IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REDACTED VERSION--
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PRELIMINARY STATEMENT

Elting's brief ("Elting's Brief" or "EB") demonstrates that the forced sale order entered below cannot be reconciled with the purposes of Section 226 or the record. A case that raised the issue of whether a custodian was needed to break deadlocks has resulted in an unprecedented requirement that Shawe either sell his shares or, in order to keep them, pay Elting a public market control premium for her private, non-controlling shares—in short, a penalty against Shawe and a potential windfall for Elting. All this without any finding of breach of duty by Shawe, or that Shawe should be punished in the deadlock-breaking process, and despite findings that Elting also bore responsibility for the dynamics. The court opted for this extreme result notwithstanding uncontroverted evidence that TransPerfect Global, Inc. ("TPG" or the "Company") continues to prosper and despite the availability of less drastic alternatives to a forced sale of Shawe's property.

How did this case get so far off track? As Elting's Brief demonstrates, by focusing not on the law, but on Shawe's conduct that upset Elting. The court found that conduct distasteful, and as a consequence imposed a forced sale to achieve a result deemed "fair" to Elting. In doing so, the court did not decide, as it should have, what would or would not be necessary to protect TPG, and ignored what would be fair to Shawe.

As the court found, Shawe's discovery behavior was a matter for a sanctions proceeding, not a penalty under Section 226. Shawe's other behavior may be relevant to why there was alleged deadlock, but since it did not amount to a breach of duty to Elting or TPG, and the business continues to prosper, that behavior should have no bearing on the outcome under Section 226. Elting relies heavily on initial 2015 EBITDA numbers reported in 2016 to argue that Shawe's alleged conduct or the alleged deadlocks are harming TPG, when in fact there is no consequential EBITDA decline, TPG remains extremely profitable, revenues continue to climb, and no evidence connects any EBITDA fluctuation to the parties' disputes.

Shorn of its pejorative attacks, Elting's Brief has no answer to Shawe's legal and factual arguments as to why courts should not leapfrog over the relief that the statute specifically provides—a deadlock-breaking custodian—to the drastic measure of requiring stockholders to sell their property or buy the whole business at a potentially excessive premium. Whether Section 226 permits such a result at all, and whether it may be imposed when less drastic measures are available and untried, are issues of first impression and importance. The decision should be overturned.

ARGUMENT

I. NEITHER SECTION 226 NOR CASE LAW PERMITS A FORCED SALE, ESPECIALLY WHERE LESS DRASTIC MEASURES REMAIN UNTRIED.

A. Elting Does Not Squarely Address Shawe's Forced Sale Argument.

Section 226(b) neither grants nor implies authority to compel the forced sale of a stockholder's personal interest in a corporation. Indeed, as Shawe's opening brief ("Shawe's Brief" or "SB") shows, other than under a few statutes that explicitly so provide, we know of no situation (and Elting cites none) where a court can force a stockholder to sell his shares. SB 19-20.

Elting first tries to avoid this issue entirely by contending that Shawe did not preserve it. EB 37. Shawe "fairly presented" the issue below, Supr. Ct. R. 8, contending that, absent consent, the court should not order a sale under Section 226. *See* A2383; A2385; A3786-91; A3836; A3850; A3852-57; A3916-23. Indeed, one section of Shawe's post-trial brief is titled "If the Court Does Appoint a Custodian, It Should Not Grant the Custodian the Authority to Dissolve the Company or Force a Sale of Shawe's Stock." A3786. While the argument below about lack of authority for a forced sale focused on the absence of precedent, rather than an analysis of the statutory framework, additional reasoning in support of an argument advanced below is permitted on appeal. *See N. River Ins. Co.* v. *Mine*

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Safety Appliances Co., 105 A.3d 369, 382-83 (Del. 2014); *Mundy* v. *Holden*, 204 A.2d 83, 87-88 (Del. 1964); *Great Am. Indem. Co.* v. *State ex rel. Mills*, 88 A.2d 426, 430 (Del. 1952); *Kerbs* v. *Cal. E. Airways, Inc.*, 90 A.2d 652, 659 (Del. 1952). Further, because courts know they need statutory authority to order a result under a statute, there is nothing unfair or improper about statutory analysis being presented on appeal.

