

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION



Noted

1-6-12

CAUSE NO: FSD 1 OF 2012 (PCJ)

The Hon Sir Peter Cresswell
In Open Court on 28 May 2012

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IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

AND IN THE MATTER OF TRIDENT MICROSYSTEMS (FAR EAST) LTD.

APPEARANCES: Mr. Colin McKie, Ms. Caroline Moran and Ms. Victoria Lissack of Maples and Calder for the Petitioner

Mr. Kai McGrielle of Solomon Harris for United Microelectronics Corporation

RULING

- 1 This is the hearing of the petition of Trident Microsystems (Far East) Ltd (in provisional liquidation) (the "Company") that the Company be wound up pursuant to Part V of the Companies Law (2011 Revision) (the "Petition"). For the reasons set out below, the Company seeks a further adjournment of the Petition and the continuation of its provisional liquidation until 8 August 2012.
- 2 The Petition was first listed for hearing on 16 February 2012. On that date, Mr Justice Foster adjourned the Petition until 3 July 2012 to allow the joint provisional liquidators ("JPLs") to continue to explore restructuring proposals for the Company and its subsidiaries carrying on certain of its businesses. Mr Justice Foster also granted liberty to the JPLs to apply to restore the Petition for hearing at an earlier date if they considered it appropriate to do so. Subsequently, as a result of the sale of the majority of the Company's business and assets, a restructuring of the Trident group ("Group") around the remaining businesses no longer appeared to be possible. Accordingly, due to this change of circumstances, the JPLs considered that it was appropriate to restore the Petition for an earlier hearing. By Order dated 12 April 2012, I restored the Petition for hearing on 28 May 2012.

3 The Company now requests a further adjournment of the Petition and the continuation of its provisional liquidation until after 31 July 2012. As set out further below, the grounds for this application are:

- (1) Pursuant to the terms of the purchase agreements that have previously been approved by the Court, the Company, its parent company Trident Microsystems Inc. ("TMI") and their subsidiaries are required to continue to provide services to each of the third party purchasers for transitional periods. It is anticipated that these transitional periods will have ended by 31 July 2012;
- (2) A winding up order could (a) cause certain licenses held by the Company from third parties, that are critical to operations during the transitional periods, to terminate and (b) result in management and employees that are critical to fulfilling the transitional services refusing to assist any further; and
- (3) Some form of restructuring of the Company may still be feasible in order to maximise the value of certain of the Company's remaining patents and tax attributes.

4 The JPLs support the adjournment of the hearing of the Petition and the continuation of the provisional liquidation. In addition, United Microelectronics Corporation ("UMC") the sole remaining member of the Creditors' Committee appointed in this provisional liquidation, has confirmed that it supports the adjournment. (Since the appointment of the Committee, which comprised UMC, ARM Limited ("ARM") and Wipro Technologies ("Wipro"), ARM and Wipro have been paid their pre-petition debts in full as a result of the terms of the purchase agreements with Entropic Communications Inc and Sigma Designs Inc. UMC is still the largest trade creditor of the Company).

BUSINESS AND OPERATIONS OF THE COMPANY AND THE GROUP

5 The Company is incorporated in the Cayman Islands. It is the holding company for a number of subsidiaries throughout Europe and Asia. TMI is the Company's sole shareholder and is incorporated in Delaware (the Company and TMI, collectively "Companies"). The shares of TMI were listed and traded on NASDAQ.

6 Prior to the commencement of the Chapter 11 proceedings in Delaware and the provisional liquidation, the Group was engaged in the business of making microchips for use in television and home entertainment equipment, in particular for use in "set-top boxes" (i.e. cable television boxes). The Group was a leading competitor in the digital home entertainment market.

7 The business of the Group was broadly divided into the following business units:

- (1) The set top box business ("STB Business") which was that part of the Group that developed and sold microchips that control the functions of cable television boxes. The STB Business was the most valuable business unit of the Group and generated approximately 50% of the Group's revenue.
- (2) The "TV Business" which was that part of the Group that developed and sold microchips for displaying and transmitting high-quality images, graphics and audio for digital TVs, PC-TVs and analog TVs. The TV Business generated approximately 45% of the Group's revenue. The TV Business also included two small ancillary product lines, the "Audio Business" and the demodulator business ("Demod Business").
- (3) The Audio Business was engaged in designing, developing, manufacturing, marketing, selling, distributing, refurbishing and servicing integrated circuit components, software and hardware for audio devices.
- (4) The Demod Business was engaged in designing, developing, manufacturing, marketing, selling, distributing, refurbishing and servicing standalone analog and digital audio and video demodulators and decoders.

8 The manner in which the Group operated these business units is described in detail in the Second Affidavit of Mr Teichmann and the First Affidavit of Mr Hinkelman.

9 The operations of the Group may be summarised as follows:

The Group did not manufacture its own products. Instead, the Group focussed on research and development and the manufacturing process was carried out by third parties.

Once the design and technology for a specific product was developed, the Group would carry out the necessary registrations to protect its intellectual property ("IP") rights in the product ("Owned IP"). The Company was the economic and legal owner of almost all of this Owned IP.

