C. Procedural History

On June 22, 2010, Meso commenced this action by filing a complaint (the "Complaint") against Roche charging it with breach of contract as to (1) the Global Consent (Count I) and (2) the Roche License (Count II). Roche promptly moved to dismiss the claims against it for failure to state a claim. For its part, Meso sought to submit Count II to arbitration and to stay further proceedings on that count pending the arbitration panel's decision.

In a Memorandum Opinion dated April 8, 2011,[75] I denied Roche's motion to dismiss and referred the question of whether Count II was arbitrable to a New York arbitration panel (the "Arbitration Panel" or "Panel"). In April and May 2012, the Arbitration Panel heard testimony from eight witnesses over four days. On September 10, the Arbitration Panel concluded that Meso's claim for breach of the Roche License was not arbitrable and that each party should bear its own costs and expenses.

On September 2, 2012, Roche moved for summary judgment in this Court on both counts of the Complaint. After extensive briefing, I heard argument on November 5, 2012. At the argument, I confirmed the Panel's final award and lifted the stay as to Count II. A trial on the merits of both counts is scheduled to begin on February 25, 2013. This Opinion constitutes my ruling on Roche's motion for summary judgment.

D. Parties' Contentions

Roche seeks summary judgment on several independent grounds. First, Roche avers that Count I is barred by the doctrine of laches because it was filed outside the analogous three-year statute of limitations period. Roche also seeks summary judgment on Count I on the bases that: (1) the Global Consent was not intended to govern the assignment of rights contained in the Roche License; and (2), as a matter of law, a reverse triangular merger cannot be an assignment by operation of law. In support of summary judgment on Count II, Roche argues that this Court is bound by the Arbitration Panel's finding that MSD and MST were not, and were not intended to be, parties to the Roche License. Moreover, Roche contends that the plain language of the Roche License and the Meso Consent unambiguously indicate that MSD and MST were not parties to the Roche License, and, therefore, have no standing to sue for breach of it. Finally,

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[75] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438 (Del. Ch. Apr. 8, 2011).

Roche argues that the extrinsic evidence conclusively shows that MSD and MST were not intended to be parties with the right to enforce the Roche License.

Meso disputes all of Roche's contentions and urges denial of Defendants' motion for summary judgment in its entirety. As a threshold matter, Meso contends that Count I accrued within the analogous three-year limitations period, and that, therefore, it is not barred by laches. Roche also argues that summary judgment on Count I is unwarranted because both the plain language of the Global Consent and the extrinsic evidence show that the parties intended the Global Consent to cover IGEN's intellectual property. In regard to Count II, Meso denies that this Court is bound by the Arbitration Panel's determination. Finally, Meso asserts that the Roche License is ambiguous and that there are triable issues of material fact as to whether MSD and MST were parties to the Roche License or had rights to enforce it.

II. ANALYSIS

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[76] In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence are to be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that no material question of fact exists.[77] The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue for trial.[78]

In addition, summary judgment may be denied when the legal question presented needs to be assessed in the "more highly textured factual

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[76] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

[77] *Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008) (citing *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldg. Co.*, 853 A.2d 124, 126 (Del. Ch. 2004)).

[78] Ct. Ch. R. 56(e); *Walker L.L.P.*, 2008 WL 2487256, at *3 (citing *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007)).

setting of a trial"[79] or when the Court "decides that a more thorough development of the record would clarify the law or its application."[80]

When an issue presented for summary judgment is one of contractual interpretation, "the role of a court is to effectuate the parties' intent,"[81] taking the contract as a whole and "giving effect to each and every term."[82] If the language of the agreement is "clear and unambiguous," the reviewing court finds the parties' intent in the ordinary and usual meaning of the words they have chosen.[83] If, however, "the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity. Then the interpreting court must look beyond the language of the contract to ascertain the parties' intentions"[84] from extrinsic evidence, such as "overt statements and acts of the parties, the business context, prior dealings between the parties, and business custom and usage in the industry."[85] Determining intent from extrinsic evidence "may be accomplished by the summary judgment procedure in certain cases where the moving party's record is not *prima facie* rebutted so as to create issues of material fact."[86] Generally, on a motion for summary judgment, the moving party must show there is no genuine issue of material fact, and "summary judgment may not be awarded if the [disputed contract] language

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[79] *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1239 n.3 (Del. Ch. 1987) (citing *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948)).

[80] *Tunnell v. Stokley*, 2006 WL 452780, at *2 (Del. Ch. Feb. 15, 2006) (quoting *Cooke v. Oolie*, 2000 WL 710199, at *11 (Del. Ch. May 24, 2000)).

[81] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

[82] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *8 (Del. Ch. Apr. 8, 2011); *see also GMC Capital Invs., LLC v. Athenian Venture P'rs I, L.P.*, 36 A.3d 776, 779 (Del. 2012) ("The meaning inferred from a particular provision cannot control the meaning of the entire agreement if such an inference conflicts with the agreement's overall scheme or plan.").

[83] *Lorillard Tobacco Co.*, 903 A.2d at 739 (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195–96 (Del. 1992)); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007), *aff'd*, 985 A.2d 391 (Del. 2009) (TABLE).

[84] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) (footnotes omitted); *see also Hynansky v. Vietri*, 2003 WL 21976031, at *2 n.14 (Del. Ch. Aug. 7, 2003) (citing *Eagle Indus.*, 702 A.2d at 1232) (considering extrinsic evidence on motion for summary judgment).

[85] *Concord Steel, Inc. v. Wilm. Steel Processing Co.*, 2009 WL 3161643, at *6 (Del. Ch. Sept. 30, 2009) (internal quotation marks and footnote omitted), *aff'd*, 7 A.3d 486 (Del. 2010) (TABLE).

[86] *Eagle Indus.*, 702 A.2d at 1233.

is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation."[87]

A. Count I: Breach of Section 5.08 of the Global License

In Count I, Meso alleges that Roche breached Section 5.08 of the Global Consent by effecting an assignment of BioVeris's rights and obligations by *operation of law or otherwise* without the written consent of MSD and MST. Section 5.08 states in pertinent part:

> Neither this Agreement nor any of the rights, interests or obligations *under this Agreement* shall be assigned, in whole or in part, *by operation of law or otherwise* by any of the parties without the prior written consent of the other parties; provided, however, that the parties acknowledge and agree that the conversion of [BioVeris] in accordance with Section 2.01 of the Restructuring Agreement and the continuation of [BioVeris] as a result thereof shall be deemed not to be an assignment and shall not require any consent of any party . . . .[88]

Defendants seek summary judgment in their favor on three grounds: (1) Count I is barred by the doctrine of laches; (2) BioVeris's rights, interests, or obligations relating to its intellectual property are not subject to Section 5.08; and (3) Roche's acquisition of BioVeris through a reverse triangular merger was not an assignment by operation of law. I address each of these points in turn.

1. Is Count I barred by the doctrine of laches?

Roche asserts that Count I is time-barred by Delaware's applicable three-year period of limitations. "[I]n a court of equity, the applicable defense for untimely commencement of an action for an equitable claim is laches, rather than the statute of limitations."[89] Laches "operates to prevent the enforcement of a claim in equity if the plaintiff delayed unreasonably in asserting the claim, thereby causing the defendants to change their position

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[87] *GMC Capital Invs., LLC*, 36 A.3d at 784.

[88] Ross Aff. Ex. 28 § 5.08 (emphasis added).

[89] *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *13 (Del. Ch. Dec. 23, 2008); *see also Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009) (citations omitted).

to their detriment."[90] This doctrine "is rooted in the maxim that equity aids the vigilant, not those who slumber on their rights."[91] There are three generally accepted elements to the equitable defense of laches: "(1) plaintiff's knowledge that she has a basis for legal action; (2) plaintiff's unreasonable delay in bringing a lawsuit; and (3) identifiable prejudice suffered by the defendant as a result of the plaintiff's unreasonable delay."[92]

The Court of Chancery generally begins its laches analysis by applying the analogous legal statute of limitations.[93] The time fixed by the statute of limitations is deemed to create a presumptive time period for purposes of the Court's application of laches absent circumstances that would make the imposition of the statutory time bar unjust.[94] In this case, the analogous statute of limitations for a claim of breach of contract is three years "from the accruing of the cause of such action."[95]

Under Count I, Meso alleges that Roche violated Section 5.08 of the Global Consent by assigning BioVeris's rights and obligations without the written consent of Meso.[96] In that regard, Defendants contend that Plaintiffs' cause of action accrued on April 4, 2007, when Roche Holding, Lili Acquisition, and BioVeris entered into a *binding* Agreement and Plan of Merger (the "BioVeris-Lili Merger Agreement"). Yet, Meso did not file their Complaint until June 22, 2010—over three years after April 4, 2007. Thus, according to Roche, Meso's claim is barred by laches. Meso disputes that conclusion, arguing that the cause of action did not accrue until all contingencies in the BioVeris-Lili Merger Agreement had been fulfilled, *i.e.*, on June 26, 2007, the date the merger closed.

"[A] cause of action 'accrues' under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of that cause of action."[97] "The 'wrongful act' is a general concept that varies depending on the nature of the claim at issue. For breach of contract claims, the wrongful act is the breach, and the cause of action accrues at the time of breach."[98] Breach is defined as

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[90] *Scureman v. Judge*, 626 A.2d 5, 13 (Del. Ch. 1992), *aff'd sub nom. Wilm. Trust Co. v. Judge*, 628 A.2d 85 (Del. 1993).

[91] *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982).

[92] *See Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *7 (Del. Ch. Mar. 22, 2004).

[93] *See, e.g.*, *Adams*, 452 A.2d at 157; *Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989).

[94] *See U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993).

[95] 10 *Del. C.* § 8106.

[96] *See* Compl. ¶ 66.

[97] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).

[98] *Whittington v. Dragon Gp. LLC.*, 2008 WL 4419075, at *5 (Del. Ch. June 6, 2008)

a "[f]ailure, without legal excuse, to perform any promise which forms the whole or part of a contract."[99] To determine the accrual date, therefore, courts must examine the language of the contract.

Here, Section 5.08 of the Global Consent provides that "[n]either this Agreement nor any of the rights, interests or obligations under this Agreement shall be assigned, in whole or in part, by operation of law or otherwise by any of the parties without the prior written consent of the other parties."[100] Because the BioVeris Merger did not close until June 26, 2007, the alleged assignment that forms the basis for the claimed breach did not occur until that date.[101] As a result, Roche's laches theory must rely on the BioVeris-Lili Merger Agreement entered into on April 4, 2007 amounting to an anticipatory breach or repudiation of the Global Consent.

"[R]epudiation is . . . a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach."[102]

(citing *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005)).

[99] *See L.H. v. C.H.*, 2000 WL 33200939, at *1 (Del. Fam. Nov. 28, 2000) (citing Black's Law Dictionary 130 (6th ed. 1991)); *see also* Black's Law Dictionary 200 (8th ed. 2004) (defining "breach of contract" as a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance").

[100] Ross Aff. Ex. 28 § 5.08.

[101] Section 1.1 of the BioVeris-Lili Merger Agreement states that "[u]pon the terms and subject to the conditions set forth in this Agreement, and in accordance with the [Delaware General Corporation Law ("DGCL")], at the Effective Time (as defined herein), [Lili Acquisition] shall be merged with and into [BioVeris], and the separate corporate existence of [Lili Acquisition] shall thereupon cease." Brown Aff. Ex. 4 § 1.1. The BioVeris-Lili Merger Agreement further provides:

> Effective Time. Subject to the provisions of this Agreement, as soon as practicable on the Closing Date, the parties shall file with the Secretary of State of the State of Delaware a certificate of merger executed in accordance with, and in such form as is required by, the relevant provisions of the DGCL . . . . The Merger shall become effective upon the filing of the Certificate of Merger or at such later time as is agreed to by the parties hereto and specified in the Certificate of Merger.

Id. § 1.3. Both parties agree that the merger "closed" on June 26, 2007. At this point, I do not have the Certificate of Merger in the evidentiary record. Drawing reasonable inferences in the light most favorable to the nonmoving party, Meso, I conclude for purposes of summary judgment that the merger did not become effective until June 26, 2007. Therefore, the alleged assignment did not occur until that date.

[102] *Restatement (Second) of Contracts* § 250 (1981); *see also* 1A *Corpus Juris Secundum* § 302 (2007) ("A cause of action arising out of contractual relations between the parties accrues as soon as the contract or agreement is breached, irrespective of any knowledge on the part of plaintiff or of any actual injury occasioned him or her. Ordinarily, the time for performance of the agreement must have expired, but where the agreement has been renounced or repudiated, or a party has placed performance beyond his or her power, intentionally or otherwise, there is such a breach as will at once give rise to a cause of action.") (citations omitted); 1 C. Corman, *Limitation of Actions* § 7.2.1, p. 488 (1991) ("An *anticipatory* breach of contract occurs when an obligor repudiates a duty before the time for the obligor's performance, and the aggrieved party elects, before completion of his or her performance, to consider the obligor's repudiation to be a present breach.").

Viewed in this light, Roche arguably effected a repudiation of the Global Consent on April 4, 2007, when it entered into a binding merger agreement obligating its board of directors to recommend to its stockholders approval and adoption of that agreement.

However, "[t]he time of accrual . . . depends on whether the injured party chooses to treat the . . . repudiation as a present breach."[103] If the party "[e]lects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from [the] time of performance to the date of such election."[104] If, however, the injured party instead opts to await performance, the "cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation."[105] The rationale behind this rule is that the "failure to regard repudiation as final is advantageous to the wrongdoer, since he is thus given an enlarged opportunity of nullifying the effect of the repudiation . . . and therefore should not work prejudice to the injured party in the calculation of the period of the Statute of Limitations."[106]

In this case, Roche could have nullified the effect of its repudiation by obtaining Meso's consent before the June 26, 2007 closing date when the alleged assignment by operation of law took place. But, Meso should not be prejudiced by the fact that Roche had an opportunity to nullify the effect of their repudiation. Moreover, under the record currently before me, I cannot find as a matter of undisputed fact that Meso objectively manifested an intent to treat the repudiation as a breach. Thus, for purposes of summary judgment, I assume that the cause of action did not accrue until June 26, 2007.

