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OF THE  
STATE OF DELAWARE**

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Re: *Hermelin v. K-V Pharm. Co.*,  
Civil Action No. 6936-VCG

Dear Counsel:

I have the Plaintiff's Motion for Judgment on the Pleadings on Counts IV and VI of his Verified Amended Complaint ("Complaint"), together with a Partial Motion for such a judgment with respect to Count I. I also have the parties' briefing on these Motions. This case involves the Plaintiff's claim for advancement and indemnification regarding lawsuits arising out of his

tenure of employment with the Defendant. Count I of the Complaint seeks advancement of fees for these lawsuits, and Counts IV and VI of the Complaint seek indemnification with respect to two of the suits, respectively the “SEC Enforcement Matter” and the “Derivative Action.” The Plaintiff seeks a declaratory judgment concerning his entitlement to advancement and indemnification.

With respect to Counts IV and VI, the Defendant has represented to the Court and has changed its pleadings to reflect that although it does not concede that the Plaintiff was entitled to indemnification in connection with the SEC Enforcement Matter and the Derivative Action, it has nonetheless paid the fees incurred by the Plaintiff for those actions and has indicated that it will *not* seek to claw back those amounts. Thus, according to the Defendant, Counts IV and VI are moot. Nevertheless, the Plaintiff seeks a declaratory judgment with respect to these Counts, on the theory that only a judgment from the Court will estop the Defendant or its assigns from attempting to claw back the fees advanced with respect to these underlying litigations in the future. In the alternative, the Plaintiff seeks a full litigation and determination of these issues, despite the concessions of the Defendant.

I find that the Defendant is correct that the request for declaratory judgment with respect to Counts IV and VI is moot because those

paragraphs no longer state an actual controversy between these parties. Having waived its right to contest indemnification with respect to the SEC Enforcement Matter and the Derivative Action, and having specifically waived the right to claw back amounts paid, the Defendant and its assigns are barred from further actions inconsistent with such waiver. Moreover, I have relied specifically on the Defendant's waivers in reaching my decision here, and thus the Defendant and its assigns are judicially estopped from litigating the issue in this or any court in a manner inconsistent with its representations here.<sup>1</sup>

Similarly, with respect to Count I, the Plaintiff seeks a declaratory judgment that he is entitled to advancement of legal fees arising out of a number of underlying actions. The Defendant has waived its right to contest advancement with respect to all of these actions except for one, the "Jail Records Matter." The Defendant's agreement to provide advancement in these cases is binding upon it, and the advancement claims of Count I (other than the Jail Records Matter) are therefore moot. Once again, the Plaintiff's

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<sup>1</sup> "[J]udicial estoppel . . . prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling." *Osborne v. City of Wilmington*, 2011 WL 5302695, at \*6 n.24 (Del. Ch. Oct. 31, 2011) (quoting *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 860 (Del. 2008)). See also *Banet v. Fonds de Regulation et de Controle Cafe Cacao*, 2010 WL 1066993, at \*4 (Del. Ch. Mar. 12, 2010) (applying judicial estoppel to preclude a party from advancing an argument inconsistent with a position taken in a prior proceeding by a litigant in privity with that party).

stated concern that the Defendant may renege on its commitment to provide advancement is misplaced, since in reaching my decision here I have, as invited by the Defendant, specifically relied on its promise to continue advancement. Thus, the Defendant would be judicially estopped from reversing its position, and the Plaintiff could remedy any such reversal by seeking specific performance in this Court.

Because I find that no actual controversy exists with respect to the indemnification claims of Counts IV and VI as well as the non-Jail Records Matter advancement claims of Count I, the Plaintiff's Motion for Judgment on the Pleadings is denied.

To the extent that the Defendant seeks dismissal of Counts IV and VI or partial dismissal of Count I, I think it prudent to simply stay the proceedings upon those Counts pending resolution of the balance of this action.

To the extent that the foregoing requires an order to take effect,

IT IS SO ORDERED.

Sincerely,

*/s/ Sam Glasscock III*

Sam Glasscock III