In developing or dealing with the technology for a specific product, the Company would often also need to use IP owned by third parties. Accordingly, the Company would enter into licenses with these third parties in order to do so ("Licensed IP").

The Company would then contract with third party manufacturers to manufacture the new products and in doing so would license or sub-license the relevant Owned IP or Licensed IP to these third party manufacturers as required.

The Company would also enter into all supply contracts to purchase the relevant components for its products from third party vendors in order to provide these components to the manufacturers as required

The Company had no employees. Instead, pursuant to a number of intercompany agreements, in return for agreed service fees, the Company's subsidiaries, TMI and their employees provided the necessary management, research and development, sales, marketing, distribution and procurement services to the Company and where necessary, to each other.

Accordingly, the Company was effectively the core of the Group in that it held all the supply contracts, manufacturing contracts, Owned IP and Licensed IP necessary to manufacture the Group's products. Other than certain local obligations that were incurred directly by the subsidiaries, such as rent, the Company was therefore responsible for all contractual relationships and payment obligations for the Group's manufacturing operations.

INSOLVENCY PROCEEDINGS

The Group's financial difficulties were caused by a combination of the following factors:

The Group had expended a considerable amount of financial resources on research and development to develop a new version of microchips for use in the next generation of set-top box systems. However, the set-top-box manufacturers had not yet introduced this next generation of the set-top box to the market. Accordingly, the Group was unable to sell the new microchips and recover the costs of developing this new product.

As a result of being unable to sell these new microchips, the Group's inventory levels and costs were higher than historic levels and higher than had been budgeted. Accordingly, in order to manage inventory levels and costs, the Group was required to reduce prices on its other products to ensure that they were sold quickly.

The Group also faced increased pricing pressure from Taiwanese suppliers who had won over large sections of the global market due to competitive pricing.

A number of the Group's significant customers (e.g. large scale TV manufacturers) had commenced manufacturing certain product components themselves, instead of purchasing them from the Group, thereby reducing the customer base for the Group's products.

- 10 As a result of the above factors, the Group experienced significant operating losses which, over time, diminished the Group's net cash reserves.
- 11 TMI's share price was US\$0.18 as at 31 December 2011, having fallen from a high of US\$31.49 in 2006. This restricted the Group's ability raise money through further equity investment. In addition, due to the lack of liquidity, the Group was unable to raise debt financing.
- 12 Despite efforts to streamline the workforce in September 2011, the Group continued to suffer losses and its net cash balances continued to decline.
- 13 By January 2012, the Company was insolvent on a cash flow basis. The cash reserves at that time were approximately US\$12,268,728, which were insufficient to meet the combined amount of US\$13,811,576 that fell due to two key creditors of the Company in mid January. TMI was also insolvent on a cash flow basis at this time.

- 14 As a result, on 4 January 2012 the Company and TMI jointly filed for Chapter 11 relief in the United States Bankruptcy Court for the District of Delaware ("Delaware Bankruptcy Court" and "Delaware Bankruptcy Proceedings"). On the same day the Company presented the Petition and issued a summons seeking the appointment of provisional liquidators pursuant to section 104(3) of the Companies Law (2011 Revision) ("Companies Law") on the grounds that the Company was insolvent and intended to explore a compromise or restructuring with its creditors.
- 15 On 5 January 2012 the Delaware Bankruptcy Court granted relief pursuant to Ch. 11 including orders permitting the Company and TMI to continue to operate their business as debtors-in-possession, which they have since done. The Delaware Bankruptcy Court has not appointed a trustee in bankruptcy.
- 16 The JPLs were appointed to the Company on 11 January 2012. The purpose of their appointment was to allow the Company to explore potential restructuring options, to support the Delaware Bankruptcy Proceedings and to facilitate the orderly implementation of any plan of reorganisation. A joint protocol was also put in place to ensure the efficient administration of the Delaware Bankruptcy Proceedings and the provisional liquidation. The Order approving the Protocol is dated 25 January 2012.
- 17 Since that time, the Company has continued to operate its business as a debtor in possession, subject to the oversight of the JPLs and the ultimate supervision of the Delaware Bankruptcy Court and this Court.
- 18 The financial position of the Company, TMI and the Group as at 5 January 2012 is described in detail by Mr Teichmann [Second Teichmann, paras 19 to 29, supplemented and corrected in Fourth Teichmann, paras 4 to 7]. An overview of the current assets and liabilities of the Company is set out at paragraphs 14 to 26 of Ms Fisher's Tenth Affidavit. As Ms Fisher explains, it has not been possible to present an accurate estimate of the Company's assets and liabilities at this time.
- 19 Since the commencement of the provisional liquidation, the Company has received the following amounts as net sale proceeds from Entropic Communications Inc. ("Entropic") in respect of the sale of the STB Business and Sigma Designs Inc. ("Sigma") in respect of the

TV Business pursuant to the terms of their respective purchase agreements ("Entropic Purchase Agreement" and "Sigma Purchase Agreement" respectively):

(1) US\$55,866,624 from Entropic on 12 April 2012; and

(2) US\$33,700,000 from Sigma on 4 May 2012.

