

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DONALD GASGARTH, PAUL FREISCHLAG,
JR., JEFF ZWITTER,

Plaintiffs,

v.

TVP INVESTMENTS, LLC,

Defendant.

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: C.A. No.
: 2018-0621-JTL
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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, December 7, 2018
9:15 a.m.

- - -

BEFORE HON. J. TRAVIS LASTER, Vice Chancellor

- - -

TRIAL TRANSCRIPT

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

1 APPEARANCES:

2 SAMUEL T. HIRZEL II, ESQ.
3 AARON M. NELSON, ESQ.
4 Heyman Enerio Gattuso & Hirzel LLP

-and-

4 ANDRÉS CORREA, ESQ.
5 PAT DISBENNETT, ESQ.
6 of the Texas Bar
7 Lynn Pinker Cox Hurst
8 for Plaintiffs

9 TIMOTHY R. DUDDERAR, ESQ.
10 DANIEL M. RUSK IV, ESQ.
11 Potter, Anderson & Corroon LLP
12 for Defendant

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1 THE COURT: Good morning, everyone.
2 Let's proceed.

3 MR. DUDDERAR: Your Honor, I'm just
4 going to rise now to introduce some people with me at
5 the counsel table. Dan Rusk, my associate at Potter
6 Anderson. All the way to the right is Jeffrey Lutz
7 from Culhane Meadows, who represents TVP in the
8 Georgia action. And in the back is Robert Kumor, one
9 of our associates as well.

10 THE COURT: Great. Thank you all for
11 being here.

12 MR. NELSON: Good morning, Your Honor.
13 Aaron Nelson representing plaintiffs from Heyman
14 Enerio Gattuso & Hirzel. With me today is my
15 colleague, Sam Hirzel. And from the firm of Lynn
16 Pinker, we have Andrés Correa and Patrick Disbennett
17 and they've been admitted pro hac vice.

18 THE COURT: Great. Welcome.
19 Let's get underway.

20 MR. CORREA: Your Honor, may I proceed
21 on behalf of plaintiffs?

22 THE COURT: Absolutely.

23 MR. CORREA: Your Honor, we have one
24 housekeeping matter to begin. I believe the parties

1 have agreed to preadmit the Joint Exhibits on the
2 Joint Exhibit list. So if there are no objections, I
3 would move to preadmit the Joint Exhibits.

4 MR. DUDDERAR: No objection.

5 THE COURT: That's fine.

6 MR. CORREA: And we delivered a copy
7 of those.

8 Second, Judge, we prepared, or I
9 prepared a PowerPoint to go through some of the
10 pleadings and evidence that I believe are relevant.
11 We've had some technical difficulties this morning
12 with our computer. I have a printed version that I've
13 delivered to opposing counsel. And with the Court's
14 permission, if I could approach.

15 THE COURT: That's fine.

16 MR. CORREA: Your Honor, Andrés Correa
17 on behalf of plaintiffs.

18 My clients, Your Honor, are three
19 individuals, Mr. Gasgarth, Mr. Zwitter and
20 Mr. Freischlag, who served as officers and directors
21 of the defendant in this action, TVP Investments, a
22 Georgia company, or a company that is housed in
23 Georgia.

24 They provided a number of services

1 over that time period. We are here because we contend
2 they have been sued by reason of those services, in
3 connection with those services, and the services they
4 provided between '09 and 2013.

5 Judge, what I would like to do is
6 begin where I believe TVPI wants me to begin, which is
7 by focusing exclusively on the pleadings in the
8 Georgia action, the counterclaims that have been pled,
9 which are referenced or which reference back to the
10 first amended complaint that we filed on behalf of our
11 three clients in Georgia.

12 But the one big-picture point I would
13 make -- just to orient the Court a little bit, I think
14 it's helpful, it's the first slide I've put in the
15 PowerPoint, which is the background here is that prior
16 to 2006, my clients, three individuals on the one
17 hand, Mr. Urvan and his companies on the other --
18 Mr. Urvan is the owner today of TVP -- they operated
19 independently of each other. I'm not even sure they
20 knew each other. My clients provided advisory
21 services to companies. Mr. Urvan focused on building
22 his www.GunBroker.com website successfully.

23 In 2006, the two come together and
24 begin some business relationships. But it's really in

1 2009 that I believe that the pleadings and the
2 evidence show that they really came within the
3 umbrella of this new entity, TVP Investments. And
4 that's really where I think the relevant acts and
5 omissions that they've being accused of took place.
6 And at that time, they begin operating as one.

7 And my clients have testified, and I
8 believe the pleadings will reflect, that they focused
9 at that time exclusively on TVPI, because that is
10 where their compensation would come from, as we allege
11 in the Georgia action.

12 What I believe, again, big picture, as
13 context, the dispute appears to be by TVPI here in
14 this proceeding that the acts they took between the
15 time period they believe, they understand, were not
16 acts on behalf of TVPI, were acts on behalf of
17 something else, another company, another effort. We
18 believe that that's not the type of clean demarcation
19 and line that can be drawn at this stage.

20 We obviously disagree that they were
21 acts undertaken on behalf of another entity.
22 Regardless, I believe that is where the heart of the
23 dispute appears to be.

24 So Judge, I begin, Your Honor, with

1 paragraph 1, this is Slide 3, paragraph 1 of our
2 complaint -- and actually, let me correct that --
3 Joint Exhibit 2 of the second amended counterclaim of
4 TVP, the live counterclaim in Georgia, paragraph 1,
5 where they allege the counterclaims arise out of the
6 transactions and occurrences that are the subject
7 matter of my clients' claims against the parties
8 asserting the counterclaims, which is why I referenced
9 first to our claims for some context, which I think is
10 important.

11 I listed the claims on Slide 5 that we
12 have, my clients have in Georgia that began this
13 dispute: breach of contract, fraud, fraudulent
14 inducement. But they really boil down to one factual
15 allegation, which is Slide 6, paragraph 1 of Joint
16 Exhibit 24, my clients' first amended complaint in the
17 Georgia action, which states, "This case involves a
18 promise by Mr. Urvan on behalf of TVP" to compensate
19 my clients, plaintiffs in this action and also in
20 Georgia, "for their years of hard work and dedication
21 to TVP and its various entities."

22 In paragraph 28 of that same pleading,
23 my clients go on to identify what that service
24 entailed, what it was, what it consisted of. And they

1 only identify two positions they ever held at TVP.
2 Number one, they served on the board of directors.
3 And number two, they acted as senior managers/
4 executives of the company, i.e., officers. That was
5 the only and exclusive position they identify having
6 occupied at TVP.

7 And I would submit to the Court that
8 that is the position and the capacity they used to
9 conduct the services they believe they provided to
10 TVP.

11 In the same first amended complaint by
12 my clients, Joint Exhibit 24, the next slide, in
13 paragraph 25, there is an allegation that takes the
14 form of a press release that we pasted into the
15 complaint. This press release is also Joint Exhibit
16 56. It has been agreed to by the parties and entered
17 as evidence.

18 And this press release I find
19 important for a couple of reasons. Number one, it is
20 part of this complaint before any advancement issues
21 came up, before any counterclaims existed.

22 Number two, it is a press release from
23 back in July 2009, contemporaneous with the formation
24 or roughly contemporaneous with the formation of TVPI

1 back in '09 that describes at the time what my clients
2 understood their responsibility, their official
3 duties, were as officers and directors of TVPI. It
4 even quotes Mr. Urvan in this release.

5 This is an allegation. It is a
6 document from the time. The parties may disagree with
7 whether it's accurate or not, but I believe it
8 accurately reflects at the very least what my clients
9 understood their duties were as officers and directors
10 of TVPI and, number two, what they alleged those
11 duties and responsibilities were when we filed the
12 action in Georgia.

13 And what they say, what my clients
14 allege, is that they were appointed to the board of
15 directors; that they focused -- Mr. Gasgarth and
16 Mr. Zwitter, two of the three, were focused on capital
17 formation and corporate development.

18 And this is where I would direct the
19 Court's attention most specifically. "The executive
20 team," referring to not just my clients but also
21 Mr. Urvan, "will also identify and execute on business
22 extension, strategic investments and acquisition
23 opportunities. TVP Investments' strategy is to
24 partner with and invest in companies"

1 I emphasize that, Your Honor, because
2 I believe it gives the context for the counterclaims
3 and for the complaints and the main attacks that TVP
4 and Mr. Urvan have against my clients.

5 And I would take one pause to mention
6 that TVPI, as stated in the briefing by TVPI, is a
7 holding company. It doesn't manufacture widgets. It
8 doesn't provide some specific service to consumers.
9 It is a company of companies. It is a company that
10 holds interest, that manages other companies, a number
11 of other companies.

12 And that is important, Your Honor, for
13 I believe the reasons that it gives the context for
14 why every complaint against my clients pertains to
15 what they were doing as officers and directors, what
16 they were supposed to be doing, or weren't doing
17 correctly, as officers and directors of TVPI, which is
18 help TVPI be a company of companies, hold other
19 interests, manage other companies.

20 The next two slides are demonstratives
21 that I believe, in my mind, help me understand this
22 relationship. TVPI is at the top, and the four human
23 beings, the natural persons that lead TVPI, are my
24 three clients plus Mr. Urvan as directors and

1 officers. Mr. Urvan as the CEO, my clients as
2 executive vice presidents and also members of the
3 board of directors. Mr. Zwitter wasn't a director in
4 2009. He became one in 2011. Otherwise, they all
5 were.

6 And what the Court will see in this
7 demonstrative is that there is a number of entities
8 that TVPI is the wholly -- is the parent of, that are
9 wholly owned by TVPI, including the main asset of
10 TVPI, which is the GunBroker.com, LLC, which owns and
11 houses technology and the website relating to
12 GunBroker.com.

13 But in addition to that, the next
14 slide adds another layer, which is really what comes
15 out in the second amended counterclaims by TVPI.
16 These additional companies that were invested in by
17 TVPI, they actually show up, as the evidence I believe
18 shows, on their financial records and books as
19 investments of TVPI that my clients are alleged to
20 have led and actually led those investments into
21 companies like Fusion Sleep, which is mentioned in the
22 second amended counterclaims. Simtrol, same deal.
23 Zenovia, same deal.

