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TABLE OF ABBREVIATIONS

<u>Term</u>	<u>Definition</u>
1992 License	License and Technology Development Agreement between Boehringer and IGEN dated September 23, 1992, A47
2003 License Agreement	License Agreement dated as of July 24, 2003 between IGEN International and IGEN LS LLC, A337
2003 Transaction	Transaction between Roche and IGEN embodied in agreements dated as of July 24, 2003
BioVeris	BioVeris Corporation
Boehringer	Boehringer Mannheim GmbH
Consent	Consent by Meso Scale Technologies, LLC. and Meso Scale Diagnostics, LLC., A363-64, attached to 2003 License Agreement
ECL	Electrochemiluminescence
IGEN	IGEN International, Inc.
JVOC	Joint Venture Operating Committee of the IGEN Board of Directors, responsible for matters relating to IGEN's joint venture interest in MSD, <i>see</i> B255
Meso	Collectively, MSD and MST
MSD	Meso Scale Diagnostics, LLC.
MST	Meso Scale Technologies, LLC.
Roche	Roche Diagnostics GmbH and collectively all Defendants below, Appellees

NATURE OF PROCEEDINGS

This case is about whether Meso,¹ by signing a two-paragraph Consent that was attached to a 2003 License Agreement between Roche and the patent holder IGEN, became a party to that 2003 License Agreement with rights to enforce its terms? After a five-day trial, the Court of Chancery correctly answered this question: “No.”

Roche, not Meso, moved for summary judgment on this issue in the Court of Chancery. The 2003 License Agreement defines only Roche and IGEN as “Parties” and disclaims third-party enforcement rights. Based on those and other plain terms in the contemporaneous documents, plus testimony from the negotiators that they *never* discussed that the Consent would make Meso a party or bestow upon it any share of IGEN’s enforcement rights, Roche argued that Meso’s claims should be rejected as a matter of law. In opposing the motion, Meso urged the Court of Chancery to hold a trial, contending that the Court needed to “construe the contracts on a fully developed factual record that contains all of the relevant evidence of the parties’ intent.” B399. Vice Chancellor Parsons obliged and then, after the trial, systematically rejected Meso’s claims in a detailed 77-page Memorandum Opinion.

¹ Plaintiffs Below, Appellants, Meso Scale Diagnostics, LLC. (MSD) and Meso Scale Technologies LLC. (MST) collectively are referred to as “Meso.” The Defendants Below, Appellees collectively are referred to as “Roche.” A Table of Abbreviations listing these and other abbreviations used in the brief can be found at iii.

SUMMARY OF ARGUMENT

Faced with the fact that the Court of Chancery accepted Roche's construction of the relevant documents² after a full trial, Meso now argues, as it must, that the Court of Chancery's decision is wrong as a matter of law. On appeal, Meso contends that no trial on liability was even necessary because of two words—"join in"—in the fourth line of the Consent, words that Meso claims unambiguously make it a party to the 2003 License Agreement and allow it to enforce IGEN's rights under the agreement, irrespective of the parties' actual intent. Br. 18-27. Meso also claims that the Court of Chancery's findings concerning the meaning of "join in" are "unreasonable," even though based on testimony from the drafters, and should be rejected as a matter of law. Br. 28-35. Both arguments are thinly-veiled attempts to dispute the Court of Chancery's factual findings and rejection of Meso's story.

1.a. Denied. Meso's attempt to second-guess the Court of Chancery's findings in the guise of a plain language argument fails. Meso's argument depends on a strained reading of "join in" that is divorced from the context of the 2003 Transaction and that contradicts other, far clearer, language in the 2003 License Agreement. If anything, the terms of the 2003 License Agreement entitle Roche to judgment as a matter of law (as Roche argued in its own summary judgment motion). At a minimum, the inconsistency between Meso's construction of the Consent and a host of terms in the 2003 License Agreement demonstrates

² Meso asserts on appeal that it signed the actual 2003 License Agreement, (Br. 34-35), but it did not. As discussed below (pp. 32-34), the Court of Chancery found that the Consent Meso signed was a *separate* document, distinct from the 2003 License Agreement. Op. 26, 43-44.

ambiguity, and it was both appropriate and prudent for the Court to review the extrinsic evidence. The words “join in” also do not have the mystical significance Meso claims. New York law does not, as Meso suggests, impose upon the parties a dramatically different meaning than they intended, simply because they used the words “join in” in the Consent. The Court of Chancery did not err in giving Meso the benefit of the doubt, concluding that in this context the words “join in” were ambiguous, and then rejecting Meso’s interpretation based on the evidence.

1.b. Denied. The Court of Chancery correctly found that Meso did not grant a license to Roche and is not a party to any portion of the 2003 License Agreement, including Article 2.

1.c. Denied. The Court of Chancery also correctly found that Roche and IGEN did not intend for Meso to enforce any of the terms and conditions of the 2003 License Agreement. Indeed, if there were any doubt, in §14.11, the drafters eliminated the possibility that anyone other than Roche and IGEN was entitled to enforce any of those terms.

1.d. Denied. The Court of Chancery properly reviewed the entire 2003 License Agreement and the other documents comprising the 2003 Transaction, and correctly interpreted the documents in context.

2.a. Denied. Meso’s alternate argument, that the Court of Chancery’s interpretation is wrong because it is “unreasonable,” also fails. The Court of Chancery correctly adopted an interpretation of the 2003 License Agreement, the Consent, and more specifically, the words “join in,” that was based on the

testimony of the witnesses who negotiated and drafted them. That the Court of Chancery refused to draw the inferences that Meso advanced from Meso's parol evidence was a consequence of the Vice Chancellor's fact finding. It does not make his decision unreasonable as a matter of law.

2.b. Denied. The Court of Chancery did not err in its treatment of the unanimous decision of a three-arbitrator Panel, which, after conducting its own four-day hearing, rejected Meso's story and concluded that Meso was not a Party to or otherwise entitled to arbitrate under the dispute resolution provisions in the 2003 License Agreement. The Vice Chancellor supported his findings on Meso's status with grounds other than just the arbitrators' ruling. Further, the Court of Chancery made limited use of the Panel's decision, giving it only the narrow preclusive effect that Meso itself advocated below. This limited effect was appropriate because the issue of whether Meso is a party to the arbitration provision was actually litigated and adjudicated in the arbitration. Under the practical approach to issue preclusion that applies, the difference in the burdens of proof between the two proceedings does not counsel against giving effect here to the Panel's narrow ruling.