20 However, although both of these amounts were paid to the Company, the Company is required to allocate these cash amounts between the various Group companies that were party to the purchase agreements and had title to the different assets being sold. This allocation process is currently underway with the assistance of PricewaterhouseCoopers. Until the allocation is complete, it is not clear how much cash will be available in the Company for distribution to its creditors.

21 The Company will also receive further payments from Cambridge Silicon Radio Ltd ("CSR") in the event the purchase agreement for the Audio Business completes ("Audio Purchase Agreement") and may also be able to realise some value for certain patents and tax attributes which are held by the Company.

22 As many of the Company's liabilities have either been assumed by Entropic and Sigma or discharged as required pursuant to the terms of their respective purchase agreements, the JPLs will not have an accurate figure in respect of all outstanding trade creditor claims until the creditors are requested to lodge their claims as part of the claim process. The JPLs will also be required to reach a determination on the validity of the intercompany claims pursuant to the terms of the intercompany agreements referred to above.

23 As a result, the current level of distributions that will be available for creditors of the Company is unclear.

24 A detailed overview of all the steps taken in the provisional liquidation is set out in the Case Memorandum dated 24 May 2012 to which I refer.

SALE OF ASSETS

25 Entropic Purchase Agreement

On 12 April 2012, TMI, the Company and certain of their subsidiaries, completed the Entropic Purchase Agreement ("Entropic Sellers"). The subsidiaries that are a party to the Entropic Purchase Agreement are: Trident Digital Systems (UK) Ltd; Trident Microelectronics Ltd (based in Taiwan); Trident Microsystems (India) Pvt. Ltd; Trident Microsystems (Japan) GK; Trident Microsystems (Korea) Limited; Trident Microsystems (Nederland) BV; Trident Microsystems (Taiwan) Ltd; Trident Multimedia Technologies (Shanghai) Co. Ltd and Trident Multimedia Technologies (Shanghai) Co. Ltd. (Shenzen Branch).

Entropic paid the sum of US\$55,866,624 to the Company on that day. US\$2,000,000.00 of the purchase price was paid into escrow for the purpose of making payments to the Company's foreign subsidiaries in China and India once the local assets located in China and India have been properly transferred to Entropic under the relevant local law.

The categories of assets to be transferred pursuant to the Entropic Purchase Agreement and the current status of these asset transfers are set out at paragraphs 32 and 33 of Mr Hinkelman's First Affidavit.

26 Sigma Purchase Agreement

On 4 May 2012, TMI, the Company and certain of their subsidiaries namely Trident Microelectronics Ltd, Trident Microsystems (Europe) B.V., Trident Microsystems (Taiwan) Ltd, Trident Multimedia Technologies (Shanghai) Co. Ltd and Trident Microsystems (Beijing) Co. Ltd., completed the Sigma Purchase Agreement ("Sigma Sellers").

Sigma paid the sum of US\$33,700,000.00 to the Company on that day. Approximately US\$1,200,000.00 of the purchase price was paid into escrow for the purpose of making payments to the Company's foreign subsidiaries in China, once the local assets located in China have been properly transferred to Sigma under the relevant local law.

The categories of assets to be transferred pursuant to the Sigma Purchase Agreement and the current status of these asset transfers are set out at paragraphs 36 and 37 of Mr Hinkelman's First Affidavit.

In respect of the assets to be transferred to Sigma, Sigma purchased much of the technology hardware relating to the TV Business, including servers, computers, lap-tops, hard drives etc. However, pursuant to section 7.12 of the Entropic Purchase Agreement, before any such assets can be transferred, the Companies are required to carry out a data cleansing process to ensure that certain Owned IP that has been purchased by Entropic does not remain on this equipment. It is anticipated that this data cleansing will be completed by the end of June. However, Entropic will then carry out a data cleansing audit during a 15 day period which means this process may not complete until mid/end July.

27 CSR Purchase Agreement

TMI and the Company have also agreed in principle to sell the Audio Business to CSR. This agreement anticipates a purchase price of US\$900,000, of which US\$350,000 would be paid to the Company and the balance to the Company's subsidiary in Germany. This sale has yet to complete. It is envisaged that it will do so shortly. The categories of assets to be transferred pursuant to the CSR Purchase Agreement are set out at paragraph 42 of Mr Hinkelman's First Affidavit.

28 As explained further below, both the Entropic and Sigma Purchase Agreements provide that for a transitional period, the Group must continue to provide business continuity on behalf of, and transition support services to, these entities. The purpose of the transitional period is to enable the purchasers to focus on business integration activities to ensure the integration of the newly purchased business units and related employees and technology.

29 The CSR Purchase Agreement provides for a transitional period in principle also, however CSR has not yet confirmed which transition services it will require (if any). The CSR Purchase Agreement does not provide for a business continuity period.

TRANSITION SERVICES AGREEMENTS

30 Before Entropic, Sigma or CSR (collectively "Purchasers") will be in a position to operate the relevant business units which they have purchased, the Company must transfer all of the relevant supply and manufacturing contracts with third parties, Licensed IP and Owned IP to the Purchasers. In addition, TMI and its subsidiaries will need to transfer all employees, leases, tangible assets etc. This process necessarily takes time and cannot be completed

immediately upon the closing date of the relevant purchase agreements. The transitional and business continuity periods are designed to ensure that the business of the Group continues to operate without interruption until the relevant business units can be fully transferred, thereby maintaining value for the Purchasers.

Entropic Transitional Services

- 31 Section 7 of the Entropic Purchase Agreement requires TMI and its subsidiaries to provide certain services and support to Entropic, for a transitional period after the closing date. In the first instance, section 7 provides that after the closing date, the Entropic Sellers shall generally continue and maintain their business relationships with all lessors, licensors, customers, suppliers or other third party relating to the STB Business for the benefit of Entropic.
- 32 In addition, the Entropic Sellers were required to enter into the Transition Services Agreement which requires the Entropic Sellers to provide certain specified services to Entropic, in return for a fee to cover costs, for a transitional period after the Entropic Closing Date.
- 33 In this regard, pursuant to the terms of the Transition Services Agreement, TMI and its subsidiaries will provide accounting and tax services, analog engineering services, personnel services, information technology services, legal services, sale services and supply chain and operations assistance for a period of up to 90 days after the closing date (i.e. 12 April 2012).
- 34 In particular schedule A-7 puts in place a "business continuity period" whereby the Group is required to operate the business of the Group generally for the benefit of Entropic under the same process structure and processes as prior to the closing date. The purpose of this business continuity period is to allow Entropic to focus on business integration activities and is intended to last until 31 May 2012 but can be extended for a further two months. No extension has been requested. However the Group will continue to collect the accounts receivable for Entropic until the end of June.
- 35 Accordingly, in order for the Entropic Sellers to fulfill their obligations to Entropic pursuant to section 7 of the Entropic Purchase Agreement and pursuant to schedule A-7 of the Transition Services Agreement, the Entropic Sellers are required to continue to operate the STB

Business in the ordinary course during the business continuity period for the benefit of Entropic.

- 36 Since the closing date, the Entropic Sellers have therefore continued to operate the STB Business in the ordinary course for the benefit of Entropic as if the purchase had not occurred e.g. by carrying out the ordinary course procurement, distribution, billing and accounts collectable services. The billing, shipping and procurement of goods on behalf of Entropic completed at the end of May and Entropic has now taken over this part of the supply chain and operations process. However, the Entropic Sellers continue to collect all accounts receivable for Entropic.
- 37 It is anticipated that the other transitional services specified above will continue to be required by Entropic until 31 July 2012.
- 38 All of the transitional services will be carried out by either TMI or the subsidiaries and their employees. The Company does not directly provide any of these services however as explained below, in order for the Entropic Sellers to fulfil their obligations during the business continuity period and the transition period the Company must maintain certain Licensed IP to which it is a party. If the Company fails to do so, the Group's products could not be manufactured by the third parties or sold and distributed to customers without being in breach of third party intellectual property rights. In addition, as set out further below, the appointment of official liquidators to the Company could have knock-on effects on the retention of employees at subsidiary level, that are required to fulfil the transitional services.

Sigma Transition Services

- 39 Section 8.9 of the Sigma Purchase Agreement requires TMI and its subsidiaries to provide certain services and support to Sigma, for a transitional period after the closing date. In the first instance, section 8.9 provides that after the closing date, the Sigma Sellers shall generally continue and maintain their business relationships with all lessors, licensors, customers, suppliers or other third parties relating to the TV Business for the benefit of Sigma.

40 In addition, the Sigma Sellers were required to enter into a Transition Services Agreement which requires the Sigma Sellers to provide certain services to Sigma, in return for a fee to cover costs, for a transitional period after the closing date.

41 Pursuant to the terms of the Transition Services Agreement, TMI and its subsidiaries will provide accounting and tax services, HR services, information technology, sale services, supply chain and operations assistance and engineering services during the transitional period, which for the majority of services is anticipated to be until the end of July.

42 In particular, Schedule A-5 again provides for a "business continuity" period whereby the Group must operate the TV Business on Sigma's behalf under the same process structure and process as prior to the acquisition of the TV Business. This is to allow Sigma to focus on business integration. It is anticipated that the business continuity period will last until 30 June, 2012.

43 Accordingly, in order for the Sigma Sellers to fulfill their obligations to Sigma pursuant to section 8.9 of the Sigma Purchase Agreement and pursuant to schedule A-5 of the Transition Services Agreement, the Sigma Sellers are required to continue to operate the TV Business in the ordinary course during the business continuity period for the benefit of Sigma.

44 Since the closing date, the Sigma Sellers have been fulfilling their obligations to Sigma during the business continuity period and the Sigma Sellers have been operating the TV Business in the ordinary course for the benefit of Sigma. In this regard, the Sigma Sellers have, among other things, been carrying out all procurement, shipping, accounts collectible and billing services for Sigma that relate to the TV Business.

