INSIGHTS

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# DIRECTOR AND OFFICER LIABILITY

## Recent Delaware Court of Chancery Opinion Provides Guidance on Advancement and Indemnification

*A recent opinion of the Delaware Court of Chancery provides guidance on drafting indemnification and advancement provisions, and clarifies the circumstances under which a director or officer may or may not be entitled to advancement "by reason of the fact" of his or her service as such. The Court held, among other things, that a provision of a certificate of incorporation extending mandatory advancement rights to a director or officer, without specifying that it applied to both current and former directors and officers, only applied to current directors and officers.*

**By John Mark Zeberkiewicz and Stephanie Norman**

In recognition of Delaware's strong public policy in favor of indemnification and advancement rights, the Delaware courts frequently have ruled in favor of corporate directors and officers seeking advancement and indemnification under provisions of certificates of incorporation, bylaws and agreements extending such rights.[1] In some cases, the Court of Chancery has expressed exasperation with corporations that refuse to honor the mandatory advancement rights they had extended.[2] But in *Charney v. American Apparel, Inc.*,[3] the Court declined to enforce a former director-officer's right to advancement under an indemnification agreement, holding that there was no causal nexus between the claims at issue in the proceeding for which the former director-officer was seeking advancement and his corporate capacity. In addition, the Court held that the director-officer was not entitled to advancement under the certificate of incorporation because the provision granting mandatory advancement rights applied to "directors and officers," which the Court construed as limited to *current* directors and officers, and the former director-officer was not serving as a director or officer at the time the proceeding was filed in the Delaware Court of Chancery.

### Background

The opinion in *American Apparel* arose from a series of events leading to the resignation and removal of Dov Charney, the founder and a significant stockholder of American Apparel, Inc., as a director and chief executive officer of that

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company. In June 2014, the board of directors of American Apparel suspended Charney as president and chief executive officer and advised him of its intent to terminate him for cause under his employment agreement. Following Charney's unwillingness to resign as president and chief executive officer, the board adopted formal resolutions revoking all of Charney's power to act for or on behalf of the company.

In response to Charney's subsequent actions (namely, his entry into an agreement with a third-party fund for the acquisition of additional shares of American Apparel stock and his purported call of a special meeting of stockholders to change the composition of the board), American Apparel and Charney (together with the third-party fund and its affiliates) entered into a standstill agreement. Under the terms of that agreement, Charney was prohibited from acquiring additional stock, running a proxy contest or taking actions to remove directors until the company's 2015 annual meeting, and from making statements that would disparage or otherwise reflect negatively upon the company.

***Rights to indemnification and advancement are considered separately.***

In accordance with the standstill agreement, Charney resigned as a director. The standstill agreement also provided that Charney would not act as an officer or employee of the company or any of its subsidiaries until a suitability committee of the board conducted an investigation into the conduct leading to his suspension and made a determination as to whether it was appropriate for Charney to be reinstated. In December 2014, after the suitability committee had completed its investigation, the board terminated Charney.

In May 2015, American Apparel initiated proceedings against Charney for alleged violations of the standstill agreement, claiming, among other things, that he had discussed a potential takeover of the company, expressed "anti-board sentiments" in meetings with the company's employees, publicly made negative statements regarding the company, and submitted a declaration in support of a motion to invalidate the results of the company's 2014 annual meeting.

After the proceedings were initiated against him, Charney sent an e-mail to American Apparel demanding that it advance his expenses under his indemnification agreement, his employment agreement and the company's bylaws. American Apparel's counsel promptly responded with a letter denying the request. Charney then filed a verified complaint for advancement, following which he and the company cross-moved for summary judgment. In his motion for summary judgment, Charney asserted that he was entitled to advancement under the company's certificate of incorporation and his indemnification agreement.[4]

## The Court's Analysis

In denying Charney's motion, the Court analyzed separately his rights to advancement under each of the certificate of incorporation and the indemnification agreement.

