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IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHILIP R. SHAWE and SHIRLEY SHAWE	)	
	)	
Respondents-Below, Appellants,	)	No. 423, 2016
	)	
v.	)	Court Below: The Court of
	)	Chancery of the State of
ELIZABETH ELTING	)	Delaware, C.A. Nos. 9686-CB,
	)	9700-CB and 10449-CB
Petitioner-Below, Appellee	)	

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PRELIMINARY STATEMENT

For the first time in Delaware's modern corporate history, the Court of Chancery has invoked 8 *Del. C.* § 226 to appoint a custodian with authority to force objecting stockholders to sell their shares. The stockholders, Philip R. Shawe ("Shawe") and Shirley Shawe ("Ms. Shawe"), collectively own 50% of TransPerfect Global, Inc. ("TPG" or the "Company"), a highly profitable translation services provider to businesses around the globe. The forced sale order grants an extraordinary windfall to Elizabeth Elting ("Elting"), the other stockholder, in the form of a control premium that she had not achieved at the bargaining table, but achieved from the court despite its finding that she "*acted improperly at times to pursue [her] goal*" of being "bought out." August 13, 2015 Opinion (Ex. A) ("Op.") at 72 (emphasis added). No statute, precedent, or facts support this extreme result.

There is no dispute that Shawe and Elting have not gotten along personally for several years, and their disputes have often been unpleasant. However, the *relevant* legal question is what impact did their personal animosity have on *the Company as a going concern*. The undisputed answer is that despite *personal* disagreements, TPG has remained extraordinarily successful and extremely profitable—the opposite of dysfunctional or irreparably injured. It is not, and never has been, the business of the Court of Chancery to intervene in personal

disputes at companies, or to give un-bargained for windfalls to disgruntled stockholders, especially not when it would require other stockholders to participate in a potential sale of their shares against their will.

The court's fundamental error was failure to differentiate between *personal* disagreements, which are real, and irreparable *corporate* injury, which is not. Long recitation of nasty infighting among stockholders, or disapproval of some of Shawe's pre-litigation and litigation conduct, is irrelevant to the core legal issues. And even if significant judicial intervention could be justified, the court erred in forcing an auction of TPG as a *first* resort, without empowering a custodian to explore less intrusive alternatives. Further, the court's findings establish that Elting has been the driver of disputes and has acted "improperly," contrary to corporate interests, in pursuit of personal interests, namely to pressure Shawe into buying her shares and to obtain massive cash distributions. By contrast, the court rejected that Shawe's conduct was for self-enrichment rather than corporate goals.

Undoubtedly, Elting will respond as she always has, by claiming that Shawe has behaved worse than Elting, or Shawe is a "bully" and a "mean" person who engaged in discovery misconduct, or Elting just does not trust him. But *personal strife* does not provide a basis under Delaware corporate law for forcibly divesting Shawe of his life's work. When the *relevant* facts and statutes are considered, the conclusion must be that the unprecedented sale order is reversible error.

NATURE OF PROCEEDINGS

Proceedings commenced on May 15, 2014, when Elting filed a Verified Petition of Dissolution of Shawe & Elting LLC (the "LLC"), a separate entity owned solely by Shawe and Elting. (C.A. No. 9661-CB.) On May 22, 2014, Shawe filed a Verified Complaint individually and derivatively on behalf of TPG alleging, *inter alia*, Elting's breaches of fiduciary duty to TPG. (C.A. No. 9686.) On May 23, Elting filed a petition (C.A. No. 9700), which, as amended, sought: (i) appointment of a custodian under Section 226(a)(2) to sell TPG, or (ii) equitable dissolution, and asserted breach of contract and fiduciary duty claims against Shawe. In December 2014, Elting petitioned for appointment of a custodian under Section 226(a)(1) "with the authority necessary to act in the best interests of the Company and its stockholders," but did not seek TPG's dissolution or sale. (C.A. No. 10449-CB.)[1]

On February 19, 2015, just prior to trial, the court denied Shawe's *in limine* motion to use at trial Elting's Gmails with her counsel, which were stored on her TPG-owned computer and accessible through the TPG network, holding they were

[1] Elting also sought monetary and other sanctions for Shawe's alleged pre-litigation and litigation misconduct. In the August 13, 2015 decision on appeal here, the court stated that the sanctions issue would be addressed separately and it was not a basis for the forced sale decision. Op. at 65, 89. In recent months the court imposed sanctions on Shawe and awarded Elting $7,103,755 in attorney's fees. A5 (Trans. ID 59448613). On September 6, 2016, the court stayed Shawe's payment obligation pending determination of his September 2 motion to amend or alter the judgment, which the court denied on September 20, 2016. A4 (Trans. ID 59512845); A2 (Trans. ID 59586764). Other than as set out in Point III, *infra*, this brief does not address the factual and legal errors associated with the sanctions proceedings.

privileged. A2258-73. On March 2, 2015, during the trial, the court held that Elting's emails with her husband concerning TPG business matters were protected by the marital communications privilege. A2834-39.

Following a six-day trial, the court issued its opinion on August 13, 2015. The court denied Elting's petition for "equitable dissolution" because Elting failed to show that Shawe had breached any duty to TPG or acted in his self-interest. Op. at 89. Despite finding that Elting had "acted improperly at times to pursue [her] goal" "to be bought out," Op. at 72, including by "her blanket opposition to acquisitions," Op. at 69-70, the court dismissed Shawe's direct and TPG's derivative breach of fiduciary duty claims "without regard to their merit," because "Shawe was at least equally at fault" with Elting and, therefore, had "unclean hands." Op. at 93-95.

Without finding financial harm to TPG from the parties' disputes, Op. at 73, the court found "irreparable injury" under Section 226(a)(2), based on Elting's blocking of acquisitions, and concerns of client and employee morale and retention. Op. at 72-78. Despite the court's findings regarding Elting's improper conduct, the court granted her petition for a forced sale of TPG, and appointed Robert J. Pincus as custodian (the "Custodian") "to oversee a judicially ordered sale of the Company" and to act as a third director. Op. at 78-85.

On February 8, 2016, the Custodian submitted his "Plan of Sale for a Modified Auction" ("Plan of Sale"), which recommended a modified auction in which the stockholders (with or without third parties) could participate as bidders, but were required to participate as sellers; requested authority to impose an uncompensated non-compete/non-solicit restriction on the stockholders; and sought sole discretion to decide all aspects of the sale process. A3974-79. Shawe and Ms. Shawe objected, arguing, *inter alia*, that given the costs and risks, including of a "busted auction," the most efficient, value-maximizing plan was a sale process among existing stockholders within a fair value range. A4086-87. On May 25, 2016, Shawe filed a fully executable all cash, no contingencies offer to purchase Elting's shares for $300 million, and requested mediation, which the court denied. A4219-22; A4287-88. On June 20, 2016, the court adopted the Custodian's proposed Plan of Sale, with the exception of the uncompensated non-compete and non-solicit restriction. June 20, 2016 Letter Opinion (Ex. B) ("Letter Opinion") at 10-11. The Custodian then submitted a proposed implementing order, to which Shawe and Ms. Shawe objected, A4289-04, and which the court signed unchanged. July 18, 2016 Sale Order (Ex. C) ("Sale Order"). On August 18, 2016, the court granted a limited stay pending appeal, A5 (Trans. ID 59440897), and granted Shawe's motion for interlocutory appeal, A5 (Trans. ID 59440856).

SUMMARY OF ARGUMENT

1. The court erred by ordering a forced sale of TPG under Section 226. The decision both exceeded the court's statutory powers and erred in foregoing less drastic alternatives, at least in the first instance. It was also error to forcibly divest the Shawes' ownership rights in TPG for the purpose of giving Elting a control premium to which she had no legal right, and to adopt a sale mechanism that provided the Custodian with virtually unfettered discretion to conduct an auction.

2. The court also erred in ordering the sale of TPG based on the unsupported conclusion that its "governance structure is irretrievably dysfunctional." Op. at 77-78. This is wholly inconsistent with the undisputed evidence of the uninterrupted profitability, growth and continuing success of the Company before, during and after the litigation below. The holding is based on personal complaints by one stockholder, or speculation about non-financial injury to come, not the kind of business harm—or prospect of harm—that the statute addresses.

3. The court also erred in holding that the attorney-client privilege shielded Gmails that Elting made accessible without a password on her TPG-owned computer and over the TPG network, making them TPG property under TPG's computer policy. The court also erred in holding that Gmails and TPG-account emails Elting exchanged with her husband concerning TPG business were protected by the marital communications privilege.