45 It is anticipated that the other transitional services referred to above will continue to be required by Sigma until 31 July, 2012.

46 All of the transitional services will be carried out by either TMI or the subsidiaries and their employees. The Company does not directly provide any of these services. However as explained below, in order for the Sigma Sellers to fulfil their obligations during the business continuity period and the transitional period, the Company must maintain certain Licensed IP to which it is a party. If the Company failed to do so, the Group's products could not be manufactured by the third parties or sold and distributed without being in breach of third party

intellectual property rights. In addition, as set out further below, the appointment of official liquidators to the Company could have knock-on effects on the retention of employees at subsidiary level, that are required to fulfil the transitional services.

Licensed IP held by the Company

- 47 As noted above, in order to develop or deal with technology for certain products the Company holds Licensed IP from third parties.
- 48 Certain Licensed IP is integral to the business of the Group. For example, certain Licensed IP is utilised in the process of third party manufacturing of the Group's products. Other types of Licensed IP are used directly by the Group in R&D or to enable distribution of manufactured products. Other types of Licensed IP are also used by the Group in order to carry out further developments of products, for example if any products contain bugs that need to be fixed.
- 49 Accordingly, the Group needs to continue to use the Licensed IP during the course of the business continuity and transitional periods in order to operate the business of the Group and fulfil their obligations. In addition, much of the Licensed IP is used across all of the Group's business units. Accordingly the Company cannot, for example, transfer all Licensed IP purchased by Entropic to Entropic at this time because the Company will need to continue to use the Licensed IP to fulfil its obligations to Sigma and potentially to CSR.

POTENTIAL RESTRUCTURING

- 50 Upon the closing of the CSR Purchase Agreement, the key remaining unrealised assets of the Company will be certain patents which are currently licensed by MStar Semiconductors ("MEMC Patents"). This license is due to terminate on 31 December 2013. These patents have been valued at approximately US\$10 million. The Companies and certain of their subsidiaries may also have some valuable tax attributes available to them in the United States.
- 51 The Companies and their restructuring advisors FTI Consulting Inc. ("FTI") are currently considering whether there are any restructuring options available in order to maximise the value of the MEMC Patents and the tax attributes. By way of further explanation:

- (1) As no acceptable offers to purchase the patents have been received, the Company is considering whether it should retain the patents in order to continue to license them out to third parties. If the Company retained the patents, it would then also be in a position to issue litigation to protect its rights under these patents as and when necessary against third parties that may intentionally or unintentionally be breaching the Company's IP rights.
- (2) Certain of the Companies stakeholders have expressed an interest in taking the value of the tax attributes. The Companies and FTI are exploring whether they can deliver value for the tax attributes to stakeholders.

52 I am informed that the Companies and FTI have only commenced considering these suggestions with stakeholders recently. Accordingly the JPLs, the Companies and FTI have not had an opportunity to consider whether these proposals are feasible. However a potential restructuring of the Company and certain other companies that hold the tax attributes, has not been ruled out as a possibility to create value for these remaining assets.

53 It is anticipated that FTI, the Companies and the JPLs will be able to reach a decision as to whether any restructuring would be feasible by the end of July.

CONSEQUENCES OF OFFICIAL LIQUIDATION AT THIS TIME

Transition Services Agreements

54 As the assets and contracts purchased by Sigma and Entropic are still in the process of being transferred, and also as a result of the transitional and business continuity periods required pursuant to the relevant agreements, Mr. Colin McKie ("Mr. McKie") submits that the Companies and their subsidiaries cannot simply cease all operations at this time. Nor can the Companies take any actions that would operate to jeopardise or devalue the assets that are to be transferred to the Purchasers, without exposing the Companies to claims for breach of contract.

55 The making of a winding up order over the Company at this time could (according to Mr. McKie) have two serious consequences relating to the Transition Services Agreements:

The licenses from third parties for the Licensed IP held by the Company could terminate; and

The employees in the Group subsidiaries that must be retained in order to carry out the transition services may stop co-operating.

56 Licensed IP

At least some, if not all of the licences pursuant to which the Company holds the Licensed IP from third parties, contain standard termination provisions that would permit the third party licensor to terminate the license agreements upon the appointment of liquidators to the Company or commencement of a liquidation.

Certain of this Licensed IP is integral to the business of the Company and the Group and will be required in order to operate during the business continuity and transition periods. Consequently the Licensed IP comprises of key licenses that are required to be transferred to the Purchasers pursuant to the STB, TV and Audio Purchase Agreements.

