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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| SLINGSHOT TECHNOLOGIES, LLC, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | C.A. No. 2019-0722-NAC |
| | : | |
| ACACIA RESEARCH CORP., ACACIA RESEARCH GROUP, LLC, MONARCH NETWORKING SOLUTIONS LLC, KATHARINE WOLANYK, and TRANSPACIFIC IP GROUP, LTD., | : | **Original Version Filed: November 18, 2022**<br><br>**Public Version Filed: December 14, 2022** |
| | : | |
| Defendants. | : | |

# DEFENDANT TRANSPACIFIC IP GROUP LIMITED'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

HEYMAN ENERIO
GATTUSO & HIRZEL LLP
Patricia L. Enerio (# 3728)
Jamie L. Brown (# 5551)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300
*Attorneys for Defendant Transpacific IP Group Limited*

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## PRELIMINARY STATEMENT

This is a standard shakedown case arising from Plaintiff Slingshot Technologies, LLC's ("Slingshot") failed efforts to acquire a portfolio of patents (the "Orange Portfolio") from Defendant Transpacific IP Group Limited ("Transpacific"), following an unsuccessful attempt to raise purchase funds during its (four-time extended) exclusivity period. When it became apparent that Slingshot could not close on the portfolio, Transpacific moved on and sold its patents to a well-funded patent acquisition firm, as it was entitled to do.

Nothing nefarious occurred. Rather, Slingshot failed to perform before it exclusive option expired. Transpacific proceeded to monetize its assets and shed the maintenance burden it carried for far longer than anticipated, selling the patents to a much larger entity with reliable and immediately-available closing funds.

Instead of accepting that its own failures were the sole reason it failed to close on the portfolio, Slingshot commenced a shakedown campaign, parading a draft complaint and threatening to sue innocent parties in an effort to negotiate a "business solution." When those efforts failed, Slingshot filed this action, relying on bold and suspect allegations rooted in smoke and mirrors to suggest wrongdoing occurred, when it did not. Slingshot's Second Amended Complaint—its third attempt at stating viable claims—artfully weaves together certain facts, coincidences, suspicions and possibilities to reverse-engineer a fictional narrative of "reasonably

conceivable" circumstances that cloaks its nonperformance under the guise of victimization.

In ruling on Transpacific's Motion to Dismiss, this Court determined the ***only*** way for Slingshot to prevail on its sole remaining claim—arising under the implied covenant—would be to "prove that Transpacific knew that Acacia was using knowledge gained from Burford in connection with its acquisition of the Orange Portfolio." (MTD Ruling ¶ 6(h) (Ex. 1; Trans.# 66463595)).[1] Discovery has now borne out the truth: there is absolutely no merit to Slingshot's now-disproven allegations. Despite voluminous discovery, including written discovery, thousands of documents, and eight depositions, Slingshot has not and cannot provide one shred of evidence that "Transpacific knew that Acacia was using knowledge gained from Burford," requiring judgment in Transpacific's favor. (*Id.*). Indeed, Slingshot appears to have abandoned its sole remaining claim against Transpacific, failing to identify any probative information in response to targeted interrogatories and essentially conceding under oath that there's no evidentiary basis demonstrating Transpacific had such knowledge:

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[1] Exhibit citations referenced herein refer to exhibits attached to the Transmittal Affidavit of Jamie L. Brown. Citations to deposition testimony are indicated by the witness' last name, and all deposition transcripts referenced herein are included in Defendants' Joint Appendix ("Jt. Appx."), which contains full copies of referenced deposition transcripts and other key discovery material.

Did Transpacific know that Acacia was using information purportedly gained from Burford in connection with its acquisition of the Orange portfolio?

A I -- I have no way of knowing whether they did or not. I don't know.

(Eggleston 319:22-320:4).

## NATURE AND STAGE OF THE PROCEEDINGS

Slingshot filed its original Verified Complaint for Equitable and Monetary Relief on September 6, 2019, seeking equitable and monetary relief against Defendants Acacia Research Corporation ("ARC"); Acacia Research Group, LLC ("Acacia RG" and together with ARC, the "Acacia Defendants"); Katharine Wolanyk ("Wolanyk") and Transpacific.

On October 30, 2019, all Defendants moved to dismiss the claims against them for failure to state a claim and filed opening briefs. (Trans.# 64370695; 64370788). On December 3, 2019, Slingshot responded to those motions by filing its First Amended Verified Complaint for Equitable and Monetary Relief. (Trans.# 64484380).

All Defendants briefed motions to dismiss again on January 30, 2020. (Trans.# 64533346; 64534490; 64675012; 64675137; 64672867). Slingshot once

again elected to amend its complaint, filing its Second Amended Complaint (the "SAC" or "Second Amended Complaint") on April 9, 2020. (Trans.# 65569774).

The claims against Transpacific remained unchanged through every iteration of Slingshot's pleading, and included two counts for breach of contract (Counts V and VI) and a claim for breach of the implied covenant (Count VII). First, through Count V, Slingshot alleged Transpacific breached a "non-circumvention" provision contained in the Patent Sale Agreement between the parties, which prohibited Transpacific from entering "into any sale transaction regarding the Patents with any funding source introduced to [Transpacific] by [Slingshot] for a period of one year," by selling its Orange Portfolio to Acacia RG following Slingshot's failed exclusivity period. (Ex. 2 § 6.5; *see* SAC ¶ 174). Second, Count VI alleged Transpacific breached the terms of a separate contract between the parties—the Intellectual Property Services Agreement—by sharing Slingshot's purported "confidential information" about its own assets. (SAC ¶¶ 181-187). Finally, Count VII of the Second Amended Complaint backstopped Count V, and asserted an implied covenant claim, alleging that, Section 6.5 of the PSA must be extended by the covenant to prohibit "a transaction with a separate entity … that recently named a key executive from a funding source." (*Id.* ¶ 191).

In May 2020, all Defendants were forced to brief motions to dismiss for the third time. (Trans.# 65665649; 65665957; 65664827). The Court held oral argument on Defendants' motions to dismiss on February 12, 2021. (Trans.# 66339287).

After the hearing, the Court issued four separate orders addressing the motions, and dismissed two defendants (including Wolanyk) and several of Slingshot's claims. (Trans.# 66420753; 60420755; 66463595; 66468377).

Specifically, the Court dismissed all direct breach of contract claims against Transpacific (Counts V and VI), ruling Slingshot's proposed interpretations of the contracts at issue were not reasonably conceivable and were premised on conclusory allegations that failed to state a claim. (Ex. 1 - MTD Ruling ¶¶ 5-8). First, the Court ruled that Transpacific had not breached any contractual obligation in selling its patents to Acacia RG, "a third-party buyer," given that "Acacia was not a funding source introduced to Slingshot's proposed interpretation of the Patent Sale Agreement between the parties was not "reasonably conceivable," and thus failed to state a claim. (*Id.* ¶ 5(d)). The Court further determined Slingshot's allegations based on the Intellectual Property Services Agreement were "conclusory" and not "reasonably conceivable." (*Id.* ¶¶ 7(b); 8(b)-(c)).

The Court permitted Slingshot's implied covenant claim to proceed to discovery, determining that, based on the plaintiff-friendly pleading standards and

the inferences it may draw in Slingshot's favor, it was reasonably ***conceivable*** to infer the possibility of a breach of the implied covenant claim: "all that is required is some reason to ***infer*** that Transpacific ***could have*** known that Acacia was using knowledge gained from Burford," and given that there were publicly-available news articles about Wolanyk's appointment to the Acacia board, "[a]t this ***preliminary stage***, it is reasonable to ***infer*** that Transpacific knew Acacia had obtained information from Burford through Wolanyk." (*Id.* ¶ 6(g)) (emphasis added). But the Court warned Slingshot that "[a]t a later stage of the case, after discovery, Slingshot will not be able to benefit from the plaintiff-friendly pleading standard and the ***inference*** to which it is ***currently*** entitled." (*Id.*) (emphasis added).

The Court provided Slingshot with a roadmap as to the only avenue to a possible remedy from Transpacific: "Slingshot [must] prove that Transpacific knew that Acacia was using knowledge gained from Burford in connection with its acquisition of the Orange Portfolio." (*Id.* ¶ 6(f)). "Absent ***evidence*** that Transpacific ***knew*** that Acacia was using knowledge gained from Burford, Slingshot will not be able to establish a breach of the implied covenant." (*Id.* ¶ 6(h)) (emphasis added).[2] There is no such evidence.

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[2] To be clear, Slingshot never even ***alleged*** that Transpacific ***knew*** Acacia RG—the "third-party purchaser" of its patents—had purportedly used information improperly acquired from Slingshot's purported funding source, Burford. (*See* SAC ¶¶ 188-195). Indeed, Transpacific could not ***know*** that which never occurred: Acacia RG never obtained information from Burford through Ms. Wolanyk and thus,

This is Transpacific's Opening Brief in support of its Motion for Summary Judgment as Count VII—the sole remaining claim against it.

## STATEMENT OF FACTS

### A. The Parties and Non-Parties

Plaintiff Slingshot Technologies LLC is based in Baltimore, Maryland purports to be "in the business of acquiring intellectual property and engaging in patent licensing campaigns." (SAC ¶¶ 16, 32). Slingshot consists of two principals, York Eggleston and Keith Machen—its General Counsel. (Machen 22:16-18).

Transpacific is a Singapore-based "intellectual property strategy and advising company" that "owns valuable intellectual property portfolios" that it manages, markets, licenses and liquidates in order to generate economic return. (SAC ¶¶ 21, 33; Proulx 15:20-16:9). Transpacific has approximately 11 employees, but is primarily operated by its founder and CEO, Guy Proulx, and its Executive Vice President, Brad Close. (Proulx 15:12-13; Proulx 18:5-8; Proulx 20:24-21:4; Close 10:25-11:3; Close 20:21-23). One of the intellectual property portfolios it owned was known as the "Orange Portfolio," which is at issue in this action. (SAC ¶ 2).