On the merits, the only two cases that the court relied upon to support the forced sale involved stockholders who had already *agreed* to a sale or other ownership change. *See Bentas* v. *Haseotes*, 2003 WL 1711856, at *1 (Del. Ch. Mar. 31, 2003); *Fulk* v. *Wash. Serv. Assocs., Inc.*, C.A. No. 17747, at 3 (Del. Ch. June 4, 2001) (TRANSCRIPT), and 2002 WL 1402273, at *5 (Del. Ch. June 21, 2002). Elting says this distinction "misses the point." EB 38. But it is the entire point: in neither of those cases did the court take the leap, taken below, of ordering a stockholder to sell his property over his objection. Likewise, in the two additional decisions Elting cites, the parties had agreed to sell "100% of the stock of the Company." *In re Supreme Oil Co.*, 2015 WL 2455952, at *1 (Del. Ch. May 22, 2015) (ORDER); *EB Trust* v. *Info. Mgmt. Servs., Inc.*, C.A. No. 9443-VCL, at 2-3 (Del. Ch. June 17, 2014) (ORDER).

Elting also misinterprets *In re Scovil Hanna Corp.*, C.A. No. 664-N (Del. Ch.). While the *Scovil* court "exercised [its] equitable discretion to appoint a receiver to administer the sale of the company," EB 39, neither party objected to a sale. *See* Resp. Receiver Mot. (June 30, 2006); Petit. Receiver Mot. (July 14, 2006). The issue in *Scovil* was not whether to order a sale but what sanction was appropriate to address misbehavior by a stockholder that may have given him an advantage in the sale process. C.A. No. 664-N, at 2 (Del. Ch. May 9, 2006) (ORDER). Here, while the court imposed monetary sanctions against Shawe for discovery-related conduct, it explicitly rejected Elting's request for sanctions related to the sale process. Op. 83.

Elting also argues that because the statute authorizes the court to *liquidate* a corporation, then "*a fortiori*" it also empowers the court to order a sale, suggesting that a sale is some lesser form of liquidation. EB 38. This reflects a misunderstanding of the difference between liquidation and sale. In a liquidation, the corporation's property is sold. The stockholders continue to own shares, but the corporation is no longer a going concern and its operating assets are replaced by the cash obtained in liquidation. This distinction is expressly reflected in the language of Section 226(b), which does not empower the custodian to "liquidate" the corporation, but to "liquidate its affairs *and distribute its assets*" (emphasis added), making clear that it is the corporation's property, not the stockholders' property, that may be sold, with the proceeds to be distributed to creditors and stockholders.

Moreover, liquidation is appropriate only when a company has abandoned its business, is insolvent, or is otherwise in need of "a winding up of [its] affairs." *Rosan* v. *Chicago Milwaukee Corp.*, 1990 WL 13482, at *4 (Del. Ch. Feb. 6, 1990). Of course, nobody argues that the affairs of the enormously successful TPG should be wound up. Accordingly, the court's authority to liquidate a corporation is irrelevant to whether Section 226(b) authorizes the forced sale of the owners' stock in that corporation.

Elting posits that the sale here is not "forced" because Shawe can participate in the auction. EB 40. But forcing a party to buy someone else's property in order to keep his own amounts to the same thing, particularly where, as here, he would have to pay a multimillion dollar premium for the other stockholder's shares. *See infra* at 12-14.

Finally, Elting argues that Shawe has behaved badly—her preferred justification for every request for judicial intervention—and that "equity will not suffer a wrong without a remedy." EB 40 (citations omitted). Section 226, however, provides a "remedy" for deadlocks in corporate governance, not for some general righting of personal "wrong[s]" between stockholders who no longer get along. This is consistent with Delaware corporate law generally, which does not deal with personal relationships between stockholders. Nor is punishment the purpose of Section 226, or the stated purpose of the decision below. *See* Op. 83.

Even the powers of a court of equity have limits; one limit that no Delaware court has ever breached is that a stockholder is not required to sell his personal property to resolve corporate governance issues.[1] Section 226 should not be the starting point for that unprecedented result.

B. Even If Section 226 Permitted a Forced Sale, It Would Be Proper Only as a "Last Resort," After Less Drastic Alternatives.

Elting, like the court, recognizes that a forced sale of a profitable company "should be implemented only as a last resort and with extreme caution." Op. 81-82; EB 36. Nonetheless, Elting insists that there was no need to explore—much less try—practicable, less intrusive alternatives to sale. Echoing the court's decision, she argues that any effort to determine whether matters could be resolved by appointing a custodian to serve as a third director "'would enmesh an outsider

[1] A long line of cases prohibits directors from taking measures that would compromise a stockholder's ownership right in its shares, even when such measures might be beneficial to other stockholders. *See, e.g.*, *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *12-15 (Del. Ch. Oct. 10, 2016) (collecting cases).

and, by extension, the Court into matters of internal corporate governance for an extensive period of time.'" EB 36 (quoting Op. 81).

