EFiled: Nov 23 2016 10:18PM EST
Filing ID 59875812
Case Number 423,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REPLY BRIEF OF APPELLANT SHIRLEY SHAWE

COOCH AND TAYLOR, P.A.
Jeremy D. Eicher (#5093)
Thomas A. Uebler (#5074)
Mark M. Dalle Pazze (#6021)
The Brandywine Building
1000 West Street, 10th Floor
Wilmington, DE 19801
Telephone: (302) 984-3800
Fax: (302) 984-3939

Attorneys for Shirley Shawe

OF COUNSEL:

Adam K. Grant
POLSINELLI PC
600 3rd Ave
New York, NY 10016
Telephone: (212) 413-2833

Dated: November 23, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other

PRELIMINARY STATEMENT

Appellee Elizabeth Elting's ("Elting") Answering Brief ("Ans. Br.") fails to meaningfully engage with Appellant Shirley Shawe's ("Ms. Shawe") arguments. Where Elting engages with Ms. Shawe's arguments, her counterarguments are illogical, unsupported by the law and focused on portraying Phil Shawe negatively to prejudice this Court against Ms. Shawe.

Ms. Shawe's Opening Brief ("Op. Br.") established that the Sale Order, as structured, violates the rights guaranteed to her by both the United States and Delaware constitutions. Specifically, it demonstrated that a forced sale of Ms. Shawe's share of TransPerfect—a sale that benefits only Elting—constitutes a taking without public purpose under both the United States and Delaware Constitutions, and violates 10 *Del. C.* § 6061 *et seq*. ("Takings Argument").

In response, Elting attempts to refute the Takings Argument through procedural arguments. First, without citing to any authority, Elting argues that the Sale Order somehow does not compel the sale of Ms. Shawe's stock because she can bid to purchase the entire company. This argument is nonsensical. Elting's next argument is equally flawed, she asserts that challenges to the Sale Order's constitutionality were waived because they were absent from Ms. Shawe's responsive pleading, *filed months before the Sale Order was contemplated*. Finally, Elting asserts, *ipse dixit*, that it is not in the interests of justice for this

Court to consider the Takings Argument without citing or discussing any of the factors examined in an "interests of justice" analysis. Each of these "procedural" arguments fails.

In attempting to address the Takings Argument's merits, the Answering Brief fails to delineate between stockholder rights and property rights to conclude that the Takings Argument is meritless. Elting's misunderstanding of the fundamental differences between these rights is the foundation for her erroneous insistence that a sale under the Sale Order is the same as a dissolution or liquidation. Remaining consistent, Elting fails to offer legal support for this flawed and conclusory argument.

Elting also entirely ignores Ms. Shawe's assertion that the Sale Order violates the Delaware Constitution, not even mentioning this issue in her Answering Brief and in attempting to refute Ms. Shawe's argument concerning violations of 10 *Del. C.* § 3108 with semantics, Elting demonstrates a misunderstanding of the concepts of the government's eminent domain and condemnation powers.

Turning to the derivative claims, Elting suggests that Ms. Shawe's ability to bring such claims has been extinguished while simultaneously arguing that the issue is not properly before this Court. Elting disingenuously incants that these

claims have been "fully litigated," with Ms. Shawe "actively participating" as if those magic words will cause Ms. Shawe's claims and rights to disappear.

Endeavoring to address the arguments that the Court of Chancery's attempt to extinguish her derivative claims was erroneous, Elting repeats the same *ad hominem* argument she made throughout this litigation—that all rulings should be made in her favor because Phil Shawe is bad. Notwithstanding that Ms. Shawe is the only party to whom the Court of Chancery did not attribute some level of malfeasance, this argument is irrelevant to Ms. Shawe's claims.

ARGUMENT

I. THIS COURT'S CONSIDERATION OF SHIRLEY SHAWE'S TAKINGS ARGUMENT IS APPROPRIATE AND IN THE INTERESTS OF JUSTICE

A. Ms. Shawe's was Not Required to Assert her Takings Argument as an Affirmative Defense.

To counter Ms. Shawe's Takings Argument (Op. Br. pp. 4-14), Elting cites to Court of Chancery Rule 8(c) for the *general rule* that an affirmative defense is waived if not pled. Ans. Br. p.64-65. However, the very authority cited by Elting interpreting that rule—5 Fed. Prac. & Proc. Civ. § 1271 (3d. ed.) ("Federal Practice Manual") and *Gragg v. Orange Cab Co.*, 145 Fed Supp. 3d 1046, 1049 (W.D. Wash. 2015)—expressly provides that only *certain* challenges to a statute's constitutionality must be raised as affirmative defenses. Ms. Shawe's claims do not fall into that subset of challenges.

