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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| FRANKLIN BROWN, | ) | |
| | ) | |
| Plaintiff Below, Appellant | ) | No. 438,2016 |
| | ) | |
| v. | ) | |
| | ) | On Appeal From The Court of |
| RITE AID CORPORATION, | ) | Chancery of the State of Delaware, |
| | ) | |
| Defendant Below, Appellee | ) | C.A. No. 11596-VCL |

# APPELLANT'S REPLY BRIEF

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## PRELIMINARY STATEMENT

Each of the issues raised by this appeal is subject to *de novo* review by this Court. Moreover, this appeal presents several narrow matters of first impression. Brown[1] asks this Court to use the clean slate before it to protect the public policies underlying 8 *Del. C.* § 145 and provide a small measure of justice in Brown's 15-year battle to cause Rite Aid to comply with its clear statutory, contractual, and moral obligations. By contrast, Rite Aid asks this Court to sanction its wrongdoing.

In an ugly attempt to poison this Court's impression of Brown, Rite Aid persists in its pattern of grossly misrepresenting the scope of Brown's conviction and the nature of prior litigation between the parties, notwithstanding repeated corrections by Brown's attorneys for more than the last decade in multiple court filings and proceedings. *See, e.g.*, A372-373, A374-376, A448-449, A476-477, A548, A580-581, and B139-140. When Rite Aid is forced to explain its misrepresentations, it feigns innocence, claiming it "inadvertently misstated" critical facts or committed "innocent error." A539, A548.

For example, even after filing the Cumberland County Action in violation of the permanent federal Bar Order that Rite Aid's same attorneys had just 14 months earlier helped Judge Dalzell craft in connection with settlement of the multi-district

[1] Unless otherwise defined herein, capitalized terms have the meaning ascribed in Appellant's Opening Brief ("AOB").

securities litigation in the Eastern District of Pennsylvania—the same lawsuit Rite Aid used to convince Chancellor Chandler to stay and ultimately dismiss Brown's 2003 Delaware Advancement Action (A259-260)—Rite Aid asserted during oral argument below that its violation of the Bar Order was nothing "other than a very unfortunate inadvertence." A644. That "very unfortunate inadvertence," which Rite Aid never disclosed, even when seeking (in violation of the Bar Order) summary judgment against Brown in the amount of $297.4 million, has been used by Rite Aid to deprive Brown completely of his right to advancement since January 2003, with devastating consequences for Brown and his family. A562.

From the first page of its Answering Brief (the "RAB"), Rite Aid mischaracterizes Brown's conviction, incorrectly asserting he "looted" the company and that his conviction "aris[es] out of his role in conspiracies to misappropriate and to conceal the misappropriation of millions of dollars from Rite Aid." RAB 1. As support, Rite Aid provides bulleted statements from Brown's ***indictment and falsely claims they are jury findings***, calling them: "Jury Fraud Conspiracy Findings" or "Jury Obstruction Conspiracy Findings." RAB 9-10. Even a cursory reading of the actual findings in the Jury Verdict Form ("JVF"), reveals that the jury did ***not*** find Brown guilty of looting the company, misappropriating or concealing misappropriation of millions of dollars, destroying

evidence, or submitting to the company any document that was forged or unauthorized. A186-A206.

Brown's indictment was never submitted to the jury, 24 of the 36 counts against Brown were dismissed before trial, and most of the objectives supporting the conspiracy charged in Count 1 were also dismissed before trial. A180-206, A551-553. That conspiracy originally contained 11 different objects (A087-088, A552-553); 8 were dismissed before trial, leaving only paragraphs a, b and e. A087-088, A190. Significantly, only paragraph "e" charged Brown with conspiring to defraud Rite Aid, and he was ***acquitted*** of that object. A190. Brown was also ***acquitted*** of the only substantive Count charging Brown with defrauding Rite Aid. A188. This acquittal also negated the only forfeiture count alleged against Brown. Rite Aid's false recrafting of "jury findings" and insertion of inflammatory and false language such as "forged" (***not*** in the JVF), is emblematic of Rite Aid's deceptive tactics. *See* RAB 9.

