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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARION COSTER, Plaintiff Below, Appellant, v. UIP COMPANIES, INC., STEVEN SCHWAT, and SCHWAT REALTY LLC, Defendants Below, Appellees.	)	**PUBLIC VERSION** **FILED AUGUST 9, 2022** C.A. No.: 163,2022 On Appeal from the Court of Chancery of the State of Delaware C.A. No. 2018-0440-KSJM CONSOLIDATED

APPELLEES UIP COMPANIES, INC., STEVEN SCHWAT, AND SCHWAT REALTY LLC'S ANSWERING BRIEF

Of Counsel:

Deborah B. Baum
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth St., N.W.
Washington, D.C. 20036-3006
Tel: (202) 663-8772

Stephen B. Brauerman (#4952)
Elizabeth A. Powers (#5522)
BAYARD, P.A.
600 N. King Street, Suite 400
P.O. Box 25130
Wilmington, Delaware 19801
(302) 655-5000

Attorneys for Defendants Below, Appellees Steven Schwat, Schwat Realty, LLC, Peter Bonnell, Bonnell Realty, LLC, and Steven Cox

Neal C. Belgam (#2721)
Kelly A. Green (#4095)
Jason Z. Miller (#6310)
SMITH KATZENSTEIN &
JENKINS LLP
1000 West Street, Suite 1501
Wilmington, Delaware 19801
(302) 652-8400

Attorneys for Defendant Below,
Appellee UIP Companies, Inc.

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NATURE OF PROCEEDINGS

This is an appeal from the Court of Chancery's second decision in favor of the Defendants, following a remand order, in which this Court directed the Court of Chancery to review the challenged sale of 33 1/3 shares of stock (the "Stock Sale") under *Schnell v. Chris-Craft Industries, Inc.*,[1] and *Blasius Industries, Inc. v. Atlas Corp*.[2] These consolidated cases were the first of six lawsuits now pending in four courts that Appellant Marion Coster ("Coster") has brought against these Defendants and affiliates of UIP Companies, Inc. ("UIP" or the "Company") – all following her unsuccessful efforts to force a buyout of the UIP shares she inherited from her late husband.

Coster began her wave of lawsuits on June 15, 2018, when she filed an action in the Court of Chancery seeking the appointment of a custodian, alleging a deadlock over a vote to elect the Company's board of directors (the "Board") (the "Custodian Action"). *Coster v. Schwat*, C.A. No. 2018-0622-SG. The two shareholders each owned 33 1/3 of the Company's 100 authorized shares. On August 15, 2018, the Board approved the sale of the Company's remaining 33 1/3 authorized shares to Bonnell Realty, LLC (the "Stock Sale"); the sale broke the deadlock. The sale price

[1] 285 A.2d 437 (Del. 1971).

[2] 564 A.2d 651 (Del. Ch. 1988).

was based on an independent valuation performed by the McLean Group and diluted equally the ownership interests of the two "deadlocked" shareholders.

On August 22, 2018, Coster filed another complaint seeking cancellation of the Stock Sale (the "Cancellation Action"). *Coster v. UIP Companies, Inc., et al.*, C.A. No. 2018-0440-KSJM. A trial on the consolidated cases was held on April 17 and 18, 2019. On January 28, 2020, the Court of Chancery issued a 66-page memorandum opinion denying all of Coster's requested relief, declining to appoint a custodian, and finding that the Stock Sale was entirely fair to the Company and its shareholders.[3]

On June 29, 2021, this Court affirmed the Court of Chancery's factual findings and its entire fairness analysis but reversed and remanded the case for further analysis under the equitable standards set forth in *Schnell* and *Blasius* (the "Appellate Decision").[4] Specifically, this Court held that even a transaction held to be entirely fair should also be reviewed under "*Schnell/Blasius*," and directed that, "[g]iven our deferential standard of review on appeal for the Court of Chancery's factual findings, the court should have an opportunity to review all of its factual findings in any manner it sees fit in light of its new focus on a *Schnell/Blasius* review."

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[3] *Coster v. UIP Cos., Inc.*, 2020 WL 429906 (Del. Ch. Jan 28, 2020) ("1st Op").

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

The Court of Chancery did just that. Following post-remand briefing and oral argument, it issued a memorandum opinion on May 2, 2022, ("2d Op."), again finding for Defendants on all counts. The Court of Chancery considered the review required under *Schnell* and held that the Board's stated motivations for the Stock Sale were genuine, not pretextual, and that it acted in good faith. So, as directed by this Court, the Chancellor analyzed the facts under *Blasius*, and held that the Board demonstrated a "compelling justification" for approving the Stock Sale. Coster filed a Notice of Appeal on May 13, 2022, and argues that the Court of Chancery erred by applying *Blasius* at all, and in approving the Stock Sale.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly found that *Schnell* invalidates a board action in the stockholder-franchise context "in the limited scenario wherein the directors have no good faith basis" for that action.[5] Indeed, as this Court noted, under *Blasius*, "*Schnell* [does] not apply when the board acts in good faith[.]"[6] That good faith is, essentially, one of the two triggers for analysis under *Blasius.* Coster's argument – that any conflicted board action, even if taken in good faith, that is in any important way tainted with any inequitable motivation, must fail under *Schnell* – is inconsistent with this Court's ruling, and fundamentally inconsistent with the basic holding of *Blasius.* *Blasius* only applies once the court finds that the board acted in good faith, but "for the primary purpose of impeding stockholders' franchise rights," in which case, the court must consider if there is a "compelling justification" for the action.[7] If, as Coster argues, *Schnell* invalidates any board action with any potential whiff of self-interest or an inequitable motivation (such as impeding a shareholder's franchise rights), then *Blasius* would have no analytical role, predicated as it is on the "primary purpose" of the challenged action being inequitable. Moreover, if Coster's *Schnell* interpretation were correct, this Court

[5] 2d Op. 19-22.
[6] *Coster*, 255 A.3d at 962.
[7] *See id.*

would have either invalidated the Stock Sale, or directed its invalidation, in the prior appeal, where it identified a number of findings it believed established inequitable motivations under *Schnell*.[8] Instead, this Court's remand order directed an analysis of all of the Court of Chancery's factual findings, including those that this Court found were "inconsistent" with the noted inequitable motivations for the Stock Sale.[9] The Court of Chancery also correctly held that the Board had an "equitable purpose" to reduce Coster's leverage as an equal stockholder in order to protect the Company.[10]

2. Denied. The Court of Chancery correctly held that, "[i]n the exceptionally unique circumstances of this case, Defendants have met the onerous burden [under *Blasius*] of demonstrating a compelling justification[,]" for approving the Stock Sale.[11] The Court of Chancery correctly considered the threat the Custodian Action posed in determining whether Defendants had a "compelling justification" motivating them to approve the Stock Sale. Defendants appropriately acted to moot the threat of a custodian appointment and were under no obligation to delay pending an outcome in the Custodian Action. The Court of Chancery correctly

[8] *See Coster*, 255 A.3d at 963-64.
[9] *Id.* at 964.
[10] 2d Op. 23-24.
[11] 2d Op. 24.

considered evidence of Wout Coster's views as to the format of the Stock Sale; Coster herself cites testimony as to his wishes in support of her arguments on appeal.[12] Although the Court of Chancery also correctly weighed Coster's motivations in filing suit when weighing the equities as to the validity of the Stock Sale, the evidence of Wout Coster's wishes and Coster's motivations were not ultimately determinative of the Court of Chancery's finding of a "compelling justification." Finally, the Court of Chancery correctly held that the Stock Sale was appropriately tailored to the Board's purpose of mooting the Custodian Action.

