EFiled: Jan 30 2004 4:24PM EST
Filing ID 3043456

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 S. STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

January 30, 2004

Richard I. G. Jones, Jr., Esquire
Ashby & Geddes
222 Delaware Avenue, 17th Floor
P.O. Box 1150
Wilmington, DE 19899-1150

Peter J. Walsh, Jr., Esquire
Potter Anderson & Corroon LLP
1313 North Market Street
P.O. Box 951

Re: Christopher S. Weaver v. ZeniMax Media, Inc.
C.A. No. 20439-NC
Date Submitted: October 8, 2003

Dear Counsel:

This letter opinion addresses cross-motions for summary judgment brought by Plaintiff Christopher S. Weaver ("Weaver") and Defendant ZeniMax Media, Inc. ("ZeniMax"), which Weaver once served both as officer and director. Weaver seeks advancement of the costs incurred in defending counterclaims brought against him by ZeniMax in an action filed by Weaver and pending in the State of Maryland.

1. BACKGROUND

ZeniMax is a Delaware corporation with its primary place of business in Montgomery County, Maryland. Weaver was ZeniMax's Chief Technology Officer and a member of its Board of Directors from June 1, 1999 until June 30, 2002.

Weaver had been hired by ZeniMax under an "Executive Employment Agreement" (the "Agreement").[1] The relationship between Weaver and ZeniMax deteriorated, and Weaver departed from ZeniMax on the expiration of the Agreement at the end of June 2002. Weaver claimed that he was entitled to severance benefits under the Agreement, and, on December 13, 2002, he filed an action in the Circuit Court of Montgomery County, Maryland (the "Maryland Action") to recover those benefits.[2]

On February 19, 2003, ZeniMax filed a two-count counterclaim (the "Counterclaim") in the Maryland Action.[3] Count I alleges that Weaver breached his fiduciary duties to ZeniMax in his capacity as an officer and director by failing to manage properly the research and development projects for which he was responsible and by making repeated misrepresentations about the projects to ZeniMax's management. In addition, this count sets forth ZeniMax's contentions that his mismanagement resulted in a waste of corporate assets and caused it "substantial financial losses." Count II alleges that Weaver breached the Agreement as an employee by taking more vacation time than

[1] The Agreement appears as Ex. 1 to the Transmittal Affidavit of Richard I. G. Jones, Jr. ("Trans. Aff.").
[2] Trans. Aff., Ex. 2.
[3] Trans. Aff., Ex. 3.

allowed and receiving reimbursement from ZeniMax for personal travel expenses in connection with non-work related absences.[4]

On March 17, 2003, Weaver demanded[5] that ZeniMax advance him the costs of defending the Counterclaim pursuant to section 5.4 of ZeniMax's bylaws,[6] which reads as follows:

> 5.4 Advancement of Expenses. The Corporation shall, if so requested by an officer or director, advance expenses (including attorneys' fees) incurred by a director or officer in advance of the final disposition of such action, suit or proceeding upon the receipt of an undertaking by o[r] on behalf of the director or officer to repay such amount if it shall ultimately be determined that such director or officer is not entitled to indemnification.[7]
>
> The Corporation may advance expenses (including attorneys' fees) incurred by an employee or agent in advance of final disposition of such action, suit or proceeding upon such terms and conditions, if any, as the Board of Directors deems appropriate.[8]

---

[4] When the pending motions were filed, these damages totaled only $3,987.95. ZeniMax has since amended Count II to seek compensatory damages of $35,000. This letter opinion does not address the implications, if any, of the amendment. The Counterclaim, as amended, also contains a Count III which alleges a breach of the duty of loyalty by Weaver. Weaver has not yet made a claim for advancement regarding Count III in this court.

[5] Trans. Aff., Ex. 4.

[6] Trans. Aff., Ex. 9.

[7] Weaver provided to ZeniMax the necessary undertaking to repay any advancement which may eventually be found not to be appropriate for indemnification.

[8] Article SEVENTH of ZeniMax's certification of incorporation contains a similar provision. Trans. Aff., Ex. 11.

