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Case No. 3150-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JACKSON WALKER L.L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3150-VCP
	)	
SPIRA FOOTWEAR, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: January 24, 2008
Decided: June 23, 2008

Bruce E. Jameson, Esquire, Marcus E. Montejo, Esquire, PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, *Attorneys for Plaintiff Jackson Walker L.L.P.*

Peter J. Walsh, Jr., Esquire, Kevin R. Shannon, Esquire, Jennifer A. Chamagua, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, *Attorneys for Defendant Spira Footwear, Inc.*

PARSONS, Vice Chancellor.

This is an action for advancement. On August 8, 2007, Plaintiff, Jackson Walker L.L.P. ("Jackson Walker"), filed a complaint seeking an order requiring Defendant, Spira Footwear, Inc. ("Spira"), to advance legal fees and expenses, pursuant to Section 145 of the Delaware General Corporation Law ("DGCL")[1] and the bylaws of Spira, related to an action pending in the District Court of El Paso County, Texas (the "El Paso Action"). This action is currently before me on the parties' cross-motions for summary judgment.[2]

Initially, the El Paso Action involved a dispute among major shareholders of Spira for control of the corporation. Jackson Walker participated in the litigation on behalf of Spira at a time when the former majority shareholders controlled the company. In connection with a tentative settlement, the challenger shareholder acquired control of Spira, terminated Jackson Walker's representation of the company, and caused Spira to file a claim against Jackson Walker in the El Paso Action.

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[1] 8 *Del. C.* § 145. This court has jurisdiction over advancement actions and may "summarily determine a corporation's obligation to advance expenses (including attorneys' fees)." *Id.* § 145(k).

[2] On August 30, 2007, Spira moved to dismiss or in the alternative to stay this action in favor of the El Paso Action. Spira effectively abandoned that motion, however, based on Jackson Walker's subsequent motion for summary judgment and the scheduling of trial in the El Paso Action for July 2008. *See* Spira's Answering Br. in Opp'n to Pl.'s Mot. for Summ. J. and Opening Br. in Supp. of its Mot. for Summ. J. ("DAB") at 1. Spira's opening brief in support of its motion to dismiss, and reply brief in support of its motion for summary judgment will be referred to as "DOB" and "DRB," respectively. Jackson Walker's combined answering brief to Spira's motion to dismiss and opening brief in support of its cross-motion for summary judgment and its reply brief in further support of its motion for summary judgment will be referred to as "POB" and PRB," respectively.

The central issue on the motions is whether, based on Jackson Walker's status as former outside litigation counsel for Spira in the El Paso Action and the nature of claims Spira later brought against Jackson Walker in that action, Jackson Walker constitutes an "agent" eligible for advancement under 8 *Del. C.* § 145. Relying on this court's opinion in *Fasciana v. Electronic Data Systems Corp.*,[3] I find that Jackson Walker is entitled to advancement as an "agent" under Spira's bylaws and DGCL § 145 as to the claims asserted against it by Spira.

I. FACTUAL BACKGROUND

A. The Parties

Jackson Walker is a Texas limited liability partnership engaged in the practice of law. Spira is a Delaware corporation with its principal place of business in Texas and is in the footwear business.[4] Andrew Krafsur is Spira's current chief executive officer.[5]

B. History

In early 2005, Andrew, then also the chief executive officer of Spira, owned 22% of Spira; his brother David Krafsur and Francis LeVert collectively held 58%; and the remaining 20% was held by approximately 250 shareholders.[6] In February 2005,

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3 829 A.2d 160 (Del. Ch. 2003).

4 Compl. ¶¶ 2-3. The Complaint is verified and therefore constitutes part of the factual record for purposes of the parties' summary judgment motions.

5 Affidavit of Andrew Krafsur ("Krafsur Aff.") ¶ 1. Because multiple parties share the same last name, I refer to Andrew Krafsur, and his sibling David, by their first names. No disrespect is intended.

6 *Id.* ¶ 2.

Andrew, David, and LeVert entered into a shareholders agreement, pursuant to which they agreed to "equalize" the shares held by them, and to contribute shares back to Spira for its further capitalization.[7] The terms of the agreement were never fulfilled, and Andrew's relationship with David deteriorated, ultimately resulting in litigation.[8]

In the fall of 2005, Spira initiated litigation against David and LeVert in Texas for breaches of fiduciary duty. David and LeVert later terminated Andrew from his position at Spira, and caused Spira to dismiss the action against them.[9] Then, on December 27, 2005, they filed the El Paso Action in state court in Texas against Andrew seeking to have the February 2005 shareholders agreement declared invalid.[10]

In or about February 2006, David and LeVert entered into a preliminary agreement to sell their interest in Spira to Byron and Steven LeBow (the "LeBows").[11] On April 30, 2006, David and LeVert, as majority shareholders of Spira, elected a new Board of Directors of Spira, consisting of the LeBows, as well as an accountant and a lawyer of the LeBows.[12] Spira then entered into a series of transactions with the LeBows, David, and LeVert, as well as certain LeBow affiliated entities.

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7 *See id.* ¶ 3, Ex. A (handwritten term sheet).

8 *Id.* ¶ 3.

9 *Id.* ¶ 4.

