IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PAUL PERCONTI,	:	
Plaintiff,	:	
v.	:	**C.A. No. 18630-NC**
THORNTON OIL CORPORATION, a Delaware corporation,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: October 23,200l
Date Decided: May 3, 2002

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NOBLE, Vice Chancellor

Plaintiff Paul Perconti ("Perconti") is a former officer of Defendant Thornton Oil Corporation ("Thornton" or the "Company"), a Delaware corporation. Perconti, by this action, seeks indemnification, pursuant to both 8 Del. C. § 145(c) and Thornton's bylaws, for costs incurred in defending a criminal action which he contends was brought against him "by reason of the fact" that he was an officer of Thornton. Perconti has moved for summary judgment. This is the Court's decision on that motion.

I. Background

Perconti served as president and chief executive officer of Thornton from the mid-l 980s until the termination of his employment in May 1998. Thornton's principal place of business is in Louisville, Kentucky, from where it operates combination gasoline stations and convenience stores in the regional market. While in office, Perconti was responsible for all operational and financial activities of Thornton.

This action focuses on Perconti's trading activities in the petroleum futures market. His involvement in the trading of commodities was two-fold. On the one hand, as the chief executive officer of Thornton, he invested Thornton's funds in petroleum futures as part of the Company's effort to protect against fluctuations in the price of gasoline. On the other hand, Perconti also engaged in petroleum futures trading for his individual

benefit through an investment vehicle, TEGRA Investment Group, L.L.C. ("TEGRA"). This venture was created by Perconti and three other Thornton executives, one of whom was Kevin Hobbs ("Hobbs"), Thornton's chief financial officer. Although created for personal investment purposes, it in fact paralleled Thornton's investment activities on a smaller scale. Perconti and his associates initially contributed their own funds, but, after a few months, trading in the name of TEGRA was allegedly financed with Thornton funds.

In February 1999, Perconti and Hobbs were indicted in the United States District Court for the Western District of Kentucky in a twenty-count indictment (the "Indictment") accusing them of embezzling funds from Thornton to support their speculative activities in the commodities market, trading on behalf of Thornton beyond their authorized limits in an effort to increase their annual bonuses, making false statements to hide their improper conduct and to protect their positions with Thornton, and committing related offenses. Although Hobbs pled guilty to all counts of the Indictment, Perconti went to trial, and the jury failed to reach a unanimous verdict. After declaration of a mistrial, the United States Attorney dismissed all charges against Perconti.

Thereafter, Perconti filed this action for indemnification to recover the expenses incurred in defending against the criminal charges. In addition, Perconti seeks to recover the attorneys' fees and expenses which he has incurred in pursuing his indemnification claim.

II. The Parties' Contentions

Perconti's claim for indemnification rests on two alternative grounds, 8 ***Del.*** C. § 145(c) and Section 2 of Article XI of the Thornton bylaws.

First, under 8 ***Del. C.*** § 145(c), a director or officer of a corporation who is "successful on the merits or otherwise" in the defense of an action or proceeding against him, is entitled to indemnification by the corporation of "actually and reasonably" incurred legal expenses in defending against that action or proceeding,' if he was made a party to the proceeding "by reason of the fact that [he] is or was a director [or] officer, . . . of the corporation."[2]

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[1] 8 ***Del.*** C. § 145(c) provides:

> To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

Section 145(c) was amended in 1997, 71 Del. Laws Ch. 120. Previously, the corporation's statutory indemnification obligation had also extended to employees and agents. Although this amendment was enacted during the course of Perconti's activities at issue, it has no bearing on the questions presented here.

[2] The "by reason of the fact" language appears in 8 ***Del.*** C. § 145(a), which provides in pertinent part:

> (a) A corporation shall have power to indemnify any person who was or is a party . . . to any. . . completed action, suit or proceeding, whether

Second, Thornton's bylaws oblige the corporation to indemnify "whether the basis of such proceeding is alleged action in an official capacity while serving as a director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent . . ."[3]

The parties dispute whether the criminal prosecution occurred "by reason of the fact that [Perconti] was an [officer]" or was based on an "alleged action in an official capacity while serving as [an officer (or in any other capacity)]." Perconti contends that the criminal proceeding resulted

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civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by ***reason*** of *the fact that* the person is or was a director, officer, employee or agent of the corporation, . . . against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful. (emphasis added).

[3] Art. XI, § 2 of the Thornton bylaws provides in material part:

Each person who was or is made party or is threatened to be made a party to or is involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a "proceeding"), by reason of the fact that he or she is the legal representative, is or was a director, officer, employee or agent, of the corporation . . . whether the basis of such proceeding is alleged action in an official capacity as director, officer, employee or agent or in any other capacity while serving as a director, officer, employee or agent, shall be indemnified to *the fullest extent authorized by Delaware General Corporation Law* . . . . (emphasis , added).

from his alleged abuse of corporate authority as a Thornton officer and from his alleged breaches of fiduciary duties he owed the Company. Thornton asserts that indemnification is precluded because Perconti's activities were undertaken for personal gain and not for corporate purpose and, thus, did not constitute conduct in his official capacity.

Finally, Perconti argues that, if he is successful in this action, he is entitled to the legal fees incurred in vindicating his indemnification rights because, under Delaware law generally and under the bylaws as authorized by 8 Del. C. § 145(f), a broad indemnification obligation assures a successful indemnitee that the costs reasonably incurred will be borne by the indernnitor. Thornton, on the other hand, argues that there is no right to receive an award of fees for the prosecution of an indemnification action under Section 145 or bylaw provisions adopted in conformance with Section 145 and that its conduct in this matter does not constitute a basis for deviating from the "American Rule," which generally leaves the burden of legal expenses to the party incurring them.

III. Analysis

A. **Applicable legal standard**

Summary judgment may be awarded when the moving party demonstrates that there are no material facts in dispute and that it is entitled

to judgment as a matter of law.[4] Factual inferences must be drawn in the light most favorable to the party opposing the motion? Indeed, "[i]f a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . ., summary judgment is inappropriate.'"

B. **Indemnification – the statutory requirements**

Indemnification assists corporate officers and directors in resisting unjustified lawsuits and encourages corporate service by assuring individuals that the risks incurred by them as a result of their efforts on behalf of the corporation will be met, not through their personal financial resources, but by the corporation.[7]

> Indemnification for officers and directors should be seen as less an individual benefit arising from personal employment than as a desirable underwriting of risk by the corporation in anticipation of greater corporate-wide rewards. . . .

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[4] *Williams v. Geier,* 671 A.2d 1368, 1375 (Del. *1996); Scharf v. Edgcomb Corp.,* Del. Ch., C.A. No. 15224, mem. op. at 5, Steele, V.C. (Aug. 2 1, 2000).

[5] *Brown v. Ocean Drilling & Exploration Co., 403* A.2d 1114, 1115 (Del. 1979).

[6] *Cerberus Int'l, Ltd.* v. *Apollo Mgmt., L.P.,* Del. Supr., No. 13 1, 2001, slip op. at 17, Veasey, C.J. (Mar. 13, 2002).

[7] *VonFeldt v. Stifel Fin. Corp.,* 714 A.2d *79, 84* (Del. *1998); Hibbert v. Hollywood Park, Inc., 457* A.2d *339, 343-44* (Del. 1983); *Mooney v. Willys-Overland Motors, Inc., 204* F.2d *888, 898* (3d Cir. 1953); *see generally* RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 145.2 (4th ed. 2002-l Supp.) (noting that the scope of indemnification over time has expanded beyond the original primary purpose of providing indemnification "in situations where the propriety of their actions as corporate officials is brought under attack.") (quoting *Essential Enters. Corp. v. Automatic Steel Prods., Inc.,* 164 A.2d 437, 441 (Del. Ch. 1960)); *see also Merritt-Chapman & Scott Corp.* v. *Wolfson,* 321 A.2d 138, 141 (Del. Super. 1974).

> [D]irector and officer indemnification benefits the corporation more than the director or the officer covered.[8]

Thus, Section 145 must be applied in light of the broad, salutary policy goal of assuring corporate officers and directors that their corporation will absorb the risks that may result from performance of their duties and, accordingly, Delaware's indemnification statute has been interpreted expansively.[9]

Under 8 ***Del.*** C. § 145(c), an officer or director who meets the requirements of the statutory provision has an absolute right to indemnification. [10] "A party eligible for mandatory indemnification under § 145(c) must demonstrate two key elements: (1) that the matter at issue was covered by § 145(a) or (b); and (2) that the party was successful on the merits or otherwise."' [1] Thornton does not dispute that Perconti was "successful" in the Kentucky criminal proceedings as the result of the prosecution's decision to dismiss all charges following the mistrial.[12]

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[8] ***Scharf v. Edgcomb Corp.,*** Del. Ch., C.A. No. 15224, mem. op. at 11, Steele, V.C. (Dec. 2, 1997).

[9] ***See, e.g., VonFeldt v. Stifel Fin. Corp.,*** 714 A.2d at 84 ("We eschew narrow construction of the statute where an overliteral reading would disserve [the policies behind indemnification]."); ***see also Witco Corp. v. Beekhuis, 38*** F.3d 682, 691 (3d Cir. 1994).

[10] ***See Witco Corp. v. Beekhuis, 38*** F.3d at 691; ***Green v. Westcap Corp. of Delaware, 492*** A.2d 260,265 (Del. Super. 1985).

[11] ***Cochran v. Stifel Fin. Corp.,*** Del. Ch., C.A. No. 17350, mem. op. at 23, Strine, V.C. (Dec. 13, 2000) (hereinafter ***"Cochran II"***).

[12] ***See id.*** at 23-24.

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[11] *Cochran v. Stifel Fin. Corp.,* Del. Ch., C.A. No. 17350, mem. op. at 23, Strine, V.C. (Dec. 13, 2000) (hereinafter *"Cochran I.').*

[12] *See id.* at 23-24.

Although this dispute turns on the meaning to be ascribed to the "by reason of the fact that [he] was . . . an officer" language of Section 145(a), the statutory analysis of Perconti's claim starts with Section 145(c). If the former officer is "successful on the merits or otherwise" in a proceeding described in Section 145(a), then he is entitled to indemnification regardless of whether or not he acted in good faith or in what he perceived to be the best interests of the corporation. Dismissal of the charges against Perconti by the government, for whatever reason, constituted "success." That "mere attainment of success"[13] in an action described in Section 145(a) entitles the officer to indemnification for the "expenses (including attorneys' fees) actually and reasonably incurred by him." Perconti incurred and has paid legal fees of $322,500 in defense of the charges contained in the Indictment.[14] Because Thornton concedes that the legal fees were reasonable, my inquiry necessarily must focus on whether the criminal proceeding was one that fell within Section 145(a), or, more specifically, whether the criminal proceeding was brought against Perconti "by reason of the fact that he was [an] officer of [Thornton]."

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[13] Id., mem. op. at 22.

[14] See Affidavit of Paul Perconti in Support of His Motion for Summary Judgment at ¶ 14.

C. "By reason of the fact"

The parties' positions on the meaning of the "by reason of the fact" language may be summarized in few words. Perconti contends that the Indictment alleges and is ultimately dependent upon breaches of his fiduciary duties as corporate officer – breaches that occurred by reason of his status as chief executive officer and president of Thornton. Thornton, in response, argues that Perconti's acts were purely for personal gain, perpetrated without any consideration of the corporation's interests.

When construing a statute, a court's obligation is to ascertain the legislative intent expressed by the statutory language." It is a fundamental rule of statutory construction that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[16] The words of the statute, of course, are to be given their common meaning.[17] The phrase "by reason of' can be equated to "by virtue of," "by

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[15] ***Coastal Barge Corp. v. Coastal Zone Indus. Control Bd., 492*** A.2d 1242, 1246 (Del. 1985); ***Angelini v. Court*** *of* ***Common Pleas, 205*** A.2d 174, 176 (Del. 1964).

[16] ***Caminetti v. United States, 242*** U.S. ***470, 485*** (1917); ***Hudson Farms, Inc. v. McGrellis, 620*** A.2d 2 15, 2 17 (Del. 1993).

[17] ***Mayer v. Executive Telecard, Ltd., 705*** A.2d 220,221 (Del. Ch. 1997).

force of," or "by the authority of."[18] I understand "by reason of' to convey the concept of a causal connection or nexus between, in this case, the charges alleged in the criminal proceedings and the corporate function or "official [corporate] capacity"" of, in this case, Perconti. Furthermore, this reading is consistent with the purposes of the indemnification statute[20] and the tradition of interpreting the indemnification statute broadly.[21]

Thornton contends that a corporate officer is not entitled to indemnification when his conduct is motivated by personal self-interest and greed. I am persuaded, however, that an officer will not be denied indemnification under Section 145(c) because his conduct was motivated exclusively by personal greed. First, Section 145(c) assures indemnification to the corporate officer who has been "successful" in the criminal proceeding. It does not require a determination that the corporate officer was "innocent." Guilty parties may prevail in criminal proceedings for any

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[18] **See BLACK'S LAW DICTIONARY** 201 (6th ed. 1990); **WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED** *307* (Merriam-Webster 1993); *United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206* U.S. 118, 127 (1907).

[19] *Cochran* II, mem. op. at 12 (quoting *Cochran v. Stifel Fin. Corp.,* Del. Ch., C.A. No. 17350, mem. op. at 37, Strine, V.C. (March 8, 2000) (hereinafter "*Cochran I*")) ("[T]he obvious intent of the statute is to govern actions against such a person as a result of his actions in his official capacity.").

[20] *See* ***supra*** note 7 and accompanying text.

[21] *See, e.g., VonFeldt v. Stifel Fin. Corp.,* 714 A.2d at *84; Heffernan v. Pacific Dunlop GNB Corp., 965* F.2d 369, 375 (7th Cir. 1992) ("Both the language and the purpose of Delaware's indemnification statute support interpreting its scope expansively.").

of a number of reasons, including, of course, the requirement that the jury be convinced of guilt beyond a reasonable doubt or a prosecutorial decision not to devote additional resources to obtaining a conviction following a mistrial. Second, to require the corporate officer seeking indemnification under Section 145(c) to demonstrate that he pursued his course of conduct for the benefit of the corporation or for purposes other than self-interest would limit the rights clearly conferred by Section 145(c) in a manner that was not (but could have been) included in the legislative standard.[22] The right of a "successful" corporate officer to indemnification derives from his status as a corporate officer. If the conduct resulting in the prosecution was done in his capacity as a corporate officer, without regard to what his motivation may have been, then the ensuing prosecution was "by reason of the fact that" he was a corporate officer.[23]

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[22] Under Section 145(a), an "unsuccessful" corporate officer may be indemnified if "the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation." This good faith inquiry has not been mandated under Section 145(c) for the "successful" corporate officer. *See Waltuch v. Conticommodity Servs., 88* F.3d 87 (2d Cir. 1996).

[23] Corporate officers may be subjected to prosecution for conduct resulting from a wide range of motivations. For example, they may be subjected to prosecution for their actions (or their decisions not to take action) when their decision was motivated solely by their perception of the corporation's best interests and where they do not believe that their conduct would be unlawful (e.g., strict liability criminal offenses). They may also recognize that criminal prosecution may result from their actions but, in their view, believe that the risk is in the corporation's best interests. Then there are circumstances where the corporation's best interests and the officer's personal greed have the potential for congruency. In this matter, Perconti's desire to invest in futures contracts in excess of his authorization could be viewed in this light. He may have been motivated primarily –

The case law is consistent with this analysis. For example, in *MCI Telecom. Corp. v. Wanzer*,[24] the corporate officer was alleged to have participated in a "kickback" scheme pursued in conjunction with the corporation's vendors. The Court, noting that the operative pleadings in the underlying litigation alleged that the conduct had been carried out "in his capacity as a [corporate officer,]"[25] approved the concept that the "by reason of' requirement would be satisfied where the alleged breach of fiduciary

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or, perhaps exclusively – by the potential increase in his bonus if his excessive investments were successful. However, if he made profitable decisions, as he hoped he would, the corporation would have benefited as well. Considering that a corporate officer makes his decisions with an eye toward enhancing his compensation may take one down a path that leads too far: presumably, most corporate officers make corporate decisions in the utmost good faith with the expectation or the hope that their correct (i.e., the one that, in hindsight, turned out to have been profitable) decision will result in enhanced compensation. Finally, at the end of this continuum is conduct which constitutes a total abuse of the authority entrusted to the corporate officer with the only possible result being harm to the corporation. Perconti's use of his corporate status to accomplish embezzlement is an example of this. All of this possible conduct – which spans the range of motivations – would happen "by reason of the fact" of one's status as a corporate officer.

[24] Del. Super., C.A. Nos. 89C-MR-216 & SE-26, mem. op., Poppiti, J. (June 19, 1990). Until enactment of Section 145(k) in 1994, the Superior Court was frequently the appropriate forum for an officer seeking reimbursement by virtue of his right to indemnification because, by that point, his claim was for a liquidated sum and, thus, remediable at law. See R. **FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF** CORPS. **& BUSINESS ORGS. § 4.22,** at n.420 (3d ed. 2002 Supp.).

[25] In the action for which Wanzer sought indemnification, the conduct alleged was said to have occurred "in his capacity as MCI's director of corporate services." The Indictment alleges, at paragraph 2, that "at all times relevant to this Indictment, the defendant, **PAUL PERCONTI,** was the President and Chief Executive Officer of Thornton Oil Corporation. As President and Chief Executive Officer, **PERCONTI** had the duty to manage the affairs of the company responsibly, to safeguard the assets of the company, and to protect the interests of the company's shareholders."

duty arises out of his status as corporate officer.[26] Engaging in a kickback scheme is no less an action pursued for personal profit than Perconti's actions in investing beyond his authority or, indeed, diverting corporate funds for his own benefit through use of his corporate authority.

In *Merritt-Chapman & Scott* v. *Wolfson*, the corporate officer seeking indemnification was alleged to have participated in a scheme, aided by the use of inside information, involving the purchase of the corporation's stock which, in essence, was a fraud on the corporation's shareholders.[27] Personal trading in the corporate stock was not related to the scope of the officer's employment or his corporate responsibilities. However, because the officer participated in the sale using inside information which he possessed by virtue of his corporate status, the "by reason of' requirement was deemed satisfied and the officer was found to be entitled to indemnification. Thus, this corporate officer, motivated by personal gain, acting contrary to the best interests of the corporation's shareholders, and using an attribute of his corporate status (access to inside information), was deemed eligible for indemnification under Section 145(c).

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[26] *MCI Telecomm. Corp. v. Wanzer,* mem. op. at 17 (quoting *ADM Corp. v. Thomson,* 707 F.2d 25, 28 (1st Cir. 1983)) ("He was sued for a breach of a fiduciary duty; thus his legal expenses arise 'by reason of his being' an officer.").

[27] 321 A.2d at 140-41.

Other jurisdictions interpreting Section 145 have also construed its scope broadly. In ***Heffernan v. Pacific Dunlop*** *GNB* **Corp.,** the Court of Appeals was confronted with a challenge to the District Court's conclusion that a director was not entitled to indemnification because "he had been sued for 'wrongs he committed as an individual, not as a director.'"[28] Heffeman had been sued under the Securities Act of 1933 regarding the sale of company stock that he had sold in his private capacity. The Court of Appeals, while recognizing that Heffeman had acted in concert with the corporation's interests in carrying out a stock sale agreement, concluded that "*we* find no support in the language and purpose of Delaware's indemnification statute for defendants' argument that it limits indemnification to suits asserted against a director for breaching a duty of his directorship or for acting wrongfully on behalf of the corporation he serves."[29] The Court found it sufficient that "the substance of [the allegations against the director] and the nature and context of the transaction giving rise to the complaint indicate that [the director] may have been sued,

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[28] ***Heffernan*** *v.* ***Pacific*** *Dunlop GNB Corp., 965* F.2d at 372 (quoting *Heffernan v.* ***Pacific*** *Dunlop GNB* Corp., 767 F. Supp. 913,916 (N.D. Ill. 1991)).

[29] *Id.; see* ***also Witco*** *Corp. v. Beekhuis, 38* F.3d at 691-93. The Court in ***Witco*** focused on the nexus between the litigation for which indemnification was sought and the corporate officer's status. See *id.* at 691-92. It did note that there was no allegation that the corporate officer had engaged in self-dealing or criminal activity which was not undertaken on behalf of the corporation. See *id.* at 693. Thus, it did not consider the precise question presented here.

at least in part, because he was a director of [the indemnifying corporation.]"[30]

D. **Perconti's alleged activities**

In order to ascertain whether Perconti was prosecuted "by reason of the fact" that he was an officer of Thornton, it is necessary to describe the charges against him and the circumstances from which the charges arose.[31] I draw my understanding from the Indictment[32] and from Thornton's description of his conduct.[33]

Thornton traded in the petroleum futures market in an effort to protect itself against fluctuations in the price of petroleum products and, perhaps, to profit from the effort. As the chief executive officer of Thornton, Perconti was ultimately responsible for these trading decisions. During the relevant period, Thornton's founder and chairman, James Thornton ("Mr. Thornton")

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[30] ***Id.; see also Rudebeck v. Paulson,*** 612 N.W.2d 450 (Minn. Ct. App. 2000) (indemnifying costs of defending against claims of sexual harassment).

[31] The following description of Perconti's conduct must be read with the understanding that the jury did not convict him of any of the crimes charged.

[32] Perconti was charged with conspiracy under 18 U.S.C. § 371, wire fraud under 18 U.S.C. §§ 1343 & 1346, conspiracy to launder money under 18 U.S.C. § 1956(h), and engaging in monetary transactions in criminally derived property under 18 U.S.C. § 1957.

[33] Thornton argues that summary judgment should not be granted to Perconti because there are material facts in dispute. Thus, by relying on Thornton's characterization of the events leading up to the Indictment, I meet my duty to view the facts in the light most favorable to the non-moving party and to abjure reliance on material facts the non-moving party claims to be disputed. Furthermore, while it remains Perconti's burden to demonstrate the absence of dispute over material facts, I note that, despite Thornton's lukewarm assertion that material facts are in dispute, it has not specifically identified any.

had instructed Perconti to limit Thornton's exposure in the commodities market to $600,000.

In late 1996, Perconti decided to profit personally from his experience in the petroleum futures market. He and three other Thornton executives formed TEGRA as a vehicle for investing in the commodities market. TEGRA's investment strategy, albeit on a smaller scale, followed Thornton's investment strategy. TEGRA's investments, from late 1997 through May 1998, were funded with Thornton's funds instead of TEGRA's funds and instead of the funds of its individual members. This was accomplished through a fraudulent scheme of embezzling funds from Thornton for both making investments and covering margin calls. Moreover, in an effort to enhance his bonus, Perconti traded, on Thornton's account, in an amount far in excess of the limits established by Mr. Thornton. Perconti lied to Mr. Thornton and caused Thornton's profit and loss statements to be falsified in order to keep Mr. Thornton from learning about the substantial losses that had resulted from Perconti's trading activities and about the embezzlement scheme.[34] When his conduct was uncovered in May 1998, Mr. Thornton fired Perconti.

[34] Perconti and Hobbs were also charged with embezzlement through the device of writing Thornton checks that were payable to "cash," The scheme also included illegal wire transfers and money laundering.

The Indictment, returned in February 1999, alleged that Perconti pursued these activities for personal gain. Most of the conduct alleged to have been criminal was done, not for the benefit of the corporation, but to enhance his personal financial position. It is, however, fair to conclude that the investments in petroleum futures contracts in excess of the amount established by Mr. Thornton may have been prompted by dual motives -- as Thornton profited, so would Perconti profit in terms of his bonus. Nonetheless, Perconti's predominant motivation was personal gain. Indeed, none of the charges alleges that he was acting on behalf of the Company, in the sense that the Company could also be criminally liable for his conduct. Moreover, the Indictment makes clear that the Company was a victim and not a beneficiary of his conduct.

In essence, Perconti decided to gamble in the commodities market. He gambled with Thornton's money and, when he lost money, he simply took more money from Thornton to pursue his scheme and to cover the margin calls. These allegations formed the basis for the criminal prosecution. Thus, the question, to which I must now turn is whether the criminal proceeding was brought against him "by reason of the fact" that he was president and chief executive officer of Thornton.

The crimes with which Perconti was charged occurred because of his status as an officer of Thornton. Without that status, he would not have had any obligation to provide "his honest services" to Thornton or to report truthfully to Mr. Thornton about the Company's financial status and its commodities trading activities. Similarly, it was his status as officer that enabled him to embezzle (or to cause another to embezzle for his benefit) or to transfer the corporate funds for his benefit. Clearly, he could not have made the excessive investments in the commodities market on behalf of Thornton without the authority arising from his executive position. Finally, his position facilitated the hiding of his conduct from Mr. Thornton.

Thornton points out that Perconti was charged, not with breaching any fiduciary duty owed to the Company, but with violating federal criminal statutes. The conduct alleged in the Indictment, however, would have been a violation of his fiduciary duties to the corporation; investing beyond his authority and directing that corporate funds be applied for his personal benefit both are the product of a corporate officer's abject failure to comply with his fiduciary duties. In short, Thornton overlooks the obvious: conduct which falls within the scope of a federal criminal statute can also be a breach of a corporate officer's fiduciary duty.

The more typical scenario for indemnification may involve corporate officers who are alleged to have engaged in criminal conduct that may have been beneficial to the interests of the corporation or, at least, was consistent with the corporation's purposes. It does not necessarily follow, however, that actions carried out in a corporate capacity without regard for the corporation's interests or, indeed, in derogation of the corporation's interests are not undertaken "by reason of' the officer's corporate status. Despite Thornton's urging, Section 145(c) simply does not draw the line which it advocates. The inquiry, in these circumstances, is into whether the criminal scheme is alleged to have employed the corporate powers (or, for example, confidential inside information acquired through the corporate status) conferred upon the officer by virtue of his status. Here, Perconti's use of the corporate powers entrusted to him was critical to, and instrumental in, the carrying out of the scheme in which he participated and because of which the Indictment issued.[35]

Thornton's argument, which is not without substantial appeal, ultimately reduces to: given Perconti's conduct, it is inequitable and unfair

[35] If, for example, it had been alleged that Perconti had acquired a gun and a ski mask and had randomly robbed one of Thornton's gas stations on a Saturday night, a crime involving his employer would have been alleged. It could not be said that the ensuing robbery charges were brought "by reason of' his status as corporate officer because none of his corporate powers or other attributes of his corporate status were used in, or were necessary for, the commission of the robbery as described.

for the Company to bear the cost of his defense of the criminal proceeding. Because of subsequent litigation between Thornton and Perconti[36] and the procedural posture of this case, the perception of Perconti's conduct is perhaps more clear than usually would be the case. This Court's function is not to revisit the criminal proceedings or to make a judgment about Perconti's ethics or, indeed, morality. Any reference to the appropriateness of Perconti's conduct must cease before it starts because the question of culpability is resolved absolutely by the statute's lenient standard of "successful on the merits or otherwise." The dismissal of the charges against Perconti resolved that issue for purposes of indemnification for the costs incurred in defending against those charges. Ironically, Thornton's detailed analysis of Perconti's conduct – however unpalatable it may have been – amply demonstrates a course of abuse of his corporate position through a series of failures to comply with his fundamental duties to the corporation. The criminal allegations do not merely have a nexus to the corporation; instead, they arise out of the core of his duties to the

[36] See Compendium of Exhibits Cited in the Answering Brief of Thornton Oil Corporation in Opposition to Plaintiffs Motion for Summary Judgment, at Exs. B, C & E-I.

corporation.[37] For that reason, in the plain words of the statute, the charges were brought against him "by reason of the fact that" he was an officer of Thornton.[38]

Accordingly, I am satisfied that there are no material facts in dispute and that Perconti is, as a matter of law, entitled to summary judgment indemnifying him in accordance with 8 ***Del. C.*** § 145(c) for legal fees in the amount of $322,500 as incurred in his defense of the charges alleged in the Indictment.[39]

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[37] It may be useful to make an assumption, in this instance, probably one contrary to fact. Suppose that the charges against Perconti were total fabrications. In that event, it would seem that the costs of Perconti's actions in defending his integrity and honesty in investing and handling corporate funds should be indemnified in furtherance of the policies supporting indemnification generally and Section 145(c) in particular.

[38] Thornton asserts that Perconti's activities were "purely personal" and, thus, not undertaken in his corporate capacity. See *Cochran* II, mem. op. at 12 (quoting *Cochran* ***I***, mem. op 37-38) ("When a person signs an employment agreement or promissory note with the corporation he serves, he is, one, would think, acting as an individual."); ***Heffernan*** *v. Pacific Dunlop GNB Corp.*, 965 F.2d at 372 (observing that it was "not a situation in which [the director] maintained a personal trading portfolio and encountered litigation over his individual sale of security in an unrelated company"); ***Bensen*** *v. Am. Ultramar, Ltd.*, 92Civ.4420, 1996 WL 435039, at *3 (S.D.N.Y. Aug. 2, 1996) (applying foreign law patterned after Delaware's and stating that 8 *Del. C.* § 145 "does not cover transactions that are purely personal"). The sufficient answer, as set forth above, is that the criminal charges were filed against Perconti because of actions that he took in his corporate capacity and, accordingly, they were not "purely personal." If the actions have a sufficient nexus to the corporation and the officer's role in the corporation, then it is difficult to see how such actions may be characterized as "purely personal."

[39] Although Perconti and Thornton have differing views on whether the scope of indemnifiable conduct is broader under the bylaws than under 8 *Del. C.* § 145(c), they do not disagree that, if Perconti is entitled to indemnification under § 145(c), he is also entitled to indemnification under the bylaws.

E. "Fees for fees"

Perconti's motion for summary judgment also seeks a determination that he is entitled to reimbursement of the attorneys' fees and expenses that he has incurred in this action.

Under the "American Rule,"[40] each party routinely bears the burden of its own legal fees unless an exception to this general principle is applicable. For example, a litigant whose opponent acts in bad faith or frivolously may be awarded her fees.[41] The burden of legal fees may also be shifted by statute or agreement between the parties.[42]

Plaintiff relies exclusively upon Thornton's bylaws.[43] His argument is straightforward. The bylaws confer upon him rights that are contractual in nature? They provide for indemnification to the "fullest extent" allowed by Delaware law. He is entitled under the bylaws to indemnification for the costs incurred in defense of the criminal action. He will not be made

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[40] *See, e.g., Seinfeld v. Coker,* Del. Ch., C.A. No. 16964, mem. op. at 8-9, Chandler, C. (Dec. 4, 2000) (discussing the "American Rule").

[41] *See, e.g., Chamison v. HealthTrust, Inc. - The Hosp. Co.,* Del. Ch., 735 A.2d 912, 926-27 (Del. Ch. 1999), *aff'd,* 748 A.2d 407 (Del. 2000) (awarding legal fees and expenses to a former director seeking vindication of rights when the corporation acted in bad faith in refusing to meet its indemnification obligation). Perconti does not invoke this exception as a basis for an award of his fees.

[42] See DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 13-3(a), at 13-7 (2001).

[43] *See supra* note 3. "[R]ules which are used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws." *Hibbert v. Hollywood Park, Inc., 457* A.2d at 342-43.

whole if he must use a significant portion of his recovery from the Company to pay his lawyers to obtain that relief. Delaware law, as noted in *Cochran I,* allows corporations to commit to pay "fees for fees" through their bylaws. Because Thornton's bylaws may lawfully provide for "fees for fees," then "fees for fees" are encompassed within the bylaws' general grant of indemnification "to the fullest extent allowed by Delaware law."

In addition, Perconti invokes *Pike Creek* which teaches that a contractual indemnification provision, "very broad in scope," is construed under Delaware law to include the right to recover the costs of successful efforts to vindicate those indemnification rights.[45] The Supreme Court concluded that an indemnitee "is not held harmless if it must incur costs and attorney's fees in bringing suit to recover on the indemnity clause. The [indemnitor], on the other hand, can avoid such costs and attorney's fees by paying the amount due without the necessity of suit."[46]

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[44] *Salaman v. Nat 'l. Media Corp.,* Del. Super., C.A. No. 92C-01-16 1, mem. op. at 11, Del Pesco, J. (Oct. *8,* 1992); *see also Hibbert v. Hollywood Park, Inc., 457* A.2d at 342-43.

[45] *Pike Creek Chiropractic Ctr., P.A. v. Robinson, 637* A.2d 418 (Del. *1994).* In *Pike Creek,* the indemnification clause provided in pertinent part: "The Employee shall hold the Employer harmless and indemnify the Employer, its successors and assigns, against any liabilities and expenses, including attorney's fees which result from any acts and [omissions] of the Employee." *Id.* at 419-20. This language was construed to allow the employer the right to recover not only the fees it incurred in defending the malpractice action against it and its employee, but also the costs of recovering those fees from its employee.

[46] *Id.* at 422-23 (quoting *Manson-Osberg Co. v. State, 552* P.2d 654,660 (Ak. 1976)).

This Court, on several occasions, has denied applications for "fees for fees" in actions arising under both Section 145 and indemnification provisions of corporate bylaws.[47] Claims based on Section 145 have been rejected because the General Assembly could have, knew how to, but did not authorize an award of such fees.[48]

The question raised by Perconti here is whether Thornton's bylaws are to be construed as entitling him to "fees for fees." The bylaws do not expressly authorize the recovery of those fees and, indeed, they contain no language that even hints at the answer.

In ***Mayer,*** bylaws granting indemnification "to the fullest extent permissible under subsections (a) through (e) of Section 145 of the General Corporation Law of Delaware" were construed as not providing for "fees for fees." The Court concluded that bylaws authorized by 8 ***Del. C.*** § 145(c) could not be construed as allowing "fees for fees" because the inquiry, as required by 8 ***Del.*** C. § 145(a), to measure the good faith of the director in seeking indemnification would be "meaningless" since the good faith requirement imposed upon the director would "invariably be satisfied" as to his effort to seek indemnification. Thus, the Court concluded that the

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[47] ***See, e.g., Cochran I,*** mem. op. at 53-54; ***VonFeldt v. Stifel Fin. Corp.,*** Del. Ch., CA. No. 15688, mem. op. at 3-4, Chandler, C. (Aug. 18, 1997), ***rev 'd in part,*** 714 A.2d 79 (Del. ***2000); Mayer v. Executive Telecard, Ltd., 705*** A.2d at 22 l-24.

[48] ***See Mayer v. Executive Telecard, Ltd., 705*** A.2d at 221-22.

General Assembly could not have intended to authorize "fees for fees" through the structure of Section 145(a).

Thornton argues that ***Mayer*** is dispositive of the question raised by Perconti. ***Mayer,*** however, involved bylaws limited to the rights that could be conferred upon under Section 145(a)-(e). As recognized in ***Mayer,*** the potential effect of Section 145(f) was not addressed.[49] Because Thornton's bylaws authorize reimbursement to the "fullest extent" allowed by Delaware law, I now turn to consider Section 145(f), which provides:

> The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office.

Thus, to some extent, Section 145(f) allows for a "private ordering" of indemnification rights above and beyond the statutory terms. Thornton offers no reason why the bylaws, in a manner consistent with Section 145(f), could not provide for, as the result of the "private ordering" of the corporation's relationship with its corporate officers, payment of fees

[49] ***See id.*** at 225 n.7.

reasonably incurred in vindicating indemnification rights provided by both Section 145(c) and the bylaws.[50]

Under our case law, "fees for fees" may be recovered only if such recovery is expressly authorized by the bylaws.

> "This Court has clearly held that the right to . . . indemnification against fees and expenses incurred in a successful action to obtain indemnification is not found in section 145 and must be based on express provisions found either in corporate bylaws or separate agreements."[51]

Although *VonFeldt* and *Cochran I* may have focused on Section 145(a) & (b), the bylaws at issue there would have required payment of "fees for fees" if bylaws granting indemnification rights to the "fullest extent" allowed by Delaware law and Section 145(f) acted together to confer that right. In *Cochran I,* for example, the bylaws provided for indemnification

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[50] I need not determine, for present purposes, whether in order to rely upon a bylaw provision premised upon Section 145(f), Perconti would have to satisfy Section 145(a)'s good faith requirement, not only as to his pursuit of the indemnification action, but also as to the conduct which led to the incurring of those expenses for which indemnification was sought. *Mayer* may be read as directing the focus of the good faith analysis under Section 145(a) to the decision to seek indemnification. On the other hand, if the recovery of "fees for fees" is viewed as part of the corporation's duty to indemnify for bad faith conduct (but required by Section 145(c) because the officer prevailed in the criminal action) then the corporation could be seen as indemnifying the officer for expenses incurred as a product of his bad faith conduct, expenses not mandated by Section 145(c). For an analysis distinguishing between Section 145(a) with its good faith obligation and Section 145(c) without a good faith obligation, see *Waltuch v. Conticommodity Servs.*, *88* F.3d at 95-97.

[51] *Cochran I,* mem. op. at 53-54 (quoting *VonFeldt,* mem. op. at 3-4). An example of a provision in a certificate of incorporation expressly authorizing "fees for fees" may be found in *Chamison v. HealthTrust, Inc., 735* A.2d at 927.

"to the full extent authorized by law."[52] Although the Court acknowledged that "[Section] 145(f) suggests that a corporation's decision to provide broader indemnification rights should not be disturbed unless those broader rights are 'contrary to the limitations or prohibitions set forth in the other Section 145 subsections, or other statutes, court decisions or public policy . . .,'"[53] it, nonetheless, concluded that "fees for fees" could not be awarded. Thus, "fees for fees" applications based on bylaws comparable to the Thornton bylaws have been denied.

Moreover, ***Pike Creek*** cannot be read to save Perconti's claim.[54] The policies behind the general contract law of Delaware, as enunciated in ***Pike Creek,*** are different from the particular considerations motivating the indemnification of officers and directors, whether directly pursuant to statute or through bylaws as authorized by statute. Even though the "private ordering" allowed by Section 145(f) may go beyond the precise legislative purposes that resulted in enactment of Section 145, any bylaw adopted under Section 145, including Section 145(f), must be viewed in the context of

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[52] *Cochran I,* mem. op. at 4.

[53] ***Id***. at 47 (quoting *E. Norman Veasey et al., Delaware Supports Directors with a* ***Three-****Legged Stool* ***of*** *Limited Liability, Indemnification, and Insurance, 42* **BUS. LAW.** *399,* 415 (1987)).

[54] I note that *Cochran* ***I, VonFeldt,*** and *Mayer* were all written after *Pike Creek. See also Chamison v.* ***HealthTrust,*** *Inc.,* 735 A.2d at 926-27 '(discussing both corporate indemnification and *Pike Creek).*

corporate indemnification, which has history and policy different from those implicated in ***Pike Creek.***

Section 145(f) accords the corporation flexibility in structuring its indemnification obligations in ways that are yet to evolve. To hold that Section 145(f) and a standard bylaw providing for indemnification to the "fullest extent" of the law join forces to confer indemnification rights to the furthest frontier of indemnification, in my judgment, would be inconsistent with the common understanding given to such provisions. The simple, and certainly not original, answer is that, if the drafters of the bylaws intended for the corporation to pay "fees for fees," it would have been easy enough to have drafted such a provision explicitly? Because of the unique aspects of further subjecting the corporation to potential liability for "fees for fees," especially where the good faith of the person seeking them may be questioned, and because of the tradition of not awarding "fees for fees" in indemnification actions under 8 ***Del. C.*** § 145(c),[56] I am reluctant to conclude that those who adopted Thornton's bylaw indemnification with its very general, but broad, language intended to include "fees for fees."

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[55] ***See Cochran II,*** mem. op. at 28. Alternatively, this concern could be addressed through a separate agreement.

[56] ***See Mayer v. Executive Telecard, Ltd., 705*** A.2d at 222.

Thus, notwithstanding Section 145(f) and the broad language of Thornton's bylaws, but particularly in light of the compelling case law requiring that any award of "fees for fees" must be expressly authorized by the bylaws, I am satisfied that Thornton's bylaws may not be interpreted as authorizing or requiring the payment to Perconti of "fees for fees."[57] Accordingly, Perconti's motion for summary judgment on this claim will be denied.

IV. Conclusion

For the above reasons, I grant Perconti's Motion for Summary Judgment on his claim for indemnification of legal fees and expenses in the amount of $322,500 as incurred in the defense of the Indictment, but I deny his motion on his claim for an award of the legal fees and expenses incurred in the prosecution of this action.

I ask that counsel confer and submit an implementing form of order.

Vice Chancellor

[57] *See VonFeldt v. Stifel Fin. Corp.*, 714 A.2d at 86 n.29 (noting that this issue has not been addressed at the appellate level).