IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TR INVESTORS, LLC, GLENCLOVA INVESTMENT CO., NEW TR EQUITY I, LLC, NEW TR EQUITY II, LLC, and TRANS-RESOURCES, INC.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 6697-CS
ARIE GENGER and TPR INVESTMENT ASSOCIATES, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: January 3, 2013
Date Decided: February 18, 2013

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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.

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

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.

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

[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.

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.

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%

[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.

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]

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

[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 Hapoalim did not exercise its option.

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

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[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).

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 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.

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

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 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

[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.
[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.

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

[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-

voting interest in Trans-Resources, unless a court found that the irrevocable proxy that Genger claimed to have over the Sagi 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

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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).

[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).

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 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

[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 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).

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

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[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.*

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 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

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[35] July 2010 Op. *3.
[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. 11, 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

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 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

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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).

[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.*

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

[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.

counterclaim who 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

[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).

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]

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

[53] Final J. Order ¶ 19 (Aug. 17, 2010).
[54] *Id.*
[55] Status Quo Order Pending Appeal (Aug. 17, 2010).
[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).

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 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

[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).

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

[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.

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 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*

[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.*

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]

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:

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[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 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.

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

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[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.

[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

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:

> 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.
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> 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

[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.].

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]

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.

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[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).
[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.

> 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]

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

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[94] *Id.* at 311.
[95] *Id.* at 314.
[96] *Id.*
[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

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]

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

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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 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).

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

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[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).

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.

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

[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).

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 briefing. It is not necessary for me to consider this affidavit or these arguments, because the determinations of the previous action have preclusive effect. Genger himself acknowledges that if the rulings of the previous action are given preclusive effect, the Trump Group is entitled to summary judgment.[117] But, in the interest of completeness, I consider Genger's arguments anyway, and explain why they do not defeat summary judgment.

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

A. The Trump Group Has The Right To Buy The Genger Shares

1. The Doctrine Of Issue Preclusion Prevents Genger From Challenging The Findings Of The Previous Action[118]

The doctrine of issue preclusion provides that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[119] The Supreme Court has adopted a four-prong test for issue preclusion. Issue preclusion applies if "(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) [the issue was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment."[120]

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[118] The Trump Group has also suggested that it should also be able to prevail under the related doctrine of claim preclusion. The doctrine of claim preclusion provides that "a judgment, once rendered, [is] the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'" Charles Alan Wright et al., 18 *Federal Practice and Procedure* § 4402 (2d ed., updated 2012) (citation omitted).

Here, the doctrine of claim preclusion is not applicable. Because two indispensable parties were missing from the previous action—TPR and the Orly Trust—our Supreme Court held that its decision was not the "full measure of relief" between the Trump Group and Genger as to the block in question in this case, the Genger Shares. Supr. Ct. Op. 202-03. Instead, the Supreme Court suggested the Trump Group obtain relief in a court that had jurisdiction over all the relevant parties to determine the beneficial ownership of the shares. *Id.* at 203 n.98. Thus, the Supreme Court held that the prior action did not have the effect of barring a future action to determine the beneficial ownership of the Genger Shares and the Orly Trust Shares. The Revised Final Judgment Order, although it stated that it was a "final judgment," left open the question of the beneficial ownership of the Genger and Orly Trust shares. Rev. Final J. Order ¶¶ 15-16.

[119] Restatement (Second) of Judgments § 27 (1982).

[120] *Acierno v. New Castle Cnty.*, 679 A.2d 455, 459 (Del. 1996) (quoting *Graham v. IRS*, 973 F.2d 1089, 1097 (3d Cir. 1992)); *see also Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *4 (Del. Ch. Aug. 25, 1997) (applying the same test to determine if issue preclusive effect was to be given to determinations made in a § 225 action).

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

As to the second prong of the issue preclusion test, there is no question that these issues were litigated. Much of the trial testimony revolved around the question whether the 2004 transfers were valid, or whether they had later been ratified by the Trump Group.[123] In their post-trial argument and briefing, counsel for each side focused on whether the shares reverted to TPR, and, if so, whether the Trump Group had the right to

[121] *See* Supr. Ct. Op. 194-97 (upholding this court's finding that the 2004 transfers were invalid); *id.* at 198 (upholding the judgment of this court "insofar as it adjudicate[d] the merits of the Trump Group's Section 225 claims").
[122] *Id.* at 201.
[123] In fact, *all* witnesses at trial testified on the supposed notice, validity, or ratification of the 2004 transfers, some at great length. *See, e.g.*, Tr. 74-78 (J. Trump – Direct), 281 (Hirsch – Cross), 476-77 (E. Trump – Direct), 555-57 (S. Genger – Direct), 571 (Small – Direct), 626-27 (Dowd – Direct), 785-87 (O. Genger – Direct), 855-60 (A. Genger – Direct), 970-1029 (Lentz – Direct) (Dec. 15-17, 2009).

buy them.[124] Between my July 2010 and August 2010 opinions, counsel renewed these arguments, with a particular focus on the Genger and Orly Trust Shares.[125] Genger's lawyers in particular produced a plethora of legal arguments why Genger should retain control over Trans-Resources, including arguments on appeal by his new counsel (retained post-trial) that directly contradicted the arguments made earlier by his trial counsel.[126] The New York Supreme Court noted that Genger had a "full and fair"

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

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

[126] At trial, Genger advanced "every conceivable exculpatory theory that ever crossed his lawyers' inventive minds." July 2010 Op. *12. I now summarize his post-trial arguments, many of which I have mentioned elsewhere in this opinion. First, Genger claimed that the Trump Group ratified the 2004 transfers, and the irrevocable proxies, by not objecting to Genger's voting the TPR Shares in a Trans-Resources stockholders meeting on June 25, 2008, twelve days after the Trump Group learned of the 2004 transfers. Def's. Post-Tr. Op. Br. 15-23 (Jan. 15, 2010). Second, Genger claimed that, by purchasing the Sagi Trust Shares from the Sagi Trust, the Trump Group again ratified the 2004 transfers. *Id*. at 23-26. Third, Genger argued that, in any case, the Trump Group had known about the 2004 transfers years before, and had ratified them, or acquiesced in them, in 2005. *Id*. at 26-30. Fourth, Genger claimed that the Trump Group's claims were barred under the statute of limitations, or laches. *Id*. at 30-32. Fifth, Genger claimed that undoing the 2004 transfers would require his divorce settlement to be reformed. *Id*. at 32-39. Sixth, Genger argued that the Trump Group itself violated the Stockholders Agreement when it purchased the Sagi Trust Shares, because it pledged these shares to a lender in return for funding. *Id*. at 39-42. Sixth, Genger argued that his irrevocable proxies over the Sagi Trust Shares and the Orly Trust Shares were valid and effective, and that even if they were deemed ineffective, he still controlled the Sagi and Orly Trust Shares through a backup voting trust agreement. *Id.* at 42-49.

In addition to his main arguments, Genger advanced various theories based on the allegedly inequitable nature of the Trump Group's conduct, claiming that Orly would be disinherited, and that the Trump Group had deliberately engineered a means of obtaining Trans-Resources on the

opportunity to litigate these issues.[127] A rereading of the briefs filed by Genger suggests that the word "fulsome" would also be apt.

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

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cheap. *See id.* at 5, 7. Genger also suggested that the transfer of the Genger Shares should not be void because the Trump Group had no right of refusal as to those shares. *Id.* at 17 n.5. And, Genger suggested that the Trump Group had no right to buy the Sagi Trust Shares from TPR, because it was not a "permitted transferee." Def's. Post-Tr. Reply Br. 18 n.24 (Feb. 5, 2010). None of these arguments was convincing and all were rejected.