Elting's cites to the Federal Practice Manual's explanation that a constitutional challenge may be deemed an affirmative defense, when it challenges the constitutionality of the statute "relied upon *by the plaintiff*." 5 Fed. Prac. & Proc. Civ. § 1271 (3d ed.) (emphasis added). Even then, however, not all constitutional challenges must be raised as affirmative defenses. *Id.* At the pleadings stage, a party is only required to raise constitutional challenges as affirmative defenses if the party asserts that the statute is facially invalid regarding

that party (*i.e.* any remedy found through the application of such statute would be unenforceable due to the unconstitutionality of the statute).[1] To rule otherwise would require plaintiffs to predict at the pleading stage that the court's verdict will unconstitutionally apply an otherwise valid statute.

Here, Ms. Shawe does not challenge the constitutionality of Section 226 nor does she assert that the statute is inapplicable to this case. Instead, she challenges the constitutionality of the Court of Chancery's *interpretation* of Section 226 in the Sale Order. Ms. Shawe asserts that Section 226 provides only for the dissolution of a corporation or the liquidation a corporation's property. Accordingly, the law cannot require Ms. Shawe to foresee the trial court's unprecedented interpretation of Section 226 and raise constitutionality as an affirmative defense in order to raise a constitutional challenge to that interpretation. To do so would prohibit litigants from challenging any unconstitutional application of otherwise valid statutes.

[1] *See e.g., Holland v. Cardiff Coal Co.*, 991 F.Supp. 508, 515 (S.D. WV, 1997) ("In this case, Reed Branch's Fifth Amendment taking defense is an affirmative defense within the definition of that term because in raising that defense, Reed Branch essentially maintains that even if it is found liable under the terms of the Coal Act, Reed Branch cannot be held liable because the Act, as applied, violates the Constitution.").

B. Elting's Argument that Consideration of Ms. Shawe's Takings Argument is Not in the Interests of Justice is Unsupported by Delaware Precedent.

Without citation to any authority or analysis of the "interests of justice" under Rule 8(c), Elting reasserts that Ms. Shawe's failure to raise the Takings Argument as an affirmative defense prevents this Court from considering it under Rule 8(c). Alternatively, Elting asks this Court to consider Ms. Shawe and Phil Shawe as one and the same so that the Court of Chancery's findings of Phil Shawe's bad acts make consideration of the Takings Argument inequitable. This argument is unsupported by law or fact. If anything, the decades of benefit Elting received because of Ms. Shawe's ownership interest in TransPerfect make it inequitable for Elting to reap further benefit by pretending Ms. Shawe's ownership is illusory.

TransPerfect is only a "woman-owned" business because Ms. Shawe is a stockholder. That status benefited all TransPerfect stockholders, but it personally advanced Elting most of all. For two-plus decades, she has cultivated the image of "Liz Elting, Co-CEO of a woman-owned business" and basked in the numerous accolades that came with that position. Her current TransPerfect web biography notes that "Crain's New York Business has named TransPerfect . . . one of the

largest women-owned companies for nine consecutive years."[2] Although Ms. Shawe's one share of TransPerfect is the *only* reason she is "Liz Elting, Co-CEO of a woman-owned business," Elting repeatedly has trivialized, if not outright ignored, Ms. Shawe's standing as a TransPerfect stockholder with all rights incumbent that standing in this litigation, and has encouraged the courts to do the same.

Elting repeatedly has attempted to characterize Ms. Shawe's interest in TransPerfect as merely a subset of Phil Shawe's ownership. *See, e.g.,* Ans. Br. pp. 65-66 ("*the Shawes* have been represented by at least eleven different law firms" and, "*[t]he Shawes* have engaged in unprecedented scorched-earth litigation…."); *See also,* Ans. Br. pp. 63, 64, 72, and 73. The Court of Chancery explicitly rejected this argument, finding that Ms. Shawe's "legal ownership of one percent of TPG" legally invalidated Appellee's claim under DGCL Section 273. Op. at 4, n.7. That rejection notwithstanding, Elting continues to rely on this argument, and it must fail as a matter of law.