Brown was not indicted until age 74, more than two years after his retirement from Rite Aid and two years after a thorough and intense Rite Aid internal investigation found no wrongdoing by Brown. Brown was therefore granted coverage under Rite Aid's D&O liability insurance (unlike his principal co-defendants). A315, A494-95. Contrary to Rite Aid's assertions, Brown faithfully served Rite Aid and its predecessor companies for more than 45 years,

refusing to accept approximately $12 million in earned LTIPs, refusing to exercise $23 million in vested stock options, and not selling 360,000 shares with a value of at least $16 million of Rite Aid stock owned by his immediate family, for a total loss of about $51 million to Brown. A312. If Rite Aid was looted, it was not by Franklin Brown.

In return, Rite Aid refused to meet its clear obligations to Brown and even discontinued advancements nine months before his trial—despite the Charter making such advancements mandatory. A212-213; *see also* A207-17 (construing the same Charter provision in *Bergonzi*). This Court previously recognized the severe and irreparable harm caused by the wrongful withholding of advancement and indemnification, and Brown is living proof of this harm. *See Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005); A321-323. To put it mildly, Rite Aid's conduct toward Brown has been antithetical to Delaware's policy of "encourag[ing] 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." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005).

## I. SECTION 2255 MOTIONS ARE UNIQUE AND PART OF THE UNDERLYING ACTION AND THE COURT BELOW ERRED BY CONCLUDING BROWN'S INDEMNIFICATION CLAIM ACCRUED ON JANUARY 10, 2011, NOT NOVEMBER 10, 2014

This Court has held that, "[a] cause of action for indemnification accrues when the officer or director entitled to indemnification can 'be confident any claim against him ... has been resolved with certainty.'" *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 919 (Del. 2004). Until the underlying claim is conclusively resolved, the appropriate claim is for advancement and not indemnification.[2] "Generally, the matter on which the claim for indemnification is premised may be said to have been resolved with certainty only when the underlying investigation or litigation is definitely resolved." *Scharf*, 864 A.2d at 919. "The implicit rationale for this conclusion is that the person seeking indemnity should not have to rush in at the first possible moment but rather should be able to wait until the outcome of the underlying matter is certain." *Id.* (citations omitted). If the decision below is

[2] Section 145(e) authorizes advancement prior to the "final disposition" of an "action, suit or proceeding." 8 *Del. C.* § 145(e). The term "final disposition" is "obviously linked to the concept of ultimate indemnification." *Sun Times Media Grp., Inc. v. Black*, 954 A.2d 380, 395 (Del. Ch. 2008). Thus, § 145(e) states that expense incurred in defending a "criminal ... action, suit or proceeding" shall be paid by the corporation, upon receipt of an undertaking that the amount shall be repaid if the recipient "shall ultimately be determined" not to be entitled to indemnification. As explained in *Black*, "[t]he most logical reading of the text is that advancement must be provided until the underlying action, suit, or proceeding is finally resolved or disposed of, in the sense that its outcome is not subject to further disturbance. Why? Because it is only at that point that the ultimate determination that the recipient either was or was not entitled to indemnification can be made." *Black*, 954 A.2d at 395.

affirmed, corporate officers like Brown will be required to pursue lawsuits for indemnification while simultaneously challenging their convictions through Section 2255 motions filed in the original criminal trial court. As the Court of Chancery noted in *Branin v. Stein Roe Investment Counsel, LLC*, 2015 WL 4710321, at *6 n.40 (Del. Ch. July 31, 2015), this "would potentially decrease litigation efficiency by promoting the parallel and simultaneous litigation of an underlying action and a related indemnification claim. That would create the possibility for conflicting judgments, and even if that circumstance were avoided, resources could be wasted." Whether such simultaneous parallel litigation should be the norm in Delaware is, as the Court of Chancery noted, "a policy judgment that ultimately the Delaware Supreme Court would have to make." A661-662.

Rite Aid focuses on the meaning of "final judgment" in a criminal case, but refuses to acknowledge that finality is variously defined, and like many legal terms, its precise meaning depends on context. *See Black*, 954 A.2d at 394-95 ("a court should not blind itself to the context in which … words are used") (citing *Clay v. United States*, 537 U.S. 522, 527 (2003)). Rite Aid cites *United States v. Frady*, 456 U.S. 152, 164-165 (1982) for the proposition that a "final judgment" in a criminal case, after appeal has been waived or exhausted, commands respect. RAB 22, 24-25. But near the time *Frady* was decided, the United States Department of Justice, Bureau of Justice Statistics, published a report analyzing

federal criminal appeals during 1985-1999 which found that success rates on direct appeal were nearly identical to success rates for § 2255 and *habeas* proceedings.[3]