Using June 26, 2007 as the accrual date, Meso asserted its claims within the three-year limitations period. The "analogous statute of limitations provides a presumption of what is reasonable."[107] Although Roche alleges that summary judgment should be granted based on laches

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[103] *See* 1 C. Corman, *Limitation of Actions* § 7.2.1, p. 488 (1991); *see also Franconia Assocs. v. United States*, 536 U.S. 129, 143–44 (2002); *Restatement (First) of Contracts* § 322 cmt. a (1932) ("The party injured is given an election whether he will regard an anticipatory repudiation as final."). *But see Phoenix Fin. Corp. v. Iowa-Wisconsin Bridge Co.*, 41 Del. (2 Terry) 130, 141–42 (Super. Ct. 1940) ("We think the statute of limitations would not begin to run until some disavowal of the contract on the part of the defendant, or of some repudiation or dishonoring of the tickets by the defendant or someone in authority.").

[104] *See* 1 C. Corman, *Limitation of Actions* § 7.2.1, pp. 488–89 (1991).

[105] *Id.* at p. 488.

[106] *Restatement (First) of Contracts* § 322 cmt. a (1932).

[107] *See In re Transamerica Airlines, Inc.*, 2007 WL 1555734, at *15 (Del. Ch. May 25, 2007).

because Meso's delay was unreasonable and prejudicial, Delaware courts presume, in the absence of exceptional circumstances, that an action filed within the analogous limitations period was neither the product of unreasonable delay nor the cause of undue prejudice.[108] "Whether or not [the elements of laches] exist is generally determined by a fact-based inquiry, and therefore summary judgment is rarely granted on a laches defense."[109] Based on the truncated record available at this point, therefore, I deny Roche's motion for summary judgment to the effect that Count I is barred by laches.

2. Are rights, interests, or obligations relating to BioVeris's intellectual property subject to Section 5.08 of the Global Consent?

a. Does the plain language of the Global Consent make clear that Section 5.08 is limited to the assignment of rights, interests, or obligations created by the Global Consent itself?

Roche argues that the plain language of the Global Consent indicates that Section 5.08 covers only "rights, interests or obligations" created by the Global Consent itself. Meso, on the other hand, avers that Section 5.08 was intended to cover the rights and interests in IGEN's intellectual property.

Roche advances three arguments in support of its interpretation of Section 5.08. First, Roche argues that the term "Agreement" is defined as "the Global Consent and Agreement," and, therefore, the requirement in Section 5.08 for consent in order to assign rights, interests, or obligations "under this Agreement" means under the Global Consent itself. Roche also points out that the eleven other Transaction Agreements use the term "this Agreement" to refer to the rights created by each specific agreement. Second, Defendants contend that if Section 5.08 had been intended to govern the assignments of rights created under the other Transaction Agreements, it would have been unnecessary to include the non-assignment provisions contained in those other agreements. Finally, Defendants argue

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[108] *Whittington v. Dragon Gp., LLC*, 991 A.2d 1, 9 (Del. 2009); *see also Reid v. Spazio*, 970 A.2d 176, 183 (Del. 2009); *Bovay v. H. M. Byllesby & Co.*, 12 A.2d 178, 190 (Del. 1940) ("Statutes of limitations, strictly as such, are not binding on Courts of Equity, but, in the absence of peculiar circumstances, clearly making the application of any such rule inequitable and unjust, it seems that the time fixed by the analogous statutory provision, barring a right of action in a Court of Law, will ordinarily be followed in determining whether the complainant has been guilty of laches."); *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 2012 WL 3201139, at *15 (Del. Ch. Aug. 7, 2012).

[109] *See Tafeen v. Homestore, Inc.*, 2004 WL 556733, at *8 (Del. Ch. Mar. 16, 2004) (internal quotation marks and citations omitted).

that it would be unreasonable to construe the use of "boilerplate" anti-assignment language to have created the broad blocking rights Meso now claims.

In opposition, Meso contends that "*under* this Agreement" has a broad meaning that would incorporate rights, interests, or obligations "within the grouping or designation of" the Global Consent. According to Meso, the proviso, which carves out the transfer of rights from the private LLC BioVeris to the public corporation BioVeris, shows that Roche's narrow construction of Section 5.08 is unreasonable because the rights transferred during the conversion were not created by the Global Consent itself. Meso also argues that the Global Consent was intended to be "global" in scope. Finally, Meso asserts that Roche's disparagement of Section 5.08 as "boilerplate" is irrelevant because boilerplate terms are both valid and enforceable.

Taking the contract as a whole, and giving effect to each and every term, the overall structure of the Global Consent amply supports construing the "rights, interests or obligations" referenced in Section 5.08 as encompassing the rights and interests in IGEN's intellectual property. While Roche argues that "rights, interests or obligations" refer to "rights, interests or obligations" created by the Global Consent itself,[110] Roche has not identified persuasively what those rights, interests, or obligations might be. At the motion to dismiss stage, however, Roche argued that "[t]he 'right' created under [Section 3.02(b) of the Global Consent] was the right to transfer those interests—not the interests themselves."[111] On the pending motion for summary judgment, Roche asserted that the non-assignment provision's "effect was limited to the four corners of [the Global Consent] and had no application to Roche's acquisition of BioVeris in 2007."[112] In other words, the only interpretation proffered by Roche is that Section 5.08 was intended to prevent the assignment of the right to transfer the interests in Article 3 of the Global Consent. Such a reading does not comport with the *plural* reference to rights, interests, and obligations.[113] Moreover, Roche's reading of the Global Consent would make the reference to interests and obligations mere surplusage in contravention of well-recognized contract

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[110] Defs.' Opening Br. 22.
[111] Br. in Supp. of Defs.' Mot. to Dismiss 18.
[112] Defs.' Opening Br. 30–31.
[113] Ross Aff. Ex. 29 § 5.08.

construction principles. For these reasons, I am not convinced that Roche's interpretation of Section 5.08 is reasonable.[114]

More likely, "rights, interests or obligations" refers to the "right, title and interest in and to any and all intellectual property and other proprietary and confidential information or materials owned by [IGEN] . . . to which MSD [or] MST . . . has any direct or indirect rights or benefits . . . pursuant to the MSD Agreements."[115] In simpler terms, MSD and MST consented in the Global Consent to the transfer of IGEN's intellectual property to which MSD or MST at least arguably had an interest. In that context, I consider Meso's reading of Section 5.08 to be reasonable. That is, one reasonable interpretation of the non-assignment provision is that it was intended to prohibit further assignment of those rights and interests, including IGEN's rights and interests in the Joint Venture Agreement and MSD License, by operation of law or otherwise, without the written consent of the other parties.

To the extent that rights and interests in intellectual property were exclusively licensed to MSD through the MSD License, for example, those rights and interests would be included in Section 5.08's prohibition. In any event, however, to make its claim in Count I, Meso still would have to prove at trial that the merger of Lili Acquisition into BioVeris involved an assignment of rights to which MSD and MST had a direct or indirect interest under the MSD Agreements.

3. Did the BioVeris Merger constitute an assignment "by operation of law or otherwise" under Section 5.08?

Roche argues that even if this Court concludes that Section 5.08 applies to the assignment of rights, interests, or obligations relating to BioVeris's intellectual property, Roche still is entitled to summary judgment on Count I because no assignment by operation of law or otherwise occurred when Roche acquired BioVeris through a reverse triangular merger. Specifically, Roche asserts that BioVeris remained intact as the surviving entity of the merger, and, therefore, BioVeris did not assign anything. Meso, on the other hand, contends that mergers generally, including reverse triangular mergers, can result in assignments by operation of law.

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[114] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010) ("An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.").

[115] *See* Ross Aff. Ex. 29 § 3.02(e); *see also id.* § 3.02(b).

At the motion to dismiss stage, I noted that Section 5.08 does not require Meso's consent for changes in ownership, but prohibits, absent consent from MSD and MST, an assignment of BioVeris's rights and interests *by operation of law or otherwise.*[116] I concluded that no Delaware case squarely had addressed whether a reverse triangular merger could ever be viewed as an assignment by operation of law.[117] I further stated that "Plaintiffs plausibly argue that 'by operation of law' was intended to cover mergers that effectively operated like an assignment, even if it might not apply to mergers merely involving changes of control."[118]

To interpret an anti-assignment provision, a court "look[s] to the language of the agreement, read as a whole, in an effort to discern the parties' collective intent."[119] Roche contends that the language "by operation of law or otherwise" makes clear that the parties did not intend Section 5.08 to cover reverse triangular mergers. I find Roche's interpretation of Section 5.08 to be reasonable. Generally, mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger.

Upon the completion of a merger, Section 259 of the DGCL[120]120 provides:

> When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations *except the one into which the other or others of such constituent corporations have been merged*, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations . . . the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account . . . *shall be vested in the corporation surviving or resulting from such merger or consolidation*; and all property, rights, privileges, powers and

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[116] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *10 (Del. Ch. Apr. 8, 2011).

[117] *Id.*

[118] *Id.* at *13.

[119] *Tenneco Automotive Inc. v. El Paso Corp.*, 2002 WL 453930, at *1 (Del. Ch. Mar. 20, 2002).

[120] 8 *Del. C.* § 259.

> franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations.[121]

In *Koppers Coal & Transport Co. v. United States*,[122] the United States Court of Appeals for the Third Circuit concluded that "the underlying property of the constituent corporations is transferred to the resultant corporation upon the carrying out of the consolidation or merger as provided by Section 59."[123] Other courts in Delaware have held that Section 259(a) results in the transfer of the *non-surviving corporation's* rights and obligations to the surviving corporation by operation of law.[124] For example, in *DeAscanis v. Brosius-Eliason Co.*,[125] the Delaware Supreme Court associated Section 259 with assignments by operation of law.[126] The language in Section 259, "except the one into which the other or others of such constituent corporations have been merged," however, suggests that the surviving corporation would not have effected any assignment. In sum, Section 259(a) supports Roche's position that a reverse triangular merger generally is not an assignment by operation of law or otherwise, and that, therefore, Section 5.08 was not intended to cover reverse triangular mergers.

I also note that Roche's interpretation is consistent with the reasonable expectations of the parties. Pursuant to the widely accepted "objective theory" of contract interpretation—a framework adopted and followed in Delaware—this Court must interpret a contract in a manner that satisfies the "reasonable expectations of the parties at the time they entered into the contract."[127] The vast majority of commentary discussing reverse triangular

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[121] *Id.* § 259(a) (emphasis added).

[122] 107 F.2d 706 (3d Cir. 1939).

[123] *Id.* at 708 (referring to Del. Rev. Code 1935, § 2092, a precursor to 8 Del. C. § 259(a)).

[124] *See Heit v. Tenneco, Inc.*, 319 F. Supp. 884, 887 (D. Del. 1970) ("8 Del. C. § 259 provides that when a merger becomes effective all assets of the merged corporation, including any causes of action which might exist on its behalf, pass by operation of law to the surviving company."); *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972) ("Upon the formation of American Mushroom Corporation, the rights of the constituent corporations based on the warranties passed to their successor, American, pursuant to the agreement of merger and 8 *Del. C.* § 259."); *see also* 2 David A. Drexler, Lewis S. Black Jr. & A. Gilchrist Sparks, III, Delaware Corporation Law and Practice § 35.07 (2010) ("Section 259 provides that the rights and liabilities of the constituent corporations in a merger pass by operation of law to the surviving corporation.").

[125] 533 A.2d 1254, 1987 WL 4628 (Del. 1987) (ORDER).

[126] *Id.* at *2.

[127] *The Liquor Exchange, Inc. v. Tsaganos*, 2004 WL 2694912, at *2 (Del. Ch. Nov. 16, 2004).

mergers indicates that a reverse triangular merger does not constitute an assignment by operation of law as to the surviving entity. For example, this Court has recognized that "it is possible that the only practical effect of the [reverse triangular] merger is the conversion of the property interest of the shareholders of the target corporation.[128] Similarly, in *Lewis v. Ward*,[129] then-Vice Chancellor Strine observed:

> In a triangular merger, the acquiror's stockholders generally do not have the right to vote on the merger, nor are they entitled to appraisal. If a reverse triangular structure is used, the rights and obligations of the target are not transferred, assumed or affected. Because of these and other advantages to using a triangular structure, it is the preferred method of acquisition for a wide range of transactions.[130]

Leading commentators also have noted that a reverse triangular merger does not constitute an assignment by operation of law.[131] Based on the commentary on this subject, I consider it unlikely that the parties would have expected a clause covering assignments by operation of law to have applied to reverse triangular mergers.

Meso disagrees and has advanced three theories in support of its interpretation of Section 5.08, *i.e.*, that the anti-assignment clause was intended to cover reverse triangular mergers. Those theories are: (1) the acquisition of BioVeris was nothing more than the assignment of BioVeris's intellectual property rights to Roche; (2) Delaware case law regarding forward triangular mergers compels the conclusion that a provision covering

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[128] *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169, at *7 (Del. Ch. Jan. 18, 1996).

[129] 2003 WL 22461894 (Del. Ch. Oct. 29, 2003).

[130] 2003 WL 22461894 (Del. Ch. Oct. 29, 2003).

[131] *See, e.g.*, 1 R. Franklin Balotti & Jesse A. Finkelstein, Delaware Law of Corporations and Business Organizations § 9.8 (2013) ("The advantage of this type of merger is that T will become a wholly-owned subsidiary of A without any change in its corporate existence. Thus, the rights and obligations of T, the acquired corporation, are not transferred, assumed or affected. For example, obtaining consents for the transfer of governmental or other licenses may not be necessary, absent a provision to the contrary in the licenses or agreement, since the licenses will continue to be held by the same continuing corporation."); Elaine D. Ziff, *The Effect of Corporate Acquisitions on the Target Company's License Rights*, 57 Bus. Law. 767, 787 (2002) ("One widely-recognized advantage of employing a reverse subsidiary structure is that it purportedly obviates the issue of whether the merger constitutes a transfer of the target company's assets in violation of existing contracts, because the 'surviving company' is the same legal entity as the original contracting party.").

assignment "by operation of law" extends to all mergers; and (3) this Court should embrace a California federal court's holding that a reverse triangular merger results in an assignment by operation of law.

