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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KROENKE SPORTS & ENTERTAINMENT, LLC, OUTDOOR CHANNEL HOLDINGS, INC., SKYCAM, LLC and CABLECAM, LLC, Defendants-Below, Appellants, v. NICOLAS A. SALOMON, Plaintiff-Below, Appellee.	C.A. No. 225,2020 Court below: Court of Chancery, C.A. No. 2019-0858-JTL

OPENING BRIEF OF APPELLANTS

Of Counsel:
Kevin D. Evans
EVANS LAW PLLC
5613 DTC Parkway, Suite 850
Greenwood Village, CO 80111
(720) 738-3971
kdevans@evansplllc.law

BARNES & THORNBURG LLP
Thomas E. Hanson, Jr. (#4102)
1000 N. West Street
Suite 1500
Wilmington, DE 19801
(302) 300-3447
thanson@btlaw.com

Attorneys for Defendants-Below, Appellants

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I. INTRODUCTION AND NATURE OF PROCEEDINGS

Skycam, LLC and CableCam LLC (together, the "Aerial Camera Business" or "ACB") provide remotely controlled aerial camera services used in the production of sporting and entertainment events.[1] (A0161). Outdoor Channel, Inc. ("Outdoor") owned the Aerial Camera Business through a subsidiary during the time that Nicolas A. Salomon ("Salomon" or "Appellee") was President of the ACB. (A0161). Outdoor also owns and operates a cable television network that provides programming related to a wide range of outdoor activities such as hunting and fishing. (A0161). Kroenke Sports & Entertainment, LLC ("KSE" and, together with ACB and Outdoor, "Appellants") is an entertainment and management group that acquired all of Outdoor's stock in May 2013. (A0161).

In February 2015, Salomon filed suit in federal court in Dallas, Texas against KSE and Outdoor, claiming that they interfered with his efforts to acquire the Aerial Camera Business. (A0162). On February 27, 2019, the federal court entered summary judgment against Salomon on each of his claims. (A0163; A0205–A0233). During that lawsuit, KSE and Outdoor learned that Salomon had misappropriated the entire hard drive of his work computer (over 21 gigabytes of material), and thus Appellants brought an arbitration proceeding against him before

[1] Picture the cables and cameras overhead at sporting events such as football games, and you have the Aerial Camera Business.

JAMS in Los Angeles pursuant to Salomon's Confidential Information Agreement with Outdoor. (A0059–A0067; A0164–A0167; A0524–A0527). During that arbitration, Salomon refused to provide any undertaking to support his request for advancement of fees and costs, and thus Appellants declined to advance any amounts. (A0088; A0635–A0646). Applying California law as required, the JAMS arbitrator found that by downloading and surreptitiously taking his entire work computer hard drive, Salomon had knowingly and intentionally violated a California computer fraud statute and engaged in other misconduct, and awarded Appellants over $440,000 in damages. (A0068–A0112). The California Superior Court in Los Angeles confirmed the award over Salomon's objections and entered final judgment thereon, and the Texas State court in Austin domesticated that California judgment. (A0171–A0175; A0348–A0355).

On April 1, 2019, Salomon filed a Notice Of Appeal in the United States Court of Appeals for the Fifth Circuit from the summary judgment entered against him in his suit against KSE and Outdoor. (A0163–A0164). In that appeal, Salomon requested the Fifth Circuit to appoint pro bono counsel to represent him, and in connection with that request filed a financial affidavit on August 6, 2019 (Salomon's affidavit is dated August 3, 2019). (A0164; A0234–A0235; A0609–A0621).[2] In his sworn affidavit, Salomon attested that his debts far exceed his assets, and that he has

[2] The Fifth Circuit docket reflects Salomon's filing on August 6, 2019.

had no income since March 2017. (A0164; A0234–A0235). The Fifth Circuit since denied Salomon's request for pro bono counsel in his appeal of the civil judgment entered against him.

On April 5, 2019, Salomon also filed "counterclaims" in JAMS seeking "indemnification" related to the JAMS proceeding resulting in the award against him for misappropriation of Appellants' property. (A0175; A0622–A0634). On August 5, 2019—the eve of the hearing on Appellants' motion to dismiss Salomon's "counterclaims" in JAMS and one day before filing his Fifth Circuit financial affidavit, Salomon for the first time provided a purported undertaking and changed his "counterclaims" in JAMS to ones for advancement. (A0113–A0114; A0177). He sought advancement for his appeal of the Texas State court domestication of the California final judgment,[3] and for appeals he claims he intends to pursue related to the JAMS awards and the California State court final judgment against him. (*See* A0033–A0051). The JAMS arbitrator denied Salomon's "counterclaims" for advancement, finding that his purported undertaking was "illusory" in light of Salomon's admissions of insolvency and no income in his Fifth Circuit financial affidavit. (A0121–A0123).

[3] The Texas State court also sanctioned Salomon personally for making frivolous arguments in an effort to avoid domestication. (A0353–A0355).

After failing before JAMS in his effort to secure advancement, Salomon filed an action in the Delaware Court of Chancery seeking the very same relief. (A0033–A0051). During oral argument below, Salomon's counsel also conceded that Salomon "spent all of his money, or the vast majority of it, in his own personal lawsuit against the defendants in the District Court in Texas. So he has no money to pay for that appeal." (A0677:3–14). Notwithstanding the admissions by Salomon and his attorney that prove the "undertakings" to be illusory and dishonest, the Chancery Court nevertheless entered summary judgment in favor of Salomon, and this appeal followed. (*See* Exhibit A, hereto).

Following entry of summary judgment, the Court below entered, on March 24, 2020, a *Fitracks* Stipulation and Order implementing the summary judgment ruling (the "*Fitracks* Order"). (A0718-A0725). Under the *Fitracks* Order, Salomon submitted bills totaling $153,874.68 in fees and expenses purportedly for litigating the underlying actions (the "Motion for Advancement"). (A0863-A0878). Appellants opposed the Motion for Advancement on grounds that Salomon's counsel treated the request for advancement as a "blank check" to charge exorbitant amounts for unnecessary work that would never have been billed (and indeed was not billed) to a paying client. (A0949-A0960). In fact, the amount sought was nearly three times what Appellants' counsel billed during the same time period. (A0950). Notwithstanding Appellants' well-founded objections, the Court below awarded

Salomon all of his fees and expenses by Order dated June 11, 2020. (*See* Exhibit C, hereto). Salomon also filed a Motion for Indemnification for fees and expenses in the excessive and unreasonable amount of $192,772.10, for litigating the advancement action in the Chancery Court ("Motion for Indemnification"). (A0726-A0736). Over Appellants' objection, the Court below, by Order dated June 3, 2020, again, awarded a full recovery. (*See* Exhibit B, hereto). As discussed below, the awards by the Court below were an abuse of discretion, because, among other things, the Court based both awards on the same work – Salomon's counsel learning the facts of the underlying actions. (*See* Exhibit B, ¶ 5; Exhibit C, ¶ 7).

