EFiled: Jul 12 2022 11:21AM EDT
Filing ID 67812211
Case Number 163,2022

IN THE
Supreme Court of the State of Delaware

MARION COSTER, an individual,
Plaintiff-Below, Appellant,

v.

UIP COMPANIES, INC., a Delaware corporation; STEVEN SCHWAT, an individual; and SCHWAT REALTY, LLC, a Maryland company
Defendants-Below, Appellees.

NO. 163,2022
On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 2018-0440-KSJM

APPELLANT MARION COSTER'S CORRECTED OPENING BRIEF

Max B. Walton (#3876)
Kyle Evans Gay (#5752)
CONNOLLY GALLAGHER LLP
267 East Main Street
Newark, DE 19711
(302) 757-7300
Attorneys for Plaintiff Below, Appellant Marion Coster

Of Counsel:
Michael K. Ross
Serine Consolino
AEGIS LAW GROUP LLP
801 Pennsylvania Avenue, NW – Ste. 740
Washington, DC 2000

July 12, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This is an appeal from a decision by the Court of Chancery following a reversal and remand by this Court on June 29, 2021.

This litigation commenced on June 15, 2018, when Plaintiff Marion Coster ("Coster")—one of two fifty-percent stockholders in UIP Companies, Inc. ("UIP" or the "Company")—filed a petition for appointment of a custodian under 8 *Del. C.* § 226(a)(1) (the "Custodian Action"). Coster did so because a deadlock existed between her and the other fifty-percent shareholder—Defendant Schwat Realty LLC (wholly-owned by Defendant Steven Schwat)—over the election of a new board to replace the holdover board.

In response to the Custodian Action, UIP's three-member holdover board—on which Schwat serves as Chairman—approved a sale of one-third of the Company's authorized but unissued shares to an entity solely-owned by holdover Board member Peter Bonnell (the "Stock Sale"). Later that same day, Defendants filed an Amended Answer in the Custodian Action proclaiming it "moot" in light of the Stock Sale.

One week later, Coster filed a separate Verified Complaint for Cancellation of Stock Issue or Imposition of Constructive Trust, Case No. 2018-0622, Dkt. No. 1 (the "Cancellation Action"). Upon agreement of all parties, the Court of Chancery consolidated the two proceedings.

A trial was held April 17 and 18, 2019. On January 28, 2020, the Court of Chancery issued a memorandum opinion denying all relief sought by Coster (the "First Opinion," hereafter cited as "First Op." and attached hereto as Ex. A).

On June 29, 2021, this Court, sitting *en banc*, reversed and remanded for further proceedings (the "Appellate Decision").[1] Following post-remand briefing and oral argument, the Court of Chancery issued a memorandum opinion on May 2, 2022, again denying all relief sought by Coster (the "Second Opinion," hereinafter cited as "Second Op." and attached hereto as Ex. B). Coster filed a Notice of Appeal on May 13, 2022.

This is Coster's opening brief on appeal.

---

[1] *Coster v. UIP Cos., Inc.*, 255 A.3d 952 (Del. 2021).

SUMMARY OF ARGUMENT

1. The Court of Chancery's holding on remand that *Schnell v. Chris-Craft Indus., Inc.*,[2] "does not apply in this case,"[3] even though one of the Stock Sale's purposes "was inequitable,"[4] should be reversed. At the threshold, the Court misapplied Delaware precedent in concluding that *Schnell* applies only "in the limited scenario wherein the directors have no good faith basis" for board action.[5] This Court should clarify existing caselaw by holding that a breach of fiduciary duty under *Schnell* occurs where, as here, a conflicted board motivated in any important respect by self interest takes inequitable action against a shareholder (or group of shareholders), even if other, non-inequitable motivations also exist. The Court of Chancery also erred in its *Schnell* analysis in concluding that the Board's desire to extinguish Coster's leverage as a fifty-percent stockholder—including her power to approve board appointments and to file the Custodian Action given the stockholder deadlock—"was an equitable purpose, in the sense of action that was in the best interest of the Company. . . ."[6] Under Delaware law, the relevant inquiry is whether the Stock Sale was inequitable to Coster, not whether it was inequitable to the Company.

---

2 285 A.2d 437 (Del. 1971)
3 Second Op. 22.
4 *Id.* at 21.
5 *Id.* at 19.
6 *Id*. at 23.

2. The Court of Chancery also considered on remand "whether the UIP board had a compelling justification for" the Stock Sale under *Blasius Indus, Inc. v. Atlas Corp*.[7] The Court of Chancery held that "[i]n the exceptionally unique circumstances of this case, Defendants have met the onerous burden [under *Blasius*] of demonstrating a compelling justification."[8] That holding was the product of several errors, and should be reversed. *First*, the Court improperly conflated justifications for the Stock Sale with arguments against appointment of a custodian—arguments that could and should have been made in the Custodian Action instead of the Board engaging in self-help by mooting it. *Second*, the Court erred in basing its ruling in substantial part on its determination that the Stock Sale implemented a succession plan that had been supported by Wout Coster, Plaintiff's husband who had died more than three years before the sale.[9] *Third*, the Court impermissibly relied on what it considered an improper motive for Coster filing the Custodian Action. *Fourth*, the Court erred in concluding that a close fit existed between the "means" adopted by the Board—permanently diluting Coster's UIP ownership from one-half to one-third—to accomplish its desired "end" of terminating the Custodian Action.[10]

---

7 564 A.2d 651, 661-62 (Del. Ch. 1988); Second Op. 24.
8 *Id*. at 26.
9 *Id.* at 10, 28, and 31.
10 *Id.* at 27-28.

3. In the event this Court cancels the Stock Sale as a breach of the Board's fiduciary duties, the parties would return to the *status quo ante*: a deadlock between the two fifty-percent owners over appointment of directors. Absent appointment of a custodian, Coster will be relegated to "perpetual minority status without remedy or recourse" in a Company of which she is the rightful one-half owner.[11] To remedy this—and to avoid further delay and harm to Coster's interests—this Court should remand to the Court of Chancery with instructions to appoint a custodian pursuant to 8 *Del. C.* § 226(a)(1) whose powers are limited to casting tiebreaking votes in the event of stockholders deadlocks, including with respect to election of a new UIP board.

[11] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 240 (Del. 1982).

STATEMENT OF FACTS

A. UIP Companies, Inc. ("UIP" or the "Company")

UIP is a real estate services company formed under Delaware law in 2007 by Wout Coster (Plaintiff's deceased husband), Kees Bruggen, and Defendant Steven Schwat.[12] In approximately 2011, Bruggen left UIP.[13] He resigned his board seat and transferred his 33 1/3 shares back to the Company, leaving Wout Coster and Schwat each with one-half ownership.[14]

UIP is a substantial company. It has "almost a hundred employees," A503 [Tr. 424:2], and had revenues exceeding $34.5 million in 2017. A122 [JX-66 at 7].

B. Defendants' Failed Attempt to Buy Out Wout Coster

In early 2014, Wout Coster began negotiations with Schwat and Bonnell for a buyout of his UIP shares by Bonnell and Heath Wilkinson, another senior UIP executive. A490-93 [Tr. 323:20-325:10]. Throughout those negotiations, Wout Coster insisted on receiving millions of dollars for his UIP shares. A058 [JX-114 at 4].

In April 2014, Wout Coster, Bonnell, Schwat, and Wilkinson signed a non-binding term sheet for the sale of Wout's shares (the "Term Sheet"). Under the Term

---

12 First Op. 2.
13 *Id.* at 4.
14 *Id.*

Sheet, Bonnell and Wilkinson would pay Wout $2,125,000 for his fifty-percent interest. A048-54 [JX-11].

The parties thereafter decided to attempt a more tax efficient means of Wout selling his UIP shares. A494-97 [Tr. 335:19-338:11]. Meanwhile, Wout became increasingly ill. A477-80, A485-88 [Tr. 8:12-10:6, 133:24-136:8].

As the months passed, Schwat and Bonnell began pushing Wout to agree to deal terms that were unacceptable to him. Wout frequently objected that the proposed deal did not sufficiently compensate him for his shares. A487-88 [Tr. 135:11-136:2]; A062 [JX-173 at 2]. Ultimately, "[n]o deal was ever finalized."[15]

C. Coster Inherits Her Husband's UIP Stock

Wout died on April 8, 2015.[16] The following day, Schwat approached Coster's probate counsel about purchasing what was now Plaintiff Marion Coster's fifty-percent interest in UIP.[17] Negotiations ensued during the remainder of 2015, 2016, and into 2017.[18] Throughout the negotiations, Schwat and Bonnell told Coster that her fifty-percent ownership was essentially worthless because UIP did not generate annual profits. A075-76 [JX-219 at 2-3].

---

15 First Op. 11.
16 *Id*.
17 *Id.* at 12.
18 *Id*. at 12-18.

As the months passed, Bonnell continued to press Coster to relinquish her shares. During a meeting in the summer of 2016, Bonnell even threatened to fraudulently transfer all of UIP's assets. A483 [Tr. 41:2-22]. Bonnell stated that, if Coster continued to insist on payment for her stock, he and Schwat could simply "create a new corporation and transfer all [UIP's] assets into the new corporation." A483 [Tr. 41:15-17].

With party-to-party negotiations stalled and having received no distributions from UIP in the over two years since Wout's death, Coster engaged current litigation counsel in the summer of 2017. A080-83 [JX-45]. Counsel-to-counsel discussions took place over approximately the next six months over the terms of a global settlement of all disputes between the parties, including the buyout of Coster's UIP shares that both sides wanted. A084-92 [JX-233].[19] Those discussions collapsed after defendants refused to counter a written settlement proposal from Coster. A084-92 [JX-233].

D. Coster Calls a Series of Shareholder Meetings to Obtain Representation on UIP's Board of Directors

When the settlement talks failed, Coster was left as a fifty-percent owner of UIP with no board representation, no income from the Company despite its obvious success, and no visibility into the Company's affairs. A481-82, A484 [Tr. 28:23-

[19] First Op. 12-18.

29:2, 55:14-20]. Facing a freeze-out with no relief in sight, Coster called the first of two shareholder meetings to obtain representation on UIP's Board.[20]

The first stockholder meeting occurred on May 22, 2018. Among other matters, Coster's proxy holder (her counsel) proposed that Brian Henderson and Veronica Hall—each a relative of Coster and a highly-educated professional, A453-55 [JX-295 & JX-296]—be appointed to fill the two empty board seats.[21] Schwat voted against the motion.[22]

Coster's proxy holder then moved that a vote be held to fill all five board seats with Henderson, Hall, Coster, Schwat, and Bonnell.[23] Schwat objected to the proposal, and refused to allow the vote.[24] He adjourned the meeting, and said the Company would consider a request for another meeting to vote on a full five-member board.[25]

Later that same day, Coster (through counsel) called for another meeting to elect a board.[26] The Company's counsel (Pillsbury) agreed to the meeting, but

---

20 First Op. 20.
21 *Id.* at 21-22.
22 *Id.* at 22.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 23.

announced, without explanation, that the Board had voted to reduce the size of the board from five to three.[27]

That meeting occurred on June 4, 2018.[28] Votes were held on three motions regarding board composition. Coster's proxy and Schwat cast opposing votes on each, so none passed.[29] The Company's Board thus continued to be comprised of the three holdover directors appointed in 2007: Schwat, Bonnell, and Cox (the "Board").[30]

E. Coster Files the Custodian Action, Whereupon Schwat and Bonnell Devise a Plan to Moot It

On June 15, 2018, Coster filed the Custodian Action. As the Court of Chancery observed, the complaint in the Custodian Action "mainly sought to impose a neutral tiebreaker to facilitate director elections . . . ." [31] The complaint also noted that, despite UIP's apparent success in a booming real estate market, "the Company's finances appear to have been structured to avoid realizing a significant net proft."[32] A097 at ¶ 23.

---

27 First Op. 23.
28 *Id.* at 24.
29 *Id.*
30 *Id.*
31 *Id.* at 25.
32 The complaint noted that "Mrs. Coster believes this may have occurred through redirection of corporate opportunities in which she is not an owner, and to salaries and benefits for senior officers, among other routes." A097 at ¶ 24.

Upon filing of the Custodian Action, Schwat and Bonnell "worked together to develop the plan to moot the Custodian Action and neutralize the threat of Plaintiff controlling the Company."[33] The plan they devised was to sell to Bonnell's wholly-owned company—Bonnell Realty, LLC—33 1/3 authorized but unissued shares of UIP for one-third of the purported value of UIP.[34]

Schwat reached out to Andy Smith of the McLean Group to inquire whether he could perform a valuation of UIP for purposes of the sale to Bonnell.[35] Three days later—before the McLean Group was even retained—Smith emailed Schwat: "Steve, FYI I had lunch with Jason Smolen yesterday . . . I casually mentioned the valuation issue of related party companies (not mentioning UIP or you, of course), he totally gets it and agrees that there is no value [to UIP]." A107-10; A505-08 [JX-56; Tr. 539:4-540:4]. Schwat—co-founder and one-half owner of UIP—replied, "Awesome." *Id*. Schwat, on behalf of UIP, then formally engaged the McLean Group. A111-15; A506 [JX-57; Tr. 540:5-9].

As the Court of Chancery found, Schwat was motivated, at least in part, by his own self-interest in orchestrating the Stock Sale. The Court held that "Schwat faced a choice between the lesser of evils. He could dilute his economic power and voting power by placing stock in Bonnell's friendly hands or risk surrendering his

---

33 First Op. 41.
34 *Id.* at 28.
35 *Id.* at 25-26.

power over UIP to an unknown custodian. The Stock Sale most effectively served his personal interest."[36]

F. Defendants Dilute Coster's Ownership Interest

On August 14, 2018, Smith sent Schwat the final version of the valuation, which concluded that the estimated fair market value of a 100.0% equity interest in UIP was just $123,869.[37] The next day, August 15, 2018—without a Board meeting and without notice to Coster—the Board adopted a Unanimous Written Consent approving a sale of 33 1/3 UIP shares to Bonnell for $41,289.67.[38]

The uncontroverted evidence at trial was that Wout Coster would not have approved of the terms of the Stock Sale to Bonnell, which diluted Coster's ownership interest from one-half to one-third, and extinguished her important power to approve board appointments and other stockholder action. Coster testified at trial as follows:

Q: And, Ms. Coster, you are aware that the board of directors of UIP sold one-third of the company to Peter Bonnell in August [2018] for $41,000?

A. I – yes.

Q. Did they inform you before they did this?

A. They did not.

Q: Do you believe Wout would have approved of this transaction?

---

36 First Op. 41.
37 *Id.* at 28.
38 *Id.*

A. Never.

Q: Did you approve of this transaction?

A: Of course not.

A489 [Tr. 149:1-17].