### Advancement Rights of Former Directors and Officers under the Certificate of Incorporation

The Court noted that the certificate of incorporation provided that American Apparel was required, "to the full extent permitted by Section 145 of the [Delaware General Corporation Law ("DGCL")], … [to] indemnify all persons whom it may indemnify pursuant thereto" and further provided that "[e]xpenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative, or investigative action, suit or proceeding for which such officer or director may be entitled to indemnification hereunder shall be paid by [American Apparel] in advance of the final disposition of such action, suit

or proceeding" upon the receipt of an undertaking.[5] Charney claimed that his rights to advancement under the certificate of incorporation arose directly from his indemnification rights, arguing that because American Apparel would be able to indemnify him against expenses arising from those claims, it would be required to advance his expenses. The Court disagreed, stating that "the Company's indemnification and advancement obligations under the Charter are not coterminous with respect to former, as opposed to current, directors and officers."[6]

***The Court held that the certificate of incorporation only granted mandatory advancement to current directors and officers.***

Citing to *Advanced Mining Systems, Inc. v. Fricke*,[7] the Court noted that rights to indemnification and advancement are considered separately, and that a right to mandatory indemnification, on its own, does not include an obligation to advance the expenses as to which a party may ultimately be indemnified.[8] The Court found that, while the certificate of incorporation required indemnification for all of the parties it was entitled to indemnify under Section 145 of the DGCL—which would include current and former officers and directors—the advancement provision did not expressly provide mandatory advancement rights to *former* directors and officers.[9] In so finding, the Court noted that the provision "refers simply to 'officers' and 'directors' without any further qualification" and that when those words "are not qualified by the adjective 'former' (or a similar adjective)," the Delaware courts have construed them to refer only to current directors and officers.[10]

The Court also relied on Section 145(e) of the DGCL in holding that the provision did not grant mandatory advancement to former directors and officers. The advancement provision of American Apparel's certificate of incorporation tracks almost verbatim the first sentence of Section 145(e) of the DGCL, which sentence empowers a corporation to advance expenses to its current directors and officers, provided that such officers and directors provide an undertaking to repay the amounts so advanced it they are ultimately not entitled to indemnification.[11] The second sentence of Section 145(e), by contrast, empowers a corporation to extend advancement rights to former directors and officers and to other employees or agents of the corporation (or other persons serving at the request of the corporation as directors, officers, employees or agents of other enterprises) on such terms and conditions as the corporation deems appropriate, but it does not expressly require the provision of an undertaking.[12] Thus, in light of case law construing the unadorned term "director and officer" and the statutory distinction between current and former directors and officers in Section 145(e), the Court held that the certificate of incorporation only granted mandatory advancement to current directors and officers.[13]

**The "Causal Nexus" Language under the Indemnification Agreement**

The Court next addressed whether Charney was entitled to mandatory advancement under his indemnification agreement. The Court first noted that, by virtue of Section 145(f),[14] "separate from and in addition to the Charter provision," American Apparel had agreed to provide Charney contractual rights to indemnification and advancement. As the indemnification agreement clearly extended advancement rights to Charney in his capacity as both a current and former director and officer,[15] the Court's analysis focused on whether there was a sufficient causal nexus between the claims in the underlying proceeding and Charney's corporate capacity, as the advancement clause contained language requiring such a causal nexus.

Parsing the relevant language of the agreement, the Court noted that the main indemnification clause provided that if Charney "was, is or becomes a party to […] a Claim by reason of (or arising in

part out of) an Indemnifiable Event, the Company shall indemnify [Charney] to the fullest extent permitted by law … against any and all Indemnifiable Amounts."[16] The Court next noted that the term "Indemnifiable Event" was defined as "any event or occurrence, whether occurring before, on or after the date of this Agreement, related to the fact that [Charney] is or was a director and/or officer or fiduciary of the Company, or is or was serving at the request of the Company as a director, officer, employee, trustee, agent or fiduciary of another Person, or by reason of anything done or not done by [Charney] in any such capacity."[17] The advancement clause, in turn, provided: "If so requested by [Charney], the Company shall advance … any and all Expenses incurred by [Charney]," with "Expenses"[18] defined generally as "'all fees, costs and expenses incurred in connection with any Claim relating to any Indemnifiable Event.'"[19]

The Court's central inquiry, therefore, was whether the actions underlying the standstill proceeding for which Charney was seeking advancement were related to the fact that he is or was a director and/or officer of the company, or occurred by reason of anything he did or omitted to do in his capacity as such.[20] Charney argued that the indemnification agreement's formulation of the causal nexus to his corporate capacity—namely, the "related to the fact" formulation—was intentionally broader than the "by reason of the fact" formulation that appears in Section 145. Proceeding from this premise, Charney argued that he was entitled to advancement of his expenses in the standstill proceeding because some of the alleged violations occurred before he was officially terminated, and because they were all related to the fact that he once was a director or officer. In other words, Charney argued that the provision should be read to mean that he should be advanced expenses for any proceeding to which he would not have been made a party "but for" his capacity as a current or former director or officer.

