shares reverted to TPR, and that the Trump Group had the right to buy these shares—are all subject to issue preclusion under the Supreme Court's test. As to the first prong of the test, deciding whether the Trump Group could vote the Sagi Trust Shares, which the Trump Group asked me to find in its complaint, necessarily involved the questions of whether the 2004 transfers were valid, whether the Sagi Trust Shares reverted to TPR, and whether the Trump Group had had the right to purchase the Sagi Trust Shares.[121] And, deciding that TPR had the right to vote the Genger Shares and Orly Trust Shares, which was the aspect of my August 2010 opinion that "pose[d] no problem," also involved the exact same questions.[122] Thus, the first prong of the test is satisfied.

As to the second prong of the issue preclusion test, there is no question that these issues were litigated. Much of the trial testimony revolved around the question whether the 2004 transfers were valid, or whether they had later been ratified by the Trump Group.[123] In their post-trial argument and briefing, counsel for each side focused on whether the shares reverted to TPR, and, if so, whether the Trump Group had the right to buy them.[124] Between my July 2010 and August 2010 opinions, counsel renewed these arguments, with a particular focus on the Genger and Orly Trust Shares.[125] Genger's lawyers in particular produced a plethora of legal arguments why Genger should retain control over Trans-Resources, including arguments on appeal by his new counsel (retained post-trial) that directly contradicted the arguments made earlier by his trial counsel.[126] The

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[121] *See* Supr. Ct. Op. 194-97 (upholding this court's finding that the 2004 transfers were invalid); *id.* at 198 (upholding the judgment of this court "insofar as it adjudicate[d] the merits of the Trump Group's Section 225 claims").

[122] *Id.* at 201.

[123] In fact, *all* witnesses at trial testified on the supposed notice, validity, or ratification of the 2004 transfers, some at great length. *See, e.g.*, Tr. 74-78 (J. Trump – Direct), 281 (Hirsch – Cross), 476-77 (E. Trump – Direct), 555-57 (S. Genger – Direct), 571 (Small – Direct), 626-27 (Dowd – Direct), 785-87 (O. Genger – Direct), 855-60 (A. Genger – Direct), 970-1029 (Lentz – Direct) (Dec. 15-17, 2009).

[124] *E.g.*, Def's. Post-Tr. Op. Br. 15-38 (Jan. 15, 2010); Pls.' Post-Tr. Op. Br. 32-46 (Jan. 15, 2010).

[125] *See, e.g.*, Letter to the Court from Thomas J. Allingham II, Esq. (Aug. 2, 2010); Letter to the Court from Donald J. Wolfe, Jr., Esq. (Aug. 4, 2010). Although the parties focused more on the Trump Group's right to buy the Genger and Orly Trust Shares after my July 2010 opinion, the Side Letter Agreement, under which the Trump Group contracted to buy these shares from TPR, was the subject of briefing, argument, testimony, and even the pre-trial order. *E.g.*, Pls.' Post-Tr. Op. Br. 29-30 (Jan. 15, 2010); Def's. Pre-Tr. Op. Br. 22 n.10 (Dec. 3, 2009); Post-Tr. Oral Arg. 120-22 (Apr. 26, 2010); Tr. 401-02 (Hirsch – Cross) (Dec. 16, 2009); Stip. Pre-Tr. Order 9-10 (Dec. 4, 2009).

[126] At trial, Genger advanced "every conceivable exculpatory theory that ever crossed his lawyers' inventive minds." July 2010 Op. *12. I now summarize his post-trial arguments, many of

New York Supreme Court noted that Genger had a "full and fair" opportunity to litigate these issues.[127] A rereading of the briefs filed by Genger suggests that the word "fulsome" would also be apt.

As to the third prong of the test, the three issues were decided in a "final and valid judgment." As I have explained, the Supreme Court upheld this court's determination that the Trump Group was entitled to purchase the Sagi Trust Shares, because the transfers of those shares were invalid and they reverted to TPR.[128] And, the Supreme Court also found that the Genger Shares and the Orly Trust Shares were invalidly transferred and reverted to

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which I have mentioned elsewhere in this opinion. First, Genger claimed that the Trump Group ratified the 2004 transfers, and the irrevocable proxies, by not objecting to Genger's voting the TPR Shares in a Trans-Resources stockholders meeting on June 25, 2008, twelve days after the Trump Group learned of the 2004 transfers. Def's. Post-Tr. Op. Br. 15-23 (Jan. 15, 2010). Second, Genger claimed that, by purchasing the Sagi Trust Shares from the Sagi Trust, the Trump Group again ratified the 2004 transfers. *Id.* at 23-26. Third, Genger argued that, in any case, the Trump Group had known about the 2004 transfers years before, and had ratified them, or acquiesced in them, in 2005. *Id.* at 26-30. Fourth, Genger claimed that the Trump Group's claims were barred under the statute of limitations, or laches. *Id.* at 30-32. Fifth, Genger claimed that undoing the 2004 transfers would require his divorce settlement to be reformed. *Id.* at 32-39. Sixth, Genger argued that the Trump Group itself violated the Stockholders Agreement when it purchased the Sagi Trust Shares, because it pledged these shares to a lender in return for funding. *Id.* at 39-42. Sixth, Genger argued that his irrevocable proxies over the Sagi Trust Shares and the Orly Trust Shares were valid and effective, and that even if they were deemed ineffective, he still controlled the Sagi and Orly Trust Shares through a backup voting trust agreement. *Id.* at 42-49.

