



COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

LEO E. STRINE, JR.  
VICE CHANCELLOR

New Castle County Courthouse  
Wilmington, Delaware 19801

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***RE: TR Investors, LLC, et al. v. Arie Genger, C.A. No. 3994-VCS***

Dear Counsel:

This letter addresses an issue raised by the Trump Group's<sup>1</sup> proposed order implementing my July 23, 2010 memorandum opinion (the "Opinion"). That proposed order included language determining that the Trump Group had the right to purchase shares of Trans-Resources, Inc. ("Trans-Resources") that Arie Genger caused TPR Investment Associates ("TPR") to transfer in 2004 to the trust for his daughter Orly (the "Orly Trust") and to himself personally.<sup>2</sup> That language differed from my July 23, 2010 memorandum opinion (the "Opinion"), which only held that the Trump Group was entitled to the Trans-Resources shares transferred in 2004 to the trust of Genger's son

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<sup>1</sup> There are four named plaintiffs in this action: TR Investors, LLC, Glenclova Investment Co., New TR Equity I, LLC, and New TR Equity II, LLC (collectively, the "Trump Group").

<sup>2</sup> Letter from Thomas J. Allingham II to the Hon. Leo E. Strine, Jr. (July 27, 2010) (enclosing proposed order).

Sagi (the “Sagi Trust”). Implicit in the Trump Group’s proposed order is the assertion that I reached an incorrect — or, perhaps more accurately, an incomplete — conclusion as to the Trump Group’s ability to acquire all of Trans-Resources’ shares.

A full blow-by-blow account of the complex series of share transfers and contracts leading up to the issue at hand can be found in the Opinion. It suffices to say here that my conclusion that the Trump Group was entitled only to the shares transferred to the Sagi Trust (the “Sagi Shares”) was based on the fact that the Trump Group had entered into a Purchase Agreement in 2008 for the Sagi Shares. That Purchase Agreement included a provision indicating that, if the share transfer to the Sagi Trust were found void, then the share purchase would be between the Trump Group and TPR, which Sagi Genger controlled by 2008. Thus, the Purchase Agreement appeared to be a broad settlement of the dispute as to the Trans-Resources shares *held by the Sagi Trust*. For that reason, I found the Trump Group to have appropriately purchased the shares transferred to the Sagi Trust. But, I declined to address the control of the shares improperly transferred to the Orly Trust or Genger himself. In so concluding, I was motivated by the fact that determining whether the Trump Group was entitled to the shares wrongly transferred to Genger and the Orly Trust was unnecessary to determine control in this action pursuant to 8 *Del. C.* § 225.<sup>3</sup>

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<sup>3</sup> My reasoning was as follows:

What I overlooked was a side letter agreement (the “Letter Agreement”) executed contemporaneously with the Purchase Agreement. In that Letter Agreement, the Trump Group contracted with TPR to purchase the shares that had purportedly been transferred to Genger and the Orly Trust in 2004 if it were found that those transfers were improper.<sup>4</sup> When read in conjunction with the Purchase Agreement, the Letter Agreement indicates that the Trump Group contracted with TPR not only for the shares transferred to the Sagi

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Although the 2004 Transfers violated the terms of the Stockholders Agreement, which in Section 3.2 provides that the Trump Group can purchase all of TPR’s shares, the Trump Group cannot purchase the shares transferred to Arie Genger or the Orly Trust because the Trump Group must abide by the settlement terms to which it agreed in the Purchase Agreement. Because the 2004 Transfers violated the Stockholders Agreement, Arie Genger and the Orly Trust have been found to not be the record or beneficial owners of the shares transferred to them. Per Section 11 of the Purchase Agreement, that entitles the Trump Group to 64% of the Balance Shares, and nothing more beyond the Sagi Shares that it has already bought. As to the Transfer from TPR to Arie Genger himself, the major problem was the lack of notice. Under the Stockholders Agreement, Genger could receive shares from TPR so long as he: (1) gave proper notice to the Trump Group entities; and (2) signed on to the Stockholders Agreement. He did neither and, as a result, cannot exercise any rights under the Stockholders Agreement. Although the Trump Group believes that Genger's violation should require him to transfer all of his Trans-Resources shares to the Trump Group, that remedy is disproportionate. That sort of relief is unnecessary to this control dispute and therefore this § 225 action. Nevertheless, Trans-Resources appears entitled, in any event, to deny Genger the right to vote his shares until he gives formal notice and signs on to the Stockholders Agreement. As to the Orly Trust, it is not before the court, and the shares it was wrongly transferred are also not necessary for the Trump Group to exercise control. Therefore, I do not issue any ruling as to those shares, because that is unnecessary in this § 225 action. Obviously, my finding that the shares were wrongly transferred creates problems for Arie Genger, but that exposure is a result of his own secretive contract breach.

*TR Investors, LLC v. Genger*, 2010 WL 2901704, at \*19 (Del. Ch. July 23, 2010).

<sup>4</sup> JX-226 (Letter Agreement (Aug. 22, 2008)) (the “Letter Agreement”).

Trust, but for all of the shares that TPR originally held before the wrongful transfers were effected.

Thus, it is clear that I issued my original decision in ignorance of a material fact, which is that there was a binding contract between TPR and the Trump Group as to the shares held by Genger and the Orly Trust (the “Arie and Orly Shares”). In addition, in determining that I need not reach the issue of who owned the Arie and Orly Shares, I overlooked at that point in my reasoning the fact that, under the Stockholders Agreement,<sup>5</sup> even though the Trump Group would have the right to appoint four of Trans-Resources’ six directors as the holder of the Sagi Shares, the right to designate the remaining two directors could depend on who controls the Arie and Orly Shares.<sup>6</sup> Moreover, I also ignored the reality that Genger himself sought to have this court declare who was the rightful owner of the Arie and Orly Shares.<sup>7</sup> Although the Orly Trust was

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<sup>5</sup> JX-101 (Stockholders Agreement (2001)) (the “Stockholders Agreement”) at § 1.2(c).

<sup>6</sup> Thus, determining whether the Trump Group is entitled to purchase the Arie and Orly Shares is within the scope of a § 225 action. *See Levinhar v. MDG Med., Inc.*, 2009 WL 4253211, at \*11 (Del. Ch. Nov. 24, 2009) (“Although Section 225 actions are summary proceedings, claims that bear on the appropriate composition of the board of directors may be brought in connection with a Section 225 action.”); *Agranoff v. Miller*, 1999 WL 219650, at \*17 (Del. Ch. Apr. 12, 1999), *aff’d*, 1999 WL 636634 (Del. July 28, 1999) (stating that in a § 225 action, “[t]he court can determine any legal or factual issue, the resolution of which can affect the outcome of a corporate election . . . or of any other stockholder vote”).

<sup>7</sup> *See* Genger’s Answer and Counterclaim, Claim for Relief ¶ (c) (requesting a declaration that “Mr. Genger is the rightful owner of 13.99% of TRI shares and the Orly Trust is the rightful owner of 19.43% of TRI shares, subject to the Irrevocable Proxy granted to Mr. Genger”); Stipulated Pre-Trial Order § III.A ¶ 3 (stating that an issue of fact remaining to be litigated was “[w]hether the October 2004 transfers of [Trans-Resources] common stock to Arie Genger and to the Orly Genger 1993 Trust (the “Orly Trust”) and the Sagi Trust can and should be found void without also voiding or reforming the related transactions”). In light of those requests,

not formally before the court, Orly Genger provided testimony in aid of her father's case and is clearly working in concert with him on a joint legal strategy. For example, shortly after the Opinion was issued on July 23, 2010, Arie Genger and Orly Genger jointly sought and obtained an ex parte temporary restraining order against TPR in New York state court for the purpose of preventing TPR from transferring any shares.<sup>8</sup> Her rights were fully protected and argued by two of the nation's best law firms, who sought to have me declare that she was the rightful owner of the shares transferred to her.

After considering these factors, to which I gave inadequate attention, I now determine the following, which is largely consistent with my original ruling. As previously held, all of the transfers Genger caused TPR to make in 2004 were in violation of the Stockholders Agreement. In that circumstance, the Trump Group was given the right to purchase the transferred shares. In my original decision, I overlooked the reality that the Trump Group had struck a deal with TPR to remedy the improper transfers not only as to the transfer of the Sagi Shares, but also as to the transfers of the Arie and Orly Shares.<sup>9</sup> In my original decision, I also gave inadequate weight to the principle of

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Genger's recent arguments that determining ownership of the Arie and Orly Shares is outside the scope of the § 225 action come with little grace because they are inconsistent with his own litigation position. *See* Letter from Donald J. Wolfe, Jr. to the Hon. Leo E. Strine, Jr. (Aug. 4, 2010)) (arguing that determining ownership of the Arie and Orly Shares is outside the scope of this § 225 proceeding).

<sup>8</sup> *See* Letter from Thomas J. Allingham II to the Hon. Leo E. Strine, Jr. (July 27, 2010) (explaining the ex parte temporary restraining order Arie and Orly Genger obtained over the weekend).

<sup>9</sup> *See Genger*, 2010 WL 2901704, at \*19 ((reflecting an ignorance that the Trump Group had entered in the Letter Agreement providing that TPR will sell the Arie and Orly Shares to the

freedom of contract. Under the plain language of the Letter Agreement, it was the right of the Trump Group to purchase all the improperly transferred shares, not just the ones transferred to the Sagi Trust.<sup>10</sup> In issuing what I thought was dictum to the effect that it would be disproportionate to award the Arie and Orly Shares to the Trump Group,<sup>11</sup> I ignored the important reality that leaving Genger and the Orly Trust with the Shares would arguably put Genger in a position to claim two members on the Trans-Resources board, if he were allowed to cure his transfer to himself and if the Orly Trust were allowed to keep the shares it had wrongly received.<sup>12</sup> In my view, that error in thinking is material as it would stick the Trump Group in a continued relationship with Genger after he had done precisely what the Stockholders Agreement had been designed to prevent — enmesh the Trump Group in his family disputes.<sup>13</sup> As important, in treating this as a remedial issue I could side-step, I too lightly overrode the parties' contractual bargain. The Stockholders Agreement provides the Trump Group with a right to purchase the shares from TPR when Trans-Resources shares are transferred to a non-permitted

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Trump Group if Genger and the Orly Trust are not found to be beneficial owners of the Trans-Resources shares transferred to them).

<sup>10</sup> Letter Agreement 1-2.

<sup>11</sup> *See Genger*, 2010 WL 2901704, at \*19 (“Although the Trump Group believes that Genger’s violation should require him to transfer all of his Trans-Resources shares to the Trump Group, that remedy is disproportionate.”).

<sup>12</sup> *See id.* (failing to focus upon this important issue).

<sup>13</sup> *See Genger*, 2010 WL 2901704, at \*3-5 (discussing evidence showing that the purpose of the Stockholders Agreement was to prevent the Genger family’s infighting from infecting the governance of Trans-Resources).

transferee.<sup>14</sup> That provision is not ambiguous and given that, it was clearly contractually permissible for the Trump Group to resolve any difference about the repurchase option by a consensual bargain with TPR. My passing sympathetic thought about the extent of the remedy has no place trumping a contractual remedy choice. Nor did that thought adequately consider the reality that Genger would likely attempt to argue that the Trump Group had to elect two of his nominees to the board because he and the Orly Trust supposedly retained control of approximately 32% of the shares. The Trump Group bargained to avoid being in such a tangled relationship with the Gengers if he engaged in improper transfers by securing a right to acquire *all* shares subject to an improper transfer, not just enough to get a voting majority.

My earlier ruling slighted this problem, and suggested that Arie Genger could simply cure the improper transfer to himself by providing proper notice and by signing on to the Stockholders Agreement.<sup>15</sup> It ignored that if he could be let off the hook like that by an equitable softie like me and, if the Orly Trust was left with its shares, he could argue that the Trump Group was bound to elect two directors of his choosing to the board. Now that all the relevant factors have been adequately considered by me, it is clear that I gave these considerations too little weight and improperly reduced the Trump Group's contractual rights.

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<sup>14</sup> Stockholders Agreement §§ 3.2, 3.3(b); *see also* Letter from Thomas J. Allingham II to the Hon. Leo E. Strine, Jr. (Aug. 4, 2010) at 6.

<sup>15</sup> *See Genger*, 2010 WL 2901704, at \*19.

Of course, it 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. In that sense, the endgame of this struggle would be fitting if regrettable, in that the Gengers would find themselves fighting over a pot of money and who should get what. To that point, it may be that the Trump Group would be wise to pay the consideration for the Arie and Orly Shares into a court in New York, and allow the Gengers to have at it about who gets the proceeds. The resolution of any such dispute, however, is not relevant to the determination that both the Trump Group and Genger have asked me to make.

That determination is whether the Arie and Orly Shares are validly owned by Arie Genger and the Orly Trust. Again, the answer is no, they are not. The transfers were invalid. That left the Trump Group with the right to purchase the Shares from TPR, and thus TPR and the Trump Group were free to settle that dispute by a new bargain for sale. If the Trump Group exercises its rights under the Letter Agreement, it will own the shares improperly transferred to Genger and the Orly Trust, and neither of those transferees ever had a legitimate interest in the shares. If those transferees have any beef with TPR or Sagi Genger, the transferees are free to file suit against them. But the Trump Group may purchase the Arie and Orly Shares per the terms of the Letter Agreement, may vote those

Shares, and Trans-Resources need not recognize Genger or the Orly Trust as stockholders.

In revising my earlier decision to address this issue, I therefore correct my failure to focus as closely as I should have on the control consequences of the transfers to Genger and the Orly Trust, the primacy that should be given to the contractual remedy provision, the bargain-destroying consequences of not according the Trump Group the full benefit of the Stockholders Agreement, and the inequity of subjecting the Trump Group to attempts by Genger to relitigate issues that he sought to litigate in this court.

For all these reasons, I treat the proposed order submission of the Trump Group as a motion for reargument, a motion I hereby grant, and will issue a final judgment in favor of the Trump Group in conformity with this decision.

Very truly yours,

*/s/ Leo E. Strine, Jr.*

Vice Chancellor

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