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## **Delaware Court of Chancery Confirms that a Reverse Triangular Merger is Not an Assignment by Operation of Law.**

In *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, the Delaware Court of Chancery confirmed, for the first time, that a reverse triangular merger was not an assignment by operation of law. The decision has particular significance for determining whether anti-assignment provisions in contracts governed by Delaware law have been triggered.

In prior decisions in this case, the Court had reserved judgment on whether a reverse triangular merger could constitute an assignment by operation of law – a reservation that presented considerable implications for Delaware law governed anti-assignment clauses in the context of M&A transactions, which are often structured using reverse triangular mergers.

In 2007, Roche agreed to acquire BioVeris Corp. for the purpose of obtaining BioVeris's intellectual property rights. The BioVeris intellectual property rights, however, were subject to an agreement pursuant to which BioVeris could not assign "its rights, interests, or obligations . . . by operation of law or otherwise" without the prior consent of plaintiff Meso Scale. The Roche acquisition of BioVeris was structured as a reverse triangular merger in which a Roche subsidiary would merge with and into BioVeris with BioVeris remaining as the surviving corporation.

Plaintiff Meso Scale alleged that a breach of contract occurred when the Roche subsidiary merged with and into BioVeris because the merger constituted an assignment of BioVeris's rights and obligations without Meso Scale's consent. Roche moved for summary judgment, arguing that Roche's acquisition of BioVeris through a reverse triangular merger was not an assignment by operation of law and therefore did not require Meso Scale's consent. The Court granted Roche's motion for summary judgment and found that under Delaware law the entity surviving a merger remains intact and therefore no assignment occurs. The Court stated that "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." This result may differ from a forward or forward triangular merger where the acquired corporation would be the non-surviving entity and there may be a transfer of its rights and obligations to the acquiror or the acquiror's subsidiary, as applicable, by operation of law.

Importantly, the Court's holding that a reverse triangular merger is not an assignment by operation of law is limited to transactions and agreements governed by Delaware law and is not necessarily applicable to transactions and agreements evaluated under the law of other jurisdictions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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