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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, v. SHU KANEKO a/k/a Joseph Kaneko, Defendant-Below, Appellee.	§ § § § § § § § § § § §	No. 174, 2017 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 9861

ANSWERING BRIEF OF
DEFENDANT-BELOW, APPELLEE SHU KANEKO

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's March 22, 2017 Memorandum Opinion (the "MSJ Opinion") granting the motion of defendant-below, appellee Shu Kaneko for summary judgment on plaintiff-below, appellant Robert W. Seiden's claims, brought in his capacity as Receiver (the "Receiver") for Southern China Livestock, Inc. ("SCLI" or the "Company"), on the grounds that they are barred by a general release (the "Release") the Company gave Kaneko in connection with an arms-length settlement agreement (the "Settlement Agreement").[1] The Court of Chancery held that the undisputed evidence showed that "the Release is binding and enforceable and that it releases Kaneko from all claims asserted against him in this litigation."[2]

The Receiver made two main arguments below, both of which were properly rejected by the Court of Chancery. The Receiver first argued that the Court of Chancery's November 3, 2015 memorandum opinion on Kaneko's motion to dismiss the operative complaint (the "MTD Opinion")[3] established law of the case that the Release is not enforceable. That argument ignored the different standards applicable on motions under Rules 12(b)(6) and 56, as well as the plain language of

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[1] MSJ Op. 1 (Exhibit A to the Appellant's Opening Brief ("OB")).

[2] *Id*.

[3] 2015 WL 7289338 (Del. Ch. Nov. 3, 2015).

the MTD Opinion itself, which says that the Court was evaluating only the sufficiency of the pleadings and not making any definitive factual determinations.[4]

The law of the case argument also ignores that the MTD Opinion was rendered on the basis of allegations in a complaint that were, after the Receiver was afforded the opportunity to conduct full discovery, conclusively proven false. The MTD Opinion denied Kaneko's motion to dismiss based on the Receiver's allegations that Kaneko committed fraud, controlled the Company, and exerted duress over it at the time SCLI entered into the Settlement Agreement. Discovery revealed that the Receiver made those allegations on no more than information and belief without investigating whether there was any factual basis for them. The Receiver uncovered no evidence to support those theories during discovery.

The Receiver's second argument is that he presented evidence of a triable issue of fact as to the enforceability of the Release. However, he offered the trial court no more than conclusory and circular statements, and references to the pleadings, rather than evidence to support his arguments.[5] When pressed at oral argument to identify how the evidence at trial would differ from that offered by

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[4] *Id*. at **5-6 & n.70.

[5] The Receiver continues this pattern on appeal, citing the allegations of the complaint in support of his claims that Kaneko looted or defrauded the Company. *See* OB at nn. 2-8, 10-22, 66-67, 70-72, 89-90.

Kaneko in support of the motion for summary judgment, the Receiver could only respond, "There are irregularities and there's contradictory evidence."[6] But the Receiver did not identify any evidence that would contradict the undisputed summary judgment record. The Court of Chancery therefore correctly rejected both of these arguments and ended the Receiver's quest to prosecute the released claims.

[6] A1459:9–A1463:6; *see also* A1474:13–1478:2.

SUMMARY OF ARGUMENT

I. Denied. The Court of Chancery correctly held that the MTD Opinion did not, under the law of the case doctrine, preclude Kaneko's asserting the Release as an affirmative defense. The MTD Opinion denied dismissal on the grounds that, drawing all reasonable inferences in the Receiver's favor, he had sufficiently pled that the Release lacked consideration. The MTD Opinion, however, did not make any definitive findings of fact. Therefore, the conclusion in the MTD Opinion that the Receiver had adequately alleged that the Release failed for lack of consideration did not preclude the Court of Chancery from considering evidence on the issue at the summary judgment phase.

II. Denied. The Court of Chancery correctly held that the Release is supported by consideration and enforceable. It is undisputed that the Release covers the claims asserted in this action. It is also undisputed that the parties to the Settlement Agreement understood the overall bargain they were striking; at the Company's request, Kaneko obtained certain shares of common stock for the Company in exchange for a release. The Court of Chancery correctly held that Kaneko's doing what the Company asked, when he was under no obligation to do so, constitutes valuable consideration. Furthermore, neither below nor in this Court has the Receiver offered any evidence that would support a finding in his favor by clear and convincing evidence that the Release is invalid.

STATEMENT OF FACTS

The factual background below is taken from the evidentiary record presented to the Court of Chancery with the briefing on Kaneko's motion for summary judgment, which formed the basis of the MSJ Opinion.

A. The Private Placement and Effort to Bring SCLI Public

Beginning around February 1, 2010, SCLI conducted a private placement (the "Private Placement") to raise up to $10 million for investment in Jiangxi Yingtan Huaxin Livestock, Ltd. (the "Farm Operator"), a hog farm operator in Jiangxi Province, PRC.[7] The Private Placement memorandum described SCLI as a highly speculative investment and discloses the risk that the Company might not raise sufficient funds to carry out its business plan, conduct a public offering or become exchange-listed.[8]

Kaneko helped the Farm Operator prepare for the Private Placement by forming a Nevada corporation, Southern China Livestock International Inc. (the "Holding Company"), to hold an indirect interest in the Farm Operator.[9] He also set up bank accounts for the Holding Company.[10]

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[7] MSJ Op. 3; B19-24.

[8] B19, B32-33, B42-43.

[9] MSJ Op. 3; *see also* B288-90 (Kaneko Dep. at 54:22–62:6).

[10] B290, B302 (Kaneko Dep. at 64:12–65:12, 276:3-4).

On or about April 1, 2010, SCLI (then known as Expedite 4, Inc.) announced: (i) it had entered into a reverse merger with the Holding Company, which caused it to become a public company; (ii) the first closing of the Private Placement; and (iii) Kaneko's appointment as CFO and a director on SCLI's four person board.[11] As part of the transaction, the Company issued common stock in exchange for 100% of the Holding Company, of which 90% of the newly-issued shares were to go to Pan, Xu and the Farm Operator's other former owners (the "Song Held Shares").[12] Due to PRC laws, SCLI issued the Song Held Shares to defendant Song subject to the terms of earn-in agreements.[13] In September 2010, as SCLI disclosed in its SEC filings, the Song Held Shares were transferred to an entity, Shu Mei Yu, Ltd ("Shu Mei").[14]

B. SCLI after Kaneko's Resignation on October 8, 2010

On October 8, 2010, Kaneko resigned as CFO and director, and SCLI replaced him with Wei "Wayne" He.[15] Although Kaneko who was not deleted as an

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[11] B80, B146 (Form 8K). Besides Kaneko, the board included SCLI's Chief Executive Officer Luping Pan, Dengfu Xu and Xin Zhao, all of whom were managers of the Farm Operator. *Id*.