STATEMENT OF FACTS

A. TPG Is a Thriving, Highly Profitable Business

Shawe and Elting co-founded the business that became TPG in 1992, and have always served as its co-Chief Executive Officers and sole directors, until the court appointed a custodian to act as a *de facto* third director. Op. at 3. TPG's Bylaws provide for it to have three or more directors. Op. at 5-6.

By any measure, TPG is a remarkably successful business. It has experienced extraordinary growth in revenue and profitability every year for over two decades, growing "from a dorm room start-up to a major player in the global market for translation services." Op. at 5. It is "highly profitable," Op. at 1, with revenue growth from $199 million in 2008 to over $500 million in 2015, over 4000 employees in roughly 100 cities worldwide, Op. at 7; A4330-40, cutting-edge technology, and no debt. A2397; A2720; A2765; A2867; A4334-35.

From 2012 to 2014, during the period when, according to the trial court's decision, "complete and utter dysfunction" or "irretrievabl[e] dysfunction[]" took hold, Op. at 77, 80, TPG's revenue grew by almost 40%, from $341 million to over $471 million. Op. at 7. From 2013 to 2014 alone, revenue grew by $70 million (17%), with net profits increasing by over 50% from $52.1 million to $79.8 million. A3468; A3628-42; A3611-12; A3953-54. From 2009 through 2014, the stockholders received total distributions of over $157 million, including non-tax

distributions of over $63 million. A2914; A2916; A3380-467; A3645-47.[2] TPG has continued to report record-breaking revenues since trial. A4334-35.

The evidence at trial established that Shawe has been the principal driver of TPG's success, and that Elting's contributions during the past several years have been minimal. As the court noted, "[n]umerous witnesses testified at trial to the effect that Shawe's contributions to the operations and current success of the business significantly exceed the contributions made by Elting." Op. at 83 n.324; *see also* A2719-20; A2740-42; A2753-54; A2764-65; A2867; A3114-15; A2844-46; A2849; A2852; A599-600; A579. As one witness put it, "Liz allows us the opportunity to solve the problem on our own." A2719; *see also* A2867; A2740-41; A2764; A3118; A3138; A3145; A591; A600; A579; A2852; A3139-40.

B. Elting Did Not Negotiate a Buy-Sell Agreement

In June 2007, with the assistance of sophisticated corporate counsel, Shawe and Elting reorganized their various businesses under TPG. Op. at 5. Then and after, Shawe and Elting chose not to enter into a buy-sell agreement or implement an agreed exit mechanism or other agreement for ownership disposition. Op. at 8, 82; A3939-40; A2534; A2585; A2731; A2778; A2790; A2917-24; A3153; A3366; A3657; A3605; A3615; A3607. Thus, Elting owns only what she negotiated

[2] "Non-tax distribution" (sometimes referred to as a "profit distribution") refers to a distribution to stockholders over and above what is needed to pay taxes on the earnings of the Company. *See* Op. at 5 (explaining S corporation tax and non-tax distributions).

for—a 50% non-controlling interest in a corporation, with no right to be bought out and no ability to obtain a control premium for her shares.[3] However, there are no restrictions on her right to sell her shares to any third party, and no non-competition restriction upon her exit.

C. Elting Acted "Improperly" to Force Greater Distributions and a Buy-Out

As the court found: "Elting has expressed a desire to be bought out *and acted improperly at times to pursue that goal.*" Op. at 72 (emphasis added).[4] The extensive trial record—including the court's findings—proves Elting's self-interested misconduct, such as self-dealing and refusals to approve acquisitions aimed at keeping TPG competitive, payment of attorney fees to continue important patent litigation, essential office leases, and important new hires.

In February 2011, Elting informed Shawe that she wanted him to buy out her interest in TPG. Op. at 8; A3366. When Shawe did not agree, Elting began to demand ever-increasing profit distributions, contrary to their past practice of

[3] The court recognized that Elting had no current right to a control premium, stating at the post-trial argument, "Ms. Elting, you'd be naive to think that the maximization of your 50 percent interest is this Court's driving concern. It is not. This is a court of equity, but you should not expect to get a windfall from this Court that you failed to obtain for yourself when you structured your ownership in this enterprise." A3939-40. The court then granted precisely that windfall.

[4] At least since 2011, Elting repeatedly told Shawe, employees, friends and others that she "wants out" of TPG, to "harvest" or "cash out" her position, demanded that Shawe propose an "exit strategy," and sought help from employees to convince Shawe to sell TPG so they would "never have to work again." A2778; A2525; A2585-86; A3648-56; A3153; A3366; A3657; A3605; A3615; A2731. Even her Goldman Sachs bankers recognized that her purported purchase offer to Shawe only "makes sense if Liz is really a seller." A3378; A2856.

"relatively modest distributions" above tax liabilities. Op. at 9; A2538-39. In January 2012, Shawe acceded to Elting's demand for a non-tax distribution totaling $10 million. Op. at 9; A2405; A2469; A2539. In November 2012, however, Shawe did not agree to Elting's demand for another $10 million non-tax distribution. Op. at 12; A2925-26. Elting then pursued an escalating strategy of withholding approval of corporate opportunities as leverage for her demands for distributions, and to pressure Shawe to buy her out. Every employee witness testified to observing Elting threatening to withhold approval of, or refusing to approve, beneficial business decisions as a means to gain personally through non-tax distributions or increased power. *See, e.g.*, A2452; A2724; A2748-49; A2754; A2765; A2864-65; A2784.

Elting blocked acquisitions. Despite their undisputed importance to TPG's growth and profitability, including acquiring offices, technology and talent,[5] Elting blocked all acquisitions since 2013 to use them as leverage to extract distributions from TPG. *See* Op. at 22; A2465; A2930-32. Instances included Elting's threat to withhold approval of the "Vasont" acquisition unless Shawe capitulated to her demand for a $2 million non-tax distribution, which he did. A2414; A2986; A2563; A2505; A2913; A2995-96; A3380-95; *see also* Op. at 12 (day after Shawe

[5] *See* A2524; A2526; A2527-28; A2765; A2720; A2739; A3204-05; A3210-11. The failure to acquire new companies was damaging to TPG, A2518, and Elting admitted that "certainly sales and revenues would be much greater if we could make acquisitions." A2519; A3659-62. Elting's refusal to consider M&A opportunities on the merits since mid-2013 cost TPG several key opportunities to grow and compete in a fast-evolving marketplace. A2768-69.

rejected Elting's November 2012 $10 million profit distribution demand, "Elting summarily rejected a proposed acquisition of a company called Rixon, writing, '[D]on't bother.'"); A2765-68; A2967-68; A2969; A2973; A2964-65; A2754; A2442-43; A2519; Op. at 30 (December 2013: "all acquisitions are on hold" over distribution demands); A3008; A3111-12; A3281. Although finding that "Elting is opposed to acquisitions" and that "blanket opposition to acquisitions does not comport with a director's obligation to act in the best interests of the corporation as a general matter," Op. at 69-70, the court nonetheless held that the "deadlock concerning acquisitions" was causing "irreparable injury" to TPG, entitling Elting to appointment of a custodian and a forced sale. *Id.* at 77.

Elting asked clients to withhold business from TPG. The court found "it is more likely than not" that Elting "exploit[ed]" concerns of two major TPG clients, Bank of America and Goldman Sachs—concerns caused by *Elting's* petition to dissolve TPG—by asking them to threaten to withhold their business unless TPG provided audited financial statements to further her buy-out pursuit. Op. at 48, 72 n.290; *see also* A3026-27; A3034-38; A3166; A3168; A2868; A1056. Contrary to Elting's repeated claims that TPG would be harmed without audited financial statements, her adviser's emails to Goldman Sachs revealed that her allegations of harm to TPG were merely a litigation strategy to force a buy-out. *See, e.g.*, A3026-27 (stating her lawsuit has "nothing to do with the very strong

underlying health of the business"; "[t]he dissolution proceeding is simply the motion that had to be filed . . . to force the buy/sell process to begin in earnest").

Elting threatened to stop paying TPG's attorneys. In November 2012, at a key juncture in a major, ultimately successful patent litigation (*MotionPoint*) concerning rights in OneLink, one of TPG's prized products, Elting threatened to stop paying the patent attorneys unless she received an immediate distribution, saying, "there's about to be no company," and "I'll give you 2 minutes to decide. I won't call [the attorneys] if you agree that we each take $ out immediately. If you don't the [*MotionPoint*] suit is over." A2928; A2927; *see also* A2929 ("It's 5 million each to our personal accounts or it's over . . . . Make your decision now."); Op. at 12-13; A2784; A2543-44; Op. at 16 (in March 2013, again refusing to pay *MotionPoint* attorneys "unless Shawe approved an immediate profit distribution").

