

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINSVILLE DIVISION**

THOMAS R. WILLIAMSON, III,

Appellant,

vs.

CASE NO. 1:07-CV-00016-MP-AK

MOLTECH CORPORATION, n/k/a
SION POWER CORPORATION

Appellee

**BRIEF OF THE APPELLANT
THOMAS R. WILLIAMSON, III**

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TABLE OF CONTENTS

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION.....1

STATEMENT OF THE ISSUES PRESENTED1

APPLICABLE STANDARD OF APPELLATE REVIEW.....1

STATEMENT OF THE CASE2

Nature of the Case.....2

Course of the Bankruptcy Proceedings.....3

Disposition in the Court Below.....5

Statement of Facts.....9

ARGUMENT.....11

I. The Bankruptcy Court Committed Reversible Error When it Failed to Honor the Res Judicata Effect of the Summary Judgment Denial by the Supreme Court of New York.....11

II. The Bankruptcy Court Erred When it Granted Summary Judgment in Favor of Moltech Because: 1) Restricted Stock Options Have Calculable Value and Therefore Can Give Rise to a Damage Claim; and 2) Williamson Submitted Sufficient Evidence Into the Record to Not Only Establish Damages With Reasonably Certainty but also Sufficient Evidence to Create a Genuine Issue of Material Fact as to the Value Of the Stock Options and Consequently Williamson’s Damages Thereby Precluding Summary Judgment.14

A. The Bankruptcy Court Erred When It Held That Restricted Stock Options Have No Value.....17

B. The Bankruptcy Court Erred When It Held That Williamson Failed to Establish a Claim For Damages With Any Reasonable Certainty.....22

III. The Bankruptcy Court Erred In Finding That There Were No Genuine Issues Of Material Fact That Precluded Summary Judgment.....27

A. Material Facts Concerning Valuation.....	28
B. Williamson Disputes Other Factual Findings by the Bankruptcy Court.....	32
IV. Conclusion.....	32
CERTIFICATE OF SERVICE.....	34

TABLE OF AUTHORITIES

CASES

Boyce v. Soundview Technology Group, Inc., 2004 WL 2334081, 3 (S.D.N.Y. 2004) <i>vacated and remanded as to damages by Boyce v. Soundview Technology Group, Inc.</i> , 464 F.3d 376 (2 nd Cir. 2006).....	8, 9, 15, 23, 24, 25
Boyce v. Soundview Technology Group, Inc., 464 F.3d 376 (2 nd Cir. 2006).....	8, 15, 23, 24, 25, 26, 27, 29, 31
Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).....	2, 28
<u>District of Columbia Court of Appeals v. Feldman</u> , 460 U.S. 462 (1983).....	13
Everett v. Everett, 195 Mich. App. 50, 489 N.W. 2d 111,113 (1992).....	19
Hermanowski v. Acton Corp., 580 F. Supp. 140, 146 (E.D.N.Y. 1983), <i>aff'd in relevant part</i> , 729 F.2d 921 (2d Cir. 1984).....	20
Hollinger v. International Paper Company, 2005 WL 2840530, *3 (N.D. Fla. Oct. 27, 2005).....	27
In re Dicks, 306 B.R. 700, 703 (Bankr. M.D. Fla. 2004).....	14
In re Keene, 135 B.R. 162 (Bankr. S.D. Fla. 1991).....	14
In re Optical Technologies, 246 F.3d 1332, 1334 (11 th Cir. 2001).....	2
Lucente v. International Business Machines, Corporation, 310 F.3d 243, 262 (2 nd Cir. 2002).....	21, 22, 30
Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 196 (2 nd Cir. 2003).....	14
Phillips v. United States of America (<i>In re Phillips</i>), 197 B.R. 363, 365 (M.D. Fla. 1996).....	1
Potts v. Budget Rent A Car System, Inc., 2005 WL 3057175, *1 (N.D. Fla. Nov. 14, 2005).....	27
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).....	13
Rosen v. Bezner, 996 F.2d 1527, 1530 n. 2 (3 rd Cir. 1993).....	2

Schultz v. Commodity Futures Trading Com’n, 716 F. 2d 136, 139, 141 (2 nd Cir. 1983).....	20
Scully v. U.S. Wats, Inc., 238 F.3d 497 (3 rd Cir. 2001).....	18, 19, 20, 21, 22, 30
Siegel v. Laric Entertainment Corp., 307 A.D. 2d 861, 863 (N.Y. 1 st App. Div.).....	14, 15
United States v. Cartwright, 411 U.S. 546, 551, 93 S. Ct. 1713, 36 L.Ed.2d 528 (1973).....	15
Williamson v. Moltech Corp., 690 N.Y.S. 2d 628, 261 A.D.2d 538 (N.Y. App.Div.1999).....	6, 11
Winters v. Lavine, 574 F.2d 46, 55-56 (2 nd Cir. 1978).....	12, 13

STATUTES

17 C.F.R. § 230.144(c)(3)(2007).....	24
28 U.S.C. § 157	1
28 U.S.C. § 158(a)(1)	1
28 U.S.C. § 1738.....	14

TREATISES

Les Barenbaum, Ph.D. & Walt Schubert Ph.D., Measuring the Value of Executive Stock Options. 12 No. 12 Fair Share 3,3 (December 1992).....	19
Black’s Law Dictionary, 1305 (7 th ed. 1997)	12

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Under 28 U.S.C. § 158(a)(1), “[t]he district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.”

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Bankruptcy Court erred when it granted Moltech’s Motion for Summary Judgment.
2. Whether the Bankruptcy Court erred as matter of law when it held that Williamson was not entitled to recover damages on his breach of contract claim.
3. Whether the Bankruptcy Court erred when it found that Williamson failed to produce any evidence of damages.
4. Whether the Bankruptcy Court’s finding that Williamson previously asserted solely a claim for specific performance and not damages was clearly erroneous.

APPLICABLE STANDARD OF APPELLATE REVIEW

The United States District Court for the Northern District of Florida (hereafter the “District Court”) acts as an appellate court in reviewing decisions of the United States Bankruptcy Court for the Northern District of Florida (hereafter the “Bankruptcy Court”). Phillips v. United States of America (*In re Phillips*), 197 B.R. 363, 365 (M.D. Fla. 1996).

In the Eleventh Circuit, district courts review a bankruptcy court's grant of summary judgment *de novo*. In re Optical Technologies, 246 F.3d 1332, 1334 (11th Cir. 2001). Accordingly, the District Court must determine: 1) whether the Bankruptcy Court was correct in finding that there were no genuine issues of material fact that preclude summary judgment; and, if so, 2) that the Movant, Moltech Corporation (n/k/a Sion Power Corporation)(hereafter "Moltech") was entitled to summary judgment as a matter of law. Id at 1335; *see also* Rosen v. Bezner, 996 F.2d 1527, 1530 n. 2 (3rd Cir. 1993)("because summary judgment may only be granted where there is no genuine issue of material fact, any purported 'factual findings' cannot be 'factual findings' as to disputed issues of fact, but rather are conclusions as a matter of law that no genuine issue of material fact exists"). Moltech, as the party seeking summary judgment, bears the initial burden of informing the District Court of the basis of its motion and identifying those materials that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The District Court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to Williamson and determine whether that evidence could reasonably sustain a jury verdict. *See* Celotex, 477 U.S. at 322-23.