Within hours of the Board's approval of the Stock Sale, Defendants filed an Amended Answer in the Custodian Action, which stated: "in light of the issuance of additional shares . . . there is no deadlock, and Plaintiff is not a 50% shareholder." A182, A461-62 [Dkt. No. 12 at 3, PTO ¶ 28]. According to the Amended Answer, the Custodian Action was now "moot." A204, A461-62 [Dkt. No. 12 at 25, PTO ¶ 28].

A week later, on August 22, 2018, Coster filed the Cancellation Action. A462 [PTO ¶ 29] Upon stipulation of the parties, the Court consolidated the Cancellation Action with the previously-filed Custodian Action. A209-12, A462 [Dkt. No. 16, PTO ¶ 29].

A few months after the Stock Sale, Andy Smith—who had performed the valuation of UIP—emailed Schwat to inquire whether the dispute with Coster had been resolved. Schwat replied, "[l]ong from resolved, but we made our point and we will have to see what happens." A206-08 [JX-290].

G. The Court of Chancery's First Opinion

Following a two-day hearing in April 2019, and completion of post-trial briefing, the Court of Chancery issued its decision on January 28, 2020. That decision concluded that "Defendants have met their burden to show that the Stock Sale satisfies the entire fairness standard" and thus the Board did not breach its fiduciary duties in approving it.[39] The Court of Chancery thus refused to "assume that the stockholders are currently deadlocked," and declined to appoint a custodian.[40]

H. This Court Reverses and Remands for Further Consideration by the Court of Chancery

On June 29, 2021, this Court, sitting *en banc*, reversed and remanded for further proceedings. The Court held that, in subjecting the Stock Sale only to entire fairness review, the Court of Chancery erred by not considering Coster's equitable challenges.[41]

The Court framed the issues for determination on remand. If the Board approved the Stock Sale intending to interfere with her voting rights as a 50% stockholder and entrench themselves in office by thwarting the Custodian Action, then "the court need not go any further to find a breach of fiduciary duty" under *Schnell*.[42] This Court further explained that, "under *Blasius*, even if the court finds

---

39 First Op. 64-65.
40 *Id.* at 65.
41 *Coster*, 255 A.3d at 960.
42 *Id.* at 963.

that the board acted in good faith when it approved the Stock Sale, if it approved the sale for the primary purpose of interfering with Coster's statutory or voting rights, the Stock Sale will survive judicial scrutinuy only if the board can demonstrate a compelling justification for the sale."[43]

I. On Remand, the Court of Chancery Again Denies all Relief Sought by Coster

Following post-remand briefing and oral argument on November 8, 2021, the Court of Chancery issued a memorandum opinion on May 2, 2022, again denying all relief sought by Coster.

First, the Court of Chancery held that *Schnell* "does not apply in this case"[44] even though it found on remand that one of Board's purposes for the Stock Sale "was inequitable."[45] After criticizing "*Schnell*'s vagueness and relatively inflexibility," the Court held that *Schnell* applies only "in the limited scenario wherein the directors have no good faith basis" for board action.[46]

Second, the Court of Chancery found "that the Stock Sale was for the primary purpose of mooting the Custodian Action."[47] The Court then considered "whether the UIP board had a compelling justification for" the Stock Sale, as required to

---

43 *Id.*
44 Second Op. 22.
45 *Id.* at 21.
46 *Id.* at 14, 19.
47 Second Op. 23.

survive *Blasius* review.[48] The Court held that "Defendants have met the onerous burden [under *Blasius*] of demonstrating a compelling justification" for the Stock Sale.[49]

Lastly, having found no breach of fiduciary duty under *Schnell* or *Blasius*, the Court determined there was "no need" to address Coster's request for appointment of a custodian.[50]

Coster filed this appeal on May 13, 2022.

---

48 *Id.* at 24.
49 *Id.* at 26.
50 *Id.* at 31.

ARGUMENT

I. THE COURT ERRED IN NOT CANCELLING THE STOCK SALE UNDER *SCHNELL*

A. Question Presented

Did the Court of Chancery err in holding that *Schnell* does not apply in this case because, according to the Court, the Stock Sale "did not totally lack a good faith basis"? Plaintiff preserved this question below in Plaintiff's Post-Remand Opening Brief (A523-27 [pp. 9-13]) and in Plaintiff's Post-Remand Answering Brief (A555-59 [pp. 4-8]).

B. Standard and Scope of Review

The Court's ruling that the Stock Sale is not invalid under *Schnell* is a mixed question of law and fact. The Court's legal conclusions are reviewed *de novo*, and its factual findings are reviewed for clear error.[51]

C. Merits

The Court of Chancery's holding that *Schnell* "does not apply in this case,"[52] even though it found one of the Board's purposes for the sale "inequitable,"[53] should be reversed for numerous reasons. At the threshold, the Court misapplied Delaware precedent in concluding that *Schnell* applies only "in the limited scenario wherein

---

51 *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).
52 Second Op. 22.
53 *Id.* at 21.

the directors have no good faith basis" for board action.[54] Not only is that interpretation of *Schnell* novel under Delaware law, it effectively reads *Schnell* out of existence by placing on plaintiffs the extraordinarily heavy burden to disprove every proffered business reason claimed by a defendant when board action is challenged. This Court should reverse, and hold that a breach of fiduciary duty occurs under *Schnell* where, as here, a conflicted board takes inequitable action against a shareholder (or group of shareholders) motivated in any important respect by the board's self-interest, even if other, non-inequitable motivations also existed.

The Court of Chancery also erred in its *Schnell* analysis in concluding that the conflicted Board's desire to extinguish Coster's leverage as a fifty-percent stockholder to approve a new board—and to file the Custodian Action given the stockholder deadlock—"was an equitable purpose, in the sense of action that was in the best interest of the Company. . . ."[55] The relevant inquiry is whether Stock Sale was inequitable to Coster, not whether it was inequitable to the Company.

---

54 Second Op. 19.

55 *Id.* at 23.

1. The Court of Chancery Erred in Holding that *Schnell* Does Not Apply Because the Stock Sale "Did Not Totally Lack a Good Faith Basis"

In its Appellate Decision, this Court detailed nine "undisputed facts or facts found by [the Court of Chancery] that support the conclusion, under *Schnell*, that the UIP board approved the Sale for inequitable reasons."[56]

On remand, the Chancery Court did not take issue with any of those nine facts. To the contrary, it expressly found that "the UIP board's desire 'to eliminate Plaintiff's ability to block stockholder action, including the election of directors, and the leverage that accompanied those rights' ***was inequitable***."[57] The Court nevertheless held that *Schnell* "does not apply in this case," because the Board "did not act exclusively for an inequitable purpose."[58] That legal conclusion was error.

a. The Court of Chancery Viewed the Scope of *Schnell* to be Unresolved Under Delaware Law

The Court of Chancery began its *Schnell* analysis by extensively criticizing *Schnell*'s "inequitable purposes" test and, in its view, the "inflexible form of relief [required] when its application is triggered."[59] The Court deemed the instant case a prime example of such inflexibility, noting that, "as the Appellate Decision directs,

---

56 *Coster*, 255 A.3d at 963-64.

57 Second Op. 21 (emphasis supplied).

58 *Id.* at 22.