First, Meso contends that "the acquisition of BioVeris was nothing more than the assignment of BioVeris's intellectual property rights to Roche" because, as a result of the acquisition, Roche Diagnostics effectively owned the ECL patents.[132] Meso's argument, however, is unavailing because it ignores Delaware's longstanding doctrine of independent legal significance. That doctrine states:

> [A]ction taken in accordance with different sections of [the DGCL] are acts of independent legal significance even though the end result may be the same under different sections. The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirements of the second section.[133]

Indeed, the doctrine of independent legal significance has been applied in situations where deals were structured so as to avoid consent rights. For example, in *Fletcher International, Ltd. v. ION Geophysical Corp.*,[134] this Court noted:

> [T]he fact that one deal structure would have triggered [Plaintiff's] consent rights, and the deal structure in the Share Purchase Agreement did not, does not have any bearing on the propriety of the Share Purchase Agreement or the fact that under that Agreement, [Plaintiff's] consent rights did not apply. This conclusion, for contract law purposes, is analogous to results worked by the "doctrine of independent legal significance" in cases involving similar statutory arguments made under the DGCL.[135]

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[132] Pls.' Answering Br. 34.
[133] *Orzeck v. Englehart*, 195 A.2d 375 (Del. 1963).
[134] 2011 WL 1167088 (Del. Ch. Mar. 29, 2011).
[135] *Id.* at *5 n.39.

Here, Lili Acquisition was merged into BioVeris, with BioVeris as the surviving entity.[136] Under Section 259, the surviving entity continued to "possess[] all the rights, privileges, powers and franchises" it had before the merger plus those of each of the corporations merged into it. Thus, no assignment by operation of law or otherwise occurred as to BioVeris with respect to what it possessed before the merger.[137]

Meso also avers that this Court should look to Delaware's forward triangular merger cases for the propositions (1) that a provision covering assignment "by operation of law" extends to *all* mergers[138] and (2) that this Court should assess whether Meso was adversely harmed in construing the parties' intent. Meso relies primarily on two cases for that proposition: *Star Cellular Telephone Co. v. Baton Rouge CGSA, Inc.*[139] and *Tenneco Automotive Inc. v. El Paso Corp.*[140]

In *Star Cellular*, the Star Cellular Telephone Company, Inc. ("Star Cellular") and Capitol Cellular, Inc. ("Capitol Cellular") were limited partners in the Baton Rouge MSA Limited Partnership. Baton Rouge CGSA, Inc., the original general partner, could "transfer" its interest as a general partner only after written notice to all the other partners and a unanimous vote of the other partners.[141] Baton Rouge CGSA, Inc. ultimately was merged into Louisiana CGSA Inc. through a forward triangular merger. Star Cellular and Capitol Cellular sued, alleging that the merger constituted a prohibited "transfer" of Baton Rouge's general partnership interest. The Court of Chancery first noted that "[a]s a general matter in the corporate context, the phrase 'assignment by operation of law' would be commonly understood to include a merger."[142] Nonetheless, the Court held that it "will not attribute to the contracting parties an intent to prohibit the Merger where the transaction did not materially increase the risks to or otherwise harm the

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[136] Brown Aff. Ex. 4 § 1.1.

[137] *See* 8 *Del. C.* § 259(a).

[138] Pls.' Answering Br. 32 ("Under Delaware law, mergers result in assignments by operation of law.").

[139] 1993 WL 294847 (Del. Ch. Aug. 2, 1993), *aff'd*, 647 A.2d 382, 1994 WL 267285 (Del. 1994) (ORDER).

[140] 2002 WL 453930 (Del. Ch. Mar. 20, 2002).

[141] *Star Cellular*, 1993 WL 294847, at *3. The specific provision stated:

> The General Partner may transfer or assign its General Partner's Interest only after written notice to all the other Partners and the unanimous vote of all the other Partners to permit such transfer and to continue the business of the Partnership with the assignee of the General Partner as General Partner.

Id.

[142] *Id.* at *2.

limited partners."[143] The Court also noted that "where an antitransfer clause in a contract does not explicitly prohibit a transfer of property rights to a new entity by a merger, and where performance by the original contracting party is not a material condition and the transfer itself creates no unreasonable risks for the other contracting parties, the court should not presume that the parties intended to prohibit the merger."[144] Thus, the trial court in *Star Cellular* concluded that the challenged merger did not constitute a prohibited transfer.

The Supreme Court affirmed the Court of Chancery's decision and summarized the lower Court's ruling as follows:

> The court found that the term "transfer" in the anti-transfer provision has no "generally prevailing meaning." The court determined that the assets of Baton Rouge, including its General and Limited Partnership Interest, were transferred to Louisiana by operation of law. The trial court rejected a "mechanical" interpretation of the term "transfer," adopting the criticism of such an analysis found in certain legal journals. The Court of Chancery held that there was an ambiguity as a matter of law, and that the Partnership Agreement did not expressly include transfers by operation of law in its anti-transfer provision.[145]

The Supreme Court then summarily held that: "This is a contract case, and we agree that an ambiguity exists in the Partnership Agreement. The Court of Chancery correctly dealt with that ambiguity."[146]

In *Tenneco Automotive*,[147] the Court of Chancery examined the enforcement of an insurance agreement. While that action was ongoing, the plaintiff merged into a successor entity through a forward triangular merger. The original insurance agreement contained an anti-assignment provision which stated that "no party hereto may assign or delegate, whether by operation of law or otherwise, any of such party's rights or obligations under or in connection with this [insurance agreement] without the written consent

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[143] *Id.* at *11.

[144] *Id.* at *8.

[145] *Star Cellular Telephone Co. v. Baton Rouge CGSA, Inc.*, 647 A.2d 382, 1994 WL 267285, at *3 (Del. 1994) (ORDER).

[146] *Id.*

[147] 2002 WL 453930 (Del. Ch. Mar. 20, 2002).

of each other party hereto."[148] The Court concluded that the anti-assignment provision was ambiguous based on a tension that existed between the language of that provision and that of the whole agreement.[149] Having concluded that the provision was ambiguous, the Court applied the approach adopted in *Star Cellular*, and noted that the defendant "has not identified any adverse consequences that may befall it from the merger."[150] Therefore, the Court found that the parties did not intend to preclude the challenged acquisition of rights under the insurance agreement, and granted a motion to substitute the successor entity as the plaintiff.[151]

Although both *Star Cellular* and *Tenneco* involved a transfer assignment by operation of law, each of those decisions involved a finding that the non-consenting party had not been adversely harmed and that the parties had not intended to require consent to the challenged transaction. It is important to note, however, that the broad statement in *Tenneco* that an assignment by operation of law commonly would be understood to include a merger, appears to rely on *DeAscanis v. Brosius-Eliason Co.*[152] The *DeAscanis* case focused on Section 259 and mergers in connection with which assignments were made by non-surviving constituent entities. Indeed, *Tenneco* acknowledged that, under Section 259, the corporation that was merged into the second corporation "cease[d] to exist."[153] Thus, both *Tenneco* and *Star Cellular* are distinguishable because they involved forward triangular mergers where the target company was not the surviving entity, whereas in this case BioVeris was the surviving entity in a reverse triangular merger.

In both cases, after reading the agreement as a whole, the Court found the anti-assignment language at issue to be ambiguous. The anti-assignment provisions on their own indicated that consent might be required because there had been assignments as a matter of law. In light of other inconsistencies, however, the Court ultimately determined the agreements to be ambiguous. In this case, on the other hand, there was no assignment by operation of law or otherwise. Furthermore, upon examination of Section 5.08, the Global Consent, and the related Transaction Agreements, there are no comparable inconsistencies that might support an inference that the

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[148] *Id.* at *1.
[149] *Id.* at *3.
[150] *Id.* at *4.
[151] *Id.*
[152] *Tenneco*, 2002 WL 453930, at *2 n.6 (citing DeAscanis v. Brosius-Eliason Co., 533 A.2d 1254, 1987 WL 4628 (Del. 1987) (ORDER)).
[153] *Id.* at *2.

parties intended to depart from the principle that a reverse triangular merger is not an assignment by operation of law. To the contrary, there was a recognition that Roche might acquire BioVeris.

Meso also contends that the proviso at the end of Section 5.08 made clear "that even mere changes of corporate form would result in prohibited assignments (but for the express exception),"[154] and that, therefore, any merger also would result in a prohibited assignment. The conversion of an LLC to a corporation, however, is distinguishable from a reverse triangular merger in that a conversion results in a change in the corporate form. A reverse triangular merger does not.[155] Even if Meso were correct that the proviso reflected the parties' intent that a change in corporate form would constitute an assignment, that conclusion has no bearing on reverse triangular mergers, which do not result in a change in corporate form. Moreover, the proviso arguably operated as a cautious, "belt and suspenders" reaction to a concern that Meso might attempt to extract hold-up value from the contemplated conversion of Newco into a corporation. For these reasons, I conclude that the proviso to Section 5.08 does not create an ambiguity as to whether the "assignment by operation of law or otherwise" language was intended to cover the reverse triangular merger in this case. Thus, Meso has not shown that its proposed interpretation of Section 5.08, like Roche's, is a reasonable one in the circumstances of this case.

As a final argument, Meso suggests that this Court should embrace the United States District Court for the Northern District of California's holding in *SQL Solutions, Inc. v. Oracle Corp.*[156] that a reverse triangular merger results in an assignment by operation of law.[157] There the court stated, "an assignment or transfer of rights does occur through a change in the legal form of ownership of a business."[158] The court in *SQL Solutions* applied California law and cited a line of California cases for the proposition that whether "an assignment results merely from a change in the legal form of

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[154] *Id.* at *2.

[155] *See* 8 *Del. C.* § 259(a). Indeed, before 2006, the conversion of an LLC to a corporation arguably could have resulted in a discontinuity in the existence of the converted LLC. Notably, in 2006, 6 *Del. C.* § 18-216(c) was amended to clarify that situation by adding the following sentence: "When a limited liability company has converted to another entity or business form pursuant to this section, for all purposes of the laws of the State of Delaware, the other entity or business form shall be deemed to be the same entity and the conversion shall constitute a continuation of the existence of the limited liability company in the form of such other entity or business form."

[156] 1991 WL 626458 (N.D. Cal. Dec. 18, 1991).

[157] *See* Tr. 72.

[158] *SQL Solutions, Inc. v. Oracle Corp.*, 1991 WL 626458, at *3.

ownership of a business . . . depends upon whether it affects the interests of the parties protected by the nonassignability of the contract."[159]

I decline to adopt the approach outlined in *SQL Solutions*, however, because doing so would conflict with Delaware's jurisprudence surrounding stock acquisitions, among other things. Under Delaware law, stock purchase transactions, by themselves, do not result in an assignment by operation of law. For example, in the *Baxter Pharmaceutical Products* case,[160] this Court stated, "Delaware corporations may lawfully acquire the securities of other corporations, and a purchase or change of ownership of such securities (again, without more) is not regarded as assigning or delegating the contractual rights or duties of the corporation whose securities are purchased."[161] Similarly, in *Branmar Theatre Co. v. Branmar, Inc.*,[162] the Court held that "in the absence of fraud . . . transfer of stock of a corporate lessee is ordinarily not a violation of a clause prohibiting assignment . . . ."[163]

Delaware courts have refused to hold that a mere change in the legal ownership of a business results in an assignment by operation of law. *SQL Solutions*, on the other hand, noted, "California courts have consistently recognized that an assignment or transfer of rights does occur through a change in the legal form of ownership of a business."[164] The *SQL Solutions* case, however, provides no further explanation for its apparent holding that any change in ownership, including a reverse triangular merger, is an assignment by operation of law. Both stock acquisitions and reverse triangular mergers involve changes in legal ownership, and the law should reflect parallel results. In order to avoid upsetting Delaware's well-settled law regarding stock acquisitions, I refuse to adopt the approach espoused in *SQL Solutions*.

In sum, Meso could have negotiated for a "change of control provision." They did not. Instead, they negotiated for a term that prohibits "assignments by operation of law or otherwise." Roche has provided a

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[159] *See Trubowitch v. Riverbank Canning Co.*, 30 Cal. 2d 335, 344–45 (1947); *see also People ex rel. Dep't of Pub. Works v. McNamara Corp.*, 28 Cal. App. 2d 641, 648 (1972).

[160] *Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148 (Del. Ch. Mar. 11, 1999).

[161] *Id.* at *5 (internal citations omitted) ("The nonassignability clause contains no language that prohibits, directly or by implication, a stock acquisition or change of ownership of any contracting party.").

[162] 264 A.2d 526 (Del. Ch. 1970).

[163] *Id.* at 528.

[164] *SQL Solutions, Inc.*, 1991 WL 626458, at *3. It is not entirely clear whether the *SQL* court intended to distinguish between a change in legal ownership and a "change in the legal form of ownership." As I understand it, the *SQL* court intended the latter phrase to include the former.

reasonable interpretation of Section 5.08 that is consistent with the general understanding that a reverse triangular merger is not an assignment by operation of law. On the other hand, I find Meso's arguments as to why language that prohibits "assignments by operation of law or otherwise" should be construed to encompass reverse triangular mergers unpersuasive and its related construction of Section 5.08 to be unreasonable.

For the foregoing reasons, I conclude that Section 5.08 was not intended to cover the BioVeris Merger and that Roche is entitled to summary judgment in its favor as to Count I.

B. Count II: Breach of the Roche License

In Count II of the Complaint, Meso seeks damages against Roche for breach of the Roche License for marketing and selling ECL products outside of the field. Plaintiffs aver that because they "joined in" the Roche License, they are entitled to enforce the provisions of the Roche License, including Section 2.6 whereby Roche "covenant[ed] that it will not, under any circumstances, actively advertise or market the Products in fields other than those included in the Field."[165] Roche urges this Court to grant summary judgment on Count II because Meso was not a party to the Roche License, and, therefore, cannot enforce the rights in the Roche License. Specifically, Roche argues that: (1) this Court is bound by the Arbitration Panel's finding that MSD was not, and was not intended to be, a party to the arbitration provisions; (2) under the plain language of the Roche License, MSD and MST are not parties to the Roche License; and (3) extrinsic evidence confirms that MSD and MST are not parties to the Roche License.[166] I address each of these points in turn.

1. Are the findings of the Arbitration Panel binding?

In my Memorandum Opinion dated April 8, 2011, I referred the question of whether Count II was arbitrable to the Arbitration Panel and

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[165] Ross Aff. Ex. 29 § 2.9.