STATEMENT OF THE CASE

Nature of the Case

Williamson brings an appeal of a summary judgment granted in favor of Moltech on its objection to Williamson's timely filed proof of claim (Claim No. 36) in Moltech's confirmed, Chapter 11 Case (Case No. 01-00512). Through Claim No. 36, Williamson

asserted an unsecured claim in the amount of \$3,000,000.00 arising from Moltech's breach of an incentive stock option agreement ("ISO Agreement"). Moltech filed an objection to Claim No. 36 and subsequently moved for summary judgment. After hearing oral arguments and considering supporting and contravening affidavits and memoranda of law filed by the parties, the Bankruptcy Court granted summary judgment in favor of Moltech on the grounds that Williamson failed to produce any evidence of damages suffered as a result of Moltech's alleged breach of the ISO Agreement.

Course of the Bankruptcy Proceedings

Moltech filed a petition for relief under Chapter 11 of the United States Bankruptcy Code on August 9, 2001. Williamson filed his proof of claim on November 20, 2002 (Claim No. 36) asserting an unsecured claim in the amount of \$3,000,000.00, arising from Moltech's breach of an ISO Agreement as a result of Williamson's wrongful termination by Moltech in 1995. (Docket No. 8, Part 12).¹ On or about November 9, 2004, after the confirmation of Moltech Corporation's Chapter 11 Plan, Moltech filed its objection to Claim No. 36 (the "Objection"). (Docket No. 8, Part 10). Through the Objection, Moltech claimed Williamson was terminated for cause and that his stock option rights under the ISO Agreement terminated upon his termination for cause.

On August 15, 2006, Moltech moved for summary judgment (hereafter the "Motion"). (Docket No. 6, Part 14). In the Motion, Moltech argued that even if it breached the ISO Agreement as a result of wrongfully terminating Williamson,

¹ Shortly after his termination, Williamson filed a multi-count suit against Moltech before the Supreme Court of the State of New York for Erie County (subsequently transferred to Suffolk County) seeking, among other things, damages for his wrongful termination and breach of the ISO Agreement. (Docket No. 6, Part 8-9). This action was stayed upon Moltech's filing for bankruptcy relief in August 2001.

Williamson suffered no actual damages and therefore is not entitled to an unsecured claim against the estate. Id. Moltech claimed that the underlying value of Williamson's stock options, if he had been allowed to purchase them, were valueless or of *de minimis* value because of their restrictive nature and the subsequent cancellation through the confirmed Chapter 11 Plan. Id. Finally, Moltech claimed Williamson failed to allege any facts in support of his \$3,000,000.00 damage claim. Id. On August 31, 2006, Williamson filed his brief reply arguing that: 1) his claim for breach of the ISO Agreement is for monetary damages for breach of contract; and 2) any damages arising from Moltech's breach of the ISO Agreement, under applicable New York law, are measured as of the date of the breach and not six years later on the petition date or ten years later on the confirmation date as argued by Moltech (the "Reply"). (Docket No. 6, Part 4). On September 6, 2006 the day before the hearing on its Motion, Moltech filed the affidavit of Mr. Herbert Rosenberg, corporate secretary and general Council of Moltech, in response to Williamson's Reply stating that Moltech's stock on the date of breach was restricted, had no ready market and therefore had no value. (Docket No. 6, Part 3).

At the September 7, 2006 hearing, the Bankruptcy Court reserved ruling and allowed Williamson to file a contravening affidavit and for the parties to file memoranda of law in support of their respective positions. (Bankruptcy Docket No. 527). On October 2, 2006, Williamson filed his affidavit thereby submitting facts into evidence directly disputing Moltech's assertion that the stock options were valueless on the date of breach and presenting various different possible valuations for the stock options based on

Moltech's financial statements from the relevant time period, pre-breach sales of stock to institutional and private investors, and various valuation reports prepared by third parties on behalf of Moltech. (Docket No. 3, Parts 1-10). In addition, Williamson filed a supporting memorandum of law. (Docket No. 2, Part 9). Moltech simultaneously filed its supporting memorandum of law. (Docket No. 4, Part 1). On December 15, 2006, the Bankruptcy Court entered its Memorandum Opinion on the Debtor's Motion for Summary Judgment on the Debtor's Objection to Claim Number 36 and its Order Granting Motion for Summary Judgment (hereafter collectively referred to as the "Judgment"). (Docket No. 2, Parts 8, 2). On December 22, 2006, Williamson filed his Notice of Appeal thereby commencing this appeal. (Docket No. 2, Part 1).

Disposition in the Court Below

The Bankruptcy Court, after considering the affidavits, the record before it, and drawing all inferences in favor of Williamson, held "that the undisputed facts demonstrate that [Moltech] is entitled to judgment as a matter of law." (Docket No. 2, Part 8, Judgment at 1). Particularly, the Bankruptcy Court ruled that Williamson failed to produce any evidence showing that he suffered damages as a result of Moltech's breach of the ISO Agreement. Id.

The Bankruptcy Court's Findings of Fact

Williamson was hired by Moltech in January 1994 to be its president and chief operating officer. Id. at 2. Moltech and Williamson entered into an Employment Agreement and the ISO Agreement. Id. Williamson was terminated in January 1995 and shortly thereafter brought suit in New York State Court for wrongful termination (the

“State Court Action”). Id at 2-3. In the State Court Action, Williamson was seeking specific performance wherein now Williamson was seeking damages. Id. The Supreme Court for Erie County in the State of New York denied Moltech’s motion for summary judgment on Williamson’s claims on April 7, 1998, “concluding that there was a genuine issue as to whether Mr. Williamson had in fact been wrongfully terminated . . . [which] decision was affirmed in relevant part by the Appellate Division in *Williamson v. Moltech Corp.*, 690 N.Y.S. 2d 628, 261 A.D.2d 538 (N.Y. App.Div.1999).” Id.²

Moltech filed its petition for relief under Chapter 11 in 2001. Id. Williamson timely filed Claim No. 36 seeking damages arising from his wrongful termination and Moltech’s subsequent breach of his ISO Agreement. Id. The Bankruptcy Court then acknowledged that Williamson “has consistently asserted that he is seeking money damages for the alleged breach, not specific performance, and he has made no suggestion that this is an action for conversion rather than breach of contract.” Id.

