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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AVANTOR, INC., Defendant Below, Appellant, v. MARC J. CENTRELLA, Plaintiff Below, Appellee.	No. 373, 2024 Appeal from Court Chancery of the State of Delaware, C.A. No. 2022-0876-NAC **PUBLIC VERSION FILED - NOVEMBER 6, 2024**

APPELLANTS' OPENING BRIEF

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PRELIMINARY STATEMENT

This is an appeal from a final Chancery Court judgment ordering a Delaware corporation to continue advancing fees incurred by a former employee in prosecuting his affirmative claims against the company – even though the company's lawsuit that triggered advancement terminated two years ago.

On September 8, 2022, Appellant Avantor, Inc. ("Avantor"), sued recently-departed executive Appellee Marc Centrella to enforce post-employment covenants implicated by his plan to join an Avantor competitor (the "Plenary Action").[1] Five weeks later, the employment offer was withdrawn and Avantor dismissed its complaint as moot. Meanwhile, Centrella counterclaimed, requesting a declaration that the covenants were invalid, and later added a claim for tortious interference with the job offer.

On September 29, 2022, Centrella filed the advancement Petition (the "Advancement Action")[2] that is the subject of this appeal. For a year, Centrella litigated his advancement claim on the sole ground that he was sued as an Avantor "officer" (the "Officer Claim"). The Chancery Court rejected that contention in November 2023, finding he had not been an "officer" as defined in Avantor's By-

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[1] Docketed as *Avantor, Inc. v. Marc J. Centrella*, C.A. No. 2022-0795-NAC (Del. Ch.)

[2] Docketed as *Centrella v. Avantor, Inc.*, C.A. No. 2022-0876-NAC (Del. Ch.)

laws. Shortly before the ruling, Centrella aired a new claim – citing a By-law provision extending indemnification and advancement to those serving at Avantor's request as employees of Avantor subsidiaries (the "Employee Claim") – a claim the Court deferred for trial.

On July 1, 2024, after a one-day trial, the Chancery Court found Centrella was a covered person sued in that capacity. The Court also found Avantor must pay the entire cost of Centrella's prosecution of his affirmative tortious interference claim, scheduled for trial in May 2025 in *Centrella v. Avantor, Inc.*, C.A. No. N23C-10-200 PRW CCLD (the "Superior Court Action").[3] Further, the Court granted Centrella all his fees-on-fees, even though for more than a year he pursued only the legally meritless Officer Claim.

In awarding ongoing advancement, the Chancery Court held Centrella faces a risk of litigation from Avantor today even though: (a) Avantor dismissed as moot its only claim against him in October 2022; (b) the non-compete at issue in Avantor's mooted claim expired in August 2023; and (c) Avantor has stated unequivocally and repeatedly it has no claims against Centrella. Reaching conclusions inconsistent with the Chancery Court's reasoning, on August 28, 2024, the Superior Court

[3] As discussed below, the Plenary Action was dismissed for lack subject matter jurisdiction with leave to transfer pursuant to 10 *DEL. C.* §1902. Centrella elected to transfer his claims on November 13, 2023.

dismissed Centrella's claim for a declaration that his post-employment covenants are unenforceable, finding no "actual active controversy present related to that." Trans. of Oral Arg., Superior Court Action, at 60 (Aug. 28, 2024) (A1040).

The Chancery Court erred as a matter of law in finding the termination of Avantor's claims against Centrella did not also terminate Centrella's advancement right. The Court erred as well in awarding fees for pursuing the patently invalid Officer Claim. Reversal is warranted.

NATURE OF PROCEEDINGS

On September 8, 2022, Avantor brought the Plenary Action against Centrella to enforce post-employment covenants implicated by the former executive's plan to join an Avantor competitor, [redacted] in a similar role. On September 9, Centrella demanded advancement on the sole basis he was sued in his capacity as an officer. Because Centrella had not been an "officer" within the meaning of Avantor's By-laws, Avantor rejected Centrella's demand and on September 29, Centrella brought the Advancement Action from which this appeal is taken.

On September 28, 2022, Centrella counterclaimed in the Plenary Action, seeking a declaration that his post-employment covenants were unenforceable. On October 12, 2022, [redacted] withdrew its offer and on October 18, Avantor dismissed its Plenary Action Complaint as moot. On February 10, 2023, Centrella amended his Plenary Action Counterclaim to add a count for tortious interference with the [redacted] job offer. On August 19, 2023, Centrella's non-compete expired.

On October 26, 2022, Avantor moved for summary judgment dismissing the Advancement Action and Centrella cross-moved for judgment in his favor. With the motions pending, the parties conducted document and deposition discovery. Centrella renewed his summary judgment motion on March 23, 2023, raising a new

claim – that Avantor's indemnification By-law covered him in his capacity as an employee of an Avantor subsidiary (the "Employee Claim").

During a November 13, 2023, hearing on the Advancement Action summary judgment cross-motions, the Court dismissed Centrella's Officer Claim and set the Employee Claim for trial. The Court also held it had no subject matter jurisdiction over Centrella's Counterclaims, which were refiled in the Superior Court. On November 21, 2023, Centrella formally amended his Advancement Action Petition to assert the Employee Claim along with the Officer Claim.

The Employee Claim was tried on April 4, 2024. On July 1, 2024, the Chancery Court issued a Memorandum Opinion (the "Opinion" or "Op."; Ex. A, attached) in which it held, in part: (a) Centrella was entitled to advancement under the Employee Claim; (b) advancement did not terminate with the dismissal of Avantor's Complaint or the termination of the non-compete, but will continue through final judgment on Centrella's Counterclaims; and (c) Centrella was entitled to all fees-on-fees, including those incurred pursuing the invalid Officer Claim. On August 1, 2024, the Chancery Court entered a stipulated Order establishing a procedure for processing Centrella's fee claim. Ex. B, attached. Trial on Centrella's tortious interference Counterclaim is scheduled for May 28, 2025.

On February 5, 2024, the Superior Court denied Avantor's motion to dismiss Centrella's tortious interference claim as barred by the absolute litigation privilege. Certification of an interlocutory appeal was sought but denied.

On May 8, 2024, Avantor moved in the Superior Court to dismiss Centrella's declaratory judgment count as moot. On August 28, 2024, the Superior Court granted the motion, finding no case or controversy regarding enforceability of the covenants. Trans. of Oral Arg., Superior Court Action, at 59 (Aug. 28, 2024) (A981-1055); Order, Superior Court Action (Aug. 30, 2024) (A1056).

