EFiled: Oct 05 2020 04:46PM EDT
Filing ID 65990444
Case Number 225,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KROENKE SPORTS & ENTERTAINMENT, LLC, OUTDOOR CHANNEL HOLDINGS, INC., SKYCAM, LLC and CABLECOM, 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

ANSWERING BRIEF OF APPELLEE

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Dated: October 5, 2020

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I. NATURE OF THE PROCEEDINGS

The Court is familiar with this advancement action as it has already been the subject of an improper interlocutory appeal. (B0093-B0098.)

On October 28, 2019, Plaintiff-Below, Appellee Nicolas A. Salomon ("Salomon" or "Appellee") filed a verified complaint in the Court of Chancery seeking advancement from Defendants-Below, Appellants Kroenke Sports & Entertainment, LLC, Outdoor Channel, Inc. Skycam, LLC, and CableCam LLC (collectively, "KSE" or "Appellants"). (A0033-A0151.) KSE moved to dismiss the complaint for failure to state a claim. (A0152-A0355.) Pursuant to an expedited briefing schedule (A0356-A0400), KSE answered the complaint (A0401-A0450), and Salomon moved for summary judgment, (A0451-A0509).

On February 26, 2020, the Court of Chancery heard oral argument on both motions. The Court of Chancery entered an order denying KSE's motion to dismiss and granting summary judgment in favor of Salomon (the "Advancement Order"). (A0715-A0717.) On March 24, the Court of Chancery entered an order establishing a *Fitracks* procedure to address Salomon's advancement requests on an ongoing basis (the "Fitracks Order"). (A0718-A0725.) Salomon subsequently brought two motions under Court of Chancery Rule 88: 1) for advancement, and 2) for "fees–on-fees," or indemnification, for the successful enforcement of advancement rights. (A0726-A1112.) Both motions were granted. (A1113-

A1123.)

Prior to the entry of the Fitracks Order, on March 19, KSE filed a notice of appeal of the Advancement Order (the "First Interlocutory Appeal"). (B0035-B0036; A0017.) On March 23, KSE moved to stay the Advancement Order pending appeal (the "Stay Motion"). (B0037-B0046.) The Court of Chancery denied KSE's motion to stay on April 1, stating:

> I am denying the motion for stay pending appeal because the appeal was not taken from a final order. The order from which the appeal was taken implements the Fitracks procedure, so it clearly contemplates further action by the trial court. . . . No one has sought interlocutory appeal, nor has anyone sought certification of a partial final judgment.

(B0047-B0049.) On April 7, KSE moved the Court of Chancery for entry of partial final judgment or, in the alternative, certification of interlocutory appeal. (B0050-B0068.) The Court of Chancery denied that motion without prejudice (B0069-B0071).

On April 23, this Court dismissed KSE's First Interlocutory Appeal, thus mooting the Stay Motion. (B0093-B0098.) The Court concluded that the First Interlocutory Appeal was "interlocutory because, under the Fitracks Order, the Court of Chancery retains jurisdiction to resolve disputes about the amount of fees and expenses for which Salomon demands advancement going forward." *Id*. The Court further explained that in an "appropriate" advancement case, a "company might seek interlocutory review under Rule 42 of this Court." *Id*. The First

Interlocutory Appeal, Case No. 112, 2020, was closed after KSE failed to file a motion for re-argument. *Id.* The same day the Court dismissed the Stay Motion, KSE moved a second time in the Court of Chancery for entry of a partial final judgment or, in the alternative, for certification of an interlocutory appeal. (B0072-B0092.) On July 8, the Court of Chancery denied the entry of partial final judgment and declined to certify the interlocutory appeal. (B0116-B0121.) The Court of Chancery stated:

> By design, Delaware authorizes entities to grant broad advancement rights. *See Sider [v. Hertz Glob. Holdings, Inc.*, No. CV 2019-0237-KSJM], 2019 WL 250148, at *3 [(Del. Ch. June 17, 2019)]. Despite having chosen to grant those rights, entities often resist complying with their advancement obligations. Seeking interlocutory review of an advancement determination is one way to "turn off the advancement spigot." *Id.* But the "policy of Delaware favors advancement when it is provided for, with the Company's remedy for improperly advanced fees being recoupment at the indemnification stage," or "on appeal after issues of reasonableness have been finally resolved." *Sider*, 2019 WL 250148, at *3 (quoting *Tafeen*, 888 A.2d at 206; *Mooney*, 2015 WL 3413272, at *6).
>
> This policy interest . . . suggest[s] that interlocutory appeals in advancement cases should be reserved for particularly exceptional cases. This is not such a case.