ZeniMax responded on March 3 1, 2003, by informing him that he had not met the applicable standard for advancement.[9] Weaver then asked for an explanation of why this standard was not met." What happened next is the subject of some dispute. Weaver claims that ZeniMax ignored the inquiry; ZeniMax claims it did not initially respond because it was waiting to see how a claim filed under its directors and officers' insurance would be resolved." In any event, Weaver filed this action for advancement on July 17, 2003.

II. CONTENTIONS

ZeniMax now agrees that Weaver is entitled to advancement. of his costs in defending Count I of the Counterclaim.[12] Because-there are no material factual disputes, some fairly narrow questions remain: (1) whether Weaver is entitled to advancement for the costs of defending Count II; (2) how should the amount of that advancement be ascertained; and (3) whether Weaver may recover his "fees on fees" for bringing this action?

---

[9] Trans. Aff., Ex. 5.
[10] Trans. Aff., Ex. 13.
[11] The claim was ultimately rejected.
[12] By the time ZeniMax filed its opening brief in support of its motion for summary judgment, it had conceded that Weaver was entitled to advancement of his Count I fees.

Weaver asserts that he should be advanced the full cost of defending Count II because he is being sued by reason of his having been a director and officer of ZeniMax. ZeniMax, recognizing that its bylaws provide for mandatory advancement of costs incurred because of one's status as an officer or director but that advancement of an employee's costs is discretionary, argues instead that this claim has been brought against Weaver solely as former employee and, therefore, he is not entitled to advancement.

Although ZeniMax has conceded that it must advance Weaver the costs of defending Count I, it argues that Weaver is entitled to only 25% of his total costs based on the proposition that his costs should be divided, first, equally between his prosecution of his direct claims and his defense of the Counterclaim and, second, equally between the two counts of the Counterclaim. Weaver argues that this result is unfair and should be rejected in favor of a good faith estimate approach for determining an allocation of costs.

Lastly, Weaver tenders a claim for his attorneys' fees and costs incurred in bringing this action; his entitlement, Weaver argues, is based on ZeniMax's certification of incorporation and its bylaws. ZeniMax asserts that "fees on fees" are not authorized by its bylaws and, even if he were entitled, no fees should be awarded because Weaver cannot claim to be a prevailing party.

III. ANALYSIS

A. *Standard of Review*

Under Chancery Court Rule 56, summary judgment may be granted only when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law.[13] When 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 no material question of fact exists.[14] "Summary judgment is an effective vehicle for deciding the advancement of legal fees 'as 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.'" [15]

[13] *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).
[14] *Cochran v. Stifel Fin. Corp., 2000* WL 1847676, at *4 (Del. Ch. Dec. 13, 2000) *("Cochran"), aff d in part sub nom. Stifel Fin. Corp. v. Cochran, 809* A.2d 555 (Del. *2002)* (*"Stifel Financial"); Tanzer v. Int'l Gen. Indus., Inc., 402* A.2d 382, 385 (Del. Ch. 1979).
[15] *Morgan* v. *Grace, 2003* WL 22461916, at * 1 (Del. Ch. Oct. 29, 2003) (quoting *Weinstock v. Lazard Debt Recovery GP, LLC, 2003* WL 21843254, at *2 (Del. Ch. Aug. 1, 2003)).

B. Advancement for Count II

Article 5 of ZeniMax's bylaws provides that indemnification is mandatory for those cases brought "by reason of the fact that such person is or was a director or officer of the Corporation" and that indemnification is permissive if brought "by reason of fact that such person is or was an employee or agent of the Corporation."[16] Furthermore, as noted above, section 5.4 of the bylaws requires advancement only when requested by officers or directors but not employees. ZeniMax's board refused to advance Weaver any costs with respect to Count II. Thus, Weaver's entitlement to indemnification for Count II, which focuses on claims that he breached the Agreement, turns on whether this portion of the Counterclaim was brought by reason of fact that he was an officer and director, or an employee.

