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Case Number 423,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PHILIP R. SHAWE and SHIRLEY SHAWE, Respondents-Below, Appellants, v. ELIZABETH ELTING, Petitioner-Below, Appellee.	)	No. 423, 2016 Case Below: Court of Chancery of the State of Delaware, C.A. Nos. 9686-CB, 9700-CB and 10449-CB **PUBLIC / REDACTED VERSION** **NOVEMBER 18, 2016**

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PRELIMINARY STATEMENT

If ever a case cried out for the remedy of a court-supervised sale, this is it. Words like "deadlock" and "dysfunction" scarcely do justice to the horror show confronting Chancellor Bouchard at TransPerfect Global Inc. ("TPG" or the "Company"). Philip Shawe, determined to make life hell for his co-owner and former fiancée Elizabeth Elting, has for years relentlessly stalked and bullied her, lied, cheated, and threatened to get what he wants. There is no comparable fact pattern in the history of Delaware corporate law. The only apt comparisons are black comedies like "The War of the Roses" and "Ruthless People." But this isn't funny.

As the Chancellor found, Shawe's conduct is not merely a personal affront to Elting. Shawe has bred a climate of deep distrust at TPG and a corporate culture of conflict and dishonesty. The parties are hopelessly deadlocked, and have been for years, over a host of fundamental business decisions from hiring to acquisitions to profit distributions. And the stalemate is grievously harming the Company, with key employees jumping ship, [redacted], and major clients poised to take their business elsewhere.

Ignoring most of the Chancellor's meticulously detailed 104-page August 13, 2015 Memorandum Opinion (Shawe's Opening Brief ("PSOB") Ex. A, "Opinion" or "Op."), Shawe's brief operates in an alternative universe where the parties' disputes are mere "squabbles" and "personal disagreements" of the sort "that

frequently arise in any successful corporation's conduct of business"; Elting is the principal wrongdoer and Shawe the innocent victim; and their Company is "the opposite of dysfunctional." PSOB 1, 2, 30, 34. This is, of course, pure bunk. Shawe has proven himself to be a pervasive liar, as Chancellor Bouchard subsequently held in his July 20, 2016 decision ("Sanctions Opinion") imposing sanctions for his obstruction of discovery, violation of court orders, and massive spoliation of evidence. His spin on the facts is unworthy of respect, much less credence.[1]

Shawe's legal grounds for reversal are equally hollow. Because the parties stipulated to shareholder deadlock under 8 *Del. C.* § 226(a)(1), Chancellor Bouchard unquestionably had discretion to appoint a custodian under that section, regardless of whether a threat of irreparable harm was established under section 226(a)(2). Shawe nevertheless argues that it was legal error to appoint a custodian under (a)(2) because "non-financial" harm supposedly cannot constitute "irreparable injury." But TPG *has* suffered actual financial harm as a result of the chronic deadlock: [redacted]

[1] Chancellor Bouchard found that Shawe made "repeated, intentionally false statements under oath in connection with the Merits Trial," in "seemingly every form imaginable," in order "to obstruct discovery and conceal the truth about activities relevant to this case," all of which "prejudiced Elting's ability to fully develop the record" at trial. B3781, 3812, 3827-30. The court awarded Elting, as sanctions, all of her attorneys' fees on the sanctions proceedings and one-third of her fees in litigating the merits. B3833. Shawe's appeal of the Sanctions Opinion is pending.

[redacted]. And the record shows that further harm is occurring and much more is *threatened*, which is all the statute requires. Staff morale has plummeted, leading to a mass exodus of employees; the Company's culture has been compromised and its reputation tarnished; and major clients are questioning the Company's stability and re-evaluating their relationships. All of these harms or potential harms are relevant despite the Company's continuing profitability. Section 226, as revised in 1967, provides for the appointment of a custodian to resolve deadlocks at solvent but dysfunctional companies.

Shawe similarly attacks the actual sale remedy as improperly interfering with the functioning of a healthy company and creating an unbargained-for exit mechanism for Elting. But section 226 by definition operates only when the parties have failed to provide a contractual basis to break deadlock. It is a pro-business statute that gives the Chancellor broad equitable discretion in acting to extricate profitable companies from crippling deadlock. And being subject to the default remedies of Delaware corporate law *is* part of the parties' bargain.

Nor does the remedy operate as a "forced sale" of Shawe's property. The Chancellor specifically preserved Shawe's right to bid for the shares he does not already own; no one is forcing him to be a seller. And the sale process does not give Elting alone a "control premium." If a third party acquires the Company, both Elting *and* Shawe will share in the premium that they *both* created (indeed, the TPG

divisions that Elting operates have been more profitable than Shawe's). If one of them ends up buying out the other, it is only fair that the acquirer should pay fair value. Shawe's alternative – forcing Elting to sell her half of TPG for hundreds of millions of dollars less than it is worth – would be the opposite of equity. His further argument that the July 18, 2016 Order (PSOB Ex. C, "Sale Order") improperly delegates judicial power to the Custodian without meaningful review ignores that the Sale Order itself provides for judicial review of any sale and of all the Custodian's intermediate actions.

Equally meritless is the argument advanced on appeal for the first time by Shawe's mother, who owns 1% of the Company, that the Sale Order effects an unconstitutional "taking" of her property. Even if Ms. Shawe's argument were properly considered (and it is not), it fails on multiple grounds. Ms. Shawe, like her son, need not sell her share if she can successfully compete as a buyer, and should she fall short in that regard she will necessarily be fairly compensated by whoever was willing to pay more for TPG stock than she was. Moreover, her interest in the Company has always been subject to all of the provisions of the Delaware General Corporation Law ("DGCL"), including section 226, which constitutes an integral part of TPG's charter and authorizes the court-ordered sale at issue. Her interest has thus never been "vested" beyond the reach of the remedies prescribed by law, and

there is nothing unconstitutional in its sale pursuant to laws that authorized such a remedy from the time she acquired it.

The Chancellor further acted within his discretion in determining that remedies short of a court-supervised sale would not free TPG from its current extreme dysfunction. This is not a short-term conflict that might be resolved with a few tie-breaking votes. Rather, Shawe has for years been unalterably committed to making Elting miserable at all costs. He vowed never to negotiate a buy-sell agreement *fifteen years ago*, threatening to sabotage any sale until Elting let him buy her out for "next to nothing." The Chancellor correctly concluded that Shawe's scorched-earth conduct towards Elting – including breaking into her office, stealing her Gmails, and repeatedly stalking, threatening, and publicly humiliating her – has destroyed any chance of trust and cooperation between the parties. And Shawe's continuing bizarre conduct – including orchestrating public attacks on the Chancellor and filing countless crackpot lawsuits directly and through surrogates – further confirms that he and Elting simply cannot continue as co-owners of TPG. Significantly, the deadlock, dysfunction, and improper shenanigans continue even today, months after appointment of a custodian, confirming that a tie-breaking mechanism is no solution.

Finally, the Chancellor correctly held that Elting had a reasonable expectation of confidentiality and thus may claim privilege over private Gmails with her counsel

that Shawe obtained only by breaking into Elting's locked office, dismantling her computer, and secretly accessing her hard drive remotely. The court also correctly held that Elting's private communications with her husband concerning her disputes with Shawe are protected by the spousal privilege.

NATURE OF PROCEEDINGS[2]

On May 23, 2014, Elting filed a Verified Petition captioned *In re Transperfect Global, Inc* (C.A. No. 9700-CB). B1. The petition, as subsequently amended, asserted, *inter alia*, a claim to appoint a custodian or receiver based on deadlock under 8 *Del. C.* § 226(a)(2). B130. On September 17, 2014, Elting filed a Verified Complaint, pursuant to 8 *Del. C.* § 211, to compel an annual stockholders meeting (C.A. No. 10141-CB). On December 4, 2014, TPG's stockholders resolved the Section 211 action by stipulating that they "shall be deemed to have participated in a stockholders meeting for the election of directors . . . at which the Stockholders were so divided that they failed to fill the vacancy on the Board and they also failed to elect successors to directors whose terms have expired (*i.e.*, Shawe and Elting)." A3181-84. On December 10, 2014, Elting filed a Verified Petition seeking appointment of a custodian or receiver under 8 *Del. C.* § 226(a)(1) (C.A. No. 10449-CB). B12.

On February 10, 2015, Shawe filed a motion *in limine* seeking to use Elting's stolen Gmails at trial, arguing that they were not protected by the attorney-client privilege. On February 19, 2015, the court denied Shawe's motion, holding that the Gmails were privileged. A2258-73. On February 20, 2015, Shawe moved to compel

[2] In the interests of brevity, this summary omits the procedural details regarding Elting's motion for sanctions against Shawe, which is the subject of Shawe's separate appeal.

production of emails exchanged between Elting and her husband withheld from production based on the spousal privilege. On March 2, 2015, the court denied Shawe's motion, holding that they were protected by the spousal privilege. A2834-39.

A six-day trial took place from February 23, 2015 to March 3, 2015. Following post-trial arguments, the Chancellor issued the Opinion on August 13, 2015. The 104-page Opinion explains "in painstaking detail" that "the state of management of the corporation has devolved into one of complete dysfunction between Shawe and Elting, resulting in irretrievable deadlocks over significant matters that are causing the business to suffer and that are threatening the business with irreparable injury, notwithstanding its profitability to date." Op. 1. The court also found that Shawe and Elting are unable "to elect successor directors, and there is no prospect they will do so in the future." Op. 1. Based on these findings, the Chancellor held that the requirements of sections 226(a)(1) and (a)(2) "have been satisfied" and appointed a custodian "to oversee a judicially ordered sale of the Company" and, in the interim, "to serve as a third director." Op. 1, 84. The court directed the Custodian to evaluate and submit "a proposed plan to sell the Company with a view toward maintaining the business as a going concern and maximizing value for the stockholders." Op. 84. The court also issued a separate implementing Custodian Order. B3330.

On February 8, 2016, the Custodian submitted a proposed plan of sale. A3967-4073. Aided by Houlihan Lokey, the Custodian considered five alternatives for carrying out the court's directive. A3972-79; A4007-37. He concluded that the one "most likely to maximize stockholder value while continuing the business as a going concern" is a so-called "Modified Auction," which permits the stockholders, as well as third parties, to bid for control of the Company. A3974. On April 27, 2016, the court held a half-day hearing on the proposed plan.

On June 20, 2016, after briefing and argument, the Chancellor issued a Letter Opinion (PSOB Ex. B, "Plan Opinion") accepting the Custodian's recommendations, with the exception of a proposed non-compete clause. The Chancellor directed the Custodian "to confer with counsel for the parties and to submit an implementing order consistent with this letter decision by July 1, 2016." Plan Opinion 12. On July 18, 2016, the Chancellor sent a letter to the parties overruling the Shawes' objections (B3773) and entered the Sale Order as proposed.

On August 18, 2016, the court certified an interlocutory appeal of the Opinion and Custodian Order, the Plan Opinion, and the Sale Order. B3835. Adopting the Custodian's recommendation, the Court permitted preparations for a sale to proceed pending appeal but stayed any actual implementation of a sale, including engagement with third parties. B3849.

SUMMARY OF ARGUMENT

Shawe #1. Denied. Based on the facts and the equities, the court properly exercised its discretion by appointing a Custodian to sell the Company as the best way to maintain the business as a going concern and maximize shareholder value. The Chancellor did not ignore less drastic alternatives; those alternatives did not and would not work. The Sale Order does not "force" Shawe or his mother to sell their shares in the Company; rather, the "Modified Auction" permits all three shareholders to bid for the Company. The parties' inability to agree on a contractual exit strategy does not make this relief unavailable under section 226; rather, that is the only circumstance in which such a remedy is needed. Nor does the Sale Order delegate "judicial authority" to the Custodian; all actions, recommendations, and decisions by the Custodian are explicitly subject to judicial review.