59 *Id.* at 13 ("*Schnell* has been widely criticized"); *id.* at 14 (describing *Schnell* as "an inferior tool for addressing fiduciary misconduct"); *id.* at 15 ("*Schnell* provides little guidance as a standard").

if the board approved the Stock Sale for inequitable purposes under *Schnell*, then this court should 'cancel' the Stock Sale."[60]

After criticizing *Schnell*, the Court of Chancery posed a series of questions it deemed unresolved under Delaware law, including: "Does *Schnell* apply to board actions lacking any good faith basis or all board actions having any bad faith motivation? Must the court look to the directors' subjective intent in making this determination? . . . ."[61] The Court commented that "the struggle is real" in attempting to draw "the line between *Schnell* and *Blasius*."[62]

The Court then decided that, "in the category of stockholder-franchise challenges," *Schnell* applies only "in the limited scenario wherein the directors have no good faith basis for approving the disenfranchising action."[63] If any modicum of good faith exists, according to the Chancellor, then *Blasius*'s "compelling justification" standard applies instead.[64] The Court concluded that the determination of whether any good faith exists "can be made based on evidence that speaks directly to subjective intent. That factual finding also can be made when objective evidence discredits proffered business reasons for the decision."[65]

---

60 Second Op. 13.
61 *Id.* at 18.
62 *Id.* at 17 n.58.
63 *Id.* at 19.
64 *Id*.
65 *Id.*

b. This Court Should Hold that Inequitable Action by a Conflicted Board Motivated in any Important Respect by Self-Interest Violates *Schnell*

The Court of Chancery committed legal error in cabining *Schnell*'s application to "the limited scenario"[66] in which a board takes disenfranchising action "exclusively for an inequitable purpose."[67] The Court of Chancery's holding that *Blasius*, not *Schnell*, applies where a board intentionally takes inequitable action to impede stockholder voting rights if the board acted with any good faith misapplies *Blasius* and other Delaware precedents.

In *Blasius*, the Court of Chancery considered whether a breach of fiduciary duty occurred under *Schnell* when the board increased its size by two to thwart a minority shareholder's attempt to obtain stockholder approval of a transaction. After careful review of the record, Chancellor Allen held that no *Schnell* violation occurred because he "[could not] conclude that the board was acting out of a self-interested motive ***in any important respect***" when approving the expansion.[68] If the board had acted out of self-interest "in any important respect," Chancellor Allen made clear that "one would not need to inquire further. The action taken would constitute a breach of [fiduciary] duty" under *Schnell*.[69]

---

66 Second Op. 19.
67 *Id.* at 22.
68 *Blasius*, 564 A.2d at 658 (emphasis supplied).
69 *Id*.

Here, the Court of Chancery got it backwards. *Blasius* does not stand for the proposition that *Schnell* is inapplicable where a board has ***any*** good-faith motive, no matter how scant, when taking disenfranchising action.[70] To the contrary, inequitable action impeding stockholder voting rights violates *Schnell* where a board acts with a "self-interested motive in any important respect."[71] That approach aligns with other Delaware precedents holding that a breach of fiduciary duty occurs where a board "intentionally acts with ***a*** purpose"—not with a singular purpose—other than advancing the best interests of the corporation . . . ."[72] The Court of Chancery's novel holding places an artificial limitation on the *Schnell* doctrine, "[o]ne of the most venerable precepts of Delaware's common law corporate jurisprudence . . . ."[73]

This Court should reverse. A conflicted board's self-perceived good faith, no matter how scant, should not be allowed to excuse inequitable action that harms the voting rights of a stockholder (or group of stockholders). Instead, this Court should reaffirm the continuing validity of Chancellor Allen's *Blasius* reasoning by holding that inequitable action by a conflicted board violates *Schnell*—and thus constitutes

---

70 Second Op. 21 (the Board "did not totally lack a good faith basis" in approving the Stock Sale).

71 *Blasius*, 564 A.2d at 658.

72 *Stone ex rel. Am South Bancorporation v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (emphasis supplied); *Gagliardi v. TriFoods Intern. Inc*., 683 A.2d 1049, 1051 n. 2 (Del. Ch. 1996) (a bad faith transaction is one that is authorized for ***some*** purpose *other than* a genuine attempt advance corporate welfare . . . .") (internal quotation omitted; emphasis supplied).

73 *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003).

a breach of fiduciary duties without resort to *Blasius*'s "compelling justification" test—if motivated "in any important respect" by the board's self-interest.

To hold otherwise—and require a plaintiff to prove complete bad faith by a conflicted board—would improperly relegate *Schnell* to the functional equivalent of the highly-deferential business judgment rule.[74] That would turn Delaware law on on its head. It has long been settled that the business judgment rule does not apply where, as here, a conflicted board undertook the challenged action.[75] Indeed, the very rationale underlying *Schnell* and its progeny is that, as Chancellor Allen noted in *Stahl v. Apple Bancorp*,[76] the business judgment rule affords inadequate protections to an aggrieved stockholder where, as here, a board interferes with stockholder voting rights.[77]

Why? Because a conflicted board can always claim ***some*** good-faith reason for self-interested action—*i.e.*, that the board members believed it benefitted the company in ***some*** fashion. That is especially true where, as here, the disenfranchised shareholder has no board representation and had no notice of the disenfranchising

---

74 *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 43 (Del. Ch. 2013) (where the business judgment rule applies, "[o]nly when a [challenged board] decision lacks any rationally conceivable basis will a court infer bad faith and a breach of duty").

75 *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984).

76 579 A.2d 1115 (Del. Ch. 1990).

77 *Id.* at 1122.

action.[78] The Court of Chancery's holding below functionally, impermissibly, and imprudently renders *Schnell* a nullity.

c. The Court of Chancery's Findings Establish that the Stock Sale Was Motivated in Important Respects by the Board's Self-Interest

Here, a breach of fiduciary duty occurred under *Schnell* because, in orchestrating and approving the Stock Sale, the Board was motivated by self-interest in two "important respect[s]."[79] First, Schwat sought to further his personal interests in maintaining his plenary control over UIP. Second, the Board sought to maintain itself in office.

i. The Stock Sale Furthered Schwat's Personal Interests

At the outset of its First Opinion, the Court of Chancery correctly characterized this case as a dispute over "control and ownership" of UIP.[80] With Schwat in total control of UIP,[81] no representation on the holdover board,[82] and

---

78 *See* A104 [Verified Complaint for Appt of Custodian at ¶¶68-69]; *see also* First Op. 45.

79 *Blasius*, 564 A.2d at 658.

80 First Op. 1.

81 *Id.* at 40 (finding that "Plaintiff could not reduce Schwat's control, terminate his employment, or effect change to any member of Schwat's team").

82 A104 [Verified Complaint for Appt. of Custodian at ¶¶ 68-69].

believing the Company was deliberately being run at break-even over her objection,[83] Coster filed the Custodian Action.

