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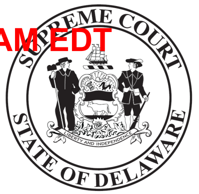

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN EVANS,	:	
	:	No. 208,2023
Plaintiff Below,	:	
Appellant/Cross Appellee	:	On Appeal from the Court of
	:	Chancery of the State of Delaware
v.	:	
	:	C.A. No. 2018-0454-LWW
AVANDE, INC.,	:	
	:	
Defendant Below,	:	
Appellee/Cross Appellant	:	

CORRECTED
OPENING BRIEF OF APPELLANT/CROSS-APPELLEE

Dated: August 14, 2023

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NATURE OF THE PROCEEDINGS

This is an appeal from an indemnification proceeding in the Court of Chancery, in which Plaintiff Shawn Evans ("Evans"), the former CEO of Avande, Inc. f/k/a Avande, LLC ("Avande"), seeks to be indemnified for the amounts spent successfully defending himself in an action brought by Avande against him, styled *Avande v. Evans, et al.*, C.A. No. 2018-0203-AGB (the "Plenary Action").

The operative amended complaint in the Plenary Action (the "Complaint" or "Compl.") alleged five counts against Evans: Count I (Declaratory Judgment); Count II (Breach of Fiduciary Duty); Count III (Tortious Interference with Contract and/or Business Relations); Count IV (Defamation and/or Trade Libel); and Count V (Conversion). A sixth count alleged that DC Risk Solutions, Inc. ("DC Risk") and Avandel, Inc. ("Avandel") aided and abetted Evans in breaching his fiduciary duties to Avande.[1] The details of the Plenary Action, and the rulings therein, are set forth in more detail in the subsequent section.

On September 23, 2021, the Court of Chancery entered partial summary judgment in favor of Evans, ruling that Evans was entitled to indemnification in connection with the allegations Avande brought against him in Counts I (Declaratory

[1] Avande later voluntarily dismissed its aiding and abetting claim against Avandel. *See* A65 at Dkt. 113.

Judgment) and V (Conversion), and that Evans was also entitled to "fees on fees" for those claims. A272.

On March 11, 2022, the Court of Chancery conducted a trial on a paper record to resolve Evans' entitlement to indemnification on Count II (Breach of Fiduciary Duty), Count III (Tortious Interference with Contract and/or Business Relations), and Count IV (Defamation and/or Trade Libel). In its June 9, 2022 Post-Trial Memorandum Opinion ("Mem. Op.") (attached as Exhibit B hereto), from which Evans now appeals, the Court ruled that Evans is not entitled to indemnification for any of those three remaining counts. On June 27, 2022, the Court entered an Order and Judgment in favor of Avande, denying indemnification on all three remaining counts (A422-425), even though, after a full trial before Chancellor Bouchard, Evans had been almost entirely successful in defending the breach of duty claim against him, and was fully successful on the tortious interference and defamation claims.

As to the breach of duty claim against him, the Court ruled that Evans did not achieve "partial success" (Mem. Op. at 15-18), which would have triggered mandatory indemnification "to the extent" of that success under 8 *Del. C.* § 145(c), even though the Chancellor had entered a Judgment Order in Evans' favor on all but four *de minimus* transactions, out of several thousand allegedly improper transactions. As to the tortious interference and defamation claims against him, which were each dismissed in full, the Court denied indemnification because it found

there was no nexus or causal connection between Evans' role as CEO and the misconduct alleged in those claims (Mem. Op. at 10-15), even though Evans would have needed confidential information from Avande to engage in the alleged misconduct, and Avande specifically alleged in its Complaint that Evans' actions were "based on his prior interactions with third parties when he served as CEO." A11-12 (Compl. at ¶ 19).

Based upon these rulings, on July 18, 2022, Evans filed an affidavit pursuant to Court of Chancery Rule 88 in support of an award for partial indemnification of attorneys' fees and expenses (the "Damages Motion"). A16 at Dkt. 82. Following subsequent briefing on the Damages Motion, on April 19, 2023, the Court issued a telephonic ruling awarding Evans partial indemnification. A20 at Dkt. 101-102. On May 18, 2023, the Court entered a Final Order and Judgment, awarding an agreed upon amount of $79,599.77, and requiring Avande to pay this amount to Evans within ten days. *See* Exhibit A hereto.

This timely appeal followed.

SUMMARY OF ARGUMENTS

1. ***Defense of Count II alleging Breach of Duty.*** The Court of Chancery erred in ruling that Evans was not "partially successful" in defending the breach of duty claim against him. The plain language of 10 *Del. C.* § 145(c) mandates indemnification "to the extent" that any former officer "has been successful … in defense of any action … or in defense of any claim, issue or matter therein." Here, Chancellor Bouchard's Judgment Order expressly entered judgment "in Evans' favor and against Avande on Count II [breach of duty], with respect to (a) any transaction making up the Challenged Amount (as defined in the Memorandum Opinion)" with certain minimal exclusions. A224 at ¶ 2.

Thus, Evans was successful in defending this claim for thousands of transactions valued at more than $5 million, while Avande was successful for only four transactions valued at less than $22,000. Accordingly, the plain language of Section 145(c), in combination with the plain language of the Judgment Order, requires indemnification for virtually all of Evans' expenses incurred defending this breach of duty claim. It was error for the Court of Chancery to rule that Evans "did not prevail" on this claim (Mem. Op. at 16), and deny any indemnification simply because the Court could find no precedent for an indemnification order that parsed out transactions the way the Judgment Order does here.

2. ***Defense of Counts III and IV alleging Tortious Interference and Defamation.*** The Court of Chancery also erred in ruling that Evans was not entitled to indemnification for successfully defending the tortious interference and defamation claims against him because those claims were purportedly not brought "by reason of the fact" of Evans' status as a former CEO. Under established Delaware law, Evans' alleged misuse of confidential information obtained while he was CEO satisfies the "by reason of the fact" or "official capacity" standard, a standard that is interpreted broadly in favor of indemnification.

These claims involve allegations that Evans interfered with Avande's business relationships with third parties, such as venders, service providers and lenders, and that Evans defamed Avande to those parties. The identities of these third-party business contacts are confidential non-public information, and Avande specifically alleged in its complaint against Evans that these allegations are "based on [Evans'] prior interactions with third parties when he served as CEO." A11-12 (Compl. at ¶ 19). Under Delaware law, the alleged misuse of confidential information entitles Evans to indemnification, regardless of whether the corporation expressly uses the phrase "confidential information" in its complaint against the former officer. *See, e.g., Brown v. LiveOps, Inc.*, 903 A.2d 324, 325 (Del Ch. 2006) ("labeling of the counts" is irrelevant where indemnitee "had access to confidential and proprietary information concerning LiveOps's business and customers").