[166] In other words, Defendants seek summary judgment because the contract is unambiguous and the extrinsic evidence fails to create a triable issue of material fact. *See GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012) ("In cases involving questions of contract interpretation, a court will grant summary judgment under either of two scenarios: when the contract in question is unambiguous, or when the extrinsic evidence in the record fails to create a triable issue of material fact and judgment as a matter of law is appropriate.").

stayed further proceedings on that Count pending the Panel's decision.[167] On September 10, 2012, the Panel ruled that Meso's claim for breach of the Roche License, *i.e.*, Count II, is not arbitrable.[168] Specifically, the Panel's decision stated that:

> The claims asserted by [MSD] in this arbitration are hereby dismissed without prejudice to their being asserted in a court, based on this arbitration panel's finding/conclusion that said claims are not arbitrable, it being understood that this Award is not intended to resolve or reflect upon the merits of such claims as they may be presented in a court.[169]

On November 5, 2012, I confirmed the Arbitration Panel's narrow holding that Meso's "claims are not arbitrable and that the parties' costs and expenses of this arbitration shall be borne by the parties."[170] I did not address, however, the extent to which the Panel's award might have any res judicata or claim-preclusive effect or any collateral estoppel or issue-preclusive effect in this action.

Roche contends that the Arbitration Panel found that Meso was not, and was not intended to be, a party to the Roche License. Roche notes that the neutral chairman of the Arbitration Panel, Arbitrator Charles J. Moxley, Jr.,[171] wrote in a concurrence:

> There is no basis under the arbitration provisions of the [Roche License], the [Roche License] itself, the Consent, the parol evidence in this case, the bases upon which Meso and Roche tried the Phase I hearing, or applicable law for concluding that the criteria for Meso's being a party to the arbitration provisions of the [Roche License] are in any material way different from

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[167] *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 2011 WL 1348438, at *15 n.108, *18 (Del. Ch. Apr. 8, 2011).

[168] Pls.' Opp'n to Defs.' Mot. to Confirm Final Award of Arbitrators Ex. A, Final Award of Arbitrators, 3.

[169] Final Award of Arbitrators 38.

[170] Tr. 102.

[171] The Arbitration Panel consisted of three arbitrators: one appointed by each of the opposing parties and a third arbitrator appointed by the other two. Brown Aff. Ex. 3 § 6.2(c). The third arbitrator was Mr. Moxley.

> those applicable to its being a party to the Agreement more generally.[172]

Roche contends I am bound by that determination under the doctrine of collateral estoppel.

"Under Delaware law a judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the parties and determined in the first action."[173] "Briefly stated, the three elements to a collateral estoppel are: (1) a determination of fact; (2) in a prior action; (3) between the same parties."[174] For the reasons set forth below, the Arbitration Panel's determination is entitled to only very limited collateral estoppel or issue-preclusive effect in this action.

First, Arbitrator Moxley's concurrence was neither a determination by the Arbitration Panel nor a finding necessary to the Arbitration Panel's holding. "Under the doctrine of collateral estoppel, if a court has decided an issue of fact *necessary* to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case."[175] Because a concurring opinion is not necessary to a holding, I am not bound by Arbitrator Moxley's statements.

Moreover, the Arbitration Panel, in its majority decision, stated that Meso's claims were "dismissed without prejudice to their being asserted in a court," and that their Award was "not intended to resolve or reflect upon the merits of such claims as they may be presented in a court."[176]

Indeed, once an arbiter concludes that a claim is not arbitrable, the arbiter does not have jurisdiction to resolve other disputes. As the Supreme Court of the United States observed in *First Options of Chicago, Inc. v. Kaplan*,[177] "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration" and "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute."[178]

The Arbitration Panel was tasked with determining whether or not the dispute as to Count II was arbitrable. The Panel ultimately determined that

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[172] Final Award of Arbitrators 19.
[173] *E.B.R. Corp. v. PSL Air Lease Corp.*, 313 A.2d 893, 894 (Del. 1973).
[174] *Id.* at 895.
[175] *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995) (emphasis added).
[176] Final Award of Arbitrators 38.
[177] 514 U.S. 938 (1995).
[178] *Id.* at 942–43.

they did not have jurisdiction to hear the Roche License claims. They based that determination, at least in part, on a finding that when MSD and MST consented to and "join[ed] in the licenses granted" in the Roche License, they did not also become parties to the arbitration provision in that agreement. That finding is entitled to issue-preclusive effect here. To the extent the Arbitration Panel may have opined on topics outside of their jurisdictional inquiry, however, this Court is not bound by those statements. Therefore, I reject, for example, Roche's argument that Arbitrator Moxley's suggestion in his concurrence that MSD and MST were not parties to the Roche License precludes litigation of that issue in this action.[179]

2. Does the plain language of the Roche License show that MSD and MST are not parties to the Roche License?

Roche also seeks summary judgment on the basis that the plain language of the Roche License and Meso Consent unambiguously indicates that MSD and MST are not parties to the agreement, and that, therefore, MSD and MST cannot enforce the Roche License.

Roche cites the following elements of the Roche License, among others, to support its position that MSD and MST are non-parties. First, the Roche License provides that it is made "by and between IGEN International . . . and IGEN LS."[180] Second, "Parties" is a defined term that includes only IGEN LS and IGEN International.[181] Moreover, the Roche License provides that:

> Except for the provisions of Section 2.2(a) related to immunity from suit and Article 9 relating to Indemnitees, nothing contained in this Agreement is intended to confer upon any other than the Parties hereto and their respective successors and permitted assigns, any benefit, right or remedy under or by reason of this Agreement.[182]

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[179] *See Chambers Belt Co. v. Tandy Brands Accessories, Inc.*, 2012 WL 3104396, at *4 (Del. Super. July 31, 2012) ("[T]he only finding that could be given either *res judicata* or collateral estoppel effect is that the disagreement is not arbitrable due to a lack of compliance with the timing requirements of the APA.").

[180] Brown Aff. Ex. 3 at 1.

[181] *Id.*

[182] *Id.* § 14.11.

Finally, the signature page to the Roche License contained signature lines only for officers of IGEN LS and IGEN International.[183] Roche further contends that, as non-parties to the Roche License, MSD and MST have no standing to pursue claims for breach of that agreement.[184]

Meso, on the other hand, relies on the Meso Consent that immediately followed the IGEN LS and IGEN International signature page. The Meso Consent stated that MSD and MST "consent to the foregoing License Agreement . . . and hereby consent to and *join in the licenses granted* to [IGEN LS] and its Affiliates in the License Agreement."[185] Meso avers that because MSD and MST "join[ed] in the licenses granted," they are entitled to enforce the entire Roche License or, at the very least, Article 2 thereof entitled "Grant and Scope of the Licenses." Finally, Meso points out that the Roche License was "subject to the terms and conditions of this Agreement."[186]

Preliminarily, I note that the Roche License states that it "is made in accordance with and shall be governed and construed under the laws of the State of New York, U.S.A., without regard to conflicts of laws rules."[187] Consequently, I interpret both the Roche License and the attached Meso Consent in accordance with New York law. In New York, "[w]hether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous"; however, "when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms."[188]

New York courts have held that mere consent to an agreement does not make one a party to that agreement.[189] MSD and MST, however, arguably did more than merely consent to the Roche License, they "join[ed] in the licenses granted." A number of New York cases and cases applying New York law have held that a party who joins a contract can enjoy the "same rights" as other parties. For example, in *Karabu Corp. v. Gitner*,[190]

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[183] *Id.* § 14.11.

[184] *See* Defs.' Opening Br. 45 (citing *Parker & Waichman v. Napoli*, 815 N.Y.S.2d 71, 74 (1st Dept. 2006)).

[185] Brown Aff. Ex. 3 at 0055887 (emphasis added).

[186] *Id.* § 2.1.

[187] Ross Aff. Ex. 29 § 6.4.

[188] *Bailey v. Fish & Neave*, 8 N.Y.3d 523, 528 (2007) (internal citations and quotation marks omitted).

[189] *See In re H.D. Baskind & Co.*, 203 N.Y.S.2d. 701, 704 (N.Y. Sup. 1960) (Rejecting motion to compel arbitration by stockholders who consented to an agreement).

[190] 16 F. Supp. 2d 319 (S.D.N.Y. 1998).

the United States District Court for the Southern District of New York held that a travel consolidator who executed a "joinder agreement" became a party to the agreement with the "same rights" as other parties to the agreement.[191] Similarly, in *Digene Corp. v. Ventana Medical Systems, Inc.*,[192] the United States District Court for the District of Delaware held that "New York law has long held that a signatory may be bound by, and thus a party to, a contract, even though the signatory is not named as a party in the body of the contract."[193] Finally, in *Institut Pasteur v. Chiron Corp.*,[194] the United States District Court for the District of Columbia, applying New York law, held that "[t]here is no authority for the notion that an individual or company can 'join in' a contract—at least in the sense of assuming obligations directly under the contract—in some capacity other than as a party".[195]

Roche, however, argues that those cases are distinguishable "because the parties to the agreements were either signatories to the agreement, joined the full agreement, or both."[196] While MSD and MST may not have joined the full agreement, they explicitly joined in "the licenses granted." Indeed, Roche has not referenced a single New York case that holds that a party who joins in part of an agreement is not a party to any aspect of the agreement.[197] Under New York law, one who joins in an agreement without qualification is a party to the contract with rights and obligations under the contract. By analogy, one who joins in part of an agreement arguably has the right to enforce at least that part of the agreement.

Thus, Roche's argument that the plain language of the Roche License and attached Meso Consent unambiguously makes clear that IGEN and IGEN LS are the only two parties to the agreement is unavailing. The cases Meso relies on for the converse of that proposition do not turn on the question of whether the party seeking to enforce the provisions of an

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[191] *Id.* at 320.

[192] 316 F. Supp. 2d 174 (D. Del. 2004).

[193] *Id.* at 183.

[194] 2005 WL 366968 (D.D.C. Feb. 16, 2005).

[195] *Id.* at *11.

[196] Defs.' Reply Br. in Supp. of Their Mot. for Summ. J. ("Defs.' Reply Br.") 21.

[197] The cases cited by Defendants in their opening brief discuss the implications of consenting to an agreement, not joining in an agreement or part of an agreement. *See* Defs.' Opening Br. 45 (citing *In re H.D. Baskind & Co.*, 203 N.Y.S.2d 701, 704 (N.Y. Sup. 1960); *La Chemise Lacoste v. Alligator Co.*, 374 F. Supp. 52 (D. Del. 1974), *rev'd on other grounds*, 506 F.2d 399 (3d Cir. 1974); *Kansas City v. Milrey Dev. Co.*, 600 S.W.2d 660, 663–65 (Mo. Ct. App. 1980)). The remaining cases relied upon by Defendants are from other jurisdictions, and deserve only limited weight. *See* Defs.' Reply Br. 27–28.

agreement is a party to that agreement. Rather, Meso's cases focus on whether the party "joined in" the agreement.

In that regard, Roche argues it still is entitled to summary judgment because the plain language of the Meso Consent unambiguously shows that MSD and MST "join[ed] in" only the "licenses granted," not in the entire 2003 License Agreement. While Roche does not explain what it means by only the "licenses granted," one of Roche's lawyers, Christian Steinmetz, testified before the Arbitration Panel that he believed that MSD and MST "did not join in all of Article 2," just Sections 2.1 and 2.7, *i.e.*, "the two granting provisions."[198] Article 2 of the Roche License, however, is titled "Grant and Scope of the Licenses."[199] A reasonable reading of the Roche License and the attached consent, therefore, is that Meso joined in the entire Article 2, including Section 2.6, which prohibited Roche from marketing products outside the defined field. Thus, I conclude that Roche's construction of the Roche License is not the only reasonable construction.

In sum, Roche has not shown that, as a matter of New York law, one who joins in part of an agreement cannot enforce the part of the agreement to which they subscribed. Moreover, the Roche License is ambiguous as to whether Meso joined into the entire article granting the licenses or just the granting provisions. For these reasons, I reject this "plain meaning" aspect of Roche's argument for summary judgment.

3. Does the extrinsic evidence require the conclusion that MSD and MST are not entitled to enforce the Roche License?

Finally, Roche contends that it is entitled to summary judgment because the record conclusively shows that IGEN International and IGEN LS did not intend MSD and MST to be parties with the right to enforce the Roche License. In support of that argument, Roche cites the testimony of the lawyers and key negotiators of those documents. For example, Robert Waldman, an attorney for MSD and MST, testified that there were no discussions as to whether MSD or MST would be a party to the Roche License.[200] Moreover, Waldman stated that "[w]e weren't thinking of the possible consequences if Roche was not honoring the license—at least I wasn't."[201] Similarly, Daniel Abdun-Nabi, IGEN's general counsel, did not

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[198] Ross Aff. Ex. 8 at 500.
[199] *See id.* Ex. 29 art. 2.
[200] Brown Aff. Ex. 66 at 1099.
[201] *Id.* at 1115.

believe that MSD or MST was entitled to enforce the out-of-field sales provisions.[202]

In support of its opposing view, Meso emphasizes that James McMillan, an attorney for MSD and MST, stated that he understood the join-in language to reflect that Meso was granting a license to Roche.[203] Likewise, IGEN's CEO, Sam Wohlstadter, testified that he believed MSD and MST had an interest in the technology and were a party to the Roche License.[204]

Thus, the testimony and other evidence available on Roche's motion for summary judgment raise triable issues of material fact as to whether MSD and MST were intended to be parties to, or have enforcement rights under, the Roche License. Based on my conclusion *supra* that the meaning of the "join in the licenses granted" language in the Meso Consent attached to the Roche License is ambiguous, it will be necessary to consider extrinsic evidence on the question of MSD and MST's ability to enforce the Roche License.[205] Consequently, Meso is entitled to present this question at trial.

For all of the foregoing reasons, I deny Roche's motion for summary judgment as to Count II.

III. CONCLUSION

For the reasons stated in this Opinion, I grant Roche's motion for summary judgment in its favor on Count I and deny the motion for summary judgment as to Count II.

IT IS SO ORDERED.

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[202] *Id.* Ex. 67 at 122–23.

[203] *See* Ross Aff. Ex. 31 at 135 ("[I]t was at the very least Meso granting licenses to Roche.").

[204] *Id.* Ex. 64 at 54–55.

[205] *See United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 834 (Del. Ch. 2007); *U.S. West v. Time Warner Inc.*, 1996 WL 307445, at *10 (Del. Ch. May 6, 1996).

TR INVESTORS, LLC, ET AL v. ARIE GENGER, ET AL

No. 6697-CS

In the Court of Chancery of the State of Delaware

February 18, 2013

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Matt Neiderman, Esquire, Gary W. Lipkin, Esquire, and Benjamin A. Smyth, Esquire, of Duane Morris LLP, Wilmington, Delaware, Attorneys for Defendant TPR Investment Associates, Inc.