Shawe #2. Denied. The question of irreparable injury need not be addressed because the court held (and the parties stipulated) that the requirements of section 226(a)(1) – which does not require irreparable injury – were met. As for section 226(a)(2), Shawe does not argue that the Chancellor's factual findings of deadlock were clearly erroneous, and the record amply supports the Chancellor's conclusion that the Company was and is suffering from real and threatened irreparable harm. While TPG has suffered tangible financial injury [redacted]

the law does not require that such injury be quantified; indeed, the nature of irreparable harm is that it is not readily quantifiable.

Shawe #3. Denied. The court correctly found that Elting's expectation of confidentiality in her personal, password-protected, web-based Gmail account was reasonable because Shawe obtained those Gmails by surreptitiously breaking into Elting's locked office and secretly accessing her computer's hard drive for the sole purpose of gaining intelligence concerning his disputes with Elting, and Elting reasonably relied on advice that her Gmails were secure. Elting likewise had a reasonable expectation of confidentiality in her TPG-account emails with her husband concerning her disputes with Shawe because, among other reasons, the Company's computer use policies were intended to apply only to Company employees, not its owners.

Ms. Shawe #1. Denied. The argument that the court-ordered sale of the Company would result in an unconstitutional "taking" of property was admittedly never raised below and has therefore been waived. This Court's Rule 8 does not support consideration of the argument, since the interests of justice do not support, let alone "require," such consideration. And the argument is meritless in any event because Ms. Shawe acquired her interest in the Company subject to all of the provisions of the DGCL, including section 226, and the exercise of judicial authority pursuant to section 226 involves no deprivation of any vested property right.

Ms. Shawe #2. Denied. The dismissal with prejudice of Shawe's derivative claims was not erroneous as to Ms. Shawe, because she actively participated throughout the proceedings in which those claims were fully litigated. The question whether the doctrines of *res judicata* and collateral estoppel may bar Ms. Shawe from pursuing derivative claims in another case is not properly before this Court, as the court below made no rulings in that regard.

COUNTERSTATEMENT OF FACTS

After a six-day trial at which eleven witnesses testified and more than 1,700 joint exhibits were received in evidence, the Chancellor made over 60 pages of "painstaking[ly] detail[ed]" (Op. 1) findings of fact, most of which Shawe's opening brief ignores. The Chancellor also made numerous devastating credibility determinations, including that Shawe's own testimony was repeatedly not credible (*see, e.g.*, Op. 54, 59, 62); that the testimony of Kevin Obarski, TPG's Senior Vice President for Sales, was "rehearsed, belligerent, and calculated to serve as a cheerleader for Shawe rather than to provide straight answers" (Op. 15 n.50); and that Michael Stone, the Company's accountant, "was biased for [Shawe] and against Elting" (Op. 37 n.160, 71). The Chancellor's factual findings, entitled to deference unless "clearly erroneous," *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015), are amply supported by the trial record.

A. TPG and the Parties

Elting and Shawe co-founded the Company and are its co-CEOs. TPG's bylaws require at least three directors but, prior to the Custodian's appointment, Elting and Shawe were the only board members. Op. 3, 5-6.

There are 100 shares of TPG's stock of which Elting owns 50 and Shawe owns 49. Op. 3. Shawe's mother owns the remaining 1 share, but Shawe has always treated that share as his own property and has held himself out as a 50% owner of

the Company. Op. 3-4; B2721; B2800; B2804; B2509; B2511. There are therefore two factions of TPG's shareholders with equal, non-controlling ownership interests. Op. 4.

Managerial responsibilities for each of the Company's business lines, which are run as separate divisions or "production center[s]," are divided between Elting and Shawe. Contrary to Shawe's contention that he has been the "principal driver" of TPG's success (PSOB 8), Elting and Shawe's respective divisions have accounted for roughly equal percentages of the Company's revenue, but Elting's divisions significantly outperformed Shawe's in both revenue growth ($55 million to $14 million) and profitability ($55 million to $34 million) in 2014. Op. 6; A2413; A3523. The engine that drives all of those divisions, however, is made up of non-production departments – Sales, Marketing, Communications, Accounting and Finance, Operations (including Legal), Human Resources, and Information Technology – together known as "Shared Services." Op. 6. Elting and Shawe jointly manage those departments, and their employees are supposed to report to both of them. *Id*.

B. The Genuine Deadlock Between Elting and Shawe Has Caused Complete and Irretrievable Dysfunction in the Company's Management

The trial record overflows with support for the Chancellor's central factual findings: that Elting and Shawe are "deadlocked on several matters of critical

importance to the Company;" that the deadlocks "reflect genuine, good faith divisions . . . of a fundamental and systematic nature over how the Company should be managed" and have resulted in "complete," "utter," and "irretrievabl[e] dysfunction[]" at the Company; and that Elting's distrust of Shawe, "which strikes at the heart of the palpable dysfunction," is "understandable" and "justified." Op. 1, 68, 70, 71, 72, 77, 80.

The core conflicts underlying this litigation began "in earnest" in late 2012, when they became "weekly, if not daily, occurrences." Op. 7, 11. That is when Shawe threatened to "shut down the entire Company if he did not get his way" after he and Elting disagreed about whether to hire an employee in India and whether to open an office in Montpellier, France. Op. 9-11; B2484; B2481; B2490. Improper "bullying tactics" like that have been Shawe's "*modus operandi*" whenever he and Elting disagree about corporate and managerial decisions. Op. 11. Shawe has acted "to 'create constant pain' for Elting until she acquiesced to his demands" (Op. 15 (quoting B2506)), leading to a practice of, in Shawe's words, "mutual hostaging" (Op. 11, 69; A2547) – a "destructive culture" that has characterized Shawe and Elting's business relationship for years (Op. 69) and is largely responsible for the widespread managerial paralysis at the Company. *See, e.g.*, Op. 9-10, 12-13, 14-16, 18-19, 22, 30. As the Chancellor found, the deadlock between Shawe and Elting covers a wide range of issues:

Deadlock over distributions. Elting and Shawe have been at loggerheads over distributions for an "extended" period. Op. 68. Elting wants the Company to issue regular distributions tied to the Company's profits, but Shawe has refused to enter into a distribution agreement and, as the court found, has instead used this issue repeatedly as "a club to exert leverage over Elting." Op. 68-69; A2401; A2693; *see also* Op. 12, 13, 18-19; B2492; B2494-95; B2537; B2524. As conflicts intensified in 2013, Shawe even used this leverage to disrupt routine distributions to cover the parties' pass-through tax liabilities resulting from TPG's status as a Subchapter S corporation. Op. 16-17; A2409; A2694-95; A2696-97; A2714; A2808; A2995; B2512.

Deadlock over acquisitions. The parties are at a stalemate over further corporate acquisitions because Elting "does not trust Shawe" and therefore believes it is unwise "to increase her investment with him." Op. 69; A2442-43. Contrary to Shawe's assertion that the Chancellor viewed Elting's position on acquisitions as "improper" (PSOB 15), the court actually found that Shawe's chronically abusive and dishonest conduct toward Elting made her distrust entirely "understandable" and "justified." Op. 70-71. And it is not just Elting who has blocked potential acquisitions – Shawe has done precisely the same thing. Op. 12 (Shawe "nixed" acquisition after Elting suggested she should manage it); A2463-64; A2928.

Deadlock over personnel. Elting and Shawe's deadlock over employment decisions is far-reaching and exemplifies the abhorrent extremes to which Shawe will go to get his way. Over Elting's objection, Shawe has hired several senior level employees and given raises to others in Shared Services, and even in Elting's divisions, through various "work-around" tactics, including falsified offer letters, secret payrolls, and other deceptive practices. Op. 41-44, 56-57, 70; A2513-14; A2710-13; B2734; B2744; B2741; B2747; B2924; B2943; B2945; B2957; B3027; B42. The parties are also deadlocked over whether to retain at least three senior executives in Shared Services (the COO, CIO, and CTO) whom Elting believes should be terminated for ignoring her instructions and aiding Shawe's misconduct. *See* Op. 32, 43-45, 71; A2678; A2706-07; B2637-38; B2818-19; B2851; B2794. In addition, Elting seeks to terminate the CFO, whom Shawe initially agreed to fire in 2013 and whose duties Shawe himself conceded have been "outsourced." Op. 26, 71; A2582; A2805-06; B2514-15; B3014. Shawe and Elting also clashed vehemently about the role of the Company's former treasurer, Gale Boodram, whom Shawe publicly harassed in a series of wildly inappropriate, mass-circulated emails, one of which prompted the Company's then head of HR to denounce Shawe's conduct as "appall[ing]," "disgust[ing]," and "out of control." Op. 7-8, 23-24, 27-28; B2596; B2587; A2990; B2556; B2564; B2572. That head of HR resigned

several months later, and Elting and Shawe were unable to agree on his replacement. Op. 28, 71; A2400; A2444; A2682.

Deadlock over outside professionals. Shawe and Elting have similarly clashed over outside advisors. Op. 71. For instance, Shawe engaged Kasowitz Benson, the Company's long-time outside counsel, to represent him personally in his disputes with Elting despite the obvious conflict and then secretly had them continue work for the Company over Elting's objection. Op. 38-39; B2715; B2722; A2419; B2878; B228-230. To retaliate against Elting for retaining her own counsel, Shawe unilaterally and without business justification fired Cushman & Wakefield, the Company's long-time real estate broker, which employs Elting's husband, Michael Burlant. Op. 26; B2581. The parties also disagree about replacing both the Company's outside accountant, Michael Stone of Gerber & Co., who has aligned with Shawe against Elting (Op. 37 n.160, 58, 71; A2792; A2795; A2798-2800; A2805; B2936; B2816), and its PR firm, which quit in April 2014 after Shawe unilaterally stopped paying them (Op. 46, 71; A2420, A2714).

Deadlock over expense true-ups. "Historically" each January, Elting and Shawe, with Stone's assistance, had engaged in a "true-up" process to reconcile "unagreed-upon" charges (often including personal expenses on both sides) that either one had charged to the company during the previous year. Op. 36-37, 71; A2401; A2398-99; A2402-03; A2577-78; A2804; B62; B2475. In October 2013,

Elting – *at Stone's suggestion* – had the Company pay one of Kramer Levin's bills as well as a bill issued by her financial expert, with the understanding that those expenses would be part of the annual true-up process to occur just three months later. Op. 37-38, 71; A2404; A2804-05; A3020. Shawe, however, refused to allow the true-up process to occur in 2014 and 2015. Op. 38; A2702; A2805; B3114.[3]

Deadlock over audited financials. Shawe and Elting remain sharply divided over whether the Company should finally obtain audited financial statements. Op. 47, 71. Shawe has continued to resist this step, even though the Custodian has determined it is necessary. B3776.

The parties' deadlock has been deepened by Shawe's relentless and appalling mistreatment of Elting, which the court found "strikes at the heart of the palpable dysfunction" in the Company's management and further demonstrates "the basis for Elting's justifiable distrust of Shawe." Op. 70-71, 89.

Shawe spied on Elting, stole and reviewed thousands of her personal and privileged emails, and repeatedly broke into her locked office. After Elting retained counsel to help her try to resolve her disputes with Shawe, Shawe became

[3] Shawe's assertion that the Custodian "agreed that the[se] payments were personal expenses, not part of the true-up process" (PSOB 14), is simply untrue. Rather, Shawe's continuing resistance to the true-up process even under the supervision of the Custodian led Elting to simply reimburse the payments, as she always intended, outside of the process. B3484.