On September 3, 2024, the Chancery Court entered partial final judgment on Centrella's entitlement to advancement and fees-on-fees. Ex. C, attached. On September 4, Avantor appealed the partial final judgment.

SUMMARY OF ARGUMENT

1. Advancement rights end once the claim triggering the entitlement terminates, at which point any reimbursement right becomes one for indemnification. Because the claim entitling Centrella to advancement was terminated when Avantor dismissed its Complaint in October 2022, the Chancery Court erred by treating his claim as one for advancement, not indemnification.

2. Advancement may be available for a claimant's affirmative claims brought in a defense to claims for which advancement is mandatory. Any entitlement, however, ends with the termination of the claims triggering advancement in the first place. The Chancery Court erred by concluding that, once triggered, advancement for formerly defensive counterclaims continues through final judgment.

3. To warrant advancement, a litigation "threat" requires a manifested intent to bring claims against an indemnified party, not a theoretical possibility a claim might be asserted sometime in the future. The Chancery Court erred by concluding a threat against Centrella existed where, among other things, Avantor dismissed as moot its only claim; explicitly disclaimed any intent to bring new claims; disavowed the existence of any claims; and where Centrella's non-compete had expired.

4. Fees-on-fees must be proportionate to the results achieved. The Chancery Court erred by awarding Centrella full fees-on-fees where the first year of litigation in the Advancement Action was devoted solely to his unsuccessful Officer Claim.

FACTS

Avantor is a publicly-traded Delaware corporation headquartered in Radnor, Pennsylvania, operating globally. Pre-Trial Order ("PTO") ¶¶1-2 (A667). The Company sells to customers in the biopharma, healthcare and advanced technologies and applied materials industries. *Id.* ¶3 (A667); TR[4] 162 (Baker) (A725). A Fortune 500 company, Avantor reports annual revenues of "roughly 7 billion" dollars and has about 14,000 employees worldwide. TR162 (Baker) (A725); Henson DEP 11 (A602).

Acquisitions are "a key growth component" for Avantor. TR162 (Baker) (A725). In 2017, Avantor acquired VWR Corporation through a merger in which VWR Corporation stockholders received cash consideration totaling $6.4 billion. (A529-533); PTO ¶4 (A667).

A. Centrella And His Covenants.

In December 2019, Avantor hired Centrella as Vice President Corporate Strategy/M&A. Op. 4. Centrella was not an officer designated by Avantor's Board of Directors. (A119-20, A121); Miller Aff. ¶¶14, 17, 20, 22-23 (A346-47).

[4] Trial testimony is cited with the abbreviation "TR,"a page citation and witness' name. Deposition testimony is cited as witness' name and the abbreviation "DEP."

In addition to wages, Centrella was eligible for Avantor equity awards. TR53-54 (Centrella) (A698); Centrella DEP 42-43 (A545). Centrella's offer letter stated that to receive equity, he had to accept a Personal Services Agreement ("PSA") "including restrictive covenants, non-compete and non-solicitation provisions." (A73). On January 6, 2020, Centrella received copies of (a) Restricted Stock Unit Grant Notices Under the Avantor 2019 Equity Incentive Plan issued by Avantor; (b) a Restricted Stock Unit Agreement ("RSUA"); (c) an Option Agreement Under the Avantor 2019 Equity Incentive Plan ("Option Agreement"); and (d) a Personal Services and Restrictive Covenant Agreement ("PSA"). (A75-117).

The RSUA and Option Agreement required that Centrella "become party to an agreement with the Company which contains restrictive covenant obligations …" (A82, A97). The PSA contains a non-compete effective "while employed by Avantor and for the one-year period that immediately follows his/her separation from employment …" (A109). In addition, in connection with a February 23, 2022, RSUA, Centrella explicitly accepted an agreement barring him from working for a competitor for one year following separation. RSUA §17(b) (A140); Centrella

Verified Ans. and Countercl. ¶¶9-10 (A306-07). Centrella was awarded equity under Avantor's 2019 Equity Incentive Plan. (A306).[5]

Centrella headed "the business side" of the M&A function. TR163, 168-69 (Baker) (A725, A726-27); PTO ¶15 (A668). Then–General Counsel Justin Miller described Centrella as a member of Avantor's "inner sanctum" in that he was one of a small group privy to non-public information about Avantor's acquisition strategy and potential targets. Miller Aff. ¶15 (A255). During his tenure at Avantor, Centrella staffed three transactions that closed and "several other transactions that didn't come to fruition." TR169 (Baker) (A727); PTO ¶15 (A668).

In July 2022, Avantor announced the hiring of Kitty Sahin as Executive Vice President for Strategy and Corporate Development. PTO ¶18 (A669). Centrella viewed the hiring as an effective demotion and in July advised Avantor he was considering leaving to take another job. Op. 9. Sometime later, Centrella disclosed the job was as head of Mergers & Acquisitions with [redacted] TR110-11(Centrella) (A712); Avantor Compl. ¶35 (A178). The announcement raised particular concerns for Avantor. In addition to the fact [redacted] was an Avantor competitor, [redacted]

[5] While Centrella denies having ***executed*** the PSA, he does not deny that he received it or that he was aware his equity grants were conditioned on acceptance of the PSA. Nor does he deny having accepted other agreements contained the same non-compete language as the Avantor PSA.

[redacted] Avantor Compl. ¶¶ 15, 30-36, 38 (A170, A177-78).

Over the next several weeks, Centrella discussed his potential departure with Avantor's General Counsel, Miller, and its Chief Human Resources Officer, Meaghan Henson. Each told Centrella that [redacted] was an Avantor competitor and that he would violate his restrictive covenants if he took the job. *See* PTO ¶20 (A669).

Although Centrella apparently accepted the competitor's job offer in July, his lawyer represented to Avantor's general counsel that Centrella did not do so until more than two weeks after leaving Avantor. On August 15, 2022, Miller emailed Centrella that "it seems likely you will join [redacted] despite Avantor's significant concerns. If I have misread your intentions, please let me know so that we can avoid unnecessary legal actions." (A146). Miller advised Centrella his last day at Avantor would be August 19, 2022. PTO ¶22 (A669). Centrella's lawyer responded, writing: "Please assume nothing about my client's intentions." (A145). Two days later, Centrella's counsel advised Miller her client had "yet to decide if, when or how he will join [redacted] *Id*.[6]

[6] Asked to reconcile his counsel's statement with his claim he accepted the job before termination, Centrella simply repeated he "already accepted employment at [redacted] at that date but I hadn't started." TR71 (Centrella) (A702).

