IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HUGH EDMUNDSON, Plaintiff, v. THEOREM TECHNOLOGY, INC., Defendant.	C.A. No. 2026-0647-CDW (NAC)

ORDER RESOLVING EXCEPTIONS TO FINAL REPORT

1. Hugh Edmundson is the co-founder and a former director and officer of Theorem Technology, Inc. ("Company"). He seeks advancement under the Company's Certificate of Incorporation and an Indemnification Agreement for expenses incurred in connection with defending an International Chamber of Commerce arbitration proceeding.[1] The underlying proceeding alleges that Edmundson violated a restrictive covenant contained in the Merger Agreement detailing the terms of the sale of the Company to Pagaya Technologies Ltd.[2] Edmundson asserted counterclaims alleging breaches of the Merger Agreement by the Company and Pagaya.[3]

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[1] *See generally* Compl. (Dkt. 1) Ex. A ("Certificate of Incorporation"), Ex. B ("Indemnification Agreement"), Ex. E ("Request for Arbitration"); Theorem Technology, Inc.'s Opening Brief in Support of its Notice of Exceptions (Dkt. 40) ("Opening Br."). I note that the language of the Certificate of Incorporation and Indemnification Agreement together grants Edmundson a mandatory advancement right with the maximum scope permissible under Delaware law. *See* Certificate of Incorporation at 1–2, Indemnification Agreement §§ 5, 12(f).

[2] *See* Compl. Ex. D ("Merger Agreement"); Request for Arbitration ¶¶ 2–14.

[3] *See generally* Compl. Ex. F ("Answer to Request for Arbitration, and Counterclaims").

2. The case was assigned to a Magistrate and the parties cross-moved for summary judgment. After hearing argument, the Magistrate issued a report dated September 14, 2026, that, for the most part, ruled in favor of Edmundson ("Report"). The Company took exceptions to the Report.

3. When reviewing exceptions, a constitutional judge reviews the Magistrate's report *de novo*.[4] After conducting *de novo* review, I conclude that, subject to a short clarification below, the Report should be adopted as an order of the Court and I overrule the Company's exceptions.

4. As the Magistrate explained, under § 5.17(b) of the Merger Agreement, a "customer or client" is defined as someone with whom Edmundson "had contact" or "for whose relationship with the Company Group" he was responsible "during the twelve (12) months before the merger's closing." A claim that Edmundson violated § 5.17(b)(i), then, is "inextricably intertwined" with his role as a director and officer of the Company.[5] True, as the Company mentions, the disputed language in § 5.17(b)

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[4] *See DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).

[5] *Pontone v. Milso Indus. Corp.*, 100 A.3d 1023, 1051 (Del. Ch. 2014) ("*Pontone II*"). The Company notes § 5.17(b) also provides that, for purposes of the entire agreement, the word "client" encompasses all "investors in funds or similar investment vehicles manages or advised by the Company Group." Merger Agreement § 5.17(b). As a result, the Company claims that "[t]here is no requirement that investors were previously managed by, or had any relationship to, Edmundson." Theorem's Reply Br. in Further Support of its Notice of Exceptions at 5 (Dkt. 46). That reading cannot be correct. Reading the general definition of "client" to be applicable to § 5.17(b) in this way would leave the specific definition of "customer or client" "[f]or purposes of this Section 5.17(b)" without meaning, violating multiple established canons of contract interpretation. *See, e.g.*, *Sunline Com. Carriers, Inc. v. CITGO Petrol. Corp.*, 206 A.3d 836, 839 (Del. 2019) (courts must "give each provision and term effect, so as not to render any part of the contract mere surplusage" (internal quotation marks omitted)); *Crispo v. Musk*, 304 A.3d 567, 575

operates as a "scoping device."[6] But the scope of Edmundson's ongoing post-termination obligations under § 5.17(b), by operation of that language, is expressly tied to his past activities as an officer and director of Theorem.[7]

5. Senior Magistrate Molina's decision in *Barr v. Genesis CMG Holdings, LLC*[8] is instructive. In that case, even without the bespoke language defining "customer or client" found in § 5.17(b), the court noted that "[i]t defies logic to suggest that the Plaintiff did not learn of, form relationships with, or otherwise gain knowledge of these parties through his official capacity with the Defendant. As such, the allegations of solicitation of specific clients and employees are inextricably intertwined with the Plaintiff's former position."[9] So too here.

6. Nor does *Charney v. American Apparel, Inc.*[10] compel a different outcome. In *Charney*, Chancellor Bouchard refused to order advancement of fees

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(Del. Ch. 2023) ("[S]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." (internal quotation marks omitted)).

[6] Opening Br. at 41.

[7] The Company also argues in a footnote in its reply brief that advancement is not warranted for its claim that Edmundson breached § 5.17(b)(iii). This argument did not feature in the Company's Opening Brief, nor does it appear to have been fairly presented to the Magistrate. I decline to consider it now. *See Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *Bronstein v. Tyson 2.0, Inc.*, 2026 WL 3182483, at *2 (Del. Ch. Oct. 23, 2026) ("[T]he exceptions process is not available for parties to spring new arguments." (internal quotation marks omitted)).

[8] 2025 WL 3720720 (Del. Ch. Dec. 23, 2025).

[9] *Id.* at *6.

[10] 2015 WL 5313769, at *16 (Del. Ch. Sept. 11, 2015).

incurred by a former officer defending a claim that the officer breached a standstill agreement executed in response to his attempt to mount a proxy contest after he was terminated.[11] The *Charney* court noted that the proxy contest, which the officer initiated as an individual, involved no "use[] or abuse[]" of corporate power.[12] Chancellor Bouchard specifically noted that the company did not allege that the officer "misused [c]ompany information to violate the Standstill Agreement."[13]

7. Here, unlike *Charney*, not only does the language of § 5.17(b) directly connect Edmundson's alleged breaches of the Merger Agreement to his former status as an officer of Theorem, but it is apparent that Theorem contends Edmundson improperly used Company information.[14]

8. The Report's reasoning answers the Company's remaining arguments that advancement is not warranted to defend the Company's affirmative claims and provides an independent basis for finding that Edmundson is entitled to

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[11] *Id.* at *16–17.

[12] *Id.* at *16.

[13] *Id.* at *17.

[14] *See, e.g.*, Kirkham Declaration in Support of Defendant's Opening Br. Ex. 9 ¶ 34 (Dkt. 38) (Theorem's Arbitration Statement of Claim) ("Mr. Edmundson emailed . . . a Theorem investor . . . to report that '*there have been some goings on at Theorem post-acquisition*' and that, having been '*terminated over the weekend*,' he could now '*speak freely*' and answer '*any questions about the situation*.'" (emphasis in original)); *id.* ¶ 35 ("In the days following [Edmundson's] termination, many Theorem investors, including investors who . . . had no reason to take additional action, abruptly demanded liquidating trusts on the supposed basis that the [Theorem Investment Committee] had been materially reconstituted . . . .").

advancement.[15] The statement of the claim filed in the arbitration suggests that Theorem alleges Edmundson shared confidential information, learned during his tenure at the Company, with Theorem investors.[16]

9. Turning to Edmundson's breach of contract counterclaim, I adopt the Report's conclusion with the following clarification. In *Citadel Holding Corp. v. Roven*, the Delaware Supreme Court explained that expenses incurred prosecuting a counterclaim are advanceable if it is (1) a compulsory counterclaim, and (2) "advanced to defeat, or offset," an affirmative claim that an individual is entitled to advancement to defend.[17]

10. The Magistrate correctly concluded that the breach of contract claim was a compulsory counterclaim. There is a "logical relationship" between the substance of Theorem's claim that Edmundson breached § 5.17(b)(i) and the breach of contract counterclaim which challenges the exact conduct by the Company and Pagaya that Edmundson is alleged to have disclosed in violation of the restrictive covenant.[18]

11. This court has grappled with the proper application of the second prong of *Roven*. Then-Vice Chancellor Strine explained in *Zaman v. Amedeo Holdings, Inc.*

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[15] Report ¶¶ 12–14.

[16] *See supra* note 14.

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

[18] *Transamerica Occidental Life Ins. Co. v. Aviation Off. of Am., Inc.*, 292 F.3d 384, 389 (3d. Cir. 2002).

that *Roven* should not be read to mean that "a corporate official should have his cost of playing offense paid simply because the company sued him first and he is now forced to play offense in the corporation's chosen forum or give up the right to do so later."[19] Instead, he likened advanceable counterclaims to affirmative defenses, "which has the effect of requiring a fairly tight nexus between the counterclaim and the claims faced by the corporate official."[20]

12. Thus, the *Zaman* court concluded that:

> the costs of prosecuting a counterclaim should be subject to advancement if the counterclaim would qualify as a compulsory counterclaim[] under the traditional counterclaim test used by both Delaware and federal civil procedure *and* when that counterclaim so directly relates to a claim against a corporate official such that success on the counterclaim would operate to defeat the affirmative claims against the corporate official. In other words, a counterclaim fits within the "in defending" language if it defends the corporate official by directly responding to *and* negating the affirmative claim.[21]

13. Six years later, in *Pontone v. Milso Industries Corp.*,[22] Vice Chancellor Parsons acknowledged the tension between the Supreme Court's use of the word "offset" in *Roven* and this court's holding in *Zaman*. He concluded that,

> [t]o the extent that the standard employed by the Court in *Zaman* can be read to make compulsory counterclaims that offset, but cannot defeat, affirmative claims ineligible for advancement, I consider that reading to be in conflict with the standard articulated and applied in *Roven*. When

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[19] 2008 WL 2168397, at *34.

[20] *Id.* at *35.

[21] *Id.* (emphasis in original).

[22] 2014 WL 2439973, at *5 (Del. Ch. May 29, 2014) ("*Pontone I*").

> there is an apparent conflict between this Court's and the Delaware Supreme Court's statement of the law, the latter is controlling.[23]

This court also noted in *Krauss v. 180 Life Sciences Corp.* that the word "offset" should be construed "broad[ly]."[24]

14. I recognize the court's concern in *Zaman* and the Company's argument in this case that a counterclaim must do more than merely produce a damages award to "offset" a claim and warrant advancement of expenses incurred prosecuting that counterclaim. Otherwise, for any counterclaim seeking an award of damages, the two elements of the *Roven* test would collapse into each other. Our case law, though, is clear that a broad reading of the word "offset" forecloses the conclusion that to be advanceable, a counterclaim, if meritorious, must *entirely* defeat the corresponding affirmative claim.[25]

15. Here, success on the breach of contract counterclaim would, at least in part, impair the Company's affirmative claim for breach of § 5.17(b)(i). For example, the breach of contract counterclaim alleges that Pagaya damaged its relationships with Theorem investors through its "unlawful meddling in violation of the Merger Agreement."[26] Successfully proving this allegation would certainly harm the

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[23] *Id.*

[24] 2022 WL 665323, at *9 n.81 (Del. Ch. Mar. 7, 2022).

[25] *See Pontone I*, 2014 WL 2439973, at *5–8.

[26] Answer to Request for Arbitration, and Counterclaims ¶¶ 27–35.

Company's claim that it was damaged by Edmundson's conduct allegedly in violation of the restrictive covenant. The claim falls within the broad reach of the word "offset."

16. Admittedly, the question of whether expenses incurred prosecuting the breach of contract counterclaim are advanceable is less clear cut than it would be for a counterclaim with the potential to defeat the Company's claim outright. In furtherance of Delaware's "policy of encouraging capable persons to serve as corporate fiduciaries by assuring litigation expense protection," however, close questions like this "should be resolved in favor of advancement."[27]

17. The Court adopts the Report, subject to the clarification above, as an order of the Court.

/s/ Nathan A. Cook
Vice Chancellor
Dated Submitted: November 5, 2026
Date Decided: November 10, 2026

[27] *Rogers v. Mary Kay Hldg. Corp.*, 2025 WL 3199166, at *3 (Del. Ch. Nov. 17, 2025). As Edmundson recognized at oral argument, the Company could re-raise many of its arguments made in this proceeding in a plenary proceeding concerning indemnification or recoupment—if it so chooses. *See Kaung v. Cole Nat'l. Corp.*, 884 A.2d 500, 509–510 (Del. 2005); *see also White v. Curo Tex. Hldgs., LLC*, 2017 WL 1369332, at * 12 (Del. Ch. Feb. 21, 2017) ("Deferring resolution of less clear-cut disputes to the indemnification stage helps avoid excessive litigation over advancement." (internal quotation marks omitted)); *Bowers v. Black Lives Matter Glob. Network Found., Inc.*, 2026 WL 2023082, at *7 (Del. Ch. July 13, 2026) ("Consequently, where the plaintiff has demonstrated some entitlement to advancement, yet the precise scope of advancement is ambiguous, prudential concerns counsel in favor of granting entitlement to advancement and deferring resolution of less clear-cut disputes to the indemnification stage . . . ." (internal quotation marks omitted)).