The ISO Agreement entitled Williamson to “purchase a certain amount of Moltech common stock based on the length of time he worked for the corporation and his achievement of certain objectives . . .” Id. Williamson exercised his option in January 1995 and purchased 8,630 shares. Id at 4.³ Although copies of the actual stock certificates were not in evidence, the Bankruptcy Court stated that they “should have restrictive legends on them making these limits on their transferability apparent, which is often the case for restricted shares.” Id. Williamson never sold any shares he exercised

² As discussed later in the brief, Moltech did not in fact appeal any issues associated with the denial of its motion for summary judgment as to Cause of Action V, Williamson’s specific cause of action for damages arising from the breach of the ISO Agreement.

³ As discussed later in the brief, Williamson, prior to his termination, attempted to exercise shares but his request was denied by Moltech.

and all his shares in Moltech were canceled when the Plan was confirmed on May 6, 2005. Id.

The Bankruptcy Court's Decision

For the purposes of the Motion, the Bankruptcy Court accepted Williamson's allegations of wrongful termination and Moltech's subsequent breach of the ISO Agreement as true and proven thereby making damages the only issue for consideration. Id. at 5. The Bankruptcy Court held that damages is an essential element of Williamson's claim that he must prove, with reasonable certainty, in order to establish his breach of contract claim stating that "[i]f there is no evidence of damages, an essential element of Mr. Williamson's claim is lacking, and summary judgment must be entered against him." Id.

The Bankruptcy Court found that Williamson's properly executed and filed claim is presumed valid and allowed unless a party in interest objects to it and introduces sufficient evidence to rebut the presumption. Id. After reviewing the record and Moltech's supporting affidavit, the Bankruptcy Court, without explanation, found that Moltech pierced the presumption and that it was "entitled to summary judgment if Mr. Williamson fails to produce any evidence of damages to support his claim." Id. at 6.

Since all relevant actions occurred in New York, combined with the choice of law provision of the ISO Agreement, the Bankruptcy Court turned to New York law to determine Williamson's claim for damages. Id. Citing New York law, the Bankruptcy Court recognized Williamson's right to seek damages for Moltech's breach of the ISO Agreement. Id. Relying heavily on the United States District Court for the Southern

District of New York’s decision in Boyce v. Sandview Technology Group, Inc., 2004 WL 2334081 (S.D.N.Y.),⁴ the Bankruptcy Court held that damages should be calculated as of the date of the breach and, in cases where the shares at issue are held in a private company not actively traded on any public exchange, the “hypothetical market standard” is the appropriate tool to determine the fair market value of the shares in the absence of a traditional market place. Id at 7. Citing Boyce, the Bankruptcy Court defined the “hypothetical market standard” as being “fair market value determined at” the price at which a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts, would exchange the property at issue.” Id. Although damages must be demonstrated by reasonable certainty, mathematical certainty is not required. Id. Nevertheless, the Bankruptcy Court held that Williamson must demonstrate both the existence and the amount of damages with reasonable certainty. Id. Quoting Boyce, “damage awards cannot be based on a multitude of assumptions, speculation or conjecture.” Id at 7-8.

Applying New York law, the Bankruptcy Court held that Williamson produced no evidence establishing the existence of damages. Id at 8. The key determining factor in its decision was not the lack of a ready market for the stock options, but their restrictive nature. Id. Pursuant to the Bankruptcy Court, since the stocks were restricted “there could have been neither willing buyer or willing seller at the time of breach, no ‘hypothetical market’ could have existed.” Id. Because the stock at issue were restricted at the time that the breach of the ISO Agreement occurred, the Bankruptcy Court

⁴ A decision that was subsequently vacated and remanded by the Second Circuit in Boyce v. Soundview Technology Group, Inc., 464 F.3d 376 (2nd Cir. 2006).

reasoned that, had no breach occurred, Williamson would have received his stock options, which, being restricted and not sellable, would have had no value. Id at 8-9. Accordingly, the Bankruptcy Court refused to award him damages that it believed, due to the restricted nature of the stock, “would put him in a better position he would have been if the [ISO Agreement] had been fully preformed.” Id at 11.

In reaching this decision, the Bankruptcy Court disregarded undisputed evidence of various valuations of the stock options submitted by Williamson that directly contradicted Moltech’s claim that the stock options had no value on the date of breach. Id at 9-11. This evidence included pre-breach stock sales to insiders and investors, valuation calculations prepared by Moltech itself during the relevant time periods, and valuations prepared by third party accountants of Moltech for tax purposes. Id. The Bankruptcy Court specifically stated “[t]he fact that the shares may have had some value for tax purposes does not mean that Mr. Williamson could have sold them.” Id at 9.

Finally, the Bankruptcy Court refused to apply the “wrongdoer rule” because, for the reasons stated above, it found that the existence of damages has not been demonstrated with the requisite certainty. Id at 10.

STATEMENT OF FACTS

In January 1994, Moltech hired Williamson to act as its president and chief operating officer, the parties executing a three-year Employment Agreement and the ISO Agreement, both dated January 13, 1994. (Docket No. 6, Part 3, Rosenberg Aff’d at 2); *see also* (Docket No. 6, Part 14); (Docket No. 4, Part 3). Pursuant to the terms of the ISO Agreement, Williamson was entitled to purchase stock options at \$0.05 (adjusted for

splits/stock dividends). (Docket No. 6, Part 14). As of February 3, 1994, Moltech valued the stock options to the IRS at \$0.21 (stock value of \$0.26 less option exercise price of \$0.05) and as of August 15, 1994, Moltech valued the stock options to the IRS at \$0.40 (based on \$0.45 stock value). (Docket No. 3, Part 2 and 5; Docket No. 4, Part 3, Williamson Aff'd at 8-9).

Zweifler valued the restricted stock of Moltech as of January 14, 1994 at \$0.26. (Docket No. 3, Part 4; *see also* Docket No. 4, Part 3, Williamson Aff'd at 8).

Price-Waterhouse valued the restricted stock at \$0.45 as of April 1994. (Docket No. 2, Part 12, Financial Statement at 8; Docket No. 4, Part 5-10, Rosenberg Dep. at 425-26; *see also* Docket No. 3, Part 5; Docket No. 4, Part 3, Williamson Aff'd at 8-9).

In August 1994, preferred stock was issued having a conversion based on \$4.50 per common share. (Docket No. 4, Part 5-10, Rosenberg Dep. at 53-55); *see also* (Docket No. 4, Part 3). In October 1994, Moltech received \$3,000,000 from Ericsson. (Docket No. 2, Part 12); *see also* (Docket No. 4, Part 3, Williamson Aff'd at 6, 9 and 10). In December 1994, Moltech received \$1,000,000 from Electrolux. Id.

On or about January 12, 1995, Williamson exercised his stock options, which Moltech refused to honor. (Docket No. 4, Part 5-10, Rosenberg Dep. at 473).

Moltech terminated Williamson on January 20, 1995. (Docket No. 6, Part 3, Rosenberg Aff'd at 4). Williamson filed a complaint for breach of contract in Erie County, New York, which was subsequently removed to Suffolk County. (Docket No. 6, Part 8-9). In Cause of Action V of the Amended Complaint, Williamson specifically

alleged “damages in the sum of no less than Three Million Dollars (\$3,000,000) or such other and larger sum....” Id.