On September 6, Centrella's counsel advised Miller by email her client had accepted [redacted] offer and would be starting on or about September 21. (A149); PTO ¶23 (A669). Along with the email, his counsel included a draft complaint captioned *Marc J. Centrella v. Avantor, Inc. and the Board of Directors of Avantor*, asserting a claim for a declaration that Centrella's post-employment covenants were unenforceable. (A149-164).

B. The Advancement Action

On September 8, 2022, Avantor sued Centrella in the Chancery Court, seeking enforcement of non-compete and confidentiality covenants. The Complaint alleged Centrella's pending job violated his non-compete and that he likely had disclosed, or inevitably would disclose, confidential information to his new employer in violation of his confidentiality restrictions.

On September 9, Centrella demanded advancement on the sole basis that he was sued as "a corporate officer of Avantor." PTO ¶33 (A671); (A267-68). On September 28, Centrella answered the Plenary Action Complaint, also asserting a Counterclaim for a declaration his covenants were unenforceable. The next day, he commenced the underlying Advancement Action, again asserting the Officer Claim as the sole basis for his alleged entitlement. (A319-A336).

On October 12, 2022, [redacted] rescinded its job offer and on October 18, Avantor stipulated to dismissal of its Complaint without prejudice "because the claims for relief … are now moot." Stip. Order Dismiss Pl's. Claims, Plenary Action (Oct. 18, 2022) (A339). Avantor further represented it "no longer has any reason to believe Centrella has used any of Avantor's confidential information for his own benefit or the benefit" of [redacted] *Id.* (A339, n.1). On February 10, 2023, Centrella amended his pleading to add a tortious interference claim. (A349-A371).

On October 26, 2022, the parties cross-moved for summary judgment in the Advancement Action. Discovery – including Centrella's February 14, 2023, deposition of Avantor's then–General Counsel (Miller) – proceeded pending a summary judgment ruling. (A372-A478). On March 23, 2023, Centrella filed a "renewed" summary judgment motion, adding a new, alternative argument that he was entitled to advancement because "Avantor's By-laws expressly extend advancement rights to 'employees' of Avantor's subsidiary corporations of which Centrella is one." (A484-85).

On November 13, 2023, the Chancery Court dismissed Centrella's Officer Claim, but held his Employee Claim for trial. Op. 11. The Court also concluded it had no subject matter jurisdiction over Centrella's Counterclaims, which were refiled in the Superior Court. Trans. of Ruling on Summary Judgment, Advancement

Action (Nov. 13, 2023). On November 21, Centrella amended his Advancement Petition to assert the new Employee Claim, which was tried on April 4, 2024. Am. Pet., Advancement Action, (Nov. 21, 2023) (A510-A528).

C. Avantor Disavows Any Claims

When Avantor dismissed its Plenary Action Complaint, Centrella's non-competes had ten months left on their term. To avoid any implication it was waiving it contractual rights for the remaining term, Avantor dismissed the Complaint without prejudice. Avantor has made it clear, however, that the dismissal ended for all time any claims arising from Centrella's offer from [redacted]

While Centrella continues to litigate aggressively his claims against Avantor, Avantor has not asserted any new claims against Centrella. Instead, it has affirmatively disavowed any unresolved claims arising from the withdrawn job offer. Among other things:

- Although two years have passed since Avantor dismissed its only claim against Centrella, it has brought no new claims.

- In its Pre-Trial Brief, Avantor wrote that "[a]ny 'threat' of Avantor's affirmative claims ended on October 18, 2022, when Avantor voluntarily and with Centrella's consent, dismissed its claim." Avantor's Pre-Trial Brief at 35 (A658).

- In its Post-Trial Brief, Avantor represented:

> The Plenary Action Complaint was dismissed as moot, a representation the circumstances giving rise to the Plenary Action were no longer extant. … This includes all aspects of [Avantor's] claim: the non-compete breach; the alleged confidentiality breach; and the damages prayer. … Any effort to "reassert" such claims would have required a subsequent change of circumstances; specifically, a decision by Centrella to take a different job with a competitor before the non-compete expired.

Post-Trial Brief (A850) (citations omitted).

- In its Post-Trial Brief, Avantor rejected Centrella's alleged concern that it would pursue damages for Centrella's "short-lived [redacted] offer" stating

> it is unclear what damage claim might exist given that: (a) the Plenary Action, which included a prayer for damages, was dismissed as moot; (b) Centrella did not go to work for a competitor; (c) the dismissal stipulation recites Avantor has no reason to believe he provided confidential information to [redacted] (c) Avantor, Inc., has not brought a damage claim; and (d) almost two years have passed since [redacted] withdrew its offer.

Id. (A833).

- On August 19, 2023, Centrella's non-compete expired. When asked during the June 18, 2024, post-trial argument whether Avantor believed the expiration should be extended through equitable tolling, Avantor's counsel noted that no such claim had been asserted and that "the company is not arguing that during his brief period between when on September 6 his counsel let us know that he would intend to join and start … and when we brought suit, we're not arguing that should

extend any noncompete period." Trans. of Post-Trial Oral Arg., Advancement Action, 82-83 (June 18, 2024) (A966-67).[7]

- Avantor's counsel represented to the Chancery Court that it had submitted a sworn interrogatory response in the Superior Court action confirming it would not assert damages against Centrella related to its Plenary Action Claims and that it was aware of no damages. *Id.* 83 (A967).

- Asked by the Court at the post-trial hearing whether Avantor had a claim for damages or injunctive relief, counsel responded:

> The company is aware of no facts that would give rise to a claim. The company's not giving a release. It's just not aware of any facts.
>
> Now, I guess there's a theoretical argument that the company might have had some damages, probably legal fees, before for a period of a couple of days there was an issue about whether Mr. Centrella was going to take a job that the company believed was a violation. The Company has no intent to purse that damages claim … And I'll make that representation Your Honor.

Tr. 89-90 (A973-74).

[7] The Opinion suggests the Chancery Court was uncertain whether Avantor has foresworn any claim the non-compete should be equitably tolled. Op. 35. Avantor unequivocally represents it will not assert any such claim. As discussed below, any such claim would be meritless, even if brought.