The Court of Chancery appropriately recognized that this Court has never considered whether, in the context of a criminal proceeding against a corporate officer, indemnification should extend to a motion attacking the conviction and/or sentence under § 2255. A660-662. The Court of Chancery further recognized that "[t]his is something that, really, only the Delaware Supreme Court can decide." A660. Brown contends, as the court held in *Black*, that "an action, suit or proceeding refers to a discrete administrative or judicial matter involving a particular subject and ***encompasses all its stages***, and ... the final disposition of such an action, suit or proceeding occurs when its outcome is no longer subject to any further review as of right." *Black*, 954 A.2d at 396 (emphasis added). Accordingly, it is only at the conclusion of a § 2255 motion—which is as of right (AOB 23 n.6, 24 n.8)—that the ultimate determination of entitlement to indemnification can be made.

[3] U.S. Department of Justice, Office of Justice Program Bureau of Justice Statistics Special Report, *Federal Criminal Appeals, 1999 with trends 1985-1999.* Available at https://www.bjs.gov/content/pub/ascii/fca99.txt (last visited November 23, 2016) (reporting 12% success rate on the merits for direct appeals in 1999 (the only year for which the study reported this data) and 13% success rate on the merits for § 2255 and *habeas* proceedings in 1995 (the only year for which the study reported this data)). This Court may take judicial notice of this report. *See McCoy v. State*, 112 A.3d 239, 252 (Del. 2015) (taking judicial notice of U.S. Census Bureau statistics).

To avoid this logic, Rite Aid raises the specter of endless litigation that "would effectively negate any time limitation" for advancement and ultimately indemnification. RAB 21-22. Rite Aid claims indemnification would never accrue because, "as long as the convicted defendant is alive … there is always a chance of subsequent reversal." RAB 24. Rite Aid cites *Morris v. Beard*, a murder case in which a death sentence was vacated after 18 years based on a *habeas* petition under § 2254. *Id.* Rite Aid also points to collateral attacks on civil judgments suggesting that Brown seeks to open Pandora's box. *Id.* at 22 n.3. Brown has not requested, however, that this Court hold that *all* collateral proceedings—civil and criminal—must be completed before an indemnification claim accrues. The only question before this Court is whether Brown's indemnification claim accrued before the completion of his § 2255 motion. Thus, many of Rite Aid's arguments authorities are inapposite from the start. *See* RAB 22-24, 29.[4]

Brown's Opening Brief identified at least five ways, addressed below, in which § 2255 motions are unique proceedings that remain a part of the underlying action. AOB 21-25. Rite Aid, however, largely avoids the unique nature of a §

[4] Setting aside the fact that *Morris v. Beard* was a § 2254 *habeas* action rather than a § 2255 motion, that decision is also irrelevant because it is hard to conceive how a murder prosecution would arise "by reason of the fact that [the defendant] is or was a director or officer" of a corporation.

2255 motion and conflates such motions with other collateral and post-conviction remedies.

### A. Section 2255 Motions Are Part of the Underlying Criminal Action

Rite Aid does not deny that § 2255 motions are considered part of the underlying proceeding. *See* AOB 21-24; RAB 26-27. Instead, Rite Aid sidesteps that fact by arguing Brown did not appropriately raise this issue below. RAB 27. Rite Aid is wrong and cannot deny that Brown cited several times to various statutory subsections in § 2255 in his opposition to Rite Aid's motion to dismiss or that Brown argued that his § 2255 motion "is an important part of the review process ***in a criminal case***," during which the criminal trial court may "set aside" the conviction or grant "a new trial." A467-68 (emphasis added). Nor can Rite Aid deny that Brown cited a key decision standing for this proposition. A467 (citing *Wall v. Kholi*, 562 U.S. 545 (2011)).

At oral argument below, Brown's counsel argued what is self-evident from the statutory language and procedural rules applicable to § 2255 motions:

> A 2255 is part of the same proceeding. It's a collateral proceeding but it's filed in the same case. There is no new case number assigned to a 2255 motion. And it is the only procedure in which certain constitutional appellate issues may be raised. And the analysis of *Sun-Times* applies equally because if the deciding factor is when is it that the corporate officer can be certain that the case is over with certainty, in some cases, they may choose not to file a 2255 or the time period within which to do so may run, at which point [Rite Aid] would be

> correct: the cert. denial from the direct appeal would be the end of it. There would be no other possible proceedings. That was not the case here. He did pursue a 2255, and that could have resulted, just like direct appeal, in a new trial and a full acquittal.