Elting cites no case law to support her assertion that Phil Shawe's actions should bear on this Court's consideration of Ms. Shawe's argument. Besides being irrelevant to an "interests of justice" analysis, Elting's assertion blatantly attempts

[2] TransPerfect Legal Solutions, at http://www.transperfectlegal.com/about/leadership (last visited Nov. 23, 2016).

to color Ms. Shawe with the taint of Phil Shawe's alleged actions hoping to create distaste for Phil Shawe that will inspire this Court to rule against his mother. However, the factors this Court examines to determine if an argument falls within the interests of justice exception to Supreme Court Rule 8(b) fails to include "likability by association." Even if likeability were a factor, Ms. Shawe is the only party the Court below never found to have acted inappropriately prior to, or during, this litigation so equity would militate in favor of Ms. Shawe's Takings Argument being considered in the interests of justice.

C. A Review of Applicable Case Law surrounding Supreme Court Rule 8 shows that consideration of the Takings Argument is appropriate.

Consideration of Ms. Shawe's Takings Argument is in accord with the case precedent, as evidenced by a review of the facts and circumstances where this Court relied upon Rule 8 to allow determination of an issue not presented to the Court below. This Court has considered such arguments when: (1) the issue is outcome determinative and may have significant implications for future cases; *Scion Breckenridge Managing Member, LLC* v. *ASB Allegiance Real Estate Fund*, 68 A.3d 665, 679 (Del. 2013); *see also, Sandt v. Delaware Solid Waste Authority*, 640 A.2d 1030, 1034 (Del. 1994); (2) consideration will promote judicial economy because it will prevent the necessity of reconsidering the issue's applicability in light of a future result; *Sandt*, 640 A.2d at 1034; (3) when a question of public policy is involved pertaining to Constitutional guarantees. *Rickards v. State*, 77

A.2d 199, 202 (Del. 1950). All these factors are implicated by Ms. Shawe's Takings Argument.

1. This Court's conclusion whether imposing the Sale Order results in an impermissible taking is outcome determinative and has significant implications for future cases.

The Takings Argument is outcome determinative, as acceptance of it would invalidate the Court of Chancery's interpretation of Section 226 and require the Sale Order be revoked. Further, a determination will have significant implications for future cases in Delaware's preeminent area of law, explaining the boundaries of the Court of Chancery's equitable powers under Section 226. As such, this factor weighs in favor of consideration.

2. Consideration Promotes Judicial Economy.

If a forced sale occurs, there is no scenario in which Ms. Shawe retains her share, as purchasing the entire company is beyond her means. Elting's argument of the possibility of Ms. Shawe not having to sell her share exists (if Phil Shawe purchases the company) returns to the same invalid legal argument that Phil and Ms. Shawe are a single entity. They are not. Compelling the sale of Ms. Shawe's share to Phil Shawe would *still* effect an unconstitutional taking. Therefore, as in *Sandt*, this Court's consideration of the issue will avoid the necessity of reconsideration no matter how a sale is consummated.

3. Public Policy Warrants Consideration of the Takings Argument.

In *Rickards v. State,* this Court stated that:

> the rule, that matters not presented at the trial may not be raised on review, is subject to two exceptions—(1) when the question is one of jurisdiction of the subject matter, and (2) when a question of public policy is involved. *Cf. Walter v. Keuthe*, 98 N.J.L. 823, 121 A. 624. Since the defendant seeks to raise here a question of the application of certain constitutional guarantees which has never been passed on by this Court, we are constrained to permit him to do so under the public policy exception to the rule, even though the objection was made below at best by implication.

77 A.2d 199, 202 (Del. 1950).

Ms. Shawe also raises the applicability of certain constitutional guarantees to an interpretation of Section 226 on which this Court has never opined. Thus, the Takings Argument presents a question of public policy pertaining to Constitutional guarantees warranting consideration.

II. THE SALE ORDER CANNOT BE CURED OF ITS CONSTITUTIONAL AND STATUTORY VIOLATIONS

Elting's assertion that the Takings Argument is meritless relies on three fundamental misunderstandings. First, Elting fails to distinguish between "stockholder rights" and "personal property rights in a share of stock." Second, Elting fails to recognize the distinction between the "forced sale of personal property," and a "dissolution' or "sale of corporate assets." Finally, Elting fails to recognize that, under Delaware law, "a sale by judicial action" cannot be valid

unless undertaken through eminent domain as a condemnation under 10 *Del. C.* § 6102. Relying upon these mistakes, Elting erroneously concludes that the Sale Order does not violate the Fifth Amendment of the U.S. Constitution. Then, as an afterthought, and based on her lack of understanding of eminent domain, she attempts, and fails, to dismiss Ms. Shawe's allegations that the Sale Order violates Delaware Statute with a one line semantics argument.