24 I emphasize this because I think this

1 is what gives the Court the context to understand that
2 when they complain in the Georgia action, in the
3 second amended counterclaims, about these activities
4 that my clients were undertaking, they call them --
5 they have recast them as being Triton Value Partners'
6 activities, activities by some other entity, when, in
7 reality, according to what my clients pled in the
8 Georgia action and what they disclosed in the press
9 release back in 2009, that was their job as officers
10 and directors of TVPI.

11 So moving on, Your Honor, to Slide 12,
12 I have taken what I understand to be some of the
13 allegations that provide the main thrust for almost
14 every claim in the second amended counterclaims that
15 TVPI has filed. So I'm now referring to Joint Exhibit
16 2, the second amended counterclaim. And I started by
17 highlighting paragraph 8, that TVPI at least admits
18 that it hired my clients to provide managerial
19 services, executives, to serve as executives of TVP.

20 Paragraph 14 begins this attack, this
21 complaint, that instead of really focusing on TVP,
22 they appear to be moonlighting. They appear to be
23 spending the time, the paid-for time they were
24 supposed to be spending for the benefit of TVP, using

1 that corporate time and authority, instead of towards
2 the benefit of TVP, for these sides businesses.

3 Paragraph 15 is more explicit. "TVP
4 allowed [Plaintiffs] to engage in these
5 side-operations, so long as their work at TVP was
6 prioritized and performed to standard."

7 Paragraph 16 clarifies that plaintiffs
8 "participated in the solicitation, negotiation and/or
9 execution of transactions involving [six entities]."

10 Those transactions, those investments,
11 are what I referred to earlier, the strategic
12 investments disclosed in the press release, alleged in
13 the Georgia action, that my clients understood to be
14 their responsibilities at TVP.

15 Slide 13, paragraph 21, I think makes
16 this more explicit. "Losses from these [personal]
17 investments" -- I'll take a pause there. "Personal"
18 is in brackets because it was added to the second
19 amended counterclaims as an amendment from the first
20 amended counterclaims. I'll come back to this, but I
21 believe it reveals an effort to try to separate this
22 conduct from their duties at TVP.

23 "Losses from these [personal]
24 investments, coupled with" a couple of other things

1 "led to their termination," which, to me, reinforces
2 this notion that TVP and Mr. Urvan believe my clients
3 were supposed to be making strategic investments;
4 those investments failed for a number of reasons; and
5 that's why they terminated them from their executive
6 officer-director positions at TVPI in 2013.

7 Paragraph 31, "Urvan and TVP have
8 never received any compensation from [Plaintiffs]
9 related to" these side consultations -- that's my
10 terminology, borrowing from another paragraph -- "that
11 were undertaken while on the clock at TVP." This is
12 these complaints about things they did while they
13 should have been spending TVP time on TVP business
14 instead of on what they believe were different
15 endeavors.

16 Paragraph 40, Plaintiffs "have also
17 been unjustly enriched for having conducted Triton
18 business, while they were supposed to be working at
19 TVP." Once again, this emphasis on using TVP time and
20 resources, instead of towards TVP, on something else.

21 And then paragraphs 66 and 77, that
22 plaintiffs, my clients, "represented that they
23 would ... prioritize their duties," duties, "at TVP,"
24 a term that refers explicitly to the well-known duties

1 of officers and directors of companies over all other
2 projects. "To the contrary, while [Plaintiffs] served
3 as at-will employees of TVP, they continued to
4 'moonlight,'" TVPI alleges, "as business consultants
5 for Triton."

6 Judge, the next slide, I put up again
7 this graphic where it's TVPI with its various
8 affiliates, because I believe that's the context in
9 which these allegations that I have just emphasized
10 and read can be best understood in.

11 My clients were conducting strategic
12 investments. TVP and Mr. Urvan in the Georgia action
13 have sued them because they believe that those
14 strategic investments did not pan out.

15 I believe they alleged in different
16 claims that they didn't pan out because you didn't
17 turn over the profits you gained from them to TVPI
18 and/or Mr. Urvan. And that's a quote. You did not
19 convey information about those investments or respond
20 to requests for information back to TVPI or Mr. Urvan.
21 You did not pay the amounts that we agreed you would
22 pay in connection with those investments.

23 All of those strategic investments
24 they complain about, that main thrust of their second

1 amended counterclaims, my clients undertook in their
2 official capacities as officers and directors of TVPI,
3 as evidenced by their own allegations and their
4 pleading in the Georgia action and that press release
5 I quoted from earlier.

6 Now, as I mentioned at the beginning,
7 I believe TVPI's response has been, at least on the
8 briefing, that they were not acting in that capacity.
9 They were acting under a different capacity. They
10 were wearing a different hat. I disagree that that's
11 what the pleadings reflect.

12 Regardless, as I stated at the
13 beginning, I believe TVPI -- that's not the kind of
14 line drawing the Court can engage in in a summary
15 fashion, an efficient fashion, a clean fashion, at
16 this early stage.

17 However, I think that plaintiffs --
18 I'm sorry -- TVPI acknowledges this in their briefing
19 at page 4, their response. Their answering brief at
20 page 4 begins with this sentence that, "From
21 January 2009 until November 2013, in connection with
22 the services Triton provided to Urvan during this time
23 period, Plaintiffs served as officers and/or directors
24 of TVPI."

1 Your Honor, I don't dispute that at
2 some point in time, Triton Value Partners, the
3 company, was involved in providing some kind of
4 relationship or services to Mr. Urvan. I think the
5 pleadings reflect that that happened before 2009, not
6 once my clients became officers and directors.

7 Regardless, I believe TVPI
8 acknowledges implicitly, if not explicitly, that
9 whatever services Triton at some time may have
10 provided to TVPI or to Mr. Urvan were in connection
11 with the services in the official capacities that my
12 clients provided to TVPI, which reinforces this notion
13 that this isn't something that can be easily
14 separated. This isn't something that you can ask my
15 clients, Well, what hat were you wearing at this time?
16 And I don't think that that's a line the Court is
17 going to be able to officially draw at this stage.

18 Your Honor, that focuses on the
19 pleadings. And I believe if the Court -- and I'm
20 happy to review in detail, count by count, but I
21 believe if the Court looks at Count I, which refers
22 to, in part, not paying over some profits from these
23 strategic investments; Count II, which is unjust
24 enrichment as an alternative remedy to Count I; Count

1 III, the Georgia securities fraud; Count IV,
2 conversion, not turning over the funds that you may
3 have earned from those strategic investments; Count V,
4 fraud, for lying, allegedly, about what you were going
5 to do with these strategic investments, all of those,
6 the main thrust comes back to this issue I've been
7 discussing: that what my clients understood to be
8 their officer duties, their director duties, to do
9 corporate development, to find, identify strategic
10 investment and partnership opportunities -- today,
11 TVPI is saying, That's Triton work, that's not TVPI
12 work. I believe the pleadings reflect differently.

13 And I believe that that's what they
14 are being accused of having done. That is what gives
15 rise to the claims by TVPI and by Mr. Urvan that that
16 work on strategic investments did not pan out to their
17 satisfaction.

18 I focus now, Your Honor -- I have two
19 other things I want to touch on. First is the
20 amendment that TVPI made, and then, finally, some of
21 the evidence that was developed in depositions and
22 documents.

23 The amendments, Your Honor, I believe
24 many of the courts that have addressed disputes

1 similar to these have emphasized that you look at the
2 claims as actually pled. But it is also relevant to
3 understand the true essence of those claims, to
4 understand the substance of the claims, to see what
5 that history is, how we got to the claims as they are
6 today. And here, today, I think it's especially
7 relevant because the amendments they undertook were
8 made on September 13th, the date that their answer in
9 this case was due.

10 And I believe the amendments I have
11 copied and pasted in these slides, starting with
12 paragraph 17, I think the Court will see, with the
13 context I have laid out, they all try to recast
14 allegations that originally simply refer to
15 investments that, in my opinion, tied back to the
16 strategic investments my clients alleged in the
17 Georgia complaint, and tried to morph those, change
18 them, into something that was outside of TVPI and,
19 instead, within the umbrella of Triton Value Partners.

20 Paragraph 17 used to say, "As such,"
21 my clients, "the Triton Defendants actively solicited
22 Urvan and TVP ... as investors," et cetera. Now, it
23 says my clients "as owners and employees of Triton,"
24 an effort to separate the conduct and put it into

1 another bucket.

2 Paragraph 20 adds the allegation that
3 my clients received investments in excess of a million
4 dollars. The allegation they added was "separate and
5 apart from their work at TVP."

6 Paragraph 21, "losses from these
7 investments" became "losses from these personal
8 investments."

9 Paragraph 44, "the merits of multiple
10 investments" became "the merits of multiple outside
11 investments." And I think, as I read this, it reveals
12 an effort to transform company activities and duties
13 into personal activities and duties in an effort to
14 avoid official capacity.

15 The last thing I would emphasize, Your
16 Honor, about some amendments is former Count III,
17 which was the breach of fiduciary duty count, which
18 was withdrawn by TVPI. And to their credit and I
19 think good faith negotiations among counsel, there
20 were payments made in connection with that count. So
21 I do not fault them for that. Of course, though, TVPI
22 has not taken a position as to whether that count was
23 or was not by reason of my clients' services. They
24 have simply said they have no position.

1 But more importantly, the way TVPI in
2 its briefing itself described the now-withdrawn breach
3 of fiduciary duty allegation tracks very closely to
4 allegations that, to this day, remain in the second
5 amended complaint.

6 In the answering brief of TVPI, at
7 page 36, the way TVPI summarized its breach of
8 fiduciary duty case was that "breach of fiduciary duty
9 claim was based upon allegations that Plaintiffs (1)
10 failed to prioritize" the work of TVP. That
11 allegation stays and continues in the second amended
12 complaint.

13 Number two, there is an allegation
14 about this bank loan that increased boundaries "for
15 Triton's other side businesses." So, again, a breach
16 of fiduciary duty claim complaining about my clients'
17 side businesses because it goes to this issue of
18 loyalty.