In addition to his main arguments, Genger advanced various theories based on the allegedly inequitable nature of the Trump Group's conduct, claiming that Orly would be disinherited, and that the Trump Group had deliberately engineered a means of obtaining Trans-Resources on the cheap. *See id.* at 5, 7. Genger also suggested that the transfer of the Genger Shares should not be void because the Trump Group had no right of refusal as to those shares. *Id.* at 17 n.5. And, Genger suggested that the Trump Group had no right to buy the Sagi Trust Shares from TPR, because it was not a "permitted transferee." Def's. Post-Tr. Reply Br. 18 n.24 (Feb. 5, 2010). None of these arguments was convincing and all were rejected.

On appeal, Genger changed counsel, and some of his arguments. He pressed again his arguments that the Trump Group ratified the 2004 transfer of shares to the Sagi Trust, and that the Sagi Trust Shares were subject to the irrevocable proxy. Corrected Appellant's Op. Br. 17-23, No. 592, 2010 (Del. Nov. 16, 2010). He also renewed the argument that, because Genger was a permitted transferee, the transfers should not be voided as to him. *Id.* at 28.

But, as the Supreme Court noted, he subtly altered his argument as to when the Sagi Trust executed a proxy in favor of Genger. At trial, Genger represented that the Sagi Trust executed the proxy on the same day as the transfer of shares took place; on appeal, he argued that the Sagi Trust executed the proxy on the *following* day. Supr. Ct. Op. 197. The Supreme Court therefore declined to consider Genger's new reason why the proxy should be considered valid under New York law. And, more strikingly, Genger made an "about-face" on whether the court should have decided the question of the ownership of the Genger and Orly Trust Shares, and argued that the court had no right to do that, *even though he had asked the court to decide this in his counterclaim.* Supr. Ct. Op. 199; *see* Corrected Appellant's Op. Br. 24-28, No. 592, 2010 (Del. Nov. 16, 2010).

[127] N.Y. 2013 Op. 14.

[128] Supr. Ct. Op. 194-96 (upholding this court's finding that the Trump Group did not ratify the transfers of the Sagi Trust Shares); *id.* at 198 (upholding this court's finding that the Trump Group could vote the Sagi Trust Shares).

TPR. Even though the court only ruled that TPR had the right to vote these shares, it noted that, if the shares reverted to TPR, the Trump Group had the right to buy them.[129] And, the Revised Final Judgment Order, which the parties agreed on, provided explicitly that the Trump Group had a right to purchase TPR's stake in Trans-Resources.[130]

Nevertheless, Genger has suggested to this court that the Revised Final Judgment Order is not "final, " because it provides that the Trump Group is "presently" the owner of its original 47.15% stake in Trans-Resources and the Sagi Trust Shares.[131] According to Genger, "presently" meant at that moment, and did not prevent him from relitigating the consequences of past events settled definitively by the Revised Final Judgment Order. The implication of this, in Genger's view, is that Genger retains the right to relitigate the ownership of the Sagi Trust Shares.[132] I have rejected this argument, as it would make a mockery of the finality of this court's and our Supreme Court's decisions.[133] After I rejected this argument, Genger offered to stipulate that the word "presently" does no work in the Revised Final Judgment Order,[134] but he nevertheless stressed it twice in his brief in opposition in this motion.[135] I reject this argument again. In any case, Genger has only claimed that the Trump Group's ownership of its original holding in Trans-Resources and the Sagi Trust Shares is ephemeral, not that its right to buy the Genger and Orly Trust Shares is likewise temporary.

Finally, as to the fourth prong of the test, I have explained why my resolution of the three issues I have identified was essential to the ruling. First, these issues were essential to the question of who owned, and could vote, the Sagi Trust Shares—which was central to the § 225 action. If the Trump Group did not have the right to buy these shares, it would not have been able to vote them or designate a majority of the Trans-Resources board.

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[129] *Id.* at 201.

[130] Rev. Final J. Order ¶ 12 ("As a result [of the violation of the Stockholders Agreement], the transfers were void, the purportedly transferred shares continued at all times to be owned of record by TPR, and Investors and Glenclova had the right under Section 3.2 of the Stockholders Agreement to buy all of the shares purportedly transferred by TPR.").

[131] Tr. of Oral Arg. 81:4-19 (Aug. 30, 2012).

[132] *See* Def's. Opp'n to Pls.' Second Mot. To Reopen Case 2-3 (Sept. 25, 2012).

[133] Tr. of Oral Arg. 81:15-82:3, 101:19-102:2 (Aug. 30, 2012).

[134] Def's. Opp'n to Pls.' Second Mot. To Reopen Case 2-3 (Sept. 25, 2012) ("Arie Genger hereby offers to stipulate that the inclusion of the word 'presently' does not change the meaning of the order as compared to its meaning excluding the word 'presently,' without prejudice to his ability otherwise to prosecute his remaining claims, in whatever court or courts ultimately hear them.").

[135] Genger Br. in Opp'n 17, 18.

