EFiled: Jun 11 2019 01:24PM EDT
Transaction ID 63349571
Case No. Multi-Case

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re: TRANSPERFECT GLOBAL, INC.	C.A. 9700-CB
ELIZABETH ELTING, individually and Derivatively on behalf of TRANSPERFECT GLOBAL, INC. and TRANSPERFECT TRANSLATIONS INTERNATIONAL, INC., Plaintiff, v. PHILIP R. SHAWE, Defendant. TRANSPERFECT GLOBAL, INC. and TRANSPERFECT TRANSLATIONS INTERNATIONAL, INC., Nominal Parties.	**Public version pursuant to Chancery Court Rule 5.1(d)** **Date of public version: June 11, 2019** C.A. 9686-CB
ELIZABETH ELTING, Petitioner, v. PHILIP R. SHAWE and SHIRLEY SHAWE, Respondents, and TRANSPERFECT GLOBAL, INC. Nominal Party.	C.A. No. 10449-CB

PHILIP R. SHAWE'S OPPOSITION TO ELIZABETH ELTING'S MOTION TO RECOVER ATTORNEYS' FEES AND EXPENSES FROM PHILIP R. SHAWE AND PRS CAPITAL LLC

THIS DOCUMENT IS A CONFIDENTIAL FILING.
ACCESS IS PROHIBITED EXCEPT AS AUTHORIZED BY COURT ORDER.

Philip R. Shawe respectfully submits this Opposition to the motion of Elizabeth Elting seeking recovery of attorneys' fees and expenses from Shawe and PRS Capital LLC ("PRS," now known as Transperfect Holdings LLC).[1]

1. This motion represents the latest chapter in Elizabeth Elting's acts of dishonesty crafted by her lawyers to harm Shawe and TransPerfect. At trial she paid Blackstone to swear that TransPerfect was worth $1.2 billion only to have them bid a net $420 million at auction. Her lawyers told this Court that she was a buyer to get an auction, but that too was untrue. Then, when the Custodian, Robert B. Pincus, sought approval of the sale, her lawyers denied that they had reviewed the draft SPA, another lie. Now she comes before this Court seeking fees intentionally inflated through dishonest overbilling and unnecessary work designed to undermine the Indemnitors' case. Elting's run-up-the-bill bad faith litigation tactics included once again taking aim at Mr. Pincus (who she previously asserted was ethically challenged and only out to protect himself) with a harassing subpoena for temporally irrelevant deposition testimony and documents. In equity and for the reasons stated below, this Court should reject her motion for her egregiously grossly excessive, unreasonable, unnecessary, and unauthorized fees.

[1] Abbreviated terms herein have the same meaning as defined in Philip R. Shawe's Brief in Opposition to Elting's Motion to Enforce Shawe's and PRS's Indemnification Obligations ("Shawe's Opp. Brief"), filed on February 15, 2019. Shawe's Opp. Brief is incorporated herein by reference.

ELTING'S CURRENT MOTION IS PROCEDURALLY IMPROPER

2. As an initial matter, Elting's motion is procedurally improper, and should be dismissed for that reason alone. Elting seeks to recover "Damages" as defined in §10.2 of the SPA, consisting of attorneys' fees paid to Kramer Levin ("KL") and Becker Glynn ("Becker"). *See* Transmittal Affidavit of David L. Finger, dated June 4, 2019 ("Finger Aff."), Ex. A, §10.2. Elting is therefore seeking to recover damages for an alleged breach of a contractual indemnification provision. Such a claim requires the filing of a plenary action and the procedural due process safeguards, including the right to take discovery, receive testimony, and to assert counterclaims, that go with such an action.

3. Indeed, PRS is not even a party to the underlying Delaware litigation, and thus the Court may not order relief against PRS by motion in this action. Rather, Elting must commence an action and serve process on the defendants, as with any other claim for damages. *See* Letter from David L. Finger to Hon. Andre G. Bouchard, filed March 6, 2019.

