SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH **PART** 54
Justice

Index Number : 153375/2016
SHAWE, PHILIP
vs.
ELTING, ELIZABETH
SEQUENCE NUMBER : 002
DISMISSAL

INDEX NO. _____
MOTION DATE 5/3/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 37-68
Answering Affidavits — Exhibits _____ **No(s).** 69-72
Replying Affidavits _____ **No(s).** 74-78

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/29/17

SHIRLEY WERNER KORNREICH, J.S.C.

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PHILIP SHAWE,

Plaintiff,

-against-

ELIZABETH ELTING, KRAMER LEVIN NAFTALIS & FRANKEL, LLP, and RONALD S. GREENBERG,

Defendants.

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Index No.: 153375/2016
(The Elting Action)

DECISION & ORDER

SHIRLEY SHAWE, derivatively on behalf of Transperfect Global, Inc. and Transperfect Translations International, Inc.,

Plaintiff,

-against-

KIDRON CORPORATE ADVISORS LLC, MARK B. SEGALL, JOHN AND JANE DOES 1 THROUGH 10, whose true names are unknown,

Defendants,

-and-

TRANSPERFECT GLOBAL, INC., and TRANSPERFECT TRANSLATIONS INTERNATIONAL, INC.,

Nominal Parties.

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Index No.: 652482/2016
(The Kidron Action)

SHIRLEY SHAWE, derivatively on behalf of Transperfect Global, Inc. and Transperfect Translations International, Inc.,

Plaintiff,

-against-

CUSHMAN & WAKEFIELD and MICHAEL BURLANT,

Defendants,

Index No.: 652664/2016
(The Cushman Action)

-and-

TRANSPERFECT GLOBAL, INC., and
TRANSPERFECT TRANSLATIONS
INTERNATIONAL, INC.,

Nominal Parties.

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SHIRLEY WERNER KORNREICH, J.:

In motion sequence number 002 in each of the above captioned actions,[1] defendants move to dismiss the amended complaint. Plaintiffs oppose the motions, which are consolidated for disposition. For the reasons that follow, defendants' motions are granted.

I. Introduction

These cases concern the acrimonious disputes between Elizabeth Elting and Philip Shawe that resulted in the Delaware Court of Chancery (Bouchard, C.) ordering the forced sale of Transperfect, the company they co-founded in college. In a 104-page post-trial opinion dated August 13, 2015, Chancellor Bouchard appointed a custodian and ordered the company's sale because:

> the state of management of the corporation has devolved into one of complete dysfunction between Shawe and Elting, resulting in irretrievable deadlocks over significant matters that are causing the business to suffer and that are threatening the business with irreparable injury, notwithstanding its profitability to date. The stockholders of the corporation have stipulated to their inability to elect successor directors, and there is no prospect they will do so in the future. ... [A]ppointment of a custodian to sell the corporation, with a view toward maintaining the business as a going concern and maximizing value for the stockholders, affords the only just and viable remedy under the unique circumstances of this case.

In re Shawe & Elting LLC, 2015 WL 4874733, at *1 (Del Ch 2015) (the Post-Trial Decision); *see id.* at *32 ("I appoint [the custodian] to serve as a third director with the authority to vote on

[1] The court cites to documents filed on the New York State Courts Electronic Filing system (NYSCEF) in these actions with the citation "____ Action, Dkt. __" (e.g., Elting Action, Dkt. 1).

any matters on which Shawe and Elting cannot agree and which rise to the level **that he deems to be significant** to managing the Company's business and affairs.") (emphasis added). The Chancellor also dismissed, with prejudice, all of Shawe's breach of fiduciary duty claims against Elting on the ground of unclean hands. *See id.* at *36-38.

An extensive review of the Post-Trial Decision, with which the court assumes familiarity, makes it clear that while there are no angels in this case, Elting and Shawe are not on anything close to equal equitable footing. Simply put, the Post-Trial Decision was a massive win for Elting; it amounts to a worst-case-scenario loss for Shawe. Shawe's displeasure is manifest in his vigorous appeal to the Supreme Court of Delaware and political campaign to limit the Court of Chancery from ordering the sale of a profitable closely-held company.[2]

The three cases now before this court (in addition to others not at issue on the instant motions) represent some of Shawe's most recent collateral challenges to the loss he suffered in Delaware. They are replete with revisionist history that borders on downright frivolity. It is as if the Delaware proceedings, and its notable holdings, never occurred. Indeed, in addition to the damning substantive findings made against Shawe in the Post-Trial Decision, the Chancellor also issued a scathing, yet equally thorough decision dated July 20, 2016, in which Shawe was sanctioned for engaging in egregious litigation misconduct. The Chancellor explained that:

> clear evidence adduced at the sanctions hearing establishes that Shawe acted in bad faith and vexatiously during the course of the litigation in three respects: (1) by intentionally seeking to destroy information on his laptop computer after the Court had entered an order requiring him to provide the laptop for forensic discovery; (2) by, at a minimum, recklessly failing to take reasonable measures to safeguard evidence on his phone, which he regularly used to exchange text messages with employees and which was another important source of discovery; and (3) by repeatedly lying under oath—in interrogatory responses, at deposition,

[2] *See* Jeff Mordock, DELAWARE ONLINE, *TransPerfect Bill in Doubt After Senate Meeting* (Jun. 14, 2017); *see also* Jeff Mordock, DELAWARE ONLINE, *TransPerfect CEO Files Federal Lawsuit Against Delaware* (Mar. 20, 2017).

> at trial, and in a post-trial affidavit—to cover up aspects of his secret deletion of information from his laptop computer and extraction of information from the hard drive of Elting's computer.

In re Shawe & Elting LLC, 2016 WL 3951339, at *1 (Del Ch 2016) (the Sanctions Decision). The Chancellor wrote that "Shawe's actions obstructed discovery, concealed the truth, and impeded the administration of justice" and that "[h]e needlessly complicated and protracted these proceedings to Elting's prejudice, all while wasting scarce resources of the Court." *Id.* Shawe's misdeeds included surreptitiously obtaining access to Elting's computer and accessing her privileged communications with counsel during the pendency of the Delaware litigation. *See id.* at *2. The sanction imposed on Shawe for this and the litany of other serious misconduct detailed by the Chancellor was 33% of Elting's litigation expenses plus all of her expenses associated with the sanctions hearing. *See id.* at *20. The total amount of the sanction exceeded $7 million. *See In re Shawe & Elting LLC*, 2016 WL 5122738, at *3 (Del Ch Sep. 20, 2016).