STRINE, *Chancellor.*

I. Introduction

This is a motion for summary judgment in a long-running dispute over the ownership of Trans-Resources, a Delaware corporation. The plaintiffs are the Trump Group, which took a 47% stake in Trans-Resources in 2001. The defendants are Arie Genger, the founder of Trans-Resources, and TPR Investment Associates, the holding company through which Genger owned Trans-Resources. After the Trump Group invested in Trans-Resources, Genger retained, through TPR, a majority 53% stake in the company. But, in 2004, Genger divorced his wife, Dalia, and as part of his divorce settlement, divided his 53% stake into three smaller blocks. Genger kept for himself one of these blocks, a 14% share in Trans-Resources (the "Genger Shares"). The other two blocks, each just under 20% of Trans-Resources, were given to trusts for his son, Sagi (the "Sagi Trust Shares"), and daughter, Orly (the "Orly Trust Shares"). Genger purported to retain a proxy over the Sagi Trust Shares and the Orly Trust Shares. Dalia took control of TPR,

which no longer held any Trans-Resources stock, but had various other assets.

The transfer of the Trans-Resources stock out of TPR violated the terms of the Stockholders Agreement that TPR had signed with the Trump Group. Under the Agreement, Genger was not permitted to transfer the Trans-Resources stock without first giving the Trump Group notice and, in some cases, the option to buy the stock. The Agreement also provided that if Genger did transfer Trans-Resources stock in violation of the Agreement, the Trump Group had the right to buy the stock.

In 2008, the Trump Group discovered the transfers. The Trump Group then entered into a Stock Purchase Agreement with the Sagi Trust whereby it bought the 20% Sagi Trust Shares. TPR was also a party to the Stock Purchase Agreement, and the Agreement provided that, if the transfer of the Trans-Resources stock out of TPR to the Sagi Trust should prove void for any reason, the Trump Group would be considered to have purchased the Sagi Trust Shares from TPR directly. The Trump Group then filed a § 225 action to assert its right to elect a majority of the Trans-Resources board of directors, on the ground that it now owned two-thirds of Trans-Resources' stock.

Genger counterclaimed, asking this court to declare that he had the right to vote all of the Trans-Resources stock formerly held by TPR, on account of the proxy he claimed. He also asked this court to declare that he owned the Genger Shares, and that the Orly Trust owned the Orly Trust Shares. In July 2010, after a trial, I found that the 2004 transfers were void. Because the transfers were void, the Trans-Resources stock reverted to TPR. I then found that the Trump Group had the right to buy the Sagi Trust Shares from TPR. As to the Genger and the Orly Trust Shares, I made no findings beyond ruling that these shares were owned by TPR, and that Genger could cure the void transfer of shares to himself by signing on to the Stockholders Agreement. My ruling thus focused on those issues that were necessary to determining which party had the right to elect the members of the Trans-Resources board, which was the critical issue in the § 225 action.

When the parties could not agree how to implement my decision, I reconsidered my opinion, taking into account a Side Letter Agreement that the Trump Group had entered into with TPR at the same time as the Stock Purchase Agreement. Under the Side Letter Agreement, the Trump Group had the right to purchase the Genger Shares and the Orly Trust Shares from TPR, in the event that the 2004 transfers were invalidated, and the Trans-Resources stock reverted to TPR. I issued a new opinion that gave effect to the Side Letter Agreement, and thus found that the Trump Group had the right to buy all of the shares improperly transferred from TPR, not just the

Sagi Trust Shares. The Trump Group then purchased the Genger Shares from TPR and placed the money into escrow.

Genger appealed my decisions to the Supreme Court. In 2011, the Supreme Court upheld my July 2010 opinion in full, and my August 2010 decision in part. As to the July 2010 ruling, the Supreme Court upheld my determination that the Trump Group had the right to buy the Sagi Trust Shares, and that none of the Trans-Resources stock wrongfully transferred by TPR was covered by a proxy. As to the August 2010 ruling, the Supreme Court found that my determination that TPR could vote the Genger and the Orly Trust Shares "pose[d] no problem."[1] But, the Supreme Court ruled that I could not make a determination as to the ownership of the Genger Shares and the Orly Trust Shares, because two indispensable parties—TPR and the Orly Trust—had not been joined to the action. Therefore, the Supreme Court reversed my decision on the ultimate ownership of these shares. Nevertheless, the Supreme Court left undisturbed my findings that that the 2004 transfers were void, that the Trans-Resources stock reverted back to TPR, and that the Trump Group had the right to purchase the Trans-Resources stock held by TPR.

The Trump Group and Genger then negotiated a Revised Final Judgment Order, in which they agreed that the Trump Group owned 67% of Trans-Resources, consisting of its original 47% stake and the approximately 20% Sagi Trust Shares. The parties also stipulated that TPR had the right to vote the Genger and Orly Trust Shares, and that the Trump Group had the right to purchase these shares under the Stockholders Agreement. This flowed logically from my prior findings, affirmed on appeal, that Genger's proxy did not run with the Trans-Resources stock transferred out of TPR; that Genger's violation of the Stockholders Agreement caused the Trans-Resources stock to revert back to TPR; and that, because of this violation, the Trump Group had the right to buy the stock.

Immediately after the Supreme Court handed down its decision, the Trump Group filed this action against Genger and TPR. By joining TPR as a defendant, the Trump Group sought to correct for the absence of TPR in the prior action, which had caused this court's determination that the Trump Group owned the Genger Shares to be reversed. The Trump Group now moves for summary judgment on the ground that there are no genuine issues of fact as to its ownership of the Genger Shares. TPR cross-moves for summary judgment, seeking an order that the funds that the Trump Group paid for the Genger Shares should be released from escrow.

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[1] Genger v. TR Investors, LLC, 26 A.3d 180, 201 (Del. 2011) [hereinafter Supr. Ct. Op.].

I find in favor of the Trump Group. The doctrine of issue preclusion prevents the relitigation of an issue that has been litigated and decided in a previous action, when the decision on that issue was essential to the previous action. The decisions that the 2004 transfers were void, that the Trans-Resources stock reverted to TPR, and that the Trump Group had the right to buy this stock, were essential to the previous action. And, they were memorialized in the Revised Final Judgment Order, which Genger and the Trump Group negotiated. Therefore, my rulings on these issues have issue preclusive effect, and Genger does not have the right to relitigate them.

By joining TPR to this action, the Trump Group has corrected for the jurisdictional defect in the prior action that led my finding that it could purchase the Genger Shares to be reversed. The Trump Group has not attempted to join the Orly Trust as a party, and the Orly Trust Shares are not before the court.[2] Because it is settled that the Trump Group has the right to buy the Genger Shares, the only issue I must decide is whether it has actually done so.

The Trump Group has submitted an affidavit under Rule 56(e) attesting that it has placed the funds for the Genger Shares into escrow, and that it has taken possession of the shares. Because Genger has not shown that there is any triable issue of fact as to the Trump Group's purchase of the Genger Shares, I grant summary judgment to the Trump Group. Genger has raised a host of arguments why summary judgment may not be granted here, but because he is precluded from relitigating the issues that were decided in the prior action, I may not consider them. And, Genger acknowledges that if the Trump Group benefits from issue preclusion, it is entitled to summary judgment. Even so, I address Genger's arguments, and explain why they would make no difference even if I were to take them into account.

But, I do not grant TPR's cross-motion to have the funds paid for the Genger Shares released from escrow. The Trump Group and TPR signed an escrow agreement that governs the release of the funds. TPR wants me to ignore the escrow agreement, which the parties bargained for, and order that the escrowed funds be released to it now. Because the parties have a contract that governs the release of the escrowed funds, and there is no equitable reason for me to override it, TPR's motion is denied.

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[2] The ownership of the Orly Trust Shares is the subject of another action before this court, Genger v. TR Investors, LLC, C.A. No. 6906-CS. This action has been stayed by order of the New York Supreme Court.

II. Background

Where the facts in this section are not referenced, they are taken from our Supreme Court's opinion in August 2011, and constitute those fact-findings of this court that the Supreme Court relied upon in its decision.[3] Because the litigation in Delaware has proceeded in parallel with litigation in state and federal court in New York, I present the action in these three sets of cases together, in more or less chronological order.

A. The Trump Group Gets Embroiled In Trans-Resources

In 1985, Arie Genger formed Trans-Resources, a Delaware corporation. Trans-Resources was entirely owned by TPR Investment Associates, Inc. Genger owned a 51% majority interest in TPR. His wife Dalia, and beneficial trusts for his children Sagi and Orly, the Sagi Trust and the Orly Trust, held a 49% minority interest in TPR.[4]

Trans-Resources was initially successful, but by 2001 was nearly insolvent. Jules Trump, a friend of Genger, then offered to bail out Trans-Resources. Trump and his brother Eddie effected this bailout through two entities that they controlled, TR Investors, LLC, and Glenclova Investment Co., two of the plaintiffs in this action (collectively, the "Trump Group").[5] The Trump Group bought almost all of Trans-Resources' $230 million debt at a fraction of its face value. The Trump Group then converted this debt into a minority 47.15% stake in Trans-Resources. This left TPR with a 52.85% stake.[6]

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[3] *See* Supr. Ct. Op. In this opinion, if a citation to a court document is identified by date but not jurisdiction, it refers to the previous action in this court, TR Investors, LLC v. Genger, C.A. No. 3994-CS.

[4] This 49% interest was held by a limited partnership, D&K LP. Dalia was the general partner of D&K LP, with a 4% interest. The Sagi Trust and the Orly Trust were limited partners, with a 48% interest. *See* Pls.' Op. Br. Ex. A Schedule 3.2 ("Stockholders Agreement" (Mar. 30, 2001)) [hereinafter SA].

[5] TR Investors took a 25.18% stake in Trans-Resources, and Glenclova took a 21.97% stake. *See* SA Schedule A. The Trump Group includes the two other plaintiffs in this action, New TR Equity I, LLC, and New TR Equity II, LLC. These two entities did not take part in the 2001 bailout. Instead, they purchased shares from the Sagi Trust under the 2008 Stock Purchase Agreement. *See* TR Investors, LLC v. Genger, 2010 WL 2901704, at *11 (Del. Ch. July 23, 2010) [hereinafter July 2010 Op.]; *see also* Def's. Pre-Tr. Br. Ex. 2 (Dec. 3, 2009) ("Stock Purchase Agreement" (Aug. 22, 2008)) [hereinafter SPA].

[6] The parties bargained for a 51/49 split of the shares. The Trump Group permitted Genger to retain a 51.85% stake because Trans-Resources' lender, Bank Hapoalim, had an option over 1.85% of Trans-Resources' stock, known as the "Balance Shares." If Bank Hapoalim did not exercise its option, the Balance Shares were to be distributed to the non-TPR stockholders, in proportion to their stockholdings. July 2010 Op. *5; *see* SA § 1.6. It is undisputed that Bank

The rights of the Trump Group and TPR were governed by a Stockholders Agreement. The parties to that Agreement were the Trump Group, TPR, and Trans-Resources, and the Agreement provided that the Trump Group and TPR "directly and indirectly own[ed] 100% of the outstanding common stock" of Trans-Resources.[7] The Stockholders Agreement set out a formula determining who had the right to designate directors to the Trans-Resources six-person board.[8] The Agreement limited the ability of all stockholders to transfer their shares without the consent of the other stockholders. TPR was only permitted to transfer its holding in Trans-Resources freely to Genger, entities controlled by Genger or TPR, Genger's estate, and (on Genger's death) Genger family members and trusts.[9] And, even in the case of such a permitted transfer, TPR still had to give the Trump Group "written notice."[10] If Genger wished to have TPR distribute its Trans-Resources stock to non-permitted transferees, he had to give the Trump Group both written notice and the right of first refusal. If Genger attempted to distribute TPR's Trans-Resources stock in violation of the Stockholders Agreement, such a distribution was void, and the Trump Group would have the right to purchase those shares.

In 2004, Genger divorced Dalia. As part of the divorce settlement, Genger transferred control of TPR to Dalia.[11] He also caused TPR to transfer its 52.85% stake in Trans-Resources, giving 13.99% to himself (the Genger Shares), 19.43% to the Sagi Trust (the Sagi Trust Shares), and 19.43% to the Orly Trust (the Orly Trust Shares). The trustees of the Sagi and Orly Trusts purported to give Genger irrevocable proxies allowing him to vote these shares for the rest of his life. In addition, the trustees and Genger signed voting trust agreements, under which, if the proxies were ever deemed invalid, the trustees would be obligated to vote their trusts' shares in accordance with Genger's wishes.[12] In his divorce settlement, Genger

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Hapoalim did not exercise its option.

[7] SA pmbl. Genger was not a party to the Stockholders Agreement, except as to one sentence in respect of Trans-Resources' key man life insurance. *Id.* at 40.

[8] *See id.* § 1.2. The Stockholders Agreement provided that, so long as the Trump Group, TPR, and their permitted transferees controlled a majority of Trans-Resources stock, these stockholders would vote in a bloc so that they designated all six members of the Trans-Resources board. To simplify for the purposes of this opinion, the Agreement provided that the side with the larger holding (either the Trump Group or TPR) would designate four directors, and the side with the smaller holding would designate two directors.

[9] July 2010 Op. *3-4; *see* SA § 2.1.

[10] SA § 2.1.

[11] Dalia did not receive Trans-Resources stock. In addition to the Trans-Resources stock, TPR held other assets, supposedly with a total equity value of about $20 million in October 2004. *See* Pls.' Post-Tr. Op. Br. Ex. A, Schedule III(i) (Jan. 15, 2010) (Marital Property (Dec. 31, 2003)) (TPR assets).

[12] *See* Def's. Pre-Tr. Br. Exx. 23-25 (Dec. 3, 2009) (voting trust agreements).

represented and warranted that "*the TRI Stock [owned by TPR] represents 52.85% of the issued and outstanding shares of common stock of TRI*" and that, apart from options held by Trans-Resources' lender, Bank Hapoalim, on 1.85% of Trans-Resources' stock, "*there exist no other direct or indirect ownership interests in TRI.*"[13] But, Genger also represented in his divorce settlement that "*[e]xcept for the Consent of TPR . . . no consent, approval or similar action is required in connection with the transfer of TRI Stock.*"[14] That representation was false, because the Stockholders Agreement required that Genger give the Trump Group "written notice" of the transfer to himself, and the right to buy the shares transferred to the Sagi Trust and the Orly Trust.[15] Genger did not give that written notice and right of first refusal, and thus violated the Stockholders Agreement in addition to making a false representation in his divorce agreement.

