

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KELLY BARBEY and THE	§
BERMUDA HESED FOUNDATION,	§ No. 391, 2023
a Bermuda Trust,	§
	§ Court Below—Court of
Plaintiffs Below, Appellants,	§ Chancery of the State of
	§ Delaware
v.	§
	§ C.A. No. 2022-0107
KENNETH YOUNG,	§
	§
Intervenor Below, Appellee.	§

Submitted: April 19, 2024

Decided: June 11, 2024

Before **VALIHURA, TRAYNOR, and LEGROW**, Justices.

ORDER

(1) After consideration of the parties’ briefs and the record on appeal, we affirm the judgment of the Court of Chancery in this action under 8 *Del. C.* § 225 on the basis of and for the reasons stated in the court’s September 29, 2023 memorandum opinion. In the unusual and troubling circumstances of this case, Kellog “Kelly” Barbey could ultimately retain a seat on the board only if the Court of Chancery unwound the inversion. That result would require factual development and an application of Japanese law that was not sufficiently presented to the Court of Chancery.

(2) As the Court of Chancery recognized, in a Section 225 proceeding the court may adjudicate issues that are necessary to the determination of who holds a

corporate office.¹ Thus, the Court of Chancery has “resolved, among other things, the validity of stock issuances, stock transfers, stock conversions, and stock acquisitions in Section 225 actions in order to determine which votes should be counted in ascertaining proper board composition.”² But the scope of a Section 225 action does not permit the court to “go further and actually rescind a transaction procured through . . . unlawful behavior or award money damages to those harmed by that behavior.”³ “That type of ultimate relief can only be obtained in a plenary action in a court that has *in personam* jurisdiction over any necessary or indispensable parties.”⁴ It appears that Barbey could be restored to the board only by unwinding the stock swap, which would require an analysis of Japanese corporate law and which might affect the rights of hundreds of stockholders⁵ that are not

¹ See *Genger v. TR Investors, LLC*, 26 A.3d 180, 199 (Del. 2011) (“A Section 225 proceeding is summary in character, and its scope is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer. In determining what claims are cognizable in a Section 225 action, the most important question that must be answered is whether the claims, if meritorious, would help the court decide the proper composition of the corporation’s board or management team. If not, then those claims are said to be collateral to the purpose of a Section 225 action and must be raised in a separate plenary action.” (internal quotations, footnotes, and alterations omitted)).

² *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Restaurant Holdings, Inc.*, 2017 WL 4570612, at *3 (Del. Ch. Oct. 13, 2017) (citations omitted).

³ *Genger*, 26 A.3d at 200 (internal quotations omitted).

⁴ *Id.*

⁵ See Appendix to Opening Brief at A133 (stating that 139 of the total 191 Cerego stockholders agreed to swap their shares); *id.* at A485-87 (listing stockholders and their preferred and common stock holdings); *id.* at A601 (listing nineteen “major shareholders”); see also *Barbey v. Young*, C.A. No. 2021-0900, Docket Entry No. 17, Transcript of Oct. 21, 2021 Argument on Motions for Temporary Restraining Order and Expedited Proceedings, at 18 (Del. Ch.) (defendants’ counsel stating that Cerego “has a little under 200 investors”).

parties, in a representative capacity or otherwise, to this action. Although the ongoing plenary action might provide a path to such relief, we conclude that this Section 225 action does not, in the circumstances of this case.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be AFFIRMED.

BY THE COURT:

/s/ Gary F. Traynor
Justice