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COURT OF CHANCERY
OF THE
STATE OF DELAWARE

LEO E. STRINE, JR.
CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

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***RE: T.R. Investors, LLC, et al. v. Genger*, C.A. No. 3994-CS**

Dear Counsel:

8 *Del. C.* § 225 is designed to protect the wealth-creating potential of a Delaware corporation by allowing this court to resolve quickly and efficiently disputes over the composition of its board of directors.[1] The plaintiffs T.R. Investors, Glenclova Investment Co., New TR Equity I, LLC, New TR Equity II, LLC, and Trans-Resources, Inc. (collectively, the "Trump Group") move to reopen a § 225 action in which they largely prevailed last year because, they contend, the defendant Arie Genger has violated the relief that the Revised Final Judgment in the § 225 action gave them. This relief

[1] 8 *Del. C.* § 225; *see Box v. Box*, 697 A.2d 395, 398 (Del. 1997) ("The purpose of section 225 is to provide a quick method for review of the corporate election process to prevent a Delaware corporation from being immobilized by controversies about whether a given officer or director is properly holding office."); *Atkins v. Hiram*, 1993 WL 545416, at *5 (Del. Ch. Dec. 23, 1993) ("The reason for a summary proceeding [under § 225] is to preclude a leaderless, and therefore foundering, corporation.").

made clear that they owned 67.75% of the voting shares of Trans-Resources, and rejected Genger's challenge to ownership of 19.43% of Trans-Resources' stock, the so-called "Sagi Trust" shares. For the reasons that follow, I grant the Trump Group's motion.

The core issue in the § 225 action was whether Arie Genger or the Trump Group owned a majority of the shares of Trans-Resources. The Trump Group filed suit in August 2008 in the U.S. District Court for the Southern District of New York to resolve this issue.[2] But Genger urged that court to stay that action, and instead repeatedly asked *this* court to make not just a determination of voting rights for the purposes of the § 225 action, but a plenary determination regarding the ownership of three contested blocs of shares that together constitute a majority of Trans-Resources' stock.[3] These blocs are the "Arie shares," comprising 13.99% of Trans-Resources' stock; the "Sagi Trust shares," 19.43% of Trans-Resources' stock; and the "Orly Trust shares," another 19.43% of Trans-Resources' stock. Genger was explicit that he did not want this court to restrict itself to determining only voting rights.[4] Instead, he asked this court to declare affirmatively that he was the owner of the Arie shares; that his daughter's trust, the Orly

[2] *Glenclova Inv. Co. v. Trans-Res., Inc.*, 2012 WL 2196670 (S.D.N.Y. June 14, 2012).
[3] *See* Mem. in Opp'n to Pls.' Mot. for a Contempt Order at 4 (Oct. 31, 2008) (D.I. 47); Defs.' Mot. to Reopen Case and for Entry of a Standstill Order at 8-9 (Nov. 10, 2008) (D.I. 51); Answer to V. Compl. at 13 (Jan. 5, 2009) (D.I. 82); Answer to V. Am. Compl. at 18-19 (Mar. 30, 2009) (D.I. 134); Stip. Pre-Tr. Order at 6-7 (Dec. 4, 2009) (D.I. 302); Defs.' Post-Tr. Op. Br. at 9 (Jan. 15, 2010) (D.I. 332).
[4] Stip. Pre-Tr. Order at 6-7 (Dec. 4, 2009) (D.I. 302).

Trust, owned the Orly Trust shares; and that his son's trust, the Sagi Trust, owned the Sagi Trust shares.[5]

After trial and post-trial motions, Genger lost on all counts in this court. The court found that the Trump Group owned, and could vote, 100% of Trans-Resources' stock.[6] Having now lost in his chosen forum, Genger backtracked on appeal and argued that this court lacked jurisdiction to make a plenary determination as to these shares because the case was only a § 225 action, despite Genger's own request for plenary relief on the ownership question.[7] On appeal, our Supreme Court recognized that Genger had made an "about-face" on this question, but held for him as to two blocs of disputed shares, the Arie shares and the Orly Trust shares.[8] As to these shares, two indispensable parties—TPR, a holding company through which Genger had controlled Trans-Resources, and the Orly Trust—had not been joined to the litigation.[9]

But, as to the Sagi Trust shares, the Supreme Court did not find in Genger's favor. There was no absence of an indispensable party as to these shares: the Trump Group had bought them from TPR in a binding Purchase Agreement.[10] The Supreme Court also held that Genger was perfectly free to consent to a binding plenary adjudication of his

[5] *Id*. at 6.
[6] *TR Investors, LLC v. Genger*, 2010 WL 3279385 (Del. Ch. Aug. 9, 2010).
[7] *Genger v. TR Investors, LLC*, 26 A.3d 180, 199-203 (Del. 2011).
[8] *Id*. at 199.
[9] *Id*. at 202.
[10] *See id*. at 194-98.

ownership rights in the shares, as he had done.[11] Thus, on remand, a Revised Final Judgment was entered stating that the Trump Group owned 67.75% of the stock of Trans-Resources—including the 47.15% of Trans-Resources that Genger did not dispute that the Trump Group owned, and the 19.43% Sagi Trust shares.[12] The Revised Final Judgment also stated that TPR, and not Arie Genger and the Orly Trust, was the record owner of the shares that were not owned by the Trump Group.[13]

Counsel for the Trump Group and Genger "met, conferred, and agreed" on the Revised Final Judgment.[14] Nonetheless, from the time that it was entered, Genger has attempted to interfere with the Trump Group's ability freely to use and dispose of the Sagi Trust shares, and to use its majority voting control of Trans-Resources, subject only to its legal and equitable duties under Delaware's corporation law. Genger is trying to

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[11] *Id*. at 202.
[12] Revised Final Judgment Order ¶ 7 (Aug. 19, 2011) (D.I. 416). I explain the arithmetic. Under the original 2001 Stockholders Agreement between the Trump Group and Genger, the Trump Group obtained a 47.15% stake in Trans-Resources. Genger retained a 52.85% stake. But, the Trump Group had bargained for a 49%/51% split, and Genger's stake included an extra 1.85% of Trans-Resources' stock, termed the "Balance Shares," that the Trump Group had the right to buy on condition that one of Trans-Resources' creditors did not purchase them first (which it did not). The 2008 Purchase Agreement between the Trump Group, the Sagi Trust, and TPR provided that if Genger and the Orly Trust were deemed not to be the "record and beneficial owner[s]" of the Arie and Orly Trust shares, TPR was to transfer 64% of the Balance Shares—corresponding to those Balance Shares that were not included in the 19.43% Sagi Trust shares—to the Trump Group. The Revised Final Judgment confirmed the Trump Group's control of its original 47.15% stake, the 19.43% Sagi Trust shares, and these remaining Balance Shares, another 1.17% of Trans-Resources. This made a total of 67.75% of Trans-Resources. *See TR Investors, LLC v. Genger*, 2010 WL 2901704, at *5 (Del. Ch. July 23, 2010) (describing the operation of the Balance Shares).
[13] Revised Final Judgment Order ¶ 8.
[14] Letter from Thomas J. Allingham II, Esq. to the Court (Aug. 10, 2011) (D.I. 415).

relitigate, in the New York Supreme Court, the ownership of the Sagi Trust shares, even though the Revised Final Judgment—which Genger agreed to—establishes that the Trump Group is the owner of these shares.[15] Genger has also sought an injunction in the New York Supreme Court to prevent TPR from voting the Arie and Orly Trust shares, although the Revised Final Judgment states that TPR is the "record owner" as to these shares.[16] The New York court denied this request, on the ground that it was "tantamount to asking this court to ignore the decision of the Delaware Supreme Court."[17] But, noting that the question of the beneficial ownership of the Arie and Orly Trust shares was yet to be decided, the court entered an injunction requiring that the Trump Group and TPR give Genger "ten business days of notice with respect to the future transactions that impact"

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[15] Revised Final Judgment Order ¶ 7; *see* Third Amended and Supplemental Complaint, *Genger v. Genger*, Index. No. 651089/2010, ¶ 181 (N.Y. Sup. Ct. Sept. 20, 2011) ("Accordingly, Arie seeks an Order and declaratory judgment to reform the Court-Ordered Stipulation of Settlement to provide as follows: (i) That the transfer by Arie of his 51% interest in TPR to [his wife] and the concurrent transfer of the 3000 shares of TRI stock to Arie, the Orly Trust and the Sagi Trust . . . is voided *ab initio* . . . ."); *id*. ¶ 182 ("The $21,715,416.00 paid by the Trump Group to the Sagi Trust under the 2008 Stock Purchase Agreement will be returned to the Trump Group by TPR and the Sagi Trust."); *id*. ¶ 201 ("The Trump Group are not bona fide purchasers of any of the 3000 TRI shares that reverted to TPR."); *see also* Hr'g Tr., *Genger v. Genger*, Index. No. 651089/2010, 7:8-12 (N.Y. Sup. Ct. Oct. 11, 2011) ("There is no question that we [*i.e.*, counsel for Genger] will be arguing that Sagi Genger had absolutely no authority to sell his or any of the shares which are the subject of this litigation and we're prepared to go to trial on that authority issue . . . .").

[16] Revised Final Judgment Order ¶ 8; *see Genger v. Genger*, No. 651089/2010, at *5 (N.Y. Sup. Ct. Dec. 28, 2011) ("Arie's motion [seeks an order] directing and authorizing Arie to exercise all rights, including TPR's voting rights, with respect to [the Arie and Orly Trust shares].") [hereinafter N.Y. Dec. 2011 Op.].

[17] N.Y. Dec. 2011 Op. *8.

these shares.[18] Counsel for Orly Genger—who is aligned with Arie—has argued for a very broad application of the word "impact."[19] Even though the New York court specifically noted that it did not wish to "hamper the Trump Group in the operation of business," Genger seems to be using the injunction to do precisely this.[20] The injunction that Genger has obtained thus appears to prevent the Trump Group from managing Trans-Resources as it has the right to do under the Revised Final Judgment, given the Supreme Court's determination on appeal that this court properly found that the Trump Group owned the Sagi Trust shares and could vote the entirety of Trans-Resources' stock.[21]

The Trump Group now seeks to reopen the § 225 action to hold Genger in contempt and to prevent him from further frustrating its rights under the Revised Final Judgment. Genger's response is to argue that if he is in violation of the Revised Final Judgment, the Trump Group's remedy is to ask the New York court to heed this court's judgment under the Full Faith and Credit Clause of the Constitution, and so this court should not even consider the Trump Group's motion for contempt. Genger does not view an attempt to overturn a final judgment of this court that was the product of our Supreme

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[18] *Id*. at *12; *see also id.* at *15 ("[T]he Trump Group and TPR shall have to give plaintiffs ten business days' notice of future transactions that may impact the subject shares (except for share dilution) . . . .").
[19] *See* Hr'g Tr., *Genger v. Genger*, Index No. 109749/2009, at *8 (N.Y. Sup. Ct. Aug. 8, 2012) ("You [Justice Feinman] ordered that any transaction that may impact the [TRI] shares, just impact in any way the [TRI] shares, you said at least give 10 business days' notice.") (statement of Genger's counsel) [hereinafter N.Y. Aug. 2012 Hr'g].
[20] N.Y. Dec. 2011 Op. *12; *see* N.Y. Aug. 2012 Hr'g (application for a temporary restraining order in relation to promissory notes).
[21] *Genger v. TR Investors, LLC*, 26 A.3d 180, 203 (Del. 2011).

Court's decision on appeal as one implicating the interests of justice in a way that would justify this court to entertain a contempt motion.

I disagree. Our law is clear that a party that has obtained a court order may seek an order of civil contempt against the opposing party "to coerce obedience to [the] order."[22] In *Arbitrium (Handels AG) v. Johnston*, this court held that "[t]o establish civil contempt, plaintiffs must demonstrate that the defendants violated an order of this Court of which they had notice and by which they were bound."[23] Genger is bound by the Revised Final Judgment, which definitively settled the question of the ownership of the Sagi Trust shares and who has the right to manage Trans-Resources. Genger, as the Supreme Court acknowledged and is indisputable from his numerous pleadings, sought a plenary ruling about ownership of all the disputed blocs in this court himself, and asked this court to decide this question rather than leave it to the New York courts.[24] He did so repeatedly, including in the pre-trial stipulation in the action, where he stated:

> Mr. Genger respectfully requests that the Court enter an Order:
> 1. Finding that Mr. Genger owns 794.40 shares [*i.e.*, 13.99%] of TRI common stock;
> 2. Finding that the Orly Trust owns the equity interest in 1,102.80 shares [*i.e.*, 19.43%] of TRI common stock;

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[22] *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 1992 WL 83518, at *7 (Del. Ch. Apr. 22, 1992).
[23] *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 1997 WL 589030, at *3 (Del. Ch. Sept. 17, 1997).
[24] *E.g.*, *Genger*, 26 A.3d at 202 ("In this case, Genger voluntarily asked the trial court to determine that he *beneficially* owned 13.99%, and that the Orly Trust *beneficially* owned 19.43%, of the Trans-Resources shares.").

> 3. Finding that the Sagi Trust owned the equity interest in 1,102.80 shares of TRI common stock as of August 21, 2008 . . . .[25]

The Trump Group understood that Genger could bind *himself* to the jurisdiction of this court.[26] But, if it had known that Genger would stultify himself for personal advantage by pointing to the absence of his daughter (who sat in court through trial and testified for her father, and who has yet to be deposed about whether she authorized her father as her agent to seek plenary relief regarding ownership of the Orly Trust shares), it might have taken the wise precaution of joining Orly Genger, and TPR, as defendants in the action. Nonetheless, for present purposes, the indisputable reality is that the Supreme Court affirmed this court's determination that the rightful owner of the Sagi Trust shares is the Trump Group, and that TPR is the record owner of the Arie and Orly Trust shares.[27]

Therefore, this court's judgment in the § 225 action as to the ownership of the Sagi Trust shares, and who has the right to manage Trans-Resources and vote its shares, was final. Genger is bound by it, and is thus wrong that the Trump Group's sole recourse is to present this ruling to the New York court and request that it be given full faith and credit.

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[25] Stip. Pre-Tr. Order at 6-7, No. 3994-VCS (Dec. 4, 2009) (D.I. 302).
[26] *Genger*, 26 A.3d at 202.
[27] *Id*. at 194-98 (upholding this court's July 2010 opinion, which affirmed the Trump Group's ownership of the Sagi Trust shares); *id*. at 200 ("[W]e affirm the judgment of the Court of Chancery insofar as it determines the *record* ownership of the disputed Trans-Resources shares in the [August 2010] Opinion and the Final Judgment Order.").

In *Arbitrium*, the case that Genger relies on, the plaintiffs ultimately did not obtain a contempt order against the defendants because the order that the plaintiffs claimed was being violated did not bind the defendants in their personal capacities.[28] In that case, the § 225 action that led to the court's order was not a plenary determination of ownership rights, and so the defendants, who had been removed as officers and directors of the corporation, were not prevented from asserting their ownership rights elsewhere.[29] But, in this case, the judgment as to the Sagi Trust shares was a plenary determination, and the Supreme Court upheld it in full.[30] Therefore, the Trump Group may prevent Genger from challenging the ruling on the ownership of these shares in New York. The Trump Group may also seek to prevent Genger from using the injunction he obtained in New York to disrupt the governance of Trans-Resources, because the question of who has the right to manage Trans-Resources was settled in a binding way by the Revised Final Judgment that followed the § 225 action.

Because the Trump Group may seek to hold Genger in contempt, it is appropriate for it to move to reopen the closed proceedings. A party that moves for a finding of contempt may do so in the case in which the judgment is being violated.[31] The party may use Court of Chancery Rule 60(b)(6), which permits a judge to grant relief for "any . . .

[28] *Arbitrium*, 1997 WL 589030, at *4.
[29] *Id*.
[30] *Genger*, 26 A.3d at 202.
[31] *See In re Tyson Foods, Inc.*, 919 A.2d 563, 599 (Del. Ch. 2007) ("Plaintiffs' proper recourse with regard to contempt would be to file a motion to show cause in the earlier case.") (citing Del. Ct. Ch. R. 70(b)).

reason justifying relief from the operation of the judgment," to reopen a closed case.[32] Under Rule 60(b)(6), the moving party must demonstrate why there are "extraordinary circumstances" that justify reopening the case.[33] In this case, it appears that there is a plausible argument that Genger has taken conscious steps to impede the Trump Group's use of its undisputed ownership of the Sagi Trust shares, and its right to manage Trans-Resources, in violation of the Revised Final Judgment. In this unusual situation, the Trump Group should have the opportunity to present a motion for contempt. Therefore, the motion to reopen this case under Rule 60(b)(6) is granted. The parties shall confer and present an order consolidating this matter with the other pending dispute, C.A. No. 6697-CS, so that the matters can be efficiently brought to a conclusion.

Very truly yours,

/s/ Leo E. Strine, Jr.

Chancellor

[32] Del. Ct. Ch. R. 60(b); *see McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491, 503 (2d Cir. 2000) (noting that Rule 60(b)(6) could be used to reopen a closed case so that plaintiffs could seek a contempt order, if it was shown that the defendant had breached a court order) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378 (1994)).

[33] *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 634 n.9 (Del. 2001); *see McGoff v. Rapone*, 78 F.R.D. 8, 24 (E.D. Pa. 1978) (stating that "the aggrieved party must bear the burden of persuading the court to reopen [a final] matter 'in the interests of justice' on a 60(b)(6) motion" before "the contempt remedy will lie"); *cf. Steinbach v. Royal & SunAlliance Ins. Co.*, 2008 WL 3852741 (W.D. Wis. Aug. 14, 2008) (denying the plaintiff's motion for relief under Rule 60(b)(6), and then for a ruling of contempt, where the plaintiff had not shown why the judgment should be re-opened).