After the instant actions were commenced, in separate decisions issued on February 13, 2017, the Supreme Court of Delaware affirmed both the Post-Trial Decision and the Sanctions Decision.[3] In affirming the Post-Trial Decision, the Supreme Court recounted "some of the highlights" of Shawe's malfeasance:

> • Shawe engaged in a secret campaign to spy on Elting and invade her privacy by **intercepting her mail, monitoring her phone calls, accessing her emails**

[3] The Post-Trial Decision was affirmed in a 4-1 decision, while the affirmance of the Sanctions Decision was unanimous. It should be noted that, in arguing about the scope of the custodian's authority here, Shaw misguidedly relies on Justice Valihura's dissenting opinion. This court, instead, relies on the plain language of the Chancellor's affirmed order appointing the custodian and the Supreme Court's majority opinion. Moreover, while Shaw has filed a petition for a writ of certiorari, the issues raised by that petition (e.g., the Constitutional arguments rejected by the Delaware Supreme Court as having been waived for failure to raise them before the Court of Chancery) have no bearing on the validity of the factual findings made by Chancellor, which were affirmed by the Delaware Supreme Court. Hence, for the purposes of this court's res judicata analysis, the relevant findings made in Delaware are final.

> **(including thousands of privileged communications with her counsel)**, and entering her locked office without permission on numerous occasions ...
>
> ...
>
> • Shawe sought to have Elting criminally prosecuted by referring to her as his ex-fiancée seventeen years after the fact when filing a "Domestic Incident Report" as a result of a seemingly minor altercation in her office.
>
> • Shawe disparaged Elting and tried to marginalize her within the Company by gratuitously disseminating a memorandum (on Gerber's letterhead) to employees in her own division accusing her of collusion and financial improprieties.
>
> • Shawe disparaged Elting publicly by unilaterally issuing a press release in the Company's name containing false and misleading statements.

Shawe v Elting, 157 A3d 152, 156-57 (Del 2017) (the Post-Trial Affirmance) (emphasis added; bullet points in original).

The Supreme Court further noted that the Chancellor:

> also made detailed findings about continuous acrimonious disputes over personal and business expenses, weekly if not daily temper tantrums, and "mutual hostaging" between the founders over proposed acquisitions, stockholder distributions, employee hiring, pay and bonuses, and office locations. The court also found that Shawe bullied Elting and those aligned with her, expressing his desire to "create constant pain" for Elting until she agreed with Shawe's plans. It was common for senior officers to be drawn into their disputes, who were then abused by threatened firings, substantial fines, inappropriate emails, and by withholding compensation and promotions.

Id. at 157. The Court, moreover, stated that the Chancellor "best captured the lengths that Shawe would go to harass Elting in its recounting of Elting's plane trip to Paris in 2014:

> On December 2, 2014, Elting boarded a red eye flight to Paris and discovered, to her surprise, that Shawe was seated across the aisle from her. Shawe claimed to have "no idea" she would be on the flight. In truth, Shawe previously learned that Elting would be on the flight and made arrangements to be seated next to her without her knowledge. ... I find Shawe's characterization of the incident as an attempt to extend an olive branch not to be credible. He did not deny telling Elting that he had "no idea" she would be on the flight, which was not true, and the smiley-face emoticon at the end of his text message [to his co-workers] suggests he was amused by yet another opportunity to harass Elting, who Shawe knew full well would not welcome his presence on the flight.

Id., quoting Post-Trial Decision, 2015 WL 4874733, at *23.

Also, in affirming the Sanctions Decision, the Supreme Court of Delaware noted that Shawe "gained access to approximately 19,000 of Elting's e-mails, including approximately **12,000 privileged communications** between her and her counsel." *Shawe v. Elting*, 157 A3d 142, 145 (Del 2017) (emphasis added). Simply put, the Supreme Court agreed with the Chancellor that Shawe's behavior was "unusually deplorable." *See id.*

It is against this backdrop that the court evaluates the three instant actions. That said, before the court delves into the merits, a brief explanation of the company's corporate structure is warranted. Transperfect Global, Inc. (TPG) is a Delaware corporation. Elting owns 50% of TPG; Shaw owns 49%; and Shawe's mother, Shirley Shawe (Shirley), owns the other 1%. TPG wholly owns Transperfect Translations International, Inc. (TPI), which is a New York corporation. "For most purposes, the distinction between TPG and its subsidiaries, including TPI, is not relevant and thus they are referred to collectively as the 'Company.'" Post-Trial Decision, 2015 WL 4874733, at *1. "The Company is one of the world's leading providers of translation, website localization, and litigation support services. It has 92 offices in 86 cities worldwide, employs more than 3,500 full-time employees, and maintains a network of more than 10,000 translators, editors and proofreaders working in approximately 170 different languages." *Id.*

Shortly after the Post-Trial Decision was issued, Shirley moved to intervene in the Delaware action to assert derivative claims (many of which she now asserts in the instant actions). By order dated September 2, 2015, the Chancellor denied the motion given Shirley's

extensive participation in her son's litigation. *See Shawe v Elting*, 2015 WL 5167835 (Del Ch 2015) (the Intervention Decision). He explained:

> [Shirley] argues that because Shawe was not properly able to represent her interests, it is appropriate to dismiss the derivative claims with prejudice only as to him, "so that the dismissal does not have preclusive effect on other stockholders." To be clear, Shawe and Elting account for 99% of the Company's shares. The only other stockholder conceivably in the mix is [Shirley]. Although denial of the opportunity to intervene would prejudice Shirley]'s ability to press a Rule 59(e) motion in the hopes of preserving her ability to relitigate the derivative claims, such prejudice should be considered within the practical reality that stockholders holding 99% of the Company's shares already have fully litigated those claims.
>
> ...
>
> [T]he totality of the circumstances weighs decisively against permitting intervention at this late date. In short, I am hard-pressed to see any equity to affording [Shirley] the opportunity to seek a "do-over" at the last minute, much less how any manifest injustice would result from depriving her of the chance to do so, where enormous private and judicial resources have been expended to resolve the derivative claims in a case in which holders of 99% of the Company's stock fully litigated the issues and [Shirley] was an active participant.