A. Elting confuses stockholder rights with personal property rights in a share of stock.

Elting's argument that the Sale Order is not a taking confuses Ms. Shawe's rights to *the corporation's property* (conferred to her through her ownership of stock) with Ms. Shawe's rights to *her personal property* (the share of stock).[3] Based on this confusion, Elting argues that Delaware's rejection of the vested-rights doctrine somehow acts to strip Ms. Shawe of *her property rights* in her share of TransPerfect stock. This is not correct. The vested-rights doctrine relates to rights under the "flexible contract between corporations and shareholders" that control Ms. Shawe's *ownership interest in TransPerfect* (evidenced by her

[3] Elting's Answering Brief implies that Ms. Shawe's Takings Argument fails to identify a "legally-cognizable property interest" (Ans. Br. p. 67, n.26) and that a stockholder's interest in a corporation is not property (Ans. Br. 68, n.27). However, the DGCL is clear that, "The shares of stock in every corporation shall be deemed personal property." 8 *Del. C.* § 159. As asserted in her Opening Brief, Ms. Shawe's legally-cognizable property interest is her share of TransPerfect, personal property protected by the Fifth Amendment. Shirley Shawe Opening Brief at p.4.

TransPerfect share). Ans. Br. p.67. The vested-rights doctrine, however, is irrelevant here, because the Takings Argument asserts an unconstitutional taking of Ms. Shawe's *personal property*, not a change of her rights in her interest in TransPerfect.

B. A sale pursuant to the Sale Order is not the equivalent of a dissolution or a liquidation

In addition to confusing stockholder ownership rights and personal property rights, Elting's argument is further muddled by her equating the Sale Order with "dissolution." *See,* Ans. Br. p. 68 ("Not surprisingly, Ms. Shawe fails to cite a single case in which a stockholder even argued (much less succeeded in persuading a court) that the loss of *stockholder rights* in connection with a court-ordered *dissolution* amounted to an unconstitutional taking.") (emphasis added); *Id.* at p. 69 ("The Court of Chancery, as a court of equity, has the power to order the *dissolution* of a solvent company and appoint a receiver to *administer the winding up of those assets*.") (emphasis added). Ms. Shawe never challenges that Section 226 grants the Court of Chancery the power to order the dissolution of a corporation or liquidation of a corporation's assets. The Court of Chancery regularly takes such actions without violating any constitutional protections. It explicitly considered dissolution in this action, ultimately determining that it was not warranted on the record. Op. at 85-89.

The Sale Order does not order the dissolution of TransPerfect or the liquidation or distribution of TransPerfect's assets to its creditors and stockholders. Instead, the Sale Order purports to require Ms. Shawe, personally, to surrender her property to a custodian, acting as an agent of the Court, to be sold to the highest bidder, specifically and solely for the benefit of a private party, Elting. The Court of Chancery's decision explicitly recognized that the Sale Order likely would cause a benefit to Elting at Ms. Shawe's and Phil Shawe's expense. Op. at 79 (stating, absent a sale of the entire company, "she will be left with the Hobson's choice of remaining locked with Shawe in corporate hell or cashing out her stake for a fraction of its true value."); *Id*. at 80 (noting that "it would be unjust to leave Elting with no recourse except to sell her 50% interest in the Company."); *Cf.*,*id*. at 80 (considering and rejecting Phil Shawe's argument "that a custodian should not be authorized to sell the Company, or otherwise impose a 'buy/sell' process. . . ."); *Id*. at 83 (acknowledging the "distinct possibility" Phil Shawe would be the most logical purchaser of the business. . . ."). No matter who purchases TransPerfect, the Sale Order requires Ms. Shawe's share to be taken by a State agent and sold against her wishes. The equitable power granted to the Court of Chancery to craft a fair resolution is not so great to allow an order violating Ms. Shawe's constitutional rights.