A628-629. The court clearly understood Brown's argument:

> I understand the arguments that are made under *Sun-Times* about what it means to have a final disposition.... It may be that for procedural purposes, one brings that type of collateral attack in the same core proceeding, but it strikes me that that is a separate and distinct phase of the litigation, and that in terms of the right to indemnification, finality for purposes of final disposition is achieved when the original underlying criminal proceedings end.

A660-661. Brown expressly made his § 2255 argument and the court below considered it; the argument was not waived.

Rite Aid also avoids the significance that § 2255 motions are part of the same proceeding by noting that § 2255 was motivated in part by the need to reduce the burden on federal courts in districts hosting prisons. RAB 28-29. Setting aside the fact that this was not the only motivation behind § 2255 (*see* AOB 21-22), Congress' partial motivation for enacting § 2255 does not change the nature of the proceeding that Congress actually created—a narrow proceeding ***that remains part of the underlying criminal action***.

### B. Section 2255 Motions Can Vacate a Sentence or Order a New Trial

Rite Aid argues that § 2255 motions are commensurate with *habeas* actions (RAB 29), but utterly fails to respond to the Advisory Committee Notes highlighting the differences between these proceedings. AOB 21-22. Whether a *habeas* action must be concluded for an indemnification claim to accrue is not before this Court, and the material differences between § 2255 motions and *habeas* actions mean that this Court's ruling will not automatically apply to *habeas* actions.

### C. Section 2255 Motions Have a One-Year Statute of Limitations and Are as of Right with Respect to One Motion Only

Rite Aid ignores that a § 2255 motion is subject to a one-year limitation period, and any successive motion must be certified by a three-judge panel of the court of appeals to either contain new evidence that, if proven, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense or rely upon a new rule of constitutional law announced by the United States Supreme Court. *See* 28 U.S.C. §§ 2255(f) and 2255(h). A corporate officer in prison following a criminal prosecution may file only one § 2255 motion as of right. 28 U.S.C. §§ 2255(a) and 2255(h).

These facts eviscerate Rite Aid's arguments that accepting Brown's position would result in eternal advancement or prevent indemnification claims from ever accruing. *See* RAB 21-24. It is nothing new to Delaware law that indemnification claims may take many years to accrue. *See, e.g.*, *Branin v. Stein Roe Inv. Counsel, LLC*, 2014 WL 2961084, at *1 (Del. Ch. June 30, 2014) (underlying action not final for indemnification purposes for more than ten years). Furthermore, Rite Aid's complaint regarding eternal advancement comes with ill grace, as here Rite Aid terminated Brown's advancement before his trial and more than eight years before it now argues his indemnification right accrued.

### D. Section 2255 Motions Are the Only Means to Challenge Certain Important Constitutional Defects, Including Claims of Ineffective Assistance Of Counsel

Rite Aid does not contest that a § 2255 motion was the only means for Brown to pursue his ineffective assistance of counsel claim. *See* AOB 25. Nor does Rite Aid contest that Rite Aid cutoff Brown's advancement nine months before his criminal trial and reviewing courts questioned the diligence of Brown's trial attorneys. AOB 9-12.

Ironically, continuing mandatory advancements through a § 2255 motion (until an indemnification claim accrues) should *reduce* the need for ineffective assistance of counsel motions. Excusing the corporation from its obligation to advance for a § 2255 motion only compounds the injury to the indemnitee, and

endangers a defendant's constitutional right to effective assistance of counsel. *See U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008) (affirming dismissal of indictment where government's pressure under the Thompson Memorandum persuaded KPMG to deny advancement of attorneys' fees resulting in violations of defendants' constitutional rights); A322-23. The full consequence to Brown of losing advancement here was immeasurable. The only consequence to Rite Aid for breaching its mandatory advancement obligation to Brown has been an economic benefit.

### E. Section 2255 Motions Are Such an Integral Part of the Criminal Appeal Process that Indigent Defendants Retain the Right to Appointed Defense Counsel, Just as They Do on Direct Appeal

Rite Aid does not address the fact that § 2255 motions are such an integral part of the criminal appeal process that indigent defendants retain the right to appointed defense counsel for such proceedings, just as they do on direct appeal. AOB 25 n.9. This reiterates the importance of § 2255 motions and their connection to the underlying criminal proceeding.