19 Number three, the breach of fiduciary
20 duty claim used to be based on the allegation that my
21 clients "used their affiliation with TVPI to raise
22 Triton's profile in other ways as well." That
23 fiduciary duty claim focused on things that remain in
24 the allegations today. Specifically, you used your

1 resources, what we made available to you at TVPI, your
2 authority, not to help TVPI, but to be disloyal and to
3 help Triton instead. That essence of claims remains
4 in the amended counterclaims today.

5 The final thing I would highlight for
6 the Court, Your Honor, is that some of the discovery
7 that's come out in the proceedings I believe is
8 consistent with the pleadings I've just reviewed and
9 with the amendments I've just reviewed.

10 The first is the termination email,
11 the email in which Mr. Urvan terminates my clients
12 from their officer and director positions at TVPI,
13 Joint Exhibit 14 in December 9, 2013. He says the
14 reason he is terminating them is because he's "unhappy
15 with your results," because "requests regarding past
16 investments have gone unanswered," because "the GB
17 investment round was a dud," and because "I am
18 extremely unhappy with your handling of Zenovia."
19 That is one of the companies that is expressly
20 identified in the second amended counterclaims.

21 I believe this termination email in my
22 mind reinforces the notion that Mr. Urvan at the time
23 understood that my clients, part of their official
24 capacity was to manage investments on behalf of TVPI,

1 find strategic partners, find strategic investments,
2 and according to Mr. Urvan, he's unhappy with how that
3 turned out. And thus, first he terminated and now has
4 sued my clients in connection with his unhappiness
5 over those strategic investments, which they list in
6 detail in the second amended counterclaim.

7 The testimony from my clients, Your
8 Honor, I believe is consistent with this. What they
9 explained is what I began explaining as the context.
10 Once TVPI was formed, their activities became
11 exclusively their TVPI activities. Mr. Freischlag
12 testified to that effect. Mr. Zwitter testified to
13 that effect.

14 And here, for the record, I'm
15 referring to the testimony of Mr. Freischlag, page 22,
16 lines 7 through 13, where he says that -- he was
17 asked, "But you, Don and Jeff during this time period
18 continued in your positions with Triton; right?"

19 The answer was, "It really didn't
20 matter. All of our efforts were focused on GunBroker
21 or GunBroker related activities, hundred percent after
22 2009."

23 Mr. Zwitter, page 29, lines 13 through
24 16: "And so TVP Ventures you said was the entity that

1 effectively became the Triton business; is that right?

2 "No, the TVPI venture business."

3 And then Mr. Gasgarth, in his
4 affidavit, paragraphs 17 and 18, explains that once
5 TVPI was formed, the three individuals, the
6 plaintiffs, my clients, "began operating and
7 functioning exclusively for TVPI and its goals."

8 Even Mr. Urvan admitted at great
9 cost that -- with great difficulty, I mean, that my
10 clients wore multiple hats in his opinion. They wore
11 multiple hats both within the TVPI family of
12 companies. They were officers and directors of the
13 affiliates and subsidiaries. They also wore multiple
14 hats, according to Mr. Urvan, considering Triton Value
15 Partners, this other company.

16 He admitted, page 18, line 16 to 17:
17 "They wore multiple hats?"

18 "I suppose you can say -- phrase it
19 that way."

20 And then he goes on to say on page 18,
21 lines 18 to 17: "I wouldn't say that they never did
22 anything in their TVPI hats."

23 Now, I believe the evidence, the
24 pleadings, the amendments, reflect that what my

1 clients were accused of doing, they did in their,
2 quote, TVPI hats. Mr. Urvan obviously disagrees, but
3 even he admits that to some degree, they acted wearing
4 their TVPI hats. And that, to me, translates into
5 acting in their official capacity as TVPI officers,
6 and thus, that being the reason they're being sued
7 today, or at least one of the reasons.

8 The last slide I have, Your Honor, in
9 this presentation is what, to me, is the most common
10 sense reason why my clients and the pleadings are
11 credible on this notion that my clients focused
12 exclusively on their official capacity at TVPI.

13 The reason is that's where they were
14 going to get paid. They had a 10 percent interest,
15 which they were going to house in this Triton Value
16 Partners entity, and they had a management fee that
17 was a percentage of profits. They only got paid if
18 TVPI grew. They only would receive the economic
19 benefit of the remuneration of their efforts if TVPI
20 grew.

21 Therefore, for them to benefit from
22 their own work, which is what they allege they want in
23 their Georgia action, they had to work for the benefit
24 of and the growth of TVPI by adding, in their own

1 words at the time in 2009, strategic investments,
2 partnership opportunities.

3 That, Your Honor, I believe, we would
4 submit, is what TVPI attacks and what they complain
5 about in the Georgia action. They say when you went
6 out and did these strategic investments, you were
7 disloyal to Triton. That's a reference to a duty they
8 had to Triton. You did not convey back profits you
9 should have conveyed. That's a reference to taking
10 TVPI money and misappropriating it, I suppose,
11 converting it and using it for something else, money
12 they only had access to by virtue of their officer
13 capacities.

14 You did not adequately report on your
15 investments. You did not keep me informed, as was
16 your duty to do, which is what one of the emails of
17 Mr. Urvan says to my clients.

18 Your Honor, I believe that, in closing
19 on that point, the evidence is sufficient to conclude
20 that there is a nexus, a sufficient nexus, between the
21 complaint and the counts and my clients' activities in
22 officer and director capacities.

23 There is one claim that I think
24 doesn't fall the same way or doesn't fall within that

1 set of allegations, which is this claim about a
2 personal loan, that Mr. Urvan made some kind of
3 personal loan to my three clients. That's one-half of
4 Count I. The second half relates to these investments
5 too. The first half of Count I says, We gave you
6 personal loans and you didn't pay them back.

7 Your Honor, to be very candid, if the
8 first thing I had seen was the second amended
9 counterclaim and I read, You got personal loans,
10 you've got to pay them back, I'm not sure that that's
11 advancement.

12 However, in the first amended
13 counterclaims, that allegation was different in one
14 crucial respect. It said, We gave you personal
15 loans -- and this is what they removed -- comma, which
16 were advances on your salary at TVPI, meaning they're
17 asking for monies they paid to my clients back
18 because, allegedly, in their opinion, my clients did
19 not earn that money when working for TVPI. For some
20 reason, they did not earn it. Whatever they did or
21 didn't do as officers and directors, according to
22 Mr. Urvan and TVPI, means they have to pay back the
23 compensation they were given or advanced.

24 And that advanced language was in the

1 first amended counterclaim. It was removed in the
2 amendments. And it also shows up in exhibits that
3 we've submitted to the Court where Mr. Urvan in his
4 deposition admits that on occasion, our clients were
5 advanced funds they were to be paid as officers and
6 directors, as employees at TVPI.

7 My closing point, Your Honor, is Slide
8 28, on the threatened claims that we briefly addressed
9 on the call on Wednesday. I'll divide the threatened
10 claims into two buckets.

11 And on the first, I'm not going to ask
12 for relief on this today. They pled affirmative
13 defenses in the Georgia action. They've withdrawn
14 their breach of fiduciary duty claim. I tried to ask
15 Mr. Urvan in deposition, Are you going to refile your
16 breach of fiduciary duty claim?

17 He says, I don't know. I can't
18 speculate. I can't tell you. He was very coy about
19 those intentions.

20 I asked, What arguments are you going
21 to make in connection with affirmative defenses about
22 whether my clients did or did not do their jobs as
23 officers and directors?

24 He said, I don't know what I'm going

1 to say or I'm not going to say.

2 I believe, Judge, that there is a
3 strong risk that he's going to use and complain about
4 my clients' failure to perform their duties in
5 order -- in connection with their affirmative
6 defenses. But at this stage, I have nothing more than
7 speculation by Mr. Urvan where he says, I don't know
8 what I'm going to do.

9 So I'm not going to ask for relief,
10 but I do want to make clear for the record that we
11 could find ourselves in the situation where he begins
12 making those complaints in the Georgia action. And I
13 hope not, but we may have to come back here if that's
14 the situation. But I'll set that aside.

15 The second bucket relates to this
16 October 19, 2018, letter, Joint Exhibit 20, from TVPI,
17 from TVPI's counsel, in which they explicitly -- they
18 don't threaten. They say that if you don't do what
19 we're asking you to do, which is withdraw your
20 complaint here in Delaware, if you don't stop pursuing
21 advancement, it "will result in a separate" -- I'm
22 reading, "will result in a separate cause of action
23 accruing to TVP, for each and every counterclaim upon
24 which advancement is denied"

1 I believe, Your Honor, that, as the
2 Court knows, the provision at issue here contains
3 common language about threatened claims. I believe
4 this is a direct and explicit threat about future
5 actions they will file and actions that will result
6 from our alleged conduct.

7 And I believe that if they, in fact --
8 if we have to investigate, if we have to research, if
9 we have to begin defending or prepare to defend and
10 then actually defend against that kind of claim, I
11 believe those should be advanceable as well, under the
12 provision that the LLC operating agreement has.

13 So unless the Court has any questions,
14 Your Honor, with that, I'll conclude my presentation
15 and reserve any remaining time for reply.

16 THE COURT: Have you done any work yet
17 on the claim that you just discussed?

18 MR. CORREA: No, Your Honor, beyond 5
19 minutes' worth of looking at the statute, but no.

20 THE COURT: And how would one
21 distinguish between what you would need to do to
22 prepare for the breach of fiduciary duty claim and
23 what you would be doing to defend against these other
24 counterclaims down in Georgia? What is involved, and

1 what are you envisioning that you would do in
2 addition? It seems to me it's the same facts. Is it
3 legal research that you're contemplating? What would
4 be the incremental ...

5 MR. CORREA: There would be some legal
6 research in terms of the elements and what amounts to
7 breach of fiduciary duty as opposed to what amounts to
8 a breach of a contractual obligation or some other
9 obligation or some other tort.

10 But, factually, I believe the Court is
11 correct that they are very, very similar, that if they
12 begin complaining about what the officers, one of my
13 plaintiffs, did or did not do as officers and
14 directors, that all really ties together.

