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December 14, 2006

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Re: Konfirst v. Willow CSN Incorporated
C.A. No. 1737-N
Date Submitted: July 12, 2006

Dear Counsel:

Willow CSN Incorporated (“Willow”), the Respondent in this appraisal action, has challenged several appraisal demands.

The merger giving rise to this action was approved on July 1, 2005, by written consent. On July 1, 2005, stockholders then listed on Willow’s stock register were mailed a Notice of Action by Written Consent in Lieu of a Meeting (the “Notice”). The Notice informed Willow stockholders of the merger and of their rights to appraisal under 8 *Del. C.* § 262 and of the requirement that any

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demand for appraisal be sent to Willow within twenty days after the date the Notice was mailed, *i.e.*, on or before July 21, 2005.¹

Willow has challenged the sufficiency of 33 appraisal demands.² The first twelve of the challenged appraisal demands were postmarked after July 21, 2005.³ By the plain language of § 262(d)(2), the failure of a stockholder to send the written demand for appraisal within twenty days after the corporation mailed written notice of the merger precludes the Court from considering that stockholder's demand for appraisal. "Time periods under [8 *Del. C.* § 262] are strictly enforced, and the failure to meet a deadline will result in the loss of appraisal rights."⁴ Accordingly, these twelve appraisal demands must be rejected.

Some of the stockholders falling into this category point out that they had recently moved or had been on vacation and, thus, did not receive the notice as

¹ By 8 *Del. C.* § 262(d)(2), "[a]ny stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares."

² For convenience, the Court adopts the numbering system implemented by Willow.

³ The appraisal demands postmarked after July 21 were submitted by Keith Bornstein, Michael Cabage, Jerry J. Jegen, Robert Kemmerer, Bradley K. Moore, Sixties Seconds Productions, Inc., Mitchell E. Pozin, Ellis J. and Ellen K. Sklar, Edward B. Stephens, Patricia A. Vandivier, Joseph Y. and Judy Yasutake, Wendell and SaraLou Zimmer.

⁴ R. FRANKLIN BALOTTI AND JESSE A. FINKELSTEIN, *THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS* § 9.44[c], at 9-118 (2002)

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soon as would ordinarily have occurred. Unfortunately, those explanations are not legally sufficient. Willow's obligation was to mail the notice to the stockholder "at the stockholder's address as it appears on the records of the corporation."⁵ Even though the tardy receipt of the notice may not be the stockholder's fault, that will not avoid loss of the right to appraisal. Also, the demand of Mr. Stephens, although bearing a postage meter date stamp of July 21, 2005, was postmarked July 22, 2005. The controlling date, however, is the date with the actual postmark; that date is July 22, 2005; and that date is too late to preserve the right to appraisal.

Appraisal demands 13 and 14⁶ were both dated after July 21, 2005. Mr. Taylor's was dated August 10, 2005, and Mr. Odom's was dated July 22, 2005. Evidently, no postmark evidence is available, but the dates on the demands are sufficient to demonstrate that the appraisal demands were not submitted timely. It is, after all, "the dissenting stockholder [who] has the burden of showing that the

⁵ Notice of a merger effectuated under 8 *Del. C.* § 262(d)(2) must be given to the stockholders entitled to appraisal rights. This subsection, however, does not specify the means by which the sender of the notice is to ascertain the proper addresses of the stockholders. Other provisions of the Delaware General Corporation Law, *see, e.g.*, 8 *Del. C.* §§ 222(b), 251(c), 253(c), make clear that statutory notice, in general, is sufficient if appropriately directed to the address shown on the records of the corporation. Any other perspective, moreover, would beg the question: if not that address, then what address?

⁶ These are the appraisal demands of William F. Taylor, Jr. and Robert R. Odom.

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written demand was sent to the corporation within the 20 day period and that the corporation received the demand.”⁷ The dates on these appraisal demands preclude their consideration.

