**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| LEILANI ZUTRAU individually and on behalf of ICE SYSTEMS, INC.,<br><br>Plaintiff,<br><br>v.<br><br>JOHN C. JANSING,<br><br>Defendant,<br><br>and<br><br>ICE SYSTEMS, INC.<br><br>Nominal Defendant. | C.A. No. 7457-VCP |

**MEMORANDUM OPINION**

Submitted: December 17, 2012
Decided: March 18, 2013

Michael W. McDermott, Esq., David B. Anthony, Esq., BERGER HARRIS, LLC, Wilmington, Delaware; Stephen B. Brauerman, Esq., Vanessa R. Tiradentes, Esq., BAYARD, P.A., Wilmington, Delaware; *Attorneys for Plaintiff Leilani Zutrau.*

Kurt M. Heyman, Esq., Meghan A. Adams, Esq., PROCTOR HEYMAN LLP, Wilmington, Delaware; *Attorneys for Defendant John C. Jansing.*

**PARSONS, Vice Chancellor.**

This action is before me on a motion to dismiss derivative and direct claims related to breaches of fiduciary duty by the defendant, who is the president, sole director, and majority shareholder of a proxy processing company. The defendant allegedly engaged in gross mismanagement, fraud, and other corporate misconduct, which forms the basis of the plaintiff's fiduciary duty claims. In response, the defendant purportedly effectuated a reverse stock split that would cash out the plaintiff and defeat her standing. The plaintiff alleges that the reverse stock split was a breach of the defendant's fiduciary duty to minority shareholders and did not pay "fair value." The plaintiff also avers that the defendant engaged in equitable fraud and negligent misrepresentation when he assured the plaintiff that she would maintain her equity interest in the company. The plaintiff seeks, among other relief, appointment of a receiver to prevent further gross mismanagement and irreparable harm.

The defendant has moved to dismiss aspects of the plaintiff's claims on the basis that they are barred by the doctrines of *res judicata* and collateral estoppel because those claims allegedly were litigated and resolved in a prior New York lawsuit. The defendant also contends that the plaintiff's request for appointment of a receiver fails to state a claim upon which relief can be granted. Finally, the defendant argues that the plaintiff's equitable fraud and negligent misrepresentation claim is barred by the doctrine of laches or, alternatively, should be dismissed as an attempt to "bootstrap" a breach of contract claim into a fraud claim.

Having considered the parties' briefs and heard oral argument on the defendant's motion to dismiss, I conclude that the doctrines of *res judicata* and collateral estoppel do

not apply to the claims and issues in this case. Moreover, I conclude that the defendant is not entitled to dismissal of the plaintiff's request for appointment of a receiver because the well-pled allegations conceivably could support appointment of a receiver. Finally, I decline to consider the defendant's remaining defenses because they were not part of his motion, as originally filed. Accordingly, I deny the defendant's motion to dismiss in its entirety.

## I. BACKGROUND

### A. The Parties

Plaintiff, Leilani Zutrau, is a minority shareholder of Nominal Defendant ICE Systems, Inc. ("ICE" or the "Company"). Zutrau previously served as the Executive Vice President of ICE. ICE is a Delaware S corporation that operates under the name "Proxytrust" and provides proxy processing and related information services to the United States trust banking industry. Defendant John C. Jansing is ICE's President, sole director, and majority shareholder.

### B. Facts[1]

Jansing joined ICE in 1993 and became one of ICE's four shareholders. After the other three shareholders left the Company, Zutrau became an employee of ICE to perform primarily finance-related functions. Shortly thereafter, Zutrau created an

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[1] Unless otherwise noted, the facts recited herein are drawn from the well-pled allegations of Plaintiff's Second Amended and Supplemental Complaint, together with its attached exhibits, and are presumed true for purposes of Jansing's motion to dismiss.

accounting system that allowed ICE to report income and collect receivables. Zutrau also brought ICE into compliance with its contractual and financial obligations to its clients.

In March 2001, Jansing allegedly offered Zutrau an equity stake in ICE if she would commit herself full-time to rehabilitating ICE until it became profitable and could be sold. Two years later, in late 2003, Zutrau asked Jansing about the stock she had been promised. Jansing stated that he needed to reorganize ICE and buy out the three other shareholders first. Later, at Jansing's insistence, Zutrau entered into a "Restricted Stock Agreement" ("RSA") whereby the parties formalized the stock grant to Zutrau.

