EFiled: Jul 17 2017 10:01PM EDT
Filing ID 60863925
Case Number 223,2017 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

OPTIMISCORP, a Delaware Corporation,	)	
	)	
Defendant Below,	)	
Appellant,	)	No.: 223,2017
	)	
v.	)	
	)	On Appeal from the Court of
WILLIAM HORNE,	)	Chancery of the State of
	)	Delaware
Plaintiff Below,	)	
Appellee.	)	C.A. No. 12268-VCS

APPELLANT'S OPENING BRIEF

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Dated: July 17, 2017
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NATURE OF PROCEEDINGS

Appellant, defendant-below OptimisCorp ("Optimis") appeals (i) the Amended Final Order and Judgment of the Court of Chancery dated May 4, 2017,[1] (ii) the Final Order and Judgment of the Court of Chancery dated May 2, 2017,[2] and (iii) the Memorandum Opinion of the Court of Chancery dated March 3, 2017, which held that appellee, plaintiff-below William Horne ("Horne"), is entitled to indemnification of his legal expenses under 8 *Del. C.* § 145(c).[3]

On August 5, 2013, in the case captioned: *Optimiscorp v. Waite*, C.A. No. 8773-VCP (Del. Ch.) (the "Plenary Action"), Optimis, Alan Morelli ("Morelli") and Analog Ventures, LLC ("Analog" and, collectively, the "Optimis Plaintiffs") filed a Verified Complaint (the "Plenary Complaint") against John Waite ("Waite"), William Atkins ("Atkins"), Gregory Smith ("Smith" and, collectively with Waite and Atkins, the "Director Defendants") and Horne (together with the Director Defendants, the "Plenary Defendants").

The Plenary Complaint alleged, in relevant part, that Horne breached his fiduciary duties as Optimis's former chief financial officer and, separately, that

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[1] A true and correct copy of the Court of Chancery May 4, 2017 Order is attached hereto as **Exhibit A**.

[2] A true and correct copy of the Court of Chancery May 2, 2017 Order is attached hereto as **Exhibit B**.

[3] A true and correct copy of the Court of Chancery March 3, 2017 Memorandum Opinion is attached hereto as **Exhibit C** (the "Indemnification Opinion"). *See Horne v. OptimisCorp.*, C.A. No. 12268-VCS, 2017 WL 838814 (Del. Ch. Mar. 3, 2017).

Horne breached certain express and implied obligations owed to Optimis as a stockholder and a party to a certain stockholders agreement (as defined *infra*, the "Stockholders Agreement").

On August 26, 2015, the trial court issued a Memorandum Opinion and Final Judgment and Order (the "Trial Opinion") (i) finding the Director Defendants breached their fiduciary duty of loyalty to Optimis in two distinct respects, but awarding no damages for those fiduciary violations, (ii) dismissing the Plenary Plaintiffs' other claims, (iii) granting, in part, and denying, in part, Horne's request for discovery sanctions, and (iv) denying the parties' cross-claims for attorneys' fees and costs. *See generally Optimiscorp v. Waite*, C.A. No. 8773-VCP, 2015 WL 5147038 (Del. Ch. Aug. 26, 2015).[4]

The parties then filed cross-appeals. The Supreme Court heard oral argument on the cross-appeals on April 20, 2016 and affirmed the holdings of the Trial Opinion by Order dated April 25, 2016, including its holding that the Director Defendants breached their fiduciary duties owed to Morelli and Optimis. *See generally Optimiscorp v. Waite*, 137 A.3d 970 (Del. 2016) (Table). In particular, the Supreme Court also observed that the Director Defendants acted to "sandbag" Morelli by concealing that their true aim in calling a special meeting of Optimis's Board of Directors (the "Optimis Board") was to oust Morelli as CEO. *Id.* at *2.

[4] A true and correct copy of the Trial Opinion is attached hereto as **Exhibit D**.

On April 27, 2016, Horne filed a Verified Complaint for Indemnification (the "Indemnification Complaint") in the Court of Chancery, seeking indemnification pursuant to 8 *Del. C.* § 145(c). After limited discovery, Horne moved for summary judgment. Optimis opposed the motion on limited grounds, namely that: (i) the breach of contract and implied covenant of good faith and fair dealing claims against Horne were not brought by reason of the fact he was an officer (A00550-51); (ii) the fees and costs Horne sought in defending claims involving his post-employment conduct were not indemnifiable (A00551-51); and (iii) Optimis should be permitted to take limited discovery to challenge the reasonableness of a portion of Horne's requested fees and costs. A00551-54.

On March 3, 2017, the trial court issued the Indemnification Opinion, granting Horne's motion for summary judgment in its entirety. By Amended Final Order and Judgment dated May 4, 2017, the trial court awarded Horne $1,900,032.94 in fees and expenses, $96,638.99 in pre-judgment interest, and post-judgment interest in the amount of $307.85 *per diem*. *See* **Exhibit A**.

On June 1, 2017, Optimis timely appealed the Indemnification Opinion. This is Optimis's opening brief in support of its appeal.

SUMMARY OF ARGUMENT

1. The trial court erred as a matter of law in holding that in order to sustain a "not by reason of the fact" defense, the underlying claim must not only be brought against the former officer in his personal capacity, but also be adequately prosecuted at trial. In finding that Optimis failed to meet this standard, and thereby rejecting its "not by reason of the fact" defense, the trial court erroneously held Optimis to a higher standard than that required under settled Delaware law.

2. The trial court clearly erred in finding, based on inferences drawn solely from the Trial Opinion, that Optimis did not "actually prosecute" its breach of contract claims against Horne. To the contrary, the Trial Opinion makes facially clear that Optimis did in fact prosecute its contract-based claims against Horne before, during, and after trial.

3. The trial court erred when it held that the legal expenses Horne incurred in defending Optimis's contract-based claims were by reason of the fact of his executive office, not his personal capacity as a stockholder. The Indemnification Opinion relied on the Trial Opinion's conclusion that the conduct underlying the breach of contract claim against Horne complied with his fiduciary duties. But the Trial Opinion did not expressly find—as the trial court incorrectly infers—that Horne was acting in his official capacity when he engaged in the conduct underlying the breach of contract claim. Furthermore, the Trial Opinion acknowledges that the

breach of contract claim against Horne was grounded on the Stockholders Agreement (as defined *infra*), which Horne entered into in a purely personal capacity when he was a non-employee, consultant to Optimis.

STATEMENT OF FACTS

The Plenary Action involved "complicated and unusual facts." *Optimiscorp v. Waite*, 137 A.3d 970 (Del. 2016) (Table) at *1.

In 2006, Morelli co-founded Optimis to develop innovative software for the healthcare industry. *Optimiscorp*, 2015 WL 5147038, at *24. Optimis was formed as a Delaware corporation with its principal place of business in California. Optimis's strategy was to acquire healthcare service providers in the physical therapy field to help design and test its software. *Id.*

In June 2007, Optimis purchased Rancho Physical Therapy ("Rancho") from the Director Defendants (the "Rancho Transaction"). *Optimiscorp*, 2015 WL 5147038, at *22-23. To facilitate the purchase, the Director Defendants provided a legal opinion and assurances that they had the ability to enter into that transaction—a legal opinion on which Optimis relied. The Rancho Transaction was memorialized by, among other things, a Stock Purchase Agreement whereby Rancho became a wholly-owned subsidiary of Optimis, and the Director Defendants became directors and shareholders of Optimis. *Id.* at *3. The Rancho Transaction also included a Stockholders Agreement, which the Director Defendants and Horne signed in June 2007 (the "Stockholders Agreement"). *Id.* at *23.

The Stockholders Agreement granted Morelli and Analog the right to designate five of the nine directors on the Optimis Board. *Optimiscorp*, 2015 WL 5147038, at *23, *74.

In the first few years following the Rancho Transaction, the Director Defendants and Horne were satisfied with Optimis's direction under Morelli's leadership. By late 2010, however, the Director Defendants began to have concerns about Morelli's helmsmanship. *Id.* at *29. In particular, Smith shared with Waite and Atkins (but not Morelli) his view that Optimis was suffering from poor financial budgeting and inadequate internal controls. *Id.* at *30. But the Director Defendants' chief concern was purely selfish, namely, getting their liquidity out of Optimis. So instead of acting as honest fiduciaries by voicing their concerns to the Optimis Board, Waite, Atkins and Smith made the calculated and self-interested decision to lie in wait, keeping their concerns to themselves. *Id.* at *31 (quoting Waite stating "I am not sure that confronting this situation at a board meeting with other[s] present is the best approach to getting us to our goal of liquidity.").

At around this time, the Director Defendants considered the possibility of waging a coup to take down the Morelli board faction. Describing the Director Defendants' thinking at the time, Waite explained that "if we were to create that confrontation at the board level, then we must be in a position to do what would amount to a hostile takeover. I am not sure that is what we want to do right now."

Id. The Director Defendants decided against voicing their concerns in a transparent and orderly fashion at the board level, and opted instead to remain mute until the time was ripe for a Pearl Harbor-type ambush. Specifically, in early 2012 the Director Defendants decided to lead an insurgency of key Optimis employees to remove Morelli as CEO. Key to the Director Defendants' designs was Horne, who was then Optimis's chief financial officer. *Optimiscorp*, 2015 WL 5147038, at *3. Horne made an easy mark. In addition to being CFO, Horne was also carrying on a long term, clandestine romantic affair with Morelli's estranged wife. *Id.* at *25, *40. And Horne made no secret of his "stated hatred of Morelli." *Id.* at 45 (noting that "Horne, referring to Morelli, told [Nancy] Solomon that '[P]ersonally I hate the mother f-cker"). *Id.* So, as the Trial Opinion acknowledges, Horne had his own, personal reasons and biases for seeing Morelli marginalized and disgraced. *See also id.* at *80 (referring to Horne's adverse "biases" toward Morelli).

Horne was one of the original parties to the Stockholders Agreement. A00528. In fact, Horne helped draft the Stockholders Agreement when he was a non-employee, consultant to Optimis. A00528 (citing *Optimiscorp v. Waite*, No. 8773-VCP, Transcript of Videotaped Deposition of William Horne, Tr. at 86 (Del. Ch. May 7, 2014)). Horne started at Optimis as a consultant in 2006 and became its CFO in January 2008. *Optimiscorp*, 2015 WL 5147038, at *3, *23.

A. The Plenary Complaint Alleged That Horne Breached His Personal Obligations Under The Stockholders Agreement.

In the Plenary Action, Optimis alleged that no later than February 2012, Horne joined the Director Defendants in their "unlawful conspiracy" to cause harm to Morelli and Optimis for their purely selfish designs. A00528 (quoting Plenary Complaint at ¶ 16). The Plenary Complaint alleged that Horne was a logical partner in crime because he shared the Director Defendants' desire to "seek revenge against Morelli for his defiance of [Horne's] self-dealing and unlawful efforts to take control of the entire Company." A00529 (quoting Plenary Complaint at ¶ 4). More pointedly, the Plenary Complaint alleged the "principal goal of the coup" was an effort "to gain control" because the Plenary Defendants "disagreed with Morelli and the Board's strategic vision and plan for the Company." *Id.* (quoting Plenary Complaint at ¶ 27). The Plenary Complaint further alleged that Horne and his confederates made the calculated decision to breach the Stockholders Agreement because "they knew that, in light of the unambiguous terms of the Stockholders Agreement to which they all were, and are, parties, a mere difference of opinion over the business plan would not justify a change of control." *Id.*

Additionally, the Plenary Complaint alleged that Horne was the first of the Plenary Defendants to be informed by Tina Geller about her alleged relations with Morelli at a bar in February 2012. A00529. Geller, an Optimis employee at the time, accused Morelli of inappropriate conduct. The Plenary Plaintiffs asserted that,

after learning about this, the Director Defendants and Horne used this information "to coax Geller into bringing a false sexual harassment complaint against Morelli and to use it as an excuse to remove him and solicit the other directors and stockholders to support their change in control." A00529-30 (quoting Plenary Complaint at ¶ 18).

On February 20, 2012, using his personal e-mail account, Horne forwarded a copy of the Stockholders Agreement to George Rohlinger, another Optimis employee, who in turn relayed the document to Waite. *Optimiscorp*, 2015 WL 5147038, at *36. The Plenary Complaint alleged that, after receiving the February 20, 2012 e-mail, Waite "contacted certain of the other directors and stockholders (a majority of whom was needed to amend the Stockholders Agreement) and offered them ... valuable inducements ... [in what constituted] illegal vote buying." A00530 (quoting Plenary Complaint at ¶ 22).

At some point in the second half of 2012, Horne met with Waite and Laura Brys, Optimis's counsel, and recommended that, if Morelli was removed, "the Stockholders Agreement probably would need to be amended." *Optimiscorp*, 2015 WL 5147038, at *48. Horne came by this valuable information not through his executive office, but in the course of helping draft the Stockholders Agreement when he was a non-employee, consultant to Optimis. Horne's recommendation brought about the proposed amendment of the Stockholders Agreement that extinguished

Morelli and Analog's contractual rights to appoint a majority of the Optimis Board seats ("Amendment No. 2"). *Id.*

After the stage was set, Waite called a special meeting of the Optimis Board on October 20, 2012 (the "October Meeting"). *Id.* Concealing their agenda from Morelli and Analog, and armed with Horne's advice, the Director Defendants pushed through Amendment No. 2. *Id.* at *51. Then, to complete the coup, the Director Defendants voted at the October Meeting to terminate Morelli as Optimis's CEO. *Id.*

This ambush, sparked by Horne, soon became the focus of a Section 225 action brought by Morelli and Analog in the Court of Chancery. *Id.* at *52. The 225 Action was resolved on March 21, 2013, resulting in nullification of Amendment No. 2 and restoration of Morelli's and Analog's contractual rights. *Id.* at *48.

B. The Trial Opinion Establishes That Optimis Presented Its Contract-Based Claims At Trial.

According to the Indemnification Opinion, "Counts 3 and 4 [of the Plenary Complaint] alleged that Horne breached the stockholders agreement in undefined ways ..." *Horne*, 2017 WL 838814, at *2. The Trial Opinion, however, defines the breach of contract claims in detail.

Horne's endorsement of the adoption of Amendment No. 2 formed the basis of the Plenary Plaintiffs' claim that Horne breached the express provisions of the Stockholders Agreement. A00066-67. In particular, the Plenary Complaint asserts

that the creation and execution of Amendment No. 2 constituted breaches of the implied covenant of good faith and fair dealing because: (1) "it deprived Morelli of the benefit of the bargain under the agreement"; and (2) "the process of enacting it fell below minimal standards of fairness ...." *Id.* In the Indemnification Complaint, even Horne characterizes certain allegations against him in the Underlying Litigation as claims that he "breached the Stockholders Agreement." A00013. Horne also describes the contractual claims as alleged breaches of both express obligations and the implied covenant of good faith and fair dealing. A00066-67.

The Trial Opinion noted that the Plenary Complaint alleged, *inter alia*, that the Plenary Defendants "violated a stockholder agreement to which they were, and are, parties ...." *Optimiscorp*, 2015 WL 357675, at *1. The Trial Opinion concluded, however, that "the plaintiffs have not met their burden of proving . . . their claims for breach of either the terms of the stockholders agreement or the implied covenant of good faith and fair dealing inherent in that agreement." *Id.* at *2. The Plenary Complaint also alleged that the Plenary Defendants breached the implied covenant of good faith and fair dealing. *Id.* at *56 ("Plaintiffs also contend that Defendants breached the Stockholders Agreement or the related implied covenant of good faith and fair dealing."). The Trial Opinion acknowledges this claim, stating that "Plaintiffs contend that Defendants breached the Stockholders Agreement by adopting Amendment No. 2." *Id.* at *73.

The Trial Opinion concluded that Horne did not breach the Stockholders Agreement. Specifically, the Court held that "[t]here is not evidence that Defendant Horne ever signed Amendment No. 2, nor was Horne present at the October 20 Meeting. How he breached the Stockholders Agreement is unexplained by Plaintiffs." *Id.* The Plenary Plaintiffs also alleged but did not prove that Horne breached the implied covenant of good faith and fair dealing by depriving them of the right to appoint a majority of Optimis's Board and because the process by which Amendment No. 2 was conceived and adopted was improper. *Id.* at *75-76. Yet at the same time, these adverse findings leave no doubt that Optimis did in fact prosecute its contract-based claims against Horne at trial.

ARGUMENT

I. THE TRIAL COURT ERRED BY APPLYING A MORE EXACTING STANDARD THAN THAT REQUIRED BY 8 *DEL. C.* § 145(C).

A. Question Presented

Whether the trial court erred by (i) creating and applying an actually-and-cogently-prosecuted standard in determining whether Optimis's breach of contract claims were by reason of the fact that Horne was a former officer, and (ii) holding that Optimis did not actually prosecute its contract-based claims against Horne. Optimis preserved these issues for appeal at A00527-33, A00541, A00852-58.

B. Standard of Review

The scope of review on appeal of a decision on summary judgment is *de novo* consideration, pursuant to which the Supreme Court may review the entire record, including the pleadings and any issues such pleadings may raise, as well as the trial court's order and opinion. *Pike Creek Chiropractic Ctr. v. Robinson*, 637 A.2d 418, 420-21 (Del. 1994); *In re Kraft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013) (holding that the Supreme Court "reviews a trial court's decision to grant summary judgment *de novo.*"). From this review, the Supreme Court is free to draw its own conclusions with respect to the facts if the findings below are wrong and if justice so requires, particularly where the findings arise from deductions, processes of reasoning or logical inferences. *Dutra de Amorim v. Norment*, 460 A.2d 511, 514 (Del. 1983); *Fiduciary Trust Co. v. Fiduciary Trust Co.*, 445 A.2d 927, 930 (Del.

1982). *See also Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 508 (Del. 2005) (citing *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004) and applying a *de novo* standard of review in the context of 8 *Del. C.* § 145).

C. Merits of the Argument

Horne's indemnification claim derives solely from 8 *Del. C.* § 145(c). A00014-15. Section 145(c) provides:

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

Thus, to be entitled to indemnification under Section 145(c), the plaintiff "must demonstrate two key elements: (1) that the matter at issue is covered by §145(a) or (b); and (2) that the party was successful on the merits or otherwise." *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *3 (Del. Ch. May 3, 2002) (quoting *Cochran v. Stifel Fin. Corp.*, 2000 WL 1847676, at *9 (Del. Ch. Dec. 13, 2000), *aff'd in part, rev'd in part*, 809 A.2d 555 (Del. 2002). To be covered by Sections 145(a) and (b), the former officer must incur legal expenses "by reason of the fact that the person is or was a director, officer, employee or agent of the corporation." 8 *Del. C.* § 145(a)-(b).

1. The trial court erroneously applied a heightened "by reason of the fact standard" that finds no support in Delaware law.

The trial court created what, in effect, translates into an actually-and-cogently-prosecuted standard. Specifically, the trial court stated:

> the theories of liability *actually prosecuted* against Horne were very much 'moving targets' [quoting *Optimiscorp*, 2015 WL 5147038, at *55] and ultimately the trial court was left to observe with respect to the breach of contract claim that '[h]ow [Horne] breached the Stockholders Agreement [was] unexplained by Plaintiffs' [quoting *Optimiscorp*, 2015 WL 5147038, at *73].

Based on these inferences drawn from the Trial Opinion, the trial court rejected Optimis's "not by reason of the fact" defense, in essence, because Optimis failed to "actually" or cogently prosecute its contract-based claims against Horne. In this way, the trial court erroneously heightened the "brought by" element of the "by reason of the fact" inquiry to require that the claim be actually and cogently prosecuted at trial to a standard nowhere defined in Section 145 jurisprudence. No support can be found for the trial court's expansion of the applicable standard.

2. The trial court's misapplication of the legal standard rests on clearly erroneous factual inferences drawn from the Trial Opinion.

The trial court incorrectly found that the Plenary Plaintiffs "chose not to prosecute" its breach of contract and implied covenant claims against Horne. *Horne*, 2017 WL 838814, at *4. *See also id.* at *5 (stating that "even if the "[Plenary] Plaintiffs" had actually prosecuted their breach of contract claim against Horne,

...."). This factual finding is clearly erroneous and material to the trial court's rejection of Optimis's "not by reason of the fact" defense.

In at least three separate instances, the Trial Opinion acknowledges that Optimis presented breach of contract claims at trial. For example, the Trial Opinion noted that the Plenary Complaint alleged that the Plenary Defendants "violated a stockholder agreement to which they were, and are, parties ...." *Optimiscorp*, 2015 WL 357675, at *1. The Trial Opinion further stated that "Plaintiffs also contend that Defendants breached the Stockholders Agreement or the related implied covenant of good faith and fair dealing." *Id.* at *56. The Trial Opinion also acknowledged that "Plaintiffs contend that Defendants breached the Stockholders Agreement by adopting Amendment No. 2." *Id.* at *73. Likewise, the Plenary Complaint alleged that Horne breached the implied covenant of good faith and fair dealing relating to his involvement with the Amendment No. 2. *Id.* at *75-76.

The Indemnification Opinion also incorrectly draws an inference that the Trial Opinion considered Optimis's breach of contract claims to be "moving targets." *Horne*, 2017 WL 838814, at *4 (quoting *Optimiscorp*, 2015 WL 5147038, at *55). Yet the Trial Opinion's reference to "moving targets" was merely a characterization of Horne's argument; it was not a factual finding. *Optimiscorp*, 2015 WL 5147038, at *55 ("All defendants strenuously have complained that the claims against them have been a shifting target and impossible to defend against without enormous

expense."). The Trial Opinion goes on to hold that Optimis's breach of contract claim was deficient because its theory was not clearly explained. *Id.* at *73. From this, the trial court inferred that the Plenary Plaintiffs "chose not to prosecute" the contract-based claims against Horne. This was clear error.[5]

Similarly, the Indemnification Opinion also incorrectly draws an inference that the Plenary Plaintiffs' implied covenant claims "were [n]ever meaningfully developed in discovery or prosecuted at trial." *Horne*, 2017 WL 838814, at *4 n.47 (citing *Optimiscorp*, 2015 WL 5147038, at *75-77). While not clear from the Indemnification Opinion, presumably this inference is drawn from the following statements in the Trial Opinion: "Plaintiffs' implied covenant claims are more colorable [than the breach of contract claims], but still are not meritorious. Plaintiffs make several arguments in this regard, *some of which were not introduced until the post-trial briefing*." *Optimiscorp*, 2015 WL 5147038, at *75 (emphasis added). Yet, the Trial Opinion does not specify which of the "several arguments" were not raised until after trial or whether any such post-trial argument was specific to the implied covenant claims against Horne. And, in any event, the same section of the Trial Opinion characterizes the implied covenant claims as "more colorable" [*id.*], which necessarily suggests that at least some of the claims were prosecuted at trial.

[5] It also bears noting that the Trial Opinion specifically identified a number of claims which the Court found Plaintiffs to have abandoned. *Id.* at *55. The contract-based claims against Horne are not on that list.

Therefore, it was clearly erroneous for the Indemnification Opinion to infer, categorically, that none of the implied covenant claims were "prosecuted at trial." *Horne*, 2017 WL 838814, at *4 n.47.

II. THE TRIAL COURT ERRED BY HOLDING THAT THE BREACH OF CONTRACT CLAIMS WERE BROUGHT BY REASON OF THE FACT THAT HORNE WAS A FORMER OFFICER OF OPTIMIS.

A. Question Presented

Whether the trial court committed legal error in holding that Horne's legal expenses related to his defense of Optimis's breach of the Stockholders Agreement claim were by reason of the fact that Horne was Optimis's former CFO. Optimis preserved these issues for appeal at A00540-45, A00859-62.

B. Standard of Review

This Court reviews the Court of Chancery's legal conclusions regarding whether a former officer is entitled to indemnification under 8 *Del. C.* § 145 under a *de novo* standard of review. *Kaung*, 884 A.2d at 508.

C. Merits of the Argument

Officers of a Delaware corporation are not afforded mandatory indemnification when they are sued for breach of personal contractual obligations, rather than by reason of their status as officers. *See Cochran v. Stifel Fin. Corp.*, 2000 WL 1847676, at *6 (Del. Ch. Mar. 8, 2000), *aff'd in pertinent part, rev'd in part, Stifel Fin. Corp. v. Cochran*, 809 A.2d 555 (Del. 2002). To determine whether a suit against an officer for breach of contractual obligations is by reason of their status as officers, the Court considers whether a causal nexus occurs between the

claim and one's official capacity. *See Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at * 13 (Del. Ch. Sept. 11, 2015).

The Delaware Supreme Court has stated "if there is a nexus or causal connection between [a claim] and one's official capacity, those proceedings are 'by reason of the fact' that one was a corporate officer..." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 215 (Del. 2005). A causal nexus between Horne's actions and his former corporate capacity may exist if his actions involve "the exercise of judgment, discretion, or decision-making authority on behalf of [Optimis]" or "make use of any entrusted corporate powers in order to engage in the conduct that gave rise to the specific claims." *Lieberman v. Electrolytic Ozone, Inc.*, 2015 WL 5135460, at *3 (Del. Ch. Aug. 31, 2015) (quoting *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 403 (Del. Ch. 2009) and *Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *3 (Del. Ch. Jan. 30, 2004)). However, the Court of Chancery recently reiterated that "[t]here is no causal connection between a corporate official's acts and his or her corporate power when the parties are litigating a specific and personal contractual obligation that does not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation." *Charney*, 2015 WL 5313769, at *16.

As part of its analysis in holding that Horne was not liable for aiding and abetting breaches of fiduciary duty, the Trial Opinion states:

> [I]t is not surprising that Horne, as Optimis' CFO, knew about the provision in the Stockholders Agreement effectively giving Morelli the ability to appoint a majority of Optimis' Board until early 2015. Similarly, once Brys told Horne that it might be necessary to remove Morelli as CEO, it would have been *consistent with Horne's duties* as an officer of Optimis to advise her of the provision in the Stockholders Agreement that would enable Morelli to reverse any such action. Thus, Plaintiffs have not proven any aiding and abetting.

Optimiscorp, 2015 WL 5147038, at *80 (emphasis added).

Based on this holding, the Indemnification Opinion infers that Horne was acting in his official capacity and notes that it "was determined by the trial court to be an act taken in compliance with Horne's fiduciary duties as an officer of the Company." *Horne*, 2017 WL 838814, *4. But the Trial Opinion did not expressly state that Horne's actions were in fact performed in his official capacity, just that Horne's actions were not in breach of his fiduciary duties.

Moreover, that Horne's conduct complied with his fiduciary duties is immaterial to the Section 145(c) analysis. The relevant inquiry is not whether Horne's conduct complied with fiduciary duties, but whether Horne used his corporate powers in the exercise of his decision-making authority. Horne came to know of the pertinent provisions of the Stockholders Agreement as a stockholder, before he became an officer of Optimis. And by discussing certain provisions of the Stockholders Agreement with Optimis's counsel, Horne engaged in conduct that was also consistent with that in which any other signatory to the Stockholders Agreement

could have engaged. Horne's conduct did not involve the use of decision-making authority or corporate powers but only Horne's knowledge as a non-employee, consultant and a party to the Stockholders Agreement.[6] Furthermore, the Trial Opinion demonstrates Horne's personal animus and biases toward Morelli, raising serous doubt regarding Horne's true motivations. For this reason, too, the trial court committed clear error in finding that no genuine dispute of material fact exists as to whether Horne engaged in the conduct underlying the breach of contract claims in his official capacity.

The Court of Chancery applied similar reasoning in *Charney v. American Apparel, Inc.*, 2015 WL 5313769 (Del. Ch. Sept. 11, 2015). There, the Court refused to advance expenses to a former CEO in connection with a suit by the company, American Apparel, against the CEO, Dov Charney, for alleged violations of a standstill agreement, including an attempted takeover of the company. *Id.* at *15. Similar to Horne's arguments here, Charney argued that "but for" his status as CEO he would not have been able to breach the standstill agreement. The Court rejected this argument because it did not matter that Charney's status as CEO put him in a position to breach the agreement, rather what mattered was whether Charney's conduct was causally connected to "the use or misuse of Charney's

[6] Horne did not attend the October Meeting and thus, unlike the other Plenary Defendants, Horne did not exercise any official duties in connection with Amendment No. 2 or the meeting. *Optimiscorp*, 2015 WL 5147038, at *73.

corporate power as a director or officer of American Apparel." *Id.* at *15-*16 ("Although it is likely true that, 'but for' being a director and/or officer of the Company, Charney would not have been subject to ... the Standstill Agreement, that observation does not mean that any conceivable violation of the Standstill Agreement is causally connected to Charney's former positions as a director and officer."). The Court found instead that "Charney's status within the Company may have formed part of the narrative leading to the execution of the Standstill Agreement, but it did not create a causal nexus with the transaction itself, which was between the Company and Charney personally." *Id.* The same holds true here.

As noted above, Horne first learned of the substance of the Stockholders Agreement when acting as a non-employee, consultant to Optimis and later, when entering into the Stockholders Agreement in his personal capacity. Furthermore, the record does not establish that Horne used the alleged misconduct underlying the contract-based claims in furtherance of his corporate powers. In fact, the Trial Opinion makes clear that Horne used his *personal* e-mail to forward the Stockholders Agreement to Rohlinger. *Optimiscorp*, 2015 WL 5147038, at *36.[7]

[7] As the Trial Opinion explains, Horne testified at trial that he believed that he used his personal e-mail "because it was the one that was open when Rohlinger called him and asked him about the Stockholders Agreement." *Id.* at *36. But, as also indicated in the Trial Opinion, the Court found Horne's deposition and trial testimony "contradictory" and "troubling" and, as such, the Court noted with regard to Horne's credibility "that it is important to examine anything he said with a degree of skepticism." *Id.* at 45.

The Court of Chancery's decision in *Cochran* is also instructive. There, the Court refused to award indemnification to an officer for certain claims arising out of an employment contract that were not "by reason of" the officer's position at the company. *Cochran*, 2000 WL 1847676, at *6. The Court stated:

> When a corporate officer signs an employment contract committing to fill an office, he is acting in a personal capacity in an adversarial, arms-length transaction. To the extent that he binds himself to certain obligations under that contract, he owes a personal obligation to the corporation. When the corporation brings a claim and proves its entitlement to relief because the officer has breached his individual obligations, it is problematic to conclude that the suit has been rendered an "official capacity" suit subject to indemnification under § 145 and implementing bylaws.

Id. Based on these observations, the Court ruled that the purported indemnitee was not entitled to indemnification for claims arising out of his personal contractual obligations. *Id.* On appeal, the Supreme Court affirmed and held that indemnification of an officer in a scenario where the company has sought to enforce the terms of a contract is inappropriate because it "would render the officer's duty to perform his side of the contract in many respects illusory." *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 562 (Del. 2002).

The same reasoning applies here. Horne's contractual obligations owed to Optimis were personal to him in his capacity as a shareholder. Again, Horne executed the Stockholders Agreement in his individual capacity as a stockholder,

not as an officer. In fact, when Horne executed the Stockholders Agreement he was a consultant for Optimis, not an employee. A00528. Horne's obligations under the Stockholders Agreement, therefore, were personal in nature and not related to his status as CFO. Accordingly, the trial court erred when it held that Optimis's breach of contract claims against Horne were brought by reason of Horne's executive office.

CONCLUSION

For the foregoing reasons, Appellant OptimisCorp, respectfully requests that (i) the trial court's Indemnification Opinion granting Horne's summary judgment be reversed in the respects detailed above, and (ii) the matter be remanded, in pertinent part, so that the non-indemnifiable expenses Horne incurred in defending Optimis's contract-based claims are deducted from his indemnification award.

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Dated: July 17, 2017
Wilmington, Delaware