



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRASCENT MANAGEMENT)	
CONSULTING, LLC,)	
)	
Plaintiff-Below)	No. 126, 2016
Appellant,)	
v.)	Court Below:
)	Court of Chancery
GEORGE BOURI,)	Case No. 10915-VCMR
)	
Defendant-Below)	
Appellee.)	

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellee George Bouri is a former Managing Principal and a former member of the board of managers of appellant Trascent Management Consulting, LLC (“Trascent”) whose mandatory right to advancement of attorneys’ fees and litigation expenses was upheld by the Court of Chancery in a well-reasoned oral ruling (“Ruling”), Op. Br. Ex. C, and subsequent summary judgment order (“Order”), Op. Br. Ex. B.¹ The circumstances that have led to this point are all too typical.

After recruiting him for over a year, Rakesh Kishan convinced Mr. Bouri to join UMS Advisory, Inc. on June 30, 2013. Six months later, Mr. Kishan formed Trascent and asked Mr. Bouri to join the newly formed limited liability company. To entice Mr. Bouri into service, Trascent gave him broad, mandatory advancement rights under the terms of his Executive Employment Agreement and Trascent’s Amended and Restated Limited Liability Company Agreement. That common bargain bore fruit for Trascent, at least initially, as the company saw exceptional

¹ References to “Op. Br.” refer to Appellant’s Opening Brief. The transcript of the Ruling on Mr. Bouri’s motion for partial summary judgment was attached to the Appellant’s Opening Brief as Exhibit C and the Order granting Mr. Bouri’s motion for partial summary judgment was attached to the Appellant’s Opening Brief as Exhibit B. References to “DKT” refer to those portions of the Appendix to Appellant’s Opening Brief containing the Court of Chancery docket which Trascent Bates stamped DKT-i-xvi. Trascent did not include a complete copy of the docket in its Appendix. The Appendix of Appellee George Bouri includes a complete copy of the docket, and has been Bates stamped DKT-i-xli.

growth under Mr. Bouri's management, recruiting and business development efforts.

The relationship eventually soured, however. Trascient terminated Mr. Bouri allegedly for cause, but failed to specify what the cause was or afford Mr. Bouri the opportunity to remedy the supposed cause. Trascient subsequently filed suit in Delaware alleging various purported misdeeds, including that Mr. Bouri fraudulently induced Trascient to enter into the employment and limited liability company agreements. As is often the case, Trascient found it unpalatable to honor its advancement obligation and finance Mr. Bouri's defense. It thus rejected his request for advancement. Initially, it did so without offering any justification.

Mr. Bouri was forced to file counterclaims and move for summary judgment to enforce his right to mandatory advancement. Since that time, Trascient has offered a number of *post hoc* rationalizations for refusing to honor Mr. Bouri's advancement right. In this appeal, Trascient abandons all but one of its arguments raised below, focusing solely on its contention that Mr. Bouri's purported fraud in the underlying action bars him from enforcing his mandatory advancement right. Trascient did not even plead this defense until more than a month after the parties completed briefing on Mr. Bouri's summary judgment motion.

Trascient's untimely effort to justify its denial of Mr. Bouri's advancement right diverges from existing Delaware precedent. Specifically, Trascient asks that

Mr. Bouri's alleged underlying fraudulent conduct be examined in the context of ruling on advancement, a request that is inconsistent with controlling Delaware law which holds that the scope of an advancement proceeding "is limited to determining 'the issue of entitlement according to the [company's] advancement provisions and not to issues regarding the movant's alleged conduct in the underlying litigation.'"²

Although the Court of Chancery recognized the narrow scope of advancement proceedings and that Mr. Bouri's alleged conduct at issue in the underlying action is not part of the advancement analysis, Trascent's Opening Brief ignores the Court of Chancery's analysis and the case law on which it relies.

Instead, Trascent argues that because it has raised a fraud in the inducement defense the Court of Chancery was required to take Mr. Bouri's alleged underlying conduct into account when evaluating his right to advancement. Such an approach is inconsistent with settled Delaware law, including the Court of Chancery's decision in *Tafeen v. Homestore, Inc.*, 2004 WL 556733 (Del. Ch. Mar. 22, 2004), *aff'd* 888 A.2d 204 (Del. 2005), and, as the Court of Chancery recognized in granting Mr. Bouri's motion for summary judgment, such an approach would "turn advancement on its head, where any allegation challenging the right to advancement would collapse that right into one only for indemnification and cripple the summary nature of [advancement] proceedings." Op. Br. Ex. C at 18.

² *Kaung v. Cole Natl. Corp.*, 884 A.2d 500, 509 (Del. 2005) (quoting *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 503 (Del. 2005)).

This is a straightforward mandatory advancement proceeding and the Court of Chancery's Ruling and Order are supported by established Delaware law that has been developed to further the invariant policies underlying advancement. Neither Trascant's fraud in the inducement allegations nor the evidence it purports to have marshalled in support thereof impacts the scope of an advancement proceeding or justifies Trascant's obstinate refusal to advance funds to Mr. Bouri. The right to advancement does not disappear when the entity from which advancement is sought asserts claims (or evidence) against the party seeking advancement. To the contrary, this is precisely when the right to advancement is most critical. Trascant, a limited liability company that is wholly a creature of contract, must honor its contractual commitment and advance the fees and expenses Mr. Bouri incurs defending himself against the claims raised by Trascant.

Mr. Bouri respectfully submits that this Court should affirm the Ruling and Order in all respects.