Furthermore, the resolution of these issues was also essential to the question of who could vote the Genger and the Orly Trust Shares. It was necessary to find that the 2004 transfers were void, and that the shares reverted to TPR, to determine that TPR had the right to vote the Genger and Orly Trust Shares. The Supreme Court upheld this finding.[136] The Supreme Court also observed that the blocks of shares transferred out of TPR were identically situated: just as the Trump Group had the right to buy the Sagi Trust Shares, because these shares were transferred in violation of the Stockholders Agreement, the Trump Group also had the right to buy the improperly transferred Genger and Orly Trust Shares.[137] Therefore, the fourth prong of the Supreme Court's issue preclusion test is satisfied.

Accordingly, the issues that were already decided by this court and the Supreme Court—that Genger wrongly transferred the Trans-Resources shares from TPR, that these shares reverted to TPR, and that the Trump Group has the right to purchase them—have preclusive effect in this action.[138]

2. Genger May Not Avoid The Preclusive Effects Of The Prior Judgments By Arguing That He Was Held To A Higher Standard Of Proof

As I have noted, Genger's burden of proof in the prior litigation was raised from the preponderance standard to the "clear and convincing" standard, as part of the sanctions he received in the contempt action for despoiling evidence. He argued to the New York Supreme Court that, because he bore a higher burden of proof in the prior Delaware action than in the New York Action, the Delaware action should not have issue preclusive effect.[139] The New York court rejected that argument.[140]

In his brief to this court, Genger appears to waive that argument.[141] But, because Genger's waiver is ambiguously phrased,[142] I say why the

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[136] Supr. Ct. Op. 201 (holding that this court's determination "that TPR was the record owner [of] and entitled to vote" the Genger and Orly Trust Shares "pose[d] no problem").

[137] *Id.* at 199 (rejecting the contention that "the Trump Group's right to buy, and TPR's right to sell, the Genger Shares and the Orly Trust Shares were 'collateral' issues").

[138] *See Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *8 (Del. Ch. Aug. 25, 1997) ("[F]indings made in a § 225 action may be accorded collateral estoppel effect where the relevant criteria are otherwise satisfied . . . .").

[139] N.Y. 2013 Op. 10.

[140] *Id.* 13-14.

[141] Def's. Br. in Opp'n 22 ("Collateral estoppel does not determine the beneficial ownership of the Genger Shares not because of the standard by which this Court decided beneficial ownership, but because this Court's decisions as to beneficial ownership were reversed.").

heightened burden of proof that Genger bore in the prior action does not make any difference to this case.

Although it is true that relitigation of an issue may be precluded if "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action," this doctrine has no application in the circumstances here.[143] As the New York Supreme Court said: "[T]he Chancery Court imposed on Arie a higher burden of proof as a sanction for spoliating evidence and contempt of court. To permit him to relitigate his claims here would render the sanction nugatory."[144] Genger's own conduct is what changed the preponderance standard, which was the preexisting standard. The cure for his taint of the evidentiary record was to elevate the burden of persuasion, because he had made it impossible for the Trump Group to have a fair chance to litigate on a trustworthy evidentiary record.[145] It would defeat the equitable nature of the doctrine of issue preclusion if Genger, having been held to a higher burden of proof because of his contempt, was able to *benefit* from this higher burden later by using it to deny preclusive effect to the prior judgment.[146]

This reasoning has been endorsed by the United States Court of Appeals for the Third Circuit. In *Wolstein v. Docteroff*, the court found that a default judgment for damages in a fraud action that had been imposed on a defendant as a sanction for his bad-faith refusal to comply with discovery requests precluded the defendant from arguing, in a later bankruptcy proceeding, that the debt was not the result of fraud (and was thus dischargeable).[147] The court "d[id] not hesitate" in holding that the sanction on the defendant had preclusive effect, and noted that "[t]o hold otherwise would encourage behavior similar to [the defendant's] and give litigants who abuse the processes and dignity of the court an undeserved second bite at the apple."[148] The logic of *Docteroff* applies to this case: Genger cannot avoid

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[142] *Id.* at 21-22 ("There is ample authority that a party who fails to prove something by clear and convincing evidence, for example, is not collaterally estopped from attempting to prove it by a preponderance of the evidence. . . . The parties dispute whether those cases ought to apply where, as here, the heightened burden of proof derives not from the substantive legal claim but from a contempt sanction.").

[143] Restatement (Second) of Judgments § 28(4) (1982).

[144] N.Y. 2013 Op. 14.

[145] *See* Dec. 2009 Op. *19 (stating that the contempt sanction would "deprive Genger of the advantages of any evidentiary gaps that his own misbehavior might have . . . caused").

[146] *See, e.g., PenneCom B.V. v. Merrill Lynch & Co.*, 372 F.3d 488, 493 (2d Cir. 2004) ("[C]ollateral estoppel is an equitable doctrine . . . ."); *Nations v. Sun Oil Co. (Del.)*, 705 F.2d 742, 744 (5th Cir. 1983) (same).

[147] *Wolstein v. Docteroff (In re Docteroff)*, 133 F.3d 210 (3d Cir. 1997).

[148] *Id.* at 215.

the preclusive effect of the prior rulings simply because he was given a more lenient contempt sanction than a default judgment.[149] Therefore, Genger is precluded from relitigating the issues that were decided in the previous litigation.

