IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HARRY PONTONE, Plaintiff, v. MILSO INDUSTRIES CORPORATION and THE YORK GROUP, INC., Defendants.	)	C.A. No. 7615-VCP

MEMORANDUM OPINION

Submitted: March 18, 2014
Decided: May 29, 2014

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PARSONS, Vice Chancellor.

This Memorandum Opinion addresses the exceptions of Defendant Milso Industries Corporation ("Milso") to the Second Report of the Special Master in this corporate advancement action. I begin by briefly reciting the relevant background and then turn to my analysis of the exceptions.

I. Background[1]

Plaintiff is Harry Pontone; Defendants are Milso and The York Group, Inc. ("York"), of which Milso is a wholly owned subsidiary. Pontone formerly served as an officer and director of both organizations, which are active in the death care industry and, in particular, casket manufacturing. In this litigation, Pontone seeks advancement from Defendants of his legal fees and expenses incurred in connection with ongoing litigation between the parties in the United States District Court for the Western District of Pennsylvania (the "Pennsylvania Action").[2] Pontone, his son Scott Pontone, and the Batesville Casket Company ("Batesville") are the defendants in the Pennsylvania Action. Defendants here, along with their parent company, Matthews International Corporation ("Matthews"), are the plaintiffs in that action (the "Pennsylvania Plaintiffs").

The Pennsylvania Plaintiffs initiated the Pennsylvania Action on August 16, 2010, and amended their complaint to add Pontone as a defendant on February 28, 2011. The

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1 Unless otherwise noted, the facts recited herein are undisputed and are drawn primarily from the verified complaint and the evidence cited in the parties' respective submissions regarding Milso's exceptions to the Special Master's Second Report.

2 *See York Gp., Inc. v. Pontone*, 2014 WL 896632 (W.D. Pa. Mar. 6, 2014); *York Gp., Inc. v. Pontone*, 2012 WL 3127141 (W.D. Pa. July 31, 2012).

Pennsylvania Plaintiffs allege that, beginning in early 2010, Pontone, while still employed by York and Milso, participated in a wrongful scheme with Scott to induce several of the Pennsylvania Plaintiffs' employees and many of their most lucrative customers to move to Batesville, one of York and Milso's principal competitors. The Pennsylvania Plaintiffs further allege that, since his retirement from York and Milso in September 2010, Pontone has continued to solicit the companies' customers on behalf of his son and Batesville, under the guise of selling insurance for a nonparty insurance company. The Pennsylvania Plaintiffs claim that these actions violated Pontone's employment contract with York and Milso (the "Employment Agreement"), which included express non-compete and non-solicitation covenants, as well as the common law. The Pennsylvania Plaintiffs have asserted numerous claims against Pontone, including for breach of contract, breach of fiduciary duty, tortious interference with contractual relations, unfair competition, and unjust enrichment. In response, Pontone has asserted a number of counterclaims against the Pennsylvania Plaintiffs, which are discussed in greater detail *infra*.

On June 12, 2012, Pontone filed his complaint in this action, claiming a right to receive indemnification and advancement from Defendants for attorneys' fees and expenses he has incurred and will continue to incur in connection with the Pennsylvania Action. York and Milso each have bylaws that provide their officers and directors with indemnification and advancement rights, but the parties dispute the precise scope of those rights. Before filing his complaint, Pontone unsuccessfully requested indemnification and advancement from Defendants.

In an oral ruling on January 17, 2013, I granted in part a motion by Pontone for partial summary judgment, holding that, under Milso's bylaws, Pontone was entitled to advancement of any reasonable legal fees and expenses he incurred in defending himself in the Pennsylvania Action. I denied summary judgment as to York's advancement obligations, finding York's bylaws ambiguous as to whether they provided for mandatory or permissive advancement. I also directed the parties to follow the procedures set forth in *Fuhlendorf v. Isilon Systems, Inc.*[3] to process Pontone's then current and ongoing requests for advancement from Milso. On May 13, 2013, I entered an order implementing the summary judgment ruling and appointing a Special Master to resolve any disputes between the parties as to the amount of fees and expenses properly subject to advancement. That order was partially amended on August 9, 2013 (the "August Order").

On November 12, the Special Master issued his Second Report, which addressed Milso's objections to Pontone's requests for advancement submitted in March, May, June, and July of 2013. In that report, the Special Master overruled most of Milso's objections. On November 27, pursuant to the procedure established by this Court's orders, Milso filed a notice of exceptions to the Special Master's Second Report. After extensive briefing, I heard argument regarding Milso's exceptions on March 18, 2014. This Memorandum Opinion constitutes my ruling on those exceptions.

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[3] 2010 WL 4570225 (Del. Ch. Nov. 9, 2010).

II. Analysis

Milso takes exception to the Special Master's Second Report on the grounds that it:

> 1. Contains fundamental errors pertaining to the legal standard and determination of which counterclaims are advanceable under Delaware law;
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> 2. Improperly determines the portions of the advancement requests relating to Pontone's intrusion on seclusion counterclaim;
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> 3. Fails to provide that any "fees on fees" will be discounted to properly and proportionately account for Milso's success;
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> 4. Improperly holds that Pontone's supplemental explanations for certain claimed fees are adequate; and
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> 5. Fails to discount the interest charged to Milso based upon the inadequacy of the invoices provided.[4]

For the reasons that follow, I find some merit to Milso's first exception in that I conclude the standard applied by the Special Master to determine which counterclaims were advanceable was overbroad and that two of the eight challenged counterclaims for which the Special Master recommended advancement are not properly subject to advancement. Milso's remaining exceptions are overruled. I address below the five exceptions seriatim. Because the first exception involves the most complicated legal and factual issues, I treat it in greater depth.

[4] D.I. No. 101 (Def.'s Notice of Exceptions to Special Master's Second Report).

A. Exception 1

Milso's first exception is that the Second Report contains fundamental errors pertaining to the applicable legal standard and determination of which of Pontone's counterclaims in the Pennsylvania Action are advanceable under Delaware law. I consider, first, whether the Special Master applied the correct standard. I then address, under the controlling standard, whether the Special Master properly determined which of Pontone's counterclaims are subject to advancement.

1. Legal Standard for Advancement of Counterclaims

Advancement is permitted, but not required, under 8 *Del. C.* § 145(e). When provided for in a company's bylaws, advancement is a contractual right arising from those bylaws. Milso's bylaws provide for both indemnification and advancement and employ the broadly worded conventional language for such bylaws. Thus, Milso is required to provide to current and former officers and directors, such as Pontone, advancement of expenses incurred "in defending" any action brought "by reason of such person being or having been a director or officer."[5] I previously held that the Pennsylvania Action constitutes such an action. Therefore, whether Pontone's counterclaims in the Pennsylvania Action are advanceable ultimately turns on whether they qualify as having been asserted "in defending" against the affirmative claims made in the Pennsylvania Action.

[5] D.I. No. 20 Ex. W § 2.15.

To determine whether Pontone's counterclaims were asserted "in defending" against the affirmative claims, and thus are advanceable, the Special Master applied the standard set forth by the Delaware Supreme Court in *Citadel Holding Corp. v. Roven*.[6] In that regard, the Special Master examined whether Pontone's counterclaims were: (1) "necessarily part of the same dispute" as the Pennsylvania Plaintiffs' affirmative claims; and (2) "advanced to defeat, or offset," those claims.[7]

As to the first prong of the test applied by the Special Master, Milso argues that, at a minimum, Delaware law requires counterclaims to qualify as compulsory under the traditional test used by Delaware and federal civil procedure in order to be "necessarily part of the same dispute" and eligible for advancement. Milso contends that, in contravention of this standard, the Special Master merely looked to whether Pontone's counterclaims were intertwined with the affirmative claims in some general sense and thus improperly found numerous non-compulsory counterclaims to be subject to advancement. As to the second prong of the test, Milso asserts that the Special Master erred in concluding that advancement is required for counterclaims that are capable of merely offsetting, but not defeating, affirmative claims. According to Milso, advancement is only appropriate for counterclaims that have the potential to negate one or more of an opposing party's affirmative claims.

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6 603 A.2d 818, 824 (Del. 1992).

7 *See* Second Report of the Special Master 18 (quoting *Roven*, 603 A.2d at 824).

On the first point, I agree with Milso that the touchstone utilized by Delaware courts to determine whether a counterclaim is "necessarily part of the same dispute," and thus eligible for advancement, is whether the counterclaim would qualify as compulsory under the prevailing Delaware and federal procedural standard. In *Roven*, the plaintiff, who was covered by his former employer's advancement bylaw, sought advancement for the costs of defending an action brought against him by his former employer, including the costs of asserting various counterclaims.[8] After noting that the plaintiff's counterclaims were compulsory under federal procedural rules, and thus would be waived if not raised, the Court held that the counterclaims qualified for advancement because they were "necessarily part of the same dispute and were advanced to defeat, or offset" the affirmative claims.[9]

Since the decision in *Roven*, Delaware courts repeatedly have held that the baseline requirement for a counterclaim to be advanceable is that it qualify as compulsory.[10] In *Zaman v. Amedeo Holdings, Inc.*,[11] this Court clarified that the relevant inquiry in that regard is whether the counterclaim would qualify as compulsory under the traditional test used by the Delaware and federal civil procedure rules, not whether it actually qualifies as compulsory under the rules of the jurisdiction where it was asserted.

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8 603 A.2d 818.

9 *Id.* at 824.

10 *See, e.g., Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392 (Del. Ch. 2009); *Sun-Times Media Gp., Inc. v. Black*, 954 A.2d 380, 397 (Del. Ch. 2008); *Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *3 (Del. Ch. Mar. 28, 2008).

11 2008 WL 2168397 (Del. Ch. May 23, 2008).

This refinement avoids the anomaly that previously existed in some states in which, by rule, all counterclaims are defined as permissive. Absent the refinement, for litigation pending in such states, no counterclaims could be considered defensive or advanceable, even though estoppel might preclude those claims from being asserted later.[12] The holding in *Zaman* thus prevents a corporate official's advancement rights from varying in "accordion-like" fashion based on the jurisdiction where he or she is sued.[13]

According to Federal Rule of Civil Procedure 13 and its Delaware analog, a counterclaim is compulsory if it, among other requirements, "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim."[14] Application of the standard articulated in *Zaman*, therefore, serves to ensure the factual interrelatedness of affirmative claims and advanceable counterclaims. That is, a counterclaim will qualify as "necessarily part of the same dispute" as an affirmative claim against which it is purportedly defending if, and only if, it would qualify as compulsory under the prevailing Delaware and federal procedural standard. Indeed, in *Zaman* and subsequent cases, this Court effectively has construed the "necessarily part of the same dispute" requirement to mean that a counterclaim must qualify as compulsory in that sense.[15]

The Special Master, therefore, did not err in asserting that a counterclaim must be "necessarily part of the same dispute" as the opposing party's affirmative claims to be

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12 *Id.* at 35.

13 *Id.* at 36.

14 Fed. R. Civ. P. 13(a)(1); *accord* Del. Ct. Ch. R. 13(a).

15 *See Zaman*, 2008 WL 2168397, at *35; *Paolino*, 985 A.2d at 399–400.

advanceable. I agree with Milso, however, that in determining whether that requirement was satisfied the Special Master did not address explicitly whether the counterclaims in question qualified as compulsory under the test used in Delaware and federal civil procedure.[16] In that regard, the standard the Special Master applied in determining whether the challenged counterclaims were sufficiently related to the affirmative claims to qualify for advancement may have been over-inclusive. Therefore, I consider Milso's challenges to the Special Master's individual determinations as to which counterclaims are advanceable *infra* in Section II.A.2.

As to the second prong of the Special Master's test—that the counterclaims must be "advanced to defeat, or offset" the affirmative claims—I find Milso's objections unpersuasive and concur with the Special Master that counterclaims that either defeat or offset affirmative claims may be considered defensive and subject to advancement. In arguing against this standard, Milso contends that the "advanced to defeat, or offset" language, which was used by the Supreme Court in *Roven*,[17] is overly broad. Rather, Milso asserts that the standard actually applied in *Roven*, and concretely established by this Court in *Zaman*, is that a compulsory counterclaim can only qualify as defensive for purposes of advancement if it has the potential to fully defeat or negate an affirmative claim.

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16 *See* Second Report of the Special Master 19–27.

17 *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992).

I reject Milso's attempt to read the "offset" language out of the Court's decision in *Roven*. In *Roven*, the plaintiff sought advancement for the defense of a claim brought against him by his former employer under Section 16(b) of the Securities and Exchange Act of 1934 (the "1934 Act"). Among other things, the plaintiff sought advancement for counterclaims he had asserted in the underlying action, including counterclaims for illegal corporate control, laches, and estoppel. The advancement bylaw at issue in *Roven*, like the one here, was worded broadly to include any expenses incurred "in defending" a covered action. In addition, the Supreme Court adopted a broad reading of the phrase "in defense" in the litigation context.[18] Against that backdrop, and after noting that the plaintiff's counterclaims were compulsory, the Court upheld advancement as to the challenged counterclaims because they were "necessarily part of the same dispute and were advanced to defeat, *or offset*" the affirmative claims.[19]

Importantly, Section 16(b) is a "strict liability provision" of the 1934 Act, and disgorgement under that section is required even in the absence of wrongdoing.[20] Thus, it does not appear that the counterclaim for illegal corporate control could have negated or defeated the claim against the plaintiff director. On the other hand, any recovery on that counterclaim presumably would have offset the director's liability on the Section 16(b)

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18 *Id.* at 824 & n.7 (citing Black's Law Dictionary 377 (5th ed. 1979)).

19 *Id.* at 824 (emphasis added).

20 *See ION Geophysical Corp. v. Fletcher Int'l, Ltd.*, 2010 WL 4378400, at *13 (Del. Ch. Nov. 5, 2010).

claim. The Court in *Roven*, therefore, held that compulsory counterclaims that offset liability, as well as those that would defeat it, are defensive for purposes of advancement.

Milso argues, in the alternative, that even if *Roven* can be read to extend advancement to compulsory counterclaims that merely offset liability, the later-decided *Zaman* case established a narrower standard for advanceable counterclaims than *Roven*. According to *Milso*, that standard then was adopted by the Delaware Supreme Court through its affirmance of *Baker v. Impact Holding, Inc.*,[21] which quoted *Zaman*'s statement of the applicable standard.

This argument is also flawed. At the outset, however, I acknowledge that *Zaman* can be read to suggest a standard for the advancement of counterclaims that appears somewhat more restrictive than the standard used in *Roven*. In relevant part, Chief Justice Strine, then writing as a Vice Chancellor, stated in *Zaman* 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 counterclaim should be subject to advancement if the counterclaim would qualify as a compulsory counterclaim[] under the traditional counterclaim test used by both Delaware and federal civil procedure *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. 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.*[22]

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21 2010 WL 2979050 (Del. Ch. July 30, 2010).

22 2008 WL 2168397, at *35 (Del. Ch. May 23, 2008) (emphasis added).

The requirement in *Zaman* that a compulsory counterclaim must be able to "defeat" or "respon[d] to and negate[e]" an affirmative counterclaim to qualify as defensive and be eligible for advancement comports with the "defeat" language in *Roven*. The standard established in *Roven*, however, indicates that a compulsory counterclaim that is asserted to "defeat, *or offset*" an affirmative claim is advanceable.[23] According to Milso, the *Zaman* opinion rejects the notion that counterclaims that merely "offset" an affirmative claim are advanceable.[24]

To the extent that the standard employed by the Court in *Zaman* can be read to make compulsory counterclaims that offset, but cannot defeat, affirmative claims ineligible for advancement, I consider that reading to be in conflict with the standard articulated and applied in *Roven*. When there is an apparent conflict between this Court's and the Delaware Supreme Court's statement of the law, the latter is controlling. Thus, I hold the governing standard to be the one established in *Roven*, under which compulsory counterclaims "advanced to defeat, *or offset*" affirmative claims may be subject to

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[23] 603 A.2d at 824 (emphasis added).

[24] The seemingly more restrictive language of *Zaman*, however, also can be read as simply tailoring the *Roven* standard to the facts of the *Zaman* case. Notably, the Court in *Zaman* ultimately concluded that each of the handful of compulsory counterclaims that had been asserted by the party seeking advancement had the potential to defeat one or more of the affirmative claims and, therefore, were advanceable. 2008 WL 2168397, at *36–37. The only two counterclaims the Court found were not subject to advancement were for abuse of process and malicious prosecution based on the filing of a *separate action* from the one in which the counterclaims were asserted, and that separate action already had terminated. *Id.* at 37. Those counterclaims, therefore, did not arise out of the same transaction or occurrence as the affirmative claims and were not compulsory.

advancement.[25] This conclusion also comports with Delaware's public policy in favor of advancement.[26]

In that regard, I find unpersuasive Milso's argument that the Supreme Court adopted *Zaman*'s statement of the standard governing advancement of counterclaims through its two-sentence affirmance of this Court's decision in *Baker v. Impact Holding, Inc.*[27] The plaintiff in *Baker* sought advancement for the costs of pursuing affirmative claims in litigation that he initiated. This Court ultimately rejected the plaintiff's request on the straightforward grounds that the litigation of his claims could not be considered to be "defending," as required by the relevant advancement provision. The plaintiff in *Baker* had not been sued, or threatened with suit, and *no claims* had yet been asserted against him.[28]

Although this Court in *Baker* cited to *Zaman*'s statement of the standard for advancement as to counterclaims, including the "directly respon[d] to and negat[e]" language, the Court distinguished both *Zaman* and *Roven* on the grounds that the parties

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25 603 A.2d at 824 (emphasis added).

26 *See Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) ("[t]he invariant policy of Delaware . . . on indemnification is to 'promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated.'") (quoting Folk on the Delaware General Corporation Law § 145 (4th ed. 2001)); *Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *3 (Del. Ch. Mar. 28, 2008) (finding the same "invariant policy" extends to advancement).

27 2010 WL 2979050 (Del. Ch. July 30, 2010), *aff'd*, 21 A.3d 596 (Del. 2011).

28 *Id.* at 6–7.

seeking advancement in those cases actually had had claims asserted against them.[29] Thus, this Court's holding in *Baker* did not turn on application of the *Zaman* test, and the Court had no occasion to parse the distinction between whether a counterclaim defeats, negates, or offsets an affirmative claim. For these reasons, I do not regard the Supreme Court's summary affirmance of *Baker* as having effected a change to the standard governing advancement of counterclaims articulated in *Roven*.

In conclusion, I hold that a counterclaim will be considered to be "defending" and thus advanceable, if it is: (1) "necessarily part of the same dispute," in the sense that it qualifies as a compulsory counterclaim under the prevailing Delaware and federal procedural standard; and (2) "advanced to defeat, or offset" the affirmative claims. Thus, while the Special Master's statement of the standard was not necessarily incorrect, to the extent the Special Master failed to consider whether Pontone's counterclaims were compulsory under the prevailing test, his application of the first prong may have been overly broad.

2. Determination of Which Counterclaims are Advanceable

In the Pennsylvania Action, Pontone asserted a total of nine counterclaims for: (1) breach of contract (Count II); (2) breach of the implied covenant of good faith and fair dealing (Count IV); (3) tortious interference with prospective economic advantage (Count VI); (4) unjust enrichment (Count VIII); (5) unfair competition (Count X); (6) misappropriation of name, image, and likeness (Count XI); (7) abuse of process (Count

[29] *Id.* at 6.

XIII); (8) intrusion on seclusion (Count XV); and (9) declaratory judgment and injunctive relief (Count XVII).[30] The Special Master found each of these counterclaims to be advanceable except for Count XIV for intrusion on seclusion. Milso has conceded that Count XVII for declaratory judgment and injunctive relief is advanceable. Milso challenges, however, the Special Master's determination as to each of the remaining seven counterclaims that the Special Master concluded were subject to advancement.

a. Milso has not stated a viable challenge to Counterclaim Counts II and X

The scope of Milso's challenge is limited as to Count II for breach of contract and Count X for unfair competition. Specifically, Milso does not dispute that those counterclaims qualify as compulsory or that they are capable of offsetting the affirmative claims in the Pennsylvania Action.[31] Instead, as to Count II, Milso argues only that it is incapable of negating Pontone's affirmative claims. As set forth previously, however, both compulsory counterclaims that defeat and those that offset affirmative claims are subject to advancement.

As to Count X for unfair competition, Milso concedes that it is capable of negating certain of Pontone's affirmative claims. Nonetheless, Milso argues that some of the allegations supporting counterclaim Count X, if asserted as independent claims, would

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30 D.I. No. 20 Ex. F (Pontone Defendant Counterclaims in the Pennsylvania Action). Counterclaim Counts I, III, V, VII, IX, XII, XIV, XVI, and XVIII were not asserted by Pontone and therefore were not addressed in the Special Master's Second Report.

31 *See* Def. Milso's Opening Br. in Supp. of its Exceptions to the Special Master's Second Report ("Def.'s Opening Br.") 23–26 & n.6, 30–32.

fail one or both prongs of the counterclaim advancement test.[32] Thus, Milso asserts that the fees and expenses it is required to advance for Count X should be discounted. Under "Delaware's overarching approach to Section 145," however, "claims are evaluated individually or in appropriate groupings."[33] Therefore, claims generally should be assessed as a whole for purposes of Section 145, and I do not consider it appropriate, in this summary proceeding, to analyze Pontone's entitlement to advancement on an allegation-by-allegation basis, as Milso requests. Because Count X indisputedly is a compulsory counterclaim and is "advanced to defeat, or offset" Milso's affirmative claims, it qualifies for advancement.

Therefore, I overrule Milso's exceptions regarding counterclaim Counts II and X under the governing standard, and I affirm the Special Master's determination that those counterclaims are advanceable.

b. Counterclaim Counts IV, VI, VIII, XI, and XIII

The five remaining counterclaims that Milso challenges regarding advancement are Count IV for breach of the implied covenant, Count VI for tortious interference with prospective economic advantage, Count VIII for unjust enrichment, Count XI for misappropriation of name, image, and likeness, and Count XIII for abuse of process. As to several of these counterclaims, Milso repeats the flawed argument that they are not

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[32] Milso argues, for example, that certain of the allegations underlying Pontone's unfair competition claim are effectively restatements of other counterclaims that Milso contends are non-advanceable, such as Pontone's counterclaims for abuse of process and misappropriation of name, image, and likeness.

[33] *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 400 (Del. Ch. 2009).

advanceable because they are only capable of offsetting, but not defeating, the affirmative claims. Milso also argues, however, that Counts VI, VIII, XI, and XIII should not be subject to advancement because they do not qualify as compulsory. If Milso is correct that any of those counterclaims is not compulsory, then that counterclaim would not be "necessarily part of the same dispute" as the affirmative claims and would not be advanceable. Thus, to determine whether Milso has stated a valid exception to the Special Master's findings as to those counterclaims, I analyze whether they qualify as compulsory. Milso has not challenged Count IV on the grounds that it is non-compulsory. Its challenge to Count IV, however, is related to, and dependent on, its argument that Count XIII is not advanceable. Thus, I address whether Count IV is advanceable after addressing Milso's arguments as to Count XIII.

As noted previously, the relevant inquiry for purposes of advancement is whether a counterclaim would qualify as compulsory under the prevailing test used by Delaware and federal civil procedure. As previously noted, under Fed. R. Civ. P. 13(a) and its Delaware analog, a counterclaim is compulsory if it, among other requirements, "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Decisions generally interpret the term "transaction or occurrence" as used in Rule 13(a) liberally to further the policies underlying the rule, including discouraging a multiplicity of suits and promoting judicial economy.[34] In that regard, the test used by

[34] *See* 6 Wright & Miller, *Federal Practice and Procedure* § 1410 (3d ed. 2014); *In re Will of Mansfield*, 1990 WL 156530, at *5 (Del. Ch. Oct. 12, 1990); *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 389–90 (3d Cir. 2002).

federal courts and a majority of state courts to determine whether a claim and counterclaim arise out of the same "transaction or occurrence" is whether the two bear a "logical relationship."[35] That test has been applied by Delaware courts,[36] and recently was endorsed by our Supreme Court.[37] Whether two claims bear a logical relationship to one another may be informed by considerations such as whether they share issues of fact and law in common or would involve presentation of the same evidence.[38]

Pontone's counterclaim Count VI is for tortious interference with prospective economic advantage. With this counterclaim, Pontone essentially asserts that the Defendants, *i.e.*, the Pennsylvania Plaintiffs, have wronged Pontone by attempting to prevent him from working for his current employer and from doing business with other participants in the casket market. To prevail on this claim, Pontone would need to prove that he is legally entitled to conduct the business activities that the Pennsylvania Plaintiffs seek to prevent him from continuing through their affirmative claims. Thus, counterclaim Count VI and the Pennsylvania Plaintiffs' affirmative claims involve common issues of fact and law pertaining to the nature and legality of Pontone's business

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35 *See Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Protestant Church*, 1995 WL 420003, at *8 (Del. Ch. July 13, 1995); 6 Wright & Miller, *Federal Practice and Procedure* § 1410 (3d ed. 2014).

36 *See, e.g., Mother African Union First Colored Methodist Protestant Church*, 1995 WL 420003, at *8; *Marydel Ranch Inc. v. Bartell*, 1986 WL 716904, at *2 (Del. Com. Pl. July 11, 1986).

37 *Mott v. State*, 49 A.3d 1186, 1188–89 & n.8 (Del. 2012).

38 *See id.*; *Transamerica Occidental Life Ins. Co.*, 292 F.3d at 389–90.

activities and are logically related. Count VI, therefore, arises out of the same transaction or occurrence as certain affirmative claims and is compulsory.

Pontone's counterclaim Count VIII is for unjust enrichment. As the Special Master observed, this counterclaim can be regarded as a mirror image of the unjust enrichment claim asserted against Pontone by the Pennsylvania Plaintiffs. That affirmative claim asserts that Pontone has been unjustly enriched because he has profited from business activities in violation of his contractual obligations. For his part, Pontone counterclaims that the Pennsylvania Plaintiffs have profited from, among other things, their improper efforts to restrict his business activities and interfere with his business relationships. Count VIII, therefore, is responsive and logically related to the Pennsylvania Plaintiffs' affirmative claim for unjust enrichment and qualifies as compulsory.

Pontone's counterclaim Count XI is for misappropriation of name, image, and likeness. Specifically, Pontone claims that the Pennsylvania Plaintiffs improperly used his name and likeness at two customer events conducted in 2011. The Special Master found that this counterclaim arose out of the same underlying dispute as the affirmative claims because it countered the Pennsylvania Plaintiffs' claim that they have a right to use the Pontone name and that Pontone's continued use of that name in business constitutes trademark infringement and unfair competition. The Pennsylvania Plaintiffs, however, have asserted their trademark infringement claim solely against *Scott* Pontone,

not *Harry* Pontone, the party seeking advancement in this action.[39] Moreover, the Pennsylvania Plaintiffs have not challenged Harry Pontone's use of the Pontone name, as part of their unfair competition claim or otherwise.[40] Thus, Count XI is legally and factually distinct from, and logically unrelated to, the affirmative claims asserted against Pontone in the Pennsylvania Action. Count XI, therefore, is not compulsory.

Pontone's counterclaim Count XIII is for abuse of process. The principal basis for this counterclaim is Pontone's allegation that the Pennsylvania Plaintiffs commenced and have continued the Pennsylvania Action with the improper purpose of harassing, threatening, and otherwise harming him. In an order issued on May 22, 2013, the Pennsylvania court dismissed this counterclaim on the grounds that, under Pennsylvania law, an abuse of process claim based on the initiation and continuation of a lawsuit is not ripe until the Court has issued a final verdict and the lawsuit is complete.[41] The Special Master correctly noted that the mere fact that a counterclaim has been dismissed does not preclude advancement for that counterclaim. Here, however, the Pennsylvania Court's reason for dismissing Count XIII directly supports the conclusion that the counterclaim is not compulsory, because a claim for relief that is not ripe at the time a defending party

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39 D.I. No. 1 Ex. 1 ¶¶ 174–184 (Am. Compl. in the Pennsylvania Action, dated Feb. 28, 2011).

40 *Id.* ¶¶ 185–190.

41 Def.'s Opening Br. Ex. E at 16–19.

serves its responsive pleading does not qualify as a compulsory counterclaim.[42] Thus, Pontone's premature counterclaim for abuse of process—Count XIII—is not compulsory.

Pontone's counterclaim Count IV is for breach of the implied covenant of good faith and fair dealing. Milso contends that this counterclaim is not advanceable because it is based solely on the same allegations that underlie Pontone's abuse of process counterclaim—namely, that Milso wrongfully initiated and has continued the Pennsylvania Action—which is an allegation that the Pennsylvania Court dismissed as premature. Contrary to Milso's representations, however, it is not apparent that Count IV is based solely on the allegations that Milso wrongfully commenced and has continued the Pennsylvania Action. The pleading Pontone filed in the Pennsylvania Action setting forth his counterclaims asserts that the Pennsylvania Plaintiffs "breached the implied covenant of good faith and fair dealing under [the Employment Agreement], *including but not limited to,* by wrongfully enforcing the [Employment Agreement] through legal process without basis."[43] Moreover, subsequent filings by Pontone in the Pennsylvania Action indicate that the counterclaim for breach of the implied covenant depends on additional allegations, including that Milso improperly has sought to extend indefinitely the restrictive covenants in the Employment Agreement and intentionally has failed to mitigate its purported damages.[44] In addition, I note that Milso does not dispute the compulsory nature of the counterclaim for breach of the implied covenant, which arises

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42 6 Wright & Miller, *Federal Practice and Procedure* § 1411 (3d ed. 2014).

43 D.I. No. 20 Ex. F ¶ 199 (emphasis added).

44 Choa Aff. Ex. 1 at 7–9.

out of the Employment Agreement that is central to Milso's affirmative claims against Pontone.[45] For the foregoing reasons, I overrule Milso's objection to the Special Master's determination that Count IV is advanceable.

In summary, counterclaims Count IV for breach of the implied covenant, Count VI for tortious interference with prospective economic advantage, and Count VIII for unjust enrichment are compulsory, and it is undisputed that each is also capable of offsetting the Pennsylvania Plaintiffs' affirmative claims. I therefore overrule Defendants' objections to the award of advancement as to those counterclaims and uphold the Special Master's determination that Counts IV, VI, and VIII are advanceable. On the other hand, counterclaim Count XI for misappropriation of name, image, and likeness and Count XIII for abuse of process are not compulsory. Those counterclaims, therefore, are not "necessarily part of the same dispute" as the affirmative claims and Pontone's assertion of them does not qualify as "defending." Defendants, therefore, have stated a valid objection to advancement for those counterclaims and, contrary to the Special Master's findings, I hold that Counts XI and XIII are not subject to advancement.

Based on my conclusion that Counts XI and XIII are not subject to advancement, I direct the parties to implement the following procedure. Within fifteen days of this ruling, Pontone's counsel shall: (1) review the expenses for which Pontone has requested advancement; (2) identify in good faith which portions of the advancement requests submitted thus far were incurred in pursuing counterclaims Count XI and XIII; and (3)

[45] *See* Def.'s Opening Br. 23 & n.6.

provide a certification of the belief that the remaining expenses would have been incurred by Pontone regardless of whether Counts XI and XIII were asserted. Any amounts identified in response to step 2 that already have been paid to Pontone shall be deducted from Pontone's next future request or requests for advancement from Milso, as necessary, until the amounts that have been advanced improperly have been fully offset. To the extent Milso disputes Pontone's identification of the expenses that were incurred in pursuing counterclaim Counts XI and XIII, Milso may object to that identification in the same manner applicable to all of its objections under the Order Granting Advancement.[46] The Special Master then shall determine the amount, if any, to be credited to Milso in the ordinary course of addressing those objections.

B. Exception 2

Milso's second exception to the Second Report is that it improperly determines the portions of Pontone's advancement requests that are attributable to Pontone's counterclaim for intrusion on seclusion ("IOS").

In his Draft Second Report, the Special Master set forth a procedure by which Pontone's counsel was to identify and certify the fees and expenses previously incurred in connection with the non-advanceable IOS counterclaim, for which past amounts advanced would be returned to Milso. In that regard, Pontone's counsel was directed to review the expenses for which Pontone had requested advancement, identify in good faith the portions of the requests that were attributable to the IOS counterclaim, and certify that

[46] D.I. No. 89.

the remaining expenses would have been incurred regardless of whether the IOS counterclaim was asserted.[47]

Following the release of the Draft Second Report, counsel for Pontone notified Milso, by letter, that it had identified $3,635.50 in past expenses attributable to the IOS counterclaim. Included in the letter was an affidavit by one of Pontone's attorneys, in which she recited the review undertaken by her firm to identify the relevant expenses and certified, under oath, that "the remaining fees and expenses subject to Mr. Pontone's advancement request would have been incurred . . . regardless of whether his intrusion on seclusion counterclaim was asserted."[48] Attached to the affidavit were billing records identifying specific time entries related to the IOS counterclaim that totaled $3,635.50.

In his Second Report, the Special Master determined that the amounts identified by counsel for Pontone as relating to the IOS counterclaim were reasonable in light of the peripheral nature of that claim and, moreover, were adequately supported by counsel's good faith certification. On that basis, the Special Master directed Pontone to return to Milso the amount of $3,635.50.

Milso argues that, contrary to the Special Master's findings, the amounts that Pontone's counsel identified as attributable to the IOS counterclaim are unreasonably low. In that regard, Milso notes that $3,635.50 accounts for less than 1% of the $397,212.32 in fees related to the nine Pontone counterclaims to which Milso previously

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47 D.I. No. 91 at 24.

48 Choa Aff. Ex. 18-B (Affidavit of Valeria Healy).

had objected. Moreover, Milso asserts that Pontone's estimate is not credible because it is based on "a self-serving, after-the-fact review of the invoices,"[49] influenced by the Special Master's finding that the IOS counterclaim is not subject to advancement. For these reasons, Milso advocates for an alternative methodology according to which it would be reimbursed for counterclaim-related fees and expenses it has advanced based on the percentage of Pontone's counterclaims that ultimately are held to be non-advanceable. For example, based on the conclusion that only the IOS counterclaim is not advanceable, Milso argues that the Special Master should have awarded it an 11% reimbursement, based on the fact that it was one out of nine counterclaims.

The fees identified by counsel for Pontone as relating to the IOS counterclaim are admittedly minimal. Nevertheless, in my *de novo* review of the Special Master's Second Report, I conclude that the methodology established by the Special Master and his finding that the identified fees are reasonable should be confirmed. As to methodology, the procedure set forth by the Special Master resembles the one utilized by this Court in *Fasciana v. Electronic Data Systems Corp.*[50] to determine what portion of the fees and expenses incurred by the party seeking advancement related to matters that were subject to advancement. There, the Court directed the plaintiff to "submit a good faith estimate of expenses incurred to date" that related to the precise allegations that triggered

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[49] Def.'s Opening Br. 36.

[50] 829 A.2d 160 (Del. Ch. 2003).

advancement.[51] The Court also required plaintiff's attorneys to provide "a sworn affidavit certifying their good faith, informed belief that the identified litigation expenses relate solely to defense activity" undertaken in response to the allegations for which advancement was owed.[52] Noting that "some level of imprecision will be involved in the retrospective accomplishment of this task," the Court nonetheless found that the procedure it put in place provided "adequate protection so that [the defendant] can reserve any ultimate fight about the precise amounts until a later indemnification proceeding."[53] The *Fasciana* decision supports the methodology established by the Special Master, which I substantially adopted *supra*. This methodology is preferable to the one proposed by Milso because Milso's approach fails to account for any variation in the importance of, or work required for, the various counterclaims.

If the amounts identified by Pontone as relating to any of the non-advanceable counterclaims that he has asserted—namely, the counterclaims for IOS, for misappropriation of name, image, and likeness, and for abuse of process—were to fall so low as to be implausible, they could require adjustment by the Court.[54] Here, however, the Special Master determined that the amounts Pontone averred were attributable to the

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51 *Id.* at 177.

52 *Id.*

53 *Id.*

54 *See O'Brien v. IAC/Interactive Corp.*, 2010 WL 3385798 (Del. Ch. Aug. 27, 2010), *aff'd*, 26 A.3d 174 (Del. 2011) (finding plaintiff's assertion that his significant affirmative claims for declaratory relief accounted for only .14% of his attorneys' fees in the underlying action implausible and discounting the amount owed by defendant for indemnification by 10% to account for those claims).

IOS counterclaim, although minimal, were reasonable in light of the peripheral nature of that counterclaim. This Court concurs with that finding and notes that "a balance of fairness and efficiency concerns would seem to counsel deferring fights about details until a final indemnification proceeding."[55] Accordingly, I overrule Milso's Exception 2.

C. Exception 3

Milso's third exception is that the Second Report fails to provide that any "fees on fees" awarded to Pontone in pursuing this advancement action will be discounted to properly and proportionately account for Milso's successful challenges to Pontone's claimed advancement rights. In that regard, Milso argues that, under Delaware law, Pontone is only permitted to recover "fees on fees" that are proportionate to his level of success in obtaining advancement. Pontone counters that this exception is unfounded, because Milso did not object to Pontone's "fees on fees," or raise them as an issue, in any of the submitted objections that the Special Master considered in his Second Report. Should the Court nonetheless consider the merits of Milso's exception, Pontone argues that the Court should defer to the unambiguous language of Milso's bylaw, which states that "if successful *in whole or in part*, the indemnittee shall also be entitled to be paid the expense of bringing and pursuing such Indemnittee Action."[56] According to Pontone, this bylaw provision requires that, if Pontone is at all successful in this advancement

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55 *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 177 (Del. Ch. 2003).

56 D.I. No. 20 Ex. W § 2.15(c).

action, even in part, Milso must pay the entire amount of his fees incurred in litigating this action.

At the outset, I agree with Pontone that this exception is not well founded. The Second Report addresses two sets of objections made by Milso, namely, its objections submitted on July 22, 2013 in response to Pontone's March, May, and June 2013 requests for advancement and its objections submitted on August 12, 2013 in response to Pontone's July 2013 request for advancement. Neither set of objections raises the issue of "fees on fees." Instead, they focus primarily on the counterclaim advancement issues addressed *supra*. Milso did raise the discounting of "fees on fees" in later objections submitted to the Special Master. The Special Master, however, expressly declined to address those later objections in his Second Report, reasoning that it would make sense to resolve the counterclaim dispute before analyzing other objections that could depend, directly or indirectly, on the outcome of that dispute. Because the issue of "fees on fees" was not raised in Milso's objections that were the focus of the Special Master's Second Report, that report understandably did not address that issue. Nonetheless, because this issue has been raised in subsequent objections pending before the Special Master, I consider it to be in the best interests of the Court and the parties to provide some guidance on the question here to streamline the resolution of, and minimize, future disputes relating to the issue.

A literal reading of Milso's bylaw does suggest that Pontone is entitled to indemnification for all "fees on fees" related to this advancement action if he is even partially successful in obtaining advancement from Milso, which he indisputedly has

been. Delaware courts, however, have interpreted Section 145 of the Delaware General Corporation Law[57] as imposing a reasonableness requirement on the "fees on fees" that an individual can recover in pursuing indemnification or advancement. In that regard, this Court held in *Fasciana v. Electronic Data Systems Corp.*[58] that even a bylaw that provided for indemnification to the fullest extent permitted by Section 145 will permit a covered employee to recover only "those expenses reasonably proportionate to the level of success . . . achieved" in an advancement action.[59]

In addition, in *Schoon v. Troy Corp.*,[60] this Court, in assessing the plaintiff's entitlement to "fees on fees" from the defendant corporation, considered a bylaw provision substantially the same as the one at issue here. That bylaw stated:

> If a claim for indemnification or advancement of expenses under this Article is not paid in full . . . the indemnitee may file suit to recover the unpaid amount of such claim and, *if successful in whole or in part*, shall be entitled to be paid the expense of prosecuting such claim."[61]

Despite the broadly worded bylaw, the Court in *Schoon* cited *Fasciana* in support of the proposition that "courts should only award that amount of fees that is reasonable in

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57 8 *Del. C.* § 145.

58 829 A.2d 178 (Del. Ch. 2003).

59 *Id.* at 184.

60 948 A.2d 1157 (Del. Ch. 2008).

61 *Id.* at 1176 (emphasis added).

relation to the results obtained."[62] Thus, the *Schoon* Court decided to "discount the plaintiffs' costs in prosecuting this [advancement] action by half" to account for the fact that they were unsuccessful in obtaining advancement for a substantial portion of the invoices they had submitted.[63]

Based on this precedent, Pontone is only entitled to recover "fees on fees" that are proportionate to his level of success in this advancement action. I also note that determining an appropriate award of "fees on fees" based on the results obtained by a plaintiff in an advancement or indemnification action "is a nonscientific inquiry that simply involves a reasoned consideration of the issues at stake in the case and an assessment of the plaintiffs' level of success."[64]

In the August Order, I granted Pontone 100% of the reasonable "fees on fees" he incurred in this action during the period before July 10, 2013.[65] I also awarded Pontone 100% of the reasonable "fees on fees" he incurred between July 10 and July 30, 2013 relating to the July 10, 2013 hearing held before this Court and this Court's subsequent entry of the August Order.[66] My decision to award Pontone these fees was based on the facts that he had prevailed in substantially all of his litigation efforts against Milso in the

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62 948 A.2d at 1176 (quoting *Fasciana*, 829 A.2d at 178) (internal quotation marks omitted).

63 948 A.2d at 1176.

64 *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *39 (Del. Ch. May 23, 2008).

65 D.I. No. 89 ¶ 9.

66 *Id.*

period preceding July 10, 2013, and that Milso had raised a plethora of objections to providing Pontone with any level of advancement, even after this Court's grant of partial summary judgment in favor of Pontone, most of which proved to be without merit.

As to Pontone's reasonable fees and expenses incurred after July 10, 2013 in responding to Milso's objections submitted on July 22, 2013, the August Order provided that "Defendant [Milso] shall pay the same proportion of Plaintiff's fees and expenses as the proportion of advancement sought by Plaintiff and ultimately awarded by the Special Master or the Court."[67] Although that provision, by its terms, applies only to the July 22 objections, it represents a workable formula for awarding "fees on fees" on an ongoing basis that would be proportionate to Pontone's level of success in this advancement action. That approach, therefore, shall provide the appropriate standard for awarding "fees on fees" moving forward, including as to Pontone's litigation efforts related to the Special Master's Second Report, which addressed the objections submitted by Milso on both July 22 and August 12, 2013. To the extent Milso may have overcompensated Pontone for its "fees on fees" related to those objections, the Court requests that the Special Master determine an appropriate monetary offset in his next report.

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[67] *Id.* ¶¶ 3, 9. Stated differently, Defendant Milso shall pay the same proportion of Pontone's "fees on fees" as the fees and expenses ultimately awarded by the Special Master for the periods in question bears to the fees and expenses from the underlying action that Pontone sought to have advanced.

D. Exception 4

Milso's fourth exception to the Second Report is that the Special Master improperly held that Pontone's supplemental explanations for a number of heavily redacted invoice entries were adequate.

In the Special Master's Draft Second Report, he held that $5,709.99 of fees and expenses sought for advancement were supported by time entries that had been overly redacted, such that "Pontone has not provided enough information to support its advancement request."[68] The Special Master, therefore, instructed Pontone either to: (1) provide unredacted versions of those time entries or additional descriptions of the work to which they related; or (2) return the fees backed by those entries. Pontone chose the former option and provided additional information on the redacted entries in the form of general descriptions of the subject matter of the work associated with each entry.

In his Second Report, the Special Master determined that, with the supplemental descriptions, the redacted time entries provided adequate information to support advancement of the relevant fees. In reaching this conclusion, the Special Master relied primarily on three considerations: (1) that the reasonableness of the fees was not genuinely at issue because Milso had disclaimed any "excessiveness" objections; (2) that the Special Master's own *in camera* review of the unredacted versions of the contested time entries confirmed that the fees were incurred in defending the Pennsylvania Action, and did not relate to the non-advanceable IOS counterclaim; and (3) that because Milso's

[68] D.I. No. 91 ¶ 51.

counsel in the advancement action is also its counsel in the Pennsylvania Action, it would be inappropriate to condition Pontone's right to advancement on disclosing his attorneys' strategies and mental impressions.[69]

Milso argues that the additional explanations provided by Pontone are vague and ambiguous, and do not correct the informational deficiencies in the underlying time entries. Specifically, Milso contends that it is entitled to enough information to identify any non-advanceable amounts and that, with the information provided, it cannot determine whether the fees and expenses backed by the redacted time entries relate to counterclaims for which advancement has been, or ultimately might be, disallowed. Pontone defends the Special Master's conclusion as well founded and supported by the record.

In general, "a party seeking advancement [need not] provide portions of billing statements that might reveal its defense strategy to a litigation adversary . . . . Rather, . . . a party seeking advancement must provide a reasonable basis for its request, and must waive privilege to the extent necessary to accomplish that end."[70] Establishing a reasonable basis typically requires a party seeking advancement to provide enough information for the defendant to confirm that the amounts requested are properly advanceable, *i.e.*, reasonable and incurred in defending the underlying action.[71]

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69 D.I. No. 97 ¶ 62.

70 *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *38 (Del. Ch. May 23, 2008).

71 *See Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 825 (Del. 1992).

Nonetheless, "[t]he mental processes or other work product of the attorneys who billed the time is not subject to disclosure."[72]

Here, I concur with the Special Master that the reasonableness of the fees requested is not genuinely at issue because Milso disclaimed any "excessiveness" objections.[73] Whether those fees were incurred in defending the action is at issue, however, and turns on whether they were incurred in pursuing one of the counterclaims that have been held non-advanceable. Thus, Milso is entitled to information sufficient to indicate that the claimed expenses do not relate to counterclaims for which advancement has been disallowed, to the extent such information can be provided without revealing Pontone's attorneys' work product or mental impressions.

With that in mind, I agree with the Special Master's assessment that the challenged time entries initially were insufficient. The time entries the Special Master identified as inadequate were so heavily redacted that they lacked any meaningful indication of, for example, what general legal issues the billing individuals were researching.[74] Moreover, I am not convinced that Pontone could not have revealed additional information without disclosing his attorneys' work product or mental

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72 *Id.* at 825 n.8.

73 Choa Aff. Ex. 15 at 3 n.2, Ex. 16 at 2 n.1.

74 For example, two time entries typical of the ones challenged stated only, "research relating to . . . ." and "Researched cases in support of . . . decision relating to . . . ." Choa Aff. Ex. 21-A. Another time entry provides, unhelpfully, "Research . . . and . . . Research standards for . . . Research . . . Confer with [one of Pontone's attorneys] regarding research relating to . . . research, . . . and updated case law on . . . ." *Id.*

impressions. Therefore, the redacted time entries Pontone originally provided were inadequate.

Whether the supplemental descriptions were sufficient to correct the informational deficiencies in these overly redacted time entries presents a closer question. Some of the added descriptions admittedly are vague and provide less than complete insight into the tasks billed for each entry.[75] Pontone did identify, however, the entries related to "counterclaims."[76] Moreover, the Special Master reviewed the unredacted time entries *in camera* and did not find Pontone's descriptions to be misleading or note any red flags. Rather, following his *in camera* review, the Special Master determined that the amounts billed on the challenged entries were incurred in defending the Pennsylvania Action and, at a minimum, did not relate to the IOS counterclaim. Because a portion of the redacted time entries may relate to the additional counterclaims that I have held non-advanceable in this Memorandum Opinion, Pontone's counsel shall indicate, under oath, whether any of those time entries relate to those counterclaims, and Milso's advancement obligations shall be offset accordingly.[77] Subject only to that qualification, I overrule Milso's fourth exception.

Notwithstanding that ruling, however, I expect Pontone to do a better job in the future of providing Milso with information that will permit it to determine which portion

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[75] For example, Pontone's descriptions of some of the time entries as relating to "specific aspects of Plaintiffs' claims" or "procedural and discovery issues relating to case" were broad and not particularly elucidating. *Id.*

[76] *Id.*

[77] *See supra* Section II.A.2.

of Pontone's invoices relate to non-advanceable counterclaims. In that regard, I note that the parties recently have reached an agreement, which this Court has entered as a joint stipulation and order (the "Stipulation and Order"), addressing how "redaction" objections should be resolved moving forward. That Stipulation and Order provides, in relevant part, that:

> If Milso raises "redaction" objections to future invoices submitted by Pontone in support of his advancement requests, Pontone will only be required to provide the same level of additional detail as provided to Milso on March 25, 2014, which will reflect whether any specific redacted text relates exclusively or partly to any counterclaim to which Milso objects, and, to the extent possible, Pontone will identify any specific counterclaim by name where possible.[78]

The Court hereby endorses this cooperative solution and any appropriate update of it to which the parties might agree.

E. Exception 5

Milso's fifth and final exception to the Second Report is that the Special Master did not discount certain prejudgment interest paid by Milso based on the inadequacy of the information initially provided by Pontone.

The August Order, issued on August 9, 2013, provides that, except as to sums already advanced, pre-judgment interest for Pontone's April 3, 2012 advancement request began to accrue on April 3, 2012, the date of the request.[79] Milso argues, however, that the $305,899.30 in fees and expenses for which Pontone requested advancement on April

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[78] D.I. No. 128 ¶ 2.

[79] D.I. No. 89 ¶ 7.

3, 2012, and which Milso had not paid as of the date of the August Order, were not supported by adequate information until much later. On that basis, Milso contends that the Special Master should have held that prejudgment interest on those fees did not begin to run until at least March 20, 2013, when supporting invoices were provided.

Even assuming that it was procedurally proper, which it may not be, I find Milso's exception to be without merit.[80] "In Delaware, prejudgment interest is awarded as a matter of right."[81] Moreover, a party seeking advancement "is entitled to interest computed from the date of demand," defined as the date on which the party "specified the amount of reimbursement demanded and produced his written promise to pay."[82]

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80 Pontone challenged the procedural propriety of this exception on two grounds. First, Pontone argues that the exception is a thinly veiled and untimely attempt by Milso to reargue an issue that this Court already decided in both the May and August Orders. In response, Milso says that the Court expressly gave it leave to reargue this issue to the Special Master in the May 1 teleconference that resulted in the May Order. In that teleconference, the Court stated that it would not change the pre-judgment interest dates specified in the Special Master's proposed order, but that Milso could "make arguments to the special master that [the invoices submitted] are inadequate" and did not trigger pre-judgment interest. D.I. No. 48 at 12. Second, Pontone effectively contends that Milso waived Exception 5 because Milso did not raise the issue of prejudgment interest in its July and August 2013 objections, which are the objections addressed by the Second Report. Milso claims it adequately preserved this objection by raising it in its exceptions to the Special Master's Draft Second Report.

Based on my understanding of the applicable law, as discussed in the text and reflected in cases like *Roven*, I need not reach either of Pontone's procedural challenges. Instead, I reject Milso's fifth exception on the merits.

81 *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) (citing *Moskowitz v. Mayor & Council of Wilm.*, 391 A.2d 209 (Del. 1978)).

82 *Roven*, 603 A.2d at 826 & n.10.

On April 3, 2012, Pontone requested by letter that Milso provide advancement for $324,607.49 in legal fees and expenses he had incurred in the Pennsylvania Action.[83] Attached to the letter was a chart summarizing the monthly billing invoices from Pontone's attorneys. Concurrent with his request for advancement, Pontone provided Milso with a written undertaking, promising to repay any amounts advanced for fees and expenses that ultimately are held to be non-indemnifiable.[84] By the date of the August Order, $305,899.30 of the advancement amount initially requested by Pontone on April 3, 2012 remained unpaid.[85] Based on these facts, the "date of demand" from which prejudgment interest should run on that amount is April 3, 2012.

In arguing against this result, Milso cites *Schoon v. Troy Corp.*[86] for the proposition that "the court will not award prejudgment interest where the party seeking advancement 'deprived [the company] of the fair chance to make prompt payment required to avoid a later imposition of prejudgment interest.'"[87] According to Milso, Pontone deprived it of the opportunity to make prompt payment because the information that accompanied the April 3, 2012 advancement request—a chart summarizing Pontone's invoices—was insufficient to demonstrate Pontone's entitlement to

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83 D.I. No. 15 Ex. A.

84 *Id.* Ex. D.

85 D.I. No. 89 ¶ 7.

86 948 A.2d 1157 (Del. Ch. 2008).

87 *Id.* at 1171–72 (citing *Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006)).

advancement for the amounts requested. Milso contends that Pontone did not cure this problem until, at the earliest, March 20, 2013, when he provided redacted invoices to support his earlier advancement request.

I reject Milso's argument for three reasons. First, the contention that pre-judgment interest should not accrue until the party seeking advancement has "made a showing sufficient to invoke his right to advances" was considered and rejected by the Delaware Supreme Court in *Roven*.[88] There, as noted previously, the Court ruled that prejudgment interest is awarded as a matter of right and begins to accrue on the date of demand.

Second, Milso's reliance on *Schoon* is misplaced. In *Schoon*, the Court held that the plaintiff's initial request for advancement did not trigger prejudgment interest because the plaintiff had failed to specify the amount of reimbursement sought.[89] By not specifying this amount, the plaintiff had failed to satisfy one of the two requirements set forth in *Roven* for the commencement of prejudgment interest and deprived the defendant of "a fair chance to make prompt payment."[90] By contrast, here, there is no dispute that Pontone's request for advancement on April 3, 2012 set forth the specific amount of reimbursement he sought.

Third, Milso's argument that Pontone's failure to provide additional information "deprived it of a fair chance to make prompt payment" rings hollow under the facts of this case. By letter dated May 2, 2012, Milso denied Pontone's April 3, 2012 request for

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88 *Citadel Hldg. Corp. v. Roven*, 603 A.2d at 826.

89 *Schoon v. Troy Corp.*, 948 A.2d at 1172–73.

90 *See id.* at 1173.

advancement.[91] Nowhere in that letter did Milso complain that Pontone provided insufficient information to support his request. Rather, Milso asserted that, under its bylaws, Milso had no obligation to advance any fees or expenses that Pontone incurred in the Pennsylvania Action. There is no evidence in the record to suggest that Milso would have honored its advancement obligations any sooner if Pontone had provided his attorneys' invoices at an earlier date. Indeed, that notion is contradicted by the fact that Milso continued to deny its obligation to advance any portion of Pontone's fees and expenses even after those invoices were provided. Under these circumstances, I find unconvincing Milso's assertion that Pontone's failure to provide additional information in his April 3 demand deprived it of a fair chance to make prompt payment.

For the foregoing reasons, Milso's fifth exception is overruled and I hold that April 3, 2012 is the date on which prejudgment interest began to accrue on the $305,899.30 in advancement requested by Pontone on that date and which remained unpaid as of the August Order.

III. Conclusion

For the reasons stated in this Memorandum Opinion, I conclude that Milso's first exception to the Special Master's Second Report was valid in part. In that regard, I hold that the standard for counterclaim advancement applied in the Second Report improperly omitted the requirement that, for a counterclaim to be advanceable, it must qualify as compulsory under the prevailing test used by Delaware and federal civil procedure. As a

[91] D.I. No. 15 Ex. F.

consequence, the Second Report incorrectly determined that Pontone's counterclaims for misappropriation of name, image, and likeness (Count XI) and abuse of process (Count XIII) are subject to advancement. Pursuant to the procedure set forth in this Memorandum Opinion, therefore, Pontone is directed to identify and certify the past expenses incurred in connection with counterclaim Counts XI and XIII, to be used as an offset against Milso's future advancement obligations.

Milso's remaining exceptions are overruled, subject to the additional guidance provided in this Memorandum Opinion regarding: (1) the portion of Pontone's "fees on fees" Milso will be obligated to reimburse; (2) Pontone's obligation to identify what portion, if any, of the redacted time entries challenged in Exception 4 relate to counterclaim Counts XI and XIII; and (3) the continued use of the parties' agreed procedure for addressing future "redaction" objections by Milso.

IT IS SO ORDERED.