COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: November 11, 2005
Decided: December 20, 2005

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Re: *James E. Henke, et al. v. Trilithic Inc.*,
Civil Action No. 13155

Dear Counsel:

Petitioner James E. Henke ("Petitioner") has moved for reargument and reconsideration of certain discrete aspects of this Court's October 28, 2005 Memorandum Opinion (the "Memorandum Opinion")[1] appraising the shares of Respondent Trilithic, Inc. ("Trilithic"). Petitioner's motion raises two issues. First, Petitioner claims that this Court "misapprehended the nature and value of the assets involved in [the] Eagle Creek

[1] *Henke v. Trilithic, Inc.*, 2005 WL 2899677 (Del. Ch. Oct. 28, 2005).

transaction."[2] Second, Petitioner claims that this Court overstated Trilithic's debt because it did not account for debt paid in the last month before the merger and because it included Trilithic's cash overdraft in its calculation of Trilithic's debt.[3] For the reasons stated below, Petitioner's motion is granted in part and denied in part and the Memorandum Opinion is modified accordingly.

I. ANALYSIS[4]

A. Legal Standard

"A court will grant an applicant's motion for reargument where it appears that the court has overlooked a decision or princip[le] of law that would have a controlling effect or the court has misapprehended the law or the facts so that the outcome of the decision would be affected."[5] "This standard is a highly flexible one, permitting reargument if it can be shown that the court's misunderstanding of a factual or legal princip[le] is both material and would have changed the outcome of its earlier decision."[6] "Motions for

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2 Pet'r's Mot. for Reargument ("PMR") ¶ 1.

3 *Id.* ¶¶ 4–7.

4 The Court recited the facts of this case at length in the Memorandum Opinion, *Henke*, 2005 WL 2899677, at *1–4, and will not repeat them here.

5 *VGS, Inc. v. Castiel*, 2003 WL 1794210, at *1 (Del. Ch. Mar. 27, 2003) (internal quotations and citations omitted).

6 *Id.*

reargument," however, "are not a mechanism for litigants to relitigate claims already considered by the court."[7]

B. Eagle Creek Transaction

Petitioner argues that the Court erred by not adding to the DCF[8] analysis-determined value of Trilithic's common equity the amounts listed in the Asset Purchase Agreement 1) for accounts receivable due from Eagle Creek to Trilithic, 2) to pay off a loan Trilithic had extended to Eagle Creek and 3) for engineering assistance Trilithic agreed to provide to Eagle Creek.[9] With respect to the first two amounts, the Court concludes that it did misapprehend a fact affecting the outcome of its decision.

As noted in the Memorandum Opinion, "[t]he 'outstanding obligations' owed by Eagle Creek to Trilithic had no bearing on the value of the assets sold."[10] Indeed, the obligations had no bearing on the value of the tangible and intangible assets, *e.g.*, inventory and intellectual property, that the Court did add to the value of Trilithic's common equity. The outstanding obligations, however, are assets in and of themselves.

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7 *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *1 (Del. Ch. Mar. 22, 2000) (noting that movant bears a heavy burden on a Rule 59 motion for reargument).

8 Capitalized terms have the same meaning in this letter opinion as they do in the Memorandum Opinion.

9 PMR ¶ 2.

10 *Henke*, 2005 WL 2899677, at *11.

A right to receive cash, whether for goods sold or money lent, is an asset that can be bought, sold and valued just like the inventory and intellectual property whose value the Court did add to the value of Trilithic's common equity. Because the Court did not consider the receivables or the loan in its DCF analysis of the fair value of Trilithic's shares as of the Merger Date, it understated the value of Trilithic's common equity to that extent. Therefore, the Court will add $154,524.21[11] to the fair value of Trilithic's common equity.

With respect to the exclusion of the amount paid for engineering assistance,[12] Petitioner has neither cited a fact the Court overlooked nor a principle of appraisal methodology or controlling law that is material and would change the Court's decision. The Court considered the inclusion of this amount in its appraisal of Trilithic's shares

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[11] Eagle Creek paid Trilithic $80,754.29 for the accounts receivable, Trial Ex. 112 at T4502, and $73,769.92 to pay off the loan Trilithic had extended it, Trial Ex. 121 at T4472.

[12] In their motions, the parties refer to the "engineering assistance" as "research and development expense." *See, e.g.*, PMR ¶ 3; Resp't's Reply to Mot. for Reargument at 3. Trilithic and Eagle Creek used this term in an amendment to the original Asset Purchase Agreement. *See* Trial Ex. 121 at T4472. Regardless of the term used, the agreement was for Trilithic to sell engineering assistance to Eagle Creek. *See* Trial Ex. 112 at T4502 ("The purchase price includes providing eighty (80) hours of technical engineering assistance by Seller to Purchaser with scheduling to be mutually agreed upon by both parties hereto . . . ."). For the sake of consistency with the Memorandum Opinion and because it better describes the nature of this piece of the transaction, the Court continues to use the term "engineering assistance."

and, acting within the broad discretion afforded it in an appraisal action,[13] rejected Petitioner and Petitioner's expert's contentions.[14] As such, the Court need not reconsider its decision not to add the amount Eagle Creek paid Trilithic for engineering assistance to the value of Trilithic's common equity.