Before proceeding to its conclusion as to the proper interpretation of the "causal nexus" language in the indemnification agreement, the Court reviewed the historical basis for the "by reason of the fact" standard articulated in Section 145. A proceeding in which a person is seeking advancement "by reason of the fact" that he or she is or was a director or officer, the Court noted, is one in which "'there is a nexus or causal connection between' the underlying proceeding and 'one's official corporate capacity.'"[21] The Court stated that a "causal connection exists 'if the corporate powers were used or necessary for the commission of the alleged misconduct.'"[22] The Court then stated that it would review the indemnification agreement's "related to the fact" causal language in light of the statutory formulation and the case law construing it.

***The Court's central inquiry was whether the actions related to the fact that he is or was a director and/or officer of the company.***

The Court stated that the indemnification agreement itself did not define its "related to the fact" standard, and that the parties cited no authority providing a definition. The Court noted, however, that at least one opinion of the Court of Chancery used the terms interchangeably in the advancement context, and applied the "related to the fact" standard using the Delaware Supreme Court precedent construing the "by reason of the fact" standard.[23] The Court then stated two reasons for which the indemnification agreement's standard should be construed consistently with the standard found in Section 145.

First, the Court stated that Charney's proposed interpretation would essentially mandate advancement in any case where, "but for" his service as an officer or director, he would not have been made (or threatened to be made) a party to the proceeding for which he was seeking advancement—and that such standard would yield absurd results. To illustrate, the Court offered a hypothetical in which a director, in the course of

a deposition in which he would not be participating "but for" his position as a director, commits a tort against the stenographer and then seeks advancement for the costs incurred with the ensuing tort lawsuit. Second, the Court held that Charney's interpretation of the "related to the fact" language in the indemnification agreement would have resulted in an interpretation of the agreement under which American Apparel would have exceeded its statutory power under Section 145.[24]

### Examining the Causal Nexus

Having undertaken the foregoing analysis, the Court found that none of the actions at issue in the underlying proceeding regarding the standstill agreement arose "by reason of the fact" that Charney was an officer or director of American Apparel. The alleged actions, including Charney's alleged disparaging statements against American Apparel and his activities in furtherance of a proxy contest, were not "causally connected to the use or misuse of Charney's corporate power as a director or officer of American Apparel."[25] The Court indicated that a causal connection between a corporate official's conduct and his or her corporate status does not arise when "the parties are litigating a specific and personal contractual obligation that does not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation."[26]

***Corporate practitioners should bear in mind, the distinction between current and former officers and directors.***

Addressing Charney's argument that the underlying standstill actions were "inextricably intertwined" with his status as a former director and officer, the Court distinguished the facts before it from those at issue in *Pontone v. Milso Industries Corp.*[27] In *Pontone*, the Court held that a former officer and director was entitled to advancement of expenses in connection with a claim he faced when it was alleged that he misused confidential information he obtained while a director or officer when he started working for a competitor.[28] The *American Apparel* Court noted that, in *Milso*, there was a causal nexus because corporate powers—namely, information that the director and officer had obtained in an official capacity—were necessary to the alleged misconduct. By contrast, Charney's alleged misconduct relied only on his association with American Apparel, and not by reference to his discharge of a formal corporate power or the use of information provided to him in a corporate capacity.[29] This distinction, therefore, also would appear to serve to distinguish cases in which corporate officials made party to actions, suits or proceedings in insider trading and similar claims have nonetheless been entitled to advancement, despite claims that, in dealing in inside information, they were acting in an individual capacity.[30]

## Conclusion

In light of the *American Apparel* opinion, corporate practitioners should bear in mind, when drafting indemnification and advancement provisions, the distinction between current and former officers and directors. Corporate practitioners also should be mindful of the causal nexus requirements under applicable law and any instrument extending rights to indemnification and advancement of expenses, and should not assume that, where a director or officer has mandatory rights to indemnification or advancement, such director or officer automatically will be entitled to indemnification or advancement of expenses in connection with an action, suit or proceeding merely because he or she would not have been made a party (or threatened to be made a party) "but for" his or her position as a corporate officer.

## Notes

1. *See*, *e.g.*, *Blankenship v. Alpha Appalachia Holdings, Inc.*, 2015 WL 3408255, at *18 (Del. Ch. May 28, 2015) ("Delaware's salutary public policy of 'attracting the most capable people into corporate service'

through broad indemnification and advancement protections supports resolving ambiguity in an instrument governing advancement rights in favor of advancement.") (footnotes omitted); s*ee also Holley v. Nipro Diagnostics, Inc.*, 2014 WL 7336411, at *1 (Del. Ch. Dec. 23, 2014) ("In advancement cases, the line between being sued in one's personal capacity and one's corporate capacity generally is drawn in favor of advancement with disputes as to the ultimate entitlement to retain the advanced funds being resolved later at the indemnification stage."). *See generally* John Mark Zeberkiewicz & Blake Rohrbacher, *No Surprises: The Mandatory Nature of Mandatory Advancement and Indemnification*, The Corporate Governance Advisor, Vol. 15, No 6 (Nov./Dec. 2007), at 21 (stating that "the Delaware courts will give boards of directors significant leeway in regulating advancement when the relevant bylaw or other contractual provision provides for discretion, but boards may have little chance of succeeding in a contest regarding a mandatory-advancement provision").

2. *See, e.g.*, *Nipro Diagnostics*, 2014 WL 7336411, at *1 (in granting an officer's motion for summary judgment on his claim to mandatory advancement, the Court stated: "This is yet another advancement case in which a company disputes its obligation to pay the attorneys' fees of an officer or director during the course of litigation"); *see also Lieberman v. Electrolytic Ozone, Inc.*, 2015 WL 5135460, at *4 (Del. Ch. Aug. 31, 2015) (noting that the Court will "look through creative pleading" and order advancement where a case is styled as a breach of contract claim so as to avoid advancement if "success on a breach of contract claim and a fiduciary duty claim would be based on the same set of facts").

3. 2015 WL 5313769 (Del. Ch. Sept. 11, 2015).

4. Although Charney's verified complaint asserted that he was entitled to advancement under the company's bylaws (and not the certificate of incorporation), he did not move for summary judgment under the bylaws, instead asserting that the certificate of incorporation was one of the sources of mandatory advancement to which he was entitled.

5. *Am. Apparel*, 2015 WL 5313769, at *7. The "persons" that a corporation may indemnify under Section 145 of the DGCL include the following: "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 (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise." 8 *Del. C.* § 145(a)(b). In addition, Section 145(j) provides that the "indemnification and advancement of expenses provided by, or granted pursuant to, [Section 145] shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person." *Id.* § 145(j).

6. *Am. Apparel*, 2015 WL 5313769, at *7.

7. 623 A.2d 82 (Del. Ch. 1992).

8. *Am. Apparel*, 2015 WL 5313769, at *7.

9. *Id.* ("The first sentence of Article Eighth, Paragraph B [of the certificate of incorporation], which governs indemnification, makes mandatory what Sections 145(a) and 145(b) of the Delaware General Corporation Law permit, i.e., for a corporation to indemnify any person sued 'by reason of the fact that the person is or was a director, officer, employee or agent of the corporation.' In other words, insofar as indemnification is concerned, this first sentence specifically incorporates statutory provisions expressly applicable to both current and former directors and officers.").

10. *Id.* (citing *Schoon v. Troy*, 948 A.2d 1157 (Del. Ch. 2008) (holding that a bylaw amendment that eliminated the "present or former" qualifier had the effect of removing former directors from the class of persons entitled to advancement), and *King v. DAG SPE Managing Member, Inc.*, 2013 WL 6870348, at *5-6 (Del. Ch. Dec. 23, 2013) (holding that a former director does not have inspection rights under Section 220 of the DGCL as such rights are afforded to "any director")). *But see* Jennings v. San Vicente Group, Inc., C.A. No. 19348 (Del. Ch. Mar. 27, 2002) (TRANSCRIPT). In *Jennings*, the Court noted that the "ultimate issue" in the case was whether former directors and officers seeking advancement under the corporation's bylaws were entitled to have their litigation expenses advance under a bylaw provision that "on its face … grants advancement rights only to current directors and officers." *Id.* at 3-4. The defendant corporation claimed that the bylaw provision unambiguously applied only to current directors and officers, noting that such reading was required, as other provisions of the bylaws expressly made a distinction between current and former directors and officers. *Id.* at 4. While noting that the corporation's position was not "frivolous," the *Jennings* Court stated that it was "not without its problems." *Id.* at *5. First, the Court noted that other sections of the bylaw governing indemnification and advancement used the "unadorned" terms director and officer, and that the parties conceded that those provisions applied to both current and former directors and officers. Based on that fact, the Court found that one "could infer logically and reasonably that the term 'director' and 'officer' in [the advancement section] is intended to have the same broad meaning as it is given" in the other sections of the indemnification and advancement bylaw that refer to directors and officers, without qualification, but are read to include both current and former directors and officers. *Id.* The Court then noted that its finding was "buttressed" by the fact that the advancement provision required amounts so advanced to be repaid if the recipient is found later not to be entitled to indemnification by the corporation as authorized in a section of the bylaws that referenced the indemnification provisions of the bylaws, which provisions created indemnification rights in favor of both current and former directors and officers. The Court ultimately concluded

that the advancement bylaw was ambiguous—susceptible on its face to two different readings, each of which was reasonable—and proceeded to resolve the ambiguity in favor of the parties seeking advancement, rather than resorting to extrinsic evidence. The Court stated: "[W]here an advancement provision is ambiguous as to its coverage—that is, as to the universe of entitled beneficiaries—in the absence of evidence compelling a narrow construction, the Court should resolve the ambiguity consistent with the policy underlying indemnification, which is to encourage qualified persons to serve as directors and officers of Delaware corporations." *Id.* at 7-8.

11. *See* 8 *Del. C.* § 145(e).

12. *Id.* Interestingly, the unqualified term "directors and officers" in Section 145(e) was apparently once understood to refer to *current and former* directors and officers. Until it was amended in 1983, Section 145(e) required, as a condition to a corporation's advancement of expenses to its officers, directors, employees and agents (and other specified parties serving at its request), that the corporation obtain an undertaking from the person to whom the expenses were advanced. In 1983, the statute was amended to "eliminate[] the requirement that an employee or agent to whom expenses … are paid by the corporation in advance furnish an undertaking," but to leave "existing law with respect to the advancement of expenses to directors and officers … unchanged." *See* H.B. 185, 132nd Del. Gen. Assem. (1983). The statute was further amended in 1997 to eliminate the requirement that former directors and officers provide the undertaking. As so amended, Section 145(e) provided that expenses incurred by "former directors and officers or other employees and agents" may be paid on such conditions the corporation deems appropriate. The 1997 amendments to Section 145(e) were made in connection with amendments to Section 145(c), which were intended to provide that the corporation's statutory obligation to indemnify its officers and directors where they were successful on the merits or otherwise in an action, suit or proceeding, applied only to current directors and officers, as well as those to Section 145(d), which prescribed specific procedures for making the determination as to whether persons who are directors and officers at the time of determination have met the standard of conduct necessary to establish entitlement to indemnification. *See* S.B. 106, 139th Del. Gen. Assem. (1997). Despite the multiple changes to Section 145(e), the requirement to provide an undertaking is arguably implicit and need not be mandated by statute. As one corporate law treatise has noted: "Although Section 145(e) does not expressly require a written undertaking for advancement with respect to persons who are not current directors or officers, the Delaware Court of Chancery has stated that it is implicit in the concept of receiving an 'advancement' that a person must repay the expenses advanced if he or she is not entitled to be indemnified for those expenses." *See* 1 David A. Drexler et al., *Delaware Corporate Law and Practice* § 16.04, at 16-19 (2014 Supp.) (citation omitted).

13. The Court further noted that even if the certificate of incorporation did afford advancement rights to former directors and officers, the provision would still not afford Charney advancement rights because he was not made a party to the standstill proceeding "by reason of the fact" that he formerly was a director or officer of the company. *Am. Apparel*, 2015 WL 5313769, at *8 n.42.

14. *See* 8 *Del. C.* § 145(f) ("The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office.").

15. *American Apparel*, 2015 WL 5313769, at *9-10. American Apparel argued that the indemnification agreement did not in fact extend to Charney in his capacity as a former officer or director based on the agreement's survival clause, which it argued should be construed to mean that, once Charney ceased to be a director or officer, he was entitled to advancement only if he were able to demonstrate that the claims in the underlying proceeding were brought by reason of his status as a director or officer. *Id.* The Court rejected this argument, stating "the only reasonable interpretation of [the survival clause] when read together with the other provisions of the Indemnification Agreement is as a durational provision to define the period of time the obligations in the Indemnification Agreement remain in effect and not, as the Company advocates, as a provision that specifies the circumstances in which Charney would be eligible to receive advancement (or indemnification) once he is no longer a director or officer of the Company." *Id.* at *10. The Court therefore held that the indemnification agreement continued in effect when the underlying proceeding was filed and, although Charney was no longer a director or officer when that proceeding was commenced, he was still exposed to being named a party to a proceeding by reason of his corporate status. *Id.* at *11.

16. *Id.* at *8.

17. *Id.*

18. *Id.*

19. *Id.* The Court's own simplified version of the advancement provision was as follows: "The Company shall advance any and all [Expenses] expenses incurred in connection with any [Claim] proceeding relating to any [Indemnifiable Event] event or occurrence related to the fact that Charney is or was a director and/or officer of the Company, or by reason of anything done or not done by Charney in any such capacity."

20. *Id.* at *11.

21. *Id.* at *12.

22. *Id.*

23. *Id. Underbrink v. Warrior Energy Services Corp*. 2008 WL 2262316 (Del. Ch. May 30, 2008), is the opinion the *American Apparel* Court referenced.

24. *American Apparel*, 2015 WL 5313769, at *12. The *American Apparel* Court noted that, although the dispute before it related to advancement under Section 145(e) (which does not include the "by reason of the fact" language) rather than indemnification under Section 145(a) or Section 145(b) (each of which contains such language), the indemnification agreement's "related to the fact" standard applied equally to both indemnification and advancement. While expressly not addressing American Apparel's argument that a "'corporation may not provide advancement where indemnification would be unlawful,'" *id.* at *12, n.77, the Court stated that, because the indemnification agreement's causal nexus language applied equally to advancement and indemnification, "it is not reasonable to believe that the drafters of the Indemnification Agreement intended to impart a meaning to the phrase 'related to the fact' that would render the indemnification provision *ultra vires*." *Id.* at *12.

25. *Id.* at *15.

26. *Id.* at *16 (citation omitted).

27. 100 A.3d 1023 (Del. Ch. 2014).

28. *Id.* at 1051-52.

29. In *Lieberman v. Electrolytic Ozone, Inc.*, the Court similarly held that former officers failed to establish the causal nexus required to receive advancement where the underlying claims (for breach of an employment and non-compete agreement) only involved their post-termination conduct, which conduct did not depend on the former officers' use of corporate authority or position. 2015 WL 5135460, at *6 (Del. Ch. Aug. 31, 2015). The Court rejected the former officers' arguments that they were entitled to advancement because such claims would not have arisen "but for" the former officers' positions as such, explaining that the underlying "claims are not based on wrongful action taken by Plaintiffs while employed by [the company]." *Id.* at *6 n. 43. The Court stated: "There is some suggestion that [one of the former officers] may have downloaded some [company] information before leaving its employ, but there is no showing that it was wrongful or done for some ulterior purpose. This is not an instance where conduct inappropriate during employment continued in some fashion after termination.… In short, perhaps the phrase 'by reason of the fact' can be read literally to afford some support for Plaintiffs' position. However, the 'by reason of the fact' standard 'is not construed so broadly as to encompass every suit brought against an officer and director.'" *Id.*

30. *See, e.g., Holley v. Nipro Diagnostics, Inc.*, 2014 WL 7336411 (Del. Ch. Dec. 23, 2014).