This is a case of first impression in Delaware. Appellants have not found another case where an officer (current or former) filed an affidavit attesting to insolvency and no income in an effort to secure an advantage in one lawsuit, and at the same time provided a purported undertaking in a related proceeding claiming that he would repay all advanced amounts if he is so obligated. As explained below, Appellants submit that an "undertaking" provided under such circumstances is illusory and fraudulent, and that requiring advancement under such circumstances and facts is against public policy. In the alternative, Appellants also challenge the unreasonable amount of fees awarded to Salomon for advancement and indemnification.

II. SUMMARY OF ARGUMENT

1. Advancement is properly denied under a provision like that here when a former officer refuses to provide an undertaking. *Wong v. USES Holding Corp.*, 2016 WL 769043, at *1 (Del. Ch. Feb. 26, 2016); *Brooks-McCollum v. Emerald Ridge Serv. Corp.*, 2004 WL 1752852, at *3 (Del. Ch. July 29, 2004). When Salomon did get around to providing a purported undertaking on August 5, 2019, it was illusory and fraudulent. Because Salomon one day later filed a financial affidavit in the United States Court of Appeals for the Fifth Circuit attesting to his insolvency in an effort to secure appointment of pro bono counsel (an admission confirmed by his counsel during oral argument below), Salomon's so-called undertaking was a "promise . . . in form only but not in substance." *Mobile Oil Corp. v. Wroten*, 303 A.2d 698, 701 (Del. Ch.), *aff'd*, 315 A.2d 728 (Del. 1973). Moreover, a promise to repay a financial obligation is fraudulent if the promise is made without the intention of honoring it. *See, e.g., Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *7–10 (Del. Ch. Dec. 23, 2008) (a promise to repay with no intention of performing constitutes promissory fraud; such fraud is proven by an "observable, objective, external fact with which to divine the speaker's intent"—such as Salomon's Fifth Circuit affidavit). A former officer who submits a financial affidavit conceding insolvency and no income in one court in order to secure a personal advantage, and at the very same time provides a purported

undertaking in a related proceeding in an effort to secure advancement, has not provided a truthful undertaking. In addition, Salomon's current counsel then conceded during oral argument below that Salomon "spent all of his money, or the vast majority of it," in his discredited lawsuit against KSE and Outdoor. (A0677:3–14). To permit advancement under these unique circumstances renders the undertaking requirement in 8 *Del. C.* § 145(e) and Salomon's Indemnification Agreement worthless and a nullity.

2. Public policy requires that one who makes a promise to repay in order to secure a financial benefit must promise to do so truthfully. Indeed, Delaware courts have noted the "strong" and "venerable public policy against fraud," that Delaware respects "the law's traditional abhorrence of fraud," and that such public policy "is largely founded on the societal consensus that lying is wrong." *See, e.g.*, *FDG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 859–60 (Del. Ch. 2016); *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1035 (Del. Ch. 2006). It is against public policy to allow someone to falsely and/or fraudulently promise to repay loaned or advanced amounts. A former officer who files a sworn affidavit in court attesting to his insolvency and no income, and at the same time promises to repay many hundreds of thousands of dollars in advanced amounts, has not provided a truthful undertaking. Rather, the promise is illusory and the former officer has engaged in fraud. Moreover, if advancement were ordered

under these highly unique circumstances, it likely could have a chilling effect on the willingness of companies to offer advancement, which itself is against public policy. For these additional reasons, advancement is improper here.

3. In the event the Court is unable to determine on the record that Salomon's purported undertakings were illusory or fraudulent, or that advancement here would violate public policy, a genuine question of material fact exists that precluded summary judgment in favor of Salomon. *See, e.g., Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970) ("Any application for [summary] judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom."). Salomon's illusory and deceptive undertakings precluded entry of summary judgment in his favor.

4. In the alternative, the attorneys' fees awarded to Salomon for advancement and indemnification were excessive and unreasonable and should have been substantially reduced. "Indemnification and advancement provisions are not a blank check for corporate officials." *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 186 (Del. Ch. 2003). The party seeking advancement "'bears the burden of justifying the amounts sought'." *See White v. Curo Texas Holdings, LLC*, 2017 WL 1369332, at *4 (Del. Ch. Feb. 21, 2017) (quoting *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, *823–24 (Del. 1992)). The party must show that the fees requested are

"reasonable" and estimated in "good faith." *Id.* at *2, *4–6, *17 (emphasis added); *see also Kuang v. Cole Nat'l Corp.*, 2004 WL 1921249, at *4–5 (Del. Ch. Aug. 27, 2004); *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, *995 (Del. Ch. 2012) (quoting *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 177 (Del. Ch. 2003)). The invoices submitted by Salomon failed entirely to meet this standard, and the Court below abused its discretion when it awarded all of the fees Salomon requested.

III. STATEMENT OF FACTS

This case finds root in and stems directly from the lawsuit Salomon filed against KSE and Outdoor in February 2015. Salomon filed that case in the United States District Court for the Northern District of Texas, Dallas Division, after he had been terminated as President of the Aerial Camera Business for performance reasons. (A0076; A0138; A0161–A0163; A0521–A0522).

A. Salomon's Federal Court Lawsuit

In his lawsuit, during which Salomon at various times was represented by three different law firms,[4] Salomon alleged that KSE and Outdoor had interfered with and prevented his attempted acquisition of the Aerial Camera Business pursuant to a term sheet that Salomon and his joint venture partner had entered into with Outdoor in February 2013.[5] (A0522-A0524). Because KSE acquired all of the stock of Outdoor (albeit after the expiration of the term sheet), and retained the Aerial Camera Business, Salomon claimed that his supposed rights under the term sheet were violated. (*Id.*).

[4] Including Michael Avenatti.

[5] Salomon also sued his former joint venture partner, Pacific Northern Capital ("PNC"). PNC testified during discovery that it and Salomon could not agree on the equity structure of the acquisition entity, and could not raise all capital required to attempt to purchase the Aerial Camera Business. (A0520–A0521; A0607:18–A0608:25).

On February 27 2019, the Chief Judge of the Dallas federal court entered summary judgment against Salomon on each of his claims. (A0205–A0233; A0523). During discovery in the case, KSE and Outdoor learned that shortly before his termination as President of the Aerial Camera Business, Salomon improperly downloaded and took the entire contents of his ACB work computer; the misappropriated computer hard drive contained over 21 gigabytes of material, consisting mainly of confidential and proprietary information belonging to Appellants.[6] (A0090–A0095; A0164–A0165 & A0169; A0524). Salomon admitted under oath that he took that material to assist him in preparing the discredited lawsuit he filed against KSE and Outdoor.[7] (A0090 & A0103; A0196).

B. JAMS Arbitration Based On Salomon's Theft Of Appellants' Property

After learning of Salomon's misconduct, and Salomon's refusal to return all property and attest thereto, Appellants filed an arbitration proceeding against him on January 18, 2018 in the JAMS Los Angeles office pursuant to Salomon's Confidential Information Agreement with Outdoor. (A0524–A0527). Salomon

[6] For instance, and as simply a few examples, Salomon misappropriated company business plans, contracts with customers, and documents pertaining to a sensitive contract with the Department of the Navy. (A0094–A0095; A0517 & A0524).