4. In this regard, Elting's reliance on Court of Chancery Rule 88 as the procedural mechanism for her motion is misplaced. Rule 88 sets forth the requirements for making a fee application and, therefore, is a supplemental procedural means for determining the amount of reasonable fees following an award

of attorneys' fees in the underlying plenary action. *See, e.g., Danenberg v. Fitracks, Inc.*, Del. Ch., 58 A.3d 991, 996-97 (2012).

5. Thus, Rule 88 is clearly inapplicable here. Instead, Elting's current motion seeks to recover fees incurred in the defense of the Christian Suit in federal court in New York as damages arising out of an alleged contractual breach that has yet to be asserted as a cause of action in a plenary proceeding.[2] Such a substantive claim for contractual indemnification, therefore, necessitates the commencement of an action and the exercise of jurisdiction over both Indemnitors as defendants therein. *See, e.g., Weil v. Vereit Operating Partnership, L.P.*, 2017 WL 3840477 (Del. Ch. Aug. 29, 2017) (Amended Verified Complaint for Advancement) (asserting causes of action for declaratory judgment and breach of contract).

6. Moreover, the SPA contemplates the commencement of such an action and provides that it be filed in this Court. *See* Finger Aff., Ex. A, §12.11. Elting's motion is therefore procedurally defective and should be denied on that basis.

[2] Elting's initial motion to enforce did not seek any form of monetary damages for breach, but instead focused on whether Elting had breached her obligations under the SPA. Specifically, Elting sought an order declaring, *inter alia*, that Elting's service of discovery requests on Shawe was not a breach of her obligations and that the Indemnitors should have no right to direct Elting or her counsel in the Christian Suit as to the manner in which Elting's defense may be pursued. *See* Elting Brief dated January 16, 2019, at 4.

ELTING IS NOT ENTITLED TO RECOVER FEES BILLED BY EITHER KL OR BECKER

7. Even if Elting's motion was not procedurally improper, which it plainly is, Elting is not entitled to recover attorneys' fees paid by her to KL or Becker. As set forth below, Elting's fee application for the $116,523.04 in fees and expenses billed by KL between September 24 and December 3, 2018 should be denied in its entirety. On September 27, 2018, Elting requested indemnification in the Christian Suit pursuant to SPA §10.5. Finger Aff., Ex. B. On October 3, the Indemnitors advised KL that they had elected to assume Elting's defense and that, pursuant to §10.6(b), they intended to engage Venable as counsel for Elting. *Id*., Ex. C. In that letter, the Indemnitors expressly advised KL that "[a]s provided in Section 10.6(b) of the SPA, to the extent that Ms. Elting continues to utilize you or any other counsel in the defense of the action, Ms. Elting shall be solely responsible for the fees and expenses of such counsel." *Id*. KL never responded to this notice and instead continued to incur, without authority, extraordinarily excessive and unreasonable fees under the criteria set forth in *Mahani v. EDIX Media Group., Inc*., Del. Supr., 935 A.2d 242, 245-46 (2007).

8. Elting's application for $93,524.13 in fees and expenses billed by Becker after it had been substituted as counsel for Elting, covering the period from

December 5, 2018 through March 21, 2019, should also be denied in its entirety.[3] Elting is not entitled to reimbursement for those fees because, notwithstanding that the Indemnitors had assumed Elting's defense, Elting refused to participate in, and aggressively sought to undermine, a common defense conducted by the Indemnitors and their counsel. Thus, Elting pursued a separate counter-defense that was consistently adversarial to Shawe and TransPerfect, in breach of the SPA. Accordingly, the Indemnitors notified Elting of the breach on December 19, 2018, and subsequently disclaimed indemnification on January 7, 2019.[4] Finger Aff., Exs. D and E. Moreover, the work performed by Becker was almost entirely unnecessary, unreasonably excessive for the unnecessary work performed, and counterproductive given that Elting was indemnified against liability.