Mr. McKie submits that if the Company was placed into official liquidation and the third party licensors terminated the licences, the potential consequences would be as follows:

- (a) The Company would be exposed to claims for breach of contract under the purchase agreements because it had not maintained the assets which it had covenanted to sell to the Purchasers and would no longer be in a position to transfer these licenses (section 8.1(b) of the Entropic Purchase Agreement at RCB-3 page 55 and section 9.1(b) of the Sigma Purchase Agreement GM-4 page 37);
- (b) Any continued use of the Licensed IP, notwithstanding the termination, during the transitional or business continuation period could expose the Company to claims from the licensors for breaching their IP rights;
- (c) The Company is still working to obtain the consents of certain licensors to transfer the licences for the Licensed IP to the Purchasers. If the licensor had the opportunity to terminate the license, this could very easily disrupt negotiations and result in the licensor terminating the license and requiring the relevant Purchaser to enter into a new license with it on less favourable terms. This is particularly the case because the Company has the benefit of very favourable terms under a number of the older

licenses. Again this would expose the Company to breaches of contract claims from the Purchasers given that the Company has undertaken to deliver the various consents to the Purchasers.

- (d) In sum, the potential liability of the Company for breach of contract claims would be likely to exceed by a substantial margin the cost to the Company of continuing with the relevant licenses.

57 Employees

Prior to the commencement of the provisional liquidation and the Delaware Bankruptcy Proceedings, there were approximately 10 directors/officers of the Group and approximately 20 senior managers. The Group is now operating with only one remaining director, Mr David Teichmann and three senior managers based in Taiwan, Hong Kong and the US respectively (collectively "Management Team").

In the event the JPLs were appointed as official liquidators, they would need to replace the director of the Company and also need to consider taking direct control of the Company's subsidiaries in order to wind down the Company's assets.

However, the JPLs consider that the continued involvement and cooperation of the Management Team upon an official liquidation would be essential to fulfil the transition and business continuity services because the official liquidators would not have the expertise to continue operating the business without the assistance of the Management Team. In particular:

- (a) The Management Team have in depth technical knowledge about the operation of the Group, its intellectual property and other assets required in order to provide the transition and business continuity services and to ensure that the data cleansing process required before certain assets can be transferred to Sigma is carried out correctly.
- (b) The Management Team have the knowledge to ensure the correct assets are transferred to the correct Purchaser and that intellectual property is transferred at the

appropriate time. In this regard, there are currently a number of disputes between Entropic and Sigma as to which assets comprise STB assets and which comprise TV assets.

- (c) The remaining employees located in Taiwan, Hong Kong and the US are also necessary to carry out the day to day actions required under the transition services agreements. The Management Team ensures the continued management and cooperation of these employees in order to complete these services.

58 The official liquidators would therefore have immediately to negotiate consultancy agreements with the Management Team and all other key members of management (approximately 30 people). Their co-operation would not necessarily be guaranteed and the negotiation and implementation of such consultancy agreements would be costly and time consuming.

59 None of the Management Team will be employed by the Purchasers at the end of the transition period. Accordingly, they are fulfilling the Group's remaining obligations under the purchase agreements as a matter of professional integrity and loyalty to the Group and its remaining employees. If official liquidators are put in place, there is no guarantee that the Management Team would remain with the Group as they may consider that the responsibility for the remaining employees and fulfilling the Group's remaining obligations had passed to the official liquidators.

60 If the Management Team did not remain with the Group after the official liquidation, the consequences would be as follows:

- (a) The employees in Taiwan, Hong Kong and the US continue to cooperate due to their loyalty to and confidence in the Management Team. If the Management Team were replaced by the official liquidators, it is very likely that these employees would no longer remain with the Group for the duration of the transitional period. This would mean the Group could no longer fulfil their obligations to the Purchasers under the transition services agreements.

(b) Furthermore, the official liquidators do not have the necessary in depth knowledge and expertise about the Group's assets, Owned IP and Licensed IP to operate during the transitional services period or even to continue the timely process of transferring the assets to the Purchasers under the purchase agreements, without the assistance of the Management Team. An inability to perform these actions would leave the Company open to claims for breach of contract (see section 6.1 of the Entropic and Sigma Transition Services Agreement).

61 Furthermore, even if the Management Team and other members of management were prepared to assist, the JPLs are of the opinion that it is unlikely that official liquidators would be able to assume control of the Company and its subsidiaries without causing delays and disruption to its business and operations (at least in the short term).

Possibility of Restructuring

62 Given recent discussions in relation to the MEMC Patents and the tax attributes, there may (I am informed) still be a prospect that the Company could be restructured in order to achieve a higher return to creditors than would be available if all assets are simply liquidated.

63 Such a restructuring would be implemented by way of filing a plan of reorganisation (rather than a plan of liquidation) in the Delaware Bankruptcy Proceedings.

64 As a matter of Delaware bankruptcy law, I am informed, the purpose of such a plan of reorganisation is the continuation of the debtor's business or a significant a portion thereof.

65 Although the proposals in respect of the MEMC patents and the tax attributes, have still not been developed fully, as a matter of Delaware law, an official liquidation (I am informed) is likely to be an impediment to having such a plan of reorganisation approved (unless the official liquidation could be stayed) because the Company would be in a wind down and dissolution process rather than in a position to continue as a viable entity post confirmation of the plan.

66 Accordingly, if the Company is placed into official liquidation, Mr. McKie submits that an opportunity to restructure the Company may be lost.