15 THE COURT: All right. Thank you.

16 MR. CORREA: Thank you, Your Honor.

17 MR. DUDDERAR: Good morning, Your
18 Honor. Tim Dudderar on behalf of TVPI, the defendant
19 in this case.

20 So, Your Honor, I think where we find
21 ourselves now in plaintiffs' request for advancement
22 is that they are contending, and we heard it again
23 today, that between 2009 and 2013, they did virtually
24 everything in their professional lives for TVPI. And

1 the story, as it's evolved through this case and
2 eventually wound up in the affidavit of Mr. Gasgarth,
3 which is JX 44, is that virtually everything they did
4 during the four-year period was only in their capacity
5 as officers and directors of TVPI.

6 And then they argue that accepting
7 their version of those facts, it's not possible for
8 any counterclaim in the Georgia action to have been
9 asserted against them in any capacity other than one
10 that implicates their covered roles.

11 And therefore, without even looking --
12 and even though Mr. Correa promised that he would
13 start by looking at the counterclaims, he did not.
14 And he didn't look at the counterclaims, really, at
15 all, except for some stray allegations that are within
16 the pleading, but not the counterclaims themselves.

17 But their contention is that the Court
18 need not and should not even look at the counterclaims
19 themselves, and the Court can still find in their
20 favor on advancement.

21 Now, the story that the plaintiffs
22 have told in support of that argument is clearly one
23 of recent vintage and not consistent with their words
24 and actions before their quest for advancement began.

1 The more important point, however,
2 which I will get to, of course, is that the story
3 isn't even relevant to the Court's decision here
4 because the analysis that the Court ought to perform,
5 we think, based on the authorities that we've
6 presented, is that the analysis is whether the actual
7 counterclaims alleged against the plaintiffs implicate
8 their roles as officers and directors of TVPI. That's
9 the analysis, and that's what I plan to focus on, for
10 the most part, today.

11 But I do want to talk a little bit
12 about some of the facts that Mr. Correa also did delve
13 into that sort of make up the story of what they were
14 doing for those four years between 2009 and 2013.

15 And while our position, again, is that
16 the Court need not make factual findings regarding
17 what they did as Triton versus what they did as TVPI,
18 and it's not relevant to the analysis, I do want to
19 push back on it because it has really become the
20 centerpiece of their argument in this case.

21 So there are good reasons, I think,
22 based on the limited record that we developed in
23 discovery, even, for the Court to be more than a
24 little skeptical of the story that the plaintiffs are

1 telling today.

2 For one thing, as we pointed out in
3 our brief, Your Honor, it's not the story that the
4 plaintiffs told in their own complaint that they filed
5 in the Georgia action, which was filed, of course,
6 before advancement was ever even on the horizon.

7 Plaintiffs' entire claim in the
8 Georgia action is that in 2009, they and Triton, which
9 is a coplaintiff in that case, had entered into a deal
10 with Mr. Urvan where they would get an equity interest
11 in TVPI in exchange for Mr. Urvan giving Triton -- I'm
12 sorry -- Mr. Urvan giving them an equity interest in
13 TVPI. There was essentially -- the allegation is that
14 there was a swap of equity interest in each side's
15 respective entities.

16 Paragraphs 22 and 23 of their current
17 complaint, which are paragraphs that I note that
18 Mr. Correa skipped over today in his discussion of
19 what that complaint is about, those are the paragraphs
20 that reflect the deal that is at the heart of their
21 complaint in the Georgia action. And in those
22 paragraphs, plaintiffs allege a bunch of things, but
23 they allege that the equity interest at TVPI was
24 actually earned by Triton over a three-year period.

1 Plaintiffs further allege that the
2 interest that they were to give Mr. Urvan was to come
3 from plaintiffs' own work and entities -- I'm sorry --
4 own entities and work, separate and apart from TVPI.
5 That's paragraph 23. And the 25 percent interest that
6 plaintiffs were to give Mr. Urvan was in an entity
7 owned by plaintiffs and Triton called TVP Ventures.
8 That's paragraph 23 as well.

9 So this leads to the question of, if
10 it is true, as plaintiffs now say in this case where
11 they're seeking advancement, that Triton ceased to
12 exist as of 2009, and that all of the work that they
13 did for the next four years was only in their roles as
14 officers of TVPI, how would the deal that they allege
15 in Georgia make any sense?

16 It was basically that they were
17 swapping equity interests with Mr. Urvan in each
18 side's respective entities. What value would an
19 interest in Triton, in a Triton affiliate, have if, as
20 the plaintiffs say today, they effectively stopped all
21 work for that entity and did everything for the next
22 four years only for TVPI?

23 If everything that they did was for
24 TVPI from 2009 on, what exactly was it that they were

1 giving or promising to give Mr. Urvan 25 percent of?
2 He owned TVPI and all of its affiliated companies. So
3 whatever money plaintiffs made for TVPI was already
4 Mr. Urvan's. He didn't need plaintiffs to give him
5 25 percent of it. They didn't have that to give.

6 So it's clear that what they are
7 actually alleging in that complaint is that they would
8 continue their work as Triton, separate and apart from
9 TVPI, and the 25 percent interest that they promised
10 Mr. Urvan would be from the work that they did as
11 Triton.

12 The plaintiffs' allegations in the
13 Georgia action only make sense if, contrary to the
14 story that the plaintiffs are telling in this case,
15 Triton continued to be a viable business, and they, as
16 its three principals, continued to work on Triton's
17 behalf, which is exactly what happened.

18 THE COURT: I'm sorry, Mr. Dudderar.
19 Help me out in terms of finding this allegation in the
20 original Georgia complaint.

21 MR. DUDDERAR: Sure, Your Honor.
22 So -- I'm sorry. It is the current complaint.
23 Plaintiffs' current complaint is JX -- I don't know
24 why I don't have it written down here -- JX 24. It's

1 JX 24, and I'm talking about paragraphs 22 and 23.

2 THE COURT: All right. I see what
3 you're saying now. Thank you.

4 MR. DUDDERAR: So aside from what they
5 alleged in the Georgia action, the contention in this
6 case that the plaintiffs have made the centerpiece of
7 their argument, that they did nothing for Triton and
8 everything for TVPI, is also not consistent with
9 documents that were produced during the limited
10 discovery we had in this case.

11 For example, and Mr. Correa mentioned
12 one of the press releases that is in the JXs. There
13 are actually two: JX 55 and 56. But these are
14 examples of press releases that plaintiffs issued
15 concerning things that they were doing in connection
16 with Mr. Urvan's businesses in 2009.

17 JX 55 is a press release that was
18 issued in March of 2009. And it talks about this
19 \$7 million debt financing with Bank of America that
20 was arranged "by Triton Value Partners." It doesn't
21 say "arranged by the plaintiffs in their roles as
22 officers of TVPI." It says "by Triton Value
23 Partners."

24 And then the press release at the end

1 includes a little marketing blurb about Triton Value
2 Partners and a link to its website and a phone number
3 for Triton's media contact, as does JX 56, which is
4 another press release that was issued in July of 2009
5 and was the one that Mr. Correa referenced that's
6 actually excerpted into their Georgia complaint,
7 except for it lops off the last part, which is this
8 marketing blurb for Triton Value Partners' services.

9 So it's kind of hard to plead that
10 Triton Value Partners is out there advertising its
11 services like this in 2009 if, as the plaintiffs now
12 claim, the business had effectively shut down and they
13 were only doing work for TVPI.

14 Every email produced in this case that
15 is to or from the plaintiffs is at a tritonvp.com
16 email address. And all emails sent by plaintiffs
17 throughout the time period include the Triton Value
18 Partners logo in their signature blocks.

19 And to talk about what the plaintiffs
20 testified to, not surprisingly, Mr. Zwitter
21 testified -- and this is pages 21 to 25 of his
22 deposition -- that Triton was providing strategic,
23 advisory and business development and other services
24 to clients in 2009, 2010, 2011, and 2012.

1 So, again, this is all to say that the
2 Court shouldn't buy this story that the plaintiffs are
3 telling now that they were all in at TVPI and they did
4 nothing for Triton.

5 The more important point -- maybe this
6 will come as a relief to Your Honor -- is that none of
7 that actually matters to the analysis that the Court
8 needs to do here, because as I said at the beginning,
9 the analysis that the Court should do based on the
10 authorities that we've presented is to look at the
11 counterclaims themselves and to decide for each
12 counterclaim whether or not it implicates their roles
13 as TVP officers or directors. We submit that it
14 doesn't.

15 And I'd like to turn to that
16 claim-by-claim analysis now, unless Your Honor has any
17 questions about anything I just said.

18 THE COURT: That's fine.

19 MR. DUDDERAR: So as we said at the
20 very beginning of our answering brief, the sole issue
21 for the Court to decide here is whether the
22 counterclaims alleged against plaintiffs in the
23 Georgia action are brought by reason of the fact of
24 their roles as officers or directors of TVPI.

1 And the operative counterclaim here
2 that the Court ought to analyze is the second amended
3 counterclaim in the underlying Georgia action, which
4 is JX No. 2.

5 So there are five counterclaims.

6 Counterclaim Count I, which Mr. Correa
7 briefly touched on, is a counterclaim for breach of
8 contract. And it alleges that the plaintiffs breached
9 two contracts.

10 One are loan agreements where each of
11 the plaintiffs borrowed money from Mr. Urvan and TVPI.
12 That's paragraphs 25 to 28 of that counterclaim.

13 And then it also alleges that they
14 breached another agreement with Mr. Urvan and TVPI,
15 that plaintiffs would pay them 25 percent of the money
16 that they earned from the work that they were
17 performing as principals of Triton. Those are
18 paragraphs 29 to 31.

19 Quite clearly, as alleged, neither of
20 these aspects of Count I implicate roles of
21 plaintiffs. You wouldn't expect them to, as officers
22 of TVPI.

23 The loans are clearly alleged as
24 personal loans and on their face do not and could not

1 implicate any official capacity.

2 The 25 percent agreement, the
3 allegation on its face only involves an agreement
4 regarding work that they were doing not in their roles
5 as TVPI.

6 Now, as to the personal loans, we
7 heard it again today, plaintiffs contend that a prior
8 version of the counterclaims, not in the actual Count
9 I but in the counterclaims, included an allegation
10 that the loans were taken as advancements against
11 future salary.