3. Genger Is Not Entitled To Relitigate The Prior Action

The doctrine of issue preclusion "is designed to provide repose and put a definite end to litigation."[150] Therefore, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."[151]

Accordingly, Genger may not now try to relitigate the 2004 transfers, or the Trump Group's right to purchase the Trans-Resources shares transferred from TPR. Genger himself acknowledges that he is not entitled to relitigate the transfers if my prior rulings are given preclusive effect.[152] Therefore, I now move on to the only remaining question in the case, which is whether the Trump Group has in fact exercised its right to purchase the Genger Shares.

B. The Trump Group Has Purchased The Genger Shares From TPR

Under Court of Chancery Rule 56(e), a party may support its motion for summary judgment with an affidavit "made on personal knowledge" and

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[149] Dec. 2009 Op. 19 (declining to grant a default judgment against Genger). Other courts have applied the same reasoning as *Docteroff*. *See, e.g.*, *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1261-71 (11th Cir. 2011) (applying Georgia law, and granting preclusive effect to a state court's striking of arbitration defenses as a sanction for "repeated and flagrant discovery violations"); *Bush v. Balfour Beatty Bah., Ltd. (In re Bush)*, 62 F.3d 1319, 1323-25 (11th Cir. 1995) (noting that the "general rule" is that default judgments are not given issue preclusive effect, but holding that it was not an abuse of discretion for a trial court to give preclusive effect to a default judgment granted against the defendant because of the defendant's abuse of the discovery process).

In any event, I found in my post-trial decision that Genger would not have prevailed on the question of whether TPR had given proper notice to the Trump Group under the Stockholders Agreement "even if [the Trump Group] had the burden to show that they had not been given proper notice." July Op. 15. And Genger himself, in his briefing to the Supreme Court, represented that this court "stated in its July and August opinions that it would not have found in favor of Arie under any burden of proof." Corrected Appellant's Op. Br. 33, No. 592, 2010 (Del. Nov. 16, 2010).

[150] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 (Del. 1991) (citation omitted).

[151] *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted).

[152] Genger Br. in Opp'n 25 ("The Trumps Are Not Entitled To Summary Judgment Absent Preclusion").

"set[ting] forth such facts as would be admissible in evidence."[153] The party opposing summary judgment may not merely deny the facts in the affidavit, but "by affidavits or . . . otherwise" must "set forth specific facts showing that there is a genuine issue for trial."[154] If the opposing party cannot provide an affidavit contesting the facts set forth in the moving party's affidavit, it may, under Rule 56(f), furnish an affidavit showing why discovery is required.[155]

The Trump Group has provided an affidavit from Mark Hirsch, an officer of Trans-Resources, attesting that the Trump Group has exercised its rights to buy the Genger Shares under its Side Letter Agreement with TPR, and that it has placed the funds for the shares in escrow.[156] Genger has not challenged this with an affidavit of his own. Instead, counsel for Genger has submitted an affidavit under Rule 56(f) asserting that more discovery is required into certain factual issues.

But, Genger's counsel's Rule 56(f) affidavit does not actually challenge the fact that the Trump Group has exercised its rights to purchase the Genger Shares by placing the money for those shares into escrow. Instead, Genger's counsel raises a variety of theories as to why the purchase was improper. None of these theories sets forth any reason to believe that there is a "genuine issue for trial" as to the purchase of the Genger Shares. Rather, the theories in the affidavit are an attempt to relitigate the issues that are precluded by my earlier decisions. Nevertheless, in the interests of completeness, I now show in more detail why Genger's arguments to avoid summary judgment, including those in his counsel's affidavit, are not effective.

C. Genger's Arguments Cannot Defeat Summary Judgment

I first discuss the arguments that Genger puts forward, through his counsel's affidavit, in an attempt to raise a triable issue of fact to defeat summary judgment. Then, I consider his new argument that TPR did not originally have an economic ownership interest in Trans-Resources' stock.

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[153] Del. Ct. Ch. R. 56(e).
[154] *Id.*
[155] *Id.* 56(f).
[156] Hirsch Aff. ¶¶ 4-5, 7, C.A. No. 6697-CS (Nov. 12, 2012).

1. The Theories In Genger's Counsel's Affidavit Do Not Set Forth Any Triable Issues Of Fact

In his affidavit, counsel for Genger asserts, on personal knowledge, that there are issues of fact that require discovery as to: (i) whether TPR was permitted to sell the Genger shares to the Trump Group;[157] (ii) whether Sagi breached his fiduciary and contractual duties in selling his shares;[158] (iii) whether the Trump Group was complicit in such a breach;[159] (iv) whether TPR sold the Genger Shares at an unfairly low price;[160] (v) whether the Trump Group improperly bought the Genger Shares outside of the Stockholders Agreement;[161] and (vi) whether the Trump Group lied to this court about its negotiations with Bank Hapoalim to refinance Trans-Resources.[162]

As to Genger's first theory, I rejected Genger's argument that the alleged need to reform his divorce settlement should have any impact on this case, and the New York Supreme Court agreed.[163] The Trump Group has also pointed to evidence demonstrating as a matter of fact that even without the 2004 transfers, Genger's marriage settlement would not be void for lack of consideration, and thus would not be annulled entirely under New York law.[164]

Genger's second and third theories—the claims that Sagi has breached his fiduciary and contractual duties, and that the Trump Group is complicit in this breach—are also irrelevant to this action. Sagi was not a party to the divorce agreement, and counsel for Genger has not pointed to any other

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[157] Lamb Aff. ¶ 12(a).