"enraged" and extended his "personal vendetta" through a campaign of "surreptitious monitoring" that included intercepting Elting's mail and tracking her phone calls. Op. 32-33, 70 n.288; B2637; A2678; B3105. On New Year's Eve 2013 – in conduct "tantamount to a burglary" (B3354) – Shawe secretly and repeatedly entered Elting's locked office to dismantle, remove, and copy her computer hard drive. Op. 33-34; A2260-61; B1508-16; B1906.[4] As a result of this theft, Shawe obtained access to thousands of messages in a private, password-protected, web-based Gmail account that Elting had created specifically to communicate confidentially with her lawyers. Op. 33-35; A2259-60; B1485; B1531. Thereafter, using Elting's unique computer name obtained during his surreptitious late-night visits, Shawe was able on at least 20 separate occasions to covertly access Elting's emails remotely and save them to a device. Op. 34; A2261-63; A2607-08; B1523-25; B1531-35; B1550; B1883.

[4] It turns out that Shawe actually enlisted Michael Wudke, the then President of TPG's Forensic Technology business, to help him effectuate the surreptitious theft of Elting's emails, a process they repeated on two other nights early in 2014. B3782-83; *see also* A2261. The court's findings of fact in the Opinion omitted Wudke's involvement because Shawe "repeatedly provided false testimony during the litigation to conceal Wudke's involvement in the extraction of Gmails from the hard drive of Elting's computer" and "Wudke's role did not become known until late November 2015, shortly before the Sanctions Hearing." B3783-84; *see also* B3801-04, B3810.

Through these "stealthy actions," Shawe accessed approximately 19,000 of Elting's Gmails, including approximately 12,000 privileged communications with her attorneys. Op. 34-35; A2265; B1484-85. Shawe and his "paralegal" Nathan Richards also entered Elting's locked office on numerous other occasions in January and February 2014, each time in the middle of the night, to snoop, take photographs, and remove documents, which were given to an investigator working for Shawe's lawyers at Sullivan & Cromwell. Op. 35-36; A2261; B3064-66; A2609; B1593; B3785-86.

Shawe issued a false and misleading press release in the Company's name to disparage Elting. "Upp[ing] the ante in his campaign to disparage Elting," Shawe issued a press release – which he published in a *New York Times* advertisement, disseminated to multiple newswires, and posted on TPG's Facebook page – "falsely purport[ing] to be an official public statement of the Company"; "falsely characteriz[ing] Elting as a 'minority shareholder'"; and "falsely attribut[ing] to Elting a quotation suggesting she was 'extremely pleased'" with rulings adverse to her in a related New York action. Op. 58-59, 70; B2953; A2439; A2689-90.

Shawe filed a false police report against Elting. On June 11, 2014, just weeks after Elting commenced this litigation, Shawe filed a "Domestic Incident Report" with the New York City Police in which he claimed Elting had kicked and

pushed him. Op. 54; B2910. Shawe's police report related to a "seemingly minor altercation" that occurred the previous day when Shawe confronted Elting in her TPG office and stuck his foot in her door to prevent her from closing it. Op. 53-54, 70; A2436; B2908. To ensure the police would treat the report as a domestic violence incident requiring Elting's arrest, he deceitfully identified Elting as his ex-fiancée, even though their engagement had ended almost two decades earlier. Op. 54; A2437.[5]

Shawe stalked Elting on a trans-Atlantic flight. To avail himself of "yet another opportunity to harass Elting," Shawe, who knew Elting would not welcome his presence, secretly arranged to sit next to her on a flight to Europe during the thick of this litigation and then joked about it to allies in the Company. Op. 61-62; A2690; B3165.

These and many other facts exhaustively catalogued by the Chancellor "demonstrate the dysfunction in the Company's management, the basis for Elting's justifiable distrust of Shawe, and the need for relief under Section 226 to resolve proven deadlocks." Op. 89. The court described Shawe's conduct as "disturbing

[5] Shawe then commenced a tort action against Elting. Op. 54; A2437. Purportedly in connection with that lawsuit, more than four months after the incident in Elting's office, Shawe's counsel sent a letter advising Elting not to move any items in or around her office until they could be inspected, which Shawe promptly forwarded to TPG employees. Op. 55; B2967; A2686-87; B2970. The court found that letter to be merely another "pretext for Shawe to embarrass Elting." Op. 55.

and contrary to expected norms of behavior" and noted that "other asserted acts of misconduct," such as those related to spoliation of evidence, would be the subject of a separate hearing. *Id.* These comments hardly support Shawe's preposterous assertion that the court determined that he has not acted contrary to TPG's interests. PSOB 14.

C. The Deadlock and Dysfunction are Causing Irreparable Harm

Like its findings regarding deadlock, the court's findings that the Company "already has suffered from this dysfunction" and is "threatened with much more grievous harm . . . if the dysfunction is not addressed" (Op. 77-78) are grounded firmly in the record. Indeed, Shawe himself admitted that his "turmoil" with Elting has "the potential for grievously harming" the Company. Op. 73; A3691.[6]

Shawe's contention that the court's finding of irreparable harm is based on "*isolated* expressions of employee morale and retention concerns" (PSOB 15 (emphasis added)) is absurd. As the Chancellor found, employee after employee (including the COO, CTO, CIO, Senior Vice President of Sales, Vice President of Corporate Development, and former head of HR) – most of whom Shawe listed as

[6] Shawe says it was erroneous for the court to cite this admission because it was part of a settlement proposal. PSOB 34. But Shawe himself "cited and relied on this document in his opening post-trial brief." Op. 73 n.294; A3761-62. In fact, Shawe affirmatively relied on *all* of his purported settlement proposals – and Elting's rejection of those proposals – to support his main merits defense that the deadlock was manufactured, and introduced those offers into evidence at trial. A2348-53; A3728-29; A3761-62; A3169-78; A3186-93; A3274-78; A3329-32.

his own witnesses – have recognized that the "Shawe/Elting feud" is harming employee morale and the Company's ability to retain talent. Op. 74-76; A2977 (feud is "biggest business issue" Company faces); A2961 (it is "the number 1 reason people leave to go to work at competitors"); A3154-55 (it has caused "mass exodus" in Accounting and Finance, "[e]mployees are resigning . . . at unprecedented rates," and "[t]he company's reputation is taking a beating, internally and externally."); B97-98; A2990; A3161; B49-B50; A2870. The court also found that because of the Company's dysfunction, many of the lost Shared Services staff could be replaced only through Shawe's resort to "duplicitous" and "unilateral" actions. Op. 76.

Shawe faults the Chancellor for relying on employees' contemporaneous written comments rather than their subsequent testimony. PSOB 16. But the Chancellor reasonably gave less credence to trial testimony offered by employees "loyal to Shawe" and biased in his favor (*see, e.g.*, Op. 15 n.50, 74), particularly since most of them met with Shawe's counsel to prepare to testify. A2732; A2868-69; B2444-45; B95-96; B108-109; B77; B47-48.

Moreover, as the court found, a number of major clients, most of which are able to terminate their relationship with the Company at any time, have expressed concern about continuing to work with TPG because of the disputes between Elting and Shawe, and the Company's competitors are exploiting the ongoing dysfunction to woo customers. Op. 76-77; A2444; A2583-84; *see also* A2870 (Shawe's witness,

the Company's Vice President of Strategic Accounts, conceding that disputes have made it more difficult to maintain and add clients). And, as Shawe admitted, the deadlock over acquisitions threatens further harm. Op. 77.

It is thus hardly surprising that all of this turmoil has already started to take its toll on the Company's profitability. [redacted]

ARGUMENT

I. THE COURT CORRECTLY CONCLUDED THAT THE REQUIREMENTS OF SECTIONS 226(A)(1) AND 226(A)(2) WERE MET AND PROPERLY EXERCISED ITS DISCRETION TO APPOINT A CUSTODIAN

A. Questions Presented

1. Whether the Chancellor correctly concluded that the requirements of section 226(a)(1) were satisfied?

2. Whether the Chancellor correctly concluded that the requirements of section 226(a)(2) were satisfied?

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). Assuming the statutory requirements have been met, whether to appoint a custodian, and for what purpose, is reviewed for abuse of discretion. *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982). Under this standard, "the reviewing court may not substitute its own notions of what is right for those of the trial judge, if his judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968).

C. Merits of Argument

1. The Court Correctly Concluded that the Requirements of Section 226(a)(1) Were Satisfied

Under section 226(a)(1), the court may appoint a custodian for a solvent corporation when "[a]t any meeting held for the election of directors the stockholders are so divided that they have failed to elect successors to directors whose terms have expired." 8 *Del. C.* § 226(a)(1). This provision "does not require a showing of irreparable injury as a prerequisite to obtaining relief." Op. 66. *See Giuricich*, 449 A.2d at 238 (irreparable injury requirement of § 226(a)(2) inapplicable in stockholder-deadlock situation under § 226(a)(1)).

Based on the December 2014 stipulation among the stockholders (A3181-85), the court found that the requirements of this provision "plainly have been met." Op. 66. Shawe does not take issue with that finding, but argues that section 226(a)(1) does not "require" the appointment of a custodian (PSOB 37-38), an obvious proposition that the Opinion itself acknowledges. Op. 67, 78-79. This Court held in *Giuricich*, however, that it is "an abuse of discretion and error of law" not to appoint a custodian under this provision in the face of "conceded shareholder-deadlock." 449 A.2d at 240; Op. 67 n.281.

Shawe also says that Elting "did not petition for dissolution" under this provision and asked the court only to appoint a custodian "with the authority necessary to act in the best interests of the Company and its stockholders." PSOB

37. But that is precisely what the court did – it appointed a custodian "to safeguard the Company," *not* to dissolve it, although such relief may often be referred to as a form of "dissolution." Op. 82. To that end, the court directed the Custodian to propose "a plan to sell the Company with a view toward maintaining the business as a going concern and maximizing value for the stockholders." Op. 84. The court acted within its discretion in so doing.

2. The Court Correctly Concluded that the Requirements of Section 226(a)(2) Were Satisfied

Under section 226(a)(2), the court may appoint a custodian for a solvent corporation when "[t]he business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division." 8 *Del. C.* § 226(a)(2). The court's findings on both deadlock and irreparable injury are fully supported by the record.

(a) The Finding of Deadlock is Unassailable

The Chancellor found that "Shawe and Elting are deadlocked on several matters of critical importance to the Company," including profit and tax distributions; the pursuit of acquisitions; the need for expense true-ups; whether to obtain audited financial statements; and the hiring and retention of both employees and outside advisors. Op. 68-71. The court "reject[ed] Shawe's defense that Elting

has manufactured the deadlocks," finding that the parties' disputes "reflect genuine, good faith divisions between Shawe and Elting of a fundamental and systemic nature over how the Company should be managed." Op. 72.

Shawe does not deny that he and Elting "have been unable to agree" on any of these matters – *for years*. Nor does he press his "manufactured deadlock" theory, which the court demolished when it found that Elting's distrust and inability to work with Shawe are "understandable" and "justified." Op. 70-71. Instead, he takes a new tack, arguing that their disputes are just "personal disagreements," having nothing to do with the "business" of the Company, and thus "irrelevant to the Section 226 inquiry." PSOB 2, 33.