[12] MSJ Op. 4.

[13] *Id.*

[14] *See* B167.

[15] B161, B163.

authorized signatory on SCLI's US bank accounts, in December 2010 Kaneko added He as a signatory to the Company's account at Bank of America.[16]

From October 8, 2010 on, SCLI no longer listed Kaneko as an officer or director in any filing made with the SEC, nor did Kaneko sign any SEC filings.[17] Pan and/or He signed and certified those filings, and certain forms (when required) were approved by SCLI's entire seven-member board—which included two newly-appointed independent US directors who served on the audit committee—and consented to by SCLI's auditor, Schwartz Levitsky Feldman, LLP/SRL.[18]

C. SCLI's Attempt to Raise Funds in Summer 2011

Despite SCLI's positive financial results,[19] the effort to conduct a public offering failed, and SCLI "went dark."[20] SCLI sought to provide the Private Placement investors with an exit.[21] There is no evidence that Kaneko was involved in, much less controlled, the process.

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[16] A3413.

[17] *See*, *e.g.*, B172.

[18] *See* B142, B161, B172.

[19] SCLI's audited financials state that it generated $10.9 million from operations in fiscal year 2010, and, as of September 30, 2010, had $6.3 million working capital and $2,427,302 in cash. B128, B176.

[20] MSJ Op. 3.

[21] *Id*.

On July 21, 2011, SCLI engaged Hickey-Freihofer Capital ("Hickey") to find a new investor to buy out the Private Placement investors.[22] Pan signed the engagement letter on behalf of SCLI.[23] Alan Lewis, the Hickey banker who worked on the engagement, testified that most of his interactions were with Company employee Meng Qinghuan, and he had only passing contact with Kaneko to ask for his assistance locating a missing bank statement.[24] Hickey's efforts to find a new investor were unsuccessful.[25]

On March 6, 2012, Kaneko dissolved the Holding Company because it was inactive, he was no longer involved with the Company, and had not spoken to Pan for many months.[26]

D. SCLI's Settlement and Release of Kaneko

Beginning in summer 2011, several Private Placement investors, including Boyd Hinds, questioned Kaneko's use of SCLI's funds and transfer of real property to a family trust. For example, around spring 2012, Hinds exchanged numerous

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[22] *Id*.

[23] B189.

[24] B244-45, B269-70, B272 (Lewis Dep. at 26:4-16, 28:23–29:5, 31:6–32:5, 129:9–130:22, 139:10–140:4).

[25] MSJ Op. 3.

[26] B292-94.

emails with Li "Ken" Kai, a consultant who worked with SCLI in China, in which Kai floated the theory, which would eventually be repeated throughout this dispute, that Kaneko "control[led]" SCLI's bank accounts and had "gone missing."[27] These unsubstantiated claims would eventually blossom into the threats against Kaneko that led to the Settlement Agreement and then into the allegations of the FAC.[28]

Around November 2012, Qinghuan contacted Lewis saying that SCLI might have the opportunity to do a transaction with a private equity fund and go public on the Chinese Main Board exchange.[29] He told Lewis that the fund had concerns about the Company's capital structure that pertained to the Song Held Shares.[30] One reason that Lewis was interested in helping the Company with the issue was he had not made anything on his prior, contingent engagement.[31]

In mid-November, the Company entered into a Business Services Agreement with Lewis' advisory firm, HF Capital Advisory, LLC ("HF Advisory"), pursuant to

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[27] *See* B200. Kaneko was not "missing"; in 2012, he moved from Virginia to Irvine, California, where he still lives. B286 (Kaneko Dep. at 7:9-20).

[28] *See* B254 (Lewis Dep. at 66:2–67:18, 68:21–69:11); B306, B308-09, B311-12 (Hinds Dep. at 80:16–81:25; 96:5–97:2, 98:3–99:17; 100:6-19, 106:3–110:25); *see also* OB 17.

[29] MSJ Op. 3; *see also* B248-49 (Lewis Dep. at 43:11–44:7).

[30] MSJ Op. 4.

[31] *Id*.

which Lewis agreed to assist the Company to obtain: (i) funds held in escrow by SCLI's former outside counsel (the "Escrow"); and (ii) the Song Held Shares and certain other shares issued to consultants.[32] Pan signed the agreement on behalf of SCLI.[33] It provided for payment of a monthly retainer once the Escrow was recovered and a success fee upon recovery of the Song Held Shares.[34] The Company also retained a new law firm, Ofsink, LLC in New York ("Ofsink").[35]

Once engaged, Lewis began work on the recovery of the Song Held Shares.[36] On January 5, 2013, Lewis sent Kaneko an email threatening that SCLI had certain claims that are remarkably like those eventually brought by the Receiver:

> SCLI recently obtained the bank account statements from both the company's [BoA] and BBT bank accounts. Upon examining the accounts, the company is alleging that you, as sole signatory of their US bank accounts, made over $1 million of unapproved payments to your personal accounts and other affiliated entity accounts back in 2010-2011.
>
> The [C]ompany hired a US law firm to initiate a lawsuit against you in the US to seize your properties that you conveyed to [your family trust] in an attempt to recoup

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[32] MSJ Op. 3-4; B206-12.

[33] B209.

[34] B210.

[35] *See* B213-19.

[36] MSJ Op. 5.

> some of the misappropriated funds,... along with obtaining the [Song Held Shares]....[37]

In the same email, Lewis proposed a way to resolve these claims if Kaneko would facilitate the return of "management shares," that is, the Song Held Shares:

> I've talked to the [C]ompany and management seems open to offering you both a full liability waiver and [to] drop the lawsuit re: the misplaced company funds so that you can move on with your life, in exchange for your cooperation in turning over the management shares.[38]

When they later spoke, Kaneko denied the allegations, making "clear to Lewis that he had done nothing wrong and owed the Company nothing."[39] Nevertheless, Kaneko was "eager to cooperate and help clear his name."[40] After the call, Kaneko contacted the various parties who held the Song Held Shares.[41] When he next spoke to Lewis, Kaneko said that because of the misappropriation allegations, those who may be deemed owners of the Song Held Shares (collectively, the "Shu Mei Parties") wanted a liability waiver.[42] Lewis asked Ofsink to prepare the paperwork, which

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[37] B236.

[38] *Id*.

[39] MSJ Op. 5 (quoting B255 (Lewis Dep 70:17-71:1)).

[40] *Id*. (quoting B255 (Lewis Dep. 71:2-11)).

[41] *Id*.

[42] *Id*.

included the Settlement Agreement.[43] Lewis regularly informed Qinghuan of these developments.[44]

On February 20, 2013, Kaneko emailed his signed Settlement Agreement and documents signed by each of the Shu Mei Parties (an agreement to cancel any interest in the Song Held Shares, blank stock powers and affidavits of loss) to Ofsink; Lewis emailed the agreements executed by Pan, which had been held in escrow by Ofsink, the next day.[45] Lewis testified that with the Shu Mei Parties' signing the documents, "We'd received everything we needed to get the shares back,"[46] which, to reiterate, was done at the Company's request to right the Company's capital structure so that it could pursue a transaction with a new investor.

The Settlement Agreement, as finalized, contains SCLI's general release of Kaneko

> from all actions, any causes of action, suits,... claims and demands whatsoever... any Company Release Party ever had, now have or hereafter can, shall or may, have for, upon, or by reason of any matters, cause now have or hereafter can, shall or may, have for, upon, or by reason of

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[43] *Id*. (quoting B255 (Lewis Dep. at 72:21-23)).

[44] B255-56 (Lewis Dep. at 73:21-74:2).

[45] MSJ Op. 6.

[46] B262 (Lewis Dep. at 98:21-25).

> any matters, cause or thing whatsoever from the beginning of the world to the date of this Agreement.[47]

The Company's undertakings also include a covenant not to sue.[48] Kaneko gave the Company a reciprocal release, pursuant to which he gave up, among other things, his claims against the Company for compensation that he was owed, and broadly promised to keep Company information confidential and not to disparage the Company.[49] The parties represented that each had received independent legal advice, and that the Settlement Agreement binds "assigns, successors-in-interest, agents, representatives, officers, directors, employees, clients, members and shareholders."[50]

Each party also represented that "[t]he execution of this Agreement and delivery of the consideration specified effect a settlement of denied and contested claims."[51] Lewis understood this meant

> [t]hat in exchange for his cooperation of obtaining all [of the Song Held Shares] for management, that the

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[47] MSJ Op. 9 (quoting A0610).

[48] A0610.

[49] A0609-10; *see also* B296-97, B299, B304 (Kaneko Dep. at 138:11–142:20, 151:24–152:13, 374:24–375:14).

[50] A0611.

[51] A0611-12. Confirming this dynamic, Lewis believed that the Company's claim that Kaneko had misappropriated $1 million was exaggerated. B258 (Lewis Dep. at 83:18–84:7).

> [C]ompany was granting [Kaneko] a blanket release and waiver of liability and an agreement not to sue him for anything related to the misappropriation of funds, the PIPE offering, work as a CFO for the [C]ompany, et cetera.[52]

On July 17, 2013, the Company's board of directors resolved by unanimous written consent, *inter alia*, to enter into the Settlement Agreement and the agreements with the Shu Mei Parties, HF Advisory and Ofsink, and ratified all actions taken in furtherance of those agreements.[53]

Lewis testified the Company was not under any duress to settle with Kaneko; rather, it seemed the way to achieve "the best result."[54] Pan and Xu were "savvy businessmen" who understood the decision to waive liability against Kaneko.[55] With the Song Held Shares resolved, Lewis was eager to begin work on finding an outside investor for SCLI, but Qinghuan later "indicated that both PRC firms were no longer interested in pursuing a deal with the company due, in part, to pork prices taking a drastic fall in the Chinese market."[56]

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[52] B250 (Lewis Dep. at 88:24–89:8).

[53] MSJ Op. 6; *see* A1364-69.

[54] B267 (Lewis Dep. at 120:12–121:10).

[55] B258-59, B274-77 (Lewis Dep. at 84:23–86:23, 149:7–157:14).

[56] B262 (Lewis Dep. at 99:3-16, 100:17-24).

E. Procedural History

1. The Filing of this Action

On January 17, 2014, the Court of Chancery appointed the Receiver after the Company had defaulted in consolidated Section 220 actions brought by certain investors, including those whose 2011 and 2012 allegations animated the Company's settlement with Kaneko.[57]

On July 7, 2014, the Receiver filed the original complaint.[58] It contained eight causes of action against Kaneko centered on the alleged conversion of private placement proceeds and the transfer of the Song Held Shares to Shu Mei, for which he sought $7,594,695, the entire amount raised in the Private Placement. Although the original complaint did not reference Lewis' discussions with Kaneko or the Settlement Agreement, multiple allegations mirrored the assertions made in Lewis' January 5, 2013 email.

On September 24, 2014, Kaneko filed a motion to dismiss and/or for summary judgment, to which he attached the Settlement Agreement.[59] As it later came out in discovery, by the end of August 2014, the Receiver's counsel had already spoken to Ofsink and Lewis, and, by September 11, 2014, received the Settlement Agreement

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[57] MSJ Op. 2; *see also* A1380.

[58] *See* A1 (docket).

[59] *See* A2-3.

and other key documents from Lewis, including his investigative reports, Qinghuan's contact information and the board's written consent approving the Settlement Agreement.[60]

Instead of opposing the motion, the Receiver filed the First Amended Complaint (the "FAC"), piling on five more causes of action against Kaneko: conversion, fraud, conspiracy to defraud, fraudulent transfer and "corporate waste" based upon the Settlement Agreement.[61]

2. The MTD Opinion and Discovery

On January 30, 2015, Kaneko moved to dismiss the FAC. In the MTD Opinion, the Court dismissed all claims against Kaneko pertaining to the Song Held Shares on the grounds of laches, holding that Kaneko had not concealed the shares' transfer, which had been disclosed in SCLI's SEC filings.[62] Kaneko also moved to dismiss on the grounds of the Release. The Court denied that aspect of the motion, reasoning that, under the lenient Rule 12(b)(6) standard, the Receiver's allegations of continued control gave rise to a litigable issue surrounding the Release and

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[60] *See*, *e.g.*, A0627-35; *see also* B266-68 (Lewis Dep. at 114:20–119:12, 121:11–125:9).

[61] *See generally* A28-74.

[62] MTD Op., 2015 WL 7289338, at *8.

precluded dismissal.[63] In addition, the Court held, "for purposes of this Motion to Dismiss," the Release failed for lack of consideration.[64] The MTD Opinion emphasized the procedural context in which the court reached these conclusions:

> [T]he record is largely devoid of information surrounding the relationship among Lewis, Kaneko, and SCLI, and the Court is therefore *unable, at this stage in the proceeding, to develop an opinion* regarding the propriety of the relationship, the Release negotiations, or the Release itself.[65]

On November 18, 2015, Kaneko answered, asserted affirmative defenses including release and estoppel, and filed a third party claim against the Company for indemnification.[66]

In the course of discovery over the next year,[67] Kaneko took the testimony of Lewis, Hinds and the Receiver, who also served as the Rule 30(b)(6) witness for his

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[63] *Id*. at *6 ("Plaintiff's allegations regarding Kaneko's extended control over SCLI and [the Holding Company], however, cast doubt on this reasoning and, with all reasonable inferences drawn in Plaintiff's favor, suggest that the Company may have offered this deal intending to insulate Kaneko from liability for his alleged fraudulent scheme while receiving in return only a portion of its entitlement, that is, possession of the Song Held Shares.").

[64] *Id.* at *6 & nn. 73, 75-76, 80, 84

[65] *Id*. at *5 n.70 (emphasis added).

[66] *See* A10 (docket).

[67] While discovery was pending, the Vice Chancellor who issued the MTD Opinion retired.

investigative firm Confidential Security & Investigations, LLC ("CSI"). At his deposition, held two days before the discovery cutoff, the Receiver was asked about the evidentiary basis for allegations in the FAC as well as information obtained thereafter. The Receiver testified that neither he nor anyone from CSI had ever spoken to any Qinghuan or any other officer, director or employee of SCLI to investigate the claims.[68] For example, although the FAC questions Lewis' status by calling him an "alleged consultant" of SCLI,[69] the Receiver admitted that neither he nor CSI ever investigated whether Lewis was an SCLI consultant.[70] Similarly, although the FAC alleges there is "serious doubt" whether SCLI authorized the Settlement Agreement,[71] the Receiver never investigated the issue.[72] Indeed, the Receiver's investigation and discovery efforts consisted of little more than requesting documents from Kaneko and taking his deposition.

3. The MSJ Opinion

After the close of discovery, on October 31, 2016, Kaneko moved for summary judgment on the grounds of the Release, laches and failure to state a claim

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[68] B314-18 (Seiden Dep. at 32:23–34:7, 93:17–94:4, 121:2-25).

[69] A44 ¶ 52.

[70] B320 (Seiden Dep. at 168:17–169:18).

[71] A44-45 ¶ 53.

[72] B321-24 (Seiden Dep. at 173:18–175:5, 305:9–309:9).

for fraud and fraudulent transfer. He also sought summary judgment on his third-party claim for indemnification and legal fees under the bad faith exception to the American Rule. Of the thirty-five evidentiary exhibits Kaneko offered in support of his motion, sixteen pertained to the investors' and Company's 2011 and 2012 allegations of Kaneko's wrongdoing, Lewis's work for SCLI and the Settlement Agreement.[73] The Receiver's few exhibits on these topics duplicated Kaneko's evidence,[74] and none of them support an inference of Kaneko's continued control after the Holding Company's dissolution or lack of consideration. In response to repeated questioning by the Court during oral argument, the Receiver's counsel could not identify how evidence at trial would differ from that offered in connection with the motion for summary judgment.[75]

On March 23, 2017, the Court of Chancery issued the MSJ Opinion, which: (i) granted Kaneko's motion for judgment on the Receiver's claims against him on the grounds of the Release; (ii) denied Kaneko's request for fee shifting; and (iii) stayed ruling on Kaneko's claim for indemnification. The Court of Chancery

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[73] *See* A539-41 (Ward Aff. Exs. 16-29, 31 and 32).

[74] Answering Brief of Plaintiff in Opposition to Defendant's Motion for Summary Judgment (Dec. 23, 2016), Exs. A, B, D-G, P, S.

[75] A1459:9–A1463:6; *see also* A1474:13–1478:2.

entered partial final judgment in Kaneko's favor under Rule 54(b).[76] Only the grant of summary judgment is at issue in this appeal.

The Court of Chancery noted that, on its face, the conduct alleged in the FAC fell within the plain language of the Release.[77] It next considered the Receiver's argument that the MTD Opinion's conclusion that the Release failed for lack of consideration established law of the case conclusively precluding Kaneko's reliance on the Release.[78] The Court of Chancery held that it did not "because [the MTD Opinion] did not make definitive findings of fact on the motion to dismiss, but appropriately accepted all well-pled facts as true and drew all reasonable inferences in the Receiver's favor."[79] The law of the case doctrine is, therefore, inapplicable, "because the underlying facts were never conclusively determined."[80]

Next, the Court of Chancery held that the Receiver put forth no evidence in support of his substantive challenges to the Release. That is, the Receiver has no evidence that Kaneko controlled the Company in 2013.[81] With respect to the

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[76] MSJ Op. 22 n.57.

[77] MSJ Op. 9-10.

[78] *Id.* at 10.

[79] *Id.* at 11.

[80] *Id.* at 12.

[81] *Id.* at 12-13.

Receiver's miscellaneous arguments that the form of the Release and the surrounding circumstances render it unenforceable,[82] the Court of Chancery held that "None of [the Receiver's] observations, either alone or together, provides any basis to invalidate the Release," noting that the record showed that many Company documents were in English, did not bear a chop, that the Receiver had not provided evidence of how Lewis' payment caused a conflict, and that the Receiver had not provided no evidence that not copying Pan, the investors or others on his emails should somehow invalidate the Release.[83]

The Court of Chancery next rejected the Receiver's "attempts to gin up issues of fact relating to the adequacy of consideration supporting the Release...."[84] Contrary to the Receiver's assertion, there is no legal requirement that a contract recite precisely the consideration being exchanged.[85] The Court also found that the undisputed facts did not support the Receiver's claim that Kaneko's effectuating the return of the Song Held Shares was "past" consideration because "testimony in the record reveals that both parties held their signed copies of the Release in escrow until all mutual covenants were fully performed, a fact that reveals the parties' belief that

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[82] *Id.* at 14.

[83] *Id.* at 14-15.

[84] *Id*. at 16.

[85] *Id*. at 16-17.

their performance obligations were ongoing and not yet satisfied."[86] Lastly with respect to consideration, the Court of Chancery held, whether or not the Song Held Shares should have been transferred to Shu Mei, "the fact remains that the Company did not, in fact, have the shares when it needed them to begin serious negotiations with the private equity company that was potentially willing to provide an exit for the US investors."[87] Thus, Kaneko's facilitating the return of those shares conferred value on the Company.

Finally, the Court rejected the Receiver's argument that Lewis' lacked authority to negotiate the Release.[88] The evidence in the record is undisputed that Lewis had authority to negotiate the Release, and even were there a question on the subject, "the fact that the board subsequently ratified the corporate act moots any argument that the Release is voidable."[89]

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[86] *Id.* at 18.

[87] *Id.*

[88] *Id.* at 19.

[89] *Id.* at 19-21.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT THE LAW OF THE CASE DOCTRINE DID NOT APPLY.

A. Question Presented

Whether the Court of Chancery correctly held that the MTD Opinion did not establish law of the case precluding enforcement of the Release.[90]

B. Standard of Review

The parties agree that the trial court's application of the law of the case doctrine is reviewed *de novo*.[91]

C. Merits of Argument

It is settled (and often repeated) that the law of the case doctrine is a guideline that fosters finality in litigation by encouraging courts to defer to previously determined issues in the same litigation.[92] The law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."[93] The doctrine differs from *res judicata* because "it is not an absolute bar to reconsideration of a prior decision that is clearly wrong,

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[90] *See* B338-45.

[91] *See* OB 27.

[92] *See Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1181-82 (Del. 2000) (citing *Kenton v. Kenton* 571 A.2d 778, 784 (Del. 1990)).

[93] *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.).

produces an injustice or should be revisited because of changed circumstances."[94] The doctrine applies only to a "specific legal issue" that was "necessarily decided,"[95] and then only if "the facts underlying the ruling do not change."[96]

Here, the facts pertinent to whether the Release was sufficiently supported by consideration were not the subject of an earlier merits determination that "necessarily decided" the claim. On the contrary, the MTD Opinion assessed the sufficiency of the FAC's allegations under the reasonable conceivability standard to determine whether the Receiver had stated a pleadings-stage claim, and expressly disclaimed any ultimate conclusions about the propriety of the Release.[97] As the Court of Chancery stated in rejecting the Receiver's law of the case argument, the MTD Opinion "made clear that it was drawing all reasonable inferences that logically flow from the well-pled facts in the plaintiff's favor, as it is required to do

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[94] *Id.*; *see also Topps Chewing Gum, Inc. v. Fleer Corp.*, 1987 WL 19875, at *4 (Del. Ch. July 31, 1987) ("[l]aw of the case directs a court's discretion, it does not limit the tribunal's power") (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)), *aff'd* 539 A.2d 1060 (Del. 1988); 18 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE ¶ 134.22[i][a] (3d ed. 2004) ("The law of the case doctrine does not, however, limit the court's power to reconsider or change its decision, it merely protects the ability of the court to build to its final judgment by cumulative rulings.").

[95] *Gannett*, 750 A.2d at 1181-82.

[96] MSJ Op. 11 (quoting *State v. Wright*, 131 A.3d 310, 321-22 (Del. 2016)).

[97] MTD Op., 2015 WL 7289338, at *5 & n.70.

on a motion to dismiss."[98] Thus, the MTD Opinion was not a decision the merits, only the sufficiency of the pleadings. Accordingly, the Court of Chancery concluded in the MSJ Opinion that:

> Because Vice Chancellor Noble did not make definitive findings of fact on the motion to dismiss, but appropriately accepted all well-pled facts as true and drew all reasonable inferences in the Receiver's favor, his conclusions regarding the lack of consideration for the Release cannot be the law of the case.[99]

Nonetheless, the Receiver argues that the Court of Chancery erred by "completely ignor[ing]" the MSJ Opinion and declining to apply the law of the case doctrine.[100] The crux of his argument is that the facts in the record concerning the Release have not changed since the FAC was filed.[101] Setting aside whether that premise is even true (which it is not, for the reasons addressed below), the argument misconstrues the Court of Chancery's ruling. Its crucial reason for holding the law of the case doctrine inapplicable is that "the underlying facts were never conclusively determined" at the motion to dismiss stage, regardless whether the

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[98] MSJ Op. 10.

[99] *Id*. at 11.

[100] OB 23-24, 28-31.

[101] *Id*. at 28.

underlying facts had or had not changed as a result of discovery.[102] Because the facts had not been determined, the doctrine cannot apply.

Moreover, as the Receiver admits, the law of the case doctrine applies only to decisions rendered in the "procedurally appropriate" way.[103] Even if the MTD Opinion had not disclaimed any intention to make conclusive fact findings about the Release, there is no support for the proposition that a Rule 12(b)(6) motion is a procedurally appropriate way finally to resolve a mixed question of law and fact like the adequacy of the consideration supporting the Release.[104] This is logical, given that the movant under Rule 12(b)(6) is bound, as is the court, to treat the allegations of the complaint as true regardless whether the movant disputes the allegations. By contrast, summary judgment is a procedurally appropriate mechanism to address mixed questions.[105]

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[102] MSJ Op. 11-12 ("In this instance, the law of the case doctrine is inapplicable not because the facts have changed, but because the underlying facts were never conclusively determined.").

[103] OB 27 (citing *Taylor v. Jones*, 2006 WL 1510437, at *5 n.29 (Del. Ch. May 26, 2006)).

[104] MSJ Op. at 16 n.41 (describing the adequacy of consideration as a mixed question of law and fact); *see*, *e.g.*, *Adv. Litig., LLC v. Herzka*, 2006 WL 4782445, at *5 (Del. Ch. Aug. 10, 2006) ("The law of the case only applies to reconsideration of *legal* issues." (emphasis in original)).

[105] *See*, *e.g.*, *Arnold v. Soc'y for Savings Bancorp, Inc.*, 650 A.2d 1270, 1276 (Del. 1994) (affirming the trial court's grant of summary judgment on mixed question of law and fact); *Pub. Serv. Comm'n v. Util. Sys., Inc.*, 2010 WL 318269,

The cases the Receiver cites cut against the application of the law of the case doctrine here. In *Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*,[106] this Court held that the law of the case doctrine precluded a trial judge from reviving a claim after trial that had been dismissed at the pleadings stage by another judge who had subsequently retired.[107] Similarly, in *Porter v. Texas Commerce Bancshares, Inc.*,[108] the Court of Chancery held that its decisions on a Rule 12(b)(6) motion would establish law of the case regarding the legal sufficiency of several theories pled in the complaint. Thus, in both cases, a prior determination that claims

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at *4 (Del. Ch. Feb. 18, 2010) (granting summary judgment on a mixed question of law and fact where the facts were undisputed).

[106] 112 A.3d 878, 894-95 (Del. 2015); *see also Northpointe Holdings, Inc. v. Nationwide Emerging Managers, LLC*, 2010 WL 3707677, at *4 (Del. Super. Sept. 14, 2010) (dismissing a contract claim because the complaint did not allege conduct that amounted to a breach).

[107] The Receiver appears to focus on *Nationwide* due to the change of judge. He overstates his case. In *Odyssey Partners v. Fleming Company*, Vice Chancellor Lamb, in considering a motion for summary judgment, weighed defendants' argument that a prior ruling on a motion to dismiss issued in the same case by Chancellor Allen limited the issues to be decided on summary judgment, and held that it did not. 1998 WL 155543, at *1 (Del. Ch. Mar. 27, 1998). He explained that this Court's instruction in that "courtesy and comity" require successor judges to adhere to the prior rulings of a previous judge comes into play "only when a prior decision actually or necessarily decides an issue." *Id.* (citing *Frank G.W. v. Carol M.W.*, 457 A.2d 715 (Del. 1983)). Because "the Chancellor merely analyzed the plaintiffs' claim in the context of a motion to dismiss, in order to determine whether the plaintiffs had sufficiently alleged a claim," the issue at summary judgment had by necessity not been decided. *Id.* at *2.

[108] 1989 WL 120358, at *7 (Del. Ch. Oct. 12, 1989).

were not sufficiently pled as a matter of law—a procedurally appropriate determination at the Rule 12(b)(6) stage—established law of the case. Neither case stands for the proposition that a trial court's determination that a claim is sufficiently pled would stop the court from subsequently considering whether the allegations are supported by evidence.[109]

That is what the Court of Chancery did here. The MTD Opinion accepted the allegations of the FAC as true, but at the summary judgment stage the Court of Chancery's focus shifted from the allegations to the evidence.[110] The Court of Chancery granted the motion for summary judgment because the Receiver had, even after the opportunity to take discovery, no proof to support of his allegations attacking the sufficiency of the Release, and no witnesses who would rebut Lewis' or Kaneko's testimony. In addition, the undisputed evidence showed the existence of at least three forms of consideration and numerous other facts supporting the validity of the Settlement Agreement, none of which were in the record at the pleadings stage, such as: (i) Lewis' deposition testimony regarding the engagement

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[109] The other case the Receiver cites is also off base. *See Taylor*, 2006 WL 1510437, at **5-6 (referencing the court's discretion when it comes to the law of the case doctrine, and hewing after trial to factual determinations made at the summary judgment stage in the absence of any material change in the factual record or equitable reason to revisit its conclusions).

[110] MSJ Op. 7 ("The court... may not look to the allegations or denials in the pleadings when determining whether a material issue of fact remains for trial.").

that resulted in the Release; (ii) Hinds' deposition testimony regarding allegations being made in 2011 and 2012 about alleged wrongdoing by Kaneko, and his related emails; (iii) the retainer letters between SCLI and Lewis and Ofsink, all of which show the effort to obtain the Song Held Shares began months before Lewis contacted Kaneko; (iv) documents confirming that Lewis conducted his own investigation of Kaneko, as well as his correspondence with the Receiver's counsel answering questions about his engagement; and (v) the SCLI board of directors' unanimous written consents adopting and ratifying the Lewis and Ofsink retainers and Settlement Agreement.

The Court of Chancery correctly declined to give preclusive effect to the MTD Opinion and instead considered the evidence. Neither the law of the case doctrine nor equity supports the Receiver's argument that he should prevail despite the undisputed evidence.

II. THE COURT OF CHANCERY CORRECTLY FOUND, BASED ON UNDISPUTED THE EVIDENCE, THAT THE RELEASE IS VALID AND ENFORCEABLE.

A. Question Presented

Whether the Court of Chancery correctly held found that the Release is valid and enforceable.[111]

B. Standard of Review

The parties agree that the Court of Chancery's decision granting summary judgment is reviewed *de novo*.[112]

C. Merits of Argument

Delaware law generally respects parties' ability to order their affairs by contract, and strives to predictably and consistently enforce their bargains.[113] Delaware law also generally favors the private resolution of disputes, and recognizes the validity of general releases to that end.[114] The utility of releases is diminished if parties cannot count on them to be predictably and consistently enforced such that

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[111] *See* A510-21.

[112] *See* OB 34.

[113] *See ev3, Inc. v. Lesh*, 114 A.3d 527, 529 n.3 (Del. 2014) (collecting cases for this proposition); *see also Adams v. Jankouskas*, 452 A.2d 148, 155-56 (Del. 1982) (Where contract "language is clear and unambiguous, it will not be lightly set aside").

[114] *See Seven Invs. v. AD Cap. LLC*, 32 A.3d 391, 397 (Del. Ch. 2011).

they will provide "complete peace."[115] To that end, Delaware law requires a party challenging the effectiveness of a release to do so with clear and convincing evidence.[116] The Receiver is charged with the Company's knowledge and subject to any agreements it entered.[117]

The Release, on its face, contains "standard release language."[118] It reflects the Company's intent to release Kaneko from all claims it may have had against him; Kaneko agreed to a reciprocal release likewise releasing the Company.[119] There is no dispute that if the Release is enforceable, it releases all of the Receiver's claims against Kaneko.[120] On appeal, the Receiver contends that the Release is not enforceable for two reasons: (i) the Settlement Agreement fails for lack of consideration; and (ii) there are "suspicious" circumstances surrounding the execution of the Settlement Agreement giving rise to triable questions about its validity. For the reasons discussed in turn next, the Court of Chancery correctly held

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[115] *See id*. (describing achieving "complete peace" as a purpose of settling).

[116] MSJ Op. 9 (quoting *Riverbend Cmty., LLC v Green Stone Eng'g LLC,* 2012 WL 1409013, at *6 (Del. Super. Apr. 4, 2012), *aff'd* 55 A.3d 330 (Del. 2012)).

[117] *Haas v. Sinaloa Exploration & Dev. Co.*, 152 A. 216, 219 (Del. Ch. 1930).

[118] MSJ Op. 10.

[119] *Id*.

[120] *Id*.

that none of the Receiver's theories are supported by evidence (much less clear and convincing evidence sufficient to carry his burden on proof at trial), and therefore the MSJ Opinion should be affirmed.

1. The Settlement Agreement Is Supported by Consideration.

The bulk of the Receiver's argument is that the Company received no, or too little, value in exchange for the Release it provided to Kaneko. "[C]onsideration for a contract can consist of either a benefit to the promisor or a detriment to a promisee."[121] Although the Receiver attacks the Court of Chancery's analysis, he points to no evidence it overlooked or ignored.

The Receiver does not, and cannot, dispute that the parties to the Settlement Agreement "understood the overarching purpose for the Release and the specifics of what each party was giving and getting."[122] Indeed, it appears that one of the purposes of threatening Kaneko with litigation in the first place was to induce him to agree to assist the Company with obtaining the Song Held Shares in exchange for the Release.[123] The Company getting exactly what it wanted in exchange for precisely what it offered is the embodiment of bargained-for consideration.

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[121] MSJ Op. 14 (quoting *First Mortg. Co. of Pa. v. Fed. Leasing Corp.*, A 456 A.2d 794, 795-96 (Del. 1982)).

[122] MSJ Op. 17 (citing B235-36).

[123] *See* B236 ("I've talked to the company and management seems open to offering you [and Song] a full liability waiver and drop the lawsuit re: the misplaced

No evidence supports the Receiver's argument that there was no consideration because Kaneko, in essence, received the Release in exchange for nothing.[124] There is no evidence that Kaneko had any obligation to assist SCLI with the return of the Song Held Shares. Indeed, he was not willing to do so unless SCLI provided him with the Release in return, as it had offered.[125] His doing something that he was not otherwise required to do is consideration.[126]

On the "something for nothing" issue, the Receiver contends that the Song Held Shares "were not permitted to be transferred under the Lock Up Agreement," and therefore Kaneko's obtaining their return did not constitute consideration to the Company.[127] As a threshold matter, no evidence supports the Receiver's assertion. It is undisputed that SCLI disclosed the transfer of the Song Held Shares to Shu Mei in multiple SEC filings, at least one of which states that the transfer was "subject to

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company funds so that you can move on with your life, in exchange for your cooperation in turning over the [Song Held Shares]."").

[124] OB 44.

[125] MSJ Op. 5.

[126] Even if it was debatable whether Kaneko were under an obligation to help return the Song Held Shares (and there is no evidence that he was), his undertaking the obligation still would constitute valuable consideration. *See Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 769 F.Supp. 671, 739 (D. Del. 1991) (holding that consideration is satisfied if the duty is doubtful or subject to honest dispute").

[127] OB 44.

the option and lock-up agreements."[128] The Receiver has never presented a shred of evidence to raise a question that the Company, Pan and Xu (who signed the SEC filings disclosing the transfer) did not know about it, nor that they viewed the transfer as a violation of any agreement. To the contrary, these disclosures and subsequent conduct support that the fully-disclosed transfer to Shu Mei was known and ratified, not that it was illegal. Accordingly, the Receiver cannot attack the Release consideration on that basis.[129]

In any event, even if the transfer of the Song Held Shares had been a violation of an agreement, the Receiver offers no evidence that Kaneko's obtaining their return was not consideration. As the Court of Chancery succinctly put it, the Company needed the shares but did not in fact have them, and Kaneko was in the best position to help the Company get what it needed.[130] "Given these facts there can be no bona fide dispute that the Company considered the return of the Song Held Shares to be valuable consideration."[131]

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[128] B165-67.

[129] The Form 10K discloses that Song transferred the shares because he was concerned about personal liability. B167. This evidence highlights the Receiver's failure to identify any evidence of improper intent motivating the transfer of the Song Held Shares to Shu Mei, and further supports that the share transfer was valid.

[130] MSJ Op. 18-19.

[131] *Id*. at 18.

Deli v. Hasselmo,[132] on which the Receiver relies,[133] does not support a different result. There, the Court held that someone returning a videotape that she possessed and was already legally obligated to return did not constitute consideration for another's promise not to view the tape.[134] In contrast here, the Receiver has not offered any evidence—regardless whether the Song Held Shares were properly transferred to Shu Mei in the first place—that Kaneko was obligated to assist the Company to achieve their return such that his agreeing to do so was not consideration. Unlike the plaintiff in *Deli*, he did not possess the shares and was under no obligation to return them, much less to get others to do so.[135]

The Receiver next argues that the consideration Kaneko provided was flawed because the holders of the Song Held Shares delivered affidavits of loss instead of stock certificates.[136] The Receiver is correct that the Court of Chancery did not address this point, but the reason may lie in its banality. Obtaining an affidavit in

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[132] 542 N.W.2d 649 (Minn. App. 1996).

[133] *See* OB 37.

[134] *Deli*, 542 N.W.2d at 657.

[135] The other case the Receiver cites, *U.S. v. Mardirosian*, 602 F.3d 1, 7-8 (1st Cir. 2010), is even farther off-base. It involved a contract that was void *ab initio* as against public policy because it dealt with the disposition of stolen paintings.

[136] OB 44-45.

lieu of a lost certificate is commonplace.[137] The holders of the Song Held Shares did not have certificates, so Osfink prepared affidavits of loss for them to sign, which the Company accepted as the functional equivalent of receiving share certificates.[138] The Receiver has offered no evidence to the contrary.

The Receiver also speculates that consideration for the Settlement Agreement is lacking because the Company might not have known the exact amount allegedly misappropriated by Kaneko or did not have all bank records needed to analyze this question.[139] Again, the Court of Chancery observed, "the undisputed evidence makes clear that everyone involved in the negotiation and execution of the Release understood the overarching purpose for the Release and the specifics of what each party was given."[140] The Company placed value on the return of the shares.[141] That suffices to make Kaneko's assistance valuable consideration. There is no

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[137] *See*, *e.g.*, https://www.sec.gov/fast-answers/answerslostcerthtm.html (Fast Answers: Stock Certificates, Lost, Stolen).

[138] B277-78 (Lewis Dep. at 160-62).

[139] OB 36, 43, 45.

[140] MSJ Op. 17.

[141] *Id.* at 18.

requirement that the consideration exchanged when parties strike a contact be equal or even near equal.[142]

The Receiver's fourth attack is to deem Kaneko's effort to obtain the Song Held Shares "past consideration."[143] On this, the Receiver points to verbiage in the Settlement Agreement, which puts the word "facilitated" in the past tense, and fact that the board consent was signed five months later.[144] The Court of Chancery found no evidence to support this claim, given that the undisputed testimony showed that the parties "held their signed copies of the Release in escrow until all mutual covenants were fully performed, a fact that reveals the parties' belief that their performance obligations were ongoing and not yet satisfied."[145] The Receiver

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[142] *See Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("The Vice Chancellor could not have more correctly held that we limit our inquiry into consideration to its existence and 'not whether it is fair or adequate...'"). The cases the Receiver cites do not stand for the proposition that the court must inquire into the relative value of the consideration exchanged in the contract context. Those cases concern claims of self-dealing in the fiduciary context and approval of derivative claims. *See* OB 36 (citing *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57 (Del. 1952); *Mullen v. Alarmguard of Delmarva, Inc.*, 1993 WL 258696, at *7 (Del. Super. June 16, 1993)).

[143] OB 37-38.

[144] *Id.*

[145] MSJ Op. 17-18.

identifies no evidence overlooked by the Court of Chancery in deciding this issue.[146]

Finally, even if there were merit in the Receiver's other attacks on the consideration the parties exchanged, the Receiver does not dispute that the parties' exchange of *mutual* releases within the Settlement Agreement constitute consideration for one another as a matter of law.[147] Accordingly, in any event, the Release is supported by consideration.

2. The Court of Chancery Correctly Held That No Evidence Supports The Receiver's Claims Of "Suspicious" Circumstances Surrounding The Settlement Agreement.

The Receiver gathers a grab-bag of bullet points that he—in what appears a concession to the lack of evidence—deems "suspicious."[148] Having had three years since his appointment to investigate and two years to conduct discovery in this case, the Court of Chancery correctly held that the time for the Receiver to proceed on suspicion is long gone.

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[146] The cases cited on OB 38 do not support the proposition that Kaneko offered past consideration and are procedurally inapposite. *See Cigna Health & Life Ins. Co. v. Audax Health Solutions, Inc.*, 107 A.3d 1082, 1088 (Del. Ch. 2014) (considering a requirement imposed after signing a merger agreement, and allegedly in violation of the DGCL, that non-consenting stockholders execute a release before they could receive merger consideration); *In re Cellular Communications Int'l, Inc. S'holders Litig.*, 752 A.2d 1185 (Del. Ch. 2000) (scrutinizing consideration in the context of a request to approve a proposed settlement of derivative claims).

[147] MSJ Op. 17 n.46.

[148] OB 42-43.

For example, the Court of Chancery correctly rejected the arguments that the Release and board consent are invalid because they did not bear the Company "chop," noting there was no evidence that SCLI consistently used a chop on its agreements.[149] On the contrary, several of the Company's contracts entered into the record below, including the 2011 retainer letter with Hickey and 2012 retainers of Ofsink, do not bear a chop.[150]

Similarly, sometimes documents were translated, and sometimes they were not, but that is not a basis to attack the validity of the Release.[151] Email communications with Kai and Qinghuan and other documents in the record show that the Company employed English-speakers in the PRC.[152] On appeal, the Receiver offers no legal authority or new evidence to controvert these points.

The Receiver also makes a cursory claim that 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."[153] The Receiver, however, presented no evidence of a

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[149] MSJ Op. 14-15.

[150] *See* B181-95, B213-24.

[151] MSJ Op. 15 ("The Receiver has pointed to nothing – no testimony, no legal authority – that suggests lack of translation will affect that validity of the Release.").

[152] *See*, *e.g.*, B196-205, A0628-29.

[153] OB 42.

single thing Kaneko did with respect to SCLI after dissolving the Holding Company in early 2012, leading the Court of Chancery to conclude, "The Receiver's evidence of Kaneko's purported control, even if present in the record, stops approximately ten months short of the relevant time frame."[154] The Court of Chancery described the Receiver's assertion that it is "suspicious" that Kaneko was positioned to help obtain the return of the Song Held Shares "as a Hail Mary.... The fact that Kaneko was positioned to secure the return of the Song Held Shares, the very consideration he brought to the bargain, is hardly evidence he controlled the Company, directly or indirectly, at the time of the Release."[155] On appeal, the Receiver again fails to identify any evidence that the Court of Chancery missed, much less evidence that rises to the level of showing Kaneko had actual control over the Company's affairs.

The Receiver next attacks the compensation structure agreed to between Lewis and SCLI, which provided for a success fee.[156] The Court of Chancery found that the Receiver had not made any connection between Lewis' compensation and the Release's validity.[157] The Receiver again points to no evidence that the Court of Chancery overlooked.

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[154] MSJ Op. 13.

[155] *Id*.

[156] OB 42.

[157] MSJ Op. 15.

The balance of the Receiver's arguments are at best undigested ideas, such as, Lewis did not copy Pan on emails or tell investors about the Release.[158] None of these points undermine the Release's validity. The Receiver identifies no legal requirement that Lewis had to copy Pan on emails or disclose his engagement by the Company to investors.[159] Other arguments are simply incoherent. For example, the Receiver declares, "[t]he Release was one-sided in nature," without elaboration or legal authority.[160]

In the end, the Receiver faces an insurmountable problem. He obtained no evidence from the Company or the officers or directors affiliated with it in February 2013 when the Settlement Agreement was negotiated and signed, or in July 2013 when the board signed its consent. He may not, in opposing Kaneko's motion or in appealing the Court of Chancery's decision, substitute speculation for evidence. Having failed to gather or present sound evidence to support his theories, the Court correctly granted summary judgment in Kaneko's favor and enforced the Release.

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[158] OB 42.

[159] MSJ Op. 16.

[160] Because Delaware Courts do not weigh the consideration that parties agree to exchange, *see supra* n.142, this argument fails as a matter of law.

CONCLUSION

Kaneko respectfully requests that this Court affirm the Court of Chancery's judgment dismissing all claims against him.

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