By 8 Del. C. § 145(a), a corporation is authorized "to indemnify any person who was or is a party . . . to any threatened, pending or completed action, suit or proceeding. . . by reason of the fact that the person is or was a director, officer, employee or agent of the corporation . . . ." In addition, 8 *Del. C.* § 145(e) authorizes "[e]xpenses (including attorneys' fees) incurred by an officer or director in defending any civil,

[16] ZeniMax Media Inc. Bylaws § 5.1(a), (b).

criminal, administrative or investigative action, suit or proceeding [to] be paid by the corporation in advance of the final disposition of such action . . . ."

When this Court has construed the "by reason of the fact" requirement of 8 *Del. C.* § 145 in the indemnification context, it has done so broadly and in favor of indemnification.' [7] Thus, for instance, in *Perconti* v. *Thornton Oil Corp.,* a corporate officer was found entitled to indemnification after an unsuccessful criminal prosecution for, among other things, "investing beyond his authority and directing that corporate funds be applied for his personal benefit."[18] Even though that officer was alleged to have engaged in criminal conduct for personal benefit, he was, nevertheless, prosecuted by "reason of fact" that he was an officer because his "use of corporate powers entrusted to him was critical to, and instrumental in, the carrying out of the scheme in which he participated and because of which the [i]ndictment issued."[19]

However, "by reason of the fact" is not construed so broadly as to encompass every suit brought against an officer and director. For example, claims brought by a corporation against an officer for excessive compensation paid or breaches of a non-

[17] *Perconti v. Thornton Oil Corp., 2002 WL* 982419, at *4 (Del. Ch. May 3, 2002). See *also Merritt-Chapman & Scott Corp. v. Wolfson,* 321 A.2d 138, 140–41 (Del. Super. 1974).
[18] *Perconti, 2002* WL 982419, at *7.
[19] *Id.*

competition agreement are "quintessential examples of a dispute between an employer . . . and an employee" and are not brought "by reason of the fact" of the director's position with the corporation.[20] As this Court has explained:

> 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. Such a conclusion would render the officer's duty to perform his side of the contract in many respects illusory. [21]

Count II, captioned "Breach of Contract,"[22] specifically sets forth the following allegations of breach of the Agreement: (1) Weaver "fail[ed] to devote his full time and efforts to the business of the Company;" (2) he "was paid for non-work related absences

---

[20] *Cochran, 2000* WL 1847676, at *5.

[21] Id. at 6.

[22] In contrast, Count I bears the headline, "Breach of Fiduciary Duty of Care." Labels of this nature are not necessarily helpful, but, here, they accurately reflect the substantive allegations which follow.

The Counterclaim has a typical structure. The factual background is contained in 22 paragraphs under headings of "Parties," "Jurisdiction," and "General Allegations." The substantive relief is framed in terms of specific allegations of Count I and Count II which each incorporate all preceding paragraphs. The core allegations of Count I concern "failing to manage properly the R & D Projects and . . . misrepresenting the status of the Projects to ZeniMax's management . . . result[ing] in a waste of corporate assets." Counterclaim ¶ 25.

in excess of his allotted 4 week [paid] annual vacation;" and (3) he "wrongly received reimbursement for travel and other expenses."[23] These claims are in the nature of an employment dispute, based on a personal obligation owed to the corporation, as addressed in ***Cochran,*** and, unlike Perconti, Weaver did not need to make use of any "entrusted corporate powers" in order to engage in the conduct that gave rise to the specific claims alleged in Count II.

Weaver, however, contends that ZeniMax's claims cannot be so readily segregated. For example, Paragraph 20 of the Counterclaim provides:

> Weaver breached the Agreement and his fiduciary obligations by demanding and receiving compensation for non-work related absences beyond the amount allowed under the Agreement.

From this, Weaver understandably argues that ZeniMax's pleadings demonstrate that the fiduciary duty claim and the employment contract claim are based on certain critical common facts -- whether Weaver used "ZeniMax time" for his personal time.[24]

---

[23] Counterclaim ¶¶ 2 8-3 3.

[24] Paragraph 10 of the Counterclaim also provides:

> 10. Weaver repeatedly breached his duties under Maryland law and the Agreement in various ways, including (1) by failing to discharge his responsibilities as Chief Technology Officer (CTO) in a reasonable manner, including his actions in connection with research and development programs of the Company which caused substantial losses to the Company; (2) by refusing to report to ZeniMax's management as CTO, including a failure to provide timely or accurate information to ZeniMax's management

The Court must seek to discern the nature of the claims which Weaver is called upon to defend by reading the Counterclaim as a whole and providing a reasonable interpretation of the substance of the allegations of each count. Notwithstanding the somewhat artless drafting (at least from the perspective of one charged with ascertaining the scope of an advancement claim), Count I and its fiduciary duty claims are fairly read as arising out of Weaver's "entrusted corporate powers" and do not rely upon Weaver's failure to put in time on the job; by contrast, the failure to put in the appropriate time is squarely implicated and clearly the target of Count II.[25] In sum, factual allegations

---

> on the Company's research and development projects; (3) by claiming compensation for non-ZeniMax work related absences in excess of the four weeks allotted under the Agreement as paid time off; and (4) by claiming reimbursement from ZeniMax for expenses said to be business related which were actually personal expenses.

This paragraph may be read as an attempt by ZeniMax to premise a breach of contract claim on Weaver's failure to keep management aware of the projects he supervised, an allegation which is a material part of its fiduciary duty claim.

[25] Weaver points to argument made by ZeniMax during a discovery dispute in the Maryland Action. There, ZeniMax asserted "[t]estimony sought from the depositions of [certain individuals who worked where Weaver is alleged to have spent his time which otherwise should have been devoted to ZeniMax] is also relevant to ZeniMax's counterclaims for breach of contract and breach of fiduciary duty. Whether section 1.1 (b) of Mr. Weaver's Employment Agreement entitled Mr. Weaver to [pursue the other opportunities] on ZeniMax's time and expense when doing so violated his obligation as a full time officer of the Company is a key issue in dispute in this case." ZeniMax Media, Inc.'s Reply to Christopher Weaver's Opp'n to ZeniMax's Mot. for Commission to Take Depositions of Philip Khoury, William Uricchio and Henry Jenkins, at 3, Trans. Aff., Ex. 10. According to Weaver, this demonstrates that the fiduciary duty and breach of

discretely within Count II address employee issues arising out of his personal capacity – not issues based on Weaver's status as an officer or director.

Weaver invokes ***Reddy v. Electronic Data Systems Corp.***[26] There, the Court, found an entitlement to advancement where "the negligence, gross negligence, common law fraud, and contract claims brought against Reddy all could [have] be[en] seen as fiduciary allegations, involving . . . the charge that a senior managerial employee failed to live up to his duties of loyalty and care to the corporation."[27] *Reddy* avoided the exacting scrutiny of ***Cochran,*** which was an indemnification action, because (1) the employee's undertaking to repay afforded protection to the company if advancement had not been appropriate; and (2) the public policy favoring indemnification and advancement could be frustrated if the corporation could frame its claims in such a fashion that only claims not subject to indemnification were pursued even though claims for which indemnification was required could have been based on the same set of facts. Because

---

contract claims substantially overlap. Although Weaver's interpretation is not implausible, the quoted provision can more easily be read as asserting that the potential deponents have knowledge of facts, some of which relate to one claim and some of which may relate to another claim.

[26] *2002* WL 1358761 (Del. Ch. June 18, 2002), *aff'd, 820* A.2d 371 (Del. 2003).

[27] ***Id.*** at *6. The bylaws in ***Reddy*** did not distinguish between the advancement rights of (a) directors and officers and (b) employees.

the claims under the Agreement are framed precisely by Count II and do not directly impinge upon the fiduciary duty claims of Count I, the potential for abuse, properly identified in *Reddy,* is not present here.[28]

Weaver's reading of *Reddy,* moreover, leads to the conclusion that *Cochran's* separate evaluation of employee or personal claims is never appropriate in an advancement action. I do not read *Reddy* so broadly, especially where, as here, the employment issues are tied directly to an employment agreement and are not premised on the same factual allegations as the fiduciary duty claim. The claims against *Reddy,* instead, were based upon a breach of an implied covenant of good faith and a claim sounding in tort. Moreover, "EDS . . . premised its contractual claims entirely on allegedly improper actions taken by Reddy in his official capacity.'"? Here, Count II arises out of the Agreement and not from any act in Weaver's official capacity.[30]

---

[28] I acknowledge and concur in the principle set forth in *Reddy* that this Court's decisions in advancement cases should not "turn on whether the complaint in the underlying action is pled with particularity or generally." *Id.* at *9 n.29. In contrast, the Counterclaim, when fairly read, focuses on two separate aspects of Weaver's conduct – that undertaken in his official capacity and that undertaken in his personal or employee capacity. It is not the nature of the pleading in the underlying action that controls; it is that ZeniMax alleges separate and distinct claims – one of which qualifies for advancement and one of which does not.