Nonsense. The differences between Elting and Shawe have *everything* to do with the business of the Company. In a two-director deadlock case, "personal" and "business" disputes become one and the same for purposes of 226(a)(2). *Hoban v. Dardanella Elec. Corp.*, 1984 WL 8221, at *3 (Del. Ch. June 12, 1984). The court in *Hoban* found that the "acrimonious" personal division between the only two directors and shareholders "*has clearly carried over to their positions as directors*," and as a result the company was "threatened with irreparable injury because its two directors are so divided respecting the management of the company that the required vote for action necessary to its survival cannot be obtained." *Id.* (emphasis added). Here, similarly, the differences may have a personal element, but they have wrought

dysfunction and deadlock in matters going to the heart of the Company's functioning and future.

(b) The Court Correctly Found That Deadlock Threatens the Company With Irreparable Injury

Based on abundant record support, the Chancellor found that the Company is both suffering and threatened with irreparable injury as a result of the undeniable deadlock – concluding that the Company's "governance structure is irretrievably dysfunctional"; that it "already has suffered from this dysfunction"; and that it "is threatened with much more grievous harm to its long-term prospects if the dysfunction is not addressed." Op. 77-78. As detailed above (at 23-25), these current and threatened harms include plummeting morale and a mass exodus of employees; the threat of loss of major customers; damage to the Company's public reputation and goodwill; and harm flowing from the inability to agree on acquisitions. After the court ruled, the consequences of these problems became further manifested [redacted]

Shawe levels several attacks at the irreparable harm finding – all beside the point given the stipulated shareholder deadlock under section 226(a)(1) that itself supports appointment of a custodian regardless of the existence of irreparable harm. *See Giuricich*, 449 A.2d at 238 (irreparable harm showing not prerequisite to appointing custodian under 226(a)(1)). He first argues that Elting was required to

show quantifiable "financial" harm and that the Company's continuing profitability precludes such a showing. PSOB 15. But leaving aside that [redacted] such a showing is unnecessary. Irreparable harm is irreparable precisely because it cannot readily be quantified.[7]

As the Chancellor pointed out, Professor Folk "referred to the 'irreparable injury' standard in Section 226 as 'a familiar equity principle.'" Op. 73-74. And the court applied this familiar principle "in the traditional sense," taking account of factors like "harm to a corporation's reputation, goodwill, customer relationships, and employee morale." *Id.* Despite Shawe's argument to the contrary (PSOB 30-31), it was no error for the court to draw on case law from other contexts to explain how the concept of irreparable injury has been applied to corporations. Shawe's attempt to impose instead the requirements for obtaining mandatory injunctive relief makes no sense. PSOB 31. He himself acknowledges that the purpose of a mandatory injunction is "to restore the status quo ante." PSOB 31. Section 226 permits the appointment of a custodian for the opposition reason: because the status quo – a state of deadlock – is not working.

Citing *Giuricich*, Shawe asserts that "irreparable injury" requires the equivalent of "imminent corporate paralysis." PSOB 29. But *Giuricich* was decided

[7] In any event, the statute requires only "threatened" harm, which is indisputably established on this record.

under section 226(a)(1), not section 226(a)(2), and the footnote from which Shawe quotes discusses the state of Delaware law before section 226 was amended in 1967 to add the custodian remedy. *Giuricich*, 449 A.2d at 239 n.13. Shawe also relies on *Miller v. Miller*, 2009 WL 554920 (Del. Ch. Feb. 17, 2009), but that case, unlike this one, involved "minor disagreements" that "in general, ha[d] been reasonably and promptly resolved" – and thus did "not approach irreparable harm." *Id*. at *3. Indeed, none of Shawe's cited cases stands for the proposition that section 226(a)(2) requires a showing of quantifiable "financial" harm, let alone anything approaching "imminent corporate paralysis."[8]

Shawe also argues that the court's irreparable harm ruling "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." PSOB 30. Hardly. The finding of irreparable harm here flowed from an extreme and unique fact pattern of deadlock and dysfunction. It is unlikely to set much of a factual precedent.

[8] Shawe also cites *TecSyn International, Inc. v. Polyloom Corp.*, C.A. No. 11918 (Del. Ch. July 14, 1992) (TRANSCRIPT), *Barry v. Full Mold Process, Inc.*, 1975 WL 1949 (Del. Ch. June 16, 1975), and *Hoban*, 1984 WL 8221. PSOB 29-30. In none of these cases did the court say that financial harm is a prerequisite for appointing a custodian, that non-financial harm does not constitute "irreparable injury," or that the court cannot appoint a custodian to redress deadlock at a profitable company.

Finally, Shawe argues that the Chancellor erred by failing to consider whether the "unclean hands" defense should have barred appointment of a custodian under section 226. PSOB 35. While he alluded to this argument in a single sentence of his pre-trial brief (A2381), he did nothing to pursue it at or after trial, where he pressed unclean hands as a defense only to Elting's equitable dissolution claim, not her statutory claims. A3827.[9] He should therefore be deemed to have abandoned it.

The argument misses the point of the deadlock statute in any event. As the court observed in *Hoban*, "[r]egardless of who may ultimately prove to be right or wrong in this dispute, the fact remains that the dispute has created an impasse on [the Company's] board, and it is with this fact that the Court must deal." 1984 WL 8221, at *3.

And even if unclean hands applied and had been properly preserved, it is unthinkable that the isolated incidents where the Chancellor criticized Elting's reactions to Shawe's extreme provocation (for example, declining to agree to acquisitions) could be viewed as the kind of "reprehensible" conduct triggering the unclean hands doctrine. The suggestion that Elting may be compared to a "strike" shareholder wrongfully trying to force a buy-out (PSOB 33) merely repackages the

[9] Shawe's other appendix cites likewise do not focus on this claim. *See* A3719-20 n.6 (discussing Elting's motion for sanctions); A3776-78 (arguing that Company was not harmed); A4085 (no mention of unclean hands); and A2353-63, A3782-83 & A3843-48 (arguing that deadlock was "manufactured," not genuine).

"manufactured conflict" argument that the court justifiably rejected. Elting did not act "to extract personal benefits at the expense of TPG" (PSOB 36) – she legitimately sought distributions of profits she had earned and otherwise stood up for herself in the face of unimaginable misconduct.[10] Even if her behavior may not always have been perfect, she did nothing that could remotely disable the court from fashioning a remedy for the total deadlock and dysfunction found to exist at TPG.

[10] Because Shawe prevented ordinary profit distributions, Elting's non-tax distributions in 2014 were "less than 1.5% of the Company's net profits that year." Op. 69 n.286.

II. THE COURT OF CHANCERY PROPERLY EXERCISED ITS DISCRETION TO DIRECT THE CUSTODIAN TO SELL THE COMPANY

A. Questions Presented

1. Whether the court properly exercised its discretion by directing the Custodian to sell the Company "with a view toward maintaining the business as a going concern and maximizing value for the stockholders"?

2. Whether the Sale Order improperly delegates judicial power to the Custodian, or insulates his decisions from "meaningful" judicial review?

B. Scope of Review

Whether to appoint a custodian, and for what purpose, is reviewed for abuse of discretion. *Giuricich*, 449 A.2d at 240.

C. Merits of Argument

1. The Court Correctly Held that a Sale is both Appropriate and Necessary Here

The Sale Order was well within the Chancellor's discretion. Section 226 provides that a custodian "shall have all the powers and title of a receiver . . . but the authority of the custodian is to continue the business of the corporation and not to liquidate its affairs and distribute its assets, except when the Court shall otherwise order." 8 *Del. C.* § 226(b). Beyond that, the precise role of the custodian is left to the court's discretion. As the court explained in *Miller*, "there is no formula to employ; a case-by-case evaluation of the factual context is necessary." 2009 WL

554920, at *5 n.19. Among other considerations, "the notion of remedying an 'injustice' informs the Court's discretion," and "[t]he consequences of [the] deadlock for the stockholders and the enterprise must be assessed." *Id.*; Op. 79.

After concluding that it "would be unjust" not to appoint a custodian at all (Op. 80), the Chancellor considered two possible roles for the custodian. One option was "to appoint a custodian to serve as a third director or some form of tie-breaking mechanism in the governance of the Company." Op. 81. The Chancellor "reject[ed] this option because it would enmesh an outsider and, by extension, the Court into matters of internal corporate governance for an extensive period of time." *Id.* The other option was "to appoint a custodian to sell the Company so that Shawe and Elting can be separated and the enterprise can be protected from their dysfunctional relationship." *Id.* The court recognized that "such a remedy should be implemented only as a last resort and with extreme caution," but concluded that "it is appropriate and necessary in this case." Op. 81-82. The trial itself, as well as the pre- and post-trial proceedings, all supported "the painfully obvious conclusion" that these parties "need to be separated from each other in the management of the Company for its own good," and that "[t]heir dysfunction must be excised to safeguard the Company." Op. 82.

Having previously "oppose[d] the appointment of a custodian for any purpose" (Op. 80), Shawe now contends that by ordering a sale of the Company

rather than a permanent (or longer-lasting) tie-breaking mechanism, Chancellor Bouchard abused his discretion in three respects. Each of his arguments is specious.

(a) Shawe's "Forced Sale" Argument is Factually and Legally Baseless

First, Shawe argues that section 226 does not permit what he calls – on nearly every page of his brief – a "forced sale." *E.g.*, PSOB 18-21. To the extent he suggests that section 226(b) never empowers the Court of Chancery to put a deadlocked company up for sale, Shawe never previously made, and thus did not preserve, the argument. *See Huatuco v. Satellite Healthcare*, 93 A.3d 654, 2014 WL 2566155, at *1 (Del. June 5, 2014) (TABLE) (Supreme Court will not consider argument not properly presented to Court of Chancery). In any event, where the facts warrant it, the Court of Chancery clearly can grant, and has granted, this unusual relief. As the Opinion correctly notes, Vice Chancellor Jacobs did so in *Fulk v. Washington Service Associates, Inc.*, 2002 WL 1402273 (Del. Ch. June 21, 2002), and in *Bentas v. Haseotes*, 2003 WL 1711856 (Del. Ch. Mar. 31, 2003). Op. 81 n.320. More recently, Vice Chancellor Laster did so in *EB Trust v. Information Management Services, Inc.*, C.A. No. 9943-VCL (Del. Ch. June 16, 2014) (TRANSCRIPT) and (June 17, 2014) (ORDER), and in *In re Supreme Oil Co.*, 2015 WL 2455952 (Del. Ch. May 22, 2015). *See also Brown v. Rosenberg*, 1981 WL 7638, at *5 (Del. Ch. Dec. 17, 1981) (Under 8 *Del. C.* § 226, "it is more likely than unlikely that a Court will end up appointing a receiver to liquidate a corporation

where there are but two stockholders, both of whom own 50% of the corporation's shares, when they are unable to agree on anything.").

Shawe asserts that the stockholders in *Fulk* and *Bentas* ultimately "agreed that the company should be liquidated or sold." PSOB 20-21. But this misses the point. Section 226 vests the court with broad discretion in deadlock cases to fashion a remedy that fits the facts. In exercising that discretion, the court of course is not limited to choosing a remedy to which the parties have agreed. Such a rule would illogically leave the court powerless, in the most extreme cases, to redress the deadlock at all. Indeed, because section 226(b) expressly authorizes the court actually to *liquidate* a corporation if it should so "otherwise order," *a fortiori* the statute empowers the court to order a sale.

This Court explained in *Giuricich* that, prior to 1967, the statute provided only for a receiver with liquidation powers that made little sense for a still-profitable company. 449 A.2d at 236-37. "One of the important changes accomplished" by the 1967 amendment was to authorize the appointment of a custodian, as opposed to a receiver, who could "continue the business of the corporation" rather than "liquidate its affairs and distribute its assets" if the company is not insolvent." *Id*. at 237. The statute, as amended, is now "seldom invoked" by stockholders of insolvent corporations in need of receivers, and "[o]f far greater utility is the application of Section 226 to corporations that remain solvent but that are paralyzed by director or

stockholder deadlock." Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice In the Delaware Court of Chancery*, § 8.09, at 8-226 (2015).