10 *Id.* ¶ 5, Ex. C (David and LeVert's Original Pet.). The caption of the El Paso Action is *David Krafsur, et al. v. Andrew Krafsur, et al.*, Cause No. 2005-8707.

11 *Id.* ¶ 6.

12 *Id.* ¶ 7, Ex. G (Exec. Summ. of Apr. 30, 2006 Board Meeting).

On May 11, 2006, Andrew moved in the El Paso Action for the appointment of a receiver for the shares in dispute. A July 3, 2006 hearing date was set for that motion, to be followed two weeks later by a trial.[13]

Spira then retained Jackson Walker as its counsel in connection with the El Paso Action.[14] On or about June 16, 2006, Jackson Walker presented Spira with its engagement letter. The letter states Spira asked Jackson Walker to represent it "as local counsel, . . . in connection with a dispute among Spira's shareholders . . . ."[15]

On June 23, 2006, Jackson Walker filed a Plea in Intervention on Spira's behalf in the El Paso Action. In that pleading, Spira sought a declaratory judgment that, among other things, the shareholders agreement was unenforceable and various actions taken by David and LaVert were proper.[16] In August 2006, the parties tentatively settled the El Paso Action by an agreement under which Andrew would purchase David and LeVert's controlling interest in Spira and refinance Spira's line of credit, the parties would exchange releases, and the action would be dismissed.[17] After the tentative

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13 *Id.* ¶ 10, Ex. L.

14 *See* Affidavit of Jeffrey M. Sone ("Sone Aff.") ¶ 2; Affidavit of Marcus E. Montejo ("Montejo Aff.") Ex. 1. Jackson Walker was retained by Steven LeBow, President of Spira and a member of the Board of Directors. *See* Sone Aff. ¶ 4. Sone is a member of the bar of the State of Texas and of the law firm of Jackson Walker L.L.P. *Id.* ¶ 1. Montejo is Delaware counsel for Jackson Walker.

15 Krafsur Aff. Ex. M.

16 Montejo Aff. Ex. 2.

17 Compl. ¶ 5.

settlement agreement, Andrew paid $2 million in January 2007 to purchase David and LeVert's majority stake in Spira, refinanced Spira's line of credit, and took over the control and management of Spira. Other aspects of the settlement agreement, however, remain unfulfilled, including the dismissal of the El Paso Action.[18]

By the fall of 2006, Jackson Walker anticipated that upon regaining control of Spira, Andrew would sue Jackson Walker.[19] On October 9, 2006, Jackson Walker entered into a supplemental engagement agreement with Spira, which provided for the prosecution of any lawsuits arising out its representation of Spira exclusively in the district courts of Dallas County, Texas.[20]

Upon assuming control of Spira, Andrew instructed Jackson Walker to cease all work (which it did), and refused to pay Jackson Walker for work they had done at the

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[18] *See id.* ¶ 6.

[19] On September 26, 2006, in an internal email Alan Greenspan of Jackson Walker wrote to Sone:

> We have to do some serious talking about whether we continue to rep this client. We can't keep getting brought in, then left out, then brought in. LeBow is doing a lot of stupid stuff that is really hurting the case plus *I'm convinced that andy [Krafsur] is going to sue us as soon as he gets control of the company*. We need to get paid up front, weekly billing, big retainer, the whole thing, plus LeBow has to follow my instructions. It won't work otherwise.

Krafsur Aff. Ex. Y (emphasis added).

[20] *Id.* Ex. Z.

direction of the former Spira board and management.[21] Thereafter, on March 5, 2007, Jackson Walker sued Spira in Dallas County to collect outstanding invoices totaling in excess of $50,000 (the "Dallas Action").[22] Then, on June 4, 2007, Spira amended its plea in the El Paso Action to add Jackson Walker as a defendant.[23] In that pleading, Spira accused Jackson Walker of breaching its fiduciary duties to Spira and of negligence, because:

- Jackson Walker wrongfully filed on behalf of Spira the initial Plea in Intervention which allegedly "was an action blatantly designed to further the interests of the LeBows, David Krafsur and Francis LeVert to the detriment of Spira."[24]
- Jackson Walker negotiated the terms of a supplemental engagement agreement specifying Dallas County as a venue for any fee disputes.
- Jackson Walker accepted payment for the work that it did for Spira.[25]

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21 Compl. ¶ 7.

22 *See* Montejo Aff. Ex. 3.

23 *See* Affidavit of Jennifer A. Chamagua ("Chamagua Aff.") Ex. A (First Am. Plea in Intervention of Spira ("First Am. Plea")). Chamagua is Delaware counsel for Spira.

24 First Am. Plea ¶ 19.

25 *Id.* ¶¶ 24-25.

On July 9, 2007, Spira filed its Second Amended Plea in Intervention in the El Paso Action.[26] The Second Amended Plea seeks damages against Jackson Walker in the form of forfeiture of all fees paid to them by Spira as well as avoidance of the fees Jackson Walker contends remain unpaid.

Jackson Walker filed this action in Delaware on August 8, 2007 to obtain advancement of its attorneys' fees and expenses in defending the claims brought against it by Spira in the El Paso Action.

