

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SAKI DODELSON,	:	
	:	
Plaintiff,	:	
	:	
v	:	Civil Action No.
	:	2019-00029-SG
AC HOLDCO, INC., d/b/a	:	
ACHIEVE3000,	:	
	:	
Defendant.	:	

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Court of Chancery Courthouse
 Courtroom No. 1
 34 The Circle
 Georgetown, Delaware
 Tuesday, May 21, 2019
 1:32 p.m.

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BEFORE: HON. SAM GLASSCOCK III, Vice Chancellor

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RULINGS OF THE COURT ON CROSS-MOTIONS FOR SUMMARY
JUDGMENT

CHANCERY COURT REPORTERS
 Leonard L. Williams Justice Center
 500 North King Street - Suite 11400
 Wilmington, Delaware 19801
 (302) 255-0533

1 APPEARANCES:

2 KURT M. HEYMAN, ESQ.
3 AARON M. NELSON, ESQ.
4 GILLIAN L. ANDREWS, ESQ.
Heyman Enerio Gattuso & Hirzel LLP
for Plaintiff

5 THOMAS W. BRIGGS, JR., ESQ.
6 RICHARD LI, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
for Defendant

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THE COURT: Counsel, thank you for indulging me. I am able to rule from the bench and I intend to do so. What follows is my bench decision in this matter.

Before me are cross-motions for summary judgment on plaintiff's demand for advancement. Neither party points to a material factual issue, and I consider the matter submitted for decision on the current record. The issue before me is one of contract interpretation and is, I find, well suited to such a decision.

I give it here as a bench ruling, not because the issues lack importance, but for a contrary reason. The issues involve important advancement rights that, if they are to be effectively vindicated, must be so with alacrity. This is, accordingly, an expedited matter, and I find it most appropriate to give my decision now.

The plaintiff, Saki Dodelson, an individual, was the CEO and a director of defendant AC Holdco, a Delaware company. Dodelson resigned as CEO on April 18, 2018, but she remained a director until June 2018 when she was removed from the board. The

1 pertinent facts here are mercifully brief and straight
2 forward.

3 Dodelson commenced legal action
4 against her former employer, AC Holdco, in New Jersey
5 on August 31st, 2018. AC Holdco then filed
6 counterclaims augmented by amendment against Dodelson
7 in the New Jersey action. Dodelson made a demand for
8 advancement for legal expenses to defend against AC
9 Holdco's counterclaims based on her understanding of
10 AC Holdco's charter, which provides for advancement
11 under certain conditions. AC Holdco refused
12 Dodelson's demand, and this litigation in Delaware
13 ensued.

14 On these cross-motions for summary
15 judgment, there are two issues before me. The first
16 is whether Dodelson is entitled, as a general matter,
17 to advancement in light of the fact that she was no
18 longer a director or officer of AC Holdco when the
19 counterclaims were filed. If yes, the second question
20 is the extent to which Dodelson is entitled to
21 advancement in light of the nature of the
22 counterclaims.

23 The advancement rights in question
24 arise, if at all, in the AC Holdco charter, which

1 operates as a contract binding on these parties. I
2 turn to that document, and specifically Article X. I
3 note that in interpreting and enforcing contractual
4 obligations as here, I must apply the agreement of the
5 parties as expressed objectively in the language of
6 the agreement.

7 Article X of the charter provides that
8 "To the fullest extent permitted by applicable law,
9 the Corporation is authorized to provide
10 indemnification of (and advancement of expenses to)
11 directors, officers, employees and agents of the
12 Corporation"

13 Section 2 of Article X is titled
14 "Advancement of Expenses of Directors and Officers,"
15 and states that, "The Corporation shall pay the
16 expenses (including attorneys' fees) incurred by a
17 director or officer of the Corporation in defending
18 any Proceeding in advance of its final disposition,
19 provided, however, that such payment of expenses in
20 advance of the final disposition of the Proceeding
21 shall be made only upon receipt of an undertaking by
22 the Indemnified Person" -- and importantly, I note
23 "indemnified person" is a defined term -- "to repay
24 all amounts advanced if it should ultimately be

1 determined that the Indemnified Person is not entitled
2 to be indemnified under this ARTICLE X or otherwise."
3 And that's the end of the quote from Section 2 of
4 Article X.