Moltech moved for summary judgment in New York specifically including the damages of Cause of Action V on September 22, 1997 and summary judgment was denied on all Causes of Action of the Amended Complaint on April 7, 1998. (Docket No. 6, Part 5-6). The Order was not appealed as to Cause of Action V. Id.; see *also Williamson v. Moltech Corp.*, 690 N.Y.S. 2d 628, 261 A.D. 2d 538 (N.Y. App. Div. 1999).

Moltech filed its voluntary petition for bankruptcy on August 8, 2001. (Bankruptcy Docket No. 1). Williamson timely filed his claim as to the \$3,000,000 damages on or about November 20, 2002. (Docket No. 2, Part 8, Judgment at 3). Moltech objected to the claim on November 9, 2004. (Docket No. 8, Part 10). Moltech filed for summary judgment on August 16, 2006. (Docket No. 6, Part 14). The bankruptcy court issued its order granting summary judgment on December 15, 2006. (Docket No. 2, Part 8). Williamson timely filed a notice of appeal on December 22, 2006. (Docket No. 2, Part 7).

ARGUMENT

I. The Bankruptcy Court Committed Reversible Error When it Failed to Honor the Res Judicata Effect of the Summary Judgment Denial by the Supreme Court of New York.

As stated above in the Statement of Facts, Williamson initially filed suit for breach of the ISO Agreement against Moltech in 1995 before the Supreme Court for Erie County in the State of New York. Venue was subsequently transferred to Suffolk

County. In his Amended Complaint filed in the State Court Action, specifically Cause of Action V, Williamson claims “damages in the sum of no less than Three Million Dollars (\$3,000,000) or such other and larger sum....” (Docket No. 6, Part 7-9).

Moltech, as in the matter at hand, moved for summary judgment as to multiple counts of the complaint including Cause of Action V, Williamson’s damage claim for breach of the ISO Agreement. (Docket No. 6, Part 5-6).

As stated by the Bankruptcy Court in the Judgment, the Supreme Court denied summary judgment in its order dated April 7, 1998. No appeal was brought by Moltech as to the denial of summary judgment on Cause of Action V. Accordingly, pursuant to the doctrine of *res judicata* and potentially the Rooker-Feldman Doctrine, Moltech is now precluded from seeking summary judgment as to Williamson’s right to assert a claim for damages for Moltech’s breach of the ISO Agreement.

The Bankruptcy Court acknowledged the summary judgment denial of April 7, 1998 when the stock was just as restricted. However, because the Bankruptcy Court apparently believed that the cancellation of stock through the approval of Moltech’s confirmed plan in 2005 was relevant, it apparently overlooked the fact that it was bound by *res judicata* as to the summary judgment ruling of the Supreme Court of New York.

Res judicata bars the same parties “from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been --- but was not --- raised in the first suit..” See Black’s Law Dictionary, 1305 (7th ed. 1997); see also Winters v. Lavine, 574 F.2d 46, 55-56 (2nd Cir. 1978)(holding that “under the New York concept of *res judicata* a prior judgment is

conclusive upon the parties in any subsequent action involving the same cause of action not only as to those issues which were actually litigated but also as to any issues which might have been, but were not, litigated in the earlier action”).

The subject transactions at issue in the state court summary judgment order and the Motion are the same. The parties are the same. The dispute concerning the restricted nature of the stock was an issue that Moltech could have brought before the state court, had Moltech chosen to do so. However, Moltech did not. Pursuant to the doctrine of *res judicata*, Moltech is now barred from doing so. Accordingly, the Bankruptcy Court erred when it granted summary judgment in favor of Moltech as Moltech is precluded by *res judicata* from seeking to deny Williamson’s right to damages for the breach of the ISO Agreement. The Judgment should be reversed and Moltech’s request for summary judgment should be denied.

Moltech’s summary judgment request may also be precluded by the Rooker-Feldman Doctrine. The Rooker-Feldman Doctrine prohibits a federal court from considering claims actually decided by a state court or claims that are inextricably intertwined with a state court’s earlier judgment. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Put simply, a bankruptcy court cannot act as an appellate court to a state court judgment. However, this is essentially what Moltech asked the Bankruptcy Court to do. Moltech moved for summary judgment in the State Court Action on Cause of Action V. Moltech’s summary judgment was denied and all appeals were exhausted years before the filing of its bankruptcy petition in August 2001. Now, within the context of its

bankruptcy case, Moltech seeks to do what it was unable to do in the state court, secure summary judgment denying Williamson's right, as a matter of law, to recover damages as a result of Moltech's breach of the ISO Agreement. Such an action is barred by the Rooker-Feldman Doctrine and therefore, the Judgment should be reversed and Moltech's request for summary judgment denied.⁵

II. The Bankruptcy Court Erred When it Granted Summary Judgment in Favor of Moltech Because: 1) Restricted Stock Options Have Calculable Value and Therefore Can Give Rise to a Damage Claim; and 2) Williamson Submitted Sufficient Evidence Into the Record to Not Only Establish Damages With Reasonably Certainty but also Sufficient Evidence to Create a Genuine Issue of Material Fact as to the Value Of the Stock Options and Consequently Williamson's Damages Thereby Precluding Summary Judgment.

As stated correctly by the Bankruptcy Court, New York law governs the substantive rights of the party in the matter at hand. (Docket No. 2, Part No. 8, Judgment at 6). Under New York law, damages for breach of contract are awarded in order to put the non-breaching party in the same economic position it would have been if the contract had been performed. Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 196 (2nd Cir. 2003). Breach of contract damages are measured from the date of the breach. Id. (stating that New York courts have repeatedly rejected damage awards based on what the actual economic conditions and performance at the time were in light of hindsight); *see also* Siegel v. Laric Entertainment Corp., 307 A.D. 2d 861, 863 (N.Y. 1st App. Div.

⁵ It should be further noted that pursuant to 28 U.S.C. § 1738, a federal court must confer the same preclusive effect that judgment would be given in the rendering state. *See In re Dicks*, 306 B.R. 700, 703 (Bankr. M.D. Fla. 2004) *citing In re Keene*, 135 B.R. 162 (Bankr. S.D. Fla. 1991).

2003)(holding that awards in breach of contract actions are ordinarily ascertained as of the date of the breach).

When dealing with a breach of an incentive stock option agreement, New York law holds that damages are calculated by using the common approach to calculating damages: the difference between the contract price and the “fair market value” of the property calculated at the time of breach. Boyce v. Soundview Technology Group, Inc., 2004 WL 2334081, *3 (S.D.N.Y. 2004) *vacated and remanded as to damages by Boyce v. Soundview Technology Group, Inc.*, 464 F.3d 376 (2nd Cir. 2006).

