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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN EVANS, Plaintiff Below-Appellant/Cross-Appellee, v. AVANDE, INC., Defendant Below-Appellee/Cross-Appellant.	No. 208, 2023 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 2018-0454-LWW

APPELLEE/CROSS-APPELLANT'S COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

This is an action brought by Shawn Evans ("Evans") against Avande, Inc. ("Avande" or the "Company"), a corporation which he served as a director and officer, for indemnification of expenses paid to defend Evans from claims Avande filed against him for breaches of fiduciary duty and other misconduct. Following a trial on those claims, judgment was entered in favor of Avande on some of the Company's causes of action, and in Evans' favor on others. In particular, Avande was found to have carried its burden to prove that Evans engaged in self-dealing transactions that were not entirely fair to the Company. As a result, Avande was awarded damages from Evans and granted an accounting, which ultimately led to an additional award of damages against Evans.

In this proceeding, Evans argues that Avande must indemnify him for expenses paid to defend a cause of action on which a trial court entered judgment against him and found him liable for breaching his fiduciary duties. He also seeks indemnification for defending claims challenging acts taken when Evans no longer was a director or officer of Avande. The Court of Chancery, applying well-settled case law interpreting 8 *Del. C.* § 145 ("Section 145"), correctly rejected Evans' claims, finding his arguments "novel" and contrary to established precedent. Evans recycles the same arguments on appeal, but they are no more persuasive now than

they were in the proceeding below. The Court of Chancery's well-reasoned holdings denying indemnification to Evans should be affirmed.

At the same time, the Court of Chancery awarded Evans partial indemnification from Avande commensurate with his limited success in defending the Company's litigation against him. While Section 145 is intended to ensure that directors and officers are reimbursed for out-of-pocket expenses they personally pay to defend themselves, evidence Evans produced in the damages portion of this proceeding showed that Evans himself did not pay a single cent of defense costs. Instead, Evans' counsel fees were paid entirely by his co-defendant, DC Risk Solutions, Inc. ("DC Risk"), a separate corporation owned by Evans which was held to have benefited from Evans' self-dealing. Nonetheless, to the extent the Court of Chancery found Evans was entitled to partial indemnification, the court ordered Avande to reimburse Evans for defense costs actually paid by DC Risk. Avande cross-appeals from this aspect of the Court of Chancery's ruling, which is inconsistent with case law and the policies Section 145 is designed to promote.

Evans was a director and officer of Avande until February 18, 2018, when he was removed from those positions. Following Evans' removal, Avande discovered his breaches of fiduciary duty and commenced an action in the Court of Chancery, *Avande, Inc. v. Evans, et al.*, C.A. No. 2018-0203-AGB (the "Plenary Action"),

against Evans and DC Risk, his wholly owned business entity. Avande alleged six causes of action in the Plenary Action:

- **Count I:** Against Evans, seeking declaratory and injunctive relief to (a) confirm that Evans was validly removed as Avande's Chief Executive Officer, (b) enjoin him from purporting to act for the Company, and(c) compel him to return the Company's property in his possession.

- **Count II:** Against Evans, alleging that he breached his fiduciary duties of loyalty, care, and good faith while he served as a director and officer of Avande.

- **Count III:** Against Evans, alleging that he tortiously interfered with Avande's contractual and/or business relations after he was terminated from his positions as a director and officer of the Company.

- **Count IV:** Against Evans, alleging that committed defamation and trade libel through his communications with Avande's vendors and creditors after he was terminated from his positions as a director and officer of the Company.

- **Count V:** Against Evans and DC Risk, alleging that they converted Avande's confidential business information by accessing it without authorization after Evans was terminated from his positions as a director and officer of the Company.

- **Count VI:** Against DC Risk, alleging that it aided and abetted Evans' breaches of fiduciary duty.

See A0135-A0143.

The Court of Chancery held a three-day trial in the Plenary Action in February 2019. *See* A0171. On August 13, 2019, the Plenary Court issued a post-trial

Memorandum Opinion ruling in Avande's favor on Counts II and VI, holding that Evans breached his fiduciary duties to Avande while being aided and abetted by DC Risk. *See* A0218-A0219.[1] As relief, the Plenary Court awarded Avande damages and ordered an independent third party to conduct an equitable accounting, at Evans' expense, to examine self-dealing transactions involving Evans and DC Risk. *See* A0221-A0223. The accounting determined that Evans caused Avande to transact with DC Risk on unfair terms and awarded additional damages to the Company for Evans' self-dealing. *See* A0234-A0235; A0245. On September 21, 2020, following the accounting, the Plenary Court entered a Final Judgment holding Evans and DC Risk jointly and severally liable for damages to Avande. *See* A0246-A0247.

On June 25, 2018, while the Plenary Action was pending, Evans commenced this proceeding by filing a complaint with the Court of Chancery seeking advancement from Avande, pursuant to Section 145(e) of the Delaware General Corporation Law ("DGCL"), for his expenses incurred to defend the Plenary Action. *See* B0001-B0205. The Court Below set a trial date of October 24, 2018 to decide Evans' entitlement to advancement. *See* B0243-B0244. Evans, however, then decided to forgo his advancement claim against Avande and on September 28, 2018,

[1] Where appropriate, and to reduce potential confusion, this brief will refer to the court hearing the Plenary Action as the "Plenary Court" and the court hearing this indemnification action as the "Court Below."

stipulated to voluntarily staying this proceeding until the Plenary Action concluded. *See* B0247.

On November 17, 2020, after the stay was lifted, Evans filed an Amended Complaint that repleaded his advancement claim as one for indemnification from Avande, pursuant to Section 145(c), for expenses he purportedly paid to defend himself in the Plenary Action. *See* B0250-B0323. After Avande answered the Amended Complaint (*see* B0324-B0413), the Company moved for judgment on the pleadings on the grounds that Evans' claim was not ripe for adjudication. *See* B0414-B0564. In response, Evans cross-moved for summary judgment, asking the Court Below to confirm his entitlement to indemnification as a matter of law. *See* B0565-B0614.

On June 25, 2021, the Court Below denied Avande's Motion for Judgment on the Pleadings in a bench ruling. *See* B0785-B0801. On September 23, 2021, the Court Below issued a Memorandum Opinion deciding Evans' Motion for Summary Judgment. *See* A249-A272. The Court Below granted that motion in part, finding Evans legally entitled to indemnification from Avande for expenses paid to defend Counts I and V alleged against him in the Plenary Action. *See* A0266-A0267; A0272. The Court Below otherwise denied Evans' motion, finding that it could not hold, as a matter of law, that Evans must be indemnified for expenses paid to defend Counts II, III, and IV. *See* A0258-A0264; A0267-A0270.

Specifically, the Court Below denied mandatory indemnification under Section 145(c) and Avande's Bylaws because Evans was not "successful on the merits or otherwise in defense of" Count II, the Company's claim for breach of fiduciary duties in the Plenary Action. A0264. The Court Below also denied mandatory indemnification as to Counts III and IV (for tortious interference and defamation), even though Evans prevailed on those claims in the Plenary Action, because it could not conclude as a matter of law that Avande brought them "by reason of the fact" that Evans was a director or officer of the Company. A0267-A0270.