[158] *Id.* ¶ 12(b).

[159] *Id.* ¶ 12(c).

[160] *Id.* ¶ 12(d).

[161] *Id.* ¶ 12(e).

[162] *Id.* ¶¶ 13-16.

[163] *See* July 2010 Op. *18 ("Genger only has himself to blame for whatever mess his decision to make the 2004 Transfers has caused for his divorce settlement. . . . [I]t is not the Trump Group's problem . . . ."); N.Y. 2013 Op. 16 ("[A]s Trump Group was not a party to the divorce stipulation, Arie's and Dalia's alleged 'mutual mistake' in effecting the 2004 Transfers is immaterial and may not be used as a defense in Arie's dispute with Trump Group. Moreover, Arie seeks to undo the Delaware courts' adverse findings against him and Trump Group's right to buy the 'invalidly transferred shares,' notwithstanding that they were transferred as a result of his misrepresentation in the divorce stipulation . . . . In any event, any equitable or contractual right in favor of Arie to reform the divorce stipulation does not override the pre-existing contractual right of Trump Group to purchase the invalidly transferred shares . . . .").

[164] *See* MSA art. II § 2 (describing property Genger received under the divorce agreement); *see also Apfel v. Prudential-Bache Secs. Inc.*, 600 N.Y.S.2d 433, 435 (1993) (holding that courts will not avoid a contract on grounds of inadequacy of consideration alone).

contract that Sagi may have breached.[165] The New York Supreme Court dismissed Genger's claim against the Sagi Trust and TPR for breach of contract, and also his claim against Sagi, the Sagi Trust, and the trustee of the Sagi Trust for aiding and abetting tortious interference with contract.[166] As I stated in my August 2010 opinion, it may be that Genger and Orly have a claim against the TPR and Sagi for some sort of breach of an implied equitable duty in the way in which the proceeds from the sale of the TPR's stake in Trans-Resources were allocated.[167] But, this has nothing to do with the question of whether the 2004 transfers were invalid, and whether the Trump Group had the right to purchase the shares from TPR.[168] The New York Supreme Court agreed with this analysis.[169] Genger has not disputed that he ceded control of TPR to Dalia in his divorce settlement, that Dalia therefore had the right to cede TPR to Sagi, and that Sagi thereafter had the right to, and continues to, control TPR.[170] Genger is not a stockholder, officer, or director of TPR. He concedes that TPR is directed and controlled by Sagi. Genger has thus raised no triable issue of fact over TPR's actual or apparent authority to sell Trans-Resources' stock to the Trump Group.

The fourth issue, *i.e.* the adequacy of the price paid, is related to the second and third issues. As I have said, Genger may have a claim a breach of fiduciary duty against TPR and Sagi[171]. The New York Supreme Court also found that a claim for unjust enrichment may lie against the Trump Group.[172] But, that claim does not affect the validity of the Trump Group's purchase of Trans-Resources stock from TPR, and ownership of that stock.

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[165] *See* MSA pmbl.; Lamb Aff. ¶ 12(b).

[166] N.Y. 2013 Op. 29-31.

[167] Aug. 2010 Op. *3 ("[I]t may well be that the bargain that TPR—a company that Arie Genger allowed to pass out of his control—struck poses some equitable problem for TPR. That is, it may be that Genger and Orly Genger have claims against TPR and Sagi Genger over how the price paid by the Trump Group for the Arie and Orly Shares was allocated.").

[168] *Id.*

[169] *E.g.*, N.Y. 2013 Op. 25 (refusing to dismiss a claim of unjust enrichment against Sagi and TPR); *id.* at 28 (refusing to dismiss a claim of breach of fiduciary duty against Sagi).

[170] Genger has disputed Sagi's control of TPR in the New York action only by seeking to have his eight-year-old divorce reformed. That claim was rejected by the New York Supreme Court. *See* N.Y. 2013 Op. 34 (dismissing Genger's argument that his divorce should be reformed so that Dalia was not ceded 51% of TPR). In the previous Delaware litigation, Genger cast doubt on Sagi's right to control TPR, but did not seriously challenge this point. *See* Def's. Pre-Tr. Br. 3 (Dec. 3, 2009) ("If the transfer of shares to the Sagi Trust in October 2004 is void, then so too must be the transfer to Mr. Genger's ex-wife, Dalia Genger, of TPR; otherwise, Sagi Genger, who now controls TPR, would obtain direct control over the TRI shares returned to TPR—the very result that voiding the transfer to his trust was intended to prevent."); *see also* Def's. Post-Tr. Reply Br. 1 (Feb. 5, 2010) (same).

[171] Aug. 2010 Op. *3.

[172] N.Y. 2013 Op. 19.

Genger's fifth theory is that TPR did not have the right to sell the Genger Shares outside of the Stockholder Agreement.[173] The Trump Group bought the Genger Shares under the Side Letter Agreement. Genger therefore argues that the Trump Group has not purchased the Genger Shares in accordance with the Revised Final Judgment Order, which provided that the Trump Group "had the right under Section 3.2 of the Stockholders Agreement to buy all of the shares purportedly transferred by TPR."[174] Genger's argument fails for two reasons.