C. Ms. Shawe's participation in the sale process does not cure the Sale Order's unconstitutionality.

Elting also argues that the Sale Order does not compel Ms. Shawe's share to be sold because the Court afforded her the right to bid and buy all the shares. Ans. Br. p.64. This argument is illusory and bereft of merit. The Sale Order indisputably compels the sale of her share. Without her share being sold, no party could bid to purchase it. The argument that her share will not be transferred unless another "party bids more for the Company than she (and her son) deem it *to be worth*" is also meritless. *Id*. (emphasis added). All that is required is that a third party bid more for the company than Ms. Shawe can *afford*. In reality, the opportunity to purchase all the shares of TransPerfect is misleading because Ms. Shawe cannot afford to purchase TransPerfect under any valuation yet presented. Elting's sham buy-back argument, unsupported by any case law, is nonsensical, impractical, and irrelevant to the merits of her Takings Argument.

D. Elting failed to acknowledge Ms. Shawe's arguments that the Sale Order violates the Delaware Constitution and failed to understand unambiguous Delaware law.

Elting wholly ignores Ms. Shawe's argument that the Sale Order violates the Delaware Constitution and fails in her attempt to disregard the argument that the Sale Order violates Title 10, Chapter 61 of the Delaware Code through a distinction without a difference. Ironically, Elting cites to *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection et al.*, 560

U.S. 702 (2010) to support her assertion that the Sale Order does not violate Title 10, Chapter 61because "it is a sale by judicial action pursuant to the DGCL and not by condemnation or eminent domain." Ans. Br. p.70. In *Stop the Beach*, however, the Supreme Court clarified that, "though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing." 560 U.S. at 713. The Court then explains why Elting's semantics argument fails, stating:

> The Takings Clause (unlike, for instance, the Ex Post Facto Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor ("nor shall private property be taken" (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.

Id. at 713-714.

Elting's argument that the Sale Order does not violate Title 10, Chapter 61 also evidences that she misunderstands the terms "condemnation" and "eminent domain." Eminent domain is the power of a government to take private land and condemnation exercises the power of eminent domain. In Delaware, eminent domain may only be exercised under Title 10, Chapter 61 which "shall govern the procedure for *all condemnations* of real and *personal property* within this State

under the power of eminent domain *exercised by any authority whatsoever, governmental or otherwise*." (emphasis added).[4]

E. Elting's argument that the Sale Order satisfies the public use requirement of the Takings Clause fails.

Elting's argues that the Sale Order "satisfies the constitutional "public use" requirement" because "it is rationally related to a conceivable public purpose." Ans. Br. p.69. Elting asserts that the public purpose is "regulating the internal affairs of corporations created under Delaware law." *Id.* Under Elting's theory, no Delaware law regulating Delaware corporations could ever be declared unconstitutional. The Public Use Clause is significantly narrower, to prevent exactly this type of pretextual argument. As explained in *Kelo v. City of New London*, the taking in this case would be unconstitutional because the Court of Chancery explicitly intended for the Sale Order to benefit Elting. 545 U.S. 469, 490 (2005), ("transfers intended to confer benefits to particular, favored entities, and . . . with only incidental or pretextual public benefits, are forbidden by the Public Use Clause."). *See also*, Op. Br. pp.11-14.

[4] Ironically, condemnation is, in fact, effected through "sale by judicial action." However, pursuant to Chapter 61 of Title 10, the judicial action may (among other requirements) only be exercised through a condemnation proceeding in the Superior Court. 10 *Del. C.* § 6102.

III. TO THE EXTENT THE COURT OF CHANCERY INTENDED ITS DISMISSAL WITH PREJUDICE OF THE DERIVATIVE ACTION TO EXTINGUISH MS. SHAWE'S RIGHT TO BRING SUCH CLAIMS, IT WAS ERRONEOUS.

As a matter of law, Ms. Shawe was not a party to Phil Shawe's fiduciary duty derivative action, *Shawe v. Elting, et al.* C.A. No. 9686-CB ("Derivative Action"). The Court of Chancery and this Court explicitly denied Ms. Shawe's motion to intervene in the Derivative Action, rulings that would have been procedurally and practically impossible if Ms. Shawe had already been a party. Elting's attempt to argue to the contrary by repeating the terms "coordinated and functionally consolidated" and "actively participated" do not change the facts, or the law. Ans. Br. p.71.

In both law and fact, the Derivative Action indisputably was not decided on the merits. Phil Shawe's claims were dismissed due to a finding that he had come to the Court with unclean hands, making him an inadequate representative for a derivative action. Op. at 90-97. The court neither ruled in favor of Elting, nor concluded that she did not breach her fiduciary duties.[5] Elting's attempts to infer the contrary by the repeated use of the term "fully litigated" are made to bolster the

[5] To the contrary, despite not having to comment on the underlying facts, the Court of Chancery explicitly found that Elting had "expressed a desire to be bought out and acted improperly at times to pursue that goal." Op. at 72. *See also*, Op. at 93.

res judicata and collateral estoppel arguments made against Ms. Shawe in the pending New York derivative action.

Finally, despite Elting's claims to the contrary, the ruling of the court below is ambiguous and incomplete. The unusual procedural posture of this action combined with the record comments of the court below and the myriad Court of Chancery precedent contradicting those comments, taken together, create ambiguity in the Delaware judiciary's position on the dismissal of a derivative action. It is prejudicial to Ms. Shawe to leave her in a procedural purgatory where, on the one hand she lacks standing to appeal the dismissal, and on the other, the dismissal extinguishes her derivative claims with no prior due process or post-judgment recourse. Accepting this situation would allow a wrong without a remedy. As both Elting and the Court of Chancery made clear, "equity will not suffer a wrong without a remedy." Ans. Br. p.40 *citing* Op. at 81. Equity demands that Ms. Shawe have a right to appeal the "with prejudice" dismissal of the Derivative Action, or receive confirmation from this Court that the dismissal did not extinguish her rights.

This ambiguity does not bar Ms. Shawe's appeal it reinforces its necessity. Assuming Ms. Shawe's right to appeal the application of the "with prejudice" dismissal, her failure to do so would extinguish it. Further, in light of the record comments of the Court below, judicial economy weighs in favor of this Court

affirming Ms. Shawe's right to bring derivative claims. The alternative—this Court remand to the Court of Chancery to clarify Ms. Shawe's rights—will inevitably result in another appeal to this Court just to return all parties to this exact situation.

A. "Functional consolidation" has no valid legal effect and cannot serve as a basis to deprive Ms. Shawe of her legal rights

The unique procedural nature of the consolidated trial of the related cases without actual consolidation has resulted in prejudice to Ms. Shawe. Elting attempts to argue that Ms. Shawe's participation in the consolidated trial should preclude her ability to now challenge the applicability of the "with prejudice" dismissal of Phil Shawe's claims on any "legal, equitable, or factual basis…". Ans. Br. pp.72-73. To support this assertion, Elting cites to the language of the Court of Chancery's opinion on Ms. Shawe's motion to intervene. Referencing the procedure for the trial of the four associated actions the court states, "*although not technically consolidated*, [the four cases] had been coordinated and functionally consolidated for purposes of discovery, pretrial proceedings, trial, and post-trial proceedings." Appendix to Ans. Br. App. 3337-3338 (emphasis added). The language of the opinion does not support Elting's argument.

Elting ignores the inherent contradiction in her argument—that Ms. Shawe on the one hand, failed to intervene, and on the other, actively participated. This

assertion of Ms. Shawe's existence as a "functional" co-party to be bound by the dismissal, but not for purposes preventing dismissal is illogical and prejudicial.

First, nothing in the Court of Chancery's above-quoted language states that the "functional consolidation" of the cases granted any legal standing to Ms. Shawe regarding the Derivative Action. Second, the Court's power to order that a single trial be held for the four cases is found in Ct. Ch. R. 42(a) which states:

> *Consolidation.* When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs.

The rule makes clear that an order for a joint trial is distinct from consolidation. The Court of Chancery explicitly chose to hold a joint trial and not to consolidate the cases, and explicitly acknowledges that the cases were never consolidated. As a matter of law, therefore, Ms. Shawe may not retroactively be treated as if consolidation had occurred to be bound by the dismissal of the Derivative Action. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. ") (internal citations omitted.). "Functional consolidation" does not designate Ms. Shawe as a

party or make her a party by service of process, and therefore is not bound by the decision in the Derivative Action.

B. Phil Shawe's status as an inadequate representative precludes a holding that the dismissal of the Derivative Action bars Ms. Shawe from bringing such claims.

Unsurprisingly, Elting fails even to address the argument in Ms. Shawe's Opening Brief that, as a matter of law, it is impossible for the dismissal of the Derivative Action to extinguish Ms. Shawe's claims. Op. Br. at pp. 21-22. As the Opening Brief explains, the Court of Chancery has explicitly found that, "Decisions that give preclusive effect to a Rule 23.1 dismissal *universally recognize* that another stockholder still can sue if the first plaintiff provided inadequate representation. *South v. Baker*, 62 A.3d 1, 12 (Del. Ch. 2012) (emphasis added)." *Id*. Each of Phil Shawe's derivative claims against Elting were dismissed pursuant to a determination of Phil Shawe's unclean hands. Op. at 90-97.[6] It is impossible for Phil Shawe to be an adequate derivative representative if his unclean hands and acquiescence precluded a judgment on the merits of the derivative claims.

Phil Shawe's inadequate representation also precludes any consideration of Elting's argument that the joint trial somehow put Ms. Shawe "on notice that her

[6] Notably, the Court also found that two of Phil Shawe's claims were barred by acquiescence, a doctrine that cannot possibly be imputed to Ms. Shawe. Op. at 96.

son's derivative claims could be defeated based on his unclean hands." Ans. Br. p.72. Any notice Ms. Shawe had of Phil Shawe's Derivative Action or the affirmative defenses are irrelevant. As she was not a party to the litigation, and Delaware law ensures that her rights could not be extinguished by Phil Shawe's unclean hands. *In re Ezcorp Inc. Consulting Agreement Derivative Litigation,* 130 A.3d 934, 943-949 (Del .Ch. 2016) Finally, as a matter of law, any extinguishing of Ms. Shawe's rights from the dismissal of the Derivative Action violates Ms. Shawe's due process rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (Stating, when listing the minimum due process protections that must be present to bind an absent plaintiff, "Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *See also, In. re. Ezcorp Inc.*, 130 A.3d at 947.

C. Elting asks this Court to pass on clarifying the effect under Delaware law of a "with prejudice" dismissal of a derivative action in favor of the New York courts.

Elting cites no law to contradict the arguments and case law in Ms. Shawe's Opening Brief explaining that Delaware law requires that the only plaintiff to whom a dismissal with prejudice of a derivative action applies is the named plaintiff. *See In. re. Ezcorp Inc.*, 130 A.3d 943-949; *See also,* Op. Br. p.21. Elting then contradicts her prior arguments to the contrary, by asserting that the Court below did not intend to extinguish Ms. Shawe's rights to assert the dismissed

derivative action alleging that "when the Chancellor said 'I think the derivative claims aspect of this case is a done deal' he was not 'purporting to rule on any [other cases].'" Ans. Br. p.73. Notwithstanding that Elting's conclusion is belied by the context of the comment, which was made in response to an assertion that the valuation of Ms. Shawe's share should include her unique derivative rights, what Elting does not explain is the purpose of her argument.

Elting suggests this issue is not properly in controversy because, as Elting is aware, the defendants in the pending New York derivative action have filed motions to dismiss alleging that the Court of Chancery's opinion bars Ms. Shawe's derivative claims under *res judicata*. The doctrine of *res judicata* would be inapplicable to Ms. Shawe as a matter of Delaware law under the precedent offered by Ms. Shawe because a "with prejudice" dismissal, applicable only to the named plaintiff, has no *res judicata* effect to any other class member. *Phillips Petroleum Co.*, 472 U.S. at 805. However, in New York, defendants have argued that the Court of Chancery's decision is evidence that Delaware law allows the "with prejudice" dismissal of Phil Shawe's claims to bar Ms. Shawe's actions.

Ms. Shawe contends that the unique procedural process has created a prejudice against her that can only be resolved by this Court's clarification of Delaware law as to the with prejudice dismissal of a derivative action. The issue is

therefore validly before the Court, and the Court should not pass on clarifying an issue of Delaware law in favor of the Courts of a sister state.

CONCLUSION

For the reasons cited in Appellant Shirley Shawe's Opening Brief and herein, the decision of the Court of Chancery should be reversed and remanded.

COOCH AND TAYLOR, P.A.

/s/ Jeremy D. Eicher
Jeremy D. Eicher (#5093)
Thomas A. Uebler (#5074)
Mark M. Dalle Pazze (#6021)
The Brandywine Building
1000 West Street, 10th Floor
Wilmington, DE 19801
Telephone: (302) 984-3800
Fax: (302) 984-3939