Id. at *3-4.

The Delaware Supreme Court affirmed, holding that Shirley stands in her son's shoes, and, thus, is bound by all of the holdings in the Delaware action. *See* Post-Trial Affirmance, 157 A3d at 169 ("We agree with the Court of Chancery that Shirley Shawe's active participation in two of the three 'coordinated and functionally consolidated' actions before the Court of Chancery put her on notice that the claims could be dismissed based on Shawe's unclean hands. The court also found that Shawe functionally represented Shirley Shawe's ownership interest in the Company. Thus, **she is bound by the dismissal with prejudice of the derivative claims brought by Shawe**.") (emphasis added).

II. Allegations & Procedural History

A. The Elting Action

Shawe commenced the Elting Action by filing his original complaint on April 21, 2016. He filed an amended complaint on June 3, 2016, in which he asserts causes of action (1) under New York Judiciary Law § 487 against Ronald Greenberg and his law firm, Kramer Levin Naftalis & Frankel, LLP (Kramer Levin), which represented Elting in the underlying litigation; and (2) for malicious prosecution against Elting, Greenberg, and Kramer Levin. *See* Elting Action, Dkt. 33.

By way of further background, in addition to the Delaware litigation, on May 8, 2014, Elting, represented by Greenberg and Kramer Levin, commenced an action in this court seeking redress, *inter alia*, for Shawe locking Elting and the company's then-treasurer, Gale Boodram, out of the company's payroll system. *See Elting v Shawe*, Index No. 651423/2014 (Sup Ct, NY County) (the 2014 Action). The 2014 Action was assigned to Justice Schweitzer, and was later reassigned to this part after Justice Schweitzer's retirement. The 2014 Action is currently stayed pursuant to an order issued by this court on September 17, 2015 (2014 Action, Dkt. 725) because it will be mooted after the Delaware proceedings finally conclude.[4]

Immediately after filing the 2014 Action, Elting moved by order to show cause (OSC) for a temporary restraining order (TRO) and preliminary injunction to, among other things, restrain Shawe from being involved with the company's payroll. Elting's OSC was referred to Justice Scarpulla, who issued a TRO on May 8, 2014 [*see* 2014 Action, Dkt. 82], which Justice

[4] To the extent Shaw indicates in his briefs an intention to recommence that litigation in earnest, it is the court's hope that this decision will dissuade him from doing so. As explained herein, while plaintiffs are not being sanctioned for filing these borderline frivolous lawsuits, it seems implausible to articulate a non-frivolous basis for Shawe to maintain his claims in the 2014 Action at this juncture.

Schweitzer modified after a June 26, 2014 oral argument, though he refused to vacate the portion of the TRO relating to the company's payroll. *See* Elting Action, Dkt. 45 (6/26/14 Tr.).[5] However, shortly thereafter, by order dated August 4, 2014, Justice Schweitzer vacated the TRO and denied the preliminary injunction motion. *See* 2014 Action, Dkt. 522.

In the Elting Action, Shawe complains that Elting and her counsel lied about certain facts to make it appear that an injunction was necessary. In particular, Elting's counsel represented that Boodram was locked out of the payroll system, when, in fact, she had telephone access. Her counsel also allegedly misrepresented the company's ownership structure. This court will not delve deeply into these issues because they were the subject of extensive briefing on a sanctions motion granted by Justice Schweitzer in an order dated December 22, 2014 (2014 Action, Dkt. 665), which was reversed by the Appellate Division on June 30, 2015 because "it was defendant [i.e., Shawe], not plaintiff [i.e. Elting], who discovered plaintiff's misstatements in her complaint, and that defendant, rather than notifying plaintiff or the court of the misstatements, moved to dismiss the complaint." *See Elting v Shawe*, 129 AD3d 648, 648-49 (1st Dept 2015). Critically, the Appellate Division held that "the misstatements, while inaccurate, **are not material**." *Id.* at 649 (emphasis added).

Prior to that Appellate Division decision being issued, but after the Elting Action was reassigned to this part, in a cross-motion filed on January 23, 2015, Shawe moved to renew his sanctions motion (i.e., to ask for additional sanctions). The court denied the cross-motion by order dated February 10, 2015 (2014 Action, Dkt. 710), and the Appellate Division affirmed on February 16, 2016. *See Elting v Shawe*, 136 AD3d 536 (1st Dept 2016). The Appellate Division again emphasized the immateriality of the representations of Elting and her counsel:

[5] Other portions of the motion and TRO (e.g., the appointment of a Special Master) are not germane to this decision.

> While the statement by plaintiff's counsel that both sides had equal access to ADP, the company's payroll administrator, is not strictly true, **it is not materially false**. It is true, as the subsequent deposition testimony makes clear, that plaintiff and her assistant had telephone access and higher administrative and security powers than defendant and his team. However, the gravamen of the underlying dispute is whether the parties each had access to the ADP payroll system, which is accessed through the Internet; the deposition testimony establishes that they did. **In the absence of a material misstatement of fact**, the motion court providently exercised its discretion in denying the motion to renew defendant's motion for sanctions. **Because the misstatement is not material**, there is no need to consider whether the motion to renew should be granted to avoid substantive unfairness.

Id. at 536-37 (emphasis added; internal citation omitted). Notwithstanding the Appellate Division twice holding that sanctions against Elting and her counsel are not warranted because the alleged misrepresentations in procuring the TRO were not material, Shawe filed the Elting Action to yet again seek redress for these misrepresentations. As explained herein, this is far more of an abuse of process than the immaterial accusations Shawe lodges against Elting. It is res judicata that the representations made to procure the TRO do not warrant adverse consequences.

Shawe also asserts claims based on Elting having supposedly "cooked up a bogus payroll dispute to obtain a TRO to gain leverage in buy-out negotiation." *See* Elting Action, Dkt. 66 at 20. However, this allegation, which was a theory at the heart of Shawe's litigation strategy in Delaware, was expressly rejected by the Chancellor. He explained:

> **I reject Shawe's defense that Elting has manufactured the deadlocks described above simply to facilitate a sale of the Company and liquidate her interest in it**. The record does show that Elting has expressed a desire to be bought out and acted improperly at times to pursue that goal. It also shows that she and Shawe both engaged in "mutual hostaging" over specific hiring decisions, employee compensation, outside counsel payments, office leases, acquisition candidates, and other matters (mostly routine in nature) as they each sought to advance their own agendas within the Company. That said, this is not a case where a director has "sought to create a deadlock by refusing to consider any issue" until the deadlock is resolved. It cannot be legitimately disputed in my judgment that the matters discussed above reflect genuine, good faith divisions

> between Shawe and Elting of a fundamental and systemic nature over how the Company should be managed.