12 And plaintiffs contend, we heard it
13 again today, that the Court ought to read the claim as
14 it's currently drafted, as if that allegation were
15 still in the case, and if it does so, the counterclaim
16 would implicate plaintiffs' official capacities
17 because, presumably, they were paid salaries for
18 performing those roles.

19 There's two problems with this
20 argument. One is the allegation is not in the case
21 anymore. Plaintiffs had the opportunity to ask a
22 corporate representative of TVPI about why it was
23 removed, and Mr. Urvan told them it was because it was
24 not accurate and that that was why it was removed. So

1 the allegation isn't part of the counterclaim and
2 shouldn't be read as if it is.

3 Mr. Urvan further testified at his
4 deposition on behalf of the company that the company
5 is expressly not seeking damages as part of this or
6 any other claim for any amounts that may be considered
7 advancement on future salary. That should end the
8 matter. It's not being sought in the second amended
9 counterclaim.

10 Second, even if the Court were to
11 consider that allegation as part of the claim, even
12 though it shouldn't, it does not make the claim into
13 one that is brought by reason of the fact of the
14 plaintiffs' official capacities.

15 And I think that Weaver versus
16 ZeniMax, which I believe is still good law, is
17 instructive where, there, I believe, then-Vice
18 Chancellor Noble held that things like claims by a
19 corporation against an officer to recover for
20 overpayment for things like taking too much vacation
21 time do not touch upon official capacity. They are
22 more sort of just basic run-of-the-mill employee
23 issues.

24 So the argument there, Your Honor, is

1 that even if you were to consider that allegation that
2 is not part of the second amended counterclaim as
3 still part of that claim, it does not implicate the
4 "by reason of the fact" language and does not trigger
5 advancement.

6 Regarding the 25 percent agreement
7 aspect of Count I, plaintiffs' argument is basically
8 to attempt to change the nature of that claim from
9 what it is into one where the company is complaining
10 about plaintiffs wrongfully spending too much time
11 doing non-TVPI work. That's not what's alleged.

12 But again, even if it was, the Weaver
13 versus ZeniMax case, for the same reasons I just
14 stated, would indicate that that is not a claim
15 brought against plaintiffs in their official
16 capacities and does not also trigger advancement.

17 Counterclaim Count II, Your Honor, is
18 a companion claim to Count I. It's pled in the
19 alternative in the event that the Georgia court does
20 not find the existence of a contract, and so it covers
21 the same ground. And for the same reasons as I just
22 discussed, it would not implicate the plaintiffs'
23 official capacity as officers or directors of TVPI.

24 Counterclaim Count III is the one that

1 I think really most of the discovery and a lot of the
2 parties have focused on as one where the discovery
3 that has been taken in this case really matters. But
4 I would submit, and we did in our papers, that,
5 look -- and just to back up, Count III is a claim that
6 the plaintiffs violated the Georgia Securities Act.

7 And the Court, we would submit, need
8 not look any further than the face of the
9 counterclaims to determine that it doesn't implicate
10 the plaintiffs' roles as officers of TVPI. And that's
11 true even if the Court were to accept the plaintiffs'
12 current description of what those roles entailed.

13 The claim itself is alleged against
14 plaintiffs and Triton exclusively in their role on the
15 selling side of the investments at issue, and those
16 are investments that are alleged to qualify as
17 securities under the Georgia Securities Act.

18 The claim specifically alleges that
19 the plaintiffs, which include Triton in the Georgia
20 action -- Triton is a counterclaim defendant to this
21 claim -- specifically alleges that the plaintiffs and
22 Triton solicited Urvan and TVPI into investing in
23 certain companies that are named in the complaint.
24 That's paragraph 46 of the second amended

1 counterclaims. That plaintiffs made such
2 solicitations and accepted money for the investments
3 they were soliciting without having registered as
4 broker-dealers. That's paragraph 52. That the
5 plaintiffs failed to register the securities they sold
6 to Urvan and TVPI. Paragraph 50. And failed to
7 maintain proper records of the transactions.

8 These are all allegations concerning
9 actions of plaintiffs on the sell side of these
10 transactions. The Court doesn't need, therefore, to
11 consider the evidence.

12 But there is evidence that completely
13 backs up, as we lay out in our brief at pages 30 to
14 32, very strong record evidence supporting the facts
15 that each of these companies that are listed in Count
16 III and in which Urvan and TVPI invested were
17 companies that plaintiffs considered portfolio
18 companies of Triton and that plaintiffs otherwise had
19 relationships with through Triton, in most cases
20 before TVPI was even formed.

21 Now, again, the Court need not
22 consider that evidence, but it's there, and it
23 completely backs up the argument that this claim is
24 against plaintiffs for actions that they took in their

1 roles on the sell side as Triton principals.

2 Now, the plaintiffs' response is that
3 this claim implicates their roles as officers of TVPI
4 because part of their jobs in those roles was to
5 diversify Urvan's and TVPI's assets and to identify
6 and make suitable investments in other companies.

7 But even if you accept that
8 contention -- and there are lots of reasons not to,
9 and I'll get to some of them -- all that establishes
10 is that plaintiffs may have had some role on the
11 buying side of these transactions in their capacities
12 as TVPI officers.

13 Not even the plaintiffs have been able
14 to come up with a story that places them on the
15 selling side of the transaction in their roles as TVPI
16 officers. That's what the claim alleges, that they
17 were on the selling side, and that in doing so, they
18 violated the Georgia Securities Act.

19 So, at best, I see plaintiffs'
20 contentions here as taking issue with the merits of
21 the claim. And I assume that they will argue in the
22 Georgia case that to the extent they had any role in
23 the transaction, it was on the buying side.

24 That's an argument that they can make

1 to the Georgia court that Your Honor doesn't have to
2 be concerned with. Your Honor has to be concerned
3 with the allegations, which are that they were
4 involved on the selling side, and that in doing so,
5 they violated the Georgia Securities Act.

6 Now, I'll briefly touch on the factual
7 issue that's implicated by this claim. And that is
8 plaintiffs' contention that their duties as officers
9 of TVPI included a role in diversifying "the assets of
10 TVPI by finding and investing in promising ventures."
11 That's from the plaintiffs' opening brief at 37,
12 citing the Gasgarth affidavit at paragraph 13 and 16
13 through 20.

14 And I don't say this lightly, but it's
15 hard to classify this contention by the plaintiffs as
16 anything other than something that they concocted for
17 the purposes of increasing their chances of obtaining
18 advancement in this case.

19 Virtually the sole source that the
20 plaintiffs cite as evidence of this being one of their
21 roles as officers of TVPI is the Gasgarth affidavit,
22 which, again, is JX 44, which was submitted after
23 discovery was completed in connection with plaintiffs'
24 opening brief.

1 And while in his affidavit,
2 Mr. Gasgarth includes several sworn paragraphs
3 regarding a very important role, an involved role,
4 that he and other plaintiffs had at TVPI, in
5 identifying and making investments on TVPI's behalf
6 and diversifying Mr. Urvan's investments. And we
7 heard again from Mr. Correa, it seems like that was
8 the most important thing that they did when they were
9 at TVPI.

10 Mr. Gasgarth, however, said none of
11 that in his sworn interrogatory, which asked him
12 directly to identify specifically what roles he had in
13 his position as an officer of TVPI. In fact, none of
14 the plaintiffs identified any role at TVPI involving
15 diversifying Mr. Urvan's assets and making investments
16 with TVPI's funds.

17 As we pointed out in our brief, we
18 posed the same interrogatory to each of the
19 plaintiffs. That's Interrogatory No. 23. And the
20 responses are JX 36, JX 37, and JX 38, which asks each
21 of the plaintiffs to identify and describe their roles
22 and responsibilities at TVPI.

23 Not one of the plaintiffs said in
24 response to that interrogatory that they had a role in

1 diversifying TVPI's assets and finding investments in
2 promising ventures. It just seems to me to be an
3 incredible omission when their story today is that was
4 among the most important things that they did for the
5 company.

6 Mr. Gasgarth's affidavit also says at
7 paragraph 20 that such investments were to be held in
8 subsidiaries of TVPI "including another entity called
9 TVP Ventures." That's at paragraph 20 of his
10 affidavit. So he's saying there that TVP Ventures was
11 a subsidiary of TVPI.

12 But that sworn statement is
13 contradicted by plaintiffs' pleading in the Georgia
14 action, which, again, is JX 24, which unequivocally
15 identifies TVP Ventures as a holding company belonging
16 to Triton and the three plaintiffs. That's at
17 paragraph 23 of their complaint in the Georgia action.

18 Mr. Gasgarth's affidavit also states
19 that he and the other two plaintiffs agreed to provide
20 Mr. Urvan with 25 percent of the investments
21 plaintiffs identified as part of their work for TVPI
22 and its affiliates. That's paragraph 20 also.

23 That sworn statement is also
24 contradicted by plaintiffs' Georgia complaint, which

1 states that the agreement that they entered into was
2 so that Mr. Urvan would realize value "through
3 Plaintiffs' own entities and work, separate and apart
4 from TVP." That's paragraph 23 of the Georgia
5 complaint.

6 So we've pointed out those, we've
7 pointed out other issues with Mr. Gasgarth's
8 affidavit, and plaintiffs' contention that their
9 positions at TVPI included some role in identifying
10 and making investments in other companies.

11 But the bottom line, again, is even if
12 the Court is inclined to believe those contentions,
13 they would establish only that plaintiffs had some
14 role on the buy side of TVPI, and that's not what
15 Count III is about. Count III is about a violation of
16 the Georgia Securities Act against plaintiffs in their
17 role on the selling side.

18 Counterclaim Count IV, Your Honor,
19 this is a counterclaim for conversion. And this is a
20 claim that was added to the counterclaims in the
21 second amended counterclaim that was filed after the
22 plaintiffs filed this advancement complaint. So like
23 Count II is to Count I, Count IV is a companion claim
24 to Count III, as it alleges that the plaintiffs

1 unlawfully converted the money that they received from
2 Urvan and TVPI to make these investments that they
3 solicited from Urvan and TVPI in other companies. And
4 those are all the investments that are identified in
5 Count III.

6 And so for the same reasons that I
7 just discussed with Count III, Count IV alleges
8 conduct that plaintiffs could only have undertaken in
9 a capacity other than TVPI, because not even they say
10 that they were engaged in the selling of securities in
11 their roles as officers of TVPI.

12 Now, plaintiffs' argument, I don't
13 know that I heard it today, but it certainly is in
14 their brief on Count IV, is just incomprehensible to
15 me. It appears that the plaintiffs are contending
16 that because this count was added at the same time
17 that the fiduciary duty claim was dropped from the
18 counterclaims, that somehow the Court ought to
19 consider it essentially a reassertion of the breach of
20 fiduciary duty claim and treat it as if it's the same
21 thing.

22 There's no authority supporting that
23 position, and they don't cite any. I think the
24 authority says that, as with any claim, the Court

1 ought to read Count IV exactly as it's alleged.

2 The withdrawn breach of fiduciary duty
3 claim that plaintiffs were alleged to have breached in
4 the prior version of the counterclaims alleged that
5 they breached those duties by failing to prioritize
6 their work for TVPI and causing TVPI to enter into
7 transactions and use their affiliation with TVPI in
8 ways that benefited Triton.

9 Count IV, as it exists today, alleges
10 none of those things. None of those allegations are
11 within Count IV at all.

12 It alleges, as I just discussed, that
13 plaintiffs and Triton -- Triton is a defendant to this
14 counterclaim -- wrongfully converted funds that they
15 solicited from TVPI and Mr. Urvan to invest in other
16 companies. That is not conduct that implicates their
17 roles as officers of TVPI. And, therefore, they're
18 not entitled to advancement as to that claim either.

19 And finally, Count V, Counterclaim
20 Count V is a claim that is alleged against plaintiffs
21 for fraud. The claim specifically alleges two types
22 of fraud or two instances of fraud. One is that the
23 plaintiffs made false statements and omissions in
24 order to obtain their positions as officers and

1 directors of TVPI. That's paragraphs 65 through 69 in
2 the second amended counterclaim. And second, that
3 they lied to Mr. Urvan and TVPI by telling them that
4 they would invest the \$1 million that plaintiffs
5 solicited for investing in other companies listed in
6 Count III.

7 The first part clearly does not
8 implicate plaintiffs' roles as officers in TVPI
9 because it is clear from the pleading that the
10 allegedly false statements were made prior to
11 plaintiffs ever becoming officers of TVPI. The claim
12 is that they made these statements in order to obtain
13 the positions. So it can only be that the
14 misstatements were made before they were actually in
15 those positions and cannot implicate them for purposes
16 of an advancement claim.

17 The second part of Count V, again,
18 concerns the fraudulent statements that induced
19 Mr. Urvan and TVPI to invest \$1 million,
20 approximately, in the companies listed in Count III.
21 And so for the same reasons I discussed in connection
22 with Counts III and IV, the underlying conduct alleged
23 in that counterclaim or that aspect of the fraud
24 counterclaim cannot implicate their roles as officers

1 of TVPI either.

2 That is what I wanted to say on the
3 claim-by-claim analysis.

4 And I can briefly touch on the
5 threatened claim issue, Your Honor. It seems like it
6 got narrowed a little bit today. It seems like the
7 only threatened claim that is left in this case is the
8 one relating to the October 19, 2018, letter from
9 TVPI's Georgia counsel.

10 Now, when we were together on the
11 phone, at least, for the pretrial conference on
12 Wednesday, Your Honor indicated that while not ruling
13 at the time as to whether or not this was a claim that
14 the plaintiffs could add by amendment to this case,
15 that you would consider threatened claims to the
16 extent that they were not new, basically. That if
17 they were parts of counterclaims that had been part of
18 this case, you would consider them and try to resolve
19 them on the "by reason of the fact" issue that's
20 always been part of this case.

21 I would submit that, and I think it's
22 pretty clear, this October 19, 2018, letter is a new
23 claim. I mean, they've had it, obviously, since
24 October 19, 2018, which was during discovery. Never

1 made any indication at all that they were going to
2 seek advancement. Never made a demand for
3 advancement. Never attempted to amend their complaint
4 to add it as a claim.

5 It didn't even come up as a
6 possibility until Mr. Urvan's deposition, which was on
7 November 9th, which was the last day of discovery in
8 this case. And even then, after that, they didn't do
9 anything to try to add it to the case, but just argued
10 it in their brief as if it had been. It hasn't been.

11 We don't think that it's appropriate
12 for it to be added to the case now. It would be
13 prejudicial. But in the event that Your Honor,
14 nonetheless, is inclined to consider it as a claim in
15 the case, we would submit that it's not a threatened
16 claim.

17 I'm not a Georgia lawyer, but I
18 understand that Georgia law and this particular
19 statute requires that a letter like the one that was
20 sent, be sent in order to preserve a claim. If you
21 don't send the letter, then the claim is lost. So I
22 think the purpose of the letter was to comply with the
23 statute and preserve a claim, not threaten a lawsuit.

24 But even if the Court were to consider

1 this a threatened claim, it's still subject to the "by
2 reason of the fact" language in the LLC agreement.
3 And the claim being preserved is essentially one for
4 abusive litigation. That's what the underlying
5 statute is about.

6 The letter itself indicates that the
7 claim being preserved obtains only to the extent that
8 the plaintiffs are not successful in receiving
9 advancement. In other words, if this Court determines
10 that plaintiffs are not entitled to advancement, it
11 has done so because the Court made a determination
12 that the "by reason of the fact" language hasn't been
13 satisfied and, therefore, they were not being sued in
14 their official capacity.

15 So the claim, if one were to be
16 brought pursuant to this letter, it would only be
17 brought to the extent that this Court has already
18 determined that they're not entitled to advancement.
19 Therefore, for the same reasons, the claim, to the
20 extent Your Honor considers it a threatened claim, in
21 the October 19, 2018, letter likewise could not be a
22 claim brought by reason of the fact of the plaintiffs'
23 official capacities.

24 Unless the Court has any other

1 questions, that was all that I have.

2 THE COURT: Thank you.

3 MR. CORREA: Your Honor, brief
4 rebuttal?

5 Your Honor, just a few specific points
6 in response, starting with the argument of the
7 securities fraud action refers to activities on the
8 selling side. That is simply not what the pleading
9 actually, their second amended counterclaim, states.

10 Paragraph 46 states that my clients,
11 plaintiffs, have "advised Urvan and TVP (and other
12 investors) as to the merits of multiple outside
13 investments, regularly participated in securities
14 transactions, and received commissions and
15 transaction-based remuneration"

16 It does not limit that claim to on the
17 selling side nor -- honestly, I think that would
18 change the result. Regardless, what they're
19 complaining about is my clients' roles, to use this
20 Court's language from the Paolino decision, their
21 "exercise of judgment, discretion, or decision-making"
22 when dealing with these strategic investments that my
23 clients contend were made on behalf of TVPI as
24 officers and directors.

1 Number two, Mr. Dudderar makes
2 reference to TVP Ventures, to this 25 percent deal
3 that is part of Count I, the breach of contract. What
4 my clients alleged in the Georgia action is that
5 Mr. Urvan wanted to take part in the benefit of the
6 work that my clients had done different from what they
7 were doing with Mr. Urvan, which they had, for years
8 before the formation of TVPI, my clients had a
9 separate role at different other companies.

10 But what Mr. Gasgarth testifies, what
11 Mr. Zwitter testified in deposition, Mr. Freischlag,
12 is that once they formed it, all of that became
13 subsumed within the umbrella of TVPI and its
14 affiliates.

15 Specifically, Mr. Gasgarth at
16 paragraph 20 testifies that "Any and all ownership
17 interests in those companies would be indirectly owned
18 by the three of us, plus Mr. Urvan, by way of TVPI and
19 its affiliates and subsidiaries (including another
20 entity called TVP Ventures). We agreed with Mr. Urvan
21 that he would receive 25 percent of the investments we
22 identified as part of our work for TVPI and its
23 affiliates."

24 This TVP Ventures is one of these

1 related companies that would house these interests.
2 And again, TVPI is a holding company, a company of
3 companies. And these gentlemen agreed to maybe a
4 complex structure, maybe a common structure, where
5 they would put these interests in different entities.
6 But the work to identify and bring those in within
7 this family of companies was work that my clients
8 undertook as officers and directors of TVPI.

9 Mr. Dudderar takes some issue with
10 Mr. Gasgarth's affidavit, I guess indirectly stating
11 that it is misleading or false. We invited both
12 witnesses to come today to the hearing, Mr. Gasgarth
13 and Mr. Urvan, but Mr. Dudderar had expressed that
14 there was no objection to the admission of his
15 testimony.

16 I would have welcomed a review of the
17 credibility of these gentlemen, but I believe that his
18 testimony is consistent with the documents I've shown
19 the Court today as well as with his deposition
20 testimony and the allegations in the pleadings.

21 Mr. Dudderar says that in our rog
22 response, we did not identify what we now consider to
23 be important work we conducted on behalf of TVPI. I
24 beg to differ.

1 The rog response, which is Response to
2 Interrogatory No. 23 in JX 36 states, "Plaintiff's
3 roles and responsibilities at TVP included without
4 limitation: working with the executive team to set
5 corporate strategy and develop new business
6 opportunities; financing strategy and marketing;
7 analyzing and seeking out strategic financial
8 opportunities and relationships; contacting and
9 meeting with potential investors, partners, and
10 strategic acquisition partners"

11 All of that ties back to and is
12 consistent with what I began my presentation by
13 saying, that in that press release back in 2009, my
14 clients alleged that part of their responsibilities
15 were to identify strategic investments for TVPI, which
16 results in -- a practical effect is diversifying
17 Mr. Urvan's assets, which at the time were
18 concentrated heavily on the GunBroker website.

19 Mr. Dudderar believes or contends that
20 the fraud allegations -- this is my next-to-final
21 point -- the fraud allegations relate to things stated
22 before the formation of TVPI. I find that -- two
23 points on that, Your Honor.

24 Number one, in order -- they allege

1 that what my clients said they would do as officers
2 and directors of TVPI, they didn't do. So clearly,
3 there is a nexus there.

4 Number two, I find that somewhat
5 analogous to this Court's decision and explanation in
6 Danenberg versus Fittracks about -- and we can parse
7 about representations that were made pre-merger,
8 post-merger. If there is a sufficient nexus, it's
9 covered. I would encourage -- I think that's
10 analogous to the result or should be analogous to the
11 result in that case.

12 Finally, Your Honor, Mr. Dudderar
13 began by referencing either an allegation or a
14 statement by Mr. Freischlag that Triton was doing
15 something that we, today, say was actually plaintiffs.

16 I will concede that there is -- that
17 it is not -- I said this earlier -- it is not a clean
18 demarcation, especially in the terminology used by
19 these individuals. In fact, Mr. Urvan himself, I
20 believe, used the name "Triton" to refer as an ease of
21 reference to the three individuals.

22 The best evidence I have of that is
23 Joint Exhibit 12. It is a January 2013 email from
24 Mr. Urvan to my clients where he, for the first time,

1 begins expressing some displeasure with my clients.
2 And what he says is "Triton was supposed to be raising
3 [capital]."

4 The one thing we've been able to agree
5 on in this case, according to the pleadings and
6 according to Mr. Urvan's testimony, is that my
7 plaintiffs' jobs as officers and directors was to
8 raise capital, not Triton's, yet Mr. Urvan back in the
9 day uses the terms somewhat interchangeably.

10 I believe that is simply an indication
11 that the way they began their relationship was as
12 three individuals plus this company, Mr. Urvan plus
13 his companies. And the references to each other,
14 frankly, were not exactly clearcut and black and white
15 throughout the history of their relationship. But
16 that relationship changed, and it ultimately evolved
17 into a joint relationship within the housing of TVPI
18 as officers and directors.

19 And with that, Your Honor, I would
20 encourage the Court, I believe, to follow the
21 oft-stated finding in this case of the case -- in
22 Paolino and in Danenberg, that drawing the lines that
23 TVPI asks that we draw at this stage is impracticable,
24 and it is nearly impossible without substantial

1 litigation and discovery about when you were doing
2 this, who were you acting on behalf of?

3 I asked Mr. Urvan himself, When you
4 were taking your actions on behalf of your companies,
5 which hat were you wearing? He was unable to
6 designate who he was acting on behalf of.

7 I believe the evidence, the
8 preponderance of the evidence, is enough to conclude
9 that my clients were using or allegedly abusing their
10 official capacities. And to the extent there's any
11 other line drawing or parsing that needs to be made,
12 it can be done in the context of a final
13 indemnification hearing.

14 I believe my colleague, Mr. Nelson,
15 would like to address the Court, if that's all right
16 with the Court.

17 MR. NELSON: Your Honor, there was a
18 mention in the briefing of the legality of the success
19 premiums, and it wasn't mentioned here today. I
20 wanted to offer to talk about it if Your Honor had any
21 questions.

22 THE COURT: I don't.

23 MR. CORREA: With that, Your Honor.

24 Thank you very much.

1 THE COURT: All right. Great.

2 Here's when I'd like to do. We're
3 going to take a recess until 11:30, and then we'll
4 come back and I'll give you a ruling.

5 We stand in recess until then.

6 (A brief recess was taken.)

7 THE COURT: Welcome back, everyone.
8 Please be seated.

9 As I indicated, I'm going to give you
10 my ruling now. This will let folks move on. So as
11 not to keep anyone in suspense, I am granting the
12 plaintiffs' claim for advancements, and I'm also
13 awarding fees on fees for this litigation. You can
14 now kick back and listen to my ruling because you've
15 heard the bottom line.

16 The plaintiffs are Donald Gasgarth,
17 Paul Freischlag and Jeff Zwitter. They are the
18 principals of a management advisory firm called Triton
19 Value Partners, LLC. I'm going to call it "the
20 advisory firm."

21 Beginning in 2006, nonparty Steve
22 Urvan began working with the plaintiffs and the
23 advisory firm to help him manage his various
24 businesses. Urvan is an entrepreneur. His most

1 significant business is an online gun brokerage firm
2 called GunBroker.com.

3 From 2006 until 2009, the commercial
4 relationship between Urvan and his businesses and the
5 advisory firm seems to me to have been in the nature
6 of a customary arm's length relationship with an
7 investment advisor or an investment bank. At the
8 beginning of 2009, effective January 15, 2009, Urvan
9 restructured his operations to bring the three
10 plaintiffs in-house. He did this by forming a new
11 holding company called TVP Investments, LLC. TVP is
12 an obvious reference to Triton Value Partners, the
13 name of the advisory firm. The parties go back and
14 forth between TVPI and TVP, which I find terribly
15 confusing and hard to remember. I'm therefore using
16 "advisory firm," and I'm going to call TVP
17 Investments, "HoldCo."

18 HoldCo is a Delaware limited liability
19 company based in Georgia. Urvan consolidated his
20 various businesses under it, including GunBroker. The
21 record in this summary proceeding conflicts on how the
22 ultimate ownership stake was structured, but the basic
23 intent appears to be for Urvan to have been the
24 ultimate beneficial owner of 90 percent of HoldCo, for

1 Triton to get a 10 percent equity interest, and for
2 Triton also to receive a 30 percent profit interest,
3 analogous to some type of carried interest.

4 Gasgarth and Freischlag became
5 directors of HoldCo. Gasgarth, Freischlag and Zwitter
6 became officers of HoldCo. Approximately two years
7 later, Zwitter also became a director of HoldCo.
8 Urvan was CEO and chairman of HoldCo. He also was the
9 controlling owner, with the dominant equity stake.

10 The record indicates that Gasgarth,
11 Freischlag, and Zwitter were supposed to bring
12 private-equity-style management expertise to Urvan's
13 suite of companies to help lessen the load on Urvan,
14 who was feeling overstretched at the time. They were
15 also supposed to help raise capital for his ventures.
16 They were also supposed to help him diversify his
17 investments by bringing other investment opportunities
18 to the HoldCo family of companies. Exhibits in the
19 record that indicate this include JX 7 and JX 60.

20 JX 7 shows that the three plaintiffs
21 weren't just appointed as directors and officers of
22 the parent company, HoldCo. They were appointed to
23 those roles for each of the subsidiaries. This means
24 they were placed deep in the organization so that they

1 would have this type of operating capacity.

2 JX 60 is a presentation that
3 summarizes the type of working relationship that the
4 parties were contemplating.

5 The relationship lasted four years but
6 did not fare as well as expected. In 2013, Urvan
7 terminated the relationship. The termination email is
8 found at JX 14, and it reflects the fact that the
9 plaintiffs were working internally for and on behalf
10 of HoldCo and not pursuant to some external advisory
11 relationship.

12 In December 2017, the plaintiffs filed
13 suit against Urvan and HoldCo in the Superior Court of
14 the State of Georgia for Fulton County. The complaint
15 alleged that the plaintiffs had not been fully paid
16 the management fees that HoldCo had promised them.

17 In February 2018, HoldCo filed
18 counterclaims.

19 In April, Urvan and HoldCo jointly
20 filed amended counterclaims. By their own terms --
21 and I'll come back to this -- the amended
22 counterclaims recite that they arise out of the same
23 transactions and occurrences as the plaintiffs'
24 claims.

1 On June 21, 2018, the plaintiffs
2 demanded advancement from HoldCo in connection with
3 the plaintiffs' defense of the amended counterclaims.

4 To paraphrase, Section 7.2 of HoldCo's
5 LLC agreement provides -- it's really a
6 corporate-style indemnification provision. It states,
7 in summary, "Each person who was or is made a party or
8 is threatened to be made a party to or is involved in
9 any threatened, pending, or completed proceeding by
10 reason of the fact that he is or was a director or
11 officer of [HoldCo] shall be indemnified by [HoldCo]
12 to the fullest extent permitted by law."

13 Section 7.3 builds in an advancement
14 right. It says, "The right to indemnification
15 conferred in this Article VII shall include the right
16 to be paid or reimbursed by the Company the reasonable
17 expenses incurred by a person of the type and title to
18 be indemnified under Section 7.2, who was, is, or is
19 threatened to be made a named defendant or respondent
20 in a proceeding in advance of the final disposition of
21 the proceeding."

22 Urvan caused HoldCo to advance his own
23 defense in the Georgia litigation, recognizing thereby
24 that the causes of action and the disputes in that

1 litigation implicated his duties as an officer and
2 director of HoldCo, but HoldCo refused to make
3 advancements for the plaintiffs for their defense of
4 the counterclaims. They made a demand, but in July,
5 HoldCo rejected it. My review of the letter reflects
6 a number of arguments that one could perhaps most
7 charitably describe as strained.

8 In August, the plaintiffs filed their
9 verified complaint for advancement in this action. On
10 September 13, 2018, just before the answer was due,
11 HoldCo filed its second amended counterclaims in
12 Georgia. The obvious intent of that strategy was to
13 replead the counterclaims and attempt to avoid
14 liability for advancement. HoldCo said as much in a
15 letter to the plaintiffs in October, which stated: "As
16 you are aware, [HoldCo] took immediate action to amend
17 its counterclaims to remove any allegation or cause of
18 action involving the plaintiffs' services to [HoldCo]
19 as a former officer or director."

20 I have obviously been paraphrasing
21 "HoldCo" as the entity when I'm reading these
22 quotations.

23 HoldCo also threatened the plaintiffs
24 with the Georgia equivalent of a claim for malicious

1 prosecution by stating that if the plaintiffs did not
2 withdraw their advancement case, HoldCo would sue them
3 under a Georgia statute that prohibits abusive or
4 harassing litigation.

5 The key issue for deciding whether the
6 plaintiffs are entitled to advancements is whether the
7 counterclaims were asserted against them in a covered
8 capacity.

9 Section 7.2 of the LLC agreement uses
10 the "by reason of the fact" standard from Section 145
11 of the DGCL. I'll note up front, "by reason of the
12 fact" is not limited to breach of fiduciary duty
13 claims. It's "by reason of," so it extends far beyond
14 simply breach of fiduciary duty claims.

