IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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| FAITH ZAMAN and THOMAS W. DERBYSHIRE, | ) | |
| Plaintiffs, | ) | |
| v. | ) | C.A. No. 3115-VCS |
| AMEDEO HOLDINGS, INC., a Delaware Corporation, PH PARTNERS, INC., a Delaware Corporation, PALACE HOLDINGS, INC., a Delaware Corporation, KAVA HOLDINGS, INC., a Delaware Corporation and CEDAR SWAMP HOLDINGS, INC., a Delaware Corporation, | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

Date Submitted: February 25, 2008
Date Decided: May 23, 2008

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**STRINE, Vice Chancellor.**

## I. Introduction

Faith Zaman and Thomas Derbyshire are British attorneys and spouses. Derbyshire met a very rich man, Prince Jefri, the younger brother of the Sultan of Brunei. Because Derbyshire was a successful young barrister experienced in addressing difficult cases, his talents were attractive to Jefri, who was in the midst of a strange legal feud with his brother, the Sultan.

Eventually, Jefri retained both Derbyshire and his then-fiancée and now wife, Zaman, who was trained as a barrister but had left practice to work at an investment bank, at a sum of either one (Jefri's version) or two (the Derbyshires' version) million pounds a year a piece. The scope of the retention is a key issue in this lawsuit. But, I conclude that the retention was extremely broad and involved the appointment of Derbyshire and Zaman as agents with broad managerial and financial authority over all of Jefri's American corporations, corporations of which he claimed to be the sole beneficial owner. The assets of these corporations included high-end hotels, like the New York Palace Hotel, and large estates. Jefri's legal battle with his brother included a dispute over these assets, with the Sultan acting (through the Brunei Investment Agency, which he solely dominates and controls as Brunei's dictator) to seize control over those assets from Jefri.

From August 2004 to November 2006, Derbyshire and Zaman performed diverse managerial, financial, and legal duties for Jefri and his corporations. These duties included helping to manage the New York Palace Hotel, and causing various of the corporations to engage in transactions to raise funds for Jefri and his corporations to defend themselves against the Sultan's legal onslaught. Jefri did not respect corporate

formalities and treated his various corporations as his to do with as he pleased, as their sole beneficial holder. To that end, the Derbyshires were charged by Jefri with raising funds from particular entities and applying them to the benefit of Jefri personally and others of his entities. Put simply, when Jefri spoke, the entities acted, regardless of whether he had any formal role in their governance structure, other than as ultimate beneficial owner. Likewise, having been giving a broad power of attorney to act on Jefri's behalf as to any of his assets, which everyone involved understood to include the corporations, the Derbyshires caused numerous of Jefri's corporations to take actions, irrespective of whether they had formal officer or director roles at the corporations. They did so as agents empowered by Jefri to act on all of his corporations' behalf.

In November 2006, relations between Jefri and the Derbyshires changed. Fearing that the BIA was about to succeed in securing control of Jefri's American empire, Zaman decided to stop sending funds from the New York Palace Hotel to a corporation that was financing the living expenses of Jefri and his children. When Jefri learned of this, he acted to terminate the Derbyshires from all their positions in his corporations. This action was consistent with his prior behavior and course of dealing, in which it was clear that Jefri purported to speak for all of his entities and all those entities followed his direction.

Jefri then turned around and with his corporations filed lawsuits against the Derbyshires. In those lawsuits, it was alleged that the Derbyshires exploited their power over the corporations' assets, by siphoning off funds to pay themselves excessive fees, using credit cards for improper personal expenses, and causing the corporations to enter

into sweetheart contracts that unduly benefited themselves. The Derbyshires deny these allegations and say that all their conduct was authorized by Jefri and that to the extent that they received funds, it was with Jefri's permission and to compensate them in accordance with his promise to them.

This post-trial decision addresses the Derbyshires' claims for advancement and indemnification. These claims require the court to address numerous issues, many of which are of no interest to anyone other than the parties themselves.

When all that analysis is done, I conclude that the Derbyshires are entitled to most of what they seek, including indemnification for a dismissed federal lawsuit filed against them and advancement for most of the claims pending against them (and their responsive counterclaims) in the state lawsuit pending against them. Because they have been predominately successful, I award the Derbyshires fees on fees equal to 80% of their fees and expenses in this action.

## II. Factual Background

Regrettably, resolving this § 145 case requires an in-depth consideration of the events leading up to the lawsuits for which advancement and indemnification is sought.[1] That consideration is necessarily also affected by the approach to the case taken by the defendants. The defendants — Amedeo Holdings, Inc., PH Partners, Inc., Palace Holdings, Inc., Kava Holdings, Inc. and Cedar Swamp Holdings, Inc. (collectively, the "defendants") — are all Delaware corporations that are beneficially owned by Prince Duli Yang Teramat Mulia Paduka Seri Pengiran Digadong Sahibul Mal Pengiran Muda

[1] 8 *Del. C.* § 145.

Haji Jefri Bolkiah ("Jefri"). At all relevant times before November 8, 2007, Jefri exercised total dominion over these corporations and treated them as if they were his personal property. Yet, when this case proceeded, Jefri was unwilling to sit for a deposition, and his children, Princes Bahar and Hakeem — who served as officers and directors of several of the defendant corporations — also had the same reluctance. The court did not require the three princes to be deposed but only on the condition that the defendants could not later rely upon testimony from them at trial.

Similarly, the defendants proffered an inadequate Rule 30(b)(6) witness on behalf of the defendants, Jonathan Berman of the firm of Jones Day, which was originally the primary counsel for the defendants in this litigation. Berman was an unhelpful, uninformed witness.

The shape of the trial record therefore involved no testimony from the defendants, and only testimony from the plaintiffs, Thomas Derbyshire and Faith Zaman. Notwithstanding their refusal to participate in a forthright manner in discovery, the defendants, as we shall see, attempted to shift their arguments in the midst of trial and advance new factual defenses. This move was, I find, unfair and procedurally improper.

The following recitation of the facts is necessarily influenced by the record as the parties shaped it, and to the extent the recitation is more similar to the story told by the Derbyshires, the defendants have only themselves to blame, as they failed to tell their own story at trial in a manner that gave me confidence that it could stand up to adversarial testing.

## A. The Battling Brothers Of Brunei

The odd relationship between two brothers in the royal family of Brunei is central to this litigation. Jefri is the son of the 28th Sultan of Brunei, the former ruler of Brunei Darussalam. Jefri's oldest brother, Haji Hassanal Bolkiah Mu'izzaddin Waddaulah, is the current Sultan of Brunei. The nation of Brunei occupies an area of land slightly smaller than Delaware on the island of Borneo in Southeast Asia. The source of its wealth is oil.

From 1983, shortly after Brunei received independence from the United Kingdom, until 1997, Jefri served as the chairman of the Brunei Investment Agency (the "BIA"), the agency responsible for investing that country's substantial oil wealth. In 1998, the Brunei government and the BIA alleged that while he headed the BIA, Jefri misappropriated approximately $15 billion. But Jefri was never criminally prosecuted. This could have been because his brother, the Sultan, still cared for him. It could have also been, as the defendants argued earlier in this case, that Jefri had authority for everything he did from his brother, and had misappropriated funds for the Sultan's use as well.[2] But for whatever reason, Jefri escaped a long term in the jailhouse.

He did, however, execute a Settlement Agreement with the BIA in which he promised to disclose the hidden locations of the property he held and to return almost all

[2] Defs. Pre-Trial Op. Br. at 2-3 ("For about a decade, Prince Jefri was responsible for disbursing funds from Brunei's treasury for public and private projects; acquiring for himself, the Sultan and other members of the extended Royal Family cars, airplanes, jewelry, art works, real estate and other assets; paying stipends and making gifts to members of the Royal Family and other foreign dignitaries; and directly transferring money (estimated to be $8 billion) to the Sultan's personal bank accounts.").

of his remaining assets to the BIA. Also in the Settlement Agreement, Jefri consented to asset freezing injunctions in Brunei and London.

Although the expenses of Jefri's lavish lifestyle were dwarfed by those of the Sultan, the assets he had taken from the BIA allowed Jefri to enjoy a posh life in London and elsewhere as a multi-billionaire. He refused to give it up. Over the course of the next several years, Jefri did not reveal or relinquish many of the assets as he had stipulated.[3] Jefri took the position that certain actions by the BIA had violated the Settlement Agreement, thereby discharging him from complying with its terms.[4] He argued that he had no choice but to enter the Settlement Agreement because he had been placed under house arrest,[5] the Sultan had possession of his passport, and his family had been brought into the litigation. According to Jefri, he and the Sultan had entered into a side-agreement in which Jefri was allowed to retain six so-called "Lifestyle Assets" including properties in London, Paris, and two luxury hotels in the United States. The BIA disagreed and commenced legal actions against Jefri and many holding companies he beneficially owned in different courts around the world to wrestle away assets.

B. Jefri's American Assets

The present case involves Jefri's American assets. These include the New York Palace, a five star luxury hotel in New York, the Hotel Bel-Air, another five star hotel in

[3] Although Jefri transferred over 600 properties, over 2,000 cars, over 100 paintings, 5 boats, and 9 aircraft to the BIA, he still retained billions of dollars of assets in other holdings.
[4] *See id.* at 3 ("The Sultan and the BIA soon breached the Settlement Agreement (and the collateral contract), causing Prince Jefri to refuse to perform his executory obligations as well.").
[5] Defs. Pre-Trial Ans. Br. at App. B.

Los Angeles, and several large estates. The Sultan claims these assets were bought with funds Jefri misappropriated from the BIA.

Jefri has resisted his brother's attempt to take away his American assets or as the defendants put it, to "crush [him]."[6] Even after signing the Settlement Agreement in May of 2000, Jefri continued to assert that he was the rightful owner of the American assets. In various legal proceedings, Jefri argued that the Settlement Agreement was void because of the BIA's non-compliance and its inducement by coercion. Jefri also sought to bargain with the BIA for more flexibility. In these efforts, Jefri began to incur heavy legal bills to protect his empire. He employed several close advisors and confidants, including at least one British barrister to manage his ongoing lawsuits. His inner circle was given authority to act as his agents plenipotentiary, managing ongoing lawsuits against the BIA and using his businesses and properties to pay the bills.

Because of the restrictions imposed on him by the Settlement Agreement and various freezing orders, Jefri could not move funds among the assets he owned in traditional ways. Instead, he used advisors to sell real estate properties and to do whatever it took to generate the funds for defending against the Sultan's legal campaign and for keeping up his lifestyle.

Jefri held his assets, which included other operating businesses aside from the hotels, through dozens of entities organized according to the laws of numerous jurisdictions in multiple layers.[7] This complex holding structure facilitated Jefri's ability

[6] Defs. Post-Trial Ans. Br. at 2 n.3.
[7] Around seventy corporations were sued by the BIA along with Jefri in proceedings in Brunei.

to generate cash, as he could cause entities to sell assets and distribute the resulting funds to support his legal defense and lifestyle costs. For present purposes, a few of these chains of ownership are relevant.

The first is the chain of ownership controlling the New York Palace. At the top of this chain, Jefri owns Shearn Skinner Trust Company, a Malaysian company. Shearn Skinner Trust Company owns NYP Holdings Limited, a company organized according to the laws of the Malaysian territory of Labuan. NYP Holdings Limited owns NYP Realty Limited, another Labuan company. NYP Realty Limited owns defendant Amedeo Holdings, Inc., a Delaware corporation. Amedeo Holdings owns defendants PH Partners, Inc., and Palace Holdings, Inc., both Delaware corporations. PH Partners is the general partner of a New York limited partnership named Amedeo Hotels Limited Partnership. Palace Holdings is its limited partner. Ultimately, Amedeo Hotels does business as the New York Palace Hotel.

The Hotel Bel-Air chain of ownership is simpler. At the top of this chain is Jefri. Jefri wholly owns Sol Properties, Inc., a Cayman Islands corporation. Sol Properties owns defendant Kava Holdings, Inc., a Delaware corporation. Kava owns the Hotel Bel-Air.

Lastly, Jefri owned a mansion on the North shore of Long Island called the Sunninghill Estate. Jefri wholly owns Pinsley International, Ltd., a British Virgin Islands company. Pinsley International owns defendant Cedar Swamp Holdings, Inc., a Delaware corporation. Cedar Swamp Holdings owned the Sunninghill Estate.

## C. Jefri Hires Zaman And Derbyshire

As the legal conflict against the BIA and the Sultan intensified in mid-2004, Jefri dismissed several of his closest advisors, who served as officers and directors at many of Jefri's corporations. This is when the Derbyshires come into the story.

Giacomino (Jay) Majestro, one of Jefri's inner circle, introduced Jefri to his acquaintance, Thomas Derbyshire and Derbyshire's then-fiancée and now-wife, Faith Zaman, as possible replacements for the dismissed advisors. Jefri soon hired Zaman and Derbyshire, as Jefri later described, "to advise [him] on legal issues related to a lawsuit in Brunei, *to exercise Prince Jefri's control of the Palace Hotel as well as the Bel Air Hotel in California*, and to investigate any past financial irregularities with respect to hotel operations."[8] Derbyshire was a successful British barrister with sixteen years of experience and "a substantial reputation as an expert in fraud and money laundering cases."[9] Zaman was a non-practicing barrister who had recently left ING Investment Bank where she had managed private client assets and worked with corporations and other entities.

Consistent with Jefri's customary informal practice, the Derbyshires' retention agreement was oral. They contend Jefri agreed to pay them £2 million each per year. Jefri claims it was only £2 million per year for the pair.

The Derbyshires' first order of business was to investigate their predecessors, whom Jefri had accused of stealing from him, and they planned a trip to the United States

[8] JX 17 ("Federal Compl.") ¶ 25 (emphasis added).
[9] Pls. Pre-Trial Op. Br. at 7.

to review the corporate books and records of the New York Palace Hotel and the Hotel Bel-Air. Before they embarked on this mission, on August 10, 2004, Jefri executed various documents so that Derbyshire and Zaman could prove to others the almost limitless discretion they now wielded over the Prince's affairs. To reflect this relationship, Jefri signed a letter of authority that reads as follows:

> Dear Sir,
>
> Please be advised that I hereby authorise Mr. Thomas Derbyshire, Miss Faith Zaman, Mr. Jay Majestro . . . and any person authorised by them in writing, to give such instruction as they may consider appropriate to commence and prosecute any proceeding on my behalf *with regard to my assets, liabilities and affairs, whether in my name or in the name of any other person, body corporate, trust or similar entity directly or indirectly on my behalf.*
>
> You are also hereby authorised to act on any such instructions, with immediate effect, *as if they had been given by me in person* and to provide them any such information and documents as they may request.[10]

At trial, Zaman and Derbyshire testified persuasively that the letter granted them authority to act as general agent on behalf of all of Jefri's corporations. At the same time, Jefri also executed a general power of attorney for Derbyshire, Zaman, and Jay Majestro to act on his behalf, with the restriction that any action would require "approval in writing from all three attorneys . . . ."[11] A few days later, Jefri specifically designated Zaman "as [his] authorized signatory for any funds to be transferred and legal fees."[12] The

[10] JX 8 (emphasis added).
[11] *Id.* (capitalization altered).
[12] JX 9.

Derbyshires' understanding that they had been given broad authority to act as agents for all of Jefri's U.S. corporations is one shared by the defendants themselves.

In the federal lawsuit one of the defendants and Jefri caused to be brought against the Derbyshires, they alleged that "Jefri granted [the Derbyshires] a general power of attorney authorizing them to act on his behalf in all respects,"[13] and that the Derbyshires "*took control of companies owned by him* and, therefore his primary financial assets, including the Palace Hotel."[14] "Derbyshire and Zaman," the allegations continued, "were appointed officers of PH Partners Inc., the general partner of Amedeo, with full authority to manage the affairs of the Palace Hotel."[15]

When the Derbyshires arrived in New York, they had to initiate litigation to retake control of the hotels for Jefri. After the successful conclusion of those lawsuits, Jefri appointed the Derbyshires as directors and officers of the corporations holding the hotels.[16]

### D. Jefri Doesn't Observe Corporate Formalities In Empowering The Derbyshires Or In Any Other Manner

Jefri does not follow corporate formalities. This is not to say that most of his corporations do not have assets and that they do not sporadically hold board meetings or have directors who pass resolutions. But those instances are the exception to the general rule, which is that Jefri, as beneficial owner, does what he wants with the corporations, regardless of how many levels down a chain of subsidiaries a corporation is.

[13] Federal Compl. ¶ 20.
[14] *Id.* ¶ 30 (emphasis added).
[15] *Id.* ¶ 52.
[16] Trial Tr. at 356.

Jefri did not grace us with his presence at trial to explain his approach to corporate governance. From the record, his approach is simple: when he speaks or someone charged by him with authority speaks, the corporations he controls do what they are told. If that means acting without any proper resolution by a corporate board or through action of a person who is not an officer or director, they do so. The only requirement is that Jefri have given his blessing or personally empowered the person acting.

Consistent with this way of doing business, when Jefri authorized the Derbyshires to act on his behalf at any corporation he owned directly or indirectly, no corporate resolution accompanied that action. This matched the corporations' prevailing practice, which generally involved an absence of board meeting, board minutes, or resolutions. Along with his general grant of authority to the Derbyshires, Jefri also appointed them formally as directors and officers of several of his entities for certain periods of time.

The following chart of the Derbyshires' various positions with the defendants illustrates their formal service in those capacities was included by the parties in the pre-trial stipulation:

| **Company** | **Individual** | **Position** | **Begin Date** | **End Date** |
|---|---|---|---|---|
| Amedeo Holdings | Thomas Derbyshire | Director, Vice-President | 1/19/2005 | 5/19/2005 |
| Amedeo Holdings | Faith Zaman | Director, Secretary, Treasurer | 1/19/2005 | 11/07/2006 |
| Kava Holdings | Thomas Derbyshire | Director | 10/11/2004 | 5/19/2005 |
| Kava Holdings | Thomas Derbyshire | Secretary, Treasurer | 10/11/2004 | ---------- |

| Company | Individual | Position | Begin Date | End Date |
|---|---|---|---|---|
| Kava Holdings | Faith Zaman | Director | 5/19/2005 | 11/07/2006 |
| Cedar Swamp Holdings | Faith Zaman | Director, Secretary, Treasurer | 3/05/2005 | 6/22/2005 |
| Palace Holdings | Thomas Derbyshire | Director, Vice-President | 1/19/2005 | 5/19/2005 |
| Palace Holdings | Faith Zaman | Director, Secretary, Treasurer | 1/19/2005 | 11/07/2006 |
| PH Partners | Thomas Derbyshire | Director, Vice-President | 1/19/2005 | 5/19/2005 |
| PH Partners | Faith Zaman | Director, Secretary, Treasurer | 1/19/2005 | 11/07/2006 |

After Jefri had a disagreement with Jay Majestro, Jefri decided his sons Prince Hakeem and Prince Bahar should constitute a majority of each corporate board, and appointed them as directors and officers on a single day in May of 2005. Derbyshire resigned from his roles as an officer to make room for the princes, but the three princes asked him to continue to fulfill his previous duties on behalf of each entity.

The most obvious way in which Jefri failed to play by the rules that typically apply to corporate ownership is the manner in which he received funds from his operating businesses for his own personal use. Corporate law has a tool to acceptably transfer wealth from a corporation to its stockholders — the dividend. But rather than preparing the paperwork to move dollars through the six layers of entities separating Jefri from the New York Palace Hotel (that we know of), Jefri instructed his agents (including the Derbyshires) to transfer funds from the Hotel to himself and entities he controlled that

were not parents in the New York Palace chain of ownership. Likewise, Jefri instructed the New York Palace Hotel to issue credit cards to Derbyshire and Zaman that they were to use while representing Jefri or his entities in *any capacity*. At Jefri's request, the Derbyshires also used those cards to make purchases for Jefri and his family.

Acting on Jefri's broad mandate, the Derbyshires were able to engage in transactions at any of the corporations controlled by Jefri in order to generate funds for purposes approved by Jefri, most notably to raise fees to defend against the Sultan. The Derbyshires also took on more mundane managerial roles. In October of 2005, Derbyshire assumed various positions at one of the restaurants at the New York Palace Hotel. After the managing director of the New York Palace Hotel died in February of 2006, Zaman assumed that role and began running the Hotel on a day to day basis. Although that appointment appears to have been made formally through a resolution by several of the corporations in the chain of ownership of the Palace Hotel including three of the defendants and signed by Bahar as president of those entities,[17] Jefri's own lawsuit against the Derbyshires indicates that Jefri made the appointment.[18]

E. The Sultan Closes In And Jefri Fires The Derbyshires

The Sultan's legal campaign began to affect Jefri's relationship with the Derbyshires in 2005. By that time, Jefri had fallen behind in paying the retainers

[17] JX 113. The certificate purports to be in Bahar's capacity as president of NYP Realty, Amedeo Holdings, PH Partners, and Palace Holdings, the corporate parents of the New York Palace Hotel. The document produced into evidence was unsigned, but I conclude that Bahar likely signed something materially identical.

[18] Federal Compl. ¶ 29 ("[Zaman] convinced Prince Jefri . . . that she should be appointed as managing director."); *see also* Defs. Post Tr. Op. Br. at 33 ("Prince Jefri asked [Zaman] to be the Hotel's Managing Director.").

promised to them. According to them, Jefri authorized them to accept certain sums from and arrangements with his various corporations as a method for being paid. As we shall see, Jefri and the defendants do not agree that that was the case. They say that the Derbyshires exploited their authority to engage in unfair self-dealing.

By 2006, Jefri had suffered losses in court that made it more likely the BIA would eventually prevail. The High Court of Brunei issued injunctions prohibiting disposal of Jefri's assets on February 21, 2006, and March 25, 2006. On September 19, 2006, the Brunei Court of Appeal executed certain documents transferring ownership of NYP Holdings Limited, the Palace Hotel's Labuan parent, to a subsidiary of the BIA. Jefri appealed the decision in Brunei to the Judicial Committee of the English Privy Council in London, which for historical reasons hears certain appeals from the court systems in former British colonies. This meant that as a practical matter Jefri continued to control the companies in his empire. But the BIA was getting closer to obtaining control over Jefri's U.S. assets.

After its September 2006 victory, the BIA sent a letter to the late managing director of the New York Palace Hotel on October 23, 2006 asserting ownership over the hotel and instructing management not to undertake any transaction not in the "ordinary course of business operation."[19] It threatened personal liability for any member of the management team that did not comply. This letter caused Zaman pause to reconsider some of the tasks she was performing at Jefri's insistence.

[19] JX 13.

In particular, Zaman had been causing substantial payments to be made from the Palace Hotel to an entity named Argent International, which she claims to have originally believed was for Hakeem and Bahar's "directorship fees."[20] She contends that she later came to understand that those payments were being used by Jefri for his personal expenses. After receiving the letter from the BIA, Zaman refused to make further payments to Argent, despite Jefri's instructions.

On November 7, 2006, Jefri removed the Derbyshires from all positions of authority at his corporations.[21] That their removal was effected by a letter from Jefri without documents evidencing their removal by formal corporate action was consistent with the general failure of Jefri and the defendants to observe corporate formalities. Jefri treated his corporate empire as a pool of assets under his personal dominion.

## III. Jefri And His Corporations Sue The Derbyshires

### A. The Federal Action Is Filed

On December 1, 2006, Jefri, as well as several entities he controlled including Amedeo Hotels, Casa de Meadows, a Cayman Islands corporation and Cedar Swamp Holdings, Inc., a Delaware corporation (collectively the "New York Plaintiffs") filed a lawsuit in the U.S. District Court for the Southern District of New York against the Derbyshires and entities allegedly owned and controlled by them; Zaman's friend, Charles Hoareau; Zaman's brother, Arzie Zamarni; and Zaman's mother, Sam Zaman

[20] Trial Tr. at 143.
[21] JX 24 ("Federal Am. Compl.") ¶ 38 ("Jefri . . . relieved Zaman and Derbyshire from all of their positions with him, and with the companies he owns directly or beneficially, including any officership or directorship they held."); *see also* JX 14 (purporting "to terminate, with immediate effect, [Zaman's] role . . . at the New York Palace Hotel").

(the "Federal Action"). The New York Plaintiffs put forward numerous different factual situations and legal theories, but they boil down to the same basic story. Put simply, Jefri hired Zaman and Derbyshire to occupy positions of trust and confidence, and they misused that trust and confidence to rip him off.

"Initially," the New York Plaintiffs contend, "Zaman and Derbyshire were retained to advise Prince Jefri on legal issues relating to a lawsuit in Brunei, *to exercise Prince Jefri's control of the Palace Hotel as well as the Bel Air Hotel in California*, and to investigate any past irregularities with respect to hotel operations."[22] But they "insinuated themselves into almost every aspect of Prince Jefri's legal and financial affairs."[23] The Derbyshires "*took control of companies owned by [Jefri] and, therefore, his primary financial assets, including the Palace Hotel*."[24] "In [this] capacit[y] Zaman and Derbyshire owed fiduciary duties including, among other things, the duties to deal honestly, fairly and in the best interest of Prince Jefri *and his companies* . . . to refrain from self-dealing and the *usurpation of corporate opportunities* . . . and to put the interests of Prince Jefri *and his companies* before their own interests."[25]

Although the New York Federal Action involved numerous specific claims, its essence was simple. The New York Plaintiffs alleged that the Derbyshires gorged themselves at the expense of Jefri and his corporations, granting themselves lavish perquisites, entering into self-dealing transactions, and putting friends and relatives on

[22] Federal Compl. ¶ 25 (emphasis added).
[23] *Id.* ¶ 30.
[24] *Id.* (emphasis added).
[25] *Id.* ¶ 31 (emphasis added).

the payroll in cushy, non-essential jobs. For their part, the Derbyshires contended that everything they did was with the permission and for the benefit of Jefri, the sole beneficial owner of the corporations in question. They deployed assets of the various corporations to help Jefri and the corporations defend against the Sultan's litigation onslaught and to provide living expenses for Jefri and his family. To the extent that they received personal benefits, it was with Jefri's permission and as a way of covering the substantial retainer payments they were owed.

### B. The London Action Is Filed

On December 5, 2006, before any substantial activity had occurred in the Federal Action and just four days after that action had been filed,[26] the New York Plaintiffs filed a proceeding in the High Court of Justice, Queen's Bench Division, Commercial Branch in London (the "London Action").[27] This suit was brought under a British jurisdictional statute that allows a British court to hold proceedings in aid of foreign litigation.[28] In other words, it was a proceeding that was supplemental to the main lawsuit taking place in New York and therefore the court would conduct no independent determination of the merits of the case except as necessary to grant preliminary relief. The purpose of the London Action was to obtain a worldwide freezing order over the Derbyshires' assets. The defendants have not explained exactly why a supplemental action needed to be

[26] *See* JX 30 at 7.
[27] *Amedeo Hotels Limited Partnership v. Zaman*, Claim No. 2006 Folio 1271 (High Court of Justice, Queen's Bench Division, Dec. 6, 2006).
[28] JX 173 ¶ 2 ("This action is brought under Section 25 of the Civil Jurisdiction and Judgments Act 1982 in support of proceedings in the US District Court for the Southern District of New York."). The caption of that case, *In the Matter of the Civil Jurisdiction and Judgments Act 1982 and in the Matter of Proceedings Before the United States District Court Southern District of New York*, is instructive as to its purpose. *Id.* at 1.

commenced, but a later comment by Judge Kaplan, the Federal District Court Judge presiding over the Federal Action gives some insight as to the reason:

> [O]n the basis of the limited information that I have about the UK proceedings, it appears that relief, *far broader than anything that lies within the power of this Court*, is being sought. I understand further from plaintiff's counsel that the only reason it is being sought is in aid of the proceeding pending in my court here in the United States.[29]

C. The New York Plaintiffs Seek Temporary Relief

Simultaneously before two courts on different sides of the Atlantic, the New York Plaintiffs sought very similar ex parte relief against the Derbyshires. On December 6, 2006, the New York Plaintiffs sought a worldwide freezing order against the Derbyshires in London. The New York Plaintiffs prevailed in London and an order prohibiting the Derbyshires from "dispos[ing] of, deal[ing] with or diminish[ing] the value of any of [their] assets . . . up to the value of US $28 million" was issued by the British court.

The very next day, on December 7, 2006, the Federal District Court entertained application for a temporary restraining order. In particular, the New York Plaintiffs sought to attach various properties in New York and in California that Jefri alleged that the Derbyshires were claiming to beneficially own. Those same properties were the subject of the worldwide freezing order, and included the Sunninghill Estate in New York. The Federal District Court denied the motion and in doing so observed that the New York Plaintiffs could obtain similar relief by filing a lis pendens in a California court over the California properties, as they already had for the Sunninghill Estate.

[29] JX 22 at 15-16 (emphasis added).

On December 15, 2006, the first hearing with all the parties present was held in the Federal Action. The Derbyshires immediately disclaimed any beneficial interest in the Sunninghill Estate and claimed that it had never left Jefri's beneficial ownership. The Derbyshires simultaneously applied to lift the worldwide freezing order in the London Action.

On January 25, 2007, the U.K. Court discharged the original freezing order and reimposed another, in a stinging decision that cast neither Jefri nor the Derbyshires in a favorable light. The court noted that Jefri had made "a serious material non-disclosure which would usually require the Order to be set aside,"[30] but it reasoned that "[t]he net result of discharging the existing order might well be to deprive [the] BIA, which is blameless in this matter, of assets belonging to it while providing a windfall to the [Derbyshires] who would become free to use and dispose of property which they would otherwise have no right to deal with."[31] The court was also concerned that there was "a real risk that any judgment that might be obtained by [the plaintiffs] in New York would remain unsatisfied"[32] because of "the facility . . . which the [Derbyshires] have for incorporating companies, sometimes inappropriately and transferring money around the world."[33] Accordingly, the court reimposed the worldwide freezing order.

[30] JX 81 ¶ 62.
[31] *Id.* ¶ 65.
[32] *Id.* ¶ 69.
[33] *Id.* ¶ 70.

## D. The London Action Concludes

Over the course of the next several months, the parties filed various motions and appeared in hearings for the Federal Action and the London Action. On February 8, 2007, the New York Plaintiffs filed an Amended Complaint (the "Federal Amended Complaint") that dropped some claims against the New York Defendants, but asserted several more. The Federal Amended Complaint told a somewhat narrower but similar story as the original Federal Complaint.

The Derbyshires filed an answer in response on March 2, 2007. In that answer, the Derbyshires asserted several counterclaims against Jefri and his entities that directly related to the claims the New York Plaintiffs had asserted against them.

Meanwhile, the Derbyshires sought to dismiss the London Action. It appears from the record that they had convinced Judge Kaplan that the British court's participation was interfering with the Federal Action.[34] The Derbyshires claim with some basis that the New York Plaintiffs perceived that the pendency of a duplicative London Action gave them leverage and therefore would not accept the Derbyshires' disclaimer of any beneficial interest in the Sunninghill Estate. In an attempt to force a close to the proceedings in London, the Derbyshires moved in the Federal Action that, among other things, a default judgment be entered against Westfields Invest Limited LLC ("Westfields") — the corporation that now owned the Sunninghill Estate. To achieve this

[34] *E.g.*, JX 41 at 16 (statement of Judge Kaplan: "I rather apprehend that, quite apart from rule 65 and the granting of any order, the same practical effect, if not better could be obtained if I were to indicate to the English courts that in my view their proceeding is now interfering with this one.").

result, the Derbyshires also sought to disclaim any interest in Golden Twist Limited — an entity used to purchase televisions for sale to Jefri's hotels — and to return the balance of a bank account held by Golden Twist to the New York Plaintiffs.

At a hearing on March 15, 2007, the parties agreed to a two-week hiatus from discovery in the London Action during which they anticipated a negotiated conclusion to that proceeding would be reached. Those talks were a success and on March 30, 2007 the parties entered a Stipulation and Order in the Southern District of New York that, among other things, resulted in the discharge of the freezing order and the dismissal of the London Action.[35] That Stipulation contained several other terms of note. In it, the Derbyshires disclaimed any beneficial interest in the Sunninghill Estate or any entity that owned it. In place of the order that had left their assets frozen world-wide, the Derbyshires consented to the imposition of deeds of trust for $8 million over two homes they owned in Manhattan Beach, California that would be satisfied if they prevailed in a final judgment.[36] This allowed the Derbyshires to resume a normal life by allowing them to use their bank accounts and manage their financial affairs. In return, the New York Plaintiffs agreed to liens that could not be executed upon unless the Derbyshires lost in litigation.[37] According to the Derbyshires, the liens encumbered assets that they had no intention of selling and therefore this was a relatively painless trade off.

[35] JX 23.
[36] They had purchased the properties with funds that originated from the sale of a Las Vegas ranch in 2004 that the Derbyshires claim Jefri wanted them to have and Jefri claims they stole from him.
[37] *See* Trial Tr. at 455.

## E. The Federal Action Concludes

Shortly after the London Action concluded, the Federal Action concluded as well. Federal subject matter jurisdiction was predicated upon a claim made under the Racketeer Influenced and Corrupt Organizations ("RICO") Act,[38] a statute originally intended to address members of organized crime syndicates. In that claim, the New York Plaintiffs alleged that Zaman, Derbyshire, Zaman's friend Hoareau (who participated in the sale of Sunninghill), Zaman's brother, Arzie Zamarni, and various entities controlled by Zaman constituted an "enterprise" under the RICO statute. The New York Plaintiffs argued that "the defendants were not engaged in a series of independent frauds," but that "[e]ach alleged fraud . . . was a smaller 'implementing scheme' that formed part of a single 'master scheme' to enrich Zaman and Derbyshire at Prince Jefri's expense."[39]

On March 2, 2007, the Derbyshires moved to dismiss the RICO claim.[40] After considering the issue, Judge Kaplan issued a memorandum opinion on May 17, 2007, in which he found that no "enterprise" existed under the RICO statute.[41] He dismissed the claim with prejudice.[42] With no basis for federal jurisdiction, he dismissed the lawsuit entirely. At that time, no claims were being asserted against the Derbyshires in any court.

The New York Plaintiffs filed a notice of appeal but abandoned the appeal on July 24, 2007. The judgment in the New York Federal Action then became final. The Derbyshires argue that as a technical matter this resulted in the Stipulation and Order that

[38] 18 U.S.C. § 1962(c).
[39] JX 25 ("Federal Memorandum Opinion") at 13.
[40] *Id.* at 6.
[41] *Id.* at 15, 16.
[42] *Id.* at 16.

dismissed the London Action becoming unenforceable, but the parties have agreed to abide by its terms voluntarily for the time being and retain the liens on the Derbyshires' properties in California.[43]

F. The Lawsuit Is Re-Filed In New York State Court

This break in the litigation was short-lived. On May 18, 2007, the New York Plaintiffs re-filed the bulk of their remaining claims in the Supreme Court of the State of New York, County of New York (the "State Action").[44] As in the previous Federal Action, the New York Plaintiffs alleged that the Derbyshires had engaged in multiple breaches of fiduciary duty to enrich themselves at the expense of Jefri and his corporations. The State Action did involve some winnowing, as the New York Plaintiffs dropped some previous contentions, while continuing to advance a broad range of claims.

On October 15, 2007, after the New York Plaintiffs replaced their counsel, Loeb & Loeb with Jones Day, they filed an Amended Complaint in the State Action, and withdrew many of their previous claims against the Derbyshires.[45]

G. The Derbyshires Seek Advancement And Indemnification From The Defendants

The Derbyshires seek advancement and indemnification under the bylaws of the Delaware corporations who are defendants in this action for attorneys' fees incurred in defending the Federal Action and the London Action, and the future expenses of defending the State Action. These Delaware corporations each have bylaws that provide for indemnification and advancement of legal fees to current and former officers and

[43] Transcript of Oral Argument ("Tr. of Oral Argument") at 20.
[44] JX 27 ("State Compl.").
[45] JX 28 ("State Am. Compl.").

directors and certain agents of the corporations. In all pertinent respects, the bylaws are identical to one another. In relevant part, § 6.1 of each of the various bylaws states:

> The corporation shall indemnify and hold harmless, *to the fullest extent permitted by applicable law* . . . any person who was or is made or is threatened to be made a party or is otherwise involved in any threatened, pending, or completed action, suit or proceeding . . . by reason of the fact that he, or a person for whom is the legal representative, is or was a director or officer of the corporation or *is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or of a partnership* . . . against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such indemnitee.[46]

Section 6.2 of those same bylaws states that "[t]he corporation shall pay the expenses (including attorneys' fees) incurred by an indemnitee in defending any proceeding referred to in Section 6.1 in advance of its final disposition . . . ."[47] Section 6.3 states that in any action against the director "the corporation shall have the burden of proving that the indemnitee was not entitled to the requested indemnification or advancement of expenses."[48]

## IV. The Claims In This Case And The Court's Approach To Addressing Them

The issues to be decided are deceptively simple. First, I must decide whether the Derbyshires are entitled to indemnification from the defendants for the Federal Action and, in that connection, whether the London Action is considered part of the Federal Action or a separate proceeding. Second, I must decide whether the Derbyshires are

[46] *E.g.*, JX 3 ("Bylaws") § 6.1 (emphasis added); *see also* JX 4-6.
[47] Bylaws § 6.2.
[48] *Id.* § 6.3.

entitled to advancement from the defendants for the New York State Action. Finally, I must decide whether the Derbyshires should receive fees for prosecuting this action.

Regrettably, the matters to be decided are not so neatly packaged. The Derbyshires are accused of helping themselves to an all you can eat buffet at the expense of Jefri and his corporations, and inviting friends and family along for the meal. These accusations have been set forth in complaints that contain over twenty claims on average.[49] And precisely because Jefri treated his corporations as his personal property and did not observe corporate formalities, the record is not a tidy one. Jefri's decision not to participate in shaping it added to the murk.

To address the case rationally, it is useful to move from the more general to the more particular. Therefore, as an initial matter, I will address an important overarching issue, which is whether the Derbyshires acted in a capacity that entitles them to seek advancement and indemnification from the defendants. Clarifying this question necessarily precedes a determination whether any particular claim against them implicates the advancement and indemnification rights contained in the defendant corporations' bylaws.

After determining that question, I turn to the issue of how to treat the Federal and London Actions. Are they, as the Derbyshires contend, completed proceedings in which the Derbyshires succeeded on the merits or otherwise, and are entitled to

[49] The Federal Complaint contains 26 claims, the Federal Amended Complaint contains 24 claims, the State Complaint contains 22 claims, and the State Amended Complaint contains 16 claims.

indemnification? Or are they, as the defendants contend, merely a part of the ongoing dispute that is now going on in the New York State Action?

After deciding those issues, I examine the New York State Action to see whether and to what extent, if any, the Derbyshires are entitled to advancement. This involves a mind-numbing recitation of the multitudinous claims of the New York Plaintiffs in order to see if those claims trigger advancement.

I next examine whether the presence of other defendants in the New York State Action in any way diminishes the legal fees owed to the Derbyshires.

I then turn to the question of whether fees must be advanced to the Derbyshires to prosecute several counterclaims they raise in response to the claims the New York Plaintiffs have brought against them.

Nearing the end of my long journey through wondrous landscape of § 145, I resolve issues the defendants have raised about the reasonableness of the legal fees the Derbyshires seek.

Finally, I examine how successful the Derbyshires have been in this action to determine to what extent, if any, they are entitled to "fees on fees."

Before I embark on that sequence of decision-making, however, I must address each side's post-trial attempt to inject a waived argument into this proceeding.

### A. The Defendants Waived Any Argument Based On Orders Obtained By The BIA In Other Proceedings

The odd and constantly changing relationship between Jefri and his brother, the Sultan, affected the manner in which the defendants defended this lawsuit. When this

action was originally filed, Jefri was clearly in control of the defense. He had retained the law firm of Jones Day, to work with the Delaware firm of Richards, Layton & Finger, to represent the defendants.

In making their arguments to the court, the defendants portrayed Jefri and themselves as the victims of coercion and overreaching by the Sultan.[50] The Sultan, the defendants argued, had used his brother as a political scapegoat for his own overspending of his nation's resources.[51] To cover up his own complicity, the Sultan turned on his brother, who he had chosen to run the BIA for many years, and began in the late 1990s a still-ongoing campaign to "crush Prince Jefri."[52] In their pre-trial opening brief, the defendants argue that the Sultan used "coercion" to force Jefri into one settlement agreement by placing him under house arrest and extracting a false confession from him,[53] and used Brunei courts that were under this thumb to obtain unfair orders against Jefri requiring him to transfer his assets, which included the defendants, to the BIA. In

[50] *E.g.*, Defs. Pre-Trial Op. Br. at 3 (" [T]he Sultan blamed Prince Jefri for the country's condition. . . . [and] coerced Prince Jefri into executing a 'Settlement Agreement' . . . pursuant to which he agreed to return to the BIA most of his remaining assets in return for the right to retain some core personal assets. . . . [T]he BIA [later] sued Prince Jefri in the courts of Brunei (before a judge the Sultan had selected) . . . and soon obtained, without discovery or trial, an order . . . directing Prince Jefri to give most of his remaining assets to the BIA . . . .").

[51] Defs. Pre-Trial Ans. Br. at 2 (arguing that Jefri did not convert funds from BIA to his own use; that the Sultan himself "has had (and has been spending) much of the money" the BIA and the Sultan contend Jefri took; and that "the Sultan has spent a stupefying $400 million in legal fees in his efforts to crush Prince Jefri."), *id.* at App. B (indicating that Jefri's admission that he withdrew funds from the BIA for his personal use resulted from when he "was placed under house arrest and compelled [by the Sultan] to take responsibility for the allegedly missing funds" and that "$8 billion of this money went to the personal bank accounts of the Sultan, whose lavish spending recently has exceeded Brunei's GDP").

[52] Defs. Pre-Trial Ans. Br. at 2 n.3.

[53] *See Id.* at App B ("Prince Jefri was placed under house arrest and compelled to take responsibility for the allegedly missing funds.").

support of this argument, the defendants noted that the Sultan preceded his 2004 legal campaign by amending Brunei's constitution to declare himself infallible and immune from any obligation to appear in court (or for his designees to appear), and to subject anyone who criticized him to criminal punishment.[54] In their briefs, the defendants took the position that their rightful beneficial owner was Jefri, not the BIA, and that Jefri was the victim of an unfair, coercive legal campaign, and implied that any fruits of that campaign were not the result of proceedings that comported with any reasonable standard of due process.[55]

Before the second day of trial — which occurred several weeks after the first day because the parties expected only a one day trial in the first instance — the Privy Council in London issued two decisions rejecting Jefri's appeal from the courts in Brunei on November 8, 2007. As a result, the BIA began to exercise control over the defendants' corporate parents and Jones Day sought to withdraw as counsel for the defendants. The reason was that Jones Day was Jefri's personal counsel and could not, consistent with their ethical obligations, simultaneously represent him and a subsidiary of the BIA, which was his direct litigation adversary in ongoing proceedings.

On the second day of trial, with Richards Layton & Finger now acting as lead counsel, the defendants suddenly injected a new defense into the case that had not been included in their answer, their pre-trial briefs, or the pre-trial order. That defense was based on the argument that the Derbyshires should forfeit any right to advancement or

[54] *See* JX 72 (Supreme Court Act (Amendment) Order to the Constitution of Brunei Darussalam, 2004).
[55] Defs. Pre-Trial Op. Br. at 5.

indemnification because they had taken actions in violation of the words of certain agreements and court orders that had resulted from the BIA's legal campaign against Jefri. That is, the same defendants who had portrayed the Sultan and the BIA as having improperly wielded dictatorial power to coerce Jefri and others into an unfair settlement agreement and to subject Jefri to unfair orders from a kangaroo court now wanted to base their defense on the idea that the Derbyshires had, by violating those same agreements and orders, forfeited their rights to indemnification and advancement, because the BIA was the rightful beneficial owner of the defendants. I permitted some questioning on this point, without deciding that the defendants had properly preserved this defense.

In post-trial briefing, the Derbyshires have argued that this defense is waived. They are clearly correct. The defendants have reversed course, as a result of the ongoing tango between Sultan and Prince. Had the defendants wished to present this affirmative defense, they should have raised it in their answer. They never moved to amend their answer, and never raised the defense in their pre-trial brief or the pre-trial order. They gave no fair notice.[56]

[56] *Alexander v. Cahill*, 829 A.2d 117, 128-29 (Del. 2003) (instructing that a "trial judge's focus should be on whether the issue could have been, but was not, raised pretrial in some form and whether or not the failure to do so caused prejudice to a party without notice of the defense by making it difficult, if not impossible, to fairly face the issue for the first time during trial."); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *22 n.117 (Del. Ch. 2006) (an argument that was first raised in a pre-trial brief was waived because discovery was closed and the parties had already shaped their trial plans at the time the issue was first raised); *Commonwealth Constr. Co. v. Cornerstone Fellowship Baptist Church, Inc.*, 2006 WL 2567916, at *19 (Del. Super. Ct. Aug. 31, 2006) (finding that a party waived its right to assert an argument that it put forth "for the *first* time ever in its second post trial brief") (emphasis in original); *see also Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003).

Compounding the lack of procedural propriety is the approach the defendants took to discovery in this case. The defendants adamantly resisted producing Jefri or his sons for deposition. When they produced a Rule 30(b)(6) witness, it was Jonathan Berman of the Jones Day law firm. His testimony was uninformed and generally useless. Given this record of recalcitrance and lack of fair notice, it would be grossly unfair to permit the defendants to pull a belated defense out of the air at trial. Had this defense been at the table, Jefri — and likely even the Sultan — would have been required to appear for deposition.

Finally, the defendants' own submissions call into serious question the validity of the relief and contracts the BIA procured against Jefri and his affiliates. The defendants did not produce a trial witness of their own on any point, much less to prove that those civil orders and contracts were valid. Given that the defendants themselves were actively taking the position that Jefri was their rightful owner until deep into this case and that the BIA had only succeeded by coercion and dictatorial overreaching, they are in a graceless position to argue that the Derbyshires forfeited their right to indemnification and advancement by taking Jefri's side of the dispute with the BIA. Put simply, the forfeiture is by the defendants, who are stuck with their prior arguments and their failure to raise this defense in a timely and fair manner.[57]

[57] I note that the defendants benefited from a similar decision of the court to enforce its procedural rules. I ruled that the Derbyshires waived their right to seek indemnification and advancement for certain fees they paid to the law firm of White & Case because they did not file certain interrogatory responses relevant to that issue.

B. The Derbyshires Cannot Premise A Claim For Indemnification On § 145(a) Of The DGCL As They Failed To Preserve That Argument

The defendants were not alone in raising new arguments at an inappropriately late stage. The Derbyshires' post-trial submissions attempt to assert for the first time an alternative basis for indemnification of their expenses in the Federal and London Actions. In the pre-trial stipulation, the Derbyshires premised their argument for indemnification solely on the ground that they were "were successful on the merits or otherwise" in those actions and entitled to indemnification under the terms of § 145(c) of the DGCL.[58] Likewise, in their pre-trial briefs, the Derbyshires relied exclusively on the argument that they were successful on the merits or otherwise in those actions.[59]

In their post-trial briefs, the Derbyshires for the first time assert that they are entitled to indemnification under § 6.1 of the defendants' various bylaws because the Derbyshires were sued in an indemnifiable capacity and the defendants cannot prove that, per the terms of § 145(a) of the DGCL, the Derbyshires acted in bad faith and in a manner they did not reasonably believe to be in or not opposed to the defendants' best interests. Raising this argument in the post-trial briefs is unfair, too late, and does not preserve this argument. It is waived.[60] The Derbyshires' request for indemnification must rise or fall on their only properly preserved argument.

In considering that argument, I will, however, consider the success issue in light of both § 145(c) and § 6.1 of the defendants' bylaws, as the effect of that bylaw was

[58] *See* PTO, §§ 3, 4.
[59] *See* Pls. Pre-Trial Br. at 31-33; Pls. Pre-Trial Reply Br. at 20-22.
[60] *See* note 56, *supra*.

properly put into issue by the Derbyshires as was the relevance of § 145(c), and therefore their relationship was properly tested at trial. The relationship between the two sources of authority for indemnification is important. As will be discussed, there are claims as to which the Derbyshires were at most "agents" of certain defendants. Under § 145(c), mandatory indemnification for success is not required as to an agent, only as to "a present or former director or officer of a corporation."[61] But, § 6.1 contractually obligates the defendants to indemnify an agent serving at their request at another corporation to the full extent permitted by Delaware law. Therefore, as a contractual matter, if the Derbyshires acted in an indemnifiable capacity, the defendants must indemnify if § 145(c) would authorize them to do so if the Derbyshires were directors or officers. The reason why is simple: if Delaware law mandates indemnity for success by a director or officer, a corporation is not prohibited by Delaware law from providing indemnity to an agent who was successful.[62] Having promised to indemnify persons they ask to serve as agents of other corporations to the fullest extent permitted by Delaware law, the defendants are bound if a person is sued in an indemnifiable capacity and is successful. Not only that, per the plain terms of § 6.3, the burden of persuasion is on the defendants to prove that the plaintiffs are not entitled to indemnification. Therefore, as to any issue where the evidence is equally balanced, the Derbyshires prevail.

[61] 8 *Del. C.* § 145(c).
[62] *See Cochran*, 2000 WL 286722, at *17 (Del. Ch. 2000), *aff'd in pertinent part*, *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555 (Del. 2002).

C. Are The Derbyshires Covered Under The Bylaws?

The defendants make several major arguments as to why the Derbyshires are not defending claims against them that implicate a capacity in which they are owed rights under § 6.1. The first is the defendants' belated attempt to portray the Derbyshires as merely outside legal advisors for Jefri and his entities. This tack was taken in the latest complaint the New York Plaintiffs filed in the State Action, which narrowed formerly broad allegations that the Derbyshires were empowered with broad managerial and financial authority over all of Jefri's entities into an allegation that the Derbyshires were merely acting as some sort of outside counsel. This tactic is unconvincing. For one, the defendants themselves have not stuck to that description in this case.[63] For another, from the get-go, the New York Plaintiffs have made clear that the Derbyshires were given extensive managerial and financial authority over the corporations beneficially owned by Jefri. The Federal Complaint was replete with allegations of this kind.[64] Not only that, the substantive claims against the Derbyshires do not involve wrongdoing of the kind that could be accomplished by an agent simply acting as outside or even inside counsel. Rather, the substantive claims depend on the notion that the Derbyshires had controlling managerial and financial power over Jefri's entities, such that they could decide who

[63] *See* Defs. Pre-Trial Op. Br. at 6 ("Jefri retained [the Derbyshires] to work . . . as his agents to supervise his business affairs."); *id.* ("Jefri executed powers of attorney giving [the Derbyshires] broad powers to handle his financial affairs . . . .").

[64] *See, e.g.*, Federal Compl. ¶ 20 ("Jefri granted them a general power of attorney authorizing them to act on his behalf in all respects."); *id.* ¶ 24 ("[The Derbyshires] were retained as personal legal counsel to Prince Jefri *and the various entities of which he was the beneficial owner*.") (emphasis added); *id.* ¶ 30 ("[The Derbyshires] took control of companies owned by him and, therefore, his primary financial assets, including the Palace Hotel."); *id.* ¶ 52 ("Derbyshire and Zaman were appointed officers of PH Partners Inc., *the general partner of Amedeo, with full authority to manage the affairs of the Palace Hotel* . . . .") (emphasis added).

those entities hired, who they contracted with, the terms of those contracts, what assets those entities would sell and what products they would purchase, and who would receive the proceeds from such transactions. Read fairly, the various complaints filed by the New York Plaintiffs allege that the Derbyshires were given plenary managerial authority to act for Jefri's entities, subject only to his direction and control. That is, whatever titles they formally held — and for many periods they held directorships and officerships according to the New York Plaintiffs' own pleadings — the Derbyshires possessed the same or greater managerial power and discretion in fact than directors and top officers do as a matter of legal formality. For this reason, it is apparent that the Derbyshires were at the very least agents of the corporations for which they acted within the meaning of § 6.1 of the defendants' bylaws and § 145 of the DGCL.[65]

[65] This holding is consistent with this court's decision in *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 173 (Del. Ch. 2003). In that case, this court read the term agent in § 145 narrowly so as to avoid characterizing every outside provider of legal or other services as an agent entitled to coverage for advancement in, for example, malpractice actions brought by the corporation as a client. It therefore required a showing that the agent be an agent in the sense that he had "the power to act on behalf of the principal [i.e., the corporation] with third persons." *Id*. at 169-70. In support of that position, *Fasciana* cited with approval a decision holding that "indemnification statutes are 'designed to protect person exercising corporate discretion and authority, not the attorneys those persons hire to give them legal advice.'" *Id.* at 172 (citing *Western Fiberglass, Inc. v. Kirton, McConkie & Bushnell*, 789 P.2d 34, 38 (Utah Ct. App. 1990). The New York Plaintiffs have not accused the Derbyshires of providing erroneous legal advice; rather, they charge the Derbyshires with misusing the broad managerial and financial authority the Derbyshires were granted over the businesses and assets of Jefri's entities. The agency with which the Derbyshires were entrusted was broad, and gave them the right to manage, speak for, and contract for the entities, subject for the most part only to the check of Jefri's direction and control. Consistent with this, the claims against the Derbyshires almost entirely deal with contracts or transactions they supposedly used their managerial authority over the entities to effect. The fact that the Derbyshires were British attorneys is largely irrelevant to the claims against them, and given that they are licensed only in Great Britain, it is not surprising that the New York Plaintiffs do not point to instances of legal malpractice as the basis for their claims. That is because their claims are rooted in managerial misconduct.

Relatedly, the various complaints of the New York Plaintiffs also demonstrate that the Derbyshires face, as a general matter, claims in the Federal and State Action "by reason of" their service as directors, officers, or agents of Jefri's corporations, including the defendants. In reaching this conclusion, I apply the basic test to determine whether a claim implicates a corporate official's indemnification or advancement rights. In *Homestore v. Tafeen*, our Supreme Court held that "if there is a nexus or causal connection between any of the underlying proceedings . . . and one's official capacity, those proceedings are 'by reason of the fact' that one was a corporate officer, without regard to one's motivation for engaging in that conduct."[66] That "connection is established if the corporate powers were used or necessary for the commission of the alleged misconduct."[67] In considering whether a corporate official faces an official capacity claim, the key inquiry is whether the claim depends on a showing that the official breached duties, quintessentially fiduciary duties, he owed to the corporation in that capacity or faces liability from a third party due to actions taken in his official capacity.[68] For reasons similar to those establishing their agency relationship, the

[66] 888 A.2d 204, 215 (Del. 2005); *see also Bernstein v. Tractmanager, Inc.*, 2007 WL 4179088, at *5 (Del. Ch. 2007) (quoting *Tafeen*, 888 A.2d at 215); *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *6 (Del. Ch. 2002)).

[67] *Bernstein v. Tractmanager, Inc.*, 2007 WL 4179088, at *5 (citing *Brown v. Liveops, Inc.*, 903 A.2d 324, 329 (Del. Ch. 2006) and *Perconti*, 2002 WL 982419, at *6).

[68] *Tafeen*, 888 A.2d at 214. Similarly, in *Reddy v. Elec. Data Sys. Corp.*, this court rejected an argument that claims against a former employee that stated breaches of fiduciary duty but that were pled using other legal theories would not give rise to advancement rights under a bylaw extending advancement rights to former employees. 2002 WL 1358761, at *6 (Del. Ch. 2002) ("I also reject EDS's alternative argument, which rests largely on pleading formalism. . . . [T]he negligence, gross negligence, common law fraud, and contract claims brought against Reddy all could be seen as fiduciary allegations, involving as the do the charge that a senior managerial employee failed to live up to his duties of loyalty and care to the corporation."); *see also Weaver*

Derbyshires' were sued for wrongfully discharging their corporate powers. The claims against them depend on their use of extensive managerial and financial authority, mostly involving actions taken with regards to the assets and business of the New York Palace Hotel.

The defendants' primary argument involves an attempt to turn Jefri's disregard for corporate formalities into a corporate asset that can be wielded against the Derbyshires. As I have just mentioned, in the Federal and State Actions, most of the misconduct alleged by the New York Plaintiffs involved action taken by the Derbyshires regarding the assets and business of the Palace Hotel. But the entity that directly owned the Palace Hotel is a New York limited partnership, Amedeo Hotels, whose organizational documents do not contain a provision for the advancement and indemnification of directors, officers, or agents. But Amedeo Hotels itself is wholly owned by two of the defendants, PH Partners and Palace Holdings, both of which have bylaws like § 6.1 and § 6.2, quoted previously, that extend advancement and indemnification to the full extent permitted by Delaware law to any person who serves as an agent of another corporation at their request. PH Partners and Palace Holdings are in turn wholly owned by Amedeo Holdings, another defendant with bylaws like § 6.1 and § 6.2. For the sake of simplicity, I will hereafter refer to PH Partners, Palace Holdings, and Amedeo Holdings as the Delaware Palace Holding Corporations.

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*v. ZeniMax Media, Inc.*, 2004 WL 243163, at *3 (Del. Ch. Jan. 30, 2004) (applying the same reasoning, but reaching a different result because the claim did not require the corporate official to discharge his authority as an officer or as a director).

The defendants contend that their bylaws does not benefit the Derbyshires for any actions taken at the Palace Hotel level because there is no formal document from the Delaware Palace Holding Corporations asking the Derbyshires to serve at the Palace Hotel level at their request. At the most, the defendants say, the Derbyshires were charged by Jefri with acting at the Palace Hotel level and, in their later stage briefs, purport to argue that Jefri was out of bounds in exercising dominion over lower level corporations in his empire without following formalities himself. Because the Derbyshires were lawyers and were asked to provide legal advice to Jefri and his entities, including the defendants, the defendants also say that the Derbyshires have only themselves to blame for any gap in documentation and are stuck with the hard fact that no formal document from Delaware Palace Holding Corporations that asks them to serve at the Palace Hotel level. If I do otherwise, the defendants say, I will be dishonoring Delaware's tradition of respecting the independent legal dignity of separate legal entities.

The defendants' arguments on this score are unconvincing for two major reasons. For starters, I find that Bahar signed a document on behalf of the defendant Delaware Palace Holding Corporations that named Zaman as managing director of the Palace Hotel.[69] This is consistent with representations the Palace Hotel made in an application to obtain Zaman's work visa, allegations made by the defendants' allies in the Federal Complaint, and statements the defendants themselves make in this proceeding.[70]

[69] JX 113.
[70] *See* JX 11 at 21 (stating, in a visa application that "*ownership* has asked Ms. Zaman assume the position of Managing Director"); Federal Compl. ¶ 29 ("[Zaman] convinced Prince Jefri . . .

Moreover, in the Federal Complaint, the New York Plaintiffs averred that "Derbyshire and Zaman were appointed officers of PH Partners Inc., the general partner of Amedeo, with *full authority to manage the affairs of the Palace Hotel*."[71]

Second, even absent the specific evidence linking the New York Palace Holding Corporations to the Derbyshires' status as agents for the Palace Hotel, I would reject the defendants' position. It is Jefri and the defendants, and not the court, who have disrespected the separate legal existence of the various entities involved in Jefri's American empire. I am simply required to address the implications of Jefri's way of doing business on the Derbyshires' request for advancement and indemnification.

As to that matter, I think it plain that when Jefri spoke, he spoke for all his entities. Although he did not grace this court with his presence at trial, his own claims in the Federal and State Action presume that the Derbyshires were empowered to act for all of his entities and that their alleged wrongdoing at the Palace Hotel level adversely affected Jefri as the beneficial owner of all the corporations. As a traditional matter, Jefri could only suffer injury personally because each of the corporations under him in the chain of ownership leading to the Palace Hotel were injured first. In the traditional order of things, if the Palace Hotel were successful, Amedeo Hotels could pay dividends to PH Partners and Palace Holdings, which could in turn pay dividends on up the chain, until they were received by Jefri. Likewise, in the traditional order of things, if the Palace

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that she should be appointed as managing director."); Defs. Post Tr. Op. Br. at 33 ("Prince Jefri asked [Zaman] to be the Hotel's Managing Director.").

[71] Federal Compl. ¶ 52 (emphasis added).

Hotel was injured by wrongdoing, that diminution in value would diminish the value of Amedeo Hotels, which would have an effect up the line until it hit Jefri.

Therefore, I find that when Jefri asked the Derbyshires to serve as agents for all of his entities, he was speaking for those entities. Thus, whenever the Derbyshires served a lower level subsidiary, they were serving at the requests of the subsidiaries above them in the chain of ownership flowing down from Jefri.[72]

In so ruling, I reach a result consistent with the Supreme Court's decision in *VonFeldt v. Stifel Financial Corp.*, in which the court found that the election of a director to the board of a wholly-owned subsidiary at the instance of the corporate parent constituted a request by the parent to have the director serve on the subsidiary's board.[73] Although the facts in this case are different, the fundamental reasoning of *VonFeldt* applies. Jefri was — as the defendants themselves argued in this court and in the Federal and State Actions — the sole beneficial owner of all the relevant American assets. In that role, he claims the ability to seek broad relief from the Derbyshires personally, skipping over several of his subsidiary corporations who bear a closer relation in the ownership chain to the ultimate economic assets the Derbyshires are alleged to have injured or misappropriated. Given the complete dominion Jefri exercised over the defendants to this action, it is inferable that he was speaking for them in empowering the Derbyshires to

[72] Federal Compl. ¶ 52 ("Derbyshire and Zaman were appointed officers of PH Partners Inc., *the general partner of Amedeo, with full authority to manage the affairs of the Palace Hotel . . . .*") (emphasis added).

[73] *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 88 (Del. 1998) (when a corporate official filled multiple roles at a subsidiary with the parent's knowledge, the court refused to engage in "undue formalism" and a "hyper-technical exercise of trying to measure the 'scope'" of the parent's request and inferred that the parent had requested the official to serve in all his capacities, not just as a director).

act at the Palace Hotel level. Just like the parent corporation in *VonFeldt*, the Delaware Palace Holding Corporations are in no position to argue that the Derbyshires were not serving at their request at the Palace Hotel.[74] When Jefri spoke, his authorization rolled downward for the benefit of his various subsidiary corporations.

Therefore, the Derbyshires were serving as agents of the Palace Hotel at the request of the Delaware Palace Holding Corporations. As to any claims raised against the Derbyshires for breach of their duties as agents of the Palace Hotel, they are entitled to seek advancement and indemnification under § 6.1 of these defendants' bylaws.[75]

The implications of this reasoning are not identical, however, as to the various chains of ownership in issue. For example, defendant Cedar Swamp owned the Sunninghill Estate. But Cedar Swamp has no owner that is a defendant in this case with a bylaw like § 6.1. Because of that, the Derbyshires could not be serving Cedar Swamp as an agent of another entity. They were agents for Cedar Swamp itself at the requests of others. Under § 6.1 of Cedar Swamp's bylaws, Cedar Swamp owes no advancement or indemnification obligations to its own agents. Therefore, unless the Derbyshires were accused of engaging in improprieties involving the Sunninghill Estate as officers or directors of Cedar Swamp, Cedar Swamp owes them nothing.

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[74] *See* note 71, *supra*.

[75] This conclusion is made even stronger as to Zaman. Given the undisputed fact that she was a director of the Delaware Palace Holding Corporations for nearly all of the relevant time period, the Palace Hotel-related claims can be conceived of as implicating her official duties at those Holding Corporations for another reason. As a director of those Holding Corporations, she could not take action at a subsidiary level that purposely injured those Corporations without breaching her fiduciary duties to them. *See Grace Bros. v. UniHolding Corp.*, 2000 WL 982401, at *13 (Del. Ch. 2000) ("There is no safe harbor in our corporate law for fiduciaries who purposely permit a wholly-owned subsidiary to effect a transaction that is unfair to the parent company on whose board they serve.").

Likewise, the chain of ownership culminating in the Hotel Bel-Air is similar to the chain leading to the Sunninghill Estate, which is that a defendant with a § 6.1 bylaw, Kava, directly owns the Hotel Bel-Air. Therefore, to the extent that the Derbyshires were accused of misconduct as an agent of the Hotel Bel-Air, they are not entitled to protection from Kava. Only to the extent that the Derbyshires are accused of wrongdoing as director or officers of Kava does Kava owe them protection.

This raises another nuance. Although I believe it is sensible to infer that the Derbyshires served as agents of other corporations at the request of each of the corporations above them in the chain of ownership, I cannot infer that wherever in Jefri's empire the Derbyshires served, they must have done so at the request of all of his entities, regardless of whether those entities were in the relevant chain of ownership. Put plainly, I see no basis to infer that Kava — the owner of the Hotel Bel-Air — requested the Derbyshires to serve as agents of the Palace Hotel in New York. Similarly, I see no reason to infer that the Delaware Palace Holding Corporations requested the Derbyshires to serve as agents of the Hotel Bel-Air.

The Derbyshires ask me to draw this inference because they say that they raised funds from various of Jefri's corporations to pay for the defense against the Sultan's legal offensive. But they have not shown any disproportionate contribution to certain chains of ownership to the common fund. In other words, I do not have any basis to infer that the Derbyshires were not helping to raise funds from the Hotel Bel-Air to cover its corporate parents' fair share of the legal funds. As important, the Derbyshires have no evidence that they used funds from specific corporations to defray legal bills of any defendant in

this case. None of the defendants were named as parties in the Sultan's lawsuits, which targeted Jefri and his higher level holding corporations. No testimony or document in the record exists that identifies a specific law firm that did specific work for any defendant, and was paid through funds raised at a subsidiary in another chain of ownership.

Although Jefri and the defendants' own failure to follow formalities necessarily causes me to depart from the formalistic reasoning that might otherwise be dispositive in a case like this, the record does not support a wholesale departure from such reasoning. It is one thing to infer that the upstream corporations made a cascading request for service at the lower levels, it is another one entirely to conflate Jefri's empire and to assume that whenever a person acted as an agent of one of Jefri's entities, she did so as the request of every other. Jefri's level of indifference to the separate legal existence of his bevy of corporations might, after fuller inquiry than occurred in this case, justify such a sweeping inference. But even considering that the defendants have the burden of persuasion,[76] I think they have slightly the better of the argument on this point and that is sufficient under a preponderance of the evidence standard.

To summarize, I find that:

- As to any claims against them for wrongdoing in their capacities as agents, directors, or officers of the Palace Hotel, the Derbyshires are covered by § 6.1 of the bylaws of the Delaware Palace Holding Corporations.

- As to any claims against them for wrongdoing as agents of Cedar Swamp, the Derbyshires are not covered by § 6.1 of the bylaws of any defendant. To the extent that the Derbyshires were sued for

[76] Bylaws § 6.3.

wrongdoing as directors or officers of Cedar Swamp, they are covered by § 6.1 of the bylaws of Cedar Swamp.

- As to any claims against them for wrongdoing as agents of Kava (the Hotel Bel-Air's direct owner), the Derbyshires are not covered by § 6.1 of the bylaws of any defendant. To the extent that the Derbyshires were sued for wrongdoing as officers or directors of Kava, they are covered by § 6.1 of the bylaws of Kava.

D. Were The Derbyshires Successful On The Merits Or Otherwise In The Federal And London Actions?

There is no dispute that the Federal and London Actions are completed. But there is a dispute as to whether the Derbyshires have a ripe claim to indemnification for those Actions. The defendants claim that because only one count of the twenty-six count Federal Complaint was dismissed with prejudice, the RICO count, and the others were dismissed without prejudice and are, on balance, being pursued in the State Action, the Federal Action is in essence on going. Therefore, the defendants say, the Derbyshires must await the end of the State Action to seek indemnification. Alternatively, the defendants say that even if the Derbyshires have a ripe claim for indemnification, the Derbyshires were not successful on the merits or otherwise in the Federal Action, and certainly not in the London Action, which they weakly contend should be treated as separate from the Federal Action. For their part, the Derbyshires argue that they got the entire Federal Action dismissed, that the final judgment in the case is now non-appealable, that the London Action was an action in aid of the Federal Action, and that nothing obtained as a result of that Action diminishes the overall success they achieved.

As will be agonizingly (if one is alert to the discussion) or mind-numbingly (if one is rendered insensate by it) clear once the claims remaining in the State Action are

discussed for purposes of considering advancement, Jefri and his allies have made a sweeping attack on the Derbyshires in their lawsuits. In the Federal Action, the RICO count was the final count, number 26, of a 50-page attack on the Derbyshires' compliance with their fiduciary duties.

The Federal Action alleged that the Derbyshires had misused their wide ranging authority over Jefri's assets and businesses, to enrich themselves and their families at the expense of Jefri and his corporations. The only of the defendants in this case who was a plaintiff in that case was Cedar Swamp. But it is clear that much of the fiduciary wrongdoing that the Federal Complaint alleges took place at the Palace Hotel level. Jefri claimed injury from that misconduct, which therefore necessarily presupposed injury to the corporations in the chain of ownership running down to the Hotel. The lengthy complaint is replete with references to fiduciary duties, faithlessness, disloyalty, and to the Derbyshires' "control of [the] companies owned by [Jefri] and, therefore, his primary financial assets, including the Palace Hotel."[77] Indeed, the RICO count is premised on the notion that each of the specific instances of alleged wrongdoing was in aid of an overall conspiracy among several legal persons comprising an illegal racketeering enterprise prohibited by RICO.

After considering the defendants' arguments, I conclude that they have not met their burden under § 6.3 to show that the Derbyshires did not achieve success on the merits or otherwise in the Federal and London Actions. My reasons are several.

[77] Federal Compl. ¶ 30.

First, I believe that the attainment of a dismissal on a RICO claim is a big deal. The defendants would have me believe that the RICO Count was of no moment, a mere damages intensifier. That is a self-serving and unconvincing argument. Jefri and the defendants' allies threw the most serious count they could find at the Derbyshires and lost. The dismissal of the RICO count was a huge deal for the Derbyshires, just as a victory on that count would have been a huge win for Jefri.

Second, the Federal Action is over. To claim that it is simply continuing because the rest of the counts were dismissed without prejudice would in my view add complications to the already increasingly unwieldy administration of § 145 cases. The Derbyshires did not choose to be sued in federal court. Jefri and his allies chose the forum. The lawsuit they brought in that forum has now been dismissed with finality, in its entirety, and they have abandoned any right of appeal. At the time of the dismissal, no claims were pending against the Derbyshires anywhere.[78]

In my view, it is more efficient and consistent with the purposes behind § 145 to consider the Federal Action concluded and to determine whether the Derbyshires were successful in that action or not now. The fact that the Derbyshires might not succeed in defending against the similar, reasserted claims brought against them by Jefri and his allies in a different action, the State Action, does not justify delay. In this respect, I recognize that there are prior cases holding that if similar claims are pending in two

[78] *Cf. Gatz v. Ponsoldt,* 2004 WL 3029869, at *6 (Del. Ch. 2004) (when a derivative action was dismissed in federal court, the plaintiff was required to make a demand or show demand excusal based on the board in office as of the time of the filing of a subsequent state derivative action, even though the subsequent state derivative action was premised on an excessive compensation claim that was first raised in the dismissed federal action).

forums simultaneously, dismissal of one case so that the other case can go forward does not constitute success for purposes of § 145(c).[79] But in this situation, Jefri and his allies chose their forum and were out of court on all claims once Judge Kaplan dismissed the Federal Action.[80] The success on the "merits or otherwise" standard is one that grants indemnification to corporate officials even when they have not been adjudged innocent in some ethical or moral sense.[81] Here, the Derbyshires were successful in having the Federal Action entirely dismissed. The fact that the dismissal of a lot of the counts was without prejudice does not mean that the Derbyshires were not successful.

To hold otherwise could lead to an array of possibilities that make my head hurt. For example, if I hold that the Federal Action is not in fact over for § 145(c) purposes, how long do the Derbyshires have to wait for fees on the RICO count defense? Or would I in fairness, as the Derbyshires contend, have to pick through the now moribund Federal Action as if it were a live case, for the purpose of determining which of the counts in the Federal Complaint implicate the Derbyshires' advancement rights, and make an award of advancement as to a case that is now over? Relatedly, to allow the defendants to escape

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[79] *E.g.*, *Galdi v. Berg*, 359 F. Supp. 698, 702 (D. Del. 1973) (concluding "that when a case is dismissed without prejudice *so that the same issue may be litigated in another pending case*, an indemnification award would be premature and contrary to the spirit of the statute") (emphasis added).

[80] *Cf. Galdi*, 359 F. Supp. at 701 (holding that because two other lawsuits relating to the same facts were "in active prosecution" the dismissal of a claim without prejudice "decided nothing with respect to the allegations of wrongdoing by [the putative indemnity] or any other defendant").

[81] *See Waltuch v. Conticommodity Services, Inc.*, 88 F.3d 87, 96 (2d Cir. 1996) (reasoning that "'success' under § 145(c), does not mean moral exoneration" and that "[e]scape from an adverse judgment or other detriment, for whatever reason, is determinative"); *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974) (holding that any result other than a conviction in a criminal proceeding "must be considered success" for the purposes of 8 *Del. C.* § 145(c)).

the force of the Federal Action's dismissal would create an incentive for plaintiffs like Jefri who control corporations that owe advancement and indemnification rights to the defendants they seek to sue to engage in questionable forum selection tactics, safe in the recognition that a loss that results in a dismissal on jurisdictional or forum non conveniens grounds will not result in a ripe claim for indemnification. These reasons support the primary reason I believe the Derbyshires' claim for indemnification is ripe, which is that the Federal Action is final and cannot be revived except by that rarest of motions, a successful application under Rule 60.

Furthermore, I believe that the London Action must be considered as part of the Federal Action. The London Action was not an independent action, it was one filed in aid of the Federal Action.[82] It should be considered in the overall assessment of whether the Derbyshires were successful in the Federal Action, especially since the relief sought was designed to secure the rights of the New York Plaintiffs to recover if they ultimately succeeded in the Federal Action.

There are two major issues regarding whether the Derbyshires were successful on the merits within the meaning of § 145(c). First, the defendants contend that the dismissal of the RICO count did not signal success on all counts. I reject that argument. Success on the RICO count caused the dismissal of the entire proceeding.

[82] The claim form filed by the New York Plaintiffs to commence the London Action states succinctly that "[t]he Claimants seek injunctive relief and a Freezing Order in support of proceeding filed in New York," JX 19, and the various orders in the London Action each explain that the proceeding is "in support of proceedings in the US District Court for the Southern District of New York," *e.g.*, JX 81 at 2.

Second, the defendants contend that the London and Federal Actions resulted in Jefri and his allies securing ownership of the Sunninghill Estate and obtaining a lien on two expensive houses owned by the Derbyshires in California. They claim that this relief, which is now in the form of a contract or arrangement rather than a judicial order,[83] means that the Derbyshires suffered important losses, precluding a finding of substantial enough success to deem them successful in the Federal Action overall as that Action, rather than simply on certain claims against them in that Action.

Although this issue is not free from doubt, the defendants have not persuaded me that the security Jefri and his allies obtained requires a finding that the Derbyshires were not successful as to the Federal Action as a whole. The most important relief the defendants claim was achieved was an agreement by the Derbyshires to relinquish any claim to Sunninghill Estate. The Sunninghill Estate claim in the Federal Action rested on the contention that the Derbyshires fraudulently arranged for the sale of the Estate to a corporation, Westfields, that they beneficially owned for an inadequate price. The Derbyshires, however, contend that the Sunninghill Estate never left Jefri's beneficial ownership, as Westfields was simply holding the Estate for Jefri.[84] In this respect, the Derbyshires suggest that the transaction was simply one of many maneuvers by Jefri to raise cash for his own needs and to thwart the BIA's legal campaign. Although the

[83] The Derbyshires took the position at oral argument that they may, at some later time, contest whether the lien remains in effect. *See* Tr. of Oral Argument at 20.

[84] They make a similar argument with respect to Golden Twist — an entity that retained some of the excess proceeds of selling plasma screen televisions to Jefri's hotels at an inflated price. In the Settlement Agreement, the Derbyshires disclaimed any beneficial interest in that corporation. The following analysis is equally applicable to Golden Twist.

defendants have raised doubt about the good faith of the Derbyshires, they have not persuaded me that, on balance, the Derbyshires do not have the better story.[85] As the record stands, I believe it more probable that the Sunninghill transfer was made with the knowledge and approval of Jefri and his sons for their own purposes. Also important is the fact that I see no basis to believe that the Derbyshires claimed to have beneficial ownership of Sunninghill during the Federal and London Actions. As they put it, they were happy to sign any document that made clear that Jefri was still the Estate's beneficial owner.

More troubling to the Derbyshires' indemnification claim is their ultimate assent to the entry of a lien against their homes in California. They concede they would prefer that the lien was not in place, although they note that Jefri could have obtained much of the same benefit simply by filing a lis pendens in California.

Although I concede that Jefri and his allies achieved some increased level of security that might be beneficial in the event they ever actually succeed on a claim in the State Action, I do not think that this sort of de minimis achievement obviates an overall finding of success for the Derbyshires. During the Federal Action, the Derbyshires were successful on several preliminary issues in the case before Judge Kaplan, but that does not play into my determination. Likewise, that the New York Plaintiffs obtained interim relief that led to a voluntary agreement providing certain security to them in the event

[85] In a deposition in the Federal Action, Jefri conceded that he authorized Derbyshire to transfer the Sunninghill Estate from Cedar Swamp to another entity, Westfields. JX 33 at 469. Also, Bahar's name is on the sales contract, the receipt of funds, and the closing documents to that transaction. JX 53-56. The record also contains evidence showing Jefri as beneficial owner in Westfields' Operating Agreement. JX 65.

they ever win does not undercut the reality that the Derbyshires filed a dispositive motion, convinced Judge Kaplan it should be granted, and obtained dismissal of all the claims against them, thereby ending the Federal Action. For all these reasons, I conclude that the Derbyshires were successful on the merits or otherwise as to the Federal and London Actions.

The defendants who are responsible for indemnifying both the Derbyshires for that success are the Delaware Palace Holding Corporations. Kava is responsible for indemnifying Zaman because she was charged with injuring the Hotel Bel-Air by attempting to sell it from underneath Jefri while serving as a director of Kava. Cedar Swamp is also responsible for indemnifying Zaman because the Federal Complaint asserted that she was the sole director and officer of Cedar Swamp when the Sunninghill Estate was transferred to Westfields, and that she breached her fiduciary duties in those capacities.[86] In that regard, I find no reason to pick apart the case and only award partial indemnification. The Federal Complaint pled that the Derbyshires were at the center of a wide-ranging conspiracy to injure Jefri and his corporations, through actions taken involving the Palace Hotel and the Sunninghill Estate. This "conspiracy to defraud" claim tied together the various allegations against the Derbyshires into one "fraudulent scheme [that was], in its totality, orchestrated by Zaman and Derbyshire."[87] Similarly in the RICO claim, the New York Plaintiffs' argued that "the defendants were not engaged in a series of independent frauds," but rather that "[e]ach alleged fraud . . . was a smaller

[86] Federal Compl. ¶ 43.
[87] Federal Compl. ¶ 220.

'implementing scheme' that formed part of a single 'master scheme' to enrich Zaman and Derbyshire at Prince Jefri's expense."[88]

Multiple claims that comprised the conspiracy and RICO claims allege that both Derbyshires owed Jefri and his entities fiduciary duties as a result of the positions of authority and agency entrusted to them.[89] In defending against the Federal Complaint, the Derbyshires necessarily had to confront all these allegations because they were inextricably linked by the New York Plaintiffs themselves and then used as a collective mass to buttress the conspiracy and RICO counts. Given this, these entities, all of which were under the sole beneficial ownership and domination of control of Jefri at all relevant times, are jointly responsible for all the fees and expenses incurred by the Derbyshires in the London and Federal Actions. Those fees and expenses were less than Jefri and his allies incurred to prosecute the case, were at rates that are within reason, and I therefore I award the entire amount sought. Any currency risk shall be at the expense of the defendants.

## V. To What Extent Are The Derbyshires Entitled To Advancement In The Pending State Action

After the Federal Action was dismissed, the New York Plaintiffs brought suit against the Derbyshires and certain others in the New York Supreme Court. The initial

[88] Federal Memorandum Opinion at 13 (quoting the New York Plaintiff's memorandum opposing the motion to dismiss the RICO claim).

[89] *E.g.*, Federal Compl. ¶ 21 (alleging that both Derbyshires breached fiduciary duties to Jefri and Cedar Swamp in connection with Sunninghill Estate sale); *id.* ¶ 30 (alleging that Zaman owed Cedar Swamp fiduciary duties based upon here position as Cedar Swamp's sole director, as well its president, secretary and treasurer); *id.* ¶ 138 (both Derbyshires had fiduciary roles as "officers, directors, and/or senior executives of the Plaintiff entities" and because of the authority reposed in them by Jefri over his assets and entities); *id.* ¶¶ 52, 55 (same as to their conduct at the Palace Hotel).

complaint in the State Action had twenty-two counts, including the very broad civil conspiracy count that was in the Federal Complaint and that was similar to the prior RICO count. The initial State Action complaint was narrower than the Federal Complaint, as several allegations of wrongdoing were withdrawn and claims regarding Sunninghill Estate were withdrawn given that the Derbyshires had disclaimed ownership of the Estate in the previous litigation.[90]

In terms of the costs of responding to the initial State Action complaint, I find that the Derbyshires are entitled to advancement, largely on the same grounds as they were entitled to indemnification in the Federal Action. The civil conspiracy count in the initial State Action complaint tied all their actions together and alleged a concerted course of action involving misconduct spanning Jefri's entire American empire. Given that, the Derbyshires are entitled to advancement for all their fees and expenses in responding to the initial State Action complaint, as all the work necessary to respond to that complaint was related to claims against them in the indemnifiable capacities they worked for the defendants. Having chosen this pleading tactic of alleging an empire-wide conspiracy by the Derbyshires, the Jefri-controlled New York Plaintiffs themselves created the necessary nexus between all the counts and the capacities in which the Derbyshires are

[90] Along the way, the New York Plaintiffs advanced a bunch of other claims against the Derbyshires based on their misuse of fiduciary authority at the Palace Hotel. The following claims, denominated in terms the parties have used, are not in the State Amended Complaint: the Conspiracy to Defraud, the Sunninghill Estate Fraud, the Sunninghill Furniture Fraud, the Hoareau Internship Fraud, the Zamarni Job Fraud with respect to the Derbyshires, the Sam Zaman Fraud, the Arzie Zamarni Hotel Accommodations Fraud, and the Hotel Sale Fraud. If the Derbyshires were not entitled to indemnification for the entirety of their defense of the Federal Action, they would be entitled to indemnification from the Delaware Palace Holding Corporations for expenditures in defending against these dropped claims.

owed advancement. Therefore, the same defendants who are responsible for indemnifying one or both of the Derbyshires for the Federal Action as determined previously are responsible to the same extent for advancement of fees and costs for the State Action until the filing of the State Amended Complaint.

Perhaps in recognition of this problem, the State Amended Complaint is narrower and dropped the conspiracy count. It is also narrower in another sense that is entirely unconvincing, as I have previously discussed.[91] Seeking to narrow the defendants' exposure to advancement claims by the Derbyshires, the State Amended Complaint drops the broad allegations previously made regarding the Derbyshires' pervasive managerial and financial control of Jefri's entities and seeks to portray them as almost exclusively providers of legal advice.[92] This pleading tactic is unavailing, as the State Amended Complaint, as we shall see, alleges conduct by the Derbyshires that is not of the sort that can be undertaken simply by outside legal advisors, but conduct that requires that the actors have been granted managerial and financial authority over the entities and their assets.

Because the State Amended Complaint drops the conspiracy count trying all the Derbyshires' acts together, however, it is necessary to address the major claims it asserts, so that a judgment can be made about the extent to which and the source from which the Derbyshires are entitled to advancement. To make this tedious exercise completely

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[91] *See* Part IV.C, *supra*.

[92] *Cf.* Defs. Pre-Trial Op. Br. at 11. ("Prince Jefri and Amedeo filed an Amended Complaint dropping parties and claims and *reformulating elements of the case*.") (emphasis added). The defendants also point to the fact that Cedar Swamp is no longer a plaintiff in the State Action meaning that no defendant in this action remains a plaintiff in the State Action.

understandable to a reader not familiar with the full record in this case would require hundreds of pages. I do not take that approach. Rather, I will simply identify the basic nature of the claim and issue a brief ruling about whether the claim triggers advancement.

Before addressing the specific claims, it is relevant to note that, as the defendants freely admit, "Prince Jefri makes largely the same fraud and breach of fiduciary duty claims against Derbyshire that he has made against Zaman."[93] It is also relevant to note that the overall theme of the State Amended Complaint is consistent with the prior complaints. The Derbyshires are charged with having abused the positions of trust they occupied for Jefri and his entities. Instead of using their fiduciary authority for proper purposes, they used it to enrich themselves and their relatives and friends through excessive compensation, sweetheart contracts, and fraudulent transfers. The Derbyshires face serious charges of breach of the fiduciary duty of loyalty, fraud, and theft, all involving misuse of the broad managerial authority entrusted to them.

### A. Claims Relating To The Palace Hotel[94]

The following claims implicate only the Delaware Palace Holding Corporations and a determination that advancement is owed as to these claims applies to only those defendants.

[93] *Id.* at 14.

[94] In the Federal Action, the Derbyshires had been accused of arranging for a sale of the New York Palace and Bel-Air Hotel in a way that resulted in an unfair commission to themselves. That allegation was reasserted in the Federal Amended Complaint, but was not reasserted in the State Action.

1. Golden Twist

In 2005, the Palace Hotel decided to upgrade its guest rooms with 42 inch plasma screen televisions. Zaman formed Golden Twist as an intermediary to purchase the televisions at a cost lower than the hotels paid to Golden Twist. Golden Twist sold the televisions and various related equipment to the Palace Hotel for $4,050,515.62.[95] Zaman contends that Jefri directed these transactions and that the funds the Hotel paid to Golden Twist that exceeded the cost of the televisions were used to pay for legal fees in defending Jefri's entities and to compensate Zaman for fees Jefri owed her.

The State Amended Complaint alleges the New York Palace Hotel "has yet to receive delivery of all televisions and equipment for which it had contracted and paid Golden Twist."[96] The State Amended Complaint also alleges that Zaman "caused at least $1.2 million of the funds paid . . . to be transferred to her personal bank account" in breach of her fiduciary duties.[97] The initial State Complaint alleged a breach of fiduciary duty claim against Thomas Derbyshire as well regarding this issue, but that claim was not reasserted in the State Amended Complaint.

A plain reading of the State Amended Complaint makes clear that Zaman is accused of having breached the fiduciary duties she owed as a director, officer, and agent of the corporations that own the New York Palace Hotel by causing that Hotel to incur

[95] Although Zaman testified at trial that Golden Twist also delivered televisions to the Hotel Bel-Air, the State Amended Complaint does not mention the Hotel Bel-Air in this connection and its corporate parent, Kava Holdings, is not and has never been a party to the underlying litigation against the Derbyshires. Trial Tr. at 110; *see, e.g.*, State Am. Compl. ¶¶ 44-56, 100-27.
[96] State Am. Compl. ¶ 55.
[97] *Id.* ¶¶ 52, 113, 115.

excessive costs to generate a profit for Golden Twist, which she then improperly diverted to herself. This is a serious claim of wrongdoing in her official capacity. She is entitled to advancement to defend herself against this charge, which she denies.[98]

2. Sub-Lease Frauds

The State Amended Complaint alleges that in October 2005 and March 2006 the Derbyshires granted, without Jefri's knowledge or approval, two long-term, below-market rate sub-leases of real property to companies that the Derbyshires own and control. The October 2005 sub-lease is between Amedeo Hotels and a company owned by Zaman, Fitzjohn's Holdings, Inc., for a 2,600 square foot third-floor apartment in the New York Palace Hotel. The March 2006 sub-lease is between Amedeo Hotels and another company owned by Zaman, Eurofinch Limited, for the restaurant space now occupied by Maloney & Porcelli, which is located on 50th Street across from the Palace Hotel.

The Derbyshires contend that Jefri granted them these subleases as a bonus for additional work, and to compensate them for their salary, which had been in arrears for over a year at the time of the March 2006 sub-lease.[99] Both sub-leases were executed by Zaman on behalf of the tenant, and Bahar purportedly on behalf of Amedeo Hotels as President.

[98] The State Amended Complaint alleges a constructive trust claim based on Zaman's alleged diversion of $600,000 from the Golden Twist television sale proceeds to purchase a hotel or motel located in Nacogdoches, Texas. Because this claim depends upon proof that Zaman's actions with respect to Golden Twist violated her fiduciary duties to the New York Palace Hotel, she is entitled to advancement to defend the claim.

[99] Trial Tr. at 432.

The State Amended Complaint alleges that these leases resulted from breaches of fiduciary duty, and fraud by the Derbyshires, who used their managerial authority at the New York Palace Hotel to enrich themselves to the detriment of Jefri and the entity that directly owned the Palace. It also alleges that Bahar, who is not a native speaker of English, relied on Zaman to explain the terms of the lease and was unilaterally mistaken about its terms, and alternatively that the leases are unconscionable. In reality, the essence of all these claims is that the Derbyshires — who owed fiduciary duties to Jefri and his entities — breached their fiduciary duty of loyalty by causing the New York Palace Hotel to enter into unfavorable leases and by misleading Bahar and Jefri into accepting those leases as fair. Therefore, advancement is due to the Derbyshires to defend against these claims.

3. Credit Card Misuse

In or around April of 2005, the Derbyshires were issued corporate credit cards with billings to be paid by the New York Palace Hotel. The Derbyshires say that Jefri authorized the issuance of these cards, authorized them to use the cards to cover expenses they incurred in performing work for any of his entities, and had them also incur expenses to make purchases for him and his family members with the cards.[100] Zaman testified that the credit card expenses that did not directly relate to operations of the

[100] The Federal Complaint reflects Jefri's understanding that the permissible use of the credit cards was not confined to Amedeo Hotels L.P. *See* Federal Compl. ¶ 56 ("In connection with her fiduciary *roles* in regard to the Palace Hotel, Zaman was given a[] . . . credit card billable to Amedeo.") (emphasis added).

Palace Hotel were allocated to a special "ownership expense" category and thereby attributed to PH Partners and Palace Holdings.[101]

In the Federal Complaint, the Derbyshires were accused of making unauthorized and improper expenses to their credit cards exceeding $1.1 million. After the Derbyshires argued that many of the charges related to charges they made on behalf of Jefri and his sons Bahar and Hakeem, the amount was reduced.[102] The State Amended Complaint alleges that the charges are "believed to be in excess of $650,000."[103]

A fair reading of the State Amended Complaint indicates that the Derbyshires are accused of misusing the broad authority entrusted to them over the assets of the New York Palace Hotel. Instead of confining their use of the corporate credit card — which must have had some mighty high limits — to proper purposes that advanced the interests of Jefri and his entities, they supposedly misused the confidence reposed in them by using the card for personal expenditures. Although the defendants try to characterize this as outside the scope of their advancement duties on the ground that this is just a contractual dispute about the use of a credit card, I am not persuaded by their argument.[104]

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[101] Trial Tr. at 99.
[102] *Id.* at 161.
[103] State Am. Compl. ¶ 38.
[104] The credit card charges are asserted as a fiduciary duty claim throughout all four complaints filed by the New York Plaintiffs. Up until the last State Amended Complaint the claim is asserted based upon, among other things, "[the Derbyshires'] positions as officers and directors, and Zaman's position as managing director of the Palace Hotel." State Compl. ¶ 120; *compare id. with* State Am. Compl. at 26 (stating that the fiduciary duty claim is brought "as to Matters Relating to Her Employment") *and id.* ¶¶ 94, 95 (stating that "[a]s an employee of Amedeo Hotels L.P., Zaman owed Amedeo Hotels L.P. fiduciary duties" and purporting to bring claims on that relationship alone).

The claims against the Derbyshires are grounded in their alleged misuse of the substantial fiduciary responsibility they were given as key managerial agents for Jefri and his entities.[105] These entities entrusted the Derbyshires with wide authority to incur expenses on the dime of the New York Palace. That sort of entrustment suggests that Jefri and his entities believed that the Derbyshires needed to have leeway to make substantial expenditures when that was proper to advance corporate purposes. The dispute in the State Action is whether they misused that authority, by using the card for purposes not authorized by Jefri. That is an official capacity claim for which they are owed advancement rights.[106]

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[105] The claim is pled against Zaman as a "violat[ion]" of her fiduciary duties, purportedly as "an officer and employee of Amedeo Hotels L.P.," and also as a fraud claim. *Id.* ¶¶ 95, 96, 101, 105. As to Derbyshire, it is pled solely as a fraud claim. *Id.* ¶ 105.

[106] I make this conclusion fully aware of *Cochran v. Stifel* and other cases that have held that corporate bylaws do not extend to claims that hinge *exclusively* on compliance with contractual employment arrangements are not "by reason of" acts in an official capacity. *See*, *e.g.*, *Cochran*, 2000 WL 1847676, at *4, *aff'd in pertinent part*, *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555 (Del. 2002); *see also Weaver*, 2004 WL 243163, at *4. But here, the essence of the credit card claims is breach of fiduciary duty, and they depend on proof that the Derbyshires misused the trust reposed in them by using corporate resources for personal, not corporate purposes. This is not a situation where they are alleged to have committed merely a breach of a specific term of a contract; indeed, the credit card claims are not based on any written contract but on the Derbyshires' failure to honor the fiduciary duties that came with receiving the corporate card to carry out their managerial duties. Also, I note that a finding that the claims are "by reason of" a corporate capacity for purposes of advancement will not be of much assistance to the Derbyshires at the indemnification stage. If it turns out after an adjudication on the merits that the Derbyshires were in fact bilking the Palace Hotel and its owners with excessive credit card charges, they will not be entitled indemnification for any judgment against them. *Homestore v.* Tafeen, 888 A.2d 204, 214 ("The limited and narrow focus of an advancement proceeding precludes litigation of the merits of entitlement to indemnification for defending one self in the underlying proceedings. If it is subsequently determined that a corporate official is not entitled to indemnification, he or she will have to repay the funds advanced.") (citing *Perconti*, 2002 WL 982419, at *3-5 and *Reddy v. Electronic Data Sys. Corp.*, 2002 WL 1358761, at *5-7, *aff'd*, 820 A.2d 371 (Del. 2003)).

### 4. Abuse Of Signing Privileges

Although the parties at times characterize them as three distinct causes of action, the Sam Zaman Accommodations Fraud, the Zamarni Accommodations Fraud, and the Abuse of Signing Privileges claims are logically intertwined. In the Federal Action, the New York Plaintiffs alleged in their original complaint that "Zaman's mother, Sam Zamarni [sic], and her brother Arzie Zamarni, were . . . unjustly enriched with long-term luxury accommodations at the Palace Hotel free of charge"[107] and that this also enriched Zaman, Derbyshire, and various entities controlled by them.[108] These allegations were absent from the Amended Federal Complaint and the initial State Complaint, but were reasserted in the State Amended Complaint as a breach of fiduciary duty claim against Zaman as well as a fraud claim against Derbyshire, Zaman, and entities controlled by them. The State Amended Complaint reads as follows: "Zaman violated [her] fiduciary duties by making excessive and improper use of the signing privileges with Amedeo Hotels L.P.'s New York Palace Hotel for her personal benefit and for the benefit of her family."[109] The fraud claim is premised on the Derbyshires "represent[ing] . . . that . . . [c]harges they made pursuant to their signing privileges to the accounts of the New York Palace were necessary and proper charges Derbyshire and Zaman had incurred in the course of their work for the New York Palace Hotel."[110]

[107] Federal Compl. ¶ 75.
[108] *Id.* ¶ 216.
[109] State Am. Compl. ¶ 102.
[110] *Id.* ¶ 105.

The State Amended Complaint's only indication as to when the visits took place was "[b]etween May 2004 and November 2006."[111] Throughout this time period, Zaman was the director, secretary, and in some cases treasurer of the Delaware Palace Holding Corporations.[112] Derbyshire served as director and vice president of these entities throughout much of this time as well.[113] Throughout this entire period, it is also clear that the Derbyshires wielded wide-ranging managerial authority to act on behalf of the Palace Hotel.

Given the nature of these allegations, it is clear that the Derbyshires are accused of misusing their fiduciary authority over the Palace Hotel to benefit themselves and their relatives at the unfair expense of the Hotel. Thus, the Derbyshires are entitled to advancement to defend against these claims.

5. Zamarni Job Fraud

In October of 2005, Zaman's brother, Arzie Zamarni, was hired for a position at the New York Palace Hotel as an "operations analyst."[114] The New York Plaintiffs allege that Zaman hired Zamarni for what amounted to be a no-show job at an exorbitant salary of $140,000 per year in breach of her fiduciary duties and Palace Hotel policies against nepotism. Zaman testified at trial that Zamarni was hired to replace two former employees, who had resigned within several weeks of one another, with the express

[111] Federal Compl. ¶ 75.
[112] Much of this time period, as well as particular instances of this conduct alleged in earlier complaints, pre-dates Zaman's role as an employee. The defendants have not attempted to explain how misuse of signing privileges could be a breach of Zaman's fiduciary before Zaman had any employment role at the hotel duty — presumably to the corporations in the holding structure for which she was an officer and director — but not afterwards.
[113] He served in these roles from January 19, 2005 to May 19, 2005.
[114] State Am. Compl. ¶ 35.

consent of Jefri's sons Bahar and Hakeem,[115] who were then directors and officers of the Delaware Palace Holding Corporations and other entities in that chain of ownership.

The Federal Complaints and the initial State Complaint allege that claim against Zaman as one for breach of fiduciary duty, but the State Amended Complaint alleges this cause of action solely against Zamarni.[116] This conduct must have necessarily been a result of her corporate positions. In reality, the ultimate viability of the claim depends on proof that Zaman breached her fiduciary duties even though the claim is now only asserted against her brother. Therefore, Zaman will likely still incur legal fees because this claim accuses her of wrongdoing in her official capacities. As such, Zaman is entitled to advancement for fees she incurs related to this claim.

6. Zaman Employment Contract

The State Amended Complaint alleges that Zaman's employment agreement as managing director of the Palace Hotel is unconscionable, has compensation terms grossly in excess of industry standards, and was fraudulently procured.[117] The New York Plaintiffs seek to have the contract voided. The employment agreement is countersigned by Bahar and Hakeem on behalf of Amedeo Hotels and Zaman contends she was asked by Jefri to assume this role.[118]

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[115] Trial Tr. at 113.
[116] State Am. Compl. ¶¶ 140-45.
[117] JX 11.
[118] Defs. Post Tr. Op. Br. at 33 ("Prince Jefri asked [Zaman] to be the Hotel's Managing Director."); *see also* JX 11 at 21 ("Due to the sudden and unfortunate passing of John Segreti, Managing Director of the New York Palace Hotel, *ownership has asked Ms. Zaman assume the position of Managing Director (Interim)* until a permanent General Manager is hired.") (emphasis added).

The State Amended Complaint clearly alleges that Zaman misused her fiduciary status to procure for herself a sweetheart employment contract that was grossly unfair to the New York Palace.[119] In the defendants' own words, she "caus[ed] Amedeo to enter into . . . [that] Employment Agreement."[120] Thus, it alleges wrongdoing by Zaman in her official capacity. Zaman is entitled to advancement to defend against this claim.

7. Gilt Restaurant Contract

The State Amended Complaint raises a new claim that "Derbyshire and Zaman violated [their] fiduciary duties by including and causing Amedeo Hotels to enter into and execute to Derbyshire's benefit a one-sided and unconscionable employment agreement by which Derbyshire was made director [i.e., managing director] of Gilt Management LLC."[121] Derbyshire was appointed as a manager of Gilt Management LLC at the request of Gilt's two members, defendants PH Partners and Palace Holdings, as evidenced by a written consent in lieu of a meeting on October 17, 2005.[122] That written consent was signed by Zaman on behalf of PH Partners and Palace Holdings.[123] Thereafter, Thomas Derbyshire was appointed to become its managing director and

[119] In this way, the employment contract allegations here are analogous to the employment agreement allegations in *Reddy* that were held to be a proper subject for advancement because the conduct alleged to have breached the official's employment agreement was the identical conduct alleged to have breached the official's fiduciary duty. *Reddy*, 2002 WL 1358761, at *6; *cf. Weaver*, 2004 WL 243163, at *4-5 (finding an employment contract claim not to be a proper subject for advancement where the underlying conduct alleged in that claim was separable from the conduct alleged in a breach of fiduciary duty claim).
[120] Defs. Pre-Trial Op. Br. at 12.
[121] State Am. Compl. ¶ 92 (emphasis added); *see also id.* ¶ 100.
[122] Defs. Post-Trial Op. Br. at 35 n.17 ("Derbyshire was appointed as the managing director of Gilt at the request of PH Partners and Palace Holdings."); *see also* JX 158.
[123] JX 158; *see also* Trial Tr. at 274.

entered into an employment contract that was signed by Bahar and Hakeem.[124] More important is the overriding reality that this is yet another claim grounded in the notion that the Derbyshires abused the broad fiduciary confidence reposed in them to manage and engage in transactions on behalf of entities controlled by Jefri. Thus, they are entitled to advancement to defend against this claim.

B. Other Claims

1. The Tomiyasu Ranch Funds Claim

At one time, Jefri beneficially owned the Tomiyasu Ranch, which is a residential real estate property located in Las Vegas, Nevada and formerly owned by a Cayman Islands Corporation named Casa de Meadows. Jefri told the Derbyshires that Jefri's previous advisors had sold the property without his consent. During the course of an investigation, the Derbyshires discovered that the $14 million yield from the sale of the Tomiyasu Ranch in early 2004 had been diverted to pay Jefri's legal bills. Of the original sale price, over $5 million was deposited in a client account with the Bryan Cave law firm in Los Angeles and later transferred to another law firm for future services after Bryan Cave withdrew from their representation of Jefri. At Zaman's request, those funds were delivered Zaman through a check dated April 25, 2006 and payable to "Casa de Meadows Inc., a Cayman Is. Corp."[125] Zaman formed a Delaware limited liability

[124] Trial Tr. at 366-67 ("And specifically in relation to this document, I had a number of positions with Gilt Management. I was both manager, as evidenced here, and I was also a director of the company. And I had an employment contract as managing director which was signed by Prince Hakeem and Prince Bahar."). The Derbyshires have not produced that employment agreement or explained in which capacities the princes signed it.
[125] State Am. Compl. ¶ 24.

company named "Casa de Meadows Inc., Cayman Islands Corp. LLC" and deposited the check in a New York bank account opened by that entity. Jefri and the Derbyshires dispute whether Jefri authorized Zaman to receive those funds. All of the complaints in the Federal and State Action allege multiple claims against the Derbyshires and entities they control for allegedly misappropriating these funds under various legal theories.

The Derbyshires claim that in securing the release of those funds they were acting as agents of Casa de Meadows at the request of the defendants in order to pay the legal fees incurred by the defendants. But there is no reliable evidence that supports those arguments. As indicated previously, none of the defendants was directly subject to suit by the BIA in the years relevant to this case. There is no evidence that funds went from Casa de Meadows to pay for counsel employed by any of the defendants themselves. As I held previously, unless the Derbyshires can prove some specific nexus between conduct they took for an entity like Casa de Meadows and defendants who are not in the chain of ownership leading to Casa de Meadows, they are not entitled to advancement or indemnification from the defendants. Without such a nexus, there is no basis to infer that the Derbyshires were acting at the Casa de Meadows level for the defendants, as nothing done at the Casa de Meadows level affected them.

Therefore, the Derbyshires are not entitled to advancement for defending against the claims relating to disposition of the funds from the Tomiyasu Ranch sale.[126]

[126] There is also a constructive trust claim alleging that the Derbyshires used the proceeds from the Tomiyasu Ranch sale to purchase two houses in Manhattan Beach, California, through Oceanview Estate LLC, a Delaware entity beneficially owned and controlled by them. Because there is no basis for advancement as to their conduct in connection with the Tomiyasu Ranch, the

2. Confidential Information Claims

The Derbyshires face a breach of fiduciary duty claim and a breach of contract claim related to confidential information that involve the same facts. The State Amended Complaint alleges that the Derbyshires breached their obligation to keep confidential certain information they acquired while working for Jefri and his entities. They allegedly disclosed some of this information to banks that have business relationships with the New York Palace Hotel and also to the BIA, Jefri's litigation adversary.[127] They also allegedly took certain information belonging to Jefri and his entities and have refused to return it.

Although this allegation arises in part out of conduct that took place after the Derbyshires' removal, § 6.1 does not preclude advancement simply because they were removed. Rather, because the claims against her allege that the Derbyshires, as fiduciaries, had access to confidential information and breached their fiduciary duty by disclosing it to third parties and by misappropriating it for themselves, the necessary nexus between their official capacity and the claims exist. Clearly, the fact that Zaman "was" a director, officer, and/or agent of the New York Palace Hotel and Derbyshire "was" the same is important to these claims.[128] When fairly read, the State Amended Complaint alleges that the Derbyshires abused the confidence entrusted them as general fiduciaries of Jefri and his entities, including the New York Palace Hotel.[129] They are

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Derbyshires are not entitled to advancement as to the constructive trust claim as it relates to the Manhattan Beach properties.

[127] JX 24 ("Federal Am. Compl.") ¶ 150; State Compl. ¶ 148.

[128] Bylaws § 6.1 (granting advancement to someone who is made a party to a lawsuit because she "was" serving as a director, officer, or agent of another corporation at the corporation's request).

[129] State Am. Compl. ¶¶ 69, 75; *see* Trial Tr. at 159.

entitled to advancement to defend against this claim from the Delaware Palace Holding Corporations as to those claims because the information at issue seems to primarily involve the New York Palace Hotel.[130] I will not order advancement from Kava or Cedar Swamp, as none of the information is alleged to have involved those entities.

3. Breach of Retention Agreement

The State Amended Complaint alleges that the Derbyshires breached the oral retention agreement they reached with Jefri to compensate them for work they were to do for Jefri and his companies. This claim was first asserted in the Federal Action with the sole requested relief being damages. In the State Amended Complaint, this claim was amended to request rescission or reformation of the agreements. Some aspects of this claim resemble a plain vanilla breach of contract dispute. For example, Jefri contends that the fee was £1 million each, per year, but the Derbyshires allege that the fee was £2 million each, per year. The New York Plaintiffs, however, have pled this claim to clearly implicate the Derbyshires' official capacities. They argue that the "breaches of fiduciary duty, fraud and other forms of misconduct by Zaman and Derbyshire" described in the complaint "constituted material breaches of that oral retention agreement"[131] and that the retention agreement should therefore be rescinded or reformed.[132] Because, by the New York Plaintiffs' own words, this breach of contract claim focuses not on the terms or formation of the agreement, but on related breaches of duty in the Derbyshires'

[130] Trial Tr. at 159.
[131] State Am. Compl. ¶ 171.
[132] Likewise the claim asserts that the Derbyshires' disclosure of confidential information breached this agreement. As I determined previously, fees for defending the disclosure of confidential information claim shall be advanced to the Derbyshires.

indemnifiable capacities, the Derbyshires are entitled to advancement from the Delaware Palace Holding Corporations to defend this claim.

4. Barrister Fraud

Jefri alleges that Zaman misrepresented herself as a practicing barrister to him, which supposedly induced Jefri to employ her. Zaman denies she did this. The State Amended Complaint makes this allegation in support of a claim for fraud. Zaman says she has yet to incur separate legal expenses for this claim because it has not yet been addressed in any motion filed with a court. Zaman admits that she is not entitled to any fees she incurs to defend this allegation, which is based on conduct predating her service in a fiduciary capacity for any of Jefri's entities.

5. Accounting

The first three complaints filed by the New York Plaintiffs sought an accounting from Zaman and Derbyshire for "information regarding the use and disposition of monies and/or other assets received by them from [the New York] Plaintiff's . . . [a]s [their] attorney's, attorneys-in-fact, as well as in their capacities as officers and directors of the Plaintiff entities . . . ."[133] The State Amended Complaint contains a similar claim based on fiduciary duties allegedly owed to Amedeo Hotels and Jefri by the Derbyshires in their capacities as legal advisors. This is yet another example of a narrowing of the State Amended Complaint simply to buttress the defendants' defense of this action. Like the other examples, it does not succeed of its purpose. Clearly, the Derbyshires face these

[133] Federal Compl. ¶ 110.

accounting claims because they were entrusted with broad managerial authority to act on behalf of Jefri's entities, including the New York Palace Hotel.

To the extent that the New York Plaintiffs seek to have the Derbyshires account for any funds of the defendants, or any subsidiaries of the defendants, the Derbyshires are entitled to advancement for defending these accounting claims.

## VI. To What Extent Should The Amounts Of Indemnification And Advancement Be Reduced Because The New York Plaintiffs Sued Other Parties?

The defendants seek to reduce their obligations of indemnification and advancement by pointing out that their allies the New York Plaintiffs sued parties other than the Derbyshires. For example, in several counts in the Federal and State Action complaints, the New York Plaintiffs sue entities wholly owned and controlled by the Derbyshires.[134] It is often the case that fiduciaries are accused of breach of fiduciary duty by going to work for a new entity they have formed or for engaging in a self-dealing transaction through an entity they control. When the success of the plaintiff in proving the claim depends on the fiduciary having misused her fiduciary authority in order to obtain an unfair benefit for herself by conferring benefits on a corporation she controls, I

[134] In their opening pre-trial brief, the defendants argued that the Derbyshires should have sought advancement and indemnification from their wholly-owned corporations. Defs. Pre-Trial Op. Br. at 39-41. The defendants failed to respond to the Derbyshires' response to this argument or raise it in any of their post-trial briefs. As such, it is effectively waived. *See* note 56, *supra* (discussing waiver). Even if that argument was not waived, I would reject it because it is analogous to an argument that was rejected by this court in a previous case that a corporate indemnitor can reduce its obligations by arguing that the indemnitee's own wholly-owned entity has provided indemnification. *See DeLucca v. KKAT Management, L.L.C.*, 2006 WL 224058, at *9 (Del. Ch. 2006); *see also Schoon v. Troy Corp.*, 2008 WL 821666, at *13 & n.82 (Del. Ch. 2008) (citing the reasoning used in *DeLucca*).

perceive no rational basis to reduce the corporate-plaintiff's duty of indemnification to the fiduciary.

Here, for example, the only way that the New York Plaintiffs can recover against the Derbyshires' wholly-owned entities is to show that those entities received ill-gotten gains as a result of fiduciary misconduct by the Derbyshires. These entities are simply the repositories for the ill-gotten gains the Derbyshires supposedly secured for themselves.[135] But, in the event that the New York Plaintiffs fail and the Derbyshires are found to have been proper recipients of these funds, a ruling that their own entities must pay half of the defense costs to these claims would not leave them whole.[136] It would leave them worse off than if they had simply put the funds in a personal bank account, and only because they used a venerable technique Delaware has long touted to conduct business: forming a corporation to hold certain assets. For these reasons, I will not reduce any obligation of the defendants to advance funds or indemnify the Derbyshires on account of the inclusion of the presence of their wholly-owned entities in the complaints filed by the New York Plaintiffs.

The presence of other defendants who are natural persons and not controlled entities of the Derbyshires has different implications. These defendants include Arzie Zamarni and Marcus Zaman, who are Faith Zaman's brothers; Sam Zaman, who is Faith Zaman's mother; and Charles Horeau, a friend of Zaman's who signed paperwork related

[135] The defendants only add to this perception by referring to them as "shell corporations" for the Derbyshires. Defs. Pre-Trial Op. Br. at 8.
[136] *See DeLucca*, 2006 WL 224058, at *9 ("[The indemnitee] has caused [her wholly-owned] company to bear her expenses in a situation when the KKAT Companies owed her advancement rights and is thereby suffering the economic costs of that decision.").

to the Sunninghill Estate Sale. Each of these defendants in the underlying Federal and State Actions has been sued on the ground that he or she was the beneficiary of largesse improperly bestowed upon him or her by the Derbyshires using their control over assets belonging to entities beneficially owned by Jefri. The Derbyshires admit that they are not entitled to advancement nor indemnification for work performed on behalf of these defendants. Their counsel has proffered an estimate of the work done for these persons.

The defendants quibble that the estimates are way too low and reflect a bad faith allocation. But their argument does not convince me. The reality is that these defendants are largely in the case as a potential source of recovery, but whose exposure requires in the first instance that the New York Plaintiffs show that the Derbyshires misused their fiduciary authority to enrich these relatives and friends. That the Derbyshires' counsel, who also represents these defendants, has had to do little additional work to address these defendants' role in the Federal and State Actions makes perfect sense, given the nature of the claims against them. I will not quibble with the proposed reductions. Furthermore, as to future requests for advancement, the Derbyshires' counsel has promised to keep a tally of the hours expended to address the claims against these defendants and to exclude those hours from requests for advancement. Compliance with that promise will be a condition of the Derbyshires' future right to advancement.

VII. Are The Derbyshires Entitled To Advancement For Their Counterclaims?

The defendants assert the familiar defense that they are not required to advance the Derbyshires' fees and expenses attributable the counterclaims in the State Action because the advancement provision only provides advancement "in defending any proceeding"

that is indemnifiable.[137] In this case, for reasons that will soon become apparent, the resolution of that argument is nettlesome.

In *Citadel Holding Corp. v. Roven*, the Delaware Supreme Court held that the "in defending" language in an advancement agreement covered a director's affirmative defenses and counterclaims.[138] The court reasoned that "the term 'defense' has a broad meaning" in the litigation context and had no difficulty concluding that affirmative defenses were included within the advancement agreement's "in defending" limitation.[139] But, the court struggled with the question of whether the director's counterclaims were defensive and thus captured within the "in defending" limitation but ultimately concluded that they were. The court explained its rationale as follows:

> The counterclaims present a more difficult problem. Technically, of course, they represent separate causes of action. But under the Federal Rules of Civil Procedure, certain claims must be asserted by a defendant in the same action and others are permissive. *See* Fed. R. Civ. P. 13(a) and (b). Counterclaims arising from the same transaction as the original complaint must be asserted or be thereafter barred. Fed. R. Civ. P. 13(a). Thus, in the federal action at least, any counterclaims asserted by Roven are *necessarily part of the same dispute and were advanced to defeat, or offset,* Citadel's Section 16(b) claim. We therefore believe the Agreement covers Roven's costs incurred in pursuing the counterclaims he asserted in the federal action as well.[140]

As I read *Roven*, the primary rationale was that the counterclaims were substantively defensive and thus within the scope of the contractual words "in defending" because they

[137] Bylaws § 6.2.
[138] 603 A.2d 818, 824 (Del. 1992).
[139] *Id.*
[140] *Id.* (emphasis added).

"were advanced to defeat, or offset" the corporation's claims against a director.[141] The court buttressed its conclusion that the counterclaims were defensive by noting that the counterclaims were compulsory counterclaims under the Federal Rules of Civil Procedure that had to be asserted or lost forever, but, for reasons I will explain, the court's reasoning was not dependent on defining the counterclaims as compulsory counterclaims.

I acknowledge that after *Roven*, courts have used the question of whether counterclaims are compulsory or permissive as a heuristic for determining whether counterclaims are defensive counterclaims that are within the scope of the standard "in defending" limitation included in many advancement and indemnification provisions.[142] That approach is in fact what *Roven* was likely intended to provide — a general rule of application that could be easily applied. But this case, however, provides an example of where that heuristic breaks down if *Roven* is read literally to require that a counterclaim be compulsory under the rules of the particular forum in which the party seeking advancement has been sued, rather than simply under the prevailing Delaware and federal approach. The counterclaims asserted by the Derbyshires in the Federal Action were compulsory counterclaims because the Federal Rules of Civil Procedure applied and they

[141] *Id.*
[142] *See, e.g.*, *Reinhard & Kreinberg v. Dow Chemical Co.*, 2008 WL 868108, at *3 (Del. Ch. Mar. 28, 2008); *see also Gentile v. SinglePoint Fin., Inc.*, 787 A.2d 102, 110 (Del. Ch. 2001) (noting that the "use-it-or-lose-it" scenario of a compulsory counterclaim "was the logical underpinning of [*Roven*]").

arose out of the same transaction.[143] But, the analogous counterclaims in the State Action are not compulsory counterclaims because all counterclaims are permissive under New York civil procedure.[144] The defendants seize upon that feature of New York civil procedure and argue that it conclusively determines that the Derbyshires' counterclaims are outside the scope of the "in defending" language in § 6.2 of the defendants' bylaws. I disagree.

For starters, I find it impossible to read the holding of *Roven* as driven by the idea that a corporate official should have his cost of playing offense paid simply because the company sued him first and he is now forced to play offense in the corporation's chosen forum or give up the right to do so later. The term compulsory only means that the defendant must bring forward his offensive claim in the pending action or forsake it.[145] Nothing about the "use it or lose" nature of a compulsory counterclaim actually compels a defendant to assert the counterclaim. A corporate official remains free to defend the claims against him by playing defense only without asserting a "separate cause[] of action."[146] Nothing in the text of *Roven* seems to be driven by the notion that an advancement provision that does not explicitly provide coverage for a corporate official to bring affirmative claims has an implicit exception for instances when the corporate

[143] FED. R. CIV. P. 13(a)(1) ("A pleading must state as a counterclaim any claim that . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.").
[144] N.Y. CPLR §§ 3011, 3019; *see also* David D. Siegel, *Practice Commentaries*, N.Y. CPLR C3019:2 (McKinney 2008) ("In New York practice, all counterclaims are 'permissive.'").
[145] 6 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1409 (2008) ("Perhaps the most important characteristic of a compulsory counterclaim is that it must be asserted in the pending case. A failure to do so will result in its being barred in any subsequent action.").
[146] *Roven*, 603 A.2d at 824 (noting that counterclaims are "separate causes of action").

official is sued first and must play offense in someone else's chosen forum. And, honestly, I find it hard to understand the policy basis for such an interpretation. Indeed, one can argue that it would have been most sound for *Roven* to have simply held that unless the advancement bylaw affirmatively covers suits brought by the corporate official, the official must fund his own claims for affirmative relief, whether they are brought as independent claims or as counterclaims of any kind.[147]

But, *Roven* took another approach that was based on the logical inference that when a compulsory counterclaim has the effect of negating the viability of the claim against the corporate official owed advancement rights, then the corporate official is entitled to advancement. *Roven* seamlessly linked its holding that compulsory counterclaims were subject to advancement with its prior discussion of affirmative defenses, holding that both had the effect of constituting an effective means to defeat the claims brought against the corporate official. In so finding, the court, quite naturally, took comfort in the limiting effect of the compulsory counterclaim test, which has the effect of requiring a fairly tight nexus between the counterclaim and the claims faced by the corporate official.

[147] *See, e.g.*, DAVID A. DREXLER, LEWIS S. BLACK, JR. & A. GILCHRIST SPARKS, III, DELAWARE CORPORATE LAW AND PRACTICE § 16.02[3] (2008) (noting that the standard applied in *Roven* could be "viewed as unduly lenient" and suggesting that a corporation wishing to avoid being compelled to indemnify directors for affirmative actions should "place appropriate limitations upon its indemnification bylaw."); Elizabeth S. Stong, *Advancement of Legal Expenses to Officers and Directors*, N.Y.L.J., Sept. 25, 1997 (discussing *Roven* and noting that "companies cannot depend with confidence on § 145(e) or the term 'defensive' to defeat the advancement of expenses to directors who bring suits against the company.").

Although the *Roven* court did not say so, it might also have been influenced by efficiency considerations.[148] For example, if as is the case here, a corporation sues a fiduciary saying that a specific transaction is tainted by breaches of fiduciary duty because it was substantively unfair and the product of self-dealing and deception, a counterclaim by the fiduciary alleging that the transaction was fair and should be enforced according to its plain terms would, if successful, directly negate the corporation's claim. Having such a counterclaim adjudicated at the same time is efficient, both in terms of costs to the litigants and to society's scarce judicial resources. Equally important, holding that the corporate officer should receive advancement for defending against the claim that the transaction is tainted but not for his counterclaim that the transaction is enforceable would require courts in § 145 to make imprecise hair-splitting decisions about which efforts of counsel were defensive and which were for offensive purposes. To my mind, these were the kind of considerations that drove the decision in *Roven,* and I believe it highly unlikely that the *Roven* court's analysis was dependent on whether the forum in which the corporate official was sued had a compulsory counterclaim approach like Delaware's and that of our federal judicial system.

For these reasons, I believe that the interpretation of the "in defending" limitation most faithful to the Supreme Court's teaching in *Roven*, is that the costs of prosecuting a

[148] *See* 6 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1409 (2008) ("The reason for compelling the litigant to interpose compulsory counterclaims is to enable the court to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence.").

counterclaim should be subject to advancement if the counterclaim would qualify as a compulsory counterclaims under the traditional counterclaim test used by both Delaware and federal civil procedure[149] *and* when that counterclaim so directly relates to a claim against a corporate official such that success on the counterclaim would operate to defeat the affirmative claims against the corporate official.[150] In other words, a counterclaim fits within the "in defending" language if it defends the corporate official by directly responding to *and* negating the affirmative claim.

In so holding, I also note some of the implications of a contrary determination. For starters, the reality that 16 states either have no compulsory counterclaim requirement or have material carveouts from the traditional compulsory counterclaim test must be taken into account.[151] Moreover, in many of the states without compulsory counterclaim requirements, certain permissive counterclaims must be asserted or lost forever by

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[149] *See Kaye v. Pantone, Inc.*, 395 A.2d 369, 371 n. 2 (Del. Ch. 1978) (noting that Delaware's Rule 13 is similar to Federal Rule 13).

[150] *See Fasciana*, 829 A.2d at 175 n.49 (noting that *Roven's* "focus on the fact that the indemnitee's affirmative defenses and counterclaims were *part and parcel of reasonable efforts to defeat the official capacity claims* supports the inference that courts should order the advancement of only those reasonable costs related to the litigation of claims arising out of the indemnitee's actions in the capacity that triggers the indemnitee's right to advancement") (emphasis added). The defensive focus of the counterclaim is an important limitation because one can imagine counterclaims that would be compulsory under the traditional test in that they arise out of the same transaction or occurrence but that are not directly responsive to the affirmative claims. *See generally* Douglas D. McFarland, *Issues in Pretrial Litigation: In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699, 732 (2007) (discussing the broad scope of the transaction or occurrence test).

[151] *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L.REV. 945, 945 (1998) ("Nine states, however, have no compulsory counterclaim rule. . . . Seven states have largely adopted the federal compulsory counterclaim rule but have added important exceptions.").

operation of estoppel.[152] That includes the State of New York, where the State Action against the Derbyshires is pending. In New York, if the Derbyshires lost on the claims against them, they may be precluded from filing an offensive action addressing the same transactions later. If *Roven* is based on the notion that a corporate official should be able to play offense when effectively compelled to use it or lose it in its adversaries' forum, preclusion of this kind would seem to implicate the same concern. In light of such complexities, I believe that the most plausible reading of *Roven* is that the *Roven* court was creating a general rule using the traditional counterclaim test that would govern all § 145 cases rather than a rule that would entail interpreting complex, jurisdiction-specific law.

More importantly, as a matter of contract law, I find it difficult to interpret the "in defending" language in bylaws as having an accordion-like nature that varies because of the forum chosen by the party suing the corporate official owed advancement rights. The very same counterclaim would be covered differently by the very same contract depending on the procedural rules of the forum chosen by the party suing the official.

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[152] *See, e.g.*, *Henry Modell and Co. v. Minister, Elders and Deacons of the Reformed Protestant Dutch Church*, 502 N.E.2d 978, 980 (N.Y. 1986) ("While New York does not have a compulsory counterclaim rule (*see*, CPLR 3011), a party is not free to remain silent in an action in which he is the defendant and then bring a second action seeking relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory."); *see also* David D. Siegel, *Practice Commentaries*, N.Y. CPLR C3019:2 (McKinney 2008) ("Even in New York, with its permissive counterclaim rule, however, when [the defendant's] claim does have a relationship to [the plaintiff's claim], [the defendant] had better consider carefully the potential effect of the doctrine of collateral estoppel, which can have the same impact as a compulsory counterclaim rule."); Arthur F. Greenbaum, *Jacks or Better to Open: Procedural Limitations on Co-party and Third Party Claims*, 74 MINN. L. REV. 507, 512 (1990) ("[P]ressure to bring related claims arises independently of state rules of civil procedure, from the doctrines of res judicata and collateral estoppel.").

Not only that, the consequence of such an approach would be to require this court, in summary § 145 actions, in the position of making expedited decisions about the pleading and preclusion law of diverse foreign jurisdictions.[153] Similarly, when it turned out that a corporate official did not have to play offense, even as to a counterclaim that had the effect of negating the claim against the corporate official, this court would have to adjudicate questions about which efforts of the official's counsel constituted offense and what constituted defense when the reality would be that most of the work was undertaken for both purposes.[154]

In reaching the decision I do, I am also mindful that *Roven* has been around for many years without great controversy. I find it difficult to believe that is because corporations understood *Roven* not to apply to actions brought in the 16 states without the traditional compulsory counterclaim rules. Moreover, corporations retain the contractual freedom to explicitly carve-out all counterclaims or offensive claims from advancement.

In sum, while I do not doubt that there is a rational argument that *Roven* never should have embraced the idea that any type of counterclaim was subject to advancement under a contractual right for "defending" an action, if *Roven* is good law, it is because it

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[153] An admittedly cursory look at the issue suggests that such determinations could be complicated because there is uncertainty about what counterclaims might be barred by estoppel if not asserted. *See, e.g.*, David D. Siegel, *Practice Commentaries*, N.Y. CPLR C3019:2 (McKinney 2008) (noting some uncertainty in the law); Mark Davies, 1B Civil Practice Law and Rules § 4:250 (McKinney 2008) ("Although, in the opinion of the editor of this volume, such a waiver will only result in the unusual circumstances described in *Musco*, attorneys might be well advised to err on the side of caution and assert as counterclaims, not merely as defenses, any related claims against the plaintiff, at least where the defendant has not asserted any objections to personal jurisdiction.").

[154] Given the Supreme Court's decision in *Cochran* granting fees on fees for successful advancement and indemnification proceedings, the company would bear the risk of having to pay all the attorneys' fees in such legal battles. 809 A.2d at 561 (Del. 2002).

recognized that compulsory counterclaims that, if successful, negate the claim against the corporate official are defensive in the sense long recognized by sports fans, which is that a good offense is the best defense.[155]

I now turn briefly to whether the Derbyshire's counterclaims are embraced within the "in defending" limitation in the defendants' advancement provisions because they are directly responsive to and negate the affirmative claims in the State Action.

The Derbyshires bring several counterclaims that merit only brief discussion. In the Answer in the State Action, filed July 20, 2007, the Derbyshires sued for breach of their retention agreement. I earlier ruled that the Derbyshires were owed advancement because the New York Plaintiffs alleged that there had been a material breach of the retention agreement rendering those agreement unenforceable as a result of breaches of fiduciary duty committed by the Derbyshires. Their counterclaim that the agreements are enforceable and there is no excuse for Jefri's non-compliance with those agreements is directly responsive and if the Derbyshires succeed, the affirmative claim against them must fail. For this reason, they are entitled to advancement on this counterclaim.

[155] That said, I acknowledge that *Roven* poses a difficult interpretive question over which reasonable minds can differ. Put simply, I recognize that *Roven* can plausibly read very literally to apply only to compulsory counterclaims. For example, that approach was taken in a recent case. *See Reinhard*, 2008 WL 868108, at *3 (analyzing *Roven* and plausibly concluding that the "in defending" language only applies to compulsory counterclaims that must be pled in the underlying litigation). The practical consequence of reading *Roven* literally, however, is illustrated by that case because, given the complicated litigation context in that case, the parties were remitted to reach agreement or provide more briefing on what law applied to the question of whether a counterclaim was compulsory, the procedural law of the forum (a federal district court in a diversity action) or the law of the state whose laws governed the substantive claims. *Id.* at *5. Ultimately, however, our Supreme Court must answer the question of how to read *Roven*, as the text of that decision can plausibly lead to different interpretations.

As discussed earlier, the New York Plaintiffs also assert that Zaman breached her fiduciary duties by causing the consummation of an unfair and therefore unenforceable employment contract for herself as managing director of the New York Palace Hotel. Zaman asserts a counterclaim that the agreement is enforceable and that she is owed payments under that same employment agreement. If she proves her counterclaim, she negates the allegation that the formation of the contract was tainted by fiduciary misconduct. It is therefore proper for advancement.

The New York Plaintiffs also continue to assert claims that Zaman and Derbyshire breached their fiduciary duties when Zaman caused entities that were controlled by her, Eurofinch and Fitzjohn's, to enter sweetheart subleases with the owner of the New York Palace Hotel. Her wholly-owned entities, Eurofinch and Fitzjohn's, sued Jefri and Amedeo Hotels for breach of contract on those same leases, alleging that the leases were proper and enforceable, allegations that, if true, defeat the claim that those leases were the product of fiduciary wrongdoing. I admit that it is somewhat unusual to consider the counterclaims by the wholly-owned entities as directly responsive to the affirmative claims against the Derbyshires, but the facts of this case are such that those claims are designed to defeat the affirmative claims. Moreover, the reality of wholly-owned entities is that if the counterclaim expenses were not advanced, the Derbyshires would pay the costs of the counterclaims being asserted by the entities in a way that would substantively

defeat their advancement rights.[156] The costs of prosecuting these counterclaims are therefore properly subject to advancement.

There is one category of counterclaims that is different. The Derbyshires have filed two additional counterclaims based on the filing of the Federal Action against them. The first is for abuse of process. They claim the New York Plaintiffs "included in the federal court complaint allegations they knew to be false and misleading and omitted facts which they knew made the allegations materially false, which would injure Ms. Zaman and Mr. Derbyshire and the other defendants."[157] The second, related counterclaim is for malicious prosecution. The Derbyshires allege that the New York Plaintiffs "lacked probable cause to believe the [Federal Action] could succeed," and that they "acted with malice in initiating the [Federal Action]."[158] The problem for them is that the Federal Action is over. These counts are not addressed to the pending claims in the State Action and therefore do not have the effect of acting to negate them. Therefore, the Derbyshires are not entitled to advancement for prosecuting these counterclaims.

## VIII. Are The Amounts Sought For Indemnification And Advancement Reasonable?

As with every issue in this case, the parties squabble over the amounts the Derbyshires seek are reasonable. The defendants' position on this is compromised by the reality that their own fees and expenses for prosecuting the Federal and State Actions

[156] *Cf. Cochran*, 809 A.2d at 561 (adopting a rule requiring mandatory awards of fees on fees in advancement cases so that corporate officials are not left with hollow victories because the costs of securing advancement offset the advancement due).
[157] JX 63 ¶ 104.
[158] *Id.* ¶¶ 152, 153.

against the Derbyshires dwarf the amounts they seek for indemnification and advancement. They also admit that the rates charged by the Derbyshires' counsel are reasonable.

But the defendants say that they have been hampered in determining the reasonableness of the request because the Derbyshires' counsel has redacted portions of billing records on the grounds of attorney-client privilege. Before trial, the defendants sought unredacted versions of those bills so that Jones Day, counsel for the New York Plaintiffs at the time and currently counsel for Jefri in the State Action, could review them. The parties contest whether the Derbyshires offered to produce unredacted bills to the defendants' Delaware counsel, Richards Layton & Finger, to review them for reasonableness on the condition that they not be shared with Jones Day and that privilege would not be waived.[159] The parties agree that the unredacted bills were never produced. Those redactions, however, have not been attacked as improper except on the grounds that the very act of seeking indemnification and advancement constitutes a waiver of the privilege. The defendants cite for that proposition the Supreme Court's decision in *Citadel Holding Corp. v. Roven*.[160]

Candidly, I do not think *Roven* stands for the proposition that a party seeking advancement must provide portions of billing statements that might reveal its defense strategy to its litigation adversary as a condition to vindicating its contractual right to

[159] Tr. of Oral Argument at 112 ("[W]e offered to show [unredacted bills to counsel at Richards Layton & Finger]. He didn't take us up on it."); *id.* at 87 (counsel from Richards Layton & Finger asserting that unredacted bills were never produced).
[160] 603 A.2d 818, 825 (Del. 1992).

advancement.[161] Rather, *Roven* stands for the proposition that the party seeking advancement must provide a reasonable basis for its request, and must waive privilege to the extent necessary to accomplish that end.[162]

The defendants have made no showing that the bills they received do not provide them with a fair indication of the work performed for the Derbyshires.[163] Moreover, because the defendants are allied with the New York Plaintiffs, giving them access to the unredacted bills would provide them with an unfair leg up in the ongoing State Action. Equally important, because the defendants are fully apprised of how the Federal and State Actions have proceeded, in terms of how much discovery has been taken, how many motions litigated, etc., they are well positioned to point out instances where the Derbyshires' counsel got out of bounds. Most likely because the New York Plaintiffs' counsel cost their clients far more to handle the Federal and State Actions than did the Derbyshires' counsel, the defendants have not raised a plausible quibble. Their request

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[161] *Cf. Dunlap v. Sunbeam Corp.*, 1999 WL 413299, at *1-2 (Del. Ch. 1999) (interpreting *Roven* and allowing indemnitees, for the purpose of establishing the reasonableness of their own fees, discovery regarding the corporation's attorneys' billing information in the same action but protecting the corporation's attorney-client privilege by allowing it to "redact anything it considers protected by this privilege" and agreeing to review in camera any redactions that the indemnitees thought were unfair).

[162] *Roven* states: "Roven is required to demonstrate the reasonableness of any expenses for which he demands advances as a prerequisite to recovery. The amount of time expended by his attorneys is the very nub of his claim. Any evidence offered on that issue therefore waives the privilege as to that subject only." *Roven*, 603 A.2d at 825. But it also makes clear that any discovery regarding the reasonableness of attorney fees should be limited and not include the "mental processes or other work product of the attorneys who billed the time." *Id.* & n.2.

[163] In other words, the defendants have not made a showing that the Derbyshires' use of the attorney-client privilege implicates the two concerns underlying waiver of that privilege — "fairness and discouraging use of the attorney-client privilege as a litigation weapon." *Id.*

for unredacted bills is entirely untargeted and not focused on any subject of work done by the Derbyshires' counsel that appears to have involved excess.

Therefore, subject to a final vetting by the parties over certain quibbles raised by the defendants late in the game, I award the Derbyshires the full amount they seek for indemnification in the Federal and London Actions, and the full amount they seek for advancement in the State Action up to the stage at which the State Complaint was amended. To that end, the Derbyshires' counsel shall review this decision, revise the request for advancement based on the rulings made in this decision, and provide the defendants with an estimate. After the parties meet and confer on the issue, the Derbyshires' counsel shall file a final estimate, with a certification of counsel that the amounts sought are proper in reference to the rulings made in this decision. I will then use that estimate as the basis for my final judgment.[164] As to future requests for advancement, counsel for the Derbyshires shall provide a similar certification with each request, which shall be a pre-condition to the defendants' obligation to advance.

## IX. Fees On Fees

In *Stifel Financial Corp. v. Cochran*, the Supreme Court held that plaintiffs who succeed in prosecuting a request for advancement or indemnification are entitled to receive fees on fees.[165] In the wake of that decision, this court has held that plaintiffs who are only partially successful shall receive fees on fees reflecting the extent of their

[164] Through this process the parties can take a hard look at some of the expenses sought to be advanced that the defendants believe to be excessive, including restaurant bills ranging into the hundreds of dollars each and allegedly personal expenses. The defendants first raised these beefs in their final post-trial brief. *See* Defs. Post-Trial Ans. Br. at 28.
[165] 809 A.2d 555, 561 (Del. 2002).

success, and has made clear that the determination of the level of success is a non-scientific inquiry that simply involves a reasoned consideration of the issues at stake in the case and an assessment of the plaintiffs' level of success.[166]

Here, I believe that the Derbyshires have substantially prevailed on their claims, and award fees on fees equal to 80% of their costs of prosecution. Although they did not succeed on all issues — such as their request for the Tomiyasu Ranch Fraud and their request for fees for lawyers they consulted for personal advice while they were still working for Jefri and his entities — they succeeded on most of the key issues in the case. In addition, they faced adversaries who refused to admit that they had any obligation to advance or indemnify at all; who changed position on issues during the course of the case; who refused to produce material witnesses for deposition, but later tried to inject issues into the case that could only be fairly resolved in the presence of those issues; and who proffered an inadequate Rule 30(b)(6) witness. The Supreme Court's rationale for adopting the fees on fees rule in *Cochran* was to ensure that corporate officials do not achieve a pyrrhic victory in § 145 cases, whereby what they win is largely offset by their costs of prosecution.[167] An award of 80% of the Derbyshires' fees is a measured way to reflect that policy interest, while giving the defendants credit for the fact that the Derbyshires did not attain complete success.

[166] *See, e.g., Fasciana*, 829 A.2d at 187-88.
[167] 809 A.2d at 561.

## X. Conclusion

The Derbyshires have been largely successful on their claims. Their counsel shall prepare a conforming final order, with approval as to form, and submit it within 30 days. Pre-judgment interest shall be assessed at the legal rate from the date the Derbyshires first sought indemnification or advancement for fees and expenses they have proven their entitlement to in this case. Any currency risk shall be borne by the defendants.