2.c. Denied. The Court of Chancery's finding that Meso was excluded from the definition of the "Parties" was correct and well-grounded in the record. The Court of Chancery's findings concerning the parties' intentions in drafting the Consent, and its rejection of Meso's assertions concerning those intentions, are also both correct and well-grounded in the record.

STATEMENT OF FACTS

A. The 1992 License and the IGEN/Roche Litigation

In 1992, IGEN held patents to a diagnostic detection technology called ECL. A53, A79-93. Led by its chairman and CEO, Samuel Wohlstadter, IGEN granted an exclusive license to Boehringer (later acquired by Roche) to develop and commercialize ECL for use in diagnostic instruments and assays placed in hospitals, blood banks, and clinical reference laboratories. Op. 3; A47, A52.

In 1995, IGEN agreed to provide Samuel Wohlstadter's 24-year old son, Jacob Wohlstadter and his company, MST, with an opportunity to try to develop ECL for certain research uses. Op. 4, 9. IGEN agreed to set up, fund, and license a joint venture, MSD, of which Jacob Wohlstadter became the President and CEO. Op. 4; A94-116, B262. MSD's joint venture agreement and 1995 license allowed it to pursue ECL in connection with defined "Research Technologies" and a "Research Program." Op. 4; A94-116, A117-143.³

In 1997, IGEN sued Boehringer (later Roche) for alleged breaches of Boehringer's 1992 License. A144. IGEN sought hundreds of millions of dollars in damages, claiming, among other things, that Roche had not properly calculated and paid royalties and was selling ECL-based instruments and assays outside its allowed fields. A150-51; Op. 5-6. In early 2002, a jury awarded IGEN over \$500 million in actual and punitive damages and ruled that IGEN could terminate the 1992 License. *See IGEN Int'l, Inc. v. Roche Diagnostics, GmbH*, 335 F.3d 303,

³ Certain terms in the joint venture agreement and license were amended in 2001. Op. 4 & n.3; A153-156, A157-164.

308 (4th Cir. 2003). On July 9, 2003, the Fourth Circuit overturned the jury's punitive damages award and all but \$18 million of the compensatory damages but upheld IGEN's right to terminate the 1992 License. *See id.* at 312, 314-15.

B. The 2003 Transaction and the 2003 License Agreement⁴

While the appeal was pending, Roche and IGEN resumed negotiations over a long-term resolution. Op. 8-15. Both companies had a strong interest in continuing their relationship. By this time, Boehringer and Roche had made a considerable investment in commercializing their ECL-based diagnostic instruments and assays. *IGEN*, 335 F.3d at 307. Roche needed either to settle with IGEN and renew its right to use ECL or to start over with a new technology.

A266. For its part, IGEN reported that “[w]ithout the revenues we receive from Roche or a suitable replacement, we may lack sufficient funds to successfully maintain or further develop our business,” and that its debt could be accelerated. B98-99.

On July 24, 2003, shortly after the Fourth Circuit's decision, IGEN and Roche entered into a transaction that, when it closed on February 13, 2004, settled their litigation, transferred ownership of the IGEN intellectual property to a newly created entity called BioVeris, and licensed to Roche the ECL technology rights it needed to continue to serve its customers. Op. 1, 22-23; B233, B242-43, B259-

⁴ A contemporaneous summary of the facts underlying the 2003 Transaction can also be found in BioVeris's Registration Statement filed with the SEC on September 26, 2013. B236-58.

261.⁵ The centerpiece of the 2003 Transaction was the 2003 License Agreement, a detailed, 25-page agreement, pursuant to which IGEN granted Roche a license that allowed Roche to continue the ECL-based diagnostics business it had developed. A337-61; B259-261; Op. 22-23, 45.

The 2003 License Agreement defines the Parties as IGEN International, Inc. and IGEN LS LLC, which, as a result of the deal structure, became BioVeris and Roche after the closing. Op. 24 n.78; A337; B240. The agreement also specifies that “IGEN and its Affiliates” were the entities granting the license. A343, at § 2.1. MSD and MST are mentioned only once, in § 1.1, which specifically excludes each of them from being an IGEN “Affiliate.” A337.

IGEN’s ability to grant the license is addressed in § 9.6. There, IGEN represents that it has title to the “Licensed ECL Technology” and the ability to perform under the 2003 License Agreement, confirming that there would be no conflict with any contract to which it was bound. A353-54. IGEN’s fundamental ownership of the ECL rights was underscored in § 13.2, which reserves to IGEN the right to allow other parties to use any Licensed ECL Technology “for any purpose.” A357.

Given the prior litigation, Roche and IGEN negotiated at length concerning

⁵ The mechanics of the transaction were as follows: IGEN granted IGEN LS LLC, a newly-created subsidiary of IGEN, a non-exclusive, paid up ECL license. IGEN then transferred ownership of its intellectual property, including the ECL patents, to a new publicly traded entity, BioVeris Corporation, owned by the former shareholders of IGEN. A merger subsidiary of Roche, 66 Acquisition Corporation II, was then merged into IGEN, with IGEN (along with its sole asset, ownership of IGEN LS LLC, with its ECL license rights) being the surviving Roche subsidiary. IGEN LS LLC then further licensed its ECL rights to Roche. B239-41.

IGEN's remedies for "out-of-Field" sales. B430 (634:21-635:5), B432 (643:6-644:20). Both parties recognized that Roche could not prevent its customers from using Products outside the Field. A345-46, at § 2.5; B339 (120:6-121:3); A664-5 (780:17-782:26). Roche also insisted that Roche's license could not be terminated for out-of-Field sales. A352, at §7.2(c); B416-17 (295:20-298:10). In the end, Roche and IGEN agreed to employ a "Field Monitor" process, through which the exclusive remedy for out-of-Field sales was the payment by Roche "*to IGEN*" (later BioVeris) of "65% of all undisputed revenues earned through out-of-Field sales." A345, at § 2.5(a), (b); B339 (119:7-25). The idea was, as the Court of Chancery found, to "turn over the profit from those sales to [IGEN]." Op. 26 n.86; B457 (1051:24-1053:2). This remedy was IGEN's alone. B432 (644:16-20); B328 (48:2-15); B107. The Parties agreed in § 14.11 that they had no intent "to confer upon any person other than the Parties hereto . . . any benefit, right or remedy." A361, at § 14.11.