Elting "hostaged" employee hiring decisions. Elting refused to approve a promising sales hire "until the dividend happens." A2934; A2469-70; Op. at 16 & n.52. When Shawe agreed to a $1 million distribution, and asked for approval on another needed hire, Elting replied: "At this juncture it needs to be 3.5 million each." A3643; A2471. When Shawe then approved $4 million in distributions, Elting demanded "6 million to proceed" with the hires. A2938-40; A2942; A2473-74. Shawe then asked if $6 million each, *plus* $2 million per quarter "nail[ed] it down"; Elting responded, "No." A2945-49; A2475.

Elting withheld approval for critical leases. Elting withheld approval of essential office leases, even proposing to her advisers to refuse to approve a desperately needed London lease as "leverage to obtain a buy/sell agreement … '(*for the good of the company*).'" Op. at 53 (emphasis added); A3030. Elting's husband, Michael Burlant, who worked at Cushman & Wakefield, TPG's real estate brokers, then delayed Cushman's action on the proposed London lease, causing TPG to lose the lease opportunity, and causing severe disruption at the London office. A3030; A2557. Elting disrupted other lease opportunities to pressure Shawe into approving distributions. *See* A3013 ("[N]ot approved, this is not approved, *its leverage*, what else do you have." (emphasis added)); A587 (discussing A3288); A3011-12; A3601-02; A2560; A2571; A2574; A3012; A2767-68; A3281.

Elting violated internal controls. Elting violated internal controls to force a large tax distribution, harming TPG by causing a cash crunch and vendor complaints, just as Shawe had warned. In what the court described as an "ugly episode," Op. at 16-17, in April 2013, without consulting Shawe, Elting and her loyal assistant Gale Boodram, *see* Op. at 7-8 & n.20, forced employees on threat of termination to impersonate another employee and transfer $9 million to a TPG account, from which Elting made the distributions without Shawe's signature. Op. at 16-17; A2952; A3023-25; A2953; A3627; A3287; A565; A2410; A2785-86;

A2950; A2954; A2955; A2408; A2695; A2544-45; A2986-87; A2956; A3663-68; A2958.

Elting misused company funds to pay her personal advisors. Elting paid attorneys, Kramer Levin, and her financial adviser with TPG funds. A2404; A2997-3005; A3015-19; A2987-89. Elting claimed these payments were not improper because "the plan was all along to true it up." A2404. However, the "true up" process only applied to "unagreed-on," but properly deductible, business expenses, not personal expenses. A2576-77; A2781-82; A3609-10; A576; A3020; A2571-72. Despite this clearly improper use of TPG funds, the court blamed Shawe for blocking the "true-up," Op. at 97, calling it an area of "deadlock." Op. at 71. The court's error was highlighted when the Custodian agreed that the payments were personal expenses, not part of the true-up process, requiring Elting to reimburse TPG directly. A4174-79.

D. Shawe Did Not Act Contrary to TPG's Interests

In contrast to its findings with respect to Elting's self-interested misconduct, the court determined that there was no showing that "any of Shawe's specific acts was the product of a breach of the fiduciary duty of loyalty." Op. at 88; *id*. at 89 ([T]he "record does not show that Shawe engaged in self-dealing or financially enriched himself at the Company's expense. . . . [M]any of the cited acts of misconduct . . . *were aimed at Elting personally*" (emphasis added)). Elting herself

admitted that Shawe never once demanded a distribution or other personal benefit in exchange for approving a business decision, A2465, and she abandoned her breach of fiduciary duty and breach of contract claims. Op. at 47 n.206. Indeed, the court recognized the "distinct possibility" not only that "Shawe would be the most logical purchaser of the business," but also "that a third party would be unwilling to acquire the Company without securing his participation and expertise." Op. at 83.

E. The Court Did Not Find Actual or Threatened Irreparable Injury to the *Business* of TPG

Acknowledging that "the Company has been highly profitable," the court made no finding "that the Company suffer[ed] or [was] threatened with irreparable *financial* harm." Op. at 73 (emphasis added). Instead, it characterized as evidence of irreparable injury to the business of TPG isolated expressions of employee morale and retention concerns and customer concerns, for which the court already found Elting at least partially at fault. Op. at 71-72 & n.290, 74-75. Most surprising, the court found that *Elting's* successful blocking of acquisitions, which the court had correctly deemed improper, Op. at 69-70, "threatens harm." Op. at 77. The court did not address why it rewarded Elting's own improper conduct with the equitable relief of a custodian and forced sale of the Shawes' interests in TPG.

The court ignored unrefuted expert testimony that TPG "has an amazingly low [employee] turnover percentage," A2897, and extensive testimony refuting

that employee morale or retention were serious concerns, which, to the extent relevant, placed substantial blame for these problems on Elting. A3160-65; A2719; A2736; A2753; A2767; A2777; A2867; A2868; A568; A581; A594-95; A3111-13; A3118-19; A3143; A3280-81; A3285; A3618-19. Instead, the court found "irreparable injury" based largely on comments in 2013 and 2014 from a handful of TPG's 4,000 employees, largely centered on email exchanges among executives almost a year and a half before trial, Op. at 74-75 & nn. 299-302, 304 A2961-63; A2976-84; A2990-94, and a few other isolated employee comments. Op. at 56, 75-76; A3154-59.

The court also found "irreparable injury" because several clients "have expressed major concerns" about the disputes between Shawe and Elting, Op. at 76, despite the absence of any finding or evidence that TPG has lost any of those clients or other business as a result of the dispute (and despite the fact that these clients' initial concerns were centered on the fact that *Elting* had petitioned to dissolve TPG and the court's findings that *Elting* had solicited expressions of concern from Goldman Sachs and Bank of America to further her desire to be bought out). Op. at 48, 77; A2519; A2583; A2730; A2740; A2779; A2864; A2897; A3522-23; A3520-21.[6]

[6] When presented post-trial with additional evidence that several of these clients had entered into new contracts with TPG, the court declined to take judicial notice. Op. at 76 n.308.

ARGUMENT

I. NEITHER SECTION 226 NOR CASE LAW PERMITS A FORCED SALE, ESPECIALLY WITHOUT FIRST EXPLORING THE EFFICACY OF LESS DRASTIC MEASURES

A. Questions Presented

1. Was the court's interpretation of Section 226(b) to permit appointment of a custodian to conduct a forced sale of a stockholder's shares correct? (Preserved at, *e.g.*, A3786-91; A3836; A3850; A3852-57; A2382-83; A3916-23; A4114-16.)

2. Assuming that Section 226(b) authorizes mandatory sale, is it appropriate to appoint a custodian to conduct the sale without first mandating that the custodian attempt less drastic means? (Preserved at, *e.g.*, A3786-88; A3849-50; A2382-83; A3919-21; A4085; A4140.)

3. Does Section 226 authorize the court to order all stockholders to sell, to provide a windfall to a stockholder who desires to sell? (Preserved at, *e.g.*, A3788-95; A3850-57; A2383-87; A3919-21; A4085; A4106-13.)

4. Does the broad authority and discretion afforded the Custodian under the Sale Order comport with Delaware principles of corporate governance, judicial power and judicial review? (Preserved at, *e.g.*, A4113-20; A4291-303.)

B. Scope of Review

The interpretation of a statute is a question of law, reviewed de novo. *Corvel Corp.* v. *Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 868 (Del. 2015). Even where the statute gives discretion, the court must apply the correct legal standard,

and failure to do so is an abuse of discretion. *Giuricich* v. *Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982). If the court applies the correct legal standard and gives the facts their appropriate legal significance, the decision whether to appoint a custodian and for what purpose is reviewed for abuse of discretion. *Id.* at 240.

C. Merits of Argument

1. Section 226(b) Should Not Be Read to Authorize the Court to Require a Stockholder to Sell His Shares

The court's order of a forced sale of TPG requires Shawe to sell his own property against his will. This is a radical ruling, as the right to "own and alienate shares" is fundamental to share ownership. *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1049-50 (Del. Ch. 2015); *see also Strougo* v. *Hollander*, 111 A.3d 590, 595 n.21 (Del. Ch. 2015) (citing William T. Allen, *et al.*, *Commentaries and Cases on the Law of Business Organization* 177 (2d ed. 2007)); *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1039-40 (Del. Ch. 2012). It is well settled that "the DGCL, the certification of incorporation, and the bylaws together constitute a multi-party contract among the directors, officers, and stockholders of the corporation." *In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 132 A.3d 67, 87 (Del. Ch. 2015); *see also Activision*, 124 A.3d at 1049-50.