In re Scovil Hanna Corp., C.A. No. 664-N (Del. Ch.), demonstrates how the Court of Chancery has exercised its equitable power (under the analogous provisions of 8 *Del. C.* § 273, which would have applied if Shawe literally owned 50% of the Company) to remedy deadlock in the face of facts similar to – but not nearly as egregious as – those here.[11] In *Scovil*, the relationship between the corporation's two co-owners and chief officers had so deteriorated that one invaded the other's office and stole privileged attorney-client communications regarding the parties' dispute. C.A. No. 664-N, at 8-12 (Del. Ch. Apr. 20, 2006) (TRANSCRIPT). Acknowledging that the company's owners "hate each other now" and were stuck in a business relationship "gone way bad," C.A. No. 664-N, at 13 (Del. Ch. Oct. 19, 2005) (TRANSCRIPT), then Vice Chancellor Strine exercised his equitable discretion to appoint a receiver to administer the sale of the company and, indeed, to bar Hanna from bidding, thereby giving Scovil the option of either selling the company to a third party or buying it himself.

[11] The Chancellor in fact noted that this case "in substance involves the type of 50-50 deadlock that Section 273 was intended to address." Op. 78 n.312; *see also* A2911 (case is "within a whisker of a 273 case").

While the facts here make *Scovil* look like a kindergarten spat, Shawe, unlike Hanna, is not being "forced" to sell his stock. Chancellor Bouchard declined to preclude Shawe from bidding, which Elting had requested as a form of sanction. Op. 83. As Shawe thus acknowledges (PSOB 5), the Custodian recommended, and the Chancellor approved, a "modified auction," which "has the benefit of permitting each stockholder to bid for control of the Company (alone or in partnership with a third party)." Plan Opinion at 4; Sale Order ¶ 1.

Shawe's further argument that TPG's by-laws and charter do not provide for a "forced sale" ignores that the DGCL is a part of the certificate of incorporation of every Delaware corporation, 8 *Del C.* § 394, and thus every shareholder is subject to the rights and remedies it provides, including section 226.[12]

What Shawe's "forced sale" argument ignores, above all, is that the Court of Chancery is a court of equity, and "equity will not suffer a wrong without a remedy." Op. 81 (quoting *Weinberger v. UOP, Inc.*, 1985 WL 11546 (Del. Ch. Jan. 30, 1985),

[12] Shawe also vaguely suggests that "forcing" him to sell his shares "may" amount to an unconstitutional taking of his property. PSOB 21. He does not claim to have preserved this argument, and merely refers this Court to Shirley Shawe's brief ("SSOB"), which openly concedes that the takings argument "was not presented to the Court below." SSOB 4. In any event, as discussed in more detail in Point IV (at pp. 66-70), the argument is ludicrous. Even if a sale of the Company constituted a forced disposition of the Shawes' "property," it would not implicate the Takings Clause because Shawe and his mother will receive just compensation. In fact, as Shawe himself argues, they will receive far more than their non-controlling stakes would otherwise garner.

aff'd, 497 A.2d 792 (Del. July 9, 1985) (TABLE)). As Vice Chancellor Jacobs said in *Bentas*: "My interpretation of Section 226 is consistent with the equitable powers of the Court, which has broad discretion to craft remedies as justice and equity require." 2003 WL 1711856, at *4 n.13. And in *Miller*, Vice Chancellor Noble said that the scope of the injustice "influences the scope of the authority to be conferred on the custodian." 2009 WL 554920, at *5 n.19.

Shawe's conduct demands a remedy. After trial, the Chancellor described Shawe's actions as "disturbing and contrary to expected norms of behavior." Op. 89. Even worse, post-trial sanctions discovery revealed that Shawe had made "repeated false statements under oath during the course of this litigation," establishing that he "subjectively acted in bad faith to obstruct discovery and conceal the truth about activities relevant to this case." B3827.

The court in *Scovil* pointedly noted that "[t]here are consequences to one's behavior." C.A. No. 664-N, at 24 (Oct. 19, 2005) (TRANSCRIPT). Shawe's reprehensible (and potentially criminal) conduct informs the court's exercise of discretion to fashion an appropriate remedy.[13]

[13] The equitable dissolution cases that Shawe cites (PSOB 20) in no way undermine the Court of Chancery's power to grant this remedy. Two of them – *Berwald v. Mission Development Co.*, 185 A.2d 480 (Del. 1962), and *Drob v. National Memorial Park, Inc.*, 41 A.2d 589 (Del. Ch. 1945) – pre-date the legislature's extensive revision of Section 226 in 1967: "Such cases are neither governing nor persuasive in [a] case dealing with the 1967 amendment of § 226." *Giuricich*, 449

(b) The Court Correctly Concluded that There are No Other Viable and Equitable Solutions

Shawe contends that the court also erred by foregoing "less intrusive alternatives." PSOB 21-24. But the Chancellor expressly explored other alternatives, at every possible juncture. On March 9, 2015, days after the trial ended, he appointed Mr. Pincus to serve "as a mediator to assist Elting and Shawe in negotiating a resolution of their disputes." Op. 64. Those efforts proved unsuccessful. Then on June 3, 2015, at the conclusion of post-trial arguments, he told the parties that "no decision would be rendered" for at least another month "to afford them additional time to seek to resolve their disputes through the auspices of the mediator," but "[n]o resolution was reached by that date." Op. 64-65. And the parties' disputes reached the Court of Chancery only after repeated efforts to resolve them in New York – including settlement discussions, a mediation, and multiple sessions with a court-appointed Special Master – all failed. Op. 29; A2438-39.

The "most obvious alternative" now, according to Shawe, is to appoint one or more additional tie-breaking directors (PSOB 22) – an option that the Chancellor rejected because it would require "the Court to exercise essentially perpetual oversight over the internal affairs of the Company." Op. 81. Shawe says we know

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A.2d at 236. The third, *VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250 (Del. Ch. Apr. 28, 2014), was not a deadlock case at all, and thus sheds no light on the appropriate remedy for deadlock.

that this approach "would have worked" because "it already has been working for over a year," since Mr. Pincus was installed to act as a third director. PSOB 23. Unfortunately, this could not be further from the truth. Even with a third director in place, dysfunction reigns at TPG and the Shawes have continued to wreak havoc, often behind the Custodian's back. For example:

- Shawe leaked a purported settlement offer to the press, falsely signaling (including to potential buyers) that a resolution was at hand. B3499.

- Shawe and his mother recently filed three new lawsuits in New York against Elting, her lawyers, her financial expert, and her husband. Moreover, Ms. Shawe purported to assert her claims derivatively, on behalf of the Company, without any consultation with the Custodian – an obvious end-run around the process envisioned by the Chancellor. B3502-58.

- An "open letter," purportedly signed and paid for by 610 TPG employees in various offices, was sent to the Chancellor and published in the *News Journal*. The letter urged against any sale of the Company. Shortly thereafter, a Workers' Committee in the Barcelona office – ninety of whose employees had signed the letter – submitted a formal complaint to the Custodian reporting that employees had been improperly pressured to sign. As a result, the Custodian had to engage Spanish counsel to provide advice concerning possible implications of the matter under Spain's employment laws. B3565.

- Timothy Holland, a TPG employee who works exclusively for Shawe, recently filed a Section 1983 lawsuit *against the Chancellor and the Custodian* in federal court in New York accusing them of violating the First and Fourth Amendment rights of TPG employees. B3847. Mr. Holland's name is also on the incorporating documents of Citizens for a Pro-Business Delaware, Inc. – the purported grassroots group that is behind the ongoing media blitz and lobbying efforts in Delaware to try to prevent the sale. B3579.

Far from showing that the court erred, these developments confirm that a "tie-breaker" cannot eradicate either the deadlock or the resulting dysfunction.

It has been two and a half years since this litigation commenced and four years since the deadlock that led to the litigation began "in earnest." Op. 7. "The parties have had literally years to attempt to resolve [their disputes], but they have failed to do so despite repeated attempts." Op. 83. Then Vice-Chancellor Strine's observation in *Scovil* could not be more apt: "[U]ltimately what needs to happen is somebody needs to buy out the other one or the third party needs to buy out. *That's the only way this is going to end*." C.A. No. 664-N, at 32-33 (Oct. 19, 2005) (TRANSCRIPT) (emphasis added).

(c) The Court Rightly Rejected Shawe's "Windfall" Argument

Shawe argues that the court erred by giving Elting a supposed "windfall" to which she is not contractually entitled. Citing no relevant authority, he theorizes that section 226 was not intended to provide stockholders with "a non-contractual escape clause from their investments," and as applied in this case, would afford Elting a control premium that she never negotiated. PSOB 24-25.

The Chancellor correctly dismissed this argument, noting that although Shawe and Elting never entered into a buy/sell agreement, "they also never came to terms on any other form of agreement to govern the management of the Company, such as an operating agreement or a stockholders agreement, the terms of which might

influence the analysis of whether relief under section 226 is warranted." Op. 82. In that void, "the provisions of the Delaware General Corporation Law, including those afforded under section 226, apply by default." *Id.*

Indeed, if relief under section 226 were available only when the parties have contracted for it, the statute would be rendered meaningless. Thus in *Fulk*, the Court of Chancery appointed a custodian under section 226 to sell the company, even though Fulk and Long – like Elting and Shawe – had "never agreed to an 'exit strategy'" and "the stockholders were unable to reach agreement on that critical issue." 2002 WL 1402273, at *6.[14]

The sale remedy is further necessary because Shawe's conduct has made Elting's 50% stake otherwise unsaleable. The Chancellor aptly asked: "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. 80. Shawe's flippant response is, "anyone who likes to make money." PSOB 23. But

[14] The cases that Shawe cites to support his windfall argument (PSOB 24-25 & n.10) either are irrelevant or affirmatively support a sale. *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993), and *Blaustein v. Lord Baltimore Capital Corp.*, 2013 WL 1810956 (Del. Ch. Apr. 30, 2013), *aff'd*, 84 A.3d 954 (Del. 2014), involve the treatment and appraisal rights of minority shareholders, which Elting of course is not. Moreover, neither case involved shareholder or director deadlock or the potential appointment of a custodian. And in *Ueltzhoffer v. Fox Fire Development Co.*, 1991 WL 271584 (Del. Ch. Dec. 19, 1991), *aff'd*, 618 A.2d 90 (Del. 1992), which did involve section 226, the Court appointed a custodian under Section 226(a)(1) because there, as here, the parties conceded their inability to elect a board. *Id.* at *1.

Shawe's erratic and irresponsible conduct as reflected in the Opinion and the Sanctions Opinion plainly threatens to scare off potential bidders for Elting's interest. B3475-78.

The record shows this has always been Shawe's intention. When Elting first suggested some 15 years ago that they negotiate a buy-sell agreement, Shawe responded as follows:

> No way. I will never sign a buy-sell agreement with you. If you ever want out of the company or if you ever don't want to work with me anymore and you try to sell the company to someone else, I will meet them, let them know what a crazy person I am and I'll sabotage the company – or I will buy you out for next to nothing.

A2394. Shawe notably did not deny having made those statements (A2535), and in the 15 years since, he has remained unwilling to enter into a buy-sell agreement. A2534; A2602-03; B2513. Shawe has insisted he will not sell his shares voluntarily, to Elting or anyone else, no matter the price. A2587; A2855; B2834. If the Company is not sold, therefore, Elting – like Fulk – will be left with no choice but to endure the "constant pain" (Op. 80) Shawe has committed to inflicting, until she can take it no more and accepts whatever deal Shawe deigns to offer her. In contrast, the sale process will maximize shareholder value for *all* – with any control premium being paid, as is only fair, by the acquiring party, and shared by all selling shareholders.