SUMMARY OF ARGUMENT

1. Admitted that, in an advancement proceeding, a movant seeking advancement must establish that there is a corporate instrument which grants him or her the right to advancement and that such right has been triggered by the claims pled in the underlying proceeding.

2. Denied as stated. The legal principles summarized in paragraph 2 are not pertinent to advancement proceedings because settled law provides that (i) advancement and indemnification are distinct rights, (ii) advancement proceedings are narrow in scope and limited to determining whether the claims asserted in the underlying action trigger the right to advancement contained in a corporate instrument; (iii) issues regarding the movant's alleged conduct in the underlying litigation, such as allegations the movant fraudulently induced the non-movant to enter the corporate instrument at issue, are peripheral to and beyond the scope of advancement proceedings; and (iv) consideration of the movant's underlying conduct would transform an advancement proceeding into an indemnification action and effectively eliminate the right to advancement, a right which has no value unless it is enforced before the underlying merits are considered. Relying on this settled law, the Court of Chancery properly rejected Trascent's effort to expand the scope of this advancement proceeding to include Mr. Bouri's alleged fraudulent conduct, an issue in dispute in the underlying action.

3. Denied. In the context of advancement proceedings, the scope of the inquiry is narrow: Courts examine the terms of the corporate instruments at issue and determine if the claims pled in the underlying action trigger a right to advancement under those instruments. In its well-reasoned Ruling on Mr. Bouri's motion for summary judgment, the Court of Chancery recognized the narrow scope of advancement proceedings, noting that (i) indemnification and advancement are distinct rights, (ii) a right to advancement has value only if it is enforced while the underlying action is pending, and (iii) consideration of peripheral issues, such as allegations of fraud in the inducement at issue in the underlying proceedings, are beyond the narrow scope of advancement proceedings and threaten to collapse summary advancement proceedings into actions for indemnification.

4. Denied. In the context of upholding Mr. Bouri's right to advancement, the Court of Chancery properly refused to consider evidence which Trascent contends supports its claims of fraud pending against Mr. Bouri in the underlying action. Such evidence falls outside the scope of an advancement proceeding and, therefore, was properly deemed to be a peripheral to the motion for summary judgment before the Court below.

STATEMENT OF FACTS

A. THE EMPLOYMENT AGREEMENT, THE LLC AGREEMENT, AND MR. BOURI'S RIGHT TO ADVANCEMENT THEREUNDER.

After recruiting him for over a year, Rakesh Kishan convinced Mr. Bouri to join UMS Advisory, Inc. on June 30, 2013. B.92 at ¶ 6. Six months later, Mr. Kishan asked Mr. Bouri to join Trascent, an entity Mr. Kishan formed in April 2013, before Mr. Bouri joined UMS. Mr. Bouri and Trascent entered into an employment agreement effective January 1, 2014 (the "Employment Agreement"). A.189-202; Op. Br. Ex. C at 4. Effective that same date, Mr. Bouri (i) became a minority member of Trascent, obtaining 25% of its Class A units, and (ii) was appointed to Trascent's board of managers by Mr. Kishan, Trascent's majority member. B.4 at ¶ 11; B.24 at ¶ 11; B.243 at ¶14; Op. Br. Ex. C at 4.

In accordance with 6 *Del. C.* § 18-108, both the Employment Agreement and the Trascent Management Consulting, LLC Amended and Restated Limited Liability Company Agreement (the "LLC Agreement"), A.203-248, include extremely broad, mandatory advancement provisions nearly identical in content. Op. Br. Ex. C at 4-6.³ Specifically, Section 6.1(a) of the Employment Agreement provides that:

³ Appellant's Opening Brief asserts that the Court of Chancery has jurisdiction over the advancement dispute pursuant to 8 *Del. C.* § 145(k). Op. Br. at 17. As Trascent is a Delaware limited liability company, Section 145(k) does not apply to it or to proceedings involving it before the Court of Chancery. The Court of

[Trascent] shall indemnify . . . [Mr. Bouri] against any . . . loss . . . or expense (including reasonable attorneys' fees . . .) suffered or incurred by [Mr. Bouri] by reason of, arising from or relating to, the operations, business or affairs of . . . [Trascent]

A.198 at § 6.1(a). Section 6.1(b) of the Employment agreement further states that:

[u]nless a determination has been made by final, nonappealable order of a court of competent jurisdiction that indemnification is not required, [Trascent] shall, upon the request of [Mr. Bouri], advance or promptly reimburse [Mr. Bouri]'s reasonable costs of . . . litigation . . . , including reasonable attorneys' fees

Id. at § 6.1(b). Sections 6.2(a) and (c) of the LLC Agreement contain virtually identical language granting Mr. Bouri broad advancement rights as a result of his appointment as a “Manager” of Trascent by Mr. Kishan. A.220 at § 6.2(a) and A.221 at § 6.2(c); Op. Br. Ex. C at 6.

When Mr. Bouri joined the company, Trascent had eleven employees and approximately \$3 million in sales. By the end of 2014, Trascent had over forty employees and over \$10 million in annual sales. Mr. Bouri was responsible for \$7 million in sales in 2014. B.103 at ¶ 37. In recognition of his superlative performance, Trascent agreed on two separate occasions to increase Mr. Bouri's ownership interest in the company, first from 25% to 35% and then from 35% to 43%. B.93-95 at ¶¶ 7-11.

Chancery does have jurisdiction over the pending dispute pursuant to 6 *Del. C.* § 18-111.

B. TERMINATION AND DENIAL OF ADVANCEMENT.

Notwithstanding Mr. Bouri's acknowledged success, the parties eventually had a falling out. On April 8, 2015, Mr. Kishan, acting in his capacity as majority member, removed both Mr. Bouri and Itay Fastovsky, the only Trascient managers other than Mr. Kishan, from Trascient's board of managers. B.12-13 at ¶ 28.

Acting as the sole manager of Trascient, Mr. Kishan then terminated Mr. Bouri's employment, purportedly for cause under the Employment Agreement but without any cause being cited. B.13 at ¶ 29.

Eight days later, Trascient commenced the underlying action. Trascient's original verified complaint alleged that "[e]ffective January 1, 2014, Trascient and Bouri . . . entered into the [Employment Agreement]" and attached a copy of that agreement to the pleading. B.4 at ¶¶ 10-11; B.7 at ¶19. The original complaint further alleged that, in connection with joining Trascient, Mr. Bouri obtained a minority membership interest in the company, the members of the company executed the LLC Agreement and Mr. Kishan, Trascient's majority member, appointed Mr. Bouri and Mr. Fastovsky to Trascient's board of managers. B.4-5 at ¶¶ 11-12. A copy of the LLC Agreement also was attached to the pleading. B.5 at ¶ 12. In its original complaint, Trascient sought, among other things, to enforce the terms of the Employment Agreement and the LLC Agreement and a judicial

declaration that it had grounds to terminate Mr. Bouri for cause under the terms of these contracts.⁴ B.1-17.

On May 7, 2015, Mr. Bouri sent Trascent an advancement request and undertaking related to the lawsuit. B.120-123. On May 26, 2015, Trascent responded with a letter denying Mr. Bouri's request. B.125-128. Trascent offered no explanation or justification for its refusal:

By your letter of May 7, 2015, Mr. Bouri asserts a right to indemnification (sic) pursuant to the Employment Agreement and the LLC Agreement. The indemnification (sic) provisions of the agreements do not apply to the claims asserted against Mr. Bouri in the Action. Accordingly, Mr. Bouri's request for indemnification (sic) is denied.

B.127.

Trascent filed its First Amended Verified Complaint on June 9, 2015. B.18-48; DKT-iii (Transaction ID 57349385). Trascent again attached copies of the LLC Agreement and the Employment Agreement to its verified pleading and continued to seek to enforce and obtain a judicial declaration of its rights under those agreements. B.24 at ¶ 12; B.27 at ¶ 19.

On June 29, 2015, Mr. Bouri answered the First Amended Verified Complaint and filed counterclaims seeking, among other things, a declaration that

⁴ Under the terms of his Employment Agreement, Mr. Bouri is entitled to certain severance payments regardless of the nature of his termination; however, a "for cause termination" would reduce the total benefits due to Mr. Bouri under the Employment Agreement by more than \$675,000 and avoid the cancellation of Mr. Bouri's obligation to repay a \$430,000 Promissory Note. A.193; B.374 at ¶ 1.

Trascent breached its advancement obligations under the Employment Agreement and the LLC Agreement. B.50-128; DKT-iv (Transaction ID 57473085).

C. MR. BOURI'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RELATED PLEADINGS.

On July 14, 2015, Mr. Bouri moved for partial summary judgment on his claim for advancement (the "Summary Judgment Motion") and filed an opening brief in support thereof. DKT-v (Transaction ID 57551004).

On September 16, 2015, Trascent filed a motion for leave to file a Second Amended Complaint. B.129-178; DKT-xi (Transaction ID 57881299). The proposed Second Amended Complaint added new first and second causes of action which alleged that Mr. Bouri fraudulently induced Trascent into entering the Employment Agreement and the LLC Agreement and that Mr. Bouri's supposed fraud bars him from enforcing these contracts. B.139-140. Specifically, the proposed Second Amended Complaint alleged that Mr. Bouri's pre-employment statements that he had voluntarily resigned from his prior employer and was a wealthy man were incorrect, and that these purported misrepresentations mandate rescission of the Employment Agreement and a declaration that Mr. Bouri cannot enforce the LLC Agreement. B.144-145 at ¶¶ 12-13; B.164-165 at ¶¶ 50-51; B.166-168 at ¶¶ 54-61.

The same day it filed its motion for leave to file the Second Amended Complaint, Trascent filed its answering brief in response to the Summary Judgment

Motion. B.179-209; DKT-ix (Transaction ID 57881288). Trascient argued there were five reasons why the Court of Chancery should deny the Summary Judgment Motion. B.195. One of the five was that “Bouri’s misrepresentations . . . render the [Employment Agreement and the LLC Agreement] voidable and preclude Bouri from enforcing them against Trascient.” B.196. Trascient submitted five affidavits and additional documents related to its contention in the underlying action that Mr. Bouri had made pre-employment misrepresentations, DKT-ix-x (Transaction ID 57881288); A.182-188 (two of the five affidavits), and argued that this evidence barred Mr. Bouri from exercising his right to advancement and prevailing on the Motion for Summary Judgment. B.196-200.

On October 7, 2015, Mr. Bouri filed his reply brief. B.210-234; DKT-xiii (Transaction ID 57984507). Among other things, Mr. Bouri argued that “Trascient’s attempt to focus the Court on merits-related issues and argue that Mr. Bouri’s request for advancement must be denied because he purportedly engaged in fraud . . . must be rejected” because “‘Delaware courts have consistently declined to undertake such an analysis’ in the context of advancement proceedings.” B.228 (citing *Tafeen*, 2004 WL 556733, at *4). This concluded the briefing on Mr. Bouri’s Summary Judgment Motion.

Thereafter, on November 11, 2015, Trascent filed its Second Amended Verified Complaint. B.235-273; DKT-xvi (Transaction ID 58150493).⁵ The next day, on November 12, 2015, more than a month after briefing on the Summary Judgment Motion concluded and five months after Trascent originally denied Mr. Bouri's advancement request, Trascent filed its First Amended Answer to Mr. Bouri's First Amended Verified Counterclaims. B.274-310; DKT-xvi (Transaction ID 58156737). Trascent's First Amended Answer added new Fifth and Sixth affirmative defenses which asserted that "[t]he Counterclaims are barred by Bouri's fraudulent inducement of the Employment Agreement and the LLC Agreement," and "[t]he Counterclaims are barred by the doctrine of resume fraud." B.309. In this appeal, Trascent relies on these belatedly asserted defenses to contend that Mr. Bouri's alleged fraudulent acts bar him from enforcing his right to advancement under the terms of the Employment Agreement and LLC Agreement.

The purported fraudulent acts which Trascent contends bar Mr. Bouri from enforcing his rights to advancement are the same purported acts which give rise to the fraud claims Trascent has asserted against Mr. Bouri in the first two causes of action asserted in the Second Amended Complaint. Thus, Trascent wants to

⁵ Copies of the Employment Agreement and the LLC Agreement were attached to the proposed Second Amended Complaint and Trascent sought, in the alternative, to enforce the terms of those agreements. B.244 at ¶15; B.246 at ¶ 22.

examine Mr. Bouri's alleged conduct at issue in the underlying litigation for purposes of determining whether he is entitled to advancement.

On January 20, 2016, the day before oral argument on the Motion for Summary Judgment, Trascent submitted two additional affidavits and other documents which it contends support its underlying claims that Mr. Bouri engaged in pre-employment fraud. A.147-181. Trascent argued that the evidence in these affidavits and the other materials it had previously submitted to the Court of Chancery barred Mr. Bouri from exercising his rights to advancement. *Id.*

D. THE SUMMARY JUDGMENT MOTION IS GRANTED.

On January 21, 2016, the Court of Chancery heard oral argument on the Summary Judgment Motion. A.1-59. On January 29, 2016, the Court of Chancery issued its Ruling on the motion, explaining why each of Trascent's five arguments was deficient and finding that "Mr. Bouri's right to advancement is clear as a matter of law." Op. Br. Ex. C at 3.

In its Ruling, the Court of Chancery stated:

Summary judgment is proper only if the pleadings, depositions, and discovery on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

In ruling on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party. This Court has found that claims for advancement of attorneys' fees are particularly well-suited for the (sic) resolution by summary judgment because "the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to

advancement and the pleadings in the proceedings for which advancement is sought.”

* * *

As to indemnification and advancement . . . Delaware courts have “made clear that Section 108 [of the Delaware LLC Act] defers completely to the contracting parties to create . . . rights and obligations with respect to indemnification and advancement. Furthermore, the right to advancement “is not dependent upon a determination that the party in question ultimately will prevail or be entitled to indemnification.”

* * *

As this Court in *DeLucca* [*v. KKAT Mgmt., LLC*, 2006 WL 224058 (Del. Ch. Jan. 23, 2006)] said, “it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court’s job to enforce the clear terms of contracts.”

Here, the contract language is clear: until a court determines that Trascent is not obligated to indemnify Mr. Bouri, Trascent must . . . cover both the legal fees and costs Mr. Bouri has incurred and those that he will incur as litigation continues.

Op. Br. Ex. C at 10-13 (citations omitted from original). The Court further ruled that all of the claims and counterclaims “arise from, or relate to, the operations, business or affairs” of Trascent, and trigger Mr. Bouri’s right to advancement. Op. Br. Ex. C at 14-15, 23.

With regard to Trascent’s contention that Mr. Bouri’s alleged underlying fraud barred his right to advancement, the Court of Chancery stated:

The facts in the *Tafeen* [*v. Homestore, Inc.*, 2004 WL 556733 (Del. Ch. Mar. 22, 2004), *aff’d* 888 A.2d 204 (Del. 2005)] case are very similar

to those here, particularly as it relates to the [fraud] causes of action in the second amended complaint.

There, the company argued that Tafeen's "underlying misconduct served to fraudulently induce the corporation to enter into the officer employment relationship and, in that context, to extend contractual advancement rights to the officer employee."

The Court rejected that argument, however, reasoning that, "[w]hile this may be a proper basis for a fraud-in-the-inducement action against Tafeen, the argument does not serve as a defense here."

The Court distinguished its analysis of whether Tafeen was entitled to advancement under the company's governing rules from whether Tafeen fraudulently induced the company to enter into the employment contract, which the Court viewed as a peripheral issue.

As the *Tafeen* Court said, the Court's analysis "does not extend to peripheral issues regarding the moving party's alleged conduct in the underlying action, even if ultimate entitlement to advancement of fees may in some fashion be connected to those issues."

Trascent attempts to distinguish *Tafeen* on this point, arguing that *Tafeen* turned on the Court's distinction between the employment contract and the company's bylaws as dual sources of advancement rights, but I do not read *Tafeen* the same way Trascent does. *Tafeen* did not turn on the difference between a contract and a governing document.

Instead, in *Tafeen*, the Court was referring to "peripheral issues" as underlying conduct not pertinent to advancement. Holding otherwise would turn advancement on its head, where any allegation challenging the right to advancement would collapse that right into one only for indemnification and cripple the summary nature of these proceedings.

The *DeLucca* Court recognized Delaware's policy in favor of advancement rights and recognized the unique rights these rights play, saying, "It is precisely in the circumstance when a business official is accused of serious wrongdoing that the right to advancement is critical, as that right secures the funds for the official to defend herself."

* * *

Thus, the disputes at issue in this case are not new or novel and have largely been already resolved by this Court in *DeLucca* and *Tafeen*; and the same results are appropriate here.

Op. Br. Ex. C at 16-18, 20.

On February 12, 2016, the Court entered its Order granting the Summary Judgment Motion and incorporating the January 29, 2016 Ruling by reference. Op. Br. Ex. B.

E. TRASCENT’S APPLICATION FOR INTERLOCUTORY REVIEW AND ITS OPENING BRIEF.

On February 22, 2016, Trascent filed its Application for Certification of Interlocutory Appeal and its Memorandum of Law in Support thereof. B.311-336; DKT-xxi (Transaction ID 58612273). Trascent’s application argued that the Court of Chancery’s Ruling and Order conflicted with law that precludes a party from enforcing a contract it procured by fraud and that the Court below erred by considering Trascent’s fraudulent inducement affirmative defense a “peripheral issue” to the advancement motion and by granting the motion notwithstanding the evidence it had submitted supporting its fraud claim. *Id.*

On March 3, 2016, Mr. Bouri filed his answering brief in opposition to Trascent’s application for interlocutory appeal. B.337-371; DKT-xxii (Transaction ID 58663908). Mr. Bouri argued that none of the case law cited by Trascent

regarding Rule 56 and contracts procured by fraud arose in the advancement context and that, in that context, settled Delaware law supported the Court of Chancery's ruling on the Summary Judgment Motion. *Id.* In sum, Mr. Bouri's answering brief raised the same arguments he raises herein and cited settled Delaware law related to the scope of advancement proceedings and the policy underlying advancement in order to rebut Trascent's contention that the Court below erred when granting the motion. On March 11, 2016, the Court of Chancery denied Trascent's application for certification of interlocutory appeal. B.372-373; DKT-xxvii (Transaction ID 58705580).

While denying Trascent's request for interlocutory review, the Court below certified its Order regarding advancement as a final order pursuant to Court of Chancery Rule 54(b). Op. Br. at Ex. A. Trascent perfected its appeal and filed its Opening Brief on May 10, 2016.

Trascent's Opening Brief on appeal ignores the Court of Chancery's rationale and the arguments advanced in opposition to Trascent's request for interlocutory review and chooses instead to raise issues that are not considered within the context of a narrow, summary advancement proceeding. Perhaps Trascent intends to address why the settled law and policy related to advancement should be set aside in this case in its reply brief. That would be inconsistent with applicable Supreme

Court Rules,⁶ deprive Mr. Bouri of the opportunity to provide a written response to these points and is reminiscent of Trascent's provide-no-explanation-response to Mr. Bouri's initial advancement demand.

⁶ Sup. Ct. R. 13(c)(i) ("Appellant shall not reserve material for reply brief which should have been include in a full and fair opening brief").

ARGUMENT

I. The Court Of Chancery Correctly Rejected Trascent's Fraud In The Inducement Defense

A. Question Presented

The question presented on appeal is whether the Court of Chancery erred when it rejected Trascent's fraud in the inducement defense when granting the Summary Judgment Motion. It did not. The Court below followed settled law and policy when it ruled that evidence of a party's alleged fraudulent activities which are at issue in the underlying proceeding constitute peripheral issues/underlying conduct that is outside the scope of an advancement proceeding. This issue was presented to the Court of Chancery in Mr. Bouri's Reply Brief in Support of His Motion for Partial Summary Judgment as to His Claim for Advancement, B.228-231, at oral argument on the Summary Judgment Motion, A.15-19, addressed by the Court of Chancery in its Ruling, Op. Br. Ex. C at 15-20, and in Mr. Bouri's answering brief in opposition to Trascent's application for interlocutory review, B.356-364.

B. Scope of Review

The Supreme Court applies *de novo* review to a grant of summary judgment based on the terms of a contract.⁷ A claim that a trial court applied an incorrect

⁷ *Citadel Holdings Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992).

legal standard raises a question of law that the Supreme Court also reviews *de novo*.⁸

C. Merits

1. Mr. Bouri's Right To Advancement Has Been Triggered

The Court of Chancery correctly determined that Mr. Bouri has advancement rights under Sections 6.1(a) and 6.1(b) of the Employment Agreement and Sections 6.2(a) and 6.2(c) of the LLC Agreement. Op. Br. Ex. C at 13. These contracts, which Trascent has sought to enforce throughout the underlying proceedings, entitle Mr. Bouri to advancement for any loss “relating to, the operations, business or affairs of . . . [Trascent],” a broad grant that as written is not limited by allegations of fraud or any of the other defenses Trascent raised below.

The Court of Chancery also correctly determined that all of the claims and counterclaims at issue in the underlying action trigger Mr. Bouri's right to advancement. Trascent does not contest this determination.

2. Mr. Bouri's Alleged Underlying Conduct Is Outside The Scope Of An Advancement Proceeding

The Court of Chancery correctly determined that Trascent's allegations of fraud in the inducement and evidence in support thereof do not limit Mr. Bouri's

⁸ *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd*, 785 A.2d 625, 638 (Del. 2001).

right to advancement. The Court of Chancery's Ruling is consistent with both longstanding precedent and public policy that strongly favors advancement.

a. The Court's Ruling is Not Inconsistent with Legal Authority Addressing Advancement

Trascent contends that the Court of Chancery's Ruling conflicts with legal principles related to breach of contract claims, fraudulent inducement defenses, and summary judgment. Op. Br. at 18-20. Yet, the case law Trascent cites arises outside the advancement context and the other legal principles it relies on must be evaluated within the narrow scope of advancement proceedings. In the advancement context, which is unique for sound reasons discussed below, the scope of the Court of Chancery's analysis and Ruling fit squarely within settled precedent and policy.

b. The Scope of an Advancement Proceeding is Limited and Does Not Allow for Review of the Movant's Alleged Underlying Conduct

Indemnification and advancement are legally distinct rights.⁹ A right to advancement has no value unless it is enforced while the underlying action is pending.¹⁰

⁹ *Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 580 (Del. Ch. 2006).

¹⁰ *See Morgan v. Grace*, 2003 WL 22461916, at *1 (Del. Ch. Oct. 29, 2003) ("The value of the right to advancement is that it is granted or denied while the underlying action is pending.").

To ensure advancement rights are meaningful and independent of rights to indemnification, advancement actions are summary in nature and narrow in scope.¹¹ Advancement proceedings are limited to “the question of whether claims pled in an [underlying] complaint . . . trigger a right to advancement under the terms of a corporate instrument.”¹² Ignoring this limitation, Trascent seeks to expand the scope of this advancement proceeding to include an examination of Mr. Bouri’s

¹¹ *Kaung*, 884 A.2d at 509; *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 213 (Del. 2005).

¹² *DeLucca*, 2006 WL 224058, at *6. *See also Kaung*, 884 A.2d at 509 (“the scope of an advancement proceeding . . . is limited to determining ‘the issue of entitlement according to the corporation’s advancement provisions’ . . .”) (citation omitted).

The law regarding the scope of advancement proceedings and the limited nature of the judicial inquiry in such disputes is well settled and consistent with the approach adopted by the Court of Chancery in this case. *See, e.g., Homestore*, 888 A.2d at 213 (“[t]he scope of an advancement proceeding is . . . limited to determining the issue of entitlement in accordance with the corporation’s own uniquely crafted advancement provisions”); *Marino v. Patriot Rail Co., LLC*, 2016 WL 770262, at *16 (Del. Ch. Feb. 29, 2016) (“[t]he scope of an individual’s advancement right normally turns on the pleadings in the underlying litigation that trigger the advancement right”); *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *3 (Del. Ch. June 23, 2008) (advancement proceedings are summary in nature and limited in scope to whether underlying proceedings trigger rights to advancement under the advancement provisions at issue); *DeLucca*, 2006 WL 224058, at *6 (advancement proceedings are limited in scope to “the question of whether claims pled in an [underlying] complaint . . . trigger a right to advancement under the terms of a corporate instrument”); *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co., LLC*, 853 A.2d 124, 126-27 (Del. Ch. 2004) (“the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought.”) (quoting *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843245 at *2 (Del. Ch. Aug. 1, 2003) (internal quotation marks omitted)).

alleged underlying conduct; yet, the movant's alleged underlying conduct cannot be considered in an advancement proceeding:

the scope of an advancement proceeding . . . “is limited to determining ‘the issue of entitlement according to the [company’s] advancement provisions and not to issues regarding the movant’s alleged conduct in the underlying litigation.’”¹³

This is true even if entitlement to advancement is impacted by that conduct.¹⁴

If the claims pled fit within the scope of the advancement provisions, advancement is granted. Nothing more, including the conduct at issue in the underlying proceeding, is considered at this stage. The reason for this approach is straightforward: a clear authorization of advancement rights, as exists here, “presupposes that the [company] will front expenses before any determination is made of the corporate official’s ultimate right to indemnification.”¹⁵ Thus, conduct at issue in the underlying action cannot form the basis of a defense to an advancement action.¹⁶

¹³ *Kaung*, 884 A.2d at 509 (quoting *Homestore*, 886 A.2d at 503).

¹⁴ *Tafeen*, 2004 WL 556733 at *5 (dismissing defenses based on underlying conduct as a matter of law and stating that “the Court’s analysis . . . extends only to entitlement according to advancement provisions; it does not extend to . . . the moving party’s alleged conduct in the underlying action, even if ultimate entitlement to advanced fees may in some fashion be connected to those issues”).

¹⁵ *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *9 (Del. Ch. June 18, 2002), *aff’d sub nom. Elec. Data Sys. Corp. v. Reddy*, 820 A.2d 371 (Del. 2003).

¹⁶ *Trascent’s* citation to *Tafeen v. Homestore, Inc.*, 2004 WL 556733 (Del. Ch. Mar. 22, 2004) as support for the statements that “The preference for prompt resolution of advancement disputes does not override and invalidate legitimate

c. The Scope of an Advancement Proceeding Remains Limited Even When Fraud is Alleged

Trascent ignores the foregoing authority and argues that Mr. Bouri's alleged underlying conduct can be considered in the context of this advancement proceeding because Trascent has raised issues of fraud in the inducement. Trascent is incorrect.

As the Court of Chancery correctly stated in its Ruling, Mr. Bouri's alleged conduct at issue in the underlying litigation, including his alleged fraudulent activities, is a "peripheral issue" that is "not pertinent" to the summary advancement proceeding. Op. Br. Ex. C at 16-18. The *Tafeen* decision on which the Court of Chancery relied resolved this very issue and held that a fraud in the inducement defense does not change the scope of an advancement proceeding and cannot defeat a claim for advancement "as a matter of law."¹⁷

defenses to claims for advancement," Op. Br. at 20-21 n.13, and that "an affirmative defense may preclude the entry of summary judgment on a claim for advancement," Op. Br. at 23, is misplaced. While *Tafeen* did find that Homestore's unclean hands defense might preclude advancement, it did so only to the extent the defense was "based not in Tafeen's conduct related to the underlying claims, as previous unclean hands arguments have been based, but in his conduct in making the advancement claim itself." 2004 WL 556733, at *6-7. This limited exception does not apply here as Trascent's fraudulent inducement defense is based on Mr. Bouri's alleged underlying conduct, not his exercise of his advancement rights.

¹⁷ *Tafeen*, 2004 WL 556733 at *5.

In *Tafeen*, Homestore raised four separate defenses premised on an “analysis of Tafeen’s conduct *in the underlying action*.”¹⁸ One of those defenses was that Tafeen fraudulently induced Homestore to extend advancement rights to him. After initially noting that (i) Homestore’s defenses asked the Court to review Tafeen’s conduct at issue in the underlying proceedings, (ii) “Delaware courts have consistently declined to undertake such an analysis” in an advancement proceeding and (iii) “no defense proffered by Homestore moves this Court to do otherwise,” Chancellor Chandler examined and dismissed each of the four “Defenses Involving Tafeen’s Conduct in the Proceedings” as a matter of law.¹⁹

With respect to Homestore’s fraud in the inducement defense, the Court of Chancery stated:

Homestore next states that Tafeen’s “underlying misconduct effectively served to fraudulently induce the corporation to enter into the officer employment relationship and, in that context, to extend contractual advancement rights to the officer employee.” Because Tafeen fraudulently induced Homestore to enter into an employment contract with him, the argument goes, the entitlements provided by the Advancement Bylaw, which are only extended to Tafeen because of his position as an executive officer, should not be provided to him.

While this may be a proper basis for a fraud-in-the-inducement action against Tafeen, the argument does not serve as a defense here. The Advancement Bylaw is not dependent upon Tafeen’s employment contract. This action is to determine Tafeen’s entitlement to advancement under Homestore’s *governing* rules. Whether or not

¹⁸ *Id.* at *4-6 (emphasis in original).

¹⁹ *Id.*

Homestore was fraudulently induced to enter into the *employment contract* with Tafeen is a peripheral issue. For the same policy reasons discussed in *Reddy*, the Court’s analysis in a Section 145(k) action extends only to entitlement according to advancement provisions; it does not extend to peripheral issues regarding the moving party’s alleged conduct in the underlying action, even if ultimate entitlement to advanced fees may in some fashion be connected with those issues. Homestore’s motion for summary judgment as to this defense is denied as a matter of law.²⁰

Thus, in *Tafeen*, the Court of Chancery refused to expand the scope of an advancement proceeding to include an analysis of the fraud in the inducement defense, noting that such a defense failed “as a matter of law” and failed “even if ultimate entitlement to advanced fees may in some fashion be connected with” the movant’s alleged underlying fraud.²¹

Despite the clarity of *Tafeen*, Trascent attempts to distinguish it by arguing that “the advancement right at issue in *Tafeen* did not arise from the contract allegedly induced by fraud.” Op. Br. at 22. The Court of Chancery considered and rejected this distinction:

Trascent attempts to distinguish *Tafeen* . . . arguing that *Tafeen* turned on the Court’s distinction between the employment contract and the company’s bylaws as dual sources of advancement rights, but I do not read *Tafeen* the same way Trascent does. *Tafeen* did not turn on the difference between a contract and a governing document.

Instead, in *Tafeen*, the Court was referring to “peripheral issues” as underlying conduct not pertinent to advancement. Holding otherwise

²⁰ *Id.* at *5 (italics in original).

²¹ *Id.*

would turn advancement on its head, where any allegation challenging the right to advancement would collapse that right into one only for indemnification and cripple the summary nature of these proceedings.

Op. Br. Ex. C at 17-18. The Court of Chancery's reading is correct. As both the *Tafeen* court and the Court below have held, issues concerning a movant's underlying conduct, including allegations of fraud, are "peripheral" and "not pertinent" to advancement.²² This is true "even if ultimate entitlement to advanced fees may in some fashion be connected with those issues."²³

Any other result would cause corporate executives to lose their advancement rights based on the alleged misconduct at issue in the underlying proceeding. That is not Delaware law. As stated in *DeLucca*:

the right to advancement does not go away simply because the entity from which advancement is sought is alleging that the plaintiff has committed perfidious acts against it. Indeed, it is precisely in the circumstance when a business official is accused of serious

²² Op. Br. Ex. C at 18; 2004 WL 556733, at *5.

²³ *Tafeen*, 2004 WL 556733, at *5. Even if Trascent's efforts to distinguish *Tafeen* had merit, which they do not, the distinction Trascent attempts to draw has no impact here. Mr. Bouri is seeking advancement pursuant to the Employment Agreement and the LLC Agreement. While he signed the LLC Agreement as a member of Trascent, this did not give him advancement rights. Rather, it was Mr. Kishan's decision to appoint Mr. Bouri as a Trascent manager which conferred advancement rights on Mr. Bouri under the LLC Agreement. A.220-221 at § 6.1 (defining covered persons as, among other things, Managers of Trascent), § 6.2(c) (granting advancement to Covered Persons) and B.243 at ¶¶ 14 (noting Mr. Kishan, as majority member, elected Mr. Bouri to serve as a Manager of Trascent). Thus, Mr. Bouri, like Mr. Tafeen, is relying on advancement rights that were given to all officers under the terms of the company's operative instruments.

wrongdoing that the right to advancement is critical, as that right secures the funds for the official to defend herself.²⁴

The Court of Chancery's Ruling follows established Delaware law in the context of advancement.

d. The Ruling is Consistent with the Public Policy Underlying Advancement – To Attract Qualified Individuals.

The Ruling not only follows well-established precedent, it is consistent with the public policy on which that precedent is based. “Rights to indemnification and advancement are deeply rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person’s employment and more as a desirable mechanism to manage risk in return for greater corporate benefits.”²⁵ Those benefits include “encourag[ing] persons to serve in a company, ‘secure in the knowledge that expenses incurred by them in upholding their honesty and integrity will be borne by the corporation they serve.’”²⁶

²⁴ *DeLucca*, 2006 WL 224058, at *11. *See also* Op. Br. Ex. C at 18 (noting that considering Mr. Bouri’s alleged underlying fraudulent conduct “would turn advancement on its head, where any allegation challenging the right to advancement would collapse that right into one only for indemnification and cripple the summary nature of these proceedings.”).

²⁵ *Kaung*, 884 A.2d at 509.

²⁶ *Filip v. Centerstone Linen Servs., LLC*, 2014 WL 793123, at *12 (Del. Ch. Feb. 27, 2014) (quoting *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 344 (Del. 1983)). *See also Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *10 n.89 (Del. Ch. May 30, 2008) (“Delaware courts have found advancement to function primarily as a benefit to the corporation, and not to the directors”); *DeLucca*, 2006 WL 224058, at *7 (“Delaware has a strong public policy in favor of

In order to advance that policy and ensure Delaware companies can attract the most qualified individuals, Delaware courts have been reluctant to deprive parties of their advancement rights.²⁷ Even Trascent acknowledges that Delaware public policy “favors resolving advancement disputes early and in favor of the claimant.” B.335. This policy further supports the Ruling and weighs against Trascent’s appeal.

e. Trascent Cannot Rewrite The Operative Agreements To Suit Its Current Preferences

Trascent also contends that the Ruling and Order “impose[] a significant, immediate, and ongoing economic burden on Trascent that Bouri may be unwilling or unable to repay” should Trascent succeed on the merits in the underlying action. Op. Br. at 16 n.3. Yet, if Trascent did not want to bear this risk, it should have adopted narrower advancement provisions or conditioned advancement on the receipt of adequate collateral. For example, Trascent could have agreed to advance expenses in cases that do not involve Trascent asserting fraud claims against the party seeking advancement. Certainly narrower provisions “would have been easy to draft and would have been crafted in far less expansive terms than were used” in

assuring key corporate personnel that the corporation will bear the risks resulting from performance of their duties . . .”).

²⁷ See *Bergonzi v. Rite Aid Corp.*, 2003 WL 22407303, at *2, 4 (Del. Ch. Oct. 20, 2003) (holding that former CFO was entitled to advancement even after having pled guilty to a criminal conspiracy to defraud the company).

the applicable agreements.²⁸ This is particularly true in the limited liability context, where the indemnification and advancement “statutes are quite different from their corporate law counterpart[s] and place an even greater emphasis on contractual freedom.”²⁹ Trascent did not take this step and now wants a Court to ignore “the plain language of [its] contracts and generate an after-the-fact judicial contract that reflects [its] current preference.”³⁰ Any regret Trascent has for its failure to take this step does not justify setting aside Mr. Bouri’s advancement rights based on Trascent’s belated fraud in the inducement affirmative defense.

f. Trascent Seeks to Rely on Mr. Bouri’s Alleged Underlying Conduct to Deny Him Advancement

Trascent has sued Mr. Bouri alleging he fraudulently induced Trascent to enter the Employment Agreement and the LLC Agreement. Trascent has introduced evidence it contends supports its underlying fraud claims and asks that the Court of Chancery’s Ruling and Order be overturned based on that evidence. Trascent’s request is inconsistent with established Delaware law which provides that an advancement proceeding is summary in nature and “limited [in scope] to determining ‘the issue of entitlement according to the [company’s] advancement provisions and *not to issues regarding the movant’s alleged conduct in the*

²⁸ *DeLucca*, 2006 WL 224058, at *2.

²⁹ Wolfe & Pittinger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 8.02 at 8-23.

³⁰ *Id.*

underlying litigation”³¹ and would turn this straightforward advancement action into an indemnification proceeding.

The Court of Chancery’s Ruling and Order, in comparison, are consistent with the distinction between advancement and indemnification, the rule that a movant’s alleged underlying conduct is not considered in the context of an advancement proceeding and the policies underlying advancement proceedings. The Ruling and Order were the product of an orderly and logical deductive process, and should be affirmed.

³¹ *Kaung*, 884 A.2d at 509 (emphasis added).

CONCLUSION

For the foregoing reasons, Mr. Bouri respectfully requests that this Court affirm the Court of Chancery's Ruling and Order on the Motion for Summary Judgment.

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