

## **Delaware Chancery Court Holds that a Reverse Triangular Merger is not an Assignment by Operation of Law**

An important question that must be confronted early in the process of any corporate merger is what consents must be obtained under the target's contracts in order to consummate the transaction. Often the contract provisions are not clear, requiring consent for assignments, including "by operation of law or otherwise". Despite the many mergers that occur involving Delaware corporations, the question of whether a reverse triangular merger<sup>1</sup> constitutes an assignment by operation of law under Delaware law was only recently addressed by the Delaware court in the case of *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*.<sup>2</sup>

The case involved a dispute between Roche Holding Ltd, the pharmaceutical giant, and Meso Scale Diagnostics, LLC and its affiliates ("MSD"). Bioveris Corp. ("Bioveris"), a subsidiary of Roche acquired in 2007 through a reverse triangular merger, had obtained intellectual property licenses from a former affiliate of Bioveris in a 2003 transaction that also included a global written consent from MSD to the transfer of those licenses (the "Global Consent") as MSD retained a springing license in the transferred intellectual property.

MSD argued, among other things,<sup>3</sup> that the reverse triangular merger violated the non-assignment clause of the Global Consent. The Global Consent provided that "neither this agreement nor any of the rights, interests or obligations under this agreement shall be assigned, in whole or in part, by operation of law or otherwise by any of the parties without the prior written consent of the other parties."<sup>4</sup> The defendants sought summary judgment of this count on several grounds. First, they argued it was time barred by the doctrine of laches since the claim was brought allegedly outside the analogous three-year statute of limitations. Second, they argued consent of MDS was not required either because the non-assignment clause in the Global Consent did not apply to the technology in question or because "as a matter of law, a reverse triangular merger cannot be an assignment by operation of law."<sup>5</sup> The court was not persuaded by the defendants' laches argument, finding that the date of the Bioveris closing, which was within three years of the filing of the complaint, was the relevant starting date, and not the date the merger agreement was signed, which was outside the three years. On the second point, the Court rejected defendants' argument that the consent right was intended only to cover an assignment of the rights under the Global Consent, finding the more reasonable interpretation to be the consent right applied to any assignment of the underlying technology. However, the court granted the defendants' summary judgment on the basis that no consent was required as a result of the Bioveris merger, since a reverse triangular merger did not constitute an "assignment by operation of law or otherwise."

The Chancery Court began by explaining that "[g]enerally, mergers do not result in an assignment by operation of law of assets that began as property of the surviving entity and continued to be such after the merger."<sup>6</sup>

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<sup>1</sup> A reverse triangular merger refers to an acquisition whereby the target entity is merged with a subsidiary (usually an entity formed specifically for this purpose) of the acquirer, with the target being the surviving corporation under Delaware Code §259.

<sup>2</sup> *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2013WL 655021 (Del. Ch. Feb. 22, 2013) ("*Meso Scale*").

<sup>3</sup> The complaint included two counts. The plaintiffs prevailed on the second count of the complaint which alleged a breach of the license for marketing and selling products outside the licensed territory. *Id.* at 49-60.

<sup>4</sup> *Id.* at 24.

<sup>5</sup> *Id.* at 20.

<sup>6</sup> *Id.* at 35.

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The Court found reasonable defendants’ position that based on the language of Delaware Code §259(a)<sup>7</sup> and the general view of commentators that a reverse triangular merger does not constitute an assignment by operation of law of the contracts of the surviving corporation, the parties would not have intended the language to apply to this form of merger. The Court distinguished other Delaware cases that involved forward triangular mergers where the target did not survive. The Court rejected the analysis of California courts which hold that any form of change of ownership triggers an assignment by operation of law.<sup>8</sup> The Chancery Court stated that “under Delaware law, stock purchase transactions, by themselves, do not result in an assignment by operation of law”<sup>9</sup> and concluded that “[b]oth stock acquisitions and reverse triangular mergers involve changes in legal ownership, and the law should reflect parallel results.”<sup>10</sup> Finally, the Court did not find any ambiguity created by a proviso in the Global Consent that addressed specifically the change in legal ownership from a limited liability company to a corporation, stating that MSD could have negotiated for a change of control but did not. The Court concluded the non-assignment clause was not intended to cover the reverse triangular merger of Bioveris and granted the defendants’ summary judgment on that count.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene Banks at 212.701.3439 or [hbanks@cahill.com](mailto:hbanks@cahill.com); Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); or John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).

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<sup>7</sup> *Id.* at 35-36. The court quoted the pertinent part of Delaware Code §259(a) as follows:

“When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations *except the one into which the other or others of such constituent corporations have been merged*, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations . . . the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account . . . shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations.” (emphasis added by the court)

<sup>8</sup> See, e.g., *SQL Solutions, Inc. v. Oracle Corp.* 1991 WL 626458 (N. D. Cal. Dec. 18, 1991).

<sup>9</sup> *Meso Scale* at 47.

<sup>10</sup> *Id.* at 48