2. The Sale Order Does Not Improperly Delegate "Judicial Power" to the Custodian, Whose Final and Interim Decisions Remain Subject to the Chancellor's Review and Approval

Shawe's final argument, that the Sale Order improperly delegates to the Custodian exclusive authority to carry out the sale (PSOB 25), outright mispresents the facts. Consummation of any sale transaction is expressly conditioned on court approval of the Custodian's recommendation. Sale Order ¶¶ 1, 18 (a). And, after the Custodian submits his recommendation to the court, the parties will have an opportunity to object *and* to appeal (*id.* at ¶ 18 (c)-(e)) – giving either the Chancellor or this Court, but not the Custodian, the final say.

The Sale Order also provides for judicial review of "[a]ll interim actions, recommendations and decisions of the Custodian" under an abuse of discretion standard. *Id.* at ¶ 15. Despite Shawe's inexplicable claim that "[t]he Sale Order provides no standards by which the Custodian is to exercise this authority or be evaluated" (PSOB 26), the Order states in the same paragraph that the Custodian must act "in the best interests of the Company, with a view toward maintaining the business as a going concern and maximizing value for the stockholders." Sale Order ¶ 15.

Moreover, the Sale Order, including these specific provisions, was itself modeled after sale orders entered by the Court of Chancery in other deadlock cases. *See, e.g.*, *Supreme Oil*, 2015 WL 2455952; *In re Carlisle Etcetera LLC*, 2015 WL

10371435 (Del. Ch. May 4, 2015). Shawe cites no authority to suggest that this order, or any of those, "improperly delegates judicial power" to the Custodian or "insulates" the custodian's actions from "meaningful review."[15] PSOB 25-26.

[15] The cases that Shawe cites for this point are off the mark. In *DiGiacobbe v. Sestak*, this Court held that when a case has been referred to a Special Master *for a trial on the merits*, the Master's legal and factual findings must be reviewed by the court *de novo*, because "masters are constitutionally prohibited from exercising judicial power." 743 A.2d 180, 184 (Del. 1999). And *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), merely held that once a sale of the company becomes inevitable in the face of a takeover threat, the duty of the board changes from preserving the company to maximizing value for the stockholders.

III. THE COURT'S PRIVILEGE RULINGS WERE PROPER IN ALL RESPECTS

A. Questions Presented

1. Whether the Chancellor properly determined that Elting's communications with her attorneys using her personal, password-protected, web-based Gmail account were privileged?

2. Whether the Chancellor correctly held that the spousal privilege applied to Elting's private communications with her husband about her disputes with Shawe?

B. Scope of Review

The Court reviews discovery and evidentiary rulings concerning the application of privileges against disclosure for abuse of discretion, *Swanson v. Davis*, 69 A.3d 372, 2013 WL 3155827, at *4 (Del. June 20, 2013) (TABLE), unless they involve questions of law, in which case they are reviewed *de novo*. *Espinoza v. Hewlett-Packard Co.*, 32 A.3d 365, 271-72 (Del. 2011).

C. Merits of Argument

Shawe challenges the court's separate rulings that (i) thousands of Elting's Gmails with her counsel are protected by the attorney-client privilege, and (ii) 35 of Elting's Gmails and 212 of her TPG account emails with her husband regarding her disputes with Shawe are protected by the spousal privilege. But he inexplicably conflates the different legal standards the Chancellor applied in making those

rulings, and lumps together the distinct facts on which each ruling was based. For instance, Shawe sweepingly claims that the court "rejected" the factors articulated in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y 2005), for evaluating the reasonableness of Elting's expectation of confidentiality in her emails (PSOB 43), but the Chancellor explicitly applied *Asia Global* only to Elting's TPG emails with her husband. A2836-38. He analyzed Elting's Gmails under the body of case law governing private email accounts. A2266-68. As explained below, the Chancellor correctly applied the law and the facts in each of his privilege rulings, and both should be affirmed.

1. The Court Correctly Ruled that Elting's Gmails are Protected by the Attorney-Client Privilege

Shawe's assertion that Elting waived privilege over obviously private communications with her lawyers, which Shawe obtained by burglarizing her office and hacking her computer, takes a lot of nerve.

The emails in question were exchanged through a private, password protected, web-based Gmail account that Elting created in October 2013 specifically to communicate confidentially with her attorneys. A2259; Op. 33; B1639-40; B1484. After her initial experience using Gmail proved time-consuming for an executive trying to run a company, Elting asked TPG's then Director of Global Information Technology, George Buelna, whether there was a more efficient way to send and receive her personal Gmails. A2260; Op. 33; B1648-49; B1819. Buelna configured

the Outlook program on Elting's TPG computer to allow her to access both her corporate TPG email account and her personal Gmails. A2260; Op. 33; B1649-50. He assured Elting that her Gmail would be secure as long as no one knew her Gmail password, and Elting did not share her password with anyone (including Buelna), nor was it saved on her office computer or TPG's computer network. A2259-60; B1493; B1654, 1750. Buelna did not inform Elting, and Elting was otherwise unaware, that this process caused her Gmails to be automatically saved as .pst files on her office computer's hard drive. A2260; Op. 33; B1828; B1499-1500; B1775.

Delaware Rule of Evidence 502(b) provides that the attorney-client privilege applies to "confidential communications" between a client and her attorney made in the furtherance of legal advice. Shawe's only argument on appeal is that Elting's Gmails are not confidential. "Confidential" in this context means "not intended to be disclosed to third persons." Del. R. Evid. 502(a)(2); *see also Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *4 (Del. Ch. Sept. 17, 2004) (communication with attorney is confidential "unless the client *intends* the information to be disclosed to non-confidential persons") (emphasis in original). The privilege therefore applies if the client's "subjective expectation of confidentially [is] objectively reasonable under the circumstances." *In re Info. Mgmt. Servs. Inc. Deriv. Litig.*, 81 A.3d 278, 285 (Del. Ch. 2013) ("*IMS*").

Shawe wrongly contends that the Chancellor erred by declining to analyze the reasonableness of Elting's expectation of confidentiality exclusively under the *Asia Global* factors.[16] As the court correctly noted (A2266-67), *Asia Global*, 322 B.R. at 251, and the only Delaware case ever to apply it, *IMS*, 81 A.3d at 282, 285 n.1, both involved the use of a company email account as opposed to a private, web-based, password protected email account like Elting's Gmail.[17] Indeed, in *IMS*, Vice Chancellor Laster reasoned that, unlike corporate email accounts, for which *Asia Global* may be an appropriate test, courts "have generally afforded greater privacy protection to webmail." 81 A.3d at 285 n.1.

The Chancellor thus properly considered and applied the body of case law governing private email accounts, including *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010). There, the New Jersey Supreme Court held that an employee's emails, sent on a company laptop but over a personal, password

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[16] Those factors, none of which is dispositive, are:

> (1) does the corporation maintain a policy banning personal or other objectionable use [of its email systems], (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.

[17] The *Asia Global* court applied federal privilege law, 322 B.R. at 254-55, not, as Shawe suggests, New York law. PSOB 42-43.

protected email account, were confidential. The employer had created a forensic image of the laptop's hard drive and discovered that, unbeknown to the (now former) employee, temporary internet files containing the contents of several of her emails had been automatically stored on the laptop. *Id.* at 656. In addition to this unusual and unanticipated method of access to the emails, the court pointed out that the company's email policy spoke in broad terms – reserving the right to "review and access 'all matters on the company's media systems and services at any time'" – but failed to mention the use of personal email accounts at all. *Id.* at 659.

To like effect is *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 552 (S.D.N.Y. 2008), in which an employer accessed a former employee's personal email account by using the employee's user name and password, which had been automatically stored on the employer's computer. Although the employer had a published policy explaining that employees had no right of personal privacy in "any matter stored in . . . the system" or "personal e-mail accounts on Company equipment," the court held that the emails had been sent with a reasonable expectation of confidentiality. *Id*. at 552, 564 (emphasis omitted). The court reasoned that, although the employee had unintentionally left his account vulnerable to the "prying eyes" of the employer, there was nothing in the policy suggesting that the employer could dig into the employee's personal email accounts. *Id*. at 565.

These cases teach that the *Asia Global* test is not readily adaptable to personal email accounts, which may give rise to a reasonable expectation of privacy even when accessed through an employer's computer system. Instead, the "multitude of different facts that can affect the outcome in a given case" requires a "fact-specific" inquiry in each case. *Stengart*, 990 A.2d at 662.[18]

The unique facts here support the Chancellor's finding that Elting had an objectively reasonable expectation of confidentiality in her Gmails. A2268. Elting is not an employee but a principal owner of the Company, and she asked a senior technology employee to help her gain access to her private Gmail in a manner that would be convenient yet remain secure. As the Chancellor concluded, Elting reasonably believed that her Gmails were secure even though she was then able to access them from her office computer. She never shared her password with anyone or otherwise made it available, and TPG's chief computer technician, as well as Elting's own independent computer expert, informed her that her Gmails were in fact secure. A2259-60, 2269-70; B1654, 1728-29, 1750, 1775; B1819-20.

[18] Shawe criticizes the court for not applying *Long v. Marubeni Am. Corp.*, 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006), *Gipe v. Monaco Reps, LLC*, 2013 WL 3389345, (N.Y. Sup. Ct. July 2, 2013), *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083 (W.D. Wash. 2011), and *Miller v. Blattner*, 676 F. Supp. 2d 485 (E.D. La. 2009), which he claims involve "virtually identical facts." PSOB 43. But neither *Long* nor *Miller* even cite *Asia Global*, and none of these cases involve anything even approaching the outrageous measures Shawe employed to obtain Elting's Gmails or involve private emails of a company's owner.

Shawe's clandestine methods further support Elting's reasonable expectation of confidentiality. Shawe obtained Elting's Gmails by repeatedly "skulking" around in the middle of the night to "surreptitiously" access her hard drive and remotely copy .pst files from it. A2271-72. Elting cannot reasonably be expected to have anticipated that her fiduciary and longtime partner would break into her office to disassemble her computer, and then repeatedly abuse his network administrator privileges to root through her hard drive in an intentional search for Gmails with her lawyers. *See Forward v. Foschi*, 27 Misc. 3d 1224(A), 2010 N.Y. Slip Op. 50876(U), at *5-8 (N.Y. Sup. Ct. May 18, 2010) (in case involving co-owners in a dissolution proceeding, ruling that one co-owner had reasonable expectation of privacy in her private emails accessible through her company email account, even though the co-owner was a system administrator who had access to her account).