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

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

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

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

right to buy them.[129] And, the Revised Final Judgment Order, which the parties agreed on, provided explicitly that the Trump Group had a right to purchase TPR's stake in Trans-Resources.[130]

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

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[129] *Id.* at 201.
[130] Rev. Final J. Order ¶ 12 ("As a result [of the violation of the Stockholders Agreement], the transfers were void, the purportedly transferred shares continued at all times to be owned of record by TPR, and Investors and Glenclova had the right under Section 3.2 of the Stockholders Agreement to buy all of the shares purportedly transferred by TPR.").
[131] Tr. of Oral Arg. 81:4-19 (Aug. 30, 2012).
[132] *See* Def's. Opp'n to Pls.' Second Mot. To Reopen Case 2-3 (Sept. 25, 2012).
[133] Tr. of Oral Arg. 81:15-82:3, 101:19-102:2 (Aug. 30, 2012).
[134] Def's. Opp'n to Pls.' Second Mot. To Reopen Case 2-3 (Sept. 25, 2012) ("Arie Genger hereby offers to stipulate that the inclusion of the word 'presently' does not change the meaning of the order as compared to its meaning excluding the word 'presently,' without prejudice to his ability otherwise to prosecute his remaining claims, in whatever court or courts ultimately hear them.").
[135] Genger Br. in Opp'n 17, 18.

has only claimed that the Trump Group's ownership of its original holding in Trans-Resources and the Sagi Trust Shares is ephemeral, not that its right to buy the Genger and Orly Trust Shares is likewise temporary.

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

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

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

and Orly Trust Shares.[137] Therefore, the fourth prong of the Supreme Court's issue preclusion test is satisfied.

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

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

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

[137] *Id.* at 199 (rejecting the contention that "the Trump Group's right to buy, and TPR's right to sell, the Genger Shares and the Orly Trust Shares were 'collateral' issues").
[138] *See Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *8 (Del. Ch. Aug. 25, 1997) ("[F]indings made in a § 225 action may be accorded collateral estoppel effect where the relevant criteria are otherwise satisfied . . . .").
[139] N.Y. 2013 Op. 10.
[140] *Id.* 13-14.

In his brief to this court, Genger appears to waive that argument.[141] But, because Genger's waiver is ambiguously phrased,[142] I say why the heightened burden of proof that Genger bore in the prior action does not make any difference to this case.

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

[141] Def's. Br. in Opp'n 22 ("Collateral estoppel does not determine the beneficial ownership of the Genger Shares not because of the standard by which this Court decided beneficial ownership, but because this Court's decisions as to beneficial ownership were reversed.").
[142] *Id.* at 21-22 ("There is ample authority that a party who fails to prove something by clear and convincing evidence, for example, is not collaterally estopped from attempting to prove it by a preponderance of the evidence. . . . The parties dispute whether those cases ought to apply where, as here, the heightened burden of proof derives not from the substantive legal claim but from a contempt sanction.").
[143] Restatement (Second) of Judgments § 28(4) (1982).
[144] N.Y. 2013 Op. 14.
[145] *See* Dec. 2009 Op. *19 (stating that the contempt sanction would "deprive Genger of the advantages of any evidentiary gaps that his own misbehavior might have . . . caused").

been held to a higher burden of proof because of his contempt, was able to *benefit* from this higher burden later by using it to deny preclusive effect to the prior judgment.[146]

This reasoning has been endorsed by the United States Court of Appeals for the Third Circuit. In *Wolstein v. Docteroff*, the court found that a default judgment for damages in a fraud action that had been imposed on a defendant as a sanction for his bad-faith refusal to comply with discovery requests precluded the defendant from arguing, in a later bankruptcy proceeding, that the debt was not the result of fraud (and was thus dischargeable).[147] The court "d[id] not hesitate" in holding that the sanction on the defendant had preclusive effect, and noted that "[t]o hold otherwise would encourage behavior similar to [the defendant's] and give litigants who abuse the processes and dignity of the court an undeserved second bite at the apple."[148] The logic of *Docteroff* applies to this case: Genger cannot avoid the preclusive effect of the prior rulings simply because he was given a more lenient contempt sanction than a default judgment.[149]

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

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

[148] *Id.* at 215.

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

In any event, I found in my post-trial decision that Genger would not have prevailed on the question of whether TPR had given proper notice to the Trump Group under the Stockholders

Therefore, Genger is precluded from relitigating the issues that were decided in the previous litigation.

3. Genger Is Not Entitled To Relitigate The Prior Action

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

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

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

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

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

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

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

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

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

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

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

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

show in more detail why Genger's arguments to avoid summary judgment, including those in his counsel's affidavit, are not effective.

