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Submitted: May 5, 2008
Decided: May 28, 2009

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Re: *In re Appraisal of Metromedia International Group, Inc.*
Civil Action No. 3351-CC

Dear Counsel:

I have reviewed and considered the supplemental briefing submitted by the parties in connection with plaintiffs' motion for reconsideration of the Court's post-trial opinion (the "April 16 Opinion").[1] For the reasons briefly given below and in light of further information provided by the parties, I conclude that the fair

[1] Unless otherwise noted, defined terms are ascribed the same meaning as in the April 16 Opinion.

value of the preferred shares on August 22, 2007 is $47.47 for each preferred share. I also award interest on this amount at the statutorily prescribed rate.

As stated more fully in the Court's April 16 Opinion, and in accordance with the clear terms of the certificate of designation, Section 8(g) of the certificate mandates the conversion of the preferred shares into common shares in "case of any consolidation or merger of the Company with or into another Person."[2] After completion of Salford's tender offer in which it obtained around 77% of MIG, and the exercise of the Top-up Option, Salford completed a short-form merger pursuant to 8 *Del. C.* § 253 which completed the merger of CaucusCom into MIG. Thus, Section 8(g) was triggered and the preferred holders were effectively forced to convert their preferred shares into common shares. To be clear, Section 8(g) is the provision in the certificate of designation that mandates the preferred holders to convert their shares. On the other hand, Sections 5.1 and 8(a) are provisions that grant preferred holders the option to convert. Here, because a merger involving MIG occurred, the preferred holders *must* convert pursuant to Section 8(g) unless they exercise their option under Section 5.1 and 8(a).

In addition, since the preferred holders must convert pursuant to Section 8(g), I must look to Section 8(g) to begin my inquiry into how the preferred shares are to be converted into common shares. Section 8(g) states:

> [E]ach share of Preferred Stock then outstanding shall, without consent of any holder of Preferred Stock, become convertible only into the kind and amount of shares of stock or other securities (of the Company or another issuer) or property or cash receivable upon such Transaction by a holder of the number or shares of Common Stock into which such share of Preferred Stock *could have been converted immediately prior to such Transaction* after giving effect to any adjustment event.[3]

The operative language is the phrase that directs the conversion of the preferred shares in the manner that they "could have been converted immediately prior to

[2] Trial Ex. JX-7, 18. For further discussion of this Court's interpretation of Section 8(g), as well as a full description of the facts of the case, refer to the Court's April 16 Opinion. *In re Appraisal of Metromedia Int'l Group, Inc.*, 2009 WL 1110663, at *7 (Del. Ch. Apr. 16, 2009).
[3] *Id.* (emphasis added).

such Transaction,"[4] which means that the conversion ratio, as calculated for a conversion under Section 8(g), must be calculated in the same manner as a conversion ratio would have been calculated "immediately prior" to the merger. Therefore, to find the appropriate conversion calculation I must look to how the preferred holders could have converted their shares immediately prior to the merger.

Salford's tender offer resulted in Salford obtaining over 77% of MIG's outstanding common shares. Under Section 1.8, the tender offer thus resulted in a "Change of Control" which occurred prior to the consummation of the merger.[5] This "Change of Control" triggers the preferred holders "one time" conversion option under Section 5.1.[6] Section 5.1 is triggered "[u]pon the Change of Control of the Company" and grants the preferred holders the "one-time option" to convert their preferred shares into common shares "at a conversion price equal to the greater of (i) the Market value for the period ending on the Change of Control Date and (ii) 66.67% of the Market Value for the period ending on September 10, 1997."[7] Since Section 8(g) mandates that the preferred shares are to be converted in the manner that they "could have been converted immediately prior" to the merger, and since immediately prior to the merger Salford completed the tender offer that gave it control of over 50% of MIG, triggering the "Change of Control" as defined in Section 1.8 and consequently Section 5.1, I conclude that the proper conversion price for calculating the conversion ratio for the Section 8(g) mandatory conversion provision is as calculated in Section 5.1—$7.91.