The Chancellor also correctly discounted the importance of TPG's computer use policy. The policy could not reasonably apply to Shawe's conduct because he was not acting on the Company's behalf when he obtained the Gmails, nor was he truly attempting to "vindicate [the Company's] corporate interests." A2271-72; *see also* Op. 70 n.288 (rejecting "as an after the fact rationalization Shawe's assertion that he was looking out for the Company's interests in taking these actions" and finding instead that he "spied on Elting to gain intelligence in pursuit of a personal vendetta against her"). If Shawe had a legitimate reason to access these emails, such

covert actions would have been unnecessary. A2271. Nor, contrary to Shawe's unsupported contention that the policy "absolutely bans personal use" (PSOB 44), does anything in TPG's policy specifically address personal emails. This case is therefore similar to *Stengart* and *Pure Power*, where computer policies granted employers rights of access and monitoring, but courts held that the lack of specific policies on personal email meant that the employees were not on notice that their personal email might not remain private.[19]

Finally, equitable considerations alone should be dispositive here. *See* B3354 ("I cannot as a judicial officer countenance that type of behavior."). Shawe not only accessed Elting's confidential communications through utterly improper means, but he continued to monitor those communications – with his counsel's knowledge –

[19] The result would have been no different had the court applied *Asia Global* to Elting's Gmails as it did to her TPG account emails with her husband. *Asia Global* itself identifies ways that employees can increase their expectation of privacy, such as keeping their office locked and protecting their computers with passwords, *Asia Global*, 322 B.R. at 257 n.7, as Elting did. The extraordinary measures Shawe took to obtain Elting's Gmails also favor application of the privilege under *Asia Global*, *see IMS*, 81 A.3d at 291 (courts consider "whether the employer used forensic recovery techniques, deployed special monitoring software, or hacked the employees accounts or files"), as does the fact that the Gmails were stored only on Elting's hard drive. *See, e.g.*, *U.S. v. Hatfield*, 2009 WL 3806300, at *9 (E.D.N.Y. Nov. 13, 2009) (documents found on CEO's hard drive were privileged even though he was aware of policy that computer equipment be used solely for company business); *U.S. v. Nagle*, 2010 WL 3896200, at *5 (M.D. Pa. Sept. 30, 2010) (objectively reasonable for employee to believe that documents stored on his laptop's hard drive would be confidential).

during the litigation. Op. 35. At the time the Chancellor ruled on privilege, the full scope of Shawe's misconduct was unknown because (as the court later found) Shawe had repeatedly lied under oath to conceal his actions. B3779, 3815-16. For the court to be deemed to have abused its discretion under such circumstances by not allowing Shawe to use Elting's stolen Gmails at trial would be an affront to all concepts of equity.

2. The Court Correctly Ruled that Elting's Emails with Her Husband Are Protected by the Spousal Privilege

Shawe attacks the Chancellor's ruling that Elting's emails with her husband concerning her disputes with Shawe are protected by the spousal privilege, but he fails even to explain the court's ruling or most of the facts upon which it rested. His appeal of this issue is meritless and should be rejected.

The spousal privilege is "[d]esigned to protect and strengthen the marital bond" and covers confidential statements between a wife and husband "that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship." *People v. Mills*, 1 N.Y.3d 269, 276 (2003) (internal quotation marks and citation omitted); *see also* N.Y.C.P.L.R. 4502(b). To evaluate the reasonableness of Elting's expectation of privacy in her emails with her husband, the Chancellor fittingly considered Elting's confidentiality expectation in

both her own Gmails and TPG emails, and also in her husband's email account. A2835-39.[20]

In determining that Elting had a reasonable expectation of confidentiality in communications with her husband using her TPG email account, the court applied each *Asia Global* factor. A2836-38. *Asia Global* emphasizes, however, that none of its articulated factors is dispositive and that the required analysis is case-specific and fact-intensive. 322 B.R. at 257, 258-59; *see also Sprenger v. Rector & Bd. Of Visitors of Va. Tech*, 2008 WL 2465236, at *4 (W.D. Va. June 7, 2008) (analysis turns on "very specific factual situations unique to each case").

Shawe principally contests the Chancellor's determination that TPG's employee handbook, "fairly read," does not apply to Elting because she is the employer and "not one of the employees whom the handbook was intended to govern." A2836-37. But that finding was based on the court's thorough textual analysis of the handbook, which confirms in numerous provisions that its policies apply to "at will" employees only and explicitly treats Elting and Shawe differently as employers. A2836-37; A2213; A2226-27; A2240; A2242. Shawe conveniently

[20] As to Elting's Gmails with her husband, the court determined that her expectation of confidentiality was reasonable for the same reasons it so found with respect to her Gmails with counsel (A2835-36), and Shawe does not appear to separately challenge that ruling in this context.

ignores these provisions.[21] And the Chancellor found that, consistent with the handbook's stated objectives, the Company has not monitored Elting's (or Shawe's) TPG email account, although there have been occasions when Elting and Shawe monitored *employees'* TPG emails. A2837.

Shawe points to an acknowledgment form as purportedly showing the computer use policy applied to Elting. PSOB 41, 44, 47 (citing (A3802-03)). That document, however, was not part of the record on which the court's privilege decision was based. Rather, Shawe first submitted it to the court a month after trial in opposition to Elting's motion for sanctions for an entirely different purpose and, as his counsel acknowledged, he did not seek to reopen the record or obtain reconsideration of the privilege decision based on the document. *See* B3328-29. It therefore should not be considered on appeal. *See Torres v. Reybold Homes, Inc.*, 103 A.3d 515, 2014 WL 5822971, at *2 n.6 (Del. Nov. 13, 2014) (TABLE) (refusing to consider evidence included in an appendix that was "not presented to or considered by" the tribunal in reaching its decision below); *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1207 (Del. 1997) ("In the absence of any indication that

[21] Shawe argues that the handbook applies to Elting because she "accused" him of violating it in litigation in New York (PSOB 44 n.15), but, as the court found, the issues raised in those proceedings do not constitute an admission because, among other reasons, Elting did not actually assert a claim against Shawe for violating the handbook. A2837.

the [evidence was] ever considered by the trial court, there is no authority for [its] consideration here"). And, even if the form were considered, the court's determination that Elting had a reasonable expectation of confidentiality remains fully supported by the record.

The court also found that Elting's reasonable expectation of confidentiality was not defeated because she communicated with her husband over his C&W email account. Shawe fails to address the court's observations that C&W's email policies could not apply to Elting and that, even if they did, they are "equivocal" about the confidentiality of employees' personal communications. A2838-39; A2298; A2301. Instead, relying on the transcript of a conversation that an employee loyal to him "secretly recorded" (A2837), Shawe claims Elting knew C&W "could" monitor her husband's email account. PSOB 46. As the Chancellor found, however, Elting's comment reflected only her understanding that employers generally may be able to monitor employees' communications for the purpose of advancing the employer's legitimate business interests. A2837-38.

Shawe further claims that Elting's emails with her husband are not protected by the spousal privilege because they supposedly involve "ordinary business matters." PSOB 48. But the Chancellor correctly found that the emails involve advice Elting was requesting and receiving from her husband about her disputes with

Shawe, and thus do not "simply" relate to ordinary business matters. A2839.[22] *Securities Settlement Corp. v. Johnpoll*, 128 A.D.2d 429 (1st Dep't 1987), on which Shawe relies (PSOB 48), does not stand for the proposition that spousal communications lose their privileged status if they are in any way related to business or the workplace. We are aware of no case that so holds, and Shawe cites none.

3. The Court's Privilege Rulings Were Inconsequential Here In Any Event

Even if either of the court's privilege rulings were incorrect, this case should not be remanded for a new trial because any error was harmless. Remand for a new trial is warranted only if the court below erred and the error deprived the appellant of a fair trial. *See Gillen v. Cont'l Power Corp.*, 105 A.3d 989, 2014 WL 7009942, at *5 (Del. Nov. 19, 2014) (TABLE) (exclusion of evidence based on privilege was not reversible error); *see also Realty Enters., LLC v. Patterson-Woods & Assocs. LLC*, 11 A.3d 228, 2010 WL 5093906, at *4 (Del. Dec. 13, 2010) (TABLE) (appellant "makes no specific allegations of how the exclusion of evidence prejudiced it" and finding error was harmless).[23]

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[22] Indeed, C&W produced 12,000 documents, including those involving communications between Elting and Burlant, that actually concerned C&W's ordinary business matters with TPG. A2839.

[23] Citing *Zirn v. VLI Corp.*, 621 A.2d 773, 780-83 (Del. 1993), Shawe incorrectly suggests that remand for a new trial is necessary whenever a privilege ruling is reversed and that he is not required to show that the excluded evidence would have affected the outcome of the trial. PSOB 40. *Zirn* says no such thing. There, this

Shawe asserts that the Chancellor likely would have reached a different conclusion in this litigation had he considered Elting's private emails with her attorneys and her husband because other emails with those parties – which *were* admitted in evidence – supposedly "strongly support" his claim that Elting manufactured the deadlock here. PSOB 40. The argument is self-defeating. Despite the existence of those documents in the record, the court found that it "cannot be legitimately disputed" that Elting and Shawe's deadlock "reflect[s] genuine, good faith division[]" between them. Op. 72. The notion that the emails Shawe seeks to use could possibly change the result is thus belied by the Opinion itself and refuted by the otherwise enormous record.

Court reversed and remanded because the trial court applied the wrong legal standard to the underlying claims and, due to that error, the court's privilege rulings took "on added significance in the event of a rehearing." *Zirn*, 621 A.2d at 780.

IV. SHIRLEY SHAWE'S "TAKINGS" ARGUMENT WAS NEVER PRESERVED BELOW AND IS BASELESS IN ANY EVENT

A. Questions Presented

1. Whether Ms. Shawe is barred from presenting her "takings" argument because it was not asserted as an affirmative defense or otherwise presented in the Court of Chancery?

2. Whether the possible sale of Ms. Shawe's one share of TPG stock pursuant to section 226 constitutes an unconstitutional "taking?"

B. Scope of Review

Consideration of an argument not presented in the trial court is within this Court's discretion. *Norman v. State*, 83 A.3d 738, 2013 WL 6710794 (Del. Dec. 17, 2013) (TABLE). Constitutionality is determined *de novo*. *Watson v. Burgan*, 610 A.2d 1364, 1367 (Del. 1992).

C. Merits of Argument

Ms. Shawe contends that the Court of Chancery lacks the power to order the Company's sale because the possible transfer of her TPG share pursuant to the Sale Order violates the Takings and Due Process Clauses of the United States and Delaware Constitutions. The argument fails on multiple grounds, discussed below, and it is ironic to say the least. The Chancellor found that Ms. Shawe's share has long been controlled by her son, who "has treated his mother's share as his own property and himself as a 50% co-owner of the Company." Op. 3-4.

The entire premise of the argument is also false, as Ms. Shawe's share has not been ordered sold. To the contrary, the court has expressly afforded all three stockholders the right to bid as purchasers, including – over Elting's objection – Shawe. Sale Order 5-6. Ms. Shawe's share will thus only be transferred to a third party if that party bids *more* for the Company than she (and her son) deem it to be worth, which would result in a significant gain for Ms. Shawe.

1. Ms. Shawe's "Takings" Defense Should Not Be Considered Because it Was Never Raised in the Court Below

Both Supreme Court Rule 8 and Court of Chancery Rule 8(c) bar Ms. Shawe from arguing, for the first time on appeal, that the relief sought by Elting and ordered by the Chancellor would be an unconstitutional "taking" of TPG stock.

Ms. Shawe contends that interpreting section 226 as permitting the sale of her TPG stock renders the statute unconstitutional. But that argument is an *affirmative defense*, which must be pled under Court of Chancery Rule 8(c) or else it is waived. 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1271 (3d ed. 2004); *Gragg v. Orange Cab Co.*, 145 F. Supp. 3d 1046, 1049 (W.D. Wash. 2015). Ms. Shawe concedes that she did not plead or present this defense below. *See* SSOB 4. She has thus waived it. Ct. Ch. R. 8(c); *Gragg*, 145 F. Supp. 3d at 1050 (finding unconstitutionality defense waived).

Even if the defense had not been waived, "[o]nly questions fairly presented to the trial court may be presented for review[.]" Supr. Ct. R. 8; *see also Annan v.*

Wilm. Trust Co., 559 A.2d 1289, 1292 (Del. 1989) (declining to consider unconstitutionality issue). Ms. Shawe's "takings" defense was not presented at all, let alone fairly presented, in the Court of Chancery.