C. Parties' Contentions

In its Complaint, Jackson Walker seeks a judgment declaring that Spira must advance all reasonable expenses, including attorneys' fees, Jackson Walker has incurred in the El Paso Action and its attorneys' fees in prosecuting this action, together with pre- and post-judgment interest. Spira disputes Jackson Walker's eligibility to receive advancement because it argues Jackson Walker was not its "agent" for purposes of Section 145.

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[26] *See* E. Link Beck Aff. ¶ 2; Chamagua Aff. Ex. B (Second Am. Plea in Intervention of Spira ("Second Am. Plea")). Beck is counsel for Spira. The claims asserted in the Second Amended Plea largely mirror those in the First Amended Plea. *See* POB at 5-6. On November 15, 2007, Spira's Second Amended Plea was dismissed on procedural grounds. Spira has filed a new complaint which makes claims largely mirroring those in the Second Amended Plea. *See* DRB at 1 n.1; Tr. at 19, 21. All citations herein are to Spira's Second Amended Plea.

II. ANALYSIS

A. Summary Judgment Standard

Court of Chancery Rule 56(c) permits summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[27] "In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and the moving party has the burden of demonstrating that there is no material question of fact."[28] The party opposing summary judgment, however, may not rest upon the mere allegations or denials contained in its pleadings, but must offer, by affidavit or other admissible evidence, specific facts showing that there is a genuine issue for trial.[29] "[S]ummary judgment may not be granted when the record indicates a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances."[30]

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27 Ct. Ch. R. 56(c).

28 *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Holding Co.*, 853 A.2d 124, 126 (Del. Ch. 2004) (citing *Tanzer v. Int'l Gen. Inds., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979); *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).

29 *Levy v. HLI Operating Co.*, 924 A.2d 210, 219 (Del. Ch. 2007) (citing Rule 56(e)).

30 *Pathmark Stores v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

Furthermore, because the parties have filed cross-motions for summary judgment, Court of Chancery Rule 56(h) applies here.[31] The court examines each motion separately.[32] Still, because none of the parties contend there is any material issue of disputed fact, the court will treat the cross-motions as "the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[33] "Thus, the usual standard of drawing inferences in favor of the nonmoving party does not apply."[34]

I also note that "[t]he scope of an advancement proceeding is usually summary in nature and limited to determining the issue of entitlement in accordance with the corporation's own uniquely crafted advancement provisions."[35] Summary judgment practice is an efficient and appropriate method to decide advancement disputes, because "the relevant question turns on the application of the terms of the corporate instruments

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31 *See* Tr. at 17, 41. Citations in this form ("Tr.") are to the transcript of argument held on January 24, 2008.

32 *Bernstein v. Tractmanager, Inc.*, 2007 Del. Ch. LEXIS 172, at *8 (Nov. 20, 2007) (citing *Union Oil Co. of Calif. v. Mobil Pipeline Co.*, 2006 WL 3770834, at *9 (Del. Ch. Dec. 15, 2006)).

33 Ct. Ch. R. 56(h); *see also Farmers for Fairness v. Kent County*, 940 A.2d 947, 955 (Del. Ch. 2008); *Twin Bridges Ltd. P'ship v. Draper*, 2007 Del. Ch. LEXIS 136, at *27 (Sept. 14, 2007).

34 *Am. Legacy Found. v. Lorillard Tobacco Co.*, 886 A.2d 1, 18 (Del. Ch. 2005).

35 *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 213 (Del. 2005) (citing 8 *Del. C.* § 145(k); *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005)).

setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought."[36]

B. Advancement

"Section 145 of the Delaware General Corporation Law endows corporations with the power to indemnify and provide advancement of attorneys' fees to officers, directors, employees, or agents of the corporation."[37] "Indemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by

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[36] *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 Del. Ch. LEXIS 83, at *6 (Aug. 1, 2003) (citing *Reddy v. Elec. Data Sys. Corp*, 2002 WL 1358761, at *3 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 371 (Del. 2003)); *see also DeLucca v. KKAT Mgmt., L.L.C.*, 2006 Del. Ch. LEXIS 19, at *20 (Jan. 30, 2006) ("Advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party . . . trigger a right to advancement under the terms of a corporate instrument . . . ."). In the same vein, this court also has observed that:

> [A]lthough advancement provisions in corporate instruments often are of less than ideal clarity, rarely is resort to parol evidence appropriate or even helpful, as corporate instruments addressing advancement rights are often crafted without the involvement of the parties who later seek advancement and often with little negotiation between any contending parties at all. Those factors are not problematic, however, as they tend to reinforce the legal policy of this State, which strongly emphasizes contractual text as the overridingly important guide to contractual interpretation.

KKAT Mgmt., 2006 Del. Ch. LEXIS 19, at *20-21.

[37] *Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *2 (Del. Ch. Mar. 28, 2008) (citing 8 *Del. C.* § 145; *Sassano v. CIBC World Mkts. Corp.*, 2008 WL 152582, at *4 (Del. Ch. Jan. 17, 2008)).

reason of that service."[38] As an important corollary to indemnification, "[a]dvancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings."[39]

"A company's bylaws are contractual in nature."[40] Thus, "indemnification is a right conferred by contract, under statutory auspice."[41] Section 145 of the DGCL provides the statutory framework for when and how a corporation may provide advancement to an officer, director, employee, or agent of the corporation.[42] "[T]he

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38 *Tafeen*, 888 A.2d at 211 (citing *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 84 (Del. 1998)).