Next, I must insert the conversion price $7.91, as calculated under Section 5.1, into the conversion formula to find the conversion ratio for converting the preferred shares into common. Section 5.1, however, does not independently

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[4] *Id.*

[5] A change of control takes place when:

> (i) any merger or consolidation of the Company with or into any person or any sale, transfer or other conveyance, whether direct or indirect, of all or substantially all of the assets of the Company . . . on a consolidated basis, in one transaction or a series of related transactions, if, in each such case immediately after giving effect to either such transaction, any "person" or "group" (other than Metromedia Company and its Affiliates) is or becomes the "beneficial owner," directly or indirectly, of more than 50% of the total voting power, in the aggregate . . . . *Id.* at *2.

[6] *Id.* at *9.

[7] *Id.*

provide a conversion formula. The only conversion formula in the certificate of designation is found in Section 8(a). In its supplemental brief, MIG makes clear that it did not calculate the conversion ratio by inserting the $7.91 conversion price into the Section 8(a) formula. MIG used the same formula found in Section 8(a), but did so under the guise that the formula is a "common, logical method when there are accrued dividends."[8] The fact is, the conversion formula in Section 8(a) is the only such formula in the certificate of designation. I will also use the formula because it is found within Section 8, which also contains Section 8(g), the section governing this conversion. Thus, the proper conversion ratio is calculated by inserting the $7.91 conversion price into the conversion formula found in Section 8(a)—which yields 10.038 common shares for each preferred share.

Section 5.1, which provides the $7.91 conversion price, was triggered by the change of control that occurred immediately before the merger upon the completion of the tender offer. I am now convinced that the $7.91 conversion price is properly inserted into the conversion formula found in Section 8(a), not because the preferred holders converted under Section 8(a), but because that formula is the only formula specified in the certificate of designation, implying that any conversion whether in Section 8(g), Section 8(a), or Section 5.1 should be implemented by the formula in Section 8(a). My conclusion is strengthened by the fact that the formula is found in Section 8, the section governing the conversion requirement under Section 8(g). Moreover, my conclusion is further bolstered by both parties' agreement, regardless of the reason, to use the $7.91 conversion price calculated in Section 5.1 in the conversion formula found in Section 8(a) to yield a conversion ratio of 10.038. In fact, both parties' experts agree that 10.038 is the proper conversion ratio. Thus, I also will use the 10.038 conversion ratio for all practical purposes in my calculation of the value of MIG's preferred shares.[9] The

[8] Resp't Br. 5.

[9] Also telling is the fact that 695 preferred holders, who did not seek appraisal, converted their preferred shares into common shares subject to the same interpretation of the interaction of Sections 5.1 and 8(a). That is, the conversion price calculated under Section 5.1 was inserted into the conversion formula as found in Section 8(a). While these 695 preferred holders received $18.16 per preferred share, representing $1.80 times 10.09 common shares, this amount did not reflect a calculation under a different formula, but rather a slightly greater value because it included conversion value of an additional month of accrued dividends that accrued between the appraisal date and the date those holders converted.

10.038 conversion ratio results in $18.07 for each preferred share (10.038 x $1.80).[10]

MIG erroneously asserts that the only conversion provisions in the certificate of designation are Section 8(a) and Section 5.1. MIG uses this misunderstanding to argue that because Section 8(b) applies only "[w]hen shares of Preferred Stock are converted pursuant to this Section 8,"[11] and because the Court concludes that Section 8(g) permits conversion under Section 5.1, the preferred holders cannot convert under Section 5.1 and receive the accumulated and accrued dividends under Section 8(b). As stated above and in my previous opinion, however, the preferred holders seeking appraisal converted under the conversion provision of Section 8(g), not Section 5.1.[12] Simply because the language of Section 8(g) structurally implicates the use of the conversion price provided in Section 5.1 does not indicate that the preferred holders actually converted under Section 5.1. To the contrary, Section 5.1 provides the preferred holders with only a "one-time option" to convert their preferred shares into common shares upon a change of control.[13] The preferred holders seeking appraisal in this case did not exercise their option to convert under Section 5.1. As I stated in my April 16 Opinion,[14] because the preferred holders are to convert under Section 8(g), Section 8 is implicated so that Section 8(b) is also triggered. Therefore, the $29.40 accumulated and accrued dividends must also be paid to the preferred holders.