D. The Chancery Judgment

On July 1, the Chancery Court issued its Opinion, holding Centrella "prevail[ed] in full on his claims." Op. 41. The Court held Centrella was a "Covered Person" under the Employee Claim and that Avantor's Plenary Action Complaint stated claims arising in his covered capacity. *Id.* at 31. The Court further held that Centrella's Counterclaims were compulsory, and therefore subject to mandatory advancement. *Id.* 32; *id* 37, n.146 (when "first asserted" Centrella's Counterclaims were designed to defeat or offset Avantor's claim). Avantor does not appeal those holdings.

Avantor does appeal the Chancery Court's holding that Centrella's Counterclaims ***remain*** subject to ongoing advancement, despite Avantor's having dismissed as moot its only claim against him and its disavowal of any unasserted claim. *Id.* 33-38. Avantor also appeals the holding that Centrella was entitled to "complete fees on fees," even for "legal argument(s) that either did not pan out or [were] unnecessary to showing entitlement to advancement. ..." *Id.*

E. The Superior Court Dismissal

On May 8, 2024, Avantor moved to dismiss Centrella's amended claim for a declaration that his employment covenants were unenforceable. Superior Court Action, D.I. 32. Part of the Chancery Court's rationale for continuing advancement

was that because Avantor's mooted complaint was dismissed without prejudice, the Court "remain[ed] unassured that Avantor, Inc. will not refile advanceable claims against Centrella." *Id.* 38. With the same facts before the Superior Court as those before the Chancery Court, Judge Wallace came to a very different conclusion. Noting that a declaratory judgment action "requires an actual controversy which in turn mandates a present dispute," the Superior Court held:

> [T]here is no present dispute that the Court can glean on what precisely Mr. Centrella can or cannot do, other than the generalized [duty not to use] certain confidential information that he obtained from his former employment either because of contract right, or as Avantor said, there could also be a common law claim.
>
> … The court doesn't see that there's an actual active controversy present related to that.
>
> … There just does not seem to be anything left of that claim that the Court would feel comfortable exercising the discretion to enter a declaratory judgment.
>
> … The present applicability of an expired covenant and no active enforcing attempt or alleged harm by the other side, just aren't appropriate for judicial determination at this point.

Trans. Superior Court Action, at 59-60, 62-63 (Aug. 28, 2024) (A1039-40, 42-43).[8] As a matter of simple logic, if there is no dispute between the parties, no case or controversy, there is no present "threat" a claim will be asserted by Avantor.

[8] This Court may take judicial notice of the proceedings and rulings in the Superior Court Action, which is the underlying litigation for which Centrella has been

ARGUMENT

I. THE CHANCERY COURT ERRED BY APPLYING DEFERENCE APPLICABLE TO ADVANCEMENT CLAIMS.

Question Presented

Where the claim triggering advancement is terminated, but the claimant elects to continue prosecuting affirmative counterclaims, is the reimbursement claim for indemnification or for advancement? Avantor Post-Trial Br.34-35 (A837-38).

Scope of Review

Whether a claimant has stated a cause of action, here a claim for advancement or indemnification, is a question of law. *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Miller v. Phillips Petroleum Co. Norway*, 537 A.2d 190, 194 (Del. 1988). Questions of law are subject to *de novo* review by this Court. *Rhone Poulenc Basic Chemicals Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

Merits

Indemnification and advancement "are separate and distinct legal actions." *Homestore, Inc. v. Tafeen,* 888 A.2d 204, 212 (Del. 2005). Advancement is forward-looking, awarding ongoing legal expenses for *pending* investigations and

awarded advancement. DRE 201; *Baldwin v. New Wood Res. LLC,* 283 A.3d 1099, 1123 (Del. 2022) ("this court can take judicial notice" of pleadings in related actions) (citations omitted).

proceedings. *Id.* at 211. Once a covered matter is concluded, whether on the merits or otherwise, the claim become one for indemnification – not advancement. *Id.*

While Centrella's Petition sought indemnification and advancement as alternative remedies, he never responded to our observation that his arguments sounded in advancement only. Avantor Post-Trial Br. 45-46 (A848-49). Nor did the Chancery Court address the issue.

The distinction is meaningful. Advancement is a provisional remedy invoked through a streamlined, summary procedure incorporating claimant-friendly presumptions. Indemnification claims are subject to a more searching inquiry, which includes reconsideration of any advancement determinations and recoupment of payments where appropriate. In parsing the distinction, this Court has described the former as "having a much narrower scope" than the later:

> [A]n advancement proceeding is summary in nature and not appropriate for litigating indemnification or recoupment. The detailed analysis required of such claims is both premature and inconsistent with the purpose of a summary proceeding.

Kaung v. Cole Nat. Corp., 884 A.2d 500, 510 (Del. 2005). Accordingly, in deciding a former chief executive officer and director's claim for indemnification for the costs of defending four claims asserted by the corporation, the Chancery Court analyzed each claim separately, explaining:

> Had this been an advancement proceeding, I would likely have viewed the four claims at issue holistically and found that the 'by reason of the fact' requirement was satisfied. Analyzing claims with a broad brush is not, however, the proper course in an indemnification proceeding.

Evans v. Avande, Inc., 2021 WL 4344020, at *8, n.75 (Del. Ch. Sep. 23, 2021); *see Thompson v. Orix USA Corp.*, 2016 WL 3226933, at *6 (Del. Ch. June. 3, 2016) ("Rather than engage in a line-drawing exercise now, it is more appropriate … for counsel to monitor the expenses for which advancement is requested and address granular disputes as necessary at the indemnification stage."); *Holley v. Nipro Diagnostics, Inc.,* 2014 WL 7336411, at *9 (Del. Ch. Dec. 23, 2014) ("In advancement cases, the line between being sued in one's corporate capacity generally is drawn in favor of advancement with disputes as to the ultimate entitlement to retain the advanced funds being resolved later at the indemnification stage."); *Mooney v. Echo Therapeutics, Inc.*, 2015 WL 3414372, at *9 (Del. Ch. May 28, 2015) ("The Company's remedy for any improperly advanced fees is to seek recoupment in future indemnification provisions.").

By treating Centrella's claim as one for advancement, the Chancery Court gave Centrella the benefit of permissive presumptions to which he would not be entitled in an indemnification claim. Addressing whether a threat exists of further claims against Centrella, the Chancery Court "paused":

> to reiterate that any doubts should be resolved in favor of advancement. The policy of Delaware favors advancement when it is provided for, with the Company's remedy for improperly advanced fees being recoupment at the indemnification stage.

Op. 37 (quoting *Mooney*, 2015 WL 3414372, at *6). Discussing whether Centrella had been sued in a covered capacity, the Court opined: "[i]n advancement cases, the line between being sued in one's personal capacity and one's corporate capacity generally is drawn in favor of advancement with disputes as to the ultimate entitlement to retain the advanced funds being resolved later at the indemnification stage." Op. 28-29 (citing *Mooney v. Echo Therapeutics*, 2015 WL 3414372, at *7).

The error in the applicable standard infected the Court's analysis – particularly the question of whether a litigation threat existed that warranted advancement, as discussed below. In addition, the determination has far-reaching implications as Delaware law favors "deferring fights about details until the indemnification stage." *Danenberg v. Fitracks, Inc.,* 58 A.3d 991, 998 (Del. Ch. 2012) (citations omitted). As a result, the Chancery Court not only granted Centrella a more deferential standard on his entitlement to advancement, but also as to the remedy by postponing Avantor's ability to challenge meaningfully the invoices submitted for reimbursement.

Because the Court evaluated Centrella's claim under an inapplicable legal standard, reversal is appropriate. *C&J Energy Servs. v. City of Miami Gen. Emps. &*

Sanitation Emps.' Ret. Trust, 107 A.3d 1049, 1066 (Del. 2014) (reversing where "the Court of Chancery failed to apply the correct standard of review …."); *New Cingular Wireless PCS v. Sussex Cnty. Bd. of Adjustment,* 65 A.3d 607, 611 (Del. 2013) (a "decision based upon the proper legal standard is a prerequisite to the court's performance of a review…") (citations omitted).

II. THE CHANCERY COURT ERRED BY HOLDING ADVANCEMENT CONTINUES.

Questions Presented

1. Where a claimant is entitled to advancement for affirmative litigation that is part of a defense to underlying claims for which coverage is mandatory, does advancement for the claimant's affirmative litigation continue after the underlying claims terminate? Avantor Post-Trial Br. 46-52 (A849-55).

2. Does a litigation threat entitling a claimant to advancement exist where the putative adverse party disavows the existence of any claims against the claimant? *Id.*

Scope of Review

1. Whether Avantor's By-laws require advancement for defensive counterclaims until those claims are fully resolved involves the construction of unambiguous contract language and "is purely a question of law … review[d] *de novo* for legal error …" *Rhone Poulenc Basic Chemicals Co.*, 616 A.2d at 1195.

2. The term "threat" as used in Avantor's indemnification By-law is unambiguous and its construction is a question of law, "review[d] *de novo* for legal error …" *Id.* To the extent the issue is a mixed question of fact and law, it is subject to *de novo* review. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999).

Merits

The Chancery Court gave two rationales for holding Centrella's advancement right will continue through the final resolution of his affirmative tortious interference claim in the Superior Court. *First*, the Court found that once advancement is triggered for a particular lawsuit, it continues for the entire "proceeding" – which the Chancery Court held as including Centrella's Counterclaims:

> Defendant directs the Court to no case suggesting that one must remain under a continued threat of litigation to receive advancement. … Although these events triggered Centrella's right to advancement under the By-laws on July 28, 2022 … the By-laws do not themselves suggest the right to advancement ends before the 'final disposition' of the Underlying Action because the indemnitor dismisses its claims. The use of "final disposition" in Section 7.02 tracks the language of 8 *Del. C.* §145(e) and means 'the final, non-appealable conclusion of a proceeding." Here, the Underlying Action (a "proceeding" as defined in Section 7.01 and used in Section 7.02 of the By-laws) has not reached its 'final, non-appealable conclusion,' so this remains an action for advancement."

Op. 33, n.131. *Second*, the Chancery Court held Centrella faced a continuing litigation "threat" because Avantor has not given him a formal release of the claims it dismissed as moot. Op. 35-38. Both legs of the analysis constitute legal error.

A. Once The Claim Triggering Advancement Ends, So Does Advancement.

We are aware of no other instance in which a Delaware Court has held advancement continues even after the threat of litigation that triggered it in the first

place terminates. To the contrary, Delaware Courts consistently have held that advancement is available for a claimant's affirmative causes of action *only* if they are "advanced to defeat, or offset the affirmative claims." *Pontone v. Milso Indus. Corp.*, 2014 WL 2439973, at *4 (Del. Ch. May 29, 2014) (internal citation omitted) (defining compulsory counterclaims as advanceable). For a counterclaim "[t]o be defensive, and thus subject to advancement, [it] must be responsive to some actual threat." *Duthie v. CorSolutions Med., Inc.,* 2009 WL 1743650, at *3 (Del. Ch. June 16, 2009). Once "the *threat* has ended, there cannot be a right to advancement of fees and expenses for affirmative claims designed substantively to defeat that threat." *Id.* (no advancement for "solely offensive" counterclaims).

When the claim or threat triggering advancement ends, so does coverage for previously defensive counterclaims. *E.g., Carr v. Glob. Payments Inc.*, 2019 WL 6726214, at *8-9 (Del. Ch. Dec. 11, 2019) (advancement stopped when pleading amended to remove allegations triggering coverage); *Mooney v. Echo Therapeutics, Inc.*, 2015 WL 3413272, at *12 (Del. Ch. May 28, 2015) (denying advancement where defendant withdrew relevant claims; "[o]ur advancement law simply does not stretch that far"); *Duthie*, 2009 WL 1743650, at *3 (advancement for defamation action discontinued where defendants represented they would not bring covered

fraud claims). As the *Duthie* Court explained, "to do otherwise would be "an unwarranted expansion … of Delaware case law." *Id.*, 2009 WL 1743650, at *8.

Diverging from this guidance, the Opinion holds that once an indemnitee brings affirmative claims to "defeat or offset" an event triggering advancement, advancement ***must*** continue until the affirmative claims reach a final, non-appealable conclusion – even if the triggering claim or threat terminates. Op. 33, n.131. The holding is premised on defining "proceeding" in the By-law as the Court case in which the indemnifiable claim originally was asserted. There is no justification for investing the term "proceeding" in the By-laws with a meaning different than that applicable to the same term in 8 *DEL. C.* §145. *Benchmark Capital Partners IV, LP v. Vague*, 2002 WL 1732423, at *7 (Del. Ch. July 15, 2022) ("Where the drafters have tracked the statutory language" in a corporate governance document, courts construe the provision consistent with the statute).[9]

[9] The theory that the By-law's use of the term "proceeding" mandated continuing advancement was crafted *sua sponte* by the Trial Court, having not been argued by Centrella. As a result, Avantor did not have the opportunity to rebut it or to explore its implications. Clear anomalies deprive it of force. In a footnote, the Trial Court noted a different result might have been reached had Avantor pointed out that Centrella's tortious interference Counterclaim was asserted after Avantor dismissed is Complaint. Op 37, n.146. Why that would be the case is unclear given that, under the Court's holding, the tortious interference claim was still asserted in the same "proceeding" as Avantor's previously-dismissed Complaint. Moreover, tying advancement to a civil action number as opposed to the claim or threat seemingly would yield a different result if Avantor ***threatened*** litigation (an act that would

While recognizing the By-laws incorporate the language of §145, the Chancery Court indicated it also expanded the scope of coverage:

> Indeed, another way to communicate "to the fullest extent under the law" would be simply to copy relevant portions of the indemnification and advancement statute into the Bylaws, but change the statute's permissive language to be mandatory. The drafters of the Bylaws seem largely to have adopted this approach, with limited deviations from the statutory text further reflecting the drafters' intent to confer extraordinarily broad rights."

Op. 15, n. 77. The By-laws' only other meaningful deviation from the statutory text is an extension of coverage to those "serving at the request of the Corporation as a director, officer, employee, agent or trust of another" entity, in addition to Avantor officers and directors. *See* Avantor By-laws, §7.01 (A69).

By contrast, the scope of covered claims by the statute and the By-law is substantively identical. The By-law applies to "[e]ach person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding … by reason of the fact he or she is or was" a covered person. *Id.* The statute authorized corporations "to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action … by reason of the fact that the person is or was" a covered person. 8 *DEL. C.*

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trigger advancement) but did not commence a "proceeding," or if the claimant's affirmative litigation was brought in a separate action rather than as a counterclaim.

§145(a). Nothing in the By-law's text supports a conclusion that it covers classes of claims that would not be covered under the Statute.

The Opinion cites no authority in support of its position that the By-law's use of "final disposition" changes the meaning of "proceeding." Indeed, the Court noted the term "final disposition" in Section 7.02 tracks the language in 8 *DEL. C.* § 145(e) and means 'the final, non-appealable conclusion of a proceeding'." Op. 33, n.131. Notably, the articles in *Duthie* contained the same language but the Court found the indemnitee's right to advancement ended before the final disposition of the lawsuit in which the affirmative claim was asserted. *Duthie,* 2009 WL 1743650, at *2, n. 12.

The Chancery Court's conclusion that, once triggered, advancement necessarily continues until the ***lawsuit*** ends, is particularly curious given its recognition that the authorities say otherwise. The Chancery Court explicitly noted that authorities "show that 'amendment can eliminate advancement obligations,' if 'the amendment and the amending party's representations alter the claim in a manner that assures the Court the plaintiff will not face litigation that triggers advancement obligations'." Op. 34.[10]

[10] The Court distinguished those authorities by questioning whether Avantor's disavowal of claims against Centrella was sufficient to end the threat of repleading. *Id.* We address that issue below.

In *Mooney*, for example, the petitioner's former employer brought and then withdrew claims against its former employee. ("*Mooney I*"). The petitioner brought a separate action for wrongful prosecution based on the abandoned claims ("*Mooney II*"). *Id.* The Court ruled the indemnitee was not entitled to advancement for the wrongful prosecution suit because:

> The only relevant affirmative claims asserted by the Company appear to be the Original Counterclaims, which [Indemnitor] withdrew before *Mooney II* was filed. Granting advancement for *Mooney II* would require a finding that, in that action, [Indemnitee] is "defending" against the counterclaims [Indemnitor] formerly asserted against him, but later withdrew in *Mooney I*. Our advancement law simply does not stretch that far.

2015 WL 3413272, at *11. Notably, *Mooney* does not state that the counterclaims were withdrawn "with prejudice," were formally released or were subject to *res judicata*.

The Trial Court distinguished *Duthie*, another decision in which the Chancery Court found advancement unavailable for a claimant's affirmative counterclaim, on the ground that the claims that originally triggered advancement were "barred by principles of issue preclusion." Op. 35 (quoting *Carr*, 2019 WL 6726214, at *8). The *Duthie* Court, however, did not base its reasoning on any reference to issue preclusion. Instead, *Duthie* explained, in part, that "Defendants have demonstrated their desire not to pursue those claims further …by filing an answer … without asserting any counterclaims." *Id.* Based on the totality of the circumstance "there is

no longer an active (or even threatened) claim that the Plaintiffs need to resist" and that "it would be an unwarranted expansion of both the plain language of the advancement provisions … and Delaware case law to order the continued advancement of fees and expenses associated with the Plaintiffs' affirmative claims." *Id.* The same is true here. Avantor argued in its brief that its answer to the Amended Counterclaims on February 26, 2024, without raising any claims against Centrella, further evidenced that there is no longer an active (or even threatened claim) that he needs to resist.

B. Any "Threat" Ended in October 2022.

The Chancery Court's alternative basis – that Centrella still faces a litigation "threat" – applies a legally erroneous definition of "threat." It is undisputed that the only claim Avantor ever brought against Centrella was its short-lived Plenary Action, which lasted from September 8 to October 18, 2022. It is equally undisputed that Avantor has not in any way manifested, explicitly or implicitly, an intent to initiate a claim against Centrella. Indeed, Avantor has stated explicitly that it has no claims against him.

The Chancery Court's holding is premised on the hypothetical possibility that at some future time Avantor might refile its moot claim because it was not dismissed

"with prejudice" and because Avantor has not issued Centrella a release. As a result, the Court was:

> skeptical that Avantor, Inc.'s voluntary dismissal of its claims without prejudice adequately "assures the Court that" Centrella "will not face litigation that triggers advancement obligations." Indeed, notwithstanding defendant's assertion that the durational terms of the relevant non-compete provisions it sought to enforce have since expired, the complaint's prayer for relief in the [Plenary] Action makes multiple references to extensions of the non-compete period pursuant to "applicable tolling provisions" in the relevant agreement. And Avantor repeatedly has refused to agree not to reassert certain claims under those agreements against Centrella.

Op. 35. In essence, the Chancery Court construed the term "threat" as a risk – no matter how remote – as opposed to an implicit or explicit warning by a claimant that litigation is coming.

The Chancery Court erred by using a legally inapplicable definition of "threat." In *Donohue v. Corning*, 949 A.2d 574 (Del. Ch. 2008), the petitioner sought advancement for an action he brought contesting his removal for cause as a director of a Delaware entity, reasoning that the asserted basis for removal (breaches of fiduciary duty) constituted a threat of a proceeding. Finding the By-law extended advancement to responses to asserted or threatened claims, the Court observed that "[t]he only explicit threat by the defendants was that they would remove him for cause." *Id.* at 580. By contrast, the record contained "multiple statements that the defendants were not "threatening any 'claim, action, suit, or proceeding'." *Id.* at 581.

Removal, however, was not a "proceeding" within the meaning of the By-law. *Id.* at 580. Turning to the definition of "threat," the *Donohue* Court opined:

> Looking to the dictionary definition [of "threat"] is not particularly helpful because threaten can mean "[t]o express a threat against," which suggests an explicit threat of a proceeding would be required, or "[t]o give signs or warnings of," which suggests the mere possibility of a future proceeding would suffice. What is informative, however, is looking at the Advancement Provision as a whole. The Provision's limitation that expenses will only be advanced for defensive or responsive actions would be eviscerated by taking an overly broad reading of threatened Proceedings. In other words, if any cloud on the horizon could constitute a threatened Proceeding, the language specifically included in the By-laws to limit advancement to defensive or responsive actions would become meaningless because the Covered Person could find a threatened Proceeding to use as a pretext in initiating whatever type of affirmative action he desired to bring. This dispute provides an example of that.

Id. at 581.[11] In other words, statements that fiduciary duties were breached was not a "threat" giving rise to advancement absent a manifestation that defendants intended to initiate an action asserting such claims. *OrbiMed Advisors LLC v. Symbiomix Therapeutics, LLC*, 2024 WL 747567, at *5 (Del. Ch. Feb. 23, 2024) ("A 'threat' is "an indication of an approaching menace; or the suggestion of an impending detriment.") (citing Black's Law Dictionary (11th ed. 2019)). Here, there

[11] As with the by-law construed in *Donahue*, Avantor's By-law excludes coverage for a claimant's affirmative claims other than compulsory counterclaims, petitions to enforce indemnification rights or claims "authorized by the Board of Directors." By-laws, §7.01 (A69).

is not even a statement that Avantor has any existing claims against Centrella, let alone an explicit or implied threat to bring a claim.

In other contexts, the Courts construed litigation "threats" in the same way – requiring words or conduct evincing an intent to initiate a proceeding seeking a remedy for a claim. In *Rexam Inc. v. Berry Plastics Corp.*, 2015 WL 7958533 (Del. Ch. Dec. 3, 2015), the Chancery Court parsed the meaning of "threat" in a dispute over whether a buyer's obligation to close was excused by a Pension Benefit Guaranty Corporation ("PBGC") challenge to alleged pension plan underfunding. The purchaser had the right to terminate the transaction if "there is pending or threatened legal or administrative action by" PBGC, which allegedly occurred as a result of an email stating, in part: "While PBGC does not plan to initiate legal action against Rexam at this time, we have not yet decided whether we will pursue this matter through the IRS and/or professional actuarial organizations." *Id.* at *2. Noting that PBGC "gave no indication it would do anything about the Pension Plan Transfer," the Court rejected the contention the email contained a threat. *Id.* at *5. Rather, it reflected "a frustrated governmental agency that, at least as of the time of the email, did not anticipate or suggest that it would likely pursue the matter. That is not a threat." *Id.* The Court further observed that "while Berry's apprehension is certainly understandable, the PBGC did not threaten to take action." *Id.* Similarly, in

I/MX Info. Mgmt. Sol. v. Multiplan, Inc., the Court held that, to constitute a litigation threat, "QMC would have to do more than simply notify Multiplan of a problem," but "must have expressed that it was going to do something about that problem, in such a way that a reasonable person would understand that QMC was intending to press the issue through a proceeding before a third party." 2014 WL 1255944, at *9 (Del. Ch. Mar. 27, 2014) (dispute over right to retain transaction escrow where litigation threatened).

The Chancery Court found no evidence Avantor manifested an intent to press any "issue through a proceeding before a third party" – only a concern the "without prejudice" dismissal of Avantor's Plenary Action claim in October 2022 did not legally foreclose that possibility. Even if the theoretical possibility of a claim is the proper standard (it is not), the evidence does not support any such risk. The Plenary Action Complaint was dismissed as moot, a representation the circumstances giving rise to the Plenary Action were no longer extant. *DG BF, LLC v. Ray*, 2020 WL 4045242, at *2 (Del. Ch. Jul. 17, 2020) ("Mootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in the matter.") (quoting *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003)). That includes all aspects of Avantor's claim: the non-compete breach; the confidentiality breach concern; and the damages prayer. Avantor specifically stipulated that

"[b]ased on discovery to date and Centrella's own representations, Avantor no longer has reason to believe" Centrella used its "confidential information for his own benefit or that of [redacted] Stip. Order Dismiss Pl's. Claims, Plenary Action (Oct. 18, 2022) (A339, n.1). Avantor has not asserted any claim in the two years since and has represented it is aware of no facts that any claim against him exists. On the same facts, the Superior Court held "there is no present dispute that the Court can glean on what precisely Mr. Centrella can or cannot do …" Trans., Superior Court Action, at 59 (Aug. 28, 2024) (1039).

One can easily imagine the response of a Court if, in the face of such representations, Avantor attempted to revive the claim it dismissed two years ago. After receiving similar disavowals of an intent to sue in *Donohue v. Corning*, this Court observed: "Having made the decision not to institute or threaten to institute a proceeding against Donohue for his actions …, the defendants are stuck with that decision." 949 A.2d at 580, n.26.

Given the undisputed evidence Avantor has not explicitly or implicitly manifested an intent to bring a claim against Centrella in any forum, the Chancery Court's holding that Centrella remains under a threat is erroneous as a matter of law. The finding that a threat exists is even more untenable given Avantor's explicit

disavowals. The holding that advancement is available for litigation fees incurred after Avantor dismissed its only asserted (or threatened) claim must be reversed.

III. THE CHANCERY COURT ERRED BY AWARDING ALL FEES-ON-FEES.

Question Presented

Is a petitioner who prevails on an advancement claim entitled to fees-on-fees for pursuing theories explicitly rejected by the Chancery Court? Op. 38-41; Avantor Post-Trial Br. 52-54 (A855-57).

Scope of Review

The requirement that fees-on-fees be "proportionate" and "reasonable" in light of any success achieved is a question of law. *See Fasciana v. Elec. Data Sys. Corp*., 829 A.2d 178, 182 (Del. Ch. 2003); *Holley*, 2014 WL 7336411, at *15. Questions of law are reviewed *de novo* on appeal. *Rhone Poulenc Basic Chemicals Co.*, 616 A.2d at 1195.

Merits

It is undisputed that for the first year of this advancement dispute, Centrella actively litigated his Officer Claim as a basis of his purported entitlement. Indeed, from September 2022 until he filed his "renewed" summary judgment brief in March 2023, the Officer Claim was his only asserted basis. It also is undisputed that in November 2023, the Officer Claim was dismissed on the merits. The Chancery Court, however, awarded Centrella all his fees on fees, even those incurred in furtherance of the legally invalid Officer Claim.

Avantor's By-laws provide with respect to fees on fees in an advancement dispute:

> To the fullest extent permitted by law, if successful in whole or in part in any such suit, or in a suit brought by the Corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit.

By-laws, §7.03 (A70). The Chancery Court held Centrella was entitled to all of his fees in pursuing advancement, even though he actively pursued his legally invalid Officer Claim for the first year of litigation.

The Chancery Court gave three reasons for its conclusion. *First*, the By-law "leaves no question that even a partially successful action by Centrella for advancement under Section 7.02 obligates Avantor to pony up." Op. 40. *Second*, "our law is not concerned with which theory a party prevails on when it comes to apportioning fees on fees for varying levels of success. Instead it is concerned with the actual success achieved." *Id.* *Third*, the Chancery Court characterized Centrella as "entirely successful on his claim for advancement." *Id*. 39-40.

The Chancery Court's first two rationales assume that any level of success by Centrella entitled him to an award of all fees, including for his invalid Officer Claim. That assumption clashes with the bedrock principle that "[a]ny award of fees-on-fees must be 'reasonably proportionate to the level of success … achieved'." *Meyers*

v. Quiz-Dia LLC, 2018 WL 1363307, at *11 (Del. Ch. Mar. 16, 2018) (quoting *Fasciana*, 829 A.2d at 184). That principle is founded in Delaware General Corporations Law ("DGCL"), §145 pursuant to which the Court "will 'only award that amount of fees that is reasonable in relation to the results obtained'." *Holley,* 2014 WL 7336411, at *15 (quoting *Pontone v. Milso Indus. Corp.*, 100 A.3d 1023, 1058 (Del. Ch. 2014)).

The *Fasciana* Court so held even though there, as here, the "By-laws clearly require [the company] to provide indemnification … to the fullest extent permitted by [DGCL] §145." *Id.* at 182. Construing a comparable by-law in *Pontone v. Milso Indus. Corp.*, the Court reasoned that "[a]lthough a literal reading of New Milso's By-law suggests that Scott is entitled to indemnification for all 'fees on fees' related to this advancement action if he is even partially successful, this Court, under Section 145 of the DGCL, will 'only award that amount of fees that is reasonable in relation to the results obtained'." 100 A.3d at 1058; *see also Holley,* 2014 WL 7336411, at *15 (DGCL required "reasonable [fees] in relation to the results obtained" where agreement mandated fees-on-fees "if [claimant is] successful in whole or in part"); *Schoon v. Troy*, 948 A.2d 1157,1176 (Del. Ch. 2008) (rejecting argument that comparable By-law required payment of all fees for partial success; plaintiffs "are restricted to an award that is proportionate to their success …").

Vice Chancellor Strine held that Delaware law "requires that EDS's By-law be read as requiring to indemnify Fasciana for any *reasonable* fees incurred by him, but only to the extent permitted by §145." *Fasciana,* 829 A.2d at 182 (emphasis added; citing *Stiftel Fin. Corp. v. Chochran*, 809 A.2d 555 (Del. 2022)); *Zaman v. Amedeo Holdings., Inc.*, 2008 WL 2168397, at *39 (Del. Ch. May 23, 2008) ("plaintiffs who are only partially successful shall receive fees on fees reflecting the extent of their success").

Although some authorities discuss proportionality in terms of results achieved – the Chancery Court's approach in concluding Centrella was "entirely successful" – the principle also has been applied to exclude fees on fees for pursuing unsuccessful arguments in a winning cause. In *May v. Bigmar, Inc.*, 838 A.2d 285 (Del. Ch. 2003), *aff'd*, 854 A.2d 1158 (Del. 2004), an indemnification petitioner offered numerous legal theories to invalidate a critical board meeting, two of which were found to be "unpersuasive" and two of which were found to "have merit." *Id.* at 291 n.26. In awarding partial fees-on-fees, the Court held: "There should be no indemnification for losing issues, including subparts of a 'winning' issue as to which the trial made specific negative findings." *Id.* at 291.

In *Fasciana*, Vice Chancellor Strine explained the policy considerations mandating proportionality in rejecting the contention of a partially successful claimant that all fees-on-fees should be awarded:

> Fasciana's rule would encourage attorneys for parties seeking advancement to raise any conceivable argument that can pass Rule 11 muster knowing that any level of ultimate success would warrant a full fees on fees award. Limiting fees on fees awards by imposing a proportionality requirement encourages parties seeking advancement or indemnification to raise only substantial claims and encourages corporations to compromise worthy claims (lest they suffer a fees on fees award) and resist less meritorious claims (knowing that success will bar a fees on fees recovery for the plaintiff).

829 A.2d at 184. This action is a case in point. For months, Centrella pursued (and Avantor defended) only one entitlement claim – the Officer Claim. In prosecuting that claim, Centrella conducted paper discovery, deposed Avantor's General Counsel, briefed two rounds of summary judgment motions and participated in multiple Court hearings. Although Avantor successfully opposed that claim, it is now required to pay for Centrella's failed efforts.

The Chancery Court erred by rejecting a proportionality analysis and, more specifically, by awarding fees-on-fees for Centrella's unsuccessful Officer Claim. Reversal is required as a matter of law.

CONCLUSION

For the reasons stated, the Chancery Court erred in holding Centrella is entitled to (1) advancement of fees incurred prosecuting his affirmative claims after Avantor dismissed its Plenary Action Complaint; and (2) all fees-on-fees, including those incurred pursuing his dismissed Officer Claim. Avantor respectfully requests this Court reverse the Chancery Court's ruling and, should this Court find additional fact finding is necessary, Avantor requests the Court remand the matter to the Chancery Court with guidance on the proper legal standards for the issues addressed on appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2024, I caused a true and correct copy of the foregoing *Public Version of Appellant's Opening Brief* to be served by File & ServeXpress upon the following counsel of record:

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