First, in both the July and the August opinions, I found that the Trump Group was permitted to negotiate, with TPR, its rights under § 3.2 of the Stockholders Agreement.[175] In the August opinion, I held specifically that the Side Letter Agreement constituted a compromise of the Trump Group's rights under § 3.2 of the Stockholders Agreement.[176] The Supreme Court rejected Genger's assertion that this court lacked jurisdiction to make such a holding.[177] Therefore, because the Revised Final Judgment Order stated that the Trump Group had the right to buy the Genger shares from TPR under the Stockholders Agreement, it follows that the Trump Group had the right to buy the Genger Shares under the Side Letter Agreement, and that Genger cannot relitigate this issue now.

Second, and equally important, Genger is not permitted to raise TPR's rights under the Stockholders Agreement. Genger is not a party to the Stockholders Agreement.[178] Therefore, he has no standing to make an argument on behalf of TPR, a company in which he owns no shares and holds no office. In my previous rulings, I rejected Genger's attempt to claim rights under the Stockholders Agreement, because Genger never signed on to that Agreement.[179] Therefore, Genger's argument that the Trump Group improperly bought the Genger Shares under the Side Letter Agreement fails.

The final issue that Genger's counsel raises is regrettable. Genger's counsel suggests that the Trump Group may have lied to this court in the prior action about its negotiations with Bank Hapoalim.[180] This powerful and reputationally damaging suggestion is entirely speculative, and relies on an unsworn translation of a supposed indictment in Israel of a former Bank Hapoalim executive in connection with actions that appear to be unrelated to

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[173] Lamb Aff. ¶ 12(e).
[174] Rev. Final J. Order ¶ 12.
[175] July 2010 Op. *17; Aug. 2010 Op. *2-3.
[176] Aug. 2010 Op. *2-3.
[177] Supr. Ct. Op. 199.
[178] *See* SA pmbl.
[179] *See* July 2010 Op. *22 n.147.
[180] Lamb Aff. ¶¶ 13-16.

this case, and unrelated to the Trump Group. Genger's counsel does not suggest a rational basis for his contention that he is "personally familiar" with this indictment, as he swears, and he does nothing to connect the conduct underlying this indictment to Trans-Resources itself, the Trump Group, or the facts of this case.[181] Therefore, Genger cannot rely on it in his attempt to defeat the Trump Group's motion.[182]

2. Genger's Argument That TPR Was A "Custodian" For Trans-Resources Stock Is Untenable

In his briefing, Genger advances the entirely novel argument that, after the Trans-Resources stock reverted to TPR following our Supreme Court's decision in 2011, TPR only became a "custodian" for this stock, and was not an economic owner of the Genger and Orly Trust Shares.[183] Under Genger's logic, TPR cannot have owned the Trans-Resources stock before the transfer if, after it reverted to TPR, TPR was merely a custodian for the stock.

Genger is judicially estopped from making this argument. The doctrine of judicial estoppel "acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding."[184] Genger's argument directly contradicts his position in the prior litigation, in which he argued that TPR had full ownership of the Trans-Resources stock, and not only record ownership.[185] Genger consistently argued to this court that, before 2004, TPR had full control of 52.85% of Trans-Resources. Under the 2004 transfers, according to Genger,

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[181] *Id.* ¶ 1.

[182] *See Geier v. Meade*, 2004 WL 243033, at *8 (Del. Ch. Jan. 30, 2004) ("This Court's Rules require more than . . . speculation to defeat a motion for summary judgment.").

For completeness, I here note an allegation that Genger put forward in his brief, but which his counsel did *not* make in his affidavit. This allegation is that Sagi received the money from the sale of the Genger Shares improperly. Genger Br. in Opp'n 26. The Trump Group's affidavit attests that the money for the Genger Shares was paid into an escrow account, under the terms of the Escrow Agreements. Hirsch Aff. ¶¶ 4-5, C.A. No. 6697-CS (Nov. 12, 2012). Genger does not contradict this with an affidavit or record evidence. And, by making this unsupported suggestion in his brief, Genger has not shown that there is any genuine issue of fact relating to the payment of the funds.

[183] Genger Br. in Opp'n 16.

[184] *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008).

[185] *See, e.g.*, Def's. Pre-Tr. Br. 8 (Dec. 3, 2009) ("Pursuant to the Stockholders Agreement, Mr. Genger continued to control TRI through his majority interest in TPR, which still owned a majority of TRI's outstanding stock."); Def's. Post-Tr. Op. Br. 3 (Jan. 15, 2010) ("[A]t best, the Trumps would have been entitled to purchase only the economic rights associated with the transferred shares . . . .").

the Trans-Resources stock was distributed to Genger, the Sagi Trust, and the Orly Trust, and Genger retained an irrevocable proxy over the Sagi Trust Shares and the Orly Trust Shares.[186] Genger's argument, therefore, was predicated on the fact that TPR had economic, as well as record, ownership of the Trans-Resources shares. And, when he argued that the Sagi Trust did not have the right to sell the Sagi Trust Shares to the Trump Group, Genger raised many arguments, but never claimed that the Sagi Trust and the Orly Trust did not own the economic interest in their respective blocks of shares. In fact, Genger attempted to make an equitable argument out of the fact that the Orly Trust *did* own the economic interest in the Orly Trust Shares.[187] Because the Genger Shares are indistinguishable from the Orly Trust Shares, Genger may not argue now that TPR did not hold the economic interest in the Genger Shares.