Defendant ARC is a publicly-traded Delaware corporation that "is an industry leader in patent licensing and partners with inventors and patent owners to unlock

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never used such information. On these issues, Transpacific incorporates herein and joins in the arguments presented by the Acacia Defendants in their Opening Brief in Support of their Motion for Summary Judgment, filed contemporaneously herewith.

the financial value in their patented inventions." (Ex. 3; *see also* SAC ¶¶ 22, 69). Transpacific first established a business relationship with Acacia many years ago, at a time when Acacia was an active purchaser of patents. (Proulx 82:2-10 ("When was the first time you heard of Acacia Research Corp.? A: … Well, that dates back about 14, 15 years"); Close 119:18-10:15; Close 121:7-18 ("Over the years, I dealt with [Acacia] a lot, yes."); Ex. 4 at Response No. 2)).

After a period of dormant operations, in the second half of 2018, ARC "reviv[ed] Acacia's IP business" and "rebuilt [its] IP team" and touted a turnaround plan following the influx of new strategic investments: "[o]ver the course of the past eight months, we have secured and evaluated all of Acacia's corporate assets, strengthened governance, advanced efforts to streamline the organization, and have reconstituted the Board by appointing directors with relevant experience and qualifications to provide strategic guidance and independent oversight." (Ex. 5; *see also* SAC ¶ 68 (discussing ARC's turnaround and reconstituted board); Proulx 82:18-83:9 ("[Acacia] kind of went silent for a while"); Close 120:16-19 ("Am I correct that Acacia is a fairly big name in the space? A: Yeah. It waxes and wanes; but yes, they are a big name in the space.")).

Defendant Acacia RG is a Texas limited liability company that is an operating subsidiary of ARC. (SAC ¶ 18). Acacia RG is the entity that ultimately purchased

the Orange Portfolio from Transpacific in April 2019, following Slingshot's failed attempts. (*See id.* ¶ 15).

Katharine Wolanyk, a former defendant who was dismissed from this action in March 2021 after prevailing on her motion to dismiss, is an outside, independent director of ARC. (Jt. Appx. Ex. Q ¶ 9). As an outside, independent director of ARC, Wolanyk does not have a managerial or executive function with respect to ARC or its operating subsidiaries. (*Id.* ¶ 8) ("I have no executive or management role at ARC, or its subsidiary… I do not lead, manage, or have any direct involvement in ARC's or ARG's intellectual property practice."). (*See also* Wolanyk 131:6-9 ("I was not involved in the day-to-day management of the business.")). Rather, Wolanyk's primary job is serving as one of the Managing Directors of non-party Burford Capital LLC ("Burford"). (Jt. Appx. Ex. Q ¶ 7). (*See also* Wolanyk 138:23-139:14 ("the ground rules for me joining Acacia's board . . . was that I had a very demanding job at Burford that I had no intention of leaving and that was my priority. And [ARC] agreed that I would be at a high level corporate governance member of the board and I would not be involved in the day-to-day running of the business which is management's job.")). Ms. Wolanyk takes center-stage in this dispute, as Slingshot has alleged its "case is about Wolanyk's gross and egregious breach of [] trust" and her purported revelation of information learned in her role at Burford to

the Acacia Defendants, which Slingshot alleges gave the Acacia Defendants the upper-hand in buying the Orange Portfolio from Transpacific. (SAC ¶ 7).

Non-party Burford is engaged in legal financing, including "funding intellectual property acquisitions and licensing and/or litigation campaigns and consulting services." (SAC ¶ 50). Burford is well known in the intellectual property industry. As a patent broker, Transpacific had a long-standing relationship with Burford, dating back to approximately 2014, and dealt with Wolanyk since the "[l]ate 2017, early 2018" timeframe. (Proulx 72:24-73:15; Close 86:18-87:3 (introduction to Burford "was years ago"); Wolanyk 29:7-17 ("I know that we talked to … Transpacific on a couple of opportunities."); Ex. 4 at Response No. 1). Slingshot contends that Burford was one of its "funding sources" within the meaning of the Patent Sale Agreement.[3] (*Id.* ¶¶ 50, 53).

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[3] Transpacific disputes that Burford was a "funding source" within the meaning of Section 6.5 of the Patent Sale Agreement, primarily because Slingshot failed to "introduce" Burford to Transpacific, and thus, failed to meet the express qualifying language set forth in Section 6.5: "[Transpacific] agrees not to enter into any sale transaction regarding the Patents with any funding source ***introduced to*** [***Transpacific***] ***by*** [***Slingshot***] for a period of one year following the expiration of the Exclusive Option period." (Ex. 2) (emphasis added). First, Transpacific had a long-standing relationship with Burford that pre-dated its relationship with Slingshot, negating the ability for an "introduction." (*See* Ex. 4 at Response No. 1) (setting forth Transpacific's ties to Burford and its principals dating back to 2012)). Second, Slingshot improperly contends that "introduced" equates to a "vague mention," which it does not. Third, there is a disputed fact issue as to whether Slingshot ever even disclosed to Transpacific that they had discussed the Orange Portfolio with Burford (they did not inform Transpacific of their communications with Burford until April 2019, and Transpacific will prevail on this fact issue if this

## B. Transpacific Seeks to Sell the Orange Portfolio

Transpacific acquired the Orange Portfolio in September 2017 from Orange (*f/k/a* France Telecom) with financing provided to it by certain investors, having the intention of quickly re-selling or "flipping" the assets to a known buyer. (Ex. 6; Proulx 26:19-21; 27:15-24; 32:13-16; 32:20–33:4). Indeed, Transpacific had an intended purchaser in mind when it acquired the assets—Bruce Lagerman—but that sale fell through. (Proulx 2:21-24; 28:8-25; Ex. 4 at Response No. 7 (citing to September 11, 2017 Letter of Intent from Lagerman Technology Ventures, Inc.); Ex. 7).

In the first quarter of 2018, Transpacific realized its transaction with Bruce Lagerman would not close and began "[t]o start looking for other people that would buy" the patents and marketing the portfolio. (Proulx 29:1-13). Transpacific's investors expected a prompt return of their capital and pressured Transpacific to sell the portfolio quickly. (Proulx 51:2-6 (investors were putting pressure on Transpacific to close quickly because "[t]he original intent of the investment was to have a return within six months"); Close 37:19-21 ("The primary focus became trying to just sell it as quickly as possible to return money to the investors.")).

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case proceeds to trial). (*See id.* Response No. 16). Nevertheless, this disputed issue of fact does not need to be resolved for purposes of this Motion, which turns on the single issue of whether there is any evidence Transpacific knew Acacia RG used information gained from Burford in its acquisition of the Orange Portfolio (it did not). (Ex. 1 - MTD Ruling ¶ 6(h)).

Indeed, the carrying costs of continuing to own and maintain the Orange Portfolio were burdensome, requiring Transpacific to pay "in the neighborhood of tens of thousands a month … each and every month." (Close 38:19-23). Mr. Close testified that the carry costs of the Orange Portfolio were a "considerable annual expenditure for Transpacific." (Close 39:4-6).

To improve the marketability and maximize interest in the Orange Portfolio, Transpacific created claim charts showing the potential value of the patents and engaged patent litigators at Susman Godfrey L.L.P. to assess taking on enforcement actions on a contingency basis. (Close 51:4-52:24) ("If I could get … Susman Godfrey, who is the gold standard in patent litigation, interested in taking the case on contingency … it would make the portfolio more attractive."). Transpacific and Susman Godfrey worked together to create a wealth of materials highlighting the potential value of the portfolio, essentially assembling a fully-completed due diligence package. (Close 81:13-21 ("We had created claim charts, really good and explicit claim charts. So it's kind of like putting due diligence up on a silver platter. So my expectation was that there wasn't a lot of due diligence for anyone to do. They could look at our work and enjoy the fruits of our labor and just take it from there. We did extensive claim-charting work to short circuit the length of due diligence other parties would need."); Close 129:13-16 (the Orange Portfolio "was a lot more teed up with claim charts and stuff than most of the portfolios they look

at. So it was a better worked up portfolio with good potential infringers."); Proulx 30:4-8 ("[W]e worked up – and we worked it up quite a bit, too. When we bought it from Orange, it was just the patent portfolio. What we do is claim charts, looking at the market. We put a lot of information around it."); Proulx 80:1-15 ("We put together claim charts and what we thought was evidence of use and, you know, a technical read on the claims as it read on certain products out in the market" and the portfolio was "fully charted" with "a bunch of documentation put together on it. It was in our data room.")). Transpacific created a data room with this wealth of materials for potential suitors. (*See e.g.,* Ex. 8 (discussing data room contents)).

### C. Slingshot expresses interest in acquiring the Orange Portfolio and executes the Patent Sale Agreement with Transpacific

Transpacific first discussed the Orange Portfolio with Slingshot in March 2018, and Mr. Proulx provided Slingshot with access to its data room, noting a $2 million asking price and "we would like a quick close if possible." (Ex. 9). But by April 4, 2018, Slingshot informed Transpacific "we must pass at this juncture" given their capacity constraints. (*Id.*). Mr. Proulx understood the concerns and indicated Transpacific would move on, as it "really would like to have this particular portfolio under contract ***in the next 30 days***." (*Id.*) (emphasis added).

Slingshot began reviewing the Orange Patent assets in June 2018 and reconnected with Transpacific, and suggested negotiating "an exclusivity period."

(Ex. 10). In mid-September 2018, Transpacific and Slingshot began negotiating the terms of a Patent Sale Agreement, and ultimately executed a Patent Sale Agreement on September 17, 2018 (the "Patent Sale Agreement" or "PSA"). (Ex. 2; SAC ¶ 34).

The Patent Sale Agreement included an "exclusive option agreement" that granted Slingshot the "sole and exclusive right, but not an obligation" to purchase the Orange Portfolio within forty-five days, or at any time on or prior to **November 1, 2018** (the "Exclusive Option Period"), upon certain terms. (Ex. 2 § 3.1; SAC ¶¶ 34-36). Those terms included a purchase price of $3.3 million. (Ex. 2 § 3.2.1). The PSA also provided that, after expiration of the Exclusive Option Period, the contract "terminated automatically without any further written notice," except certain provisions would survive the termination, including Section 6.5. (*Id.* § 3.1.2). Section 6.5 provides:

> In the event that [Slingshot] does not purchase the Patents from [Transpacific], [Transpacific] agrees not to enter into any sale transaction regarding the Patents with any funding source introduced to [Transpacific] by [Slingshot] for a period of one year following the expiration of the Exclusive Option period.