3. Denied. If, despite the foregoing, this Court were to cancel the Stock Sale, important questions would remain as to the requested appointment of a custodian, which is expressly left to the discretion of the Court of Chancery under 8 *Del. C.* § 226(a)(1).

[12] *See* Appellant's Opening Brief ("AOB") 6-7, 12-13.

COUNTERSTATEMENT OF FACTS

A. The Formation, Structure, and Operations of UIP

UIP is a real estate services company formed under Delaware law in 2007 by Steven Schwat ("Schwat"), Cornelius Bruggen ("Bruggen"), and Wout Coster ("Wout").[13] Through its subsidiaries, UIP provides various services to investment properties in the Washington, D.C. metropolitan area.[14] The Company primarily serves the real estate investments held in special purpose entities ("SPEs"), in which the UIP principals invest their own capital alongside third-party equity sponsors. B152-B153, B164-B166 [Trial Transcript ("Tr.") 25:23-26:16, 306:9-308:18.][15]

Upon its formation in 2007, UIP issued 33 1/3 shares of stock each to entities respectively controlled by Schwat, Coster, and Bruggen.[16] At the time of formation, UIP had a five-member Board of Directors ("Board") that included Wout, Schwat, and Bruggen, as well as two UIP Employees, Stephen Cox ("Cox") and Peter Bonnell ("Bonnell").[17] Bruggen left UIP in 2011, resigned as a director, and tendered his shares back to the Company at no cost, leaving Schwat and Wout each controlling one-half of the Company's outstanding shares.[18]

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[13] 1st Op. *1.
[14] *Id.*
[15] *Id.* at *2.
[16] *Id.*
[17] *Id.*
[18] *Id.* at *2.

Cox began at the Company as a "real estate analyst," but he ultimately became the Chief Financial Officer of one of UIP's subsidiaries, UIP Asset Management, Inc. B160-B161 [Tr. 181:5-10, 182:23].[19] Bonnell initially started at the Company as an "office and project manager," but his role gradually expanded, particularly due to the mentorship of Wout. B194-B199, B206 [Tr. 415:6-9, 416:7-420:5, 437:18-24][20] In fact, Wout advised both Bonnell and Coster that he intended for Bonnell to take his place at the Company. B156-B158, B199, B204-B205 [Tr. 134:17-24, 135:23-136:2, 420:11-16, 429:21-430:4.]

Over the next several years, Wout and Schwat promised Bonnell on multiple occasions that he would become a principal of, and receive equity in, the Company. B167-B168, B198 [*Id*. at 322:18-323:6, 420:11-16]; B007-B010 [JX-10.] The testimony at trial showed that, since his promotion to a principal of the Company, Bonnell and Schwat often disagree on business decisions and Company matters, as business partners often do. B189, B200-B202 [Tr. 361:1-19, 423:4-425:23.][21]

B. Buy Out Negotiations & Wout's Death

In late 2013, Wout informed Schwat and Bonnell that he had been diagnosed with leukemia; at the same time, Heath Wilkinson ("Wilkinson"), then-president of

[19] 1st Op. *2.
[20] *Id.*
[21] 2d Op. 27.

subsidiary UIP General Contracting, Inc., and Bonnell were both considering leaving the Company to pursue other opportunities. B168, B176, B203 [Tr. 323:13-19, 334:13-22, 428:5-23.][22] In response, Schwat and Wout began discussing a succession plan whereby Bonnell and Wilkinson would ultimately succeed to Wout's shares in the Company. B168-B173, B174-B177, B209-B210 [Tr. 323:11-328:22, 332:19-335:4, 460:9-461:11]; B001-B002, B003-B006, B007-B010, B011-B018 [JX-6; JX-3; JX-10; JX-98.][23]

These negotiations resulted in a Term Sheet dated April 11, 2014, which contemplated the transfer of Wout's UIP shares, among other particulars. *See* B019-B025 [JX-11.] However, to avoid tax inefficiencies, they ultimately abandoned the initial structure for the transitioning of Wout's shares. B178-B179 [Tr. 336:16-18, 337:1-2.][24] The parties continued to negotiate a revised deal structure, and although they implemented discrete agreed terms, no agreement as to the transition of the UIP shares was ever finalized. The day before he died, Wout instructed his attorney to work to complete the deal. B026-B028 [JX-29 at 2]; *see also* B180-184, B193 [Tr. 343:10-347:3, 373:1-2.]

[22] 1st Op. *3.
[23] *Id.*
[24] *Id.* at *3-4.

Wout passed away on April 8, 2015, and Coster inherited ownership of Wout's interests in UIP and other entities.[25] Over the following two years the parties continued to discuss and negotiate the buyout of the UIP shares and promote interests now held by Coster, with the involvement of Coster's then-counsel, Robert Gottlieb, as well as Coster's friends Michael Pace, a retired attorney, and his wife, Anne Pace, the executor of Wout's estate.[26] B151 [Tr. 16:7-23.] [27]

In communications contemporaneous with the ongoing buyout negotiations, Mr. Pace indicated to Michael Rinaldi, a former accountant for UIP and another advisor to Coster, that Coster wanted "no further connection to the company" and wanted to "cash out" as soon as she could. B034-B038 [JX-36 at MC0068603]; B154-B155 [Tr. 78:23-79:8.] Although Coster realized that "cashing out" would not be in the best interests of the Company, she was unmoved. B029-B033 [JX-331 at

[25] *Id.* at *5.

[26] Defendants note that, as to the buy-out negotiations and more generally, Coster's recitation of the facts often excludes critical context. For example, Coster's opening brief notes that Schwat approached Coster's counsel the day after Wout's death about a buy-out. AOB 7. But, in its initial opinion, the Court of Chancery specifically addressed this point, finding that Schwat was in fact responding to discussions initiated by Wout the day prior to his death, and that Coster was aware of those discussions, and therefore, "Schwat was not exploiting [Coster's] vulnerabilities in the days after Wout's death[,]" as Coster seems to imply again here. 1st Op. *5.

[27] *Id*. at *5-7.

MC0069535.] Indeed, in a May 1, 2016 email from Mrs. Pace to Coster's counsel, whereby Mrs. Pace served as Coster's scrivener, she wrote:

> While a [cash out] might not be in the long-term best interests of the company, frankly, Marion doesn't care about the long-term best interests of the company. ….

(*Id.*)[28]

As the Court of Chancery found, Coster, through counsel, sought a buyout of her interests at roughly ***thirty times*** the Company's total equity value as found in the Court of Chancery's post-trial decision; Defendants offered "a generous buyout price when compared with the value of the Company," as well as "multiple compromise positions[,]" but Coster declined these offers.[29] Coster only then signaled her intent to exercise her rights as a UIP shareholder as a point of leverage in the negotiations. *See* B041-B044, B045-B048 [JX-223 at 1; JX-45.][30] That strategy is ongoing, as Coster has, either herself or through her wholly owned entity Coster Realty LLC, filed five additional lawsuits against various of the Defendants in three different courts.[31]

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[28] *See also* 2d Op. 8.

[29] 2d Op. 7 (citing B039-B040 [JX-221 at MC0008261-62], 1st Op. at *7, *22-26).

[30] 1st Op. *2, 18; 2d Op. 6-7.

[31] *See Coster v. Schwat, et al.*, Civil Action No. 18-CV-1995 (U.S. District Court for D.C.); *Coster Realty, et al. v. Schwat, et al.*, Case No. 2020 CA 001430 B (D.C. Superior Court); *Coster Realty v. Schwat Realty, et al.*, Case No. 481393-V (Montgomery County Circuit Court, Maryland); *Coster Realty v. Schwat, et al.*, Case No. 2022 CA 003108 B (D.C. Superior Court).

C. Special Meeting of Stockholders & the Custodian Action

Following her unsuccessful attempts to obtain a buyout, Coster noticed a special meeting of stockholders of UIP to elect new members of the Board; elections had not been held since the Company's formation, and for Wout's entire tenure at UIP, and thus the vacancies left by Bruggen's departure and Wout's death remained unfilled.[32] Special meetings were held on May 2, and June 4, 2018, in which votes were held on various slates of directors. The Board candidates Coster proposed included her own son-in-law and daughter-in-law, who, Coster conceded, had no relevant experience in real estate management or development. B049-B050 [JX-50]; B159 [Tr. 157:1-9.] Schwat and Coster's proxy (her litigation counsel) did not agree on any of those proposals, and therefore, each vote failed.[33]

Even when advised that Defendants would "likely approve" other candidates proposed by Coster with relevant experience for the vacant seats, Coster did not provide any alternative candidates, nor did she make "any meaningful effort to negotiate board composition[.]" B159, B185-B186 [Tr. 157:1-9, 356:23-357:7.][34] Instead, on June 15, 2018, Coster filed the Custodian Action, seeking appointment

[32] 1st Op. *8.
[33] *Id.* at *8-9.
[34] 2d Op. 8-9.

of a custodian with powers to "exercise full authority and control over the Company, its operations, and management."[35]

D. The Stock Sale & Coster's Suit to Cancel the Sale

The Custodian Action constituted an existential crisis for the Company, in particular, because appointment of a custodian would give rise to broad termination rights in SPE contracts, thereby threatening UIP's revenue stream and business model. B187, B208, B211-B212 [Tr. 358:2–5, 457:10–19, 496:20–497:19.][36] Motivated both by this threat, and by the need to keep Bonnell motivated to continue to stay at the Company (the promise of equity interest in the Company was years old and had never been fulfilled), Schwat retained the McLean Group on behalf of the Company to perform an independent valuation. B051-B055 [JX-57]; B186-B188 [Tr. 357:19-359:23.][37] In a July 27, 2018 email, Schwat instructed Andy Smith of the McLean Group that the Company did "NOT want you to hurry your valuation in any way that would leave you less than 100% confident that you have the correct,

[35] 1st Op. *16; 2d Op. 9.

[36] 1st Op. *12 n.190; 2d Op. 9-10, 26.

[37] *Id*. at *12 (finding that Bonnell "was viewed as essential to the Company's survival" and that the Stock Sale "was deleterious to UIP for reasons unrelated to [Coster]."); 2d Op. 5, 10-11 (finding that these reasons were "genuine motivations" for Defendants' actions).

fair market value of the company." B061-B063 [JX-62]; B190-B192 [Tr. 362:21-364:5.]

The McLean Group provided the final valuation (the "McLean Valuation") on August 14, 2018, which determined that the fair market value of a 100-percent, noncontrolling equity interest in UIP to be $123,869. B064-B127 [JX-66 at 4.][38] The following day, the Board acted by unanimous written consent to sell 33 1/3 shares of UIP stock to Bonnell Realty LLC for one-third of the McLean Valuation amount (the "Stock Sale").[39] The Defendants then filed an amended answer indicating that the Custodian Action had been mooted by the Stock Sale, and Coster responded by filing the Cancellation Action to unwind the Stock Sale (the "Cancellation Action").[40] The Cancellation Action and the Custodian Action were consolidated upon stipulation of the parties, and trial was held on April 17 and 18, 2019. B128-B148 [Pre-Trial Order ("PTO") ¶ 29; D.I. 117.]

E. The Court of Chancery's Post-Trial Decision

On January 28, 2020, the Court of Chancery issued a post-trial opinion entering judgment on all counts in favor of the Defendants.[41] The trial court found that the Defendants "viewed the appointment of a custodian as deleterious to UIP"

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[38] 1st Op. *11.
[39] *Id.*
[40] *Id.* at *13.
[41] *Id.* at *1, *26.

and that the Stock Sale was "significantly motivated" by the desire to prevent the damage to the business that appointment of a custodian would inflict. B187, B207 [Tr. 358:2-5, 456:13-17]; B056-B057, B058-B060 [JX-58 at 1; JX-59 at 2.][42] Indeed, the Court of Chancery expressly held that "the Custodian Action was deleterious to UIP for reasons unrelated to [Coster]."[43] The trial court concluded both that "the appointment of a custodian threatened to cut off a substantial amount of UIP's revenue streams," and that the Board approved the Stock Sale in part to honor the longstanding promise of equity to Bonnell, and that these purposes "justif[ied] Defendants' efforts to moot the Custodian Action."[44] It further found that Coster "did not succeed in proving her theories regarding Defendants' purposes or justifications" for the Stock Sale.[45]

The Court of Chancery then reviewed the Stock Sale under the entire fairness standard, ultimately holding the Defendants met their burden; because Defendants met the most onerous standard of review under Delaware law, the trial court did not apply the *Schnell/Blasius* standards to evaluate Defendants' challenged conduct.[46]

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[42] *Id.* at *12.
[43] *Id.*
[44] 1st Op. *12.
[45] *Id.* at *12-13.
[46] *Id.* at *14.

F. First Appeal & Ruling of This Court

Coster appealed the Court of Chancery's ruling to this Court, arguing that the trial court erred in declining to review the Stock Sale under the *Schnell/Blasius* standards, after upholding Defendants' conduct under the onerous entire fairness review.[47] This Court affirmed the Court of Chancery's entire fairness analysis and its factual findings, but held that the trial court should also have conducted a *Schnell/Blasius* review.[48] The Supreme Court stressed the deference it afforded this Court in conducting the required analysis on remand in light of its factual findings "in any manner it sees fit."[49]

G. The Court of Chancery's Remand Decision

Following post-remand briefing and oral argument on November 8, 2021, the Court of Chancery issued a memorandum opinion on May 2, 2022, again finding in Defendants' favor on all counts.[50] Reviewing its prior factual findings under both *Schnell* and *Blasius*, the Court of Chancery first determined that *Schnell* invalidates board action in the stockholder-franchise context only "in the limited scenario wherein the directors have no good faith basis for approving the disenfranchising

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[47] *Coster*, 255 A.3d at 953, 959.
[48] *Id.* at 959-60.
[49] *Id.* at 964.
[50] 2d Op. 21-22, 26-31.

action."[51] It then found that, here, the Defendants had a "good faith basis" and "did not act exclusively for an inequitable purpose" in approving the Stock Sale, and therefore the transaction was not invalid under *Schnell*.[52]

Next applying *Blasius*, the Court of Chancery determined that, even if the Board did approve the Stock Sale for the "primary purpose" of mooting the Custodian Action, it had a "compelling justification" for doing so, because it acted to avert what it reasonably believed to be an "existential crisis" for UIP in the form of potential contract terminations resulting from a custodian appointment, and to honor the longstanding promise of equity to Bonnell.[53] The trial court further held that Defendants proved that the Stock Sale was "appropriately tailored" to its goal, citing that (i) the sale created the possibility of a "swing vote" in the form of Bonnell, (ii) the Board could have chosen much more aggressive means of effecting the same outcome, and (iii) the Stock Sale honored a succession plan that had been "favored" by Wout.[54]

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[51] *Id.* at 19.
[52] *Id.* at 21-22.
[53] *Id.* at 26-28.
[54] 2d Op. 27-28.

Because the Stock Sale passed this additional scrutiny under *Blasius*, the Court of Chancery declined to cancel the transaction and found no need to appoint a custodian.[55] Coster filed this appeal on May 13, 2022.

[55] *Id.* at 31.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT SCHNELL DID NOT APPLY TO INVALIDATE THE STOCK SALE

A. Question Presented

Did the Court of Chancery correctly apply Delaware law in holding that *Schnell* did not invalidate the Stock Sale because the UIP Board had "good faith bases" for its approval? (2d Op. 19; 21-22.)

B. Scope and Standard of Review

The Court's ruling that *Schnell* did not invalidate the Stock Sale is a mixed question of law and fact. While the Court's legal conclusions are reviewed *de novo*, its factual findings are disregarded only where there is clear error.[56] "The fact that the appellant disagrees with the court's factual determinations is not a basis for reversal. Factual findings will not be disturbed on appeal unless they are clearly erroneous."[57] Under that standard, a trial court's factual findings may not be reversed so long as they are plausible in light of the record viewed in its entirety.[58]

C. Merits of Argument

The Court of Chancery correctly held that *Schnell* "does not apply in this

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[56] *DV Realty Advisors LLC v. Policemen's Annuity & Benefit Fund of Chi., Ill.*, 75 A.3d 101, 108 (Del. 2013).

[57] *Brennan v. Abrams*, 215 A.3d 1283, 2019 WL 3883733, at *1 (Del. Aug. 16, 2019) (TABLE).

[58] *Banther v. State*, 823 A.2d 467, 483 (Del. 2003).

case."[59] Coster contests the Court of Chancery's determination that *Schnell* invalidates board action in the stockholder-franchise context only "in the limited scenario wherein the directors have no good faith basis" for their decision.[60] Coster also argues that the Court of Chancery erred in concluding that the UIP Board had an "equitable purpose" in approving the Stock Sale and mooting the Custodian Action. For the reasons set forth in the Court of Chancery's well-reasoned opinion and below, the Court should affirm.

1. The Court of Chancery Correctly Held That, in the Stockholder-Franchise Context, Schnell Applies Only Where There Was No Good Faith Basis for the Contested Board Action

Coster's arguments for application of *Schnell*, despite the finding that the Board acted in good faith, are inconsistent with this Court's decision in this case, and with the basic holding of *Blasius*, which this Court approved in *Liquid Audio*.[61] *Blasius* – which applies only where there is a *primary* (inequitable) purpose of entrenchment – would never apply if any inequitable purpose whatsoever, even in the context of other good faith motives, triggered *Schnell* and invalidation of the disputed transaction, as Coster now argues.

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[59] 2d Op. 22.

[60] *Id.* at 19.

[61] *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003); *Coster*, 255 A.3d at 962.

Although this Court in its Appellate Decision suggested certain factual findings that could support a conclusion that the UIP Board approved the Stock Sale for "inequitable reasons," it also noted several prior factual findings inconsistent with that view, and emphasized its "deferential standard of review on appeal" regarding the Court of Chancery's factual findings.[62] Despite its view that at least some factual findings evidenced "inequitable reasons" motivating the Board's approval of the Stock Sale, this Court did not direct the entry of judgment for Coster, cancelling the Stock Sale, but rather, deferred to the Court of Chancery and directed the court to engage in not just an analysis under *Schnell*, but a "*Schnell/Blasius* review."[63] The trial court followed this Court's instructions and properly determined that the Stock Sale passed muster under both standards.

a. The Court of Chancery Correctly Defined the Scope of Schnell's Application in the Stockholder-Franchise Context

In determining the proper scope of its review under *Schnell*, the Court of Chancery described the difficulty in applying *Schnell*'s holding as a standard of review, noting that application of a *per se* rule invalidating any potentially inequitable conduct would be "inflexible" and could result in "potentially harsh

[62] *Coster*, 255 A.3d at 963-64.

[63] *Id.* at 964.

consequences" in a modern context.[64] The trial court further noted that *Schnell* itself fails to define the universe of potentially "inequitable purposes" justifying the invalidation of otherwise legal board action.[65] In light of the "potentially harsh consequences," the Court of Chancery particularly relied on this Court's repeated instructions that *Schnell* should "be invoked sparingly."[66] Indeed, as this Court noted, the court in *Blasius* determined that "*Schnell* did not apply when the board acts in good faith[.]"[67]

b. This Court Should Affirm the Court of Chancery's Holding that Board Actions in the Stockholder-Franchise Context Fail Schnell Only Where the Board Had No Good Faith Basis for Its Conduct

In support of her contention that the Court of Chancery erred in holding that *Schnell* invalidates board action only in the limited scenario where the board had no good faith motivation, Coster points to language in *Blasius*, where the Court of

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[64] 2d Op. 13-14.

[65] *Id.* at 15.

[66] *Id.* at 14, 14 n.51; *see also, e.g.*, *Ala. By-Prods. Corp. v. Neal*, 588 A.2d 255, 258 n.1 (Del. 1991) (holding that while *Schnell* "is an important part of our jurisprudence, its application, or that of similar concepts, should be reserved for those instances that threaten the fabric of the law, or which by an improper manipulation of the law, would deprive a person of a clear right."); *In re WeWork Litig.*, 250 A.3d 976, 996 (Del. Ch. 2020) (providing that "'case law is indicative of a healthy inclination on the part of the judiciary to employ the *Schnell* principle of 'legal but inequitable' only sparingly,' and typically does so only when 'inequitable conduct has occurred but is not plainly remediable under conventional fiduciary doctrines'").

[67] *Coster*, 255 A.3d at 962.

Chancery found that *Schnell* was inapplicable because it "[could not] conclude that the board was acting out of a self-interested motive ***in any important respect***" when approving the board expansion action at issue.[68] It is of course correct that *Schnell* addresses situations where a board acts with a self-interested/inequitable motive: if there is no such inequitable motive at all, then *Schnell* does not apply in the first instance. But Coster stretches this language to argue that rather than articulating a ***necessary*** factor for application of *Schnell*, it was articulating a ***sufficient*** basis for triggering invalidation under *Schnell*.[69] Coster also ignores other language in *Blasius*, as noted by this Court, holding that *Schnell* does *not* apply when the board acts in good faith, even with a self-interested, inequitable motive.[70] This analysis, and the thorough and thoughtful way in which the Court of Chancery synthesized these principles, appropriately recognizes that board motivations are multi-dimensional and complex, and that rigid application of rules invalidating actions made in good faith could result in destructive outcomes.

Coster's argument also wholly fails to address the Court of Chancery's detailed analysis of Delaware case law supporting its conclusion about the proper application of *Schnell*. The Court of Chancery provided an extensive explanation of

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[68] AOB 21 (citing *Blasius*, 564 A.2d at 658).
[69] AOB 21-24.
[70] *See Coster*, 255 A.3d at 962.

how its limited application of *Schnell* is both consistent with the "policy determination that *Schnell* be deployed sparingly," and with several prior rulings in which the Court of Chancery "discredited business justifications for board actions *as a predicate* to invalidating them under *Schnell*."[71] In sum, the Court of Chancery explained, correctly, that courts relying on *Schnell* to invalidate board action first as a factual matter rejected the board's purported "good faith" business justifications and found them instead to be pretextual – which is the opposite of the Court of Chancery's findings here.[72] Contrary to these holdings, Coster argues that the Stock Sale should be invalidated regardless of the Board's valid business justifications for its approval.[73] Coster offers no explanation for how her interpretation of *Schnell*

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[71] 2d Op. 19-20 (emphasis added), 20 n. 63; *see also, e.g.*, *WNH Invs., LLC v. Batzel*, 1995 WL 262248, at *6 (Del. Ch. Apr. 28, 1995) (holding that a board's "justification for [a] stock issuance is pretextual" because the court could not "accept the contention that the timing and effect of the dilutive issuance was coincidental" and the "circumstances compel the conclusion that the purpose of the dilutive issuance was to defeat the challenge to the board's control"); *Phillips v. Insituform of N. Am., Inc.*, 1987 WL 16285, at *8 (Del. Ch. Aug. 27, 1987) (observing that "the record supplies scant grounds to suppose that an affirmative injury to the corporation was to be reasonably apprehended," and concluding that "the board acted . . . ***not to save the company from a threatened injury***, but to change the capital structure of the firm so that it would be fairer to the owners of 86% of the company's equity and would make raising additional capital easier") (emphasis added).

[72] *Id.*

[73] AOB 22-24; *but see* 2d Op. 26-28 (detailing appropriate justifications for Stock Sale).

may stand when it is wholly inconsistent with this prior, settled precedent, including *Blasius*.[74]

c. The Court of Chancery's Factual Findings Establish that the UIP Board Had Good Faith Motivations to Approve the Stock Sale

As determined by the Court of Chancery, the Board had a "good faith basis" for approving the Stock Sale, and was "motivated to advance the best interests of UIP."[75] Those interests included, as found in the post-trial decision, rewarding and retaining Bonnell as an essential employee, implementing a succession plan that Wout had favored, and mooting the Custodian Action to avoid any risk of default under some of the Company's key contracts.[76] As previously affirmed by this Court, despite the Board's mix of motivations (including those the Court of Chancery described as "problematic"), the Stock Sale was nevertheless effected through a process that was entirely fair to both the Company and its shareholders. Those same findings establish that the Board had a good faith basis to approve the Stock Sale.

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[74] Coster's argument that the Chancellor's limited application of *Schnell* relegates it to an equivalent of the "highly deferential" business judgment rule misunderstands the Court of Chancery's findings. (*See* AOB 23). Under the analysis articulated by the Court of Chancery, even where a board action in the stockholder-franchise context passes *Schnell* review, it must still pass the onerous "compelling justification" standard under *Blasius* to survive judicial scrutiny.

[75] 2d Op. 21.

[76] 1st Op. *12.

The Court of Chancery's factual findings flatly contradict Coster's representations that the Board was motivated in an "important respect" by inequitable purposes. For example, as to Coster's contention that the Stock Sale furthered Schwat's "personal interests," the uncontested facts establish that, although the Stock Sale "eliminated Plaintiff's ability to use her 50% interest to block stockholder action" it "also had that effect on Schwat."[77] The Court of Chancery's factual findings also establish that, contrary to Coster's assertions, Bonnell was not simply a favored follower of Schwat.[78] Rather, as Coster herself testified, Wout also wanted Bonnell to become a part owner of the Company.[79]

Indeed, Bonnell "enjoyed a particularly close relationship with Wout, who mentored Bonnell and groomed him to take his position in the Company."[80] The Stock Sale was, in truth, the implementation of a succession plan negotiated and agreed upon by Schwat, Wout, and Bonnell "on a clear day before any deadlock loomed."[81] Moreover, the Stock Sale imposed "no future obligations on Schwat and Bonnell to vote as a block," meaning Bonnell could at any time "switch sides . . .

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[77] AOB 24-25; 2d Op. 27.
[78] *See* AOB 25.
[79] 2d Op. 10 n. 36 (citing Tr. 134:17-24).
[80] *Id.* at 10 n. 36 (citing 1st Op. at *2); *see also* B196-B199 [Tr. 417:6-420:5].
[81] *Id.* at 10.

and unite with [Coster] to Schwat's detriment."[82] Rather than evidencing self-interested motivations, the creation of a swing vote through the Stock Sale established that "Schwat clearly believed that the Custodian Action was a threat to the Company and that Bonnell was vital to the Company."[83]

To the extent Coster argues that the Stock Sale fails under *Schnell* because the Board was motivated to entrench itself in office and its justifications were pretextual, this is likewise contradicted by the Court of Chancery's factual findings. Indeed, the trial court expressly found that the Board's "desire to reward and retain an essential employee, implement an agreed-upon succession plan, and avoid value-destructive litigation were not," in the words of *Blasius*, "pretexts for entrenchment for selfish reasons."[84] Rather, the Defendants proved that these were "genuine motivations for their actions[.]"[85] Indeed, prior to Coster's filing of the Custodian Action, Schwat sought to come to an agreement with Coster on board candidates that all parties would find acceptable – Coster declined.[86] In short, even though Stock Sale may have had the effect of keeping the current Board in place, the factual

[82] *Id.* at 27.
[83] *Id.* at 27-28.
[84] 2d. Op. 10.
[85] *Id.* at 10-11.
[86] *Id.* at 8-9; *see also* B185-B186 [Tr. 356:2-357:3].

findings show that they had genuine, good faith, "compelling" reasons for taking the action they did.

2. The Court of Chancery Correctly Determined that the Reduction of Coster's Leverage as a 50% Shareholder Was Not Inequitable

Coster contends that the Court of Chancery's finding that the Board's approval of the Stock Sale "was an equitable purpose, in the sense of action that was in the best interest of the Company" was in error.[87] In support of this contention, Coster argues that a Board action is inequitable under *Schnell* where it is intended "to deprive a person of a clear right" and, here, that is what the Board did in approving the Stock Sale and mooting the Custodian Action.[88] Coster contends that the Court of Chancery erred in considering the interests of the Company in its "inequitable" inquiry, and should have focused solely on "whether the Stock Sale was inequitable to Coster."[89] But this argument misapprehends the proper (limited) application of *Schnell*, as articulated in *Blasius*.

In *Blasius*, the Court of Chancery found that, even though the board action at issue was ultimately a violation of the stockholders' voting rights, it nevertheless was not invalidated under *Schnell* because the Board held the "good faith belief" that

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[87] *See id.* at 23; AOB 28.
[88] AOB 29-30.
[89] *Id.*

the shareholders' proposed action would "cause great injury to the Company."[90] Consequently, under settled Delaware law, the Court of Chancery appropriately considered *the interests of the Company* – and the Board's beliefs regarding those interests – in conducting its *Schnell* analysis.

And, as noted above, if *Schnell* applies as Coster argues it does, *Blasius* would be superfluous. If any action intended to "impede shareholder voting rights" were invalid under *Schnell* solely because it deprives a person of a "clear right,"[91] then *Schnell* would invalidate every board action that could possibly be subject to *Blasius* review. Coster offers no justification for the Court to rewrite Delaware law this way and the Court should decline any such invitation.

[90] *Blasius*, 564 A.2d at 658.
[91] AOB 29.

II. THE COURT OF CHANCERY CORRECTLY FOUND THAT, UNDER BLASIUS, THE BOARD HAD A COMPELLING JUSTIFICATION FOR APPROVING THE STOCK SALE

A. Question Presented

Did the Court of Chancery correctly apply Delaware law in finding that, under *Blasius*, Defendants established a "compelling justification" for approving the Stock Sale? (2d Op. 26-28.)

B. Scope and Standard of Review

The Court's ruling that the Stock Sale satisfied the "compelling justification" standard under *Blasius* is a mixed question of law and fact. While the Court's legal conclusions are reviewed *de novo*, its factual findings are disregarded only where there is clear error.[92] "The fact that the appellant disagrees with the court's factual determinations is not a basis for reversal. Factual findings will not be disturbed on appeal unless they are clearly erroneous."[93] Under that standard, a trial court's factual findings may not be reversed so long as they are plausible in light of the record viewed in its entirety.[94]

C. Merits of Argument

Coster contends that the Court of Chancery's finding that the Defendants met their burden under *Blasius* to establish a "compelling justification" for approving the

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[92] *DV Realty Advisors*, 75 A.3d at 108.

[93] *Brennan*, 2019 WL 3883733, at *1.

[94] *Banther*, 823 A.2d at 483.

Stock Sale is an "outlier" under Delaware law premised on "several errors," and therefore should be overturned.[95] This analysis, however, fails to account for the "exceptionally unique circumstances of this case," as found by the trial court.[96] The Court of Chancery's decision should be affirmed.

1. The Court of Chancery's Blasius Holding Was Appropriate Given the Circumstances of this Case

Coster argues that, given the limited number of cases triggering *Blasius* review to date, and the strict nature of its "compelling justification" standard, the Court of Chancery's ruling in this case is an "outlier" in Delaware jurisprudence.[97] Coster further argues that the trial court's holding is "extreme" in that it permanently reduced Coster's ownership stake in UIP from one-half to one-third, along with her voting power.[98] Coster's implicit argument, of course, is that the Court of Chancery's ruling must be erroneous given the sparse number of cases passing *Blasius* review. These points are unfounded for two reasons.

First, although the *Blasius* standard is certainly onerous, it is not an ***insurmountable*** standard, as Coster implicitly argues. Indeed, the *Blasius* Court fashioned the standard precisely because it foresaw the potential for circumstances

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[95] AOB 32-33.
[96] 2d Op. 26-28.
[97] AOB 33-34.
[98] *Id.*

where board action may, in good faith, impede the shareholder franchise and nevertheless be appropriate, as it was here.[99]

Second, the solution fashioned by the Board in response to the threat posed by the Custodian Action was not "extreme" in the sense Coster argues. The Court of Chancery itself identified several far more prejudicial avenues through which the Board could have reached the same outcome and mooted the Custodian Action.[100] Instead, the Board proceeded with the plan conceived "on a clear day," prior to any deadlock, that had the effect of diluting the interests of not only Coster, but Schwat as well, which protected the Company from the justifiable threat Coster's actions posed.

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[99] *See Blasius*, 564 A.2d at 651 ("In my view, our inability to foresee now all of the future settings in which a board might, in good faith, paternalistically seek to thwart a shareholder vote, counsels against the adoption of a *per se* rule invalidating, in equity, every board action taken for the sole or primary purpose of thwarting a shareholder vote . . . [i]t may be that some set of facts would justify such extreme action.").

[100] *See* 2d Op. 28 (noting that "[t]he UIP board could have chosen more aggressive means of breaking the deadlock that would have favored Schwat," including issuing Schwat an additional share or options, claiming it as part of his compensation, or that they could have "created an employee stock option plan and empowered Schwat to vote those shares.").

2. The Court of Chancery Correctly Found that the Custodian Action was an Existential Crisis to the Company, and that Defendants Had a Compelling Justification for Approving the Stock Sale and Mooting the Custodian Action

Coster argues that the Court of Chancery's *Blasius* analysis would create precedent for "an easy work around" for a holdover board in the event of a deadlock. But this is inaccurate. Any disputed board action impeding the stockholder franchise remains subject to extensive scrutiny as to both the board's motivations and business justifications, as it was here. Given the "exceptionally unique circumstances of this case," the Court of Chancery correctly concluded that the Board's action was appropriate.[101] Coster's remaining assertions of error are unfounded, and her attempts to divorce the threat posed by the Custodian Action from the evaluation of the motivations for the Stock Sale were roundly – and appropriately – rejected by the trial court.

a. The Board Acted Appropriately in Mooting the Custodian Action by Approving the Stock Sale, and Was Not Obligated to Delay Pending an Outcome in the Custodian Action

As she has in prior briefing, Coster argues that, facing the harm to the business posed by the Custodian Action, the "proper course" was for the Defendants to sit on their hands, wait to present arguments against appointment of a custodian to the

[101] 2d. Op 26.

Court of Chancery, and hope for an outcome that would not injure the Company.[102] Coster reasons that, if a custodian appointment would have "materially harm[ed] UIP," then the Court of Chancery would have denied her petition.

Coster cites no authority for the premise that Defendants were obligated to delay the Stock Sale, and instead risk triggering "broad termination provisions in key contracts" that would "threaten a substantial portion of UIP's revenue" by waiting to argue the merits of a custodian appointment.[103] Coster even disputes the settled factual findings on which the Court of Chancery, in part, based its finding that Defendants had a compelling justification in approving the Stock Sale. Specifically, Coster asserts that the evidence did not support the Court of Chancery's findings regarding "(1) the business risks [to UIP] that Defendants sought to avoid, including jeopardizing key SPE contracts, and [(2)] chancing Bonnell's departure."[104]

Coster's attempts to challenge these findings fail. Most significantly, the Court of Chancery rendered both of these factual findings in its initial post-trial

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[102] AOB 34; *see also*, *e.g.*, B213-B262 [Plaintiff's 2020 Appellate Opening Brief, at 30]; B263-B299 [Plaintiff's Post-Remand Opening Brief, at 18].

[103] 2d Op. 26.

[104] AOB 35 (citing 2d Op. 29).

decision, and those findings were affirmed by this Court on appeal.[105] Consequently, it is the law of the case that the Custodian Action posed a substantial threat to the well-being of the Company, and that the Stock Sale was motivated in part to effect the prior promise of equity to Bonnell and keep him motivated to remain at the Company. Those factual findings are not subject to further review.[106]

Regardless, as to the threat to key SPE contracts posed by appointment of a custodian, Coster argues the Court of Chancery's factual finding was erroneous because no counterparty "actually threatened" to terminate a contract in the pendency of the Custodian Action.[107] Coster raised this argument both prior to the post-trial decision and again on remand, and both times the Court of Chancery completely, and appropriately, rejected Coster's contentions because it was "not

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[105] 1st Op. at *12 (holding that the appointment of a custodian would have "constituted an event of default under various SPE contracts" and therefore "threatened to cut off a substantial amount of UIP's revenue streams, justifying Defendants' efforts to moot the Custodian Action."); *See id.* at *3 (finding that, prior to negotiation of the succession plan and the promise of an equity stake, Bonnell was "exploring opportunities with other real estate firms") (citing B203 [Tr. 428:5-23]); *see Coster*, 255 A.3d at 959 (this Court noting that "the Court of Chancery fully supported its factual findings" in its post-trial decision, and that this Court would "not disturb this aspect of the [Court of Chancery's] decision.").

[106] *See Cede Co. v. Technicolor, Inc.*, 884 A.2d 26, 38 (Del. 2005) ("It is well-settled that when an appellate court remands for further proceedings, the trial court must proceed in accordance with the appellate court's mandate as well as the law of the case established on appeal." (footnote omitted)); *see also* 2d Op. 4 (citing *Cede* and noting that the factual findings in its initial post-trial decision are "the law of the case.").

[107] AOB 35-36.

unreasonable for [Defendants] to believe that a counterparty would exercise its contractually granted [termination] rights and thus harm the Company.[108]

Indeed, in its post-remand decision, the Court of Chancery noted the "weakness" of Coster's argument that "Defendants failed to prove that investors would exercise these [termination] rights" and concluded that, "[h]aving again reviewed . . . the contract excerpts in evidence," the court remained "convinced that appointment of a custodian would constitute a terminable event under many of the Company's agreements."[109] In short, the factual record is clear that appointment of a custodian posed an "existential threat" to the Company due to the termination clauses in key contracts, and Coster failed to adduce any contrary evidence at trial or in discovery.[110]

As to the Board's desire to retain Bonnell at UIP, Coster asserts that this is insufficient to establish a "compelling justification" under *Blasius* because there was

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[108] 1st Op. *12 n.190.

[109] 2d Op. 26 n. 81 (collecting evidence of broad termination provisions); *see also* B186-B187 [Tr. 357:23–358:1] (testifying that "the appointment of a custodian is a default under the majority of JV agreements we have with our partners"); B207 [Tr. 456:15–17] (testifying that "many of the operating agreements are specific that the appointment of a custodian is a default").

[110] Coster complains that Defendants "only provided and placed selected portions" of the SPE contracts "into evidence" – but Coster of course presents no evidence, nor could she, that Defendants failed to comply with any discovery requests or that she lacked every opportunity to investigate Defendants' contentions regarding the substance of the SPE contracts.

nothing "exigent" about a sale of equity to Bonnell.[111] But the sale of equity to Bonnell did not need to be "exigent" to establish a compelling justification for the sale. And even if exigency were required, here the exigency arose from the potential contract terminations that could result from the appointment of a custodian with the powers requested by Coster in the Custodian Action. As Defendants have always contended, the timing of the Stock Sale was motivated in large part by the Custodian Action – but the substance of the transaction was to honor the longstanding promise to Bonnell and to keep him motivated to remain with the Company long-term, given that he was viewed as essential to the Company's long-term survival.[112] It was these motivations, together, on which the Court of Chancery in part rested its finding that the Board had a compelling justification for approving the Stock Sale. And regardless, the undisputed facts show that, prior to the promise of an ultimate equity interest, Bonnell was actively looking at opportunities with other real estate firms.[113]

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[111] AOB 36.

[112] 2d Op. 5 (noting that, "as much as anything, the Stock Sale was motivated by [Schwat and Cox's] desire to keep their promise to Bonnell" and that "Bonnell was viewed as essential to the Company's survival"), 23 n. 70 (noting that timing of the Stock Sale suggests that it was motivated by the Custodian Action, "the form of the transaction corroborates the UIP directors' testimony that they were pursing multiple goals at once, including a genuine desire to reward and retain Bonnell and implement the succession plan that Wout had favored").

[113] 1st Op. at *3 (citing B203 [Tr. 428:5-23])

b. The Court of Chancery Correctly Credited Defendants in Responding to the Custodian Action on the Terms of Relief Requested by Coster

Coster argues that it was error for the trial court to consider the scope of relief that Coster sought in the Custodian Action in determining whether Defendants had a compelling justification in effectuating the Stock Sale.[114] Instead, Coster argues, the trial court should have taken into consideration only its "broad discretion" under § 226(a)(1) to circumscribe any custodian's powers.[115] In essence, Coster argues that the Court of Chancery (and now this Court) should be precluded from considering the actual threat posed by the Custodian Action, based on the relief that Coster herself framed and sought, and instead consider only the most limited possible relief available under the statute in determining whether the Board had a compelling justification to act.

The Court of Chancery succinctly addressed this argument on remand, correctly noting that Coster's "belated request to narrow the requested relief" solely to a custodian with limited, tie-breaking powers did not "eliminate the business risks posed by the Custodian Action ***at the time the UIP board approved the Stock Sale***."[116] This is because the Board necessarily had to consider the full spectrum of

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[114] AOB 37-38.

[115] *Id.*

[116] 2d Op. 9 n. 34 (emphasis added).

risks posed by the Custodian Action, including those demanded by Coster, in determining an appropriate response, and not solely the most limited possible outcome. To do otherwise would be contrary to the best interests of the Company.

To the extent Coster argues that permitting the underlying ruling to stand "guts the statutory remedy under § 226(a)(1)," that is demonstrably false.[117] As the trial court noted, the facts of this case are "exceptionally unique."[118] The Stock Sale was premised not only on the specifics of the SPE contracts, but also on, among other unique factors, a prior intention to make Bonnell a shareholder as determined on a "clear day" before any deadlock.[119]

3. The Court of Chancery Correctly Considered Evidence of Wout's Views on a Stock Sale to Bonnell, But That Evidence is Not Essential to the Chancery Court's Findings Under Blasius

Coster next contends that the Court of Chancery's *Blasius* analysis is flawed because it improperly considered testimony regarding Wout's wishes with respect to the Stock Sale.[120] This argument fails for two reasons.

First, it is inconsistent with Coster's own briefing, which repeatedly cites evidence regarding Wout's wishes on, among other subjects, the Company's

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[117] *See* AOB 38.
[118] *See* 2d. Op. 26.
[119] *Id.* at 10, 26
[120] AOB 38-39.

business model and operations, buyout negotiations, and the Stock Sale.[121] Coster, in effect, argues that consideration of evidence as to Wout's wishes is impermissible only when relied upon to reach a conclusion that is not in Coster's favor. Second, the Court of Chancery was correct in considering testimony evidencing that the sale of equity to Bonnell was a plan favored by all shareholders on a "clear day before any deadlock loomed,"[122] because that evidence speaks to the reasonableness of, and genuineness of the business justifications for, the Board's action.

Finally, regardless of these points, the finding that Wout favored a sale of equity to Bonnell is not ultimately determinative of whether the Board had a compelling justification to do so; the trial court identified numerous significant bases justifying the Board action, most significantly the threat a custodian with the powers requested by Coster posed to the business.[123]

[121] *See, e.g.*, AOB 6-7, 12-13.
[122] 2d Op. 10.
[123] *See* 2d. Op 26-28.

4. The Court of Chancery Appropriately Considered Coster's Motives in Making its Findings, and Coster Mischaracterizes the Context and Application of Those Findings

Coster asserts that the Court of Chancery further erred in that it "relied on what it determined was an improper motive by Coster for filing the Custodian Action," when determining whether Defendants had met a "compelling justification" under *Blasius*.[124] Specifically, Coster contends it was error for the trial court to find that (1) Coster brought the Custodian Action for the purposes of creating leverage in buyout negotiations, and (2) appointment of a custodian would not benefit Coster and was contrary to her interests. But Coster's argument mischaracterizes, or mis-contextualizes, the Court of Chancery's findings.

As to Coster's first contention, the Court of Chancery's finding regarding Coster's motivation in bringing the Custodian Action is referenced only in its initial factual recitation.[125] It is not referenced at all in the Court of Chancery's analysis in determining whether Defendants met their burden under *Blasius*, nor does Coster point to any portion of that analysis that she asserts is based upon that finding.[126] Accordingly, although Defendants believe that Coster's motivation in bringing the Custodian Action bears on the overall balance of the equities in this case, it was not

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[124] AOB 39.

[125] *See* 2d Op. 5, 8-9.

[126] *See generally, id.* at 22-31; AOB 39-43.

a basis for the trial court's *Blasius* analysis. Even if one were to read the trial court's findings on this point as a basis for its *Blasius* analysis, such findings are not essential to the Court of Chancery's ultimate determination that Defendants had a compelling justification for the Stock Sale.

As to Coster's second contention, her argument mis-contextualizes the Court of Chancery's finding that appointment of a custodian would not have been to Coster's benefit. The Court of Chancery found that "the UIP Board believed that the Custodian Action would cause defaults under the Company's key agreements and threaten the business. No one, including [Coster], would benefit from that outcome."[127] Contrary to Coster's assertion, this was not a *carte blanche* finding that Coster acted against her best interests in bringing the Custodian Action in the general sense. Rather, the Court of Chancery found that, if appointment of a custodian resulted in the outcome that the Board credibly feared, it would harm all stockholders, including Coster. This finding is beyond reasonable dispute – if the Company did ultimately lose a significant share of its contracts because of a custodian appointment, it would necessarily harm the business and the interests of the stockholders. Accordingly, there was no error.[128]

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[127] 2d Op. 23-24.

[128] Coster asserts, in a footnote, that Schwat's offer to vote for board nominees suggested by Coster if they had relevant industry experience was an unlawful

5. The Court of Chancery Correctly Held that the Stock Sale was Appropriately Tailored to Achieve its Primary Purpose of Mooting the Custodian Action

Finally, Coster asserts the Court of Chancery erred in finding that the Stock Sale was appropriately tailored to its primary purpose of mooting the Custodian Action. As examples of alternative means of mooting the Custodian Action, Coster first reasserts her prior argument that the Defendants could simply have waited for a hearing on the merits as to appointment of a custodian, and second asserts that a reasonably tailored means would have been for Schwat to simply agree with her nominees for additional directors and vote them into office. These proposed "means" are unserious.

The suggestion that Defendants simply wait for a hearing in the Custodian Action on the merits is illogical – the Board's primary purpose, as found by the Court of Chancery, was to moot the Custodian Action.[129] Allowing the Custodian Action to go forward was not a means of mooting it; such an outcome was precisely the opposite of the Board's goal. Regardless, Defendants were under no obligation to

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imposition of an industry-experience requirement prohibited by Delaware law. (AOB 42 n.130.) Schwat, of course, was imposing no such requirement, but instead offering a compromise to vote his shares – as is his right under Delaware law – in favor of a candidate of Coster's choice that had such experience. As the Court of Chancery noted, this was simply an offer by Schwat to "negotiate . . . over the board's composition." 2d Op. 8.

[129] 2d Op. 23.

wait for a hearing when one potential outcome "threatened to cut off a substantial amount of UIP's revenue streams."[130] Indeed, their duty to act in the best interest of the Company precluded them from doing so.

As to Coster's suggestion that Schwat could have simply agreed to her proposed nominees and expansion of the Board, that is simply no solution when Schwat reasonably felt that Board members should have relevant experience in the real estate industry. At bottom, the Court of Chancery conducted a thorough analysis of the record and correctly determined that the Stock Sale was an appropriately tailored means of meeting all of the Board's goals, including mooting the Custodian Action and the threat it posed to the Company, and providing equity to Bonnell.[131] Neither of the solutions suggested by Plaintiff achieved all of those ends.[132]

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[130] *Id.* at 5 (quoting 1st Op. *12).

[131] *See id.* at 23-28.

[132] Coster's assertion that the Court of Chancery conducted a "*volte face*" regarding the fact that the Stock Sale diluted both Schwat and Coster's voting shares misapprehends the post-trial decision. (*See* AOB 44.) The Court of Chancery did not "reject" this point, but instead found that other factors motivating Schwat to approve the Stock Sale mandated application of entire fairness review, even though both Schwat and Coster were equally diluted by the sale. (*See* 1st Op. 39-42). Consequently, there was no reversal of position in the Chancellor's consideration of this fact in the new context of its *Blasius* review.

III. IF THIS COURT CANCELS THE STOCK SALE, IT SHOULD REMAND THE CASE TO THE COURT OF CHANCERY FOR A DETERMINATION ON THE MERITS AS TO WHETHER APPOINTMENT OF A CUSTODIAN IS APPROPRIATE

A. Question Presented

If, despite the foregoing, the Court were to find that the Court of Chancery erred in determining that the Stock Sale passed judicial scrutiny under both *Schnell* and *Blasius*, and instead declared the Stock Sale invalid without further proceedings, should this Court's remand order also direct the Court of Chancery to appoint a custodian with the power to cast tie-breaking votes in the event of stockholder deadlock, or should the remand direct the Court of Chancery to rule upon whether to exercise its statutory discretion to appoint a custodian?

B. Scope and Standard of Review

The Court of Chancery's determination of whether to appoint a custodian pursuant to 8 *Del. C.* § 226(a)(1) is reviewed for abuse of discretion.[133] Under this standard, "the reviewing court may not substitute its own notions of what is right for those of the trial judge, if [her] judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness."[134]

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

[134] *Chavin v. Cope*, 243 A.2d 694, 695 (Del. 1968).

C. Merits of Argument

If this Court, despite the foregoing, were to decide to cancel the Stock Sale, this case should be remanded to the Court of Chancery for further consideration of Coster's request for appointment of a custodian. Under Delaware law, the Court of Chancery "*may*" appoint a custodian in the case of a shareholder deadlock. 8 *Del. C.* § 226(a). Consequently, this Court has recognized that "the appointment of a custodian is discretionary under Section 226(a)(1)."[135] As this Court noted in its prior decision in this case, even in the event of a shareholder deadlock, the Court of Chancery "may" – not "must" – appoint a custodian.[136] Accordingly, such a determination, if needed, should be left to the sound discretion of the Court of Chancery in light of the entire factual record, and not directed at this stage by this Court.

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[135] *Id.*; *see also, In re Arthur Treacher's Fish & Chips of Ft. Lauderdale, Inc.*, 386 A.2d 1162, 1166 (Del. Ch. 1978).

[136] *Coster*, 255 A.3d at 964; *see also*, *Miller v. Miller*, 2009 WL 554920, at *5 n.19 (Del. Ch. Feb. 17, 2009) (recognizing that "[d]eadlock, itself, is not an injustice").

CONCLUSION

For the reasons set forth above, the Opinion of the Court of Chancery should be affirmed.

BAYARD, PA

/s/ Elizabeth A. Powers
Stephen B. Brauerman (#4952)
Elizabeth A. Powers (#5522)
600 N. King Street, Suite 400
P.O. Box 25130
Wilmington, Delaware 19801
(302) 655-5000

Attorneys for Defendants Below, Appellees Steven Schwat, Schwat Realty, LLC, Peter Bonnell, Bonnell Realty, LLC, and Steven Cox

Of Counsel:

Deborah B. Baum
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth St., N.W.
Washington, D.C. 20036-3006
Tel: (202) 663-8772

SMITH KATZENSTEIN & JENKINS LLP

/s/ Neal C. Belgam
Neal C. Belgam (#2721)
Kelly A. Green (#4095)
Jason Z. Miller (#6310)
1000 West Street, Suite 1501
Wilmington, Delaware 19801
(302) 652-8400

Attorneys for Defendant Below, Appellee UIP Companies, Inc.

WORDS: 9,774

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, a true and correct copy of the Public Version of Appellees UIP Companies, Inc., Steven Schwat, and Schwat Realty LLC's Answering Brief has been served upon the following counsel of record via File & ServeXpress:

Max B. Walton
Kyle Evans Gay
Connolly Gallagher LLP
267 East Main Street
Newark, DE 19711

/s/ Elizabeth A Powers
Elizabeth A. Powers (#5522)