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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| ANTHONY HORBAL and HERC MANAGEMENT SERVICES, LLC, derivatively on behalf of SEEGRID CORPORATION,<br><br>Plaintiffs-Below, Appellants,<br><br>v.<br><br>DANIEL SHAPIRA, PHILLIP OLIVERI, HANS MORAVEC, GIANT EAGLE, INC., and GIANT EAGLE OF DELAWARE, INC.,<br><br>and<br><br>SEEGRID CORPORATION,<br><br>Defendants-Below, Appellees. | No. 389, 2015<br><br>Court Below, Chancery Court of the State of Delaware, C.A. 10023-VCL |

# APPELLANTS' REPLY BRIEF

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**Dated: October 28, 2015**

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### A. The Trial Court Committed Reversible Error By Dismissing The Complaint With Prejudice.

Appellants'[1] first issue on appeal is that the Trial Court committed reversible error by dismissing the Complaint with prejudice given the nature of the relief sought by Appellees pursuant to the Motion.[2] As Appellants established in their Opening Brief, the Trial Court committed reversible error by dismissing the Complaint with prejudice because: (i) Chancery Court Rule 25(c) is merely a rule of procedure that does not provide for the dismissal of a complaint; (ii) Old Seegrid did not request the dismissal of the Complaint in the Motion – its only requested relief was the substitution of New Seegrid as the sole plaintiff in this action; and (iii) the Trial Court failed to comply with the requirements of Court of Chancery Rules 12(b)(6), 15(a), 15(aaa), and 56.

#### 1. The Court's standard of review is *de novo*, not abuse of discretion.

Appellees erroneously frame the first issue on appeal as involving an analysis of "whether a trial court properly reached an issue based on the parties' motions and the procedural status of the case," and then compound that error by asserting that this Court's standard of review of the purported issue is whether the trial court abused its discretion.[3]

[1] Unless otherwise stated, all capitalized terms have the same meaning as that set forth in Appellants' Amended Opening Brief.

[2] *See* Appellants' Amended Opening Brief at 12.

[3] *See* Appellees' Answering Brief at 13-15.

The Trial Court dismissed the Complaint with prejudice based on its erroneous conclusions that collateral estoppel applies to the Complaint and Appellants' lack standing to pursue the Complaint.[4] It is these questions of law underlying that dismissal that are the subject of this appeal.[5] This Court's standard of review of those questions of law and the circumstances in which they were rendered is *de novo*.[6] Indeed, the authorities on which Appellees rely in erroneously asserting that an abuse of discretion standard of review applies to the Trial Court's *sua sponte* dismissal of the Complaint with prejudice are inapposite.[7]

**a. Appellees' reliance on *Nicholson v. Redman* is misplaced.**

*Nicholson v. Redman*[8] is an unpublished decision in which defendants (unlike Appellees) moved to dismiss the action based on the doctrine of collateral estoppel. Plaintiff opposed the dismissal based on a purported lack of mutuality, and the trial court granted the motion to dismiss because mutuality is not required by Delaware law for defensive collateral estoppel to apply.[9] On appeal, this Court relied on *Chrysler Corp. v. New Castle County*[10] in concluding that the trial court committed "no error of law" in following "settled Delaware law" that mutuality is

[4] *See* Appellants' Amended Opening Brief at 9-11.

[5] *See id.* at 11.

[6] *See id.* at 12.

[7] *See* Appellees' Answering Brief at 13-15 (citing *Nicholson v. Redman*, 620 A.2d 858 (Del. 1993); *Barker v. Huang*, 610 A.2d 1341 (Del. 1992); *Bank of Del. v. Claymont Fire Co. No. 1*, 528 A.2d 1196 (Del. 1987); *Troy Corp. v. Schoon*, 959 A.2d 1130 (Del. Ch. 2008)).

[8] 1993 WL 22026 (Del. Jan. 6, 1993).

[9] *See id.* at *1.

[10] 464 A.2d 75 (Del. Super. Ct. 1983).

not required for defensive collateral estoppel to apply.[11] Thus, in *Nicholson*, this Court applied a *de novo* standard of review to a question of law.[12]

In any event, neither *Nicholson* nor *Chrysler Corp.* involved the propriety of a *sua sponte* dismissal – *Nicholson* addressed a motion to dismiss based on defensive collateral estoppel, and *Chrysler Corp.* concerned motions for summary judgment based on defensive and offensive collateral estoppel.[13] Thus, *Nicholson* does not support Appellees' position that this Court's standard of review of the Trial Court's *sua sponte* dismissal of the Complaint with prejudice is limited to whether the Trial Court abused its discretion.

**b. *Barker* and *Bank of Del.* do not support Appellees' position.**

*Barker v. Huang*[14] involved two motions: (i) a "hybrid motion, denominated for summary judgment and/or for dismissal for failure to state a claim," which "generally asserted that plaintiff's complaint failed to plead a claim for relief;" and (ii) a "more classic motion . . . that the complaint failed to state a cause of action."[15] This Court stated that the two motions "were sufficient notice to

[11] *See Nicholson*, 1993 WL 22026, at *1-2. This case involves the application of federal law, and not Delaware law, on collateral estoppel. *See* Appellants' Amended Opening Brief at 19; Appellees' Answering Brief at 20.

[12] Appellees incorrectly rely on this Court's final statement in *Nicholson* that no abuse of discretion occurred "[t]o the extent that the issue on appeal implicates the exercise of judicial discretion." *See* Appellees' Answering Brief at 13. This Court did not identify what exercise of judicial discretion was potentially implicated in *Nicholson*. *See Nicholson*, 1993 WL 22026, at *2. Nevertheless, as discussed in the text, the first issue on appeal in this case involves questions of law and not any exercise of judicial discretion.

[13] *See Nicholson*, 1993 WL 22026, at *1; *Chrysler Corp.*, 464 A.2d at 79.

[14] 610 A.2d 1341 (Del. 1992).

[15] *See id.* at 1348.

plaintiff that all of her claims were called into question."[16] Thus, based on *Bank of Del. v. Claymont Fire Co. No. 1*,[17] this Court concluded that "it is appropriate for a court to act *sua sponte* in the interests of judicial economy," and that the trial court did not abuse its discretion in *sua sponte* reaching the merits of plaintiff's claims.[18]

But in *Claymont Fire*, the issue was the propriety of a *sua sponte* grant of summary judgment to the non-movant when the "state of the record" created by the movant demonstrated that the interests of justice and judicial economy dictated that the non-movant was actually entitled to summary judgment.[19]

This Court made clear that: (i) the rule announced in *Claymont Fire* is based on Chancery Court Rule 56, which "gives that court the inherent authority to grant summary judgment *sua sponte* against a party seeking summary judgment;" and (ii) *Claymont Fire* "recognized that the Court of Chancery should only *sua sponte* grant summary judgment against a party seeking summary judgment when the 'state of the record is such that the non-moving party is clearly entitled to such relief[.]'"[20] This Court made clear that the standard of review applicable to a *sua sponte* grant of summary judgment to the non-movant is *de novo*.[21]

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[16] *See id.*

[17] 528 A.2d 1196 (Del. 1987).

[18] *See Barker*, 610 A.2d at 1348.

[19] *See Claymont Fire*, 528 A.2d at 1199.

[20] *See Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992).

[21] *See id.*

Here, Appellees did not seek summary judgment under Rule 56 or move to dismiss the Complaint under Chancery Court Rule 12(b)(6), but sought to substitute Old Seegrid as the sole plaintiff pursuant to Chancery Court Rule 25(c).[22] Appellants, therefore, were not on notice that the Complaint could be dismissed with prejudice.[23] Thus, neither *Barker* nor *Claymont Fire* supports Appellees' position that the Court reviews the Trial Court's *sua sponte* dismissal of the Complaint with prejudice merely for an abuse of discretion.

**c. *Troy Corp. v. Schoon* is inapposite.**

*Troy Corp. v. Schoon*[24] was rendered by the Court of Chancery, and not this Court; therefore, it does not address this Court's standard of review.[25] Moreover, Appellees erroneously rely on *Troy Corp.* for the proposition in a footnote that, based on *Capaldi v. Richards*,[26] "the court may raise issues of collateral estoppel *sua sponte*."[27] Neither *Troy Corp.* nor *Capaldi* involved the *sua sponte* application of collateral estoppel. Rather, in *Troy Corp.*, defendants moved for judgment on the pleadings or summary judgment based on the application of collateral estoppel

[22] *See* Appellants' Amended Opening Brief at 6-8.

[23] *See id.* at 8-9.

[24] 959 A.2d 1130 (Del. Ch. 2008).

[25] *See id.*

[26] 2006 WL 3742603 (Del. Ch. Aug. 9, 2006).

[27] *See Troy Corp.*, 959 A.2d at 1134 n.7.

under Delaware law,[28] and in *Capaldi*, defendant invoked the doctrine of judicial estoppel (and not collateral estoppel) in support of her pending motion to dismiss.[29]

In addition, the *Capaldi* court determined that the defense of judicial estoppel did not result in the conversion of a motion to dismiss into a motion for summary judgment because "judicial estoppel may be raised independently by the Court" and "courts have granted motions to dismiss under the doctrine of judicial estoppel."[30] In contrast, collateral estoppel is an affirmative defense that is waived if it is not raised.[31]

Thus, *Troy Corp.* does not address this Court's standard of review of the first issue on appeal. Accordingly, Appellees erroneously contend, based on inapposite Delaware authority, that this Court's standard of review of the Trial Court's *sua sponte* dismissal of the Complaint with prejudice is merely for an abuse of discretion. To the contrary, Appellants respectfully submit based on cited authority and precedent that this Court should conduct a *de novo* review of the Trial Court's dismissal of the Complaint with prejudice.

[28] *See id.* at 1133.

[29] *See Capaldi*, 2006 WL 3742603, at *1.

[30] *See id.* at *2 & n.7 (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001).

[31] *See* Appellants' Amended Opening Brief at 26-27.

### 2. The Trial Court committed reversible error by dismissing the Complaint with prejudice pursuant to the Motion.

Appellees erroneously assert that the Trial Court's *sua sponte* dismissal of the Complaint with prejudice was proper.[32] To the contrary, the Trial Court failed to comply with the notice and other procedural requirements of Chancery Court Rules 25(c), 12(b)(6), 15(a), 15(aaa), and 56(c), which constitutes reversible error.

#### a. Appellants did not have proper notice of the possibility of dismissal.

Appellees ignore the fact that the Motion was brought pursuant to Rule 25(c), sought only to substitute Old Seegrid as the sole plaintiff, and did not seek to dismiss the Complaint, let alone with prejudice.[33] Appellees also ignore that Appellants (and Old Seegrid) had no notice that paragraph 35 of the Confirmation Order was a basis on which the Trial Court could and would dismiss the Complaint with prejudice.[34] Indeed, it was not until after the parties submitted their briefs and concluded oral argument on the Motion that the Trial Court informed them that paragraph 35 of the Confirmation Order was a basis for its dismissal of the Complaint with prejudice.[35] Moreover, it is undisputed that the Motion was not a motion to dismiss for failure to state a claim under Rule 12(b)(6).[36] Thus, the Trial Court's dismissal of the Complaint with prejudice constitutes reversible error,

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[32] *See* Appellees' Answering Brief at 15.

[33] *See* Appellants' Amended Opening Brief at 6-8.

[34] *See id.* at 8-10.

[35] *See id.*

[36] *See id.* at 4-7; Appellees' Answering Brief at 9, 17.

because unlike in *Barker* on which Appellees erroneously rely, Appellants never had sufficient notice that their claims were at risk of dismissal.[37]

**b. <u>Appellants should have been given the opportunity to amend their Complaint.</u>**

Appellees misconstrue Appellants' argument concerning Rules 15(a) and 15(aaa). Appellants do not contend that the Trial Court was required to allow Appellants to amend their Complaint even if such amendment were futile.[38] Instead, Appellants contend that they were deprived of the procedural protections afforded by Rules 15(a) and 15(aaa) based on the lack of sufficient notice that the Court could dismiss the Complaint with prejudice pursuant to the Motion.[39]

As to Rule 15(a), Appellants were entitled "as a matter of course" to amend their Complaint to include allegations that were not subject to collateral estoppel and that asserted the existence of double derivative standing because it is undisputed that the Motion was not a responsive pleading to the Complaint.[40] The Trial Court, however, erroneously deprived Appellants of the opportunity to amend.[41] Indeed, the Trial Court did <u>not</u> determine that collateral estoppel barred

[37] *See Barker*, 610 A.2d at 1348.

[38] *See* Appellees' Answering Brief at 15-17.

[39] *See* Appellants' Amended Opening Brief at 4-5, 14-16.

[40] *See id.* at 15, 32; Appellees' Answering Brief at 9, 17.

[41] *See* Appellants' Amended Opening Brief at 15, 32.

all potential claims and allegations against Appellees,[42] and recognized the likelihood that Appellants could assert double derivative standing.[43]

As to Rule 15(aaa), Appellants were entitled to adequate notice that the Complaint was subject to dismissal with prejudice so they could choose to avoid the possibility of such a dismissal (absent a showing of good cause) by amending the Complaint rather than responding to Appellees' purported motion to dismiss.[44] Indeed, Appellees' failure to correctly characterize Appellants' position on appeal is encapsulated by its statement that "Rule 15(aaa) is not implicated in this case" because it never briefed its Rule 12(b)(6) motion to dismiss and, therefore, Appellants never were confronted with the choice of amending their Complaint or responding to its purported motion to dismiss.[45] In short, the Trial Court's failure to afford Appellants with the procedural protections of Rules 15(a) and 15(aaa) demonstrates that its *sua sponte* dismissal of the Complaint with prejudice constitutes reversible error.

**c. Appellants should have been provided with the procedural protections afforded to summary judgment non-movants.**

Appellees erroneously assert that Appellants were not entitled to the procedural protections afforded to summary judgment non-movants because the Trial Court was permitted to take judicial notice of the proceedings in the

[42] *See id.* at 9-11, 25-26.

[43] *See id.* at 32.

[44] *See id.* at 15-16, 32.

[45] *See* Appellees' Answering Brief at 17.

Bankruptcy Court and, therefore, it was not required to convert the Motion into a Rule 56(c) summary judgment motion.[46] Appellees' assertion incorrectly presupposes that the Motion was a motion to dismiss under Rule 12(b)(6) (which it was not), and not a motion for substitution under Rule 25(c) (which it was).[47]

But even if the Motion is deemed a Rule 12(b)(6) motion to dismiss and the Trial Court did take judicial notice of the proceedings in the Bankruptcy Court,[48] the Trial Court still erred by failing to convert the purported motion to dismiss into a summary judgment motion.[49] Although taking judicial notice of "matters that are not subject to reasonable dispute" does not convert a motion to dismiss into a motion for summary judgment,[50] Appellees erroneously assert that all the extraneous matters considered by the Trial Court were judicially noticeable facts.[51] In contrast to the Confirmation Order and other pleadings filed in the Bankruptcy Court (which are proper subjects for judicial notice), the transcripts submitted by the parties from the proceedings in the Bankruptcy Court are not judicially noticeable facts because they contain testimony and argument concerning disputed facts that are not "generally known" or "capable of accurate and ready

[46] *See id.* at 17-19.

[47] *See id.* at 9, 17; Appellants' Amended Opening Brief at 6-7.

[48] The Trial Court never stated that it was taking judicial notice of the proceedings in the Bankruptcy Court. *See* Appendix to Appellants' Opening Brief at 666-744.

[49] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006); Appellants' Amended Opening Brief at 16-18.

[50] *See Gen. Motors (Hughes)*, 897 A.2d at 169.

[51] *See* Appellees' Answering Brief at 18-19; DEL. R. EVID. 201(b).

determination."[52] Moreover, Appellees' assertion that the Trial Court was permitted to take judicial notice of the proceedings in the Bankruptcy Court because the Complaint encompassed "allegations related to the Bankruptcy Proceeding" is erroneous given that the Complaint was filed more than two months prior to the filing of the Petition.[53]

Thus, the Trial Court erroneously failed to convert the Motion into a summary judgment motion and provide Appellants with adequate notice of the need to present all their summary judgment evidence – including as to the purported preclusive effect of paragraph 35 of the Confirmation Order.[54] As this Court has stated, "[a]ny *sua sponte* conversion by the trial judge should be exercised with great caution and attention to the parties' procedural rights . . . . Before a motion to dismiss may be converted to one for summary judgment, parties must be given adequate notice and a reasonable opportunity to present pertinent material."[55] That did not happen in this case, causing substantial and unfair prejudice to Appellants. Accordingly, the Trial Court committed reversible error in *sua sponte* dismissing the Complaint with prejudice.

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[52] *See* DEL. R. EVID. 201(b); *Hinton v. Dep't of Justice*, 844 F.2d 126, 130 n.1 (3d Cir. 1988); *Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892-93 (D. Del. 1991).

[53] *See* Appellees' Answering Brief at 18; Appellants' Amended Opening Brief at 4-5, 14-15.

[54] *See* Appellants' Amended Opening Brief at 16-18.

[55] *See Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1288 (Del. 2007).

## B. The Trial Court Committed Reversible Error By Dismissing The Complaint With Prejudice Based On Collateral Estoppel.

Appellees do not dispute that this Court's standard of review of the Trial Court's application of collateral estoppel to the Complaint is *de novo*, and that the preclusive effect, if any, of the Confirmation Order is governed by federal common law.[56] Appellees concede on appeal that they have the burden of demonstrating that collateral estoppel bars the entire Complaint, and that collateral estoppel should not be applied to the Complaint if any doubt exists about whether the requirements of collateral estoppel are satisfied.[57] Appellees did not meet their burden.

### 1. Paragraph 15 of the Confirmation Order does not support the application of collateral estoppel to the Complaint.

Appellees erroneously assert that the Bankruptcy Court was required to evaluate Old Seegrid's "road to bankruptcy, its interactions with Giant Eagle, and, ultimately, the Plan offered by Giant Eagle to rescue [Old] Seegrid from its financial crisis" to determine that the Plan was proposed in good faith.[58] To the contrary, the Bankruptcy Court was not required to make any pre-petition factual determinations because it permitted Appellants to withdraw their equitable subordination claim, which was based on Giant Eagle's pre-petition conduct.[59] In addition, the Bankruptcy Court's factual determinations concerning the Plan being

[56] *See* Appellants' Amended Opening Brief at 19; Appellees' Answering Brief at 20.

[57] *See* Appellants' Amended Opening Brief at 20, 25-26.

[58] *See* Appellees' Answering Brief at 25.

[59] *See* Appellants' Amended Opening Brief at 25; Appellees' Answering Brief at 6-7.

the only means of saving Old Seegrid were based on the circumstances existing at the time of entry of the Confirmation Order and do not address the allegations in the Complaint to the effect that Old Seegrid's financial distress arose only as a result of Giant Eagle's pre-petition misconduct.[60]

In any event, even assuming *arguendo* that the Bankruptcy Court was required to make such pre-petition factual determinations, those determinations are not entitled to be given preclusive effect because they were not "essential" to the Bankruptcy Court's determination that Old Seegrid proposed the Plan in good faith, as required by 11 U.S.C. § 1129(a)(3), and set forth in paragraph 15 of the Confirmation Order.[61] Although Appellees assert that the totality of the circumstances requires the good faith inquiry under section 1129(a)(3), the authorities on which Appellees rely confirm that the good faith inquiry under section 1129(a)(3) is limited to an evaluation of the Chapter 11 Plan itself.[62] Thus, the Bankruptcy Court's factual determinations in paragraph 15 of the Confirmation Order concerning Appellees' pre-petition conduct were not "essential" to the good faith inquiry under section 1129(a)(3).[63] Moreover, the Trial Court did not determine that the statements in paragraph 15 of the Confirmation Order bar each

[60] *See* Appellants' Amended Opening Brief at 4, 23-24; Appellees' Answering Brief at 8.

[61] *See* Appellants' Amended Opening Brief at 20-24.

[62] *See* Appellees' Answering Brief at 23-24 (citing *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000); *In re Am. Capital Equip., LLC*, 688 F.3d 145, 156-57 (3d Cir. 2012) (same); *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 142 (Bankr. D.N.J. 2010) (same); *In re Unbreakable Nation Co.*, 437 B.R. 189, 198 (Bankr. E.D. Pa. 2010) (same); *In re Coram Healthcare Corp.*, 271 B.R. 228, 234 (Bankr. D. Del. 2001).

[63] *See In re Am. Capital Equip., LLC*, 688 F.3d at 157.

and every one of the allegations in the Complaint.[64] Accordingly, Appellees cannot sustain their burden of demonstrating that paragraph 15 of the Confirmation Order bars the prosecution of the entire Complaint.

### 2. Paragraph 35 of the Confirmation Order does not support the application of collateral estoppel to the Complaint.

Appellees erroneously assert that paragraph 35 of the Confirmation Order resolved "identical" issues that are "necessary" to those raised by the Complaint because it would be nonsensical "for the Bankruptcy Court to allow Giant Eagle to retain its debt if . . . Giant Eagle's loans were part of a scheme to steal" Old Seegrid's assets, as alleged in the Complaint.[65] Because Appellants did not object to the allowance of Giant Eagle's claims in the Bankruptcy Court,[66] those claims were deemed valid and allowed by the Bankruptcy Court.[67] In other words, the Bankruptcy Court determined, at most, that Old Seegrid has a contractual obligation to repay Giant Eagle's loans under Pennsylvania law; it did not address whether the timing and sufficiency of those loans, or Old Seegrid's failure to engage an independent financial advisor to evaluate those loans or pursue pre-petition financing, constitute a breach of fiduciary duties under Delaware law.[68]

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[64] *See* Appellants' Amended Opening Brief at 25-26.

[65] *See* Appellees' Answering Brief at 27.

[66] *See* Appellants' Amended Opening Brief at 28.

[67] *See* 11 U.S.C. § 502(a); FED. R. BANKR. P. 3001(f); *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992); *In re Planet Hollywood Int'l*, 274 B.R. 391, 394 (Bankr. D. Del. 2001); *In re Pinnacle Brands, Inc.*, 259 B.R. 46, 49-50 (Bankr. D. Del. 2001); *see also In re Hamilton*, 22 B.R. 560 (Bankr. D. Del. 1982).

[68] *See* Appellants' Amended Opening Brief at 27-29.

In addition, Appellees do not dispute that Appellee Giant Eagle's contractual claims against Old Seegrid and Appellants' breach of fiduciary duty claims against Appellees are governed by different legal rules – *i.e.*, Pennsylvania contract law and Delaware tort law, respectively.[69] Appellees also do not dispute that the United States Court of Appeals for the Third Circuit has held that the same legal rules must govern both cases for an issue to be "identical" and entitled to preclusive effect.[70]

Thus, Paragraph 35 in the Confirmation Order is not entitled to preclusive effect because no "identical" issues that are "necessary" to those raised by the Complaint were determined by the Bankruptcy Court in connection with Appellee Giant Eagle's loans to Old Seegrid.[71]

In dismissing the action with prejudice based on collateral estoppel, the Trial Court erroneously determined that the Confirmation Order addressed all the issues raised in the Complaint.[72] The Trial Court committed reversible error because it did not analyze each and every one of the factual bases for Appellants' breach of fiduciary duty claims and determine how the Confirmation Order's "essential" findings purportedly preclude the litigation of the Appellants' allegations in the

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[69] *See* Appellees' Answering Brief at 26-29.

[70] *See* Appellants' Amended Opening Brief at 27.

[71] *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 250 (3d Cir. 2006).

[72] *See* Transcript, dated July 14, 2015 at 28-33, 38-62, 75-80, Appendix to Appellants' Opening Brief at 693-698, 703-727, 740-745.

Complaint.[73] To apply collateral estoppel, the Trial Court would need to conduct a much more thorough analysis than Appellees offered. In particular, the Trial Court would have to review the Complaint and strike only those allegations in Appellants' complaint in which collateral estoppel applies. It then would have to determine whether Appellants could still assert viable claims in this action. Appellees, however, did not provide the Trial Court with the record to do so. Accordingly, Appellees did not sustain their burden of demonstrating that paragraph 35 of the Confirmation Order bars the prosecution of the entire Complaint.

### 3. Appellants were denied a "full and fair opportunity" to litigate in the Bankruptcy Court.

As the United States Supreme Court stated in *Kremer v. Chem. Constr. Corp.* (on which Appellees also rely), "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."[74] Such doubt exists in this case because the record shows and Appellees do not dispute that: (i) the Bankruptcy Court refused to hear Appellants' valuation evidence and evaluate the Plan under the entire fairness standard under Delaware law;[75] and (ii) Appellants did not object to Old Seegrid's

[73] *See id.*

[74] *See Kremer v. Chem. Constr. Corp*., 456 U.S. 461, 481 (1982) (internal quotations and citation omitted).

[75] *See* Appellants' Amended Opening Brief at 25-26; Appellees' Answering Brief at 31.

contractual obligation to repay Giant Eagle's loans.[76] Indeed, Appellees' own authorities confirm that Appellants' inability to be fully heard on those issues in the Bankruptcy Court precludes the application of collateral estoppel to the Complaint.[77] Instead, Appellees erroneously assert that Appellants were "not handcuffed in any way" in the Bankruptcy Court.[78] Accordingly, Appellees have not demonstrated that Appellants had a "full and fair opportunity" to litigate in the Bankruptcy Court all the legal and factual issues underlying Appellants' breach of fiduciary duty allegations in the Complaint.

[76] *See* Appellants' Amended Opening Brief at 28.

[77] *See* Appellees' Answering Brief at 30-32 (citing *Kremer*, 456 U.S. at 485; *Witkowski v. Welch*, 173 F.3d 192, 205 (3d Cir. 1999); *Troy Corp.*, 959 A.2d at 1136; *In re Summit Metals, Inc.*, 477 B.R. 484, 500 (Bankr. D. Del. 2012)).

[78] *See id.* at 32.

## C. The Trial Court Committed Reversible Error By Dismissing The Complaint With Prejudice Based On A Purported Lack Of Standing.

The Trial Court erroneously denied Appellants an opportunity to replead to assert their double derivative standing. Appellees do not dispute that Rule 25(c), on which the Motion was based, is a rule of procedure only that does not provide for dismissal, let alone with prejudice.[79] Appellees also do not dispute that this Court has held that challenges to standing are to be brought pursuant to only Rule 12(b)(6), which the Motion was not.[80]

Further, as previously discussed, the Trial Court improperly denied Appellants an opportunity to amend their Complaint in contravention of Rules 15(a) and 15(aaa).[81]

Finally, Appellees cite no authority for the proposition that Appellants, as minority owners, lack double derivative standing under Delaware law (an issue that the Trial Court did not decide), and ignores the Trial Court's pronouncement that, absent its application of collateral estoppel to bar the prosecution of the claims in the Complaint, Appellants should have an opportunity to replead to assert their double derivative standing.[82]

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[79] *See* Appellants' Amended Opening Brief at 6-7, 13; *see generally* Appellees' Answering Brief.

[80] *See* Appellants' Amended Opening Brief at 32; *see generally* Appellees' Answering Brief.

[81] *See* Appellants' Amended Opening Brief at 15-16, 32.

[82] *See* Appellees' Answering Brief at 7, 33-34; Appellants' Amended Opening Brief at 9-10, 32.

Delaware law recognizes double derivative actions. Indeed, the Court has recognized that other courts hold double derivative standing exists when a parent does not wholly own, but has majority control over or dominates its subsidiary.[83] Appellants have standing based on Old Seegrid's and Appellees' control over New Seegrid. Old Seegrid owns at least 45% of New Seegrid. Appellee Giant Eagle has appointed the majority of directors of both Old and New Seegrid and owns 47% and 40% of Old and New Seegrid, respectively. Furthermore, Old Seegrid did not have any valid business reason to transfer its derivative claims to New Seegrid, a newly created entity.[84] Based on these facts, Old Seegrid, through Appellee Giant Eagle, has sufficient control over New Seegrid to warrant a double derivative action.[85] Accordingly, the Trial Court's dismissal of the Complaint with prejudice based on Appellants' purported lack of standing constitutes reversible error.

[83] *See Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1079 n.10 (Del. 2011); *Lambrecht v. O'Neal*, 3 A.3d 277, 283 n.14 (Del. 2010). *See also Belendiuk v. Carrion*, 2014 WL 3589500, at *7 n.54 (Del. Ch. July 22, 2014).

[84] *See Lambrecht*, 3 A.3d at 284 n. 20.

[85] *See West v. West*, 825 F. Supp. 1033, 1055 (N.D. Ga. 1992. *See also* Comment, *Corporations—A Multiple Derivative Action Is Valid In Certain Instances Though The Corporation In Which Plaintiff Holds Shares Does Not Own A Controlling Interest In The Corporation Which Controls The Corporation In Whose Behalf Plaintiff Sues*, 44 GEO. L.J. 334 (1956).

## CONCLUSION

For all the above reasons and for the reasons stated in their Opening Brief, Appellants respectfully request that the Court reverse the Order and remand this action to the Trial Court with instructions to afford Appellants an opportunity to amend their Complaint. The Trial Court committed reversible error based on the: (i) *sua sponte* dismissal of the Complaint with prejudice pursuant to Rule 25(c), and failure to comply with the notice and other procedural requirements of Rules 12(b)(6), 15(a), 15(aaa), and 56; (ii) determination that Appellees sustained their burden of proving that collateral estoppel applies to all the factual allegations underlying the breach of fiduciary duty claims in the Complaint; and (iii) conclusion that Appellants lack standing to pursue the Complaint.

RESPECTFULLY SUBMITTED,

**WERB & SULLIVAN**

By: */s/ Brian A. Sullivan*

Dated: October 28, 2015

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