Genger's 180° spin is made plain by his main alternative argument in the prior litigation. That argument went like this: "Even if I caused TPR to violate the Stockholders Agreement, and gave the Trump Group the right to buy the wrongfully transferred Trans-Resources stock, the Trump Group could only obtain the economic interest in these shares, because my irrevocable proxy gave me voting control over them."[188] The reason for that prior argument is simple. Genger could not argue that economic rights to the shares did not belong to TPR without committing intentional fraud. Why? Because in both the Stockholders Agreement and his divorce settlement, he said that TPR had full ownership over the Trans-Resources stock. In the Stockholders Agreement, TPR, controlled by Genger, represented and warranted that "TPR, [TR] Investors and Glenclova directly and indirectly own 100% of the outstanding common stock . . . of [Trans-Resources]."[189] The Agreement later specified that "TPR owns 52.85% of the outstanding Shares," with no suggestion that this ownership might not be complete.[190] And, in his divorce agreement, Genger represented that, apart from the Trump Group, TPR, and Bank Hapoalim, no party had any ownership interests in Trans-Resources.[191] Therefore, Genger cannot now argue that

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[186] *E.g.*, Def's. Post-Tr. Op. Br. 47-48 (Jan. 15, 2010) (describing the distribution of the TPR Shares and the functioning of the irrevocable proxies).

[187] *Id.* at 5 ("[O]f all the inequities that would result in this case if Plaintiffs were to have their way, there is probably none greater than if Mr. Genger's daughter, Orly, were to be left disinherited.").

[188] *See* Def's. Post-Tr. Op. Br. 15-23 (Jan. 15, 2010); *see also* Supr. Ct. Op. 196-98 (rejecting Genger's proxy argument).

[189] SA pmbl.

[190] *Id.* § 1.6.

[191] MSA art. II ¶ 9(a).

TPR only had record ownership of its Trans-Resources stock without admitting that, through TPR, he made a misrepresentation in the Stockholders Agreement, and that he made *two* misrepresentations in his divorce agreement.[192] Put bluntly, facing a properly supported summary judgment motion, Genger has not filed an affidavit swearing that his former binding legal representations that TPR had full ownership were false. There is thus no material issue of fact for trial.

* * *

In conclusion, I find that the Trump Group is entitled to summary judgment on the question of whether it has purchased the Genger Shares. The Trump Group is the owner of these shares and may vote them as it sees fit.

IV. TPR Is Not Entitled To Summary Judgment On Its Cross-Motion To Have The Funds Paid For The Genger Shares Released From Escrow

TPR has filed a cross-motion seeking an order requiring the Trump Group to agree to release the escrowed sales proceeds from the Genger Shares. I deny TPR's motion, because it is an attempt unilaterally to modify its bargain with the Trump Group.

The release of the escrow money is governed by the Escrow Agreements and the injunction of the New York Supreme Court. The First Escrow Agreement, entered into in September 2010, provided that the Trump Group would put $5,928,994 of the purchase price for the Genger Shares into escrow—*i.e.*, all but $1.5 million of it.[193] In October 2010, the New York Supreme Court entered a TRO providing that "the $1.5 million that is imminently to be paid by the Trump Entities to TPR pursuant to the purported 2010 TPR Sale of TRI Stock to the Trump Entities be placed in an escrow account."[194] The Trump Group and TPR entered into a Second Escrow Agreement in January 2011, whereby the Trump Group agreed to place the $1.5 million in escrow also.[195]

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[192] Genger's other misrepresentation in his divorce agreement, as noted above, was that he did not need any consents for the 2004 transfers. *See* Supr. Ct. Op. 184.

[193] First Escrow Agreement 2.

[194] Order To Show Cause & TRO, N.Y. Action, at 3 (Oct. 5, 2010).

[195] Second Escrow Agreement 2.

The First Escrow Agreement provides that the Trump Group and TPR may jointly request to have the funds released from escrow.[196] If the Trump Group and TPR do not jointly submit a request to the escrow agent to release the funds, TPR may submit to the escrow agent a written request to disburse the funds, together with "a certified copy of a judgment of the Delaware Supreme Court affirming [this court's Final Judgment] Order in so far as it determined that (a) the 2004 Transfer of the Shares was void and (b) the Purchasers have a contractual right to purchase the Shares under the [Side] Letter Agreement" or other evidence that this court's judgment is final and unappealable.[197]

The Trump Group has refused to agree to the disbursement of the funds in the escrow agreement, and TPR now asks me to issue an order directing that the escrow proceeds be released. TPR ignores the fact that it and the Trump Group bargained for a mechanism by which TPR could obtain the funds without the Trump Group's consent. If this decision is affirmed on appeal, or if Genger chooses not to appeal it, TPR will have the right to get the funds released. It is not hard to see why the Trump Group and TPR struck this bargain: by waiting for the decision to become final and unappealable, the parties avoid the risk that they will have to waste time and money in reversing the disbursement of the escrowed funds if this decision is overturned. TPR has not offered any reason why I should override the parties' bargain simply in order that it may get the proceeds from the Genger Shares more quickly, and I decline to do so.[198]

The Second Escrow Agreement, concerning the $1.5 million, operates differently from the First Escrow Agreement. Under this Agreement, TPR may submit an application to have funds released together with the Trump Group, or on its own.[199] If TPR submits an application on its own, the Trump Group has ten days in which to object to the disbursement.[200] Under this Agreement, any party seeking a disbursement of the escrowed funds must provide a "certification . . . of the Party seeking such disbursement that the NY [Temporary Restraining] Order has been vacated, reversed, dismissed, modified, amended or clarified in such a manner as to permit the Escrow Agent to make such a disbursement."[201]

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[196] First Escrow Agreement § 2(b)(i).