Delaware Bankruptcy Proceedings

- 67 In the United States, it is (I am informed) entirely usual to carry out a liquidation in the context of a chapter 11 proceeding without any requirement to convert the proceeding into a chapter 7 liquidation, except in certain limited circumstances.
- 68 In the Delaware Bankruptcy Proceedings, the Companies, the creditors and the equityholders of TMI have dedicated extensive efforts to developing a framework for a successful conclusion to the Delaware Bankruptcy Proceedings in the context of chapter 11. I am informed that neither of the Companies nor any of its stakeholders has given any consideration to converting the Delaware Bankruptcy Proceedings to chapter 7. As a result of the continuing responsibilities of the Companies and their employees under the various purchase agreements, I am further informed that converting to a chapter 7 could be viewed as breaching the Companies' fiduciary obligations to its creditors due to the extensive disruption and waste of assets that would almost certainly occur.
- 69 In the event the Company was placed into official liquidation, the proceedings before the Delaware Bankruptcy Court would (Mr. McKie submits) probably remain as chapter 11 proceedings and would not necessarily be converted into chapter 7 proceedings. However, there is a possibility that the official liquidation of the Company could give rise to the risk that parties seeking to create a tactical advantage would argue that a conversion to chapter 7 was warranted.

LEGAL TEST TO CONTINUE PROVISIONAL LIQUIDATION

- 70 Upon the hearing of a winding up petition, the Court has discretion to adjourn the hearing conditionally or unconditionally pursuant to Section 95(1)(b) of the Companies Law. This is substantially the same as the predecessor sections of the Companies Law in force prior to 2009 (see, for instance, section 100 of the Companies Law (2000 Revision)).
- 71 The Court also has discretion to appoint provisional liquidators after the presentation of a winding up petition but before the making of a winding up order. (Section 104(1) of the Companies Law (2011 Revision)).

- 72 When the Court is asked to adjourn the winding up petition and permit the continuation of the provisional liquidation, the Court is in effect exercising its discretion to appoint provisional liquidators afresh and must accordingly give due consideration to all factors that may have a bearing on the exercise of this discretion. (*Re Fruit of the Loom (in provisional liquidation)* [2000] CILR N-7, the unreported judgment of the Chief Justice at page 7 lines 11 to 14).
- 73 The majority (95%) of the Company's assets have now been sold. It is conceded by Mr. McKie that it is not normally the function of provisional liquidators to realise substantially all of the assets of the company in provisional liquidation, and that this is more properly the function of an official liquidator. (*Ashborder BV and others v Green Gas Power Ltd and others* (Transcript 27 January 2005) [Etherton J]. See also French, *Applications to Wind Up Companies*, 2nd ed., 2007 at pp 855).
- 74 However, the Court has a broad discretion in respect of the appointment of provisional liquidators and it is generally accepted that the use of the provisional liquidation procedure is a flexible remedy not restricted to certain categories of cases. Indeed the use of the appointment of the JPLs in this case in order to support the Delaware Bankruptcy Proceedings, as well as to explore potential restructuring options, is an example of such flexibility.
- 75 In circumstances where a better outcome for stakeholders would be achieved by permitting the provisional liquidation to continue, the Court has been prepared to do so. (*MHMH Ltd v Carwood Barker Holdings Ltd* [2006] 1 BCLC 279 and see *Northern Development (Holdings) Limited* (Court of Appeal, 1 March 1977) where the Court was prepared to adjourn the petition for a lengthy period to allow a receivership to continue to maximise value for creditors).
- 76 In *MHMH*, three related financial services companies had sold their businesses and assets to a third party. The purchase price was, however, payable in quarterly instalments over a period of 4.5 years. The first two instalments had been paid when it became clear the three companies were insolvent. The balance of the purchase price was the key remaining asset of the companies. However, a provision of the purchase agreement provided that if a winding up order was made against the companies, the purchaser would be released from any further payment obligations.

77 Given the companies' insolvency, they were concerned that creditors could successfully obtain a winding up order, thus triggering this provision of the purchase agreement. The companies accordingly sought the appointment of provisional liquidators on the basis that, among other things, this would protect the assets of the companies and permit the collection of the purchase price instalments over the next four years.

78 Evans-Lombe J held that:

- (1) There was nothing abusive about appointing provisional liquidators to ensure that a substantial asset can be realised for the benefit of the companies' creditors;
- (2) Should the creditors object to this process, they could intervene to seek an immediate winding up order;
- (3) Although the usual principle is that winding up petitions should not be left outstanding for a long period of time, the Court can make exceptions to this rule in appropriate circumstances; and
- (4) This was an appropriate case to make such an exception, particularly because outside creditors would not be put at risk by continuing the provisional liquidation as the companies were not going to trade and the only expenses would be to professionals.