In exchange for the 2003 License Agreement, IGEN shareholders received shares of BioVeris and \$1.2 billion in cash from Roche. Op. 23; B424 (597:18-22).

C. Negotiations over the 2003 License Agreement and Meso's Limited Involvement

The nature of the relationship between IGEN and Meso (that is, between father and son) and redactions in IGEN's public filings of documents memorializing its activities with MSD raised questions for Roche about the scope of Meso's ECL rights, including its alleged "springing rights." Op. 4; B421-22

(584:5-587:9); B411 (245:16-255:12); B7-10, B16-35, B44-47, B55. These concerns ultimately led Roche to demand that IGEN receive a consent from Meso when IGEN reestablished its license with Roche in 2003.

Franz Humer, the Chairman of Roche, wrote to Samuel Wohlstadter:

Any settlement has to achieve for Roche complete freedom of operation in our field, including complete protection from the “Meso” companies. *Roche will not negotiate with Meso and I consider it your responsibility to deliver the necessary consents and covenants from Meso.*

Op. 9; B56 (emphasis added). Early drafts of the 2003 License Agreement reflected this uncertainty, and various options were raised to address the issue. B424 (595:20-596:19). Evidence showed that IGEN repeatedly told Roche’s negotiators that Meso’s rights would not interfere with IGEN’s license to Roche. B422 (587:10-588:2); Op. 11; B435 (752:10-22). These oral representations were reduced to writing in § 9.6. A353-54; B423 (590:5-15), B430 (634:5-19).

Roche did not negotiate with Meso regarding the terms of the 2003 License Agreement. Meso’s CEO, Jacob Wohlstadter, participated in some early negotiations, but, as the Court of Chancery found, only in his capacity as a consultant to IGEN. Op. 12-13; B430 (635:13-19); B435-36 (753:18-755:1).⁶

Drafts of the Consent frequently accompanied drafts of the License Agreement itself. But the Consent was located on a separate page and had its own

⁶ The Court of Chancery also found that, before Meso entered into a confidentiality agreement, Jacob Wohlstadter was secretly forwarding drafts of the 2003 License Agreement to Meso’s outside lawyers, without IGEN’s or Roche’s knowledge or authorization. Op. 13 n.41; B408-09 (236:6-242:10); B58-65; B66; A215-220.

separate signature block. Op. 26; A199, A210, A253, A363, B92. As finally executed, the Consent provides in relevant part:

The undersigned, Meso Scale Diagnostics, LLC (“MSD”) and Meso Scale Technologies LLC (“MST”), on behalf of themselves and their respective Affiliates hereby consent to the foregoing License Agreement dated as of July 24, 2003 and hereby consent to and join in the licenses granted to [Roche] and its Affiliates in the License Agreement. . . .

Furthermore, MSD and MST hereby represent and warrant to LLC and its Affiliates that each of them hereby waives any right that either of them may have to in any way restrict or limit [Roche] or its Affiliates’ exercise of the license granted in the License Agreement during the Term hereof.

A363-64.

The Court of Chancery heard evidence that, from Roche’s perspective, the purpose of the Consent was safety, clarity, and confirmation of its freedom to operate. B425 (598:3-21, 601:7-17); B445-46 (879:2-16, 881:9-882:11); B440-1 (815:24-816:9). In addition to testimony from Roche’s witnesses, IGEN’s negotiators, including its CFO and General Counsel, confirmed that the Consent was not intended to make Meso a grantor of a license to Roche, a Party to the 2003 License Agreement, or to provide Meso with any enforcement rights. B327-28 (43:15-18, 48:2-15); B337 (112:19-113:4), B342 (282:11-283:2). The outside counsel to IGEN’s Joint Venture Operating Committee (JVOC), which oversaw the Meso joint venture, testified to like effect. B321 (587:22-588:12). Even Meso’s outside counsel admitted that the concept that the Consent would somehow

make Meso a party was never even discussed, and that he did not remember whether he had understood Meso was a party. B418 (357:21-359:16).

To make clear that Meso would not interfere with Roche's exercise of its license rights, Roche's drafters asked that Meso both consent to the entire 2003 License Agreement and "consent to and join in the licenses granted." A363; Op. 70-73; B426 (603:20-604:5); B428-29 (626:12-628:14, 630:21-632:15); B440-41 (815:24-816:9); B446 (881:9-882:11). As the Court of Chancery found, the purpose of this additional wording was "to emphasize Meso's consent to the license that IGEN was granting to Roche," a particular concern of Roche given that Meso's ECL rights remained obscure and uncertain. Op. 70-71. The words were not intended to mean that Roche was seeking or receiving a grant of rights from Meso. Op. 71. Rather, they meant something more than consent but less than a grant of a license or a conferral of party status. Op. 70-74.

The Court of Chancery found that, when the Consent was negotiated and signed, Meso and its counsel had this same understanding. Op. 17-18 & n.59, 59 n.167. On July 16, 2003, for example, Jacob Wohlstadter and his lawyers drafted a memorandum and sent it to the JVOC, in support of his last-minute demand for payment. Op. 17-18; B106; B401 (131:5-21); B419 (367:6-8); B451-52 (1003:24-1004:11). In the opening paragraph, Jacob Wohlstadter drew the same distinctions that Roche drew between consenting, joining in a license, and becoming a party to an agreement:

As a result of being required to *consent to* the I/R transaction, *to join in* the license from NEWCO to Roche, and *to become a party to* various agreements (such as the Covenant Not to Sue and releases), MSD believes it will suffer substantial diminution in rights, prospects and value.

Op. 18-19; B106. In that same memo, Jacob Wohlstadter described IGEN as being the license grantor seven times. Even in arguing that Meso's role warranted substantial compensation, he never suggested that Meso was granting a license.

Op. 59; B106-07. He also wrote that, with respect to any out-of-Field sales, Meso would receive "no compensation." Op. 19; B107.

The tax-advantaged structure utilized required IGEN to obtain Meso's consent to the transfer of IGEN's ownership interests in the MSD joint venture to BioVeris. Op. 17 & n.56; A308-09. Jacob Wohlstadter successfully used IGEN's need for that consent to exact a multi-million dollar payment. Op. 17-22 & n.56; B329-31 (64:19-65:18; 69:23-70:11); B451 (1002:19-24). IGEN's independent directors on the JVOC thought there was no reason to pay Meso anything. Op. 19-21; B126-27; B451 (1001:15-1002:18). But to save a deal worth \$1.2 billion in cash to IGEN's shareholders, the JVOC recommended that IGEN and BioVeris provide a \$30 million capital contribution to Meso. Op. 21; B451 (1003:1-23); B149-50; B255-58. Jacob Wohlstadter countered at \$37.5 million. Op. 21; B187-88. IGEN's directors refused to pay more than \$30 million, so Jacob Wohlstadter's father, Samuel Wohlstadter, paid the balance himself. Op. 21-22; B227-29; B407 (219:13-220:6); B451 (1003:1-7). Roche paid Meso nothing. Op. 23; B424 (597:12-22).

D. Post-Closing Events

After the closing, Roche took steps to ensure compliance with the Field restrictions in the 2003 License Agreement and invited BioVeris to participate in the Field Monitor process in 2004 and 2005. Op. 27. BioVeris did not respond in 2004, but it participated in the process for 2005, which began in early 2006. Op. 27. Throughout this time, consistent with the reality that it was neither a license grantor nor the holder of enforcement rights, Meso had no contact with Roche, did nothing to monitor Roche's sales or compliance with the Field, and had no involvement with the Field Monitor process. Op. 27; B402 (141:5-142:10).

In 2004, MST exercised its right to buyout BioVeris's interest in MSD, and, as part of that process, three different appraisers valued MSD. Op. 26; B314. MSD was asked to provide a list of its intellectual property and key agreements, but even then "never identified itself as a licensor under the 2003 License Agreement." Op. 26-27; B404-05 (182:12-185:3).

In July 2006, Samuel Wohlstadter, now as CEO of BioVeris, asked Roche to consider acquiring BioVeris. Op. 28; B433 (646:5-647:10). Roche first assumed that a consent from Meso would again be part of the deal, but it became clear that Meso's consent would not be needed this time. Op. 29-30. Among other reasons, by 2007, the MSD joint venture and its Research Program had ended, and BioVeris confirmed that Meso's rights did not implicate Roche. Op. 30. Roche also finally was allowed to review Meso's Research Summaries. Op. 29-30. Meso was not otherwise involved. Op. 27-28; B315 (Response to Interrog. No. 13).

On April 4, 2007, BioVeris and Roche publicly announced their new deal. Op. 30; B267-69. Meso took no action to try to stop the deal from closing, Op. 30-31; B415 (289:23-290:2, 292:12-18), and the acquisition closed on June 26, 2007. Op. 30; B307-09.

That same day, BioVeris issued a license to its new parent, Roche. This new 2007 license granted Roche a non-exclusive license for use of the Licensed ECL Technology “in any and all fields” subject to “the rights of MSD, MST or Jacob Wohlstadter under all pre-existing agreements.” Op. 30; B290, 293, at § 2.1.⁷

After June 26, 2007, Meso made no effort to assert rights of the sort it now claims under the 2003 License Agreement. Op. 31, 32. To the contrary, Jacob Wohlstadter confirmed that he understood that only BioVeris, not Meso, was entitled to the 65% payment for out-of Field sales. B416 (295:13-19); B442 (864:15-865:6); B449 (920:23-921:11). Jacob Wohlstadter was in contact with Roche throughout 2007, but always to discuss Meso’s IP rights under its 1995 license, not the 2003 License Agreement. B450 (924:8-925:5); B434 (659:6-660:14).

Meso filed this action on June 22, 2010, just four days before the three-year anniversary of the BioVeris closing. Op. 31, 32. In its Verified Complaint, Meso told an elaborate story, portraying itself as a key player in the 2003 Transaction in which it claimed that Roche and IGEN had granted it substantial additional rights.

⁷ Jacob Wohlstadter admitted at trial that to his knowledge Roche has never infringed on Meso’s IP rights under those pre-existing agreements. B415 (291:16-22).

A508-14, A524-25. Meso further alleged that Roche and BioVeris had violated Meso's rights by concluding the 2007 transaction without Meso's involvement and by Roche's subsequent sales of ECL-based instruments and assays outside the Field defined in the 2003 License Agreement, notwithstanding Roche's acquisition of the ECL patents and the new license that Roche had received as a result of the 2007 transaction. A497, A517-27.

ARGUMENT

The Court of Chancery Correctly Concluded That Meso Is Not a Party and Has No Enforcement Rights.

A. Questions Presented

1. Did the Court of Chancery commit error in concluding that the words “join in” in the Consent are ambiguous and thus improperly look to extrinsic evidence to determine the parties’ intent?
2. Are the Court of Chancery’s factual findings respecting the parties’ intentions clearly wrong?

B. Scope of Review

The Court of Chancery’s “interpretation of contract language is reviewed by this Court *de novo*.” *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992). To the extent, however, “the trial court’s interpretation of contract language rests on findings concerning extrinsic evidence,” this Court may not set those findings aside “unless they are unsupported by the record and are not the product of an orderly and logical deductive process.” *Id.*

C. Merits of Argument

1. The Court of Chancery Did Not Err by Reviewing Extrinsic Evidence to Determine the Parties’ True Intentions.

Meso presented its own extrinsic evidence and proposed interpretation of the Consent which the Court of Chancery rejected. Yet Meso now contends it was error for the Court of Chancery even to consider extrinsic evidence. Meso argues that the Court of Chancery was required to conclude that the words “join in” in the Consent meant that Meso granted a license to Roche, became a party to the 2003

License Agreement, and secured the same (or even more) enforcement rights as IGEN. Br. 2-3. Meso supports this contention by conflating the 2003 License Agreement with the separate Consent, by myopically focusing on the words “join in” to the disregard of the overall 2003 Transaction, and by mischaracterizing New York cases interpreting the verb “to join” in a variety of different settings. The Court of Chancery did not commit error in considering the extrinsic evidence and rejecting Meso’s claims.

a. Meso Has Not Established That “Join In” As Used in the Consent Can Only Mean What Meso Contends.

Under New York law, which governs the 2003 License Agreement, unless an agreement is unambiguous—that is, “the intent of the parties is apparent from the face of the agreement”—construing the agreement “requires weighing the evidence of their intent in drafting the agreement and making a finding of fact.” *Ruttenberg v. Davidge Data Sys. Corp.*, 626 N.Y.S.2d 174, 176 (App. Div. 1995). Contract language is unambiguous “if it has ‘a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.’” *JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009) (quoting *Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978)). Conversely, an agreement is ambiguous if it is “reasonably susceptible of more than one interpretation.” *RM Realty Holdings Corp. v. Moore*, 884 N.Y.S.2d 344, 346 (App. Div. 2009).

Seeking to impose its own construction as a matter of law, Meso focuses

exclusively on the fourth line of the Consent and invokes what it contends is the “ordinary meaning” of the words “join in.” Br. 18-19. Meso contends that even though it was not the meaning contemplated by the drafters, their use of the words “join in” in the Consent *can only mean* that Meso is both a licensor under the 2003 License Agreement and a party with implicit rights of enforcement. Br. 19-20. This is far from apparent from the face of the Consent and overstates the ordinary meaning of “join in.” Meso’s construction of “join in” was not obvious to Roche or IGEN or any of their negotiators, all of whom testified to no such understanding. *See* Op. 50 & n.147; B437-38 (761:15-763:4, 764:9-23); B444-45 (875:1-876:5); B432 (644:16-20, 645:8-20); B340 (122:10-124:15), B342 (282:11-283:18); B327 (42:25-43:18). Even Meso never identified itself as a party to the 2003 License Agreement until the start of this litigation. Op. 68 n.188. In summarizing the 2003 Transaction for securities regulators and investors, BioVeris and its lawyers did not once suggest that Meso granted any license to Roche. B232-66; B342 (282:11-283:18).

Meso’s litigation construction of the phrase impermissibly demands that the Court ignore the context of the drafters use of the phrase in the Consent. Whether a provision is ambiguous must be assessed in light of the entire agreement—not based upon the term in isolation. *Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993) (applying New York law and observing that “[a]lthough the parties dispute the meaning of specific contract clauses, our task is to determine whether such clauses are ambiguous *when read in*

the context of the entire agreement”) (emphasis added, internal quotation marks omitted). In the context of the 2003 Transaction, the Consent, and the 2003 License Agreement, Meso’s construction of “join in” is wrong and, by definition, not obvious or ordinary.

To the contrary, Meso’s proposed unambiguous construction contradicts many terms in the 2003 License Agreement. On the first page of the 2003 License Agreement, the drafters provided that the agreement is “made . . . by and between” IGEN and IGEN LS” (which became BioVeris and Roche after closing). A337. They alone, and not Meso, are defined as the “Parties” who agree to the “mutual covenants and promises set out below.” Op. 23-24; A337. Meso’s claim that, by “joining in” the licenses granted by IGEN, it necessarily and implicitly became a Party to the 2003 License Agreement is directly contrary to these terms. These provisions, at a minimum, create ambiguity.

Meso calls the fact that it is not included in the express definition of Parties “irrelevant” and tries to minimize this powerful textual evidence of the drafters’ intent by suggesting that the placement of the definitions in the recitals or “preamble” somehow makes them a less significant expression of the parties’ intent than the supposedly crystal-clear “join in.” Br. 33. But where else would a drafter include the definition but at the beginning of the agreement, when those fundamental terms are first used? 2 Roger M. Milgrim, *Milgrim on Licensing*, § 12.00 (discussing “standard ‘Parties’ provision” at start of agreement).

Many other provisions in the 2003 License Agreement contradict Meso’s

position. Section 2.1 provides that “IGEN and its Affiliates” are the grantors of the licenses. A343. MSD and MST are specifically *excluded* from the definition of IGEN “Affiliates.” A337, at § 1.1. Section 3.1 likewise refers to only a single “Licensor”—IGEN—and makes no mention of Meso. A346. In § 9.6, IGEN represents and warrants to Roche that it had the power and authority to grant the license rights and that they would not conflict with its other contracts or obligations. A353. The covenants and enforcement provisions of the 2003 License Agreement also are between Roche and IGEN only. Section 2.5 provides that only Roche and IGEN may invoke to the exclusive remedy for Out-of-Field Sales with the field monitor being IGEN’s (now BioVeris’) and not Meso’s to invoke. A345. Under Article 7, only IGEN has termination rights, and only under limited circumstances. A350-52. The confidentiality obligations in Article 11 are between IGEN and Roche alone, with no mention of Meso. A356-57. Consistent with there being only two Parties to the 2003 License Agreement, only IGEN and LLC are listed in the notice provisions of § 14.3. A358-59.

Meso’s claim that it is entitled to share IGEN’s enforcement rights is also contrary to § 14.11. In that plainly worded provision, the drafters made clear that there was no intention that anyone not a defined “Party” would have enforcement rights. A361; B425 (600:19-601:6). Meso refers to this provision, Br. 33, but offers no explanation, from the evidence or applicable law, of how its construction can be squared with the drafters’ express statement that they did not intend to create enforcement rights in anyone not a named “Party,” itself a defined term.

If these many provisions do not defeat outright Meso's proposed construction, at a minimum they create ambiguity that warranted consideration of the extrinsic evidence to resolve the dispute over the parties' intentions. This is why New York courts warn against placing too much emphasis on a single phrase, as Meso invites the Court to do here: "The meaning of a writing may be distorted where undue force is given to single words or phrases. We read the writing as a whole. We seek to give to each clause its intended purpose in the promotion of the primary and dominant purpose of the contract." *Empire Props. Corp. v. Mfrs. Trust Co.*, 288 N.Y. 242, 248 (1942).

If the drafters had intended Meso to be a license grantor, a party, or to have enforcement rights, there were any number of ways for them to have indicated that intent, from including Meso in both the definition of the "Parties" and the granting clause, to specifying that Meso was entitled to exercise IGEN's enforcement rights. The drafters did not do so. Indeed, the extrinsic evidence establishes that they never even discussed doing them. Meso's "ordinary meaning" argument would impose a major, inadvertent contractual change based solely on "join in." That result is contrary to the basic premise of contractual interpretation. *Id.*

b. Under New York Law the Phrase "Join In" Does Not Have a Single, Exclusive Meaning.

Meso also argues that under New York law the use of the words "join in" in the Consent can *only* mean that Meso became a license grantor and party with enforcement rights. Br. 18-25. The Court of Chancery correctly rejected this

argument below: “[T]he term ‘join in’ does not appear to have a singular meaning under New York law[, and] . . . neither side to this dispute has presented evidence that ‘join in’ is a term of art with a specific meaning.” Op. 41.

New York courts have used the word “join” to convey, and have recognized that it can mean, many different things in many different contexts. For instance, in *Durnherr v. Rau*, 135 N.Y. 219, 221-22 (1892), the New York Court of Appeals held that the plaintiff wife who “joined” in mortgages given by her husband “was not a party to the mortgages,” but merely made a “surrender of her right,” and no obligation thereby “was created in [her] favor.” *Id.*; see also *Case v. Case*, 203 N.Y. 263, 266 (1911) (*Durnherr* “held that the wife’s joinder in the mortgages was a voluntary surrender of her right”). Although the issue in *Durnherr* ultimately concerned a covenant in a separate deed, 135 N.Y. at 222-23, the court’s treatment of “join” in the underlying mortgages belies Meso’s assertion that the term can have but one meaning under New York law.

Construing a phrase containing the words “to join,” the New York Supreme Court in *New York Central R.R. v. New York, New Haven & Hartford R.R.*, held that there were “*countless varied associations in which the phrase might be used*” and that “[t]o join’ may be passive in significance or it may denote active participation in formulation of an activity.” 208 N.Y.S.2d 605, 616-17 (Sup. Ct. 1960) (emphasis added), *modified*, 216 N.Y.S.2d 928 (App. Div. 1961). Meso unjustly criticizes the Court of Chancery for relying on the Supreme Court’s holding, Op. 41 n.126, because, Meso claims, “it did not address the holding of the

appellate court that found the same language clear.” Br. 20. The Appellate Division did not hold, however, that “join” was by itself unambiguous or that it could be construed without reference to the underlying circumstances of its use. Rather, it found the provisions in that case, which included the word “join,” to be clear in the light of the agreement as a whole. 216 N.Y.S.2d at 934. The court also gave weight to the parties’ prior agreements and relationship. *Id.* at 934-36. The phrases used were clear only in context. *Id.* In that same sense, the phrase “join in” in this case becomes clear in context.

In the only other case cited by Meso that involved a contract that contained some form of the term “join,”⁸ the court found a party’s “join[ing] in [the Agreement]” to be ambiguous and held a two-day trial to examine extensive extrinsic evidence of the parties’ negotiating history and post-execution conduct. *Institut Pasteur v. Chiron Corp.*, No. Civ. A. 03-0932, 2005 U.S. Dist. LEXIS 2177, at *1, 11-23, 24 (D.D.C. Feb. 16, 2005). Meso’s position here is even weaker, since in *Institut Pasteur* the term “join” applied to the contract itself. *Id.* at *7. Here Meso expressly “join[ed] in” the licenses granted, but only consented to the actual 2003 License Agreement. Op. 37; A363; B425-26 (601:18-602:17). In further contrast to *Institut Pasteur*, *id.* at *33, 35, Meso never assumed any

⁸ The remaining cases cited by Meso do not even involve a contract or other document using the word “join.” *Markson v. Markson’s Furniture Stores*, 195 N.E.2d 824, 825-26 (N.Y. 1935); *Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003); *Rogers v. La Salle Steel Co.*, 250 F.2d 607, 608 (7th Cir. 1957). To the extent that those courts incidentally made casual reference to parties joining contracts, they are of no precedential value and do not support Meso’s position that “join in” can have only one meaning.

obligations within the four corners of the 2003 License Agreement. *See* Op. 42-43.

There is no per se rule that under New York law the term “join” can have but one meaning regardless of the context in which it is made. But even if the cases cited by Meso meant (which they do not) that it was in some sense a party to the 2003 License Agreement, no authority and no unambiguous reading of the contract that favors Meso could answer what enforcement rights Meso would thereby have obtained. Meso’s assertion that the only way to “join” a contract is as a full participant with equal rights is contrary to New York law. As the court held in *Berry Harvester Co. v. Walter A. Wood Mowing & Reaping Machine. Co.*, 152 N.Y. 540 (1897), “[w]hether the right or privilege, conferred by the promise of one party to a tripartite contract, belongs to one or both of the other contracting parties, depends upon the intention as gathered from the words used, read so far as they are ambiguous, in the light of surrounding circumstances.” *Id.* at 547. On the question whether Meso obtained any rights under the 2003 License Agreement, the Court of Chancery resolved that critical ambiguity against Meso. Op. 55-56.

2. The Court of Chancery’s Interpretation of the 2003 License Agreement, Based on the Evidence of the Parties’ Actual Intent, Should Be Affirmed.

At trial, Roche introduced evidence from the drafters of the Consent establishing that Meso’s “join[ing] in the licenses granted” meant something more than mere consent but less than becoming a party and obtaining enforcement rights—*i.e.*, that Roche would have “freedom to operate” without interference from Meso in its use of the “Licensed ECL Technology.” B425-26 (598:3-21, 601:7-

604:5); B445-46 (879:2-882:11). This testimony is consistent with the terms of the 2003 License Agreement, the terms of the Consent, and the parties' objectively expressed intentions at the time, B428-29 (627:20-629:3, 631:21-632:15), including the intent of MSD's CEO. B106 (distinguishing between "consent to," "to join in," and "to become a party to" and recognizing that Meso "joined in the license from NEWCO to Roche"); Op. 18-19. Meso cross examined the Roche and IGEN witnesses and had the opportunity to convince the Vice Chancellor to reject their testimony, but to no avail.

After evaluating the credibility of the witnesses and analyzing the evidence at trial, the Court of Chancery found that the "join in" language in the Consent was intended to be "more than a simple consent, but less than making Meso a party to the License Agreement or to Article 2 of that agreement." Op. 70. By "join[ing] in the licenses granted" Meso also "agreed to accept Roche's use of the Licensed ECL Technology within the Field." Op. 71; B426 (603:20-604:5); B440-41 (815:24-816:9). Meso thereby committed not to assert any ECL rights that it might have or later acquire to interfere with Roche's use of ECL within the licensed Field. Op. 72-73; B425 (598:13-21, 601:10-17), B428 (626:12-627:3). As the Court of Chancery found, Roche wanted the Consent as a "defen[se] against a suit from Meso challenging some aspect of Roche's in-Field use of the Licensed ECL Technology or any inadvertent out-of-Field use by one of Roche's customers." Op. at 72; B425 (598:13-21); B446 (881:9-882:11).

The basis for the Court of Chancery's interpretation is spelled out in an

orderly, logical deductive reasoning process captured in its comprehensive Memorandum Opinion. The Court's findings are grounded in specific testimony from the primary witnesses involved in the negotiations and drafting. Op. 12, 17, 20, 21, 25-27, 30-31, 48, 50, 56, 67-69, 71. The extrinsic evidence that informed the Court's decision includes the drafting history, Op. 45-58; the events immediately preceding the signing of the 2003 License Agreement and the Consent, Op. 58-61; other 2003 Transaction documents, Op. 61-66; and Meso's post-closing conduct, Op. 66-69.

The Court of Chancery also systematically addressed Meso's parol evidence. Meso argued that a November 23, 2002 "Summary of Key Differences" and January 17, 2003 draft supported its position. The Vice Chancellor provided a detailed explanation for his rejection of the inferences that Meso sought to draw from both documents in a thorough and logical way. Op. 47-50. His findings should be respected. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

On appeal, Meso argues that the Court of Chancery's interpretation is wrong and "unreasonable." Br. 28-30. In so doing, Meso raises a series of what it facially characterizes as legal challenges, but which in reality are unsupported attacks on the Vice Chancellor's factual findings. None provides a basis for overturning the Court of Chancery's careful, well-reasoned analysis.

First, dissatisfied that the Court rejected Meso's arguments on the meaning of "join in," Meso incorrectly contends that the Court of Chancery's interpretation

fails to give the words sufficient independent meaning. Br. 28-29. The Court of Chancery found that by joining in the licenses granted, Meso agreed not to assert any rights it might have, regardless when they might vest, to interfere with Roche's in-Field use of ECL. The Vice Chancellor also found that the words "called special attention to and emphasized" Meso's acceptance of Roche's use of "Licensed ECL Technology" in the Field. Op. 71; B426 (603:20-604:5). The Court of Chancery also found that the "join in" language emphasized Meso's consent, in a "belt and suspenders" approach that provided "valuable additional support" against the subsequent assertion of a right forgone. Op. 71-72 n.195; B428 (626:12-19); B446 (881:9-882:11).

Meso's invocation of the rule against surplusage improperly demands that the Court impose a meaning that is plainly contrary to the parties' actual intent. Meso's construction would work an extreme and major change to what anyone understood was happening in the 2003 Transaction. It should, therefore, be rejected. *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 587-89 (Del. Ch. 2006) (explaining that the rule against surplusage should not be applied in an "extreme" way when it merely is "a contractual interpretation technique that is properly used only as a guide in determining the objective intent of the original parties to a contract"); *RAG Am. Coal Co. v. AEI Res., Inc.*, 1999 Del. Ch. LEXIS 226, *16-19 (Del. Ch.) (noting the "lawyerly inclination to gild the lily out of an excess of caution").

Meso also incorrectly attacks the Court of Chancery's factual findings as

being “inconsistent” because the Vice Chancellor concluded both that Meso did not grant a license to Roche and that the Consent precluded Meso from interfering with Roche’s exercise of its ECL rights within the licensed Field. Meso suggests that the latter conclusion must mean that Meso granted a license and that Meso must, therefore, also be entitled to exercise IGEN’s enforcement rights. Br. 29.

Meso’s argument is in reality a challenge to the Court of Chancery’s factual findings about the parties’ intent. Meso is correct that the Court of Chancery rejected Meso’s claims that it was a co-equal licensor with IGEN, while also finding that the parties intended the Consent to be a bar to Meso challenging Roche’s ECL-based business within the Field. Op. 71-73. But there is nothing inconsistent in these two findings. As the Court of Chancery explained, based on the trial record, Meso’s own ECL rights and relationship with IGEN were sufficiently obscure that Roche wanted complete assurance that Meso would not cause Roche a problem in connection with the \$1.2 billion license that Roche was acquiring from IGEN. Op. 4 n.3; B421-22 (584:5-587:9), B428 (626:12-627:3). Roche did not want a license from Meso; it simply wanted certainty that Meso would not interfere with its freedom to operate within the Field. B425-26 (598:3-21, 601:7-604:5); B436 (755:2-18). IGEN represented and warranted (with Meso’s express consent) that IGEN held the patents and other intellectual property to be licensed, Op. 51; A353-54, at § 9.6; B423 (590:5-593:3), B429-30 (633:16-634:14). Meso made no such commitments. Op. 57-58; A363. There is nothing inconsistent about these findings or the Court of Chancery’s construction.

Moreover, even if Meso's commitment not to interfere with Roche's exercise of its ECL rights within the Field could be characterized as some implicit *de facto* license, it would not change the result. It would not mean that the parties intended the specific contractual provisions in the 2003 License Agreement to apply to and benefit Meso. The Court of Chancery, interpreting contractual language that it found to be ambiguous on this point, found that there was no such intent, and that the parties intended specifically to exclude Meso from obtaining any rights under the 2003 License Agreement. Op. 55-56, 75; B432 (644:8-20, 645:8-20); B444-45 (875:20-876:5); B339-40 (121:4-123:18). Finally, the Court of Chancery addressed this issue in its alternative holding that, even if Meso were in some sense a licensor, it would be only in the manner of a "quitclaim," for the extrinsic evidence showed that no enforcement rights were given to Meso. Op. 75 n.197; B323-24 (660:9-661:7).

The Chancery Court found as a factual matter that the parties intended neither a conveyance from Meso to Roche of ECL rights nor that Meso obtain enforcement rights. Meso's arguments, which are in substance challenges to these factual findings, should be rejected. *Peden v. Gray*, 2005 Del. LEXIS 389, at *6-8 (Del.) (deferring to Court of Chancery construction of contract language based upon factual findings of parties' intent).

Second, Meso misconstrues the ruling below in contending that the Court of Chancery erred by giving preclusive effect to the arbitration panel's finding that Meso is not a party to the arbitration provision in Section 6.2(b) of the 2003

License Agreement. Br. 30-33. The Court of Chancery reasoned from this finding that Meso, as a matter of logic, could not be a party to the *entire* agreement (although it allowed, subject to further analysis, that Meso might be a party to portions of it other than Section 6.2(b)). Op. 39. The Court of Chancery’s analysis, however, did not rely solely upon the panel’s decision.

As the Court of Chancery found, Meso’s interpretation that it is a party to the entire 2003 License Agreement would impermissibly read out of the Consent the pointed distinction drawn therein between Meso’s “consent[ing] to and join[ing] in the licenses granted” but only “consent[ing]” to the 2003 License Agreement itself. Op. 37 & n.118. In addition to citing the arbitrators’ unanimous decision, the Vice Chancellor also separately addressed, and rejected, Meso’s arguments that it was a party to all of Article II or to Sections 2.5 and 2.6, (Op. 39 & n.121), and that “the licenses granted” were the same as the entire 2003 License Agreement (Op. 37). Even had the Court ignored the panel’s decision, the result would be the same.

To the extent that the Court of Chancery relied in part upon issues determined by the arbitration panel, it was right to do so. The Court of Chancery did not treat the panel’s decision as if it had resolved the merits of Meso’s claims. Br. 31. Instead, it merely treated as resolved one specific issue—whether Meso was a party to the arbitration provision contained in Article 6 of the 2003 License Agreement—that the panel necessarily determined in the course of finding that

Meso could not arbitrate.⁹ Op. 37 n.118; *id.* at 38 & n.120. Meso’s argument confuses *res judicata* (claim preclusion) with collateral estoppel (issue preclusion). Issue preclusion does not turn upon the adjudication of a prior claim, but upon a “fact” having been “litigated and determined” in a prior proceeding. *Auerbach v. Cities Serv. Co.*, 134 A.2d 846, 851 (Del. 1957). Roche has not argued for, and the Court of Chancery did not apply, claim preclusion.

Where, as here, a tribunal rules that it lacks jurisdiction, factual determinations necessarily reached to make that ruling are binding under issue preclusion, including the factual bases that were asserted as justifying jurisdiction. Restatement (Second) of Judgments § 27 illus. 3 (1982). Even though the panel found that it lacked jurisdiction to resolve the merits, the issue whether Meso is a party to Article 6 of the 2003 License Agreement was actually litigated and decided. Op. 38; B347-65. Moreover, by giving effect to the panel’s finding, the Court of Chancery merely gave the arbitration decision the limited effect that Meso itself advocated below. As recently as post-trial briefing, Meso agreed that this scope of preclusive effect was proper. It said, “[t]he arbitration panel’s ruling should not prevent this Court from concluding that Meso joined in the entire 2003 License Agreement except for its arbitration provision, Article 6.” B459.

Meso also argues that any level of preclusive effect is improper because the

⁹ In *Auerbach*, 134 A.2d at 851, *supplemented by* 136 A.2d 219 (Del. 1957), a case that Meso also cites, Br. 31, the issue as to which preclusion was sought had not been addressed in the prior proceeding. Here, the issue of whether Meso was a party to Section 6.2(b) was placed squarely before and explicitly resolved by the panel, adversely to Meso.

arbitrators applied a different burden of proof. But under New York law, a “practical approach” to collateral estoppel applies, and it is in this context that considerations of any differences in burdens of proof are made. *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 731-32 (2d Cir. 2001) (“[T]he value of collateral estoppel in fostering judicial economy and avoiding inconsistent results would be severely compromised if every shift in the burden of proof would make collateral estoppel unavailable.”). Thus, “under New York law, a shift in the burden of proof is not dispositive as to whether collateral estoppel can be applied.” *Id.* at 732; *Constantine v. Teachers Coll.*, 448 F. App’x 92, 94 (2d Cir. 2011).¹⁰ Meso’s position fails the practicality test, because it would give rise to the absurdity of it being a party to the entirety of an agreement containing an arbitration provision that does not apply to it (a finding by the panel that Meso did not challenge).

Third, Meso incorrectly challenges the Court of Chancery’s factual finding that the Consent is a separate document from the 2003 License Agreement and claims that the Court erred because, by signing the Consent, Meso actually signed the 2003 License Agreement. Br. 1, 34-35. As a signatory, Meso claims it can enforce its terms. As the Court of Chancery found, however, the Consent and the 2003 License Agreement were two separate documents. Op. 26, 43-44.

The Chancery Court’s finding that the documents are separate is both correct

¹⁰ The case cited by Meso on this point, *Cobb v. Pozzi*, 363 F.3d 89 (2d Cir. 2003), does not acknowledge these authorities stating New York law on issue preclusion; it cites to no New York decisions.

and fully supported by the record. Among the evidence the Court of Chancery cited were terms in another document that Meso signed, the “Global Consent and Agreement,” in connection with the 2003 Transaction. Op. 62-63; A303-04. In negotiations over that document, Meso’s own counsel requested changes in the definitional terms to clarify and distinguish between the Consent and the 2003 License Agreement, confirming that they were separate documents and making clear that Meso was involved in the former but not the latter. Op. 62-63; B131, B136; B153, B159. This fact by itself supports the Vice Chancellor’s finding.

The very wording of the Consent also shows that it is a separate document. The first sentence refers to the “*foregoing* License Agreement” and states that the waiver of rights in the Consent applies during “the Term *thereof*,” indicating that the 2003 License Agreement is a separate document. A363 (emphasis added). Similarly, the Consent refers to the 2003 License Agreement as “the License Agreement dated as of July 24, 2003,” not “this License Agreement” or “Agreement” as the 2003 License Agreement refers to itself internally. *Id.* Even the signature blocks and signature page footers are different in form and format, specifically because when asked by Meso at deposition, the drafter explained, they were separate documents. A364, A362; B346 (78:1-13); B189-90, B199-200; B201-02.

The Consent also expressly provides that it applies only to the License Agreement dated as of July 24, 2003 and not to any amendments, modifications, or supplements, unless “agreed to in a separate writing signed by MSD and MST.”

A363. This language originated with MSD. A221-22; B68, B92; B427 (624:3-625:4). By adding this proviso to the Consent, MSD and MST confirmed that the Consent was a separate document and that they were not parties to the 2003 License Agreement.

Ignoring these provisions, Meso tries to invoke § 14.8(i) of the 2003 License Agreement, which incorporates and makes the “Exhibits, Appendices and Annexes” part of the 2003 License Agreement. Br. 34. But, as the Court of Chancery found, the Consent signed by Meso was neither incorporated nor made part of the 2003 License Agreement. Op. 43-44.

As a non-party (even if providing a “Consent”), Meso has no standing to pursue claims based on alleged breaches of the 2003 License Agreement. “[O]nly the parties to a contract have standing to sue for its breach.” *Parker & Waichman v. Napoli*, 815 N.Y.S.2d 71, 74 (App. Div. 2006). Consenting to an agreement does not make one a party to that agreement. The Court of Chancery’s rejection of Meso’s claims and interpretation of the Consent in context were both correct and proper.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Chancery should be affirmed.

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