* * *

Although § 2255 motions may be considered collateral in some respects, they are unique and narrowly circumscribed proceedings that Congress defined to be a continuation of the underlying criminal action. This Court should conclude that indemnification claims do not accrue before such motions are finally resolved.

The ruling below should be reversed because Brown's criminal case was not resolved with certainty until November 10, 2014.

## II. THE COURT BELOW ERRED BY DETERMINING THE ANALOGOUS STATUTE OF LIMITATIONS IS 3 YEARS, RATHER THAN 20 YEARS

The parties agree that rules of contract construction apply to corporate charters. RAB 31; *see also Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-343 (Del. 1983). Article Tenth of the Charter provides in pertinent part:

> (2) Right of Claimant to Bring Suit. If a claim under paragraph (1) of this Section B [for indemnification] is not paid in full by the corporation within thirty days after a written claim has been received by the corporation, ***the claimant may at any time thereafter bring suit against the corporation*** to recover the unpaid amount of the claim and, if successful in whole or in part, the claimant shall be entitled to be paid also the expense of prosecuting such claim.

A011 at § B(2) (emphasis added).

In construing this language, Rite Aid makes two errors. First, Rite Aid argues that Section B(2) contains no specified time period as required by 10 *Del. C.* § 8106(c). RAB 33. Not so. Section B(2) explicitly specifies the time period for indemnification suits to be brought—"at any time" more than 30 days after indemnification is demanded and unpaid. The Charter here is even more explicit than the provision found sufficient in *Bear Stearns Mortgage Funding Trust 2006-SL1v. EMC Mortgage LLC*, 2015 WL 139731, at *15 (Del. Ch. Jan. 12, 2015), which did not explicitly extend the limitations period, but rather provided conditions precedent to the accrual of claims. Second, Rite Aid argues that Section

B(2) "simply establishes the earliest date on which a lawsuit may be filed." RAB 31. But Rite Aid's interpretation reads out of Section B(2) the phrase "at any time." Had the parties merely intended to provide a threshold date for an indemnification claim, a provision stating that "the claimant may thereafter bring suit" would be sufficient. This Court "give[s] priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014) (internal quotations omitted).

When viewed as a whole, it is clear that Rite Aid's Charter provides its officers and directors with the fullest measure of indemnification under Delaware law, including changes in Delaware law permitting broader indemnification. The paragraph immediately preceding Section B(2) confirms this:

> (1) Right to Indemnification. Each person who … is made ... a party to or is involved in any action, suit or proceeding, ... by reason of the fact that he ... is or was a director or officer of the corporation ... shall be indemnified and held harmless by the corporation to the fullest extent authorized by the General Corporation Law ***as the same*** exists or ***may hereafter be amended*** (***but***, in the case of any such amendment, ***only to the extent that such amendment permits the corporation to provide broader indemnification rights*** than said law permitted the corporation to provide prior to such amendment)....

A011 at § B(1) (emphases added). Even if the Charter did not expressly contemplate amendments to Delaware law, § 8106(c) applies retroactively and the result would be the same. *See Bear Stearns*, 2015 WL 139731, at *13.

Under Delaware's objective theory of contracts "a contract's construction should be that which would be understood by an objective, reasonable third party." *Salamone*, 106 A.3d at 367-68. Moreover, any ambiguity in the corporate certificate is construed against the corporation. *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398-99 (Del. 1996). There is no doubt that Rite Aid selected the wording of its Charter carefully and precisely. Had Rite Aid intended simply to require a claimant to wait 30 days after a demand went unpaid before filing suit, it could easily have chosen wording to reflect that meaning. Instead, Rite Aid expressly provided for an indefinite period of time during which a claimant may bring suit. *See* AOB 28-31. It is difficult to imagine how an "indefinite period," which Rite Aid admits may be the "period" under § 8106(c) (RAB 33), could be specified without language like that used here. Because the Charter specifies an indefinite period within which a claimant may bring suit, the action is subject to the 20-year limitations period under § 8106(c).