Post-Trial Decision, 2015 WL 4874733, at *28 (emphasis added). Hence, the fundamental claim underpinning all three of the instant lawsuits was rejected by the Chancellor. Therefore, as explained below, this claim cannot form the basis for any of the causes of action asserted here by Shawe and Shirley. In fact, while the payroll incident with Boodrum was extensively addressed in the Post-Trial Decision, that incident, like all of the others cited by Shawe (such as the alleged backdated Kidron retainer agreement and Elting's supposed litigation misconduct), did not give rise to any liability on the part of Elting.

Finally, Shawe asserts a claim under Judiciary Law § 487 based on a defamation counterclaim Elting filed on July 16, 2014 in another action commenced by Shawe (and still pending in a non-commercial part), in which he alleged that Elting assaulted him. *See Shawe v Elting*, Index No. 155890/2014, Dkt. 22 at 14-16 (Sup Ct, NY County). This claim borders on the frivolous. On June 10, 2014, "Shawe went to Elting's office to confront her about [a] tax distribution." Post-Trial Decision, 2015 WL 4874733, at *20. "According to Elting, Shawe would not leave her office despite repeated requests and blocked her from closing the door by putting his foot in it, at which point Elting tried to move it with [her] foot.". *Id.* (citation and quotation marks omitted). "Curiously, while his foot was in the door, Shawe called one of his attorneys from Sullivan & Cromwell, rather than focus on resolving the situation at hand (i.e., removing his foot from the door)." *Id.* The very next day:

> On June 11, 2014, Shawe filed a "Domestic Incident Report" in which he accused Elting of pushing him and kicking him in the ankle the previous day. In a parenthetical at the very end of the report, **Shawe identified Elting as his ex-fiancée, even though their engagement ended seventeen years earlier, apparently to ensure that the matter would be treated as a domestic violence incident and require Elting's arrest**. Shawe's denial of reporting the incident in this manner to have Elting arrested is not credible. The police called Elting the

> next day and told her she was going to be arrested for assault and battery. After Elting's lawyers intervened, the charges were dropped, but Shawe filed a civil tort case against her that remains pending.

Id. at *21.

Shawe now complains that, before alleging in his tort case that there was an active police investigation, Elting's counsel should have informed him that they knew that, by June 18, 2014, the police had decided not to arrest Elting. Shawe cynically maintains that, notwithstanding his deceptive reporting of the alleged assault to the police, the failure of Elting's counsel to notify him of the police decision amounts to egregious conduct sufficient to give rise to a claim under section 487. As explained below, he is wrong.

B. The Kidron Action

Shawe's mother, Shirley, commenced the Kidron Action on May 6, 2017. She filed an amended complaint on January 27, 2017, in which she asserts double derivative claims[6] (brought as a shareholder of TPG on behalf of its wholly owned subsidiary, TPI) for aiding and abetting breach of fiduciary duty against defendants Kidron Corporate Advisors LLC (Kidron) and Mark Segall (collectively, the Kidron Defendants), a co-owner and director of Kidron. *See* Kidron Action, Dkt. 22. The Kidron Defendants are alleged to have aided and abetted Elting's fiduciary duty breaches. They provided corporate advisory services to the Company, and are alleged to have aided Elting's supposed "scheme" of manufacturing deadlock – a claim that, as noted, was rejected by the Chancellor. As discussed, all of Shawe's claims against Elting for breaching her

[6] "A 'double derivative' action is a derivative action maintained by the shareholders of a parent corporation or holding company on behalf of a subsidiary company." *Sternberg v O'Neil*, 550 A2d 1105, 1107 n.1 (Del 1988); *see Pokoik v 575 Realties, Inc.*, 143 AD3d 487, 489 (1st Dept 2016) ("where the parent controls the subsidiary, a shareholder may bring a 'double' derivative action not only for wrongs inflicted directly on the corporation in which he holds stock, but for wrongs done to that corporation's subsidiaries which make indirect, but nonetheless real, impact upon the parent corporation and its stockholders.") (citation and quotation marks omitted).

fiduciary duties were dismissed with prejudice by the Chancellor. Moreover, Shirley's motion to intervene in the Delaware action to assert these claims was denied, and she, as discussed, is bound by the with-prejudice dismissal of such claims.

It should be noted that the involvement of the Kidron Defendants was addressed in the Post-Trial Decision. Therefore, there is no question that all claims regarding the Kidron Defendants were either actually litigated or could have been litigated in Delaware. For this reason, Shirley is estopped from asserting aiding and abetting claims against the Kidron Defendants that are predicated on underlying breaches of fiduciary duty claims that were dismissed with prejudice or which could have been asserted in Delaware.

C. The Cushman Action

Shirley commenced the Cushman Action on May 18, 2016, and filed an amended complaint on January 27, 2017. *See* Cushman Action, Dkt. 15. Like the Kidron Action, the claims asserted in the Cushman Action are double derivative. The amended complaint contains four causes of action: (1) breach of fiduciary duty against defendant Michael Burlant (Elting's husband), an executive director of defendant Cushman & Wakefield, Inc. (Cushman) (collectively, the Cushman Defendants); (2) aiding and abetting Elting's breach of fiduciary duty, asserted against Burlant; (3) prima facie tort, asserted against Burlant; and (4) respondeat superior liability on the forgoing three claims, asserted against Cushman. These causes of action all relate to the allegation that Burlant, who was retained to help the Company find new office space in London, scuttled potential lease opportunities to aid Elting obtain leverage in her disputes with Shawe, thereby causing the Company to lease inferior office space, which supposedly impeded its work. The court will not further address these claims because, like the claims asserted in the Kidron Action, they were dismissed with prejudice or could have been

litigated in Delaware. Burlant's involvement and the London lease issue were addressed by the Chancellor. *See Post-Trial Decision*, 2015 WL 4874733, at *20. Notably, Shawe's hostility toward Burlant demonstrates his willingness to frivolously retaliate against him. *See id.* at *10 ("Just hours after learning that Elting had retained Kramer Levin, Shawe retaliated by informing [Cushman], the Company's real estate broker for twenty years, that it could 'no longer represent [the Company].' It was obvious retaliation because [Cushman] employed Elting's husband, Michael Burlant, and because the record does not reflect any business justification for Shawe's statement.")