That is, however, precisely what custodians do. Section 226 puts no time limit on their service, and custodians have been appointed to serve tie-breaking roles for substantial periods of time, notwithstanding the supposed "enmeshment" risk. *See, e.g.*, *Miller* v. *Miller*, 2009 WL 554920, at *5-6 (Del. Ch. Feb 17, 2009), and 2016 WL 614486 (Del. Ch. Feb. 11, 2016) (seven years); *Bentas*, 2003 WL 1711856, at *1 (three years). Even if a time limit on service by a custodian seemed advisable, there would remain the alternative of creating a self-perpetuating directorial position and selection process, SB 22, an alternative on which Elting is silent.

Elting mistakenly argues that the failure of prior mediation and the supposed continuation of "deadlocks" prove that a forced sale is the only possible remedy. EB 42-43. But the failure of mediation proves nothing about whether a tie-breaker director or other alternatives might succeed. A mediator is not a custodian, and the appointed mediators had no authority to break ties or deadlocks. The current custodian has tie-breaking powers, but his mandate (which he is following) is to sell TPG, not to look for alternatives to sale. That mandate destroyed any incentive for Elting to work toward a consensual solution.

Elting's repetition of six "deadlocks" provides no better evidence that appointing a tie-breaking custodian would have been insufficient. EB 14-19. To the extent they ever existed, these deadlocks have been or could be resolved by a custodian-aided Board, and Elting does not argue otherwise:

1. **Distributions.** Elting refers to a "disrupt[ion of] routine distributions to cover … tax liabilities" of the stockholders, EB 16, but TPG has timely paid the stockholders' taxes ever since the Subchapter S corporation was formed, and in just the six years before trial, paid over $63 million in non-tax distributions as well. A2914; A2916; A3380-467; A3645-47. Since the Custodian's appointment, regular distributions and tax payments, totaling over $33 million, have continued uninterrupted. A4150; AR17-28.

2. **Acquisitions.** TPG's acquisition strategy had been in abeyance since 2013, but that is due principally to Elting withholding approval of transactions in order to extract approval of distributions for herself. *See* Op. 69. The Custodian has not resumed acquisitions as he prepares for the court-ordered sale, but if his mandate was simply to function as a tie-breaker/director he could vote to resume acquisition activity and resolve any disagreements over particular transactions.

3. **Personnel.** The court stated that Elting's refusal to approve new hires prompted Shawe to use "deceptive" means to fill job openings. Op. 42. Whatever the need for that self-help in the past, it is not needed with a tie-breaker in place. There is no claim that the practice continues.

4. **Outside Professionals.** Here, again, Elting focuses on past disputes. The Kasowitz Benson law firm no longer represents TPG, and its prior public relations firm was replaced. A4151. A tie-breaking director could decide whether to continue or alter professional relationships, and Elting offers no contrary evidence.

5. **True-ups.** As at trial, Elting ignores that, as a matter of unambiguous federal tax law, her use of corporate funds to pay her personal lawyers and financial advisors in this case could be resolved only by her reimbursing TPG, not through payments to Shawe. *See* 26 U.S.C. §§ 162(a) & 1361(b)(1)(D). Reimbursement is precisely what the Custodian ultimately required; with that payment made, there is no longer a dispute. A4150, A4175-79.

6. **Audited Financials.** The Custodian's exercise of tie-breaking authority also resolved the past dispute over whether TPG should be audited. The Custodian directed that Grant Thornton LLP proceed with an audit, which is nearing completion. A3997; A4151-52. Elting asserts that "Shawe has continued to resist this step," but cites only to the court's ruling authorizing the Custodian to direct an audit. EB 19 (citing B3776). That ruling says nothing about Shawe continuing to resist, let alone an intractable "deadlock."

Elting also argues that alleged past misconduct (such as obtaining and reviewing Elting's Gmails, arranging to sit next to her on a business trip, and litigating in New York) justified a sale order as a first resort. EB 19-22. There is no evidence, however, that any of this damaged TPG, and nothing to suggest that it would stand in the way of a Custodian breaking ties going forward. *See infra* at 23-25. Elting also complains about alleged post-Opinion conduct never addressed by the court. EB 43. Even as described by Elting, that conduct came in *reaction* to the sale order and, therefore, cannot speak to what would have occurred without one.

Elting contends that there was no need to explore the alternative of a sale of her shares to a third party. EB 45 (citing Op. 80). But the court's summary dismissal of this option because no one would "partner" with Shawe, Op. 80, is not based on any canvassing of the market or other testing of that proposition. Elting also ignores the inconsistency in the Opinion between the supposition that nobody would "partner" with Shawe and the court's statement, just three pages later, that there was a "distinct possibility" that anyone considering buying TPG might be "unwilling" to do so "without securing [Shawe's] participation and expertise." Op. 83.[2]

C. Elting's Argument that Section 226 Authorizes Creating a Non-Contractual Right to a Control Premium is Circular and Barred by Elting's Unclean Hands.

1. Section 226 Does Not Give Non-Controlling Stockholders a Right to an Immediate, Unbargained-for Control Premium.

Elting does not deny that the sale order will give her a control premium that she never achieved through bargaining and that her non-controlling interest would not command in the marketplace. *See* SB 23. Instead, Elting echoes the court's conclusory statement that "it would be unjust to leave Elting with no recourse except to sell her 50% interest in the Company" whereas an auction of the whole Company would give her a "fair price for her shares." Op. 80. What is a "fair

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[2] There is no basis for doubt that Shawe is regarded as an extraordinarily able executive, capable and motivated to build on TPG's historic success. *See* SB 8. Nor is there any basis to worry that it would be "unfair" to Elting to be stuck working alongside Shawe. *See* Op. 80-81. As part owner, Elting need not come to work in order to keep receiving sizable distributions whenever Shawe does.

price," however, depends on the bargain Elting struck; Delaware law does not add to contracts exit rights that the parties did not negotiate. *See Nixon* v. *Blackwell*, 626 A.2d 1366, 1380-81 (Del. 1993); *Blaustein* v. *Lord Baltimore Capital Corp.*, 2013 WL 1810956, at *14-17 (Del. Ch. Apr. 30, 2013), *aff'd*, 84 A.3d 954 (Del. 2014); *Ueltzhoffer* v. *Fox Fire Dev. Co.*, 1991 WL 271584, at *8 (Del. Ch. Dec. 19, 1991), *aff'd*, 618 A.2d 90 (Del. 1992) (TABLE).

Elting's main response is circular—that, given the lack of agreement between the parties, "the provisions of the Delaware General Corporation Law, including those under Section 226, apply by default." EB 45 (quoting Op. 82). This argument begs the question of whether Section 226, which says nothing about sales at all, empowers the court to award Elting a public market control premium that she could not obtain by selling her own shares. Given that non-controlling stockholders generally have no "right to be paid for their proportionate interest in the total assets of the company," *Ueltzhoffer*, 1991 WL 271584, at *8, one would expect a statute intended to create such a right to say so. Indeed, Section 262, which does grant such a right, does so explicitly, and is narrowly limited to the precise circumstances the statute addresses. *See Applebaum* v. *Avaya, Inc.*, 812 A.2d 880, 892-93 (Del. 2002). Section 226, by contrast, says nothing of the kind, and should not be construed to create such an extraordinary result.

Elting's (and the court's) position is that no alternative less drastic than a forced sale of TPG will work, because only that will yield a "fair" price for her shares, EB 4; *see* Op. 80, by which she means a price including a control premium. Fairness to stockholders, however, is not achieved by selling the whole Company for "maximum value": that outcome gives Elting more than she bargained for or is entitled to as a non-controlling stockholder and forces Shawe either to sell against his will or, in order to keep his ownership interest in his life's work, to pay Elting not only a control premium, but also a premium necessary to top an outlier bid offered by a third party.[3]

2. Elting's Unclean Hands Bar Her Claim That "Fairness" Requires a Whole Company Sale So She Can Get a Control Premium.

The trial court also erred in failing to recognize that its findings regarding Elting's misconduct trigger the doctrine of unclean hands. SB 35-36.[4] At the least, Elting's inequitable conduct should bar her from being awarded a forced sale of the property of other stockholders, justified on the court's theory that fairness to Elting—as opposed to the needs of TPG—requires it. As the court found, Elting's

[3] Even if some forced buyout were permissible under Section 226, it would be far fairer to adopt the buyout process proposed by Shawe, a process tied to an independent third party's range of fair value for TPG. A4086-87.

[4] Shawe did not, as Elting claims, abandon this position. A2336, A2381; A3782-83; A3818-19, A3827 n.2, A3843-48.

conduct included "improperly" asking key customers to withhold their business to advance her personal goal of being bought out, Op. 72, and "blanket opposition" to acquisitions, *id.* at 69-70; *see also* SB 9-14 (detailing other instances of Elting's improper conduct).