Neither the charter nor by-laws provide for forced sale, and neither does Section 226. Section 226(b), which delineates the "authority of the custodian," provides for continuation of the business or liquidation or distribution of the

corporation's assets, not a sale of stockholders' property. A custodian takes custody of the corporation's assets, not the personal assets of the stockholders. 8 *Del. C.* § 291; *see also* 8 *Del. C.* § 159 (shares are personal property of the stockholders); *Allen* v. *El Paso Pipeline GP Co.*, 90 A.3d 1097, 1105-06 (Del. Ch. 2014). The powers of a custodian under Section 226 are defined by reference to those of a receiver under Section 291, but, as this Court made clear in *Giuricich*, 449 A.2d at 237, Section 226 powers "are not as unlimited as the powers of a [Section 291] receiver." Section 291 does not grant a receiver power over the personal property of the stockholders; instead, it provides that the receiver is "of and for the corporation," and that a receiver is empowered to do "acts which might be done by the corporation." No corporation can force a stockholder to sell his shares (except pursuant to the sui generis statutory merger procedures discussed below). Similarly, under Section 297, in certain circumstances a receiver may sell "the property of the corporation."

It could not have been the legislature's intent to permit a stockholder's fundamental personal property rights to be abridged by implication. Indeed, in the rare instances in which the DGCL permits such abridgement, it is crystal clear that it is doing so. *See, e.g.*, 8 *Del. C.* § 251(c) (minority stockholder may be required to sell after a vote and subject to Section 262 rights); § 303 (sale in bankruptcy "deemed" an action of stockholders); § 273 (dissolution of 50/50 venture). The

absence of such explicit language in Section 226, in contrast with these other statutes, confirms that no such power exists under Section 226. *See generally Grimes* v. *Alteon, Inc.*, 804 A.2d 256, 260, 265 n.35 (Del. 2002) (noting each section of the DGCL should be read together to produce a harmonious whole). This is further confirmed by jurisprudence on equitable dissolution, against the backdrop of which Section 226 was enacted, which says nothing about the forced sale of stock and confirms that the receivership remedy depends on a "showing of imminent danger of great loss resulting from *fraud or mismanagement*." *Berwald* v. *Mission Dev. Co.*, 185 A.2d 480, 482 (Del. 1962) (emphasis added); *Drob* v. *Nat'l Mem'l Park, Inc.*, 41 A.2d 589, 597 (Del. Ch. 1945) (collecting cases); *VTB Bank* v. *Navitron Projects Corp.*, 2014 WL 1691250, at *5-7 (Del. Ch. Apr. 28, 2014).

The opinion below contains no textual analysis of Section 226 alone, together with Section 291, or in the context of the DGCL as a whole, to support the view that it authorizes forcing Shawe to sell his shares. Instead, relying on two cases cited in a footnote, the court said, "[a]lthough it is unusual, this Court occasionally has appointed custodians . . . to conduct a sale of the corporation." Op. at 81 & n.320. But research reveals no case ordering a sale under Section 226 over stockholder objection; and neither of the cited cases addressed the critical question of whether a forced sale is permitted because in each *the stockholders had*

agreed that the company should be liquidated or sold. Thus, in *Bentas* v. *Haseotes*, 769 A.2d 70, 79-80 (Del. Ch. 2000), and 2003 WL 1711856, at *1-3 (Del. Ch. Mar. 31, 2003), only after the parties had agreed to a sale or other ownership change did the court adopt a method of sale. Similarly, in *Fulk* v. *Washington Service Associates, Inc.*, C.A. No. 17747, at 3 (Del. Ch. June 4, 2001) (TRANSCRIPT), and 2002 WL 1402273, at *2 (Del. Ch. June 21, 2002), a Section 273 case, the sale order determined the method of sale, but only after the parties had agreed that a sale should occur.

In addition, construction of Section 226 as authority for forcing Shawe to transfer his property may raise constitutional questions under the Takings Clause of the Fifth Amendment to the U.S. Constitution and Del. Const. Art. I, § 8. *See Kelo* v. *City of New London*, 545 U.S. 469, 472, 480-87 (2005). To avoid this constitutional issue and others that may arise out of the Sale Order's implementation, this Court should construe Section 226 more narrowly. *See Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 341, 348 (1936) (Brandeis, J. concurring).[7]

2. The Court Erred by Foregoing Less Intrusive Alternatives

When a custodian is appointed, his "involvement . . . in the corporation's business and affairs should be kept to a minimum" and his powers "sharply

[7] Shawe understands that potential constitutional issues are discussed more fully in the Brief of Shirley Shawe.

limited." *Giuricich*, 449 A.2d at 240. The court violated this principle by requiring the stockholders to sell their shares without directing the Custodian to pursue less drastic and less intrusive alternatives. *See generally Ivanhoe P'rs* v. *Newmont Mining Corp.*, 533 A.2d 585, 609-10 (Del. Ch.), *aff'd*, 535 A.2d 1334 (Del. 1987).

The most obvious alternative would have been to appoint, or to charge the Custodian to establish a mechanism to appoint, the third (or additional) director(s) contemplated by TPG's by-laws, including self-perpetuating independent directors, consistent with procedures commonly found in joint venture and stockholder agreements.[8] The court rejected the third director option solely on the ground that, given Shawe's and Elting's "relatively young" age, this "would enmesh an outsider and, by extension, the Court into matters of internal corporate governance for an extensive period of time." Op. at 81. But nothing in Section 226 or the case law suggests that a court should pick a short time frame to address supposed deadlock, and the profitability and steady growth of TPG means there was time to address alternatives. Custodians can and have patiently and productively explored fair solutions with corporate constituents over the course of years in certain cases. *See*

[8] For example, the Custodian might have sought a court order that the directors amend the by-laws to expand the board by addition of independent directors and to delegate to those independent directors the ability to elect successors and fill vacancies. Shawe proposed additional alternatives before and during litigation. The court did not explore them, or direct the Custodian to do so. A3169-80; A3186-93; A3274-78; A3329-65.

Miller v. *Miller*, 2016 WL 614486 (Del. Ch. Feb. 11, 2016) (discharging tie-breaking custodian after seven years); *Bentas*, 2003 WL 1711856, at *1-3 (custodian in place for three years).

The best evidence that such tie-breaking would have worked is that it *already has been working* for over a year, as the Custodian successfully resolved most of the supposedly intractable "deadlocks"—including by implementing regularized distributions—while TPG continued to post record profits and maintained steady growth. A4149-53; A3902-03; A4189. Neither party has sought judicial review of any of the Custodian's tie-breaking decisions, and the Custodian has sought no guidance other than with respect to the forced sale order.

Of course, the Custodian's tenure could have been shortened by Elting selling her shares. However, once the court ordered a sale of the whole company, thus affording Elting a control premium that selling only her shares would not command, *see* A3484-85; A3548-49; A2878-79, Elting had no incentive to seek such a sale. The court dismissed the option of Elting selling her stock with the hypothetical question: "What rational person would want to step into Elting's shoes to partner with someone willing to 'cause constant pain' and 'go the distance' to get his way?" Op. at 80. The obvious answer is anyone who likes to make money. It was uncontested at trial that Elting received $17 million in non-tax distributions in 2012 alone, which is just a portion of the more than $157

million in combined tax and non-tax distributions paid to the three stockholders from 1999 through 2014. A2914; A3380-467; A3645-47. The personal baggage that was the obvious source of the enmity between Elting and Shawe would not be present with a new stockholder, and financial investors are generally unconcerned with the past romantic life of a partner who will earn good returns. Cases involving "equitable dissolution," such as *Carlson* v. *Hallinan*, 925 A.2d 506, 543 (Del. Ch. 2006), confirm that "[m]ere dissension among corporate stockholders seldom, if ever, justifies the appointment of a receiver for a solvent corporation. *The minority's remedy is withdrawal from the corporate enterprise by the sale of its stock.*" (emphasis added) (citation omitted). In sum, while the court acknowledged that a forced sale should be a "last resort," Op. at 81-82, it lacked a basis to conclude the time for last resorts had arrived.

