IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAUN ANDRIKOPOULOS and MICHAEL A. SANTER, *Plaintiffs Below, Appellants,* v. SILICON VALLEY INNOVATION COMPANY, LLC, *Defendant Below, Appellee.*	No. 490, 2015 On Appeal from C.A. No. 9899-VCP in the Court of Chancery of the State of Delaware

APPELLANTS' REPLY BRIEF

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Appellants[1] Shaun Andrikopoulos and Michael A. Santer respectfully submit this Reply Brief in further support of their appeal of the Trial Court's Final Judgment in the Advancement Case. For the reasons stated herein, as well as in Appellants' Opening Brief ("Opening Br."), Appellants maintain that the Trial Court erred and that the Final Judgment, which is subject to *de novo* review, should be reversed.

PRELIMINARY STATEMENT

Appellants' Opening Brief presents a narrow question: did the Trial Court err as a matter of law when it relegated the advancement claims of Appellants, both of whom had valid and undisputed claims to advancement in litigation pursued by the Receiver, to general unsecured creditor status, but granted priority to the claims of the Receiver and his counsel to the limited assets of the corporation? This question—one of first impression—though narrow, has broad implications for Delaware directors and Delaware's "invariant public policy" supporting advancement.

Despite the broad implications and public policy concerns, the issues for Appellants are much more personal: Messrs. Andrikopoulos and Santer, two former directors and officers who left a Delaware company 14 and 10 years ago,

[1] Capitalized terms not otherwise herein defined shall have the same meanings ascribed to them as in Appellants' Opening Brief.

respectively, are now being pursued for meritless claims in a California state court by a receiver appointed many years after their departures. Unlike many of the other defendants in the California Action, Appellants' legal bills are not being paid for by other corporate sources under separate indemnification agreements; instead, Appellants are personally footing their own legal bills.

Proceeding with the reasonable expectation that their Employment Agreements offered full advancement rights, Appellants demanded that their contractual rights be honored and then sued to enforce their rights. After Appellants spent a year attempting to enforce their advancement rights which the Receiver finally conceded on the eve of trial, Appellants were left with: (1) the Receiver claiming that SVIC did not have the resources to honor those contractual obligations (despite having received and paid out, as of the April 9 Hearing, over $800,000), and (2) the Trial Court's ruling that Appellants would see advancement only after every other Receiver expense had been paid. *See* Final Judgment at A1774 ("IT IS FURTHER ORDERED that the Delaware Plaintiffs' request for advancement of legal fees and expenses should be treated as a pre-petition, unsecured claim without administrative priority."). In short, the Final Judgment, which is subject to *de novo* review in this case of first impression, seeks to establish new precedent and make advancement, in the context of receivership, no longer *advancement*.

Appellee SVIC's Answering Brief ("Ans. Br.") alternates between toeing the line taken by the Court's July 30 Opinion and taking unsupported swipes at Appellants. *See*, *e.g.*, Ans. Br. at 20 ("It is Appellants, who have lined their pockets at the expense of SVIC investors, who seek to wear down the cash-strapped and insolvent entity through expensive litigation."). Despite SVIC's claims of being cash-poor and not having enough funds to pay advancement, during the course of this case, Appellants learned that the Receiver had burned through ***over $800,000*** in capital contributions and litigation settlements received by SVIC. *See* Opening Br. at 13.[2] Moreover, complaining that it is Appellants who have engaged in "expensive litigation" (Ans. Br. at 20) and who have used "this litigation as an offensive weapon" (*id.* at 11), SVIC would have this Court ignore the fact that it was the Receiver's initiation of litigation in California against

[2] SVIC and its Receiver remain bound under ¶ 8 of the Pretrial Order (A1692-1699) to "promptly notify Plaintiffs' counsel in the event SVIC obtains cash receivables or has cash in its bank account(s) in the amount of $10,000 or more" and to "provide quarterly financial statements to counsel for Plaintiffs." *See* Final Judgment at A1773 (incorporating by reference terms of Pretrial Order into Final Judgment). Appellants are aware that SVIC has settled with other parties in October 2015, but no update on monies received has been received from the Receiver. Appellants fully expect that if monies are received that they will be made aware as required by the Pretrial Order and Final Judgment. In addition, it has been many months since SVIC provided any information at all in compliance with these orders, and SVIC and the Receiver are clearly in breach of these obligations. Without this information, Appellants have no information whether SVIC's current claims of being "cash poor" are hyperbole.