Elting claims that her conduct is irrelevant because, regardless of who is at fault, the court must "fashion[] a remedy for the total deadlock and dysfunction found to exist at TPG." EB 34. But the court's decision to order a sale that enables Elting to obtain a control premium for her stock was based on its determination that it would be "unjust" to Elting personally—not TPG—to leave her with the false binary options of remaining at TPG or selling her non-controlling interest for what the market would pay. Op. 80.

The court's decision to choose a remedy that gave Elting a control premium as a matter of "fairness" was thus intended, as Elting acknowledges, to be an exercise of its equity powers for her benefit, not TPG's. EB 40-41. TPG, by contrast, would have been as well or better off if Elting's shares were purchased by a third party wishing to partner with Shawe, but who did not want to pay a premium for a non-controlling block. Accordingly, Elting's inequitable conduct should bar her from reaping that unbargained-for windfall, fashioned solely for her benefit.

D. Elting Misquotes the Sale Order's Provisions for Review of the Custodian's Decisions.

Elting argues that because the court's July 18, 2016 implementing order, *see* SB Ex. C ("Sale Order"), provides for some review by the court, it cannot constitute improper delegation of judicial power. EB 47-48. She does not respond, however, to Shawe's point that deferential review of accumulated decision-making cannot practically rectify each potential error. SB 26. These include such sensitive choices as whether to give TPG's competitors, as potential bidders, access to TPG's confidential information, employees and current customers. A4157-58; *see* A4340; AR46; AR48. The Sale Order lacks standards for the exercise of immense delegated authority, with potential for irreversible harm, no matter how the sale process or judicial review of it turns out.

Elting asserts that Shawe "outright misrepresents the facts" about standardless delegation and review, EB 47, but she ignores the court's proviso that "[a]ll actions, recommendations and decisions of the Custodian *shall be presumed to have been made* on an informed basis, in good faith, and in the honest belief that such actions, recommendations and decisions were in the best interests of the Company." Sale Order ¶ 15 (emphasis added). The Sale Order thus *presumes* but does not impose established directorial duties applicable in any sales process. *See Revlon, Inc.* v. *MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 180 (Del.

1986). By excusing the Custodian even from a duty to disclose to the stockholders how and why decisions are made, Sale Order ¶ 6, the Sale Order may make "abuse of discretion" review practically meaningless.

II. ELTING'S DILUTED "IRREPARABLE INJURY" STANDARD IGNORES STATUTORY LANGUAGE, CASE LAW, AND THE UNDISPUTED SUCCESS OF "THE BUSINESS."

A. The Court Applied the Wrong Standard for Determining Irreparable Injury Under Section 226(a)(2).

As Elting acknowledges (at 28), Section 226(a)(2) authorizes the appointment of a custodian only when division between directors is causing, or threatens to cause, "irreparable injury" to "the business of the corporation." As the court found, the *business* of TPG has continued to thrive despite Elting's and Shawe's personal disputes, Op. 7, 73, and it would be "speculative" to draw any inference of harm to profitability from these disputes, Op. 73. This should have ended the Section 226(a)(2) inquiry.

Elting argues that proof of "financial injury … is unnecessary" because in "other contexts" (not involving Section 226), abstract threats sometimes justify *temporary* judicial action to preserve the status quo. EB 30-31 & n.7. As authority, Elting and the court cite Professor Folk's treatise, asserting that it supports the proposition that the requirement of "irreparable injury" under Section 226(a)(2) is no different from the "familiar equity principle" that equitable remedies are available when money damages will not suffice. Op. 73-74. In fact, Professor Folk expressly eschewed such generalities, cautioning that Section 226(a)(2) should provide recourse only where judicial interference is necessary "to prevent *substantial and inescapable loss of going-concern values*." Ernest L. Folk, III, *The New Delaware Corporation Law* 35 (1967) (emphasis added).

Elting does not dispute that the court's irreparable injury definition was derived from case law far removed from Section 226. SB 28-32. Those cases generally involved preliminary or temporary injunctive relief rather than a final, permanent and mandatory command of the type the court issued here. No Section 226 case has applied preliminary or temporary injunction standards, or treated purported injuries such as "morale," "distrust" or "concern," as sufficient under the statute. *Id.*[5] Under the correct standard, speculative "concern" about "morale" and similar ephemera at a prosperous company cannot be the basis for intervention when there is no objective evidence that the business is in substantial jeopardy.