In finding that the "record is clear as to the conflict of"[84] Schwat with respect to the Stock Sale, the Court of Chancery made two "obvious" observations. *First*, that Schwat viewed the Custodian Action as "invasive," because it sought "to give an unknown person all of Schwat's management power along with the power to fire Schwat and any UIP employee. Schwat wished to avoid that."[85]

Second, the Court of Chancery found that Schwat and Bonnell—who Defendants conceded was also a conflicted Board member—"are good friends."[86] In fact, Schwat and Bonnell were so close that they have a "relationship that can only be described as being similar to [a] marriage."[87] Not surprisingly, then, they had been aligned against Wout in negotiations with him to buy-out his 50% ownership of UIP.[88]

Upon filing of the Custodian Action, the Court of Chancery found that Schwat and Bonnell "worked together to develop the plan to moot the Custodian Action and neutralize the threat of Plaintiff controlling the Company." The Court of Chancery

---

83 A097 [Verified Complaint for Appt. of Custodian at ¶¶23-24]; *see also* First Op. 46.
84 *Id*. at 42.
85 *Id.* at 40.
86 *Id.*
87 *Id.*
88 *Id.* at 41.

explicitly found that Schwat was motivated, in substantial part, by his own self-interest in orchestrating the Stock Sale. The Court found:

> In the end, Schwat faced a choice between the lesser of evils. He could dilute his economic power and voting power by placing stock in Bonnell's friendly hands or risk surrendering ***his power*** over UIP to an unknown custodian. ***The Stock Sale most effectively served his personal interest.*** By placing stock in the hands of his friend, Schwat quashed any risk, however minimal, of this Court ordering the expansive relief Plaintiff sought in the Custodian Action and mitigated any pressure from Plaintiff at the Board level.[89]

ii. The Board Sought to Maintain Itself in Office When Approving the Stock Sale

In the Appellate Decision, this Court listed nine "undisputed facts or facts found by [the Court of Chancery] that support the conclusion, under *Schnell*, that the UIP board approved the Sale for inequitable reasons."[90] That list included the fact that "[t]he Stock Sale entrenched the existing board in control of UIP."[91]

On remand, the Court of Chancery did not dispute this. Instead, it held that "the UIP Board did not act for the primary purpose of protecting its incumbency. Rather, the UIP board had significant business reasons for approving the Stock Sale

---

89 First Op. 41-42 (emphasis supplied). Having found that "the record is clear as to the conflict of Bonnell and Schwat," the Court of Chancery concluded there was no need to determine whether the third member of the Board—Stephen Cox—also was conflicted. Regarding Cox, however, it noted that "[h]e, too, was an officer and employee of UIP and thus was inclined to favor the *status quo* threatened by the Custodian Action." First Op. 42.

90 *Coster*, 255 A.3d at 963-64.

91 *Id.* at 964.

. . . ."[92] That was error. Even if not the Board's primary motivation, the Stock Sale should be cancelled under *Schnell* because it was motivated "in an[] important respect" by the Board's self-interest in maintaining its incumbency.[93]

As this Court noted, "[i]t is not seriously disputed that the defendants issued the Stock to Bonnell to dilute Coster's UIP ownership below 50%, ***block her attempts to elect directors***, and avoid a possible court-appointed custodian."[94] The Court of Chancery's findings clearly establish the point. Schwat and Bonnell—each conflicted directors—orchestrated the Stock Sale for the express purpose of "moot[ing] the Custodian Action and neutralize the threat of Plaintiff controlling the Company"[95] and to "mitigate[] any pressure from Plaintiff at the Board level" by insisting on a new board.[96] Indeed, at trial, both Schwat and Bonnell acknowledged their desire to maintain the holdover Board in office.[97]

Notably, in making these findings, the Court of Chancery cited *Packer v. Yampol*,[98] for the proposition that "human experience makes it unlikely that [a company's] current directors . . . would have conferred significant voting and

---

92 Second Op. 30.
93 *Blasius*, 564 A.2d at 658 (emphasis supplied).
94 *Coster*, 255 A.3d at 953 (emphasis supplied).
95 First Op. 41.
96 *Id.* at 42.
97 A502 [Tr. 400:10-11] (Schwat: "I was satisfied with the current board"; A504 [Tr. 478:15-16] (Bonnell: He and Schwat "discussed how the company is operating just fine with the board that it has.").
98 1986 WL 4748 at *10 (Del. Ch. Apr. 18, 1986),

transaction blocking rights upon [a third party], without having some confidence that [the third party] ***would support their bid for continued incumbency***."[99]

In sum, even if not its "primary purpose,"[100] the Board's desire to maintain its incumbency was an important motivation for the Board orchestrating and approving the Stock Sale. It is "mockery" to suggest otherwise.[101]

2. The Court of Chancery Erred in Holding that Eliminating Coster's Leverage as a Fifty-Percent Shareholder Was Not Inequitable Because It Was in UIP's "Best Interests."

On remand, the Court of Chancery held that the Board's desire to extinguish Coster's leverage to approve a new board—and to file the Custodian Action in the wake of the stockholder deadlock—"was an equitable purpose, in the sense of action that was in the best interest of the Company. . . ."[102] That was error.

Under *Schnell*, a challenged board action is "inequitable"—and thus breaches fiduciary duties—where, as here, it is intended "to deprive a person of a clear right."[103] In *Schnell*, this Court invalided board action intended to prevent a

---

99 First Op. 41 n.238 (alterations in original; internal quotation omitted; emphasis supplied) (quoting *Packer*, 1986 WL 4748, at *10).

100 Second Op. 30.

101 *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769, 776 (Del. Ch. 1967) ("[w]here the [board's] objective sought in the issuance of stock is not merely the pursual of a business purpose but also to retain control, it has been held to be a mockery to suggest that the 'control' effect of an agreement in litigation is merely incidental to its primary business objective.")

102 Second Op. 23.

103 *Alabama By-Products Corp. v. Neal,* 588 A.2d 255, 258 n. 1 (Del. 1991) (*Schnell* applies when a challenged board action "deprive[s] a person of a clear

dissident group of stockholders from electing its preferred slate of directors.[104] Likewise, as this Court noted in the Appellate Decision, the Court of Chancery in *Canada Southern Oils, Ltd. v. Manabi Exploration Co.*[105] enjoined board action designed "to deprive plaintiff of its voting position."[106] And in *Condec*, the Court of Chancery cancelled board action intended to reduce plaintiff's ownership interest in the company "below a majority" so as to deprive plaintiff of "his right to a proportionate voice and influence in corporate affairs."[107]

Here, the Court of Chancery thus erred in framing the "inequitable" inquiry under *Schnell* in terms of fairness to the Company.[108] The proper focus is on whether the Stock Sale was inequitable to Coster. Indeed, that is what this Court instructed the Court of Chancery to consider on remand. "If [it] is the case," this Court held, that the "interested board approved the Stock Sale intending to interfere with ***her voting rights*** as a 50% stockholder and to entrench themselves in office by thwarting

---

right."); *see also Wyser-Pratte v. Smith*, 1997 WL 153806, at *2 (Del. Ch. Mar. 18, 1997) (same).

104 *Schnell*, 285 A.2d at 439.

105 96 A.2d 810 (Del. Ch 1953).

106 *Id.* At 812-14 (discussed in this Court's Appellate Decision at *Coster*, 255 A.3d at 961).

107 *Condec*, 230 A.2d at 777 (discussed in this Court's Appellate Decision at *Coster*, 255 A.3d at 961).

108 Second Op. 23 (extinguishing Coster's "leverage as an equal stockholder" was "an equitable purpose, in the sense of action that was in the best interest of the Company . . . .").

the Custodian Action, then under *Schnell*, the court need not go any further to find a breach of fiduciary duty."[109]

* * * *

In sum, this Court should reverse the Court of Chancery's conclusion that *Schnell* "does not apply"[110] because "the UIP's board's decision did not totally lack a good faith basis."[111] Not only is that conclusion inconsistent with longstanding Delaware law, it effectively renders *Schnell* a nullity by placing a virtually impossible burden on a plaintiff to prove the complete absence of any good faith motive for board action found to be inequitable. Having found that one of the Stock Sale's purposes "was inequitable,"[112] the Court of Chancery should have cancelled the Stock Sale under *Schnell* because the Board acted selfishly in two important respects when approving it: Schwat sought to further his personal interests in maintaining his operational control over UIP, and the Board sought to maintain its incumbency.