In 2008, Trans-Resources was again having financial difficulties, and the Trump Group agreed to bail out the company a second time. The Trump Group negotiated with Bank Hapoalim to reduce Trans-Resources' debt load.[16] And the Trumps and Genger negotiated an agreement whereby, in return for further investment, the Trump Group would take majority control. During their negotiations, the Trump Group discovered that Genger had transferred stock to himself and his children's trusts in violation of the 2001 Stockholders Agreement. Despite their shock at discovering this violation, the Trumps nevertheless finalized their agreement with Genger.[17] But, Genger then reneged on that agreement, because he had found a way of channeling funds from a subsidiary of Trans-Resources to the parent company, and no longer needed the Trumps' assistance. Genger also threatened to sue the Trumps if they challenged the propriety of the 2004 transfers.

B. The Trumps Sue In This Court And Federal Court In New York To Take Control Of Trans-Resources

The Trumps responded by informing TPR and Trans-Resources that they were exercising their right under the Stockholders Agreement to purchase the shares subject to the 2004 transfers, and filed suit in the United

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[13] Genger Br. in Opp'n Ex. 6 art. II § 9(a) (Marital Settlement Agreement (Oct. 2004)) (emphasis added) [hereinafter MSA].

[14] *Id.* (emphasis added).

[15] SA §§ 2.1, 3.1.

[16] Bank Hapoalim was no longer willing to negotiate with Genger, because it had lost confidence in him. July 2010 Op. *8.

[17] *Id.* at *9.

States District Court for the Southern District of New York to enforce the agreement.[18] At the same time as filing suit, the Trump Group adopted a more efficient method of obtaining control: it purchased the Sagi Trust Shares from Sagi, who was hostile to Genger, under a Stock Purchase Agreement. To cover its bases, the Trump Group negotiated that, if the 2004 transfers were found to be void, and the Sagi Trust Shares were still held by TPR, then the purchase was to be considered as between TPR and the Trump Group.[19] This was possible because Sagi had purchased control of TPR from his mother, Dalia, with whom he was aligned.[20] Therefore, no matter what the outcome of the litigation, the Trump Group hoped to own[21] two-thirds of the stock of Trans-Resources, including its original 47.15% stake and the 19.43% Sagi Trust Shares.[22] The Trump Group would thereby control two-thirds of the voting interest in Trans-Resources, unless a court found that the irrevocable proxy that Genger claimed to have over the Sagi

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[18] Compl., Glenclova Inv. Co. v. Trans-Resources, Inc., 08-CV-7140(JFK) (S.D.N.Y. Aug. 11, 2008). The Stockholders Agreement had a forum selection clause providing that disputes would be resolved in the United States District Court for the Southern District of New York, or, if that court did not have jurisdiction, in New York state court in Manhattan. SA § 6.4.

[19] *See* SPA § 10.

[20] The feuding Genger family was split between Genger and Orly, on the one hand, and Dalia and Sagi, on the other.

[21] Despite its best efforts, the Trump Group could not cover all its bases. Genger advanced two theories at trial why he had the right to purchase the Sagi Trust Shares. *See* Def's. Post-Tr. Op. Br. 39-42 (Jan. 15, 2010) (arguing that the Trump Group had improperly pledged the Sagi Trust Shares, and that Genger had the right to buy them); Def's. Post-Tr. Ans. Br. 24 n.18 (Feb. 5, 2010) (arguing that the Sagi Trust was not permitted to transfer its shares to the Trump Group, and that Genger could vote these shares). Like many of Genger's other "ever-changing" arguments, I did not directly address these theories at trial. July 2010 Op. *12. Instead, I focused on Genger's two fundamental and most plausible theories: first, that Genger notified the Trump Group of the 2004 transfers, or that the Trump Group ratified these transfers; and second, that the Trump Group took the Sagi Trust Shares subject to a proxy. Because Genger did not bear his evidentiary burden as to those theories, there was no need to consider his alternative arguments. *Id.* at *13. For example, even if the Trump Group had improperly pledged the Sagi Trust Shares in violation of the Stockholders Agreement, once I had found that the transfer of Trans-Resources stock to Genger was void, the immediate conclusion was that Genger was not a Trans-Resources stockholder and had no standing to claim rights under the Stockholders Agreement. Likewise, once I found that the transfer of Trans-Resources stock to Genger was invalid, any rights that Genger might have been able to claim under the Stockholders Agreement to vote the shares transferred from TPR to the Sagi Trust would disappear.

Therefore, it was not necessary for me to address, individually, all of Genger's multifarious arguments, and I focused on the two key theories on which Genger relied for all his other theories. Genger dropped most of these arguments on appeal, perhaps realizing that he had to prevail on one of his two key theories in order to win at all.

[22] In the Stock Purchase Agreement, the Trump Group also bargained to buy Genger's and the Orly Trust's pro rata allocations of the Balance Shares, constituting another 1.17% of Trans-Resources stock, in case the transfers of the Genger and Orly Trust Shares were found to be void. *See* July 2010 Op. *19 (quoting SPA § 11).

Trust and Orly Trust Shares remained with those shares after they were sold. Concurrent with executing the Stock Purchase Agreement, the Trump Group entered into a Side Letter Agreement with TPR, giving it an option to purchase the Genger Shares and the Orly Trust Shares, in the event that the 2004 transfers were found to be void and those blocks of shares reverted to TPR.[23]

At the same time as filing suit in federal court in New York, the Trump Group sought a judicial determination in this court under 8 *Del. C.* § 225 that it had the right to elect a majority of the Trans-Resources board, on the ground that it held two-thirds of the company's voting stock. Genger sought to dismiss or stay the § 225 action, while simultaneously seeking to intervene in the federal action in order to protect his interests in Trans-Resources' stock.[24]

The Trump Group and Genger quickly settled the original Delaware lawsuit, stipulating, in September 2008, that the Trump Group had a right to elect a majority of Trans-Resources' board. But the following month, the Trump Group discovered that documents on Trans-Resources' computer systems had been destroyed, in violation of a Status Quo Order I had entered.[25] The Trump Group then sought to reopen the § 225 proceeding, and to hold Genger in contempt for despoiling evidence. Genger agreed to reopen the previous action, and filed a plenary counterclaim, asking this court to declare that he was the "rightful owner" of the 13.99% Genger Shares, and that the Orly Trust was the "rightful owner" of the 19.43% Orly Trust Shares.[26] In Genger's own words, he was willing to "reopen this matter for the litigation of all issues between the parties, including the underlying issue of share ownership."[27] Genger reiterated his request to have this court adjudicate the question of the beneficial ownership of all the Trans-Resources shares held by TPR at least another four times.[28] Genger also

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[23] *See* Pls.' Op. Br. Ex. C (Side Letter Agreement (Aug. 22, 2008)).

[24] Def's. Mot To Dismiss or Stay Ex. C (Sept. 8, 2008) (Mem. of Law in Support of Arie Genger's Mot. To Intervene, No. 08-CV-7140(JFK) (S.D.N.Y. Sept. 5, 2008)).

[25] Stip. Status Quo Order (Aug. 29, 2008).

[26] V. Cross-cl. & Countercl. ¶ 36(c) (Jan. 5, 2009).

[27] Mem. in Opp'n to Pls.' Mot. for a Contempt Order 4 (Oct. 31, 2008).

[28] Def's. Mot. to Reopen Case and for Entry of a Standstill Order 9 (Nov. 10, 2008) (". . . Mr. Genger was compelled to bring this Motion to preserve the status quo until this Court can resolve the parties' dispute over share ownership and voting rights."); V. Countercl. ¶ 36 (Mar. 30, 2009) (seeking identical relief to that requested in January 5, 2009 counterclaim); Stip. Pre-Tr. Order 6-7 (Dec. 4, 2009) (requesting that this court find that Genger, the Orly Trust, and the Sagi Trust respectively held 13.99%, 19.43%, and 19.43% of Trans-Resources' stock, and that the Sagi Trust could not transfer its stock to the Trump Group); Def's. Post-Tr. Op. Br. 9 (Jan. 15, 2010) (asking this court to find that Genger had "economic rights" to 13.99% of Trans-Resources' stock, that the

asked this court to find that he had the right to elect a majority of the Trans-Resources board.[29] Furthermore, he asked this court to find that the transfer of shares from the Sagi Trust to the Trump Group was void, or, if it was not void, that he retained a proxy over those shares.[30] Genger also successfully moved to stay the federal action—even though he had only just intervened in it—because he represented to the federal court that the Delaware proceedings would "likely resolve" the issues in that case.[31]

C. This Court Finds That The Trump Group Is Entitled To Purchase All Of Trans-Resources' Stock

In September 2009, I held a trial on the question of whether Genger had despoiled evidence and violated the status quo order. After trial, I found that he had, and, as part of the remedy for his contempt, I increased the burden of proof that he would have to meet in order to prevail at the trial in the forthcoming § 225 action.[32] Thus, if Genger would have been able to prevail on an issue by a preponderance of the evidence without the sanction, he would now need to prove the matter by clear and convincing evidence.[33] I also ruled that, because his conduct had led to me have severe doubts about his credibility, his uncorroborated testimony would not be sufficient for him to prevail on any material factual issue at trial.[34]

In July 2010, after a trial, I found that Genger had violated the Stockholders Agreement by transferring the Trans-Resources stock out of TPR. First, Genger had violated the Agreement by transferring the Genger Shares to himself without giving the Trump Group written notice. Genger was a "permitted transferee" under the Stockholders Agreement, meaning that he could transfer Trans-Resources stock out of TPR to himself, but he still had to give the Trump Group written notice of this transfer.[35] Second, Genger had violated the Stockholders Agreement by transferring Trans-Resources stock to the Sagi and Orly Trusts without giving the Trump Group

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Orly Trust had "economic rights" to 19.43% of Trans-Resources' stock, and that Genger had the right to purchase the Sagi Trust shares).

[29] V. Cross-cl. & Countercl. ¶ 36(a) (Jan. 5, 2009). In the alternative, Genger asked this court that, if the Stockholders Agreement was found to be unenforceable, he be permitted to elect all members of the board.

[30] *Id.* ¶ 36(b).

[31] Glenclova Inv. Co. v. Trans-Resources, Inc., 874 F. Supp 2d 292, 297 (S.D.N.Y. 2012) [hereinafter S.D.N.Y. Op.].

[32] T.R. Investors, LLC v. Genger, 2009 WL 4696062, at *18-19 (Del. Ch. Dec. 9, 2009) [hereinafter Dec. 2009 Op.].

[33] *Id.*

[34] *Id.*

[35] July 2010 Op. *3.

written notice or the right of first refusal, because the trusts were not permitted transferees under the Stockholders Agreement.[36]

I found that, because Genger had improperly transferred the Trans-Resources stock, these transfers were void and the stock reverted to TPR.[37] I then found that the Trump Group had the right to buy the Sagi Trust Shares from TPR, under the Stock Purchase Agreement that the parties had made.[38] Together, these determinations were essential to the § 225 action. The issue of whether the Trump Group had the right to buy the Sagi Trust Shares from TPR was directly relevant to the question of who could vote these shares, and thus who controlled Trans-Resources.[39] If the Trump Group had bought the Sagi Trust Shares under the Stock Purchase Agreement, as it claimed, it would be able to vote them, because they would no longer be covered by Genger's proxy.[40] Thus, my July 2010 decision that the Trump Group could vote the Sagi Trust Shares, and had majority control of the Trans-Resources board, rested on three essential grounds: (1) that Genger had transferred the Trans-Resources stock out of TPR in violation of the Stockholders Agreement, (2) that this stock reverted to TPR, and (3) that the Trump Group had the right to buy the improperly transferred stock under the Purchase Agreement.

Importantly, these findings applied to all of the Trans-Resources stock held by TPR, as all the shares were identically situated and were treated alike by Genger himself. But, I initially did not grant the Trump Group the right

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[36] *Id.* at *4.

[37] In making this finding, I rejected Genger's two main arguments, which were that the Trump Group had ratified the transfers, and that the Trump Group had had adequate notice of the transfers. *Id.* at *13-18.

[38] *Id.* at *19.

[39] In its original complaint, the Trump Group sought the right to designate four members of the six-member Trans-Resources board. V. Compl. 5 (Aug. 25, 2008). In its amended complaint, which was operative in the trial, the Trump Group again sought the right to "designate . . . a majority" of the Trans-Resources board, and also sought to determine that TPR, controlled by Sagi, had the right to designate the remaining two members of the board. Am. V. Compl. ¶ 46(i) (Mar. 1, 2009). The Supreme Court observed that the Trump Group initially only sought the right to designate a majority of the Trans-Resources board, not all of the board. Supr. Ct. Op. 200 & n.89. But, the Supreme Court also noted that, after my July 2010 opinion, "all parties agreed that the scope of the Section 225 action should be expanded to encompass which side had the right to designate and elect the two remaining Trans-Resources directors," and held that there was nothing improper with this court deciding which side could designate all six directors. *Id.* at 200-01. Thus, the ultimate scope of the § 225 action, as affirmed by the Supreme Court, was the designation of the entire Trans-Resources board.

[40] July 2010 Op. *20-22 (finding that the proxy did not run with the Sagi Trust Shares after they were transferred out of the Sagi Trust, and therefore that the Trump Group did not buy the shares subject to the irrevocable proxy).

to buy the Genger Shares and Orly Trust Shares.[41] The reason was as follows. I placed weight on the fact that the Trump Group had entered into a Stock Purchase Agreement with TPR, whereby it obtained the right to buy the Sagi Trust Shares, and I thus considered that the Trump Group had "settle[d]" its rights as to TPR.[42] This outcome appealed to my initial sense of equity, as it seemed to me that allowing the Trump Group to buy all of the Trans-Resources stock was a "disproportionate" remedy.[43] I thus ruled that Genger could cure the 2004 transfers to himself by giving the Trump Group notice and signing on to the Stockholders Agreement.[44] I also noted that the Orly Trust Shares were not before the court, and that adjudicating the shares that were wrongfully transferred to the Orly Trust was not necessary to deciding who controlled Trans-Resources.[45]

But, after my July decision, the parties brought more closely to my attention the Side Letter Agreement, under which the Trump Group had contracted for the right to buy the Genger Shares and the Orly Trust Shares from TPR, just as it had contracted to buy the Sagi Trust Shares from TPR in its "base-covering" provision in the Stock Purchase Agreement.[46] I also reflected on the fact that my initial instinct as to the equities was wrong, because it rewarded the wrongdoer, Genger, and slighted the contractual expectations of the Trump Group under the Stockholders Agreement.[47] I therefore issued a new opinion, hewing to the contractual expectations of the parties, and holding that the Trump Group had the right to buy the Genger and Orly Trust Shares.[48]

My August 2010 opinion followed logically from the essential findings of my July opinion. The opinion sought to resolve both the § 225 action, and Genger's counterclaim: the Trump Group, in the § 225 action, had asked me to declare who had the right to elect the directors of Trans-Resources, and Genger had asked me to decide in his counterclaim who

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[41] *Id.* at *19. I noted that the Trump Group had bargained for the right to buy the 64% of the Balance Shares at the same time, i.e., those Balance Shares that were part of the Genger Shares and the Orly Trust Shares. *Id.* Because the Balance Shares have been stripped out of the Genger Shares, the Genger Shares no longer represent 13.99% of the share capital of Trans-Resources. Rather, they represent approximately 13.5%.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See* TR Investors, LLC v. Genger, 2010 WL 3279385 (Del. Ch. Aug. 9, 2010) [hereinafter Aug. 2010 Op.].

