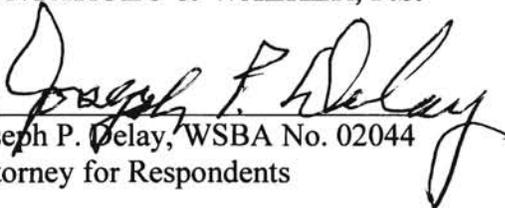
The present action does not contain a final judgment nor does it contain any other final order after judgment as required under RAP 2.2. As such, the trial court's granting of Delays' demand for arbitration is unappealable. In other words, TriGeo's appeal is frivolous.

As such, the Delays respectfully request this court grant its request for reasonable attorney's fees against TriGeo. Leave of Court is requested following the Court's decision to file an Affidavit supporting attorney's fees. RAP 18.1(d).

Dated this 17 day of May, 2012.

Respectfully Submitted.

**DELAY, CURRAN, THOMPSON,
PONTAROLO & WALKER, P.S.**

By 
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Attorney for Respondents

VII. APPENDIX

Idaho Code 30-1-602. Terms of class or series determined by board of directors.

- (1) If the articles of incorporation so provide, the board of directors is authorized, without shareholder approval, to:
 - (a) Classify any unissued shares into one (1) or more classes or into one (1) or more series within a class;
 - (b) Reclassify any unissued shares of any class into one (1) or more classes or into one (1) or more series within one (1) or more classes; or
 - (c) Reclassify any unissued shares of any series of any class into one (1) or more classes or into one (1) or more series within a class.
- (2) If the board of directors acts pursuant to subsection (1) of this section, it must determine the terms, including the preferences, rights and limitations, to the same extent permitted under section 30-1-601, Idaho Code, of:
 - (a) Any class of shares before the issuance of any shares of that class; or
 - (b) Any series within a class before the issuance of any shares of that series.
- (3) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment setting forth the terms determined under subsection (1) of this section.

Idaho Code 30-1-1002. Amendment before issuance of shares.

If a corporation has not yet issued shares, its board of directors, or its incorporators if it has no board of directors, may adopt one (1) or more amendments to the corporation's articles of incorporation.

Idaho Code 30-1-1006. Articles of amendment.

After an amendment to the articles of incorporation has been adopted and approved in the manner required by this chapter and by the articles of incorporation, the corporation shall deliver to the secretary of state for filing articles of amendment, which shall set forth:

- (1) The name of the corporation;
- (2) The text of each amendment adopted;
- (3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;
- (4) The date of each amendment's adoption; and
- (5) If an amendment:
 - (a) Was adopted by the incorporators or board of directors without shareholder approval, a statement that the amendment was duly approved by the incorporators or by the board of directors, as the case may be, and that shareholder approval was not required;
 - (b) Required approval by the shareholders, a statement that the amendment was duly approved by the shareholders in the manner required by this chapter and by the articles of incorporation; or
 - (c) Is being filed pursuant to section 30-1-120(11)(e), Idaho Code, a statement to that effect.