---

109 *Coster*, 255 A.3d at 963 (emphasis supplied).
110 Second Op. 22.
111 *Id.* at 21.
112 *Id.*

II. THE COURT ERRED IN NOT CANCELLING THE STOCK SALE UNDER *BLASIUS*

A. Question Presented

Did the Court below err in holding that Defendants carried their heavy burden under *Blasius* to show a compelling justification for the Stock Sale? Plaintiff preserved this question below in Plaintiff's Post-Remand Opening Brief (A528-35 [pp. 14-21]) and in Plaintiff's Post-Remand Answering Brief. (A560-68 [pp. 9-17]).

B. Standard and Scope of Review

The Court's ruling that the Stock Sale met *Blasius*'s compelling-justification test is a mixed question of law and fact. Whereas the Court's legal conclusions are reviewed *de novo*, its factual findings are reviewed for clear error.[113]

C. Merits

On remand, the Court of Chancery held that "[i]n the exceptionally unique circumstances of this case, Defendants have met the onerous burden of demonstrating a compelling justification."[114] The Court's holding renders this case an outlier, and was the product of several errors. It should be reversed.

---

113 *RBC Capital Markets*, 129 A.3d at 849.

114 Second Op. 26.

1. The Court of Chancery's *Blasius* Holding Renders This Case an Outlier in Delaware Jurisprudence

It has been correctly observed that *Blasius* is "so strict a test that it is applied rarely."[115] As the Second Opinion notes, "as of 2013, only five cases, four by the Delaware Court of Chancery and one by the Delaware Supreme Court, have triggered the *Blasius* test, and, at best, only one passed."[116]

The Court of Chancery's ruling that Defendants met their heavy burden under *Blasius* therefore makes this case extraordinary—if not unique—in Delaware corporate jurisprudence. But it also stands out for another reason. On the spectrum of disenfranchising action subjected to *Blasius* review by Delaware courts, the Stock Sale was extreme in its prejudicial impact on the aggrieved shareholder. Far from adjourning a shareholder meeting[117] or increasing the size of a board by two members,[118] the Stock Sale permanently reduced Coster's ownership stake in UIP from one-half to one-third and extinguished her valuable right to approve board appointments and other stockholder action.

---

115 *Mercier v. Inter-Tel (Delaware)*, 929 A.2d 786, 806 (Del. Ch. 2007); *see also* Jacob A. King, *Disenfranchising Shareholders: The Future of Blasius After Mercier v. Inter-Tel*, 119 Yale L. J. 2040, 2043 (2010) ("[a]pplication of the *Blasius* standard of review has virtually always sounded the death knell for the challenged action.").

116 Second Op. 25 n.80 (citation and quotation omitted).

117 *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376 (Del. Ch. Dec. 4, 2000).

118 *Blasius*, 564 A.2d at 652-53; *Liquid Audio*, 813 A.2d at 1132.

2. The Court of Chancery Erroneously Conflated Justifications for the Stock Sale with Arguments Against Appointment of a Custodian

In concluding that the Stock Sale passes *Blasius* muster, the Court of Chancery found that "Defendants proved that the broad relief sought by Plaintiff in the Custodian Action rose to the level of an existential crisis for UIP."[119] The Court erred in so ruling—a ruling that, if allowed to stand, would substantially undermine § 226(a)(1) by creating an easy work-around for a holdover board where, as here, stockholders are deadlocked over electing a new board.

a. If Appointing a Custodian With Broad Management Powers Was "an Existential Crisis," the Custodian Petition Would Have Been Denied Without the Need to Dilute Coster

The Court of Chancery's ruling below elides—and, curiously, undermines—its own gatekeeper role under § 226(a)(1). Under the statute, no custodian can be appointed without an order of the Court of Chancery after a hearing on the merits.[120] Upon Defendants deeming an appointment of a custodian harmful to UIP, the proper course was for Defendants to present those arguments to the Court of Chancery in defending the Custodian Action, not to take extra-judicial self-help by mooting the

---

119 Second Op. 26.

120 *See* 8 *Del. C.* § 226(a)(1). In its Second Opinion, the Court of Chancery appeared to acknowledge that the relief sought in the Custodian Action would harm the Company only if granted. *See* Second Op. 29 ("Of course, granting Plaintiff's requested relief would expose UIP to the business risks that Defendants sought to avoid . . .").

Custodian Action altogether via the Stock Sale and diluting Coster's ownership interest. If the evidence demonstrated that appointing a custodian with broad powers would materially harm UIP,[121] there can be little doubt that the Court of Chancery would have either denied the custodian request outright, or fashioned appropriately narrow relief in appointing one.

Strikingly, nowhere in either the First Opinion or the Second Opinion did the Court of Chancery find that that an exigency existed that warranted the Board's self-help measure of mooting the Custodian Action instead of defending it in the ordinary course like any other litigant. In fact, the evidence is to the contrary with respect to the two principal bases the Court of Chancery found constituted a compelling justification for the Stock Sale: (1) "the business risks [to UIP] that Defendants sought to avoid, including jeopardizing key SPE contracts, and [(2)] chancing Bonnell's departure."[122]

First, although the Court of Chancery found that many of UIP's third-party contracts could ***theoretically*** be terminated by the counterparty should a custodian

---

[121] Second Op. 26. Indeed, in its First Opinion, the Court of Chancery suggested it was exceedingly unlikely that it would have granted the full scope of relief sought in the Custodian Action. *See* First Op. 41-42 ("By placing stock in the hands of his friend, Schwat quashed any risk, ***however minimal***, of this Court ordering the expansive relief Plaintiff sought in the Custodian Action . . . .") (emphasis supplied).

[122] Second Op. 29.

be appointed,[123] there is not a shred of evidence that, in the two months between filing of the Custodian Action (June 15, 2018) and the Stock Sale (August 15, 2018)—or, for that matter, to this day—that any UIP counterparty ***actually*** threatened to terminate a contract due to the pendency of the Custodian Action. Perhaps that is because many, if not most, of the third-party contracts relied upon by Defendants are contracts between UIP and SPEs owned and controlled by Schwat and Bonnell.[124] But because Defendants only provided and placed selected portions of those contracts into evidence, the extent to which that is true cannot be determined on this record. A217-452 [JX-79].[125]

Second, there was nothing exigent about allowing Bonnell to buy equity in UIP. Bonnell admitted in sworn testimony that in the nearly three-and-a-half years between Mr. Coster's death in 2015 and the August 2018 Stock Sale, he had not once inquired about the status of the supposed promise to allow him to buy UIP stock. A213-16 [Bonnell Dep. Tr. at 186-188]. Nor is there any evidence that Bonnell threatened to leave UIP if he did not receive equity. There was no reason—

---

123 Second Op. 26 ("Defendants demonstrated that the appointment of a custodian could trigger broad termination provisions"); *see also id*. at 22 (mooting Custodian Action "avoid[ed] the risk of default under key contract").

124 First Op. 46 n.254.

125 *See also Coster*, 255 A.3d at 964 (noting that if, on remand, the Court of Chancery considers whether to appoint a custodian, it will need to determine "on a more complete record [whether] the appointment of a custodian will breach agreements or otherwise harm the company.")

and certainly not a compelling one—why a stock sale to Bonnell could not wait until appointment of a new board that included directors approved by Plaintiff or, if the Court of Chancery appointed a custodian, by the custodian after he or she determined that such a sale was in UIP's best interest.

b. The Court of Chancery Had the Discretion to Appoint a Custodian with The Limited Power of Breaking the Stockholder Deadlock Over a New Board

The Court of Chancery also erred in relying on the scope of relief sought by Coster in the Custodian Action—which included affording the custodian with "full power and control over the company"[126]—in finding that Defendants "proved" that the Custodian Action "rose to the level of an existential crisis for UIP."[127]

Irrespective of the scope of relief sought by Coster, the Court of Chancery had broad discretion under § 226(a)(1) to limit the scope of a custodian's powers.[128] The Court of Chancery thus was in no way handcuffed by the "broad relief sought by Plaintiff in the Custodian Action,"[129] and it was error for the Court to rely on that scope in holding that Defendants had met their burden of showing a compelling justification.