79 In *Re Fruit of the Loom (in provisional liquidation)* the Grand Court considered the principles to be applied on an application to continue a provisional liquidation to permit a restructuring. These principles can be summarised as follows:

- (1) The provisional liquidator must be satisfied that a restructuring of the company is likely to be more beneficial to the company's unsecured creditors than a liquidation of the company's assets and rateable distribution to the creditors;
- (2) There must be a real prospect of a restructuring being effected for the benefit of the general body of the company's unsecured creditors;
- (3) The Court will be astute to ensure that a company which is hopelessly insolvent will not be allowed to continue to trade.

80 In *Re BCCI SA* [1992] BCLC 570 at pages 572c-l, 577f-h and 578a-b Browne-Wilkinson V-C (as he then was) applied similar principles in respect of adjourning the hearing of a winding up petition to allow the provisional liquidators to explore a possible restructuring of the bank.

81 Applying the principles in the above mentioned cases to the Company, Mr. McKie submits as follows:

- (1) The continuation of the provisional liquidation will ensure that the assets of the Company can be preserved for the benefit of creditors in that the Company will not be exposed to breaches of contract claims from third party licensors or the Purchasers.
- (2) If the Company fails to maintain the licenses for the Licensed IP and/or the Company and the Group fail to discharge their obligations under the Transition Services Agreements, the Company will be at risk of damages claims for breach of contract from the third party licensors and the Purchasers, given that certain of the Licensed IP is integral to the operation of the various business units. Any damages claimed are likely to be significant. Accordingly, the appointment of official liquidators could easily destroy the remaining value left in the Company to the detriment of creditors.
- (3) The Company's role will simply be to continue to hold the Licensed IP and other remaining contracts that are subject to the purchase agreements until such time as they can be transferred.
- (4) The Audio Business will be sold by the end of May or alternatively shut down. The Demod Business is also anticipated to be sold by early June. Accordingly, by the end of June at the latest, it is expected that the Group will no longer be operating these business units.
- (5) The Purchasers will cover the costs of the Company, TMI and its subsidiaries continuing to operate under the Transition Services Agreements. Accordingly, the Company will not be exposed to further costs or liabilities pursuant to the intercompany agreements or with third parties as a result of providing transition services.

(6) As a result, it is not the case that an insolvent company will continue to trade and accrue liabilities to the detriment of creditors.

(7) Although the restructuring proposals in respect of the MEMC Patents and the tax attributes are in their infancy, such proposals have not been ruled out. The Companies and the JPLs envisage that they will be in a position to reach a determination as to whether this is feasible by 31 July 2012.

82 UMC (the sole remaining member of the Committee) approves the continuation of the provisional liquidation until 8 August July 2012.

83 In accordance with the order of this Court dated 12 April 2012, the hearing of the winding up petition was advertised in the *Wall Street Journal* and the *Cayman Islands Gazette*. As at the date of these submissions no creditors have given notice of their intention to appear.

84 For all of the reasons set out above, it is submitted that at this time making a winding up order would be premature and would not be in the best interests of the Company and its creditors.

TERMS OF THE PROPOSED ADJOURNMENT

85 I am prepared in the exceptional circumstances set out above to grant a further adjournment until 8 August 2012 to allow completion of the transfer of all assets to the Purchasers and completion of the transitional and business continuity periods. It is anticipated that by the end of July, the Company and the JPLs will also have reached a determination as to whether there are any feasible restructuring options to recover value from the MEMC Patents and the tax attributes.

86 The appropriate orders should follow the form of those made in *Re BCCI SA* and by Mr Justice Foster on 16 February 2012:

- (1) the hearing of the Petition be adjourned until 8 August 2012. This adjournment to be advertised once in the *Cayman Islands Gazette* and once in the *International Edition of the Wall Street Journal* within 14 days of the filing date of the orders.

- (2) in case the Company's financial position worsens, or for any other reason, such that the Company and/or the JPLs consider it necessary and appropriate that the Petition should be heard earlier than 8 August, then the Company and the JPLs be at liberty to restore the hearing of the Petition whereupon the Company, or JPLs as appropriate, shall re-advertise the hearing of the Petition in the *Gazette* and in the *International Edition of the Wall Street Journal* not later than 14 days prior to such hearing;
- (3) If, in the meantime, any creditor of the Company wishes to have the hearing of the Petition restored, he should apply to the JPLs who will take the necessary steps to bring the matter to the Court's attention.

I add further provisions:-

- (4) A copy of this Ruling should be provided as soon as practicable to the United States Bankruptcy Court for the District of Delaware so that the basis for this Ruling can be seen by that Court. I have already referred to the Cross-Border Insolvency Protocol Stipulation. If any of the matters referred to herein which have lead to the grant of a further adjournment are materially incorrect or prove to be materially incorrect, I would be grateful if the judge in the Delaware Bankruptcy Court would direct the appropriate person or persons to draw such matter to the attention of the JPLs and the Committee and to my attention.
- (5) The JPLs should use their best endeavour to elicit replacements for ARM and Wipro on the Creditors' Committee.
- (6) The JPLs should send by post, courier or e-mail to the known creditors a report substantially in the same form as the report of 24 May to the Court (with any necessary redactions).

DATED this 1st day of June 2012


The Honourable Justice Cresswell
Judge of the Grand Court