Appellants and SVIC's refusal to honor the advancement obligations that necessitated bringing this suit.[3]

Pared of the distractions of SVIC's swipes at Appellants, SVIC's Answering Brief presents a simple theme: receivership voids the "rules of the game" (as SVIC describes it) (Ans. Br. at 21). The implications of this decision for Appellants and Delaware directors and officers generally is, as one Court noted under similar circumstances, "potentially disastrous" where directors and officers who once operated under an assumption that their contractual rights would be honored are now left with an empty promise. *See In re Baldwin-United Corp.*, 43 B.R. 443, 457 (S.D. Ohio 1984). SVIC offers no compelling rationale why the standard rules should be voided—especially where the "rules" that are being voided are as critical as they are to the "game." Moreover, when the actions of the Receiver are scrutinized, it is clear that the general sense of "fair play" that one would expect to govern has not been met.

SVIC's reliance on bankruptcy precedent is also a false analog. Without any explanation why bankruptcy precedent should be adopted, SVIC retreats to this authority with the hope that the Court will simply adopt these decisions. Yet,

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[3] Likewise, it was SVIC's decision to push for a trial on whether the Employment Agreements were the products of fraud—only to cave on the eve of trial after expensive and time-consuming discovery had taken place. *See* Opening Br. at 10-14. SVIC tried to argue that certain amendments may have changed the operative provisions; instead, these amendments actually reaffirmed Santer's rights. In addition, as SVIC is well aware, the Andrikopoulos Employment Agreement was never amended at all.

tracing this bankruptcy precedent back shows that the basis of these decisions was in code-based provisions that the courts were compelled to uphold. Without the same code constrictions here and a strong public policy going the opposite direction, the bankruptcy precedent should have been left in the bankruptcy court.

Appellants maintain that the Final Judgment, which is subject to this Court's *de novo* review,[4] should be reversed.

[4] Despite SVIC's attempt to have the Court review the Trial Court's decision under an "abuse of discretion" standard (*see* Ans. Br. at 14-15), Appellants repeat that the standard of review on this appeal is *de novo*. While the Trial Court may be afforded broad discretion on issues related to receivership, as the Trial Court itself noted, this case involves a matter of first impression (A1767). "The Delaware Supreme Court is of course the final arbiter on matters of Delaware law." *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 663 (Del. Ch. 2012). Thus, until this Court has made a final determination of what is the law, the abuse of discretion standard is not appropriate.

I. SVIC Offers No Compelling Rationale Why The "Rules of the Game" Should Be Changed.

SVIC summarizes its position stating that receivership is "an extreme result where the rules of the game must change" (Ans. Br. at 21). The "rules" that SVIC is changing, however, are critical to the very "game" that SVIC alleges that Delaware directors and officers are playing: the expectation that express contractual rights and Delaware's strong policy in favor of advancement will be enforced.

First, there is a contractual right that is being denied. The plain language of Appellants' contracts providing for advancement (the Employment Agreements) made clear that the SVIC would be required to pay:

> The Company ***shall pay*** any expenses (including attorneys' fees), judgments, penalties, fines, settlements, and other liabilities incurred by the Executive in investigating, defending, settling or appealing any action, suit or proceeding described in this Section 19 ***in advance of the final disposition of such action, suit or proceeding***.

(A56 at § 19(b); A75 at § 19(b)). The contract language further provides that such advancement would be paid "promptly" "but in no event later than 10 days following the Executive's delivery to the Company of a written request for an advance …." *Id.* No caveats or exceptions for receivership were contained in the agreement.

Delaware law has long upheld the primacy of contract law, and in the context of advancement provisions, has required Delaware corporate entities to honor their obligations. *See DeLucca v. KKAT Mgmt., LLC*, 2006 WL 224058, at *2 (Del. Ch. Jan. 23, 2006) (refusing to upset "the broad grant of mandatory advancement they forged on a clear day" by having "the judiciary ignore the plain language of their contracts and generate an after-the-fact judicial contract that reflects their current preference"). Wolfe & Pittenger notes:

> While a corporation may impose additional conditions on permissive advancement "a board may not change the terms of [contractually] 'mandatory' advancement by [for example] later conditioning that advancement upon a showing of financial responsibility" after advancement has been sought. Moreover, a right to advancement may not be eliminated retroactively.

Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 8.02[b] (Matthew Bender & Co. 2015) (quoting *Havens v. Attar*, 1997 Del. Ch. LEXIS 12, at *43 (Del. Ch. Jan. 30, 1997)). *See also Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *27 (Del. Ch. May 28, 2015) (refusing to read additional terms and conditions into advancement right). Despite the provisions of the Employment Agreements plainly providing for prompt advancement, SVIC sought and has now been granted a tool to void the contract's plain language.

Second, there is a strong public policy, years of Delaware precedent, and a clear mandate from the General Assembly underlying the right to advancement that is being ignored. *See Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *3 (Del. Ch. Mar. 28, 2008) (noting "Delaware's 'invariant policy' in favor of advancement"); *Miller v. Palladium Indus., Inc.*, 2012 WL 6740254, at *3 (Del. Ch. Sept. 14, 2012) ("Delaware policy favors indemnification and advancement as a means of attracting qualified individuals to serve in important corporate capacities."); *Underbrink v. Warrior Energy Services Corp.*, 2008 WL 2262316, at *10, n.89 (Del. Ch. May 30, 2008) ("Advancement policies have been found to be valuable because they 'encourage[] corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service.'") (quoting *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005)). *See also* 8 *Del. C.* § 145 (providing for indemnification and advancement of directors and officers of Delaware corporate entities).[5]

Despite all of these "rules"—*i.e.*, clear expectations and requirements—that Appellants thought would be honored, SVIC argues that if the Court requires it to honor its advancement obligations, it may not be able to economically justify bringing the litigation it has initiated arguing that they are being worn down by Appellants through "expensive litigation" *See* Ans. Br. at 20. The fact is that it was the Receiver acting on behalf of SVIC who made the decision to pursue

[5] SVIC cites *Ferry v. Kehnast*, 2008 WL 2154861 (Del. Ch. May 6, 2008), and *Williams v. Calypso Wireless, Inc.*, 2012 WL 424880 (Del. Ch. Feb. 8, 2012), for the proposition that Delaware receivers are charged with the marshalling of assets and that receivers are typically paid first. However, neither *Ferry* nor *Calypso Wireless* involved treatment of advancement claims, and neither decision provided much, if any, guidance to the Trial Court in reaching its decision. The priority issues in this matter are truly an issue of first impression.

"expensive litigation" when the Receiver filed the California Action. In reviewing the "fair play" of whether Appellants should lose their advancement rights so that the Receiver can pursue its claims against Appellants, the fact remains that the cost of advancement should have gone into the Receiver's calculus regarding whether to sue in the first place. *See*, *e.g.*, *S.E.C. v. Illarramendi*, 2014 WL 545720, at *8 (D. Conn. Feb. 10, 2014) (noting in similar context that "[t]he Receiver presumably determined that despite the administrative costs attendant to pursuing the lawsuit—including his own fees and potentially those advanced to Movants—the potential recovery will produce a net economic benefit for the Receivership Estate"). Had the Court forced SVIC to honor its obligations, the Receiver would have had to make an economically rational decision as to whether the "game" (as SVIC describes it) was worth the candle.

SVIC further argues that if advancement were required to be honored, "granting administrative priority in instances such as this 'seriously could undermine, if not entirely eliminate, the ability of companies in receivership to pursue claims against former management'" (Ans. Br. at 20-21) (quoting July 30 Opinion at A1768). But this has always been the case with respect to the public policy decision that was made to allow for Delaware corporate entities to pay advancement and indemnification. In *Tafeen*, this Court specifically recognized the "salutary public policy that is served by indemnification," and that advancement is "a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards for its shareholders." 888 A.2d at 218 (internal quotations and citations omitted). This is simply the cost of "attracting the most capable people into corporate service." *Id.*

Not surprisingly, SVIC repeats the Trial Court's rationale that there is no need to attract capable people once a Delaware company is in receivership: "In the context of receiverships, 'there is no long-term horizon;[6] the focus is on winding up the entity's affairs' and 'the relevant importance of the policy justification of advancement as an inducement to attract qualified individuals to manage the company is diminished ..." (Ans. Br. at 19) (quoting July 30 Opinion at A1768). This logic, however, assumes that "qualified individuals" will still be willing to serve as managers of Delaware companies after it becomes widely known that if a Delaware company is placed into receivership even many years after those managers leave the company, any advancement rights that the manager had will be worthless. Moreover, as was stated in the Opening Brief, it is precisely when the company is in the throes of receivership that the need for advancement is paramount to managers who relied on contractual advancement when they joined a company. *See* Opening Br. at 29-30.