For publicly traded stock, value is determined by “the mean between the highest and lowest quoted selling prices” . . . as provided by the public exchange upon which the stock traded. Boyce v. Soundview Technology Group, Inc., 464 F.3d 376, 385 (2nd Cir. 2006) *quoting United States v. Cartwright*, 411 U.S. 546, 551, 93 S. Ct. 1713, 36 L.Ed.2d 528 (1973).

When calculating damages under New York law for the breach of an incentive stock option agreement in a close held corporation with no readily available market, courts apply a “hypothetical market standard” wherein a jury is required to determine “what ‘hypothetical willing buyer, being under no compulsion to sell and having reasonable knowledge of the relevant facts would pay for the asset at issue.’” Boyce v. Soundview Technology Group, Inc., 2004 WL 2334081, *3 (S.D.N.Y. 2004) *vacated and remanded as to damages by Boyce v. Soundview Technology Group, Inc.*, 464 F.3d 376 (2nd Cir. 2006).

Whereas the Bankruptcy Court agreed that New York law required the application of the “hypothetical market standard” to calculate value for stock in a close held corporation with no ready market as of the date of breach, the Bankruptcy Court found the test inapplicable to Williamson’s claim because the underlying stock in Moltech was restricted. (Docket No. 2, Part 8, Judgment at 4,8,9, and 11). In doing so, the Bankruptcy Court essentially held that a party can never recover contract damages for breach of an incentive stock option agreement if the underlying stock option associated with the agreement is restricted. Accordingly, other than specific performance, a non-breaching party to an incentive stock option agreement has no other remedy at law. This would lead to the untenable result that any corporation could breach its stock option agreement with its employees at any time, with impunity, even if the value of the restricted stock had skyrocketed. The Bankruptcy Court also held that, even if the stock was not restricted, Williamson failed to produce any reliable evidence as to the value of the stock as of the date of the breach. Id. at 9-11. The Bankruptcy Court held that all evidence submitted by Williamson, including financial statements of Moltech from the relevant time period, pre-breach sales of stock to institutional and private investors, and various valuation reports prepared by third parties on behalf of Moltech (such as Price-Waterhouse as part of its auditing of the value of Moltech), as being too speculative and not sufficient to establish damages with a reasonable certainty. Id.

In doing so, the Bankruptcy Court erred in granting summary judgment because:

- 1) restricted stock is not inherently valueless and a breach of an incentive stock option agreement does give rise to a viable and calculable claim for damages under no less than

two different theories of recovery; and 2) the Boyce decision relied on by the Bankruptcy Court and cited by the parties was recently vacated and remanded by the Second Circuit Court of Appeals in a decision that expands the methods available for calculating damages arising from the breach of an incentive stock option agreement under New York law. Both errors are material as they shift the analysis of the parties rights from an issue of law as argued by Moltech and held by the Bankruptcy Court, to a factual determination of value of the stock options at the time of the breach, including the consideration of evidence the Bankruptcy Court incorrectly found as being too speculative or immaterial to substantiate Williamson's claim for damages. Such a factual determination precludes summary judgment.

A. The Bankruptcy Court Erred When It Held That Restricted Stock Options Have No Value

In the Judgment, the Bankruptcy Court states that the restrictive nature of the stock options prevents them from having any value. (Docket No. 2, Part 8, Judgment at 4, 8, 9 and 11). Accordingly, the Bankruptcy Court found that Williamson suffered no calculable damages as a result of Moltech's breach of the ISO Agreement and therefore could not meet one of the essential elements for establishing a breach of contract claim: damages. Id. Consequently, the Bankruptcy Court granted summary judgment in favor of Moltech. Id.

Through the Judgment, the Bankruptcy Court essentially created an inflexible rule that precludes a non-breaching party to an incentive stock option agreement from ever recovering damages for a breach of that agreement when the stock options at issue are restricted. This decision is out of step with the majority of courts and jurisdictions

(including the jurisdiction whose law governs this matter) that not only allow for the recovery of damages for the breach of incentive stock option agreements dealing with restricted stock, but also identify two different theories of recovery.

One of the most insightful cases on this issue is the Third Circuit Court of Appeals decision in Scully v. U.S. Wats, Inc., 238 F.3d 497 (3rd Cir. 2001)⁶. In Scully, the primary issue for consideration on appeal was whether a corporation had improperly denied an individual the right to exercise his stock options following a wrongful termination, and if so, whether the district court, when awarding damages, improperly failed to apply a discount for the lack of marketability of the shares at issue. Id at 503. The shares at issue were, at all relevant times, restricted. Id. The district court held for the claimant as to liability and calculated damages as of the date of breach and, after first considering a discount for lack of marketability, subsequently chose not to discount in the final valuation calculation notwithstanding the restricted nature of the stock. Id. The parties appealed the decision to the Third Circuit. Id.

On appeal, the claimant argued that whereas the district court was correct in its rulings as to liability, it erred when it calculated damages from the date of breach and not from the date the stock options' restriction lapsed, which would have increased claimant's damage claim considerably. Id at 509. The defendant corporation argued that the district court was correct in calculating damages as of the date of breach, but erred when failing to apply a marketability discount to account for the restricted nature of the

⁶ Insightful because it not only identifies various theories of recovery for breaches of an incentive stock option agreement when restricted stock options are at issue, but also because it does so while applying the same substantive law at issue in this appeal, New York law.

stock. Id. The Third Circuit affirmed the district court’s finding that the claimant was wrongfully terminated, that the claimant was wrongfully denied his stock option rights and that the district court was correct in its valuation calculations. Id. at 507, 512.

In regards to the stock calculation, the Third Circuit noted that the subject incentive stock option agreement required it to be primarily interpreted by federal law and secondarily by New York state law. Id. at 507. However, the parties agreed that the result is the same regardless of what law was applied and, therefore, the Third Circuit based its decision by drawing widely from these jurisdictions as well as others. Id.

The Third Circuit began its damage analysis by first defining employee stock options (a/k/a “call options”) as being options that “allow an employee to buy the employer’s stock at a specified future date at a price (the “strike price” or “exercise price”) fixed on the date that the stock is granted. Id. at 507; *citing* Les Barenbaum, Ph.D. & Walt Schubert Ph.D., *Measuring the Value of Executive Stock Options*. 12 No. 12 Fair Share 3, 3 (December 1992). The Circuit Court noted that typically stock options are granted with the expectation that the stock will increase in price in the future. Id. The Third Circuit recognized that valuing employee stock options is complicated because, unlike other stock options, employee stock options are not publicly traded. Id.; *see also* Everett v. Everett, 195 Mich. App. 50, 489 N.W. 2d 111, 113 (1992) (noting that calculating “the value of stock options [sic] [is] a formidable tool given the numerous possible contingencies and restrictions involving stock options”).

In attempting to resolve the issue, the Third Circuit recognized that there are two distinct theories of recovery used by courts to calculate damages arising from the failure

to deliver stock options: 1) the breach of contract theory; and 2) the conversion theory. Scully, 238 F.3d at 509-10.