---

126 Second Op. 9 (quoting First Op. at 40).

127 Second Op. 26.

128 *See, e.g., In re Shawe & Elting LLC*, 2015 WL 4874733, at *30 (Del. Ch. 2015) (the Court of Chancery's discretion in considering a § 226(a)(1) petition includes, "first, whether to appoint a custodian and, second, in establishing the scope of such custodian's authority.")

129 Second Op. 26.

In sum, if the Court of Chancery's holding below stands, every board facing a shareholder petition for appointment of a custodian now has a relatively easy work-around: moot the proceeding by simply selling unissued stock to a friendly insider on the ostensible ground that appointment of a custodian would harm the company. A loophole this wide effectively guts the statutory remedy under § 226(a)(1) established by the General Assembly.

3. The Court Erred in Considering Former Stockholder Wout Coster's Wishes in Determining Whether a Compelling Justification Existed for the Stock Sale

The Second Opinion repeatedly invokes Wout Coster's desire to have Bonnell be a UIP stockholder as a ground justifying the Board diluting his widow from a one-half owner to a one-third owner and extinguishing her valuable power to approve board members.[130] Indeed, the Second Opinion concludes by emphasizing the Court of Chancery's "solace in knowing that the ultimate solution to the deadlock—the Stock Sale—was consistent with succession plan that Wout and Schwat devised on a clear day before deadlock emerged."[131]

---

130 Second Op. 10 (selling Bonnell stock furthered "the succession plan that Wout and Schwat had developed on a clear day before any deadlock loomed"), 28 (same), and 31 (same).

131 *Id.* at 31.

Putting aside the factual inaccuracies—which are manifold[132]—the Court erred as a matter of law in considering Wout's desires in holding that, three years after his death, a compelling justification existed for the Board extinguishing his widow's blocking rights and diluting her ownership interest. Under Delaware law, it is irrelevant what a former stockholder favored; it is the current stockholders to whom a board owes a duty of loyalty.[133]

4. It Was Error to Consider Coster's Motives in Seeking Relief Under the DGCL

The Court of Chancery also improperly relied on what it determined was an improper motive by Coster for filing the Custodian Action. On remand, the Court found that Coster "wielded [her] rights [as a fifty-percent stockholder] to create

---

[132] There is no evidence Wout would have approved of diluting his widow's one-half interest and extinguishing her powers as a co-equal stockholder. To the contrary, Coster's uncontroverted trial testimony was that Wout "never" would have approved of the terms of the Stock Sale. A489 [Tr. 149:12-14]. Although Wout approved of Bonnell eventually owning UIP equity, Wout emphatically wanted Bonnell (and Heath Wilkinson, who left UIP before the instant litigation) to ***purchase*** his fifty-percent interest from him. A486-88 [Tr. 134:16-136:2]; A049-50 [JX-11] at 2-3 ("Total Sale of [UIP] Interest by [Wout Coster] to HW/PB - $2,125,000"); A070-73 [JX-187] ("I consented to [the Term Sheet] when the deal included payment for [his one-half ownership of] the company. That deal doesn't exist anymore. There is no longer a sale going on . . . . In the end I need to get comfortable with the cashflow to me to live off.")

[133] *See, e.g., Nacepf v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007) ("The directors of Delaware corporations have the legal responsibility to manage the business of a corporation for the benefit of its shareholder[] owners") (internal citation and quotation omitted); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del Ch. 2010) (a board's duty is to "promote the value of the corporation for the benefit of its stockholders").

leverage in buyout negotiations" by filing the Custodian Action."[134] The Court also determined that appointment of a custodian "would [not] benefit" anyone, including Coster, and thus was contrary to her own interests.[135] The court committed legal error in both respects.[136]

---

134 Second Op. 5, 8-9.

135 *Id.* at 24.

136 The Court of Chancery also made several factual errors in this regard. Most significantly, the Court found that "[i]t was only after Defendant refused Plaintiff's buyout demand that she decided to explore her legal options." Second Op. 8. Far from a unilateral "buyout demand," both sides wanted a buyout. Almost immediately upon Wout's death in April 2015, Schwat reached out to Coster's probate counsel to propose a buyout of her UIP shares. Those party-to-party negotiations continued well into 2017, with Schwat and Bonnell eagerly seeking to obtain Coster's shares. *See* First Op. 12-18. The Second Opinion quotes at length a May 2016 email from Anne Pace (the executor of Wout's estate) to probate counsel inquiring whether Coster could have UIP dissolved to provide her with funds from an asset sale. Second Op. 8. In wrongly suggesting that email reflects the start of Coster's "legal play" to force a buyout, the Second Opinion scrambles the timeline of key events. Ms. Pace (not Coster) sent that email more than year ***before*** Coster engaged litigation counsel (who thereafter prepared and sent a books and records demand, *see* A080-83 [JX-45]), almost 18 months ***before*** counsel-to-counsel settlement discussions commenced in the Fall of 2017, *see* First Op. 19, and two years ***before*** Coster called the stockholder meetings to elect a new board after those settlement discussions failed and it became clear she would remain a fifty-percent owner of UIP for the foreseeable future and needed board representation to represent her interests. A084-92 [JX-233]; A498-501 [Tr. 385:19-388:24]. The Second Opinion also misstates the substance of the parties' pre-filing settlement discussions, which explored a global resolution of an array of claims and disputes between the parties—such as the propriety of past payouts to Bonnell from the SPEs and the fact that Coster had not received any distributions from UIP since Wout's death, *see* A084-92 [JX-233]—not just the buyout of Coster's UIP shares that both sides wanted. *See* First Op. 12-18.

Under Delaware law, shareholders are presumed to act in their own best interests when exercising statutory remedies under the Delaware General Corporate Law. In *Saxon Indus., Inc. v. NKFW Partners*,[137] the defendant argued that the relief sought by the plaintiff under 8 *Del. C.* § 211—a court order setting a shareholder meeting to elect a new board—should be denied because the plaintiff had improper motives in pursuing that relief. As this Court held, "the difficulty with this argument is that Delaware law does not presume that shareholders act contrary to their own best interests. In any event, the shareholders have a clear right to seek the relief afforded by section 211 . . . . Under such circumstances, motive, whatever its inspiration, is immaterial."[138]

The same is true here. After settlement discussions failed among counsel in the Spring of 2018, Coster was a fifty-percent owner of UIP, with no board representation and with Schwat in firm control of the Company. As the Court of Chancery found, Coster "could not reduce Schwat's control, terminate his

---

137 488 A.2d 1298, 1301 (Del. 1984).

