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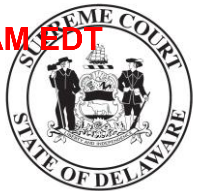

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

NATURE OF PROCEEDINGS 1

STATEMENT OF FACTS 3

A. Seegrid's Creation, Funding, and Leadership 3

B. Horbal's Termination and Ensuing Lawsuits 4

C. Seegrid Seeks Chapter 11 Protection 5

D. The Revival and Dismissal of the Delaware Action 9

ARGUMENT 13

I. THE TRIAL COURT PROPERLY DISMISSED THE ACTION WITH PREJUDICE. 13

A. Question Presented. 13

B. Scope of Review. 13

C. Merits of Argument. 13

1. The Court of Chancery properly considered and applied collateral estoppel. 14

2. The Court of Chancery complied with Rule 15 of the Rules of the Court of Chancery. 15

3. The Court of Chancery properly considered documents from the Bankruptcy Proceeding. 17

II. THE TRIAL COURT PROPERLY DISMISSED THE ACTION BASED ON COLLATERAL ESTOPPEL. 20

A. Question Presented. 20

B. Scope of Review. 20

C. Merits of Argument 20

1. The Court of Chancery correctly concluded that the Findings and Conclusions in Paragraph 15 were essential to the Bankruptcy Court Order. 23

2. The Court of Chancery correctly concluded that the Findings and Conclusions in Paragraph 35 are the same as the issues that must be decided in the Delaware Action. 26

3. The Court of Chancery Correctly concluded that Horbal had a "full and fair opportunity" to litigate issues in the Bankruptcy Court 30

III. THE TRIAL COURT PROPERLY DISMISSED THE ACTION BASED ON LACK OF STANDING. 33

A. Question Presented 33

B. Scope of Review 33

C. Merits of Argument 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

Cases

In re Am. Capital Equip., LLC,
688 F.3d 145 (3d Cir. 2012) 24

Anthony Horbal and HERC Mgmt. Servs., LLC v. Giant Eagle, Inc. and Giant Eagle of Del., Inc.,
Case No. GD-14-1-013654 4-5

Asbestos Workers Local 42 Pension Fund v. Bammann,
No. CV 9772-VCG, 2015 WL 2455469 (Del. Ch. May 21, 2015) 26, 28

Bank of Del. v. Claymont Fire Co. No. 1,
528 A.2d 1196 (Del. 1987) 14

Barker v. Huang,
610 A.2d 1341 (Del. 1992) 13-14

Betts v. Townsends, Inc.,
765 A.2d 531 (Del. 2000) 28

Braddock v. Zimmerman,
906 A.2d 776 (Del. 2006) 16-17

Burlington N. R.R. Co. v. Hyundai Merch. Marine Co.,
63 F.3d 1227 (3d Cir.1995) 21

Columbia Cas. Co. v. Playtex FP, Inc.,
584 A.2d 1214 (Del. 1991) 20

In re Coram Healthcare Corp.,
271 B.R. 228 24

In re Docteroff,
133 F.3d 210 (3d Cir. 1997) 29

In re Gen. Motors (Hughes) S'holder Litig.,
897 A.2d 162 (Del. 2006) 17-18

Harik v. Henry,
62 A.3d 1223 (Del. 2013) 16

Katchen v. Landy,
382 U.S. 323 (1966)...20

Kremer v. Chem. Const. Corp.,
456 U.S. 461 (1982)...30, 32

Magoni-Detwiler v. Pennsylvania,
502 F. Supp. 2d 468 (E.D. Pa. 2007)..30

Nat'l R.R. Passenger Corp. v. Penn. Pub. Util. Comm'n,
288 F.3d 519 (3d Cir. 2002) 23, 26

Neoplan USA Corp. v. Taylor,
604 F. Supp. 1540 (D. Del. 1985)..27

Nicholson v. Redman,
620 A.2d 858 (Del. 1993) 13

Oakes v. Oakes,
15 A.3d 217 (Del. 2011). 20

Peloro v. United States,
488 F.3d 163 (3d Cir. 2007) 20-21, 26

In re PWS Holding Corp.,
228 F.3d 224 (3d Cir. 2000) 23

Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.,
34 A.3d at 1078 (Del. 2011) 33-34

In re Santa Fe Pac. Corp. S'holder Litig.,
669 A.2d 59 (Del. 1995) 18

In re Seegrid Corp.,
Del. Bankr. Case No. 14-12391 (BLS)..5

Solomon v. Armstrong,
747 A.2d 1098 (Del. Ch. 1999) 18

In re Summit Metals, Inc.,
477 B.R. 484 (Bankr. D. Del. 2012) 31

In re TCI 2 Holdings, LLC,
428 B.R. 117 (Bankr. D.N.J. 2010) 23-24

Troy Corp. v. Schoon,
959 A.2d 1130 (Del. Ch. 2008) 14, 31

In re Unbreakable Nation Co.,
437 B.R. 189 (Bankr. E.D. Pa. 2010) 24

W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.,
914 A.2d 636 (Del. Ch. 2006) 20

In re W.R. Grace & Co.,
475 B.R. 34 (D. Del. 2012)..24

Witkowski v. Welch,
173 F.3d 192 (3d Cir. 1999) 30-31

Rules and Statutes

11 U.S.C. § 1129(a)(3)..9, 23, 24

Del. Ch. Ct. Rule 15(a) 15-17

Del. Ch. Ct. Rule 15(aaa).. 15-17

1B Moore's Fed. Prac. § 0.443(a)..27

Restatement (Second) of Judgments § 27 (1982) 23, 26

NATURE OF PROCEEDINGS

On July 14, 2015, the Delaware Court of Chancery (Vice Chancellor J. Travis Laster, presiding) dismissed Plaintiffs Anthony Horbal and HERC Management Services, LLC's (together "Horbal") Verified Derivative Complaint (the "Complaint" or the "Delaware Complaint") allegedly filed on behalf of Seegrid Corporation ("Seegrid"). The Complaint sought to assert claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty against defendants Giant Eagle, Inc.; Giant Eagle of Delaware, Inc.; Daniel Shapira; Philip Oliveri; and Hans Moravec (collectively, "Giant Eagle").