39 *Id.* at 211. The Court in *Tafeen* further noted that although "the right to indemnification and advancement are correlative, they are separate and distinct legal actions. The right to advancement is not dependent on the right to indemnification." *Id.* at 212 (citing *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992)).

40 *Reinhard & Kreinberg*, 2008 WL 868108, at *2 (citing *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990)); *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316, at *6 (Del. Ch. May 30, 2008).

41 *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 559 (Del. 2002).

42 *See* 8 *Del. C.* § 145. As to advancement, Section 145(e) states in pertinent part:

> Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred

indemnification statute should be broadly interpreted to further the goals it was enacted to achieve," which are to "promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated," and "encourage capable [persons] to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve."[43]

Courts use the tools of contractual interpretation when construing bylaw provisions relating to indemnification and advancement.[44] In that context, Delaware courts "simultaneously apply the patina of section 145's policy."[45] At the same time, "courts should be reluctant to interpret § 145 and bylaws that implement it as displacing the more specific contractual arrangements that are typically drafted between

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> by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

43 *Cochran*, 809 A.2d at 561 (quoting RODMAN WARD, JR., EDWARD P. WELCH, & ANDREW J. TUREZYN, FOLK ON DELAWARE GENERAL CORPORATION LAW § 145 (4th ed. 2001)).

44 *See, e.g.*, *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983); *Gentile v. Single Point Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001); *Reinhard & Kreinberg*, 2008 WL 868108, at *2. "In the interpretation of charter and by-law provisions, 'courts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption.'" *Centaur Partners*, 582 A.2d at 928 (quoting *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990)).

45 *Reinhard & Kreinberg*, 2008 WL 868108, at *2; *Underbrink*, 2008 WL 2262316, at *7 (citing *id.*).

corporations and outside contractors, such as attorneys, investment bankers, engineers, and information technology providers."[46]

C. Spira's Bylaws

Although the advancement authority conferred by Section 145(e) is permissive, mandatory advancement provisions are set forth in many corporate charters, bylaws and indemnification agreements.[47] Spira's mandatory advancement provision states:

> Expenses (including, without limitation, reasonable attorneys' fees and expenses) incurred in defending a civil or criminal action, suit or proceeding shall be paid by the Corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of the Director, officer, employee or agent to repay such amount if it shall ultimately be determined that such Director, officer, employee or agent is not entitled to be indemnified by the Corporation under this article or under any other contract or agreement between such Director, officer, employee or agent and the Corporation.[48]

Spira's Bylaws also provide for mandatory indemnification rights to the full extent permitted by law.[49]

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46 *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 173 n.44 (Del. Ch. 2003).

47 *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212 (Del. 2005) (citing *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992)).

48 Amended and Restated Bylaws of Spira ("Bylaws") Art. VI, § 2, *available* at Chamagua Aff. Ex. C.

49 Section 1 of Article VI of the Bylaws addresses indemnification, and states in pertinent part:

> The Corporation shall indemnify, in accordance with and to the full extent now or hereafter permitted by law, any person who was or is a party or is threatened to be made a party to

Thus, to receive advancement of its reasonable litigation expenses under Spira's Bylaws, Jackson Walker must prove: (1) that it is a party to the El Paso Action by reason of the fact that it was an agent of Spira, and (2) that it has provided Spira with the necessary undertaking. The parties' dispute centers on whether in the circumstances of this case Jackson Walker qualifies as Spira's agent for purposes of advancement; Spira does not dispute Jackson Walker provided it with an appropriate undertaking as required under the Bylaws.

D. Is Jackson Walker an Agent under the Applicable Bylaw Provision?

To qualify for advancement of expenses incurred in the El Paso Action, Jackson Walker must prove it is a party by reason of the fact it was an agent of Spira. There is no dispute Jackson Walker is a party to the El Paso Action because it was outside counsel to Spira. Thus, the only dispute is whether Jackson Walker qualifies as an "agent" of Spira under its Bylaws. I conclude that it does.

> any threatened, pending or completed action, suit or proceeding . . . by reason of the fact that such person is or was a Director, officer, employee or agent of the Corporation . . . against any liabilities, expenses (including, without limitation, reasonable attorneys' fees and expenses and any other costs and expenses reasonably incurred in connection with defending such action, suit or proceeding), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding. The indemnification provided in this article is not exclusive of any other right to indemnification provided by law or otherwise.

1. The meaning of "agent" under DGCL § 145

Both parties rely on this court's decision in *Fasciana v. Electronic Data Systems Corp.*,[50] for their positions as to why Jackson Walker does, or does not, qualify as Spira's agent.[51] In that case, the plaintiff Fasciana was an attorney who represented a target company and its shareholders in connection with its sale to the defendant corporation. By and large, Fasciana performed corporate transactional work. After the acquisition, Fasciana continued to provide legal advice and services as an attorney for the defendant corporation. Later, based on certain actions he took in connection with the sale of the target company, he was indicted on criminal charges and named as a defendant by the acquiring corporation in a civil suit, alleging malpractice and fraud on his part, together with other misdeeds.[52] In seeking advancement of his litigation expenses, Fasciana contended that, based on his actions as an attorney for the acquiring corporation, he satisfied the statutory term, "agent," and thus had a right to advancement.[53]

The court in *Fasciana* noted that the "term agent is thrown around in many legal contexts and often without great precision,"[54] but held that the Delaware General

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50 829 A.2d 160 (Del. Ch. 2003).

51 *See* POB at 9; DRB at 1.

52 Fasciana was "alleged to have engaged in misconduct in his capacity as a legal advisor to [the corporation], by assisting [the chief executive officer] in various acts of improper internal accounting . . . [and] to have violated his law firm's duties as escrow agent . . . ." *Fasciana*, 829 A.2d at 172-73.

53 *See id.* at 164-66.

54 *Id.* at 168.

Assembly intended "§ 145 as embracing the more restrictive common law definition of agent, which generally applies only when a person (the agent) acts on behalf of another (the principal) in relations with third parties."[55] The court further noted that Section 145's grant of indemnification tracks the concept of agent indemnification found in agency law. Thus, a person may be an "agent" for purposes of Section 145 when she may otherwise look to her principal for indemnity for those acts within the scope of the agency that are fairly said to be the actions of the principal.[56] Conversely, the court held the concept of an "agent" under § 145 does not include a lawyer who acts as a legal advisor to a corporate client, but does not act on the client's behalf in relations with third parties.[57]

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55 *Id.* at 163; *see also id.* at 169 (quoting *Borders v. Townsend Assocs.*, 2002 WL 725266, at *5 (Del. Super. Apr. 17, 2002)).

The court in *Fasciana* articulated this same concept alternatively as "acting as an arm of the corporation vis-a-vis the outside world," *id.* at 163; encompassing "outside contractors who acted on behalf of the corporation in dealings with third parties," *id.* at 170; and involving the situation "when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent," *id.* at 169 n.30 (quoting *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57-58 (Del. 1997)). *See also id.* at 169 n.30 (quoting *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988), for the proposition that "essential elements of an agency relationship include: (1) the agent having the power to act on behalf of the principal with respect to third parties; (2) the agent doing something at the behest of the principal and for his benefit; and (3) the principal having the right to control the conduct of the agent."). All of these articulations represent variations on the same theme.

56 *See id.* at 171.

57 *See id.* at 172-73.

On the basis of its relatively restrictive definition of agent, the court found Fasciana, a lawyer who engaged in corporate advisory work, generally not to be an agent under § 145. The court recognized one exception, however, and held that Fasciana did act as an agent of the corporation in communications he allegedly made on its behalf in negotiations with two of its customers regarding how to characterize a transaction under an incentive compensation plan.[58]

2. Was Jackson Walker an "agent"?

The crux of this case is whether Jackson Walker's actions as Spira's outside litigation counsel constitute actions of an agent of the corporation under the Bylaws and DGCL § 145.[59] This appears to be an issue of first impression under Delaware law.[60]

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[58] *See id.* at 173-74.

[59] Jackson Walker argues for a broader definition of "agent" that would include, for example, providing legal advice because, unlike the provisions at issue in *Fasciana*, Spira's advancement and indemnification provisions contain no explicit reference to Section 145. *See* POB at 11-12. The court in *Fasciana* predicated its analysis on an assumption, "that [the corporation]'s bylaws were intended to track the meaning of agent in § 145." 829 A.2d at 168.

The underlying bylaw in *Fasciana* stated, "Each person who at any time shall serve or shall have served as a[n] . . . agent of the Corporation . . . shall be entitled to . . . the advancement of expenses incurred by such person from the Corporation as, and to the fullest extent, *permitted by Section 145 of the DGCL* or any successor statutory provision, as from time to time amended." *Id.* at 167 (emphasis added). Section 1 of Article VI of Spira's Bylaws addresses indemnification, and states, "[t]he Corporation shall indemnify, in accordance with and to the full extent now or hereafter *permitted by law . . . .*" (Emphasis added). The parties dispute whether Spira intended this seemingly broader language to expand the definition of agent beyond the confines of § 145. Because I find Jackson Walker is entitled to advancement in the El Paso Action as an agent within the meaning of § 145, I need not resolve this issue.

Under *Fasciana*, Jackson Walker would be an agent if it acted on behalf of Spira in relations with third parties. The actions of Jackson Walker that form the basis for the claims asserted by Spira in the El Paso Action all relate to its role as litigation counsel to Spira. I find that in that role Jackson Walker acted on behalf of Spira in relations with third parties.

The claims Spira asserts in the El Paso Action do not involve allegations of malpractice, but rather criticize Jackson Walker's failure to countermand the former Spira management's decisions. Spira alleges, for example, that its intervention in the El Paso Action, when under the control of previous management, "was an action blatantly designed to further the interest of the LeBows, [David] and [LeVert] to the detriment of Spira."[61] In that regard, Jackson Walker is alleged to have "follow[ed] the specific direction of the LeBows," and to have "failed to exercise the care that reasonable attorneys . . . would have exercised in directing SPIRA to file the Plea in Intervention and

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60 Subsequent Delaware cases that have applied *Fasciana's* definition of agent under § 145 have not involved litigation counsel. In *Bernstein v. Tractmanager, Inc.*, the court found that a corporation's attorney who provided advisory services was not an agent for purposes of advancement where the underlying litigation involved a claim of legal malpractice, among others. 2007 Del. Ch. LEXIS 172, at *26-27 (Nov. 20, 2007). Similarly, in *Zaman v. Amedeo Holdings, Inc.*, the court found that lawyers entrusted with broad managerial and financial authority over the corporation were agents under § 145. 2008 WL 2168397, at *17 n.65 (Del. Ch. May 23, 2008).

61 Second Am. Plea ¶ 18. Spira contends its claims are "based upon the fact that [Jackson Walker] took, from the outset, a position which was clearly in the interest of the . . . then-management, even though ostensibly that position was not in the best interest of Spira." Tr. at 22.

in conducting the litigation."[62] Spira asserts that "the basis for the breach of fiduciary duty and negligence claim[s] is that Jackson Walker had an obligation to Spira, and disregard[ed] what was in the best interests of its client, and followed the direction of somebody who clearly was acting in their own interest."[63]

The alleged wrongs for which Spira has sued Jackson Walker all represent instances where Jackson Walker acted on behalf of Spira in relations with third parties. As outside litigation counsel, Jackson Walker was Spira's agent because it had the "power to act on behalf of the principal with third persons."[64] Trial lawyers have the ability to bind their client in dealings with the court and other parties to the litigation.

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62 Second Am. Plea ¶¶ 28(b), 30.

63 Tr. at 33. In its reply brief, Spira summarized its claims against Jackson Walker in the El Paso Action as follows:

> As alleged in the underlying El Paso proceeding, the LeBows sought to avoid the terms of the Shareholders Agreement, the enforcement of which clearly was in the interests of Spira and the outside investors. Jackson Walker knew or should have known that by intervening on behalf of Spira and seeking to have the Shareholder Agreement declared invalid, it was not complying with its ethical or fiduciary obligations. Even when Steven LeBow sent an email to Jackson Walker describing his plan to effectively loot Spira, Jackson Walker took no action to protect the interest of Spira and its outside investors. These and other actions form the basis of Spira's claims against Jackson Walker.

DRB at 4. According to Jackson Walker, the referenced email from LeBow represented a privileged communication mistakenly sent to Jackson Walker, which it promptly returned and deleted. *See* Krafsur Aff. Ex. R. Based on my review of that email, I do not consider it material to the issues before me.

64 *Fasciana*, 829 A.2d at 169.

Thus, in litigation, attorneys regularly "act[] as an arm of the corporation vis-à-vis the outside world."[65] Stated slightly differently, as Spira's outside counsel, Jackson Walker was given "the power to act on behalf of [Spira] with respect to third parties," litigated "at the behest of [Spira] and for his benefit," and remained subject to Spira's control.[66] Jackson Walker, therefore, meets the definition of an agent under § 145 as set forth in *Fasciana*.

In a further attempt to avoid advancement, Spira contends "Jackson Walker's time sheets . . . reveal that [its] role was not in fact limited to litigation, but extended to giving substantive and strategic advice on governance and stockholder-related issues."[67] In particular, Spira notes that Jackson Walker billed it for the preparation of stockholder meeting notices, and was "involved in advising [Spira] with respect to closing the transaction [contemplated by the tentative settlement], giving advice on corporate governance issues, solvency and operational concerns."[68]

A summary review of Jackson Walker's invoiced timesheets, however, indicates that the vast majority of its time spent on behalf of Spira related to its role as litigation

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65 *Id.* at 163.

66 *Id.* at 169 n.30 (quoting *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Mar. 30, 1988)).

67 DRB at 5; *see also* Tr. at 21-22.

68 Tr. at 24.

counsel.[69] Much of the time involves work directly related to the litigation. Other activities, such as Jackson Walker's efforts regarding the settlement of the El Paso Action plainly pertain to the litigation and constitute instances where the law firm acted on behalf of Spira in relations with third parties.[70] That Jackson Walker provided some legal services not directly related to the litigation is immaterial. Jackson Walker's primary role was to represent Spira in the El Paso Action. Indeed, Spira admits that its claims stem from Jackson Walker's actions to enable Spira to intervene to seek to have the February 2005 shareholders agreement declared invalid.[71]

In addition, while Jackson Walker concedes that some of its time spent with Spira was not litigation related, nothing in the record indicates that Spira's claims against Jackson Walker relate to any of those services.[72] Moreover, Spira's contention that "Jackson Walker's non-litigation advice is inextricably intertwined with the positions it

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69 *See, e.g.*, PRB Ex. A at Invoice No. 937232, p. 2 (6/15/06, Sone, "Review litigation background materials . . ."; 6/15/06, S. Hollan, "Legal research regarding intervention and abatement in derivative suits"; 6/18/06, Hollan, "Continue research, review transaction documents, begin preparation of pleadings"; 6/19/06 "Prepare intervention and plea to the jurisdiction . . . ."); *id.* at Invoice No. 937233, pp. 2-3; *id.* at Invoice No. 94388, pp. 2-5.

70 *See, e.g.*, *id.* at Invoice No. 948388, p. 7 (8/4/06, Josephs, "Travel to El Paso, attend settlement conference, and return travel from settlement conference.").

71 *See* DRB at 4.

72 *See* PRB at 5-6. Spira has not shown, for example, that Jackson Walker's work on behalf of Spira in relation to a stockholders meeting forms the basis for any of its claims in the El Paso Action. *See, e.g.*, *id.* Ex. A at Invoice No. 952577, p. 2; *id.* at Invoice No. 961234, pp. 3-4.

took in the El Paso proceeding, purportedly on behalf of Spira,"[73] cuts both ways. In fact, it confirms that Jackson Walker's services to Spira primarily related to litigating the El Paso Action, conduct which qualifies Jackson Walker as an agent under *Fasciana* for purposes of DGCL § 145.

Spira further attempts to avoid a finding of agency by arguing it "has not asserted any claims based on representations by Jackson Walker to third parties," and that its claims instead are based on Jackson Walker's breaches of its duties "to exercise professional care and judgment in its representation of Spira."[74] Although the court in *Fasciana* did find advanceable a claim based on false representations Fasciana allegedly made to a third party on behalf of his corporate client, that holding derived from the fact that, in that one instance, Fasciana acted on behalf of the corporation in relations with a third party. Spira incorrectly suggests that similar allegations of misrepresentations to third parties are necessary for Jackson Walker to qualify as an agent entitled to advancement in this case. The appropriate inquiry is broader: whether the claim asserted by the former corporate client emanates from actions taken by the attorney on behalf of the company and in relation to a third party. Under that test, as explicated in *Fasciana*, I hold Jackson Walker qualifies as an agent of Spira. That is, Jackson Walker was an agent

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73 DRB at 6.

74 DRB at 4-5; *see also* Tr. at 28.

of Spira when it made representations to, and otherwise acted on behalf of Spira in dealings with, the court and the other parties to the El Paso Action.[75]

Spira further cites a California case, *Channel Lumber Co. v. Porter Simon*, for the court's finding that outside litigation counsel were not agents for purposes of California's indemnification statute, Cal. Corp. Code § 317.[76] I find *Channel Lumber* inapposite because it involved a different factual scenario -- there, the corporation sued the attorney for legal malpractice.[77] In particular, the corporation "asserted that, among other shortcomings, [the attorney] had failed to assure a record of compliance with discovery requests, failed to undertake proper discovery, and failed to assert the res judicata effect

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[75] Jackson Walker may claim advancement when it is being sued for actions it took as Spira's litigation counsel made "by reason of the fact that [it] . . . was a[n] . . . agent of [Spira] . . . ." 8 *Del. C.* § 145(a); Bylaws Art. VI, § 1.

[76] 93 Cal. Rptr. 2d 482, 484 (Cal. Ct. App. 2000). Section 317 states in pertinent part:

> A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any proceeding (other than an action by or in the right of the corporation to procure a judgment in its favor) by reason of the fact that the person is or was an agent of the corporation against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with the proceeding . . . .

Cal. Corp. Code § 317(b). For the purposes of Section 317, an "agent" includes "any person who is or was a director, officer, employee or other agent of the corporation . . . ." *Id.* § 317(a).

[77] Here, Spira does not purport to have asserted any claims for legal malpractice. *See* DRB at 6-7.

of prior litigation."[78] In addition, unlike the situation in *Fasciana*, the law firm seeking advancement in *Channel Lumber* was litigation counsel, as was Jackson Walker here. Thus, the *Fasciana* decision did not squarely address the application of the term "agent" in Section 145 to a corporation's litigation counsel accused of legal malpractice.[79]

Focusing on the fact that the law firm sought indemnification as to a claim against it for malpractice, the California court in *Channel Lumber* stated:

> [W]hen outside counsel . . . is retained by a corporation to represent it at trial and then is sued by the corporation for allegedly committing legal malpractice while representing the corporation, outside counsel is a party to the malpractice suit by reason of his or her actions in the capacity of an independent contractor, not "by reason of the fact that outside counsel is or was an agent of the corporation," within the meaning and purposes of *section 317*.[80]

The Delaware courts ultimately might reach the same result, when and if that specific issue arises. The issue did not arise in *Fasciana*, however, because the attorney had not

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78 *Channel Lumber*, 93 Cal. Rptr. 2d at 485.

79 In *Fasciana*, Vice Chancellor Strine did state that by adopting an approach that excluded from the agents within § 145's reach outside attorneys who "provide specialized legal advice about a particular problem," he reached a result like that "reached by some other state courts in interpreting the term agent in their own corporation codes," such as in *Channel Lumber*. 829 A.2d at 172 & n.43. The court in *Fasciana* also recognized that one of the benefits of using a more constrained and traditional definition of agency was the ability to thereby avoid such an "odd result" as providing mandatory advancement to a lawyer involved in a malpractice dispute with the corporation. *Id.* at 171-72 & n.38.

80 93 Cal. Rptr. 2d at 484 (internal punctuation omitted).

served as litigation counsel. Similarly, the issue is not before me in this case due to the absence of any claim of malpractice.

Holding Jackson Walker eligible for advancement in the El Paso Action here comports with the court's finding in *Fasciana* that "indemnification statutes are 'designed to protect persons exercising corporate discretion and authority, not the attorneys those persons hire to give them legal advice.'"[81] In addition, the record suggests Jackson Walker acted with at least the same level of "corporate discretion and authority" as existed in the situation underlying the claim for which Fasciana received advancement.[82]

Delaware courts understandably proceed with caution in granting advancement and indemnification to agents in general, and to attorneys in particular. In that regard, Vice Chancellor Strine noted in *Fasciana*:

> The public policy served by permitting corporations to provide advancement and indemnification rights to agents is a bit less clear [than for directors and officers]. On the one hand, it seems apparent that corporations are probably presented with no shortage of outside contractors seeking to perform contractual services for them. On the other hand, it is also probably the case that contractual providers are interested in ensuring that they do not unfairly bear the risk of

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81 *Fasciana*, 829 A.2d at 172 (quoting *W. Fiberglass, Inc. v. Kirton, McConkie & Bushnell*, 789 P.2d 34, 38 (Utah Ct. App. 1990), which interpreted Utah's applicable indemnification statute); *see also Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *17 n.65 (Del. Ch. May 23, 2008) (citing *Fasciana* for the same proposition).

82 *See Fasciana*, 829 A.2d at 173-74.

> litigation for acting on behalf of their employing corporation.[83]

Nevertheless, the General Assembly has provided Delaware corporations with the option of advancing and indemnifying litigation expenses for their agents. Spira was, and is, free to craft a narrower bylaw, and then to provide narrower advancement and indemnification rights in its contracts with outside contractors. The Bylaws governing this dispute, however, contain no such limitations.

E. Jackson Walker is entitled to its reasonable attorneys' fees in prosecuting this action

Jackson Walker seeks its attorneys' fees in prosecuting this action for advancement.[84] As the Supreme Court noted in *Stifel Financial Corp. v. Cochran*, "indemnification for expenses incurred in successfully prosecuting an indemnification suit is permissible under § 145(a), and therefore 'authorized by law.'"[85] The Court further held that when a corporation's bylaws provide for indemnification "to the fullest extent permitted by law" that corporation must indemnify a director for his "fees on fees" in pursuing an action to vindicate his indemnification rights.[86]

> Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of

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83 *Id.* at 170.

84 *See* POB at 17; PRB at 9-10.

85 809 A.2d 555, 561 (Del. 2002).

86 *Id.*

> litigation. Further, giving full effect to § 145 prevents a corporation from using its "deep pockets" to wear down a former director, with a valid claim to indemnification, through expensive litigation. Finally, corporations will not be unduly punished by this result. They remain free to tailor their indemnification bylaws to exclude "fees on fees," if that is a desirable goal.[87]

The same policy considerations justifying allowance of fees on fees for indemnification claims pursued by directors equally support an award of fees for the successful prosecution of an advancement claim by an agent.[88]

Spira makes no colorable argument to the contrary. Instead, it bases its opposition to fees on fees in this action on its argument that Jackson Walker has no right to advancement. Having rejected that argument, I likewise reject Spira's opposition to Jackson Walker's request for reimbursement of the fees it incurred in prosecuting this action.

Finally, I note that both DGCL § 145 and bylaw provisions like that adopted by Spira are subject to an implied reasonableness requirement.[89] Thus, because Jackson

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87 *Id.* at 561-62.

88 *See Weaver v. ZeniMax Media, Inc.*, 2004 Del. Ch. LEXIS 10, at *22 (Jan. 30, 2004) (citing *Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *32 (June 18, 2002); *Fasciana v. Elec. Data Sys. Corp.* (*Fasciana II*), 829 A.2d 178, 182 (Del. Ch. 2003); *Weinstock v. Lazard Debt Recovery GP*, 2003 Del. Ch. LEXIS 83, at *22 (Aug. 1, 2003)).

89 *See Fasciana II*, 829 A.2d at 184 (citing *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992)).

Walker essentially achieved full success in this action, it is entitled to advancement of all of the fees and expenses it reasonably incurred in prosecuting this action.[90]

III. CONCLUSION

Jackson Walker's motion for summary judgment is granted. Spira's motion for summary judgment is denied. Jackson Walker is entitled to advancement for its reasonable fees and expenses incurred in the El Paso Action and in this action for advancement.

Jackson Walker shall prepare and file, within ten days of the date of this opinion, after notice to Spira's counsel, an appropriate form of Order and Judgment to implement this ruling. All claims Jackson Walker makes for reimbursement of fees and expenses in accordance with this opinion should conform to the guidelines provided in *Fasciana*.[91]

IT IS SO ORDERED.

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[90] *See id.* In *Fasciana II*, the court further noted:

> Limiting fees on fees awards by imposing a proportionality requirement encourages parties seeking advancement or indemnification to raise only substantial claims and encourages corporations to compromise worthy claims (lest they suffer a fees on fees award) and resist less meritorious claims (knowing that success will bar a fees on fees recovery for the plaintiff).

Id.

[91] *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 177 (Del. Ch. 2003).