D. The Instant Motions

The court reserved on the instant motions to dismiss the amended complaints in all three cases after oral argument. *See* Elting Action, Dkt. 85 (3/7/17 Tr.).[7] For the reasons set forth below, the court finds the claims in these cases to be infirm by virtue of the rulings of the Delaware courts and the Appellate Division. Moreover, even if that were not so, the double derivative claims in Kidron and Cushman Actions cannot be maintained by Shirley due to her failure to plead demand futility because a majority of the eligible, disinterested directors (Shawe and the court-appointed custodian) could have voted to authorize those actions. Since demand would not have been futile and because no so such demand was made, Shirly lacks standing to assert her double derivative claims. If the court appointed custodian would have believed that these actions are not frivolous and are likely to add value to the company (i.e., they would lead to a greater sale price), the court must assume he would comport with his duty to exercise his

[7] Oral argument regarding the amended complaint in the Elting Action and on the original complaints in the Kidron and Cushman Actions was supposed to occur on December 20, 2016, but was adjourned to March 7, 2017. In the interim, Shirley filed amended complaints in the Kidron and Cushman Actions. New briefing on those amended complaints was filed prior to oral argument. The other major development that occurred after the originally scheduled argument date was, as noted, the affirmance of the Chancellor's decisions on February 13, 2017.

business judgment in deciding whether to approve the filing of these claims. However, given the claims' clear lack of merit and borderline frivolity, it is unsurprising that Shirley did not put the issue to the custodian.

III. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. The Elting Action

Shawe cites no authority, nor is the court aware of any, that supports the proposition that a claim under Judiciary Law § 487 or for malicious prosecution may be based on conduct that a court – let alone a higher court such as the Appellate Division – has already adjudicated not to warrant sanctions. It is well settled that to state a claim under Judiciary Law § 487, the alleged conduct must "'show either a deceit that reaches the level of **egregious** conduct or a chronic and **extreme** pattern of behavior on the part of' the defendant attorneys." *Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 (1st Dept 2015) (emphasis added), quoting *Wailes v Tel Networks USA, LLC*, 116 AD3d 625, 626 (1st Dept 2014). The alleged misrepresentations and omissions were found by the Appellate Division to be too immaterial to warrant the imposition of sanctions. An immaterial misrepresentation does not rise to the level of egregiousness necessary to give rise to liability under Judiciary Law § 487. *See Melcher v Greenberg Traurig LLP*, 135 AD3d 547, 552 (1st Dept 2016) ("the plaintiff in a section 487 case may recover the legal expenses incurred as a proximate result of a **material** misrepresentation in a prior action.") (empahsis added).

Likewise, the findings of immateriality by the Appellate Division defeat Shawe's malicious prosecution claim. To state a claim for malicious prosecution, the plaintiff must plead "each of the following elements: '(1) the commencement or continuation of a ... proceeding by the defendant against the plaintiff, (2) the termination of the proceeding **in favor of the [plaintiff]**, (3) **the absence of probable cause** for the ... proceeding and (4) actual malice.'" *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (emphasis added), quoting *Broughton v State*, 37 NY2d 451, 457 (1975); *see Engel v CBS, Inc.*, 93 NY2d 195, 204 (1999) ("prov[ing] an entire lack of probable cause in the prior proceeding ... is no easy feat.").

Leaving aside the parties' disputes about when the relevant action's termination occurred, Shawe cannot point to any action that was terminated in his favor. As noted, he lost in Delaware. And while it is true that he was successful in having the TRO vacated, there has never been a determination that the TRO was obtained by means so improper as to warrant liability on the part of the movant. On the contrary, as discussed, the Appellate Division has already ruled on the lack of materiality of the representations and omissions made by Elting and her counsel. Further, given the finding that Shawe was impeding Elting's and Boodram's ability to normally access the payroll system over the internet, there was probable cause to seek an injunction. This precludes a claim for malicious prosecution.

Finally, it is true that Shawe's claim regarding Elting's alleged failure to disclose the status of the police investigation has not been adjudicated by another court. It also is true that it is cynical for Shawe to complain about Elting misrepresenting the status of that case when, in fact, it was Shawe that was found by the Chancellor to have done just that by issuing a blatantly false and misleading press release on behalf of the Company announcing his purported victory. *See* Post-Trial Decision, 2015 WL 4874733, at *22. Regardless, in considering the claim on a blank slate, the court finds it to be infirm. The court does not believe a section 487 claim may be based on an omission where the truth could have been discovered by Shawe with minimal diligence. Shawe does not claim to have confirmed the status of the police investigation into Elting before making allegations that form the basis of Elting's defamation claim (the court, to be clear, is not opining on the merits of that claim). And even if the court were inclined to find fault with Kramer Levin's omissions, the court finds that such silence, especially in the context of Shawe's own conduct, does not rise to a sufficiently extreme or egregious level to state a claim under section 487.

C. The Kidron & Cushman Actions

These actions are dismissed because the double derivative claims asserted by Shirley are barred by the doctrines of res judicata and collateral estoppel and, even if they were not, they would be dismissed for failure to plead demand futility.[8]

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 (2008), quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 (1999). Similarly, "the doctrine of collateral estoppel (or issue preclusion)[9] is rooted in principles of fairness [and] ... prevent[s] a party from relitigating an [identical] issue decided against that party in a prior adjudication."). *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 226 (2011) (citations and quotation marks omitted). Simply put, a "party [that] had a full and fair opportunity to litigate [an] issue" may not later relitigate the issue in a subsequent action. *Vera v Low Income Mktg. Corp.*, 145 AD3d 509, 510 (1st Dept 2016), citing *Kaufman v*

[8] Consequently, the court will not reach defendants' forum non conveniens arguments. Suffice it to say that it strains credulity to believe that the claims plaintiffs asserted in these cases would have been met with much success before the Chancellor in light his previous rulings. It is evident that the Chancellor, understandably, has grown tired of Shawe's litigation tactics. *See In re TransPerfect Global, Inc.*, 2017 WL 923457, at *1 (Del Ch Mar. 8, 2017) (criticizing Shawe's violation of the Chancellor's order and holding that Shawe's "motion request is frivolous on its face and will not be entertained."). Nor will the court address the respondeat superior claim against Cushman, which is mooted by the dismissal of the claims asserted against Segall.

[9] While collateral estoppel is the traditional name of the doctrine, modern courts are more inclined to use the term "issue preclusion." *See Bravo-Fernandez v United States*, 137 SCt 352, 356 n.1 (2016), citing *Yeager v United States*, 557 US 110, 120 n.4 (2009) ("Currently, the more descriptive term 'issue preclusion' is often used in lieu of 'collateral estoppel.'").

Eli Lilly & Co., 65 NY2d 449, 456 (1985). It is clear, as discussed above, that the major impetus of Shirley's lawsuits is the relitigation of matters decided in the Delaware actions.

That said, while New York law embraces many well settled principals of claim and issue preclusion, New York law does not actually govern the preclusive effect of the Delaware actions. That is because "New York courts apply the law of the rendering jurisdiction to determine the preclusive effect of the decisions of sister states." *Bruno v Bruno*, 83 AD3d 165, 169 (1st Dept 2011), citing *Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 204 (1985) ("The full faith and credit clause of the Federal Constitution requires the courts of each State to give to the judgments of other States the same conclusive effect between the parties as such judgments are given in the States in which they are rendered.");[10] *see Spectris Inc. v. 1997 Milton B. Hollander Family Trust*, 138 AD3d 626 (1st Dept 2016) ("The res judicata effect of a judgment is determined by the law of the rendering jurisdiction."). Thus, this court must look to Delaware's claim and issue preclusion law, and, similarly, look to Delaware law to determine the meaning and implications of the Chancellor's with-prejudice dismissal of the fiduciary duty claims that either are identical to or are a predicate of Shirley's aiding and abetting claims. *See Grewal v DHL Exp. (USA), Inc.*, 149 AD3d 450 (1st Dept 2017) (looking to Utah law to determine issue preclusion implications of dismissal with prejudice by Utah court).

[10] The Delaware courts have also recognized the Constitutional requirement of looking to the law of the jurisdiction that issued the judgment when determining the claim and issue preclusion implications of that judgment. *See Pyott v Louisiana Mun. Police Employees' Ret. Sys.*, 74 A3d 612, 615 (Del 2013) ("The Court of Chancery recognized that it was required to give a judgment [from another jurisdiction] the same force and effect that it would be given by the rendering court. The rationale for that determination originates from the United States Constitution's Full Faith and Credit Clause and the Full Faith and Credit Act (FFCA). The FFCA has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or issue preclusion.") (citations and quotation marks omitted).

Under Delaware law, "res judicata extends to all issues **which might have been raised and decided** in the first suit as well as to **all issues that actually were decided**." *LaPoint v AmerisourceBergen Corp.*, 970 A2d 185, 191-92 (Del 2009) (emphasis added) (citation and quotation marks omitted). "In essence, the doctrine of res judicata serves to prevent a multiplicity of needless litigation of issues by limiting parties to one fair trial of an issue or cause of action which has been raised or should have been raised in a court of competent jurisdiction." *Id.* at 192. "Res judicata operates to bar a claim where the following five-part test is satisfied: (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, **or in privity**, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree." *Id.* (emphasis added), quoting *Dover Historical Soc., Inc. v City of Dover Planning Comm'n*, 902 A2d 1084, 1092 (Del 2006).

The first factor is not disputed; the Delaware courts clearly had jurisdiction. The second factor is both obvious and, indeed, was actually decided by the Delaware courts, which ruled that Shirley was bound by the rulings on her son's claims. *See* Post-Trial Affirmance, 157 A3d at 169 (holding that Shirley "is bound by the dismissal with prejudice of the derivative claims brought by Shawe."). That holding was based on Shirley's level of involvement in the Delaware actions and the fact that her son was representing her interests. *See* Intervention Decision, 2015 WL 5167835, at *1 (Shirley is Shaw's mother; as "a holder of 1% of the stock of the Company, was not named as a party ..., but she has been separately represented and had **actively participated in every phase of the litigation of the four related actions for over one year before the [Post-Trial Decision] was issued.**"). There is no doubt that Shirley was in privity

with her son. *See* Post-Trial Affirmance, 157 A3d at 155-56 ("We credit the Court of Chancery's finding, based on evidence introduced at trial, that Shawe has treated his mother's share as his own property and himself as a 50% co-owner of the Company.") (citation and quotation marks omitted).

With respect to the third factor, '"Delaware courts will find an identity of issues for res judicata purposes when 'the same transaction formed the basis for both the present and former suits' and the plaintiff 'neglected or failed to assert claims which in fairness should have been asserted in the first action.'" *Gamco Asset Mgmt. Inc. v iHeartMedia Inc.*, 2016 WL 6892802, at *13 (Del Ch 2016), quoting *LaPoint*, 970 A2d at 193-94. The fourth factor, as noted above, requires the issues decided to have been resolved in defendants' favor. That is the case here. It is undisputed that the alleged fiduciary duty breaches – both Elting's alleged overarching "scheme" to create deadlock and the specific incidents about which Shirley complains, such as Kidron's role in assisting Elting and Cushman's involvement with the Company's search for a new London office – were at issue in Delaware and were either decided against Shawe or could have been raised by him. Shirley does not deny that her son obtained extensive discovery, participated in a fair trial, and that his claims were decided in the typically robust and thoughtful opinions that the Delaware Court of Chancery is known for. It strains credulity to imagine a fuller or fairer opportunity for Shawe to litigate his claims than he was afforded in Delaware.

To the extent Shirley complains that she was wrongfully denied the opportunity to litigate certain claims in Delaware, she belatedly waited until the eleventh hour to raise that contention, which, as noted, was squarely rejected by the Delaware Supreme Court. The actions now filed by Shirley are nothing more than an attempted end-run around that ruling. This court sees no reason to countenance this improper litigation tactic, especially when the patently baseless

claims Shirly asserts in this court would fail on the merits for the same reasons they were rejected in Delaware (i.e., the lack of merit in the claimed underlying fiduciary breaches supposedly committed by Elting's side.). As the Chancellor explained, even if such breaches were actionable, the claims for redress asserted by Shawe and his mother are barred by Shawe's unclean hands, i.e., his "deplorable" conduct. To the extent Shirley contends that New York law should apply to her claims, that contention is of no moment because the result would be the same. *See Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 (1st Dept 2015), citing *Ross v Moyer*, 286 AD2d 610, 611 (1st Dept 2001) ("Where a plaintiff has committed breaches of fiduciary duties owed to a defendant, the doctrine of unclean hands applies to bar such plaintiff from seeking relief on his or her equitable claims."); *see also TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014) (decision whether to apply New York or Delaware law immaterial where outcome would not differ).[11] And, as noted, that Shirley is the plaintiff (instead of her son) is irrelevant given her privity with her son.

Finally, regarding the fifth factor, "[i]n general, a dismissal with prejudice constitutes a final decree for res judicata purposes." *RBC Capital Markets, LLC v Education Loan Trust IV*, 87 A3d 632, 643 (Del 2014). Hence, such a dismissal constitutes a "final judgment." *Id.* at 644. While there are exceptions to this rule, such as where a dismissal is for lack of standing or lack of jurisdiction, normally, a dismissal with prejudice constitutes "an adjudication upon the merits." *See id.* at 645 (emphasis omitted). Shawe does not cite any Delaware authority that

[11] To be sure, there is authority that on a double derivative claim, the law governing the internal affairs of the subsidiary applies. *See Sternberg v O'Neil*, 550 A2d at 1124 ("Delaware has a legitimate interest in providing a forum for hearing and applying Delaware law to a double derivative claim related to the internal operation of a wholly owned Delaware subsidiary."). But since there is no difference between New York and Delaware law here, the court need not opine on whether, given the relationship between TPG and TPI, it makes sense to apply that rule in this case. That said, either Shirley or her son could have litigated TPI's claims (which are factually identical to TPG's) in Delaware. That they did not has res judicata implications.

supports the application of any exception. Where, as here, the Delaware court's rulings were made after a trial, the judgment is final and has res judicata effect.[12]

These cases, clearly, are a forum shopping exercise based on Shawe's misguided hope that this court might either view his behavior more charitably than the Delaware courts or decide not to follow their rulings. As noted earlier and addressed further below, given Shawe's wealth, this court has serious concerns that litigation might prove perpetual absent a filing injunction, as the $7 million sanction imposed by the Chancellor does not appear to have had much of a deterrent effect.

That said, even if res judicata was not grounds for dismissal, as noted above, Shirley's double derivative claims would be dismissed due to her failure to plead demand futility.[13] Where, as here, "the wholly-owned subsidiary pre-existed the alleged wrongdoing ... and the plaintiff owns stock only in the parent ... [a demand can] only be made—and a derivative action [can] only be brought—at the parent, not the subsidiary, level." *Sagarra Inversiones, S.L. v Cementos Portland Valderrivas, S.A.*, 34 A3d 1074, 1080 (Del 2011), quoting *Lambrecht v O'Neal*, 3 A3d 277, 282 (Del 2010).

Since any such demand would have had to be made upon the board of a TPG, a Delaware corporation (which could then decide whether to prosecute claims belonging to TPI), the question of whether demand futility has been properly pleaded is governed by Delaware law.

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[12] Under applicable Delaware law, issue preclusion would also have been grounds for dismissal. *See Messick v Star Enterprise*, 655 A2d 1209, 1211 (Del 1995) ("The test for applying collateral estoppel requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment."). Given the clear res judicata basis for dismissal, a separate issue preclusion analysis is not necessary.

[13] Ordinarily, demand futility, which implicates standing, is a threshold issue and is considered first. Here, however, it serves the interests of judicial economy to first address claim preclusion to make it clear that these cases have no non-frivolous possibility of revival, whether in this or a related action.

Wandel v Dimon, 135 AD3d 515, 516 (1st Dept 2016); *see Sagarra Inversiones*, 34 A3d at 1081 (law of "jurisdiction of incorporation of the entity in which the plaintiff owns shares" applies to demand futility pleading standard). While the standards for doing so are well settled, there are actually "two demand futility tests under Delaware law—as outlined by the [Delaware] Supreme Court in [*Aronson v Lewis*, 473 A2d 805 (1984) and *Rales v Blasband*, 634 A2d 927 (1993)]." *In re Ebix, Inc.Stockholder Litig.*, 2014 WL 3696655, at *19 (Del Ch 2014). "Which of *Aronson* or *Rales* applies depends on the conduct being challenged and the composition of the board when the derivative action is filed." *Id.* "In brief, the *Aronson* test applies where a stockholder challenges a business decision made by the same directors who remain in office at the time [the derivative] suit is filed. Conversely, the *Rales* test applies when the stockholder does not challenge a particular business decision or when a majority of the directors who made the business decision at issue have been replaced by the time the derivative lawsuit is filed." *Id.* (citations and quotation marks omitted). That said, "[t]he analyses in both *Rales* and *Aronson* drive at the same point; they seek to assess whether the individual directors of the board are capable of exercising their business judgment on behalf of the corporation." *Park Employees' & Ret. Bd. Employees' Annuity & Benefit Fund of Chicago v Smith*, 2017 WL 1382597, at *5 (Del Ch 2017).

"The Court must determine under *Aronson* whether, 'under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.' The test is disjunctive; satisfying either prong is sufficient. *In re Ebix*, 2014 WL 3696655, at *19, quoting *Aronson*, 473 A2d at 814. Shirley only relies on the former. Therefore, she must "demonstrate through particularized allegations that at least half of the

Board is interested or not independent." *Id.* The point of this inquiry is to assess whether plaintiff has "create[d] a reasonable doubt that 'the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand,' had one been made. *Park Employees'*, 2017 WL 1382597, at *5, quoting *Rales*, 634 A2d at 934. As then-Vice Chancellor Strine explained, "the central question is whether there is a sufficient number of impartial directors who can cause the corporation to act favorably on a demand by bringing suit. If the members of the board who cannot impartially consider the demand have the corporate power to prevent the corporation from bringing suit, then [Delaware] law considers demand futile, whether it is because the conflicted directors command a majority or because they have equal voting power with the impartial directors." *Beneville v York*, 769 A2d 80, 82 (Del Ch 2000). "[A]n equally divided vote on a motion to bring suit has the same effect as a vote in which the motion is defeated by a one vote majority." *Id.*

The Supreme Court of Delaware has explained:

> The key principle upon which this area of our jurisprudence is based is that the directors are entitled to a presumption that they were faithful to their fiduciary duties. In the context of presuit demand, the burden is upon the plaintiff in a derivative action to overcome that presumption. The Court must determine whether a plaintiff has alleged particularized facts creating a reasonable doubt of a director's independence to rebut the presumption at the pleading stage. If the Court determines that the pleaded facts create a reasonable doubt that a majority of the board could have acted independently in responding to the demand, the presumption is rebutted for pleading purposes and demand will be excused as futile.