138 *See also In re Asbestos Litig.*, 929 A.2d 373, 387-388 (Del. Super. 2006) (rejecting defendant's argument that plaintiffs' "primary incentive to file all of these cases here is to achieve a tactical advantage in the form of settlement leverage," explaining "the Court cannot concern itself with the plaintiffs' 'subjective motivation' in bringing their claims to Delaware."); *Wienkowitz v. Ford Motor Co.*, 1980 WL 317283, at *1 (Del. Super. Sept. 3, 1980) ("[I]t is difficult to see how an inquiry into the circumstances surrounding the instigation of the action could affect the substance of the claim") (quotation omitted).

employment, or effect change to any member of Schwat's team."[139] And, in the over three years since Wout's death, Coster had not received any profit distributions,[140] despite the obvious success of the Company.[141] As alleged in the Custodian Action, "the Company's finances appear to have been structured to avoid realizing a significant net profit,[142] which is improper under Delaware law unless all stockholders so agree.[143]

In sum, it was legal error for the Court of Chancery to rely on its assessment that the Custodian Action was a mere "leverage" play by Coster and that appointment of a custodian—especially one with the limited power to cast

---

139 First Op. 40. The Court of Chancery found that, even after the deadlock over a new board occurred, "Schwat remained willing to negotiate with Plaintiff over the board's composition," if Coster "nominated someone with [industry] experience . . . ." Second Op. 8. But it was impermissible for Schwat, who was Chairman of the Board and fully in control of UIP, to unilaterally impose an industry-experience requirement over Coster's objection, especially given that no such requirement exists under Delaware law. *See, e.g.*, *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 253-55 (Del. Ch. 2013) (rejecting defendants' claim that slate of directors lacks energy industry experience); *Portnoy v. Cyro-Cell Int'l, Inc.*, 940 A.2d 43, 65-69 (Del. Ch. 2008) (upholding appointment of board member lacking industry experience).

140 A481-82, A484 [Tr. 28:23-29:2, 55:14-20]

141 As of 2018, UIP had "almost a hundred employees," A503 [Tr. 424:2], and enjoyed revenues exceeding $34.5 million in 2017. A122 [JX-66 at 7].

142 A097 [Verified Complaint for Appt of Custodian at ¶23]; *see also* First Op. 46.

143 *See eBay Domestic Holdings,* 16 A.3d at 34 (fiduciary duties breached where those in control do not "maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders").

tiebreaking votes where the shareholders deadlocked—"would [not] benefit" her.[144] Here, as in *Saxon*, "motive has no relevance here," for Coster had "a clear right to seek the relief afforded" under Delaware's statute.[145]

5. The Court Erred in Holding that the Stock Sale Was Appropriately Tailored to Achieve Its Primary Purpose of Mooting the Custodian Action

After finding "that the Stock Sale was for the primary purpose of mooting the Custodian Action,"[146] the Court of Chancery erred in concluding that it was "appropriately tailored to the goal of mooting the Custodian Action while also implementing the success plan Wout favored and rewarding Bonnell."[147]

Under Delaware law, the Board's "means"—diluting Coster from a one-half to one-third owner, thereby extinguishing her right to approve a new board—was required to closely fit its ostensible "ends" of terminating the Custodian Action.[148] Yet the Board could have accomplished the same "ends" by seeking an expedited hearing and ruling on the merits in the Custodian Action, thereby ending it. Or Schwat could have expressed a newfound agreement to the first two proposals made by Coster at the May 22, 2018 stockholder meeting: that the size of the board be

---

144 Second Op. 23-24.
145 *Saxon Indus*., 488 A.2d at 1302.
146 Second Op. 23.
147 *Id.* at 27.
148 *See Pell v. Kill*, 135 A.3d 764, 787 (Del. Ch. 2016).

changed from five to four members, comprised of Schwat, Bonnel, and Coster's two nominees.[149]

Notably, in holding that Defendants had satisfied their burden to "prove[] that the Stock Sale was appropriately tailored to achieve [its] goal,"[150] the Court of Chancery relied on a defense argument that it flatly rejected in its First Opinion. The Court noted on remand that, "[a]lthough it is true that the Stock Sale eliminated Plaintiff's ability to use her 50% interest to block stockholder action, the Stock Sale also had that effect on Schwat."[151] Yet in its First Opinion, the Court of Chancery found the argument unpersuasive, describing it as "true in form," but wrong in substance.[152] The Second Opinion provides no explanation for this *volte face*, and the Court of Chancery's Second Opinion should be reversed.

---

149 First Op. 21-22 (describing the first and second motions raised by Coster's proxy at the stockholder meeting).

150 Second Op. 27.

151 *Id*.

152 First Op. 39-40.

III. IF THIS COURT CANCELS THE STOCK SALE, IT SHOULD REMAND FOR APPOINTMENT OF A CUSTODIAN FOR THE LIMITED PURPOSE OF SERVING AS A TIE-BREAKING VOTE

A. Question Presented

In the event this Court reverses the Court of Chancery's holding that the Stock Sale did not violate the Board's fiduciary duties to Coster, should this case be remanded for appointment of a custodian with the limited power to cast tie breaking votes in the event of stockholder deadlock? Coster preserved this issue below in her Post-Remand Opening Brief (A536-44 [pp. 22-30]), and in her Post-Remand Answering Brief (A569-71 [pp. 18-20]).

B. Standard and Scope of Review

The Court's ruling in favor of Defendants on Coster's statutory claim for appointment of a Custodian is reviewed for abuse of discretion.[153]

C. Merits

If this Court holds that the Board breached its fiduciary duties in approving the Stock Sale, the parties would return to the *status quo ante*: a deadlock between the two fifty-percent owners (Coster and Schwat Realty) over appointment of directors. Rather than reward Defendants with further delay—delay that benefits Schwat given his current plenary control over UIP and Coster's complete lack of power[154]—this case should be remanded for appointment of a custodian with powers

---

153 *Giuricich*, 449 A.2d at 240.

154 *See* First Op. 41-42.

limited to casting tiebreaking votes where the two fifty-percent stockholders are deadlocked.

A perpetual deadlock over election of a new board—with Schwat's friendly and entrenched Board remaining in place—is untenable under Delaware law. This Court's decision in *Giuricich* is particularly relevant. There, the plaintiffs owned fifty percent of a Delaware corporation and sought representation on the board of directors proportional to their interests in the Company, having only two of the five board seats.[155] Plaintiffs called a special meeting of stockholders for the election of successor directors.[156] No director received more than 50% of the votes, resulting in a deadlock of stockholders and perpetuating the control of the existing, holdover directors.[157] This Court ordered the appointment of a custodian, explaining that the failure to appoint a custodian would "leav[e] the existing directors in perpetual control of the corporate entity, and would relegate the one-half owners of the corporation to a perpetual minority status without remedy or recourse."[158]

---

155 *Giuricich*, 449 A.2d at 235.

156 *See id.*

157 *See id.*

158 *See id.* at 240; *see also Miller v. Miller* 2009 WL 554920 (Del. Ch. Feb. 17, 2009).

CONCLUSION

The Opinion of the Court of Chancery should be reversed, the Stock Sale cancelled as a breach of the Board's fiduciary duties to Coster, and the case remanded for appointment of a custodian pursuant to 8 *Del. C.* § 226(a)(1) with the limited power to cast tiebreaking votes where the stockholders are deadlocked, including with respect to approving a new board.

CONNOLLY GALLAGHER LLP,

/s/ Max B. Walton

Max B. Walton (Bar No. 3876)
Kyle Evans Gay (Bar No. 5752)
267 East Main Street
Newark, Delaware 19711
Telephone: (302) 757-7300
Facsimile: (302) 757-7292
mwalton@connollygallagher.com
kgay@connollygallagher.com

Dated: July 12, 2022

Attorneys for Plaintiff Below, Appellant, Marion Coster

Of Counsel:
Michael K. Ross
Serine Consolino
AEGIS LAW GROUP LLP
801 Pennsylvania Avenue, NW – Ste. 740
Washington, DC 2000

WORDS: 9,934