Under the conversion theory, damages are intended to compensate a plaintiff for actual loss. Id at 509. Schultz v. Commodity Futures Trading Com'n, 716 F.2d 136, 139, 141 (2nd Cir. 1983). The conversion theory calculates damages by “comparing the plaintiff’s exercise price to (1) the value of the stock at the time of conversion, or (2) the highest intermediate stock price between the notice of conversion and a reasonable time thereafter during which the stock could have been replaced, or whichever is greater.” Id at 509-10 *citing* Schultz v. Commodity Futures Trading Com'n, 716 F. 2d 136, 139, 141 (2nd Cir. 1983).

In the contract theory, the goal is to put the plaintiff in the same position he would have held had the breach never occurred. Id at 510. Here, you calculate damages as of the date of the breach. Id. Damages are calculated by taking the difference between a stock option’s exercise price and the market price of the same stock at the time of breach. Id. citing Hermanowski v. Acton Corp., 580 F. Supp. 140, 146 (E.D.N.Y. 1983), *aff’d in relevant part*, 729 F.2d 921 (2nd Cir. 1984). The result of the calculation produces the option’s “intrinsic value.” Scully, 338 F.3d. at 510. The contract theory, based on its date of valuation, does not allow a plaintiff to recover any prospective profit from the defendant. Id.

Either theory is applicable to calculate damages arising from the refusal to deliver stock options when demanded. Neither theory is precluded from application based upon the restrictive nature of the stock at issue. To be sure, the Third Circuit’s lengthy

discussion regarding these competing theories was initiated against the back drop of reviewing the district court's valuation of restricted stock options.

In Scully, the Third Circuit determined that the district court was correct in applying the contract theory as the damages at issue arose from a failure to deliver stock options pursuant to an incentive stock option agreement and therefore constituted a breach of contract. Id at 512. The Third Circuit affirmed all aspects of the district court's damages including its refusal, given the facts and circumstances of the case, to include a discount calculation for the restrictive nature of the stock options. Id at 515. Although approving the district court's use of the contract theory of recovery for calculating damages, the Third Circuit recognized that, "given the myriad of factors that might arise in each case, we doubt that any single universal damage theory could properly value stock options in all situations." Id at 512.

The relevance of Scully to the matter at hand lies in its undisputed acceptance that restricted stock options have calculable value, regardless of the restrictions imposed on their transferability. That's not to say that all restricted stock options have value (the specific facts and circumstances of each case determines the existence of value) but, the Third Circuit, applying federal law and New York law, clearly and unequivocally states that the restricted nature of a given stock option does not preclude the existence of value as held by the Bankruptcy Court in the Judgment. The Second Circuit, in Lucente v. International Business Machines, Corporation, 310 F.3 243, 262 (2nd Cir. 2002) came to the same conclusion when it found that no New York cases suggest a different rule for

calculating damages for the breach of an employee stock option agreement based on the restricted nature of the underlying stock.⁷

Based on Scully, Lucente and the various cases cited therein, the Bankruptcy Court erred when it held, as a matter of law, that the restricted nature of Williamson's stock options precludes them from having value which, in turn, as a matter of law, prevented Williamson from establishing the last element necessary for asserting a breach of contract claim: damages. However, as evidenced by Scully, Lucente and the myriad of cases cited therein, Williamson's damages are calculable. The determination of Williamson's damages is a factual issue. Williamson submitted sufficient, undisputed evidence (such as valuations by Price-Waterhouse, among others, and admissions by Moltech's own Affiant in his prior deposition testimony that the stock was sold for value at various times)⁸ in the underlying record to contradict Moltech's assertion that the stock options had no value as of the date of breach which creates a genuine issue of material fact which precludes summary judgment. For these reasons, and the reasons stated below in the brief, the Judgment should be reversed and Moltech's request for summary judgment should be denied.

B. The Bankruptcy Court Erred When It Held That Williamson Failed to Establish a Claim For Damages With Any Reasonable Certainty

As stated above, Williamson can recover damages for Moltech's breach of the ISO Agreement. In the Judgment, the Bankruptcy Court held that Williamson's evidence submitted in support of his damage claim, which evidence included financial statements

⁷ The Second Circuit cited Scully in its holding as support for its adoption of the contract theory of recovery. Id at 263.

⁸ *See* Docket No. 4, Part 5-10, Rosenberg Dep. 53-55 and 425-26; *see also* Docket No. 4, Part 3, Williamson Aff'd 6-9.

of Moltech from the relevant time period, pre-breach sales of stock to institutional and private investors, and various valuation reports prepared by third parties on behalf of Moltech (including Price-Waterhouse), were too speculative to determine value of the stock options and a basis for establishing damages with a reasonable certainty. (Docket No. 2, Part 8, Judgment at 9-11). In turn, the Bankruptcy Court came to the confusing conclusion that Williamson somehow failed to establish any facts that contradict Moltech's assertion that the stock options had no or *di minimis* value on the date of breach. Id.

In support of this position, the Bankruptcy Court cited Boyce v. Soundview Technology Group, Inc., 2004 WL 2334081 (S.D.N.Y.) (hereafter "Boyce I") which, among other things, stood for the proposition that damages could not be speculative and had to be calculated within a reasonable certainty. In Boyce I, the district court refused to consider certain evidence as to damages presented by the claimant including the defendant corporation's impending IPO, amended S-1 financial statements with *pro forma* projections, and pre-breach stock sales to institutional investors. Id. at *4-6. However, after oral arguments and the submission of final papers by Moltech and Williamson, the Second Circuit entered its decision in Boyce v. Soundview Technology Group, Inc., 464 F.3d 376 (2nd Cir. 2006) (hereafter "Boyce II") vacating Boyce I and remanding the matter back to the district court to consider the previously excluded evidence in its damage calculations.

The effect of the Second Circuit's decision in Boyce II has considerable effect on this Appeal. As recognized by the parties in their pleadings, Boyce I is factually on point

and is predicated on the interpretation of New York law as is this matter (although Moltech argues that the decision is allegedly distinguishable because the stock options in Boyce were simply not-sellable, not restricted as in Williamson’s case – a distinction adopted by the Bankruptcy Court that has no merit, as all privately offered stock options are generally restricted pursuant to Rule 144(3)(i)).⁹

In Boyce I, the District Court for the Southern District Court of New York denied a party’s motion for a new trial as to damages, thereby rejecting the movant’s argument that when determining damages for breach of an incentive stock option agreement in a closely held corporation, the trier of fact should consider the stocks’ post-breach future performance in its damage calculations. Boyce I, 2004 WL 2334081 at *4-5. Instead, the District Court, citing New York law, adopted the “hypothetical market standard” discussed above and set its valuation calculation instructions to the jury as limited to only considering evidence concerning the value of the stocks options as of the date of the

⁹ 17 C.F.R. § 230.144(c)(3)(2007) states, in pertinent part “(3) The term *restricted securities* means: (i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;(ii) Securities acquired from the issuer that are subject to the resale limitations of §230.502(d) under Regulation D or §230.701(c);(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of §230.144A;(iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (§230.1001);(v) Equity securities of domestic issuers acquired in a transaction or chain of transactions subject to the conditions of §230.901 or §230.903 under Regulation S (§230.901 through §230.905, and Preliminary Notes);(vi) Securities acquired in a transaction made under §230.801 to the same extent and proportion that the securities held by the security holder of the class with respect to which the rights offering was made were as of the record date for the rights offering “restricted securities” within the meaning of this paragraph (a)(3); and(vii) Securities acquired in a transaction made under §230.802 to the same extent and proportion that the securities that were tendered or exchanged in the exchange offer or business combination were “restricted securities” within the meaning of this paragraph (a)(3).

breach. Id at *1-4. The movant, unsatisfied with the District Court’s rulings and limitations on his damage claim, appealed to the Second Circuit.