C. Genger's Arguments Cannot Defeat Summary Judgment

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

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

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

[157] Lamb Aff. ¶ 12(a).
[158] *Id.* ¶ 12(b).
[159] *Id.* ¶ 12(c).
[160] *Id.* ¶ 12(d).
[161] *Id.* ¶ 12(e).
[162] *Id.* ¶¶ 13-16.

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

Genger's second and third theories—the claims that Sagi has breached his fiduciary and contractual duties, and that the Trump Group is complicit in this breach—are also irrelevant to this action. Sagi was not a party to the divorce agreement, and counsel for Genger has not pointed to any other contract that Sagi may have breached.[165] The New York Supreme Court dismissed Genger's claim against the Sagi Trust and TPR for breach of contract, and also his claim against Sagi, the Sagi Trust, and the trustee of the Sagi Trust for aiding and abetting tortious interference with contract.[166] As I stated in my August 2010 opinion, it may be that Genger and Orly have a claim against the TPR

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[163] *See* July 2010 Op. *18 ("Genger only has himself to blame for whatever mess his decision to make the 2004 Transfers has caused for his divorce settlement. . . . [I]t is not the Trump Group's problem . . . ."); N.Y. 2013 Op. 16 ("[A]s Trump Group was not a party to the divorce stipulation, Arie's and Dalia's alleged 'mutual mistake' in effecting the 2004 Transfers is immaterial and may not be used as a defense in Arie's dispute with Trump Group. Moreover, Arie seeks to undo the Delaware courts' adverse findings against him and Trump Group's right to buy the 'invalidly transferred shares,' notwithstanding that they were transferred as a result of his misrepresentation in the divorce stipulation . . . . In any event, any equitable or contractual right in favor of Arie to reform the divorce stipulation does not override the pre-existing contractual right of Trump Group to purchase the invalidly transferred shares . . . .").
[164] *See* MSA art. II § 2 (describing property Genger received under the divorce agreement); *see also Apfel v. Prudential-Bache Secs. Inc.*, 600 N.Y.S.2d 433, 435 (1993) (holding that courts will not avoid a contract on grounds of inadequacy of consideration alone).
[165] *See* MSA pmbl.; Lamb Aff. ¶ 12(b).
[166] N.Y. 2013 Op. 29-31.

and Sagi for some sort of breach of an implied equitable duty in the way in which the proceeds from the sale of the TPR's stake in Trans-Resources were allocated.[167] But, this has nothing to do with the question of whether the 2004 transfers were invalid, and whether the Trump Group had the right to purchase the shares from TPR.[168] The New York Supreme Court agreed with this analysis.[169] Genger has not disputed that he ceded control of TPR to Dalia in his divorce settlement, that Dalia therefore had the right to cede TPR to Sagi, and that Sagi thereafter had the right to, and continues to, control TPR.[170] Genger is not a stockholder, officer, or director of TPR. He concedes that TPR is directed and controlled by Sagi. Genger has thus raised no triable issue of fact over TPR's actual or apparent authority to sell Trans-Resources' stock to the Trump Group.

The fourth issue, *i.e.* the adequacy of the price paid, is related to the second and third issues. As I have said, Genger may have a claim a breach of fiduciary duty against

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

[168] *Id.*

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

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

TPR and Sagi.[171] The New York Supreme Court also found that a claim for unjust enrichment may lie against the Trump Group.[172] But, that claim does not affect the validity of the Trump Group's purchase of Trans-Resources stock from TPR, and ownership of that stock.

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

First, in both the July and the August opinions, I found that the Trump Group was permitted to negotiate, with TPR, its rights under § 3.2 of the Stockholders Agreement.[175] In the August opinion, I held specifically that the Side Letter Agreement constituted a compromise of the Trump Group's rights under § 3.2 of the Stockholders Agreement.[176] The Supreme Court rejected Genger's assertion that this court lacked jurisdiction to make such a holding.[177] Therefore, because the Revised Final Judgment Order stated that the Trump Group had the right to buy the Genger shares from TPR under the Stockholders

[171] Aug. 2010 Op. *3.
[172] N.Y. 2013 Op. 19.
[173] Lamb Aff. ¶ 12(e).
[174] Rev. Final J. Order ¶ 12.
[175] July 2010 Op. *17; Aug. 2010 Op. *2-3.
[176] Aug. 2010 Op. *2-3.
[177] Supr. Ct. Op. 199.