(*Id.* § 6.5, the "Prohibited Transaction Provision").

Slingshot alleges that during its Exclusive Option Period, it intended to "introduce the Orange Portfolio to potential funding sources and use its experience and know-how to generate interest in the patent portfolio." (SAC ¶ 37). Slingshot made representations that it would proceed "as expeditiously as possible." (Ex. 11).

But Slingshot went radio silent, did not introduce any funding sources to Transpacific during the Exclusive Option Period, and only provided updates when pressed. (Ex. 12 ("York, Keith, We have three weeks left in the exclusivity. ***Haven't heard anything for a while*** so I wanted to see if everything is on track?")) (emphasis added). As of October 12, 2018, Slingshot provided its first update to Transpacific, painting a rosy picture: "we have actually been working quite hard on this opportunity – multiple conversation partners and lawyers …. Early indications are good—actually very good—and we are trying our best to close those commitments promptly." (*Id.*). But Slingshot conceded things were "taking a bit longer than planned" and requested "extending the exclusivity period" for "an additional 45 days." (*Id.*). Accordingly, the parties negotiated the first extension on Slingshot's promise that things looked "very good" with "multiple ***conversation partners***," though no funding sources were introduced to Transpacific or identified by name. (*Id.*) (emphasis added).

### D. Slingshot and Transpacific Amend the Patent Sale Agreement

On October 15, 2018, Transpacific and Slingshot negotiated the extension of the Exclusive Option Period. Because Transpacific was continuing to pay maintenance fees on the portfolio, Mr. Proulx noted his intent to amend the PSA in a way that penalized closing delays: "My intent was that for each week (or portion thereof) you proceed beyond the current lockup period would cost another US$25k with a total of 30 days on the extension." (Ex. 13). Accordingly, on October 16, 2018 (and nearly thirty days into the Exclusive Option Period), the parties amended the PSA and executed the First Amendment to Patent Sale Agreement (the "First Amendment"). (Ex. 14).

The First Amendment extended the Exclusive Option Period to December 3, 2018, but included a graduated fee structure incentivizing Slingshot to close earlier, and compensating Transpacific for the additional time and its work to maintain and service the patents and lost opportunity costs. (*Id.* § 3.2.1). Specifically, Section 3.2.1 of the First Amendment provided that Transpacific would honor the original purchase price of $3.3 million for any closing on or before November 1, 2018, but for roughly each additional week that passed (through December 3, 2018), the purchase price would increase by $25,000. (*Id.*).

## E. Slingshot Attempts To Secure Funding

Following execution of the First Amendment, Slingshot, and its counsel, Kasowitz Benson Torres LLP ("Kasowitz"), began marketing the portfolio to various parties, seeking funding for the Orange Portfolio purchase price. (*See* SAC ¶ 39). As part of their marketing efforts, Kasowitz and Slingshot largely repackaged Transpacific's "silver platter" due diligence and claim charts. Slingshot's corporate designee conceded that the two sets of materials "appear similar . . . The diagrams do indeed look similar" and that portions of the material were "identical completely," and ultimately concluded, "[t]hey do look similar as we discussed, as we reviewed." (Machen 276:12-285:14).

In mid-October, and unbeknownst to Transpacific, Kasowitz began talks with one of Transpacific's business partners—Burford—about the Orange Portfolio on Slingshot's behalf. (*See* SAC ¶ 52; Ex. 15; Wolanyk 36:1-3; 82:8-12; 104:7-10 ("this opportunity being brought by Kasowitz on Slingshot's behalf")). Slingshot—through Mr. Eggleston—directly marketed the Orange Portfolio to other companies, including [redacted] (*See* Ex. 16). In marketing the portfolio, Mr. Eggleston made several aggressive representations about its potential upside, telling investors it could return ***billions*** of dollars. (*See* Exs. 17 (certain attachments omitted), 18, 19) (marketing "annual

revenues up to $100Bn" and possible of return of $450 Billion in 16 years and generate more than $150MM in licensing and recovery fees").

Though Kasowitz led the initial conversations with Burford, Mr. Eggleston did communicate directly with Burford representatives, primarily Emily Hostage. But neither Slingshot principal could identify any correspondence wherein Wolanyk engaged with them, she was generally a "cc" recipient on Burford's communications concerning the Orange Portfolio. (Eggleston 153:1-21 ("How many … items of correspondence did Ms. Wolanyk send to you or your counsel regarding the Orange [P]ortfolio? A. I—I couldn't say. Again, I –in terms of her initiating the e-mails versus her being on the e-mails, I-I-I-I don't recall. Q. Would you be surprised if the answer were—were none; that—that Ms. Wolanyk didn't respond or initiate any communications regarding the …Orange portfolio with Slingshot or its counsel? … A. No. I—you know—you know, no – no surprise. I mean, whatever the facts are, they are. I have no surprise on that."); Machen 80:2-5 ("Did you ever have a direct conversation with Ms. Wolanyk about the [O]range [P]ortfolio? A. No, I think not)). Kasowitz included Wolanyk on communications because she led Burford's IP financing team, but Emily Hostage took the lead for Burford—Wolanyk rarely would "review in this level of detail." (Wolanyk 98:3-14). In fact, Wolanyk's role was very limited. (*See* Wolanyk 196:3-6 (clearing up "another misconception that

there was a bunch of competitive information that I was aware of. As the leader of [Burford's IP] group, I was not in any of the details.")).

Slingshot never told Transpacific about its discussions with Burford and there are no documents suggesting otherwise. (*See* Close 88:20-89:15 ("Did York or Keith ever mention that they were in discussions with Burford about financing? A: No. … That is correct, never."); Proulx 63:22-24 ("Did Slingshot ever tell you that it had spoken to Burford to seek funding? A. No, they did not."); 122:9-20 ("[n]or did I know that they had ever even talked to Burford. They never told us that.")).[4] Slingshot concedes it "is currently not aware of any documents in which Slingshot informs Transpacific that Burford/Wolanyk were among its potential Funding Sources." (Jt. Appx. Ex. L at Response No. 11). And Slingshot essentially concedes it never mentioned Ms. Wolanyk to Transpacific. (*Id.*; Eggleston 288:15-290:2 ("So you didn't have to tell [Transpacific] that Burford [meant] Wolanyk, right? A; I don't believe I did.")).

Nor did Burford tell Transpacific that they had looked at the Orange Portfolio with Kasowitz. (Wolanyk 103:5-104:20 (Burford knew the Orange Portfolio was

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[4] Slingshot's interrogatory responses concerning the date they introduced Burford to Transpacific were evasive, and instead of identifying such a date, provided the invalid response that "Slingshot responds that it entered into its first non-disclosure agreement with Burford on October 18, 2018, at or around which point it and its outside counsel began sharing information with … Burford." (Jt. Appx. Ex. L at Response Nos. 9, 10).

"being brokered by Transpacific" but could not recall "any independent conversations with Transpacific about this portfolio"); Eggleston (287:24-288:13 ("Were you aware Mr. Close was having talks with Burford about other Transpacific deals at that time? A. No … Q. Is it odd that they never mentioned that Burford's also considering the Orange [P]ortfolio? … A. I wasn't [sic] consider it odd. Given the NDA, I don't consider that – that Burford would be advertising just because they know the seller. It wouldn't necessarily be appropriate for them to reach across in the middle of our transaction to say that they are considering financing it without our permission prior, so, no, I don't find that odd.")). In other words, Wolanyk would not have mentioned the Orange Portfolio during her parallel and contemporaneous talks with Mr. Close on other transactions because she adhered to their NDA. Ms. Wolanyk testified that she took Burford's NDA with Slingshot seriously. (Wolanyk 79:6-10 ("I take my obligations as an attorney to abide by those confidentiality obligations. It's important to Burford's business, so I'm thinking of it always in that context.")).[5]

Throughout 2018, Slingshot was purposefully opaque with the status of their (unsuccessful) negotiations with funding counterparties, who were uniformly

[5] Slingshot alleged it "introduced Transpacific to … Burford. Wolanyk … led the discussions for Burford." (SAC ¶ 50). But in response to a pointed interrogatory to identify those discussions, Slingshot could not do so. (Jt. Appx. Ex. L at Response No. 15).

rejecting the terms Slingshot was proposing.[6] Indeed, through the end of 2018, Slingshot had not introduced Transpacific to any funding sources, and spoke only in generalities or assigning its "sources" with categorical descriptions, rather than mentioning them by name. (Proulx 44:8 – 45:11 ("[T]hey never gave us specifics. Didn't know who they were talking to. Didn't know what funders they had, which ones they'd approached. They talked in generalities, always talking a very good game and sounded like they were making great progress … Q. Was there ever a point where Slingshot shared with you the names of the funders it was – A. Not at that time, no. Q. At any time, though? A. It was much later, yes. Q. All right.

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[6] Mr. Proulx testified that when Transpacific pressed Slingshot to reveal the identities of its funding sources, "[t]hey refused to tell us." (Proulx 53:7-19). One can surmise the reasons why Slingshot may not have been transparent with Transpacific and why Slingshot would not want its marketing communications getting back to Transpacific. Slingshot was using Transpacific's own confidential materials concerning the Orange Portfolio, simply rebranded with a Kasowitz stamp. Second, Slingshot's pitch proposed economics starkly different than the $3.3 million price Transpacific put on the Orange Portfolio. In fact, Mr. Eggleston told potential financiers that they should pay multiples of the purchase price Slingshot had secured with Transpacific, claiming the upside was in the range of billions. (*See* Ex. 28 ("We must exercise the option to purchase the portfolio by the end of the year … We need $5MM by December 27th to complete the transaction. Originally, a family office was in for $10MM for 30% (and could not fund by year end). But, given the shortness of time – and if would be from you … I am looking for an investment of ***$5MM for 20%*** … Anticipated returns are projected to exceed 9.5x or approximately $45MM over the anticipated life of the campaign 5 years – with capital back within 24 months…")). (*See also* Exs. 17, 18, 19, 20 (representing to potential investors "conservatively estimated 16 year projected and accumulated revenue base in excess of $450 ***Billion***" in returns, and "the assets are worth significantly more i.e. ***20-30 million***.")) (emphasis added).