5 "Indemnified person," as I mentioned,
6 is a defined term under the charter. It means "Any
7 person who was or is made or is threatened to be made
8 a party or is otherwise threatened to be made a party
9 by reason of the fact that such person is or was a
10 director or officer of the Corporation."

11 The defendant points out that the
12 advancement provision at issue does not define the set
13 of "directors or officers" entitled to advancement.
14 And, specifically, that it fails to explicitly include
15 former, as well as current, directors and officers.
16 The question is, then, how this term should be
17 interpreted.

18 The defendant argues that precisely
19 this issue was resolved recently by this court in
20 *Charney v. American Apparel, Inc.* In *Charney*, the
21 Court interpreted an advancement provision that, as
22 here, referred to "officers and directors" without
23 qualification. As here, the plaintiff in *Charney* was
24 a former officer who sought advancement under the

1 provision. As here, the question before the Court was
2 how to interpret the phrase "officer or director."

3 Because the provision was silent
4 concerning former officers and directors, the Court in
5 *Charney* was charged with determining -- as a matter of
6 common usage and in light of the contract as a
7 whole -- whether the term included former officers and
8 directors.

9 Based on language there employed, the
10 Court implied that the term "director or officer,"
11 absent limitation by adjective and in light of the
12 document as a whole, applied only to current officers
13 and directors. That is, the *Charney* court,
14 reasonably, in my view, found that the term "director
15 and officer" standing alone implied current officers
16 and current directors.

17 The provision in question then limited
18 advancement rights to such directors and officers as
19 undertook to repay advanced funds not entitled to
20 indemnification. On that basis, the Court found that
21 the former officer was not entitled to advancement.

22 The language in AC Holdco's charter,
23 to my mind, differs materially from the language at
24 issue in *Charney*. In *Charney*, a "director or officer"

1 is entitled to advancement when "such director or
2 officer" undertakes to repay. Here advancement is
3 extended to officers and directors when such
4 indemnified persons undertake to repay. Again,
5 "indemnified person" is a defined term. Therefore, I
6 must read that definition into the language of the
7 provision to understand its meaning.

8 After substituting the full definition
9 of "indemnified person" into Section 2 of Article X,
10 the section reads as follows: "The corporation shall
11 pay the expenses (including attorneys' fees) incurred
12 by a director or officer of the Corporation in
13 defending any Proceeding in advance of its final
14 disposition, provided, however, that such payment of
15 expenses in advance of the final disposition of the
16 Proceeding shall be made only upon receipt of an
17 undertaking by" -- and here I insert the definition --
18 "the person who was or is made or is threatened to be
19 made a party or is otherwise threatened to be made a
20 party by reason of the fact that such person is or was
21 a director or officer of the Corporation."

22 Given this full reading, the
23 advancement provision refers to both current and
24 former directors in the undertaking clause. By

1 contrast, the first clause of this provision refers
2 simply to "directors and officers," temporally
3 undefined, a term that in this context, as I just
4 explained, has been held to mean current directors and
5 officers.

6 At best for the defendant then, the
7 advancement provision of the charter is ambiguous.
8 The plaintiff's reading, extending advancement rights
9 to former directors and officers, is, I find,
10 reasonable.

11 Where one party has drafted a
12 contract, ambiguity is typically resolved against the
13 drafter. Here, that is the defendant. Furthermore,
14 the charter itself states in Section 3 of Article X
15 that after an indemnified person has submitted a claim
16 for advancement, such a person "may file suit to
17 recover the unpaid amount of such claim," and "In any
18 such action the Corporation shall have the burden of
19 proving the Indemnified Person is not entitled to the
20 requested ... advancement ... expenses."

21 In other words, presumably to
22 encourage individuals to serve as directors and
23 officers, the defendant in its charter authorized the
24 corporation to extend advancement rights to the

1 fullest extent permitted by law, provided for
2 mandatory advancement for directors and officers where
3 such current or former directors and officers
4 undertook to repay, and then voluntarily placed upon
5 the corporation the burden of proof to rebut
6 advancement rights.

7 In light of the language referred to
8 above, I find that the defendant has not carried that
9 burden here. To the extent that the defendant seeks,
10 at the 11th hour, further development of the record, I
11 think that opportunity has been waived. And nothing
12 indicates that such discovery would be sufficient to
13 overcome the application of *contra proferentem* and the
14 contractually imposed burden of proof that I have just
15 described. Certainly, the defendants point to no
16 likely-fruitful field for such discovery.

17 AC Holdco is, therefore, bound to
18 provide Dodelson with advancement. That does not end
19 the inquiry here. While Dodelson is entitled to
20 advancement, the parties disagree as to the scope of
21 that entitlement. The charter provides advancement
22 for a "proceeding," which is a defined term that
23 includes only those actions, suits, and proceedings to
24 which a person is involved "by reason of the fact"

1 that such a person is or was a director or officer of
2 the corporation.

3 Such language requires that a causal
4 nexus exists between the person's service to the
5 corporation and the action for which advancement is
6 contractually required. The parties agree that
7 Counts IV and V of the amended counterclaim are
8 brought by reason of Dodelson's service as a director
9 or officer, and she does not seek advancement for
10 Count III. The parties disagree as to advancement for
11 Counts I and II, which are plead to be breach of
12 contract claims.

13 I find that to the extent Counts I and
14 II of the amended counterclaim in the New Jersey
15 litigation allege breaches of the contract by which
16 Dodelson was made a fiduciary of AC Holdco and refer
17 to misbehavior she was able to engage in because of
18 her position at the company and the access to
19 information received incident to that position as an
20 officer or director, then Dodelson is entitled to
21 advancement.

22 According to the defendant, some of
23 the wrongdoing alleged in Counts I and II lacks a
24 causal nexus to Dodelson's position with the company.

1 If so, to that extent, the parties should create a
2 protocol for the allocation of sums to be advanced.
3 The parties should inform me within two weeks if they
4 are unable to agree to such a protocol on their own.
5 If not, they should submit a brief letter or memoranda
6 concerning their positions, and I will resolve the
7 issue promptly.

8 I have found that Dodelson is entitled
9 to advancement. Dodelson has requested fees on fees
10 in connection with prosecuting these advanced rights.
11 Under our case law and contractually, the plaintiff is
12 entitled to reasonable fees on fees incurred in
13 connection with litigating her advancement rights.

14 Once the question to the scope of
15 advancement and the reasonable amount of fees on fees
16 have been resolved, the parties should submit a form
17 of order consistent with this bench decision.

18 Mr. Briggs, was that comprehensible?

19 MR. BRIGGS: Yes, it was, Your Honor.

20 THE COURT: Was that comprehensible?

21 MR. HEYMAN: Clear as an unmuddied
22 lake, Your Honor.

23 THE COURT: Thank you, both.

24 Once again, I gave a bench decision,

1 not because this isn't an important matter, but
2 because it's an expedited matter. I felt that it
3 would be better done quickly rather than otherwise.

4 The briefing was very helpful and the
5 argument was well made. Thank you for making the trek
6 down. It was a pleasure to see you in my courtroom,
7 and I look forward to hearing from you in the future.

8 Anything else productive we can do
9 before we break?

10 MR. BRIGGS: No, I think that's it
11 from our perspective.

12 MR. HEYMAN: Nothing here, Your Honor.

13 THE COURT: Thank you. Have a good
14 trip home.

15 (Court adjourned at 2:45 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery for the State of Delaware, Registered Merit Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 13 contain a true and correct transcription of the rulings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I hereunto set my hand at Wilmington, this 22nd day of May, 2019.

/s/ Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter