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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

APPELLEE'S ANSWERING BRIEF

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PRELIMINARY STATEMENT

In this rigorously litigated proceeding – which has gone through extensive discovery, trial on the merits, and two Avantor motions to stay – claimant Marc Centrella seeks advancement for costs incurred as a result of Avantor's claims that he breached certain covenants. Avantor does not contest the Court of Chancery's conclusion that Avantor's claims (both threatened and asserted) triggered advancement under Avantor's "purposely" broad Bylaws. Nor does Avantor dispute the Court of Chancery's conclusion that Centrella's counterclaims in the Underlying Action[1] were compulsory and therefore subject to mandatory advancement. Instead, Avantor argues that – notwithstanding the foregoing – Centrella's right to advancement terminated as a matter of law when Avantor dismissed its affirmative claims "without prejudice."

The Court of Chancery properly rejected this argument. In a 41-page opinion issued after a full day of trial (the "Opinion"), the Court noted – among other things – that:

- Avantor's contention that it dismissed its claims as "moot" is belied by the record;
- Avantor's "sweeping" Bylaws expressly extend its advancement obligations not only to affirmative causes of action, but also any threatened litigation and any compulsory counterclaim by a covered party

[1] The "Underlying Action" is the plenary action presently pending in the Superior Court, styled *Centrella v. Avantor, Inc.*, C.A. No. N23C-10-200 PRW CCLD (Del. Sup. Ct. 2023).

such as Centrella – none of which Avantor challenges on this appeal;

- Avantor failed to meet its burden of proving that Centrella "will not face litigation that triggers advancement obligations" – as, among other things, Avantor *repeatedly* refused to agree not to reassert these or other claims, refused (on the record) to grant a release, and declined to dismiss its claims with prejudice;
- Centrella is entitled to advancement for his compulsory counterclaims in any event – to which Avantor asserts, as defenses, *the same allegations of misconduct* that triggered advancement on its affirmative claims.

Based on the foregoing, the Court of Chancery made a factual finding that Avantor had failed to meet its burden of demonstrating that Centrella is not litigating, and will not litigate, advanceable claims. As the Opinion reflects, this conclusion is amply supported by Delaware law and the Court of Chancery's assessment of record evidence.

The Court of Chancery also properly rejected Avantor's contention that the fees-on-fees award must be reduced for costs incurred on one of Centrella's two arguments on his successful advancement claim. Under Delaware law, fees-on-fees depend on the success of the advancement *claim(s)* – not on whether the court adopts every specific *argument* made in connection with a (successful) claim. Because Centrella was "entirely successful on his claim for advancement," he was entitled to fees-on-fees under Avantor's Bylaws. These Bylaws further make clear the financial consequence of Avantor's decision to litigate advancement (rather than wait until the indemnification stage, as Delaware courts routinely advise) is to be borne by Avantor alone.

NATURE OF PROCEEDINGS

A. Avantor Threatens Centrella with Litigation

From December 2019 until mid-2022, Centrella served as Avantor's "sole Vice President of Corporate Strategy and Mergers and Acquisitions ("M&A)."[2] On July 19, 2022, Avantor announced the hire of Kitty Sahin to "lead[] the Company's strategy and corporate development team."[3] Avantor does not dispute that Centrella understood this to be a demotion, and soon thereafter advised that he was resigning and accepting employment with Waters Company ("Waters").[4]

Beginning on or about July 28, 2022, Avantor threatened to sue Centrella (and to embroil Waters in that public litigation) on the grounds that – among other things – Centrella had breached contractual obligations by accepting employment with Waters.[5] Avantor further claimed that Centrella's employment would lead to the inevitable disclosure of Avantor's confidential information.[6] Centrella thereafter obtained counsel to assess these threats and to engage Avantor on his behalf in hopes of resolving Avantor's concerns.[7]

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2 A321, ¶ 35; A355, ¶ 20.

3 A321, ¶ 36; A356, ¶¶ 21-22.

4 A356, ¶¶ 21-23.

5 A356-60, ¶¶ 27, 29-45; *see also infra* at 12 n.33 (additional citations).

6 *Id.*; *see also* A180-83, ¶¶ 48-63.

7 B152.

B. The Underlying Action

During this same time, Avantor principals (including Avantor's CEO) repeatedly contacted Waters senior management, claiming that Centrella was legally prohibited from working at Waters, indicating that a lawsuit would issue if Waters employed Centrella, and explaining how this would negatively affect Waters.[8]

On August 16, 2022, Avantor terminated Centrella and informed him that his last day of work would be August 19, 2022.[9] Left with no source of income, Centrella advised Avantor that he would commence employment with Waters on or about September 9, 2022.[10]

On September 8, 2022, Avantor filed a verified pleading against Centrella, whom it described as a "*high-level … corporate officer*" functioning as part of Avantor's "inner sanctum."[11] Avantor attested under oath that (i) by merely accepting employment with Waters, Centrella had breached Avantor's non-compete covenants *and had already damaged Avantor*; (ii) Centrella had, on "information and belief," disclosed confidential Avantor information; and (iii) Centrella's employment with Waters would cause the inevitable disclosure of

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8 A360, ¶¶ 43-45; B27-B28.

9 A361, ¶ 49.

10 A361, ¶ 50.

11 A166, A169; Opinion at 10-11 (citing Avantor's admission).

additional confidential Avantor information, such that Centrella should be enjoined from starting such employment.[12]

In response, Centrella filed counterclaims seeking a declaratory judgment that these restrictive covenants did not apply here and were otherwise unenforceable, and, later, damages for tortious interference.[13] The Underlying Action was later transferred to the Superior Court of Delaware.

C. Avantor Successfully Pressures Waters into Rescinding Centrella's Job Offer.

On October 3, 2022, Avantor issued a subpoena to Waters, demanding almost immediate compliance and broad categories of potentially sensitive information dating back to January 2020.[14] By email dated October 12, 2022, Avantor threatened to depose the most senior executives of Waters.[15]

That same day, Waters rescinded Centrella's job offer.[16]

In the days that followed, Avantor withdrew its claims against the now-jobless Centrella "without prejudice,"[17] and claimed that Centrella's advancement

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12 A180-83, ¶¶ 48-49, 51, 58, 62.

13 Centrella's Answer and Verified Counterclaims (A305-15); Verified Amended Counterclaims (A350-69).

14 A365.

15 *Id.*

16 *Id.* ¶¶ 65-70; *see also id.* at A351-65 ¶¶ 3, 27-28, 45.

17 *Id.* at A365 ¶ 71; *see also* A339.

claim (discussed below) should be dismissed.

D. The Advancement Action

On September 29, 2022, Centrella commenced the summary proceeding underlying the present appeal, seeking advancement of legal fees and expenses incurred in connection with Avantor's lawsuit, as well as those incurred in connection with his compulsory counterclaims ("Advancement Action").[18] It is undisputed that Centrella asserted a *single* claim for advancement (Count I), and a separate claim for fees-on-fees (Count II).[19] Initially, based on the admission in Avantor's Verified Complaint that Centrella was a "high-level corporate officer,"[20] Centrella invoked Avantor Bylaws addressing officer indemnification and advancement rights.

The Court of Chancery determined that it could not resolve Centrella's claim on the record before it, and ordered discovery relating to Centrella's relationship with Avantor.[21] Following such discovery, Centrella filed a Renewed Motion for Summary Judgment arguing (as an additional basis for his advancement claim) that he was also entitled to advancement as an employee of Avantor, Inc.'s subsidiary

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18 A319-336.

19 Centrella's Advancement Complaint (A319-36); Amended Advancement Complaint (A510-28).

20 Avantor's Verified Complaint (A166); *see also* Opinion at 10-11 (Court of Chancery referencing this admission)

21 B269.

VWR Management.[22] While Avantor suggests that Centrella filed two separate claims for advancement (an "Officer Claim" and an "Employee Claim"), the Advancement Action at all times involved *only one* advancement cause of action (Count I).[23]

E. The Opinion, and Avantor's Attempts to Stay It

On July 1, 2024 – following a trial on the merits at which numerous witnesses were examined and over 175 exhibits admitted – the Court of Chancery issued the 41-page Opinion under appeal. The Opinion provides that Centrella is entitled to mandatory advancement, as well as full fees-on-fees. These conclusions are based, among other things, on the Court's findings that:

- Avantor's Bylaws "'were drafted broadly' on 'purpose' and provide sweeping coverage" – with testimony reflecting that the drafters "*went out of their way*" to provide much broader coverage than required.[24]
- Pursuant to those Bylaws, Centrella is entitled to mandatory advancement *both* because of Avantor's threatened and asserted claims *and* because of his pending compulsory counterclaims.[25]

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22 A500-01.

23 Avantor incorrectly contends that these arguments and claims were asserted as "alternative" legal theories. *Compare* Avantor Open. at 14 (Avantor claiming the "employee" argument was an "alternative argument"), *with* A484-85 (Centrella adding an *"additional"* ground for advancement).

24 Opinion at 12 (quoting Avantor trial testimony; internal bracket omitted); *see id.* at 15 & n.77 (citing trial testimony by Avantor and noting that drafters of Avantor's Bylaws intended those provisions "to be interpreted broadly"); *see also, e.g.*, *id.* at 14 & n.76, 16, 27.

25 Opinion at 38.

- Based on the Court's review of evidence and after directly engaging Avantor and its counsel on the issue, Avantor had failed to meet its burden of showing no ongoing litigation threat, such that Centrella was *also* entitled to advancement on that basis.[26]

- Centrella was "*entirely successful on his claim for advancement*" and had "prevail[ed] in full" thereon, and was thus entitled to full fees-on-fees.[27]

As to Avantor's contention that its dismissal (without prejudice) of its affirmative claims terminated its advancement obligations, the Court of Chancery noted – based on case law submitted by Avantor – that an indemnitor's amendment to its affirmative claims "can eliminate advancement obligations, *but only 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." Opinion at 34 (emphasis in Advancement Order) (quoting *Carr v. Glob. Payments Inc.*, 2019 WL 6726214, at *8 (Del Ch. Dec. 11, 2019), *aff'd*, 227 A.3d 555 (Del. 2020)). Avantor concedes the correctness of this standard.[28]

Avantor thereafter twice sought to stay its advancement obligations, once before the Court of Chancery and once before this Court. Both motions were denied.

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[26] *Id.* at 34.

[27] *Id.* at 40, 41 ("Centrella prevails in full on his claims for advancement and fees on fees"); *supra* at 6 (Centrella's only claims were for advancement (Count I) and fees-on-fees (Count II)).

[28] Avantor Open. at 30.

SUMMARY OF ARGUMENT

1. Denied. Because Centrella seeks advancement of ongoing legal fees and expenses in a pending litigation, this is – by definition – a claim for advancement, not indemnification. Accordingly, the Court of Chancery properly applied the legal standards for advancement (which is not dependent on the right to indemnification) in rendering its decision. As to Avantor's contention that its advancement obligations ended after it dismissed "without prejudice" its affirmative claims, Centrella respectfully incorporates his response at number (2) below.

2. Denied. The Court of Chancery correctly concluded that Centrella's right to advancement was not "terminated" by Avantor's strategic withdrawal, without prejudice, of its affirmative causes of action. Delaware courts routinely hold that advancement rights for an indemnitee's compulsory counterclaims continue even if the indemnitor withdraws its affirmative claims, and Avantor cites *no authority* to the contrary. Further, Avantor's defenses to Centrella's counterclaim (which Avantor concedes is compulsory and subject to mandatory advancement) implicate the same misconduct allegations that originally triggered Centrella's right to advancement. Litigation on the compulsory counterclaim and Avantor's defenses thereto is ongoing.

3. Denied. The Court of Chancery made a factual finding that Avantor had failed to carry its burden of proving that Centrella "will not face litigation triggering advancement obligations" – such that Centrella is entitled to advancement under Avantor's deliberately broad indemnification and advancement provisions. This factual determination was expressly supported by substantial record evidence. Among other things:

- Avantor's claims (contrary to Avantor's contentions) were *not* dismissed as "moot";
- Avantor declined to dismiss its claims "with prejudice";
- Avantor repeatedly refused to agree not to reassert these claims, and expressly refused – on the record – to grant a release; and
- Avantor claims that tolling applies, such that (contrary to Avantor's current contentions) the expiration of Centrella's non-compete does not protect him from further litigation.

Finally, and in any event, the Court of Chancery noted that the indisputably pending counterclaim and Avantor's defenses thereto (addressed above) warrant advancement irrespective of Avantor's arguments as to what constitutes a litigation "threat."

4. Denied. Avantor incorrectly suggests that Centrella asserted *two* advancement claims and was successful on only one. The record is clear that Centrella asserted only one claim for advancement and – in the Court of Chancery's words – was "entirely successful" and "prevail[ed] in full" on that sole claim. Moreover, while Avantor complains about costs incurred litigating a

particular *argument* as to Centrella's status as an officer, this argument was premised on Avantor's own judicial admission, in its verified pleading, that Centrella was a "high-level … corporate officer" of Avantor. The resulting litigation costs are a consequence of that admission and Avantor's strategic decision to contest Centrella's advancement rights instead of (as countless Delaware cases advise) reserving its arguments for the indemnification phase of this case.

COUNTERSTATEMENT OF FACTS

A. Avantor Threatens to Sue Centrella.

As noted previously, Centrella was employed as Avantor's Vice President of Corporate Strategy and M&A from December 2019 until mid-2022.[29] In this role, he was responsible for helping Avantor's CEO and board pursue targets for acquisition.[30]

On July 19, 2022, Avantor effectively demoted Centrella by announcing the hire of Kitty Sahin to "lead[] the Company's strategy and corporate development team."[31] Soon thereafter, Centrella advised Avantor that he was resigning and accepting employment with Waters.[32]

On July 28, 2022, Avantor threatened to sue Centrella on the grounds that his new employment opportunity at Waters would breach his contractual obligations.[33] Avantor further asserted a breach of its confidentiality provisions,

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29 A355, ¶ 20; *supra* at 3.

30 A633.

31 A321, ¶ 36; A356, ¶¶ 21-22.

32 A356, ¶¶ 21-23.

33 A356-60, ¶¶ 27, 29-45; *see* Avantor Complaint at A179 ¶ 40; Avantor Answer at B119, ¶ 6 (Avantor admitting it "informed [Centrella] of its view that his potential new employment would violate his contractual obligations, and that the Company intended to vigorously enforce its purported rights in this respect"); B359; Centrella Dep. at A565 (124:21-125:11) (Centrella testifying he was threatened with litigation on July 28, 2022); Trial Tr. at A690 (22:15-23:17) (same).

on a theory of inevitable disclosure.[34] Centrella obtained counsel to assess Avantor's threats and to engage with Avantor's counsel on his behalf.[35]

During this time, Avantor's CEO (among others) directly contacted Avantor on numerous occasions – insisting Centrella was legally prohibited from accepting employment at Waters and warning of commercial and legal consequences to Waters should it not rescind Centrella's employment offer. [36]

On August 16, 2022, Avantor terminated Centrella, informing him that his last day of work would be August 19, 2022.[37]

B. Further Details Regarding the Underlying Action

1. Avantor's Verified Complaint, and an Unexecuted Contract

On September 8, 2022, Avantor filed a Verified Complaint alleging, among other things, that:

- Centrella was a "*high-level, experienced, corporate officer*" who was part of Avantor's "inner sanctum."[38]
- "By accepting his employment ... Centrella expressly acknowledged that he agreed to be bound by the terms of the restrictive covenants within the PSA and subsequent RSU Agreements."[39]

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34 B152, B156; B47 ¶ 62.

35 B152.

36 A360, ¶¶ 43-45; B27-28.

37 A1376

38 A166; *see also* A169 ¶ 11.

39 A180 ¶ 46.

- "Through his[] employment with Avantor," Centrella was exposed to Avantor's confidential information, and disclosure of such information "would cause immediate, substantial and irreparable harm to Avantor."[40]

- "Centrella has breached his covenant not to compete with Avantor by accepting employment with Waters."[41]

- "Because Centrella had access to a wide array of confidential and proprietary information and trade secrets concerning all aspects of Avantor's business, his failure to abide by the non-compete … will cause immediate and irreparable harm to Avantor's business."[42]

- "On information and belief, Centrella [] breached his covenant not to use any of Avantor's confidential information post-separation by using such confidential information for his own benefit and the benefit of his new employer, Waters."[43]

- "[T]he continued threat of Centrella's failure to cease and desist breaching the restrictive covenants, *has caused and continues to expose Avantor's business to immediate and irreparable injury*."[44]

- Centrella's conduct "ha[s] had and continue[s] to have a serious and disruptive effect upon Avantor's business and its ability to prepare for and service its clients."[45]

- Any effort by Centrella to work in the M&A industry at all will result in the inevitable disclosure of confidential Avantor information.[46]

In purported support of its allegations that Centrella had breached his

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40 *Id.* ¶ 20.

41 *Id.* ¶ 48.

42 *Id.* ¶ 62.

43 *Id.* ¶ 49; *see also id.* ¶¶ 9, 11, 14, 20.

44 *Id.* ¶ 51 (emphasis added).

45 *Id.* ¶ 42.

46 *See, e.g.*, *id.* ¶ 62.

contractual obligations to Avantor, Avantor attached a "Personal Services Agreement" (PSA) to its Verified Complaint.[47] After specific inquiry from the Court of Chancery, however, Avantor's counsel admitted on October 11, 2023 that the PSA attached to its Complaint was never actually signed by Centrella.[48]

2. Centrella's Compulsory Counterclaims

On September 28, 2022, Centrella filed a Verified Answer and Counterclaim in the Underlying Action.[49] Centrella sought a declaratory judgment that Avantor's restrictive covenants – which specifically cover sales employees engaged in product sales and promotions – do not apply to him as an M&A professional and do not prohibit him from working as an M&A professional (at Waters or elsewhere).[50]

After Avantor succeeded in pressuring Waters to rescind its employment offer,[51] Centrella filed Verified Amended Counterclaims, adding a tortious interference counterclaim.[52]

After Waters rescinded its job offer to Centrella, Avantor voluntarily

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47 *Id.* ¶¶ 19-22, 44.

48 B227, at 53:3-19.

49 A272-A318.

50 A313-15 ¶¶ 44-53.

51 *Supra* at 5; *see also* A350, A358-65 ¶¶ 2, 34, 37, 65-70.

52 A364-66, A368 ¶¶ 65-75, 82-87.

withdrew its claims against him "without prejudice."[53] In a footnote to that filing, Avantor stated it "no longer has reason to believe Centrella has used any of Avantor's confidential information for his own benefit or the benefit of Waters"[54] – but declined to dismiss its claims "with prejudice" or to release Centrella from liability for the purported harm it claimed he had already caused.

After Avantor withdrew its claims, Centrella requested that Avantor agree not to enforce the restrictive covenants at issue in his declaratory judgment counterclaim.[55] Avantor refused, stating: "*Avantor is not willing to agree to Mr. Centrella's request regarding non-enforcement of the restrictive covenants.*"[56]

On November 13, 2023, the Underlying Action (now consisting of Centrella's compulsory counterclaim) was transferred to the Delaware Superior Court, where it remains pending.[57] Avantor continues to allege, as defenses in the Underlying Action, that Centrella breached restrictive covenants with Avantor and remains bound by a confidentiality provision in perpetuity.[58]

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53 A339.

54 *Id.*

55 B172-B174.

56 *Id.*

57 *Supra* at 5.

58 B336-B368, ¶¶ 55, 59, 62-64, 71.

C. Avantor's Bylaws

Avantor's Bylaws provide indemnification and advancement to any party serving as an employee of another corporation at Avantor, Inc.'s request. Specifically, Section 7.01 of the Bylaws, titled "Right to Indemnification," states as follows:

> Each 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 that he or she … is or was serving at the request of [Avantor, Inc.] as a director, officer, employee, agent or trustee of another corporation ... shall be indemnified and held harmless by [Avantor, Inc.] to the fullest extent permitted by Delaware law, … against all expense, liability and loss (including attorneys' fees …) reasonably incurred or suffered by such indemnitee in connection therewith; *provided, however, that, except as provided in Section 7.03 with respect to proceedings to enforce rights to indemnification or advancement of expenses or with respect to any compulsory counterclaim brought by such indemnitee*, [Avantor, Inc.] shall indemnify any such indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board of Directors.[59]

Section 7.02 of the Bylaws, titled "Right to Advancement of Expenses," provides for advancement of fees and expenses, including fees-on-fees in any proceeding where an indemnitee pursues his right to advancement:

> In addition to the right to indemnification conferred in Section 7.01, an indemnitee shall also have the right to be paid by [Avantor, Inc.] the expenses (including attorney's fees) incurred in *appearing at, participating in or defending* any such proceeding in advance of its final disposition *or in connection with a proceeding brought to*

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[59] B1-B26 § 7.01 (emphases added).

> *establish or enforce a right to indemnification or advancement of expenses* under this Article VII.[60]

Section 7.03 provides, in relevant part, that an indemnitee is entitled to fees-on-fees "to the fullest extent permitted by law," if he is successful "in whole or in part" on an advancement action:

> 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.[61]

Finally, Section 7.03 of the Bylaws provides that "the burden of proving that the indemnitee is not entitled to [ ] advancement of expenses" rests not with the prospective indemnitee, but with Avantor, Inc.[62]

D. The Instant Appeal

Avantor does not appeal that aspect of the Opinion holding that Centrella is entitled to advancement as a consequence of Avantor's threats and the lawsuit it filed thereafter.[63] Avantor also does not dispute that Centrella's counterclaim is compulsory and subject to mandatory advancement.[64] Instead, Avantor contends

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60 *Id.* § 7.02 (emphasis added).

61 *Id.* § 7.03 (emphasis added).

62 *Id.*

63 Avantor Open. at 18.

64 *Id.*

that its advancement obligations terminated once it withdrew (without prejudice) its affirmative claims[65] – notwithstanding (i) Centrella's pending compulsory counterclaim;[66] (ii) Avantor's assertion (as defenses) of the same allegations of misconduct that triggered advancement;[67] (iii) Avantor's repeated refusal to dismiss its claims with prejudice or to release Centrella from liability;[68] (iv) Avantor's contention that it has already suffered damage from Centrella's purported contract breach;[69] and (v) Avantor's claim of non-expiring confidentiality obligations that would be implicated should Centrella work in any comparable M&A position again.[70]

E. Avantor's Improper Inclusion (and Mischaracterizations) of Materials Outside the Record

In violation of Delaware Supreme Court Rule 14(e), Avantor includes in its brief and Appendix extensive Superior Court materials from the Underlying Action purportedly reflecting the dismissal of Centrella's declaratory judgment

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65 Avantor Open., *passim*.

66 *Supra* at 15-16, 18; Opinion at 38.

67 *Supra* at 9, 16.

68 Opinion at 35, 37.

69 A180-83, ¶¶ 48-49, 51, 58.

70 A181-83, ¶¶ 51, 58, 62.

counterclaim as moot.[71]

These materials *were not considered by the Court of Chancery and are not part of the record*.[72] Further, Avantor's attempt to suggest some precedential, preclusive, or persuasive value is factually and legally incorrect. Contrary to Avantor's assertion, Judge Wallace did *not* have the "same facts before [it] as before the Chancery Court" – and the Superior Court's dismissal of the declaratory judgment counterclaim in no way supports the notion that Avantor's "without prejudice" withdrawal of its claims rendered them "moot" or "terminated." Indeed, Judge Wallace specifically identified, as a basis for his decision, the fact that the "applicability and enforceability" of Avantor's restrictive covenants would be resolved in the context of Centrella's still-pending compulsory counterclaim for tortious interference.[73] Finally, Judge Wallace's conclusion as to Centrella's declaratory judgment counterclaim – *a different issue, solely on the pleadings, without witness testimony or evidentiary submissions, and without application of Delaware's well-developed advancement law* – has no bearing on the issues

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[71] Oral Argument Transcript (A981-1055), and Order Granting Avantor's Motion for Partial Judgment on the Pleadings (A1056), from Superior Court Action.

[72] Delaware Supreme Court Rule 14(e).

[73] Oral Argument Transcript at 1020-21, A1041, A1042-43 (Superior Court noting that the "validity," "applicability," and "enforceability" of the noncompete and any other purported obligation will be decided in connection with tortious interference counterclaim).

presently before this Court.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY ASSESSED CENTRELLA'S CLAIM AS ONE FOR ADVANCEMENT, NOT INDEMNIFICATION.

Question Presented

Where an indemnitee seeks advancement of ongoing legal expenses in an active legal proceeding, should the Court apply the legal standards for advancement or indemnification?

Scope of Review

The Court of Chancery's holding that "this remains an action for advancement" is premised on two *factual* findings: (i) that Avantor did not meet its burden of demonstrating that Centrella "will not face litigation that triggers advancement obligations," and (ii) that Centrella's compulsory counterclaim (which Avantor concedes is both compulsory and subject to mandatory advancement under its Bylaws) remains pending.[74]

This Court "defers to the Court of Chancery's factual findings supported by the record." *Coster v. UIP Cos., Inc.*, 300 A.3d 656, 663 (Del. 2023) (citation omitted). Determinations of fact should be set aside "only if they are *clearly wrong* and the doing of justice requires their overturn." *Id.* (emphasis added; citation omitted); *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015)

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[74] Opinion at 33 n.131

("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Such deference is of particular import where, as here, findings of fact involve the trial court's assessment of witness credibility:

> When the determination of facts turns on a question of credibility and the acceptance or rejection of "live" testimony by the trial judge, his findings will be approved upon review. *If there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm*.

Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1179 (Del. 1995) (emphasis added; citation omitted).

Merits

There is no merit to Avantor's contention that the "covered matter [has] concluded," and that the Court of Chancery should therefore have applied the legal standards for *indemnification* to this advancement action.[75] As a matter of controlling Delaware law – and literally by definition – a claim seeking advancement of *ongoing legal expenses* in an active legal proceeding sounds in advancement, not indemnification. *Infra* at 25-26.

First, this Court has repeatedly made clear (and Avantor concedes[76]) that

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[75] The sole exception is the issue of fees-on-fees, which sounds in indemnification rather than advancement.

[76] Avantor Open. at 20-21.

advancement and indemnification are distinct legal actions, and the right to advancement does not depend on the right to indemnification, which "must necessarily await the outcome of the investigation or litigation." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509-10 (Del. 2005) (the "narrow scope of an advancement proceeding prohibits an ultimate determination of indemnification"); *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212 (Del. 2005) (indemnification and advancement "are separate and distinct legal actions"; the "*right to advancement is not dependent on the right to indemnification*," and indemnification requires "success on the merits or otherwise" (emphasis added)).[77]

Second, the notion that there is no "covered matter" pending is simply incorrect. There is no dispute that Centrella's counterclaim is currently being actively litigated, and Avantor concedes that such counterclaim is "compulsory, and therefore subject to mandatory advancement."[78] There is also no dispute that Avantor asserts, as defenses to Centrella's counterclaim, the *same allegations of misconduct that first triggered its advancement obligations*.[79] For example, Avantor contends – to this day – that (i) Centrella is bound by the PSA that he

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[77] For this reason, Avantor's attempt to undermine the foregoing by (incorrectly) suggesting that Centrella asserted advancement and indemnification as "alternative" theories of recovery is unavailing. Avantor Open. at 21.

[78] Avantor Open. at 18.

[79] *Supra* at 9, 16.

never executed,[80] containing a non-compete with tolling provisions and a confidentiality provision that applies in perpetuity; (ii) Centrella breached his non-compete and caused Avantor harm; and (iii) any effort by Centrella to work in the M&A industry would inevitably breach his confidentiality obligations.[81] Avantor has further refused to dismiss its claims with prejudice or issue a release,[82] which would provide a legal commitment freeing Centrella from the ongoing threat of litigation. Indeed, as discussed in Section II below, the Court of Chancery made a *factual finding* – based on ample record evidence – that Avantor failed to prove that Centrella "will not face litigation that triggers advancement obligations."[83]

For these reasons, there is no merit to Avantor's contention that, as a matter of fact, the "covered matter" has "concluded." *K&K Screw Prod., L.L.C. v. Emerick Cap. Invs., Inc.*, 2011 WL 3505354, at *8 (Del. Ch. Aug. 9, 2011) ("actual controversy" exists because opponent "believes it has valid claims" and has not waived its right to assert them, *even though such party "contends it has no present*

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80 *Supra* at 15.

81 *Supra* at 13-14, 16; *see also, e.g.*, A1085-A1172, at ¶ 49.

82 *See, e.g.*, Opinion at 35 (Avantor "repeatedly has refused to agree not to reassert certain claims under these agreements against Centrella," and "[e]ven at oral argument" Avantor refused to grant a release (emphasis added)); *id.* at 37 (Avantor "refuses" to represent that it "will not bring advanceable litigation against [Centrella]" (emphasis added)); *see also* B369-B410, at 9-14; B29-116; B146-B150; B172-B174.

83 Opinion at 33-38; *see also infra* at 38-41.

intention to assert such claims" (emphasis added)); *McKenzie v. City of Rehoboth*, 755 A.2d 389, 2000 WL 724708, at *1 (Del. 2000) (order did not bring proceeding to "final" close where claim remained pending and court had not "disposed of all matters before it"); *Realogy Holdings Corp. v. SIRVA Worldwide*, 2020 WL 4559519, at *12 (Del. Ch. Aug. 7, 2020) (in context of request for certification of interlocutory appeal, holding that review of decision would not "terminate" litigation where claims – including counterclaims – remained pending).

Third, while Avantor complains that application of advancement law to this advancement action "postpon[es] Avantor's ability to challenge meaningfully the invoices submitted for reimbursement,"[84] this is literally the nature of an advancement action. Indeed, Avantor's own cases are among the substantial Delaware jurisprudence resoundingly confirming that disputes over the propriety of advanced fees should be resolved later, at the indemnification stage. *See, e.g.*, *Holley v. Nipro Diagnostics, Inc.,* 2014 WL 7336411, at *9 (Del. Ch. Dec. 23, 2014) (disputes over entitlement to advanced sums should be resolved later at indemnification stage); *Mooney v. Echo Therapeutics, Inc.*, 2015 WL 3413272, at *9 (Del. Ch. May 28, 2015) (same); *Danenberg v. Fitracks, Inc.*, 58 A.3d 991, 998 (Del. Ch. 2012) (same). These cases further confirm – emphatically – that

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[84] Avantor Open. at 23.

different standards apply to advancement and indemnification; that indemnification of past expenses is determined *after* the covered matter is adjudicated; and that disputes over a party's ultimate entitlement to advanced funds must await the indemnification stage. *Kaung*, 884 A.2d at 510 (advancement proceeding is "summary in nature and not appropriate for litigating indemnification or recoupment"); *Evans v. Avande, Inc.*, 2021 WL 4344020, at *8, n.75 (Del. Ch. Sep. 23, 2021) (different legal standards for advancement and indemnification); *Holley*, 2014 WL 7336411, at *9 (same; "disputes as to the ultimate entitlement to retain the advanced fund" should be resolved at indemnification stage); *Mooney*, 2015 WL 3413272, at *9 (same); *Danenberg*, 58 A.3d at 998 (same); *Thompson v. Orix USA Corp.*, 2016 WL 3226933, at *6 (Del. Ch. June. 3, 2016) (same).

Finally, it is unclear what Avantor hopes to gain by claiming that Centrella "never responded to Avantor's observation that his arguments sounded in advancement only" and that "the Chancery Court [did not] address the issue."[85] Both Centrella and the Court were quite clear that this was an *advancement* action – with the Opinion stating, in its very first sentence, "This is a post-trial[86] advancement decision," and noting, in the same paragraph, that Centrella's action

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[85] Avantor Open. at 21.

[86] As is clear from context, "post-trial" refers to the trial held on Centrella's advancement claim – not the still-pending Underlying Action. Opinion at 1.

was "for advancement."[87]

[87] *Id.*; *see* Centrella's Post-Trial Opening Br. (A761-96).

II. THE COURT OF CHANCERY CORRECTLY FOUND THAT ADVANCEMENT CONTINUES.

Questions Presented

1. Where an indemnitee is contractually entitled to advancement for expenses incurred (i) as a result of having been threatened to be made a party to a proceeding; (ii) in "appearing at, participating in or defending" an action for which he is entitled to indemnification; and (iii) in connection with pending compulsory counterclaims that are concededly subject to mandatory advancement, does the indemnitor's withdrawal (without prejudice) of its affirmative claims terminate its advancement obligations?

2. Is an indemnitee entitled to advancement where the trial court has made a factual finding after a full trial, based on assessments of witness credibility and indemnitor's refusal to dismiss its claims with prejudice, that an indemnitor has failed to meet its burden of proving that an indemnitee "will not face litigation that triggers advancement obligations"?

Scope of Review

1. Whether Centrella is entitled to continuing advancement of expenses incurred in connection with counterclaims that Avantor concedes are both compulsory and subject to mandatory advancement involves the construction of unambiguous contract language and is a "question of law," to be reviewed "*de*

novo for legal error." *Rhone Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

2. The Court of Chancery's finding that Avantor failed to meet its burden of proving that Centrella "will not face litigation that triggers advancement obligations" is a determination of *fact*.[88] As set forth in Section I, *supra* at 21-22, factual findings by the Court of Chancery should not be set aside unless "clearly wrong and the doing of justice requires their overturn." *Coster*, 300 A.3d at 663-64 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."); *Cinerama*, 663 A.2d at 1179.

Merits

A. Avantor's Advancement Obligations Continue Notwithstanding Its Withdrawal (Without Prejudice) of Its Affirmative Claims.

1. Withdrawal (Without Prejudice) of Avantor's Affirmative Claims Does Not End Its Advancement Obligations Relating to Centrella's Compulsory Counterclaim.

Avantor's attempt to avoid its advancement obligations relating to Centrella's compulsory counterclaim rests on a misrepresentation of Delaware law. Among other things, Avantor incorrectly asserts that a counterclaim ceases to be

[88] Opinion at 33-38 (making factual determination that Avantor failed to meet burden of showing Centrella "*will not* face litigation that triggers advancement obligation" – and, further, reiterating that Centrella is entitled to advancement in connection with his compulsory counterclaims).

"defensive"[89] – and is therefore no longer advanceable – once an indemnitor's affirmative claims are withdrawn "without prejudice."[90] Avantor goes so far as to suggest there is "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."[91] Both assertions are incorrect..

As an initial matter, there has been no "termination" of the Underlying Action, as Centrella's counterclaim (which is concededly both compulsory and subject to mandatory advancement) is being actively litigated. Just as importantly – and despite a relative dearth of cases on this subject – Delaware courts have repeatedly found that *compulsory counterclaims remain "defensive" and subject to advancement even where the indemnitor withdraws its affirmative claims "without prejudice."* In *Fillip v. Centerstone Linen Servs., LLC*, 2014 WL 1821299 (Del. Ch. May 1, 2014), for example, former employer Centerstone (just like Avantor) conceded that certain claims asserted by it had triggered its advancement obligations to its former employee Fillip. *Id.* at *4. Just like Avantor, however, Centerstone:

- insisted that its former employee was entitled to advancement "only for

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89 Compulsory counterclaims are considered "defensive" for purposes of advancement. *See, e.g., Citadel Hldg. Corp. v. Roven,* 603 A.2d 818, 824 (Del. 1992); *Mooney*, 2015 WL 3413272, at *5.

90 Avantor Open. at 27, 31-32.

91 *Id.* at 26-27.

the brief period of time that those claims were pending" before Centerstone expressed its intent to dismiss them*, id.*;

- first refused to dismiss those claims "*with prejudice*" – and only later, in an attempt to avoid advancement, finally represented it would dismiss its claims with prejudice, *id.*; and
- *argued that its affirmative defenses to the employee's claims* did not trigger its advancement obligations even if based on allegations plainly covered by Centerstone's advancement language, *id.* at *6-7.

There, as in this case, the Court of Chancery properly held that (i) employee was "entitled to advancement for all of his fees and costs related to [Centerstone's claims], through the date on which the '*with prejudice*' dismissal was (or is) accomplished"; *and* (ii) the company was "required to advance [employee] attorneys' fees and expenses incurred in *responding to Centerstone's affirmative defenses* accusing [him] of misconduct" triggering Centerstone's advancement obligations. *Id.* at *4, 7 (emphasis added).

The second point is critical – as it confirms that costs incurred by Centrella "*responding to [Avantor]'s affirmative defenses accusing [him] of misconduct*" are also "*defensive*" under Delaware law. *Id.* This is a point that Avantor wholly disregards.[92] It therefore matters little that *Fillip* addressed advancement arising from an LLC Agreement (rather than corporate bylaws governed by 8 *Del. C.* §

[92] Avantor Open. at 26-28 (claiming that compulsory counterclaims cease to be "defensive" once the indemnitor withdraws, without prejudice its affirmative claims).

145), as the indemnitee's right to advancement did not depend on any language beyond what 8 *Del. C* § 145 permits. Specifically, while the LLC Agreement in *Fillip* required advancement even where costs were not strictly "defensive," this was not necessary to trigger Centerstone's advancement obligations:

> [T]he question is not whether Fillip's claims against the company are subject to advancement, but only whether *a defense the company asserted in response to those claims requires Fillip to incur costs to defend his performance of his duties as an officer.* !

Fillip, 2014 WL 1821299, at *7 (emphasis added). The same result follows here.

Equally on-point is a Court of Chancery decision from June 2023 in *Riker v. Teucrium Trading*, C.A. No. 2022-1030-LWW, Tr. of June 13, 2023 Telephonic Rulings (Dkt. 55) (Del. Ch. June 13, 2023).[93] While this is a bench decision (which was read into the record by the Court), Vice Chancellor Will's analysis provides insight on the same practical issues that Vice Chancellor Cook needed to balance here. There, as here, the company sued first, "trigger[ing] advancement obligations under the plain terms of the [governing agreement]." *Id.* at 26-27. There, as here, plaintiff indemnitee asserted compulsory counterclaims, which the Court of Chancery found subject to advancement. *Id.* at 25. And there, as here, the company attempted to avoid its advancement obligations by withdrawing the affirmative claims that had triggered both advancement and the counterclaims. *Id.*

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93 This decision is appended as Exhibit 1 to this brief.

at 26. The Court of Chancery found that plaintiff's entitlement to advancement continued notwithstanding such withdrawal:

> The withdrawal does create a bit of a procedural oddity, but in my view, it's not a bar to advancement....
>
> As a matter of policy, Teucrium decided to sue first, forcing Mr. Riker to assert compulsory counterclaims. And in doing so, Teucrium triggered advancement obligations under the plain terms of the LLC agreement. *Teucrium cannot now attempt to avoid advancing those fees by withdrawing its claims*.

Id. at 26-27 (emphasis added); *see Imbert v. LCM Int. Holding LLC*, 2013 WL 1934563, at *10 (Del. Ch. May 7, 2013) (describing similar situation). It was not until later, when Teucrium finally committed to a formal "*with prejudice*" dismissal of its claims that advancement was terminated.[94] Again, the same analysis applies here.

Finally, Delaware courts have repeatedly observed that the tactics employed by Avantor here – a company's assertion of claims triggering both advancement and compulsory counterclaims, and subsequent withdrawal of those claims "*without prejudice*" in an attempt to avoid advancement – suggest an absence of good faith. In *Imbert*, 2013 WL 1934563, for example, defendant indemnitors

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[94] *Riker v. Teucrium Trading, LLC*, 2023 WL 7105369, at *1 (Del. Ch. Oct. 26, 2023). The underlying briefing makes clear that advancement ended only after the "dismissal *with prejudice* of the claims by [the company] that this Court found advanceable." *Riker v. Teucrium Trading, LLC*, 2023 WL 6519941 (Del. Ch.) (emphasis in original).

withdrew certain claims and argued that, because they had not reasserted those claims, plaintiff indemnitee was "no longer entitled to advancement and must instead seek indemnification." *Id.* at *10. "Of course," the Court of Chancery observed, defendants were "not willing to indemnify Mr. Imbert unless and until he can [disprove their claims]" – with defendants essentially contending that plaintiff must "prove that the claim lacked merit, and must do so without the benefit of advancement":

> *This contention borders on bad faith.* The LCM Companies remain free to assert their claims…, and have not made any binding legal representation that they will not do so. Mr. Imbert therefore is entitled to advancement. *In any event, to hold otherwise would turn advancement on its head, allowing a company to assert claims against a former fiduciary, dismiss those claims without prejudice before the fiduciary obtains advancement, and then force the fiduciary to prove his entitlement to indemnification without the benefit of the advancement claims for which he bargained*. The LCM Companies' argument on this point is, to borrow a term, risible.

Id. (emphasis added); *see also Riker*, *supra*, at 26 (quoting *Imbert*).

Unsurprisingly, *not one* of Avantor's cases supports its position. Of the three cases[95] on which Avantor relies for the notion that a counterclaim ceases to be advanceable if the affirmative claims terminate, none actually reaches such a holding. *Mooney*, 2015 WL 3413272, for example, held that plaintiff *was* entitled to advancement for fees incurred defending against defendant's claims, *even*

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[95] *See infra* at 35-36 (addressing Avantor's remaining cases on this argument). !

though defendant voluntarily withdrew those claims and represented to the court that it would not pursue them. *Id.* at *6-11. It was only with respect to a *separate* lawsuit, which was "neither compulsory nor would it defeat or offset any affirmative claim of [defendant]," that advancement was denied. *Id.* at *11-12. *Duthie v. CorSolutions Med., Inc.*, 2009 WL 1743650 (Del. Ch. June 16, 2009), in turn, did not involve counterclaims (compulsory or not) at all – but rather a separate, affirmative lawsuit filed by the indemnitees in federal district court after the indemnitor corporation accused indemnitees of fraud and breach of contract in an arbitration proceeding. *Id.* at *1. And *Pontone v. Milso Indus. Corp.*, 2014 WL 2439973 (Del. Ch. May 29, 2014), simply confirms that counterclaims are subject to advancement even if they were advanced only to "offset" the company's claim. *Id.* at *2-5.[96]

Avantor's remaining cases have nothing to do with this action – as one does not involve claims asserted by an indemnitee nor the withdrawal of any claims, and the other does not involve indemnification or advancement at all. *Carr*, 2019 WL 6726214 (no counterclaims; only question was whether *indemnitor's* affirmative claims "ar[ose] out of or pertain[ed] to" indemnitee's role as officer/director);

[96] In fact, *Pontone* confirms that whether a counterclaim is compulsory and therefore advanceable is determined "*at the time [the] defending party serves its responsive pleading*." *Pontone*, 2014 WL 2439973, at *10 (emphasis added).

Benchmark Cap. Partners IV, L.P. v. Vague, 2002 WL 1732423 (Del. Ch. July 15, 2002) (not an indemnification or advancement case).

In short, Avantor cites *no authority* supporting its position that, for a compulsory counterclaim subject to mandatory advancement, Avantor's advancement obligations ended once it withdrew (without prejudice) its affirmative claim. As Avantor's position is contrary to the plain language of its Bylaws and unsupported by a single authority, the Opinion should be affirmed.

2. Avantor Misrepresents the Opinion.

Perhaps cognizant of foregoing, Avantor attempts to undermine Vice Chancellor Cook's analysis by misstating the Opinion's language – essentially inventing, and then purporting to refute, a series of strawman arguments. These can be quickly addressed.

First, and contrary to Avantor's contentions, the Opinion *nowhere* holds that "advancement must continue until the affirmative claims reach a final, non-appealable conclusion."[97] Instead, the Court states that – per Avantor's Bylaws and consistent with 8 *Del. C.* § 145 – advancement continues through the final disposition of the *Underlying Action*:

> [Avantor's] Bylaws 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 in 8 *Del. C.* § 145(e)

[97] Avantor Open. at 28 (purporting to cite Opinion at 33 n.131).

> 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 Bylaws) has not reached its "final, non-appealable conclusion," so this remains an action for advancement*.[98]

As the Opinion correctly notes, the Underlying Action (presently consisting of Centrella's pending counterclaim and Avantor's defenses thereto) is being actively litigated in the Superior Court.

Second, and again contrary to Avantor's contentions, the Opinion *nowhere* grants the term "proceeding" in the Bylaws a meaning "different than that applicable to the same term in 8 *Del. C.* § 145" – and *nowhere* suggests that "the By-law's use of 'final disposition' changes the meaning of 'proceeding.'"[99] As a matter of common sense and consistent with Delaware law, the Underlying Action – like any legal proceeding – encompasses the pending compulsory counterclaim asserted therein, and did not "terminate" when Avantor withdrew "without prejudice" its affirmative claims. *See, e.g.*, *Roven*, 603 A.2d at 821, 824 (repeatedly noting that counterclaims and affirmative defenses were part of the underlying federal action); *Pontone*, 2014 WL 2439973, at *5 (counterclaims were part of "underlying action"). This is not a controversial proposition.

Finally, there is no merit to Avantor's assertion that "[n]othing in the By-

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98 Opinion at 33 n.131 (emphasis added).

99 Avantor Open. at 28, 30.

law's text supports a conclusion that it covers classes of claims that would not be covered under [8 *Del. C.* § 145]."[100] This Court has made clear that compulsory counterclaims are indemnifiable and advanceable under 8 *Del. C.* § 145, and the Opinion does not depart from this well-settled jurisprudence. *See, e.g.*, *Roven*, 603 A.2d at 824.

B. The Court of Chancery's Factual Determination that Avantor Failed to Prove That Centrella "Will Not Face Litigation That Triggers Advancement Obligations" Is Supported by the Record and Should Not Be Disturbed on Appeal.

As noted above, the Court of Chancery's conclusion that Avantor failed to meet its burden of proving that Centrella "will not face litigation that triggers advancement obligations" is a factual determination and should not be set aside unless "clearly wrong." *Coster*, 300 A.3d at 663-64 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Further, because this factual determination "turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge," such findings should be approved upon review. *Cinerama*, 663 A.2d at 1179; *see supra* at 21-22.

Here, the Court of Chancery found, *as a matter of fact*, that Avantor failed to meet its burden of showing that Centrella "will not face litigation that triggers

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100 Avantor Open at 30.

advancement obligations."[101] The Court spent some 1,700 words summarizing the evidence and reasoning supporting this determination – which it rendered after a trial encompassing over 175 exhibits and the Court's assessment of witness credibility.[102] While Avantor now insists it has not "manifested" any further "intent" to sue Centrella, the Opinion reflects that the Court repeatedly and specifically pressed Avantor and its counsel on this issue, and that Avantor:

- declined to dismiss its claims "with prejudice" – a fact that cast doubt on Avantor's contention that its claims were dismissed "as moot";[103]
- "*repeatedly has refused* to agree not to reassert certain claims under those agreements against Centrella";[104]
- insisted on the record that it "*is not giving a release*";[105] and
- "*refuses* to make [a representation that it will not bring advanceable litigation against Centrella]."[106]

Moreover, in the pending Underlying Action, Avantor *continues* to assert that it has already suffered damage, that Centrella breached common-law obligations merely by accepting the Waters job offer, and that any future M&A position by

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101 Opinion at 33-38. The Court also expressly noted that Centrella was separately entitled to advancement "in connection with his compulsory counterclaims." *Id.* at 38.

102 *Id.*

103 *Id.* at 33 n.130.

104 *Id.* at 35 (emphasis added).

105 *Id.* at 35 (emphasis added) (this is "far afield from the clear assurances [that no advanceable claims will be asserted] provided in the cases [Avantor] cites").

106 *Id.* at 37 (emphasis added).

Centrella would implicate his non-expiring confidentiality obligations.[107] Ultimately, inconsistencies such as these led the Court of Chancery to find that Avantor had failed to disprove an ongoing threat of advanceable litigation.

As this quintessentially factual determination was "sufficiently supported by the record," it should not be disturbed on appeal. *Cinerama*, 663 A.2d at 1179. Avantor fails in its effort to avail itself of *de novo* review by claiming this is a "mixed question of fact and law" that turns on the Court of Chancery's interpretation of the term "threat."[108] *Nothing in this part of the Opinion suggests any question or ambiguity as to what the word "threat" means – much less that the Court of Chancery must decide between conflicting interpretations thereof.*[109]

Avantor's cases on the definition of "threat" are thus wholly inapposite. Not one addresses advancement for counterclaims in an indemnifiable proceeding at all – much less whether the "without prejudice" withdrawal of affirmative claims renders advanceable counterclaims *non-advanceable*. In fact, in several of these cases – unlike here – *no litigation* against indemnitees was ever brought. *Donohue v. Corning*, 949 A.2d 574, 574-75 (Del. Ch. 2008) (putative indemnitee seeking advancement for an action he affirmatively initiated; indemnitor never initiated

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107 B158-B171, at Nos. 17, 18.

108 Avantor Open. at 25.

109 Opinion at 33-38.

litigation or implied litigation might be forthcoming); *Rexam Inc. v. Berry Plastics Corp.*, 2015 WL 7958533, at *4-5 (Del. Ch. Dec. 3, 2015) (no underlying litigation at all); *i/mx Info. Mgmt. Sols., Inc. v. Multiplan, Inc*, 2014 WL 1255944, at *6 (Del. Ch. Mar. 27, 2014) (as to specific language quoted by Avantor, no indemnifiable action was ever asserted); *OrbiMed Advisors LLC v. Symbiomix Therapeutics, LLC*, 2024 WL 747567, at *5 (Del. Ch. Feb. 23, 2024) (assessing whether indemnitees were entitled to advancement when litigation was threatened against them before they left board and initiated after they left).

III. BECAUSE CENTRELLA PREVAILED "IN FULL" ON HIS SOLE ADVANCEMENT CLAIM, THE COURT OF CHANCERY PROPERLY AWARDED HIM FULL FEES-ON-FEES.

Question Presented

Is an indemnitee who "prevails in full" on his sole claim for advancement entitled to an award of the fees and expenses he incurred in connection with enforcing that right, where both the DGCL and the indemnitor's Bylaws expressly contemplate this?

Scope of Review

The parties agree that this issue presents a question of law that is subject to *de novo* review. *Rhone Poulenc*, 616 A.2d at 1195.

Merits

The Court of Chancery observed – and Avantor does not dispute – that Avantor's Bylaws "expressly provide fees on fees to the 'fullest extent permitted by law' if an Indemnitee is successful '*in whole or in part*' in asserting an advancement claim."[110] The Court of Chancery also expressly held – and Avantor does not dispute – that Centrella was "*entirely successful*" and "*prevail[ed] in full*" on Count I of his Verified Complaint, which is his sole advancement claim.[111] Avantor nevertheless contends that Centrella should be denied full indemnification

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110 Opinion at 39 (emphasis added)

111 *Id.* at 40, 41 (emphasis added).

for the costs he incurred enforcing this right, purportedly because the Court adopted only one of his two arguments on his (single) advancement claim, and indemnitees are not entitled to fees-on-fees for "unsuccessful claims." Avantor's position fails on both the facts and the law.

First, Avantor's argument rests on the demonstrably incorrect contention (repeated nearly 20 times throughout its brief) that Centrella asserted two separate advancement *claims* – an "Officer Claim" and an "Employee Claim" – and that the "Officer Claim" was unsuccessful.[112] At all times, Centrella has asserted *one claim* for advancement,[113] and was (per the Court of Chancery) "*entirely successful on his claim for advancement*."[114] Accordingly there was – contrary to Avantor's assertions – no "unsuccessful claim" here.

As the Court of Chancery correctly recognized (and as Avantor's own cases confirm), a prospective indemnitee may assert any number of *arguments* in support of his or her advancement claim, but it is the success of the advancement *cause(s) of action* that determines whether full fees-on-fees are required. Opinion at 39-41 ("[O]ur 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

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112 Avantor Open. at 1, 2, 3, 5, 8, 13, 14, 39, 40, 43, 44

113 Advancement Complaint at A331 (one advancement claim); *see* Amended Advancement Complaint at A523-24 (same). Count II is for fees-on-fees.

114 Opinion at 40, 41.

with the actual success achieved."); *see also, e.g.*, *Dreisbach v. Walton*, 2014 WL 5426868, at *5 (Del. Super. Oct. 27, 2014) (applying a proportionality deduction because of the limited "number of *claims* on which Plaintiffs prevailed" (emphasis added)). Avantor's own case law is in accord. *See, e.g.*, *Holley*, 2014 WL 7336411, at *15 (claimant "*entitled to 100%*" of fees-on-fees where he succeeded in establishing a right to advancement, where advancement claims were the "only subjects" before court); *May v. Bigmar, Inc*., 838 A.2d 285, 291-92 (Del. Ch. 2003) (finding indemnitee entitled to a full award of "'fees on fees' for her successful prosecution of this [indemnification] action" – *even where she did not obtain indemnification on every issue*), *aff'd*, 854 A.2d 1158 (Del. 2004).

None of Avantor's cases is to the contrary. In *Pontone v. Miso Indus. Corp.*, 100 A.3d 1023 (Del. Ch. 2014), for example, the Court of Chancery granted claimant summary judgment as to *one of two* defendants from whom advancement had been sought, and in connection with only some but not all of claimants' *counterclaims*. *Id.* at 1028. Because claimant had been successful on only some of his advancement *claims*, he was awarded only 75% of the fees and expenses that were incurred prosecuting those claims. *Id.* Similarly, in *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178 (Del. Ch. 2003), claimant "sought a complete advancement of his litigation expenses for [a] criminal action and [a] civil action" – but was awarded advancement only for a "very narrow subset" of the civil and

criminal claims brought against him. *Id.* at 186. As claimant had succeeded on only a small number of the claims, the Court of Chancery proportionately reduced his fees-on-fees award. *Id.* Finally, while *May*, 838 A.2d 285, uncontroversially notes there is "no indemnification for losing issues," the court finds the indemnitee entitled to full "'fees on fees' for her successful prosecution" of an indemnification action – *even where she did not obtain indemnification on every issue*. *Id.* at 291-92. In short: Avantor cites no authority holding that fees-on-fees for a successful advancement *claim* must be reduced for any specific *argument* that the Court did not adopt. Rather, these cases stand for the non-controversial principle that a court may award fees-on-fees in proportion to the number of *claims* that are successful.

Second, as noted above, the Opinion expressly cites both the breadth of Avantor's Bylaws and Centrella's success on his sole advancement claim as reasons that a fees-on-fees proportionality assessment would be improper:

> Here, far from including an express opt-out from fees on fees, the Bylaws expressly provide fees on fees to the "fullest extent permitted by law" if an Indemnitee is "successful *in whole or in part*" in asserting a claim for advancement under Section 7.02…. This language leaves no question that *even a partially successful action* by Centrella for advancement under Section 7.02 obligates Avantor, Inc. to pony up. Further still, Centrella is *entirely successful on his claim for advancement*, so, even under the default rules governing fees on fees, a partial award would not be justified. Accordingly, Centrella is entitled to a full award of fees on fees.[115]

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115 Opinion at 39-40 (emphasis added).

For this reason, too, there is no justification for imposing the type of proportionality assessment that courts have applied in cases turning on an indemnitee's *statutory* rights pursuant to 8 *Del. C.* § 145. Avantor's case law on this point is thus entirely inapposite.[116]

Finally, Avantor's own actions defeat any notion that it should be permitted to evade its obligation to pay fees-on-fees incurred litigating Centrella's entitlement to advancement as an *officer*, on the grounds that (in Avantor's word) such argument was "legally meritless."[117] As the Court of Chancery observed, the genesis of Centrella's "officer" argument" was Avantor's own attestation in its Verified Complaint that Centrella was a "high-level … corporate officer," functioning as part of Avantor's "inner sanctum."[118] Only after advancement was sought did Avantor realize the consequences of this admission – at which point it reversed course and denied that Centrella was the type of "corporate officer" that it intended to indemnify.

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116 *Meyers v. Quiz-Dia LLC*, 2018 WL 1363307, at *11 & n.65 (Del. Ch. Mar. 16, 2018) (citing *Fasciana*, 829 A.2d 178) (proportionality of fees-on-fees is based on the reasonableness requirement of 8 *Del. C.* § 145 and Delaware case law precedent where no contractual or bylaw provision addressed the allocation of fees-on-fees)); *Zaman v. Amedeo Holdings., Inc*., 2008 WL 2168397, at *39 (Del. Ch. May 23, 2008) (proportionality of fees-on-fees is based on Delaware case law precedent where no contractual or bylaw provision addressed the allocation of fees-on-fees); *supra* at 44 (addressing *Holley*).

117 Avantor Open. at 2, 8, 39-40.

118 A166, A169; *see also* Opinion at 10-11 (referencing this admission).

In light of Avantor's argument, the Court of Chancery agreed to read past Avantor's judicial admission in favor of fact discovery into whether Centrella's position made him an "officer" as defined by Avantor's Bylaws. Accordingly, the litigation costs about which Avantor now complains were incurred *only because Avantor made a strategic decision to (i) try to benefit from depicting Centrella as a senior officer who was part of Avantor's "inner sanctum" for purposes of its confidential information allegations, while (ii) simultaneously denying him the corresponding advancement right.*

Avantor could have – at any time – obviated both the advancement presumptions and the fees-on-fees about which it now complains, simply by reserving its arguments for the indemnification phase. *See, e.g.*, *Fillip*, 2014 WL 1821299, at *1 (criticizing indemnitor for pressing advancement arguments "for more than nine months," achieving nothing "more than a pyrrhic victory that likely was erased by the fees it has paid its own attorneys and the fees it has been ordered to pay on behalf of the plaintiff"); *Mooney*, 2015 WL 3413272, at *6 ("remedy for improperly advanced fees [is] recoupment at the indemnification stage"). Instead, Avantor opted for more discovery and a full advancement trial – presumably in hopes of drowning Centrella (an individual with far less firepower than his Fortune-500 former employer) in litigation costs, simultaneously, in both his advancement case and the Underlying Action. Avantor's current complaints about

the costs of this arduous process, which it alone could control from the outset, ring hollow.

Indeed, such tactics are precisely why presumptions favoring the indemnitee, and the summary resolution of advancement claims, exist. In 2014, describing an advancement proceeding that had dragged on for considerably less time than the present year-long action, the Court of Chancery stated:

> This advancement proceeding has been pending for more than nine months and the company has pressed its arguments at length before two different judicial officers, but has yet to achieve anything more than a pyrrhic victory that likely was erased by the fees it has paid its own attorneys and the fees it has been ordered to pay on behalf of the plaintiff. That trend continues in this latest iteration of the parties' dispute. *Unfortunately, Centerstone has been victorious in delaying the inevitable and this case has tested the outer limits of any reasonable definition of a "summary proceeding."*

Fillip, 2014 WL 1821299, at *1 (emphasis added). The same is true here. Notwithstanding (i) the Court of Chancery's efforts to resolve the advancement action efficiently, and (ii) quick action by both this Court and the Court of Chancery on Avantor's two motions to stay, Avantor has "been victorious in delaying the inevitable," and this case too has "tested the outer limits of any reasonable definition of a 'summary proceeding.'" *Id.* Avantor alone is responsible for the predictable consequences of the litigation strategy it pursued.

CONCLUSION

For the reasons set forth above, Centrella respectfully requests that the Opinion be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 21, 2024, a copy of the foregoing document was caused to be served by File & Serve*Xpress* upon the following counsel of record:

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