What's the earliest date that you recall learning of an actual … funder they were in discussions with? A. Not until January of 2019. And I definitely asked many times before that point. Q. What was the response when you asked? A. They never listed us any funders. They always talked about 'the funder,' the 'family office,' the 'new funder,' the 'different funder.' It was always 'a funder,' but never a named funder."); 52:25 – 53:5 ("At this point all we knew" is what "they would tell us. Investors, funders, investors, funders, separate investors, some to do this, some to do that, always in generalities. This is the best information we got."); 88:2-11 ("typically what you got was 'trust fund,' '$500 million fund out of Boston.' You know, that's the kind of language they would use to describe who they were talking to. Never with real names"); Close 77:15-17 ("There was a lack of communication. I often had to ping them rather than get updates. We never got specifics from them about anything."); 78:10-13 (York spoke in "general terms," and "would say he has an institutional investor, a family funds investor"); 91:5-6 (Slingshot used "vague terms" like "institutional investors or family billionaire funds"); 103:11-13 (Mr. Close was never told any funders in particular in 2018); 109:1-5 (As of the end of 2018, Mr. Close did not know the investors' identities)).

As the December 3, 2018 expiration of the Exclusive Option Period approached (as extended by the First Amendment), Slingshot had no funding lined up and requested a second extension. (Jt. Appx. Ex. L at Response No. 3).

## F. The Parties Agree To A Second Extension

On November 26, 2018, Transpacific and Slingshot entered into an agreement providing a very modest extension to the Exclusive Option Period, moving it only five days, through December 8, 2018. (*Id.*; Ex. 21). In executing this extension, Transpacific required an additional $25,000 payment to cover maintenance fees and noted that the increasing maintenance fees and imminent legal filing requirements created an urgent need to close. (Ex. 22). Transpacific soon told Slingshot that more than $16,000 in fees would be due by months' end. (Ex. 23). On December 4, 2018, Slingshot told Transpacific "We are planning to close Monday," or in two days, despite the fact that there is no evidence that Slingshot had secured funding; rather, Slingshot was stringing Transpacific along. (Ex. 24).

As of December 6, Slingshot failed to close. Despite having received no information on Slingshot's purported transactional partners, Transpacific, acknowledging the difficulties of closing a transaction quickly in the midst of December holidays, engaged with Slingshot in negotiating its ***third*** extension. (*See* Proulx 53:20 ( "who do you think we would go to in December that we could start a project with … Almost everybody goes out on Christmas and holiday break – at least in the U.S. … Who exactly where we going to get in front of in the next two weeks that would even give us the time of day or … schedule a meeting? So at this point, you know, I think Brad and I talked about it. We were like, 'Listen, it's looking

unlikely. They're not giving us very specific information, but let's give them a little more time because no harm for us. At this point we can't kick off going after new investors until after – or new buyers after the new year;" "at this point it was relatively easy for us to say, 'Hey, you can have into January," or even into the third week of January. It wouldn't really matter at that point. . . because they had already tied us up all the way through the end of the year.")).

### G. The Parties Execute the Updated Patent Sale Agreement, Providing A Third Extension To Slingshot's Exclusivity

On December 8, 2018, the parties execute an updated Patent Sale Agreement (the "Updated PSA"), and Transpacific pressed to "clos[e] this out soonest." (Ex. 25; Jt. Appx. Ex. L at Response No. 3). The Updated PSA once again extended the Exclusive Option Period, this time through December 31, 2018, but required an increased purchase price payment of $3,405,000 if the Closing occurred on or before December 24, 2018, or $3,455,000 if there was a "Delayed Closing," on or before December 31, 2018. (Ex. 25, Article 2, § 3.2.1). This extension to the Exclusive Option Period was supported by a $20,000 non-refundable deposit. (*Id.* § 3.2.0). During the month of December, Slingshot frantically pursued funding with several partners, noting "[i]t's on us to get it closed," but never materialized a funding partner. (Ex. 26).

On December 8, 2018, Burford informed Slingshot it was declining the opportunity. (Ex. 27). Ms. Wolanyk testified about some of Burford's reasons, the

most compelling of which was that Burford came to the conclusion [redacted] (Wolanyk 116:8-117:6 [redacted]

Despite Burford's serious concerns about Slingshot's strategy and value representations, Slingshot continued to paint a rosy picture to Transpacific, promising an imminent closing. (Close 101:9-109:16). None of the assured investors or "multiple funding sources" Slingshot represented to be in the running

ever materialized. (*Id.*). Accordingly, Mr. Close pressed Slingshot for more information.

### H. In Early 2019, Transpacific and Slingshot Agree to a Fourth Extension in Exchange for Information about Funders; ARC Appoints Katharine Wolanyk To Its Board

By early 2019, the deadlines of the Updated PSA passed and the Exclusive Option Period expired without Slingshot closing the deal. Slingshot requested another one-month extension, this time through the end of January. (SAC ¶¶ 65-66). Transpacific agreed, but required that it be introduced to at least one imminent funding source. (*See* Ex. 29 ("Transpacific [is] open to the extension to the 31st (and potentially even first week in February) with us having a financial partner with interest. They would like to have a call with you to confirm us working together, your interest and the additional time needed to evaluate the opportunity.")). After Transpacific's call with the potential funding source—[redacted] Mr. Close confirmed Slingshot's "time is extended to the end of January," requesting updates "as much as possible." (Ex. 30).[7]

[7] Transpacific would later learn through discovery that this funding source was not seriously considering funding Slingshot, noting, "I haven't looked at [the Orange Portfolio] since that time except to fulfill your request to essentially ***feign support and interest on a call with Transpacific*** to, as I understood it, push back your closing date." (Ex. 31) (emphasis added). Mr. Eggleston disputes this account, but it highlights the issues of Slingshot's inability to identify interested funders.

Slingshot continued its attempts to reach a deal with a funder, but now concedes it did not obtain such funding until April 8, 2018, which is why it did not close on its desired purchase of the Orange Portfolio. (Jt. Appx. Ex. L at Response Nos. 1, 5)).

In the final days of Slingshot's Exclusive Option Period, ARC appointed two new directors to its Board, including Katharine Wolanyk. (SAC ¶ 83). Transpacific would not learn of this appointment until April 2019. (Close 136:13-17 (did not learn of appointment until April 2019); Proulx 83:22-84:23 (first learned Wolanyk joined ARC's board after Googling "Acacia" while on an early April 2019 call with Slingshot); Proulx 122:9-12 (did not know Wolanyk joined ARC's Board when Transpacific sold the Orange Portfolio to Acacia RG; "Nor did I know that they had ever even talked to Burford. They never told us that… I didn't even know there was a connection")).

## I. The Exclusive Option Period Expires

On January 31, 2019, Slingshot's Exclusive Option Period expired. (SAC ¶¶ 66, 89). Transpacific, having had the assets in a lockup period since September 17, 2018, then expecting to close by November 1, 2018, had reached the end of its rope. Mr. Proulx notified Slingshot there would be no more exclusivity without an "immediate down payment on the deal" of $150,000 and "clear and convincing evidence" of a closing in February:

> From: Guy Proulx <Guy.Proulx@transpacificip.com>
> Sent: Wednesday, January 30, 2019 9:10 PM
> To: York Eggleston IV <yeggleston@nexify.com>; Keith Machen <kmachen@nexify.com>
> Cc: Brad Close <brad.close@transpacificip.com>
> Subject: Pending Transaction - Orange portfolio
> Importance: High
>
> Gentlemen,
>
> First of all thanks for the update email you send yesterday which was greatly appreciated.
>
> Per our agreed extension, TIPG has been hoping that Slingshot would be able to fund the purchase of the Orange portfolio by today – Jan 31st (TW time). As you know we executed the original agreement on Sept 17th with closing set for Nov 1st, and are now at the end of the third extension with no specific closing timeline detailed to TIPG yet. The prior updates we have received from Slingshot have indicated closing was moving along smoothly; however, based on your email we now realize that payment will not be made on time or even at all. The merchant bank letter is just an engagement to attempt to find other funders, and [redacted] has been considering funding the purchase since before the second extension deadline (Dec 31st) with no definitive reply. We don't know anything about the family office, but we believe

> that they have been looking at this since before the second deadline as well.
>
> In the event that Slingshot can convincingly demonstrate now that closing can be done within the next couple of days, then TIPG will continue to work with you to close this deal in a timely fashion. A timely fashion to TIPG at this point means that we expect the payment to be received by early next week (no later than Wed TW time) in accordance with the terms already discussed which is a combined package of US$4M.
>
> In the event such timing is not possible, TIPG would still like to work with Slingshot to close this deal but would essentially need the following 2 items to proceed down this path: 1) clear and convincing evidence of certain full payment by a certain date in the month of February; and 2) an immediate down payment on the deal. Specifically the evidence needs to be a binding commitment letter to fund, that does not contain due diligence and/or fund raising exceptions. Additionally, the down payment needs to be $150k, received by Feb 4th, and will be non-refundable. Note that the down payment represents less than what the four extensions will have cost us in portfolio costs.
>
> If Slingshot does not or cannot provide these two items then please understand that TIPG is still willing to work with you towards a close, but in no manner can we guarantee exclusivity or priority on this deal.
>
> Regards,
> Guy

(Ex. 32). Mr. Proulx was clear that in the absence of "these two items then please understand that [Transpacific] is still willing to work with you towards a close, but in no manner can we guarantee exclusivity or priority on this deal." (*Id.*). Slingshot, who claims to have "invested tremendously in capital and time [and] effort" in the transaction decided to forfeit exclusivity, despite acknowledging there was a competitive "market for this deal and that multiple parties viewed it as a lucrative

opportunity" and the existence of "separate suitors for the portfolio with Transpacific ready to purchase if we do not close" who were "chomping at the bit." (SAC ¶¶ 48, 103; Exs. 33, 34). Rather than protecting its interest in the opportunity, Slingshot informed Transpacific "we will not be submitting a non-refundable $150k by Monday," but begged for a gratuitous fifth extension, without a down payment: "we do hope that we will have until the end of this month to close … with a deadline to close by mid-February. Your consideration … is appreciated." (Ex. 32). Slingshot indicated it "did not believe it was necessary to make an additional payment" to extend its exclusivity because it believed it could close before any new buyer could complete its diligence, despite knowing Transpacific's materials included full claim charts. (Jt. Appx. Ex. J at Response No. 32).

Transpacific's investors were now demanding answers, and in light of Slingshot's refusal to pay for additional exclusivity, Transpacific's interest became "trying to close as quick as possible." (Proulx 96:22-24). (*See also* Proulx 89:9-11 (In early February 2019, "We took a call with whoever would potentially want to buy this portfolio."); 115:20-24 ("I'll state that our sole interest was in getting the portfolio sold. And so whether that was Slingshot, Acacia or whoever that had money to complete a transaction, we were willing to do that.")). Transpacific was "highly motivated" to close, and began looking for a new purchaser. (Close 115:9-11).

Transpacific continued its dialogue with Slingshot and remained open to closing a transaction with them, but viewed Slingshot as a "backup purchaser," and disclosed in full candor that it had "started talks with other groups." (*See* SAC ¶¶ 90-91; Close 140:23-24 (Transpacific viewed Slingshot as a "backup buyer" once more promising buyers with reliable funding emerged); 96:22-24 ("we would still sell to them if they came up with the money"); Proulx 92:18 ("We kept the communication open with Slingshot. I thought there was always a possibility they might pull it off, however slim that might be.")).

### J. Acacia RG Emerges; Bids on Orange Portfolio

As Transpacific returned the Orange Portfolio to the open market, Acacia RG was re-emerging in the IP space. Indeed, ARC was revitalizing its operations following a proxy contest, engaged a new management team and was re-constituting its board with new directors and coming up with new strategic strategies—Wolanyk described ARC at the time as a "blank slate." (Wolanyk 54:10-18).

One of Acacia RG's new hires was Erik Ahroon, who was tasked with business development for the intellectual property division. (Ahroon 10:22-23). As a recent hire, Ahroon hit the ground running in attempting to identify patent acquisition opportunities, "cast[ing] as wide of a net as possible in terms of seeing who in the market might be selling opportunities … I was making several calls, sending emails out, looking on LinkedIn to see who might be involved in the patent

industry." (Ahroon 22:14-23). As part of that process, he reached out to Mr. Close via LinkedIn. (Ahroon 22:4-7; Ex. 35). "I reached out to see what deals might be on the marketplace." (Ahroon 23:13-13). "[M]y goal at the time was to cast a wide net into the IP industry to see who might be selling deals . . . I reached out to, you know, a few hundred people when I restarted the position. [Mr. Close] was just one individual." (Ahroon 23:19-23). Mr. Ahroon also noted it was "a cold outreach." (Ahroon 24:3-4). Mr. Close corroborated this account and testified that Mr. Ahroon's LinkedIn message was a "cold outreach." (Close 118:24-119:12; *see also* Proulx 88:24-89:11 ("I believe how it happened was Erik Ahroon reached out to Brad [Close], not on anything specific, but just a, 'Hey, you know, I've joined Acacia. We're trying to find portfolios or would love to talk.' And you know, Brad I remember called me up and said 'Hey, Acacia reached out to me.' I said, 'Well, I didn't even know they were still buying.' And he said, 'Yeah, well, I think I'm going to take the call.'")). (*See also* Ahroon 100:1-13 (Wolanyk never asked him to investigate the Orange Portfolio)). The two scheduled a call for February 8, 2019. (Ex. 36).

In Mr. Close's first call with Mr. Ahroon, Mr. Ahroon indicated that Acacia was getting back into buying portfolios, and Mr. Close informed him that Transpacific had "a hot one," as Transpacific was under immense pressure from its investors to monetize the assets. (Close 123:24-124:12; Proulx 50:24-51:6). Mr.

Ahroon testified that, during this conversation, "I learned that Transpacific did have a few deals that they were willing to present to Acacia, which we were obviously interested in because at the time we were looking for deals." (Ahroon 50:5-11). It was evident to Mr. Close during this conversation that Mr. Ahroon had no prior knowledge of the Orange Portfolio "until I told him" about it. (Close 124:17-22).

From this initial conversation, Transpacific made clear that time was of the essence. (*See* Close 129:10 ("I probably told him we wanted to sell it very quickly.")). Acacia RG was likeminded, expressing its intention to move quickly close in the first quarter of 2019. (Exs. 37 ("I would like to keep this on the front burner for a Q1 close"); 38 ("Let's get the NDA executed and if possible get the charts and overview ***as soon as possible***.")) (emphasis added). Transpacific viewed a possible deal with Acacia RG attractive because they were well-funded and positioned to close quickly. (Proulx 96:21 ("We talked with our investors … the interest was trying to close as quick as possible. We pressured [Acacia] to try to close quickly."); 98:8-18 (Acacia indicated it was prepared to close quickly, "one of the major reasons" Transpacific wanted to proceed with Acacia" and "we knew they had money in the bank"); 100:3 ("they don't need to raise funds."); Close 120:16-19 (Acacia was a "fairly big name" in the IP world)). Accordingly, ***the same day*** as their initial conversation, Transpacific and Acacia RG executed an NDA, and Acacia RG was admitted to the data room for diligence. (*See* Exs. 8; 38 ("We are quite

interested in the portfolio. Let's get the NDA executed and if possible get the charts and overview as soon as possible."); 39).

As of February 11, 2019, Transpacific and Acacia RG began negotiating the terms of a purchase agreement, with Acacia RG noting a preference for "completion in the next few weeks … Once we agree [on terms] we can then move into the exclusive investigation process (30 days) to wrap up any remaining issues." (Ex. 40). Acacia RG immediately engaged in diligence, noting "[w]e are moving on this deal quickly." (Ex. 41).

During the Transpacific-Acacia RG negotiations, no one ever discussed Ms. Wolanyk and she never participated. (Close 135:18-19 ("Did Erik [Ahroon] ever mention Katharine Wolanyk to you? A. No.")). Mr. Booth, Mr. Ahroon, and Ms. Wolanyk's testimony are also consistent, noting Ms. Wolanyk played no role in Acacia RG's negotiations or acquisition of the Orange Portfolio. (Booth 130:5-14; Ahroon 68:6-8; 100:1-23; Wolanyk 206:22-207:2 (was not "aware that [Acacia RG was] even in the hunt for [the Orange Portfolio] … I had no idea."); 195:10-20 (same); 219:9-11 ("Did you tell anyone at Acacia any information about the Orange portfolio? A. No."); 207:13-15 (she did not "tell Mr. Ahroon to contact Brad Close"); 220:17-21 ("I would like to state unequivocally that I did not share any confidential information, including the fact of the existence of [Slingshot's] transaction with Acacia or anyone regardless of whether they are a competitor or otherwise. That

was not the case.")). Mr. Close did not even know Ms. Wolanyk was on the Board of ARC at the time, nor did Mr. Proulx. (Close 136:13-17; Proulx 83:22-84:23).

By February 28, 2019, Transpacific reached an agreement with Acacia RG on the terms of a purchase agreement (the "Patent Purchase Agreement" or "PPA"), including an exclusive "investigation" period of thirty days. (Ex. 42; *see* SAC ¶ 90). During this time, Acacia RG conducted due diligence, including an assessment of Transpacific's data room contents (*i.e.,* its "silver platter" claim charts), and meeting with Susman Godrey. (Exs. 8; 43; Close 81:13-21).

Transpacific reported this development to Slingshot in real-time, disclosing on February 28, 2019 that it "made the decision to pursue a transaction with another buyer that has indicated a readiness to proceed quickly and has the funds required to close immediately. Their lockup period has commenced today and I believe we will conclude a transaction within a couple of weeks if all goes according to plan. I realize this is a major disappointment … but I must make a business decision today that benefits TIPG and our investors in the best and surest way possible. I'll ask for you[r] understanding as this is how business sometimes goes." (Ex. 44; SAC ¶ 91). Slingshot begged Transpacific "please don't do this," but Transpacific reminded Slingshot "[y]ou have repeatedly refused to make any form of payment to lock up the portfolio." (Ex. 44).

During Acacia RG's 30-day "investigation period," which ran during March 2019, Slingshot continued its efforts to pursue funding in case the Acacia RG deal fell through. And Transpacific continued to confer with Slingshot in parallel as a contingency plan in case Acacia RG elected not to close. (Proulx 114:13-19 ("[M]y general belief is that the deal isn't done until the money's in the bank, so there's always a possibility that a deal doesn't happen. Does that mean I specifically thought that Slingshot had an opportunity? Well, no. There might have been an opportunity. And until they close, they didn't close."); 102:8-12 ("I was very frank and honest in saying that, listen, if the deal falls apart, which they often do in the IP world, the patent world, there would be an opportunity for them. I didn't know if that would happen or not.")).

But Acacia RG's "investigative period" resulted in Acacia RG's approval of the assets and commitment to close. (*See* Exs. 45; 46 at § 1.3). In completing the transaction, "Acacia's Board did not discuss the Orange [] Portfolio … nor was Board approval required for [Acacia RG] to complete its acquisition of the Portfolio." (Jt. Appx. Ex. P at Response No. 13). Pursuant to the PPA, Acacia had three days to wire funds for closing. (Ex. 46 at § 1.6). The wire was received in Singapore on or about April 4, 2019, and the transaction closed with Acacia RG emerging as the owner of the Orange Portfolio. (SAC ¶ 98).[8]

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[8] Though irrelevant, following the Transpacific-Acacia RG closing, Slingshot

## K. Transpacific Introduces Slingshot to Acacia RG

After the Transpacific-Acacia RG deal closed, Slingshot and Transpacific representatives had a post-mortem call. (Proulx 84:4-86:12 (describing call wherein he explained to Slingshot that Acacia re-engaged in patent purchasing after new investment); 119:13-121:13; Machen 40:20-41:20; Eggleston 359:11-361:18). During that call, Mr. Proulx recounted informing Slingshot that Acacia purchased the Orange Portfolio and offering Slingshot an introduction to Acacia RG so it could attempt to negotiate an acquisition from the new owner. (*Id.*; Proulx 83:22-86:12; 120:7-12; 121:5-13). Mr. Close provided an email introduction between Messrs. Eggleston, Machen and Ahroon. (Ex. 47). From there, Slingshot requested that Acacia RG consider a "potential resale/partnering opportunity." (Ex. 48).

## L. Slingshot Attempts A Shakedown

Slingshot initially attempted to negotiate a purchase of all or part of the Orange Portfolio from Acacia RG. (*Id.*). Acacia RG, however, had no interest in immediately selling its newly acquired assets. (Ex. 49). Having learned of

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ultimately did obtain the funds it had been looking for since September 17, 2018 on ***April 8, 2019***, seven months after signing the PSA that contemplated a 45-day exclusivity period (and two months after the expiration of its extended exclusivity) from [redacted] In other words, discovery disproved Slingshot's allegations that it "was ready and prepared to close on its acquisition" in mid-March and that "Transpacific would have sold the portfolio to Slingshot." (*Compare* SAC ¶¶ 95-96; 104 *with* Jt. Appx. Ex. L at Response No. 1).

Wolanyk's position on the ARC Board, Slingshot pivoted into shakedown mode, attempting to exploit the appearance of a conflict of interest and extort a nuisance settlement. Indeed, Slingshot provided a "report" to its [redacted] it was "engaged in discussions with Burford who is conducting an internal investigation to ascertain and assess ***the possibility*** that confidentiality was broken in informing or impacting the decision of the new seller to step in [to] acquire the portfolio from Transpacific prior to us closing.... ***We believe this step is necessary to acquire the assets on acceptable terms.***" (Ex. 50) (emphasis added). Slingshot also tried to extort Acacia RG, threatening that "there are several potential issues around the acquisition of the portfolio from Transpacific that concerns [sic] us greatly and would likewise ***greatly impact Acacia's ability to monetize it,***" and proposed discussing a "***business solution, which would be fair to all parties.***" (Ex. 51) (emphasis added). Slingshot told ARC's CEO, Clifford Press, that it would sue Acacia, but "[i]t is our sincere hope that this will lead to an amicable business resolution which is in everyone's best interest. To that end, and in the spirit of cooperation, we are willing to share a draft copy of the complaint" Slingshot had drafted against the Acacia Defendants, though Slingshot was unwilling to share the draft complaint without executing a non-disclosure agreement containing covenants not to sue Slingshot. (Ex. 52). Slingshot also pressed Burford's deep pockets for a "beneficial and equitable resolution for all involved." (Ex. 53). When neither

engaged given the lack of wrongdoing, Mr. Eggleston pressed harder that they should "discuss[] resolution of those claims to avoid forthcoming challenge to your ownership rights." (Ex. 54). ARC's CEO remained steadfast: "I don't believe there can be any claims against us, and we haven't seen anything from you that supports any claims. I actually know what was involved in our acquisition of the Orange Portfolio, so I am confident in this," noting the truth: "[y]ou were disappointed in not completing the transaction yourself." (Ex. 55). On July 16, 2019, when Slingshot was unable to provide "facts to support [its] claims," but "refuse[d] to back down on filing a lawsuit to assert claims regarding the portfolio," the Acacia Defendants terminated discussions concerning the "business resolution" Slingshot pursued. (Ex. 56). Slingshot filed its meritless lawsuit in this Court on September 6, 2019.

### M. Discovery Disproves Slingshot's Claims

The parties produced tens of thousands of documents during discovery—none of which reveal any misappropriation of Slingshot's purported information from Burford to Acacia. Indeed, Slingshot has been unable to identify any. (*See* Jt. Appx. Ex. L at Response Nos. 21, 22). There are no documents indicating Wolanyk forwarded any email correspondence from her Burford email to anyone at Acacia or documents suggesting she ever referenced Slingshot's purported information.

Rather, the factual record is clear that Acacia RG conducted its own due diligence directly from Transpacific's data room. (Ex. 8).

Second, every witness' testimony aligns, all indicating that Ms. Wolanyk did not misappropriate any information:

- Ms. Wolanyk testified about this most clearly, stating Slingshot had a "misconception" about her involvement on the Orange Portfolio at Burford, testifying, "that's another misconception that there was a bunch of competitive information that I was aware of. As the leader of [Burford's IP] group, I was not in any of the details." (Wolanyk 196:3-6). Having not learned of Slingshot's purported confidential material, she had nothing to share. Furthermore, Ms. Wolanyk testified she never breached the Burford NDA. (Wolanyk 79:6-10). Additionally, Ms. Wolanyk gave clear testimony that she was not involved in Acacia RG's acquisition of the Orange Portfolio: she was not "aware that [Acacia RG was] even in the hunt for [the Orange Portfolio] .... I had no idea." (Wolanyk 206:22-207:2). She noted that, "[a]fter Burford passed on this, given that it is one of literally hundreds of opportunities that we look at year after year, I gave it no thought whatsoever . . . I had no idea that Acacia was interested in this until it was a done deal." (Wolanyk 195:10-17). "[T]he reality was at the time this was all happening, I had no idea any of this was going on." (Wolanyk 195:18-20). "Did you tell anyone at Acacia any information about the Orange portfolio? A. No." (Wolanyk 219:9-11). And she testified she did not "tell Mr. Ahroon to contact Brad Close." (Wolanyk 207:13-15). "I would like to state unequivocally that I did not share any confidential information, including the fact of the existence of [Slingshot's] transaction with Acacia or anyone regardless of whether they are a competitor or otherwise. That was not the case." (Wolanyk 220:17-21). In fact, Wolanyk went a step further, testifying that, had Acacia RG or ARC asked her about the Orange Portfolio, she would have recused herself, but noting she was not asked to discuss the Orange Portfolio. (Wolanyk 157:7-9 ("[H]ad I focused on it, even though Burford

had passed, I would have recused if I had been asked to discuss this, which I was not.")).

- Mr. Ahroon testified that Ms. Wolanyk never told him to contact Transpacific about the Orange Portfolio, that she never disclosed any information about the Orange Portfolio to him, and he did not receive a directive (from the Board, Wolanyk or otherwise) to close on the transaction quickly. (Ahroon 100:1-101:2). Finally, he testified that Ms. Wolanyk never mentioned Transpacific or Brad Close to him. (*Id.*).

- Mr. Booth testified that his only communication with Ms. Wolanyk was a communication "as to the status of the deal closing." (Booth 83:5-11). He also testified that Acacia RG did not contemporaneously know Ms. Wolanyk had access to materials on the Orange Portfolio in her role at Burford, and "[p]robably" learned that information "as a result of this litigation. I don't recall prior to that having any knowledge of that." (Booth 129:21-14). Further, Mr. Booth said the "transaction had been completed by" the time "Acacia learned that Wolanyk" was exposed to such information. (*Id.*).

- Mr. Close testified that Mr. Ahroon never mentioned Ms. Wolanyk in transacting on the Orange Portfolio. (Close 135:18-23).

- Mr. Proulx testified that he did not know Ms. Wolanyk was on the ARC Board at the time Transpacific sold the Orange Portfolio to Acacia RG and "didn't even know there was a connection to anything." (Proulx 122:9-20).

Third, written discovery responses corroborate the testimony. When pressed to identify documents "evidencing that Wolanyk disclosed Slingshot's Trade Secrets to ARC or Acacia RG," Slingshot's silence was deafening:

> **INTERROGATORY NO. 21:**
>
> Identify all Documents and Communications evidencing that Wolanyk disclosed Slingshot's Trade Secrets to ARC or Acacia RG, as alleged

in Paragraph 132 of the Complaint. If You are unable to locate any such Documents or Communications, please affirmatively state so.

**RESPONSE TO INTERROGATORY NO. 21:**

Subject to and without waiving the foregoing General Objections, Slingshot reserves its right to supplement its response to this Interrogatory as discovery, document production, and investigation proceed.

(Jt. Appx. Ex. L).

When asked to identify the specific information that Wolanyk disclosed, Slingshot provided another invalid answer that did not identify any information disclosed, relying only on an invalid syllogism that Wolanyk learned information in her Burford role, and because she served on ARC's Board, ***all*** her potential knowledge "***was necessarily***" in ARC's possession:

**INTERROGATORY NO. 22:**

Describe in detail all information Wolanyk provided to ARC or Acacia RG Concerning the Orange Routers Portfolio, including, but not limited to, the specific information that was conveyed, when it was conveyed, how it was conveyed and the participants to the Communication.

**RESPONSE TO INTERROGATORY NO. 22:**

Slingshot objects to Interrogatory No. 22 on the ground that it seeks a significant amount of information that is currently in the possession, custody, and control of Defendants. Subject to and without waiving the foregoing Specific and General Objections, Slingshot states that Wolanyk was on the Board of Directors of ARC, and therefore ARC (and its direct subsidiary) was necessarily in the possession of the information and knowledge that Wolanyk had relating to the Orange Portfolio. Slingshot reserves its right to supplement its response to this

> Interrogatory as discovery, document production, and investigation proceed.

(*Id.*).

Slingshot has nothing to counter this very clear record. Indeed, its own (suspect) self-serving testimony utterly fails to contradict these factual accounts, and merely speculates that something more ***may have*** happened, though discovery has confirmed that Slingshot's "suspicions" and inferences were ***completely wrong***.[9]

---

[9] When asked if he was aware of ***evidence*** that Acacia RG used Slingshot's confidential information obtained from Burford, Mr. Machen testified "that there were statements and circumstances and we had evidence, the fact that they used that information," though he pointed to none. (Machen 95:5-13). Throughout his deposition, he merely testified about his suspicions and beliefs requiring leaps and inferences, none of which are established by evidence.

## ARGUMENT

### I. STANDARD ON THIS MOTION

Pursuant to Court of Chancery Rule 56, judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Katten Muchin Rosenman LLP v. Sutherland,* 153 A.3d 722, 725 n.18 (Del. 2017).

### II. SLINGSHOT'S IMPLIED COVENANT CLAIM FAILS AS A MATTER OF LAW AND UNDISPUTED FACT

Slingshot's only remaining claim against Transpacific is for a purported breach of the implied covenant—a doctrine of limited scope to be rarely invoked by Delaware courts to read-in terms to a contract that the parties would have, but did not expressly include in their agreement. Here, the Court's Motion to Dismiss Ruling precisely drew the confines of the purported implied term, and discovery confirmed it was not breached.

### A. The Implied Covenant is a Doctrine of Limited Scope

As this Court ruled in resolving Transpacific's Motion to Dismiss, the implied covenant is used only "to infer contract terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated." (Ex. 1 – MTD Ruling ¶ 6(a)) (quoting *Dieckman v. Regency GP,* 155 A.3d 358, 367 (Del. 2017)). In other words, "[t]he implied covenant is a limited gap-filling tool to infer contractual terms to which the parties would have agreed had they anticipated a situation they failed to address; it is not a 'free-floating duty.'" *In re Encore Energy Partners LP Unitholder Litig.*, 2012 WL 3792997, *12 (Del. Ch. Aug. 31, 2012). "[M]ere silence does not a contractual gap make. 'The most obvious reason a term would not appear in the parties' express agreement is that the parties simply rejected that term *ex ante* when they articulated their contractual rights and obligations … Had the parties intended to impose that obligation upon [Transpacific], they would have said so in the [] documents." *PPL Corp. v. Riverstone Holdings LLC,* 2019 WL 5423306, *11 (Del. Ch. Oct. 23, 2019).

The implied covenant is invoked "'only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result . . . It must be clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to [require] the act later complaint of . . . had they thought to negotiate with respect to that matter."

*MidCap Funding X Trust v. Graebel Cos., Inc.,* 2020 WL 2095899, *15 (Del. Ch. Apr. 30, 2020). *See also Allen v. El Paso Pipeline GP Co., L.L.C.,* 113 A.3d 167, 183 (Del. Ch. 2014) ("To supply an implicit term, the court 'looks to the past' and asks 'what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting.'") (internal citations omitted).

The Delaware Supreme Court has routinely ruled that the implied covenant should be "rarely" invoked by courts to "quasi-reform contracts," as it is a "cautious enterprise" to disrupt contract terms negotiated by the parties. *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 442 (Del. 2005) (invoking the implied covenant is "a 'cautious enterprise"' to be used on the "occasional necessity ... to ensure the parties' 'reasonable expectations' are fulfilled."). This is precisely why "Delaware courts rightly employ the implied covenant sparingly . . . lest the parties be struck by judicial error with duties they never voluntarily accepted." *PPL Corp.,* 2019 WL 5423306, *12.

"When presented with an implied covenant claim, a court first must engage in the process of contract construction to determine whether there is a gap that needs to be filled." *Allen* 113 A.3d at 183. "If a contractual gap exists, then the court must determine whether the implied covenant should be used to supply a term to fill the gap," recognizing that "[n]ot all gaps should be filled." *Id.* The covenant should not

be used to "grant parties 'contractual protections that they failed to secure for themselves at the bargaining table'" or to "rewrite [a] contract." *Id.* 113 A.3d at 183-84 (citations omitted). Nor should terms be "implied in a contract" simply because "they are reasonable[,] but because they are necessarily involved in the contractual relationship" such that it is apparent "the parties must have intended them." *Allen,* 113 A.3d at 183.

It is the duty of the plaintiff to "allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." (Ex. 1 - MTD Ruling ¶ 6(a)) (quoting *Fitzgerald v. Cantor,* 1998 WL 842316, *1 (Del. Ch. Nov. 10, 1998). As the Supreme Court said in *Allen,* the implied covenant is not simply "free-wheeling." 113 A.3d at 183. The "plaintiff must allege facts suggesting 'from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of … had they thought to negotiate with respect to that matter." (*Id.*) (quoting *Katz v. Oak Indus. Inc.,* 508 A.2d 873, 880 (Del. Ch. 1986).

### B. The Court Invoked the Covenant in Ruling on Transpacific's Motion to Dismiss

In ruling on Transpacific's Motion to Dismiss, this Court determined that one single and precisely-defined "gap" existed in the Patent Sale Agreement: whether and how the parties would have agreed to limit Transpacific's ability to sell the Orange Portfolio to "indirect competitors," had they more specifically negotiated the matter. (Ex. 1 - MTD Ruling ¶ 6(b)).

The Court looked at the express agreement between the parties, specifically, the Prohibited Transaction Provision, which prevents Transpacific from selling to a "funding source introduced to [Transpacific] by [Slingshot] for a period of one year." (Ex. 2 at § 6.5).

This Court concluded that the Prohibited Transaction Provision addressed direct competition by barring Transpacific from selling the Orange Portfolio in a deal involving an Identified Funding Source." (Ex. 1 - MTD Ruling ¶ 6(b)). The Court then determined that "[t]he parties did not address ***indirect competition*** that could result from Transpacific selling to a third party that received information about the Orange Portfolio from" Slingshot's funding source. (*Id.*). Accordingly, the Court invoked the implied covenant on the inference "that the parties did not anticipate" this possibility. (*Id.*). From the scope of what the parties actually agreed, the Court ruled it was reasonable "to infer that Transpacific would have agreed to restrict its ability to transact with an Identified Funding Source." (*Id.* ¶ 6(d)). But

the Court also determined "[t]he Prohibited Transaction Provision, however, suggests that Transpacific would ***not*** have agreed to restrict its ability to transact with a buyer if Transpacific ***did not know*** that the buyer had received information from" Slingshot's identified funding sources." (*Id.* ¶ 6(e)) (emphasis added). The Court drew this inference because the Patent Sale Agreement language only barred Transpacific from selling the Orange Portfolio to "a funding source Transpacific knew about." (*Id.*). Accordingly, the Court ruled it was "reasonable to infer that Transpacific likewise would have insisted on a knowledge qualifier" for any other indirect limitations. (*Id.*). Thus, "[t]he resulting term would have restricted Transpacific's ability to transact with a buyer that Transpacific ***knew*** had [] received information from an Identified Funding Source." (*Id.*) (emphasis added). Indeed, Vice Chancellor Laster placed great emphasis on the "knowledge qualifier" in the Motion to Dismiss Ruling, having discussed at the motion to dismiss hearing that it would be unreasonable to assume that Transpacific would agree to a term for which it could be "strictly liable for stuff we don't know about" and it would not have agreed to undertake its own "due diligence" obligation to uncover any potential conflicts of interest for Slingshot's funding sources. (Ex. 57 - MTD Transcript at 105; 108-109).

Given the very specific resulting term, this Court provided Slingshot with guidance that, to "obtain a remedy against Transpacific," it must "prove that

Transpacific knew that Acacia was using knowledge gained from Burford in connection with its acquisition of the Orange Portfolio." (Ex. 1 – MTD Ruling ¶ 6(f)). And "[a]bsent evidence that Transpacific knew that Acacia was using knowledge gained from Burford, Slingshot will not be able to establish a breach of the implied covenant." (*Id.* ¶ 6(h)).

### C. Slingshot Cannot Establish a Breach of the Implied Covenant by Transpacific

Now, in this post-discovery phase of the litigation, all "plaintiff-friendly inferences" have vanished, and Slingshot (who bears the burden of proof) must demonstrate an ***evidentiary basis*** demonstrating that Transpacific knew Acacia was using knowledge gained from Burford. This requires Slingshot to establish at least five factual predicates that must ***all*** be true, and Slingshot's failure to establish ***any*** of the following facts are fatal to its implied covenant claim:

1) Burford and Ms. Wolanyk must be an introduced "funding source" within the meaning of Section 6.5 of the Patent Sale Agreement;

2) Burford and Ms. Wolanyk must have received Slingshot's confidential information, and not have relied on Transpacific's own work product;

3) Burford's agent, Ms. Wolanyk, then misappropriated the confidential information obtained from Slingshot and provided it to Acacia;

4) Acacia must have used that information in acquiring the Orange Portfolio; ***and***

5) Transpacific knew about Acacia's use of the purportedly misappropriated information.

While Transpacific can disprove each of these five factual predicates, for purposes of summary judgment, and to avoid any unnecessary purported factual disputes, Transpacific focuses on the last three factual predicates as to which there is no genuine issue of material fact.[10] There is absolutely no evidence (disputed or otherwise) that:

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[10] Slingshot and Transpacific dispute whether Slingshot ever actually informed Transpacific it had spoken with Burford about the Orange Portfolio (it did not). Mr. Eggleston testified that he mentioned Burford to Transpacific at a restaurant in Bethesda, Maryland on an unknown date. (Eggleston 267:13-271:21). None of Slingshot's "testimony" is corroborated by ***any*** document, is internally inconsistent, and is directly contradicted by the testimony of Transpacific witnesses, whose testimony ***is*** corroborated elsewhere in the record. (*Compare* Proulx 63:22-24 ("Did Slingshot ever tell you that it had spoken to Burford to seek funding. A. No, they did not.") *with* Machen 287:21-288:8 (claiming that Mr. Eggleston identified Burford as a funding source on a ***phone call*** with Transpacific, specifically mentioning Wolanyk by name) *with* Eggleston 288:15-289:231 270:23-25 (claiming that he identified Burford as a funding source in-person at a dinner in Maryland, but ***never*** mentioning Wolanyk specifically, nor with any detail)). Further, "Slingshot's" purported discussions with Burford were actually conducted primarily through its counsel—Kasowitz—who had a more direct relationship with Burford through other deals. (Wolanyk 36:1-3; 82:8-12; 104:7-10). The record is clear—save for the suspect testimony of Slingshot's principals who verified the Second Amended Complaint—that Transpacific was wholly unaware Slingshot had ever approached Burford with respect to the Orange Portfolio. The record is even more clear that Slingshot never mentioned Katharine Wolanyk's involvement to Transpacific. (Eggleston 288:15-289:23). Further, the record is clear that Slingshot did not have its own proprietary information, and simply repackaged Transpacific's existing marketing materials as its own, passing them on to Burford. (*See* Acacia Defendants' Opening Brief at Section II(A)(2)(B); Machen 276:12-285:14).