ELTING'S APPLICATION FOR KL'S FEES SHOULD BE DENIED

9. As outlined above, KL and Elting were on notice from October 3, 2018 that KL had not been authorized or engaged by the Indemnitors to represent Elting and, therefore, its fees would not be indemnified. At that point, KL could no longer simply bill Elting with the expectation that those fees would be covered by the Indemnitors, but was required to seek authorization, which it did not do. Under the

[3] This amount is in addition to the $50,000 retainer already paid by the Indemnitors.

[4] Elting did not incur any fees billed by Becker Glynn prior to December 18th because those fees were covered by the $50,000 retainer paid by the Indemnitors.

SPA, to the extent that Elting wished to continue to employ KL as her personal attorney or to shadow counsel designated by the Indemnitors, she was free to do so, but at her own expense. *See* Finger Aff., Ex. A, §10.6(b) ("The Indemnitee may participate (in the manner and to the extent set forth below in Section 10.6(c)), through counsel of its own choice and *at its own expense*, in the defense of any Third-Party Claim") (emphasis added).

10. On October 26, 2018, the Indemnitors informed KL that they would engage and utilize Howard Levi of Becker to represent Elting, after Elting had rejected both Venable and Moss & Gilmore LLP as counsel. *See* Finger Aff., Ex. F. Although Elting agreed to the retention of Becker pursuant to §10.6(b) of the SPA, she then raised a series of baseless impediments to Becker's substitution for KL, and unreasonably delayed Mr. Levi's retention for over a month.[5] *See id*., Exs. G and H. As a result, the engagement letter between Elting and Becker was not signed until December 4, 2018. *Id*., Ex. I. KL seized the opportunity caused by Elting's unreasonable objections and delay to run up exorbitant, unauthorized fees, for which Elting now improperly seeks indemnification.

[5] Elting, for example, sought to require that Becker be paid a replenishable retainer of $100,000, anticipating that she would be seeking to wage a fractious and costly counter-defense rather than permitting the Indemnitors to conduct the defense.

11. The Indemnitors are also not liable for KL's fees because those fees by any measure are grossly excessive and unreasonable.

12. Under Delaware law, the party making the fee application bears the burden of justifying the amounts sought as reasonable and necessary. *See Citadel Holding Corp. v. Roven*, Del. Supr., 603 A.2d 818, 823-24 (1992). In *Mahani*, 935 A.2d at 245-46, the Delaware Supreme Court held that "[t]o assess a fee's reasonableness, case law directs a judge to consider the factors set forth in the Delaware Lawyers' Rules of Professional Conduct …." (footnote omitted). *See* DLRPC R. 1.5(a). In addition to the eight factors set forth in the DLRPC, trial courts must consider "whether the number of hours devoted to litigation was excessive, redundant, duplicative or otherwise unnecessary." *Mahani*, 935 A.2d at 247-48 (citation omitted). Moreover, the Rule 1.5(a) factors for determining a reasonable fee apply to a contractual fee-shifting provision.[6] *See Danenberg*, 58 A.3d at 996 and n.1 (collecting decisions).

13. As set forth in the accompanying Affidavit of Adam Mimeles, Esq., sworn to June 4, 2019 (the "Mimeles Aff."), KL engaged in redundant and excessive billing by multiple attorneys at sky high rates for mundane tasks. In particular, each

[6] Here, Elting and KL have presented no evidence addressing the Rule 1.5 factors. *See Matter of The Hawk Mountain Trust*, 2015 WL 5243328 at *2 (Del. Ch. Sept. 8, 2015).

task performed by KL invariably involved at least a senior partner and senior associate, and in some instances an additional partner and/or mid-level associate. The most senior partner, Philip Kaufman, billed at an hourly rate of [redacted], a second partner, Ronald Greenberg, billed at [redacted], and a senior associate, Jared Heller, billed at [redacted]. Mimeles Aff. ¶ 3.