[47] *Id.* at *2.

[48] *Id.* at *3.

owned the Genger and Orly Trust Shares.[49] And so, to recap, in resolving these claims, I had reached three essential determinations: (1) that Genger had transferred the Trans-Resources stock out of TPR in violation of the Stockholders Agreement, (2) that this stock reverted to TPR, and (3) that the Trump Group had the right to buy all the Trans-Resources stock from TPR.

D. Genger Opens A New Litigation Front In New York Supreme Court

Immediately after I issued this decision, Genger sought a TRO and preliminary injunction in the New York Supreme Court to prevent the transfer of the Genger and Orly Trust Shares to the Trump Group.[50] That action (the "New York Action") is still ongoing.[51] Genger obtained the TRO, but moved to withdraw it, and his related motion for a preliminary injunction, after TPR and Sagi agreed to be bound by this court's existing Status Quo Order that required the Trump Group to give Genger five business days' notice of certain business transactions.[52] Shortly thereafter, as part of my final order in the Delaware action, I issued an injunction against most further actions in New York state court while Genger appealed my decisions to the Delaware Supreme Court.[53] That order also provided that if the Trump Group did purchase the Genger and Orly Trust Shares from TPR, Genger was permitted to seek an order that the money for these shares should be placed in escrow.[54] In addition, I entered a Status Quo Order Pending Appeal, under which the Trump Group was required to give Genger ten days' notice of certain business transactions.[55]

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[49] *Id.* at *2; *see also* Am. Compl. 17 (Mar. 11, 2009).

[50] *See* Order To Show Cause & TRO, Genger v. Genger, Index No. 651089/2010 (N.Y. Sup. Ct. July 25, 2010). This case is referred to as the "N.Y. Action." The affidavits in support of this action were dated on the same day as this court's July 2010 decision, and the summons was dated July 20, three days *before* the July 2010 decision, although it was filed later.

[51] Two other actions relating to the Trans-Resources shares are ongoing in New York Supreme Court, but are not relevant here. The first action was originally filed by Orly against Dalia, Sagi, and TPR in 2009 for allegedly looting the Orly Trust. *See* V. Compl., Genger v. Genger, Index No. 109749/2009 (N.Y. Sup. Ct. July 8, 2009). The second action was originally filed by Dalia, in her individual capacity and as the trustee for the Orly Trust, against Arie, for allegedly violating their divorce agreement by failing to transfer the Trans-Resources shares to the Orly Trust. See Compl., Genger v. Genger, Index No.113862/2010 (N.Y. Sup. Ct. Oct. 21, 2010).

[52] Order, N.Y. Action (Aug. 4, 2010); *see* Letter to the Court from Jessica Zeldin, at 2 (Aug. 2, 2010); Second Am. Status Quo Order ¶ 2 (Dec. 30, 2008).

[53] Final J. Order ¶ 19 (Aug. 17, 2010).

[54] *Id.*

[55] Status Quo Order Pending Appeal (Aug. 17, 2010).

The Trump Group and TPR entered into a First Escrow Agreement in September 2010, providing that $5.9 million of the proceeds from the Genger Shares—i.e., all the proceeds apart from $1.5 million—would be held in escrow, and would be released after the Delaware Supreme Court affirmed the Final Judgment Order, or after Genger's time to appeal expired.[56] The remaining $1.5 million would be paid directly from the Trump Group to TPR.[57] After the Trump Group gave Genger notice of this proposed transfer, as required under the Status Quo Order Pending Appeal, Genger sought and obtained a TRO in New York Supreme Court requiring that *all* of the sale proceeds from the Genger Shares should be placed in escrow.[58] In November, the New York court extended the TRO, pending the decision on Genger's application for a preliminary injunction.[59] In January 2011, the Trump Group and TPR entered into a Second Escrow Agreement, providing that the remaining $1.5 million would also be held in escrow.[60] In February 2011, the Trump Group purchased the Genger Shares from TPR, and the proceeds were placed in escrow according to the First and Second Escrow Agreements.[61] At the same time, the New York Supreme Court issued a preliminary injunction providing that TPR and Sagi could not take or use any of the proceeds from the Genger Shares "pending a determination by the Delaware Supreme Court of the Delaware Action and/or a resolution of this action."[62]

E. The Delaware Supreme Court Upholds The Finding That Genger Improperly Transferred TPR's Trans-Resources Stock, And That The Stock Reverted To TPR

Genger appealed all three of my decisions in his case to our Supreme Court. These decisions were my December 2009 opinion, where I found that Genger had despoiled evidence and was guilty of contempt; my July 2010 opinion, where I found that the Trump Group had the right to purchase the Sagi Trust Shares; and my August 2010 opinion, where I found that the

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[56] TPR Op. Br. Ex. B. (Escrow Agreement (Sept. 2010)) [hereinafter First Escrow Agreement]. The Trump Group, TPR, the Orly Trust, and Orly also entered into an escrow agreement to hold the money for the Orly Trust Shares. The Orly Trust Shares are not before the court in this action.

[57] *Id.*

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

[59] Order, N.Y. Action (Nov. 12, 2010).

[60] Pls.' Br. in Opp'n Ex. 2 (Escrow Agreement (Jan. 2011)) [hereinafter Second Escrow Agreement].

[61] Hirsch Aff. ¶¶ 4-5, 7 (Dec. 12, 2012).

[62] Decision & Order, N.Y. Action, at 13 (Feb. 17, 2011).

Trump Group had the right to purchase all the Trans-Resources stock transferred out of TPR.

The December 2009 Opinion. Genger appealed this opinion on the grounds that there was no factual or legal basis for holding him in contempt, and that the $3.2 million I awarded against him in fees was disproportionate and an abuse of discretion.[63] The Supreme Court rejected both of these contentions, and affirmed the decision in full.[64]

The July 2010 Opinion. Genger appealed this opinion on two grounds. First, he argued that the Trump Group had ratified the 2004 transfers.[65] Second, he argued that the Sagi Trust Shares were still covered by his proxy.[66] The Supreme Court rejected both of these arguments.[67] The court wrote: "[W]e uphold the judgment of the Court of Chancery insofar as it adjudicates the merits of the Trump Group's Section 225 claims."[68] Because I had decided that the Trump Group had the right to vote the Sagi Trust Shares, the Supreme Court necessarily affirmed the finding that the Trump Group had the right to buy the Sagi Trust Shares. And, because it did not disturb the finding that the Trump Group did not ratify the transfer of the Sagi Trust Shares out of TPR, the Supreme Court also affirmed the

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[63] Corrected Appellant's Op. Br. 29-35, No. 592, 2010 (Del. Nov. 16, 2010); Appellant's Reply Br. 16-20, No. 592, 2010 (Del. Dec. 23, 2010).

[64] Supr. Ct. Op. 191-94. The court also noted that Genger was explicitly barred from arguing that the amount of the attorneys' fee award against him was disproportionate. As the Supreme Court observed, Genger had agreed in the Final Judgment Order that he would not challenge the attorneys' fee award on these grounds. Instead, he would only challenge the fee award on the ground that it was "improper to award *any* sanction" for the contempt finding against him. *Id.* at 194 (emphasis added) (quoting Final J. Order ¶ 16 (Aug. 17, 2010)). Therefore, the Supreme Court reviewed the fee award only for "plain error," and found none. *Id.*

[65] Corrected Appellant's Op. Br. 17-21, No. 592, 2010 (Del. Nov. 16, 2010); Appellant's Reply Br. 2-7, No. 592, 2010 (Del. Dec. 23, 2010).

[66] Corrected Appellant's Op. Br. 21-24, No. 592, 2010 (Del. Nov. 16, 2010); Appellant's Reply Br. 8-11, No. 592, 2010 (Del. Dec. 23, 2010).

[67] Supr. Ct. Op. 194. Genger challenged each of the "three reasons" why I held his proxy did not cover the Sagi Trust Shares, namely (i) the proxy did not provide that it was to run with the shares if the shares were sold, (ii) public policy considerations prevented the separation of voting from control, and (iii) the proxy was not irrevocable under New York law. *Id.* at 196-97. The Supreme Court rejected his arguments as to the first point, noting that the plain language of the proxy held that it did not run with the shares after sale. *Id.* at 197. As to the second point, the Supreme Court eschewed arguments of public policy, simply noting that the proxy did not conform to the requirements of New York law. *Id.* And, as to the third point, the court noted that Genger, by claiming that the proxy did conform to New York requirements, was improperly raising an argument on appeal that was never "fully and fairly presented to the trial court." *Id.* at 197. Therefore, the Supreme Court did not consider Genger's new argument, although it noted that it was "unsupported by the record." *Id.*

[68] *Id.* at 198.

essential determinations that the Sagi Trust shares were improperly transferred, and that they reverted to TPR.

The August 2010 Opinion. Genger appealed this opinion on two grounds. Genger claimed that, because he was a permitted transferee under the Stockholders Agreement, the transfer of shares to him should not have been deemed void, even if the transfers to the Sagi Trust and the Orly Trust were void.[69] And, Genger claimed that this court "exceeded its authority" in adjudicating the ownership of the Genger and Orly Trust Shares.[70] *As the Supreme Court noted, this second argument was an "about-face," because Genger had asked for this very question to be decided in his plenary counterclaim.*[71]

The Supreme Court rejected Genger's claim that, because he was a permitted transferee, the transfer of shares to him was not void.[72] But, it agreed that this court "exceeded its powers" as to the adjudication of the ownership of the Genger and Orly Trust Shares.[73] The court noted that a § 225 proceeding is an *in rem*, not a plenary, action, and "[o]nly in a plenary proceeding before a court that has *in personam* jurisdiction over the litigants may the court adjudicate the litigants' property interest in disputed corporate shares."[74] The Supreme Court held that this court had lacked personal jurisdiction over two indispensable parties. First, TPR was absent from the action, but, because it had an interest in the Genger and Orly Trust Shares, its presence was required before the ownership of these shares could be determined.[75] Second, the Orly Trust was also absent, and because it had an interest in the ownership of the Orly Trust Shares, its presence was also required.[76] Therefore, the Supreme Court reversed my August 2010 opinion to the extent that these two indispensable parties were absent.[77]

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[69] Corrected Appellant's Op. Br. 28, No. 592, 2010 (Del. Nov. 16, 2010); Appellant's Reply Br. 15, No. 592, 2010 (Del. Dec. 23, 2010).

[70] Corrected Appellant's Op. Br. 24, No. 592, 2010 (Del. Nov. 16, 2010); Appellant's Reply Br. 12-14, No. 592, 2010 (Del. Dec. 23, 2010).

[71] Supr. Ct. Op. 199.

[72] *Id.* at 201 (noting that this court's determination that "that TPR was the record owner [of] and entitled to vote" the Genger Shares "pose[d] no problem").

[73] *Id.*

[74] *Id.*

[75] *Id.* at 202.

[76] *Id.* at 202-03.

[77] The Supreme Court's opinion is, at first blush, confusing, but becomes clearer in light of the position taken by the new counsel Genger retained for his appeal. Genger's counsel only argued that an indispensable party was missing as to the adjudication of ownership of the Genger Shares and the Orly Trust Shares. Corrected Appellant's Op. Br. 24-27, No. 592, 2010 (Del. Nov. 16, 2010). The Supreme Court agreed, and found that TPR and the Orly Trust should have been joined to the action. But even though the Supreme Court found that TPR was an indispensable party, the

But, the Supreme Court did not fully reject my August 2010 opinion. The Supreme Court explicitly affirmed it insofar as it found that TPR was entitled to vote the Genger and Orly Trust Shares. The court held:

> If the only new issue decided [in the August 2010 opinion] was who constituted the lawful record owners of the Genger and Orly Trust shares, the Court of Chancery's Side Letter Opinion and subsequent Final Judgment Order would pose no problem. The trial court determined that TPR was the record owner and entitled to vote.[78]

The Supreme Court thus explicitly left undisturbed the findings in my July and August 2010 opinions that the Genger Shares and the Orly Trust Shares had been improperly transferred, and that they reverted back to TPR. Thus, the Supreme Court treated these two blocks of shares in an identical manner to the Sagi Trust Shares. The Supreme Court also noted that it was necessary to make these findings in order to decide who had the right to vote the Genger and Orly Trust Shares, which the § 225 action was intended to resolve.[79]

The Supreme Court observed that there was a logical connection between the shares reverting to TPR, and the Trump Group having the right to buy them. The court said:

> If the Trump Group was . . . entitled [to buy the Genger and Orly Trust Shares], then as a legal matter those shares would continue to be held by TPR, and Genger and the Orly Trust would have no Trans-Resources shares to vote to elect the remaining two directors. If, however, the Trump Group had no contractual right to purchase the Genger and the Orly Trust

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court did *not* reverse my determination of ownership of the Sagi Trust Shares. This is odd, because, if TPR was an indispensable party as to the sale of the Genger and Orly Trust Shares, surely it was an indispensable party as to the sale of the Sagi Trust Shares also.

The answer to this apparent inconsistency lies, I believe, in the fact that Genger's counsel never sought to have my determination of the ultimate ownership of the Sagi Trust Shares reversed on appeal. What Genger wanted was for the Supreme Court to decide that he retained a proxy over the Sagi Trust Shares, so that he could still vote them. *Id.* at 21-23. Therefore, the Supreme Court was faced with Genger's inconsistent argument that this court could decide the ownership of the Sagi Trust Shares, even though TPR was absent, but it could not decide the ownership of the Genger and Orly Trust Shares.

[78] Supr. Ct. Op. 201.