The Court Below then bifurcated the remaining proceedings in this action, electing first to adjudicate Evans' legal entitlement to indemnification to the extent it was not resolved by the September 23, 2021 Memorandum Opinion – namely, Evans' claims for indemnification relating to Counts II (breach of fiduciary duty), III (tortious interference), and IV (defamation and trade libel) of Avande's Amended Complaint in the Plenary Action (the "Remaining Entitlement Issues"). *See* B0804-B0805. After ruling on the Remaining Entitlement Issues, the Court Below then addressed the amount of fees and expenses for which Evans claimed indemnification. *See id.*

The Court Below held trial on the Remaining Entitlement Issues on March 11, 2022. *See* B1250. On June 9, 2022, the Court Below issued a Memorandum Opinion

finding in Avande's favor, and against Evans, on all Remaining Entitlement Issues. *See* B1252. Specifically, the Court Below held that, while Evans prevailed on Avande's claims for tortious interference and defamation in the Plenary Action, neither cause of action was brought "by reason of the fact" that Evans was a director or officer of Avande, as required for mandatory indemnification under Section 145(c) and the Company's Bylaws. *See* B1250-B1258. The Court Below further held that Evans was not entitled to mandatory indemnification for defending Avande's claim for breach of fiduciary duty in the Plenary Action because Evans was found liable on that count, and even though Avande was awarded less than all the damages it had sought. *See* B1258-B1261. Accordingly, the Court Below held that Evans was not "successful on the merits or otherwise in defense of" Avande's breach of fiduciary duty claim, as Section 145(c) requires, and thus Evans was "not entitled to partial indemnification in connection with his defense of that claim." B1261. The Court Below directed Evans to submit an affidavit, pursuant to Court of Chancery Rule 88, identifying his expenses paid to defend Counts I and V in the Plenary Action. *See* B1262; A0422-A0423.

Evans' counsel filed his Rule 88 affidavit on July 18, 2022, seeking indemnification from Avande totaling $331,937.31 for Evans' defense of Counts I and V in the Plenary Action – a figure representing 40% of the total fees and costs billed to Evans. *See* B1269. Avande then took discovery into the evidentiary basis

for Evans' claimed expenses (*see* B1547-B1560), and Evans produced banking and billing records confirming payments to Evans' counsel for defending the Plenary Action. The documents produced by Evans showed that DC Risk, rather than Evans himself, paid 100% of the sums remitted to Evans' counsel for services rendered in the Plenary Action. *See* B1653-B1654; B1706-B1876. Avande opposed the entirety of Evans' application and asked the Court Below to deny Evans indemnification for all sums paid by DC Risk, because Evans suffered no out-of-pocket loss from defending the Plenary Action. *See* B1651-B1654.[2]

On April 19, 2023, the Court Below issued a bench ruling quantifying the indemnification award to Evans. The Court Below held, *inter alia*, that Avande is not obligated to indemnify any fees or costs for the Plenary Action that Evans' counsel billed but was never paid. *See* Ex. B, at 12. The Court Below also held that Avande is not required to reimburse expenses attributable to the defense of DC Risk, Evans' affiliated corporation and co-defendant in the Plenary Action. *See id.* at 12-13. At the same time, however, the Court Below ruled that Evans' indemnification rights require Avande to reimburse ***Evans*** for payments made by ***DC Risk*** to Evans' counsel for fees and costs attributable to Evans' defense of Counts I and V in the Plenary Action, even though Evans did not incur any personal out-of-pocket loss for

[2] Avande also opposed Evans' Rule 88 application on several other alternative grounds, none of which are implicated in Evans' appeal or Avande's cross-appeal. *See* B1650-B1651; B1654-B1660.

that defense. *See id.* at 13-18. Ultimately, the Court Below ordered Avande to reimburse 20% of the total amount actually paid by DC Risk for Evans' defense in the Plenary Action, finding that this "represents a reasonable amount" of indemnification to Evans for successfully defending Counts I and V of Avande's Amended Complaint. *Id.* at 22.

On May 18, 2023, the Court Below entered a Final Order and Judgment awarding Evans $79,599.77, consisting of (i) indemnifiable attorneys' fees and expenses in the amount of $58,106.80; (ii) pre-judgment interest totaling $9,466.57; and (iii) $12,026.40 as indemnification for "fees-on-fees" Evans paid in connection with this action. *See* Ex. A. Evans' appeal to this Court then followed, in which Evans challenges the Court Below's rulings that he is not entitled to indemnification of expenses paid in defense of Counts II, III, and IV of Avande's Amended Complaint in the Plenary Action. Avande cross-appealed from the Court Below's ruling that the Company must reimburse Evans for expenses paid by DC Risk, rather than Evans himself. This is Avande's combined answering brief on Evans' appeal and opening brief on its cross-appeal.

SUMMARY OF ARGUMENT

1. Denied. The Court Below correctly applied Delaware law, which consistently evaluates entitlement to partial indemnification under Section 145(c) on a claim-by-claim basis, to hold that Evans did not succeed on the merits in defending Count II of Avande's Amended Complaint in the Plenary Action. The governing case law is consistent with the statutory text of Section 145(c), the policies promoting indemnification of directors and officers serving Delaware corporations, and the longstanding principles intended to ensure that individuals who serve as directors and officers do so loyally and in good faith. While the Plenary Court awarded Avande less than all the damages sought on Count II, it held Evans liable for breaching his fiduciary duty of loyalty to the Company and entered judgment in Avande's favor. Accordingly, Evans' defense of Count II in the Plenary Action was not successful on the merits as required by Section 145(c) and Avande's Bylaws for mandatory indemnification.

2. Denied. While judgment was entered in Evans' favor on Counts III and IV of Avande's Amended Complaint in the Plenary Action, the Court Below correctly found that Avande did not bring those claims against Evans "by reason of the fact" that Evans served as a director and officer of the Company. Neither cause of action alleged that Evans misused Avande's confidential or proprietary information he obtained while a director or officer, and thus the claims – both of

which arose from conduct post-dating Evans' termination from Avande – lacked a causal nexus with Evans' prior corporate status. Accordingly, the Court Below correctly held that Avande is not obligated to indemnify Evans for defending those claims.

3. Avande has cross-appealed the Court Below's ruling awarding Evans indemnification for expenses paid by DC Risk. Section 145(c) limits mandatory indemnification to expenses "actually" incurred by a director or officer to defend a proceeding, and thus requires the indemnitee to have sustained an out-of-pocket loss to be reimbursed. Here, it is undisputed that Evans suffered no out-of-pocket loss from defending the Plenary Action, since DC Risk made every payment to Evans' counsel for his defense. Nonetheless, as to those claims in the Plenary Action for which the Court Below found Evans was entitled to partial indemnification, the Court Below ordered Avande to indemnify Evans as reimbursement for funds paid by DC Risk. This holding, however, relied upon precedent awarding advancement, rather than indemnification, where the policies favoring payment from the corporation during the pendency of a covered proceeding – even when a third party is paying the indemnitee's defense costs – are materially different. In this case, where Evans explicitly waived his advancement right in favor of DC Risk's assumption of his defense in the Plenary Action, forcing Avande to "indemnify" Evans for a loss he never suffered will result in an unfair windfall to Evans.

STATEMENT OF FACTS

I. EVANS IS REMOVED FROM AVANDE'S BOARD AND TERMINATED AS THE COMPANY'S CEO.

Prior to February 15, 2018, Evans was Avande's Chief Executive Officer and served as one of the Company's three directors, along with Dr. Norman Kato ("Kato") and Mehmet Ergun ("Ergun"). A0172-A0173.[3] Collectively, Evans, Kato, and Ergun owned approximately 96% of Avande's common stock. A175.

After Ergun died unexpectedly on August 31, 2017, Evans exploited the resulting vacancy on Avande's Board of Directors to entrench himself as the Company's CEO. *See* A0179-A0180. Prior to Ergun's death, the presence of three principals had a mediating effect, requiring consensus between at least two of the three directors and largest shareholders to approve corporate decisions, with Ergun often bridging disputes that existed between Kato's and Evans's differing agendas for the Company. *See* B1086 (p. 456:10-17). Ergun's sudden passing eliminated that balance and created a deadlock between Kato and Evans. *See* B0958 (pp. 15:16-16:1); B1086 (p. 457:4-7). Ergun died intestate, so his shares of Avande stock could

[3] These facts are taken from the record below and the Court of Chancery's post-trial findings in the Plenary Action, which are binding in this proceeding by application of collateral estoppel. *See, e.g.*, *Tyndall v. Tyndall*, 238 A.2d 343, 346 (Del. 1968) ("Under [the collateral estoppel] doctrine, where a question of fact essential to the judgment is litigated and determined by a valid and final judgment, the determination is conclusive between the same parties in a subsequent case on a different cause of action. In such situation, a party is estopped from relitigating the issue again in the subsequent case.").

not be voted until a representative for his estate was appointed under California law. *See* B0936; B1087 (p. 458:19-23).