3. The Forced Sale Order Gives Elting a Windfall

The court ruled that "it would be unjust to leave Elting with no recourse except to sell her 50% interest in the Company," whereas an auction will give Elting a "fair price for her shares." Op. at 80. Nowhere in the language of Section 226, its legislative history, or the case law is there any indication that the statute aims to provide disgruntled stockholders with a non-contractual escape clause from their investments. The means of exit from illiquid investments is a matter for negotiation among stockholders, not judicial intervention. *See Nixon* v. *Blackwell*,

626 A.2d 1366, 1380-81 (Del. 1993) ("It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted.").

Here, moreover, the record shows that Elting and Shawe could have, but did not, negotiate an exit mechanism either as part of the 2007 reorganization or at any other time. *See supra* pp. 8-9. By ordering TPG sold, the court gave Elting a windfall to which she was not legally entitled— a pro rata interest in the control premium that is ordinarily realizable only by selling a controlling interest in the company.[9] The court ordered this sale for the express purpose of allowing Elting to realize this control premium, asserting that "fairness" required this result. "Fairness" in fashioning equitable remedies cannot disregard legal rights, and the court cannot simply change property rights to get what it thinks is a fair solution.[10]

4. The Sale Order Improperly Delegates Judicial Power and Operates to Insulate Its Exercise from Meaningful Review

The Sale Order grants the Custodian "full and exclusive authority" to carry out in his "sole discretion" whatever plan of sale he thinks appropriate. *See, e.g.*,

[9] The exception to the rule that a non-controlling stockholder is not entitled to a control premium is appraisal under Section 262. But Section 262 allows for recovery of a proportional share of whole-company value only in narrow and inapplicable circumstances. *Agranoff* v. *Miller*, 791 A.2d 880, 888 (Del. Ch. 2001). Unlike in the appraisal context, Elting is not being forced to sell, so the unique public policy interests behind Section 262 are inapplicable to her. *See Applebaum* v. *Avaya, Inc.*, 812 A.2d 880, 893 (Del. 2002).

[10] Delaware Courts have long refused to create an exit mechanism for stockholders who, despite opportunity, never did so. *See Blaustein* v. *Lord Baltimore Capital Corp.*, 2013 WL 1810956, at *17-18 (Del. Ch. Apr. 30, 2013), *aff'd*, 84 A.3d 954 (Del. 2014); *Ueltzhoffer* v. *Fox Fire Dev. Co.*, 1991 WL 271584, at *8 (Del. Ch. Dec. 19, 1991), *aff'd*, 618 A.2d 90 (Del. 1992) (TABLE).

Sale Order ¶¶ 1-9, 17. Interim steps and judgments along the way are also left wholly to the Custodian, including all decisions about bidding, bidders, disclosure, marketing, and acceptance of bids. *Id.* ¶¶ 2-5. The Sale Order provides no standards by which the Custodian is to exercise this authority or be evaluated. Indeed, the Order expressly provides that the Custodian is not bound to consider any "constituency['s]" interest—not even "the stockholders." Sale Order ¶ 8. The Sale Order then improperly insulates the exercise of this unfettered discretion by providing that the Custodian may withhold material information from the stockholders, *id.* ¶ 6, who may not challenge any action other than by showing "an abuse of discretion by the Custodian." *id.* ¶ 18(d).

Granting the Custodian complete discretion over the sale process subject only to review for abuse of that unfettered discretion is no meaningful review at all. *DiGiacobbe* v. *Sestak*, 743 A.2d 180, 182-83 (Del. 1999). Nor can this overbroad delegation be cured by judicial review of any final sale—by then, interim steps improperly taken may have caused irreparable harm, and will be impossibly difficult to disentangle from the terms of the sale presented to the court for approval. Standard-less delegation departs from Delaware's well-established and carefully defined body of law defining appropriate director behavior in a sale process, law that could easily be applied. *See Revlon* v. *MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

II. SECTION 226 DOES NOT AUTHORIZE JUDICIAL INTERVENTION IN THE AFFAIRS OF A THRIVING COMPANY IN FURTHERANCE OF A STOCKHOLDER'S EXIT STRATEGY

A. Questions Presented

1. Can 8 *Del. C.* § 226(a)(2)'s requirement of "irreparable injury" to the "business of the corporation" be satisfied where, by any commercial measure, the corporation's "business" is thriving and no financial harm or threat was proven? (Preserved at, *e.g.*, A3776-83; A3836-48; A2383.)

2. Did the court's fact findings concerning harms to TPG meet Section 226(a)(2)'s stringent "irreparable injury" standard for appointment of a custodian? (Preserved at, *e.g.*, A3774-75; A3838-39; A2381.)

3. Given the court's findings regarding Elting's misconduct, was she barred from obtaining a forced sale as equitable relief under 8 *Del. C.* § 226? (Preserved at, *e.g.*, A3719-20 n.6; A3776-78; A3782-83; A2353-2363; A3827 n.2; A3843-48; A4085.)

4. Did the forced sale order comply with this Court's instruction that even when permissible, judicial intervention under Section 226(a)(1) should be "sharply limited," *Giuricich*, 449 A.2d at 240? (Preserved at, *e.g.*, A3771-75; A3849-3850; A2379-81.)

B. Scope of Review

The interpretation of a statute is a question of law, reviewed de novo. *See supra* pp. 17-18. Factual findings are reviewed for clear error. *Bank of N.Y. Mellon Trust Co., N.A.* v. *Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011). Whether the facts as found satisfy the applicable legal standard is a question of law, reviewed de novo. *Id.*

C. Merits of Argument

1. The Decision Misapplied the Statutory Requirement of "Irreparable Injury" to the "Business of the Corporation"

Section 226(a)(2) authorizes the appointment of a custodian only when division between directors is causing, or threatens to cause, "irreparable injury" to "the business of the corporation." As the court found, the *business* of TPG has continued to thrive despite Elting's and Shawe's personal disputes. Op. at 7, 73; *supra* pp. 7-8. The court also properly rejected as "speculative" any inference of harm to profitability from these disputes, Op. at 73, and acknowledged that its irreparable injury finding is not free from doubt, but "a closer question." Op. at 72. Nevertheless, relying on inapplicable temporary stay, preliminary injunction, and insufficiency of monetary damages cases unrelated to Section 226, the court held that the requirement of "irreparable injury" to the "business of the corporation" could be met by evidence of concerns about employee retention or "morale" and clients' questions about the disputes. There was *no* evidence that these concerns

had affected TPG's financial success. The court also relied on Elting's "blanket opposition" to acquisitions, but pointed to no evidence that any harm from Elting's misconduct amounted to "irreparable injury." Op. at 72-78; *supra* pp. 10-11.

This Court has made clear its understanding that the "irreparable injury" standard for appointment of a custodian must be equivalent to "*imminent corporate paralysis*." *Giuricich*, 449 A.2d at 239 n.13 (explaining that "*irreparable harm, or in other words, imminent corporate paralysis*" was not required under the 1967 amendments to Section *226(a)(1)*) (emphasis added). The court's decision takes a far different view of "irreparable injury," equating the injury necessary to support a forced sale with the far less stringent "irreparable injury" that may justify temporary stays or preliminary, prohibitory injunctions in "traditional" contexts. Op. at 74 & n.298. In doing so, the court's decision trivializes and undermines Section 226, which, consistent with this Court's observation in *Giuricich*, permits judicial intrusion into corporate governance only in extreme circumstances. *See TecSyn Int'l Inc.* v. *Polyloom Corp. of Am.*, C.A. No. 11918, at 4, 7 (Del. Ch. July 14, 1992) (TRANSCRIPT) (appointment of § 226 custodian is a "drastic" remedy, requiring a "very high standard" such as "financial issue[s] ... jeopardiz[ing] ... the ability of [the] Corporation to operate"); *Barry* v. *Full Mold Process, Inc.*, 1975 WL 1949, at *2 (Del. Ch. June 16, 1975) ("judicially sanctioned interference with the internal affairs of a corporation" may be granted only "grudgingly"); *Hoban* v.

Dardanella Elec. Corp., 1984 WL 8221, at *2-3 (Del. Ch. June 12, 1984) (finding irreparable injury under § 226(a)(2) where the corporation's "survival" was threatened).

This high standard is not met, for example, merely because employees or customers have expressed concerns about the principals' disputes. "[D]oubt" about "successful future operation" of business is not irreparable injury, so long as business remains "profitable" and "operates reasonably well." *Miller* v. *Miller*, 2009 WL 554920, at *1, *3 (Del. Ch. Feb. 17, 2009); *see* Ernest L. Folk, III, *The New Delaware Corporation Law* 35 (1967) (Section 226(a)(2) provides recourse only where judicial interference is necessary "to prevent substantial and inescapable loss of going-concern values.").

Despite these cautionary statements, the decision below mistakenly treats judicial intervention under Section 226 as available to address concerns that do not threaten substantial financial impact, let alone "substantial and inescapable loss of going-concern values." *Id.* If allowed to stand, it threatens to expand significantly the role of Delaware's courts in the disputes or divisions that frequently arise in any successful corporation's conduct of business.

The approach is not merely an abuse of discretion, but an error of law because it relied solely on case law defining "irreparable injury" in unrelated contexts, rather than under Section 226. Each of the cases cited by the court to

define "irreparable injury" to include morale or reputational concerns involved temporary or prohibitory relief (and in most cases both), not Section 226. None supports the deeply intrusive permanent and mandatory relief here. Mandatory injunctions may issue only "in the exercise of extraordinary judicial caution, in a clear case free from doubt, and in circumstances of extreme, great, or urgent necessity." *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 12.02[c], at 12-26 (2016) (internal quotation marks and footnotes omitted). Even a mandatory injunction ordinarily should be "restorative in nature," compelling only "such actions as may be necessary to restore the status quo ante." *Id*. Here, the court found no "extreme, great or urgent necessity," but only that "logic suggests" that TPG's "long-term prospects" were threatened by the "morale" and "reputation" issues it identified, Op. at 73, 77-78, precisely the sort of "speculative" inquiry the court acknowledged was improper. Op. at 73.

Even the temporary relief cases on which the court relied, Op. at 74 n.298, required far more significant and imminent economic harm before granting far less drastic relief (in each case tailored to make the intrusion commensurate with the perceived harm) than the court ordered here. *See Kirpat, Inc.* v. *Del. Alcoholic Beverage Control Comm'n*, 741 A.2d 356, 358 (Del. 1998) (temporary stay pending appeal; undisputed evidence that "if a stay is not granted, then Kirpat will

suffer the seizure of its inventory, loss of its customer base, and loss of its employees. *In short, Kirpat will lose its business*." (emphasis added)); *Shah* v. *Shah*, 1986 WL 10918, at *2 (Del. Ch. Sept. 25, 1986) (preliminary injunction; business "operations will be severely impaired *and may cease entirely*" (emphasis added)); *Arkema Inc.* v. *Dow Chem. Co*., 2010 WL 2334386, at *4 (Del. Ch. May 25, 2010) (*status quo* TRO entered where plaintiff met "low burden" of showing risk of irreparable loss of goodwill and harm to its reputation if supplies were cut off pending forthcoming preliminary injunction hearing).[11]

2. Properly Applied, the Irreparable Injury Requirement Could Not Be Satisfied on the Facts Found Below

Under a correct application of the controlling legal standards, the court's irreparable injury finding cannot withstand scrutiny. First, the court's conclusion that TPG's "governance structure is irretrievably dysfunctional," and that TPG is "threatened with much more grievous harm to its long-term prospects if the dysfunction is not addressed," Op. at 77-78, is illogical. A corporation's function is to earn profits and enhance stockholder value, which TPG does remarkably well. *See supra* pp. 7-8; *Miller*, 2009 WL 554920, at *1, *3. TPG is the opposite of "irretrievably dysfunctional," regardless of owner disputes.

[11] The court also cited cases for the traditional principle that injunctions may be awarded because damages are difficult to calculate, but those cases have no relevance here: Elting made no claim for damages or injunctive relief in lieu of damages, and the court did not purport to appoint a custodian and order a forced sale of TPG because damages are difficult to calculate. *See* Op. at 74 (cases cited in n.297 and *Penn Mart Supermarkets, Inc.* v. *New Castle Shopping LLC*, 2005 WL 3502054, at *15 (Del. Ch. Dec. 15, 2005), cited in n.298).

Second, as just shown, employee morale and retention issues and client concerns cannot substitute for evidence of real actual or threatened substantial injury to the business of TPG. And even if such ephemeral concerns could meet Section 226's very high standards in an appropriate case, the isolated anecdotal evidence here falls far short, particularly to appoint a custodian to carry out a forced sale of the objecting stockholders' ownership interests. *See supra* pp. 15-16.

Third, it was error for the court to rely on harm that the court itself had attributed to Elting's misconduct, particularly her "blanket opposition to acquisitions" directed at pressuring Shawe to sell his shares. *See* Op. at 69-72, 94-95. As Professor Folk warned, Section 226 presents the "potential hazard of a 'strike' shareholder seeking a receivership solely or primarily to compel a buyout of his shares," Ernest L. Folk, III, *Review of the Delaware Corporation Law* 350-52 (1968), and the same danger has been recognized by the Court of Chancery. *See, e.g.*, *Millien* v. *Popescu*, 2014 WL 656651, at *2 n.17 (Del. Ch. Feb. 19, 2014).

Fourth, it is important to note that the court correctly did not purport to find irreparable injury to the business of TPG based on perceived harms to "Elting personally." Op. at 89. Thus, the court's extensive recitation of the parties' personal dislikes, distrust and disputes was irrelevant to the Section 226 inquiry.

See Elting v. *Shawe*, Index No. 651423/2014 (N.Y. Sup. Ct.), Hr'g Tr. at 59:14-22 (A545) (characterizing disagreements between Elting and Shawe as mere "squabbles" and denying Elting's request for preliminary injunction); *TecSyn*, C.A. No. 11918, at 6, 13 (fact that "the parties have difficulty dealing with each other" not relevant to issue of "irreparable injury"); *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, at *8 (Del. Ch. Aug. 18, 2005) (expressions of "personal animosity"; "secretly taped telephone conversations"; "expletive-laden rantings, in which the parties call each other cheats, liars, and losers" not "pertinent to the legal issues" of dissolution); *In re Radiology Assocs., Inc. Litig.*, 1990 WL 67839, at *14 (Del. Ch. May 16, 1990) ("Claims for dividends or distributions are individual rather than derivative in nature.").

Finally, the court erred in asserting that "Shawe himself acknowledged 'the potential for grievously harming the business' that his feud with Elting could cause," Op. at 73, citing only a February 25, 2014 settlement proposal Shawe made to Elting. A3688-91. The statement itself is speculative so it proves no irreparable injury. And, as an offer of compromise, it was inadmissible to prove the validity of Elting's claim of irreparable injury. *See* D.R.E. 408. The court's finding that Shawe "waived" the objection to use of his compromise offer to prove liability

merely because Shawe had used it to disprove Elting's assertion that he was unwilling to compromise was clear error.[12]

3. Elting's Unclean Hands Bar Relief Under Section 226

The court failed to address the impact of its own fact findings concerning Elting's misconduct on her equitable claims for relief under Section 226. This was error, as these findings, *see supra* pp. 9-14, establish Elting's unclean hands, and thus barred her claims. Under the unclean hands doctrine, "a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit." *Nakahara* v. *N.S. 1991 Am. Trust,* 739 A.2d 770, 791-92 (Del. Ch. 1998) (citation omitted); *see Bodley* v. *Jones*, 59 A.2d 463, 469 (Del. 1947). The doctrine "is not about whose hands are dirtier . . . [It] is designed primarily to protect courts of equity from being misused by a party who has not acted fairly … as to the controversy in issue." *Patel* v. *Dimple, Inc.,* 2007 WL 2353155 at *12 (Del. Ch. Aug. 16, 2007).

As the court recognized, appointing a custodian under Section 226 and delineating his authority are discretionary exercises of equitable powers (subject to statutory limits). *See* Op. at 81, 83. A party with unclean hands may not obtain equitable relief under § 226. *See Balch Hill P'rs L.P.* v. *Shocking Techs., Inc.*,

[12] *See OptimisCorp* v. *Waite*, 2015 WL 5147038, at *9 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) (TABLE). That this document shows Shawe's effort to persuade Elting of the importance of compromise is not substantial proof that harm was likely to occur, and its use for that purpose illustrates precisely the reason that Rule 408 exists.

2013 WL 588964 at *3 (Del. Ch. Feb. 7, 2013) (in addressing whether to grant § 226(a) relief, court must consider "equitable factors," including whether "the doctrine of unclean hands" should be applied); *Moore* v. *C.H.M. Enters., Inc.*, 1983 WL 102620, at *2 (Del. Ch. Nov. 9, 1983) (declining to appoint a custodian because "[a]ny inability of the corporation to service its debts" was "due to the acts of the plaintiff"); *Millien*, 2014 WL 656651, at *2 n.17 (declining to appoint custodian where plaintiff "sought to create a deadlock").

Here, the court held that Elting had "improperly" asked key customers to withhold their business in order to further her personal desire for a buyout. Op. at 72 & n.290; *see also* Op. at 47-51. Moreover, the record is replete with examples of Elting's cynical efforts to extract personal benefits at the expense of TPG. *See supra* pp. 9-14. The court therefore "should [have] refuse[d] to interfere on [Elting's] behalf" to grant her the very relief that it had found she had acted improperly to obtain. *Bodley*, 59 A.2d at 469. Indeed, this conclusion is unavoidable, where the court invoked the unclean hands doctrine to deny Shawe's fiduciary duty claim against Elting based on "the culture of *mutual* hostaging" between them, Op. at 95 (emphasis added), and despite finding that there was no evidence that Shawe had "engaged in self-dealing or enriched himself at the Company's expense." Op. at 89, 93. This is true regardless whether the court

believed that Shawe's "hands are dirtier" than Elting's. *Patel*, 2007 WL 2353155 at *12.

4. Proper Application of Section 226(a)(1) Requires Careful Assessment of Harm, in Light of that Section's Purposes

The court stated that "Elting's petitions for dissolution of the Company under *8 Del. C.* §§ 226(a)(1) and (a)(2) . . . are granted." Op. at 104. The court devoted less than a page to Section 226(a)(1), finding its requirements satisfied by a stipulation that Shawe and Elting were "divided" over the election of directors. Op. at 66-67, A3181-85. Elting, however, did not petition for dissolution under Section 226(a)(1), seeking only appointment of a custodian "with the authority necessary to act in the best interests of the Company and its stockholders," A560, and so she has no claim for dissolution under that subsection.

Moreover, Section 226(a)(1) does not *require* appointment of a custodian (much less a forced sale) whenever stockholders "are so divided that they have failed to elect successors to directors." That interpretation would eliminate the word "may" in Section 226. Rather, Section 226(a)(1) addresses a very discrete problem – "the injustices arising from a shareholder-deadlock which permits control of a corporation to remain indefinitely in the hands of a self-perpetuating board of directors, any gross unfairness to other major stockholders notwithstanding." *Giuricich*, 449 A.2d at 239; *see also Stephanis* v. *Yiannatsis*, 1994 WL 198711 (Del. Ch. May 9, 1994), *aff'd* 653 A.2d 275 (Del. 1995). Here,

however, the only two "major stockholders" served as directors; only Elting's resort to the courts threatened to deprive either of them of the right to keep serving. Even if that were sufficient, the correct result is not to compel an auction of TPG, but to appoint a custodian for the "sharply limited" purpose of acting "only in situations in which the board of directors [] ha[s] failed to reach a unanimous decision on any issue properly before them." *Giuricich*, 449 A.2d at 240; *Miller*, 2009 WL 554920, at *5.

III. THE COURT'S PRIVILEGE RULINGS DEPRIVED SHAWE OF A FULL AND FAIR OPPORTUNITY TO BE HEARD

A. Questions Presented

1. Did the court err in holding that the attorney-client privilege applied to Gmails that Elting exchanged with her counsel through an account that, by Elting's deliberate actions, made those emails accessible without a password on both her TPG computer and to numerous employees with access to the TPG network, (preserved at, *e.g.*, A4378-90, A4393-01), and in holding that the marital communications privilege applied to TPG business-related emails that Elting exchanged with her husband on her Gmail and TPG-issued email accounts and his company email account? (Preserved at, *e.g.*, A2277-87.)

B. Scope of Review

This Court reviews questions concerning the application of privileges against disclosure de novo, insofar as they involve questions of law. *Espinoza* v. *Hewlett-Packard Co.*, 32 A.3d 365, 372 (Del. 2011).

C. Merits of Argument

The court misstated the key facts and misapplied the relevant law in holding that Elting's emails exchanged with her counsel and husband – which Elting stored on her TPG computer, were accessible through the TPG network, and thus the property of TPG – were privileged, and excluding their use at trial. A2258-73;

A2853-39.[13] These privilege rulings should be reversed and the case remanded with instructions to supplement the record and hold a new trial. *See, e.g.*, *Zirn* v. *VLI Corp.*, 621 A.2d 773, 780-83 (Del. 1993) (reversing privilege holding and remanding to supplement the trial record and hold a "rehearing"); *Citadel Hldg. Corp.* v. *Roven*, 603 A.2d 818, 826 (Del. 1992). Although it is not Shawe's burden to prove that the withheld information would have supported his position or affected the outcome of the trial, *see Zirn*, 621 A.2d at 780-83 (reversal of privilege ruling itself warrants additional discovery and rehearing), these undisclosed emails are very likely material. The few Gmails with Elting's husband and advisers that the court admitted strongly support the claim that Elting improperly manufactured deadlock and dispute as part of her dissolution strategy. *See supra* pp. 9-14.

In October 2013, on the advice of counsel, Elting created a Gmail email account separate from her TPG email account, which she used to communicate with her counsel among others. A2259. Finding the internet-based, password-protected account "cumbersome," Elting, for her personal convenience, requested that a TPG employee synchronize the Gmail account with the TPG-owned Outlook program on her TPG-owned computer; Elting admitted that she was aware that this

[13] In addition to the issue of emails with counsel, the court held that 35 Gmails and 212 TPG-account emails that Elting exchanged with her husband on his employer-issued account concerning TPG-related business matters were protected by the marital communications privilege. A2835-39.

eliminated the Gmail password protection on her TPG computer. A1996-98; A1209-10; A1226. As a result, her Gmails were stored on her TPG-owned computer, and became accessible through the TPG network to approximately 20 TPG employees, including Shawe, without her Gmail password. A1997-98; A1089-95; A1199-01; A1234-35.

Once Elting's Gmails were on the TPG system, they, like her TPG-account emails, became TPG property, subject to Company monitoring, and, under TPG's computer policy, became essentially indistinguishable from her TPG-account emails, which Elting acknowledged were not confidential. A1119-20; A3803. Elting was aware of the TPG computer policy; indeed, she signed an acknowledgement that it applied to her. A3803; A3082-86. That policy provided:

> By signing below, I further agree and acknowledge that all information, data, files, etc. entered or input on, transmitted to or from, or otherwise used with Company computers or any Company computer system ("computer data"), including, without limitation, electronic mail ("e-mail"), and Internet usage or activity, are TransPerfect property; and … may be intercepted, monitored, and reviewed by the Company at any time, with or without notice.

Both New York and Delaware require that the attorney-client privilege be "narrowly construed." *Ambac Assur. Corp.* v. *Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (N.Y. 2016) (citation omitted); *Balin* v. *Amerimar Realty Co.*,

1995 WL 170421, at *8 (Del. Ch. Apr. 10, 1995) (same).[14] The burden is on the party asserting privilege to establish each element. *Ambac*, 27 N.Y.3d at 624; *accord In re Info. Mgmt. Servs., Inc. Deriv. Litig.*, 81 A.3d 278, 285 (Del. Ch. 2013) ("*IMS*"). Attorney-client communications are not privileged if the "client does not reasonably protect the communications from the eyes of other outsiders." *See* N.Y.C.P.L.R. 4503(a)(1) & cmt. C4503:3 (McKinney 2011); *accord* D.R.E. 502(b). The client's subjective expectation of confidentiality must be objectively reasonable. *See generally* 1 Attorney-Client Privilege: State Law New York § 6:5*; IMS*, 81 A.3d at 285.

The marital communications privilege likewise applies only to communications made in confidence, also requiring an objectively reasonable belief that the communications in question are confidential. *See, e.g.*, *In re Reserve Fund Sec. & Deriv. Litig.*, 275 F.R.D. 154, 157-58 (S.D.N.Y. 2011). Moreover, the marital privilege does not apply to "ordinary business matters," as here. *Sec. Settlement Corp.* v. *Johnpoll*, 128 A.D.2d 429, 431 (N.Y. App. Div. 1987) (internal quotations omitted); *see* A2839; A2307-20.

Under New York law, whether a party's subjective expectation of confidentiality in email communications transmitted or stored on a company

[14] New York and Delaware law appear consistent on the privilege issue, but if in conflict, New York law controls, as the court noted elsewhere, A2670, including because Elting sent and received the emails at issue from her office in New York, which was also where the majority of Elting's attorneys were located. *See, e.g.*, *Carlton Invs.* v. *TLC Beatrice Int'l Hldgs., Inc.*, 1996 WL 33167792, at *2 (Del. Ch. Sept. 27, 1996).

device or network is objectively reasonable is governed by the four-part test of *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257-59 (Bankr. S.D.N.Y. 2005), followed in Delaware in *IMS*, 81 A.3d at 285, and by numerous other courts, *see, e.g.*, *Reserve Fund*, 275 F.R.D. at 159-60 (noting *Asia Global* has been "widely adopted" and listing myriad cases). That test asks:

> (1) does the corporation maintain a policy banning personal or other objectionable use [of its computer system], (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

Asia Global, 322 B.R. at 257 (footnote omitted).

The court, however, rejected the *Asia Global/IMS* standard, instead relying on *Stengart* v. *Loving Care Agency, Inc.*, 201 N.J. 300 (N.J. 2010), applying New Jersey law to a very different set of facts, while ignoring cases with virtually identical facts, including from New York, in which the courts found an absence of privilege as to web-based email accounts based on far lesser evidence than Shawe presented here. *See, e.g., Long* v. *Marubeni Am. Corp.*, 2006 WL 2998671, at *1-4 (S.D.N.Y. Oct. 19, 2006); *Gipe* v. *Monaco Reps, LLC*, 2013 WL 3389345, at *9-10 (N.Y. Sup. Ct. July 2, 2013); *Aventa Learning, Inc.* v. *K12, Inc.*, 830 F. Supp. 2d 1083, 1108-10 (W.D. Wa. 2011); *Miller* v. *Blattner*, 676 F. Supp. 2d 485, 497 (E.D. La. 2009). The court committed further fundamental error by treating Elting's situation as if it were the same as in *Stengart*, which involved a web-

based, password protected email account—the scenario *before*, but not *after*, Elting chose to synchronize her personal email account to the TPG systems, with all the consequences discussed above.

The answer to each of the *Asia Global* questions is unambiguously yes. Moreover, given that a company's computer use policy is central to all four *Asia Global* factors, the court's finding that TPG's computer policy was not "particularly relevant" because the court did not believe that Shawe was acting for a corporate purpose, A2272, was clear legal error, and its finding that it "was not intended to apply to Ms. Elting" because she was an owner of TPG, A2836, was both factual and legal error, given Elting's acknowledgement that it did.[15] *See, e.g.*, *Bingham* v. *Baycare Health Sys.*, 2016 WL 3917513, at *5 (M.D. Fla. July 20, 2016) (that employer monitored emails for purposes other than those set forth in company policy did not render employee's expectation of confidentiality objectively reasonable).

First, the TPG computer policy absolutely bans personal use on TPG electronic devices, and makes all information on or transmitted through TPG systems TPG property. The courts have consistently found that this type of absolute policy strongly supports a finding of no privilege. Under TPG's unambiguous policy, it is objectively unreasonable to believe that information sent

[15] The handbook itself makes no such distinction, and Elting accused Shawe of violating the same handbook in a complaint filed in New York. A1152.

over TPG systems was personal and not company property. *See*, *e.g.*, *Long*, 2006 WL 2998671 at *3 (no privilege where policy provided that all information on or transmitted through the company's systems was company property); *Scott* v. *Beth Israel Med. Ctr. Inc.*, 17 Misc.3d 934, 939 (N.Y. Sup. Ct. 2007) (company's e-mail policy prohibiting personal use "critical to the outcome" of finding no privilege); *Aventa*, 830 F. Supp. 2d at 1108 (ruling that company policy was dispositive); *Blattner*, 676 F. Supp. 2d at 497 ("Where, as here, an employer has a rule prohibiting personal computer use and a published policy that emails on [the company's] computers were the property of [the company], an employee cannot reasonably expect privacy in their prohibited communications."). In sharp contrast, *Stengart* relied substantially on the fact that the company "manual *permitted* personal use of e-mail," "does not address the use of personal, web-based e-mail accounts accessed through company equipment" and "created doubt about whether those e-mails are company or private property." 201 N.J. at 318, 322 (emphasis added).

Second, TPG policy explicitly provides that all data stored on or transmitted through TPG systems is "subject to interception, monitoring, and review by TPT at any time," A1120,[16] just as in *Long*, 2006 WL 2998671, at *1, and *Aventa*, 830 F.

[16] Under this policy, both Elting and Shawe managed investigations of TPG-owned computers and email accounts. A1216-17; A2019-20; A1221-22; A3965. Elting admittedly monitored the email accounts of six employees. A2011-14.

Supp. 2d at 1109. *See also, e.g.*, *Reserve Fund*, 275 F.R.D. at 163; *Scott*, 17 Misc. 3d at 940; *IMS*, 81 A.3d at 289-91. By contrast, *Stengart* relied on the fact that "employees do not have express notice that messages sent or received on a personal, web-based e-mail account are subject to monitoring if company equipment is used to access the account." 201 N.J. at 314. Likewise, Elting knew that her husband's employer, Cushman & Wakefield, could monitor his company email account, which he used for the emails at issue. A874-77. Therefore, she could not have an objectively reasonable expectation of confidentiality in those email communications. *See Reserve Fund*, 275 F.R.D. at 159 ("There can [be] no confidential communication where the spouses are on actual or constructive notice that their communications may be overheard, read, or otherwise monitored by third parties." (internal quotation omitted)); *accord Pulaski County* v. *Arkansas Democrat-Gazette, Inc.*, 371 Ark. 217, 220-21 (Ark. 2007) (private citizen had no expectation of privacy in emails sent to government official's government-issued email account because she "knew the risk that the e-mails could become public").

Third, unlike in *Stengart*, the TPG policy is unequivocal – "all messages created, sent or retrieved over the Internet ... can be disclosed to law enforcement or other third parties without prior consent of the sender." A1119; *see United States* v. *Finazzo*, 2013 WL 619572, at *10 (E.D.N.Y. Feb. 19, 2013).

Fourth, Elting indisputably was aware of TPG's computer policy and knew that it applied to her, A3803, a factor that weighs strongly against a claim of confidentiality. *See, e.g.*, *Long*, 2006 WL 2998671, at *3; *see also IMS*, 81 A.3d at 290 (senior officers with authority to decide whether company would monitor employee email do not have "a unique expectation of privacy").

Finally, in addition to rejecting the controlling TPG computer use policy, including for the TPG-account emails, the court relied on "specific facts" in holding that Elting had "an objectively reasonable expectation" of confidentiality that are either unsupported by the record evidence, or directly contradicted by it. A2268-70. First, the court overlooked that Elting clearly did not believe that her TPG email account (which she continued to use to communicate with her husband at Cushman) was confidential—which is why (as the court had noted previously) she initially created a Gmail account. A2259-60; A2269. Second, the court found that her Gmail account remained password protected, despite Elting's admission that it was not. A2259-60; A2269. Third, the trial court's conclusion that George Buelna, TPG's "director of global technology," had told her that "the confidentiality of her Gmail communications would remain protected" after synchronization, is belied by the record. A2269. Buelna testified only that he told Elting that "data in transit" from the "Google servers" to her desktop was encrypted; he said nothing about access within the Company to her Gmails.

A1052. Crucially, Buelna's supposed assurance that Elting's "Gmails would remain secure as long as no one had her Gmail password," A2260, was nullified when Elting realized that she no longer needed her Gmail password to access her Gmail account on her Company computer. A1997-98. Fourth, there is no indication that the "forensic expert" on whom Elting supposedly relied knew that Elting had synchronized her Gmails with her TPG computer; investigated whether those Gmails had been accessed either on that computer or through the TPG network; issued any opinion on that issue; or even spoke to Elting directly. A2269-70; A548-53. Fifth, all of Elting's emails with her husband involved "ordinary business matters" which are not privileged. *Johnpoll*, 128 A.D.2d at 431 (citation omitted); *see* A2839; A2307-20.[17]

In sum, all the relevant facts and all the *Asia Global* factors lead to the conclusion that Elting's Gmails, as well as her TPG-account emails – which were sent through, resided in, and accessible to numerous TPG employees through the TPG system, and were not password protected – were not protected by the attorney-client or marital privileges. Her own written acknowledgement of TPG

[17] On December 31, 2013, Shawe accessed Elting's TPG computer and discovered that she had stored her Gmails on the Company computer and reviewed them; Shawe also accessed her Gmails through the TPG network on numerous occasions in the first half of 2014. A2260-61. The court stated that it "will not condone an argument of privilege waiver under those circumstances." A2272. However, if the Gmails were not privileged in the first place, Shawe's method of accessing them is irrelevant to the privilege issue, and the Gmails would have been produced in discovery.

policy confirms that no person in her position could have had an objectively reasonable expectation of confidentiality with regard to these communications.

CONCLUSION

This Court should reverse and render judgment for Shawe or, alternatively, remand for a new trial after full disclosure of Elting's withheld emails.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 29, 2016, a copy of the foregoing was served by File & Serve*Xpress* on the following attorneys of record:

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