[29] *Id.* at *8.

[30] A narrow reading of the scope of Count II is supported by the amount at issue: $3,987.95. See note 4 *supra.*

There is no alleged use (or abuse) by Weaver of corporate authority or position in the conduct challenged by Count II. Taking too much vacation time and submitting fraudulent travel expenses are examples of personal conduct by employees; they did not give rise to claims "by reason of the fact" that Weaver was an officer and director. As such, under ZeniMax's bylaws, it is permissive to advance funds for this employment related claim but the corporation has chosen not to do so and it is not required to do so.

C. Amount of Advancement

Because Weaver does not seek advancement for his costs incurred in prosecuting his claims against ZeniMax in the Maryland Action and is not entitled to advancement for costs incurred in defending Count II, the next issue is the amount to be advanced to Weaver in his defense of Count I, for which entitlement has been conceded.[31] Weaver contends that he is entitled to advancement based on a good faith accounting and allocation of his fees; ZeniMax suggests payment of 25% of Weaver's total fees. It arrives at this percentage by assuming one-half of all fees will be incurred in defending the counterclaim and those fees will be evenly split between Counts I and II. I am satisfied that despite the administrative appeal of a formulaic analysis, the better

[31] Def. ZeniMax Media, Inc.'s Br. in Supp. of its Mot. for Sumrn. J. at 9 n.1.

approach is to rely, at least in the absence of a showing of abuse, upon the good faith allocation of Weaver's fees to the defense of Count I by his attorneys.

The proper procedure to determine the amount of any advancement claim was set out in *Fasciana v. Electronic Data Systems Corp. ("Fasciana I")*:[32]

> To implement this ruling [granting advancement], Fasciana [the prevailing plaintiff] shall submit a good faith estimate of expenses incurred to date to address the precise allegations that trigger Fasciana's advancement right. . . .
>
> I understand . . . that some level of imprecision will be involved in the retrospective accomplishment of this task. But, in order to ensure the integrity of this process, Fasciana's attorneys shall provide a sworn affidavit certifying their good faith, informed belief that the identified litigation expenses relate solely to defense activity to address those allegations for which Fasciana is owed advancement. On a going-forward basis, Fasciana's advancement requests shall all be submitted [i]n this format.[33]

The Court went on to observe that this method would be used "until some gross problem arises."[34]

I do not foreclose the possibility of ever using the "percentage method" proposed by ZeniMax. If some "gross problem arises" or if it can be shown that Weaver's

---

[32] 829 A.2d 160 (Del. Ch. 2003).
[33] *Id.* at 177. *See also May v. Bigmar, Inc.*, C.A. No. 19936, mem. op. at 5 (Del. Ch. Dec. 10, 2003).
[34] *Fasciana I*, *829* A.2d at 177.

estimates are not otherwise submitted in good faith, then it might be that this would be an equitable solution to the problem.[35] However, it does not appear that Weaver's defense costs are likely to be split evenly between the two claims, given the relatively small dollar amount sought through Count II.[36] Thus, there is no reason to deviate from precedent and to adopt any other method for determining the amount than that laid out in *Fasciana I.*

D. *Fees on Fees*

Finally, Weaver asks this Court for his attorneys' fees and costs incurred in pursuing this advancement action. ZeniMax responds that its bylaws do not obligate it to pay any "fees on fees',' and, even if it is so obligated, Weaver's lack of material success should preclude any award in this instance.

As the Supreme Court noted in *Stifel Financial,* "indemnification for expenses incurred in successfully prosecuting an indemnification suit is permissible under § 145(a), and therefore 'authorized by law.'"[37] The Court held that when a corporation's bylaws provide for indemnification "to the fullest extent permitted by law" that

[35] It is also conceivable that, in any given set of circumstances, an allocation among claims or defenses is simply not practicable.
[36] As noted, this analysis does not reflect the subsequent amendment of Count II.
[37] *Stifel Fin. Corp. v. Cochran, 809* A.2d 555,561 (Del. 2002).

corporation must indemnify a director for his "fees on fees" in pursuing an action to vindicate his indemnification rights. The Court also observed that "[a]llowing 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 litigation . . . [and] prevents a corporation from using its 'deep pockets to wear down a former director, with a valid claim to indemnification, through expensive litigation."[38] This did not "unduly punish[]" corporations because they "remain free to tailor their indemnification bylaws to exclude 'fees on fees,' if that is a desirable goal."[39]

This Court has *recognized that ***Stifel Financial*** supports an award of fees for the successful prosecution of advancement claims as well.[40] As explained in ***Fasciana II:***

> When a corporate official is entitled to an advancement of litigation expenses, the corporation wrongfully refuses to honor the official's advancement request, and, as a result, the official needs to bring a § 145 claim to enforce his contractual right, then it seems plain under the teaching of [*Stifel Financial*] that reasonable fees on fees are in order. The fact is that the right to advancement is no less of a § 145 right than the ultimate right to indemnification. And, the reasoning of [*Stifel Financial*](that ***the*** public policy purposes of the rights authorized by § 145 would be incompletely vindicated if a corporate official had to bear the expense of

---

[38] ***Id.***
[39] ***Id.*** at 561-62.
[40] ***See, e.g., Reddy, 2002*** WL 1358761, at ***9; ***Fasciana v. Elec. Data Sys. Corp., 829*** A.2d at ***182*** (Del. Ch. 2003) ***("Fasciana II"); Weinstock, 2003 WL 2*** 1843254, at ***7.

> enforcing that right) is, therefore, no less applicable to the advancement right than to the indemnification right.[41]

ZeniMax argues that its indemnification bylaw does not entitle Weaver to fees on fees because it does not authorize indemnification or advancement "to the fullest extent authorized by law." The indemnification bylaw provides that ZeniMax will only reimburse for "expenses (including attorneys' fees) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit." ZeniMax then asserts that, based on the plain language of its bylaw, since "such action or suit" refers to the action for which indemnification or advancement payments must be made, it cannot encompass any other action that was pursued to collect those payments.[42]

I am persuaded, however, that Weaver is entitled to his fees reasonably incurred in pursuing this action (to the extent that he is successful) because the bylaws do not

---

[41] *Fasciana II, 829* A.2d at 183.

[42] I note that Article SEVENTH of ZeniMax's certificate of incorporation provides: "To the maximum extent permitted by law, the Corporation shall indemnify fully any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding (whether civil, criminal, administrative or investigative) by reason of fact that such person is or was a Director or Officer of the Corporation . . . against all expenses (including attorneys' fees), judgments,, fines and amounts paid in settlement actually and reasonably incurred by such person or on such person's behalf in connection with such action, suit or proceeding and any appeal therefrom." I do not address Weaver's argument that the reference in the certificate of incorporation to indemnification "[t]o the maximum extent permitted by law" effectively forecloses ZeniMax's contention.

specifically exclude "fees on fees." Under *Stifel Financial*, if a corporation does not want to incur the obligation to pay "fees on fees," it must expressly preclude any such right. This, ZeniMax has not done.

Although ZeniMax is correct in pointing out that the bylaws in *Stifel Financial* provided for "indemnification to the fullest extent of the law," that language, while helpful to the decision, was not the controlling consideration. The Court viewed as empty an indemnification right that could be undercut by the litigation costs necessary for its vindication.[43] The Court also focused on the policies supporting indemnification of corporate officers and directors (policies also applicable to advancement): encouraging corporate officers to defend suits they consider unjustified without the worry of how to fund their defense; generally encouraging capable persons to serve as corporate officers or directors; and "prevent[ing] a corporation from using its 'deep pockets' to wear down a former director, with a valid claim to indemnification, through expensive litigation."[44]

[43] "[W]ithout an award of attorneys' fees for the indemnification suit itself, indemnification would be incomplete." *Stifel Fin. Corp.*, *809* A.2d at 561.
[44] *Id.* The last factor is even more applicable to advancement because, in that context, the burden of the underlying litigation is ongoing and accumulating.

Furthermore, the Court considered other areas of the law where "fees on fees" had been awarded[45] and concluded that similar treatment would be appropriate.

Thus, the conclusion in *Stifel Financial* is not dependent upon the "fullest extent of the law" provision in its indemnification bylaws. If it were, omission by the corporation of those words would have been sufficient and would not have necessitated the Court's guidance: "[Corporations] remain free to tailor their indemnification bylaws to exclude 'fees on fees,' if that is a desirable goal."[46] *In* short, under *Stifel Financial* and its progeny, "fees on fees" are an inherent right of the party materially successful in asserting a claim for indemnification or advancement unless the corporation, as it may, chooses to deny that right.

Turning to the amount of the fees on fees, ZeniMax argues that Weaver should receive nothing since he received only a *de minimis* benefit by filing this action. Weaver contends that he is entitled to all of his fees incurred in this action.

Fasciana II teaches that any award of fees on fees must be proportionate to the success achieved by the plaintiff. There, the plaintiff raised three claims for advancement

---

[45] The Court cited *Digiacomo v. Bd. of Pub. Ed.*, *507* A.2d 542, 547 (Del. 1986) (fee application in workers' compensation matter); *see also Pike Creek Chiropractic Ctr., P.A. v. Robinson,* 637 A.2d 418 (Del. 1994) (fees incurred in pursuing contractual right to indemnification).

[46] *Stifel Fin. Corp., 809* A.2d at 561-62.

but was only successful on one of them; this Court therefore awarded the plaintiff only one-third of his fees on fees.[47] While the Court observed that the award was not "mathematically precise" but that it did "generously compensate[] Fasciana for the very limited success he achieved,"[48] the Court focused on two critical factors: "(1) Fasciana's relief was very limited in light of the relief he sought and (2) the bulk of Fasciana's briefing in the underlying § 145 action was spent advancing arguments that [the Court] ultimately rejected."[49]

Although ZeniMax eventually conceded its obligation to advance Count I defense costs, Weaver was forced to bring this action. In addition, he prevailed on the appropriate methodology for calculating the costs to be advanced. Weaver, however, was unsuccessful in his effort to obtain advancement for Count II defense costs. Under these circumstances, there is no wholly satisfactory method for determining the proper scope of a fee award. I am persuaded, however, that Weaver is entitled to two-thirds of the costs reasonably incurred in pursuing this action until the time that ZeniMax unequivocally conceded that it would advance Count I defense costs and one-half of his costs thereafter. This litigation can be divided into two parts: before ZeniMax's binding

[47] *Fasciana II, 829* A.2d at 188.
[48] *Id.*
[49] *Id.* at 187.

acknowledgement that it is obligated to advance Count I defense costs and after that point.[50] For the first period, Weaver prevailed on two of the three issues, warranting a two-thirds award of fees. For the second part, he prevailed on one of the two remaining issues, warranting a one-half award of fees.

IV. CONCLUSION

In sum, ZeniMax is entitled to summary judgment with respect to Weaver's claim for advancement of the costs of defending Count II. However, Weaver has established his right to summary judgment awarding him advancement of the full amount of his costs in defending Count I, the amount to be determined in accordance with the teachings of *Fasciana I* by his attorneys' good faith estimate of the costs incurred in defending Count I. I also award two-thirds of his attorneys' fees and costs incurred in prosecuting this action before ZeniMax conceded his entitlement to advancement of Count I defense costs and one-half of his attorneys' fees and costs incurred thereafter.

[50] There appears to have been an interval during which ZeniMax used its willingness to advance Count I costs as a bargaining chip with respect to the methodology for determining the amount to be paid and its responsibility for Count II costs. This negotiation strategy was carried out before ZeniMax unequivocally accepted its duty to advance Count I costs.

I ask that counsel confer and submit a form order to implement this decision.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC