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Case Number 174,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

Robert W. Seiden Esq. in his capacity as Receiver for Southern China Livestock, Inc.,	)	
Plaintiff Below, Appellant,	)	No. 174, 2017
vs.	)	On Appeal from the Chancery Court
Shu Kaneko a/k/a Joseph Kaneko, Liqiang Song a/k/a Liquang Song a/k/a Li Song a/k/a Song Liqiang, a/k/a Li Qiang Song a/k/a Richard Lee,	)	of the State of Delaware C.A. No. 9861-VCS
Defendants Below, Appellees	)	

OPENING BRIEF OF APPELLANT ROBERT W. SEIDEN, ESQ. IN HIS CAPACITY AS RECEIVER FOR SOUTHERN CHINA LIVESTOCK, INC.

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NATURE OF THE PROCEEDINGS

The instant appeal is brought by Robert W. Seiden, as Receiver (the "Receiver"), over Southern China Livestock, Inc. ("SCLI"), to enforce a judgment entered in the Chancery Court on behalf of certain U.S. investors (the "Investors") who lost millions of dollars when SCLI's assets were misappropriated by Defendant Shu Kaneko ("Kaneko"), for his own personal use. After the misappropriation of assets, SCLI "went dark," creating a shield from scrutiny as Kaneko, who controlled all of SCLI's bank accounts, amongst other things, stripped the cash and others assets clean, leaving SCLI an empty shell and investors' claims unsatisfied.[1]

SCLI is a Delaware company controlled by Kaneko, the mastermind of the subject fraud. Kaneko controlled and maintained signatory authority over millions of dollars in private placement ("PP") money funneled through the corporate bank accounts. As asserted in the underlying action, in his position as a control person, Kaneko stripped SCLI's assets, leaving at least $2.35 million of the funds raised from the PP unaccounted for, hundreds of thousands of dollars of which were transferred to (or for the benefit of) Kaneko for personal expenses such as his meals, unsubstantiated travel, expenses for his condo as well as corporate housing, grocery and drug store charges, maid, landscaping bills, and other items that, under

[1] Details of the reverse merger are contained in A0028-A0074 (FAC) and A1379 (Ex. T - Timeline).

any reasonable standard, are not legitimate business expenses. These transfers for personal expenses were to the complete detriment of creditors and the Investors, who were left with claims against an empty shell entity and who have not recovered a dime of the PP funds.

After the Investors were unable to recover their investment, they sought the appointment of a Receiver in the Delaware Chancery Court. A Receiver was appointed and investigated the circumstances of the failure of SCLI. After the investigation was complete, the Receiver filed suit alleging the following claims against Kaneko: (i) breach of fiduciary duty; (ii) aiding and abetting breach of fiduciary duty; (iii) conversion; (iv) aiding and abetting conversion; (v) fraud; (vi) conspiracy to defraud and convert property; (vii) fraudulent transfer under 6 *Del. Code* § 1304(a)(1) and/or § 1304(a)(2) – Private Placement Proceeds; (viii) fraudulent transfer under 6 *Del. Code* § 1304(a)(1) and/or § 1304(a)(2) – Alleged Release; (ix) corporate waste – Alleged Release; (x) fraudulent for transfer of real property under 6 *Del. Code* § 1304(a)(1) and/or § 1304(a)(2); (xi) unjust enrichment; (xii) constructive; and (xiii) an accounting.

As a defense to the Receiver's lawsuit against him, Kaneko asserted that SCLI had released (the "Release") all of its claims against him in 2013 in exchange for the return of certain shares in SCLI—shares which Kaneko did not own, and controlled impermissibly through violation of a Lockup Agreement (defined

below)—to facilitate a purported restructuring. In its initial ruling on Kaneko's Motion to Dismiss (the "MTD"), the Chancery Court determined that the Release was *not* supported by consideration (the "MTD Opinion"), given that the shares were not owned by Kaneko, and were held by Kaneko improperly (and hence not an asset of Kaneko that could serve as consideration in exchange for the Release), and because Kaneko had failed to identify any material benefit SCLI would receive by holding the Song Held Shares in a custodial capacity for the beneficial owners, warranting denial of the MTD.

After the Chancery Court entered the MTD Opinion, Kaneko answered the Receiver's First Amended Complaint (the "FAC") and later, after the close of discovery, filed a Motion for Summary Judgment (the "MSJ"). Among other arguments in the MSJ, Kaneko again asserted, without providing any new evidence to undercut the MTD Opinion, that the Release was purportedly supported by consideration. This time, the Chancery Court (with Vice Chancellor Slights, as a newly appointed Vice Chancellor presiding after the retirement of Vice Chancellor Noble), agreed with Kaneko, disregarding its previous decision on the MTD, and entered an order (the "MSJ Opinion"), finding that the Release barred the Receiver's claims, notwithstanding that Kaneko did not own the shares returned and never provided any new arguments not raised in the MSJ Opinion, as to the validity of the "consideration" in exchange for the Release. Indeed, the arguments

and facts Kaneko raised in the MSJ are substantially the same arguments and facts which led to the ruling that the Release was not supported by consideration in the MTD Opinion, which decision, as discussed below, was entitled to deference and constituted law of the case. In addition, the MSJ Opinion fails to undertake any analysis as to the value provided by Kaneko and the value of the claims to be released by SCLI, a necessary prerequisite to determining if the exchange of value constituted fair consideration. Further, even if the Court disregarded the MTD Opinion, the Chancery Court also ignored numerous issues of material fact concerning whether the exchange at issue was for fair consideration and the facts challenging the validity of the Release. The Receiver appeals from the erroneous conclusions in the Chancery Court's MSJ Opinion.

SUMMARY OF ARGUMENT

I. The Chancery Court erred in finding that the Release was supported by consideration in the MSJ Opinion as law of the case, when the Court had previously found the Release was not supported by consideration in the MTD Opinion. Because no additional material facts were uncovered in discovery that contradicted the material facts which were already before the Chancery Court at the motion to dismiss stage, the Chancery Court had no reason to disturb this finding at the summary judgment stage, and; therefore, the Chancery Court's MTD Opinion holding that the Release was not supported by consideration was entitled to deference and constituted law of the case. *See* A1443-A1445 (MSJ Tr. 54:15-56:12); A1086-A1087 (MSJ Opp.).

II. Even if the law of the case doctrine did not apply, the Chancery Court erred in concluding at the summary judgment stage that the Release was supported by fair consideration, as the Receiver challenged the alleged consideration provided and given up in the exchange for the release of millions of dollars in claims stemming from Kaneko's position of control over SCLI. The Receiver also introduced several disputed material facts regarding the validity of the Release which he sought to avoid pursuant to the FAC. *See* A1461-A1470 (MSJ Tr. 72:12-81:7); A1086-A1088 (MSJ Opp.).

STATEMENT OF FACTS

A. SCLI Solicits Millions From U.S. Investors and Then Goes Dark, Leaving Its Investors Without Recourse.

SCLI was incorporated in Delaware on September 27, 2007 under the name Expedite 4, Inc. ("Expedite") with the objective of acquiring an operating company under a reverse merger.[2] On March 29, 2010, Expedite acquired all the stock of SCL International pursuant to that certain share exchange agreement dated March 29, 2010 (the "Share Exchange Agreement").[3] On March 29, 2010, pursuant to the Share Exchange Agreement, Expedite issued 5,623,578 shares of common stock in exchange for all of the 10,000,000 outstanding shares of SCL International (the "Reverse Merger").[4]

According to the Share Exchange Agreement, Liquang Song ("Song") received effectively in a trust capacity, 90% of the shares issued in the Reverse Merger (5,061,220 of the 5,623,578 shares).[5] In this regard, of the 5,061,220 shares, 4,386,438 were supposed to go to the former shareholders of Jiangxi Huaxin, Inc. ("Jiangxi Huaxin"), the operating subsidiary of SCL International.[6] The Jiangxi Huaxin shareholders and Song agreed that Song would acquire the

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[2] A0032 (FAC ¶9).
[3] *Id*. (FAC ¶10), see exhibit 2.1 of the 8-K dated April 1, 2010, filed with the SEC.
[4] *Id.* (FAC ¶11).
[5] *Id.* Song is a party to this matter but the Receiver was unable to serve him.
[6] *Id.* The former Jiangxi Huaxin shareholders purportedly could not acquire the shares directly because of burdensome PRC laws and regulation by the Chinese State Administration of the Foreign Exchange.

shares on their behalf and they would receive the right to purchase the 4,386,438 SCLI shares (the "Song Held Shares") for nominal consideration from Song.[7]

Also on March 29, 2010, Expedite and Song entered into a lockup agreement (the "Lockup Agreement") whereby Song agreed not to offer, pledge, sell, contract to sell, lend, transfer or otherwise dispose of any common stock that the holder owned other than in connection with an offer made to all shareholders of Expedite in connection with a merger, consolidation or similar transaction involving Expedite for a period of 18 months following the closing of the Offering (defined below).[8] *See* Lockup Agreement, attached as exhibit 10.8 to the 8-K dated April 1, 2010 filed with the SEC. In violation of the Lock-Up Agreement, Song transferred the shares to Yu Shu Mei (a company asserted to be controlled by Kaneko) in October, 2010.[9]

[7] A0032-A0033 (FAC¶11).
[8] A0033 (FAC ¶12).
[9] *See* Lockup Agreement, attached as exhibit 10.8 to the 8-K dated April 1, 2010 filed with the SEC. September 8, 2016 Deposition Transcript of Alan Lewis ("Lewis Tr.") at A0457 (155:1-9), although Kaneko is "unsure" if he was an officer of this company, further supporting that there are issues of material fact regarding Kaneko's control leading up to the Release. July 20, 2016 Deposition of Shu Kaneko ("Kaneko Tr.") at A0405 (157:2). A0460 (Lewis Tr. 167:12-20), although Kaneko claims (despite his close relationship with Song), that he "doesn't remember" if Shu Mei was named after Song's mother. A0407 (Kaneko Tr. 159:14-20).

Upon the completion of the Reverse Merger, Expedite owned 100% of the stock of SCL International and, therefore, also wholly owned the operating entity Jiangxi Huaxin.[10]

After the Reverse Merger, on May 6, 2010 (the "Closing Date"), Expedite closed its equity financing with SCL International (the "Offering") through a private placement (the "Private Placement").[11] Expedite raised $7,594,965 as part of the Offering (the "Private Placement Proceeds").[12]

On May 28, 2010, Expedite registered the shares used in the Private Placement.[13] These shares were never declared effective by the SEC. Expedite then changed its name to Southern China Livestock, Inc. on July 9, 2010.[14]

Based upon documents reviewed by the Receiver, the gross amount of the Private Placement Proceeds totaled $7,594,965, which was deposited into several bank accounts (the "Bank Accounts").[15] The Bank Accounts are all in the name of SCL International.[16] On April 8, 2010, Expedite appointed Kaneko as its Chief Financial Officer and Director.[17] As a result, Kaneko was a signatory on all three

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[10] A0033 (FAC ¶12).
[11] *Id.* (FAC ¶13).
[12] A0033-A0034 (FAC ¶15); *see also* A0077-A0079 (Press Release).
[13] A0034 (FAC ¶17); *see* S-1 dated May 28, 2010 filed with the SEC.
[14] *Id.* (FAC ¶¶17-18).
[15] *Id.* (FAC ¶19).
[16] *Id.*
[17] A0037 (FAC ¶26).

accounts, and upon information and belief, Kaneko is the only one who signed checks from these accounts.[18]

Beginning in January 2010, SCLI, through or at the direction of Kaneko, transferred millions of dollars of PP Proceeds, much of which has not been accounted for or was paid for improper and/or personal use.[19] The evidence revealed that during the period from March, 2010 to July, 2011, Kaneko looted the Bank Accounts, making and/or authorizing payments to or for his own benefit of hundreds of thousands of dollars, and effectuated transfers of millions of dollars to purportedly purchase hog farms, significant sums of which were not received by the hog farms and remain unaccounted for.[20]

In addition, Kaneko also made unexplained and/or illegitimate payments to third parties for his own benefit.[21] For example, Kaneko claims that he made authorized payments to his company, Shing Wing Inc., in excess of $25,000 ($1,800 per month), explaining that the payments were for expense reimbursements for cash payments he made while in China pursuant to an oral

[18] A0034-A0035 (FAC ¶19). Upon information and belief, while "Wei He" is listed in the signature cards of the Checking Account and Deposit Account, his actual signature is not recorded on the signature card of any of the Bank Accounts.
[19] A0035 (FAC ¶20).
[20] *See id.* (FAC ¶20); *see also* A0081-A0085 (FAC - list of payments for Kaneko's benefit); A1114-A1317 (Bank Statements).
[21] *See, e.g.*, A1257-A1259 (Ex I - outlining payments made to Kaneko's tenant, payments for lawn care, and a maid, among others).

agreement with the CEO.[22] However, these payments were not explicitly part of his employment agreement with SCLI[23] (which spelled out his compensation and reimbursement of his expense), and there are no invoices, receipts, contracts or documents explaining these payments.[24] Importantly, Kaneko was receiving this $1,800 per month no matter what in addition to his other "expense" reimbursements.[25] Additionally, he was receiving a monthly "housing allowance" of $4,000 per month for lodging in China, regardless of what the housing cost actually was and regardless of whether he actually travelled to China.[26] Kaneko also effectuated payments for his benefit for lawn services, car related expenses, maids, grocery and drug store expenses, and a litany of other personal expenses, while documents regarding such transfers had been destroyed.[27] During the time that the PP money was disposed of, substantially all such funds flowed through the Bank Accounts which Kaneko controlled.[28]

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[22] A0409-A0410 (Kaneko Tr. 1295:9-196:16); *see, e.g.,* A1114-A1317 (Bank Accounts).
[23] A1075-A1076 (Opp. to MSJ); A0410-A0412 (Kaneko Tr. 195:9-198:14).
[24] A0410-A0411 (Kaneko Tr. 196:10-197:16).
[25] A0412 (Kaneko Tr. 198:3-9).
[26] A0415 (Kaneko Tr. 252:20).
[27] Kaneko alternatively claimed that he did not recall what happened to his records, and that he destroyed the records after the Release was entered. A0380 (Kaneko Tr. 26:14-25).
[28] *See* A1114-A1317 (Ex. I - Bank Statements) (demonstrating the flow of funds through the Bank Accounts).

Kaneko resigned as CFO of Expedite 4, SCLI's predecessor, October of 2010[29], and became SCLI's director of business development.[30] He was the only officer or director on the U.S. side for SCLI,[31] and there were no other employees, secretaries, or assistants.[32] Kaneko continued to be the signatory on the Bank Accounts for SCLI,[33] and the bank statements show that he continued to be the only one that signed checks and authorized the payments out of those Bank Accounts until they were almost completely depleted as of August, 2011.[34] The bank signature cards show that Kaneko was authorized to be the sole signatory on the BB&T and Bank of America accounts (another individual was also listed as a signatory, however he never signed the signature cards) and he continued to be until November, 2011.[35] Kaneko also continued to be the President, Secretary, Treasurer, and the only Director of SCL International, SCLI's holding company

[29] Kaneko affirmed that the Holding Company is a subsidiary of Expedite 4. *See* A0383 (Kaneko Tr. 66:23-24), and Expedite later changed its name to SCLI. A0390 (Kaneko Tr. 80:7-13).
[30] A0398 (Kaneko Tr. 108:12-17).
[31] A0393 (Kaneko Tr. 83:19-20).
[32] A0394 (Kaneko Tr. 84:5-12). He also signed the signature cards for the Bank of America Accounts as president, director, CEO of the Holding Company, Secretary/Assistant Secretary, and Director. *See* A1343-A1354 (Ex. K - Signature Cards).
[33] A0399 (Kaneko Tr. 109:19-23).
[34] *See* A1114-A1317 (Ex. I - Bank Statements).
[35] *See* A1343-A1354 (Ex. K - Signature Cards).

(the "Holding Company") until 17 months later, or March 2012, when he signed, as president, the document to dissolve the Holding Company.[36]

Furthermore, at the time the Release was signed, Kaneko asserted that he was the only one who could facilitate the return of the Song Held Shares, supporting, amongst other things, that he maintained control, either directly or indirectly over such shares, [37]

B. The Alleged Settlement and Release

In January 2013, SCLI was attempting to restructure, in part, so it could pay the Investors and go back to being pig farmers.[38] Alan Lewis ("Lewis") contacted Kaneko as a so-called consultant for assistance in obtaining the Song Held Shares.[39] Meng Qunghuan ("Meng"), a consultant and liaison for SCLI (who had a junior high or high school level of English ability),[40] contacted Lewis regarding taking the company public on the Chinese Main Board exchange in Shanghai, but

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[36] A0386-A0388 (Kaneko Tr. 76-78), A1318-A1342 (Nevada records for the Holding Company).

[37] A0422 (Kaneko Tr. 361:2-8), where he admits that he had the relationships to facilitate the return of the shares; A0460 (Lewis Tr. 167:12-20).

[38] A0338 (MTD Opinion). In deciding the Motion to Dismiss, the Chancery Court knew that SCLI was attempting to restructure to pay its Investors. *See* A1112-A1113 (Jan. 5, 2013 Email); these allegations were continued in the FAC. *See* A0036-A0037 (FAC ¶25).

[39] A0443 (Lewis Tr. 63:2-11). According to Lewis, he initially worked as a consultant in July 2011 to raise capital for SCLI and became involved with SCLI again in or around November of 2012, in part, in the hopes of recouping some of the compensation he was not paid in 2011. A0433-A0434 (Lewis Tr. 25:20–26:1-3), A0436 (35:18–36:6), A0438 (43:11-16), A0451 (110:18–111:11).

[40] A0433 (Lewis Tr. 24:1-6), A0434 (28:25–29:5), A0439 (46:22-47:4).

that there were certain legal problems related to the Song Held Shares.[41] Meng expressed that SCLI wanted to sue Kaneko for allegedly stealing SCLI's PP funds, similar allegations included in claims the Receiver brought forth in this case.[42]

Lewis ultimately agreed to attempt to obtain the Song Held Shares and certain escrow funds, but understood that his compensation was premised on obtaining the Song Held Shares.[43] The agreement between Lewis and SCLI (the "Services Agreement") provided that Lewis would only receive compensation upon the completion of certain tasks, including obtaining the Song Held Shares and getting a release of certain funds held in escrow.[44]

Lewis knew that SCLI's board members were under pressure because of threats **o**f a lawsuit by U.S. investors and that the "company was very embarrassed and concerned and just frightened by all this" and that five of the seven owners "were really just simple pig farmers."[45] To obtain the Song Held Shares, Lewis believed Kaneko could assist in facilitating return and insisted on offering a liability waiver to Kaneko before such an issue arose in negotiations. Lewis also

[41] A0438 (Lewis Tr. 43:19–46:13).
[42] A0448 (Lewis Tr. 85:2-8); A1112-A1113 (email from Lewis to Kaneko dated June 5, 2013).
[43] A0438-A0439 (Lewis Tr. 45:22-46:3), A0459 (163:1-25). Lewis stood to be paid over $100,000. A0440 (Lewis Tr. 50:15-19), A0459 (162:22-24).
[44] A0458-A0459 (Lewis Tr. 161:18–163:25).
[45] A0448 (Lewis Tr. 84:15-85:8).

dissuaded Meng from pursuing legal action against Kaneko until he could obtain return of the shares.[46]

In pressing for a liability waiver for Kaneko, Lewis did not speak with company officers in China as "[a]lmost all of [his] dealings were with Meng Qunghuan . . ." who also did not have a sophisticated grasp of English.[47] Despite Meng's limited English, Lewis believed that Meng understood the legal implications of entering into a liability waiver as part of the Release.[48] Lewis assumed that Meng spoke with company officers in China who did not speak English well, if at all.[49] Lewis understood that he had approval from SCLI to offer a liability waiver in exchange for the shares, but there was no written board approval for the waiver.[50]

Lewis contacted Kaneko to request he return the Song Held Shares in January 2013.[51] Lewis kept Meng updated of his discussions with Kaneko but did not provide all of the information he obtained regarding Kaneko.[52] Ultimately, it was Lewis that requested that an attorney, Darren Ofsink, prepare the paperwork

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[46] A0448 (Lewis Tr. 84:15-85:12).
[47] A0434 (Lewis Tr. 28:25-27:1), A0439 (46:22-25).
[48] A0448 (Lewis Tr. 85:13-15).
[49] A0433 (Lewis Tr. 25:1-3), A0454 (143:2-12); A0427 (Kaneko Tr. 327:5-7) (Kaneko stated that Lupin Pan does not speak English).
[50] *See* A0449 (Lewis Tr. 86:21-23).
[51] A0448 (Lewis Tr. 82:12-18).
[52] A0446 (Lewis Tr. 77:6-11).

for the liability waiver and ensured that the Release was signed by Kaneko.[53] In February 2013, Kaneko signed the Release but indicated that the Song Held Shares were "lost" and he could return only an affidavit of loss and a stock power signed by the shareholders (the "Loss Affidavits").[54] Despite failing to obtain the return of the Song Held Shares, Lewis received $101,772 in compensation.[55] In fact, Lewis did not even obtain all of the Loss Affidavits for the Song Held Shares.[56]

Kaneko gathered the signatures for the Affidavits of Loss and Indemnity Agreement and Stock Powers on February 20, 2013.[57] Lewis stated that he

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[53] A0445 (Lewis Tr. 72:21-23).
[54] A0258-A0259 (Op. to MTD); A0044 (Compl. ¶51); A0424-A0425 (Kaneko Tr. 371:19-372:22).
[55] A0459 (Lewis Tr. 162:22-24).
[56] Lewis' role in representing SCLI in negotiating with Kaneko is called into question by his conduct where his primary concern was to move the matter along so that he could get paid. *See* A0593-A0598 (correspondence between Lewis and Kaneko). Lewis was not concerned that Kaneko would not be obtaining signatures from Gao Suhua, despite SCLI initially requesting that Kaneko obtain Suhua's signatures. *Id.* Instead, Lewis firmly pressed for a speedy resolution to avoid others getting involved and "unravel[ing]" his deal. *Id.* In a February 13 email and again on February 17, 2013, Lewis urged Kaneko to send the signatures he had because of the risk that litigators would talk the company into abandoning the settlement. *Id.* In the February 17, 2013 email Lewis stated that he knew that there were owners of SCLI that were not happy with the settlement and who wanted "a full accounting for how all the US funds were spent." *Id.* Lewis stated that it was becoming more likely that Pan would not sign and he concluded with a plea to "[p]lease push your group to get this wrapped up before it all unravels. I don't think you realize how difficult it was to get Mr. Pan and Mr. Xu to this point." *Id.*
[57] *See* A0546-A0552 (February 20, 2013 email from Kaneko to Lewis Ex. 25 to MSJ).

received the Release signed by Pan on February 20, 2013.[58] On February 20, 2013, Kaneko sent the executed Affidavits of Loss and Indemnity Agreement and Stock Powers along with the Release to Lewis and Ofsink.[59] While the Release was signed in February 2013, the Release language suggests that the Song Held Shares had already been returned.[60] Additionally, the board meeting approving of the Release did not take place until July 18, 2013—more than five months after the Release was signed.[61] Lewis did not know how the settlement agreement was explained to the board—whether it was orally explained or ever translated into a language that the board members understood.[62] Lewis stated that, in his dealings with Meng, there "didn't seem like there was a rhyme or reason" as to when he would or would not translate documents.[63] The Chop[64] was also missing from the Release, which Lewis could not explain.[65]

C. The Receiver is Appointed and Uncovers the Extent of the Looting by Kaneko

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[58] *Id.*
[59] *Id.*
[60] A1371-A1376 (stating that Kaneko "facilitated" the return of Song Held Shares).
[61] Lewis Tr. A0459-A0460 (164:15-166:24).
[62] *Id.*
[63] A0460 (Lewis Tr. 167:20-24).
[64] In China, a company's 'chop' (the "Chop") or 'seal' functions as a signature: *Zhongshan Hengfu Furniture Co. v. Home Accents Alliance, Inc.* , 2014 U.S. Dist. LEXIS 149626, at *5 n.3 (C.D. Cal. Oct. 20, 2014)
[65] *Id.*; A0460 (Lewis Tr. 167:6-11).

As further described in the FAC and the timeline,[66] after SCLI's failed IPO and based upon serious concerns regarding general management conduct, the Investors filed a Section 220 action on August 29, 2013 seeking inspection of SCLI's books and records (the "Section 220 Complaint").[67] When SCLI failed to respond, the Court issued a default judgment[68] and appointed the Receiver pursuant to an order of contempt (the "Contempt Order"),[69] which gave the Receiver authority and control over SCLI property and assets, unrestricted access to company books and records, control over SCLI bank accounts and authority to bring a lawsuit in the name of SCLI.

After doing an investigation, on July 7, 2014, the Receiver filed the complaint (the "Complaint") with the Delaware Chancery Court, which was subsequently amended on December 19, 2014 (the "FAC"), alleging 17 causes of action against Kaneko including for conversion, fraud, fraudulent transfer, fraudulent misrepresentation, breach of fiduciary duty, aiding and abetting, conspiracy, unjust enrichment, and accounting.[70] The FAC asserted that in his position as a control person, Kaneko stripped SCLI's assets, leaving over $7.5 million raised from the PP and controlled by Kaneko substantially unaccounted

[66] A1378-A1379 (Southern China Livestock Timeline).
[67] A0045-A0046 (FAC ¶55).
[68] A0046 (FAC ¶56); Order Granting Default Judgment, *In re: Southern China Livestock, Inc.*, 2013 WL 6003017, at *1 (Del. Ch. Nov. 12, 2013).
[69] A1380-A1389 (Order re: Motion for Contempt).
[70] A0048-A0072 (FAC ¶¶63-181).

for, much of which was transferred to (or for the benefit of) Kaneko, to the detriment of creditors and investors.[71] Based upon the Receiver's investigation thereafter, certain of the transfers were verified, however, there remains at least $2.35 million that was either transferred fraudulently and/or converted in breach of Kaneko's fiduciary duty to creditors and investors.[72]

D. The Chancery Court Rules that the Release was not Supported by Consideration

On January 30, 2015, Kaneko filed the MTD, alleging substantially similar arguments to his later-filed MSJ, namely that the FAC was barred by laches and the Release.[73] On November 3, 2015, the Chancery Court by memorandum decision entered an order denying Kaneko's MTD as to substantially all of the claims against Kaneko except the claims related to the Song Held Shares not relevant to this appeal. In denying the MTD, the Court explicitly held "**[t]he [r]release [f]ails for [l]ack of [c]onsideration**."[74] In this regard, the Court rejected each of Kaneko's defenses to the Release lacking consideration—which, coincidentally—are the same arguments he raised in his MSJ.[75] The Court, in

[71] A0061-A0062 (FAC ¶126).
[72] A1056 (MSJ Opp.).
[73] *See* A0119-A0124 (MTD).
[74] *Seiden v. Kaneko,* 2015 WL 7289338, at *6 (Del. Ch. Nov. 3, 2015) (emphasis added).
[75] A0337 (MTD Opinion).

rejecting Kaneko's argument that he assisted in transferring the Song Held Shares to SCLI and that amounted to valid consideration for the Release, held that:

- the transfer of the Song Held Shares to SCLI was not consideration since the shares were held in a representative capacity and not owned by Kaneko.[76]
- Kaneko failed to present any evidence that the return of the Song Held Shares would remedy the reduction in SCLI's share value, which was preventing SCLI from collapsing its U.S. operations.[77]
- the economic interest in the Song Held Shares was held by the Jiangxi Shareholders—not SCLI and did not increase SCLI's value.[78]
- the "[d]efendant fails to identify any benefit SCLI would receive by holding the Song Held Shares in custodial capacity on behalf of the Jiangxi Shareholders," determining that the Release lacks consideration.[79] (collectively, the "Consideration Ruling").

E. The MSJ Opinion Completely Ignored the Court's Previous Ruling

At the close of discovery, Kaneko filed the MSJ. In the MSJ, Kaneko re-asserted his claim, previously rejected by the Chancery Court in its MTD Opinion that the Release was valid, supported by consideration, and barred all of the Receiver's claims against him.[80] Kaneko erroneously argued that new evidence brought forth during discovery demonstrated that the Release was supported by consideration.[81] However, every piece of "new evidence" was raised and

[76] A0349-A0350 (MTD Opinion).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *See* A0477-A0479 (MSJ).
[81] *See* A0513-A0514 (arguing that facts were not available to the Court when it decided the motion to dismiss).

discounted by the Court when it denied the MTD and was not new at all. This purported "new" evidence was:

> 1. That the Release contains a non-disparagement clause. This was raised in the MTD.[82]
>
> 2. That the Release contains a confidentiality provision. This was raised in the MTD.[83]
>
> 3. That the Release contains a release of Kaneko's claims against the Company. This was raised as part of the MTD.[84]
>
> 4. That Kaneko facilitated the return of the Song Held Shares which had value to the Company and was necessary to restructure. This was raised as part of the MTD.[85]

Though the Receiver argued that the Chancery Court's prior Consideration Ruling was law of the case, the Chancery Court disagreed.[86] Rather, it found that the Consideration Ruling was not law of the case because Vice Chancellor Noble

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[82] In fact, the MTD contained the release itself. *See* A0206-A0229 (Release); *see also* A0303-A0304 of Kaneko's Motion to Dismiss Reply ("MTDR"), where Kaneko argues that a covenant not to disparage the Company is adequate consideration.)

[83] *See* A0206-A0229 (Release) (the MTD which contained a copy of the Release along with the confidentiality provision).

[84] *See* A0303-A0304 (MTDR) (arguing that a covenant not to sue the Company is adequate consideration). *See also* A0348 fn 73 (MTD Opinion) (explicitly considering Kaneko's release of the Company "from any lawsuit or other legal proceedings Kaneko had against the Company at the time of the Release" and holding that the Release is not supported by consideration.

[85] A0206-A0229 (Release); *see also* A0304-A0305 (MTDR); A0349 (MTD Opinion). This was also included in the FAC and therefore considered by the Court prior to its ruling. *See* A0036 (FAC ¶25), stating that the Company was attempting to collapse its offshore structure and "go back to being pig farmers in China." *See also* A0152-A0229 (same).

[86] MSJ Opinion attached hereto as Exhibit A, pp. 11-12.

"did not make definitive findings of fact on the motion to dismiss, but appropriately accepted all well-pled facts in the Receiver's favor, his conclusion regarding the lack of consideration cannot be law of the case."[87] This ignores, as referenced above, and discussed more fully below, that the so-called "new evidence" asserted by Kaneko was substantially the same as and tracked the allegations in the FAC and the arguments raised in the MTD.

F. The Chancery Court Failed to Consider the Issues of Material Fact Raised by the Receiver

Furthermore, the Chancery Court found that there were no disputed issues of fact regarding the purported consideration (and whether the consideration was fair value for the exchange) and the validity of the Release.[88] However, the value of the purported consideration exchanged (*i.e.*, whether the value in returning shares Kaneko did not own is a fair exchange of value as compared to the value of the claims SCLI purported to waive—which aggregated millions of dollars) is an issue of material fact that cannot be determined on summary judgment.[89] Moreover, as discussed below, the transfer of the Song Held Shares was improper and in direct contravention of the Lock-Up Agreement and, as such, return of such illegally transferred shares cannot be valid consideration.[90]

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[87] MSJ Opinion attached hereto as Exhibit A, p. 11
[88] MSJ Opinion attached hereto as Exhibit A, p. 12
[89] See Argument below at p. 36.
[90] See Argument below at 36-37.

In addition to the fact issues regarding consideration, the Receiver raised issues as to the absence of the Chop on the Releases, Lewis' apparent conflict of interest in negotiating the Release, how the Release was supported by past consideration, and how the Release was a fraudulent transfer and amounted to corporate waste.[91] The Chancery Court, in conclusory fashion, determined that there were no issues of material facts with regard to the above, or, in the case of the fraudulent transfer and waste arguments, did not address the issues at all, ultimately ruling in favor of Kaneko and dismissing the Receiver's claim based on the Release.[92] This appeal was timely filed thereafter.[93]

[91] A1086-A1087 (Opp. MSJ), A1094-A1096 (Opp. MSJ).
[92] MSJ Opinion attached hereto as Exhibit A, pp. 14-16.
[93] *See* A0026-A0027.

ARGUMENT

I. THE CHANCERY COURT ERRED IN DETERMINING THAT THE LAW OF THE CASE DOCTRINE DID NOT APPLY TO THE CONSIDERATION RULING.

A. Question Presented

Did the Chancery Court err in ruling that the earlier Consideration Ruling was not law of the case? *See* A1443-A1445 (MSJ Tr. 54:15-56:12); A1086-A1087 (MSJ Opp.).

B. Standard and Scope of Review

Review of the application of law of the case is a legal issue requiring *de novo* review. *State v. Wright*, 131 A.3d 310, 320 (Del. 2015).

C. Merits of Argument

Delaware courts apply the law of the case doctrine to legal issues that have been addressed in a "procedurally appropriate" way by the same court, and will not disturb those prior findings without a compelling reason.[94] The law of the case doctrine has been defined as "a form of intra-litigation stare decisis."[95] Findings by a court on a motion to dismiss can constitute law of the case, unless those findings are overturned on appeal. *Porter v. Texas Commerce Bancshares, Inc.*, 1989 WL

[94] *Taylor v. Jones*, 2006 WL 1510437, at *5 n.29 (Del. Ch. May 26, 2006) (citations omitted).
[95] *Carlyle Inv. Mgmt., LLC v. Moonmouth Co.* S.A., 2015 WL 5278913, at *7 (Del. Ch. Sept. 10, 2015) (citations omitted).

120358 (Del. Ch. Oct. 12, 1989). Here, through its Consideration Ruling the Chancery Court determined that the Release was *not* supported by consideration.

The Chancery Court found this was so because (i) the shares were not owned by Kaneko, but rather were held in a representative capacity; (ii) Kaneko failed to provide any reason why the return of the Song Held Shares would remedy the reduction in SCLI's share value;[96] and (iii) that because the economic interest of the Song Held Shares was at all times held by the Jiangxi Shareholders not SCLI, there was no benefit to SCLI holding them in a custodial capacity.[97] That ruling constitutes law of the case and should not have been disturbed in the MSJ Opinion. *Wright, supra*, 131 A.3d at 323 (reversing a lower court's ruling that revisited a decision regarding the adequacy of Miranda warnings after that issue had been considered as part of the trial court's prior rulings on a motion to suppress and for post-conviction relief, and finding the earlier ruling to be law of the case).

When factual findings do not change, the Court's previous ruling is law of the case. Here, no evidence presented in discovery controverted the underlying material facts determined under the Consideration Ruling. This includes, but is not limited to the fact the shares at issue were not owned by Kaneko (and thus not an asset of Kaneko's for purposes of determining consideration) or that the return of the Song Held Shares provided any material and cognizable benefit to SCLI. This

[96] A0349-A0350 (MTD Opinion).
[97] A0337 (MTD Opinion).

case is substantially similar to *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, in which this Court reversed the Chancery Court when a new judge revisited an issue that had been decided by the previous judge. This Court did so because it determined that the original finding was law of the case because the primary factual basis for the first ruling did not change. 112 A. 3d 878, 895 (Del. 2015). In *Nationwide*, the original judge retired after dismissing a breach of contract claim against Nationwide because it did not violate a replacement provision contained in the contract. *Id*. at 894.[98] However, when a new judge was appointed, he revisited this ruling and determined that the replacement provision had been breached. *Id*. On appeal, this Court determined that the finding regarding Nationwide's breach should not have been re-litigated because none of the underlying facts that had been presented to the lower court for the first ruling had changed. *Id*. at 895. Therefore, this Court found the original ruling was law of the case and reversed the Chancery Court. *Id*. at 896.

With respect to the Consideration Ruling, the Court found that the Release lacked consideration, rejecting the arguments raised by Kaneko in his MTD and determining that (i) the transfer of the Song Held Shares to SCLI was not consideration since the shares were held in a representative capacity and not owned

[98] *See Northpointe Holdings, Inc. v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677, at *4 (Del. Ch. Sept. 14, 2010) (granting motion to dismiss breach of contract claim where the party did not take action which was prohibited by contract).

by Kaneko; (ii) Kaneko failed to present any evidence that the return of the Song Held Shares would remedy the reduction in SCLI's share value, which was preventing SCLI from collapsing its US operations; and (iii) the economic interest in the Song Held Shares was held by the Jiangxi Shareholders—not SCLI and did not increase SCLI's value[99] without presenting any new material facts.[100] Kaneko repeated the same arguments in the MSJ. Indeed, as to the relevant parts of the motions, the MTD and the MTDR are almost identical to the MSJ. In the MTD and MSJ, Kaneko argues that the Release was supported by consideration because 1) through the Release, Kaneko facilitated return of the Song Held Shares (shares that Kaneko did not own, and which were transferred to him improperly in violation of the Lock-Up Agreement) and this return had value to SCLI (despite that the shares were owned beneficially by the Jiangxi Shareholders)[101] and 2) Kaneko released his own so-called claims against SCLI and agreed not to disparage SCLI and maintain confidentiality.[102] The Chancery Court in its MTD Opinion, in addressing the very arguments that Kaneko raised for a second time in his MSJ, held that the Release is not supported by consideration because the economic interest in the Song Held Shares was always held by the Jiangxi Shareholders, and Kaneko failed to "identify any benefit SCLI would receive by

[99] A0346-A0350 (MTD Opinion).
[100] *Id.*
[101] A0123 (MTD); A0305 (MTDR); A0513 (MSJ).
[102] A0304 (MTDR); A0515 (MSJ).

holding the Song Held Shares in a custodial capacity on behalf of the Jiangxi Shareholders."[103] There is not a single new material fact raised in discovery that changes this ruling.

Indeed, under one key part of the Consideration Ruling, which remains unrebutted in the MSJ, the Chancery Court held that there was no consideration because there was no benefit to the Company for return of the shares because the shares did not belong to the Company but rather to the shareholders.[104] Further, as in *Nationwide*, there is not a single material fact that was raised in discovery that changes this; i.e. who owned the shares, the custodial relationship, the violation of the Lock-up Agreement, the attempt to collapse the U.S. structure to restructure and go back to being hog farmers, were all raised in the MTD and referenced in the FAC. Indeed, Kaneko failed to come forward with any evidence that shareholders who owned shares authorized any transfers, or other arrangement, and in fact, the transfer of the Song Held Shares in September 2010 violated the Lock-Up Agreement, which prohibited their assignment or transfer until September 2011 (18 months after the Lock Up Agreement was executed).[105] Nor was any determination

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[103] *Id.*
[104] A0350 (MTD Opinion).
[105] A0033 (FAC ¶12); *see also* Lockup Agreement, attached as exhibit 10.8 to the 8-K dated April 1, 2010 filed with the SEC; Terms of Lockup Agreement included in S-1 dated October 19, 2010 filed with the SEC https://www.sec.gov/Archives/edgar/data/1415599/000121390010004249/fs1a4_sochinalive.htm; A0335 (MTD Opinion).

made as to the value of the claims that are subject to the instant lawsuit and (assuming valid, which is contested) and whether the release of such claims constituted fair value.[106]

Notwithstanding the overwhelming evidence in support of the Receiver, in order to attempt to create "new facts" to justify relitigation of the Release, Kaneko argued in the MSJ that "discovery shows that the Company wanted to obtain the Song Held Shares so that it could pursue an outside investment opportunity that otherwise would be unavailable," stating this fact was not available to the Court when deciding the MTD and was not in the FAC.[107]

Quite to the contrary, the FAC explicitly states "documents attached to the MTD reveal that SCLI was attempting to collapse its offshore structure in order to pay certain U.S. investors and 'go back to being pig farmers in China without the headache of dealing with demanding U.S. investors.'"[108] Indeed, this is also discussed in the Email Chain between Kaneko and Lewis that was attached to the MTD and, accordingly, part of the record considered by the Court in its ruling on the MTD. The collapsing of the offshore structure is synonymous with the outside investment opportunity discussed by Lewis in his deposition and discussed in the MSJ. In fact, the Consideration Ruling explicitly discusses the collapse of the US

[106] *See* A0346-A0350 (MTD Opinion) (the Chancery Court made no finding with respect to the value of the return of the Song Held Shares to SCLI).
[107] A0515 (MSJ).
[108] A0036-A0037 (FAC ¶25).

operations.[109] Therefore, this is not a new fact and, even if it were, it would not change the determination that Kaneko cannot and did not allege any benefit SCLI would receive by holding the Song Held Shares in a custodial capacity on behalf of the Jiangxi Shareholders.

Furthermore, Kaneko did not deliver the Song Held Shares to SCLI. Rather he only was able to deliver the Loss Affidavits because the Song Held Shares had been lost. The proposed restructuring transaction never occurred and the Investors never recovered a dime of the PP funds.

Therefore, because this issue was already decided in a "procedurally appropriate" way[110], the Chancery Court should not have forced the Receiver to re-litigate it, and this Court should apply the law of the case doctrine to the Consideration Ruling and reverse the Chancery Court's MSJ Opinion.

[109] A0346-A0350 (MTD Opinion).
[110] *Taylor, supra*, 2006 WL 1510437, at *5 n. 29.

II. THE CHANCERY COURT ERRED IN FINDING THAT THERE WERE NO MATERIAL FACTS RAISED IN DISCOVERY SUPPORTING THAT THE RELEASE WAS VALID AND SUPPORTED BY FAIR CONSIDERATION

A. Questions Presented

Did the Chancery Court err in determining that there were no disputed issues of material fact with regard to the Release, such that summary judgment was appropriate? *See* A1443-A1445 (MSJ Tr. 54:15-56:12); A1086-A1087 (MSJ Opp.).

B. Standard and Scope of Review

This Court reviews the Chancery Court's decisions on motions for summary judgment under a de novo standard. *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002).

C. Merits of Argument

Summary judgment is a "harsh remedy" that should be "cautiously invoked." *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 783 (Del. 2012). The Chancery Court brushed aside significant disputed issues of fact with respect to the Release when it reexamined the issue and found the Release to be valid. Therefore, this Court should reverse the MSJ Opinion and remand the matter for a trial.

1. There are Issues of Material Fact Surrounding Whether the Release was Supported by Consideration

Consideration "is a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request." *Cigna Health & Life Ins. Co. v. Audax Health Sols., Inc.*, 2014 Del. Ch. LEXIS 244, at *12-13 (Del Ch. Nov. 26, 2014) (internal quotations and citations omitted). In this case, SCLI, as the promisor, received a detriment when it purportedly gave up its claims against Kaneko for divestiture of millions of PP funds, hundreds of thousands of which was to or for Kaneko's benefit, fraudulently transferring his Real Property, and assisting in transferring the Song Held Shares but received no corresponding benefit (as discussed in the Consideration Ruling). Moreover, as discussed below, even, assuming, arguendo (which the Receiver contests), that there was some value in the transfer of the Song Held Shares to SCLI, the determination of whether the exchange of consideration between the parties was for fair value is a fact issue which cannot be determined on a motion for summary judgment.

At the outset, on a motion for summary judgment, the Chancery Court is not permitted to weigh the evidence, even where it is "skeptical" that one party will ultimately prevail, but rather must determine, drawing all inferences in favor of the non-moving party, that there are no issues of material fact. *Telxon, supra*, 802 A.2d at 262. As more fully, discussed above, if the Chancery Court is correct that the Consideration Ruling is not law of the case (it is), then the validity of the Release, and whether it was supported by fair consideration, is, at best, a contested

factual issue that should not have been determined upon a motion for summary judgment. However, the Chancery Court simply ignored these facts and erred in determining that they did not provide a basis to invalidate the Release without any determination as to the value of the claims released and the value of the so-called shares transferred.[111]

Here, as initial matter, Kaneko argued that the Release is supported by valid consideration and the Chancery Court agreed.[112] However, the MSJ Opinion does not provide any factual analysis regarding the value of the claims released, as measured against the value of the shares transferred.[113] *See Gottlieb v. Heyden Chemical Corp.*, 33 Del. Ch. 177 (Del. 1952) (issue of whether consideration was exchange for fair value an issue for trial). *Mullen v. Alarmguard of Delmarva, Inc.*, No. CIV.A.90C-11-40-1-CV, 1993 WL 258696, at *7 (Del. Super. Ct. June 16, 1993) (Adequacy of consideration is an issue of fact).

In addition, significantly, the Song Held Shares were transferred improperly in violation of the Lockup Agreement because Song transferred them to the Shu Mei entity in September 2010, within the 18 month period where transfers of the shares were barred.[114] Therefore, the return of something which was improperly

[111] MSJ Opinion attached hereto as Exhibit A, p. 14.
[112] MSJ Opinion attached hereto as Exhibit A, p. 16.
[113] A026-A0262 (Opp. MTD); *see* Ex. S, A1370-A1377.
[114] A0033 (FAC ¶12); *see also* Lockup Agreement, attached as exhibit 10.8 to the 8-K dated April 1, 2010 filed with the SEC; Terms of Lockup Agreement included

transferred in the first place is not consideration. *See Deli v. Hasselmo*, 542 N.W.2d 649, 656-57 (Minn. Ct. App. 1996) (holding that the return of a videotape with graphic material that was recorded on university equipment was not consideration for a promise by a university employee not to view the videotape where the plaintiff had an obligation to return the tape because it was university property.) Furthermore, in *Deli*, the court rejected the plaintiff's argument that she provided consideration for the promise not to view the tape because the parties had negotiated for several weeks over the return of the videotape. *Id*. at 657. See also *U.S. v. Mardirosian*, 602 F.3d 1, 7-8 (1st Cir. 2010) (a contract that purportedly conveyed title to six stolen paintings to defendant in exchange for the return of the seventh stolen painting to the original owner was void *ab initio* due to its illegality and therefore did not provide the defendant with good title to the six stolen paintings).

2. Past Consideration is Not Consideration at All.

Further, while Kaneko argued in the MSJ that he had no obligation to assist in returning the shares (a fact which the Receiver disputes because just as in the *Deli* and *Mardirosian* cases above, he had no right to the shares), the Release unequivocally states that Kaneko had *already provided* the facilitation of the return

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in S-1 dated October 19, 2010 filed with the SEC https://www.sec.gov/Archives/edgar/data/1415599/000121390010004249/fs1a4_sochinalive.htm.

of the Song Held Shares prior to the Release being entered into (the Release says "facilitated").[115] Conduct which occurred prior to the Release is past consideration and cannot serve as consideration for the Release under general contract principles. *See Cigna Health*, 2014 Del. Ch. LEXIS 244, at *12-13 (holding that the Alleged Release was unenforceable where there was no consideration for release because payment under the Alleged Release was already a pre-existing duty and not new consideration); *In re Cellular Commc'ns Int'l, Inc. Shareholders Litig*., 752 A.2d 1185, 1186-1187 (Del. Ch. 2000) (holding that release and settlement was supported by past consideration and not enforceable because consideration—a price increase of approximately $15 per share—was determined before the settlement was reached and was not "quid pro quo" for agreement to settle).

Existence of past consideration is further supported because the so-called board vote to approve the Release occurred over five months after the Release was entered into,[116] demonstrating that any consideration supporting the Release is past consideration and unenforceable. The Chancery Court dismissed this argument by discounting the five month time lapse because the Release was held in escrow during this time.[117] Because the parties later continued to hold the Release in escrow until other covenants were performed is irrelevant to the determination of

[115] A1370-A1377 (Release at 1).
[116] *See* A1363-A1369 (Board Consent).
[117] MSJ Opinion attached hereto as Exhibit A, pp. 17-18.

whether the return of the Song Held Shares was past consideration and not enforceable. What this time lapse demonstrates, instead, presents an issue of material fact, especially when coupled with the other suspicious facts surrounding the Release. The Chancery Court should not have determined the issue of past consideration on a motion for summary judgment.

3. Whether the Consideration Supporting the Release is For Fair Value is a Factual Determination That Cannot be Decided on Summary Judgment

The lower court, in its ruling without legal support, determined that "[i]f the Release is valid and applies to the conduct alleged in the FAC, then any factual disputes that may exist regarding Kaneko's conduct are irrelevant because the claims would be barred as a matter of law."[118] This belies that the Release itself was subject to avoidance pursuant to the FAC, among other things, for lack of fair value. However, just as with any other transfer, a release granted without fair value is voidable as a fraudulent transfer, amongst other things. If this was not the case, a party could effectuate a release of millions of dollars of claims to the detriment of the creditors, without any corresponding exchange of value. This would reward fraudsters and punish innocent creditors and investors, clearly not something countenanced under any rule of law.

[118] MSJ Opinion attached hereto as Exhibit A, p. 10.

Moreover, a determination of whether a release is valid is not an issue of law—but rather an issue of fact that cannot be determined on a motion for summary judgment. *See Michelson v. Duncan,* 407 A.2d 211, 223 (Del. 1979) (determining, for example, that where there is a claim of corporate waste[119], whether consideration exists to support a contract is an issue of fact that cannot be determined on a motion for summary judgment). Specifically, the issue of the value of the consideration exchanged is an issue of material fact—not of law—that cannot be determined upon summary judgment.[120] *Gottlieb v. Heyden Chemical Corp.,* 33 Del. Ch. 177 (Del. 1952). In *Gottlieb,* directors of the company signed option contracts, permitting them to purchase options at below-market prices in exchange for their labor. The "presence or absence of consideration which has a value reasonably related to the value of the concessions made by the corporation" was an issue that had to be tried. The court held that the value of this labor and whether it was a "fair exchange" gave the court "no alternative" but to take evidence. *Id*. at 180-81.

Similarly, here, the Chancery Court's focus on the value, of the consideration in denying the MTD in the initial ruling shows the issues of fact

[119] Plaintiff brought a claim for corporate waste but the lower court did not address it in its Opinion. *See* A0063-A0064 (FAC ¶¶132-136).

[120] The Chancery Court did no valuation analysis whatsoever and, instead, summarily determined that because the Company needed the shares and did not have them, "there can be no bona fide dispute that the Company considered the return of the Song Held Shares to be valuable consideration." (MSJ).

surrounding valuation of the consideration here and shows the Chancery Court erred in its later ruling on the MSJ granting summary judgment. In its Opinion regarding the MTD, the Chancery Court discussed how Kaneko assumes that "simply because Song's initial transfer to Shu Mei causes damages by preventing SCLI from collapsing its U.S. operation, the transfer to SCLI of the Song Held Shares would increase the Company's value."[121] However, the Chancery Court then holds, "Defendant fails to reason how Kaneko's return of the Song Held Shares would remedy such a reduction" in share price if SCLI were able to collapse its operations given that these shares were held by Song in a custodial capacity on behalf of others, and ultimately determines that the MTD should be denied.[122]

The Chancery Court in its opinion on the MTD hit the nail on the head—the issue of whether return of the Song Held Shares to SCLI would provide any value to SCLI is a valuation issue, and such issues cannot be determined upon a motion for summary judgment. In other words, the issue of whether Kaneko giving up claims against SCLI (claims which he admits he did not have), agreeing to keep the Settlement confidential, agreeing not to disparage SCLI, and agreeing to facilitate return of the Song Held Shares (the return of which had questionable value to SCLI, and which did not belong to Kaneko or SCLI) in exchange for release of

[121] A0350 (MTD Opinion).
[122] *Id*.

SCLI's known claims in the millions (claims which were not valued or determined as part of the MSJ) against Kaneko for pilfering the PP proceeds is a fair exchange is, like in *Gottlieb*, an issue that requires a trial and the Chancery Court erred in holding otherwise.

4. Issues Surrounding the Release are Suspicious; Giving Rise to Disputed Issues of Fact Regarding its Validity

Even after discovery, the circumstances surrounding the Release remain fraught with the same issues of material fact raised in the MTD and determined by the Consideration Ruling to be unenforceable, and otherwise void or voidable, including:

- The Release[123] does not contain the Chop, and was not translated into Pan's native language,[124] calling into question whether he understood the document at issue;
- The Release was one-sided in nature;[125]
- Kaneko was in at least indirect control of SCLI when the Release was signed, because he could facilitate the return of the Song Held Shares;[126]
- Lewis received over $100,000, including a success fee, only if he consummated the transaction, supporting a conflict of interest[127];
- Lewis did not tell the Investors about the Release even though several expressed concern to Lewis about Kaneko looting the Bank Accounts;[128]

[123] A1370-A1377 (Release).
[124] *See* A0428 (Kaneko Tr. 375:5-7).
[125] A0061-A0062 (FAC ¶126).
[126] *See* A1066.
[127] Lewis Tr. A0459 (162:22-24); *see* A0593-A0598 (February 13 and February 17 emails).

- Pan, SCLI's Chief Executive Officer, was not included on the email chain between Lewis and Kaneko discussing the Release;[129]
- The purported basis for the Release was return of the Song Held Shares; however, the shares were lost and shareholders signed only an affidavit of loss;[130]
- It remains unclear whether SCLI had all of the documents at the time of the Release showing Kaneko's transfers[131].

5. There is an Issue of Material Fact Regarding Whether SCLI Received Something More than It was Entitled To

Lastly, a release is not supported by consideration unless the plaintiff receives something more than it was rightfully entitled to. *See Travelers Cas. and Sur. Co. v. Trataros Constr., Inc.*, 819 N.Y.S.2d 852 (Sup. Ct. 2006) (prior release entered into by parties where defendant released "potential lender liability claims"

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[128] A0450 (Lewis Tr. 109:11-21). When asked if the Settlement had been disclosed to investors, Lewis replied, "I don't believe so." A0461 (Lewis Tr. 173:4-7); September 13, 2016 Deposition Transcript of Boyd Hinds ("Hinds Tr.") at A0465 (153:8-11).

[129] A1112-A1113 (Release).

[130] *See* A0608-A0605 (Aff. of Loss).

[131] Lewis gave conflicting testimony regarding when SCLI received bank statements. *Compare* A1112-A1113 (stating that "SCLI recently obtained the bank account statements from both the company's Bank of America and BBT accounts) (A0434 (Lewis Tr. 26:17-27:1)), (providing conflicting testimony regarding the bank statements—on the one hand he stated that SCLI had "some" of the bank statements *and* A0448 (83:1-1) (stating later in the deposition that SCLI had the bank statements). When asked why in his email from 2013 that SCLI had "recently" obtained the bank statements, Lewis could not recall why he had stated that. A0453 (Lewis Tr. 141:13-22). Kaneko also testified that he sent the bank statements to Mark Tong, SCLI's outside accountant, "probably some of the auditors, Pan's secretary, stuff like that" (A0418-A0419 (Kaneko Tr. 353:11-354:4)), although could not provide any details or support.

that did not actually exist against plaintiff was sufficient to support a lack of consideration for the Alleged Release to overcome a motion to dismiss). The Chancery Court found that the Company considered the return of the Song Held Shares to be valuable consideration.[132] However, consideration requires the return of something more than that to which SCLI was already entitled. *Travelers*, *supra*, 819 N.Y.S.2d at 852.

Kaneko contends that there is no evidence that he received something for nothing.[133] However, the Song Held Shares were not permitted to be transferred under the Lock Up Agreement, yet they were, with Kaneko's assistance. SCLI was already entitled to the return of the Song Held Shares, and, as such, their return cannot amount to adequate consideration. This is even more true when Kaneko failed to actually return the Song Held Share to which SCLI was entitled, but instead only provided Loss Affidavits. Further, Kaneko argues that he gave up his claims against SCLI.[134] However, there were no facts presented which indicated that he actually had claims against SCLI and he also testified that he never intended to pursue any such claims.[135] Giving up claims that do not exist is insufficient consideration. In order for a promise to forbear from an action to constitute legal consideration, the party promising to forbear must asset his right of

[132] A1531 MSJ Opinion attached hereto as Exhibit A, p. 19.
[133] A0514 (MSJ).
[134] A0402 (Kaneko Tr. 152:9-21).
[135] *Id.*

action in good faith. *Last Will and Testament of Puwalski v. Bloch*, 1996 WL 73571, at *6 (Del. Ch. Feb. 9, 1996) (finding that one sibling's purported waiver of his right to challenge the guardianship of his mother was insufficient consideration for a promise to receive funds from the estate where he had no good faith basis to assert such a claim). The Chancery Court did not address this argument in its MSJ Opinion. **This is not a situation where there was merely unequal consideration (which there was)** or a situation where SCLI's business judgment should be factored in—SCLI received no more than it was already rightfully entitled to and this is not a benefit to SCLI.[136] Therefore, the Chancery Court should not have determined that the consideration was sufficient on a summary judgment basis. This is particularly true where the Song Held Shares were not Kaneko's property and had indeed been wrongfully transferred. *See Deli* and *Mardirosian*, *supra*.

[136] A0337 (MTD Opinion).

CONCLUSION

The Chancery Court erred in reexamining the Consideration Ruling, where no evidence was presented in discovery that undermined the prior material findings that SCLI could receive no benefit from the return of the Song Held Shares, which were held in a custodial capacity and were not owned by SCLI. This Court's own precedent holds that where a ruling an issue of law is made in a motion to dismiss and no new facts are presented which change the earlier finding, such finding should not be disturbed. Therefore, this Court should overrule the Chancery Court and hold that the Consideration Ruling is law of the case.

Even if this Court does not agree that the Consideration Ruling is law of the case, and that the Chancery Court should have reexamined the validity of the Release during the Motion for Summary Judgment stage, the Chancery Court improperly disregarded disputed issues of material fact presented by the Receiver when it determined that the Release was valid. Therefore, this Court should overrule the Chancery Court and allow the Receiver to bring this matter to trial.

WHEREFORE, for the reasons stated above, the Receiver respectfully requests that this Court reverse the MSJ Opinion and issue such further orders as consistent with such ruling.

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