14. Moreover, Mr. Kaufman performed most of the work, billing approximately twice as many hours as Mr. Heller. As a result, KL billed an average hourly rate of [redacted] and logged multiple hours by both a senior partner and a senior associate for carrying out the most mundane tasks.[7] Mimeles Aff. ¶ 3. *See Concord Steel v. Wilmington Steel Processing Co*., Del. Ch., 2010 WL 571934 at *3-4 (Feb. 5, 2010), *aff'd mem.*, 7 A.3d 486(2010) ("fee request may be reduced when, for example, the court finds that senior partners account for an unreasonably high percentage of the total hours billed" and finding that "overuse of senior partners artificially inflated [plaintiff's] attorneys' fees").

15. For example, KL billed over $25,000 for these three senior attorneys to prepare Elting's seven-page answer, consisting of boilerplate denials and standard one-sentence affirmative defenses. Mimeles Aff. ¶ 6. Even more over the top, KL billed over $27,000 for Kaufman, Greenberg and Heller to review and comment on

[7] In contrast to KL's hourly rates, Mr. Levi's hourly rate at Becker was [redacted] and the hourly rate for senior associates was [redacted]. *See* Mimeles Aff. ¶ 4.

the fill-in-the-blanks form of scheduling order, and then for two attorneys to attend the scheduling conference before Judge Castel on November 15, 2018. *Id*. ¶¶ 7-8. *See Richmont Capital Partners I, L.P. v. J.R. Inv. Corp.*, Del. Ch., 2004 WL 1152295 at *3 (May 20, 2004) (when considering attorneys' fees, a "court should greet with 'healthy skepticism' 'a claim that several lawyers were required to perform a single set of tasks and may discount the time for two or three lawyers in courtroom or conference when one would do'") (citation omitted). Other egregious examples are documented in the Mimeles Affidavit. In short, KL billed over $100,000 for carrying out routine and non-contentious tasks, which comprise the vast bulk of the $116,523.04 in claimed fees and expenses.

16. Accordingly, KL's fees were inherently unreasonable and amounted to extreme overkill in defending against the Christian Suit, which was at a preliminary stage, and in which Elting was fully and unconditionally indemnified against liability. *See* Finger Aff., Ex. A, §10.4.

17. Elting's fee application as it relates to KL's fees should therefore be denied as procedurally improper and contrary to the terms of the SPA. Even if this were not the case, the amounts billed were outrageously excessive, unnecessary and unreasonable.

ELTING'S APPLICATION FOR BECKER'S FEES SHOULD BE DENIED

18. Elting is not entitled to recover fees paid to Becker after December 19, 2018 because, as set forth in Shawe's Opp. Brief, Elting manifestly breached the SPA, thereby forfeiting her right to indemnification for attorneys' fees. Pursuant to §10.6(b), once the Indemnitors elected to defend the Christian Suit, they assumed control over the conduct of the defense, with Elting having only a limited right to participate as enumerated in §10.6(c). Finger Aff., Ex. A, §10.6(c). Indeed, the Indemnitors had the right to enter into a settlement of the Christian Suit on Elting's behalf without her consent, which they did, provided that such settlement released Elting from all liability with respect to such claims, which it did. *See id*., §10.6(d).

19. Elting, however, sought to turn the indemnification provision on its head by mounting an independent and aggressive counter-defense that was adversarial to Shawe and contrary to the terms of the SPA, and then demanding that Shawe and PRS pay for it. Elting's competing defense, contrary to the direction of the Indemnitors, not only violated the terms of the SPA but also subjected the Indemnitors-Defendants to substantial additional defense costs that were completely unnecessary. *See* Mimeles Aff. ¶¶ 14-17 and 21.

20. Accordingly, because Elting refused to cede control of the defense to the Indemnitors pursuant to the SPA, and instead demanded that Becker pursue a contrary and divisive strategy, including seeking over-reaching and irrelevant

discovery from her co-defendants, the Indemnitors placed Elting on notice of breach of the SPA on December 19, 2018, and subsequently disclaimed indemnification on January 7, 2019. Finger Aff., Exs. D and E.

21. Becker billed $17,632.50 from December 5, 2018 through December 19, 2018, the date on which the Indemnitors provided notice of Elting's breach. Becker thereafter drew down the full amount of the $50,000 retainer paid by the Indemnitors. The Indemnitors are, therefore, entitled to recover the sum of $32,367.50 from Elting, which represents the difference between $ 17,632.50 and the retainer amount of $50,000, and will seek to do so, if necessary, through appropriate proceedings.

22. As detailed in the Mimeles Aff., virtually all of Becker's fees incurred by Elting were in pursuit of an independent defense based on an all-out discovery offensive, contrary to the direction of the Indemnitors and their counsel, and fall outside the scope of indemnifiable fees. This included an extensive plan of non-party discovery directed at persons with no personal knowledge of the claims and defenses in the Christian Suit, including the issuance of a subpoena to take the deposition of Mr. Pincus, accompanied by a broad document subpoena. *See* Mimeles Aff. ¶¶ 18-19.

23. In short, Elting treated Shawe as the adversary, rather than her Indemnitor, pursuing a hostile counter-defense through Becker predicated on that

premise, rather than cede the defense to the Indemnitors as required by the SPA. Elting thereby relinquished her right to obtain indemnification for Becker's fees and expenses.

24. Moreover, Elting's attempt to justify the elevated and excessive fees billed by KL and Becker by arguing that Shawe treated Elting as an adversary or aligned himself with the plaintiff lacks any evidentiary support. Rather, while Shawe disagreed with Elting as to several facts, her co-defendants diligently defended against the plaintiff's claims, ultimately settling with no liability to Elting.

25. Given that Elting was indemnified against liability, the fees incurred by her in pursuing a divisive counter-defense were unnecessary and misdirected, particularly given that a negotiated settlement with no liability was successfully pursued by Shawe. *See In Re SS&C Technologies, Inc.*, Del. Ch., 2008 WL 3271242 at *4 (Aug. 8, 2008). Indeed, Becker continued to press for discovery to go forward, and continued to bill, even after it was notified on February 27, 2019 that a settlement in principle had been reached. *See* Mimeles Aff. ¶¶ 22-23.

26. In sum, Elting's pervasive breach of the SPA bars her claim for recovery of attorneys' fees paid to Becker, which in any event were unnecessary and unreasonable given that Elting was indemnified against liability by both Shawe and PRS. Moreover, for the reasons set forth above, Elting was required to commence

a plenary action asserting breach of the SPA as a predicate for seeking damages in the form of attorneys' fees.

ELTING IS NOT ENTITLED TO "FEES ON FEES"

27. Finally, Elting argues in her current motion, without citation to any authority, that she may recover legal fees and expenses incurred in connection with her prior motion to enforce and this motion, assuming she were to prevail. The two cases cited by Elting in her prior enforcement motion, *Stifel Fin. Corp. v. Cochran*, Del. Supr., 809 A.2d 555 (2002) and *Fasciana v. Elec. Data Sys. Corp.*, Del. Ch., 829 A.2d 178 (2003), are plainly off point. Those decisions addressed entitlement to "fees on fees" with respect to a statutory action pursuant to 8 *Del. C.* §145, and are inapplicable in the present context of a contractual indemnification provision.

CONCLUSION

For all of the reasons set forth above, Shawe respectfully submits that Elting's motion for recovery of attorneys' fees and expenses should be denied.

Dated: June 4, 2019
Date of Redacted Version:
June 11, 2019

Respectfully submitted,

/s/ David L. Finger
David L. Finger (DE Bar ID #2556)
Finger & Slanina, LLC
One Commerce Center
1201 N. Orange Street, 7th Floor
Wilmington, Delaware 19801-1186
(302) 573-2525
dfinger@delawgroup.com

Attorneys for Philip R. Shawe

OF COUNSEL:

RABINOWITZ, BOUDIN,
STANDARD,
KRINSKY & LIEBERMAN, P.C.
David B. Goldstein
14 Wall Street, Suite 3002
New York, NY 10005
(212) 254-1111
dgoldstein@rbskl.com

Words: 2974