Elting also argues that TPG's "continuing profitability" is irrelevant because the revision of Section 226 in 1967 provides for "appointment of a custodian to resolve deadlocks at solvent but dysfunctional companies." EB 3. There is an enormous difference, however, between companies that are solvent but facing

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[5] Elting contends, without citation, that mandatory injunction standards should not apply under Section 226 because mandatory injunctions aim only "to restore the status quo ante." EB 31. In fact, the rationales for applying heightened standards to requests for mandatory injunctions are the same whether a mandatory injunction aims to restore the status quo or, as here, to alter it. *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 12.02[c] (2016). Either way, courts properly hesitate before commanding—as opposed to prohibiting—action. *See id.*

imminent loss of going concern value, and companies that are not just solvent but thriving. Elting cites no authority for the theory that Section 226(a)(2) aims at early judicial intervention in the internal affairs of companies that are nowhere near insolvency.

Nor does Elting properly address case law under Section 226, principally *Giuricich* v. *Emtrol Corp.*, 449 A.2d 232 (Del. 1982). There, this Court explained that "*irreparable harm, or in other words, imminent corporate paralysis*" was not required under Section 226(a)(1), because that subsection makes no reference to irreparable harm. *Id.* at 238-39 & n.13 (emphasis added). Under *Giuricich*, if "irreparable injury" were required, as it is under Section 226(a)(2), "imminent corporate paralysis" is precisely what must be proven. Contrary to Elting's argument—that when *Giuricich* defined "irreparable harm" as "imminent corporate paralysis," it was merely describing "the state of Delaware law before section 226 was amended," EB 32—*Giuricich* discussed both pre- and post-amendment law, contrasted current Section 226(a)(1) with both its predecessor and current Section 226(a)(2), and set out an irreparable injury definition applicable under both. 449 A.2d at 236-38.

Elting similarly misreads the additional Section 226 cases cited in Shawe's Brief (at 29-30). These cases show that courts consistently construe "irreparable injury" under Section 226(a)(2) to require an imminent, existential, tangible threat of harm to the business as a whole. For example, and contrary to Elting's argument (EB 32), in *Miller* v. *Miller*, the court determined that despite substantial disputes about, among other things, whether to continue or cease operations of the business, relief under Section 226(a)(2) should be denied because the corporation was "profitable," "operate[d] reasonably well," and therefore was not suffering from or threatened with "irreparable injury." 2009 WL 554920 at *1-3, *5. The court instead appointed a custodian *temporarily*, under Section 226(a)(1), to help resolve specific disputes that placed "the successful future operation" of the corporation "in doubt." *Id.* at *1, *5.

Elting argues in a footnote (at 32 n.8) that *TecSyn International, Inc.* v. *Polyloom Corp. of Am.*, C.A. No. 11918 (Del. Ch. July 14, 1992) (TRANSCRIPT), does not reflect that Section 226(a)(2) requires imminent and significant "financial harm," but there too the court held *insufficient* a long list of seemingly substantial disputes because they did not "jeopardize[] … the ability of [the] Corporation to operate." *Id.* at 5, 7. Elting's assertion that *Hoban* v. *Dardanella Electric Corp.*, 1984 WL 8221 (Del. Ch. June 12, 1984), did not require imminent and significant financial harm is also wrong. There the court found irreparable injury under

Section 226(a)(2) because "the required vote for action *necessary to [the corporation's] survival* cannot be obtained." *Id.* at *3 (emphasis added).

Elting argues that expansion of the "irreparable injury" standard to encompass "non-financial" or "personal" issues that may arise at profitable companies does not threaten to embroil Delaware's courts in such matters because the "fact pattern" here is "unlikely to set much of a factual precedent." EB 32. The question of the meaning of "irreparable injury" under the statute, however, is one of law, and the court used the wrong standard, inviting future misuse. While parties often regard their personal experience as extreme and unique, courts see many cases, and would see many more if extreme feelings without profound consequence to "the business" were actionable.

B. Irreparable Injury to TPG's Business Post-Decision Cannot Be Found Based on a Minor Dip in EBITDA.

Elting repeatedly argues that the court's "irreparable injury" ruling in mid-2015 has now been validated retrospectively by financial information in a February 2016 report by Houlihan Lokey (the "HL Report"), which said that TPG's adjusted EBITDA went from [redacted] million for 2014 to [redacted] million for 2015. EB 25; *see id.* at 1-2, 30.[6] Over [redacted] million in EBITDA in 2015 reflects a highly successful

[6] The HL Report used financial statements prepared on a non-GAAP cash basis. More recent financial statements, prepared by TPG's auditors (as demanded by Elting and required by the Custodian) on a GAAP-compliant accrual basis, show

year [redacted] A4040; 4052. The HL Report shows that [redacted] that is consistent with TPG having increased its investments in anticipation of future growth. The same document cited by Elting also reflects that Elting herself, knowing the 2015 EBITDA, forecast a [redacted] in EBITDA for 2016, bringing it to [redacted] million. A4040. Judged over any relevant period, the Company's overall financial performance reflects continuing improvement. There is no evidence of any connection between a modest decline in one financial metric and the disputes of which Elting complains.

