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June 30, 2021

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RE: *DG BF, LLC, et al. v. Michael Ray, et al.*,
Civil Action No. 2020-0459-MTZ

Dear Counsel:

On March 1, 2021, I issued a memorandum opinion (the “Memorandum Opinion”) addressing Defendants’ motion to dismiss (the “Motion”).¹ The Motion challenged, in part, whether Count XVIII of the Amended Complaint sufficiently alleged Vladimir Efros’s statements were defamatory in character.² The Memorandum Opinion did not address that question, and instead ordered the parties

¹ Docket Item (“D.I.”) 116; *see also DG BF, LLC v. Ray*, 2021 WL 776742 (Del. Ch. Mar. 1, 2021). Capitalized terms not defined herein have the meaning set forth in the Memorandum Opinion.

² *See* D.I. 77 at 42–16; D.I. 108 at 29–31; *DG BF*, 2021 WL 776742, at *24–25.

to submit supplemental briefing on “the question of whether this Court has subject matter jurisdiction over Plaintiffs’ defamation claim, which seeks damages but not injunctive relief.”³ The Memorandum Opinion also asked Defendants to indicate whether under *Organovo Holdings, Inc. v. Dimitrov*⁴ and *Perlman v. Vox Media, Inc.*,⁵ they wished to elect for a jury to decide the issues of falsity and actual malice.⁶

The parties did not submit the required supplemental briefing and, instead, on March 18, submitted a proposed joint scheduling order (the “Scheduling Order”).⁷

Paragraph 1 stated,

The parties agree that the Court has jurisdiction over the defamation claim under the clean-up doctrine. However, to the extent necessary, the parties will agree to enter into a stipulation granting jurisdiction to the Court.⁸

On March 30, I granted the Scheduling Order with the following modification:

³ *DG BF*, 2021 WL 776742, at *24.

⁴ 162 A.3d 102 (Del. Ch. 2017).

⁵ 2019 WL 2647520 (Del. Ch. June 27, 2019).

⁶ *DG BF*, 2021 WL 776742, at *25.

⁷ D.I. 117.

⁸ *Id.* at 1.

Paragraph 1 is accepted as a representation by the parties that they believe this Court has jurisdiction over Plaintiffs’ defamation claim for damages under the clean-up doctrine, and by Defendants that they do not wish a jury to decide the threshold questions underlying that claim. “It is, however, well-established Delaware law that parties cannot confer subject matter jurisdiction upon a court.” *Butler v. Grant*, 714 A.2d 747, 749–50 (Del. 1998). Given that Defendants have declined a jury trial, in accordance with *Laser Tone Business Systems, LLC v. Delaware Micro-Computer LLC*, the Court will exercise clean-up jurisdiction over the defamation claim for damages. *See* 2019 WL 6726305, *15 n.177 (Del. Ch. Nov. 27, 2019). *Cf. Nichols v. Lewis*, 2007 WL 1584622, at *1 (Del. Ch. May 24, 2007) (declining to exercise clean-up jurisdiction over a defamation claim where defendant requested a jury trial). The Court will take the motion to dismiss the defamation claim for failure to state a claim under advisement.⁹

On April 23, while I considered the pending Motion’s substantive merits, Vice Chancellor Slights issued his opinion on the motion to dismiss in *Smith v. Scott*.¹⁰ In *Smith*, the Court concluded that it did not have subject matter jurisdiction over a defamation claim, citing *Organovo* and *Perlman*.¹¹ It reiterated that “the Court of Chancery, *in all instances*, lacks subject matter jurisdiction to adjudicate the questions of whether a defendant made a false statement about the plaintiff and

⁹ D.I. 120 at 7.

¹⁰ 2021 WL 1592463, at *13–14 (Del. Ch. Apr. 23, 2021).

¹¹ *Id.*

whether it did so with actual malice.”¹² The *Smith* Court went on to address the very question I had asked the parties to brief:

To the extent the parties would have me exercise subject matter jurisdiction over Plaintiffs’ defamation claim under the “clean-up” doctrine, I decline to do so. The “clean-up” doctrine serves the important function of avoiding, when appropriate, piecemeal litigation, but the historical imperative that a jury, not a judge, should evaluate whether a defendant’s statements are defamatory shines even brighter.¹³

The Court then dismissed the defamation claim, subject to the plaintiffs’ right to transfer it to Superior Court.¹⁴

While considering the pending Motion’s merits, I came across the *Smith* opinion. I agree with Vice Chancellor Slight’s reasoning and adopt it here. Count XVIII is dismissed, subject to Plaintiffs’ right under 10 *Del. C.* § 1902 to transfer the claim to Superior Court.¹⁵ To the extent an order is required to implement this decision, **IT IS SO ORDERED.**

¹² *Id.* at *14 (emphasis added) (internal quotation marks omitted) (quoting *Perlman*, 2019 WL 2647520 at *1).

¹³ *Id.* A review of the complaint in *Smith* reveals that the plaintiffs there, like the Plaintiffs here, did not seek to enjoin the allegedly defamatory speech.

¹⁴ *Id.*

¹⁵ *See* 10 *Del. C.* § 1902 (“No civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination, provided that the party otherwise adversely affected, within 60 days after the order denying the jurisdiction of the first court has become final, files in that court a written election of transfer . . .”).

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Sincerely,

/s/ Morgan T. Zurn

Vice Chancellor

MTZ/ms

cc: All Counsel of Record, via *File & ServeXpress*