[197] *Id.* § 2(b)(ii), (iv).

[198] *See, e.g., Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *10 (Del. Ch. July 23, 2010) ("Delaware law respects the freedom of parties in commerce to strike bargains and honors and enforces those bargains as plainly written.") (citations omitted).

[199] Second Escrow Agreement § 2(b).

[200] *Id.* § 2(b)(ii).

[201] *Id.* § 2(a).

TPR argues that the injunction entered by the New York Supreme Court will expire by its own terms once this court has determined the beneficial ownership of the Genger Shares, and therefore the escrow agent will be authorized to release the funds.[202] But, there is no need for me to enter an order adjudicating the Trump Group's and TPR's rights. Instead, TPR must follow the mechanism for releasing the proceeds laid out in the contract that it bargained for with the Trump Group. TPR must ask the escrow agent to accept its certification that the New York injunction has expired.

To be sure, the escrow agent, which is the Skadden firm, counsel for the Trump Group, may well demand a formal vacating or modification of the injunction in the New York Supreme Court before it agrees to disburse the funds.[203] And TPR may well be frustrated by having to go to court in New York to request that the injunction be lifted. But, this is the bargain that the parties struck. Again, it is not hard to see why the Trump Group would have wanted the right to ensure that the New York injunction is lifted before the money was disbursed: otherwise it would risk being in contempt of court. TPR has given me no reasons to disturb the parties' bargain. Therefore, TPR's cross-motion for summary judgment is denied.

V. Conclusion

I grant summary judgment in favor of the Trump Group on its claim that it is the owner of the Genger Shares. I deny TPR's motion seeking an order to have the escrowed funds released.

I now add a postscript about the future course of this dispute. Even if Genger chooses not to appeal this ruling, this is not necessarily the end of the litigation between him and the Trump Group in this court. In November, I granted the Trump Group's motion to reopen the prior action and issued an order for Genger to show cause why he should not be held in contempt for flouting the Revised Final Judgment Order.[204] I found that Genger was attempting to relitigate in New York Supreme Court the ownership of the Sagi Trust Shares, which was settled for good in the Revised Final Judgment

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[202] TPR Reply Br. 4-5.

[203] Second Escrow Agreement § 7(b) ("Escrow Agent as Counsel. It is understood and acknowledged that the Escrow Agent is acting as counsel to (i) the Purchasers in connection with matters concerning the Delaware Action and related litigation .... The Escrow Agent's acceptance of its appointment and performance of its duties hereunder shall not be deemed in any way to conflict with its professional obligations to the Purchasers ....").

[204] *T.R. Investors, LLC v. Genger*, 2012 WL 5471062 (Del. Ch. Nov. 9, 2012).

Order.[205] I also noted that Genger had sought an injunction to prevent TPR from voting the Genger and Orly Trust Shares, even though the Revised Final Judgment Order states that TPR is the "record owner" of these shares. Although the New York Supreme Court denied this request, it entered an injunction requiring the Trump Group and TPR to give Genger ten business days' notice of any transactions that "impact" these shares.[206] The effect of this injunction, I observed, was to prevent the Trump Group from managing Trans-Resources as it had the right to under the Revised Final Judgment, and from realizing its wealth-creating potential as a Delaware corporation. The briefing for the Trump Group's contempt motion will be complete in about two months.

With the issuance of this opinion, there are now not one but two judicial decisions adverse to Genger's efforts to relitigate who has majority control of Trans-Resources.[207] This court rarely imposes the powerful sanction of contempt, and never does so with anything but regret.

Even at this late stage, one should not take action to prevent a *rational* end to this protracted struggle. Rather than proceed to decide the contempt motion immediately, I want the parties to confer with their clients, and consider the implications of these *two* judicial rulings. Perhaps, with the aid of learned counsel who bring dispassionate thinking to bear in pursuit of their clients' best interests, the parties can resolve the need for contempt proceedings, and perhaps even the need for further litigation anywhere, at least as between Genger and the Trump Group.

To that end, I will stay any further prosecution of the contempt action for thirty days.[208] At the end of that time, lead Delaware counsel for each of the parties will certify that they and their clients made a good faith effort to resolve the contempt motion. In that process, the court expects the direct involvement of lead counsel. If no accord is reached, I shall then have no option other than to consider the motions. But, at least, the parties will have been given time to attempt to reach a commonsense resolution.

The Trump Group is to submit a conforming order within five days, after approval as to form by the defendants.

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[205] *Id.* at *2.

[206] *Id.* (quoting N.Y. 2011 Op. 15).

[207] *See* N.Y. 2013 Op.

[208] That is, both dates in the Third Revised Stipulated Scheduling Order, entered on February 15, 2013, will be postponed by thirty days. Thus, Genger is now to file his response to the Trump Group's motion on or before March 24. The Trump Group is now to file its reply in support of its motion on or before April 13.