In May 2004, ICE was reorganized and reincorporated in Delaware, with ICE Systems, Inc., a New York S corporation, being dissolved. Zutrau loaned ICE the funds to buy out the other three shareholders, received a 22% equity stake in ICE, and was named ICE's Treasurer. In December 2004, Zutrau also guaranteed ICE's new five-year lease. In addition, Zutrau made loans to ICE in excess of $400,000 and personally guaranteed ICE's business line of credit.

At the end of 2005, Zutrau advised Jansing that she had breast cancer. She continued her employment at ICE, taking time off as needed for medical appointments and treatment. On June 15, 2007, Zutrau was scheduled to take a two-month leave of absence for medical treatment. She ultimately postponed the leave of absence until June 30 to continue work on an internal audit. On June 19, 2007, Jansing allegedly withdrew $250,000 from ICE's business line of credit, placed the funds in his personal bank account, and had ICE pay the interest on the withdrawal. That same day, Jansing removed Zutrau's name and signatory power from ICE's accounts. The next day, Jansing

terminated Zutrau's employment. On June 22, 2007, Jansing made a downpayment of $250,000 on a house in Southampton, New York. Jansing allegedly also used the corporate credit card for personal expenses, caused ICE to pay his personal taxes, attorneys, and accountants, and falsified corporate books.

Zutrau brought suit in New York (the "New York Action")[2] alleging six individual and four derivative causes of action against Jansing. The New York court granted summary judgment in Jansing's favor on a sex discrimination claim (count one), a claim for breach of fiduciary duty (count four), and a claim for breach of an oral employment contract (count six). The court also dismissed without prejudice Zutrau's four derivative causes of action (counts seven through ten) and denied summary judgment as to the remaining counts, including counts for disability discrimination (count two) and retaliatory discharge (count three).

### C. Procedural History

Zutrau commenced this derivative action on April 25, 2012. On June 11, 2012, Jansing purported to amend ICE's Certificate of Incorporation and effectuate a reverse stock split, which effectively would eliminate Zutrau's ownership interest in ICE. On June 19, 2012, Jansing moved to dismiss Zutrau's complaint for lack of standing to pursue a derivative claim because Zutrau no longer owned ICE stock. On August 3, 2012, Zutrau filed a second amended and supplemental complaint (the "Complaint")

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[2] For the factual and procedural history of the New York Action, see *Zutrau v. Ice Sys., Inc.*, 2011 WL 5137152 (N.Y. Sup. Ct. Oct. 28, 2011).

alleging, among other things, breach of fiduciary duty, failure to pay fair value for Zutrau's cashed-out stock, and equitable fraud. On September 21, 2012, Jansing moved to dismiss the Complaint. I heard argument on that motion on December 17, 2012. This Memorandum Opinion constitutes my ruling on Jansing's motion to dismiss.

### D. Parties' Contentions

Jansing seeks dismissal on four separate grounds. First, he seeks to dismiss Zutrau's alleged "wrongful removal" claim because that claim is barred by the doctrine of *res judicata*. Second, Jansing avers that Zutrau is collaterally estopped from re-litigating matters of fact that were determined adversely to Zutrau in the New York Action. Third, Jansing argues that Zutrau has failed to state a claim for appointment of a receiver. Finally, Jansing argues that Zutrau's misrepresentation and fraud claim is barred by laches or, alternatively, should be dismissed as merely an attempt to "bootstrap" a breach of contract claim into a fraud claim.

Zutrau disputes all of Jansing's contentions and urges the Court to deny his motion to dismiss in its entirety. Specifically, Zutrau contends that the Complaint does not plead a "wrongful removal" claim, and, therefore, is not subject to a defense of *res judicata*. Similarly, Zutrau avers that collateral estoppel is inapplicable here because she has not sought to re-litigate issues of facts previously determined adversely to her in the New York Action. Additionally, Zutrau argues that she adequately has pled a basis for the appointment of a receiver or custodian. Finally, Zutrau asserts that Jansing waived his laches and bootstrapping arguments by not mentioning those grounds in his opening brief.

## II. ANALYSIS

### A. Res Judicata

The doctrine of "*res judicata* exists to provide a definite end to litigation, prevent vexatious litigation, and promote judicial economy."[3] "In essence, the doctrine of *res judicata* serves to prevent a multiplicity of needless litigation of issues by limiting parties to one fair trial of an issue or cause of action which has been raised or should have been raised in a court of competent jurisdiction."[4] *Res judicata* operates to bar a claim where the following five-part test is satisfied:

> (1) [T]he original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.[5]

Jansing alleges that Zutrau is re-litigating her "wrongful dismissal" claim, which previously was dismissed in the New York Action. Specifically, Jansing points to Zutrau's allegation that Jansing "breached his fiduciary duties to the Company by . . .

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3 *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

4 *Taylor v. Desmond*, 1990 WL 18366, at *2 (Del. Super. Jan. 25, 1990), *aff'd*, 582 A.2d 936 (Del. 1990) (TABLE).

5 *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006).

removing [Zutrau] from actively overseeing ICE's finances as Treasurer and Chief Financial Officer of [ICE]."[6]

Zutrau, on the other hand, contends that the Complaint does not plead a "wrongful removal" claim, and that Jansing's construction of Count I, as such, is misguided. In that regard, Count I alleges that Jansing breached his fiduciary duties to ICE and its stockholders by, among other things, failing to ensure financial oversight by removing ICE's Treasurer and failing to replace that function within the Company's management.[7] Count I does not seek to re-litigate the "wrongful removal" claim, but rather alleges that by removing and not replacing Zutrau, Jansing breached his fiduciary duties to the Company. Moreover, Zutrau represented at argument and in her brief that she was not pursuing a wrongful termination claim.[8]

Based on Zutrau's representation and the nature of Count I as a breach of fiduciary duty claim, I find that Jansing has not proven the second element of the doctrine of *res judicata*, *i.e.*, that the original cause of action or the issues decided in it were the same as the case at bar. Accordingly, Zutrau's claim, as clarified, is not barred by *res judicata*.

### B. Collateral Estoppel

"Under Delaware law a judgment in one cause of action is conclusive in a subsequent and different cause of action as to a question of fact actually litigated by the

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6 Compl. ¶ 90.

7 *Id.* ¶¶ 37, 72, 90(ii).

8 Tr. 17; Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss 5–8.

parties and determined in the first action."[9] "Briefly stated, the three elements to a collateral estoppel are: (1) a determination of fact; (2) in a prior action; (3) between the same parties."[10] "Under the doctrine of collateral estoppel, if a court has decided an issue of fact *necessary* to its judgment, that decision precludes relitigation of the issue in a suit on a different cause of action involving a party to the first case."[11]

Jansing avers that Zutrau is collaterally estopped from re-litigating matters of fact that were determined adversely to her in the New York Action. Specifically, Jansing seeks to foreclose Zutrau from re-litigating allegations that Zutrau relied on Jansing's representations and promises that the grant to her of equity in ICE was intended to ensure she would remain with ICE. Zutrau, on the other hand, contends that the New York court's findings were narrow in scope and did not extend to unrelated misrepresentations made by Jansing in 2001 and 2004.

The court in the New York Action examined whether Zutrau could "enforce a purported oral agreement to employ her for as long as she owned stock in ICE."[12] The court ultimately dismissed Zutrau's breach of oral contract claim because "the parol evidence rule[] bars evidence of the prior and contemporaneous oral agreement of the

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9 *E.B.R. Corp. v. PSL Air Lease Corp.*, 313 A.2d 893, 894 (Del. 1973).

10 *Id.* at 895.

11 *See Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, – A.2d –, 2013 WL 911118, at *19 (Del. Ch. Feb. 22, 2013) (citing *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995)).

12 *Zutrau v. Ice Sys., Inc.*, 2011 WL 5137152, at *3 (N.Y. Sup. Ct. Oct. 28, 2011).

parties."[13] Thus, it is not clear that any determinations of fact were made in the New York Action regarding the nature of any representation or "oral agreement to employ [Zutrau] for as long as she owned stock in ICE."[14]

Here, the Complaint alleges that the equity grant was given to Zutrau to ensure that she would remain with the corporation and that Jansing promised her that she would "continue to realize the fruits of her labors if her committed efforts resulted in ICE's success and profitability."[15] Zutrau further alleges that, contrary to Jansing's representations, Jansing fraudulently eradicated Zutrau's equity interest "by purporting to effectuate a Reverse Stock Split."[16] While Zutrau asserts some of the same facts here as she asserted in the New York Action,[17] Count IV makes clear that her claim in this case stems from an allegation that "[Jansing] falsely represented that [Zutrau's] *equity position* would not be eliminated by his controlling hand before such benefits could be realized."[18]

Thus, the claim in the New York Action related to an alleged breach of an oral employment agreement, whereas Count IV relates to a representation by Jansing concerning Zutrau's stock ownership. The issues are distinguishable in that they relate to

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13 *Id.*

14 *Id.* at *3.

15 Compl. ¶ 110.

16 *Id.* ¶¶ 112–14. The reverse stock split occurred on June 11, 2012.

17 *Compare* Br. in Supp. of Def. John C. Jansing's Mot. to Dismiss Pl.'s Second Am. Compl. ("Def.'s Opening Br.") Ex. C ¶¶ 12–13, 25–27, *with* Compl. ¶¶ 13–14, 25.

18 Compl. ¶ 110 (emphasis added).

different representations made by Jansing and different theories of liability. The court in the New York Action concluded that the 2004 RSA, which specifically addressed employment issues, "bars evidence of *the* prior and contemporaneous oral agreement of the parties" (referring to "a purported oral agreement to employ her for as long as she owned stock in ICE").[19] The New York court, therefore, had no need to, and did not, determine any facts pertaining to the nature and content of the oral representations that Zutrau relies upon here to support Count IV for misrepresentation. Collateral estoppel does not apply for that reason[20] and because "[t]he issue is one of law and the two actions involve claims that are substantially unrelated."[21] Because Zutrau's fourth cause of action is unrelated to her breach of contract claim in the New York Action and does not depend on facts necessarily determined in the New York Action, I conclude that collateral estoppel does not preclude Zutrau's claim in this action.

### C. Appointment of a Receiver

I next turn to Jansing's argument that Zutrau has failed to state a claim for appointment of a receiver. When considering a motion to dismiss under Rule 12(b)(6), a court must assume the truthfulness of the well-pled allegations in the complaint and

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19 *Zutrau v. Ice Sys., Inc.*, 2011 WL 5137152, at *3 (N.Y. Sup. Ct. Oct. 28, 2011) (emphasis added).

20 As previously noted, collateral estoppel only applies to decisions regarding issues of fact necessary to the court's holding. *See supra* note 11 and accompanying text.

21 *Stevanov v. O'Connor*, 2009 WL 1059640, at *10 n.51 (Del. Ch. Apr. 21, 2009) (citing Restatement (Second) of Judgments § 28 (1982)).

afford the party opposing the motion "the benefit of all reasonable inferences."[22] If the well-pled allegations of the complaint would entitle the plaintiff to relief under any "reasonably conceivable" set of circumstances, the court must deny the motion to dismiss.[23] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[24]

Without relying upon any statutory basis, a party can state a claim for appointment of a custodian or receiver upon a showing of fraud, gross mismanagement, positive misconduct by corporate officers, breach of trust, or extreme circumstances showing imminent danger of great loss which cannot otherwise be prevented.[25] "It is recognized by everyone that a strong showing must be made before a receiver for a solvent

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22 *Superwire.com, Inc. v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002) (citing *Solomon v. Pathe Commc'ns Corp*., 672 A.2d 35, 38 (Del. 1996)).

23 *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

24 *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

25 *See Carlson v. Hallinan*, 925 A.2d 506, 543 (Del. Ch. 2006), *clarified by* 2006 WL 1510759 (Del. Ch. May 22, 2006); *Vale v. Atl. Coast & Inland Corp.*, 99 A.2d 396, 400 (Del. Ch. 1953). In his opening brief, Jansing suggested that the grounds for the appointment of a receiver are limited to the more typical examples of director deadlock and insolvency. Jansing, however, ignores the well-established precedent regarding fraud and fiduciary misconduct. *See Andreae v. Andreae*, 1992 WL 43924, at *9 (Del. Ch. Mar. 03, 1992) ("In general, there are two bases for the appointment of a custodian: (1) when the stockholder or director deadlock scenarios set forth in 8 *Del. C.* § 226 occur; or (2) when the managers of the corporation are guilty of fraud, gross mismanagement or creating such extreme circumstances that cause the imminent danger of great loss which cannot otherwise be prevented.").

corporation will be appointed."[26] "Mere dissension among corporate stockholders seldom, if ever, justifies the appointment of a receiver for a solvent corporation. The minority's remedy is withdrawal from the corporate enterprise by the sale of its stock."[27]

In *Tansey v. Oil Producing Royalties, Inc.*,[28] this Court considered the appointment of a receiver for a solvent corporation. In that case, the plaintiff accused the defendant of engaging in acts of fraud and mismanagement.[29] "[T]he company ha[d] been largely, if not exclusively, the vehicle for the defendant's personal convenience in handling personal financial affairs."[30] Moreover, the defendant regularly commingled corporate funds. The court ultimately concluded that "the strong evidence necessary for the appointment of a receiver for a solvent corporation exists here in ample measure."[31]

In this case, Zutrau has alleged with specificity some instances of gross mismanagement, fraud, and other corporate misconduct. For example, Zutrau alleges that Jansing allegedly commingled corporate funds by withdrawing $250,000 from ICE's

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26 *Tansey v. Oil Producing Royalties, Inc.*, 133 A.2d 141, 146 (Del. Ch. 1957); *see also Andreae*, 1992 WL 43924, at *9 ("A very strong showing of fraud or gross mismanagement by the Board must be made before this Court will exercise its discretion to appoint a custodian for a solvent corporation.").

27 *Carlson*, 925 A.2d at 543.

28 133 A.2d 141 (Del. Ch. 1957).

29 *Id.* at 146.

30 *Id.*

31 *Id.* at 147.

credit line and placing that money into his personal bank account,[32] a day later placing a deposit of the same amount, $250,000, on a new home,[33] using the corporate credit card for personal expenses,[34] and causing ICE to pay personal taxes, attorneys, and accountants.[35] Zutrau also alleges that Jansing engaged in fraud by falsifying ICE's corporate books to hide the "loan" he procured from ICE's credit line to purchase his home.[36] Finally, Zutrau accuses Jansing of gross mismanagement based on his authorization of substantial overpayments to vendors.[37]

Accepting Plaintiff's allegations as true and affording Zutrau the benefit of all reasonable inferences, her allegations of fraud and gross mismanagement are "sufficient to state a claim that might, at some later stage, lead to the Court's appointing a custodian to the corporation."[38] Therefore, Jansing's motion to dismiss Zutrau's request for appointment of a receiver pursuant to Rule 12(b)(6) is denied.

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32 Compl. ¶ 43.

33 *Id.* ¶ 45.

34 *Id.* ¶¶ 47, 63.

35 *Id.* ¶¶ 49–51; *see also id.* ¶¶ 91, 92.

36 *Id.* ¶ 43.

37 *Id.* ¶¶ 56, 58.

38 *Andreae v. Andreae*, 1992 WL 43924, at *9 (Del. Ch. Mar. 3, 1992).

### D. Defenses Not Encompassed by Jansing's Motion

Jansing argues in his reply brief that Zutrau's equitable fraud and negligent misrepresentation claim might "face serious laches and statute of limitations obstacles."[39] Jansing also avers that Zutrau's misrepresentation-based claim should be barred because (1) it requires this Court to make the unreasonable inference that Jansing knew in 2001 that he was going to cash Zutrau out of her shares, and (2) a breach of contract claim cannot be "bootstrapped" into a fraud claim.[40] As Zutrau points out, however, those defenses were not raised in connection with Jansing's motion to dismiss until his reply brief.[41]

"Under the briefing rules, a party is obliged in its motion and opening brief to set forth all of the grounds, authorities and arguments supporting its motion."[42] "The failure to raise a legal issue in an opening brief generally constitutes a waiver of the ability to raise that issue in connection with a matter under submission to the court."[43] Thus, courts routinely have refused to consider arguments made in reply briefs that go beyond

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39 Def. John C. Jansing's Reply Br. in Supp. of the Mot. to Dismiss Pl.'s Second Am. Compl. 7 & n.4.

40 *Id.* at 7–8.

41 Tr. 13.

42 *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *4 (Del. Ch. Oct. 19, 2006) (citing Ct. Ch. R. 7(b) and 171).

43 *Thor Merritt Square, LLC v. Bayview Malls LLC*, 2010 WL 972776, at *5 (Del. Ch. Mar. 5, 2010).

responding to arguments raised in a preceding answering brief.[44] Accordingly, because Jansing did not attempt to inject the laches and bootstrapping defenses into his motion until his reply brief, I find that Jansing has waived these defenses for purposes of the pending motion to dismiss.[45]

## III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I deny Jansing's motion to dismiss in its entirety.

**IT IS SO ORDERED.**

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[44] *Id.*

[45] Jansing claims that the reason he didn't raise a laches defense was because he "didn't understand this spin that [Zutrau] had on [her] claims at the time of our opening brief." Tr. 24. Even assuming that is true, it does not justify the belated expansion of the motion to dismiss that Jansing seeks.