In the interest of completeness, the Court will address briefly Petitioner's argument on the last point. As the Court noted in its Memorandum Opinion, the sale of engineering assistance "ha[d] no bearing on the value of the refrigeration monitor assets sold."[15] Further, the sale of engineering assistance is not a non-operating asset to be valued as of the time of the merger. Rather, it was part of Trilithic's regular operations.[16] As the Court previously noted, "[i]f it was known or knowable as of the Merger Date that Trilithic would sell engineering assistance, then the Court would have to include this portion of the purchase price in its DCF analysis, separate and apart from its relation to

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13 *Union Ill. 1995 Inv. Ltd. P'Ship v. Union Fin. Group, Ltd.*, 847 A.2d 340, 355 (Del. Ch. 2003) ("In an appraisal action, this court has broad discretion to determine the fair value of the shares of the petitioners.") (citing *Cede & Co. v. Technicolor, Inc.*, 684 A.2d 289, 299 (Del. 1996); *Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 804 (Del. 1992)).

14 *Henke*, 2005 WL 2899677, at *11.

15 *Id.*

16 *See* Trial Ex. 161 at 4 (noting that Trilithic provided technical assistance to Eagle Creek pursuant to their original joint venture agreement).

the sale of the non-operating assets"[17] just like any other cash flow generated from operations. But, there was no evidence that the sale was known or knowable as of the Merger Date and, therefore, the Court properly excluded it from its appraisal of the fair value of Trilithic's shares.

C. Trilithic's Debt

1. Debt payments made in May 1993

Petitioner argues that the Court improperly valued Trilithic's debt as of May 2, 1993.[18] The Court should have made allowances for debt payments made during May 1993, Petitioner argues, because the Merger Date was June 1, 1993. Once again, Petitioner has neither cited a fact the Court overlooked nor a principle of appraisal methodology or controlling law that is material and would change the Court's decision.

The Court took the value of Trilithic's debt from its most recent audited financial statements.[19] There was no evidence presented at trial that Trilithic made payments on its debt during May 1993. The Court thus did not know and could not speculate regarding how much, if at all, Trilithic had paid down its debt in the period beginning May 2, 1993, the date of its most recent pre-merger audited financial statements, and ending with the

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17 *Henke*, 2005 WL 2899677, at *11.

18 PMR ¶ 5.

19 *Henke*, 2005 WL 2899677, at *11.

Merger Date. If Petitioner had evidence that Trilithic paid down its debt during this period, then it should have offered it into evidence at trial.[20] A motion for reargument is not the time to argue and prove one's case.[21]

2. Trilithic's cash overdraft

Petitioner argues, citing to *Kleinwort Benson Ltd. v. Silgan Corp.*,[22] that the Court improperly deducted Trilithic's cash overdraft from the fair value of Trilithic's common equity.[23] Once again, Petitioner has neither cited a fact the Court overlooked nor a principle of appraisal methodology or controlling law that is material and would change the Court's decision. *Kleinwort* does not stand for the proposition that a Court should never subtract a cash overdraft from the fair value of a company's common equity in an appraisal action. Rather, it appears that the *Kleinwort* Court did not deal separately with a cash overdraft because the experts included it in their calculations of the company's

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20 The Court notes that Petitioner's expert did not make any adjustments for the payment of debts in May 1993.

21 *See Am. Legacy Found. v. Lorillard Tobacco Co.*, 2005 WL 2546495, at *3 (Del. Ch. Sept. 13, 2005) (declining to consider arguments raised for the first time on a motion for reargument).

22 1995 WL 376911, at *10 (Del. Ch. June 15, 1995).

23 PMR ¶ 6.

working capital needs.[24] Here, the Court did not include Trilithic's cash overdraft in its calculation of working capital needs and, therefore, properly subtracted it from the fair value of Trilithic's common equity. The cash overdraft, like Trilithic's other debt, is superior in right to the equity and thus must be accounted for before the fair value of the common equity can be determined.

II. CONCLUSION

For the reasons stated above, the Court modifies the Memorandum Opinion as follows: $154,524.21 is added to the fair value of Trilithic's common equity.[25] Accordingly, the Court concludes that the per share fair value of Trilithic as of the Merger Date was $268.53.[26] Petitioner's 750 shares are therefore worth $201,396.59. With interest, Petitioner is entitled to $424,170.69.[27]

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[24] 1995 WL 376911, at *10 ("Paone included bank overdrafts as a separate deduction. Kovacs did not, stating that bank overdrafts are part of working capital. Lawson also believes that bank overdrafts are included in working capital. Kovacs properly omitted bank overdrafts.").

[25] The sentence in 2005 WL 2899677, at *12 that now reads "Adding $352,537.09 to the total enterprise value yields a total value of Trilithic of $651,062.16" should read "Adding $507,061.30 to the total enterprise value yields a total value of Trilithic of $805,586.37."

[26] The calculation is as follows: $805,586.37 / 3000 shares = $268.53/share.

[27] This figure includes prejudgment interest from the Merger Date to the entry of this letter opinion and the accompanying Order of Judgment.

The Court's conclusion is effectuated in the attached Order of Judgment, entered the same date as this letter opinion.[28]

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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[28] The parties submitted a proposed form of order pursuant to the directions contained in the Memorandum Opinion, but disputed the award of post-judgment interest and costs. The attached Order of Judgment resolves the post-judgment interest dispute, but not the issue of costs. To the extent that a party seeks costs, they should apply for them as prescribed in Court of Chancery Rule 54(d).

This Order of Judgment constitutes a final order even though it does not resolve the issue of costs. *See Emerald Partners v. Berlin*, 811 A.2d 788, 791 (Del. 2001) ("[T]he pendency of a motion for costs alone does not delay the finality of a judgment on the merits.").