Appraisal demands 15 through 18⁸ were received by Willow after July 21, 2005, and do not have postmarks. Mr. Bittorf’s appraisal demand was received on September 13, 2005. Ms. Glaze’s appraisal demand was received by Willow on July 29, 2005. Mr. Stephenson’s appraisal demand was received on August 19, 2005. Mr. Reinstrom’s appraisal demand was received by Willow on August 19, 2005. Except for Ms. Glaze’s appraisal demand, which was dated July 18, 2005, none of the other three appraisal demands in this category was dated. The appraisal demands of Mr. Bittorf, Mr. Stephenson, and Mr. Reinstrom are excluded because it is not a reasonable inference, based on the ordinary course of mail delivery, that their undated appraisal demands, all received at least four weeks after the July 21 final date for mailing, were in fact mailed by July 21, 2005. Ms. Glaze’s appraisal demand, however, is in a different category. It is not

⁷ BALOTTI AND FINKELSTEIN § 9.44[c], at 9-118.

⁸ These are the appraisal demands of Steven V. Bittorf, Audrey Glaze, Garry L. Stephenson, and Gary Reinstrom.

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unreasonable to conclude that the demand, dated three days before the last date for mailing, was mailed on or before July 21, 2005, and required eight days for delivery to Willow. The Court is satisfied that Ms. Glaze has satisfied her burden of demonstrating her compliance with the statutory requirements.

Appraisal demands 19 and 20 were submitted by individuals not named on Willow's stock register.⁹ In order to present a demand for appraisal, one must be listed as a stockholder of record in the company's stock register.¹⁰ Because neither of these individuals appeared in the stock register, their appraisal demands must be rejected.

With respect to appraisal demands 21 through 24, Willow disputes the number of shares for the particular shareholders.¹¹ For these demands, the dispute arises from the difference between the number of shares shown on the demand and

⁹ These are the appraisal demands of Wayne Ten Bruin and Fred L. Solomon. Mr. Solomon's appraisal demand could also be excluded because of the postage date stamp of July 25, 2005, on the envelope conveying his appraisal demand.

¹⁰ See 8 *Del. C.* § 262(a) (“[T]he word ‘stockholder’ means a holder of record of stock in a stock corporation . . .”).

¹¹ In this category are the appraisal demands submitted by Carolyn and Ramon Ryan, Dinah Kazden, Clifford A. Jaebker, and Larry Duncan.

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the lesser number of shares shown on the stock register.¹² Under these circumstances, the number of shares owned as evidenced by the stock register controls. Thus, for these stockholders, the number of shares shown on the stock register shall be the number of shares subject to appraisal.

In contrast, appraisal demands 25 through 28 involve demands for fewer shares than the total number of shares owned. A stockholder, of course, may seek appraisal for only a portion of his shares.

Appraisal demand 25 involves 50,000 shares owned by LeRoy C. and Colleen A. Darby. Mr. and Mrs. Darby, as trustees of the LeRoy C. Darby Revocable Trust and the Colleen A. Darby Revocable Trust, own collectively 100,000 shares. Each trust, thus, held 50,000 shares. Mrs. Darby submitted an affidavit in which she averred that two separate demands for appraisal, each for one of the trusts and for 50,000 shares, were submitted. She also averred that both demands were placed and mailed in the same envelope. Willow acknowledges receipt of the demand relating to Mr. Darby's trust (50,000 shares) and does not challenge that demand. Willow has no record that the demand for Mrs. Darby's

¹² See 8 Del. C. §§ 219(c), 262(a).

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trust's shares was received. I accept Mrs. Darby's affidavit because the two demands would have been similar—although not identical—in appearance and it would have been easy for confusion to occur at Willow's end. Willow does not dispute that it received the mailing from them, and Mrs. Darby has submitted sufficient evidence for the Court to conclude that the demand for the shares in her trust was also included. Accordingly, all 100,000 shares held by Mr. and Mrs. Darby as trustees shall be subject to appraisal.

Appraisal demand 27 has been resolved by agreement of the parties.¹³ As to appraisal demands 26 and 28, they were for less than the number of shares reflected on the stock register. The demand will control.¹⁴

Finally, appraisal demands 29 through 33 are with respect to stock that was held by joint tenants. The demands were not signed by both record owners; the

¹³ That is the appraisal demand of the Petitioner, Larry L. Konfirst; the parties agree that he is entitled to appraisal to 241,370 shares as indicated on his demand.