Agreement, it follows that the Trump Group had the right to buy the Genger Shares under the Side Letter Agreement, and that Genger cannot relitigate this issue now.

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

The final issue that Genger's counsel raises is regrettable. Genger's counsel suggests that the Trump Group may have lied to this court in the prior action about its negotiations with Bank Hapoalim.[180] This powerful and reputationally damaging suggestion is entirely speculative, and relies on an unsworn translation of a supposed indictment in Israel of a former Bank Hapoalim executive in connection with actions that appear to be unrelated to this case, and unrelated to the Trump Group. Genger's counsel does not suggest a rational basis for his contention that he is "personally familiar" with this indictment, as he swears, and he does nothing to connect the conduct underlying this

[178] *See* SA pmbl.
[179] *See* July 2010 Op. *22 n.147.
[180] Lamb Aff. ¶¶ 13-16.

indictment to Trans-Resources itself, the Trump Group, or the facts of this case.[181] Therefore, Genger cannot rely on it in his attempt to defeat the Trump Group's motion.[182]

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

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

Genger is judicially estopped from making this argument. The doctrine of judicial estoppel "acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding."[184] Genger's argument directly contradicts his position in the prior litigation, in which he argued that TPR had full

[181] *Id.* ¶ 1.
[182] *See Geier v. Meade*, 2004 WL 243033, at *8 (Del. Ch. Jan. 30, 2004) ("This Court's Rules require more than . . . speculation to defeat a motion for summary judgment.").

For completeness, I here note an allegation that Genger put forward in his brief, but which his counsel did *not* make in his affidavit. This allegation is that Sagi received the money from the sale of the Genger Shares improperly. Genger Br. in Opp'n 26. The Trump Group's affidavit attests that the money for the Genger Shares was paid into an escrow account, under the terms of the Escrow Agreements. Hirsch Aff. ¶¶ 4-5, C.A. No. 6697-CS (Nov. 12, 2012). Genger does not contradict this with an affidavit or record evidence. And, by making this unsupported suggestion in his brief, Genger has not shown that there is any genuine issue of fact relating to the payment of the funds.
[183] Genger Br. in Opp'n 16.
[184] *Motorola, Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008).

ownership of the Trans-Resources stock, and not only record ownership.[185] Genger consistently argued to this court that, before 2004, TPR had full control of 52.85% of Trans-Resources. Under the 2004 transfers, according to Genger, the Trans-Resources stock was distributed to Genger, the Sagi Trust, and the Orly Trust, and Genger retained an irrevocable proxy over the Sagi Trust Shares and the Orly Trust Shares.[186] Genger's argument, therefore, was predicated on the fact that TPR had economic, as well as record, ownership of the Trans-Resources shares. And, when he argued that the Sagi Trust did not have the right to sell the Sagi Trust Shares to the Trump Group, Genger raised many arguments, but never claimed that the Sagi Trust and the Orly Trust did not own the economic interest in their respective blocks of shares. In fact, Genger attempted to make an equitable argument out of the fact that the Orly Trust *did* own the economic interest in the Orly Trust Shares.[187] Because the Genger Shares are indistinguishable from the Orly Trust Shares, Genger may not argue now that TPR did not hold the economic interest in the Genger Shares.

Genger's 180° spin is made plain by his main alternative argument in the prior litigation. That argument went like this: "Even if I caused TPR to violate the

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

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

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

Stockholders Agreement, and gave the Trump Group the right to buy the wrongfully transferred Trans-Resources stock, the Trump Group could only obtain the economic interest in these shares, because my irrevocable proxy gave me voting control over them."[188] The reason for that prior argument is simple. Genger could not argue that economic rights to the shares did not belong to TPR without committing intentional fraud. Why? Because in both the Stockholders Agreement and his divorce settlement, he said that TPR had full ownership over the Trans-Resources stock. In the Stockholders Agreement, TPR, controlled by Genger, represented and warranted that "TPR, [TR] Investors and Glenclova directly and indirectly own 100% of the outstanding common stock . . . of [Trans-Resources]."[189] The Agreement later specified that "TPR owns 52.85% of the outstanding Shares," with no suggestion that this ownership might not be complete.[190] And, in his divorce agreement, Genger represented that, apart from the Trump Group, TPR, and Bank Hapoalim, no party had any ownership interests in Trans-Resources.[191] Therefore, Genger cannot now argue that TPR only had record ownership of its Trans-Resources stock without admitting that, through TPR, he made a misrepresentation in the Stockholders Agreement, and that he made *two* misrepresentations in his divorce agreement.[192] Put bluntly, facing a properly supported summary judgment motion, Genger has not filed an affidavit swearing that his former