[79] As I have said, the Supreme Court observed that the Trump Group had requested, in the § 225 action, a finding that it was entitled to elect the majority of the Trans-Resources board, *i.e.*, four directors, not all six. *Id.* at 200 n.89. But, the Supreme Court held that the action could also determine who had the right to elect the other two directors. *Id.* at 200.

> Shares, then under the Stockholders Agreement, Genger would be entitled to designate the remaining two Trans-Resources directors.[80]

The Supreme Court rejected Genger's claim that my finding that the Trump Group could purchase the Genger and Orly Trust Shares was not relevant to the § 225 action:

> Genger contends that adjudicating the validity of the 2004 Transfers under the Side Letter Agreement exceeded the Court of Chancery's jurisdiction, because the *Trump Group's right to buy, and TPR's right to sell*, the Genger Shares and the Orly Trust Shares were "collateral" issues, *i.e.*, unnecessary to resolve the merits of the Section 225 claims. We . . . reject [this contention].[81]

Therefore, in affirming my July 2010 opinion, which held that the Trump Group owned and could vote the Sagi Trust Shares, and in affirming my August 2010 opinion insofar as it held that TPR could vote the Genger and Orly Trust Shares, the Supreme Court explicitly and implicitly affirmed the three essential grounds on which my decisions had rested: (1) that Genger had transferred the Trans-Resources stock out of TPR in violation of the Stockholders Agreement, (2) that this stock reverted to TPR, and (3) that the Trump Group had the right to buy this stock from TPR.

After the Supreme Court's ruling, the parties negotiated, and I entered, a Revised Final Judgment Order, which provided that the Trump Group was the owner of 67.75% of Trans-Resources' stock, and that TPR could vote any shares that the Trump Group did not own.[82] The Revised Final Judgment Order explicitly memorialized the three determinations that were essential to my decisions:

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[80] *Id.* This point was also noted by the federal district court in New York:

> All potential claimants acknowledge that if Arie and the Orly Trust are deemed to be the beneficial owners of the Arie Shares and Orly Trust Shares, then the Trump Group's purchase of shares from TPR would be rescinded and the interpleaded funds would go back to the Trump Group. But, if the 2004 transfer of shares to Arie and the Orly Trust is found to be invalid, then TPR had the right to sell the shares to the Trump Group . . . .

S.D.N.Y. Op. 303.

[81] Supr. Ct. Op. 199 (emphasis added).

[82] Rev. Final J. Order ¶¶ 7-8 (Aug. 19, 2011).

11. All of the transfers of shares of the authorized and issued stock of Trans-Resources that Arie Genger purported to cause TPR to make in 2004 (to himself, the Sagi Genger 1993 Trust, and the Orly Genger 1993 Trust) were in violation of the Stockholders Agreement.

12. As a result, 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.[83]

F. The Trump Group Files A New Complaint In This Court, And The Federal Court Stays Its Action

Four days after the Supreme Court's decision, the Trump Group filed a new complaint in this court, naming Genger and TPR as defendants, in order to cure the jurisdictional defect that had led to the Supreme Court vacating my decision as to the beneficial ownership of the Genger Shares.[84] The Trump Group then moved for summary judgment against Genger.[85] That motion is before the court today.

In August 2011, Genger filed an order to show cause against Sagi in New York Supreme Court seeking to extend the preliminary injunction covering the use of the escrowed funds granted by that court in February 2011.[86] The New York Supreme Court entered the order,[87] and in December 2011 again issued an injunction providing that the escrowed funds should not be disturbed, "pending the determination by a court of competent jurisdiction the beneficial ownership of such shares."[88] Under the terms of the New York court's new injunction, the Trump Group was required to give Genger "ten business days' notice of future transactions that may impact" the Genger Shares.[89]

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[83] *Id.* ¶¶ 11-12.

[84] V. Compl., C.A. No. 6697-CS (July 22, 2011).

[85] Pls.' Mot. for Summary J., C.A. No. 6697-CS (Sept. 2, 2011).

[86] Order To Show Cause & TRO, N.Y. Action (Aug. 9, 2011).

[87] Order To Show Cause, N.Y. Action (Aug. 19, 2011).

[88] Decision & Order, N.Y. Action, at 14 (Dec. 28, 2011)) [hereinafter N.Y. 2011 Op.].

[89] *Id.* at 15. About this time, in October 2011, Dalia Genger filed suit against the Trump Group in this court, seeking a declaration that the Orly Trust was the beneficial owner of the Orly Trust shares. V. Compl., Genger v. TR Investors, LLC, C.A. No. 6906-CS (Oct. 4, 2011). Orly obtained a TRO and injunction against this action. *See* Order, N.Y. Action (Apr. 9, 2012).

In an effort to try to reduce the multiforum morass in which the parties were stuck, I encouraged the parties to allow the United States District Court for the Southern District of New York a chance to decide the original case that had been filed before it.[90] This was the forum first invoked by the Trump Group, and in the state where Genger apparently wished to litigate, having lost his previous enthusiasm to have this court decide his claim. Our Supreme Court also suggested that this would be a suitable forum for the dispute, and the New York Supreme Court observed that the federal court should decide where the action would go forward.[91]

In June 2012, the federal district court issued a decision on the Trump Group's original claim, and on two related interpleader actions filed by the agents for the escrowed funds for the Genger and Orly Trust Shares.[92] The court noted that Genger's attempt to relitigate the question of share ownership in New York state court was "little more than a collateral attack on the Delaware Supreme Court ruling."[93] And, it observed that Genger's position was fundamentally inequitable:

> [E]ven though Arie is the party who made false representations in [his divorce settlement], his reformation claim does not seek to right that wrong. Instead, he wants to change the terms of the agreement in a manner designed to undo the Delaware Chancery Court's finding of liability against him, thereby allowing him to avoid the consequences of his own breach of the 2001 Stockholders Agreement—the Trump Group's right to purchase those invalidly transferred shares.[94]

The court dismissed the interpleader actions.[95] The court also resolved to stay the original action in favor of proceedings pending in the Delaware and New York state courts, while maintaining jurisdiction.[96]

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[90] *See* Tr. of Telephone Conf. 25, C.A. No. 6697-CS (Nov. 10, 2011).
[91] Supr. Ct. Op. 203 n.98; Decision & Order, N.Y. Action, at 7, 14 (Dec. 28, 2011).
[92] *See* S.D.N.Y. Op. 298-99.
[93] *Id.* at 297.
[94] *Id.* at 311.
[95] *Id.* at 314.
[96] *Id.*

G. The New York Supreme Court Rejects Genger's Collateral Attacks On The Delaware Rulings, And The Trump Group's Action Here Continues

With the federal action stayed, the state court actions continued here and in New York. In January 2013, the New York Supreme Court issued a ruling on the defendants' motion to dismiss the complaint that Genger and Orly filed in the New York Action.[97] In that action, Genger advanced various arguments to recover ownership of Trans-Resources, which included recycled versions of arguments he had made, and failed to prevail upon, in the earlier Delaware case.[98] Genger sought to reform his divorce agreement so that he could reassert control over the Trans-Resources stock that TPR had held.[99] Genger also sought to have TPR's 52.85% stake in Trans-Resources placed in a constructive trust for his benefit and for the agreement granting control of TPR to Dalia to be rescinded,[100] and alleged that the defendants had been unjustly enriched.[101] Genger moved for an injunction preventing the defendants from transferring or voting all of the Trans-Resources stock held by TPR, including the Sagi Trust Shares,[102] Genger also asserted various claims seeking monetary relief. These included claims for breach of contract, tortious interference with contract, aiding and abetting tortious interference with contract, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty.[103]

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[97] Am. Decision & Order, N.Y. Action (Jan. 3, 2013) (appeal and cross-appeal pending) [hereinafter N.Y. 2013 Op.]. The first complaint in the action was dated July 25, 2010, immediately after this court handed down its July 2010 decision, and the operative complaint was filed on September 20, 2011. Third Am. & Suppl. Compl., N.Y. Action (Sept. 20, 2011). The defendants were Trans-Resources, Jules Trump, Eddie Trump, Mark Hirsch (an officer of Trans-Resources), the Trump Group, TPR, Dalia, Sagi, the Sagi Trust, and Rochelle Fang (the trustee for the Sagi Trust).

[98] For example, Genger argued vigorously in New York that he was now entitled to reform his divorce agreement in such a way that he would still control the Trans-Resources stock transferred from TPR. *See, e.g.*, Genger's Opp'n to the Trump Group Defs.' Mot. To Dismiss, N.Y. Action, at 17-19 (Nov. 22, 2011). Genger pointed to a provision of his divorce agreement that stated that, if the agreement was held invalid, "either party may seek reformation of the affected provision." MSA art. XVI. Genger had argued this provision of his divorce agreement in this court, without success. *See* Def's. Post-Tr. Op. Br. 33-34 (Jan. 15, 2010).

[99] Third Am. & Suppl. Compl., N.Y. Action, ¶¶ 174-89 (Sept. 20, 2011).

[100] *Id.* ¶¶ 190-207, 222-26.

[101] *Id.* ¶ 221. Genger alleged that he had no adequate remedy at law for the unjust enrichment.

[102] *Id.* ¶¶ 190-207, 227-31, 257-64.

[103] *Id.* ¶¶ 208-19, 221, 232-56. Two allegations underlay Genger's claims for monetary relief. The first was that the Trump Group had paid too low a price for Trans-Resources, because it claimed the right to buy the shares at 2004 prices. *Id.* ¶ 105. The second related to the allocation of the price that the Trump Group had paid. *Id.* ¶ 121. Under the Side Letter Agreement, the Trump

The New York court dismissed the complaint in large part. The court gave preclusive effect to this court's rulings, and rejected Genger's claim that the decisions of this court and of the Delaware Supreme Court in the prior litigation were not binding on him.[104] Like the federal court, the New York Supreme Court held that to reform Genger's divorce agreement in such a way that Genger controlled, and could vote, TPR's 52.85% Trans-Resources stock would constitute a collateral attack on the Delaware Supreme Court's ruling.[105] The court refused to rescind the transfer of TPR to Dalia.[106] And, the court refused to grant Genger an injunction preventing the Trump Group from transferring or voting the stock it had received from TPR, because this too would constitute a collateral attack on the rulings of the Delaware courts.[107]

The court also dismissed Genger's claims for breach of contract, tortious interference with contract, and aiding and abetting tortious interference with contract.[108] But, the court did not dismiss Genger's claims against the Trump Group, TPR, and Sagi for unjust enrichment, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty.[109] Like this court, the New York Supreme Court acknowledged that Genger might be able to object to the way in which TPR had divided the funds it had received for TPR's Trans-Resources stock.[110] That is, the New York Supreme Court acknowledged that Genger might have a dollar fight within the Genger family (to include TPR, which his son Sagi controlled), but that this did not allow him to impede the Trump Group's ownership, and control, of the Sagi Trust Shares, and hence of Trans-Resources.

Group contracted to buy the Genger Shares and the Orly Trust Shares "based upon an aggregate value for all the issued and outstanding shares of Common Stock of the Company of $55,000,000 (as determined in the arbitration proceedings between Arie Genger and Dalia Genger . . .)." Side Letter Agreement 1-2. But, the price paid for the Sagi Trust Shares was $26,715,416—valuing Trans-Resources at approximately $137 million. SPA § 2(a). In the Delaware action, the Trump Group argued that it had paid the Sagi Trust a control premium. *See* Tr. of Office Conference 12:14-17 (July 29, 2010).

[104] N.Y. 2013 Op. 10-14.

[105] *Id.* at 15, 24-25, 32-33.

[106] *Id.* at 34-35.

[107] *Id.* at 19-20, 31.

[108] *Id.* at 22-24, 29-31.

[109] *Id.* at 19 (finding that Genger had adequately pled a claim of unjust enrichment against the Trump Group); *id.* at 21 (finding that Genger had adequately pled a claim of breach of fiduciary duty against the Trump Group); *id.* at 22 (finding that Genger had adequately pled a claim of breach of fiduciary duty against Sagi, and a claim that the Trump Group had aided and abetted this breach of fiduciary duty); *id.* at 25, 27 (finding that Genger had adequately pled a claim of unjust enrichment against TPR and Sagi); *id.* at 28-29 (finding that Genger had adequately pled a claim of breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, against Sagi).

[110] *Id.* at 18-19; *id.* at 25-26 (quoting Aug. 2010 Op. *3).

This court also resumed proceedings after the federal action was stayed, and, in September 2012, heard argument on Genger's motion to dismiss the action, or to stay it in favor of the action in New York.[111] The motion to dismiss or stay was denied.[112] This court also denied Genger's application for certification of the decision to our Supreme Court,[113] and the Supreme Court denied interlocutory review.[114] This is the decision, therefore, on the Trump Group's motion for summary judgment against Genger. It is also a decision on TPR's cross-motion for summary judgment to obtain the escrowed money paid for the Genger Shares.

III. The Trump Group Is Entitled To Summary Judgment On Its Purchase Of The Genger Shares

In the analysis that follows, I explain why the Trump Group is entitled to summary judgment. Under the doctrine of issue preclusion, Genger is not permitted to relitigate the issue of whether the Trump Group had the right to purchase TPR's holding of Trans-Resources stock. The fact that Genger was held to a higher burden of proof in the previous litigation because of his own misconduct does not affect the issue-preclusive nature of the previous action. Therefore, the Trump Group has the right to purchase the Genger Shares.

The only remaining question is whether the Trump Group has purchased the 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 "set[ting] forth such facts as would be admissible in evidence."[115] The Trump Group has submitted such an affidavit and other undisputed record evidence. Genger has not rebutted these submissions. Therefore, I grant summary judgment to the Trump Group.

Nevertheless, counsel for Genger has submitted an affidavit under Court of Chancery Rule 56(f), testifying that there are issues of fact that require discovery.[116] Genger has also put forth new arguments in his

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[111] Genger sought to dismiss the action on the ground that this court had no jurisdiction over him, that service of process on him was ineffective, and that the court had no subject matter jurisdiction over the case. Def's. Br. in Support of Renewed Mot. To Dismiss or Stay, C.A. No. 6697-CS (July 9, 2012).

[112] Order, C.A. No. 6697-CS (Sept. 10, 2012).

[113] Order, C.A. No. 6697-CS (Oct. 5, 2012).

[114] *Genger v. TR Investors, LLC*, 54 A.3d 256 (Del. 2012) (TABLE).

[115] Del. Ct. Ch. R. 56(e).

[116] *Id.* 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the Court may refuse the application for judgment . . . .").