In Boyce II, the Second Circuit vacated the District Court’s decision and remanded the matter back to the District Court as to damages pursuant to its more expansive method of calculating damages arising from the breach of an incentive stock option agreement in a closely held corporation with no readily available market. Boyce II, 464 F.3d at 392.

In Boyce II, the Second Circuit found the District Court’s refusal to consider any post-breach valuation evidence, no matter how relevant, too restrictive. Id at 386. It held that “the district judge’s April 5th ‘bright line’ ruling was too mechanical and, ultimately, deprived [the claimant] of the full benefit of his bargain.” Id. The Second Circuit found this problematic “as the primary purpose of damages is to put a wronged party in as good a position as if the breach did not occur.” Id. The Second Circuit recognized that while the “willing buyer – willing seller” test is the best evidence of fair market value, it is, by no means, the only such evidence. Id at 387. That determining value is a factual inquiry that is “necessarily an approximation.” Id. Citing a series of cases, the Second Circuit ruled that the “willing buyer – willing seller” is not the exclusive method for determining the value of stock options of a closely held corporation. Id. To wit, the Second Circuit held that “the jury should have been able to make its valuation determination on all relevant elements of the case, whether dated pre-April 5th, April 5th, or, perhaps, some short time period thereafter.” Id at 389. The Second Circuit ultimately held that the refusal of the District Court to consider evidence of valuation, including the impending

post April 5th IPO of the defendant, pre-April 5th sales by the defendant to institutional investors, amended S-1 financial statements of the defendant that contained pro forma projections and other such evidence as having affected the claimants substantive rights and therefore entitled him to a new trial on damages. Id at 389.

The strong factual similarities between Boyce II and the matter at hand makes Boyce II not only extremely persuasive but, potentially precedent setting given its application of substantive New York law. As in Boyce II, Williamson was a party to an incentive stock option agreement with a closely held corporation that had an eye towards an initial public offering. As in Boyce II, Williamson was wrongfully terminated and filed suit for breach of contract seeking, among other things, damages. As in Boyce II, the calculation of damages became the central issue. As in Boyce II, the Bankruptcy Court refused to accept as evidence of damages (for valuation purposes) financial statements of Moltech corporation, pre-breach sales of stock to institutional and private investors, and various valuation reports prepared by third parties on behalf of Moltech. As in Boyce II, Williamson's substantive rights were affected by the Bankruptcy Court's refusal to consider Williamson's evidence concerning valuation.

In light of the Second Circuit's recent ruling in Boyce II that adopts a more expansive view regarding the appropriate evidence to determine the value of stock options, Williamson remains able to establish sufficient evidence of damages. As set forth in the uncontested evidence submitted into the record by Williamson, pursuant to Moltech's valuation of the shares for tax purposes, the shares had a value of \$0.45 according to the valuation of Price-Waterhouse. (Docket No. 2, Part 12, Financial

Statement at 8). Pursuant to pre-breach private sales of Moltech stock, the stock options had a value of \$4.50 on a conversion basis from preferred stock. Finally, pursuant to third-party accounting statements prepared on behalf of Moltech, the stock options had values ranging from \$.26 valued by Zweifler as of January 1994 when Williamson joined Moltech, to \$0.45 valued by Price-Waterhouse (Docket No. 2, Part 12, Financial Statement at 8). These uncontested facts contradict Moltech's claim that the shares lacked any real value as of the date of the breach. Accordingly, there exists a genuine issue of material fact concerning damages that is more appropriate for consideration by a trier of fact. Such issues of material fact inherently preclude summary judgment. *See Boyce II*, 464 F.3d at 387 (holding that "determining value is a factual inquiry"). For these reasons, and the reasons previously stated in this brief, Williamson respectfully requests that the District Court overturn the Judgment.

III. The Bankruptcy Court Erred In Finding That There Were No Genuine Issues Of Material Fact That Precluded Summary Judgment.

The standard of appellate review for the Bankruptcy Court's summary judgment is *de novo*. Accordingly, the District Court must review the Bankruptcy Court's decision to determine "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." Potts v. Budget Rent A Car System, Inc., 2005 WL 3057175, *1 (N.D. Fla. Nov. 14, 2005); Hollinger v. International Paper Company, 2005 WL 2840530, *3 (N.D. Fla. Oct. 27, 2005).

The District Court must view all the evidence and all factual inferences drawn there from in the light most favorable to the non-moving party, and determine whether that evidence could reasonably sustain a jury verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In the case at hand, the District Court must look at all the evidence in the light most favorable to Williamson, the non-moving party.

In the Judgment, the Bankruptcy Court stated that there were no genuine issues of material fact that precluded summary judgment. However, for the reasons stated in prior sections of this brief, the Bankruptcy Court incorrectly dismissed and/or disregarded evidence regarding the value of Williamson's stock options on the date of breach that directly conflicts with Moltech's claim that the stock options had no value on the date of breach. These facts are material and create a genuine issue of material fact that precludes summary judgment. Furthermore, the Bankruptcy Court made several material findings of fact that conflict with the uncontested evidence set forth in the record.

A. Material Facts Concerning Valuation

The Bankruptcy Court erroneously states "Williamson has produced no evidence establishing the existence of damages." (Docket No. 2, Part 8, Judgment at 8). This is factually incorrect. Clear evidence was before the Court in the form of unrefuted valuations, among others, by Zweifler and Price-Waterhouse, both financial analysts of Moltech establishing various different values to the stock options at issue. (Docket No. 2, Part 12, Financial Statement at 8; Docket No. 3, Part 4-5; Docket No. 4, Part 5-10, Rosenberg Dep. at 425-26; Docket No. 4, Part 3, Williamson Aff'd 6-9, 13). Such a finding can only be supported by reliance on the theory that restricted stock has no value,

which, for the reasons stated previously in this brief is not only contrary to applicable law, but would also come as a major surprise to the financial community. Further, the affidavit on which Moltech (and the Bankruptcy Court) relies on for support was refuted by the affiant's own prior deposition testimony that clearly showed values to the restricted stock. (Docket No. 4, Part 5-10, Rosenberg Aff'd 53-55, 425-26). The stock was just as restricted when Zweifler and Price-Waterhouse made their analyses and set values of \$0.26 and \$0.45 per share respectfully (Docket No. 3, Part 4; Docket No. 2, Part 12, Financial Statement at 8). Accordingly, the Bankruptcy Court's finding that there was no evidence of damages before it when, in fact, substantial evidence of damages was shown by Williamson is erroneous and should be reversed.