- Ms. Wolanyk misappropriated any information she obtained from Slingshot through her role at Burford by providing it to Acacia;

- Acacia, having not received any confidential information from Ms. Wolanyk, purportedly used that confidential information that Slingshot provided to Burford; ***or***

- Transpacific knew Acacia used information acquired from Ms. Wolanyk through her role at Burford.

Because Ms. Wolanyk never misappropriated any information,[11] Acacia did not gain and could not have used any such information, and accordingly, there was nothing for Transpacific to know, and there is no evidence supporting any such knowledge.

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[11] Slingshot's narrative—that Wolanyk divulged information she learned in her role at Burford to ARC to give it an advantage in acquiring the Orange Portfolio—is also illogical and nonsensical. The record is clear that Burford made a hard pass on the Orange Portfolio, rejecting the investment opportunity on "the merits," considering it a bad deal. (Wolanyk 196:12-13 (Burford "thought it was not a good investment and we passed. I gave it no more thought.")).

### 1. Ms. Wolanyk Never Misappropriated Slingshot's Information

The record is clear: Ms. Wolanyk never misappropriated information she learned in her role as a Managing Director of Burford by sharing that information with any of the Acacia Defendants' agents or directing them to pursue the acquisition. As set forth in Statement of Facts, Section M, all of the witnesses' testimony aligned, indicating Ms. Wolanyk did not transmit any information she learned at Burford to anyone at Acacia RG, and ***zero*** of the tens of thousands of documents produced in this case demonstrated any actual transmission of information or a forensic trail of wrongdoing.

### 2. Acacia Never Obtained Nor Used Slingshot's Confidential Information

In the absence of any evidence that Ms. Wolanyk actually transmitted any information, Acacia RG could not ***actually know*** the information Wolanyk supposedly learned at Burford, and thus could not ***use*** information, let alone in a way that would tip off Transpacific.[12] Slingshot's attempt to counter this factual

[12] Mr. Machen testified he "believed" Erik Ahroon ***may have*** been the agent that "used the information from Katharine Wolanyk" but didn't "know how he learned it." (Machen 293:4-24). He conceded he could not point to any document corroborating his belief. (Machen 294:1-6; 298:6-8 ("How did Acacia receive [Slingshot's] information when [Ms. Wolanyk] joined the Board? A: I don't know that. I don't know.")). Mr. Ahroon's testimony refutes this.

reality is to rely on a flawed legal theory that Wolanyk's knowledge can be imputed to both Acacia entities. (*See* Jt. Appx. Ex. L at Responses Nos. 19, 21, 22 (arguing "Wolanyk was on the Board of Directors of ARC, and therefore ARC (and its direct subsidiary) was ***necessarily in possession*** of the information and knowledge that Wolanyk had")). This position has been squarely rejected by Delaware law.

**a. Wolanyk's Knowledge Gained as Burford's Managing Director Is Not Imputed to Acacia RG Or Its Agents**

Because Slingshot has utterly failed in unearthing evidence supporting its allegations of Wolanyk's misappropriation, Slingshot attempts to invoke the legal theory of ***imputed*** knowledge to suggest that anything Wolanyk knew should be deemed to apply "Acacia-wide," regardless of whether she ever communicated, shared or transferred any information. This position has been squarely rejected by Delaware (and other) courts: "[g]enerally, the fact that two or more corporations have officers or agents in common ***will not*** of itself ***impute the knowledge gained by such officers while acting for one corporation to another corporation in which they also hold office***." *NAMA Holdings, LLC v. Related WMC LLC,* 2014 WL 6436647, *27 (Del. Ch. Nov. 17, 2014) (emphasis added). *See also* 18B Am. Jur.2d Corporations § 1425 (same; and "As a general rule, when an officer or agent of one corporation with particular knowledge later acts on behalf of another corporation, his or her personal knowledge is not imputed to the second entity."); *Ripa v. Owens-Corning Fiberglas Corp.,* 660 A.2d 521, 537 (N.J. Super. 1995) (personal

knowledge of an officer of one corporation later acting on behalf of another corporation is not charged to second corporation); *City of Paterson v. Fargo Realty Inc.*, 415 A.2d 1210, 1217 (N.J. Super. 1980) (noting "well-established rule" "that when knowledge is acquired by the officers . . . of one corporation while acting on behalf of another corporation, this knowledge will not be imputed to the former corporation.").

### 3. In The Absence Of Misappropriated Information, There Was Nothing For Transpacific To "Know"

Slingshot has never once even ***alleged*** that Transpacific ***knew*** Acacia was using Slingshot's confidential information gained from Burford. Slingshot presumably omitted any such allegations in its Second Amended Complaint because Slingshot knows there is no truth to such a proposition. Slingshot—through its Rule 30(b)(6) designee, York Eggleston—testified that it has no insight into (and therefore does not and cannot make contentions concerning) Transpacific's knowledge as to whether Acacia was using misappropriated information in its acquisition efforts:

Did Transpacific know that Acacia was using information purportedly gained from Burford in connection with its acquisition of the Orange portfolio?

A I -- I have no way of knowing whether they did or not. I don't know.

(Eggleston 319:22-320:4). Mr. Machen—Slingshot's General Counsel—struggled to concede he had no personal knowledge concerning Transpacific's knowledge about the information Acacia RG was using in its acquisition, though he could not point to any ***evidence***. His testimony only regurgitated Slingshot's canned syllogism from its interrogatory responses, which at best describe three ***alleged*** factual circumstances that ***could*** support a ***possibility*** that Transpacific ***could have*** made an ***inference*** about Acacia RG: "[1] Given that Transpacific knew that Burford was a funding source and [2] we had given [Burford] confidential information and [3] they knew that Wolanyk was on the Acacia Board, ***I believe [Transpacific] knew***." (Machen 294:12-22) (emphasis added).[13] When asked ***how*** Acacia RG acquired the information from Ms. Wolanyk, Mr. Machen conceded that one cannot ***know*** information that is never conveyed or evidenced: "How did Acacia receive that information when she joined the Board? A. I don't know that. I don't know." (Machen 298:6-10). Mr. Machen further testified "I ***believe*** [Transpacific] knew that [Wolanyk] ***would*** have ***received*** our confidential information" but conceded "I don't know Transpacific – I mean, ***how*** they would know" that ***Acacia RG*** received information from Wolanyk. (Machen 298:6-299:25) (emphasis added). Mr.

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[13] As discussed *supra,* Transpacific did not know Burford was a funding source, did not Burford received materials on the Orange Portfolio from Kasowitz, and did not contemporaneously know Ms. Wolanyk was on the ARC Board. But neither of these factual disputes must be resolved for purposes of this motion.

Machen's testimony continued to unabashedly rely on ***if/then*** hypothetical syllogisms, inferences and *ipse dixit* and demonstrated a complete dearth of evidentiary bases for his beliefs: "Well, ***if*** [Ms. Wolanyk] had our confidential information and she's on the Board of Acacia, ***then*** they've received our confidential information." (Machen 298:20-23).

But there are no documents whatsoever suggesting Transpacific knew the unknowable. In fact, Transpacific asked Slingshot to identify evidence demonstrating that Transpacific knew Acacia RG was using information gained from Burford in its acquisition of the Orange Portfolio, and Slingshot provided ***no response whatsoever***:

> **INTERROGATORY NO. 25:**
>
> Identify all Documents and Communications or other evidence demonstrating that Transpacific knew Acacia RG was using knowledge gained from Burford in connection with Acacia RG's acquisition of the Orange Routers Patent Portfolio.
>
> **RESPONSE TO INTERROGATORY NO. 25:**
>
> Slingshot objects to Interrogatory No. 25 of the ground that it is duplicative of previous Interrogatories and seeks information that is currently in the possession, custody, and control of Transpacific.

(Jt. Appx. Ex. L).

On the contrary, the record establishes what Transpacific ***did*** know (and is replete with documents corroborating witness testimony): Acacia RG, through Mr. Ahroon came to it through "cold outreach," accessed its data room, conducted diligence with Susman Godfrey, determined it should close on the deal, and then wired funds. (Exs. 8; 35; Close 118:24-119:12; Ahroon 24:3-4; Proulx 88:24-89:11).

Slingshot's entire case against Transpacific rests on its invalid syllogism concerning Wolanyk's appointment to the ARC Board and the legal import of her knowledge and roles – not the "***evidence*** that Transpacific ***knew*** that Acacia was using knowledge gained from Burford" this Court told Slingshot was required "to establish a breach of the implied covenant." (MTD Ruling ¶ 6(h)) (emphasis added). Accordingly, Slingshot's implied covenant claim against Transpacific cannot stand.

## CONCLUSION

For the foregoing reasons, summary judgment should be granted in Transpacific's favor as to Count VII of Slingshot's Second Amended Complaint.

HEYMAN ENERIO
GATTUSO & HIRZEL LLP

*/s/ Jamie L. Brown*
Patricia L. Enerio (# 3728)
Jamie L. Brown (# 5551)
300 Delaware Avenue, Suite 200
Wilmington, DE 19801
(302) 472-7300
WORDS: 13,712
*Attorneys for Defendant*
*Transpacific IP Group Limited*

Dated: November 18, 2022

## CERTIFICATE OF SERVICE

I, Patricia L. Enerio, hereby certify that on December 14, 2022, copies of the public version of Defendant Transpacific IP Group Limited's Opening Brief in Support of its Motion for Summary Judgment were served electronically upon the following counsel:

John G. Harris, Esquire
BERGER HARRIS LLP
1105 N. Market Street, 11th Floor
Wilmington, DE 19801

Michael A. Weidinger, Esquire
PINCKNEY, WEIDINGER, URBAN & JOYCE LLC
3711 Kennett Pike, Suite 210
Greenville, DE 19807

*/s/Patricia L. Enerio*
Patricia L. Enerio (# 3728)