¹⁴ "Once a shareholder elects to perfect his appraisal rights with respect to a definitive allotment of stock, he may not thereafter alter his decision without strict compliance with the appraisal statute." *Ala. By-Prods. Corp. v. Cede & Co.*, 657 A.2d 254, 261 (Del. 1995). Appraisal demand 26 is that of Alan R. Filson. He demanded appraisal of 105,333 shares; the stock register indicated ownership of 117,433 shares. For Mr. Filson, 105,333 shares are entitled to appraisal. Appraisal demand 28, that of Carolyn S. Athey Murphy, was for 1,000 shares. Even though the stock register indicates that she owned 3,000 shares, only 1,000 of her shares of Willow will be entitled to appraisal; the balance must be rejected.

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demands do not clearly recite that they were also submitted by one joint tenant on the other joint tenant's behalf. "A demand for payment must be properly and formally signed by or for all stockholders of record."¹⁵ Thus, these demands must be rejected.

Several stockholders whose appraisal demands are rejected in this letter opinion submitted separate written arguments in support of their right to appraisal.¹⁶ Many of them set forth understandable reasons for their failure to comply strictly with the statutory requirements. The statutory requirements, however, are just that: they are strict and can only be avoided, if ever, in extraordinary circumstances.¹⁷ The circumstances here are not extraordinary.

¹⁵ *Raab v. Villager Indus., Inc.*, 355 A.2d 888, 892 (Del. Ch. 1976). The appraisal demands that fall into this category are those of Stephen E. Bridgman, Gary W. Crist, Barry L. Jeffries, Jack Nakamara, and Marilyn L. Nerl.

¹⁶ Pursuant to the Court's Order of May 8, 2006, the Notice of Pendency of Action to Shareholders Whose Entitlement to Appraisal is Disputed was sent and the stockholders challenged by the Respondents were afforded the opportunity to submit their views.

¹⁷ See *Cede & Co., Inc. v. Medpointe Healthcare, Inc.*, 2004 WL 2093967, at *22 (Del. Ch. Aug. 16, 2004) ("While this Court has excused a late appraisal demand in the past, this has only been done under exceptional circumstances where the shareholder was prevented from making a timely demand 'by reasons beyond his control.'") (citation omitted).

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Appraisal rights are created by statute and, in order to partake in those rights, strict compliance with the precise statutory standards is essential.¹⁸

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-NC

The following served by First Class Mail:

Mr. Keith Bornstein	Mr. Garry L. Stephenson
Mr. Michael Cabage	Mr. Gary Reinstrom
Mr. Jerry J. Jegen	Mr. Wayne Ten Bruin
Mr. Robert Kemmerer	Mr. Fred L. Solomon
Mr. Bradley K. Moore	Ms. Carolyn Ryan
Sixties Seconds Productions, Inc.	Mr. Ramon Ryan
Mr. Mitchell E. Pozin	Ms. Dinah Kazden
Mr. Ellis J. Sklar	Mr. Clifford A. Jaebker
Ms. Ellen K. Sklar	Mr. Larry Duncan
Mr. Edward B. Stephens	Mr. LeRoy C. Darby
Ms. Patricia A. Vandivier	Ms. Colleen A. Darby
Mr. Joseph Y. Yasukake	Ms. Alan R. Filson
Ms. Judy Yasutake	Ms. Carol S. Athey Murphy
Mr. Wendell Zimmer	Mr. Stephen E. Bridgman
Ms. SaraLou Zimmer	Mr. Gary W. Crist
Mr. William F. Taylor, Jr.	Mr. Barry L. Jeffries
Mr. Robert R. Odom	Mr. Jack Nakamara
Mr. Steven V. Bittorf	Ms. Marilyn L. Nerl
Ms. Audrey Glaze	

¹⁸ See, e.g., *Nelson v. Frank E. Best Inc.*, 768 A.2d 473 479-80 (Del. Ch. 2000).