In the Judgment, the Bankruptcy Court erroneously draws on later events that are irrelevant and factually incorrect to establish a zero value for the restricted stock, discussing events leading to the filing of the voluntary petition in August 2001. (Docket No. 2, Part No. 8, Judgment at 2, 9-10). The Bankruptcy Court states that "[t]he uncertainty of the endeavor is further highlighted by the fact that Moltech slid further into debt over time." *Id* at 2. While eventually true six years later, Moltech's fortunes increased greatly from 1995 to 1999 to where they were in a position to purchase the Gainesville, Florida, Energizer battery plant in 1999. Notwithstanding, both the 1999 events and 2001 events are factually irrelevant, since the rule for valuation of the damages at issue is that they are measured at the time of the breach or a short period thereafter. *See Boyce v. Soundview Technology Group, Inc.*, 464 F.3d 376, 389 (2nd Cir. 2006).

Thus, the only way the Bankruptcy Court can reach its finding of fact that restricted stock has ‘no value’ is by totally ignoring the contrary evidence before it from the valuations by Zweifler and Price-Waterhouse, and Moltech’s own Affiant’s prior deposition testimony, among others. (Docket No. 3, Part 4; Docket No. 2, Part 12, Financial Statement at 8).

The Bankruptcy Court correctly, but irrelevantly, states: “[t]he fact that an investment banker valued Moltech’s stock for tax purposes does not mean that Mr. Williamson’s shares were not restricted.” (Judgment at 9). However, the Bankruptcy Court errs by missing the fact that the shares, while restricted, do have value. Lucente v. International Business Machines, Corporation, 310 F.3d 243, 262 (2nd Cir. 2002); *see also* Scully v. U.S. Wats, Inc., 238 F.3d 497 (3rd Cir. 2001). Further the Court erred since the shares were not valued merely for tax purposes, but to meet accounting standards (either of which shows value, notwithstanding). The Court then recognizes that restricted stock must have value when it states that “[t]he IRS often determines the value of restricted shares for tax purposes and takes the restricted nature of the shares into account when doing so.” (Judgment at 9).

The Bankruptcy Court, in discussing preferred shares outstanding, erroneously states that “[e]ven if Mr. Williamson had been able to sell his shares, there is no evidence showing that they had any reasonably certain substantial value at the time of the breach.” Id. The shares were valued by one of the largest accounting firms in the world, namely, Price-Waterhouse. Moltech’s financial position and the existence of preferred stock were obviously taken into account by Price-Waterhouse in determining the value of the then-

restricted shares. Such a finding of fact can only result from the Court substituting its judgment for that of Price-Waterhouse.

The Bankruptcy Court's statement that "if the contract had been preformed, Mr. Williamson would have ended up with worthless stock" is incorrect. (Judgment at 11). In fact, Williamson would have ended up with stock having, at that time, at least the value stated by Price-Waterhouse of \$0.45, and probably greater based on other evidence before the Bankruptcy Court relating to additional funding received by the Debtor at and around the time of the breach, including Initial Public Offering expectations, which a finder of fact should take into consideration in valuing the stock as of the date of breach. *See Boyce v. Soundview Technology Group, Inc.*, 464 F.3d 376, 389 (2nd Cir. 2006).

The Bankruptcy Court's finding as an undisputed fact that the stock options had no value as of the date of the breach is incorrect. The value of the 51,780 remaining options at issue in this case,¹⁰ times even the low end of the range for stock value using the Zweifler analysis, would have been \$13,462.80. (Docket No. 3, Part 4; *see also* Docket No. 4, Part 3, Williamson Aff'd at 12-13.) Such an amount is hardly *de minimis*. Under the conversion value from preferred stock of \$4.50 per share, the damages would have been \$230,421.00, and under the Initial Public Offering analysis, they would have exceeded \$5 million. Id.

Thus, since damages ranging from \$10,873.80 to over \$5 million cannot be *de minimis* nor, as held by the Bankruptcy Court, too speculative in nature to establish

¹⁰ The number of unexercised stock options that Williamson would have been entitled to under the ISO Agreement had he not been terminated.

damages within reasonable certainty, the Bankruptcy Court's summary judgment should be overturned. Genuine issues of material fact exist that preclude summary judgment.

B. Williamson Disputes Other Factual Findings by the Bankruptcy Court

The Bankruptcy Court states that Williamson was "seeking the actual shares of Moltech stock he claims he was due under of (sic) the ISO agreement." (Judgment at 2). In fact, Williamson was seeking specific performance and damages of \$3,000,000.00, as is set forth in Cause of Action V of the Amended Complaint (Docket No. 6, Part 8-9) on which summary judgment has already been denied by the courts of the State of New York. (Docket No. 6, Part 5-6). The Bankruptcy Court's Judgment implies a non-existent change from the original Amended Complaint in stating "[Williamson] now seeks money damages rather than the shares themselves...", yet in the next few lines the Court acknowledges that Williamson had "consistently asserted" money damages as was always the case. [Emphasis added] (Judgment at 2).

Accordingly, the Bankruptcy Court failed to accord comity to the denial of summary judgment by the Supreme Court of New York, which stands as res judicata as to Williamson's right to assert a claim for damages and thus, the Bankruptcy Court's grant of summary judgment should be reversed.

Additionally, the Bankruptcy Court innocently mistakes the issue of which stocks were exercised by Williamson and when. The Bankruptcy Court states that Williamson was "able to exercise his option and purchased 8,630 shares in January 1995." (Judgment at 4). This is not true. In fact, Williamson attempted to exercise in January 1995, but the

exercise was refused, resulting in breach of the ISO Agreement that gave rise to the claim at issue.¹¹ (Docket No. 4, Part 3).

Although these factual disputes do not, in and of themselves preclude summary judgment, when taken in the aggregate with the other issues contained in this brief, further substantiate Williamson's claim that there exist genuine issues of material fact that precludes summary judgment. Accordingly, the Judgment should be reversed and Moltech's request for summary judgment should be denied.

IV. Conclusion

For the reasons set forth in detail above in this brief, the Bankruptcy Court erred when it held that Moltech was entitled to summary judgment as a matter of law. Accordingly, Williamson respectfully requests the District Court to enter a judgment: 1) finding that the Bankruptcy Court erred when it granted summary judgment in favor of Moltech as there are genuine issues of material fact that preclude summary judgment; and 2) remanding this matter back to the Bankruptcy Court for a trial on all issues so triable.

Respectfully Submitted,

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¹¹ Williamson had previously exercised stock options in 1994 totaling 8,630 shares.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished on March 7, 2007, electronically via the Court's CM/ECF system and by U.S. Mail to:

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