The Court of Chancery concluded that a final order from a prior proceeding in the Bankruptcy Court for the District of Delaware collaterally estopped Horbal from re-litigating his claims against Giant Eagle in this proceeding. The Court of Chancery also found that Horbal lacked standing to pursue the derivative claims on behalf of Seegrid because, pursuant to the Bankruptcy Court's Order, those claims were transferred to a new Seegrid subsidiary. Further, because the Court of Chancery believed that any amendments to the pleadings would be futile due to collateral estoppel, Vice Chancellor Laster dismissed the action with prejudice.

The Plaintiffs filed a timely notice of appeal.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly dismissed the Delaware Action with prejudice because: it is authorized to dismiss *sua sponte* based on collateral estoppel; the parties had ample notice and opportunity to argue the merits of their positions regarding collateral estoppel and standing; and the court complied with all applicable Court of Chancery Rules in dismissing the action.

2. Denied. The Court of Chancery properly relied on the entire record from the proceedings at the Bankruptcy Court to conclude that the collateral estoppel doctrine bars Horbal's claims in this litigation. The Court of Chancery also properly found that the Bankruptcy Court's findings and conclusions (1) were essential to its judgment and (2) raised the same issues that Horbal raised in the Delaware Complaint. Finally, Horbal had a full and fair opportunity to litigate all relevant issues in the Bankruptcy Court.

3. Denied. The Court of Chancery properly dismissed Horbal's claims for lack of standing because the record shows, and neither party disputes, that the Bankruptcy Court's Order transferred all claims previously belonging to the Seegrid Corporation to a Seegrid subsidiary created in the Bankruptcy proceeding. Furthermore, even if the Court permitted Horbal to re-plead, Horbal does not have standing to bring a double derivative action on Seegrid's behalf.

STATEMENT OF FACTS

On August 8, 2014, Horbal filed the Delaware Complaint against certain Directors of Seegrid and Seegrid's largest investor, Giant Eagle. The Complaint purported to assert claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty based on a purported scheme by Giant Eagle to use bankruptcy to steal Seegrid at an unfair value.

A. Seegrid's Creation, Funding, and Leadership

Seegrid is a start-up robotics company founded in 2003. Early investors included both Giant Eagle and Horbal. Originally, Seegrid's Board had five members, consisting of its two founders (Scott Friedman and Hans Moravec); two representatives from Giant Eagle (Shapira and Oliveri), and Plaintiff Horbal. A22, A29, A34. Horbal also served as Seegrid's President and, later, its CEO.

Horbal's tenure as CEO was marred by liquidity problems. *See* A254. As a result, Seegrid received extensive loans and investments from Giant Eagle while welcoming all other investors, including Horbal, on the same terms. *See* A380. With Giant Eagle's assistance, Seegrid did everything possible to attract investors—including engaging "multiple investment bankers or other financial advisors." A324. Yet, as the Bankruptcy Court found, "[d]espite all of these efforts, [Seegrid] was unable to secure…meaningful third-party financing…in a

context that would resolve its pressing economic challenges." *Id.* This failure led to a liquidity crisis in early July 2014. A325.

B. Horbal's Termination and Ensuing Lawsuits

On July 14, 2014, the Seegrid Board voted to terminate Horbal as CEO. *See* A55. Angry over his termination, Horbal responded with what can only be described as scorched earth litigation, bringing suits in multiple jurisdictions. On August 6, 2014, Horbal filed a lawsuit against Giant Eagle in the Court of Common Pleas of Allegheny County, Pennsylvania (the "Pennsylvania Action"). *See Anthony Horbal and HERC Mgmt. Servs., LLC v. Giant Eagle, Inc. and Giant Eagle of Del., Inc.*, Case No. GD-14-1-013654, Ct. of Com. Pl., Allegheny Cnty. Two days later, in Delaware, Horbal filed the shareholder derivative action against Giant Eagle that he now appeals (the "Delaware Action" or "this Action"). The complaints in these cases were substantially identical except for the captions and remedies sought. Both alleged that Giant Eagle was engaged in a scheme to ruin Seegrid financially in order to obtain its valuable assets on the cheap. *See, e.g.*, A8-10; B11. Not satisfied with litigation in two forums, on October 7, 2014, Horbal also filed a demand for arbitration against Seegrid for allegedly breaching a Consulting Agreement between Horbal and Seegrid.

As new leadership took the helm at Seegrid, the organization began exploring options to resolve its liquidity issues. A325-26. Initially, Giant Eagle

proposed a plan through which it would provide $8 million in financing to Seegrid under terms that Horbal had previously requested. A255. There was only one condition: all noteholders, including Horbal, would have to extend the maturity of their Seegrid Notes to provide Seegrid time to achieve its economic goals. A108; A288. Horbal refused, leaving Seegrid with no source of liquidity. *Id.*

On September 18, 2014, the Seegrid Board approved Giant Eagle's proposal for a prepackaged Chapter 11 reorganization (the "Plan"). A81. Under the Plan, Giant Eagle agreed to invest an additional $10 million in Seegrid in return for a 40% interest in a newly-created Seegrid subsidiary ("New Seegrid"). A109; A119-20. Seegrid asked Horbal to participate in the funding, but he again refused. A326. As part of the Plan, Seegrid would transfer all of its operating assets to New Seegrid in return for a 45% ownership interest in New Seegrid. A120.

C. Seegrid Seeks Chapter 11 Protection

On October 3, 2014, Seegrid filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Petition") and sought the Bankruptcy Court's approval of the Plan. *See In re Seegrid Corp.*, Del. Bankr. Case No. 14-12391 (BLS) (the "Bankruptcy Proceeding"). Twenty days later, Seegrid filed a Notice of Bankruptcy Petition and Automatic Stay in the Delaware Action. *See* A243-44.

As the sole objector to the Plan, Horbal actively contested the bankruptcy and engaged in extensive discovery. In fact, on November 17, 2014, Horbal filed an adversary complaint against Giant Eagle in Bankruptcy Court (the "ES Complaint") that mirrored the Complaints in Pennsylvania and Delaware. *See* A727-28; B11. Plaintiff Horbal also filed several objections in the Bankruptcy Court proceedings (the "Objections"), which referenced and/or incorporated Horbal's allegations in the Delaware Action. B13-47; B48-63; *see also* A698-700.[1] For example, in one Objection, Horbal alleged that "[t]he Debtor's Disclosure Statement includes an extensive one-sided diatribe that blames Mr. Horbal for the Debtor's ills…." In contrast, Horbal directed the Bankruptcy Court to

> …an extensive set of facts known to the Debtor that contradicts this narrative included by the Debtor in its Disclosure Statement. ***These facts can be found in two lawsuits that members of the Horbal Group filed against Giant Eagle and members of the Debtor's Board of Directors that are controlled by Giant Eagle***: (a) [the Delaware Action] and (b) [the Pennsylvania Action].

B39-40 (emphasis added); *see also* A699-700.

The Bankruptcy Court consolidated the equitable subordination proceeding with the Plan confirmation hearing and ordered expedited discovery in advance of a full trial on the merits. *See* B5-6. Under the consolidation order, Giant Eagle, Seegrid, and Horbal engaged in discovery on all issues—including Giant Eagle's

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[1] The objections (B13-47 and B48-63) were provided to the trial court at oral argument and are thus part of the record. *See* A698-700.

purported bad faith. *See* B6; B8. On the eve of trial, however, Horbal moved to voluntarily dismiss his ES Complaint over Giant Eagle's and Seegrid's objections. *See* B3-12. The Bankruptcy Court granted Horbal's motion, but only after recognizing the likelihood that "it will be incumbent upon this court to make findings with respect to Giant Eagle and with respect to the plan process that was presented before me." *See* B12. The Bankruptcy Court recognized that "[w]hether or not those findings have significance to litigation pending in another court" was not an issue that it was required to decide. *See Id.* But it explicitly acknowledged the "functional interplay" between the allegations in the ES Complaint (which mirror the allegations in this proceeding) and its decisions regarding plan confirmation and debtor-in-possession financing. *Id.*

Against this background, Horbal cannot contend that his factual claim that Giant Eagle conspired to use the Bankruptcy to steal Seegrid was not essential to the Plan confirmation. Horbal asserted his conspiracy allegations both in the ES Complaint and his Plan Objections, took discovery on those allegations as part of its challenge to the Plan, and, while withdrawing his ES Complaint on the eve of trial, pressed his Objections to Plan confirmation—including his conspiracy claims—through the final hearing. A698-700. At the hearing, the Court had no choice but to consider the conspiracy allegations.

After a four-day trial, which included 12 witnesses and the review of voluminous evidence, the Bankruptcy Court rejected all of Horbal's arguments in opposition to the Plan, based on factual findings that contradict the fundamental factual claims asserted in the present action. Thus, the Bankruptcy Court found that "Giant Eagle, and to a lesser extent the Horbal Group, provided funding over many years when Seegrid was in need." A324. It also found that Seegrid engaged "multiple investment bankers or financial advisors," in an effort "to seek out potential investors or purchasers." *Id.*; *see also* A374. Yet, despite Seegrid's diligent efforts, "[n]o viable alternatives to the Plan were found." A374. In short, "the Plan is the only viable option to continue [Seegrid's] business." *Id.*

The Bankruptcy Court also concluded that, far from being a nefarious investor intent on obtaining Seegrid's assets at bargain prices, Giant Eagle effectively saved Seegrid by providing it with $10 million in additional financing to "resolve [Seegrid's] pressing economic challenges." A324-2. Thus, the Bankruptcy Court found that "in the absence of" the Plan that Giant Eagle "presented," Seegrid "would likely fail and stakeholders and employees would suffer thereby." A325-26.

For these reasons, the Bankruptcy Court overruled Horbal's objections and confirmed the Plan, explicitly concluding that:

(1) "[t]he Plan is the product of good faith, arm's length negotiations between the Debtor, by and through its directors, officers and advisors, and Giant Eagle..."

(2) "Debtor, by and through its directors, officers and advisors, proposed the plan in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code"; and

(3) all causes of action "accruing to the debtor shall become assets of [New Seegrid], and [New Seegrid] shall have the authority to commence and prosecute such Causes of Action for the benefit of the Estate of the Debtor."

A374-75 (¶15); A398-99 (¶81); *see also* A323-26.

D. The Revival and Dismissal of the Delaware Action

On April 8, 2015, Seegrid, now emerged from bankruptcy and referred to as "Old Seegrid," filed a Rule 25(c) Motion seeking to substitute New Seegrid as Plaintiff in the Delaware Action. A407. In the briefing that followed, Horbal argued that "it would be inequitable to Old Seegrid's minority shareholders—including Plaintiffs—for the Court to exercise its discretion to substitute New Seegrid as the sole plaintiff in this action." A426. In response, Old Seegrid pointed out that minority shareholders were already precluded because the Bankruptcy Court Order made "factual findings, after a contested trial, that are directly contrary to the claims asserted by Horbal and HERC in the [Delaware] Complaint." A446. With the court's permission, Horbal then filed a sur-reply opposing the application of collateral estoppel. *See* A451-665. Along with his brief, Horbal filed copies of the transcript of the Bankruptcy Court's January 15,

2015, Hearing (which included its ruling from the bench) and the entire Disclosure Statement relating to the Bankruptcy Plan. *See* A451-665.

The Court of Chancery held an extensive hearing on July 14, 2015, during which the parties hotly contested (1) Horbal's ability to maintain derivative standing and (2) whether collateral estoppel barred Horbal's claims. *See generally* A666-733. During this hearing Horbal's counsel raised all of the procedural and substantive arguments he now raises on appeal. For example, Horbal's counsel at the Court of Chancery repeatedly asserted that "under the applicable law" the Bankruptcy Court's finding that Giant Eagle was *not* at the center of a conspiracy to steal Seegrid, was not "essential [or] necessary" to the Bankruptcy Court's confirmation of the Plan. *See, e.g.*, A721, A728-29.

The Court of Chancery rejected these arguments. As an initial matter, Vice Chancellor Laster found that Horbal lacked standing to pursue the Delaware Action on behalf of Old Seegrid because, "[a]s part of the bankruptcy plan, all causes of action belonging to Old Seegrid were assigned to New Seegrid." A735. As a result, Horbal could not continue to pursue the claim on Old Seegrid's behalf.

After "read[ing] all of [Bankruptcy Court] Judge Shannon's ruling, and…look[ing] through the plan," Vice Chancellor Laster also found that "one of the key arguments that Mr. Horbal made in objecting to the Plan was that the Plan had been proposed in bad faith, essentially as the culmination of the scheme that

[Horbal] had outlined in the complaint in front of me." A740-41. Vice Chancellor Laster found that, when faced with the same allegations, Judge Shannon considered them, reviewed the evidence, and rejected them. *Id.* ("Judge Shannon would not have approved the plan had he thought that this was all part of a scheme by Giant Eagle culminating in the bad faith achievement of what they ostensibly had sought all along.").

Vice Chancellor Laster relied on all of Judge Shannon's findings in the Bankruptcy Proceeding, though he focused on two paragraphs in the Final Order. Paragraph 15 of the Final Order included the Bankruptcy Court's finding that there were "[n]o viable alternatives to the Plan" and the Plan was "the product of good faith, arm's length negotiations." A742; *see also* A374. This finding, Vice Chancellor Laster explained, "was actually litigated and necessary to the plan" and he could not "reach a contrary conclusion…as to everything that happened over the years being a bad faith breach of fiduciary duty or a self-interested scheme and not reach a result contrary to this finding." A742. Paragraph 35 of the Final Order allowed Giant Eagle's debt claims under the Plan. Referring to these claims, Vice Chancellor Laster recognized that "[i]f this litigation were to go back now and undo some of the debt investments made by Giant Eagle on fiduciary grounds, that would be a finding that would be directly contrary to paragraph 35…." A743-44.

Finally, Vice Chancellor Laster held that re-pleading could not cure these problems because, “the necessary premises upon which this action rests have already been litigated and decided adversely to the plaintiff.” A744. Therefore, relying on collateral estoppel, the Court of Chancery dismissed the Delaware Action with prejudice. *Id.*; B64-68.

On July 24, 2015, Horbal timely filed its Notice of Appeal. A748.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE ACTION WITH PREJUDICE.

A. Question Presented.

Did the Trial Court commit any procedural errors by dismissing Plaintiff-Appellant's Action with prejudice after full briefing and a hearing on collateral estoppel and standing?

B. Scope of Review.

When analyzing whether a trial court properly reached an issue based on the parties' motions and the procedural status of the case, this Court reviews the trial court's decision for abuse of discretion. *See, e.g.*, *Nicholson v. Redman*, 620 A.2d 858 (Del. 1993) ("To the extent that the issue on appeal implicates the exercise of judicial discretion [in applying the doctrine of res judicata], clearly there was no abuse of discretion."); *Barker v. Huang*, 610 A.2d 1341, 1348 (Del. 1992) (declining "to find Superior Court to have abused its discretion in reaching the merits of [Plaintiff's] non-defamation tort claims, *sua sponte*").

C. Merits of Argument.

A review of the record at the Court of Chancery reveals that both Parties presented thorough arguments regarding the potential dismissal of Horbal's action. Further, the Parties, and the Court of Chancery, had the benefit of (1) thorough

briefings on standing and collateral estoppel (including Horbal's sur-reply); and (2) extensive oral arguments on all of the relevant issues.

1. The Court of Chancery properly considered and applied collateral estoppel.

The Court of Chancery provided the parties with an opportunity to fully brief their arguments regarding collateral estoppel—it even allowed Horbal to file a sur-reply on the issue. A453-62. Further, when he filed the sur-reply, Horbal attached the transcript from the January 15, 2015 Hearing in the Bankruptcy Proceeding; the transcript from the Bankruptcy Court's decision in response to Seegrid's Motion in Limine; and the Disclosure Statement for the Plan. Thus, Horbal took advantage of the opportunity to fully brief and present supporting materials related to his collateral estoppel arguments.

This is not the first time that Delaware courts have examined what form a pleading must take in order for the Court to dismiss a case based on collateral estoppel. *See, e.g.*, *Troy Corp. v. Schoon*, 959 A.2d 1130, 1134 (Del. Ch. 2008). Notably, however, "[t]he question is probably of little practical import [] as the court may raise issues of collateral estoppel *sua sponte*." *Id.* Furthermore, it is always "appropriate for a court to act *sua sponte* in the interests of judicial economy," *Barker*, 610 A.2d at 1348, and "[t]he form of the pleadings should not place a limitation upon the court's ability to do justice." *Bank of Del. v. Claymont Fire Co. No. 1*, 528 A.2d 1196, 1199 (Del. 1987) (declining to reverse *sua sponte*

grant of summary judgment because "plaintiff had a full and fair opportunity to present its views").

The Court of Chancery did not abuse its discretion when it considered, allowed briefings, and heard oral arguments regarding standing and collateral estoppel. Horbal took the opportunity to file a sur-reply on these matters and also submitted extensive exhibits in support of his position. The resulting dismissal—whether *sua sponte* or prompted by Seegrid's Motion—was both proper and fair.

2. The Court of Chancery complied with Rule 15 of the Rules of the Court of Chancery.

Rule 15(a) of the Rules of the Court of Chancery (the "Rules") provides plaintiffs with the *option* to amend pleadings "once as a matter of course" before a responsive pleading is served. Similarly, Rule 15(aaa) provides "a party that wishes to respond to a motion to dismiss under Rules 12(b)(6) or 23.1 by amending its pleading," must do so "no later than the time such party's answering brief in response to either of the foregoing motions is due to be filed." However, if a party does not amend pursuant to 15(aaa), and the court dismisses the pleading, "such dismissal shall be with prejudice." Del. Ch. Ct. R. 15(aaa).

Horbal appears to argue that these procedural privileges also require that the Court of Chancery, upon dismissing a complaint, provide the plaintiff with an opportunity to amend the complaint—even if the court concludes "that the necessary premises upon which [the] action rests have already been litigated and

decided adversely to the plaintiff." A744. However, the plain language of the Rules—and Delaware precedents—reach the opposite conclusion.

With regard to 15(a), Horbal had the right to file an amended complaint "as a matter of course," at any time prior to Seegrid's filing of a responsive pleading. Thus, as a practical matter, he *could have* amended prior to the Court of Chancery's dismissal—including in lieu of seeking leave to file a sur-reply brief. His failure to do so does not mean that Vice Chancellor Laster's reasoned decision to dismiss with prejudice denied Horbal his right under 15(a). Rule 15(a) *does not* require the Court of Chancery to provide a plaintiff with an opportunity to amend when the Court has already concluded that a prior litigation bars the plaintiff from proceeding. *Cf. Harik v. Henry*, 62 A.3d 1223 (Del. 2013).

The role of Rule 15(aaa) also shows that Horbal's interpretation of the Rules is untenable. As this Court explained in *Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006), "[t]he purpose of Rule 15(aaa) was to *curtail* the number of times that the Court of Chancery was required to adjudicate multiple motions to dismiss the same action." *Id.* at 782-83 (emphasis added). In the absence of a good cause showing "that dismissal with prejudice would not be just under all the circumstances," the Court of Chancery is *required* to dismiss *with* prejudice if the plaintiff did not opt to amend pursuant to 15(aaa). *Id.*; Del. Ch. Ct. R. 15(aaa).

Rule 15(aaa) is not implicated in this case; Seegrid never briefed its Motion to Dismiss and Horbal was never required "to elect to either: stand on the complaint and answer the motion; or, to amend or seek leave to amend the complaint before the response to the motion was due." *Braddock*, 906 A.2d at 783. But that does not mean that the Court of Chancery, when faced with a complaint barred by issue preclusion, is required to dismiss *without* prejudice in order to provide the Plaintiff with "an opportunity to amend the Complaint to include allegations that were not subject to collateral estoppel." Appellant's Am. Opening Br. ("OB") at 15. This is particularly important because the Court of Chancery—after providing Horbal with a full opportunity to brief collateral estoppel—explicitly concluded that "the necessary premises upon which this action rests have already been litigated and decided adversely to the plaintiff." A744.

Pursuant to Rule 15(a), Horbal had ample opportunity to amend the Complaint. He did not do so. That failure, however, does not change the Court of Chancery's ultimate conclusion that, due to collateral estoppel, any such amendment would be futile.

3. The Court of Chancery properly considered documents from the Bankruptcy Proceeding.

A trial court may "take judicial notice of matters that are not subject to reasonable dispute" particularly if it is relying on "publicly available facts." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006); *see also,*

e.g., *Solomon v. Armstrong*, 747 A.2d 1098, 1121 n.72 (Del. Ch. 1999); Del. R. of Evid. 201(b). If a fact is subject to judicial notice "the trial court may properly consider such fact in ruling on a motion to dismiss without affording the plaintiff an opportunity to take discovery." *Hughes*, 897 A.2d at 172. It may also "be proper for a trial court to decide a motion to dismiss by considering documents referred to in a complaint." *Id.* at 169; *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 n.6 (Del. 1995).

In this case, the Court of Chancery reviewed three "extraneous" documents, all of which were part of a public proceeding in Delaware Bankruptcy Court. Horbal himself submitted the Bench Ruling to the Chancery Court (along with other Bankruptcy Court documents) as an Exhibit to his sur-reply. *See* A469. Horbal also inserted allegations related to the Bankruptcy Proceeding into the Delaware Complaint, characterizing the bankruptcy as Giant Eagle's "latest step toward stealing [Seegrid]." A59-60; *see also, e.g.*, A62 (alleging Giant Eagle "proposed significant transactions pursuant to which virtually all of the company's assets (but not its debts) would be transferred to NewCo…"); *id.* at A65 (alleging an attempt "to dilute the investments of minority shareholders through…transfer the Company's assets to NewCo…"). Nor did Horbal argue in the relevant proceedings that any of these public documents were outside the pleadings.

The Court of Chancery's consideration of the documents from the Bankruptcy Proceeding was wholly proper and did not convert the Motion to one for summary judgment. Horbal provided and relied on the very documents which he now protests the Court should not have considered. All of the documents were public filings for which judicial notice was proper. And finally, Horbal had adequate notice that the Court of Chancery would be considering these materials.

II. THE TRIAL COURT PROPERLY DISMISSED THE ACTION BASED ON COLLATERAL ESTOPPEL.

A. Question Presented.

Did the Trial Court properly find that collateral estoppel barred Horbal's Complaint and required dismissal with prejudice?

B. Scope of Review.

The parties agree that the Court should apply the *de novo* standard of review to a trial court's decision to dismiss a complaint based on issue preclusion. *See* OB at 19; *Oakes v. Oakes*, 15 A.3d 217 (Del. 2011). "It is settled law in this jurisdiction that 'the doctrines of res judicata and collateral estoppel require that the same effect be given a [foreign] judgment rendered upon adequate jurisdiction as [the foreign court] itself would accord such a judgment.'" *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217 (Del. 1991) (quoting *Bata v. Hill*, 139 A.2d 159, 165 (Del. Ch. 1958)). Thus, this Court should analyze the preclusive effect of the federal bankruptcy court decision pursuant to federal common law. *W. Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 643 (Del. Ch. 2006); *see also Katchen v. Landy*, 382 U.S. 323, 334 (1966) ("The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts.").

C. Merits of Argument.

"Issue preclusion, or collateral estoppel, prevents parties from relitigating an issue that has already been actually litigated." *Peloro v. United States*, 488 F.3d

163, 174-75 (3d Cir. 2007). The Third Circuit has held that "[t]he prerequisites for the application of issue preclusion are satisfied when: '(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment.'" *Burlington N. R.R. Co. v. Hyundai Merch. Marine Co.*, 63 F.3d 1227, 1231-32 (3d Cir.1995) (internal citation omitted). In cases involving defensive collateral estoppel, the precluded party "must have had a 'full and fair' opportunity to litigate the issue in the first action." *Peloro*, 488 F.3d at 175.

Vice Chancellor Laster recognized that the Bankruptcy Court's adverse findings were fatal to Horbal's claims because:

(1) the Bankruptcy Court's findings involved precisely the same factual issues raised by Horbal in the Delaware Complaint;

(2) the parties litigated those issues in the Bankruptcy Proceeding;

(3) the determination of those issues was essential to the Bankruptcy Court judgment;

(4) the Bankruptcy Court's findings constituted a final and valid judgment on the merits.

Thus, Horbal can no longer plead (or prove) the key elements of his breach of fiduciary duty claims because the controlling facts underlying those claims are precluded. For example, Horbal alleges "Giant Eagle's two representatives on the [Seegrid] Board…were beholden to Giant Eagle and would pursue its interests

over those of Seegrid when the two are in conflict." A29. But the Bankruptcy Court found that Seegrid's directors—including those appointed by Giant Eagle—"proposed the Plan in good faith and not by any means forbidden by law" and that the Plan was "the product of good faith arm's length negotiations between the Debtor, by and through its directors, officers, and advisors, and Giant Eagle." A374. The Bankruptcy Court's findings also contradict Horbal's allegation that Giant Eagle sought to "seize control of Seegrid's assets on unreasonable and unfair terms." A50. The Bankruptcy Court found that "the record *does not support* this assertion." A550 (responding to the same allegation in the Bankruptcy Proceeding) (emphasis added).

Faced with these adverse findings, Horbal parses select passages of the Bankruptcy Court's Confirmation Order (specifically, paragraphs 15 and 35) to argue that those findings (1) were not "essential" to confirmation of the Plan (paragraph 15) or (2) were related to legal issues different from those raised in the Delaware Action (paragraph 35). OB at 20-29. Horbal also complains that, in the Bankruptcy Proceeding, he did not have a "full and fair" opportunity to litigate the issues he raises in the Delaware Action. OB at 29-30. None of these arguments has any merit.

1. The Court of Chancery correctly concluded that the Findings and Conclusions in Paragraph 15 were essential to the Bankruptcy Court Order.

To determine "whether [an] issue [is] essential to the judgment, [a court] must look to whether the issue 'was critical to the judgment or merely dicta.'" *Nat'l R.R. Passenger Corp. v. Penn. Pub. Util. Comm'n*, 288 F.3d 519, 527 (3d Cir. 2002) (internal citation omitted). Determinations that "have the characteristics of dicta," generally do not have a preclusive effect in later proceedings because "[s]uch determinations…may not ordinarily be the subject of an appeal by the party against whom they were made." *Id.* (quoting Restatement (Second) of Judgments § 27, cmt. h (1982)).

Paragraph 15 confirms that the Plan was "proposed in good faith and not by any means forbidden by law" pursuant to 11 U.S.C. § 1129(a)(3) of the Bankruptcy Code. The Third Circuit has explained that a plan "proposed in good faith," must "fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code." *In re PWS Holding Corp.*, 228 F.3d 224, 242 (3d Cir. 2000). To make that determination, courts look to "the totality of the circumstances," which "must be considered in the course of a 'fact-intensive, case-by-case inquiry.'" *In re TCI 2 Holdings, LLC*, 428 B.R. 117, 142 (Bankr. D.N.J. 2010) (quoting *In re PPI Enters., Inc.*, 324 F.3d 197, 211 (3d Cir.2003)). "In assessing the totality of the circumstances, a court has considerable discretion in

finding good faith." *In re W.R. Grace & Co.*, 475 B.R. 34, 87 (D. Del. 2012) (internal quotation marks and citation omitted).

Given this discretion, it should come as no surprise that a "breach of fiduciary duty by officers or directors of a debtor may certainly defeat the confirmability of the debtors' plan on lack of good faith grounds." *In re TCI 2 Holdings, LLC*, 428 B.R. at 144. Courts have often looked beyond the plan itself—e.g. to the actions of debtor's officers or the process that resulted in the bankruptcy plan—before confirming that the plan meets the requirements of 11 U.S.C. § 1129(a)(3). *See, e.g.*, *In re Am. Capital Equip., LLC*, 688 F.3d 145, 158 (3d Cir. 2012) (holding that that a plan would "not fairly achieve the Bankruptcy Code's objectives because it establishes an inherent conflict of interest"); *In re Coram Healthcare Corp.*, 271 B.R. 228 (rejecting debtor's plan of reorganization on good faith grounds because debtor's officer had been receiving payments under a separate agreement with one of debtor's creditors without the debtor's knowledge); *cf. In re Unbreakable Nation Co.*, 437 B.R. 189, 198 (Bankr. E.D. Pa. 2010) (confirming plan because "Debtor has shown that it took rational and planned steps to insure that the bidding process was competitive").

Here, the Bankruptcy Court considered such matters because Horbal required that it do so. It made objections premised on Giant Eagle's alleged conspiracy to force Seegrid into bankruptcy and buy it on the cheap. When

discovery contradicted these assertions, Horbal dropped the ES Complaint, but the Bankruptcy Court still recognized the "functional interplay" between the allegations contained therein and the Bankruptcy Court's impending decisions regarding plan confirmation and financing. B12. Horbal had alleged numerous facts—including his main theme that Giant Eagle was using the Bankruptcy Proceeding to steal Seegrid—that were still a vital part of (1) the Bankruptcy Court record, (2) Horbal's Objections, and (3) the Bankruptcy Court's factual determinations. Thus, in order to address Horbal's claim of lack of "good faith," the Bankruptcy Court was required to, and did, make factual findings regarding Seegrid's road to bankruptcy, its interactions with Giant Eagle, and, ultimately, the Plan offered by Giant Eagle to rescue Seegrid from its financial crisis.

Vice Chancellor Laster rightly concluded that he could not ignore this record—despite Horbal's unfounded claims that these critical findings were somehow "non-essential." Vice Chancellor Laster thus concluded that the findings and conclusions in paragraph 15 were "actually litigated and necessary" to the Bankruptcy Court's confirmation of the Plan. A742. He also believed that he could not "reach a contrary conclusion in this case as to everything that happened over the years being a bad-faith breach of fiduciary duty or a self-interested scheme and not reach a result contrary to [the Bankruptcy Court's] finding." *Id.*

As the record before Vice Chancellor Laster makes clear, the Bankruptcy Court properly examined "the totality of the circumstances" relating to Seegrid's bankruptcy. This fact intensive inquiry led the Bankruptcy Court to look at alternatives to the Plan, the nature of negotiations that led to the Plan, and the impact of those negotiations on "all stakeholders." A374-75. The findings that resulted from this inquiry were essential to the Bankruptcy Court's "good faith" determination and are entitled to preclusive effect.

2. The Court of Chancery correctly concluded that the Findings and Conclusions in Paragraph 35 are the same as the issues that must be decided in the Delaware Action.

When analyzing whether two issues are the same for the purposes of collateral estoppel, a court asks (1) whether "there [is] a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first?" and (2) "[h]ow closely related are the claims involved in the two proceedings?" *Peloro*, 488 F.3d at 175 n.12 (quoting Restatement (Second) of Judgments § 27, cmt. c (1982)). "[I]f the issues presented and determined in the two proceedings are the same, it does not matter whether they arise in the context of 'the same or a different claim.'" *Nat'l R.R. Passenger Corp.*, 288 F.3d at 526. Rather, it is "the underlying conduct that gives rise to the Plaintiff's claims" that must be the same in both litigations. *Asbestos Workers Local 42 Pension Fund v. Bammann*, No. CV 9772-VCG, 2015 WL 2455469, at

*17 (Del. Ch. May 21, 2015), as revised (May 22, 2015); *see also Neoplan USA Corp. v. Taylor*, 604 F. Supp. 1540, 1546 (D. Del. 1985) ("Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue, then, is subsumed in that issue and precluded by the prior judgment's collateral estoppel effect." (quoting 1B Moore's Fed. Prac. § 0.443(2))).

Paragraph 35 allowed Giant Eagle to maintain its claims against Seegrid based on "loans made to the Debtor…[that] were open to all investors, including [Horbal]." A380. Focusing on this language, Vice Chancellor Laster observed that paragraph 35 showed that there was an effort to litigate "whether Giant Eagle should actually be entitled to aspects of its claims, such as its debt position." A742-43. It would make no sense—none at all—for the Bankruptcy Court to allow Giant Eagle to retain its debt if, as Horbal claims here, Giant Eagle's loans were part of a scheme to steal Seegrid's assets through the Bankruptcy Proceeding. Recognizing this inconsistency, Vice Chancellor Laster concluded that "[i]f this litigation were to go back now and undo some of the debt investments made by Giant Eagle on the fiduciary grounds, that would be a finding that would be directly contrary to paragraph 35 of the confirmation order, which allowed Giant Eagle's claims." A743-44.

Horbal argues that "[t]he Bankruptcy Court's allowance of Giant Eagle's claims based on Old Seegrid's contractual obligation to repay [the] loans is not

'identical' to the issues *raised by the Complaint* because the confirmation of the Plan and the resolution of the breach of fiduciary duty claims *set forth in the Complaint* are not governed by the same legal rules and do not involve all the same facts." OB at 27 (emphasis added). Neither premise is correct.

First, collateral estoppel only requires that the controlling facts be the same—not every fact pled. As one Delaware court explained:

> It cannot be the case that the "controlling facts," which must remain "unchanged" for purposes of collateral estoppel, are simply those facts presented in the complaint. If that were the case, collateral estoppel would never apply and the plaintiff could litigate serially by endlessly alleging more factual support for the proposition he chooses to advance—this is clearly contrary to the efficiency and fairness principles underlying collateral estoppel. The "controlling facts" that must be identical are those that actually obtain to the issue, only a subset of which will typically be pled…. That is to say, the underlying conduct is what is at issue, not whether the Complaint raises additional facts, or a more compelling characterization of those facts, regarding the same conduct previously at issue.

Asbestos Workers Local 42Pension Fund, 2015 WL 2455469, at *18 (internal citations omitted).

Second, unlike res judicata which bars a second suit identical to the first, "where a court…has decided an issue of fact necessary to its decision, the doctrine of collateral estoppel precludes relitigation of that issue in a subsequent suit…concerning a different claim or cause of action involving a party to the first case." *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

Applying these principals, in *In re Docteroff*, 133 F.3d 210, 215 (3d Cir. 1997), the Third Circuit rejected the same argument made by Horbal here that collateral estoppel does not apply if the two suits involve difference claims. In *Docteroff*, the debtor in bankruptcy argued that a prior proceeding did not preclude a finding that a debt was dischargeable because "the dischargeability issue [was] not the same issue as the one previously litigated." The court rejected this argument because, taken "to its logical conclusion," it would mean "collateral estoppel would never apply in bankruptcy because the precise bankruptcy issue would never have been litigated…prior to the filing of the petition in bankruptcy. Such a conclusion defies common sense and reason…." *Id.*

On appeal Horbal tries to distinguish the findings and conclusions in paragraph 35 from the allegations on which the Delaware Complaint relies. The "controlling facts," however, are the same. In both the Bankruptcy Court and the Court of Chancery, Horbal argued that Giant Eagle and its representatives to the Seegrid board breached fiduciary duties by attempting to steal Seegrid's assets. The overlap is made all the more apparent by Horbal's explicit references to the Delaware Complaint in his Objections to the Plan.

3. The Court of Chancery Correctly concluded that Horbal had a "full and fair opportunity" to litigate issues in the Bankruptcy Court.

The "full and fair opportunity to litigate" requirement provides that a proceeding must "do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause" in order to have preclusive effect. *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 (1982); *see also Witkowski v. Welch*, 173 F.3d 192, 205 (3d Cir. 1999). The central tenet of the due process clause is "the right to notice and a meaningful opportunity to be heard." *Magoni-Detwiler v. Pennsylvania*, 502 F. Supp. 2d 468, 475 (E.D. Pa. 2007) (internal citation omitted).

The procedures followed by the Bankruptcy Court easily met this standard. Horbal was an active participant in the proceedings. Horbal had notice, competent representation, and pursued the ES Complaint and Objections. During the proceedings Horbal produced and received thousands of documents, took and defended numerous depositions, and contested his claims in a four-day bankruptcy hearing with twelve witnesses. A669. Horbal also had the right to appeal any adverse judgment to the federal district court in Delaware. Numerous courts have found that such a "panoply of procedures, complemented by…judicial review, is sufficient under the Due Process Clause." *Kremer*, 456 U.S. at 484.

Horbal does not dispute the fairness of these procedures. Instead, he protests a specific Order in which the Bankruptcy Court granted a Motion in Limine. Horbal had a full opportunity to present his arguments in response to the Motion in Limine and, at the appropriate time, could have appealed the Order. *See* A591.

"That the arguments made during the [bankruptcy] hearing were not accepted in full by the [bankruptcy judge] does not mean that [Horbal was] prevented from fully presenting them." *Witkowski*, 173 F.3d at 205. In *Troy Corp. v. Schoon*, 959 A.2d 1130, 1136 (Del. Ch. 2008), plaintiff Troy argued that it did not have a full and fair opportunity to litigate its claims in a prior 8 Del. C. § 220 proceeding. The court rejected this argument because, while "it was inappropriate to litigate all the issues attendant to breach of fiduciary duty claims—damages, scope of duty, affirmative defenses, etc.—in the context of a section 220 proceeding" it was not "impossible to fully and fairly litigate in a summary proceeding facts relevant to plenary claims." *Id.* at 1135. Thus, the court concluded that "[a]ny limitations Troy faced on its ability to litigate its allegations were the result Troy's litigation strategy, not anything involving the summary nature of the 220 Action." *Id.* at 1136; *see also In re Summit Metals, Inc.*, 477 B.R. 484, 500 (Bankr. D. Del. 2012) (finding plaintiff's claims precluded because they "were either asserted as objections during the main bankruptcy case and

explicitly rejected by the Court, or directly related to motions approved by the Court after hearings for which he was present, but did not object”).

It goes without saying that “[i]n our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum.” *Kremer*, 456 U.S. at 485. The Bankruptcy Court decided the merits of Horbal’s present legal claims after it provided notice and allowed discovery, briefings, and oral arguments. Horbal argued his case and was not handcuffed in any way. In short, he took his best shot and lost. But that does not change the fact that he had a full and fair opportunity to take that shot in the Bankruptcy Proceeding.

III. THE TRIAL COURT PROPERLY DISMISSED THE ACTION BASED ON LACK OF STANDING.

A. Question Presented.

Did the Trial Court properly dismiss the action due to the Horbal's lack of standing to properly prosecute the derivative claims?

B. Scope of Review

The Court applies *de novo* review to a trial court's dismissal based on lack of derivative standing. *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d at 1078 (Del. 2011).

C. Merits of Argument

Along with collateral estoppel, Vice Chancellor Laster also dismissed the Action because, pursuant to the Bankruptcy Order, New Seegrid (which is not a party to this litigation) now owns and controls the relevant claims. In response to Horbal's argument that he could re-plead and assert standing via a double derivative action, the Court of Chancery found that the collateral estoppel bar mooted any re-pleading. A740. As a result, Vice Chancellor Laster did not reach the issue of whether Horbal could avoid his standing problem by pleading double derivative standing.

While the standing problem is purely academic due to collateral estoppel, Horbal could not have pled around that problem in any event. The longstanding rule is that minority owners, like Horbal, do *not* have standing to bring double

derivative actions. Therefore, even if the Court of Chancery reached this issue, Horbal would not be able to proceed in this derivative action because, as he admitted during the Court of Chancery's July 14, 2015 hearing, Old Seegrid does not have a majority ownership stake in New Seegrid. A718; *cf. Sagarra Inversiones, S.L.*, 34 A.3d at 1079. Providing Horbal with an opportunity to seek relief through such an unprecedented action would be a waste of judicial resources, particularly in light of the Court of Chancery's holding regarding collateral estoppel.

CONCLUSION

The Court of Chancery, after "read[ing] all of Judge Shannon's ruling, …look[ing] through the plan," and granting full briefing and oral argument, recognized that it could not find in favor of Horbal without undermining the Bankruptcy Court's Order. That Order—which followed voluminous discovery, depositions, and a four-day hearing—reflected an informed and measured resolution of the issues that plagued Seegrid. Horbal was an active participant in the proceedings and presented his case. He lost, once and for all.

Accordingly, the judgment below should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 8, 2015, the foregoing document was served via File & Serve*Xpress* upon the following counsel:

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