STATEMENT OF FACTS

A. Messrs. Evans, Kato And Ergun Form Avande, With Evans And Ergun Retaining Separate Entities That Did Business With Avande

Avande is a privately-held medical claims management company. A171 *see also Avande, Inc. v. Evans*, 2019 WL 3800168 (Del. Ch. Aug. 13, 2019), at *1.[2] On February 23, 2016, Evans, Norman Kato ("Kato") and Mehmet Ergun ("Ergun") restructured Avande LLC into a Delaware corporation, Avande, Inc., with Kato holding approximately 43% of the company's common stock, Evans holding 30%, and Ergun holding 23%. A4-5 (*Avande*, 2019 WL 3800168. at *2). Two other stockholders held less than 2% of Avande common stock each. *Id.*

Kato, Ergun and Evans each served as officers, and the only three board members, of Avande. A5 (*Avande*, 2019 WL 3800168. at *2). Kato was "the medical guy" who served as Chief Medical Officer ("CMO"). A4 (*Avande*, 2019 WL 3800168. at *2). Ergun served as Chief Technology Officer and was responsible for information technology. *Id.* Evans served as CEO and described his responsibilities as doing "anything that Kato and Ergun did not do, which included administrative and financial matters." *Id.* Prior to the restructuring, Evans had been the CEO and Managing Member of the LLC entity, while Kato and Ergun held their

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[2] For the convenience of the Court, Evans will include citations to the Westlaw version of Chancellor Bouchard's post-trial opinion in the Plenary Action, where appropriate.

same respective positions as well. A2-3 (*Avande*, 2019 WL 3800168. at *1). While working for Avande, Ergun also owned and operated Avandel, which "provided all of Avande's IT services," and Evans owned and operated DC Risk, which brokered insurance policies and provided bookkeeping services for Avande. A2-6 (*Avande*, 2019 WL 3800168. at *3).

B. Avande Experiences Financial Troubles And The Death Of Ergun, Resulting In Tensions, Evans' Termination, And Litigation

Over time, Avande experienced financial troubles that resulted in growing tension between Evans and Kato. A177 (*Avande*, 2019 WL 3800168. at *3). In one instance, one of Avande's largest clients demanded a refund of over four hundred thousand dollars, and Kato "placed the blame for [this] problem on Evans" for supposedly not "reserve[ing] more of the money the Company received" from the client. A178 (*Avande*, 2019 WL 3800168. at *3).

On August 31, 2017, Ergun died unexpectedly, which "created a vacancy on Avande's board and led to a deadlock between Evans and Kato." A179 (*Avande*, 2019 WL 3800168. at *4). This tragedy was particularly difficult for Avande, because "Ergun had served as a 'go between' who maintained the 'balance' when Kato and Evans disagreed." *Id.* To complicate matters further, Ergun had died intestate, and his shares of Avande stock could not be voted until a representative from his estate was appointed. *Id.*

Around the time of Ergun's passing, Kato was communicating with a financial consultant and discussing "options for terminating Evans' role in the Company." *Id.* These discussions "touched on a disagreement between Kato and Evans concerning how to best calculate the cost of conducting a medical review." A179-180 (*Avande*, 2019 WL 3800168. at *4). Kato asked Avande's then-Chief Operating Officer to calculate the "true cost per authorization," but told the financial advisor that he did not want the COO to share this information with CEO Evans because Kato "did not want [Evans] trying to figure out the correct number" and wanted to "leave [Evans] in the dark and let him hang himself as he signs the new and essentially worthless contracts…" A180 (*Avande*, 2019 WL 3800168. at *4).

On January 8, 2018, after Evans had refused to participate in a stockholder meeting to elect new directors, thereby preventing a quorum, Kato filed an action in the Court of Chancery to compel an annual meeting. A180-181 (*Avande*, 2019 WL 3800168. at *4). The stockholder meeting was held on February 15, 2018, at which Kato and the two other stockholders that held less than 2% each, voted to remove Evans from the board and seat those two small stockholders as new directors. *Id.* The new board then voted to remove Evans as CEO. *Id.*

On March 1, 2018, approximately two weeks after his termination, Evans and his wife filed suit against Avande in California state court, demanding repayment of approximately $169,000 in loans that Evans had made to Avande. A181 (*Avande*,

2019 WL 3800168. at *4). Evans and his wife alleged that Avande failed to pay the outstanding notes within 90 days after they became due, and that they were unable to negotiate a resolution with Avande. A107-108 at ¶¶ 6-9. On January 11, 2022, the Superior Court of California entered a judgment in favor of Evans and his wife, and against Avande, in the amount of $150,000. *See Shawn Evans and Judith Evans v. Avande, Inc.,* No. CGC-18-564697, Clerk's Judgment Pursuant to CCP § 998 (Jan. 11, 2022) (A359-360).

C. The Plenary Action And The Court Of Chancery's Prior Rulings In Evans' Favor

On March 22, 2018, approximately three weeks after Evans filed suit in California, Avande initiated the Plenary Action in the Court of Chancery against Evans, DC Risk, and Avandel. A110-124. Evans alleges that Avande filed the Plenary Action in direct response to the California filing, and to rebuff Evans and his wife's insistence on being repaid for the outstanding loans Evans had made to Avande that were then past due. A326.

On May 30, 2018, Avande filed the operative Complaint in the Plenary Action. A125-169. As noted *supra,* the Complaint alleged five counts against Evans: Count I (Declaratory Judgment); Count II (Breach of Fiduciary Duty); Count III (Tortious Interference with Contract and/or Business Relations); Count IV (Defamation and/or Trade Libel); and Count V (Conversion); and included an aiding

and abetting count against DC Risk and Avandel (A157-164) (with Avande later dismissing the claim against Avandel) (*see* A65 (Dkt. 113)).

On August 13, 2019, after a three-day trial in the Court of Chancery, Chancellor Bouchard entered a post-trial Memorandum Opinion in the Plenary Action. A170-221 (*Avande*, 2019 WL 3800168). At trial, Avande had sought "over $5.3 million of damages." A171 (*Avande*, 2019 WL 3800168, at *1). The Court, however, awarded only $21,817.70 in damages, and ordered an "accounting of payments that Avande made to DC Risk Solutions, Inc." *Id.*

The Court denied Avande's request for an entire fairness review, or an accounting, of $4,691,097 in business expenses approved by Evans (the "Challenged Amount") that Avande contended the Internal Revenue Service might disallow. A206-207 (*Avande*, 2019 WL 3800168. at *14). In so doing, the Court rejected Avande's argument that "Evans should bear the burden to prove the fairness of each and every expense making up the Challenged Amount" (A196; *Avande*, 2019 WL 3800168, at *10) because "Avande has not provided substantial evidence that the transactions making up the Challenged Amount, which likely ***consist of thousands of individual expenditures*** incurred over a span of more than five years, constitute self-dealing transactions involving Evans (A202-203 *Avande*, 2019 WL 3800168, at *12) (emphasis added).

The Court ruled that, of the thousands of transactions within the Challenged Amount for which Avande sought judicial review, ***all but six*** were "subject to the business judgment rule" and Avande "has not proven that any of them constitute waste." A208 (*Avande*, 2019 WL 3800168. at *14). These six transactions were comprised of: (i) three tuition payments for the benefit of an Avande consultant; (ii) a scooter to provide transportation for Ergun; and (iii) payments to two law firms, one a divorce firm for Ergun and the other an immigration firm for an Avande employee. A208-215 (*Avande*, 2019 WL 3800168. at *14-16).

The Court further stated that "significantly, it was not for lack of trying that Avande was only able to identify six problematic transactions," explaining that Avande's COO "spent an average of three hours a day over a ten-month period culling through Evans' emails to help build Avande's case against Evans." A203 (*Avande*, 2019 WL 3800168. at *12). Notably, Avande engaged in this extended effort only after filing the Complaint, in a failed attempt to find evidence for its unsubstantiated claims against Evans in the Plenary Action. The Court also noted that Evans "did not exercise sole control over Avande's finances" and "regularly forwarded to the board financial reports, budgets, and projections that determined by category the amount of expenses the Company was incurring." A204 (*Avande*, 2019 WL 3800168. at *13).

The Court stated that "common sense suggests that many of the expenses within the Challenged Amount would have had a legitimate business purpose" and that there was "no logic or equity" to Avande's position that "Evans should be required to pay damages" for expenses that "facially had a business purpose" and where "the record is devoid of evidence that Evans stood to benefit personally from them." A205-206 (*Avande*, 2019 WL 3800168. at *13).

Shortly before trial, Avande attempted to improperly buttress its position with a 41-page "supplemental expert report" that purportedly contained "various spreadsheets quantifying alleged damages to Avande." A186 (*Avande*, 2019 WL 3800168. at *6). The Court, however, struck this report during a pre-trial conference, explaining that the production of "a new report from a previously designated expert, forty days after the agreed-upon deadline for expert reports, about fifteen hours before the expert was scheduled to be deposed, and less than ten days before trial was inexcusable and prejudicial to [Evans]." *Id.* (internal quotation omitted).

The *de minimis* amount of $21,817.70 that the Court did award in damages was the result of only ***four transactions***, namely the three tuition payments, with a combined value of $18,280.20, that Evans had authorized Avande to pay as compensation for Dr. Olivier Danhaive, a physician consultant who "performed medical reviews for Avande" (A208; *Avande*, 2019 WL 3800168, at *14); and the

purchase of a scooter for $3,537.50 that Evans had approved from a retailer where Evans was a part owner (A211; *Avande*, 2019 WL 3800168, at *15). The scooter was for the benefit of Ergun, who "had asked for a vehicle from the Company and Evans suggested getting him a scooter instead." *Id.*

On September 4, 2019, the Court entered a "Judgment Order" (A222-226), which entered judgment in favor of Evans and "against Avande, on Counts I, III, IV, and V of the Amended Complaint." A225 at ¶ 4. As to Count II, the breach of fiduciary duty claim, the Court entered judgment "in favor of Avande and against Evans" but only "in the following two respects," which included (i) "damages in the amount of $21,817.70 concerning the Danhaive and Scooter Ricambi transactions" (plus an award of pre-judgment interest), and (ii) "an equitable accounting (the "Accounting") with respect to all payments Avande … made to DC Risk before Evans was terminated as Avande's Chief Executive Officer on February 15, 2018." A223 at ¶ 1.

As to the remaining components of Avande's breach of duty claim (Count II), the Judgment Order specifically states that:

> "No relief is awarded under Count II, and ***judgment is hereby entered in Evans' favor and against Avande on Count II, with respect to (a) any transactions making up the Challenged Amount (as defined in the Memorandum Opinion) other than the transactions described in paragraph 1(a) above*** [*i.e.* the aforementioned $21,817.70] ***and (b) compensation that Evans received from Avande before his termination as CEO of Avande."***

A224 at ¶ 2 (emphasis added).

The Memorandum Opinion referenced in the Judgment Order defines the "Challenged Amount" as $4,691,097 (A195; *Avande*, 2019 WL 3800168, at *10), and explains that Evans' disputed pre-termination compensation was $445,815.50 (A219; *Avande*, 2019 WL 3800168, at *18). Thus, the Judgment Order expressly ruled "in favor of Avande and against Evans" for certain components of the fiduciary duty claim from Count II, and "in Evans' favor and against Avande" for other components of the claim. In other words, Evans was awarded judgment in his favor for successfully defending against claims that he breached his fiduciary duty in thousands of transactions involving Avande, amounting to over $5 million, while Avande was awarded judgment in its favor on only "the Danhaive and Scooter Ricambi transactions" totaling a *de minimis* sum of less than $22,000.

Accordingly, the Chancellor entered an express final Judgment Order that Evans was successful as to over 99% of the total transaction values adjudicated under Count II. The precise wording of the Judgment Order leaves no doubt as to the extent of Evans' success.

On September 27, 2019, the Court entered an "Order Governing Accounting Procedure." A227-231. This Order required an accounting (the "Accounting") to be performed by an accountant (the "Accountant"). The Accountant was a financial expert selected by Avande (A231), who was permitted to, *inter alia*, "demand and

obtain copies of all books and records of Avande, DC Risk and Evans, including without limitation all financial documents, ledgers, all checks and check books, all banking records, all credit card statements, [and] all contracts, customer data and information" (A229 at ¶ 5(a)).

On September 14, 2020, after the completion of the Accounting, the Court entered its Order (the "Accounting Judgment Order"). A232-245. The Accounting Judgment Order stated that the Accountant had examined $235,845.83 in payments made to DC Risk (A232), and filed a "Report" that found a total of only $43,687.77 in "unfair payments" (A234). In examining these numerous transactions that covered a five-year period, the Accountant applied the "entire fairness" standard, which placed the burden on Evans to demonstrate "both fair dealing and fair price." A234-235. Of the unfair payments amount, $39,384.02 (or 90.12%) was attributed to "charges for bookkeeping services that DC Risk employee (Susan Omran) performed for Avande" over the five-year period from 2013 to 2018. A235-236.

The Accountant arrived at this figure by (i) reducing the number of invoiced hours for which "he did not have satisfactory backup documentation"; and (ii) reducing the hourly rates DC Risk charged Avande, from a range of $35-40 per hour to a range of $30.50-33.07 per hour. A237. Thus, the Accountant did not identify any fraudulent transactions that involved DC Risk for the benefit of Evans. Instead, he found only that certain amounts invoiced by DC Risk lacked backup

documentation, and additionally applied a slightly lower hourly rate for DC Risk's efforts, despite Evans' testimony that he believed the $35-40 hourly rate was "below the market rate in San Francisco." *See* A215-216 (*Avande*, 2019 WL 3800168, at *17).

The Accounting Judgment Order also denied Avande's request to "reject the Accountant's findings and award it the full amount" of all the bookkeeping services DC Risk had provided to Avande during the five-year period. A236-238 at ¶¶ 4, 7. Despite Avande's contention to the contrary, the Court found "it is indisputable that DC Risk provided substantial bookkeeping services to the Company during this period." A238 at ¶ 7. Moreover, based on a declaration submitted by Avande's own expert, the Court concluded that "Avande itself acknowledges that DC Risk performed substantial bookkeeping services for the Company." A239 at ¶ 8.

The Court further denied Avande's request for an additional $366,321.92 for credit card charges made by Evans "that the Accountant did not examine in the Report" (A236 at ¶ 4), because Evans' personal credit card expenditures were "outside the scope of the Accounting" (A239 at ¶ 10). The Court found that, in response to the Report, Avande had improperly submitted a spreadsheet that included "the same credit card charges that were part of the Challenged Amount for which Avande failed to make the showing necessary to obtain an accounting and are not part of the DC Risk Transactions for which the Accounting was ordered." A242

at ¶ 13. The Court ruled that "Avande ask[s] the court to consider evidence it failed to produce at trial and to re-litigate an issue on which it lost at trial, *i.e.* its request for an accounting of the Challenged Amount. This is completely improper." A242 at ¶ 14.

Finally, the Court denied Avande's request for additional attorneys' fees and expenses in connection with the Accounting, based on Evans' alleged "failure to produce before trial nine handwritten notebooks Omran maintained" that were otherwise "provided to the Accountant." A243 at ¶ 15. The Court ruled that Avande "has not been impacted" because Evans was already required to pay "all the professional fees and expenses charged by the Accountant" and that "Avande itself" had "unduly complicated the Accounting by injecting an issue into the process that was outside the scope of the Accounting." A244-245 at ¶ 17.

In sum, the Accounting Judgment Order provides that Evans and DC Risk are jointly and severally liable to Avande in the amount of $43,687.77, plus pre- and post-judgment interest. A245 at ¶ 18. On September 21, 2020, the Court entered a "Final Order and Judgment" (A246-248), that set the amount of pre-judgment interest at $14,087.14 (A247 at ¶ 1).

After the Chancellor entered the Final Order and Judgment in the Plenary Action, Evans sought indemnification for the fees and expenses he had incurred defending himself. As explained *supra,* on September 23, 2021, the Court of

Chancery granted partial summary judgment in favor of Evans and awarded him indemnification for defending against Count I (Declaratory Judgment) and V (Conversion). A272. Following trial on a paper record, the Court issued its June 9, 2022 Post-Trial Memorandum Opinion, which denied Evans any indemnification for defending against Count II (Breach of Duty), Count III (Tortious Interference), and Count IV (Defamation). *See* Mem. Op. at 18. Following Evans' submission of his Damages Motion, and subsequent briefing thereon, the Court of Chancery entered its Final Order and Judgment on May 18, 2023. *See* Exhibit A hereto.

The denial of indemnification for defending those three Counts is the subject of this appeal.

ARGUMENT

I. THE COURT OF CHANCERY ERRED IN RULING THAT EVANS WAS NOT PARTIALLY SUCCESSFUL IN DEFENDING THE BREACH OF DUTY CLAIM AGAINST HIM

A. Question Presented

Did the Court of Chancery err in ruling that Evans was not partially successful in defending the breach of duty claim against him, where the Chancellor had issued a Judgment Order in Evans' favor on all but four *de minimus* transactions, out of several thousand allegedly improper transactions? This issue was preserved for appeal. A347-352.

B. Standard Of Review

This is a question of law, based upon the Court of Chancery's legal conclusion as to Evans' right to indemnification, and interpretation of a subsection of Delaware's indemnification statute, namely *8 Del. C.* § 145(c), for which the appropriate standard of review is *de novo. See Ocean Bay Mart, Inc. v. City of Rehoboth Beach Del.*, 285 A.3d 125, 136 (Del. 2022) ("To the extent that [an appellant] challenges the Court of Chancery's legal conclusions or raises questions of statutory interpretation," the Court will "review both questions of law and statutory interpretation *de novo*.") (citations omitted).

C. Merits Of The Argument

1. Delaware Law Favors Indemnification And Section 145(c) Mandates Indemnification In An Amount That Reflects An Indemnitee's Level Of Success In Defense Of Any Claim, Issue Or Matter

Section 145 of the Delaware General Corporation Law ("Section 145") governs the indemnification rights of corporate officers and directors, and "should be broadly interpreted to further the goals it was enacted to achieve." *Stifel Fin. Corp. v. Cochran,* 809 A.2d 555, 561 (Del. 2002) (*citing Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 344 (Del. 1983); *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 84 (Del. 1998)). Moreover, Avande's bylaws and its certificate of incorporation both provide for indemnification to the "fullest extent permitted" by Delaware law. Mem. Op. at 8-9.

The "invariant policy" of the Delaware statute is to "promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated." *Stifel,* 809 A.2d at 561 (*quoting* Folk on Delaware General Corporation Law, § 145 (2001)). In addition, the statute's "larger purpose" is "to encourage capable [persons] to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve." *Id.*

The plain language of Section 145(c) confirms that ***"[t]o the extent that a present or former director or officer of a corporation has been successful*** on the merits or otherwise in defense of any action, suit or proceeding … or in defense of any ***claim, issue or matter therein***, such person ***shall be indemnified***.." *8 Del. C.* § 145 (c) (emphasis added). Thus, pursuant to this plain unambiguous language, Section 145(c) requires partial indemnification in cases of partial success, and a corporate indemnitee must be indemnified "to the extent" of that success. *See, e.g., Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. 1974) ("The statute does not require complete success. It provides for indemnification to the extent of success 'in defense of any claim, issue or matter' in an action.").

2. Evans Is Entitled To Significant Indemnification For His Significant Success In Defending The Breach Of Duty Claim Against Him

Evans is entitled to significant indemnification for defending against Count II, because he was accused of breaching his fiduciary duties in thousands of transactions worth millions of dollars, but was found liable only for *de minimis* amounts for a handful of transactions that he entered into for the benefit of Avande.

The degree to which Evans was successful on this count is directly reflected in the text of the Judgment Order, which expressly states that ***"judgment is hereby entered <u>in Evans' favor and against Avande on Count II</u>, with respect to (a) any transaction making up the Challenged Amount (as defined in the Memorandum***

Opinion) other than the transactions described in paragraph 1(a) above and (b) compensation that Evans received from Avande before his termination as CEO of Avande." A224 at ¶ 2 (emphasis added).

The Judgment Order confirms that the portion of the claim on which Evans was successful far outweighs the portion on which Avande was successful, and ***expressly quantifies*** the specific transactions where Evans successfully defended the breach of duty allegation against him. Evans was successful and won a judgment on "any transactions making up the Challenged Amount" other than the "$21,817.70 concerning the Danhaive and Scooter Ricambi transactions." A223 at ¶ 1. The Challenged Amount "as defined in the Memorandum Opinion" is $4,691,097. A195 (*Avande*, 2019 WL 3800168, at *10). Therefore, Evans was successful regarding thousands of transactions worth $4,669,279.30, while Avande was successful on only four transactions worth less than $22,000.

Moreover, paragraph 2 also states that "judgment is hereby entered in Evans' favor and against Avande" for the "compensation that Evans received from Avande before his termination" (A224 at ¶ 2), which amounted to an additional $445,815.50 in compensation transactions. A219 (*Avande*, 2019 WL 3800168, at *18). Thus, the Judgment Order confirms that Evans won judgment on over $5 million in transactions, whereas Avande won judgment on less than $22,000 for only four transactions.

In terms of the Accounting, which was technically a separate equitable review, and not a part of the breach of duty claim, Evans was once again far more successful than Avande. The Accountant, who was selected by Avande, applied an "entire fairness" standard to $235,845.83 in transactions between Avande and DC Risk, over a five-year period, and only found $43,687.77 in "unfair payments." A234. Moreover, Avande's limited success on this issue was not based on any fraud committed by Evans, but rather the fact that the Accountant "did not have satisfactory backup documentation" for some accounting entries, and applied a slightly discounted hourly rate to the bookkeeping services DC Risk provided. A237 at ¶ 5.

This is not merely a situation where a losing party was sued for a large amount, but had judgment entered against it for only a small amount. To the contrary, this is a situation where the Court actually entered judgment ***in favor of Evans*** for a significant and discrete part of the claim. The Court specifically parsed out that Evans was entitled to judgement in his favor on certain "transactions" and not others.

The Court of Chancery was obliged to essentially hold the text of Section 145(c) in one hand, and the text of Chancellor Bouchard's Judgment Order in the other, and award Evans an indemnification amount that reflected his extensive success in defending the breach of duty claim. The Court of Chancery, however, refused to even engage in this analysis, holding instead that Avande's *de minimus*

success on the breach of duty claim nullified *in toto* Evans' right to substantial indemnification under the statute.

3. The Court Of Chancery Violated Or Misconstrued The Plain Text Of Section 145(c)

The Memorandum Opinion states that, as to the breach of duty claim, "Evans did not succeed but was found liable," and that Evans is merely advancing a "novel theory of proportional indemnification" that "contravenes the claim-by-claim approach" followed by Delaware courts. Mem. Op. at 2. Both components of this analysis are fundamentally flawed.

As to the factual issue of Evans' success on the breach of duty claim, the Court of Chancery's conclusion is directly contradicted by the plain text of the Judgment Order, which states that "judgement is hereby entered in Evans' favor and against Avande on Count II, with respect to (a) any transactions making up the Challenged Amount (as described in the Memorandum Opinion) other than the transactions described in paragraph 1(a) above [*i.e.* the four transactions totaling $21,817.70] and (b) compensation that Evans received from Avande before his termination as CEO of Avande." A224 at ¶ 2.

While it is true that Evans did not *entirely* succeed in defending the breach of duty claim against him, the plain text of Section 145(c) does not require complete success on a claim. The statute states that "[t]o the extent" that a former officer or director "has been successful … in defense of any action … or in defense of any

claim, issue or matter therein, such person shall be indemnified …" 8 *Del. C.* § 145(c)(1). Thus, the plain language of the statute clearly states that an indemnitee may be partially successful on any "claim" within an action, and if partially successful, the indemnitee is then entitled to indemnification "to the extent" of that success. Indeed, it would make no sense for the statute to mandate indemnification "to the extent" of one's success in defending a claim, if Delaware law required complete success on a claim in order for indemnification rights to attach.

The jurisprudence for interpreting a statute under Delaware law is particularly clear. "Where the language of a statute is unambiguous, no interpretation is required and the plain meaning of the words controls." *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 1999) (citations omitted). The "judicial discretion to construe a statute" only exists "when its language is obscure and ambiguous," otherwise, "when no ambiguity exists, and the intent is clear from the language of the statute, there is no room for statutory interpretation or construction." *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (internal quotation and citations omitted).

Under Delaware's principles of statutory construction, a statute is only considered ambiguous "if it is reasonably susceptible to different interpretations, or if giving a literal interpretation to the words of the statute would lead to an unreasonable or absurd result that could not have been intended by the legislature." *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012) (citations omitted).

Neither of these situations defining ambiguity applies to the language of Section 145(c). The statutory text clearly states that an indemnitee "shall" be indemnified "to the extent" that the indemnitee was successful in defending any action "or in defense of any claim, issue or matter therein." 8 *Del. C.* § 145(c). This language is not "reasonably susceptible to different interpretations" and Evans' reading of the language cannot reasonably be considered "absurd." *See, Arnold,* 49 A.3d at 1183. The plain language of the statute is therefore controlling. If anything, it is the construction of the Court of Chancery that leads to an absurd result. As noted, it would be nonsensical to require complete success on a claim as a precondition for indemnification, where the statute clearly mandates indemnification "to the extent" of an indemnitee's success on any "claim, matter or issue."

The Court of Chancery mischaracterizes Evans' position as a "novel theory of proportional indemnification" that "contravenes the claim-by-claim approach to indemnification." Mem. Op. at 2. Evans' position, however, is based on a plain text reading of the statute, which does in fact *mandate* indemnification "to the extent" of one's success in defending a "claim."

Moreover, the "claim-by-claim" cases relied upon by the Court of Chancery are inapposite to the situation at bar. Those cases all involved instances where an indemnitee received a favorable judgment *in full* on some claims, and an unfavorable judgment *in full* on other claims. In those instances, Delaware courts determined

which claims were won and which claims were lost, and then made value judgments for each claim – *i.e.* – the courts ruled either for or against indemnification on each count, and then assigned a value to their rulings on a "claim-by-claim" basis.

None of the cases relied upon by the Court of Chancery in support of this "claim-by-claim" language involve an instance like here, where Evans has a formal Judgment Order that expressly ruled *in his favor* on a specific number of transactions within a claim, and then computed the exact value of the transactions upon which Evans was successful. *See, e.g., Brown v. Rite Aid Corp.*, 2019 WL 2244738, at *5-7 (Del. Ch. May 24, 2019) (former officer "succeeded in defending himself against all eight counts" in Pennsylvania but then lost motion for costs in Delaware); *MCI Telecom. Corp. v. Wanzer,* 1990 WL 9110, at *1 (Del. Super. June 19, 1990) (granting partial indemnification where former director in alleged kickback scheme successfully defended against conspiracy, fraud and conversion claims, but was unsuccessful in defending breach of duty claim); *Paolino v. Mace Sec. Int'l, Inc.*, 2009 WL 4652894, at *1 (Del. Ch. Dec. 8, 2009) (staying indemnification issue and granting advancement for defending against counterclaims); *Zaman*, 2008 WL 2168397, at *2 (granting indemnification for "a dismissed federal lawsuit" and advancement for "most of the claims pending against them").

If and to the extent that the cases relied upon by the Court of Chancery, or any other Delaware precedent, may be interpreted to require the extinguishment of any

and all indemnification rights for a "split judgment" – *i.e.* a situation where an indemnitee like Evans obtains a formal judgment in his favor on discrete aspects of a claim against him – that precedent would clearly conflict with the plain language of Section 145(c) and should be affirmatively overturned.

II. THE COURT OF CHANCERY ERRED IN RULING THAT THERE IS NO CAUSAL LINK BETWEEN THE TORTIOUS INTERFERENCE CLAIM AND EVANS' STATUS AS FORMER CEO

A. Question Presented

Did the Court of Chancery err in ruling that there was no causal link between Evans' status as former CEO and the tortious interference claim against him that Evans successfully defended, even though confidential information that Evans learned while serving as CEO would have been "used or necessary" in order for Evans to engage in the alleged misconduct? This issue was preserved for appeal. A337-345.

B. Standard Of Review

This is a question of law based upon the Court of Chancery's interpretation of the "by reason of the fact" language in Delaware's indemnification statute, for which the appropriate standard of review is *de novo*. *See Ocean Bay Mart, Inc.*, 285 A.3d at 136 ("To the extent that [an appellant] challenges the Court of Chancery's legal conclusions or raises questions of statutory interpretation," the Court will "review both questions of law and statutory interpretation *de novo*.") (citations omitted).

C. Merits Of The Argument

1. Relevant Legal Standards For Indemnification

Section 145(c) requires mandatory indemnification where a corporate defendant "has been successful on the merits or otherwise" in defense of an action brought by a corporation under Section 145(b). *See 8 Del. C.* § 145(c). In turn,

Section 145(b), which governs situations where the corporation (as opposed to a third-party) brings suit against a former officer like Evans, requires that the individual seeking indemnification "was or is a party . . . by reason of the fact that [he] is or was a director, officer, employee or agent of the corporation …" *8 Del. C.* § 145(b). As noted, Avande's bylaws and its certificate of incorporation both provide for indemnification to the "fullest extent permitted" by Delaware law. Mem. Op. at 8-9.

In Delaware, "[t]he 'by reason of the fact' standard, or the 'official capacity' standard, is interpreted broadly and in favor of indemnification and advancement." *Pontone v. Milso Indus. Corp.*, 100 A.3d 1023, 1050 (Del. Ch. 2008) (citations and internal quotation omitted). The Delaware Supreme Court has explained that "if there is a nexus or causal connection between any of the underlying proceedings … and one's official corporate capacity, those proceedings are 'by reason of the fact' that one was a corporate officer, without regard for one's motivation for engaging in that conduct." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005) (citations omitted).

This nexus or causal connection between one's corporate capacity and the alleged misconduct is established "if the corporate powers were ***used or necessary*** for the commission of the alleged misconduct." *Pontone,* 100 A.3d at 1051 (*quoting Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007)) (emphasis

added). Further, the "post-separation use of confidential information" also creates a nexus between corporate office and alleged misconduct. *Ephrat v. MedCPU*, 2019 WL 2613281, at *7 (Del. Ch. June 26, 2019).

The Memorandum Opinion acknowledges that Avande is the party bearing the burden of proof on these indemnification issues. *See* Mem. Op. at 7 ("The parties agree that Avande bears the burden of proving that Evans is not entitled to indemnification.") (*citing Horne v. OptimistCorp*, 2017 WL 838814, at *3 (Del. Ch. Mar. 3, 2017) ("[U]nder 8 *Del. C.* § 145(c) … the ultimate burden of proof is on the defendant corporation to prove that the indemnitee is not entitled to indemnification."), *aff'd,* 177 A.3d 69 (TABLE) (Del. 2020)). The Court of Chancery erred, however, in ruling that Avande satisfied its burden.

2. Evans Is Entitled To Mandatory Indemnification For Successfully Defending The Tortious Interference Claim Against Him

It is undisputed that the Court of Chancery entered judgment in favor of Evans on the tortious interference claim (Count III) against him. *See* A225 at ¶ 4 ("Judgment is entered in favor of Defendants [Evans and DC Risk] and against Avande, on Counts I, III, IV, and V of the Amended Complaint.").

This claim involves Evans' alleged tortious interference with Avande's "relationships and/or accounts with third parties such as vendors, service providers and lenders." A138 (Compl. at ¶ 27). The Complaint states that "[t]hrough the acts

alleged herein," Evans "intentionally interfered with Avande's contracts and/or valid business relationships with third parties." A138 (Compl. at ¶ 28). Avande alleges, *inter alia,* that Evans: "refused to turn over Avande's financial and accounting records;" improperly "gained access to Avande's online accounting records;" "interfered directly with Avande's relationships with key vendors and service providers in an attempt to sabotage the Company's business;" and "solicited creditors of Avande to take legal action against [Avande]." A128-129 (Compl. at ¶8).

In order for this alleged misconduct to have occurred (which Avande failed to prove at trial), Evans would have needed to know significant confidential or non-public information about Avande, including: (i) the identities of Avande's key vendors; (ii) the identities of Avande's key service providers; (iii) the identities of Avande's lenders; (iv) the nature of each business relationship; (v) the contractual terms of the various business arrangements; (vi) the identities of the individuals at each entity who dealt with Avande; and (vii) the significance of each business relationship in relation to Avande's financial position. In order to successfully "sabotage" Avande's business as Avande alleged, Evans would have needed to know the right people to contact, the nature of those relationships with Avande, and the details of Avande's financial position and possible vulnerability, all of which was

confidential, non-public, and known by Evans only because of his former position as CEO.

There can be no doubt that Evans allegedly learned this information while serving as a director and CEO of Avande. Avande itself alleges that Evans was a director and CEO "[f]from Avande's formation in 2016 until February 15, 2018" and that Evans "was responsible for all Company financial matters including, among other things, Avande's financial transactions, payroll, insurance, tax-related matters, business filings and other financial commitments." A126 (Compl. at ¶ 3). Avande specifically alleges that Evans "was responsible for maintaining" the Company's "financial and accounting records" during the time "he served as CEO." A128 (Compl. at ¶8).

As to post-termination conduct, for which the use of confidential information creates the requisite corporate nexus sufficient to justify indemnification (*see Ephrat, supra*), Avande alleges that "since Evans was validly terminated as Avande's CEO on February 15, 2018" Evans has taken action "prejudicing the Company's relationships and/or accounts with third parties such as vendors, service providers and lenders" and that Evans' actions were ***"based on his prior interactions with third parties when he served as CEO."*** A135-136 (Compl. at ¶ 19) (emphasis added). Avande incorporated all these allegations into each of its sparsely-worded

claims for tortious interference and defamation/trade libel in Counts III and IV, respectively, "as if set forth fully herein." A138-139 (Compl. at ¶¶ 26, 30).

Accordingly, Evans is entitled to indemnification for his expenses defending Count III because these allegations involve the alleged "post-separation use of confidential information learned pre-separation" from Avande. *Ephrat,* 2019 WL 2613281, at *7; *see also Brown v. LiveOps, Inc.*, 903 A.2d at 325 (awarding advancement to former officer accused of forming a competing business where former officer "had access to confidential and proprietary information concerning LiveOps's business and customers"); *Pontone,* 100 A.3d at 1051 (granting advancement to former officer defending claims that included "tortious interference" in an alleged "scheme to divert employees and customers" that involved "misuse and misappropriation of confidential or proprietary information"); *Car v. Global Payments, Inc.*, 2019 6726214, at *7 (Del. Ch. Dec. 11, 2019) (granting advancement to former CEO where "misuse of confidential information was intertwined with the entirety of the contractual allegations" involving "unlawful competition and solicitation"); *Zaman v. Amedeo Holdings, Inc.,* 2008 WL 2168397, at *31 (Del. Ch. May 23, 2008) (granting advancement where former agents "had access to confidential information" that they allegedly disclosed to banks and used for themselves and where former status was "important to those claims"); *Scharf v. Edgcomb Corp.*, 2004 WL 718923, at *4 (Del. Ch. Mar. 24, 2004) (former officer

entitled to indemnification where he allegedly used "material nonpublic information" to engage in insider trading), *rev'd. on other grounds*, 684 A.2d 909 (Del. 2004).[3]

The Court of Chancery erroneously ruled that, as a matter of law, it may not "infer[ ] the use of confidential information," and that Avande's complaint against Evans must contain "an allegation that Evans used Avande's confidential information in the commission of the purported acts giving rise to the claims at issue." Mem. Op. at 11, 13.

As an initial matter, the Court of Chancery erred because Avande *does* allege that Evans misused confidential information, since it alleges that Evans "refused to turn over Avande's financial and accounting records," "improperly gained access to Avande's online accounting records," "interfered directly with Avande's relationships with key vendors and service providers in an attempt to sabotage the

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[3] To the extent that some of these cases involve advancement, as opposed to indemnification, Delaware law is clear that these are related concepts that generally support the same policy interests. *See, e.g., Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 779 n.52 (Del. Ch. 1998) ("Although indemnification and advancement are distinct rights, they are related concepts that are commonly addressed in neighboring statutory provisions."); *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 182 (Del. Ch. 2003) ("the reasoning … that the public policy purposes of the rights authorized by § 145 would be incompletely vindicated if a corporate official had to bear the expense of enforcing that right is, therefore, no less applicable to the advancement right than to the indemnification right") (internal parenthetical omitted).

Company's business," and "openly solicited creditors of Avande to take legal action against [Avande]." A128-129 (Compl. at ¶ 8). As explained, all of these allegations require seizing and using Avande's confidential business information against Avande.

More important, the Court of Chancery's reliance on whether or not Avande's complaint against Evans contains the magic words that Evans used or misused "confidential information" is irrelevant under Delaware law. The relevant inquiry is whether Evans' corporate powers "were used or necessary" for the alleged misconduct (*see Homestore*, 888 A.2d at 214), and whether the alleged misconduct involved the use of confidential non-public information that Evans learned while at Avande (*see Ephrat*, 2019 WL 2613281, at *7).

As explained in *LiveOpps*, "it would be inequitable" to allow a corporation to evade its obligation simply by striking the allegations that the former officer "acquired or maintained" information during his tenure in office. *LiveOps*, 903 A.2d at 329. The *LiveOpps* Court concluded that the "labeling of the counts" by the corporation is simply not relevant. *Id.* (citation omitted). Indeed, one of the allegations in *LiveOps* was that the former officer who started a competing business "had access to confidential and proprietary information concerning LiveOps's business and customers" (*id.* at 325), which is the exact type of information that Evans would have needed to use here in order to interfere with Avande's business

relationships. Thus, Avande's artful avoidance of the words "confidential information" in its pleading is irrelevant. *See also Car*, 2019 WL 6726214, at *7 (granting advancement even though amended complaint "effectively erases all mention of confidentiality from the breach of contract claim").

The irrelevance of the magic words "confidential information" is consistent with Delaware jurisprudence in other areas as well. For example, in determining whether an alleged claim is a tort or a contract, a court must look to the nature of what a plaintiff has alleged, as opposed to the self-serving nomenclature selected by that plaintiff. *See, e.g., Flowshare, LLC v. GeoResults, Inc.*, 2018 Del. Super. LEXIS 317, at *12-13 (Del. Super. July 25, 2018) ("A plaintiff 'cannot bootstrap a claim for a breach of contract into a claim for fraud … simply by adding the term 'fraudulently induced' to a complaint.'") (*quoting Furnari v. Wallpang, Inc.*, 2014 Del. Super. LEXIS 199, at *8) (Del. Super. Apr. 16, 2014)) (additional citations omitted); *SeaWorld Ent. Inc. v. Abdrews,* 2023 Del. Ch. LEXIS 125, at *17 (Del. Ch. May 19, 2023) ("A party cannot 'bootstrap a breach of contract claim into a tort claim merely by intoning the prima facie elements of the tort while telling the story of the defendant's failure to perform under the contract.'") (*quoting Cornell Glasgow, LLC v. La Grange Props., LLC,* 2012 Del. Super. LEXIS 266, at *8) (Del. Super. June 6, 2012)).

The same is true for determining whether an allegation is direct or derivative in nature. The reviewing court must interpret the nature of the allegations, and is not artificially restrained by the words chosen in the pleading. *See, e.g., In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 817 (Del. Ch. 2005), *aff'd.* 906 A.2d 766 (Del. 2006) ("the duty of the court is to look at the nature of the wrong alleged, not merely the form of words used in the complaint") (*quoting In re Syncor Int'l. Corp. S'holders. Litig.*, 857 A.2d 994, 997 (Del. Ch. 2004)); *Hauge v. Bay Landing POA, Inc.*, 2022 Del. Ch. LEXIS 165, at *23 (Del. Ch. July 7, 2022) ("'Plaintiffs' classification of the suit is not binding' and 'the Court looks at the nature of the wrong alleged, not merely the form of the words used in the complaint.'") (*quoting Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004)) (additional citations omitted).

For all these reasons, the Court of Chancery erred in ruling that Evans' status as Avande's former CEO lacked any causal connection to the tortious interference claim brought against him by Avande, on which Evans was completely successful.

III. THE COURT OF CHANCERY ERRED IN RULING THAT THERE IS NO CAUSAL LINK BETWEEN THE DEFAMATION CLAIM AND EVANS' STATUS AS FORMER CEO

A. Question Presented

Did the Court of Chancery err in ruling that there was no causal link between Evans' status as former CEO and the defamation claim against him that Evans successfully defended, even though confidential information that Evans learned while serving as CEO would have been "used or necessary" in order for Evans to engage in the alleged misconduct? This issue was preserved for appeal. A345-347.

B. Standard Of Review

This is a question of law based upon the Court of Chancery's interpretation of the "by reason of the fact" language in Delaware's indemnification statute, for which the appropriate standard of review is *de novo. See Ocean Bay Mart, Inc.*, 285 A.3d at 136 ("To the extent that [an appellant] challenges the Court of Chancery's legal conclusions or raises questions of statutory interpretation," the Court will "review both questions of law and statutory interpretation *de novo*.") (citations omitted).

C. Merits Of The Argument

1. Relevant Legal Standards For Indemnification

The relevant legal standards for evaluating Evans' right to mandatory indemnification for successfully defending the defamation claim against him are the same as those stated above regarding his successful defense of the tortious interference claim.

2. Evans Is Entitled To Mandatory Indemnification For Successfully Defending The Defamation Claim Against Him

As with the tortious interference claim, it is undisputed that the Court of Chancery entered judgment in favor of Evans on the defamation claim (Count IV) against him. A225 at ¶ 4 ("Judgment is entered in favor of Defendants [Evans and DC Risk] and against Avande, on Counts I, III, IV, and V of the Amended Complaint.").

Avande alleges in Count IV that Evans engaged in defamation and trade libel, because he "communicated with vendors and creditors of Avande and falsely stated that the Company is unable to pay its debts as they become due and payable." A139 (Compl. at ¶ 31). Avande specifically alleges that Evans "solicited Avande's vendors and creditors to take legal action against [Avande]" in order to increase Avande's expenses and "driv[e] it into bankruptcy," and that he "made false statements" to vendors and creditors "with the knowledge that the Company's solvency and ability to pay debts would be critical to them." *Id.*

As with the tortious interference claim in Count III, Evans would have had to rely on significant confidential non-public information about Avande in order to engage in this alleged misconduct, including: (i) the identities of Avande's vendors; (ii) the identities of Avande's creditors; (iii) the knowledge of which specific vendors and creditors could conceivably have taken action sufficient to "driv[e] [Avande] into bankruptcy"; (iv) the knowledge of which vendors and creditors

would have considered Avande's solvency to be "critical to them"; and (v) the actual state of Avande's financial position and solvency.

Once again, as with the tortious interference claim of Count III, there can be no doubt that Evans must have learned this information in connection with his director and CEO positions at Avande, where Avande alleges that he was "responsible for all Company financial matters." A126 (Compl. at ¶ 3). In fact, Avande expressly alleges that Evans made defamatory statements to vendors and creditors ***"with the knowledge that the Company's solvency and ability to pay debts would be critical to them."*** A139 (Compl. at ¶ 31) (emphasis added). Thus, Avande acknowledges that this claim is based on knowledge of Avande creditors that Evans would have obtained while acting as CEO.

Moreover, the alleged defamatory statements about Avande being unable to pay its bills as they became due would only be harmful to Avande if those statements had credibility or were otherwise believable. Here, to the extent that Evans made any defamatory statements to Avande creditors and vendors about Avande's ability to pay, these statements would have been highly believable because of Evans' inside knowledge obtained as a director and former CEO of Avande. Undoubtedly, a former CEO is presumably knowledgeable about a company's ability to pay its debts, whereas a stranger to the company may or may not be knowledgeable. Thus,

Evans' inside knowledge of Avande, obtained while serving as CEO, provided the necessary credibility for the alleged misconduct in Count IV.

The requisite legal nexus between Evans' corporate position and the alleged misconduct exists because Evans' knowledge of Avande's financial position, obtained while Evans was CEO, was ***necessary*** for Evans to credibly engage in the defamation conduct alleged by Avande in Count IV. *See, Potone*, 100 A.3d at 1051 (nexus or causal connection between one's corporate capacity and the alleged misconduct established where "the corporate powers were used or necessary for the commission of the alleged misconduct") (citations omitted).

Accordingly, it was error for the Court of Chancery to deny Evans any indemnification for his complete success in defending against the defamation claim brought against him by Avande.

CONCLUSION

For all the aforementioned reasons, Plaintiff respectfully submits that he is legally entitled to indemnification to the extent of his partial success in defending the breach of duty claim against him, and his complete success in defending the tortious interference and defamation claims against him, and therefore the contrary rulings of the Court of Chancery should be reversed.

Dated: August 14, 2023

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