Beam v Stewart, 845 A2d 1040, 1048-49 (Del 2004).

When determining the independence of a board member, the Court further explained that:

> A director will be considered unable to act objectively with respect to a presuit demand if **he or she is interested in the outcome of the litigation or is otherwise not independent**. A director's interest may be shown by **demonstrating a potential personal benefit or detriment to the director as a result of the decision**. ... The primary basis upon which a director's

> independence must be measured is **whether the director's decision is based on the corporate merits of the subject before the board, rather than extraneous considerations or influences.**

Id. at 1049 (citations and quotation marks omitted; emphasis added). Additionally, if a director does not face a "credible threat of the imposition of liability" in connection with the allegations in the derivative suit, then "they are not disabled from considering a demand." *Ryan v Armstrong*, 2017 WL 2062902, at *2 (Del Ch 2017). The "mere threat of liability" is not enough; it must be clear from well pleaded allegations in the complaint that there is a "substantial likelihood" that the supposedly conflicted director faces liability. *Id.*

Here, demand would not have been futile. To be sure, if TPG was still subject to a 50-50 deadlock between Elting and Shawe, Shirley would be correct in contending that demand would be futile. While Elting vehemently disputes the merits of Shirley's allegations, she does not dispute that it would be futile for Shirley to demand that Elting approve a lawsuit alleging that Elting breached her fiduciary duties or that such breaches were aided and abetted by her husband. But, with the appointment of a custodian, such deadlock no longer impedes the company from taking action. The very point of appointing a custodian was to resolve the countless issues on which Elting and Shawe could not agree (whether for bona fide reasons or otherwise). Pursuant to the Chancellor's order, issues on which Elting and Shawe deadlock are to be put to the custodian, who renders a tie-breaking vote. Here, since Shawe himself is not implicated in the wrongdoing alleged by his mother, he does not face even a "mere threat" of liability, let alone a substantial likelihood of liability. He, therefore, would have been capable of rendering an unconflicted vote on Shirley's proposed lawsuits.[14] Of course, no one disputes the

[14] There is no reason to believe Shirley has any undue influence on her son; if anything, the opposite is true. Since one cannot unduly influence one's self, and since the court views Shirley's claims as being made by her son's proxy, the court does not find Shaw to be interested.

custodian's independence or the absence of a threat of liability on his part. Ergo, had a demand been made by Shirley, a majority of disinterested directors (Shawe and the custodian) could have voted to approve her proposed lawsuit. She, therefore, has not pleaded demand futility.

Seemingly recognizing this obvious fact, Shirley avers that since Elting was conflicted, the step of putting the issue to the custodian could not have validity occurred because Elting was never in a position to opine on the matter. The court rejects this contention. Shirley is conflating the process by which issues may be put to the custodian for a tie-breaking vote and the issue of whether the majority of directors are considered conflicted for demand futility purposes. With respect to the latter, the requisite demand futility analysis, by definition, is counterfactual; it requires the assumption that a board vote never occurred and contemplates whether, had such a vote taken place, a majority of the voting board members would have been conflicted.

That is not the case here where neither Shawe nor the custodian face any realistic threat of liability for the claims asserted in the two lawsuits filed by Shirley. They, therefore, should have been given the opportunity to vote on the matter. And while technically there is a two-step process for putting the issue to the custodian (the first being a deadlocked vote between Elting and Shawe), there is no reason or case cited by Shirley suggesting that the court's demand futility analysis cannot assume the outcome of that two-step process had it occurred. In other words, the mere fact that Elting was conflicted does not mean the issue could never be put to the custodian under a demand futility counterfactual.

Any other conclusion would undermine the efficacy of custodian's ability to weigh in on major litigation decisions that affect the value of the company – an outcome the Chancellor surely did not intend. Given the parties' litigious past, Elting being conflicted on Shirley's

proposed claims was surely foreseeable. The court does not believe the Chancellor intended[15] derivative litigation to be a major carve-out from the general rule that deadlock is to be resolved by the custodian.

As discussed above, the court is extremely skeptical about the prospect of the custodian voting in favor of approving these lawsuits because of their clear lack of merit. It is unsurprising, therefore, that Shirley made the tactical decision not to make such a demand. Had she done so, she would have been restricted to arguing that the board's refusal to approve the suit was a violation of its business judgment. *Spiegel v Buntrock*, 571 A2d 767, 775-76 (Del 1990) ("By making a demand, a stockholder tacitly acknowledges the absence of facts to support a finding of futility. ... A shareholder who makes a demand can no longer argue that demand is excused. The effect of a demand is to place control of the derivative litigation in the hands of the board of directors. Consequently, stockholders who ... make a demand which is refused, subject the board's decision to judicial review according to the traditional business judgment rule."); *see Andersen v Mattel, Inc.*, 2017 WL 218913, at *3 (Del Ch 2017). That is not a finding a court would likely have made given the circumstances.

Finally, given the borderline frivolity of these lawsuits, Philip and Shirley Shawe are cautioned that the maintenance of future suits in this court that are barred by the outcome of the Delaware action may result in sanctions and a filing injunction. It is time for this saga to end.

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[15] It is curious that the parties did not seek guidance from the Chancellor on this issue, especially given the amount of time that has elapsed since the issue was raised in the parties' briefs. Hesitant to further burden the Chancellor, the court addresses demand futility based on the Chancellor's apparent intentions. That said, while it would be regrettable if this court misconstrued the Chancellor's intent with respect to how to address demand futility in this context, this decision will have virtually no precedential effect once the company is sold. Regardless, as discussed, res judicata justifies dismissal even if demand would have been futile.

Judicial economy militates against further depleting the court's time and resources. Accordingly, it is

ORDERED that defendants' motions to dismiss the amended complaints in the three above captioned actions are granted, and the Clerk is directed to enter judgment dismissing those actions with prejudice and costs.

Dated: June 29, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C