[188] *See* Def's. Post-Tr. Op. Br. 15-23 (Jan. 15, 2010); *see also* Supr. Ct. Op. 196-98 (rejecting Genger's proxy argument).
[189] SA pmbl.
[190] *Id.* § 1.6.
[191] MSA art. II ¶ 9(a).
[192] Genger's other misrepresentation in his divorce agreement, as noted above, was that he did not need any consents for the 2004 transfers. *See* Supr. Ct. Op. 184.

binding legal representations that TPR had full ownership were false. There is thus no material issue of fact for trial.

* * *

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

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

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

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

[193] First Escrow Agreement 2.
[194] Order To Show Cause & TRO, N.Y. Action, at 3 (Oct. 5, 2010).

Trump Group and TPR entered into a Second Escrow Agreement in January 2011, whereby the Trump Group agreed to place the $1.5 million in escrow also.[195]

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

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

[195] Second Escrow Agreement 2.
[196] First Escrow Agreement § 2(b)(i).
[197] *Id.* § 2(b)(ii), (iv).

any reason why I should override the parties' bargain simply in order that it may get the proceeds from the Genger Shares more quickly, and I decline to do so.[198]

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

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

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[198] *See, e.g.*, *Related Westpac LLC v. JER Snowmass LLC*, 2010 WL 2929708, at *10 (Del. Ch. July 23, 2010) ("Delaware law respects the freedom of parties in commerce to strike bargains and honors and enforces those bargains as plainly written.") (citations omitted).
[199] Second Escrow Agreement § 2(b).
[200] *Id.* § 2(b)(ii).
[201] *Id.* § 2(a).
[202] TPR Reply Br. 4-5.

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

V. Conclusion

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

I now add a postscript about the future course of this dispute. Even if Genger chooses not to appeal this ruling, this is not necessarily the end of the litigation between him and the Trump Group in this court. In November, I granted the Trump Group's motion to reopen the prior action and issued an order for Genger to show cause why he

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

should not be held in contempt for flouting the Revised Final Judgment Order.[204] I found that Genger was attempting to relitigate in New York Supreme Court the ownership of the Sagi Trust Shares, which was settled for good in the Revised Final Judgment Order.[205] I also noted that Genger had sought an injunction to prevent TPR from voting the Genger and Orly Trust Shares, even though the Revised Final Judgment Order states that TPR is the "record owner" of these shares. Although the New York Supreme Court denied this request, it entered an injunction requiring the Trump Group and TPR to give Genger ten business days' notice of any transactions that "impact" these shares.[206] The effect of this injunction, I observed, was to prevent the Trump Group from managing Trans-Resources as it had the right to under the Revised Final Judgment, and from realizing its wealth-creating potential as a Delaware corporation. The briefing for the Trump Group's contempt motion will be complete in about two months.

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

Even at this late stage, one should not take action to prevent a *rational* end to this protracted struggle. Rather than proceed to decide the contempt motion immediately, I want the parties to confer with their clients, and consider the implications of these *two*

[204] *T.R. Investors, LLC v. Genger*, 2012 WL 5471062 (Del. Ch. Nov. 9, 2012).
[205] *Id.* at *2.
[206] *Id.* (quoting N.Y. 2011 Op. 15).
[207] *See* N.Y. 2013 Op.

judicial rulings. Perhaps, with the aid of learned counsel who bring dispassionate thinking to bear in pursuit of their clients' best interests, the parties can resolve the need for contempt proceedings, and perhaps even the need for further litigation anywhere, at least as between Genger and the Trump Group.

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

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

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