EFiled: Dec 06 2024 12:57PM EST
Filing ID 75155125
Case Number 373,2024

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

APPELLANT'S REPLY BRIEF

David J. Margules (No. 2254)
Jessica C. Watt (No. 5932)
Emily C. Friedman (No. 7054)
BALLARD SPAHR LLP
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4430
Facsimile: (302) 252-4466
Email: MargulesD@ballardspahr.com
WattJ@ballardspahr.com
FriedmanE@ballardspahr.com

Attorneys for Avantor, Inc.

Dated: December 6, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

REPLY FACT STATEMENT

The core of this appeal is whether, more than two years after the claims against him were dismissed, Petitioner-Below/Appellant Marc Centrella is "threatened" with litigation, entitling him to advancement. If not, the Chancery Court's holding that advancement continued after the as moot dismissal of the claim brought by Respondent-Below/Appellee Avantor, Inc. ("Avantor"), must be overturned. As shown in Avantor's Opening Appeal Brief ("OB") and below, the finding that a threat continues was legal error.

Ignoring the law defining a "threat" as a manifested intent to make a claim in a judicial or other forum, Centrella argues the Chancery Court need not "decide between conflicting interpretations." Centrella Answering Appeal Brief ("AB") 41 (italics omitted). His factual discussion of the issue mischaracterizes the evidence.

Centrella doesn't deny "moot" means a controversy "no longer exists such that a court can no longer grant relief." *See* OB36 (*quoting DG BF, LLC v. Ray*, 2020 WL 4045242, at *2 (Del. Ch. Jul. 17, 2020)). Instead, he asserts "Avantor's claims (contrary to Avantor's contentions) were *not* dismissed as 'moot'." AB10. Although Centrella twice claims the Chancery Court made such a finding, the Court simply observed: "As to mootness, one preambulatory clause provides that 'Avantor represents that the claims for relief by its Complaint are now moot.' But, rather than dismissing with prejudice, the order provides that 'Avantor's claims in the above-

captioned action are hereby dismissed, without prejudice'." OP33 n.130. Regardless, Centrella cannot deny Avantor represented a controversy no longer exists and Centrella stipulated to the dismissal Order form.

It is undisputed Avantor has no pending claims against Centrella, and he identifies no articulated threats it might bring one. Nevertheless, Centrella argues: "Avantor repeatedly refused to agree not to reassert these claims, and expressly refused – on the record – to grant a release." AB10. He claims "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 Centrella would implicate his non-expiring confidentiality obligations." AB40-41.[1] He asserts "Avantor claims that tolling applies, such that (contrary to

[1] Centrella grossly mischaracterizes facts at issue in the Superior Court action that are irrelevant here. He claims ¶62 of Avantor's Plenary Complaint alleged "[a]ny effort by Centrella to work in the M&A industry at all will result in the inevitable disclosure of confidential Avantor information." AB14. The paragraph states: "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 set forth in the 2022 RSU Agreement will cause immediate and irreparable harm to Avantor's business." *Avantor v. Centrella*, 2022-0795-NAC (Del. Ch.) (Dkt. 1, Compl. ¶62) (A183). He denies signing the RSU Agreement, AB24-25, but admits accepting other agreements containing the same non-compete. OB11 n.5. He alleges "Avantor principals (including Avantor's CEO) repeatedly contacted Waters senior management …" to coerce Waters into withdrawing its job offer to Centrella, that Avantor "issued a subpoena to Waters, demanding almost immediate compliance and broad categories of potentially sensitive information dating back to January 2020;" and, that in an October 12, 2022, email "Avantor threatened to depose the most senior executives of Waters." AB4, 5,

Avantor's current contentions) the expiration of Centrella's non-compete does not protect him from further litigation." AB10.

Belying those contentions, Avantor's Opening Brief catalogues repeated instances in which it explicitly disavowed having any remaining claims against Centrella, including damage, injunctive or tolling claims arising from his attempt to join Avantor's competitor. OB15-17. Nor does Centrella deny that equitable tolling of Centrella's non-compete would be meaningless given that his unconsummated, short-lived prospective employment with Waters ended more than two years ago, resulting in Avantor promptly dismissing its claims. *See* OB16-17.

Responding to a question from the Chancery Court, Avantor's counsel mused that the Company arguably was damaged because it incurred legal fees, but repeated Avantor would not press that or any other claim. *Centrella v. Avantor*, 2022-0876-NAC, at 89:20-90:2 (Del. Ch. Jun. 18, 2024) (TRANSCRIPT) (A973-74). The assertions Avantor at any time claimed Centrella breached duties merely by accepting a job offer or that he was barred from accepting "any future M&A position" are fabrications.

Centrella claims "Avantor continues to allege, as defenses in the Underlying Action, that Centrella breached restrictive covenants with Avantor and remains

13. Discovery in the Underlying Action, including Centrella's own testimony, refutes that narrative.

bound by a confidentiality provision in perpetuity." AB16. The cited sources are simply denials of requests that Avantor admit Centrella did not violate duties to his former employer.

Centrella accuses Avantor of "includ[ing] in its brief and Appendix extensive Superior Court materials from the Underlying Action purportedly reflecting the dismissal of Centrella's declaratory judgment counterclaims as moot." AB19-20. He identifies the hearing transcript and Order granting Avantor's Motion for partial judgment on the pleadings, which dismissed Centrella's demand for a declaration voiding his expired non-compete because there was no case or controversy. Judge Wallace's ruling is persuasive authority from a sister Court considering the same facts as those before the Chancery Court and reaching an inconsistent result. While claiming "Judge Wallace did *not* have" the same facts before him as the Vice Chancellor, AB20 (original emphasis), Centrella does not identify any differences. Nor does he dispute this Court's authority to take judicial notice of the Superior Court rulings. *See* OB19 n.8.

ARGUMENT

I. THE CHANCERY COURT'S RELIANCE ON THE DEFERENTIAL, INAPPLICABLE ADVANCEMENT STANDARD REQUIRES REVERSAL.

The Chancery Court evaluated Centrella's claim under the wrong legal standard, treating it as one for advancement even though any advancement right terminated when Avantor's Plenary Action Complaint was dismissed in October 2022. OB20-24. Centrella admits neither he nor the Chancery Court analyzed whether he is entitled to indemnification in any amount. AB27-28. He disavows the need to do so, contending "the right to advancement does not depend on the right to indemnification." AB24; *but see Chodes v. Oasis Legal Finance Operating Company LLC*, C. A. No. 2020- 0379-JTL, at 36:11-16 (Del. Ch. Oct. 15, 2020) (TRANSCRIPT) ("[W]hen there is a clear contractual limitation such that in no event can the covered person be entitled to indemnification, then the covered person doesn't get advancement, because in that situation it is never possible that the person is entitled to indemnification.").[2] (AR39).

Centrella agrees "advancement and indemnification are distinct legal actions;" "different standards apply;" and the standard applicable to advancement is

[2] Centrella incorrectly argues the Trial Court's decision to evaluate his claim under the deferential advancement standard, rather than the more searching indemnification standard, is a question of fact, not law. AB22-23. Whether Centrella stated a claim is a question of law, requiring *de novo* review. OB20.

far more permissive than that applicable to indemnification. AB24, 26-27. He agrees the Chancery Court applied petitioner-friendly presumptions in evaluating his claim, including whether Centrella faced an ongoing litigation threat. *See* OB22-23 (*quoting* OP37). He does not dispute that application of the wrong standard mandates reversal. *See* OB 23-24.

The characterization of Centrella's claim as one for advancement turns on the effect of Avantor's termination of its claim and its disavowal of any intent to revive it or to bring another. As shown in Avantor's Opening Brief and below, Centrella has no advancement right. That error warrants reversal.

II. WITH NO ACTUAL OR THREATENED ACTION PENDING, ANY RIGHT TO ADVANCEMENT ENDED.

The Chancery Court's rationales for awarding ongoing advancement were premised on erroneous constructions of the terms "proceeding," "final disposition" and "threatened," as used in Avantor's Bylaws. OB26-38. Although Centrella contends the holding is a fact finding entitled to deference, AB39-42, he agrees his alleged entitlement "involves the construction of unambiguous contract language and is a 'question of law,' to be reviewed '*de novo* for legal error'." AB29-30 (citation omitted).

Centrella does not dispute that the operative terms are drawn from Delaware General Corporation Law § 145 and must be applied consistently with jurisprudence under the statute. *See* OB28-30.[3] Nor does he deny that an erroneous construction of the advancement bylaw requires reversal. *See id.* at 26.

Avantor's Opening Brief cites authorities making it clear the terms "proceeding" and "final disposition" refer to the course of litigation over the claims that triggered advancement. *Id.* at 27-32. Avantor cites authorities specifically holding a "threat" triggering advancement requires a manifested intent to adjudicate

[3] Avantor cited *Benchmark Capital Partners IV, LP v. Vague*, 2002 WL 1732423 (Del. Ch. Jul. 15, 2002) for the law that bylaws incorporating statutory terms are construed consistently with the statute. OB28. Centrella doesn't challenge the point, but dismisses *Benchmark* because it was "not an indemnification or advancement case." AB37.

a claim. *Id.* at 34. As shown in Avantor's Opening Brief, authorities for each point construe bylaws substantively identical to Avantor's, a point Centrella doesn't address. Centrella offers no authority supporting his contrary contentions.

A. The Trial Court's Interpretation of "Proceeding" and "Final Disposition" Were Legally Flawed.

Centrella denies the Vice Chancellor "grant[ed] the term 'proceeding' in the Bylaws a meaning 'different than that applicable to the same term in 8 *Del. C.* §145' – and *nowhere* suggest[ed] that the Bylaw's use of 'final deposition' changes the meaning of the 'proceeding'." AB38 (emphasis in original). According to Centrella, "[a]s a matter of common sense and consistent with Delaware law, the Underlying Action – like any legal proceeding – encompasses the pending compulsory counterclaim." AB38. Centrella does not address whether "final disposition" refers to the conclusion of the claim that triggered advancement in the first place, as opposed to the entire court case. Centrella's argument clashes with the authorities tying the termination of advancement to the end of the claim giving rise to advancement– not to the conclusion of the court case in which the claim triggering advancement was asserted.

Centrella cites two Delaware decisions to support his argument – *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992) and *Pontone v. Milso Indus. Corp.*, 2014 WL 2439973 (Del. Ch. May 29, 2014). In *Roven*, this Court held advancement extends to affirmative defenses and counterclaims "which will serve

to avoid or defeat an opposing party's claim." 603 A.2d at 824. *Pontone* quotes and applies *Roven*. 2014 WL 2439973, at *5-6. Neither addresses whether advancement continues after the "opposing party's claim" terminates.

According to Centrella, once advancement attaches to a court case, it continues until the court case ends, regardless of the claims it then includes. He effectively defines "proceeding" as an entire adjudicative case that includes at any time a claim triggering advancement. He defines "final disposition" as the end of such a "proceeding." The Chancery Court implicitly rejected that contention in *Carr v. Global Payments, Inc.*, 2019 WL 6726214 (Del. Ch. Dec. 11, 2019). There, Global Payments asserted several claims against a former officer, including violations of contractual prohibitions against competition and using confidential information. *Id.* at *2. The Court initially ordered advancement, noting the misappropriation of confidences component implicated Carr's status as a former officer. *Id.* Global Payments amended its contract claim to exclude the misappropriation allegations. *Id.* at *3. Although the contract claim continued – as well as the underlying action itself – the Court held the amendment "moot[ed] Carr's claim for advancement because it substantively changes the nature of the claim." *Id.* at *8.

Avantor's Opening Brief cites numerous authorities holding that once a litigation threat "ended, there cannot be a right to advancement of fees and expenses for affirmative claims designed substantively to defeat that threat." *Duthie v.*

CorSolutions Med., Inc., 2009 WL 1743650, at *3 (Del. Ch. June 16, 2009); *Mooney v. Echo Therapeutics, Inc.*, 2015 WL 3413272, at *12 (Del. Ch. May 28, 2015) ("Granting advancement … would require a finding that … Dr. Mooney is 'defending' against the counterclaims Echo formerly asserted against him, but later withdrew … Our advancement law simply does not stretch that far."); *Carr*, 2019 WL 6726214, at *4 ("Delaware law recognizes the potential for parties to eliminate their advancement obligations by amending their claims. If the amendments successfully 'moot [the] advancement dispute by removing any [] claims that would trigger an advancement right,' modification of a prior advancement order is proper;" quoting *Mooney*). The Trial Court agreed "these cases show that 'amendment can eliminate advancement obligations …'." OP34.

Centrella ignores the law applied by these authorities, dismissing each decision because none involved a claimant who continued pressing affirmative claims initially pleaded as counterclaims to a terminated complaint that triggered advancement. AB35-37. The authorities make clear, however, that a claimant's affirmative causes of action are covered ***only*** if they are defensive, and ***only*** as long as they remain defensive.

Centrella points to no language in any case, no legal principle and no aspect of logic rendering the defense requirement inapplicable to affirmative claims brought in the same case as those that initially triggered advancement. By

Centrella's logic, a separate lawsuit raising defenses to a claim triggering advancement should not be covered because they are part of a separate "proceeding." Such a rule would be inconsistent with Delaware's policy that the triggering of advancement in one lawsuit can require coverage over the claimant's affirmative claims in a different lawsuit. *E.g. Duthie*, 2009 WL 1743650, at *3. The authorities demonstrate that "proceeding" is the course of litigation over the claim triggering advancement and the "final disposition" is the termination of that claim.

While claiming Avantor misstates the Chancery Court's interpretation of "proceeding," Centrella concedes the Court applied the term as meaning all aspects of "the Underlying Action," AB37 – and isn't limited to the claim triggering advancement. According to Centrella, once advancement applies to claims in a particular court case, it continues even when the claims giving rise to the advancement entitlement end and the affirmative claims are no longer defensive. AB37-39.

The authorities Centrella cites in arguing "compulsory counterclaims remain 'defensive' … even where the indemnitor withdraws its affirmative claims," AB31-35 (emphasis omitted), do not support his assertion. In *Fillip v. Centerstone Linen Servs., LLC,* 2014 WL 1821299 (Del. Ch. May 1, 2014), the former CEO of Centerstone Linen sued his former employer, claiming benefits under his employment agreement. Centerstone counterclaimed, alleging breaches of contract

and fiduciary duty, and asserted affirmative defenses including unclean hands, each "challenging the official's conduct in his capacity as an officer." *Id.* at *6-7. Although Centerstone dismissed its fiduciary duty counterclaim "without prejudice," it continued pressing other claims. Then-Master LeGrow required advancement because the remaining counterclaims, "although styled as breach of contract claims, are premised entirely on the proposition that Fillip used his position as CEO to engage in certain conduct that Centerstone contends resulted in" contract breaches. *Id.* at *2, 5. In that context, coverage also was extended to Centerstone's affirmative defenses based on the same allegations as the covered counterclaims. *Id.* at *6-7.[4] In *Imbert v. LCM Interest Holding LLC*, 2013 WL 1934563 (Del. Ch. May 7, 2013), then-Master LeGrow ordered LCM Interest to advance a former CEO's cost of defending against claims he charged personal expenses to the business where the "claims have been withdrawn from [litigation pending in a New York court], but are expected to be submitted to FINRA arbitration." *Id.* at *9.

Centrella's reliance on a transcript ruling in *Riker v. Teucrium Trading*, C.A. No. 2022-1030-LWW (Del. Ch. Jun. 13, 2023) (TRANSCRIPT) is equally

[4] Centerstone's Affirmative Defenses included "that Fillip was barred from recovery under the doctrine of unclean hands and based on his own breaches of the Employment Agreement and the LLC Agreement." *Id.* At *2. By contrast, Avantor's Affirmative Defenses are mootness, the absolute litigation privilege, failure to state a claim, waiver and estoppel. *Centrella v. Avantor*, N23C-10-200-PRW, Dkt. 19 (Amended Answer at 30) (B366). None implicate the substantive contract breach claims Avantor asserted in September 2022 and dismissed in October 2022.

misplaced. A fired executive, Riker, threatened his former employer with a draft New York complaint, challenging his termination and raising other claims. *Id.* at 5. (AR54). Teucrium struck first, filing a Delaware action seeking, in part, declarations a stock sale contract was unenforceable (Count II) and that Riker's termination was valid (Count IV). *Id.* at 8-9. (AR57-58). Riker's threatened New York claims, brought as Delaware Counterclaims, included claims for enforcement of the contract and challenging Riker's removal. *Id.* Teucrium withdrew Counts II and IV and moved to terminate advancement for Riker's corresponding counterclaims. *Id.* at 25. (AR74).

Unlike Avantor, Teucrium continued pressing other claims for which advancement was mandated. In addition, the issues in the withdrawn Counts remained live, actively litigated claims. The Court acknowledged "[t]here is an argument to be made that with this withdrawal, the corresponding counterclaims are no longer viewed as defending but are, in fact, affirmative." *Id.* Nevertheless, the Court continued 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. … Teucrium cannot attempt to avoid advancing those fees by withdrawing its claims.

Id. at 26-27. (AR75-76). In a subsequent ruling to which Centrella alludes, but does not provide, the Court terminated advancement once it was clear the litigable controversy was over.

In an October 20, 2023, hearing, Teucrium's counsel explained Counts II and IV were dismissed with prejudice and that "[w]e're done with those claims." *Riker,* C.A. No. 2022-1030-LWW, at 4. (AR83). Although the claims were "recast … as affirmative defenses," there were "no affirmative claims against the Rikers in the Plenary Action, and there's no risk of those claims coming back." *Id.* at 19. (AR98). Quoting *Carr*, the Court noted "an amendment to a pleading or a dismissal of claims, as we have here, can eliminate advancement obligations if the amending or dismissing party 'assures the Court that [the party originally entitled to advancement] will not face litigation that triggers advancement obligations'." *Id.* at 21. (AR100). The Court identified two distinct sources of such assurance: dismissal of Teucrium's "remaining claims with prejudice" and that Teucrium "also repeated and reaffirmed their commitment to not refile any of the dismissed claims." *Id.*

Avantor was "done with" its claim against Centrella in October 2022. The authorities make clear that a claimant's affirmative causes of action are subject to advancement ***only*** if and while they are defenses to a claim triggering advancement rights. Once the claim triggering advancement ends, the claimant's affirmative causes of action are no longer defensive and no longer subject to advancement. The Chancery Court's finding that advancement continues through the final disposition of Centrella's Counterclaims – regardless of whether he is defending an actual or threatened claim – was reversible error.

B. The Chancery Court's Definition of "Threat" Was Legally Erroneous.

It is undisputed that Avantor has no claims against Centrella and has not threatened to assert any. The supposed chance it might arises solely because Avantor dismissed its only claim in October 2022 "without prejudice" and has not given Centrella a release. *See* AB40. Avantor's Opening Brief cites ample authority that a "threat" triggering advancement requires a manifested intent to assert a claim requiring adjudication. OB34-36; *e.g. i/mx Information Management Solutions, Inc. v. Multiplan, Inc.*, 2014 WL 1255944, *6 (Del. Ch. Mar. 27, 2014) ("relevant inquiry … is whether QMC 'gave signs or warnings' to Multiplan that it was going to commence an Action … or announced to Multiplan that it intended to, or that it was possible that it would …"). The Vice Chancellor erred by defining a "threat" as the lack of a legal bar against reviving a dismissed claim.

Centrella cites no authority supporting the contention a "threat" exists unless a dismissed claim is legally barred. According to Centrella, the legally-established definition of "threat" is irrelevant:

> 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.
>
> 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.

AB41 (emphasis omitted). Centrella's assertion that existence of a "threat" is a question of fact, AB30, clashes with his admission that the meaning of the indemnification/advancement Bylaw is a question of law.

Centrella's recitation of the Trial Court's fact findings – which it augments with fact contentions not found by the Court – is of no moment if the Trial Court applied the wrong standard. That is particularly so given the failure to find Avantor is pursuing a claim or has given "signs or warnings" it will do so. The Chancery Court's finding that a "threat" exists because there is no legal bar to Avantor reviving its mooted claim was clearly erroneous given Avantor's repeated representations to the Court that its claim was mooted in October 2022, that it has no intention of reviving it and that it has no other claims. *See Donohue v. Corning*, 949 A.2d 574, 580 n.26 (Del. Ch. 2008) ("Having made the decision not to institute or threaten to institute a proceeding against Donohue … the defendants are stuck with that decision.").

Donohue demonstrates the disavowing an intent to bring or revive an advancement-triggering claim is sufficient to terminate advancement. Centrella cites no authority requiring a release or a "with prejudice" dismissal to achieve that result. *Carr v. Global Payment*, is instructive. Global Payment sued a former officer alleging insider trading and breaches of non-compete and non-solicitation contracts. 2019 WL 6726214, at *2. After the Court ordered advancement, the company

amended its contract breach claim and "state[d] they will not rely on allegations of the misuse of confidential information." *Id.* at *3. The Court recognized "the potential for parties to eliminate their advancement obligations by amending their claims," but cautioned that "[t]he 'mere relabeling' of claims will not support modification when the underlying litigation remains substantially the same." *Id.* at *4. Despite casting a "jaundiced eye" on the revised pleading, the Court found:

> [T]he Defendants' amendment effectively moots Carr's claim for advancement because it substantively changes the nature of the claim. The initial Complaint … shows the Defendants originally stated a claim against Carr for the misuse of confidential information in violation of his employment agreement. They have chosen to eschew that claim. Further, they have represented to the Court that they will not rely on allegations of the misuse of confidential information in bringing their non-compete and non-solicitation arguments in the New Jersey Action, a representation on which I rely here.

Id. at *8. Accordingly, the Court terminated advancement for the defense of the contract claims. *Id.* at *9. *Accord Duthie*, 2009 WL 1743650, at *3 (defendants "demonstrated their desire not to pursue those claims further against these Plaintiffs individually by filing an answer in the Federal Action without asserting any counterclaims. Finally, the Defendants have represented to this Court that they will not assert fraud claims against the Plaintiffs in any forum."); *Mooney v. Echo Therapeutics, Inc.*, 2015 WL 3413272, at *6, 12-13 (advancement denied for affirmative claims defending against claims dropped in subsequent amended

pleading; "the only relevant affirmative claims asserted by the Company appear to be the Original Counterclaims, which Echo withdrew before *Mooney II* was filed.").[5]

The facts here are even more compelling. In *Carr*, *Duthie* and *Mooney*, unlike here, the indemnitor continued actively pressing claims against the claimant. Nevertheless, having found the claims triggering advancement were abandoned, the Court terminated advancement for the claimant's defense in the same case (*Carr*) and for affirmative claims in other lawsuits (*Duthie* and *Mooney*). Here, Avantor's only claim was dismissed as moot a little over a month after being brought, before any discovery responses were served. A337–A341.

Here, too, Centrella's cited authorities are unsupportive.[6] *K&K Screw Products L.L.C v. Emrick Capital Investments, Inc.*, 2011 WL 3505354 (Del Ch. Aug. 9, 2011) (AB25) had nothing to do with advancement, but related to whether a declaratory judgment claim presented a live controversy. The Court held it did where the defendant "indicated … it has 'numerous claims against the Company and

[5] Centrella dismisses *Duthie*, *Mooney* and *Pantone* because "none actually" hold "a counterclaim ceases to be advanceable if the affirmative claims terminate." AB35. *Duthie*, *Mooney* and *Carr* terminated advancement in other procedural settings. Centrella also claims *Pantone* "confirms that whether a counterclaim is compulsory and therefore advanceable is determined 'at the time [the] defending party serves its responsive pleading'." AB36 (*quoting Pontone*, 2014 WL 2439973 at *10 n. 96). Centrella's cherry-picked quote excludes critical language giving the phrase a different meaning: "a claim for relief that is not ripe at the time a defending party serves its responsive pleading does not qualify as a compulsory counterclaim."

[6] *Fillip*, *Imbert* and *Riker* are discussed above.

'reserves all rights' to assert them against it." *Id.* at *8.[7] *McKenzie v. City of Rehoboth*, 2000 WL 724708 (Del. May 23, 2000) considered whether an appeal from the Superior Court's determination regarding the jurisdiction of an administrative agency was interlocutory or a final judgment. *Realogy Holdings Corp. v. Sirva Worldwide*, 2020 WL 4559519 (Del. Ch. Aug. 7, 2020), addressed whether to certify an interlocutory appeal dismissing specific performance claims in a contract breach case.

Substituting meritless criticism for substance, Centrella charges Avantor's "assertion of claims triggering both advancement and compulsory counterclaims, subsequent withdrawal of those claims 'without prejudice' in an attempt to avoid advancement – suggest an absence of good faith." AB34 (emphasis omitted). The claim was dismissed "without prejudice" to avoid any implication Avantor was waiving the remaining ten-month term on Centrella's non-compete. It is strange to argue Avantor should have continued seeking an injunction to prevent Centrella from joining a competitor after the competitor withdrew the job offer.

[7] Centrella's reliance on *K&K Screw* is notable given his contention Judge Wallace's holding that Centrella's declaratory judgment claim presented no case or controversy "has no bearing on the issues before this Court." AB20-21. If *K&K Screw* is instructive on whether Centrella faces a litigation threat, so is Judge Wallace's ruling that no case and controversy is presented by Centrella's quest for a declaration his expired post-employment restrictions are invalid.

III. CENTRELLA IS NOT ENTITLED TO FEES FOR PURSUING AN INVALID THEORY.

Fees-on-fees must be proportionate to the success achieved. OB40-42. Centrella acknowledges the requirement, but incorrectly characterizes it as permissive, not mandatory. *Compare* AB46 ("these cases stand for the non-controversial principal that a court may award fees-on-fees in proportion to the number of *claims* that are successful;" original emphasis); *with*, *e.g. Holley v. Nipro Diagnostics, Inc.*, 2014 WL 7336411, at *15 (Del. Ch. Dec. 23, 2014) (DGCL requires "reasonable [fees] in relation to the results obtained" where agreement mandated fees-on-fees "if [claimant is] successful in whole or in part").[8]

Centrella does not claim the Chancery Court considered reasonableness or proportionality. Indeed, Centrella's fee demand was not before the Court. Instead, Centrella argues the Vice Chancellor correctly held a partial victory entitled him to all of his fees. AB40.

Avantor also cited authority holding "[t]here should be no indemnification for losing issues, including subparts of a 'winning' issue as to which the trial court made specific findings." OB42 (quoting *May v. Bigmar, Inc.*, 838 A.2d 285, 291 (Del. Ch. 2002), *aff'd*, 854 A.2d 1158 (Del. 2004)). Centrella does not challenge *May*'s holding, but claims the Court awarded all the petitioner's fees-on-fees, "even where

[8] The parties agree the fee award is subject to *de novo* review. AB43.

she did not obtain indemnification on every issue." AB45. *May*, however, does not say the petitioner received all the fees she incurred, only that: "An award for 'fees-on-fees' will be entered in the amount $291,829.98, as requested." 838 A.2d at 291. Nothing in *May* contradicts the ample authorities that fees must be reasonable and proportionate to the petitioners' success. *See* OB 40-42. Moreover, the petition in that action shows May only sought indemnification for the claim on which she was successful. *May v. Bigmar*, 2002 WL 32904951 (Del. Ch. Sept. 26, 2002) (COMPLAINT) (seeking "$593,37.32 of the fees and costs that were reasonably incurred … [that] were related to the Board Meeting Claim and are subject to her right to indemnification") (AR2). Centrella's demand is not limited to his successful claims.

In *Meyers v. Quiz-Dia LLC*, 2018 WL 1363307 (Del. Ch. Mar. 16, 2018), petitioners sought indemnification under two agreements – an Assignment Agreement and an Operating Agreement. The Court upheld the Operating Agreement Claim, but not the Assignment Agreement Claim. Turning to fees-on-fees, the Court noted that for a period, one set of petitioners "were pursuing only the Assignment Agreement Claims." *Id.* at *11. Because "[t]hey did not prevail on the Assignment Agreement Claims," fees incurred during that period "are not recoverable." *Id.* A second set similarly "prevailed on one of the two major

categories of claims," and the Court "start[ed] with one half as the relevant proportion of success" – reducing the award accordingly. *Id.*

It is undisputed that: (a) for a considerable period the only claim asserted by Centrella was an entitled to advancement because he had been an Avantor "officer" (the "Officer Claim"); (b) after the Court questioned the claim, Centrella raised a new theory – that the Indemnification Bylaw extended coverage to him as an Avantor subsidiary employee (the "Employee Claim"); and (c) the Court dismissed the Officer Claim, but Centrella prevailed on the Employee Claim. The fees Centrella incurred pursuing his unsuccessful Officer Claim were substantial – covering pleadings, briefing and argument for two summary judgment hearings, document discovery and depositions.

Centrella argues he should receive all his fees because he "at all times ... asserted one claim for advancement." AB1, 44. His basis for that argument is that, when he finally asserted the Employee Claim, he did so as part of the same Count in which he pleaded the Officer Claim. AB44. The argument fails because the Amended Complaint in which he asserted the Employee Claim was filed after the Court dismissed the Officer Claim, rendering the Officer Claim a nullity. OB14-15.

Centrella's reliance on the wording of the Counts in his Petition inflates the significance of those paragraphs. The use of Counts is simply a convention widely

used to summarize the operative part of a pleading. In defining the requirement for asserting a claim for relief, the Chancery Court Rules provide:

> A pleading which sets for a claim for relief … shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled.

Ch. C R. 8(a). There is no requirement that a complaint utilize counts at all, let alone a standard defining a "claim" as legal theories bundled in a single count. Delaware Courts have resisted efforts to evaluate the sufficiency of a complaint based on the theories set out in the counts. *See e.g. In re Cellular Tel. P'ship Litig.*, 2021 WL 4438046, at *61 (Del. Ch. Sept. 28, 2021) ("The failure to plead a particular legal theory is not inherently fatal."); *Trifecta Multimedia Holdings Inc. v. WCG Clinical Servs. LLC*, 318 A.3d 450, 468–69 (Del. Ch. 2024) (notice pleading standard "reject[s] the antiquated doctrine of the 'theory of the pleadings'—*i.e.*, the requirement that a plaintiff must plead a particular legal theory."); *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343, 375 (Del. Ch. 2023) (denying motion to dismiss despite inadequacy of formally asserted claim; Delaware not bound by the "restrictive theory of the pleadings doctrine" and plaintiffs' provided enough facts to state claim).

In *Hoffman v. FirstWave Bio Pharma*, 2023 WL 6295345 (Del. Ch. Sep. 27, 2023), the Chancery Court rejected the notion Centrella advances here – that different theories for advancement constitute the same claim because the relief

sought is the same. In *Hoffman*, a director sought advancement claiming he was accused of breaching fiduciary duties, creating an implication the Board "must have investigated his conduct." *Id.* at *1. In pre-trial briefing, he "developed a secondary position that, in claiming he breached his fiduciary duties and violated other laws, the Company had threated a lawsuit or regulatory proceeding." *Id.* Although both theories sought the same relief and were based on the same factual record, the Court barred the second theory because the respondent had not received fair notice. *Id.* at *11-12.

Regardless of whether Centrella's two theories are considered separate claims or separate issues, he is not entitled to fees for having unsuccessfully pursued the Officer Claim. The Chancery Court's failure to deduct those fees, or to conduct any reasonableness or proportionality analysis at all, is reversible error.

CONCLUSION

For the reasons set forth hear and in its Opening Brief, Avantor respectfully requests reversal of the Chancery Court's holding that advancement continued after Avantor dismissed its complaint of its holding that Centrella is entitled to all his fees-on-fees.

Dated: December 6, 2024

BALLARD SPAHR LLP

/s/ David J. Margules

David J. Margules (No. 2254)
Jessica C. Watt (No. 5932)
Emily C. Friedman (No. 7054)
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
Email: MargulesD@ballardspahr.com
WattJ@ballardspahr.com
friedmane@ballardspahr.com

Attorneys for Appellant
Avantor, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2024, I caused a true and correct copy of the foregoing *Appellant's Reply Brief* to be served by File & Serve*Xpress* upon the following counsel of record:

Philip Trainer, Jr., Esquire
Tiffany Geyer Lydon, Esquire
ASHBY & GEDDES
500 Delaware Avenue, 8th Floor
Wilmington, DE 19801

/s/ David J. Margules
David J. Margules (No. 2254)