To fill the vacancy and restore a properly functioning Board, Kato called a Special Meeting of Stockholders to be held on December 4, 2017, for the purpose of electing a full slate of three directors. *See* B1087 (p. 458:11-19). Despite Kato's multiple requests, Evans refused to attend the special meeting or a subsequent adjournment. *See* B0936-B0937; B1087 (p. 458:19-23). Because the 23% block of shares held in Ergun's estate could not be voted, Evans' refusal to attend the special meeting with his own 30% holdings single-handedly prevented a quorum from being present, thus precluding any stockholder vote to elect a director to replace Ergun and leaving the Company without a functioning Board. *See* A0180; B1087 (p. 458:19-23).

This deadlock forced Kato to file a proceeding under 8 *Del. C.* § 211 (*Kato v. Avande, Inc.*, C.A. No. 2018-0008-AGB (the "Section 211 Action")) on January 8, 2018, to compel an annual meeting of the Company's stockholders for electing directors. *See* A0181. After the Court of Chancery entered judgment in Kato's favor in the Section 211 Action, Avande held an annual meeting on February 15, 2018 at which only the shares appearing constituted a quorum for conducting business. *See id*. At the meeting, Avande's stockholders elected three directors but did not re-elect Mr. Evans to the Board. *See id.*; B0937; B1087 (p. 459:10-13). Immediately

following the stockholders' meeting, Avande's newly elected Board of Directors met and resolved unanimously to remove Evans as an officer of the Company and appoint Kato to replace him as CEO. *See* A0181; B0823; B0937-B0938; B1087 (p. 459:14-21).

II. AFTER HIS REMOVAL, EVANS RETALIATES AND ATTEMPTS TO FORCE AVANDE TO REPAY HIS PERSONAL LOANS.

Following his termination, Evans retaliated by, among other things, commencing litigation against Avande and freezing its bank account to collect a debt. As the Plenary Court found, Evans "admit[ted] taking certain actions after his termination that had the potential to harm Avande." A0182. For example, Evans "contacted Avande's creditors to encourage them to take legal action against Avande in an effort to force an involuntary bankruptcy." *Id*. Evans also solicited the Company's medical director "and invited him to leave Avande in order to join Evans in a new venture." *Id.*

On the same day he was terminated, Evans demanded that Avande repay loans that he and his wife made to the Company. *See* A0181; B0837-B0838; B0938; B1087 (pp. 459:22-460:1). Avande did not immediately remit payment to Evans, but asked Evans to give the Company an opportunity to review all relevant documentation and make a reasonable determination regarding its outstanding obligations. *See* A0181-A0182; B0842. On March 1, 2018, however, Evans and his wife filed a complaint against Avande in the Superior Court of California seeking to

compel payment of the loans' outstanding principal and interest. *See* A0105-A0109; A0182; B0848-B0854; B0939; B1087 (p. 460:5-19). After filing his complaint, Evans obtained from the California court an *ex parte* writ of attachment against Avande's bank account, freezing approximately $60,000 of cash that the Company otherwise needed to maintain operations. *See* B1087 (pp. 460:20-461:9).

After he was terminated, Evans also took actions admittedly intended to sabotage Avande's business. For example, Evans immediately canceled the Avande credit card which he personally guaranteed, even though he knew that the Company's day-to day operations relied on that credit line. *See* B1033 (p. 245:19-22); B1035-B1036 (pp. 253:18-254:10). Evans chose not to inform Avande that he closed the credit line, leaving the Company, unknowingly, without means to pay critical vendors. *See* B1036 (p. 255:1-20). This disrupted Avande's business, as many of these vendors were regularly paid via Evans' credit card, including the electronic fax service through which clients submitted the authorizations and claims that are the Company's lifeblood. *See* B1092-B1093 (pp. 480:18-482:7). At the time of his termination, Evans knew that "Avande's financial situation was very difficult. We had just lost a $300,000 line of credit with the bank. The bank was calling for the rapid repayment of that. We had also had a number of outstanding debts to various different entities …." B0959-B0960 (pp. 20:18-21:3).

In the Plenary Action, Evans admitted that, following his termination, he attempted to persuade Avande's vendors to assist him in causing the Company's bankruptcy and contacted Avande creditors with the intent of encouraging them to take legal action against the Company. *See* B0939; B1051 (pp. 315:13-316:8); B1053 (pp. 322:11-323:10). As Evans testified, his plan was "to marshal other people to put Avande into involuntary bankruptcy." B1056 (pp. 334:23-335:1). To that end, Evans hired counsel to represent him in preparing a petition for involuntary bankruptcy proceedings. *See* B0965 (p. 41:7-18); B1055-B1056 (pp. 333:19-335:10). Evans's counsel then contacted and solicited MedBen – which Evans knew was one of Avande's most important clients and the Company's "largest single source of revenue" (B0962 (p. 30:16-19)) – to join Evans in forcing the Company into involuntary bankruptcy. *See* B0856; B0939; B1055 (p. 330:4-9).

While Kato demanded that Evans refrain from contacting Avande's employees or clients after his termination (*see* B0835; B1054-B1055 (pp. 329:15-330:9)), Evans telephoned Dr. Luke Burchard ("Burchard"), a medical director at Avande and one of the Company's key contacts with MedBen. *See* B0938; B1168-B1169 (pp. 662:7-18, 665:3-13). During that call, Evans solicited Burchard to leave Avande and work for Evans in a new venture that would compete with the Company. *See* B0844-B0845; B1169 (pp. 665:16-667:23). By attempting to persuade Burchard to join him, Evans hoped to take Burchard's close relationship with MedBen – and

the lucrative business that would accompany it – from Avande. *See* B0965 (pp. 42:21-43:6).

III. AVANDE PURSUES THE PLENARY ACTION AGAINST EVANS AND DC RISK.

To remedy the harm caused by Evans' retaliatory actions, Avande decided to pursue legal action against him. At the same time, Avande decided to seek relief from Evans for actions and omissions he committed while serving as a Company director and officer, but which came to light only following his termination. For example, after Evans was terminated, Avande's new management found the Company's finances – which had been maintained by Evans as CEO – in shambles. Hundreds of thousands of dollars in alleged business expenses were unaccounted for and lacked basic supporting documentation. A0183-A0184. Among these expenses were payments to other companies owned by Evans, including DC Risk, and to other Avande employees for their personal benefit. *Id.* In March 2018, Avande learned that the IRS was conducting a field audit on the Company's 2016 tax return but was unable to locate many of the records the IRS requested – records which Evans had been responsible for maintaining. *Id.*

On March 22, 2018, Avande commenced the Plenary Action by filing a complaint against Evans and DC Risk in the Court of Chancery. *See* A0110-A0124; A0184. Later, Avande filed an Amended Complaint alleging (among other things) that Evans, following his termination: (i) "unilaterally canceled Avande's credit

card, preventing the Company from timely paying its day-to-day operating costs"; (ii) "unilaterally canceled Avande's contracts with critical service providers, upon whom the Company relies to conduct its everyday business"; (iii) "interfered directly with Avande's relationships with key vendors and service providers in an attempt to sabotage the Company's business"; and (iv) "openly solicited creditors of Avande to take legal action against the Company for the purpose of increasing the Company's expenses and driving it into bankruptcy." A0128-A0129. The Amended Complaint also alleged that Evans, while a director and CEO of Avande, harmed the Company through various acts, including: (i) causing the Company to expend hundreds of thousands of dollars in credit card payments without receipts or supporting documentation; (ii) reimbursing himself with Company cash for purported business expenses, without receipts or supporting documentation; (iii) improperly diverting Avande funds to DC Risk, under the guise of fees for purported bookkeeping services for the Company; and (iv) causing the Company to expend funds for his and other Avande employees' personal use. A0129-A0133. Avande alleged six causes of action against Evans and DC Risk, three of which are pertinent to Evans' appeal.

In **Count II**, Avande alleged that Evans breached his fiduciary duties while serving as a director and officer of the Company. Specifically, Avande alleged that Evans, through the conduct described in the Amended Complaint, harmed the

Company "by placing his personal interests above the interests of Avande and its stockholders, wasting Avande's assets, misappropriating Avande's opportunities and assets for his personal benefit, intentionally and/or recklessly failing to manage Avande's affairs with the requisite level of due care and diligence, and otherwise failing to manage Avande's affairs in good faith." A0137. This included Evans' self-dealing transactions with DC Risk and expenditures for his and other employees' personal benefit. A0130-A0133.

In **Count III**, Avande alleged that Evans, "[i]n the time since [he] was validly terminated as Avande's CEO on February 15, 2018," tortiously interfered with the Company's contractual and business relations by taking "various acts with the intent and effect of canceling or prejudicing the Company's relationships and/or accounts with third parties such as vendors, service providers and lenders." A0138. The Company further alleged that Evans "wrongfully induced or caused the third parties to breach their contractual and/or business relationships with Avande." *Id.* This included canceling Avande's line of credit and soliciting assistance from the Company's creditors to force Avande into involuntary bankruptcy. *See* A0128-A0129.

In **Count IV**, Avande alleged that Evans, "[i]n the time since [he] was validly terminated as Avande's CEO on February 15, 2018," committed defamation and trade libel against the Company. A0139. In support of this claim, Avande alleged

that Evans "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," "solicited Avande's vendors and creditors to take legal action against the Company for the purpose of increasing the Company's expenses and driving it into bankruptcy," and "intentionally made false statements to Avande's vendors and creditors for the purpose of damaging the Company's relationships with these third parties and with the knowledge that the Company's solvency and ability to pay debts would be critical to them." *Id.*

IV. IN THE PLENARY ACTION, EVANS IS FOUND LIABLE TO AVANDE FOR BREACHING HIS FIDUCIARY DUTIES.

Trial in the Plenary Action was held on February 20-22, 2019. A0187. After trial, Avande chose not to pursue Counts I, III, IV, and V of the Amended Complaint – the claims relating to Evans' post-termination conduct. *See id*. In a Memorandum Opinion issued August 13, 2019, the Plenary Court ruled in Avande's favor on Count II, the Company's claim against Evans for breach of fiduciary duty, and awarded damages. *See* A0208-0A212; A0221. With respect to Count VI, the Plenary Court found that Avande made a *prima facie* showing that DC Risk aided and abetted Evans' breaches of fiduciary duties and ordered an accounting to examine self-interested transactions Evans engineered between Avande and DC Risk. A0218-A0219.

In ruling that Evans breached his fiduciary duties, the Plenary Court found that he "directed that Company funds be used to pay … personal bills" of Dr. Olivier Danhaive ("Danhaive"), a contracted physician who performed medical reviews for Avande, when the payments, "in reality, [were] made to compensate Danhaive for consulting services." A0209. The Plenary Court described this as a "scheme" through which "Evans explicitly instructed … the DC Risk employee who served as Avande's bookkeeper, not to issue a Form 1099 to Danhaive for the first payment, which was characterized falsely on Avande's books as a charitable 'donation.'" *Id.* Moreover, "Evans' initial testimony about these payments was not credible and shifted when he was pressed by the court, but the upshot is that he authorized the Company to make these payments in his capacity as Chief Executive Officer while knowing he was causing the Company to violate the law in doing so." *Id*. Therefore, the Plenary Court concluded, Evans "intentionally engaged in subterfuge in plain disregard of the law" and "acted in bad faith in breach of the duty of loyalty he owed as a fiduciary of the Company." *Id*.

The Plenary Court also found that Evans acted in his self-interest by causing Avande to purchase a motor scooter, for Ergun's personal benefit, from a separate company in which Evans had an ownership interest, but "the use of Company funds to purchase the scooter was concealed from the only disinterested member of the board – Kato." A0211-A0212. Evans failed to prove that this transaction was

entirely fair to Avande because he "did not say what that [scooter] price was, he provided no written evidence of what Scooter Ricambi actually paid for the scooter, and he submitted no evidence of its fair market value at the time it was given to Ergun." *Id*.

Additionally, the Plenary Court scrutinized more than $200,000 worth of self-interested payments Evans caused Avande to make to DC Risk, allegedly for bookkeeping and administrative services, at rates and on terms that Evans alone determined. *See* A0215-A0216. Over nearly five years, Evans (for DC Risk) billed Avande for time purportedly spent by Susan Omran ("Omran"), a DC Risk employee who Evans alone supervised and controlled, on services for Avande. *See id*. Every month, Evans ensured that Avande paid DC Risk "fees" for Omran's alleged services that had no documentary support. *See* A0217.

With respect to the self-dealing payments to DC Risk, the Plenary Court held that "two things are clear":

> First, Evans stood on both sides of these transactions. He was a fiduciary of Avande who authorized the payments on one side, and the sole owner of DC Risk that received the funds on the other side. Thus, ***all of the transactions at issue are self-interested***. Second, as to Omran's bookkeeping services, which comprise a significant chunk of the amount in dispute and which was the focus of the trial insofar as expenditures involving DC Risk are concerned, ***the evidence presented at trial raised more questions than it answered***.

A0216-A0217 (emphasis added). Ultimately, the Plenary Court held:

> Avande made a *prima facie* showing at trial based on substantial evidence that the bookkeeping charges it paid to DC Risk were self-interested transactions and that the billing records appear suspicious. ***For their part, defendants did not prove the fairness of those charges and their production of a single spreadsheet during trial is problematic, because it was both untimely and incomplete.***

A0218 (emphasis added).

Based on these findings, the Plenary Court entered judgment against Evans and awarded Avande damages plus pre- and post-judgment interest. *See* A0221. The Plenary Court further granted Avande an equitable accounting to determine the entire fairness of the DC Risk payments and quantify additional damages to the Company and ordered Evans and DC Risk to bear the entire expense of the accounting. *See* A0218-A0219. The Plenary Court ruled that DC Risk "shall be jointly liable with Evans as an aider and abettor for any damages that are assessed as a result of the accounting, as DC Risk's knowing participation can be inferred from the actions of Evans, its sole owner and operator." *Id*.

V. POST-TRIAL PROCEEDINGS IN THE PLENARY ACTION.

On September 4, 2019, the Plenary Court entered judgment in Avande's favor, and against Evans, on Count II of the Company's Amended Complaint. *See* A0223. As relief, the Judgment Order awarded Avande "damages in the amount of $21,817.70 concerning the Danhaive and Scooter Ricambi transactions, plus pre-judgment interest in the amount of $5,725.15." *Id.* The Plenary Court also awarded

the Company an equitable 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." *Id.* Under the Judgment Order, "entry of any further relief under Count II and the entry of relief under Count VI shall await the outcome of the Accounting." A0224. Judgment was entered in defendants' favor on the claims Avande had abandoned, Counts I, III, IV and V of the Amended Complaint. *See* A0225.

On September 27, 2019, the Plenary Court appointed an accountant to examine dozens of payments Evans caused Avande to make to DC Risk while he was the Company's CEO. *See* A0227-A0231. Ultimately, the accounting determined that DC Risk, directed by Evans, overcharged Avande for administrative and bookkeeping services by inflating Omran's time and charging an excessive, unfair rate. *See* A0235-A0237. Based on the accountant's findings, the Plenary Court awarded Avande additional damages totaling $43,687.77, jointly and severally against Evans and DC Risk, plus pre- and post-judgment interest. *See* A0245. Including pre-judgment interest, the total award to Avande on Count II was $85,318.70. *See* A0246-A0247.

VI. DC RISK PAYS ALL OF EVANS' EXPENSES TO DEFEND THE PLENARY ACTION.

In response to Avande's discovery requests in this indemnification action, Evans produced evidence documenting the payments made to his counsel in the

Plenary Action. This evidence showed that (i) Evans did not pay a single cent to fund his defense in the Plenary Action, as DC Risk made every payment to Evans' counsel for fees and expenses relating to the Plenary Action; and (ii) DC Risk paid Evans' counsel far less than the amount for which Evans sought indemnification from Avande.

First, Evans produced documentation of payments made to Duane Morris and Bellew LLC – the two law firms that represented Evans in the Plenary Action – for attorneys' fees and costs. These payments consisted of 27 checks written to Duane Morris (totaling $561,863.88) and six wire transfers to Bellew LLC (totaling $221,211.00). *See* B1706-B1714. However, banking statements produced by Evans showed that Evans did ***not*** pay any of these funds; instead, every payment to Evans' counsel was drawn from DC Risk's bank account. *See* B1716-B1870.

Additionally, while Evans claimed that his fees and costs for defending the Plenary Action totaled $829,843.27 (*see* B1269), the evidence he produced showed that a significant portion of DC Risk's payments did ***not*** relate to the Plenary Action. None of DC Risk's checks written to Duane Morris indicate whether they paid a specific invoice or related to a specific billing matter. *See* B1707-B1712. However, Evans produced billing records from Duane Morris reflecting that the firm represented both DC Risk and Evans on multiple matters – five matters for DC Risk, and three matters for Evans (including the Plenary Action). *See* B1872-B1876.

According to Duane Morris' records, the aggregate amount paid to the firm for all eight matters was $561,863.88, which corresponds exactly to the sum of DC Risk's checks. *See id.* Duane Morris' records further reflect that, within this sum, the total paid by DC Risk for Evans' representation in the Plenary Action was $399,421.92. *See* B1341-B1546 (invoices for Matter No. R3162-00001, "Defense of Fiduciary Duty Lawsuit"); B1872 (recording payments for same billing matter number). This evidence confirms that (i) Evans made no payments to Duane Morris, and (ii) $162,441.96 of the funds DC Risk paid to Duane Morris is attributable to matters other than the Plenary Action.

ARGUMENT

I. EVANS IS NOT ENTITLED TO INDEMNIFICATION FOR DEFENDING COUNTS II, III, AND IV OF AVANDE'S AMENDED COMPLAINT IN THE PLENARY ACTION.

A. Questions Presented.

Was Evans' defense to Count II of Avande's Amended Complaint in the Plenary Action "successful on the merits" when the Plenary Court found Evans liable for breaching his fiduciary duty while awarding Avande less than the full damages sought? *See* A0297-A0300; B0351-B0352; B0644-B0646.

Did Avande bring Counts III and IV of the Amended Complaint in the Plenary Action, which alleged that Evans tortiously interfered with Avande's contractual relations and defamed Avande after he was terminated from his positions as a director and officer, "by reason of the fact" that Evans previously served in those positions with the Company? *See* A0300-A310; B0350-B0351; B0635-B0642.

B. Scope of Review.

An appeal from the Court of Chancery's post-trial rulings on the scope of indemnification raises issues of both law and fact. *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 82 (Del. 1998). This Court will "accord great deference" to the trial court's findings of fact, and "will not disturb the Court's factual determinations unless they are clearly wrong and justice requires their overturn." *Id.* at 82-83. To the extent

the Court of Chancery's holding interprets Section 145 or a corporation's bylaws, it presents legal issues that this Court reviews *de novo*. *Id.* at 83.

C. Merits of Argument.

1. *The Governing Indemnification Provisions.*

The indemnification rights of Avande's directors and officers are set forth in Article V of the Company's Bylaws. Section 5.2 addresses permissive indemnification of directors and officers in actions "by or in the right of the Company" (B0919), and thus applies to the Plenary Action. That bylaw provides, in relevant part:

> Subject to the other provisions of this Article V, the Company shall indemnify, to the fullest extent permitted by the DGCL, as now or hereinafter in effect, any person who was or is a party … to any threatened, pending or completed action or suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that such person is or was a director or officer of the Company … against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company; except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Company unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which

> the Court of Chancery or such other court shall deem proper.

B0919-B0920. Section 5.2 of Avande's Bylaws offers the full extent of indemnification authorized by, and tracks the language of, Section 145(b). *See* 8 *Del. C.* § 145(b).

Section 145(c) addresses mandatory indemnification and provides:

> To 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 referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

8 *Del. C.* § 145(c)(1). Avande's Bylaws, at Section 5.3, track this statutory language and authorize mandatory indemnification of the Company's directors and officers as permitted by Delaware law. *See* B0920. Avande's Certificate of Incorporation, at Article IX, provides indemnification to directors and officers to the "fullest extent permitted" by Delaware law. B0816.

In the Plenary Action, judgment was entered in Avande's favor on Count II and in Evans' favor on Counts III and IV. *See* A0223-A0225. Count II was brought "by reason of the fact" that Evans was a director and officer of the Company, but the Plenary Court adjudged Evans liable to the Company for breaching his fiduciary duties. While Avande's abandonment of Counts III and IV – for Evans' post-

termination tortious interference and defamatory conduct – resulted in a "successful defense" of those claims, they were not pursued "by reason of the fact" that Evans was a director or officer of the Company. As the Court Below held correctly in this action, none of these claims entitles Evans to mandatory indemnification from Avande.

2. *Evans' Defense of Count II in the Plenary Action Was Not Successful on the Merits.*

By statute, indemnification is mandatory only "[t]o the extent that a present or former director or officer has been successful on the merits or otherwise in defense of any action, suit or proceeding." 8 *Del. C.* § 145(c)(1). Therefore, Section 145(c) – and Section 5.3 of Avande's Bylaws, which contains identical language (*see* B0920) – requires only partial indemnification in cases of partial success. *See MCI Telecommunications Corp. v. Wanzer*, 1990 WL 91100, at *9 (Del. Super. June 19, 1990). When a claimant's defense is less than 100% successful, "a corporate officer should only be indemnified in an amount that reflects her limited success." *May v. Bigmar, Inc.*, 838 A.2d 285, 288 (Del. Ch. 2003), *aff'd*, 854 A.2d 1158 (Del. 2004).

Count II of Avande's Amended Complaint in the Plenary Action, which alleged that Evans breached his fiduciary duties while he served as a director and officer of the Company, was brought "by reason of the fact" that Evans held those positions. *See, e.g.*, *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005) (holding that proceedings brought "by reason of the fact" that one was a corporate

officer must have "a nexus or causal connection" with "one's official corporate capacity"); *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *4 (Del. Ch. May 3, 2002) ("If the conduct resulting in the prosecution was done in his capacity as a corporate officer … then the ensuing prosecution was 'by reason of the fact that' he was a corporate officer."). After trial in the Plenary Action, however, Evans was found liable for breaching his fiduciary duties to Avande and the Plenary Court awarded the Company damages and an accounting of self-interested payments Evans caused to be made from Avande to DC Risk. Therefore, while Evans may have been "partially successful" in defending the Plenary Action to the extent the Plenary Court ruled in his favor on other counts, he was not successful on the merits in defending Count II.[4]

For years, Delaware courts have recognized that "[w]hether a party seeking indemnification was successful is determined ***claim by claim***." *Brown v. Rite Aid Corp.*, 2019 WL 2244738, at *8 (Del. Ch. May 24, 2019) (emphasis added). In the

[4] Evans' argument that he was "partially successful" in defending Count II because the Plenary Court entered separate judgments in favor of Avande and Evans on that claim (*see* Op. Br. at 23, 27) was never presented to the Court Below and, therefore, is not properly before this Court on appeal. *See* Supr. Ct. R. 8. In any event, Evans' new argument is inapposite. Regardless of the language used in the Final Order and Judgment, the result is the same – in the Plenary Action, Evans was found liable on Count II for breaching his fiduciary duty and the Plenary Court awarded less than the full damages Avande requested. In this action, the Court Below held correctly that this result does not constitute "success" entitling Evans to partial indemnification for defending Count II.

criminal context, Section 145(c) has been held to entitle a defendant to "partial indemnification if successful on a count of an indictment, which is an independent criminal charge, even if unsuccessful on another, related count." *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. 1974). The same analysis applies when considering an indemnitee's defense of civil claims. *See MCI Telecommunications Corp.*, 1990 WL 91100, at *9 (holding that "a director who has been partially successful in defending three out of four counts of a civil complaint is entitled to indemnification"); *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 400 (Del. Ch. 2009) (recognizing "Delaware's overarching approach to Section 145, in which claims are evaluated individually or in appropriate groupings"); *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *25-33 (Del. Ch. May 23, 2008) (evaluating indemnitees' rights on a claim by claim basis). As the Court of Chancery recognized in *Paolino*, the "claim by claim" approach is consistent with this Court's holding in *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992), which "considered … counterclaims individually, as separate causes of action, to determine if they qualified for advancement." 985 A.2d at 400.

In this appeal, Evans continues to claim a right to indemnification from Avande that has no precedent under Delaware law. In the face of nearly forty years' worth of case law determining an indemnitee's partial success on "claim by claim" basis, Evans argues that he "successfully" defended Count II in the Plenary Action

on its merits – notwithstanding the finding against him that he breached his fiduciary duties – because the Plenary Court awarded Avande less than all the damages the Company sought as relief for that claim. Instead, Evans offers what the Court Below rightfully described as a "novel theory of proportional indemnification" that measures "partial success" on an individual claim according to the quantum of damages a disloyal fiduciary is ordered to pay to the corporation. A0250.[5]

The Court Below correctly rejected Evans' theory, finding it unworkable and unsupported by Delaware law. Delaware law consistently has declined to "define or identify" partial indemnification "in a scientific way," given "the problem of identifying the 'winning' issues from 'losing' ones." *May*, 838 A.2d at 290-91. A rule that attempts to measure "partial success" under Section 145(c) as a percentage of damages awarded has limited utility, since "[p]arties routinely 'win' or 'lose' where monetary damages are irrelevant or difficult to quantify." A0263. Indeed, this Court has held explicitly that liability for breaching one's fiduciary duties does not require proof of specific damages to establish harm to the corporation. *See In re*

[5] Evans concedes that his argument is unprecedented. In this action, Evans cited *Dreisbach v. Walton*, 2014 WL 5426868 (Del. Super. Oct. 27, 2014), as "the only case [he] was able to find" to support his claim for partial indemnification based on the percentage of damages for which he was held liable. B0661. After the Court Below correctly distinguished *Dreisbach* (*see* A0261-A0262), Evans has omitted it entirely from his Opening Brief in this appeal. In fact, Evans cites ***no*** case law finding an indemnitee "partially successful" in defending a claim on which he was held liable to the corporation.

Tri-Star Pictures, Inc., Litig., 634 A.2d 319, 334 (Del. 1993) (citing *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991)). Obligating a corporation to partially indemnify a director or officer who has been found liable for breaching fiduciary duties, but was ordered to pay less than the full damages sought, is inconsistent with this principle. While Evans downplays the damages awarded against him as "de minimis," this subjective characterization ignores the reality that he was adjudged to have caused tens of thousands of dollars of harm to Avande through self-interested and bad faith conduct.

The application of Section 145(c) in the criminal context, where "the dismissal of a charge equates with success in most instances, while a conviction (including a conviction resulting from a plea of guilty or *nolo contendere*) equates with failure," provides an apt analogy. *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1109 (Del. Ch. 2012). In such cases, a director or officer who is convicted on a single charge has not been "partially successful" in defending the charge if she receives less than the maximum possible criminal penalties. *See id.* (finding, where indemnitee "pled guilty to all charged offenses, paid a large fine, and received a jail sentence," that "[a]lthough by pleading guilty [he] conceivably avoided some 'expense, delay, distraction, disruption, [or] uncertainty,' he cannot be said to have 'succeeded' simply because of that fact").

Moreover, as the Court Below noted, Evans' approach is "untethered from the policy at the root of Section 145(c)." A0263. In practice, Evans argues for a rule that evaluates a "successful defense" according to ***relative levels of disloyalty*** by directors and officers. However, setting a threshold for determining partial "success" within a single cause of action – for example, if a court finds 99% of challenged transactions to be breaches of loyalty, should the self-interested director be deemed 1% successful? – runs directly contrary to bedrock Delaware law regarding fiduciary duties. If a successful defense is measured by the proportion or quantum of damages awarded against a disloyal fiduciary, directors' and officers' conduct would be guided by how much injury they might inflict upon a corporation, rather than the unflinching "rule that requires an undivided and unselfish loyalty to the corporation" and "demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation." *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). Similarly, if Section 145 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," *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002), then – as the Court Below found here – "[a] director adjudged to have acted

in bad faith in breach of his duty of loyalty can hardly assert that he is entitled to indemnification for a claim where that integrity was found lacking." A0263.

Finally, Evans' argument that the Court Below's holding violates the text of Section 145(c) (Op. Br. at 24-26) is misplaced. To the contrary, the legislative history of Section 145 shows that the statute is intended to grant partial indemnification to the extent a director successfully defends discrete "claims" within a covered proceeding. In his report on the 1967 amendments to the DGCL, Professor Folk cited then-Chancellor Seitz's request for "'clarification in the area of partial liability,' particularly 'whether the statute permits an allocation of expenses when directors have been adjudged liable as to some but not all of the claims asserted against them.'" *Folk Report* at 88, https://delawarelaw.widener.edu/files-/resources/folkreport.pdf (quoting *Essential Enters. Corp. v. Dorsey Corp.*, 182 A.2d 647, 655 (Del. Ch. 1962)). In response, the Folk Report recommended amending Section 145(c) to "provide[] … that the court may also allocate indemnifiable expenses and items when a director is adjudicated liable as to ***some but not all claims*** to the extent that the court deems fair and equitable." *Id.* (emphasis added). The "claim by claim" analysis used by the Court of Chancery in this and other cases to determine indemnification for a partially successful defense is entirely consistent with the statute's intent and Delaware's public policy.

3. *Counts III and IV in the Plenary Action Were Not Brought "By Reason Of The Fact" That Evans Was a Director Or Officer Of Avande.*

Section 145(c) (and, because it tracks the statutory language, Avande's Bylaws) provides mandatory indemnification "[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 referred to in subsections (a) and (b) of this section." 8 *Del. C.* § 145(c)(1). Section 145(b), in turn, covers an "action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the [claimant] is or was a director, officer, employee or agent of the corporation." 8 *Del. C.* § 145(b). Therefore, Avande is required to indemnify Evans only for expenses paid to successfully defend claims brought "by reason of the fact" that he was a director or officer of the Company. *Brown*, 2019 WL 2244738, at *6. While Evans may have been "successful on the merits … in defense of" Counts III and IV in the Plenary Action, neither claim arose from actions Evans took in his former corporate capacity and, accordingly, Evans is not entitled to mandatory indemnification for defending them.

a. As a Matter of Delaware Law, Counts III and IV Are Not Indemnifiable Claims.

Delaware courts consistently interpret "by reason of the fact" to require indemnification for defending claims that the claimant acted wrongfully ***while exercising duties*** as a director or officer. *See, e.g.*, *Batty v. UCAR Int'l Inc.*, 2019

WL 1489082, at *10 (Del. Ch. Apr. 3, 2019) (finding claims that did not "challenge [the claimant's] exercise of judgment, discretion, or decision-making authority on behalf of the corporation" were not alleged "by reason of the fact" that the claimant "served in a covered capacity"); *Lieberman v. Electrolytic Ozone, Inc.*, 2015 WL 5135460, at *4 (Del. Ch. Aug. 31, 2015) (finding claims that were "not dependent on any alleged on-the-job misconduct," but alleged that claimants breached contractual obligations "post-termination," did not constitute claims brought "by reason of the fact" that claimants were officers or directors); *Paolino*, 985 A.2d at 403 (Section 145 does not apply to claim "that does not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation"); *Scharf v. Edgcomb Corp.*, 2004 WL 718923, at *4 (Del. Ch. Mar. 24, 2004) ("The inquiry necessarily focuses on whether the conduct that resulted in the litigation involving the officer or director … was 'done in his capacity' as a corporate officer or director."), *rev'd on other grounds*, 864 A.2d 909 (Del. 2004); *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *6 (Del. Ch. June 18, 2002) (granting advancement where "all of the misconduct alleged by EDS involves actions Reddy took on the job in the course of performing his day-to-day managerial duties").

In the Plenary Action, Counts III and IV of Avande's Amended Complaint alleged common law tort claims against Evans for acts he took ***after*** his termination. Specifically, Count III alleged that Evans tortiously interfered with Avande's

contractual and business relations with clients, vendors, and service providers post-termination, while Count IV alleged that Evans, following his termination, made false, defamatory, and libelous statements to the Company's creditors. *See* A0138-A0139. Neither cause of action concerned Evans' "exercise of judgment, discretion, or decision-making authority on behalf of the corporation," *Batty*, 2019 WL 1489082, at *10; his "alleged on-the-job misconduct," *Lieberman*, 2015 WL 5135460, at *4; or actions "done in his capacity as a corporate officer," *Perconti*, 2002 WL 982419, at *4. Nor did Count III or IV allege that Evans "failed to live up to his duties of loyalty and care to the corporation." *Reddy*, 2002 WL 1358761, at *6. Since Evans was not alleged to have misused "any 'entrusted corporate powers' in order to engage in the conduct that gave rise to" these claims, Avande is not obligated to indemnify Evans to defend them. *Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *3 (Del. Ch. Jan. 30, 2004). *See also Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007) (under the "by reason of the fact" standard, the required causal "connection is established if the corporate powers were used or necessary for the commission of the alleged misconduct").

The case law cited by Evans is distinguishable. In each opinion, claims based on a former director or officer's post-termination conduct were held to have been brought "by reason of the fact" of the indemnitee's corporate service because they explicitly alleged misuse of a corporation's ***confidential and proprietary***

information obtained through the director or officer's official duties. *See Pontone v. Milso Indus. Corp.*, 100 A.3d 1023, 1053 (Del. Ch. 2014) (awarding advancement where "confidential and proprietary information that allegedly enabled and facilitated the wrongdoing was acquired by [plaintiff] during his tenure as an officer and director"); *Ephrat v. MedCPU, Inc.*, 2019 WL 2613281, at *9 (Del. Ch. June 26, 2019) (awarding advancement to the extent "the underlying acts depended on or utilized confidential information Petitioners obtained by reason of their service at [the corporation]"); *Zaman*, 2008 WL 2168397, at *31 (granting advancement to defend claims alleging that claimants "as fiduciaries, had access to confidential information and breached their fiduciary duty by disclosing it to third parties and by misappropriating it for themselves"); *Brown v. LiveOps, Inc.*, 903 A.2d 324, 325-26 (Del. Ch. 2006) (claims of copyright infringement, unfair competition, and conversion based on plaintiff's alleged misappropriation of confidential and proprietary information obtained while he was a director and officer arose "by reason of the fact" that he held those positions).[6]

[6] *Scharf*, which did not address post-termination conduct, but claims of insider trading for acts taken while the claimant was a director and officer, is inapposite. *See* 2004 WL 718923, at *4. *Carr v. Glob. Payments Inc.*, 2019 WL 6726214 (Del. Ch. Dec. 11, 2019), *aff'd*, 227 A.3d 555 (Del. 2020), actually undercuts Evans' claim for indemnification. In *Carr*, the Court of Chancery denied advancement after the underlying complaint was amended to "focus[] solely on [plaintiff's] post-employment competition and solicitation activity" and removed allegations that the plaintiff "breach[ed] a contract through employment of an attribute of his position as officer or director." *Id.* at *7.

By contrast, Counts III and IV in the Plenary Action did ***not*** allege that Evans misused any confidential or proprietary information belonging to Avande; rather, Avande alleged that Evans, after his termination, tortiously harmed the Company by making false statements to clients, vendors, and creditors. Avande's tort claims arose from the ***falsity*** of Evans' communications, not the fact that Evans contacted those parties using knowledge he gained while an officer of Avande. Where, as here, a claim "does not allege that the party used confidential information previously learned to facilitate" wrongful conduct, it does not "relate to a duty or attribute" of the party's former corporate position. *Carr*, 2019 WL 6726214, at *6. Reviewing the pleadings and evidentiary record in the Plenary Action, the Court Below concluded that neither the defamation nor the tortious interference claim "implicated use of confidential information." B1257-B1258. The Court Below's fact finding on this issue is entitled to "great deference" and should be affirmed. *VonFeldt*, 714 A.2d at 82-83.

As he did in the proceeding below, Evans argues that he could not have made these tortious communications without contact information he obtained before his termination. The Court Below, however, properly rejected this "but for" causal connection as inadequate to support indemnification rights, citing *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769 (Del. Ch. Sept. 11, 2015). Like Evans does here, the plaintiff in *Charney* sought indemnification for defending claims challenging

conduct occurring after he no longer was a director, including communications with third parties concerning non-confidential matters. *See id.* at *15-16. Also like Evans, the plaintiff in *Charney* argued that "[u]sing the relationships he built as CEO and the knowledge he gained as a director and officer of the Company enabled [him] to take the actions" giving rise to the claims alleged against him. *Id.* at *17. The *Charney* court held this "but for" view of indemnification rights "would lead to absurd results" and found that none of the alleged post-termination conduct was "causally connected to the use or misuse of [plaintiff's] corporate power as a director or officer." *Id.* at *13, *15. The same reasoning applies to Counts III and IV in the Plenary Action, neither of which alleged that Evans misappropriated Avande's confidential or proprietary information or exploited his former positions as director and officer to harm the Company.

b. Evans' Trial Testimony in the Plenary Action Proves There Is No Causal Connection Between Counts III and IV and His Service as a Director and Officer.

To the extent there is any doubt whether Counts III and IV in the Plenary Action were brought "by reason of the fact" that Evans was a director and officer of Avande, Evans' own trial testimony eliminates it. Evans testified repeatedly that, after his removal from Avande, he acted solely to protect his ***personal*** interests as a creditor of the Company by collecting personal loans he and his wife had made to Avande. For example, Evans attempted to justify his conduct by distinguishing

between his pre-termination acts as a fiduciary and his post-termination acts as a creditor:

> Q. After … your termination, did you make a demand of the company to be reimbursed the amounts your wife and you were owed?
>
> A. I did.
>
> * * *
>
> Q. And in that request or demand, you threatened litigation; correct?
>
> A. That's correct.
>
> Q. ***And that was at a point where you were simply a creditor, you and your wife were creditors of the company***, and you personally were a shareholder?
>
> A. ***That is correct***.

B1065 (pp. 372:12-373:6) (emphasis added).

Evans also testified that, when he tried to force Avande into involuntary bankruptcy, he was no longer an Avande director or officer and, therefore, he believed his actions as a creditor were not constrained by any fiduciary duties:

> Q. Who is Gary Kaplan?
>
> A. Gary Kaplan is a bankruptcy attorney I contacted about getting my moneys repaid.
>
> Q. And did Mr. Kaplan call Mr. Harden?
>
> A. He did.
>
> Q. And what was the purpose of that call?

A. To see if MedBen was interested in entering into involuntary bankruptcy proceedings against Avande.

Q. That phone call, did that come after … February 15th, 2018?

A. That is correct.

Q. And as of the date that this phone call was made by an attorney that you retained, ***were you an officer of Avande?***

A. ***I was not.***

Q. ***Were you a director?***

A. ***I was not.***

Q. ***Were you a creditor?***

A. ***I was.***

B0965 (pp. 41:7-42:4) (emphasis added). *See also* B0970 (pp. 61:17-62:11) (Evans acted "[a]s a creditor" when soliciting others to join in filing an involuntary bankruptcy against Avande); B1051 (p. 316:6-8) (Evans' "intent was not to put the company into involuntary bankruptcy until I was already gone"). Similarly, Evans confirmed his belief that, when he terminated Avande's credit line and solicited Avande's employees following his termination, he did so to protect his personal interests and, as a former director and officer, he no longer owed any duties to Avande. *See* B0965 (pp. 42:15-43:11); B1035 (p. 250:7-11); B1036 (pp. 255:18-256:8).

Evans' testimony in the Plenary Action proves that the conduct underlying Counts III and IV of Avande's Amended Complaint had no relationship to Evans' prior status as a director and officer of the Company and did not exploit any confidential or proprietary information he obtained while serving in those positions. Any arguments by Evans to the contrary are barred under the doctrine of judicial estoppel, which "acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding." *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008). As Evans himself admitted through his binding testimony, Avande did not bring Counts III and IV in the Plenary Action against him "by reason of" his conduct as a Company director or officer and, therefore, the Court Below held correctly that Avande is not obligated to indemnify him for defending those claims.

II. AVANDE IS NOT OBLIGATED TO INDEMNIFY EVANS FOR EXPENSES PAID BY DC RISK.

A. Question Presented.

Do Section 145(c) and the Company's Bylaws require Avande to indemnify Evans for expenses actually paid by another party, where Evans did not personally sustain any out-of-pocket loss? *See* B0353; B0642-B0643; B1554-B1555; B1651-B1654.

B. Scope of Review.

The Court of Chancery's post-trial ruling on an individual's entitlement to indemnification raises issues of law and fact. *VonFeldt*, 714 A.2d at 82. This Court will "accept the factual findings of the trial court that are not clearly wrong," and will review legal holdings *de novo* to "decide as a matter of law whether, on that factual record, plaintiff is entitled to the protections of Section 145 … and defendant's indemnification bylaw." *Id.* at 83.

C. Merits of Argument.

By its plain language, Section 145(c) grants a director or officer mandatory indemnification for "expenses (including attorneys' fees) ***actually*** and reasonably incurred by such person in connection therewith." 8 *Del. C.* § 145(c)(1) (emphasis added). This language "is best understood as a statutory embodiment of the common law of indemnification, which generally recognizes that a party who 'has not and will not sustain any actual out-of-pocket loss as the result of a claim raised against

it has no indemnification claim.'" *Levy v. HLI Operating Co., Inc.*, 924 A.2d 210, 222-23 (Del. Ch. 2007) (quoting *Perno v. For-Med Medical Grp., P.C.*, 673 N.Y.S.2d 849, 851 (N.Y. Sup. Ct. 1998)). Thus, "[w]hen a purported indemnitee has all of his indemnifiable expenses paid in full and cannot show an out-of-pocket loss, he has no claim for indemnification under section 145." *Id.* at 222. Commentators have viewed *Levy* as requiring an actual out-of-pocket loss for statutory indemnification. *See* 1 R. Franklin Balotti, et al., *The Delaware Law of Corporations and Business Organizations* § 4.12[A] (4th ed. 2022 Supp.) (quoting *Levy*); *Shareholder Deriv. Actions L. & Prac.* § 6:35 (2022-2023) ("Having had all expenses paid, the fiduciary lacks a claim for statutory indemnification because no out-of-pocket loss can be shown."); Andrew M. Johnston, et al., *Recent Delaware Law Developments in Advancement and Indemnification: An Analytical Guide*, 6 N.Y.U.J.L. & Bus. 81, 126 (2009) ("The premise for [*Levy*] was that Section 145 provides that a corporation may only grant indemnification for amounts 'actually ... incurred by the person' and once that person will no longer incur expenses, his or her claims fall away.").

This limitation on indemnification also applies to Evans' rights under Avande's Bylaws, which adopt the same language as 8 *Del. C.* § 145(c) in providing mandatory indemnification, "[t]o the extent that a present or former director or officer of the Company has been successful on the merits or otherwise in defense

of" a covered proceeding, for "expenses (including attorneys' fees) ***actually*** and reasonably incurred by such person in connection therewith." B0920 (emphasis added). The Bylaws further state, at Section 5.6(i), that "the Company shall not be obligated to indemnify any person … in connection with any Proceeding (or any part of any Proceeding) … ***for which payment has actually been made to or on behalf of such person under any statute, insurance policy, indemnity provision, vote or otherwise***." *Id.* (emphasis added).

The record below shows indisputably that Evans paid nothing to defend the Plenary Action, and that DC Risk made all payments to Evans' counsel. *See* pp. 24-26 *supra*. Accordingly, Evans incurred no out-of-pocket loss to be indemnified by Avande under Section 145(c) or the Company's Bylaws. Nonetheless, the Court Below ordered Avande to pay ***Evans*** indemnification for funds that ***DC Risk*** paid to Evans' counsel to defend him in the Plenary Action. *See* Ex. B at 18. The Court Below distinguished *Levy* on the ground that DC Risk had no contractual obligation to indemnify Evans (*id.* at 14), but this fact was not central to *Levy's* holding. Rather, as this Court has observed, "[i]ndemnification encourages corporate service by capable individuals by protecting their ***personal financial resources*** from depletion by the expenses they incur during an investigation or litigation that results by reason of that service." *Homestore, Inc.*, 888 A.2d at 211. Whether DC Risk contractually agreed to pay Evans' expenses or not is irrelevant; at no time were Evans' personal

financial resources threatened by defending the Plenary Action because DC Risk paid his defense.

On this point, the Court Below appeared to equate DC Risk's finances with Evans' personal finances, noting that "Plaintiff's counsel represented to the Court that Evans used DC Risk, a company he owned and controlled in full, as a pass-through entity for tax purposes." Ex. B at 14. However, there is no record evidence proving this, since Evans' counsel made this assertion for the first time at the final post-trial damages argument, without citing any proof or permitting Avande to take discovery on DC Risk's purported tax status. *See* B2272. Attributing DC Risk's payments to Evans also runs contrary to the "fundamental principle of Delaware law that a corporation is an entity … with an identity separate from its stockholders." *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1213 (Del. 2021).

The Court Below's ruling relied upon case law that addressed materially different facts than those present here. Specifically, none of the opinions cited by the Court Below (*see* Ex. B at 14-17) ordered a corporation to reimburse a third party that funded the indemnitee's legal defense, after the underlying proceeding had concluded, under the guise of indemnification rights. Instead, each case addressed whether an indemnitee could be denied ***advancement*** of defense costs, during the pendency of an underlying proceeding, when the defense was being (or could have

been) funded by a third party. *See Zaman*, 2008 WL 2168397, at *21 n.134; *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at *9 (Del. Ch. Jan. 23, 2006); *Sodano v. Am. Stock Exch. LLC*, 2008 WL 2738583, at *16 (Del. Ch. July 15, 2008).[7] While the Court Below found no reason to distinguish between advancement and indemnification in this context, the policy concerns underlying opinions like *DeLucca – i.e.*, allowing corporations to avoid advancing defense costs during the pendency of a covered proceeding "would encourage indemnitors to use the leverage of denial of advancement to deprive indemnitees of appropriate legal advice," 2006 WL 224058, at *9 – are not implicated in a claim for indemnification, where the underlying proceeding has concluded, and the indemnitee's defense already has been funded by a third party.

This is especially true here. Had Evans believed that Avande was obligated to fund his defense in the Plenary Action, he should have pursued his advancement claim to conclusion; instead, he voluntarily opted to forgo advancement while the Plenary Action proceeded. Evans then did not self-fund his defense but caused DC Risk to pay his expenses. As a consequence of his choices, Evans has not suffered any out-of-pocket loss that Avande should be obligated to reimburse.

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[7] *Creel v. Ecolab, Inc.*, 2018 WL 5733382 (Del. Ch. Oct. 31, 2018), also cited by the Court Below, only ruled on a motion to dismiss that the plaintiff had "stated a reasonably conceivable claim" for indemnification and held that "the question of whether [plaintiff] 'actually incurred'" indemnifiable settlement funds paid by a third party "remain[ed] open … for trial." *Id.* at *11.

CONCLUSION

For the foregoing reasons, Avande respectfully requests that this Court: (i) affirm the Court of Chancery's holdings that Evans is not entitled to mandatory indemnification for expenses paid to defend Counts II, III, and V of Avande's Amended Complaint in the Plenary Action; (ii) reverse the Court of Chancery's holding that Avande is obligated to indemnify expenses paid by DC Risk, rather than by Evans; and (iii) vacate the Court of Chancery's Final Order and Judgment awarding Evans payment of indemnification, pre-judgment interest, and "fees-on-fees" from Avande.

Dated: August 28, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 28, 2023, true and correct copies of the foregoing were served upon the following counsel of record via File & ServeXpress:

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