

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re: TRANSPERFECT GLOBAL, INC.)	
)	C.A. No. 9700-CB
)	
ELIZABETH ELTING,)	
)	
Petitioner,)	
)	
v.)	C.A. No. 10449-CB
)	
PHILIP R. SHAWE and SHIRLEY SHAWE,)	
)	
Respondents,)	
)	
and)	
)	
TRANSPERFECT GLOBAL, INC.,)	
)	
Nominal Party.)	
)	

**OPPOSITION OF CITIZENS FOR A PRO-BUSINESS DELAWARE, INC.
TO CUSTODIAN’S MOTION TO CLOSE COURTROOM**

Non-party Citizens for a Pro-Business Delaware, Inc. (“Citizens”) opposes the motion of custodian Robert B. Pincus (“Custodian”) to close the courtroom during the hearing scheduled for February 7, 2017, and to restrict public access to its transcript and record. In support thereof, Citizens states the following:

1. The Custodian asks that the hearing scheduled for February 7, 2017 be closed. The public, including Citizens, knows next to nothing about what the hearing is for. We know it is to consider a letter from Shawe’s counsel, which the

parties have redacted in its entirety.¹ The letter attached an exhibit, which was also redacted. We know that the letter contains some kind of “proposal”. Presumably the Letter is related to the Custodian’s assigned mission, which as tasked by the Court is to sell TransPerfect in a “Modified Auction”. *In re TransPerfect Glob., Inc.*, 2016 WL 3477217, at *1 (Del. Ch. June 20, 2016). That is about all that is publicly known.

2. Rule 5.1(a) states, “Except as otherwise provided in this Rule, ***proceedings in a civil action*** are a matter of public record.” No subpart of Rule 5.1 allows the Court to close its hearings to the public.

3. The Custodian cites *In the Matter of Du Pont*, 1997 WL 383008 (Del. Ch. June 20, 1997), a Chancellor Allen case. *Du Pont* looks to *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984). In *Publicker*, the Third Circuit recognizes that both the common law and the First Amendment secure to the public a right of access to civil proceedings. Thus, for a Court to limit the public’s access, there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that

¹ Citizens filed a Notice of Challenge to the confidential treatment of the Letter on January 25, as is allowed by the procedures of Court of Chancery Rule _____. The Custodian filed a motion to preserve the Letter’s confidentiality on February 1. That same day, without affording Citizens the opportunity to file an Opposition that is guaranteed by Court Rule, CITE, the Court granted the Custodian’s motion.

governmental interest.² *Id.* at 1066, 1070. The party “seeking the closure of a civil file,” of course, “has the burden of showing good cause for sealing such file.” *Du Pont* at *4 n.9.

4. The Custodian provides no explanation as to why the details that will be discussed at the February 7 hearing are entitled to greater confidentiality, and the Custodian does not explain how closing the hearing would serve an important governmental interest. Nor has the Custodian even addressed whether there is a less restrictive way to serve any important government interest, such as referencing certain confidential facts in generalities or in code. The generalized, anodyne arguments made by the Custodian do not even come close to explaining why this public Court should shut its doors to the public on this issue. All the Custodian has said suggests that, perhaps, the proceeding is regarding an offer by Shawe to purchase the Company. This Court holds public proceedings about offers to purchase the Company, even in-progress ones, all the time. CITES. This Court should not shut its doors to the public before the Hearing.

5. The Custodian cites three cases, none of which are supportive.

6. *In re Du Pont*, 1997 WL 383008 (Del. Ch. June 20, 1997), is a case from the Court’s very distinct guardianship authority, less akin to a complex commercial case and more akin to the Family Court. In *Du Pont*, the Court held

² Notably, the Court should not “relax the standard necessary to close a proceeding simply because a transcript . . . can be made available at a later date.” *Id.* at 1072.

that parties involved in guardianship cases “have a higher expectation of confidentiality than voluntary civil litigants”. *Id.* at *4. Because *Du Pont* was a guardianship case, the Court created a “narrowly tailored remedy” in which the public could access “the transcript of the hearing and the ruling, while keeping the file generally sealed”. *Id.* Here, however, the Custodian is not seeking a narrowly tailored remedy even though this case involves voluntary civil litigants. Instead, the Custodian seeks to close the entire hearing to the public **and** restrict public access to any of the transcript and record of the hearing.

7. The Custodian also cites two unpublished opinions, attached here for the Court’s convenience. The first opinion, *Air Products & Chemicals, Inc. v. Airgas, Inc.*, C.A. No. 5249-CC, letter op. at 1-2 (Del. Ch. July 7, 2010), cites no caselaw to support its decision to close the courtroom and grants the motion in part because no parties had opposed the motion. Ex. A. The second opinion, *Rohm & Haas Co. v. The Dow Chemical Co.*, C.A. No. 4309-CC, letter op. at 3 (Del. Ch. Mar. 6, 2009), appears to have been mistakenly cited by the Custodian. It relates to a motion *in limine* to preclude expert testimony and has no application here. Ex. B.

8. The Custodian argues that the Hearing should be closed because 1) the Court’s Sale Order states that offers and communications relating to offers shall be confidential and 2) the Court already held that the “Letter” filed by Shawe

should maintain confidential treatment. Mtn. ¶¶ 4, 6. As to 1), the fact that private communications between the Custodian and the parties were to be confidential does not dictate that when one of the parties asks the Court to opine on a matter, that too should be confidential. As to 2) as set forth above Citizens was not given the opportunity provided to it by the Rules to file an Opposition, so therefore the ruling was therefore without aid of adversary briefing and thus of little use.

9. Again, it is particularly difficult for Citizens, or any other member of the public, to respond to the Custodian's motion because the Custodian has deliberately withheld all but the most general information about the issue. Citizens' position is analogous to a party objecting that a document was withheld as privileged where the producing party's privilege log does not describe the document being withheld in a way that allows the objector to assess the propriety of the asserted basis for withholding the document. In such situations, the Court would hold that the privilege is waived and the document must be disclosed. *See, e.g., Mechel Bluestone, Inc. v. James C. Justice Companies, Inc.*, 2014 WL 7011195, at *1 (Del. Ch. Dec. 12, 2014). The Custodian's motion to close the courtroom should fare no better.

10. At worst, even if the Court is inclined to grant the Custodian's motion, it should do so only in part and in an alternative manner, keeping the Hearing open to the public but instructing the parties to reference facts and circumstances

necessary to be kept confidential in generalities or in code. For instance, Shawe has referenced an issue about having a confidentiality arrangement with the lender in question. The parties can safeguard that interest in large part by simply not naming the lender.

WHEREFORE, Citizens³ respectfully requests that the Court deny the Custodian's motion and allow the public to attend the February 7, 2017, hearing and access the transcript and record of the hearing.

³ Delaware courts allow the "intervention" of non-parties for the limited purpose of contesting whether information in a case should remain confidential. *Gannett Co. v. State*, 565 A.2d 895, 899 (Del. 1989). Such limited intervention is not like a general intervention under Court of Chancery Rule 24 but exists where one's First Amendment rights are, at least arguably, violated or about to be violated. *Id.* That procedure here self-evidently permits Citizens to oppose the Custodian's motion to close the courtroom. Importantly, Citizens is the only entity or person that received notice of the motion to close the courtroom that would be barred from the courtroom, uniquely situating it to provide the Court with an opposing viewpoint. To put it another way, Citizens may be the only person in the position to provide the Court with adversary input as to the Custodian's motion, particularly given the time constraints of the Court's requirements for any responses to the Motion to be made in less than 24 hours. Because Citizens was formed to advocate for employees of TransPerfect Global, Inc. ("TransPerfect") and because the hearing could impact the future of TransPerfect, Citizens has a strong interest in knowing what happens at the publicly funded hearing.

/s/

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Dated: February 3, 2017