## III. THE COURT BELOW ERRED BY CONCLUDING THE ANALOGOUS STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE CUMBERLAND COUNTY ACTION

Brown has asked this Court to apply equitable tolling to his indemnification claim as a result of the Cumberland County Action, consistent with this Court's analysis in *Levey v. Brownstone Asset Management, LP*, 76 A.3d 764, 772-73 (Del. 2013). AOB 32-38. Rite Aid construes this as an appeal to the Delaware Savings Statute, 8 *Del. C.* § 8118. RAB 43-44. Nevertheless, *Levey* was not primarily based on the Savings Statute. Instead of applying the Savings Statute directly and holding that Levey had brought his Delaware claims within a year after arbitration ended, this Court applied equitable tolling to add 331 days to the normal statute of limitations—which represented the time Levey spent litigating in court and in arbitration. *Levey*, 76 A.3d at 773. Brown asks this Court to apply the same reasoning to his equitable tolling argument. *Id.* at 772.

Although the Savings Statute is not the primary measure for Brown's claim, this Court has recognized that the "reasoning [underlying § 8118] applies with equal force" to equitable tolling. *Id.* The Savings Statute provides that, "a new action may be commenced, for the same ***cause of action***, at any time within one year after the abatement or other determination of the original action…." 10 *Del. C.* § 8118(a) (emphasis added).

This Court has not yet interpreted the phrase "cause of action" in § 8118, but the Court of Chancery has interpreted the phrase somewhat broadly as "embodying the Rule 15(c)(2) approach of deeming as one cause of action all theories that arise out of the same 'conduct, transaction, or occurrence.'" *Shandler v. DLJ Merch. Banking, Inc.*, 2010 WL 2929654, *19 & n.164 (Del. Ch. July 26, 2010) (citing *Gosnell v. Whetsel*, 198 A.2d 924, 927 (Del. 1964) (stating the Savings Statute has "a remedial purpose and should be liberally construed")).

Then-Vice Chancellor Strine noted in *Shandler* that Court of Chancery Rule 15(c)(2) allows a plaintiff who does not plead all possible theories within the limitations period to amend so long as "the claim or defense asserted in the amended pleading arose out of the same conduct, transaction, or occurrence ... in the original pleading." *Shandler*, 2010 WL 2929654, at *19. "Reading § 8118 … consistent with Rule 15(c)(2) makes policy sense as it harmonizes [Delaware's] approach to these related issues." *Id*. This Court should do the same when determining whether a pending advancement action tolls the limitations period for a subsequent indemnification action.

Rite Aid's primary argument is that a prior action must assert an "identical claim" to toll the statute of limitations for a later action. *See, e.g.*, RAB 38, 41-44; A608-609. But *Levey* never held that the prior-filed action must have raised "the identical claim" for equitable tolling to apply. Nor does Rite Aid cite any other

authority for such a requirement. While Rite Aid is correct that advancement and indemnification are "discrete and independent rights" (RAB 43), Brown's two prior claims for advancement (in Delaware and Cumberland County) and this indemnification action arise from the same conduct, transaction, or occurrence—Brown's criminal prosecution—and therefore allege the same cause of action. Indeed, Brown has continuously sought the same thing: an order requiring Rite Aid to pay Brown's defense costs (either prospectively or retrospectively) as it is statutorily and contractually obligated to do. Rite Aid's manufactured requirement of identical claims before tolling can occur is inconsistent with *Shandler*'s interpretation of the Savings Statute and with Delaware authority holding that actions under 8 *Del. C.* §§ 220 & 225 toll the limitations period for plenary breach of fiduciary duty suits. *See* A462; *see also* 54 C.J.S. Limitations of Actions § 176 (stating "original complaint *ordinarily* must be identical to the later asserted claims," but not always) (emphasis added).

The Court of Chancery embraced Rite Aid's incorrect statement of the law—that the prior-filed action must have asserted "the identical claim"—when it refused to find equitable tolling:

> I don't think that the 2003 suit in Pennsylvania tolls the statute of limitations. Again, there's just some strange things going on there, and whether it was inadvertent or advertent, that seemed to me to be focused, at least in the first instance, on advancement and other things, but I don't think it was sufficient for tolling.

A662. The court's refusal to find equitable tolling because the Cumberland County Action was "focused ... on advancement" was erroneous. As explained, both suits involve the same cause of action, which is sufficient for equitable tolling under *Levey*.[5]

[5] Similarly, Brown's claims are timely under § 8118 because this action was brought in October 2015 while his advancement counterclaims were still pending in Cumberland County. Hence, this action was filed well *before* "the abatement or other determination of the original [Cumberland County] action." 10 *Del. C.* § 8118(a).

## IV. THE COURT BELOW ERRED BY CONCLUDING BROWN'S INDEMNIFICATION CLAIM WAS BARRED BY LACHES

While it is possible under certain circumstances to resolve a laches defense on a motion to dismiss (RAB 36), laches is a fact-based inquiry that "is usually only properly disposed of by summary judgment after discovery or at trial." *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 503 (Del. 1982); AOB 39-40. The Court of Chancery recognized "some strange things going on" with Rite Aid's Cumberland County Action (AOB Ex. A at 7:14-15), but inexplicably ruled that Brown had not met the low threshold of pleading facts from which it was reasonably conceivable that laches should not apply.

Rite Aid's erroneous argument that equitable tolling requires the prior-filed action to have alleged "the identical claim" also infects its argument on two of the five *IAC* factors. *See* RAB 38-39. Rite Aid suggests that with respect to factors 1 and 4 ("pursuit of his claim" and Rite Aids' participation in "prior proceedings"), Brown is "disingenuously claiming he was pursuing indemnification in the Cumberland Action before bringing this action." RAB 38. Brown has made no such claim. While Brown did pursue advancement in Cumberland County (prior to accrual of his indemnification claim), his advancement claims arise from the same conduct, transaction, or occurrence as his indemnification claim, and therefore Brown was asserting essentially the same cause of action in Cumberland County (and originally in Delaware). *See, supra*, at 18-20. Tellingly, Rite Aid does not

deny that the improperly filed and permanently enjoined Count VII of its own Cumberland County complaint expressly sought a determination regarding Brown's indemnification rights. AOB 41; A236 at ¶ 37; A572.1 (confirming permanent injunction applies). The parties never actively litigated indemnification in Cumberland County, however, because this issue was unripe until 2014.

Rite Aid concedes the fifth *IAC* factor and admits a bona fide dispute regarding Brown's right to indemnification. RAB 41. As to the second *IAC* factor (a material and unforeseeable change in the parties' circumstances), Rite Aid ignores that Brown was incarcerated, and ignores its own unclean hands in bringing about Brown's conviction by permanently ceasing advancement nine months before trial. Rite Aid has done everything it can to avoid meeting its mandatory obligations, including serious misrepresentations to several courts, including this Court, filing a $100 million frivolous suit against Brown (the Dauphin County Action (B20-85)) to divert Brown's resources, and knowingly initiating the Cumberland County Action illegally, concealing the Bar Order from the Delaware and Cumberland County courts, as well as from Brown and his attorneys. After Brown filed this indemnification action, Rite Aid again violated the Bar Order by seeking summary judgment in Cumberland County, and attaching a $297.4 million demand in an attempt to ensure Brown's indemnification relief, if any, would never be realized.

Regarding the third *IAC* factor, whether delay is "attributable to a legal determination in another jurisdiction," Rite Aid does not address that Brown's 2003 Delaware Advancement Action was derailed by the Cumberland County Court's unwillingness to defer to Delaware. Conclusively, the Cumberland County Action was improperly filed in violation of the Bar Order, and never should have been an impediment to Brown's Delaware Advancement Action. The Cumberland County court also denied Brown's motion for advancement, contrary to how Bergonzi was treated, and the case languished for 13 years before Brown filed this indemnification suit.

In *Levey*, this Court found that, "four of the five *IAC* factors support[ed] a finding of 'unusual conditions and extraordinary circumstances.'" *Levey*, 76 A.3d at 772. "Cumulatively, they strongly suggest that Levey's case presents the rare circumstance where the analogous period of limitations ought not to be the measure of whether a litigant unreasonably delayed in commencing his action." *Id.* Here, all five *IAC* factors support a finding of "unusual conditions and extraordinary circumstances." *Id.* The Court of Chancery's determination that it did not need to "reach those [factual] issues" relevant under *IAC* "because of the [Court's] statute of limitations ruling" (AOB Ex. A at 8:5-12) misses the point—where the *IAC* factors indicate "unusual conditions and extraordinary circumstances" exist, "the analogous period of limitations ought not to be the

measure of whether a litigant unreasonably delayed in commencing his action." *Levey*, 76 A.3d at 772.[6]

Brown's extraordinary effort to obtain some minimal justice should not be barred by laches.

[6] Rite Aid is also incorrect that prejudice plays no part in the laches analysis if a claim is filed outside the analogous statute of limitations. *See* RAB 35; *Levey*, 76 A.3d at 773 n.35.

## CONCLUSION

For the foregoing reasons, and the reasons in Brown's Opening Brief, the Final Order and Judgment should be reversed.

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