(B0120.)

On July 9, KSE filed the present appeal from three interlocutory orders: (1) the Advancement Order; (2) a June 3 order awarding Salomon "fees-on-fees," or indemnification (the "Rule 88 Indemnification Order") (A1113-1118); and (3) a

June 11 order awarding advancements (the "Rule 88 Order for Past Advancements," together with the Indemnification Order, "the Rule 88 Orders") (A1119-1123). (A1124-1144.)

II. SUMMARY OF ARGUMENT

1. KSE's Arguments 1-4 are DENIED. KSE's second interlocutory appeal of the Advancement Order, and interlocutory appeal of the Rule 88 Indemnification Orders are untimely. Rule 42(d)(i) provides that "it shall be the obligation of appellant to serve and file in this Court a notice of appeal of an interlocutory order within 30 days after the entry of the order from which the appeal is sought to be taken[.]" The Advancement Order was entered on February 26 (A0715-A0717), and the Rule 88 Indemnification Order was entered on June 3 (A1113-A1118). The July 9 notice of appeal (A1124-1144) was not filed "within 30 days after the entry" of those orders. While the notice of appeal is timely regarding the Rule 88 Order for Past Advancements, KSE did not apply for certification of the appeal before the notice of appeal was filed. KSE's notice of appeal is also defective because it does not comply with Rule 42(d). Accordingly, this Court lacks jurisdiction to hear this interlocutory appeal. (B0097, at ¶ 5) ("Absent compliance with Supreme Court Rule 42, this Court has no jurisdiction to hear this interlocutory appeal.")

2. KSE's Arguments 1-3 are DENIED. KSE makes no effort whatsoever to address this Court's Rule 42(b) factors. Rather, KSE simply repeats arguments that have been made—and soundly rejected—by the Court of Chancery. KSE has not identified any new reasons why the Advancement Order should

warrant appellate review while this action is currently proceeding in the Court of Chancery.

3. KSE's Arguments 1-3 are DENIED. To the extent the Court finds that is has jurisdiction over the interlocutory issues KSE has raised, summary judgment was correctly granted and the Advancement Order was properly entered by the Court of Chancery.

4. KSE's Argument 4 is DENIED. "Exceptional circumstances" that would merit interlocutory review of the Rule 88 Orders "do not exist in this case, and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs caused by an interlocutory appeal." *Traditions, L.P. v. Harmon*, 226 A.3d 1139, at * 2 (Del. 2020).

III. STATEMENT OF FACTS

A. The Parties

Outdoor Channel Holdings, Inc. ("Outdoor"), a Delaware corporation, owns and operates the Outdoor Channel, a cable television programming company. (A0070-A0071.) SkyCam, LLC and CableCam, LLC, both Delaware limited liability companies, are wholly-owned subsidiaries of Outdoor that provide remote-controlled aerial camera services used in the production of sporting events. (A0206-A0207.)

Salomon was President of SkyCam and CableCam from 2009 through the termination of his employment on May 5, 2014. (A0071.) Salomon executed two employment agreements with Outdoor: an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" on May 6, 2009, and "Nicolas Salomon Employment Agreement" on May 2, 2011. (A0060-A0067; B0001-B0015.) Salomon and Outdoor also entered into an Indemnification Agreement, effective as of May 2, 2011 (the "Indemnification Agreement"). (A0053-A0058.)

Defendant-Below, Appellant, Kroenke Sports & Entertainment, LLC is a Delaware limited liability company that acquired all of Outdoor's stock on May 17, 2013. (A0075.)

B. The Indemnification Agreement Provides Mandatory Advancement

The Indemnification Agreement grants Salomon broad and mandatory advancement rights upon receipt of an undertaking. (A0053-A0058.) Section 7 of the Indemnification Agreement, "Expenses," states:

> The Corporation *shall pay the expenses incurred by Indemnitee 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 Indemnitee to repay all amounts advanced if it should be ultimately determined that Indemnitee is not entitled to be indemnified under this Agreement or otherwise.

(A0056 (emphasis added).) The Indemnification Agreement also entitles Salomon to the expenses he incurs in enforcing his advancement rights. (A0056 ("Indemnitee, in such enforcement action, if successful in whole or in part, shall be entitled to be paid also the expense of prosecuting his or her claim.").)

In addition to the Indemnification Agreement, Article VIII, Section 2 of Outdoor's bylaws provide Salomon with broad and mandatory advancement rights:

> In addition to the right to indemnification conferred in Section 1 of this Article VIII, *an indemnitee shall also have the right to be paid by the Corporation the expenses (including reasonable attorneys' fees) incurred in defending any such proceeding in advance of its final disposition (hereinafter an "advancement of expenses")*; provided, however, that, if the Delaware General Corporation Law requires, an advancement of expenses incurred by an indemnitee in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation,

> service to an employee benefit plan) shall be made only upon delivery to the Corporation of an undertaking (hereinafter an "undertaking"), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a "final adjudication") that such indemnitee is not entitled to be indemnified for such expenses under this Section 2 or otherwise.

(B0032 at Article VIII, Section 2.) Outdoor's bylaws define an indemnitee as "[e]ach person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a "proceeding"), by reason of the fact that he or she is or was a director or an officer of the Corporation." (*Id.*, Section 1.)

1. Indemnification extends past termination of employment

Salomon's right to advance indemnification did not terminate when his employment ended. Outdoor's agreement and obligation to advance legal expenses and attorneys' fees continue where, as here, Salomon is subject to any proceeding "by reason of the fact that he was an officer of SkyCam and CableCam." Section 4 of the Indemnification Agreement, "Continuation of Indemnity," provides:

> All agreements and obligations of the Corporation contained herein shall continue during the period Indemnitee is a director, *officer*, employee or other agent of the Corporation . . . and *shall continue thereafter so long as Indemnitee shall be subject to any possible claim or threatened, pending or completed action, suit or proceeding, whether civil, criminal, arbitrative, administrative or investigative, by reason of the fact that*

> *Indemnitee was a director of the Corporation or serving in any other capacity referred to herein.*

(A0055 (emphasis added).) Section 11(a) of the Indemnification Agreement, "Survival of Rights," states: "The rights conferred on Indemnitee by this Agreement shall continue after Indemnitee has ceased to be a director, officer, employee or other agent of the Corporation[.]" (A0057.)

2. Advancement obligations extend to Outdoor's successors

As the successor to Outdoor, KSE assumed Outdoor's obligations to advance Salomon's legal fees and expenses. Section 11(b) of the Indemnification Agreement states:

> The Corporation shall require any successor (whether direct or indirect, by purchase, merger, consolidation or otherwise) to all or substantially all of the business or assets of the Corporation, expressly to assume and agree to perform this Agreement in the same manner and to the same extent that the Corporation would be required to perform if no such succession had taken place.

(A0057.) Finally, the Indemnification Agreement states that it "shall be interpreted and enforced in accordance with the laws of the State of Delaware." (*Id.*)

3. KSE Pursued Litigation Against Salomon In Connection With His Employment By Outdoor

As detailed extensively in the record, KSE initiated an arbitration proceeding against Salomon "by reason of the fact that he was an officer of SkyCam and CableCam." (*E.g.*, A0038-A0046; A0069-A0112; A0164-A0175.) The arbitration proceeding is ongoing through appeals in California and Texas. (A0478-A0480;

Dkt. 12 at 1-3, 10-16.)

C. Salomon Sought Advancement of Fees

On August 5, 2019, Salomon requested advancement and provided an undertaking. (A0114.) KSE refused to comply with its contractually mandated advancement obligations, and Salomon brought suit in the Court of Chancery. (A0033-A0151.) After oral argument (A0667-A0714), the Court of Chancery granted Salomon's summary judgment motion for advancement, and awarded Salomon "fees-on-fees" for successfully enforcing his advancement rights, (A0715-A0717).

IV. ARGUMENT

A. The Court Should Decline To Hear This Interlocutory Appeal

1. First Question

Should the Court hear an untimely interlocutory appeal that does not comply with the procedures set forth in Rule 42?

2. Scope of Review

"A notice of appeal must be timely filed to invoke the Court's appellate jurisdiction." *World Award Found. Inc. v. Anbang Ins. Grp. Co.*, No. 264, 2020, 2020 WL 5640676, at *1 (Del. Sept. 21, 2020) (citing *Carr v. State*, 554 A.2d 778, 779 (Del. 1989)). Applications for interlocutory review are addressed to the sound discretion of this Court. Supr. Ct. R. 42(d)(v).

3. Merits of the Argument

"[A]bsent compliance with Rule 42, a judgment or order entered by a court must be final to be reviewed by this Court." *Werb v. D'Alessandro*, 606 A.2d 117, 119 (Del. 1992). Rule 42(d) states "No interlocutory order shall be reviewed by this Court unless the appeal therefrom has been accepted by this Court in accordance with the following procedure[.]" Supr. Ct. R. 42(d). KSE's appeal, which was filed on July 9, seeks review of three orders: (1) the Advancement Order, (2) the Rule 88 Indemnification Order, and (3) the Rule 88 Order for Past Advancements, entered on February 26, June 3, and June 11, 2020 respectively. (A1124-A1144.) The notice of appeal only references these three orders.

a) The appeals of all three orders are untimely

"The notice of appeal may be filed at any time *after the filing of the application for certification* in the trial court, except that it shall be the obligation of appellant to serve and file in this Court a notice of appeal of an interlocutory order within *30 days after the entry of the order from which the appeal is sought to be taken*[.]" Supr. Ct. R. 42(d)(i) (emphasis added).

KSE's appeal of the Advancement Order and the Rule 88 Indemnification Order is untimely, as those orders were entered more than 30 days prior to the filing of the notice of appeal on July 9. *Yothers v. Yothers*, 203 A.3d 719 (Del. 2018) ("Time is a jurisdictional requirement." (citing *Carr v. State*, 554 A.2d 778, 779 (Del. 1989)); *Burnett v. Kalb*, 69 A.3d 370 (Del. 2013) ("This Court has no jurisdiction to entertain the Burnetts' untimely appeal. Accordingly, their appeal must be dismissed." (citations and footnotes omitted)). Moreover, KSE has already improperly pursued interlocutory appeal of the Advancement Order (B0035-B0036), which the Court dismissed, (B0093-B0098).

Although the Rule 88 Order for Past Advancements was appealed within 30 days of entry on the Court of Chancery's docket, the notice of appeal was not filed "*after* the filing of the application for certification in the trial court[.]" Supr. Ct. R. 42(d)(i) (emphasis added). In fact, KSE did not apply for certification of the Rule 88 Order for Past Advancements to the Court of Chancery. Nor did KSE seek

certification of the Rule 88 Indemnification Order. Accordingly, the docket-below is void of such applications. (A0027.) "Because the appellant failed to comply with Rule 42 when filing the notice of interlocutory appeal, the appeal must be dismissed." *Arunachalam v. Pazuniak Law Office, LLC*, 159 A.3d 263 (Del. 2017); *see also McLeod v. McLeod*, 93 A.3d 654 (Del. 2014) ("The appellant's untimely application for certification of an interlocutory appeal in the Superior Court did not cure his failure to file an application in the Superior Court before filing this appeal as required by Rule 42." (footnotes omitted)).

b) The notice of appeal does not comply with Rule 42(d)

KSE's deficiencies extend to the form of the appeal itself. Rule 42(d) states that the "notice of appeal . . . shall include a true and correct copy of such of the following papers as shall have been filed below[.]" Supr. Ct. R. 42(d)(iv). These "papers" include: the "application for certification," the "written response, if any to the application for certification," and the "order, if any, of the trial court certifying or refusing to certify the interlocutory appeal and any opinion with respect thereto[.]" *Id.* Although the notice of appeal contains copies of the orders that KSE seeks to appeal, it does not include any of these other required materials. (A1124-A1144.) KSE did not, because it could not, include applications for certification of the Rule 88 Orders since no such applications were made. However, KSE's notice of appeal does not contain its application for certification

of the Advancement Order, Salomon's response, or the Court's denial of the certification. (A1124-A1144.) Whether KSE's omission was intentional, or the result of negligence, the notice of appeal does not comply with Rule 42(d)(iv). The appeal should therefore be denied. *See, e.g.*, *Diamond Chem. & Supply, Co. v. Patton*, 620 A.2d 857 at *1 (Del. 1993) ("With respect to the cross-appeal, Simone has failed to comply with the procedures set forth in Rule 42(d)(iv), an omission that is fatal to the cross-appeal." (citing *Julian v. State,* 440 A.2d 990 (Del. 1982)).

c) KSE's application for certification was too late for the Advancement Order and too early for the Rule 88 Orders

"[T]he purpose of Rule 42 is to prevent wasteful piecemeal litigation from overwhelming the docket of the Supreme Court." *Stein v. Blankfein*, No. CV 2017-0354-SG, 2019 WL 3311227, at *1 (Del. Ch. July 23, 2019). KSE's interlocutory appeals, the very definition of piecemeal litigation, have been wasteful, as the sole purpose has been to "cause delay" and "threaten" Salomon's "scarce" resources. Supr. Ct. R. 42(b)(ii).

Although KSE eventually applied to the Court of Chancery for certification for interlocutory appeal of the Advancement Order after this Court denied the First Interlocutory Appeal (B0050-B0068), the application was too late under Rule 42(d)(i). And it was too early to be considered a proper certification for the Rule 88 Orders. Briefing on KSE's April 23 application was not complete until May 12,

2020 (B0099-B0115; A0026), which was before either of the Rule 88 Orders were granted. Thus, the Court of Chancery did not consider the Rule 88 Orders when it denied KSE's application for certification of interlocutory appeal. (B0116-B0121.)

KSE's interlocutory appeal is untimely under Rule 42(d) and fails to comply with the requirements of Rule 42(b)—it exemplifies the piecemeal litigation Rule 42 prohibits. This appeal should therefore be dismissed. *Julian v. State*, 440 A.2d 990, 991 (Del. 1982) (dismissed appeal "because it is an appeal from an interlocutory order and there was no compliance with the procedures set forth in Supreme Court Rule 42").

B. The Court of Chancery Properly Denied Certification of Interlocutory Appeal Under the Rule 42(b) Factors.

1. Second Question

Did the Court of Chancery correctly decline to certify KSE's prior application for certification of interlocutory appeal as to earlier interlocutory orders? (B0116-B0121; A0027.)

2. Scope of Review

Applications for interlocutory review are addressed to the sound discretion of this Court. Supr. Ct. R. 42(d)(v). "In exercising that discretion, this Court may consider all relevant factors, including the decision of the trial court whether to certify the interlocutory appeal and the factors set forth in paragraph (b) of this rule." *Id.*

3. Merits of Argument

In denying the First Interlocutory Appeal, this Court could not have been more clear regarding Rule 42. "Absent compliance with Supreme Court Rule 42, this Court has no jurisdiction to hear this interlocutory appeal." (B0097 at ¶ 5 & n.7.) Despite that guidance, KSE's Opening Brief does not even mention Rule 42, let alone "contain a statement that the applicant and the applicant's counsel have determined in good faith that the application meets the criteria set forth in" Rule 42(b)(iii). KSE also fails to disclose that the Court of Chancery rejected KSE's arguments in denying certification of an interlocutory appeal as to the

Advancement Order. (B0116-B0121.)

The Delaware Supreme Court delegates authority over interlocutory appeals to the trial courts. Supr. Ct. R. 42(a). "Supreme Court Rule 42 permits certification of interlocutory appeals when 'the order of the trial court decides a substantial issue of material importance that merits appellate review before a final judgment.'" *Sider v. Hertz Glob. Holdings, Inc.*, No. CV 2019-0237-KSJM, 2019 WL 2501481, at *4 (Del. Ch. June 17, 2019) (quoting Supr. Ct. R. 42(b)(i)). "If the 'substantial issue' requirement is met, th[e] Court [of Chancery] will then analyze whether 'there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal.'" *Id.* (quoting Supr. Ct. R. 42(b)(ii)). The rule recognizes eight factors relevant to this balancing assessment. *Id.* (citing Supr. Ct. R. 42(b)(iii)(A)-(H)).

As a preliminary matter Salomon does not dispute that advancement is a "substantial issue." *Sider*, 2019 WL 2501481, at *4. Indeed, the Court of Chancery found that "the summary judgment rulings resolved two substantial issues: (i) whether the underlying arbitration had reached its final disposition and (ii) whether Salomon was entitled to advancement." (B0119.) If the "substantial issue" requirement is met, the analysis turns to whether "there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal." Supr. Ct. R. 42(b)(ii). The rule recognizes eight factors relevant to this

balancing assessment. Supr. Ct. R. 42(b)(iii)(A)-(H). The Court of Chancery held that the "benefits of certifying an interlocutory appeal do not outweigh the costs." (B0119-B0121.) Specifically, the Court of Chancery found that the issues presented in the case at bar are neither exceptional nor novel, trial courts in Delaware do not disagree over the scope or nature of the advancement right, and an interlocutory appeal does not serve the interest of justice. (*Id.*)

a) The Advancement Order does not involve a question of law resolved for the first time in this State

Despite KSE's extensive hand waving, the possibility of not being repaid for advancement of fees and expenses is not a matter of first impression in Delaware courts. For example, in *Sider*, Hertz argued that "unwarranted advancement will result in irreparable harm [to the company], particularly if the plaintiffs are unable to repay the amounts advanced[.]" *Sider*, 2019 WL 2501481, at *2. The Court stated that Hertz "ignores the frequency with which this issue arises." *Sider*, 2019 WL 2501481, at *3. Similarly, in *Reddy v. Electronic Data Systems Corp.*, the Court acknowledged that "advancement practice has an admittedly maddening aspect" because the board "is reluctant to advance funds . . . , fearing that the funds will never be paid back[,]" No. CIV.A. 19467, 2002 WL 1358761, at *5 (Del. Ch. June 18, 2002), *aff'd.* 820 A.2d 371 (Del. 2003).

Moreover, *In re Central Banking Systems., Inc.*, No. C.A. 12497, 1993 WL 183692 (Del. Ch. May 11, 1993) directly contradicts KSE's assertion that the trial

court decided a novel question of law in granting advancement to Salomon. In *Central Banking*, the Trustee asserted that the estate was entitled to be secured against the risk that "Mr. Rafton would be unable to repay" the advancements. *Id.* at *2. The court rejected that argument, holding that an only an undertaking was necessary to secure the advancement right. *Id.* at *3 (no "provision of Delaware law requires that the undertaking be secured or be accomplished by a showing of the indemnitee's financial responsibility").

Here, KSE argues that because Salomon is supposedly unable to repay the advancements, his undertaking is "illusory and fraudulent."[1] However, if Salomon had posted security or otherwise demonstrated his ability to repay, then KSE, presumably, would have honored its advancement obligations without court intervention. This is an attempt to shoehorn largely inapposite breach-of-contract case law[2] into what is otherwise an issue of corporate governance. *See, e.g.*,

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[1] Salomon's financial affidavit in the United States Court of Appeals for the Fifth Circuit never "admitted" that he could not repay the undertaking, nor does it evidence an intent not to do so. (A0621.)

[2] Appellants cite *Mobil Oil Corporation v. Wroten*, 303 A.2d 698, 701 (Del. Ch. 1973), but the court was evaluating whether an "illusory" promise could be consideration as part of a bilateral contract—it ultimately held that the promise was consideration, *id*. The other Delaware cases identified by Appellants in support of this argument relate to claims where fraud was specifically alleged. *Vituli v. Carrols Corp.*, 2015 WL 5157215, at *6 (Del. Super. Ct. May 1, 2015) (addressing fraud claims at summary judgment); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *10 (Del. Ch. Dec. 23, 2008) (evaluating the sufficiency of fraud claims under Rule 9(b)).

Marino v. Patriot Rail Co., 131 A.3d 325, 335 (Del. Ch. 2016) ("The drafters of the 1967 revision sought to eliminate uncertainty by having the first sentence of Section 145(e) specifically authorize a corporation to provide advancements to then-serving directors and officers conditioned solely on an unsecured undertaking. The sentence arguably represented a legislative determination that advancing litigation expenses to current officers or directors on that basis was entirely fair."). Moreover, KSE's position was rejected by *Central Banking*, 8 *Del. C.* § 145, and a host of other cases cited in Salomon's trial court pleadings and moving papers holding that an undertaking need not be accompanied by security or a showing of "financial responsibility," i.e. an ability to repay.[3] Only an undertaking, or commitment to repay is required. Thus, the interlocutory order does not "involve[] a question of law resolved for the first time in this State." Supr. Ct. R. 42(b)(iii)(A).

b) The decisions of the trial courts are not conflicting upon the question of law

With regard to the question of whether "[t]he decisions of the trial courts are conflicting upon the question" of § 145(e) undertakings, Supr. Ct. R. 42(b)(iii)(B),

[3] *Havens v. Attar*, 1997 Del. Ch. LEXIS 12, at *43 (Del. Ch. Jan. 30, 1997); *Gentile v. Singlepoint Fin., Inc*., 788 A.2d 111, 113 (Del. 2001); *Reddy v. Elec. Data Sys. Corp*., 2002 WL 1358761 at *4 (Del. Ch. June 18, 2002); *Blankenship v. Alpha Appalachia Hldgs., Inc*., 2015 Del. Ch. LEXIS 145, at *83 (Del. Ch. May 28, 2015); *Weil v. Vereit Operating P'ship, L.P*., 2018 Del. Ch. LEXIS 48, at *26 (Del. Ch. Feb. 13, 2018).

KSE has not identified a single case in which Delaware trial courts are in conflict. This is well-settled hornbook law. *See, e.g.*, *Marino*, 131 A.3d. at 333–37 (discussing the evolution of § 145(e) and modern case law).

c) Review of the interlocutory order will not serve considerations of justice

Salomon has broad advancement rights under the Indemnification Agreement and Outdoor's bylaws. KSE seeks interlocutory review in an effort to "turn off the advancement spigot." However, the "policy of Delaware favors advancement when it is provided for, with the Company's remedy for improperly advanced fees being recoupment at the indemnification stage," or "on appeal after issues of reasonableness have been finally resolved." *Sider*, 2019 WL 250148, at *3 (quoting *Mooney v. Echo Therapeutics, Inc.,* 2015 WL 3413272, at *6 (Del. Ch. May 28, 2015) and citing *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 206 (Del. 2005)).

KSE's public policy argument is again more hand waving. The cases KSE cites are inapposite and relate to the limitation of damages in breach of contract cases where fraud was specifically alleged under Rule 9(b). *See Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1036 (Del. Ch. 2006) ("when a seller lies—public policy will not permit a contractual provision to limit the

remedy of the buyer to a capped damage claim.")[4] Here, KSE answered the complaint with affirmative defenses (A0446-A0448), but did not file counterclaims of fraud stated "with particularity." Ct. Ch. R. 9(b). On appeal, KSE now relies on innuendo to allege fraud and criminal acts but has neither pleaded nor preserved the claims of fraud that the cited case law applies. Consequently, KSE has not shown that "[r]eview of the interlocutory order may serve considerations of justice." Supr. Ct. R. 42(b)(iii)(H).

For the reasons stated above, the interlocutory appeals should be dismissed.

[4] *See also Kainos Evolve, Inc. v. InTouch Techs., Inc.*, 2019 WL 7373796, at *2–3 & nn. 6, 12 (Del. Ch. Dec. 31, 2019) (citing *Abry Partners*, 891 A.2d at 1035-36); *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842, 859 (Del. Ch. 2016), *aff'd sub nom. A & R Logistics Holdings, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (Del. 2016) (citing *Abry Partners*, 891 A.2d at 1058).

C. The Court of Chancery properly granted summary judgment

1. Third Question

Did the Court of Chancery properly grant summary judgment of advancement?

2. Scope of Review

"To discharge its appellate function on review of the trial court's entry of summary judgment, this Court must determine 'whether the record shows that there is no genuine, material issue of fact and the moving party is entitled to judgment as a matter of law.'" *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996) (quoting *Arnold v. Society for Sav. Bancorp*, 650 A.2d 1270, 1276 (Del. 1994)). This Court reviews the Court of Chancery's decision to grant summary judgment *de novo*, both as to facts and law. *Id.*

3. Merits of Argument

As stated above, this Court has already considered and dismissed an interlocutory appeal of the Advancement Order. (B0093-B0098.) In any event, the Court of Chancery properly granted summary judgment of advancement on an undisputed record. (A0712 ("There are no disputes of material fact relating to the contract issues as to the right to advancements. Hence, I am granting the cross-motion for summary judgment.").)

a) KSE waived its claim to an issue of material fact

In its briefing leading up to the February 26 hearing and at the hearing itself,

KSE did not identify or raise any issues of material fact. On appeal, KSE raises the specter of an issue of material fact as a possible reason for reversing the Court of Chancery. In support, KSE cites two documents as evidence of having preserved the issue for appeal. First, KSE cites page 47 of the answer to the complaint, which states some of KSE's affirmative defenses in the trial court, including:

> 4. For the reasons explained in Defendants' Motion, Salomon's purported "undertakings" were "illusory, lacking substance and not given in good faith." Moreover, the purported "undertakings" lack consideration from Salomon. Accordingly, Salomon has not provided a valid undertaking.

(A0447.) This statement does not identify a single issue of material fact. Next, KSE cites Salomon's financial affidavit to the United States Court of Appeals for the Fifth Circuit (A0621), but does not explain which issue of material fact KSE raised below. In essence, KSE pointed to a single document and asked the Court of Chancery to draw a series of inferences that even today, KSE is unable to explain. For these reasons, KSE has waived its argument.

b) The Court of Chancery properly rejected KSE's "illusory promise" argument

As discussed in detail in Section IV.B.3.a-b, above, Delaware courts applying § 145(e) do not interpret an undertaking to require security or an ability to repay advancement, *e.g.*, *Sider*, 2019 WL 2501481, at *2, but that companies could draft provisions to create such requirements, *Reddy v. Electronic Data Systems*

Corporation, 2002 WL 1358761 at *4 (Del. Ch. June 18, 2002) ("If it chose, EDS could have conditioned former employees' advancement rights on an undertaking, proof of an ability to repay, or even the posting of a secured bond. But it did not do so."). KSE's drafting failures do not necessitate a change in Delaware law.

c) The Court of Chancery properly rejected KSE's public policy argument

As discussed in detail in Section IV.B.3.c, above, public policy in Delaware favors advancement. *Sider*, 2019 WL 250148, at *3. In support of its position, KSE cites to cases related to allegations of fraud in breach of contract disputes. Those cases are inapposite because KSE did not file any counterclaims, let alone plead fraud under Rule 9(b). Since KSE did not plead fraud, it cannot now claim that the trial court erred by failing to credit its unsupported claims of fraud.

D. Advancement is not the proper stage to challenge the reasonableness of fees

1. Fourth Question

Did the Court of Chancery properly decide the Rule 88 Orders?

2. Scope of Review

"The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded." *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 506 (Del. 2005) (citation omitted). This court reviews a decision to award attorneys' fees for abuse of discretion. *Mahani v. Edix Media Grp., Inc.*, 935 A.2d 242, 245 (Del. 2007).

3. Merits of Argument

As is discussed in Section IV.A.3.c, above, KSE's fourth argument is untimely and fails to comply with the process described in Rule 42. Because KSE has not applied to certify the interlocutory appeal of the Rule 88 Orders, the appeal should be dismissed on that basis alone. Even if KSE had made an application for certification of interlocutory appeal, application for interlocutory review of fees awarded pursuant to a Rule 88 Order "does not meet the strict standards for certification under Supreme Court Rule 42(b)." *Traditions*, 226 A.3d 1139, at * 2 ("Exceptional circumstances . . . do not exist in this case, and the potential benefits of interlocutory review do not outweigh the inefficiency, disruption, and probable costs caused by an interlocutory appeal.").

Similarly, the Court of Chancery held when it denied KSE's motion for partial final judgment, "[a]s in *Sider*, this litigation should follow the normal course, where 'the defendants' remedy for improperly advanced fees will be recoupment at the indemnification stage or will be an appeal after issues of reasonableness have been finally resolved.'" (B0118 (quoting *Sider*, 2019 WL 250148, at *3).)

V. CONCLUSION

For the reasons stated above, Salomon respectfully requests that the Court deny the appeal.

Dated: October 5, 2020

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