In an attempt to resurrect the defense, Ms. Shawe invokes Supreme Court Rule 8, which allows the Court to consider questions not presented below only "when the interests of justice so *require*[.]" Supr. Ct. R. 8 (emphasis added). But the interests of justice do not support, much less require, this Court to consider Ms. Shawe's defense, as doing so would frustrate the purpose of Court of Chancery Rule 8(c). *See, e.g., Jeffery v. Seven Seventeen Corp.*, 461 A.2d 1009, 1011-12 (Del. 1983) (refusing to consider newly raised argument on appeal because it was affirmative defense not raised below). Ms. Shawe cites no decision in which this Court permitted a party to raise for the first time on appeal an affirmative defense that had been waived in the trial court. Nor does she offer any explanation, let alone sufficient justification, for her failure to raise this defense during the extensive trial court proceedings.[24] That failure is even more striking given that the Shawes have

[24] Ms. Shawe asserts only that the "takings" defense implicates her "fundamental property rights" (SSOB 4), but the possibility of a court-ordered sale was obvious from the outset of the litigation. *See* B7-10 (the initial complaint asserted a claim under Section 226 and requested that the court enter an order "[d]issolving the Company" and "[a]ppointing a custodian or receiver to wind-up the business and affairs of the Company and distribute its assets"). Ms. Shawe nonetheless never raised the defense in her answer, at no time sought leave to amend her pleadings to raise it, and did nothing else to protect her supposed "fundamental property rights."

been represented by *at least eleven different law firms* in this litigation, and those firms asserted an avalanche of defenses (including numerous constitutional defenses) in an effort to defeat Elting's claims.

Far from "requiring" that this Court consider the new defense, both justice and equity militate strongly against it. The Shawes have engaged in unprecedented scorched-earth litigation designed to increase Elting's costs and bully her into selling out to Shawe on the cheap. Even after the Custodian was appointed, Ms. Shawe filed purported derivative lawsuits on behalf of the Company against Elting's husband and her financial expert (B3524-58), and she recently threatened to sue the Chancellor for age discrimination.[25] Her belated and meritless "takings" argument should thus be seen for what it is: only the latest legal maneuver on behalf of her son, who is "willing to 'cause constant pain' and 'go the distance' to get his way." Op. 80.

2. Ms. Shawe's "Takings" Argument Is Also Meritless

Even if the Court were to consider Ms. Shawe's new defense, the Sale Order would not effect an unconstitutional taking. While Ms. Shawe argues that the sale of her TPG stock is not permitted under section 226, that argument has been shown

[25] *See Delaware Judge Creates New Precedent Limiting Rights of Elderly Corporate Shareholder in TransPerfect Case*, BLOOMBERG LAW, Sept. 22, 2016.

above to be contrary to the language of the statute and prior case law. *See* pp. 35-41, *supra*.

Her constitutional argument therefore rests on the notion that, even if section 226 authorizes a sale of her TPG stock, any such sale would involve an impermissible "taking." That argument necessarily fails because Ms. Shawe's purported "private property, her interest in TransPerfect" (SSOB 9), was created under Delaware law, which makes clear that the provisions of the DGCL, including section 226, are part of every corporate charter. *See, e.g.*, *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 940 (Del. Ch. 2013) ("[O]ur Supreme Court has long noted that bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders"); 8 *Del. C.* § 394 ("This chapter and all amendments thereof shall be a part of the charter or certificate of corporation of every corporation….").[26] Delaware's corporate law "has long rejected the so-called 'vested rights' doctrine." *Boilermaker,* 73 A.3d at 955. *See also Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) (a stockholder's "*only vested right*" is the prohibition in Section 394

[26] Property interests "are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). Thus, "[a]s part of a takings case, the plaintiff must show a legally-cognizable property interest," *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993), that is superior to that of the State. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 729 (2010).

from taking away a remedy with regard to a liability that has already been incurred) (emphasis added), *aff'd and remanded*, 670 A.2d 1338 (Del. 1995).[27]

Pursuant to section 226, Elting had the right to seek judicial relief, Ms. Shawe had the right to oppose that request, and the Court of Chancery was vested with the power to grant or deny the relief, as well as the discretion to determine the appropriate remedy. In no circumstances could the court's enforcement of a right expressly prescribed by the DGCL (and accepted by each stockholder acquiring stock in a Delaware corporation) be deemed an unconstitutional taking. Not surprisingly, Ms. Shawe fails to cite a single case in which a stockholder even argued (much less succeeded in persuading a court) that the loss of stockholder rights in connection with a court-ordered dissolution amounted to an unconstitutional taking.[28]

Simply put, Ms. Shawe's "rights" with respect to her TPG stock were always subject to the power of the Court of Chancery to dissolve TPG – whether through

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[27] Ms. Shawe cites an odd assortment of cases to suggest that a stockholder's interest in a corporation is "property protected by the Fifth Amendment." SSOB 10. Those cases, however, do not even mention the Fifth Amendment, and are irrelevant here.

[28] Ms. Shawe misinterprets a footnote in *Carlton Investments v. TLC Beatrice International Holdings, Inc.*, 1997 WL 305829, at *2 n.4 (Del. Ch. May 30, 1997). There, former Chancellor Allen did not suggest, as Ms. Shawe contends, that there were any constitutional restrictions on the Court of Chancery's evaluation of a special litigation committee's proposed derivative settlement. Rather, the court explicitly limited its observation about the potential implications of the Takings Clause to "*other contexts*," *id.* (emphasis added), *not* the one then before it.

liquidation, the sale of its assets, or the sale of its stock. *See, e.g.*, 8 *Del. C.* §§ 226, 273, 291, 322; *Weir v. JMACK, Inc.*, 2008 WL 4379592, at *2 (Del. Ch. Sept. 23, 2008) (The Court of Chancery, "as a court of equity, has the power to order the dissolution of a solvent company and appoint a receiver to administer the winding up of those assets."). Having acquired her one TPG share subject to all of the provisions of the DGCL, Ms. Shawe has no basis to assert any vested right in its continued ownership. *See, e.g., Boilermakers*, 73 A.3d at 955; *Kidsco*, 674 A.2d at 492.

The Sale Order would be permissible in any event because it advances the State's compelling interest in regulating Delaware corporations and Ms. Shawe will receive just compensation. A taking satisfies the constitutional "public use" requirement if it is rationally related to a conceivable public purpose. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Delaware plainly has a strong interest in regulating the internal affairs of corporations created under Delaware law. *Sample v. Morgan*, 935 A.2d 1046, 1063 (Del. Ch. 2007) ("The United States Supreme Court has long recognized the legitimacy and importance of a state's interest in regulating the internal affairs of its corporations."); *see also In re USACafes, L.P. Litig.*, 600 A.2d 43, 52 (Del. Ch. 1991) (explaining that Delaware has an important state interest in regulating entities created under its laws). A sale of TPG serves to eliminate the stockholder and director deadlocks now plaguing the Company and enables it to be

managed effectively in accordance with Delaware's statutory scheme of corporate governance.

Contrary to Ms. Shawe's contention (SSOB 15-16), moreover, the Sale Order does not violate Title 10 of Chapter 61 of the Delaware Code because it is not an exercise of the State's power of eminent domain. Rather, it is a sale by judicial action pursuant to the DGCL and not by condemnation or eminent domain. *See, e.g.*, *Stop the Beach*, 560 U.S. at 713 (distinguishing various forms of takings).

V. THE DISMISSAL WITH PREJUDICE OF SHAWE'S DERIVATIVE CLAIMS AGAINST ELTING WAS NOT ERRONEOUS AS TO MS. SHAWE

A. Question Presented

Whether it was error to dismiss with prejudice the derivative claims against Elting, which were fully litigated below?

B. Scope Of Review

A trial court's decision to dismiss claims with prejudice is reviewed for abuse of discretion. *Scanlon v. BAC Home Loans Servicing, LP*, 26 A.3d 215, 2011 WL 3035276 (Del. Aug. 16, 2011) (TABLE). This Court will defer to the trial court's findings of fact absent clear error. *Bank of N.Y. Mellon Trust Co., N.A. v. Liberty Media Corp.*, 29 A.3d 225, 236 (Del. 2011).

C. Merits Of Argument

The derivative claims against Elting were fully litigated through trial by the holders of 99% of TPG's shares (*i.e.*, Shawe and Elting), and were dismissed based on Shawe's "unclean hands." *See* B3343 ("the practical reality [is] that stockholders holding 99% of the Company's shares already have fully litigated those claims"). Shawe does not challenge the dismissal of his derivative claims. Yet Ms. Shawe contends that it was reversible error to have dismissed the claims with prejudice because it denied her an opportunity, as the owner of the remaining 1% of TPG's

stock, to pursue the identical derivative claims against Elting in new litigation. The argument is frivolous.

Ms. Shawe is a party to two of the three "coordinated and functionally consolidated" actions currently on appeal, and she "actively participated" in them – attending every telephone and in-person hearing throughout, including the entire trial. B3337-39. "[A]s early as October 10, 2014," she was on notice that her son's derivative claims against Elting could be defeated based on his unclean hands. B3341. Rather than pursue those claims herself, she chose to let her son do so alone, and "enormous private and judicial resources" were expended to resolve them. B3344. For those reasons, among others, the Chancellor denied her post-judgment motion to "intervene" and to "modify" the dismissal of the derivative claims with prejudice. As the court stated: "I am hard-pressed to see any equity to affording Ms. Shawe the opportunity to seek a 'do-over' at the last minute." *Id.* This Court affirmed. B3485.

Ms. Shawe now seeks a third bite at the apple, repeating the same arguments that both the trial court and this Court previously rejected. Not one of the cases she cites in support of this effort remotely resembles the situation here, where a stockholder like Ms. Shawe actively participated throughout proceedings in which a totally-aligned stockholder litigated derivative claims through trial. While Ms. Shawe now argues that she was not "in privity" with her son and, unlike her son, can

"provide adequate representation for the corporation" (SSOB 21), the court below found – based on compelling evidence – that her share of TPG stock is actually controlled by her son and that she is fully aligned with him. Op. 78. No legal, equitable, or factual basis thus exists to reverse the dismissal of the derivative claims with prejudice.

Undoubtedly concerned that her two recently filed derivative suits in New York are tenuous at best, Ms. Shawe bizarrely suggests the Chancellor "informed" her during argument on the proposed plan of sale that he "believed" the derivative claims had been "extinguished" for all purposes, both in the Court of Chancery and elsewhere. SSOB 19. She thus devotes pages of her brief to arguing that she is not barred from pursuing them by the doctrines of *res judicata* and collateral estoppel. SSOB 19-21. The effort is pointless. The colloquy she cites clearly reflects that when the Chancellor said "I think the derivative claims aspect of this case is a done deal," he was referring only to "this case," and not purporting to rule on any others. Ms. Shawe A88-89. The effects of *res judicata* and collateral estoppel on Ms. Shawe's pending derivative suits are accordingly not before this Court.

To the extent Ms. Shawe may nevertheless be inviting the Court to comment on the subject, advisory opinions are, of course, prohibited. *See Stoud v. Milliken Enters., Inc.*, 552 A.2d 476, 480-81 (Del. 1989). And because a Custodian has been appointed, the fact that Ms. Shawe saw fit to file new derivative suits without ever

consulting him demonstrates only her disdain for the Custodian's authority and her desire to escape the jurisdiction of the Delaware courts.

CONCLUSION

The Court should affirm in their entirety (i) the March 9, 2015 Order appointing a Custodian; (ii) the Opinion; (iii) the Court's privilege rulings; (iv) the Plan Opinion; (v) the Sale Order; and (vi) all subsidiary decisions on which those orders and opinions are based.

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