Undisputed record evidence beyond the HL Report further dispels the doom Elting conjures. The first two months of 2016 showed [redacted] along with continued geographic expansion. AR65-70. TPG's business thus continues its unbroken history of profit and growth, years after Elting commenced litigation premised on her portrait of past "dysfunction" and prediction of imminent irreparable harm. As Elting's financial advisor privately admitted in 2014, her lawsuit actually "had nothing to do with the very

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[redacted] EBITDA between 2015 and 2016. Shawe has moved to put these GAAP-based financials before the Court.

strong underlying health of the business"; it was simply a means "to force the buy/sell process to begin in earnest." A3026-27. Nearly three years on, there is still no evidence that grave harm is materializing, only that Elting uses dire warnings of harm to TPG to advance her personal interests.

C. Even If Harms Without Grave Financial Consequence Could Constitute Irreparable Injury to a Business in Some Cases, They Could Not Justify Intervention Under Section 226(a)(2) in This Case.

Even if the type of harm necessary to trigger Section 226(a)(2) intervention may include non-financial threats, the record lacks evidence of them here. For example, Elting asserts that there has been a "mass exodus" of employees, relying solely on a 2014 letter from the COO (one of the many senior managers Elting publicly threatened to fire) to a Special Master appointed in New York. EB 24. But the letter only seeks assistance with a morale or staffing problem in the "Accounting and Finance" department arising out of Elting's demand that all new employees in that department report directly to her. A3154-55; *see* A3161. The record reflects that Elting also had caused these employees distress by reversing their year-end bonuses and suing to dissolve the Company. A2508; A2510; A2868; A3293; A3655; AR7; AR12. Critically, the "mass exodus" involved a grand total of *eight* employees. A3154-55.

Elting also relies on general complaints that the founders' "feud" had led to "[c]oncerns on the part of employees" who sometimes received conflicting instructions, A2870; *see* B49-50, or who once called the disputes the "biggest business issue" of 2013, A2977, or said it should be resolved through negotiation rather than litigation, A3691.[7] Elting never reconciles these generalities with the undisputed, empirical evidence that throughout these years TPG's employee turnover rates were "amazingly" low, and its profits historically high. *See* A2897. Indeed, Elting's own testimony identified "morale" as a problem in the back office (or "Shared Services") area "in particular." A2444. There is no evidence that the productivity of the other nearly 4,000 TPG employees was diminished by the underlying disputes. *See* EB 17.

Elting similarly misstates the record regarding clients' supposed "concern about continuing to work with TPG because of disputes between Elting and Shawe." EB 24. Elting primarily cites her own 2015 testimony listing five "concerned clients" by name, but no evidence that any of them withdrew any

[7] Elting acknowledges (at 23 n.6) that Shawe's reference to "potential" harm was made in a settlement proposal. Elting cites no law to support her use of this settlement communication to show irreparable injury, and ignores the rule that Shawe did not waive objection by presenting the settlement communication in response to Elting's allegations of unwillingness to compromise. Elting also ignores Shawe's citation of *OptimisCorp.* v. *Waite*, 2015 WL 5147038, at *9 (Del. Ch. Aug. 26, 2015), *aff'd*, 137 A.3d 970 (Del. 2016) (TABLE), affirming this rule.

business. A2444. Two of the five, Bank of America and Goldman Sachs, maintained their relationships despite Elting's improper efforts to sabotage them for her own advantage. *See* Op. 48-51; SB 11-12; AR1-4. As to others, Elting cites testimony provided by a Vice President of Strategic Accounts who, contrary to Elting's misleading paraphrase (at 25), testified not that "disputes have made it more difficult to maintain and add clients," but only that the *litigation* had "add[ed] another level of complexity" to maintaining existing client relationships. A2869-70; *see also* AR15-16.