MIG further argues that Section 5.4 demonstrates that Section 5.1 provides a separate and independent conversion right. I do not disagree with the fact that

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[10] Even if I were to conclude that the interaction of the conversion price, as calculated under Section 5.1, and the conversion formula under Section 8(a) is ambiguous, the longstanding doctrine of *contra proferentem* would apply in this case. That is, when a contract is ambiguous as to its terms, the contract should be interpreted in favor of the non-drafting party or against the interests of the drafting party. In this case, MIG is the drafting party and is therefore responsible for any ambiguous drafting in the certificate of designation. Thus, if the interaction of the conversion price, as calculated under Section 5.1 and the conversion formula under Section 8(a) was ambiguous, I would still interpret the ambiguity in petitioners' favor. *Madison Real Estate Immobilien-Anlagegesellschaft eschrankt Haftende Kg v. Kanam*, 2008 WL 1913237, at *11 (Del. Ch. May 1, 2008) ("Under the doctrine of *contra proferentem*, ambiguities in a contract will be resolved against the drafter.")). To be clear, however, this interaction is not ambiguous and I conclude that the conversion ratio is 10.038 common shares for each preferred share.

[11] Trial Ex. JX-7, 13.

[12] *Appraisal of Metromedia*, 2009 WL 1110663, at *5-6.

[13] *Id.* at *9.

[14] *Appraisal of Metromedia*, 2009 WL 1110663, at *7.

Section 5.1 provides the preferred holders with an option to convert that is independent of any other conversion right. Nevertheless, Section 5.1 is *not* the provision under which the preferred shareholders converted in this case. The merger triggered a conversion under Section 8(g), which is the "sole right" of the preferred holders in the event of a merger. Section 5.1 is only implicated indirectly by the provisions in Section 8(g) and the only implication is the conversion price calculated under Section 5.1.[15]

MIG insists that if a preferred holder exercises its option to convert under Section 5.1, and also receives the accumulated and accrued dividend payment of $29.40, it has "double-dipped" in the payment of the unpaid dividends. While it is technically true that conjoining the accumulated and accrued dividends with the conversion ratio results in using the dividends more than once in the calculation, MIG's use of the word "double-dip" dramatically overstates the situation. The $29.40 of accumulated and accrued dividends is used in the conversion formula found in Section 8(a). That formula adds the unpaid dividends ($29.40) with the liquidation preference ($50) and divides that sum by the conversion price ($7.91). This formula, the conversion ratio, equals 10.038 common shares for each preferred share. When adding the accumulated and accrued dividends, under Section 8(b), the $29.40 is "double-dipped" only because it appears twice: once in the formula calculation and once by adding the unpaid dividends as stated in Section 8(b). In the formula, however, the $29.40 only adds 3.72 additional shares to the conversion ratio. This is not a complete double counting. More bluntly, my role in this case is to interpret the contract, not rewrite it to yield a result MIG thinks more to its liking. If MIG drafted a contract that allowed for slight double-dipping, then that is the deal it struck. I will not second guess the plain meaning of the contract simply because one party complains it yields a slightly more favorable result for stockholders. My conclusion is further strengthened by the fact that the party complaining about the double-dipping is the party that wrote the language in dispute.

For the foregoing reasons, I conclude that the certificate of designation sets the value of MIG's preferred shares at $47.47 ($29.40 + $18.07) for each preferred share. Accordingly, my April 16 Opinion is modified in this respect. I also award interest on this amount at the statutorily prescribed rate, as my April 16 Opinion held.

[15] Trial Ex. JX-7, 18.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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