[6] The Trial Court noted in its July 30 Opinion that there was no "long-term horizon" (A1768) for the entity during its wind-up. This is not accurate. Given the amount of litigation that the Receiver has initiated, it appears quite likely that there will be years of litigation related to SVIC.

Finally, in attempting to rebut Appellants' argument that there is (or even could be) a market-based solution, SVIC claims that "Appellants provide no support for their conclusory statement that 'no market for such [ten to thirteen year tail] policies is known to exist" (Ans. Br. at 31). Appellants cited a number of articles supporting the argument that tail coverage on D&O policies typically runs off at most after six years. *See* Opening Br. at n.12. If the issue of whether a market-based solution exists is pertinent to this case, then the Trial Court's reference to a market-based solutions, a suggestion made totally out of the blue without any opportunity to allow for the presentation of evidence, was plain error.

While SVIC argues that receivership is a game changer which justifies tossing the rules, the rules that SVIC is seeking to evade are too important to be thrown out without a compelling legal justification. While the winding up of the affairs of a Delaware corporation is important, so too is honoring contractual promises and upholding Delaware precedent and public policy.

II. Bankruptcy Court Precedent Has No Bearing on Whether Delaware's Public Policy in Favor of Advancement Should Be Ignored in a Delaware Receivership.

In attempting to draw on bankruptcy court precedent, Appellee starts its argument on page 22 of its Answering Brief with the supposition "[i]f SVIC were in bankruptcy …." Bluntly stated, receivership is not bankruptcy and the Trial Court is not a bankruptcy court. With no authority under Delaware law, Appellee turned to precedent that it thought was an analog to the situation before the Court. However, SVIC's rationale and cited cases underlying the outcome in the bankruptcy context makes clear that bankruptcy precedent is a false analog.

For example, *In re Baldwin-United Corp.*, 43 B.R. 443 (S.D. Ohio 1984)—the earliest bankruptcy case cited by Appellee—shows that the decision made to not treat advancement claims of former directors and officers as administrative claims stemmed from the court's analysis of the priority scheme under the Bankruptcy Code and Congress' intent in establishing the scheme. Specifically, the *Baldwin-United* court focused on whether the bankruptcy court had "reasonable discretion in interpreting the provisions of [11 U.S.C.] § 503," the Bankruptcy Code's provision related to payment of administrative expenses, so as to include payment of advancement/indemnification as an administrative claim. 43 B.R. at 454. After looking to the construction of the statute and its context in the Bankruptcy Code as a whole, the *Baldwin-United* court concluded that the bankruptcy court did not have such discretion in light of Congress' intent to narrow the definition of what was an administrative claim. *Id.* at 455.[7]

The *Baldwin-United* court's decision was based on an analysis of the language of the Bankruptcy Code and case law interpreting that Code—neither of which has any bearing on this context. Even when the *Baldwin-United* court broadened its review as part of an analysis of the equities, the court again noted that in light of the limitations that the Bankruptcy Code imposed, it did "not believe that any court has the 'discretion' to overlook or defeat clear statements of Congressional purpose, and so we conclude equitable factors may not defeat the well-established principles of administrative prioritization delineated above." *Id.* at 457. Constricted by the Bankruptcy Code provisions, the *Baldwin-United* court could not classify the advancement claims as "administrative claims."

Moreover, while SVIC attempts to deride Appellants' claims of harm that will result from the deprivation of advancement as histrionics (*see* Ans. Br. at 21), the *Baldwin-United* court noted that it was "acutely aware" that its decision would have "potentially disastrous implications" for directors and officers who were deprived of their expectation of advancement. *Id.* Despite the ramifications, the

[7] The Trial Court in the July 30 Opinion commented on the holding in *Baldwin-United*, writing: "[T]he *Baldwin-United* court acknowledged that its holding 'has potentially disastrous implications for [former officers and directors].' Throughout its opinion, [the *Baldwin-United*] court contrasted the potentially competing goals of advancement and bankruptcy, but concluded that the federal bankruptcy code dictated the outcome" (A1766) (internal citation omitted).

Baldwin-United court could not justify deviating from the Code's language. *Id.*

Since there is no statutory provision[8] compelling the same result here as in the bankruptcy context, the question is whether it is better policy to deprive Appellants of their expectation of advancement or to honor the obligation as part of the cost of retaining qualified Delaware directors and officers. Indeed, Appellants cited decisions from other courts (including *Weingarten v. Gross*, 563 S.E.2d 771 (Va. 2002) (analyzing similar issue under Virginia law) and *S.E.C. v. Illarramendi*, 2014 WL 545720, at *8 (D. Conn. Feb. 10, 2014) (applying Delaware law)) which refused to read bankruptcy precedent into their analysis. Appellants maintain that there is no compelling reason to adopt the rationale underlying bankruptcy precedent, and in fact, there are compelling reasons not to do so.

SVIC argues in its Answering Brief (at 29) that *Illarramendi*, even though it applied Delaware law:

> should not determine whether this Court should be guided by the analogous bankruptcy precedent. *Illarramendi* is from the District of Connecticut and is not binding on this Court. Rather, the Court should look to the bankruptcy courts in the District of Delaware who are far more versed in interpreting and applying Delaware law and analogous situations.

Yet SVIC left unrebutted the case law cited in Appellants' Opening Brief which draws a clear distinction between the District of Delaware bankruptcy court's view

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[8] *See* Honorable J. Travis Laster, *The Chancery Receivership: Alive and Well*, 28 Delaware Lawyer 12, 15 Fall 2010 (noting that Court of Chancery is not bound by same rigid "priority schemes" as a bankruptcy court).

of advancement obligations and the Delaware state courts' view.

Appellants noted (Opening Br. at 31) that in *In re Mid-American Waste Systems, Inc.*, 228 B.R. 816 (Bankr. D. Del. 1999), the Bankruptcy Court for the District of Delaware describes indemnification claims as "merely claims for prepetition compensation for services rendered, ***not unlike salary or other benefits.***" *Id.* at 821 (emphasis added). Appellants contrasted this language in *Mid-American Waste Systems* with the Court of Chancery's language in *Scharf v. Edgcomb Corp.*, 1997 WL 762656, at *4 (Del. Ch. Dec. 4, 1997), which stated: "Analyzing director and officer indemnification provisions as if they were salary, company cars or other personal corporate prerequisites simply makes no sense."

SVIC makes no effort to harmonize the divergent reasoning between the two courts, instead citing *Mid-American Waste* together with *In re Summit Metals, Inc.*, 379 B.R. 40 (Bankr. D. Del. 2007), another bankruptcy court decision which likewise describes indemnification claims as "a form of prepetition ***compensation*** for services that is not entitled to administrative priority." *Id.* at 55 (emphasis added). Contrary to SVIC's characterization of the District of Delaware's reasoning as being more appropriate in this context, it appears to be directly contrary. Drawing the comparison between the bankruptcy court's views and the Delaware state court's views reveals that bankruptcy precedent is simply a false analog and should not be dispositive.

III. The Court Should Disregard SVIC's Implicit "Bad Guy" Defense to Advancement.

Again and again throughout SVIC's Answering Brief, SVIC attempts to paint Appellants as "bad guys" who by and large deserve what they are getting—a characterization to which Appellants ***strongly*** object. Specifically, SVIC's Answering Brief goes into a long discussion of the litigation against Peder Jungck (*see* Ans. Br. at 5-7), an SVIC founder who remained an officer of an SVIC-related company until 2010—years after Appellants left the company—essentially seeking to paint Appellants with the same broad brush that is being used to paint other SVIC officers and directors with whom Appellants have had no affiliation for over 10 years.

Appellants maintain that the claims of the Receiver against them are specifically lacking in merit in ***both law and fact***. For example, SVIC states in its Answering Brief (at 8) that "Appellants and others also received large loans …." First, this allegation is false as to Andrikopoulos: Andrikopoulos did not receive any loans from SVIC. Second this allegation is misleading: SVIC's allegations ignore the fact that SVIC never paid Santer's full salary and benefits he was owed under his Employment Agreement. After months of trying to set the record straight, Appellants filed separate cross-complaints as part of the California Action against SVIC and its former managers who were the ones responsible for driving SVIC into insolvency years after Appellants left employment with SVIC.

While the point of this case is not to argue the merits of the Receiver's claims pending in the California Action, Appellants do want it known that they maintain that their positions are decidedly different from other former directors and officers. The Receiver, in suing a multitude of other parties, cast an extremely wide net, curiously choosing to initiate litigation against certain parties with SVIC ties but skipping other obvious targets—people such as Riverson Leonard, an SVIC founder who was in control of SVIC when SVIC was sanctioned by the Court of Chancery when SVIC "lost" company-related documents[9] and the Receiver was ultimately appointed by the Trial Court in 2012. *See* Opening Br. at 6-7.

Throughout this proceeding, Appellants have been frustrated again and again with the misstatements of SVIC and its counsel, including the statement at the April 9 Hearing that "there's no record evidence that the receiver had knowledge of the advancement obligations." *See* Opening Br. at 17-18. Moreover, the statement in the Answering Brief (at 31) that the California court denied Appellants' demurrer "finding that the statute of limitations on the claims against Santer and Andrikopoulos was tolled because of their fraudulent concealment" is a cavalier description of the court's ruling. There was no finding of fact

[9] The Trial Court recognized that Appellants were "long gone" when the loss of SVIC's company documents happened (A841).

whatsoever—this was simply a ruling on a pleading motion which therefore assumed facts alleged by SVIC to be true. *See* Ex. B to Ans. Br. at 14.

Regardless of the merits of the underlying claims, Delaware courts have never viewed as appropriate the use of allegations of purported "bad conduct" as a means of depriving Delaware directors and officers of their contractual rights to advancement. For example, in *Tafeen v. Homestore, Inc.*, 2004 Del. Ch. LEXIS 38 (Del. Ch. Mar. 16, 2004), the Court of Chancery rejected a similar attempt to use a "bad guy" defense to claims of advancement:

> While still discussing Tafeen's fraudulent conduct, Homestore writes, "Tafeen thus already has profited, substantially, from his own wrongdoing. It cannot be appropriate to afford Tafeen advancement protection otherwise potentially available under Homestore's Bylaws when he never intended to act properly as a corporate officer in the first place."

Tafeen, 2004 Del. Ch. LEXIS 38, at *19-20. The Court of Chancery noted that this argument was similar to another argument that it rejected, stating:

> Both arguments are premised on the notion that Tafeen was motivated by personal greed. And, as discussed, this form of defense against advancement was considered and rejected in both *Reddy* [*v. Electronic Data Systems Corp.*, 2002 Del. Ch. LEXIS 69 (Del. Ch. June 18, 2002)] and *Perconti* [*v. Thornton Oil Corp.*, 2002 Del. Ch. LEXIS 51 (Del. Ch. May 3, 2002)]. Homestore's motion for summary judgment as to this defense is denied as a matter of law.

Id. at *20.

In *Reddy*, 2002 Del. Ch. LEXIS 69, at *17, a decision referenced by the *Tafeen* court, the Court of Chancery specifically noted, "this court has often been required to uphold the indemnification and advancement rights of corporate officials accused of serious misconduct, because to do otherwise would undermine the salutary public policies served by § 145." Refusing to be baited by the party's "bad guy" defense, the *Reddy* court stated:

> The problem with EDS's argument is that it has no logical stopping point. It is not uncommon for corporate directors, officers, and employees to be sued for breach of the fiduciary duty of loyalty, and to have to defend claims that they took official action for the primary purpose of diverting corporate resources to their own pocketbooks -- in the form of contractual compensation benefits (*e.g.*, severance payments or stock options) or an unfair return on a self-dealing transaction. Therefore, it is highly problematic to make the advancement right of such officials dependent on the motivation ascribed to their conduct by the suing parties. To do so would be to largely vitiate the protections afforded by § 145 and contractual advancement rights.

Id. at 15-16. While Appellants maintain that they will ultimately prevail in the California Action, this should not have any bearing on their contractual advancement rights.

CONCLUSION

For all the reasons stated herein as well as in their Opening Brief, Appellants respectfully request that this Honorable Court reverse the Final Judgment in accordance with the arguments outlined in this appeal and remand this case to the Trial Court for further proceedings consistent with the ruling of this Court.

Respectfully submitted,

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