

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERISOURCEBERGEN)
CORPORATION,) C.A. No. 518, 2007
)
Defendant Below,) Court Below: Court of Chancery of
Appellant,) of the State of Delaware in and
) for New Castle County
v.) C.A. No. 327
)
WILLIAM LaPOINT and JOHN M.)
NEHR, in their capacity as)
Stockholder Representatives, NEW)
ENTERPRISE ASSOCIATES VI,)
LIMITED PARTNERSHIP,)
HALPERN, DENNY FUND II, L.P.,)
and all other similarly situated former)
Shareholders of Bridge Medical Inc.,)
)
Plaintiff Below,)
Appellees.)

Submitted: February 27, 2008

Decided: April 8, 2008

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

ORDER

This 8th day of April 2008, it appears to the Court that:

(1) Amerisourcebergen (“ABC”), defendant-appellant, appeals from the Chancellor’s summary judgment and post-trial decisions. ABC contends that the Chancellor erred when he interpreted the terms of a merger agreement in a way that the parties never envisaged at the time they negotiated the merger agreement and, in turn, awarded plaintiffs, former shareholders in the acquired company, with

a windfall recovery. After reviewing the Chancellor's decision, we find that he correctly interpreted the unambiguous terms of the merger agreement and, therefore, we **AFFIRM**.

(2) A much more detailed review of the underlying transaction and the merger agreement can be found in the Chancellor's opinions,¹ but, here, ABC's contention focuses us on a much more narrow set of facts essential to ABC's appeal. ABC agreed to acquire Bridge Medical, Inc. in November 2002. Plaintiffs Appellees were former shareholders of Bridge. The merger agreement provided Appellees with additional consideration from ABC, up to \$21 million, if post-merger Bridge (Bridge remained an "independent" subsidiary company until ABC sold Bridge in 2005) met certain sales targets in 2003 and 2004 after the merger closed in January 2003.

(3) An Annex to the merger agreement dictated how ABC would operate Bridge and how earnings would be calculated to determine whether ABC would payout any or all of that additional \$21 million to the plaintiffs. Basically, Bridge's former shareholders would receive payouts in 2003 if Bridge earned at least \$2,310,000 and would receive the maximum payout of \$21 million if Bridge earned \$4,290,000 or more. Paragraph 34 of the Annex provided:

¹ *LaPoint v. Amerisourcebergen Corp.*, 2007 Del. Ch. LEXIS 55 (May 1, 2007); *LaPoint v. Amerisourcebergen Corp.*, 2007 Del. Ch. LEXIS 131 (Sept. 4, 2007).

When [Bridge]’s products or services are bundled with other products or services of [ABC] or any of [ABC]’s other subsidiaries in a sale to a customer, [Bridge] will receive revenue credit for such bundled sale at [Bridge]’s list price for such products and services (less normal discounting of 20%; provided, however, that where products and services are discounted by more than 20%, the discount to be applied for purposes hereof shall be the average amount of the discount in the last five (5) unbundled contracts executed prior to the execution of the subject contract) for determining Adjusted EBITA attainment each year for comparison to the Earnout Payment objectives of each year. The credit for bundled sales will be added to revenues for determining Adjusted EBITA attainment in the year that the software is delivered to the customer and for services in the year in which the services are provided to the customer.

(4) In January 2003, ABC and Bridge consummated the merger, and Bridge became a subsidiary of ABC. In the summer of 2003, Bridge signed an agreement to lease software to an ABC competitor, Cerner, who would, in turn, sub-lease the software to the ultimate end-user University of Pittsburgh Medical Center. To facilitate this sale to UPMC, another ABC subsidiary, AutoMed, agreed to provide its support services directly to UPMC at no charge (the Bridge-Cerner, Cerner-UPMC, and AutoMed-UPMC agreements taken together represent the “Transaction”).

(5) In 2003, Bridge failed to meet the earnings targets—before upward adjustments—that would entitle the former shareholders to any payout. Instead, in order to receive any payout, the former shareholders would have to rely on the earnings adjustments described in the Annex and in particular paragraph 34. Essentially, if the Transaction constituted a “bundled sale” and required an

adjustment to earnings, Bridge's former shareholders are entitled to the entire \$21 million payout. On the other hand, if no adjustment to earnings is necessary, Bridge's former shareholders receive no payout at all.

(6) In his summary judgment opinion, the Chancellor determined that the Transaction represented a "bundled sale." He found that Bridge's product and ABC's subsidiary's, AutoMed's, service were "sold together" in a pass-through transaction. Put simply the Chancellor found no ambiguity in the terms of paragraph 34 that supported ABC's alternative interpretation. Then in his post-trial opinion, the Chancellor made factual findings regarding discounting Bridge's product. The Chancellor noted that the plaintiffs asserted that the software had a list price of \$7.6 million, discounted to a sale price of \$1.75 million, and reflected a 77.1% discount. Later in the opinion, the Chancellor considered a litany of technical arguments advanced by ABC why the amount of the credit should be reduced. The Chancellor rejected all of ABC's arguments and found that the average discount over the past five transactions equaled 27.9%. Thus, the Chancellor determined ABC should have credited Bridge \$3,976,048 for the "bundled sale," which, in turn, added to other earnings entitled the former shareholders to the full \$21 million payout from ABC.

(7) On appeal, ABC claims that the Chancellor erred when he decided, on summary judgment, that the Transaction represented a "bundled sale." ABC

argues that the Chancellor’s interpretation counters the intent of the parties, that there was no “bundling” because it was a pass-through transaction, and that no “sale to a customer” ever occurred between AutoMed and UPMC since AutoMed’s bundled product was free. We review the Chancellor’s conclusion on interpretation of the terms of the contract for summary judgment purposes, *de novo*.²

(8) The term “bundled” is not a term-of-art and must be given “its ordinary and usual meaning.”³ As the Chancellor noted, the term “bundled sale” must mean “sold together.”⁴ We find that the record supports the conclusion that Bridge’s product was “bundled” and “sold together” with a service from AutoMed, another ABC subsidiary.

(9) ABC’s argument that the parties never contemplated and therefore never intended to credit Bridge for a transaction where its product was “bundled” with an ABC subsidiary for free, has a certain appeal on its face. At the time the parties agreed to the contract language neither may have envisioned the pass-through agreement, an ABC subsidiary’s product accompanying Bridge’s product in a packaged deal for no additional charge, or the ultimate user (customer), UPMC, making no direct payment to Bridge or ABC. However, the agreement

² *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).

³ *Northwestern Nat. Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996).

⁴ *LaPoint*, 2007 Del. Ch. LEXIS 55 at *15.

could have, but did not, exclude that scenario. The Chancellor recognized and addressed this point in his summary judgment and post-trial opinions and, nonetheless, found because the terms of the agreement were unambiguous and, in fact, could have, but did not, exclude the terms of this transaction, that this sale required a credit.⁵ Thus, the Chancellor saw no reason to speculate about what the parties may have overlooked as a potential scenario and rewrite the contract accordingly.

(10) We agree with the Chancellor's conclusion. The language in paragraph 34 credits Bridge anytime its products are bundled with ABC's subsidiaries, and discounted more than normal – regardless of who bundles the products, how they are bundled, or the fact a product may be bundled at no additional cost to the end user. Moreover, to ABC's other arguments, it simply does not matter that the Transaction passed-through Cerner, that AutoMed's product was free, and that UPMC paid Cerner, not ABC. Taken together, the different agreements between Bridge and Cerner, Cerner and UPMC, and AutoMed and UPMC constituted a "bundled sale" and within that "bundle" Bridge's product was discounted below the norm. The agreement simply leaves no room for an alternate interpretation.

⁵ *Id.* at *18; *LaPoint*, 2007 Del. Ch. LEXIS 131 at *26–27.

(11) ABC makes a number of different arguments about other calculations and adjustments to earnings. After consideration of those issues, we affirm those on the basis of the Chancellor's opinion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice