IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID F. MILLER, III,	§	
	§	No. 36, 2013
Defendant Below,	§	
Appellant,	§	Court Below: Court of Chancery
	§	of the State of Delaware
v.	§	
	§	C. A. No. 7475
PALLADIUM INDUSTRIES, INC.,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 17, 2013
Decided: July 19, 2013

Before **BERGER**, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 19th day of July 2013, upon consideration of the briefs of the parties, and their contentions in oral argument, it appears to the Court that the judgment of the Court of Chancery should be affirmed on the basis of its decision dated December 31, 2012,[1] for the following reasons:

1. At issue is the proper meaning of a corporate Bylaw that authorizes advancement of litigation expenses. Bylaw Section 5 relevantly provides:

> Expenses incurred by any persons described in Section 2 of this Article X [*i.e.*, Directors and Officers] in defending a proceeding *shall be paid* by the corporation in advance of such proceeding's final disposition *unless*

[1] *Miller v. Palladium Industries, Inc.*, 2012 WL 6740254 (Del. Ch. Dec. 31, 2012).

> *otherwise determined by the Board of Directors in the specific* case …." (italics added).

2. Relying on the authority conferred by that Bylaw language, the Board of Directors determined that, for various reasons, it was not in the corporation's best interests to provide advancement to the plaintiff. The Court of Chancery upheld this determination, concluding that "[t]here is no way to give separate and independent meaning to the 'unless' clause [of the advancement Bylaw] except as [the corporation] has interpreted it."

3. On appeal the plaintiff claims that the Court of Chancery erred as a matter of law, by interpreting the "unless" clause to downgrade an otherwise mandatory right to advancement, to one that is merely permissive and discretionary. Had the Bylaw drafters intended to make advancement permissive, (*i.e.*, subject to Board approval), plaintiff argues, they could have used the different language the Bylaws actually employ for non-officer employees and agents.[2] Since Section 5 uses "shall" and not "may," plaintiff urges the term "shall" must be understood and read to signify that the Bylaw intended to create a mandatory contractual right to advancement for officers and directors.

4. The plaintiff's interpretation erroneously assumes that the only possible interpretations of Section 5 are binary—that the officers' and directors' right to

[2] The corporation *may,* by action of the Board of Directors, provide [advancement] to employees and agents of the corporation…." (italics added).

indemnification is either totally mandatory or totally permissive, with no intermediate alternative. That assumption ignores the language of Section 2 of the Bylaws, which must be read together with Section 5. Section 2 relevantly provides that the entitlement to advancement of directors and officers, although initially discretionary, automatically becomes mandatory if the Board does not "otherwise determin[e] . . . in the specific case within 30 days of a written request for advancement." That is, unless the Board affirmatively decides to deny advancement within 30 days, an officer's or director's claim for advancement ripens into an enforceable contract right. That reading gives meaningful effect to both the terms "shall" and "unless," contrary to the plaintiff's argument. It also establishes a rational basis for the differing treatment of these two separate categories of potential claimants—a business judgment that the Board was empowered to make.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is **AFFIRMED.**

BY THE COURT:

/s/ Jack B. Jacobs
Justice