[7] Courts have found such conduct to be an abuse of judicial process. *See, e.g.*, *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1317 (D. Utah 2016), *aff'd*, 890 F.3d 868 (10th Cir. 2018); *Jackson v. Microsoft Corp.*, 211 F.R.D. 423, 430–35 (W.D. Wash. 2002).

moved to dismiss that proceeding, asserting that the American Arbitration Association and not JAMS had jurisdiction. (A0081–A0082; A0527–A0528). After briefing and oral argument, former United States Magistrate Judge (and former Second Circuit clerk and Assistant Watergate Special Prosecutor) Stephen Haberfeld denied Salomon's motion, and with Salomon's agreement set the matter for an evidentiary hearing. (A0081–A0085; A0528).

Before the JAMS hearing regarding Salomon's theft of Appellants' property, Salomon claimed that he was entitled to be indemnified pursuant to his Indemnification Agreement with Outdoor.[8] (A0087). Salomon then argued that he

[8] Salomon's assertion was based on an Indemnification Agreement that he signed with Outdoor on May 2, 2011. (A0052–A0058). The Indemnification Agreement states that Outdoor would indemnify Salomon for losses and expenses incurred in connection with proceedings against him by reason of the fact that he was an officer of Outdoor. (A0053–A0054:§§ 1–2). However, the Indemnification Agreement also precluded indemnification under various circumstances, including where Salomon's conduct was "knowingly fraudulent or deliberately dishonest," "constituted a breach of [his] duty of loyalty to [Outdoor]," or where Salomon "was not acting in good faith and in a manner [Salomon] reasonably believed to be in or not opposed to the best interests of [Outdoor]." (A0054:§ 3(b)(c),(d)).

The Indemnification Agreement also contained a provision addressing advancement (A0056:§ 7):

> Expenses. [Outdoor] shall pay the expenses incurred by [Salomon] in defending any proceeding in advance of its final disposition, provided that, to the extent required by law, the payment of expenses in advance of the final disposition of the proceeding ***shall be made only upon receipt of an undertaking*** by [Salomon] to repay all amounts advanced

was entitled to advancement after Appellants informed him that his claim for indemnification was premature. (A0088; A0120).

Pursuant to the terms of Salomon's Indemnification Agreement, ***Appellants said that they would consider his advancement request upon his providing an undertaking promising to repay advanced amounts if it ultimately were determined that he was not entitled to indemnification. Salomon refused to provide an undertaking.*** (A0088; A0540; A0635–A0646). Salomon then refused to participate further in the JAMS proceeding. (A0089–A0090).

Following a day-long evidentiary hearing and the presentation by Appellants of substantial evidence, Judge Haberfeld issued a detailed 43-page award on September 6, 2018, finding that Salomon had knowingly and intentionally committed multiple violations of law (including a violation of the California Comprehensive Data Access And Fraud Act), and was liable to Appellants for over $440,000 in damages. (A0068–A0112). In November 2018, Appellants moved to confirm that JAMS award in the California Superior Court for the County of Los Angeles. (A0236–A0330). Salomon, who then was represented by counsel, argued that the JAMS award was not a final award and could not be confirmed (although

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> if it should be ultimately determined that [Salomon] is not entitled to be indemnified under this Agreement or otherwise. [Emphasis added]

Salomon claimed he intended to pursue an indemnification claim in JAMS, he had not yet done so), and argued that JAMS did not have jurisdiction. (A0331–A0347). The California Superior Court rejected Salomon's arguments, confirmed the JAMS award, and on March 25, 2019 entered final judgment thereon in favor of Appellants in an amount in excess of $507,000. (A0348–A0352).

C. Salomon's Fifth Circuit Appeal And Admission Of Insolvency

On April 1, 2019, Salomon filed a Notice Of Appeal in the United States Court of Appeals for the Fifth Circuit, noting his intent to appeal the summary judgment entered against him by the federal court in Dallas in the case he brought against KSE and Outdoor. (A0523). On August 6, 2019, in an effort to have pro bono counsel appointed to represent him in connection with his federal court appeal, Salomon filed a financial affidavit (dated August 3, 2019) in the Fifth Circuit. (A0234–A0235; A0621). Salomon's financial affidavit explained that his debts far exceed his assets, that he is insolvent, and that he has had no income since March 2017.

D. Salomon's "Counterclaims" Before JAMS

In April 2019, after filing his Notice of Appeal in the Fifth Circuit, Salomon filed belated "counterclaims" in JAMS seeking "indemnification" from Appellants in connection with the JAMS proceeding where he was found to have engaged in knowing and intentional misconduct. (A0537; A0622–A0634). On the eve of the hearing on Appellants' motion to dismiss Salomon's "indemnification

counterclaims" in JAMS, Salomon's present counsel appeared and asked for a one-week extension, which Judge Haberfeld granted. (A0135 & A0139–A0140; A0539; A0654–A0655). The hearing was rescheduled for August 6, 2019. (A0135 & A0139–A0140).

The day before the hearing (i.e., on August 5, 2019), Salomon provided for the first time a purported undertaking by email. (A0113–A0114; A0139–A0140; A0177; A0559). At the hearing, Salomon's present counsel said that Salomon was pursuing advancement under his Indemnification Agreement, and not indemnification (notwithstanding Salomon's alleged "counterclaims"). (A0139; A0539). Judge Haberfeld denied Salomon's request for advancement, finding that in light of Salomon's affidavit in the Fifth Circuit, Salomon's so-called undertaking in which he promised to repay all advanced amounts if he is not entitled to indemnification was "illusory." (A0139–A0143; A0559–A0560). That decision was followed by another purported undertaking by Salomon on September 16, 2019, which was identical to his August 5 document except he added that his purported undertaking was provided in "good faith." (A0541–A0542).

E. Domestication Of California State Court Judgment Against Salomon

In the meantime, on May 3, 2019, Appellants moved in Texas State court in Austin, Texas (where Salomon resides) to domesticate the March 25, 2019 final judgment entered by the California Superior Court against Salomon. (A0535).

Salomon responded through counsel, once again arguing that JAMS did not have jurisdiction and that the California Superior Court should not have entered a final judgment, and a hearing was held. (A0172–A0173; A0535–A0536). Following that hearing, the Texas State court on July 31, 2019 rejected Salomon's arguments and entered an order domesticating the California judgment. (A0353–A0355; A0536). The Texas State court also ordered Salomon to pay Defendants' attorneys' fees and costs in the amount of over $55,000, and sanctioned Salomon personally in the amount of $10,000. (A0355). Salomon has appealed the domestication and sanctions order entered by the Texas State court. (A0536–A0537).

F. Salomon's Second Bite At The Apple In The Court Of Chancery

On October 28, 2019, after having failed in his advancement attempt before JAMS, Salomon filed the case below in the Delaware Court of Chancery seeking advancement and other relief in connection with the appeal Salomon filed in Texas challenging the domestication and sanctions order against him, in connection with the motion he said he intended to file in California to vacate the JAMS award denying his request for advancement,[9] and in connection with the appeal (untimely as it would be) Salomon said he would file challenging the final judgment entered by the California Superior Court on March 25, 2019. (A0033–A0051). Appellants

[9] Salomon subsequently did that, and the California Superior Court denied Salomon's motion.

moved to dismiss Salomon's Complaint, and at Salomon's request, the matter was converted to a summary judgment proceeding. (A0152–A0201; A0393–A0396). Salomon claimed that Appellant's motion to dismiss should be treated as a motion for summary judgment. (A0359, ¶ 14).

In their Answer, and in particular their fourth Affirmative And Other Defenses, Appellants pleaded that the purported undertakings given by Salomon were illusory and amounted to promissory fraud. (A0447). And in their response to Salomon's summary judgment motion and in support of their motion, Appellants again provided evidence (including Salomon's financial affidavit he submitted to the United States Court of Appeals for the Fifth Circuit) demonstrating the illusory and fraudulent nature of Salomon's purported undertakings.[10] (A0621).

After briefing and oral argument, the court below, on February 26, 2020, granted Salomon's motion for summary judgment and ordered that he was entitled to advancement. (*See* Exhibit A). In so ordering, the court said that Salomon may "turn [himself] around," that someone could become a "billionaire[ ] after declaring bankruptcy," and that there exists the possibility that Salomon "decides that what he wants to do in this life is settle his debts and repay whatever he owes, including any advancements." (A0710:17–20).

[10] Again, during oral argument below, Salomon's present lawyer also admitted that Salomon has "spent all of his money, or the vast majority of it." (A0677:3–14).

On July 9, 2020, Defendants filed their notice of appeal from the Chancery Court's summary judgment in favor of Salomon and subsequent award of attorneys' fees for advancement and indemnification. (A1124-A1144). Under the unique circumstances of this case, Appellants submit that the Chancery Court's judgment regarding advancement is erroneous and is against public policy. At the very least, the Chancery Court erroneously granted summary judgment in favor of Salomon on these facts.

G. Appellants, Not Salomon, Were Entitled To Summary Judgment

As noted above, Appellants initially filed a motion to dismiss Salomon's Complaint. Because of what Salomon said was the attachment of material outside the face of the Complaint, Salomon said that Appellants' motion should be treated as one for summary judgment, and Salomon should be allowed to file his own summary judgment motion. (A0359, ¶ 14). Salomon argued that no further discovery was necessary. (A0359, ¶ 13). The Chancery Court agreed to decide the case on summary judgment. For that reason, and given Salomon's argument that Appellants' motion to dismiss should be treated as a motion for summary judgment, Appellants argued that it was they, not Salomon, "who are entitled to summary judgment." (A0519, n.6).

H. Salomon Was Awarded Unreasonable Amounts Of Attorneys' Fees

By the time Salomon retained his present counsel on August 5, 2019, most of the legal work in the underlying actions was completed. As Salomon acknowledged below, "the arbitration was nearly over." (A0867, ¶ 14). Nonetheless, Salomon sought advancement in the amount of $150,654.50 in attorneys' fees, as follows:

> Arbitration (Fish & Richardson ("Fish") only): $41,168.00.
>
> Texas Action (Fish and Butler & Snow ("Butler")): $60,854.50.
>
> California Action (Fish only): $48,632.00.

(A0950, ¶ 2). For the same work, Appellants incurred attorneys' fees totaling just $59,570.38, as follows:

> California Action (Akin Gump ("AG") and Evans Law PLLC ("Evans"): $27,161.00. (A0964-A0998).
>
> Texas Action (Jackson Walker ("JW"), Armstrong Teasdale ("AT") and Evans): $20,313.50. (A0999-A1051).
>
> Arbitration (AT only): $12,095.88. (A1052-A1081).

A cursory review of the invoices shows that Salomon's fees were unreasonable, and significantly higher than Appellants, because the timekeepers spent an inordinate amount of time doing work that had little, to no, connection to any substantive work on Salomon's behalf. (A0903-A0922). Counsel billed for unnecessary research, drafting of research memos and lengthy internal communications. (*Id.*) The invoices show very little actual drafting of pleadings or legal filings and, when they do, the amounts charged are badly inflated. (*Id.*)

Notwithstanding the unreasonable nature of the invoices, the Chancery Court awarded Salomon advancement of all of the fees requested. (*See* Exhibit C).

As discussed above, the present matter was decided in the Chancery Court on summary judgment, without discovery. (*See* Exhibit A). Salomon, nonetheless, sought $190,701.50 in fees for the limited amount of work performed. (A0726). During the same four to five months that this matter was pending before the Chancery Court, Appellants' counsel billed $94,539.00. (A0729; A0781-A0837). The excessive nature of Salomon's request is demonstrated by the amounts billed for the few tasks performed. (A0746-A0752). Despite this fact, the Chancery Court, again, awarded Salomon all of the fees requested. (*See* Exhibit B).

1. Salomon Sought Inflated and Unreasonable Fees for the Arbitration

Although "the arbitration was nearly over," counsel billed $41,168.00 in fees (62 hours) during a five-week period, from August 5 to September 16, 2019, when the parties were primarily waiting for a decision from the Arbitrator on Salomon's request for advancement. (A0867, ¶ 14; A0918-A0922). The invoices show that counsel billed excessive amounts for unnecessary services during a time when there was no activity in the arbitration. (*Id.*)

The Arbitrator heard argument on Salomon's motion for advancement on August 6, 2019. (A0119, n 7). In advance of that argument, Plaintiff's counsel billed 17.5 hours on August 5 and 6, 2019, to draft the advancement undertaking,

communicate with the Arbitrator and handle the argument before the Arbitrator. (A0919). After the August 6, 2019 hearing, there was no activity in the arbitration until the Arbitrator issued his decision on September 5, 2019. (A0111). Nonetheless, counsel billed an additional 36.9 hours ($19,765.00) during that time period to researching, drafting research memos and communicating internally. (A0919-A0920). At the same time counsel performed this unnecessary work, they were billing an additional 28.1 hours to the Texas Action (from August 7 to August 29, 2019). (A0905-A0906).

Counsel recorded only a handful of entries after receipt of the Arbitrator's decision, with the last entry on September 16, 2019. (A0920). There is no indication that the previous hours of research and writing were necessary or ever put to substantive use. (A0918-A0922). This type of busy work would never have been performed for a paying client and should not have been charged to Appellants.

2. Salomon's Fees for the Texas Action Were Excessive and Duplicative

In the Texas Action, Salomon filed: an Entry of Appearance in the Travis County District Court, a two-page Motion for New Trial, a Notice of Appeal and related filings and Motions for Abatement and Extension in the Texas Third Court of Appeals. (A0904-A0910; A1082-A1088). For these routine filings, which did not include any briefing of the issues on appeal, Fish assembled a team of four attorneys, with billing rates ranging from $570.00 to $1,180.00/hour. (A0908). The

attorneys racked up an unreasonable (and ethically questionable) $49,032.50 in fees, and Butler invoiced an additional $11,822.00. (A0904-A0910; A1082-A1088).

As with the Arbitration, 49.2 ($36,363.50) of Fish's 65.5 hours were for researching, drafting research memos and communicating internally. (A0904-A0910). Despite Fish's sizeable bill and extensive team, Butler actually drafted some of the appellate documents, including the Motion for Abatement and Reply and Motion for Extension. (A1082-A1088). In the Court below, Salomon argued that the extensive billing was, in part, necessary "to understand the background of the case" (A0901), but the time entries, which counsel initially redacted, were to the contrary. (A0904-A0910). The bills show that counsel spent the vast majority of the time on unnecessary legal research. (*Id.*)

For instance, Salomon asserted below that Butler was retained because it is a recognized authority in Texas TCPA law. (A0871-A0872, ¶ 30). Yet, before Salomon retained Butler, Fish billed 23 hours ($10,602) to research, draft memos and discuss Texas TCPA law. (A0905-A0907). Despite this unnecessary work, Salomon claimed below there "has been no duplication of efforts." (A0872, ¶ 31). That clearly is not the case. If Fish was unfamiliar with Texas TCPA law, it should have consulted with experienced Texas counsel at the outset, rather than spending 23 hours confirming it was unfamiliar with Texas TCPA law. (A0905-A0907). Counsel would not have billed a paying client $10,000 for this unnecessary work.

The excessive nature of Fish's billings is further demonstrated by a comparison to Butler's invoices. (A0904-A0910; A1082-A1088). From November 5, 2019 to January 24, 2020, Butler billed $10,742.50 to review case documents, confer with co-counsel and prepare the Motions for Abatement and Extension. (A1082-A1088). Fish billed $49,032.50 to prepare an Entry of Appearance, a two-page Motion for New Trial and a Notice of Appeal. (A0904-A0910). There is no question this amount was inflated. (*Id.*)

3. Salomon's Fees for the California Action Were Excessive

Fish's invoices indicate that the only document it prepared and filed in the California Action was a 15-page Motion to Vacate (which Salomon lost). (A0912-0914). According to its invoices, Fish assigned a single attorney to handle this filing, and he spent 69.5 hours ($31,535) researching and drafting the Motion to Vacate, reviewing Defendants' Opposition and outlining the Reply. (*Id.*) In addition, another attorney billed 11.2 hours ($9,604) to review and revise the Motion to Vacate and to review the Opposition. (A0914). The amount of time counsel billed to this single assignment was excessive on its face and would not have been billed to Salomon directly. (A0912-A0917).

4. Salomon's Indemnification Request Also was Excessive and Unreasonable

The excessive nature of Salomon's request for fees in this action was demonstrated by the amounts billed for the few tasks performed:

a. $21,420.00 for an advancement Complaint;

b. $21,930 for filing a Motion to Expedite and Reply;

c. $48,409.50 for researching and drafting the Summary Judgment Motion;

d. $62,859.00 for researching and drafting the Summary Judgment Reply; and

e. $27,129.00 for preparing for oral argument.

(A0937-A0943).

To put these amounts into perspective, there was nothing extraordinary about Salomon's Complaint, which described the underlying facts, quoted the relevant provisions of the Indemnification Agreement and requested advancement. (A0033-A0051). Salomon's Motion to Expedite was ten pages, and the Reply was six. (A0356-A0365). Yet, counsel billed over $20,000 for that work. (A0939). For the summary judgment briefing, counsel billed over $110,000.00, which is more than what Appellants' counsel billed in the Court below in total. (A0941-A0943).

An analysis of the bills shows that Salomon's counsel improperly staffed this matter with senior attorneys that billed excessive hours for the work performed. (A0937-A0943). For example, counsel billed 25.2 hours to research and draft the Complaint. (A0938). All of that time was billed by one partner at a rate of $850.00/hour. (*Id.*) Fish should have either assigned an associate to prepare the first draft at a lower rate or the partner should have completed the task in much less time.

The same partner also billed all of the hours for researching and drafting the Motion to Expedite and the Reply (25.8 hours) and the Motion for Summary Judgment (54.7 hours). (A0939-A0941). This partner's rate, which increased to $885.00/hour in January 2020, was excessive for the number of hours spent performing these tasks. (*Id.*) It was not until the Summary Judgment Reply that Fish involved an associate at a rate of $470.00/hour, but even then the partner continued to bill excessive amounts, ***including 15.3 hours in a single day (2/19/2020), and 38.6 hours over a three-day period (2/17-19/2020)***. (A0942). Fish would not have made these staffing decisions, or billed so many hours, if it were invoicing its own paying client. Salomon's fee request was unreasonable and should have been reduced. (*Id.*)

IV. ARGUMENT

A. Salomon's Purported Undertakings Were Illusory And Fraudulent

1. First Question

Whether a purported undertaking provided by a former officer is illusory and/or fraudulent where the officer simultaneously swore under oath in federal court that he was insolvent and had no income since March 2017. This issue was preserved for appeal in both Appellants' Answer below (A0447) and in their response to Salomon's motion for summary judgment. (A0621). Salomon's purported undertakings were objectively and demonstrable illusory and false, and as such do not comply with 8 *Del. C.* § 145(e) and Salomon's Indemnification Agreement with Outdoor.

2. Scope of Review

An appeal from a decision granting summary judgment is reviewed by this Court *de novo*. *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004). This Court reviews *de novo* the Chancery Court's grant of summary judgment "both as to facts and law to determine whether or not the undisputed facts, viewed in the light most favorable to the opposing party, entitle the moving party to judgment as a matter of law." *Id.* (footnote omitted). The Court "review[s] not only the trial court's opinion but also the entire record, including the pleadings . . . and other evidence appearing in the record." *Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142

(Del. 1990). "[T]he moving party bears the burden of demonstrating both the absence of a material issue of fact and entitlement to judgment as a matter of law, . . . and . . . any doubt concerning the existence of a factual dispute must be resolved in favor of the non-movant . . . ." *913 N. Market Street P'ship, L.P. v. Davis*, 1998 WL 986007, at *1 (Del. Dec. 23, 1998) (citations omitted). And "[t]o the extent the issues on appeal are matters of law, [the Court] decide[s] whether the Vice Chancellor erred in formulating or applying legal precepts." *Gilbert*, 575 A.2d at 1142. "If material issues of fact exist or if [the Court] determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate." *Motorola, Inc.*, 849 A.2d at 935 (footnote omitted).

3. Merits of the Argument

The analysis begins here, as it must, with the language of 8 *Del. C.* § 145(e) ("Section 145(e)"):

> Expenses (including attorneys' fees) incurred by an officer or director of the corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an ***undertaking*** by or on behalf of such director or officer ***to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section***. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate. [Emphasis added]

Section 145(e) does not condition repayment on whether the officer at some point down the road is able to "turn [himself] around," or whether the officer strikes it rich and becomes a "billionaire[ ] after declaring bankruptcy"—rationales employed by the court below for awarding Salomon advancement notwithstanding Salomon's Fifth Circuit affidavit and the comments by his counsel during oral argument. (A0710:17–20). Rather, repayment in the absence of indemnification is mandatory; even the cases relied on by Salomon below so hold. *See, e.g., Fillip v. Centerstone Linen Servs., LLC*, 2013 WL 6671663, at *9 (Del. Ch. Dec. 11, 2013) ("a person who receives advancement always must repay those funds in the event he is not ultimately entitled to indemnification").

Salomon's Indemnification Agreement with Outdoor (*see supra* footnote 8 at pp. 13–14) provided for advancement upon receipt of an undertaking. During the JAMS proceeding in 2018, Appellants said they would consider advancement upon Salomon's providing an undertaking; Salomon ***refused*** to do so. (A0088; A0540; A0635–A0646). It was not until August 5, 2019 that Salomon provided a purported undertaking (A0113–A01114; A0139-A0140; A0177; A0559), and that was one day before Salomon filed his financial affidavit in the Fifth Circuit swearing that his debts far exceed his assets and that he has had no income since March 2017. (A0234–A0235; A0621). Again, Salomon filed that financial affidavit in an effort

to have pro bono counsel appointed to represent him during his Fifth Circuit appeal. Accordingly, Salomon's purported undertaking was illusory.

"Illusory" has a commonly understood definition. It means "based on or producing illusion: deceptive." https://www.merriam-webster.com (last accessed 8/31/2020). *See also* https://www.dictionary.com ("1. causing illusion; deceptive; misleading. 2. of the nature of an illusion; unreal") (last accessed 8/31/2020). Former United States Magistrate Judge Stephen Haberfeld (the JAMS arbitrator) correctly found that Salomon's purported undertakings were illusory because at the ***very same time*** Salomon promised to repay advanced amounts if he is not entitled to indemnification, Salomon filed a financial affidavit in the United States Court of Appeals for the Fifth Circuit attesting to his insolvency and that he has had no income since March 2017. (A0139–A0143; A0557-A0562). In other words, Salomon's purported undertakings were deceptive.[11] In addition, during oral argument below, Salomon's counsel noted that Salomon "has spent all of his money, or the vast majority of it." (A0677:3–14).

In *Mobile Oil Corp.*, 303 A.2d at 701, the court explained the issue with illusory promises:

[11] Moreover, even if Salomon were to liquidate assets listed in his financial affidavit, the amount he already has requested in advancement (over $340,000) before he even has appealed the California final judgment exceeds the total amount of assets he identified in his Fifth Circuit affidavit. (A0726; A0864).

> The underlying question is cases involving "illusory" promises is consideration. . . . Where the plaintiff's promise is a mere illusion, that is, where his promise exists in form only but not in substance, then it follows necessarily that there is no consideration to support the defendant's promise, and thus no enforceable contract.

Here, there can be no serious argument that a necessary and essential part of the Indemnification Agreement on which Salomon bases his claim of advancement (*see supra* footnote 8) was the obligation of Salomon to provide a truthful undertaking. Salomon has not done so. In light of his Fifth Circuit affidavit, and the admission by his present counsel during oral argument below, Salomon's promise to repay the hundreds of thousands of dollars he is requesting in advancement (just this far) "is mere illusion." Thus, as Judge Haberfeld found, Salomon's purported undertakings lack "substance" and he has failed to provide the requisite consideration to support his advancement request.

Appellants submit that the "undertaking" required by Section 145(e) and Salomon's Indemnification Agreement must be truthfully given, and objective evidence (such as Salomon's admission of insolvency and his attorney's admission likewise during oral argument) which reveals Salomon's purported undertakings to be illusory renders them worthless and a nullity.[12]

[12] In addition to being illusory, the purported undertakings of Salomon amount to promissory fraud. Courts, including in Delaware, have found that a promise to repay a financial obligation is fraudulent if the promise was made without the intention of keeping it. *See Winner Acceptance Corp.*, 2008 WL 5352063, at *9–10 (promissory fraud is alleged when specific facts "lead to a reasonable inference that the promissor

Salomon's purported undertakings also were fraudulent for another reason. Salomon emailed (i.e., wired) both of his purported undertakings from Delaware to Colorado. He wired those purported undertakings to Appellants in an effort to convince JAMS (and then the court below) to award him hundreds of thousands of dollars in advanced funds that he has admitted (via his Fifth Circuit affidavit and the comments of his counsel during oral argument in the Chancery Court) he cannot repay. In other words, Salomon devised a scheme to obtain large sums of money from Appellants by false representations and promises, and he used the wires in furtherance thereof. *See* 18 U.S.C. § 1343; *United States v. Nguyen*, 504 F.3d 561 (5th Cir. 2007) (wire fraud indictments and convictions based in part on false promises to repay mortgage loans).

In addition to the fact that Salomon's purported undertakings are illusory, the Court should not permit Salomon's fraudulent conduct to provide a basis to support

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had no intention of performing at the time the promise was made"; evidence of intent exists when there is a "readily observable, objective, external fact with which to divine the speaker's intent"). *See also Vituli v. Carrols Corp.*, 2015 WL 5157215, at *6 (Del. Super. Ct. May 1, 2015) ("[A] speaker's intent not to perform 'may be inferred from the circumstances.' . . . [T]he promisor's continued assurances after it is clear he does not intend to perform are indicative." (footnotes omitted)); *Hamad v. Zhili*, 2010 WL 2352051, at *8–9 (Cal. Ct. App. June 14, 2010); *Mullen v. Rice*, 2009 WL 1478100, at *4 (Cal. Ct. App. May 26, 2009).

a claim for advancement under Section 145(e) or Salomon's Indemnification Agreement.[13]

[13] In the court below, Salomon claimed that Appellants are improperly trying to extract security from Salomon as a condition to advancement. Not true. As noted above, well before Salomon filed his Fifth Circuit financial affidavit attesting to his insolvency, Defendants said they would consider Salomon's request for advancement if he provided an undertaking. Salomon refused. Defendants did not demand "security" for advancement. In addition, Salomon below relied on *In re Central Banking Sys., Inc.*, 1993 WL 183692 (Del. Ch. May 11, 1993). There, the court noted the "risk" that the former officer would be unable to repay advanced amounts. *Id.* at 2. That case is inapposite for at least two reasons. First, nonpayment by Salomon is far more than a "risk"; based on Salomon's admissions in his Fifth Circuit affidavit, and the comments of his counsel during oral argument below, it is a reality. Moreover, there is no suggestion that the former officer in *Central Banking* provided an illusory and fraudulent undertaking, after having just admitted that he could not repay. That is exactly what Salomon has done here.

B. Advancement Under These Unique Circumstances Is Against Public Policy

1. Second Question

Is it against public policy to order a company to advance fees and costs to a former officer who provided an objectively false and deceptive undertaking? This issue was preserved for appeal in both Appellants' Answer below (A0408) and in their response to Salomon's motion for summary judgment (A0580), and the answer is yes.

2. Scope of Review

See Section IV.A.2 above.

3. Merits of the Argument

Given that advancements typically run into the hundreds of thousands of dollars (and often times more),[14] it is not unreasonable to require that an officer act truthfully in providing an undertaking. Here Salomon did not. Indeed, for the reasons explained above, including Salomon's Fifth Circuit affidavit attesting to his insolvency and filed one day after his purported August 5, 2019 undertaking, his purported undertakings not only were illusory, they were objectively fraudulent.

[14] Indeed Salomon already, before filing any appeal of the California final judgment against him, has requested over $340,000 in fees and costs. (A0726; A0864).

"The public policy against fraud" is alive and well in Delaware. *Kainos Evolve, Inc. v. InTouch Techs., Inc.*, 2019 WL 7373796, at *2–3 (Del. Ch. Dec. 31, 2019). *See also FDG Logistics LLC*, 131 A.3d at 859 (noting "the venerable public policy to guard against fraud," and that Delaware "has consistently respected the law's traditional abhorrence of fraud"); *Abry Partners V, L.P.*, 891 A.2d at 1035 ("The public policy against fraud is a strong and venerable one that is largely founded on the societal consensus that lying is wrong.").

After having refused to provide any undertaking in 2018, undoubtedly because he understood that he could not repay any advanced amounts, Salomon (through his present counsel) gave his August 5, 2019 purported undertaking less than 24 hours before the hearing on his JAMS "indemnification counterclaims." That was done two days after dating and one day before filing his financial affidavit in the Fifth Circuit in an effort to convince the Fifth Circuit that he is insolvent and needed pro bono representation.

A judgment of advancement here would only perpetuate such objectively deceptive behavior. It would encourage an officer (present or former) to give the company what admittedly and objectively amounts to a hollow and worthless piece of paper in which the officer, employing the "magic words," "promises" to repay in order to secure advancement. That effectively would read the undertaking requirement out of Section 145(e) as well as Salomon's Indemnification Agreement.

It is true that the public policy in Delaware favors advancement rights. *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 592–93 (Del. Ch. 2006). However, just as that public policy did not " 'trump basic principles of contract interpretation' " in *Majkowski*, *id.* at 593 (footnote omitted), it also should not trump the public policy of this State against fraud. Indeed, if a company were ordered to advance fees and costs to an officer under the unique circumstances of this case, after the officer objectively concedes that he cannot repay, it is not hard to imagine companies going forward placing significant restrictions on advancement rights. The consequence could be that the unique circumstances in this case may very well result in a contraction of advancement rights. That too would contravene the public policy of this State.

Accordingly, public policy calls for reversal of the judgment of the Chancery Court and denial of Salomon's claim for advancement.

C. Did Genuine Issues Of Material Fact Preclude Entry Of Summary Judgment

1. Third Question

In the event the Court is unable to answer either of the above two questions based on the record, do material questions of fact exist that precluded the entry of summary judgment in favor of Salomon? This issue was preserved for appeal in both Appellants' Answer below (A0447) and in their response to Salomon's motion for summary judgment (A0621), and the answer is yes.[15]

2. Scope of Review

See Section IV.A.2 above.

3. Merits of the Argument

If the Court is unable to conclude based on the record (including Salomon's Fifth Circuit affidavit of insolvency and the admission by Salomon's counsel during oral argument below) that Salomon's purported undertakings are illusory and/or fraudulent, and that summary judgment should have been awarded in favor of Appellants, the entry of summary judgment by the court below finding that Salomon was entitled to advancement was improper.

[15] That said, for the reasons explained in the merits of the arguments under the first two questions, Appellants submit that this Court should reverse the judgment of the court below and find that Salomon is not entitled to advancement.

Numerous Delaware courts have said that summary judgment should not be entered "[i]f the record before the Court 'reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.'" *Patton v. 24/7 Cable Co., LLC*, 2013 WL 1092147, at *2 (Del. Super. Ct. Jan. 30, 2013) (footnote omitted). *See also Townley v. Dayon*, 1996 WL 769345 (Del. Super. Ct. Dec. 23, 1996); *Fitzgerald v. Cantor*, 1999 WL 253215, at *1 (Del. Ch. Mar. 31, 1999). Moreover, "[a]ny application for [summary] judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom." *Vanaman*, 272 A.2d at 720. *Accord SLMSOFT.com, Inc. v. Cross Country Bank*, 2003 WL 1769770, at *6 (Del. Super. Ct. Apr. 2, 2003) ("[I]f it appears that there is some reasonable theory or position under which the opponent might recover, the motion [for summary judgment] must be denied.").

As explained above, Section 145(e) and Salomon's Indemnification Agreement require a truthful undertaking, not an illusory and/or fraudulent one. Salomon's purported undertakings are objectively and demonstrably illusory and fraudulent, because at the same time he gave them, he told the United States Court of Appeals for the Fifth Circuit that he is insolvent and has had no income since March 2017; moreover, his own counsel admitted during oral argument below that

Salomon "spent all of his money, or the vast majority of it, in his own personal lawsuit against the defendants in the District Court in Texas." Yet Salomon seeks advancement of hundreds of thousands of dollars to appeal the judgments against him related to his theft of Appellants' property. At the very least, a reasonable theory exists which would entitle Appellants to judgment. And if the Court does not reverse the decision below and grant summary judgment in favor of Appellants, "it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances" (*Patton*, 2013 WL 1092147, at *2); namely, whether Salomon's financial affidavit and his counsel's comments accurately reflect his financial situation. If they do, then that would prove the illusory and fraudulent nature of Salomon's undertakings. If they do not, then Salomon has other issues (namely, whether he provided a false affidavit to the Fifth Circuit). In either event, summary judgment was improperly granted in favor of Salomon.

D. The Attorneys' Fees Requested By Salomon Should Have Been Substantially Reduced

1. Fourth Question

Should the Court determine that Salomon was entitled to advancement, did the Court of Chancery abuse its discretion by awarding all of the excessive and unreasonable fees Salomon requested? This issue was preserved for appeal in Appellants' response to Salomon's Motion for Advancement (A0949-A0960) and Appellants' response to Salomon's Rule 88 Motion for Attorneys' Fees (A0923-A0933), and the answer is yes.[16]

2. Scope of Review

The Court reviews a judge's decision to award attorneys' fees for abuse of discretion. *Mahani v. EDIX Media Gp., Inc.*, 935 A.2d 242, 245 (Del. 2007) (quoting *Tekstrom, Inc. v. Savla*, 2007 WL 328836, at *6 (Del. Super. Ct. Feb. 5, 2007). Under that standard, the Court will "not substitute [its] own notions of what is right for those of the trial judge if that judgment was based upon conscience and reason, as opposed to capriciousness or arbitrariness." *William Penn* (citing *Dover Historical Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1089 (Del. 2006)). Thus, the attorneys' fee award below must be reversed if the Court below

[16] That said, for the reasons explained in the merits of the arguments under the first two questions, Appellants submit that this Court should reverse the judgment of the court below and find that Salomon is not entitled to advancement.

"failed to assess the reasonableness of the fees and expenses or [the] determination that the fees and expenses were reasonable was capricious or arbitrary." *Mahani*, 935 A.2d at 245.

3. Merits of the Argument

The Court of Chancery abused its discretion in awarding Salomon close to $350,000 in attorneys' fees for the limited amount of work involved in this and the underlying actions. The party seeking advancement " 'bears the burden of justifying the amounts sought' " and must show that the fees requested are "reasonable" and estimated in "good faith." *See White v. Curo Texas Holdings, LLC*, 2017 WL 1369332, at *4 (Del. Ch. Feb. 21, 2017) (quoting *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, *823–24 (Del. 1992)); *see also Kuang v. Cole Nat'l Corp.*, 2004 WL 1921249, at *4–5 (Del. Ch. Aug. 27, 2004); *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, *995 (quoting *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 177 (Del. Ch. 2003)). "To determine the reasonableness of legal fees, the court will normally look to the number of hours spent and the cost per hour." *Kuang*, 2004 WL 1921249, at *5 (citing *Dunlap v. Sunbeam Corp.*, 1999 WL 1261339, at *6 & n. 9 (Del. Ch. July 9, 1999) ("discussing how to determine the reasonableness of legal fees in an advancement context"); *Citadel*, 603 A.2d at *825 n.8 ("holding that a plaintiff must demonstrate the reasonableness of his advancement request and, in doing so, '[a]ny

discovery here authorized is limited to the quantum of the expenditure, including a specification of work performed' ")).

The reasonableness standard applies to requests for advancement and indemnification. *See Kuang*, 2004 WL 1921249, at *5; *Citadel,* 603 A.2d at *825, n.8. Here, Appellants offered specific examples of how Salomon's counsel's fees were significantly inflated, and it was necessary for the Court to review the issues presented and determine if the requested fees were reasonable. The Court below failed entirely to undertake this required analysis.

Instead, on Salomon's request for advancement, the Court below addressed only one of Appellants' arguments— that Salomon's fees were almost three times higher than Appellants'—before concluding Salomon was entitled to a full recovery. (*See* Exhibit C, ¶ 7). Most of the opinion is devoted to case law discussing why a "granular review" of counsel's invoices is unnecessary unless there is a "gross problem" with the billing. (*Id.*, ¶¶ 2-5). But even under that standard, Appellants plainly showed a gross problem, as counsel had billed inordinate amounts for nonsubstantive work during a period of inactivity in the arbitration, assigned a team of lawyers to perform unnecessary tasks unrelated to substantive filings in the Texas Action, and billed over 80 hours to a single 15-page filing in the California action. (*See supra* at pp. 19-23). The Court below never analyzed these issues or explained how they did not present a "gross problem."

Rather, the Court below dismissed these issues and characterized Appellants' well-founded objections as merely "quibbl[ing] over individual line items" (Exhibit C, ¶ 8), which was not the case. Appellants showed that Salomon's counsel unnecessarily billed tens of thousands of dollars on unnecessary work with the expectation that Appellants would be forced to make payment. With no evidentiary support, the Court below concluded the excessive billings were justified because counsel "had to review the underlying actions, understand where they stood, and determine how best to represent Salomon going forward." (*Id.*, ¶ 7).

Surprisingly, the Court below used the same rationale to support its award of excessive fees in this action. In its indemnification award, the Court below found "the advancement issues governed by Delaware law were straightforward, ***but the underlying factual situation was complex***. The procedural posture was particularly complicated, and plaintiffs' counsel ***had to understand the status of multiple proceedings in which their client had attempted to litigate pro se***." (Exhibit B, ¶ 5) (emphasis added). As Salomon's counsel could not bill twice for getting up to speed on the same underlying actions, the award of a full recovery on both the advancement and indemnification motions was an abuse of discretion. *See Mahani*, 935 A.2d at 245.

Further, the Court below's cursory review of the *Mahani* factors in awarding indemnification demonstrates a failure to conduct the required reasonableness

analysis. Without the arbitrary finding that counsel needed additional time to learn the underlying facts, the *Mahani* factors weigh heavily in favor of a reduction of Salomon's fee request. Under the first *Mahani* factor, as discussed above, the Court's finding that the "underlying facts were complex" was arbitrary and capricious, as counsel received credit for getting up to speed on the underlying actions through the advancement award. (Exhibit B, ¶ 5; Exhibit C, ¶ 7). Under the second *Mahani* factor, Salomon made no showing that his counsel accepted this representation to the exclusion of other work. The Court, therefore, found this factor was "neutral." (Exhibit B, ¶ 8(b)). Under the third *Mahani* factor, the Court below, again, arbitrarily found "the amount of time was reasonable." (*Id.*, ¶ 8(c)).

Under the fourth *Mahani* factor, the Court focused on the favorable result without addressing the excessive amount that was billed. (*Id.*, ¶ 8(d)). Under the fifth *Mahani* factor, there were no time limitations, so the Court found the factor to be neutral. (*Id.*, ¶ 8(e)). Under the sixth *Mahani* factor, the Court, again, found the factor was neutral, because Salomon offered no evidence of a prior relationship with Fish. (*Id.*, ¶ 8(f)). Under the seventh *Mahani* factor, the Court found Fish had the requisite experience and reputation. (*Id.*, ¶ 8(g)). Under the final *Mahani* factor, Salomon offered no evidence that counsel represented him on a contingent fee basis. (*Id.*, ¶ 8(h)).

Thus, the first, third and fourth factors favored a reduction of Salomon's fees and the second, fifth, sixth and eighth factors were neutral. Only the seventh factor favored an award at the amount requested. The Chancery Court's finding to the contrary was an abuse of discretion. *See Mahani*, 935 A.2d at 245. Even if the award of summary judgment is affirmed, the Court should reverse and remand the attorneys' fees awards.

V. CONCLUSION

WHEREFORE, for the reasons noted above, Appellants respectfully request that the Court reverse the decision of the court below and enter summary judgment in favor of Appellants. In the alternative, Appellants respectfully request that the Court reverse the summary judgment award in favor of Salomon and reverse the award of attorneys' fees.

Dated: September 3, 2020

BARNES & THORNBURG LLP

/s/ *Thomas E. Hanson, Jr.*

Thomas E. Hanson, Jr. (#4102)
1000 N. West Street, Suite 1500
Wilmington, DE 19801
Telephone: (302) 300-3447
E-mail: thanson@btlaw.com

Of Counsel:

Kevin D. Evans
EVANS LAW PLLC
5613 DTC Parkway, Suite 850
Greenwood Village, CO 80111
Telephone: (720) 738-3971 (direct)
E-mail: kdevans@evanspllc.law

Attorneys for Defendants-Below, Appellants