

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

|                            |   |                       |
|----------------------------|---|-----------------------|
| KYLE ROBERTSON,            | ) |                       |
|                            | ) |                       |
| Plaintiff,                 | ) |                       |
|                            | ) |                       |
| v.                         | ) |                       |
|                            | ) | C.A. No. 2026-0429-DH |
| CEREBRAL, INC., a Delaware | ) |                       |
| Corporation,               | ) |                       |
|                            | ) |                       |
| Defendant.                 | ) |                       |
|                            | ) |                       |
|                            | ) |                       |
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|                            | ) |                       |

**REPORT**

Report: October 29, 2026  
Date Submitted: September 24, 2026

Andrew H. Sauder, Daniel S. Atlas, Matthew R. Conrad, DAILEY LLP; *Attorneys for Plaintiff.*

Jason C. Jowers, Stephen B. Brauerman, Sarah T. Andrade, Abraham C. Schneider, BAYARD, P.A.; *Attorneys for Defendant.*

**HUME, IV, M.**

The United States Department of Justice sued a company’s former CEO for misconduct during his tenure and at new corporate ventures that followed. The former CEO sought advancement from the company to pay for his entire defense. The company paid initially. As the United States amended its complaints and narrowed its focus to conduct at other entities, the company objected to footing the whole bill. This litigation ensued. For the reasons below, I find the former CEO’s conduct to be roughly apportionable across the entities and grant only a portion of the advancement requested.

## **I. BACKGROUND<sup>1</sup>**

### **A. The Parties**

Plaintiff Kyle Robertson was one of Defendant Cerebral, Inc.’s co-founders and served as its CEO.<sup>2</sup> Cerebral is a Delaware corporation that provides a range of telehealth services but focuses primarily on mental health treatment and medication.<sup>3</sup>

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<sup>1</sup> I draw the following facts from the pleadings and other documents of record. Unless otherwise noted, pleadings and their associated declarations and exhibits are cited by reference to items docketed in C.A. No. 2026-0429-DH. Citations are to: Plaintiff’s Verified Complaint for Advancement (“Compl.”), Docket Item (“D.I.”) 1; Jointly Submitted Stipulation and Pretrial Order (“PTO”), D.I. 51; Plaintiff’s Pretrial Opening Brief (“POB”), D.I. 54; Defendant’s Pretrial Opening Brief (“DOB”), D.I. 55; Plaintiff’s Pretrial Answering Brief (“PAB”), D.I. 59; Trial Transcript (“Trial Tr.”), D.I. 71; and Joint Trial Exhibits (“JX”).

<sup>2</sup> D.I. 1 ¶¶ 1, 20; PTO ¶ 7.

<sup>3</sup> D.I. 1 ¶ 7.

As CEO of Cerebral, Robertson reviewed and approved privacy and data-security policies, supervised marketing, and participated in data-breach responses.<sup>4</sup>

## **B. The Indemnity Agreement and Bylaws.**

A February 2019 indemnity agreement (the “Indemnity Agreement”) and Cerebral’s February 2022 Amended and Restated Bylaws (the “Bylaws”) govern Robertson’s indemnification and advancement rights.<sup>5</sup>

### **1. The Indemnity Agreement.**

The Indemnity Agreement defines “proceedings” as:

[a]ny threatened, pending, or completed action, suit, arbitration, alternate dispute resolution mechanism, investigation, inquiry, administrative hearing or any other actual, threatened or completed proceeding, whether brought in the right of the Company or otherwise and whether of a civil, criminal, administrative or investigative nature, and whether formal or informal in any case, in which Indemnatee was, is or will be involved as a party or otherwise by reason of: (i) the fact that Indemnatee is or was a director or officer of the Company; (ii) the fact that any action taken by Indemnatee or of any action on Indemnatee’s part while acting as director, officer, employee or agent of the Company; or (iii) the fact that Indemnatee is or was serving at the request of the Company as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, employee benefit plan or other enterprise, and in any such case described above, whether or not serving in any such capacity at the time any liability or expense is incurred for which indemnification, reimbursement, or advancement of expenses may be provided under this Agreement.<sup>6</sup>

Section 6 of the Indemnity Agreement provides:

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<sup>4</sup> JX 15 ¶¶ 6–7.

<sup>5</sup> D.I. 1 ¶ 8; JX 1, 2.

<sup>6</sup> JX 1 § 2(c).

**6. ADVANCEMENT OF EXPENSES.** To the extent not prohibited by law, the Company shall advance the expenses incurred by Indemnatee in connection with any proceeding, and such advancement shall be made within twenty (20) days after the receipt by the Company of a statement or statements requesting such advances (which shall include invoices received by Indemnatee in connection with such expenses but, in the case of invoices in connection with legal services, any references to legal work performed or to expenditures made that would cause Indemnatee to waive any privilege accorded by applicable law shall not be included with the invoice) and upon request of the Company, an undertaking to repay the advancement of expenses if and to the extent that it is ultimately determined by a court of competent jurisdiction in a final judgment, not subject to appeal, that Indemnatee is not entitled to be indemnified by the Company. Advances shall be unsecured, interest free and without regard to Indemnatee's ability to repay the expenses. Advances shall include any and all expenses actually and reasonably incurred by Indemnatee pursuing an action to enforce Indemnatee's right to indemnification under this Agreement, or otherwise, and this right of advancement, including expenses incurred preparing and forwarding statements to the Company to support the advances claimed. Indemnatee acknowledges that the execution and delivery of this Agreement shall constitute an undertaking providing that Indemnatee shall, to the fullest extent required by law, repay the advance if and to the extent that it is ultimately determined by a court of competent jurisdiction in a final judgment, not subject to appeal, that Indemnatee is not entitled to be indemnified by the Company. The right to advances under this Section shall continue until final disposition of any proceeding, including any appeal therein. This Section 6 shall not apply to any claim made by Indemnatee for which indemnity is excluded pursuant to Section 10(b).<sup>7</sup>

Section 8 of the Indemnity Agreement addresses Cerebral's assumption of Robertson's defense:

**8. ASSUMPTION OF DEFENSE.** In the event the Company shall be requested by Indemnatee to pay the expenses of any proceeding, the

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<sup>7</sup> *Id.* § 8.

Company, if appropriate, shall be entitled to assume the defense of such proceeding, or to participate to the extent permissible in such proceeding, with counsel reasonably acceptable to Indemnitee. Upon assumption of the defense by the Company and the retention of such counsel by the Company, the Company shall not be liable to Indemnitee under this Agreement for any fees of counsel subsequently incurred by Indemnitee with respect to the same proceeding, provided that Indemnitee shall have the right to employ separate counsel in such proceeding at Indemnitee's sole cost and expense. Notwithstanding the foregoing, if Indemnitee's counsel delivers a written notice to the Company stating that such counsel has reasonably concluded that there may be a conflict of interest between the Company and Indemnitee in the conduct of any such defense or the Company shall not, in fact, have employed counsel or otherwise actively pursued the defense of such proceeding within a reasonable time, then in any such event the fees and expenses of Indemnitee's counsel to defend such proceeding shall be subject to the indemnification and advancement of expenses provisions of this Agreement.<sup>8</sup>

## **2. The Bylaws.**

Article XI of the Bylaws governs indemnification and advancement. Section

1(a) provides:

**(a) Indemnification of Directors, Executive Officers, Employees and Other Directors and Executive Officers.** The corporation shall indemnify its directors and executive officers (for the purposes of this Article, "executive officers" shall have the meaning defined in Rule 3b-7 promulgated under the 1934 Act) to the fullest extent not prohibited by the DGCL or any other applicable law; provided, however, that the corporation may modify the extent of such indemnification by individual contracts with its directors and executive officers; and, provided, further, that the corporation shall not be required to indemnify any director or executive officer in connection with any proceeding (or part thereof) initiated by such person unless (i) such indemnification is expressly required to be made by law, (ii) the

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<sup>8</sup> *Id.* § 7.

proceeding was authorized by the Board of Directors of the corporation, (iii) such indemnification is provided by the corporation, in its sole discretion, pursuant to the powers vested in the corporation under the DGCL or any other applicable law or (iv) such indemnification is required to be made under paragraph (d) of this Section.<sup>9</sup>

Section 1(c) addresses advancement:

The corporation shall advance to any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such person is or was a director or executive officer of the corporation, or is or was serving at the request of the corporation as a director or executive officer of another corporation, partnership, joint venture, trust or other enterprise, prior to the final disposition of the proceeding, promptly following request therefor, all expenses incurred by any director or executive officer in connection with such proceeding; provided, however, that, if the DGCL requires, an advancement of expenses incurred by a director or officer in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the corporation of an undertaking, by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal that such indemnitee is not entitled to be indemnified for such expenses under this Section or otherwise.<sup>10</sup>

### **C. Robertson's Departure and the Formation of Zealthy.**

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<sup>9</sup> JX 2 Art. XI § 1(a).

<sup>10</sup> *Id.* at pp. 20–21.

In spring 2022, the United States Department of Justice (the “DOJ”) began investigating Robertson.<sup>11</sup> Cerebral terminated Robertson in May 2022.<sup>12</sup> Several months later, Robertson formed Zealhy, a new telehealth company offering online subscriptions, and incorporated it in Delaware on December 15, 2022.<sup>13</sup> Robertson served as Zealhy’s CEO, and German Echeverry served as Zealhy’s Senior Medical Director.<sup>14</sup> Both also held positions at Bruno Health, a Zealhy affiliate that provided telehealth services to Zealhy subscribers.<sup>15</sup> Robertson was its CFO, and Echeverry was its President.<sup>16</sup>

#### **D. The Florida Action and Amendments to the Complaint.**

The spring 2022 investigation prompted the DOJ to file suit against Cerebral and Robertson in April 2024.<sup>17</sup> This suit is still pending in the United States District Court for the Southern District of Florida under Case No. 24-cv-21376-RAR (the

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<sup>11</sup> PTO ¶ 11.

<sup>12</sup> PTO ¶ 6.

<sup>13</sup> *Id.*; JX 15 ¶ 41.

<sup>14</sup> D.I. 14 pp. 9–10.

<sup>15</sup> JX 15 ¶¶ 205–06.

<sup>16</sup> JX 15 ¶¶ 204–05

<sup>17</sup> PTO ¶ 14.

“Florida Action”). Within days of the filing of the original Complaint, Cerebral filed a notice of settlement.<sup>18</sup> The DOJ subsequently amended its Complaint three times.<sup>19</sup>

### **1. The Original and First Amended Complaints.**

The original Complaint asserted six counts against Cerebral and Robertson.<sup>20</sup> Counts I through IV alleged violations of Section 5 of the FTC Act (“Section 5”) arising from deceptive privacy practices, deceptive data security practices, unfair privacy and data security practices, and deceptive cancellation practices.<sup>21</sup> Count V alleged violations of the Opioid Act, and Count VI alleged violations of the Restore Online Shoppers’ Confidence Act (“ROSCA”).<sup>22</sup>

The DOJ filed the First Amended Complaint the following month.<sup>23</sup> It retained all six claims and added three more.<sup>24</sup> Counts I through IV continued to assert the same Section 5 claims against Cerebral and Robertson.<sup>25</sup> A new Count V asserted a Section 5 claim against Robertson and Alex Martelli, Cerebral’s Director of Product and Group Product Manager, for unfair and deceptive marketing and

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<sup>18</sup> D.I. 14 p. 8.

<sup>19</sup> *See* JX 4, 15, 53.

<sup>20</sup> JX 3 ¶¶ 159–85.

<sup>21</sup> *Id.* ¶¶ 159–77.

<sup>22</sup> *Id.* ¶¶ 178–85.

<sup>23</sup> PTO ¶ 17.

<sup>24</sup> JX 3 ¶¶ 159–85; JX 4 ¶¶ 256–99.

<sup>25</sup> JX 3 ¶¶ 159–77; JX 4 ¶¶ 256–99.

consumer review practices.<sup>26</sup> The original Opioid Act and ROSCA claims became Counts VI and VII, respectively, with Martelli added as a defendant to the Opioid Act claim.<sup>27</sup> The DOJ also added two claims against Robertson, Echeverry, Zealthy, and Bruno Health: Count VIII alleged unfair and deceptive practices under Section 5, and Count IX alleged violations of ROSCA.<sup>28</sup>

## **2. The Second Amended Complaint and Motion to Dismiss.**

In May 2025, the DOJ filed the Second Amended Complaint (“SAC”), which asserted no counts against Cerebral and omitted the Opioid Act claim.<sup>29</sup> Counts I through IV retained the original privacy, data security, and cancellation claims, but asserted them against Robertson alone.<sup>30</sup> Count V retained the marketing and consumer review claim against Robertson and Martelli, while Count VI retained the original ROSCA claim against Robertson alone.<sup>31</sup> The claims previously asserted as Counts VIII and IX became Counts VII and X, respectively, and continued to name Robertson, Echeverry, Zealthy, and Bruno Health.<sup>32</sup> The DOJ also added two

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<sup>26</sup> JX 4 ¶¶ 274–79.

<sup>27</sup> JX 3 ¶¶ 178–85; JX 4 ¶¶ 280–87.

<sup>28</sup> JX 4 ¶¶ 288–99.

<sup>29</sup> JX 15 ¶¶ 318–70; JX 4 ¶¶ 280–82.

<sup>30</sup> JX 3 ¶¶ 159–77; JX 15 ¶¶ 318–35.

<sup>31</sup> JX 4 ¶¶ 274–79, 283–87; JX 15 ¶¶ 336–46.

<sup>32</sup> JX 4 ¶¶ 288–89; JX 15 ¶¶ 347–54, 366–70.

claims against Robertson, Zealhy, and Bruno Health; Count VIII alleged unfair and deceptive marketing and consumer review practices under Section 5, and Count IX alleged violations of the FTC's Rule on the Use of Consumer Reviews and Testimonials.<sup>33</sup> Each count incorporates the preceding allegations.<sup>34</sup>

Counts I through VI address alleged practices at Cerebral, including privacy representations and disclosures, data-security representations and safeguards, cancellation obstacles, fabricated or compensated reviews, and subscription disclosures, consent, and cancellation mechanisms.<sup>35</sup> Counts VII through X address alleged practices at Zealhy and Bruno Health.<sup>36</sup> These allegations include misleading subscription and service representations, unauthorized charges, cancellation obstacles, privacy and security practices, improper telemedicine practices, fabricated and manipulated reviews, and ROSCA violations.<sup>37</sup>

Beginning at Section VII, paragraph 201, the SAC shifts from Robertson's conduct at Cerebral to his subsequent activities at Zealhy.<sup>38</sup> In describing those activities, the DOJ compares Zealhy's unusually high chargeback rate with

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<sup>33</sup> JX 15 ¶¶ 355–65.

<sup>34</sup> *See, e.g.*, JX 15 ¶¶ 318, 347, 366.

<sup>35</sup> *Id.* ¶¶ 319–46.

<sup>36</sup> *Id.* ¶¶ 348–70.

<sup>37</sup> *Id.* ¶¶ 348–52, 356–65, 367–70.

<sup>38</sup> *Id.* ¶¶ 200–05.

Cerebral's rate while Robertson served as CEO.<sup>39</sup> It also compares Robertson's alleged direction of fabricated reviews and suppression of authentic negative reviews at Zealthy and Bruno Health with his alleged conduct at Cerebral.<sup>40</sup> The DOJ further relies on Robertson's experience and the legal guidance he received at Cerebral to allege his knowledge of ROSCA's requirements.<sup>41</sup> As to the Cerebral review practices, the DOJ alleges that a December 2023 announcement of a settlement with Cerebral and the filing of the First Amended Complaint put Robertson on Notice that the challenged practices were unlawful.<sup>42</sup>

Robertson moved to dismiss Counts I through V of the SAC on the ground that the DOJ had failed to allege ongoing or impending violations warranting prospective injunctive relief because the challenged Cerebral conduct had occurred more than three years earlier.<sup>43</sup> The DOJ opposed dismissal, arguing that Robertson's ongoing Zealthy conduct supported injunctive relief based on his

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<sup>39</sup> *Id.* ¶ 266.

<sup>40</sup> *Id.* ¶¶ 279, 298.

<sup>41</sup> *Id.* ¶¶ 248–52.

<sup>42</sup> *Id.* ¶¶ 295, 297.

<sup>43</sup> Trial Tr. 28:4–29:7, 29:11–30:6.

Cerebral conduct.<sup>44</sup> Its opposition included a chart comparing practices at the two companies.<sup>45</sup>

According to Michael Pineiro, Robertson’s current counsel in the Florida Action, the DOJ’s position required him to defend the Zealthy allegations to defend the Cerebral-related counts.<sup>46</sup> He testified that he would have needed to perform this work even without Counts VII through X of the SAC.<sup>47</sup> In the same testimony, Pineiro expressly described Counts VII through X as pertaining only to Zealthy.<sup>48</sup>

### **3. The Third Amended Complaint.**

On April 10, 2026, the DOJ filed the Third Amended Complaint (“TAC”), narrowing the action to three counts against Robertson and Zealthy.<sup>49</sup> Count I alleged violations of ROSCA; Count II alleged unfair and deceptive practices under Section 5; and Count III alleged violations of the FTC’s Rule on the Use of Consumer Reviews and Testimonials.<sup>50</sup> It omitted separate counts for the original privacy, data security, and cancellation claims and for the marketing and consumer

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<sup>44</sup> *Id.* 31:3–20.

<sup>45</sup> *Id.* 31:21–32:6.

<sup>46</sup> *Id.* 8:13–24, 34:8–35:14.

<sup>47</sup> *Id.* 36:10–24.

<sup>48</sup> *Id.* 36:14–24 (“If you excise Counts VII to X, which only pertain to Zealthy . . .”).

<sup>49</sup> PTO ¶ 27; JX 53.

<sup>50</sup> JX 53 ¶¶ 283–99.

review claim against Robertson and Martelli.<sup>51</sup> It also removed Martelli, Echeverry, and Bruno Health as defendants.<sup>52</sup> The TAC relies on Robertson’s Cerebral-era regulatory involvement and the New York Attorney General investigation to allege knowledge of the applicable legal requirements.<sup>53</sup>

Count I of the TAC expressly addresses conduct at both Cerebral and Zealhy.<sup>54</sup> It alleges Cerebral-related failures to disclose health-data practices, Zealhy-related failures to disclose subscription terms, and cancellation and unauthorized charging practices at both companies.<sup>55</sup> Count II’s specific allegations concern only Zealhy’s practices, including cancellation representations, undisclosed charges, medication costs, and allegedly illegitimate telemedicine services.<sup>56</sup> Count III alleges violations of the FTC’s Rule on the Use of Consumer Reviews and Testimonials against Robertson and Zealhy.<sup>57</sup> The TAC nevertheless

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<sup>51</sup> JX 15 ¶¶ 318–41; JX 53 ¶¶ 283–99.

<sup>52</sup> JX 15 ¶¶ 336–41, 347–70; JX 53 ¶¶ 12–15, 283–99.

<sup>53</sup> JX 53 ¶¶ 258–64.

<sup>54</sup> *Id.* ¶¶ 285–88.

<sup>55</sup> *Id.* ¶¶ 285–88.

<sup>56</sup> *Id.* ¶¶ 292–95.

<sup>57</sup> *Id.* ¶¶ 296–99.

retains substantial background allegations concerning Cerebral, although it names only Robertson and Zealthy as defendants.<sup>58</sup>

## **E. Robertson’s Representation and the Advancement Dispute.**

### **1. Counsel Changes and Initial Advancement Discussions.**

In connection with the DOJ investigation, Robertson engaged Quinn Emanuel Urquhart & Sullivan LLP to represent him.<sup>59</sup> Cerebral began advancing Robertson’s expenses as early as August 2022.<sup>60</sup> Quinn Emanuel continued to represent Robertson until February 2025, when Paul Hastings LLP replaced it as counsel.<sup>61</sup> Shortly after the DOJ filed the SAC in May 2025, Marcus, Rashbaum, Pineiro and Meyers LLC (“MRPM”) replaced Paul Hastings.<sup>62</sup>

Following MRPM’s substitution, Pineiro and Thomas A. Bednar, outside counsel for Cerebral, discussed Cerebral’s advancement obligations concerning Robertson’s representation.<sup>63</sup> During this discussion, Bednar requested a budget.<sup>64</sup> Pineiro gave a rough estimate of approximately \$100,000 per month, but cautioned

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<sup>58</sup> JX 53 ¶¶ 12–15, 32–98.

<sup>59</sup> PTO ¶ 12.

<sup>60</sup> *Id.* ¶ 13.

<sup>61</sup> *Id.* ¶¶ 18–19.

<sup>62</sup> *Id.* ¶ 21.

<sup>63</sup> *Id.* ¶ 22.

<sup>64</sup> Trial Tr. 13:21–14:15.

that extensive discovery could increase the expense.<sup>65</sup> Pineiro assured Bednar that MRPM's billing would be transparent and reasonable compared to previous counsel's billing.<sup>66</sup>

Pineiro testified at trial that he understood Bednar and Cerebral to be concerned that MRPM would bill Cerebral for Zealthy's defense.<sup>67</sup> He reassured Bednar that Zealthy had separate counsel and that MRPM represented only Robertson.<sup>68</sup> Pineiro denied agreeing to bill Cerebral-related and Zealthy-related work separately.<sup>69</sup> He also testified that he and Bednar did not discuss Zealthy-related work necessary to defend the Cerebral claims.<sup>70</sup> Cerebral, however, maintained that Bednar and Pineiro agreed that MRPM would not bill Cerebral for Zealthy-related work.<sup>71</sup>

## **2. Discovery Expenses and Unpaid Invoices.**

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<sup>65</sup> *Id.* 14:6–11.

<sup>66</sup> *Id.* 14:12–15.

<sup>67</sup> *Id.* 14:17–15:5, 15:22–16:4.

<sup>68</sup> *Id.* 15:1–5, 15:22–16:4.

<sup>69</sup> *Id.* 15:17–23.

<sup>70</sup> *Id.* 15:6–16.

<sup>71</sup> *Id.* 227:9–228:12. Cerebral relied on Bednar's deposition testimony, affidavit, and contemporaneous email to support its understanding. *Id.* 228:2–12. Because I find the Cerebral-related and Zealthy-related work roughly apportionable independently of any alleged billing agreement, I need not resolve whether Bednar and Pinerio reached such an agreement.

Cerebral paid MRPM's first five invoices in full without requesting separate invoices for Cerebral-related and Zealthy-related work, requesting more detailed entries, or otherwise raising billing issues before payment.<sup>72</sup> On November 10, 2025, MRPM submitted separate invoices for its October legal work and third-party discovery services.<sup>73</sup> These were the first invoices Cerebral failed to pay.<sup>74</sup> Pineiro repeatedly followed up with Cerebral concerning payment.<sup>75</sup> On January 13, 2026, he emailed Bednar, explaining that the outstanding balance of \$263,326.50 was unsustainable for a boutique firm and could impede MRPM's ability to defend the case.<sup>76</sup>

On January 22, Pineiro spoke with Peter Healy of McDermott Will & Emery LLP, who also served as Cerebral's outside counsel.<sup>77</sup> According to Pineiro, Healy said Cerebral needed to raise more capital.<sup>78</sup> Pineiro also recalled Healy stating that

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<sup>72</sup> JX 69; Trial Tr. 46:14–22.

<sup>73</sup> JX 30.

<sup>74</sup> Trial Tr. 49:8–9, 55:7–10; JX 69.

<sup>75</sup> JX 34, 36, 38, 39, 43.

<sup>76</sup> JX 39.

<sup>77</sup> PTO ¶ 26; Trial Tr. 55:14–20, 69:6–18.

<sup>78</sup> Trial Tr. 69:15–24.

he was unaware of a dispute over the invoices, although Pineiro was uncertain whether that statement occurred during the January 22 call or an earlier call.<sup>79</sup>

### **3. The Advancement Demand and Cerebral's Response.**

According to Pineiro, Cerebral had not raised objections concerning invoice form, segregation, or Zealthy-related fees when Robertson made an advancement demand on February 19.<sup>80</sup> Cerebral's response requested separate invoices for Robertson's Cerebral-era actions and his subsequent actions.<sup>81</sup> Pineiro testified that this was the first such request.<sup>82</sup> Cerebral also sought separate invoices for vendor costs and legal fees and the exclusion of "ramp-up" time.<sup>83</sup> It indicated that it might raise additional questions or audit the invoices.<sup>84</sup>

### **F. Procedural Posture.**

Robertson filed this advancement action in March 2026, seeking payment of more than \$800,000 in outstanding fees.<sup>85</sup> On April 29, Robertson moved for summary judgment.<sup>86</sup> I denied Robertson's motion, finding that expenses associated

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<sup>79</sup> *Id.* 70:1–9.

<sup>80</sup> *Id.* 74:9–21; JX 45.

<sup>81</sup> Trial Tr. 75:6–13; JX 48.

<sup>82</sup> Trial Tr. 75:10–13.

<sup>83</sup> *Id.* 76:20–24, 77:12–21; JX 48.

<sup>84</sup> Trial Tr. 77:22–78:4.

<sup>85</sup> PTO ¶¶ 1, 24.

<sup>86</sup> D.I. 11.

with Cerebral and Zealthy were roughly apportionable.<sup>87</sup> Robertson then moved for reargument, which I denied on June 18.<sup>88</sup>

On July 27, Cerebral invoked its contractual assumption-of-defense right and proposed Jason Hernandez of Stearns Weaver to represent Robertson concerning claims asserted against him in his capacity as Cerebral's former CEO.<sup>89</sup> Robertson's counsel objected by letter dated July 29.<sup>90</sup>

Robertson moved for a protective order barring Cerebral from deposing him.<sup>91</sup> After hearing oral argument on the motion in September, I issued a bench ruling granting the motion.<sup>92</sup> I held trial on September 24, after which I took the matter under advisement.<sup>93</sup>

The parties agree that the Florida Action falls within the definition of a "proceeding" in the Indemnity Agreement<sup>94</sup> and that Robertson is entitled to advancement for Counts I through VI of the SAC.<sup>95</sup> The remaining dispute concerns

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<sup>87</sup> D.I. 20.

<sup>88</sup> D.I. 23; D.I. 26.

<sup>89</sup> Trial Tr. 88:9–22; JX 60.

<sup>90</sup> Trial Tr. 89:7–17; JX 61.

<sup>91</sup> D.I. 40.

<sup>92</sup> D.I. 58.

<sup>93</sup> D.I. 67.

<sup>94</sup> PTO ¶ 15.

<sup>95</sup> JX 62 pp. 7–8.

advancement for Counts VII through X of the SAC and Counts I through II of the TAC.

## II. ANALYSIS

### **A. Robertson is Entitled to Advancement for Counts I through VI of the SAC; He is Not Entitled to Advancement for SAC Counts VII Through X.**

#### **1. Work between Cerebral and Zealhy is Roughly Apportionable.**

When bylaws and contracts provide for mandatory advancement, “the company carries the ultimate burden of proving that advancement is not required.” *Krauss v. 180 Life Scis. Corp.*, 2022 WL 665323, at \*4 (Del. Ch. Mar. 7, 2022). I denied Plaintiff’s Motion for Summary Judgment, finding that expenses incurred between Cerebral and Zealhy were likely to be roughly apportionable.<sup>96</sup> During trial, I again considered whether expenses were apportionable. The Court’s apportionment test is well-settled: “Would the disputed expenses have been incurred in defense of the covered proceeding even if there was no non-covered proceeding? If the answer is yes, then the disputed expenses are advanceable.” *White v. Curo*, 2017 WL 1369332, at \*10 (Del. Ch. Feb. 21, 2017) (citation modified).

The Court should undertake apportionment review only when it can do so “realistically without significant burden to the Court.” *Holley v. Nipro Diagnostics*,

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<sup>96</sup> D.I. 22.

*Inc.*, 2015 WL 4880418, at \*1 (Del. Ch. Aug. 14, 2015). The fact that a portion of the case is subject to advancement does not mean that all expenses in the case must be advanced. *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 175 (Del. Ch. 2003) (“[*Roven*], which involved complex facts, does not hold that a plaintiff seeking advancement is entitled to have *all* of his expenses advanced if he merely proves that some portion of the case against him is subject to a contractual right of advancement.”).

Advancement is subject to a reasonableness requirement. *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at \*16 (Del. Ch. May 30, 2008). A claim is advanceable only if it arises “by reason of the fact that he was a director or officer of Cerebral.” Robertson is entitled to advancement where the DOJ “pursued” him by reason of the fact that he was Cerebral’s director or officer. *See Marino v. Patriot Rail Co.*, 131 A.3d 325, 346 (Del. Ch. 2016) (“The scope of an individual’s advancement rights normally turns on the pleadings in the underlying litigation that trigger the advancement right.”). Under the circumstances and the DOJ’s charges, he is not entitled to advancement for his conduct after he resigned. *Id.*

Pineiro acknowledged that Counts VII through X concerned only Robertson’s conduct at Zealthy, but maintained that defending Counts I through VI required

addressing the Zealthy conduct even without Counts VII through X.<sup>97</sup> The counts are temporally distinct, and each grouping relates only to Robertson's acts at that respective company. As analyzed below, I find the advancement roughly apportionable between Cerebral and Zealthy conduct.

## **2. The DOJ's Complaint Does Not Transform Zealthy Conduct Into Cerebral-based Conduct.**

The Indemnity Agreement and Cerebral's Bylaws provide Robertson with indemnification and advancement rights in proceedings arising "by reason of the fact" that he was a director or officer of Cerebral.<sup>98</sup> The parties do not dispute that the Florida Action is a "proceeding."<sup>99</sup> Cerebral agrees that Robertson is entitled to advancement for Counts I through VI of the SAC, but contends that Counts VII through X are non-advanceable because they concern his conduct at Zealthy and elsewhere.<sup>100</sup>

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<sup>97</sup> Trial Tr. 36:14–18 ("If you excise Counts VII to X, which only pertain to Zealthy, based on the background allegations which are incorporated by reference and used to support all of the other claims, I would have had to [do work relating to Robertson's time as Zealthy]."); Pl.'s Notice of Lodging of Dep. Tr., Ex. 3 at 42:10–15, D.I. 64 ("Separate from that, counts seven to 12 also were also brought against Mr. Robertson and Zealthy. And those were different causes of action that pertained solely to things that have occurred at Zealthy. But you can see the claims are sort of intertwined based on the way the government pled it.").

<sup>98</sup> JX 1 §§ 1(c), 6; JX 2 Art. XI § 1(a), 1(c).

<sup>99</sup> PTO ¶ 15.

<sup>100</sup> DOB at p. 32.

The Court reviews requests for indemnification and advancement on a claim-by-claim basis. *Paolino v. Mace Sec. Int’l, Inc.*, 985 A.2d 392, 400 (Del. Ch. 2009). “[I]f there is a nexus or causal connection between any of the underlying proceedings . . . and one’s official capacity, those proceedings are ‘by reason of the fact’ that one was a corporate officer, without regard to one’s motivation for engaging in that conduct.” *Homestore v. Taffeen*, 888 A.2d 205, 214 (Del. 2005). A nexus or causal connection “is established if the corporate powers were used or necessary for the commission of the alleged misconduct.” *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007). That said, “the conduct complained of must occur at a time when one is a corporate officer or director.” *Id.* To put it succinctly, claims for advancement “can be parsed ‘where a bright-line, temporal standard’ can be applied to demarcate advanceable claims from non-advanceable claims.” *Ahmed v. JPMorgan Chase & Co.*, 2026 WL 251542, at \*9 (Del. Ch. Jan. 21, 2026) (quoting *Mooney v. Echo Therapeutics*, 2015 WL 3413272, at \*7 (Del. Ch. May 28, 2015)).

A bright-line, temporal standard exists here. When the DOJ filed the SAC, both Cerebral and Robertson were parties.<sup>101</sup> The Complaint began with Robertson’s Cerebral conduct and pivoted to his post-Cerebral activity beginning at

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<sup>101</sup> JX 15.

Section VII and paragraph 201.<sup>102</sup> The Counts reflect a similar shift. Counts I through IV are against Robertson individually and relate to his conduct at Cerebral.<sup>103</sup> Count V involves Robertson's conduct, along with another co-defendant, Martelli, while at Cerebral.<sup>104</sup> Count VI involves only Robertson during his time at Cerebral.<sup>105</sup> Again, to the extent that Counts I through VI are by reason of the fact of Robertson's role as an officer or director at Cerebral, the parties are aligned that Robertson is entitled to advancement.

The remaining counts involve Robertson's conduct after he left Cerebral. Count VII is against Robertson and co-defendants Echeverry, Zealthy, and Bruno Health.<sup>106</sup> Count VII does not mention Cerebral.<sup>107</sup> Count VIII is against Robertson, Zealthy, and Bruno Health.<sup>108</sup> Again, there is no mention of Cerebral in Count VIII's language.<sup>109</sup> Count IX is against Robertson, Zealthy, and Bruno Health.<sup>110</sup>

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<sup>102</sup> See JX 15 ¶ 201.

<sup>103</sup> *Id.* ¶¶ 318–35.

<sup>104</sup> *Id.* ¶¶ 336–41.

<sup>105</sup> *Id.* ¶¶ 342–46.

<sup>106</sup> JX 15 ¶¶ 347–54.

<sup>107</sup> See *Id.*

<sup>108</sup> *Id.* ¶¶ 355–62.

<sup>109</sup> See *Id.*

<sup>110</sup> *Id.* ¶¶ 363–65.

As with the others, Count IX does not reference Cerebral.<sup>111</sup> Finally, Count X is against Robertson, Echeverry, Zealhy, and Bruno Health, likewise making no reference to Cerebral.<sup>112</sup>

But the analysis does not turn solely on whether Counts VII through X mention Cerebral. The DOJ's narrative complaint references Robertson's conduct at Cerebral at various points in DOJ's discussion of his post-Cerebral conduct. For instance, the DOJ recites:

Just as Cerebral's chargeback rate was often high while Robertson was its CEO, Zealhy's chargeback rate has been unusually high. Its rate has been so high that at least one payment processor threatened to stop allowing its members to use its payment cards to pay Zealhy's charges.<sup>113</sup>

In alleging that Robertson, Zealhy, and Bruno Health violated the FTC's Rule on the Use of Consumer Reviews and Testimonials, the DOJ stated:

Just as he did at Cerebral, where he informed his employees that he was 'fine with fake ones [reviews],' Robertson has led a practice of impersonating Zealhy subscribers and Bruno Health patients by fabricating online reviews purportedly written by them—but in fact written by Zealhy's own employees and Robertson himself.<sup>114</sup>

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<sup>111</sup> *See Id.*

<sup>112</sup> *Id.* ¶¶ 366–70.

<sup>113</sup> *Id.* ¶ 266.

<sup>114</sup> *Id.* ¶ 279.

Within this area, the DOJ also noted a settlement with Cerebral based on Robertson’s conduct while there:

Robertson knew that posting fake reviews, suppressing authentic reviews, upvoting positive reviews, and downvoting negative reviews was illegal no later than December 28, 2023, when the New York Attorney General announced a settlement with Cerebral relating to, among other misconduct, fake reviews that Robertson directed while its CEO (as alleged above).<sup>115</sup>

The Complaint also references Robertson’s and Cerebral’s charged conduct from the DOJ’s First Amended Complaint: “Robertson has also been on notice since May 31, 2024 that these unlawful and unethical practices have been at issue in this action, because the First Amended Complaint directly implicates analogous practices directed by Robertson when he was CEO of Cerebral.”<sup>116</sup> Robertson argues that references like these were sufficient to meet the advancement provisions of the Bylaws and Indemnity Agreement because they relate to his conduct at Cerebral, even for the conduct relating solely to his position at Zealhy.

Robertson’s corporate powers at Cerebral “were [not] used or necessary for the commission of the alleged misconduct” at Zealhy. *Bernstein*, 953 A.2d at 1011. Nor were his corporate powers at Zealhy used or necessary to commit the misdeeds at Cerebral. Robertson’s roles at Cerebral and at Zealhy were temporally distinct.

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<sup>115</sup> *Id.* ¶ 295.

<sup>116</sup> *Id.* ¶ 297.

Pineiro admitted that Counts VII through X pertain solely to Zealthy.<sup>117</sup> There was no overlap between the positions. Robertson suggests that the “DOJ’s arguments in the Florida Action . . . broadly tied together Cerebral and Zealthy related conduct.”<sup>118</sup> In support, he cites this Court’s holding that a nexus or causal connection “can include post-separation conduct if it is rooted in pre-separation responsibilities.” *Barr v. Genesis CMG Hldgs., LLC*, 2025 WL 3720720, at \*5 (Del. Ch. Dec. 23, 2025).

The mention of Cerebral as background is insufficient to justify advancement when the groups of charges each relate to Robertson’s conduct by reason of the fact that he was a director or officer at Cerebral and Zealthy, respectively. Our Courts look to the pleadings in the underlying litigation to determine whether a causal connection exists. *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at \*16 (Del. Ch. Sept. 11, 2015). “Nexus is established if the corporate powers were used or necessary for the commission of the alleged misconduct.” *Rose v. Berkeley Compute, Inc.*, 2026 WL 700385, at \*5 (Del. Ch. Mar. 5, 2026) (citation modified). I must determine whether there is a nexus or causal connection between the DOJ’s charges against Robertson in Counts VII through X and his corporate capacity at

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<sup>117</sup> Trial Tr. 36:14–18.

<sup>118</sup> POB at p 29.

Cerebral. *See Brown v. LiveOps, Inc.*, 903 A.2d 324, 328 (Del. Ch. 2006). “The Court must look to the substance of the claim, as opposed to the words a plaintiff has chosen to use in the pleading.” *Rose*, 2026 WL 700385, at \*5.

The corporate powers used in Counts VII through X took place in Robertson’s post-Cerebral role. They relate to his time and conduct at Zealhy. The DOJ’s SAC mentions Cerebral conduct in the context of Zealhy conduct but Counts VII through X solely concerned Robertson’s post-Cerebral activity and arose by reason of his role at Zealhy. Robertson did not use or need his Cerebral powers to commit the alleged misconduct in these latter counts. The DOJ’s background references do not transform Counts VII through X into Cerebral-related claims. Under these relatively unique circumstances, it would be inequitable to require Cerebral to provide advancement both for Counts I through VI, which concern Robertson’s conduct as Cerebral’s CEO, and for Counts VII through X, which concern only his subsequent Zealhy conduct.

### **3. The SAC Claims Are Not Inextricably Intertwined.**

Robertson argues that he is entitled to advancement for Counts VII through X because the defense of those claims is inextricably intertwined with the defense of Counts I through VI. In support, he directs the Court to the decisions in *Hyatt v. Al Jazeera Am. Hldgs. II, LLC*, 2016 WL 1301743 (Del. Ch. Mar. 31, 2016) and *Rizk v. TractManager, Inc.*, C.A. No. 9073-ML (Del. Ch. May 30, 2014).

Those cases are inapplicable because they do not involve the temporally distinct circumstances present here. In *Hyatt*, following a merger, the defendant served five “claim certificates” for indemnification for damages stemming from action by the acquired company, including violation of the merger agreement. *Hyatt*, 2016 WL 1301743, at \*2. Plaintiff, a former director of the acquired company whom the merger agreement appointed as Members’ Representative, received the claim certificates in that capacity. *Id.* Plaintiff filed suit against defendant alleging that the claim certificates were invalid and breached the merger agreement. *Id.* at \*3. Defendant asserted counterclaims alleging that plaintiff breached the merger agreement by failing to accept the claim certificates, and plaintiff sought advancement for the expenses incurred in defending those counterclaims. *Id.* Defendant argued against advancement, contending that plaintiff rejected the claim certificates in his role as Members’ Representative and not as a former officer or director. *Id.* at \*6. This Court held as follows:

Although the Counterclaims appear on their face to merely implicate [plaintiffs’] role as Members’ Representative, the resolution of the validity of the Claim Certificates in the Underlying Action, in part, necessarily requires [plaintiffs] to defend their actions as former officers and directors, for which they are contractually entitled to advancement. Without such a (successful) defense, the rights of [plaintiffs] (and the other former members of [the acquired company]) in the Escrow Fund will be forfeit.

*Id.* at \*9. To defend the claim certificates’ rejection, including breach of the merger agreement, plaintiffs were required to “defend their actions as officers and

directors.” *Id.* at \*10. Thus, the plaintiffs’ actions in the underlying action were directly connected to the counterclaims.

Our situation is starkly different. Counts VII through X relate only to Robertson’s conduct at Zealhy. Robertson admits as much.<sup>119</sup> Although the DOJ mentions Robertson’s Cerebral conduct as background, he is not charged in any of the relevant counts with conduct that occurred at Cerebral by reason of the fact of his role there. Each Zealhy count relates solely to Robertson’s conduct at that company. Although Robertson may have repeated misconduct from his time at Cerebral, that does not intertwine the acts.

The same is true in *Rizk*. Thomas Rizk was the founder, former CEO, and director of defendant TractManager, Inc. (“TMI”). *Rizk*, C.A. No. 9073-ML, at 2. Rizk was involved in the merger of TMI with another entity. *Id.* at 3. After the merger, Rizk remained on TMI’s board as the minority stockholders’ board designee and continued serving as CEO. *Id.* Under new management, TMI found improprieties and terminated Rizk. *Id.* at 4. Rizk filed suit against TMI but ultimately found himself embroiled in counterclaims and related lawsuits concerning his conduct as an officer or director. *Id.* at 5–9. He sought advancement of the expenses incurred in defending those claims. *Id.*

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<sup>119</sup> Trial Tr. 36:14–18.

In particular, Rizk sought advancement for what the Court termed the “New York Action.” *Id.* at 20. TMI argued that Rizk was not due advancement because the plaintiff in the New York Action sued him in his capacity as a seller in the merger. *Id.* at 21. As the Court ruled, advancement was required here because the merger and his conduct at TMI were inextricably intertwined. *Id.* As the Court noted, “the complaint in the New York Action alleges that Rizk incurred, and permitted [others] to incur, inappropriate expenses that were charged to TMI, and that Rizk improperly directed TMI resources and personnel to the Joint Venture, at the expense of TMI’s domestic business.” *Id.* at 21–22. The Court granted advancement in the New York Action, finding that the allegations were that Rizk diverted TMI resources and personnel for his benefit. *Id.* at 22. “Although Rizk was sued for representations he made as a seller, these allegations regarding Rizk’s conduct as CEO create the necessary causal connection between the New York Action and Rizk’s official capacity.” *Id.*

Rizk’s acts as CEO were part of the underlying complaint in the New York Action. Not so here. Counts VII through X address only Robertson’s acts during his tenure at Zealhy. While they may mirror the similar acts he took at Cerebral, they are by reason of the fact of his role at Zealhy, not Cerebral. The roles are temporally attenuated both in reality and in the DOJ’s SAC. Compared to the Court’s finding in *Rizk*, the mentions of Cerebral conduct are truly the “background

facts” that the *Rizk* Court considered. *Id.* The Cerebral and Zealthy conduct are not inextricably intertwined.

This Court’s decision in *Barr v. Genesis CMG Hldgs., LLC* also merits mention. *Barr*, 2025 WL 3720720. There, Theodore Barr co-founded a company that was ultimately sold to the defendant. *Id.* at \*1. Barr remained with the company but resigned less than two years after the sale and started another company. *Id.* at \*2. The defendant sued Barr in a separate suit, alleging that plaintiff breached a portion of the sale agreement by competing with the defendant and soliciting its clients. *Id.* Despite an amended complaint that was “alleging no pre-separation misconduct,” the Court held that Barr’s solicitation of his prior employees and clients indicated that Barr did “learn of, form relationships with, or otherwise gain knowledge of these parties through his official capacity with the Defendant.” *Id.* at \*6.

No such connective tissue exists here. Robertson is alleged to have committed certain acts at Cerebral. He is alleged to have committed similar acts at Zealthy. But there was no occasion when his roles crossed over. Nor is it alleged, as it was with Barr, that Robertson used his former position at Cerebral to commit misconduct at Zealthy.

**B. Robertson is Not Entitled to Advancement for Count II of the Third Amended Complaint.**

The parties agree that Robertson is not entitled to advancement for Count III of the TAC and is entitled to advancement for Count I to the extent his conduct was “by reason of the fact that such person is or was a director or executive officer of” Cerebral. That leaves Count II for me to assess.

First, it is important to note the change in posture in the TAC. When the DOJ filed its Third Amended Complaint, Cerebral was no longer a party to the action.<sup>120</sup> In the TAC, Robertson focuses on the section entitled “Unlawful Business Activities at Cerebral” with a subheading of “Robertson’s Direction of Unlawful Cancellation Practices at Cerebral.”<sup>121</sup> This section discusses Robertson’s conduct at Cerebral from 2019 to 2022, when he directed the implementation of subscription cancellation procedures designed to frustrate subscribers’ attempts to cancel.<sup>122</sup> Cerebral homes in on the charge itself. Count II is entitled “FTC Act Section 5—Unfair and Deceptive Practices.”<sup>123</sup> As Cerebral notes, there is no mention of Cerebral in the charge.<sup>124</sup> The count’s language addresses only Robertson’s conduct at Zealthy and the impact on Zealthy customers. This lacks the required causal nexus. Robertson

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<sup>120</sup> JX 53.

<sup>121</sup> POB at p. 33; JX 53 ¶¶ 32–53.

<sup>122</sup> JX 53 ¶¶ 32–53.

<sup>123</sup> *Id.* p. 58.

<sup>124</sup> DOB at p. 29; JX 53 ¶¶ 291–95.

is not charged by reason of the fact of his position at Cerebral. Although the count incorporates by reference the entirety of the TAC, the conduct relates only to Zealthy. Coupled with the DOJ's clear intent that the TAC narrow the focus of the case to Robertson's conduct at Zealthy, there is no causal nexus between the Zealthy activity and Robertson's role at Cerebral.

Robertson argues that the DOJ's incorporation of the Cerebral background means that "Count II incorporates and relies upon alleged conduct by Robertson while he was at Cerebral."<sup>125</sup> But this Court rejected this exact kind of argument in *Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at \*17. There, Charney argued that his former, covered role was inextricably intertwined with his current role because "relationships he built as CEO and the knowledge he gained as a director and officer of the Company enabled him to take the actions alleged in the Standstill Proceeding." *Id.* (citation modified). The Court rejected that argument, explaining, "Charney's former status may have made his violations of the Standstill Agreement more damaging, but that former status was not necessary for the violations themselves." *Id.*

While the Cerebral conduct may add some color and background to Robertson's acts at Zealthy, that conduct was not necessary for the Zealthy

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<sup>125</sup> POB at p. 33; PAB at p. 10.

violations that he is alleged to have committed. Robertson is not entitled to advancement for Count II of the TAC.

### **C. Cerebral Failed to Assume Robertson's Defense.**

The Indemnity Agreement contains an Assumption of Defense provision.<sup>126</sup>

The relevant portion reads:

In the event the Company shall be requested by Indemnatee to pay the expenses of any proceeding, the Company, if appropriate, shall be entitled to assume the defense of such proceeding, or to participate to the extent permissible in such proceeding, with counsel reasonably acceptable to Indemnatee. Upon assumption of the defense by the Company and the retention of such counsel by the Company, the Company shall not be liable to Indemnatee under this Agreement for any fees of counsel subsequently incurred by Indemnatee with respect to the same proceeding, provided that Indemnatee shall have the right to employ separate counsel in such proceeding at Indemnatee's sole cost and expense. Notwithstanding the foregoing, if Indemnatee's counsel delivers a written notice to the Company stating that such counsel has reasonably concluded that there may be a conflict of interest between the Company and Indemnatee in the conduct of any such defense or the Company shall not, in fact, have employed counsel or otherwise actively pursued the defense of such proceeding within a reasonable time, then in any such event the fees and expenses of Indemnatee's counsel to defend such proceeding shall be subject to the indemnification and advancement of expenses provisions of this Agreement.<sup>127</sup>

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<sup>126</sup> JX 1 § 8.

<sup>127</sup> *Id.*

Cerebral argues that it assumed Robertson’s defense and ended advancement under the Indemnity Agreement.<sup>128</sup> Jacqueline Kniska, Cerebral’s representative at trial, testified that “practically speaking,” Cerebral had not assumed Robertson’s defense.<sup>129</sup> Her qualifier of “practically speaking” was based on the absence of billing from counsel that Cerebral sought to obtain for Robertson.<sup>130</sup> Kniska’s perspective is informative but not determinative.

I turn to the Assumption of Defense provision. First, Cerebral must notify Robertson that it intends to assume the defense.<sup>131</sup> Second, the defense must be assumed within a reasonable time.<sup>132</sup> Third, if the Indemnatee’s counsel determines that there may be a conflict of interest between the Company and the Indemnatee, then indemnification and advancement are not suspended.<sup>133</sup> On March 28, 2026, Cerebral’s counsel sent a letter to Pineiro expressing concerns over advancement requests.<sup>134</sup> In that letter, Cerebral advised, “Cerebral has decided to identify counsel

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<sup>128</sup> *Id.*

<sup>129</sup> Trial Tr. 172:1–4.

<sup>130</sup> *Id.* 172:9–16.

<sup>131</sup> JX 1 § 8.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> JX 52.

to assume the defense pursuant to Section 8 of the Indemnity Agreement.”<sup>135</sup> This letter may have expressed Cerebral’s intent, but it was prospective. Cerebral had not yet retained or identified replacement counsel. This is underscored by a July 27, 2026, letter from Cerebral’s counsel to Robertson’s counsel stating that “Cerebral invokes its contractual right to assume Mr. Robertson’s defense.”<sup>136</sup> In that letter, Cerebral also noted, “Cerebral identifies and retains Jason Hernandez of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A. as proposed counsel for Mr. Robertson in the Florida Action.”

Cerebral’s assumption of defense could not have been perfected before July 27, 2026. Two days later, Robertson’s counsel wrote to Cerebral’s counsel and objected to the assumption of defense on two bases.<sup>137</sup> First, counsel argued that the assumption of defense was untimely because the DOJ filed its initial complaint in April 2024.<sup>138</sup> Second, Pineiro advised Cerebral that he reasonably concluded that there might be a conflict of interest between Robertson and Cerebral because

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<sup>135</sup> *Id.*

<sup>136</sup> JX 60.

<sup>137</sup> JX 61.

<sup>138</sup> *Id.*

Cerebral appeared committed to only defending Robertson for a portion of the proceeding.<sup>139</sup>

Addressing the conflict argument first, I find that Robertson’s counsel’s reasonable determination that a conflict of interest existed blunted the assumption of defense. The assumption of defense clause speaks to assuming the defense in a “proceeding.” Circumstances like those presented here, with multiple amended complaints and claims across different entities, were never considered by the clause’s drafters. It is ill-fitting for these circumstances. It would be challenging, although not impossible, for counsel to defend only portions of a case. In any case, I find that Robertson’s counsel provided reasonable notice of a conflict of interest.

The untimeliness argument is even stronger for Robertson. Cerebral argues that its assumption of defense was timely because it had no reason to assume the defense until Robertson’s counsel failed to provide clarity in its billing.<sup>140</sup> Robertson disagrees because the DOJ initiated its Complaint in April 2024, more than two years before Cerebral attempted to assume the defense.

I find that the timeliness prong of the Assumption of Defense relates to the viability of the defense. The DOJ filed its initial Complaint in April 2024. Since

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<sup>139</sup> *Id.*

<sup>140</sup> Trial Tr. 232:15–233:3.

then, there have been three amended complaints. The parties are scheduled to complete discovery in December 2026.<sup>141</sup> The court has scheduled trial to begin on April 19, 2027.<sup>142</sup> It is too late to reasonably assume the defense. Substituting counsel now comes with great risk to Robertson’s defense. After all, this is an indemnification agreement intended to provide a defense for corporate officers and directors. It would be illogical, then, to suggest that it is timely to replace counsel more than two years and four complaints into a three-year timeline. I find that Cerebral failed to assume the defense.

#### **D. Fees on fees**

I find that Robertson is entitled to fees on fees. Here, that is for Counts I through VI of the SAC.<sup>143</sup> A prevailing plaintiff is entitled to fees on fees in the indemnification and advancement context. *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 560–61 (Del. 2002). Robertson “prevailed in his request for advancement, but not on all points.” *Marino*, 131 A.3d at 350. Robertson is therefore entitled to fees on fees in proportion to his success in this matter. *Id.*

### **III. CONCLUSION**

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<sup>141</sup> PTO ¶ 28.

<sup>142</sup> *Id.*

<sup>143</sup> To the extent that any advancement was already provided for these Counts, that may reduce the proportion.

For the reasons explained above, I find that Robertson is entitled to advancement consistent with this Report. This is a Final Report pursuant to Court of Chancery Rule 144.