D. Elting Incorrectly Argues that Her Section 226(a)(1) Petition Makes Irreparable Injury Irrelevant.

Elting endeavors to sidestep the question of injury to TPG altogether by arguing that the court "unquestionably had discretion to appoint a custodian" under Section 226(a)(1) "regardless of whether a threat of irreparable harm was established under section 226(a)(2)." EB 2, 27. Section 226(a)(1) deals with a discrete issue—the stockholders' inability to elect directors—and the court did not appoint the Custodian to break that deadlock but rather to sell TPG. Indeed, if this directive to sell were based on Section 226(a)(1), it would be a disproportionate response to the inability to elect a third director, the issue 226(a)(1) addresses. *See Giuricich*, 449 A.2d at 240 (holding that a custodian appointed under Section 226(a)(1) should serve the "sharply limited" purpose of acting "only in situations in which the board of directors … ha[s] failed to reach a unanimous decision on any issue properly before them”); *see also Stephanis* v. *Yiannatsis*, 1994 WL 198711 (Del. Ch. May 9, 1994), *aff’d*, 653 A.2d 275 (Del. 1995); *Miller*, 2009 WL 554920 at *5-6.

III. THE COURT DEPRIVED SHAWE OF CRITICAL EVIDENCE.

The evidence at trial established that Elting and her financial advisor solicited customers to threaten harm to the Company to give Elting leverage, or fabricated evidence, in her disputes with Shawe. SB 11-12; Op. 48-52. Elting also discussed with her husband, an employee of TPG's real estate broker, how to use TPG's need for additional leased space to obtain leverage over Shawe, and how to portray that leveraging, cynically, as "for the good of the Company." SB 13; Op. 52-53; A3030-31. And Elting's counsel intervened directly in the management of TPG by telling employees not to follow Shawe's instructions, while billing TPG for his time. Op. 28-29; A3018-19. The determination that privilege should shield Elting's emails with her husband and her counsel concerning TPG and located on TPG's systems deprived Shawe of the opportunity to marshal relevant evidence regarding Elting's efforts to manufacture deadlock and injury. This could not be "harmless" because those statutory elements, "fairness," and other issues depended, at least in part, on truth.

On the merits of the privilege rulings that cut off these sources, Elting argues that the court correctly ruled that she had an objectively reasonable expectation of privacy in emails with her husband on her TPG email account, *see* EB 58. However, the record establishes that Elting not only understood that her account was accessible to others, *see* SB 47, but also believed that Shawe was monitoring that account directly, A3083. Thus, questions regarding the objective reasonableness of Elting's beliefs are irrelevant; Elting did not have even a *subjective* belief that her TPG emails were confidential. Indeed, when Elting communicated with her husband on his work-issued account, she knew that his employer, too, had a policy permitting it to monitor his emails. A874-77.

As for her Gmails, Elting deliberately arranged for them to be accessible on her TPG computer without the need to enter her Gmail password. A1996-98. As a result, Elting's Gmails were accessible on the TPG network to approximately twenty TPG employees, including Shawe—without *any* password. *Id.*; A1089-95; A1199-1201; A1234-35. These facts are wholly unlike those in either *Stengart* v. *Loving Care Agency, Inc.*, 990 A.2d 650, 663 (N.J. 2010), or *Pure Power Boot Camp* v. *Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 559-60 (S.D.N.Y. 2008), where the parties neither synchronized their personal email accounts on company-owned devices nor deliberately made their personal emails accessible to other employees without their personal account password.

Furthermore, even "the body of case law governing private email accounts," EB 52, provides that parties have no reasonable expectation of privacy in private, web-based email communications sent and received through company-owned computers where, as here, the company promulgated a written policy that any communications transmitted using company equipment and company networks are the property of the company. *See* SB 43.

Elting's continued claim that TPG's written computer policy does not apply to her is insupportable given her signed acknowledgment that she was bound by that policy. A3803. Elting has never challenged the authenticity of that document, and this Court does not have to ignore it (or Elting's misrepresentations) merely because it was discovered after trial. *See, e.g.*, *Dakota Indus., Inc.* v. *Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993). In any event, TPG's computer policy and the handbook in which it is contained do not exclude TPG's owner/officers from coverage, and while Elting now finds it convenient to argue otherwise, she made no such distinction when she alleged in court papers that Shawe had violated the very handbook that she now claims does not apply to her. *See* SB 44 & n.15. Elting's and the court's position on this issue also conflicts with the holdings of numerous courts recognizing that senior executives are not exempt from corporate computer policies merely because they are tasked with implementing those policies. *See, e.g.*, *In re Info. Mgmt. Servs., Inc.*, 81 A.3d 278, 290 (Del. Ch. 2013) (senior officers with authority to decide whether company would monitor employee email do not have "a unique expectation of privacy").

CONCLUSION

The Court should reverse and enter judgment for Shawe or, alternatively, remand for further proceedings.

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