15 The Delaware Supreme Court and this
16 Court have repeatedly affirmed the broad scope of that
17 language. In Homestore versus Tafeen, a decision from
18 2005, the Delaware Supreme Court established the test.
19 "If there is a nexus or causal connection between any
20 of the underlying proceedings" -- this is referring to
21 Section 145 because it was in the corporate context --
22 "and one's official corporate capacity, those
23 proceedings are by reason of that one was a corporate
24 officer without regard to one's motivation for

1 engaging in that conduct."

2 What one takes from that is that the
3 standard is whether there is any nexus or causal
4 connection between the underlying proceedings and the
5 official capacity.

6 This Court has explained that the "by
7 reason of the fact" standard is interpreted broadly
8 and in favor of indemnification and advancements.
9 That's from the Underbrink versus Warrior case.

10 And courts often determine whether the
11 "by reason of the fact" requirement has been satisfied
12 solely by examining the pleadings in the underlying
13 litigation. That's from the Holley versus Nipro
14 Diagnostics case.

15 The defendants have tried to turn that
16 general principle into a rule that one only looks at
17 the pleadings, but that's not accurate. The
18 entitlement to advancement is usually determined on
19 the pleadings, and based just on the pleadings.
20 Advancement is a summary proceeding, the advancement
21 standard is lenient, the "by reason of the fact"
22 standard is broad, and so ruling on the pleadings lets
23 you process these types of issues efficiently. It's
24 actually rare to have the type of trial that we're

1 having where there was discovery in connection with
2 entitlement to advancements.

3 But the fact that we usually look at
4 the pleadings doesn't prevent the Court from looking
5 at the overall litigation scenario. Nor does it
6 prevent the Court from considering discovery in the
7 rare case, such as this one, where there actually was
8 discovery and a trial record.

9 This Court has also explained that in
10 advancement cases, the line between being sued in a
11 noncovered capacity and in one's corporate capacity
12 generally is drawn in favor of advancement, with
13 disputes to the ultimate entitlement to retain the
14 advanced funds being resolved later, at the
15 indemnification stage. That is also from the Holley
16 versus Nipro case.

17 And that makes sense because part of
18 what the Court in the underlying litigation often is
19 going to do is decide questions of fact that relate to
20 the issue of ultimate capacity. That's likely going
21 to be the case here. It would be awkward,
22 inefficient, even arguably improper, for this Court in
23 a summary proceeding to decide ultimate merits issues
24 that are for the plenary action.

1 As a result, Delaware courts will
2 defer a capacity determination unless the answer can
3 be discerned swiftly, accurately, and consistent with
4 the summary nature of an advancement proceeding.

5 "Where there is no clear demarcation
6 between covered and noncovered claims, the Court will
7 err on the side of advancement." That's from the
8 White v. Curo case, which collected a lot of citations
9 for that proposition.

10 And again, the idea there is that the
11 issue for advancement is whether the claim is
12 potentially subject to indemnification. In other
13 words, if the plaintiffs seeking advancement are
14 successful in their view of the world and the
15 underlying litigation, would they be entitled to
16 indemnification? If so, then the claims are
17 advanceable, at least under the type of provision
18 that's set forth here.

19 So with those standards in mind, let's
20 turn to the Georgia action as a whole.

21 The litigation involves the business
22 relationship after the plaintiffs came in-house, when
23 they were working for the entire stack of Urvan
24 entities as directors and officers and employees.

1 They worked in these capacities for HoldCo, which is
2 the party that has the advancement obligation, but
3 also for the subsidiaries.

4 The core dispute, or one of the core
5 disputes, in the Georgia action appears to be whether
6 these three plaintiffs, when they were doing what they
7 were doing, were, in fact, working for HoldCo and its
8 subsidiaries or whether they were really continuing to
9 work for themselves or for Triton.

10 Urvan wants it to be that they were
11 continuing to work for Triton. The plaintiffs say
12 they were working for HoldCo.

13 If the plaintiffs are right and they
14 were working for HoldCo when they were doing these
15 things, then these issues are potentially
16 indemnifiable. It really isn't possible to parse
17 cleanly between these capacity issues at this stage.
18 That's a big part of what the Georgia court will be
19 deciding. But there is an obvious link between all of
20 the defendant's counterclaims and the plaintiffs'
21 claims, which seek compensation in their covered
22 capacities. And that link was recognized, as I said
23 earlier, by the allegation in the counterclaims that
24 everything arises out of the same facts and

1 circumstances as the claims.

2 I've also taken into account that the
3 defendant made targeted amendments to their claims in
4 Georgia in an effort to drop the advanceable claims.
5 Those amendments don't appear to me to have changed
6 meaningfully the scope of the Georgia litigation. In
7 other words, they didn't alter the underlying facts
8 that are going to be litigated. They didn't alter the
9 basic arguments being made of the parties. The
10 defendant simply tried to drop the legal theories that
11 most obviously called for advancement. But
12 ultimately, this dispute is one that, in my view,
13 relates to the plaintiffs' official capacities and has
14 a sufficient nexus for purposes of advancement.

15 I also point out, as I will reiterate
16 later, that part of the reason you err in favor of
17 advancement at this stage is because the defendants
18 are protected. Advancement is simply a loan. And if
19 ultimately the Georgia court makes capacity
20 determinations that are adverse to the plaintiffs, the
21 plaintiffs will have to pay back that loan, and
22 they'll have to pay it back with interest. So this is
23 not the type of proceeding that requires the same type
24 of deep analytical parsing that ultimately would

1 happen either on the merits or at the indemnification
2 stage.

3 I reach the same conclusion on a
4 claim-by-claim analysis.

5 Count I of the second amended
6 counterclaims asserts that the plaintiffs borrowed
7 money from HoldCo while they were working there and
8 that they failed to repay their loans.

9 Originally, Count I asserted that
10 these loans were advances on the plaintiffs'
11 compensation, but those allegations were dropped as
12 part of the tactical amendment. I think it's an
13 important backdrop.

14 What I think is more important is the
15 whole dispute over the loans turns on the actions that
16 the plaintiffs took or failed to take when they were
17 working for HoldCo. This is all part of the dispute
18 about whether the plaintiffs did their jobs or not for
19 HoldCo or whether they were off doing other things.
20 This claim will involve the same underlying facts as
21 the overall dispute.

22 The situation seems similar to Vice
23 Chancellor Strine's analysis in the Reddy case and his
24 distinction in that opinion of the indemnification

1 stage ruling in Cochran. I discussed these things in
2 Paolino.

3 I also think that this situation is
4 distinguishable from Weaver, which involved really
5 picayune details of the employment relationship, such
6 as taking too much vacation time.

7 Here, the loans are compensation that
8 was a financial benefit. There's a dispute about
9 whether it was compensation, but they're a financial
10 benefit that was part of the plaintiffs coming on
11 board as part of this restructuring.

12 Consequently, as in the Thompson v.
13 Orix case, this counterclaim is part of the overall
14 challenge to the plaintiffs' conduct generally, their
15 alleged failings in their official capacities, and
16 triggers advancement.

17 Count II asserts unjust enrichment as
18 an alternative to the Count I claims and is covered
19 for the same reason. If anything, it's even more
20 obviously covered because it assumes that there wasn't
21 an underlying contract, which leaves only the
22 plaintiffs' capacities as a basis for the
23 compensation.

24 Count III asserts that the plaintiffs

1 caused or permitted HoldCo to make investments in a
2 manner that violated the Georgia Securities Act. One
3 of the disputes in Georgia is whether this was part of
4 the plaintiffs' duties or not. If it was part of
5 their duties, then it's clearly advanceable, by reason
6 of their status as directors and officers.

7 The defendants have tried to draw a
8 distinction between the buy side and the sell side.
9 It's, frankly, not clear that that distinction will
10 matter, as the plaintiffs seem to have had both roles
11 for HoldCo. They seem to have been charged with
12 sell-side roles in terms of raising money, which would
13 likely involve the sale of interests in HoldCo or its
14 subsidiaries, and they also seem to have buy-side
15 roles in the form of making diversifying investments
16 for HoldCo.

17 In fact, reading paragraphs 45 through
18 50 of the complaint, which are part of Count III in
19 the Georgia case, they seem to discuss both buy-side
20 and sell-side activities for HoldCo.

21 After reading those paragraphs, you
22 get to paragraph 51, which says, "Further, the Triton
23 defendants, separate and apart from any work they
24 engaged in at [HoldCo], had engaged in acts, practices

1 and/or a course of business that has operated as a
2 fraud and/or deceit upon Urvan and/or TVP," HoldCo.

3 The way that's framed -- and it's not
4 a very detailed complaint. Georgia is clearly a
5 notice pleading jurisdiction. But the way that's set
6 up, it creates the impression that everything that is
7 going before is referring to work that the Triton
8 defendants, i.e., the plaintiffs, engaged in for
9 HoldCo. And now we're going to shift to things that
10 they potentially did not do for HoldCo.

11 The bottom line for today is this is a
12 potentially indemnifiable claim, and for present
13 purposes, that means it is advanceable. One possible
14 set of facts that could be proven in Georgia is that
15 the plaintiffs engaged in this behavior on behalf of
16 HoldCo as part of their duties as directors and
17 officers, which would make it indemnifiable, subject
18 to other restrictions. Hence, it is currently
19 advanceable.

20 Count IV asserts a conversion claim
21 against the plaintiffs for taking money for themselves
22 that they should have paid to HoldCo. I think this is
23 obviously advanceable. The idea is that they kept the
24 money and, instead, because they were directors and

1 officers of HoldCo, they should have paid it over.

2 Lastly, Count V asserts a fraud claim
3 against the plaintiffs on the grounds that they
4 represented they would dedicate their time to HoldCo
5 and prioritize their duties at HoldCo and that they
6 allegedly did not because they instead were
7 moonlighting and engaging in side operations for other
8 companies.

9 The defense to that or the main
10 defense to that, and certainly a state of facts that
11 could be proven in Georgia, is that the Georgia
12 defendants, counterclaim defendants, the plaintiffs
13 here, in fact, did everything they should have done
14 for HoldCo, weren't moonlighting, and this was all
15 part of their duties as officers and directors. That
16 makes this claim potentially indemnifiable and, hence,
17 advanceable, and brings it within their covered
18 capacities.

19 So in my view, the entire set of
20 counterclaims in Georgia is subject to advancement.

21 I'm going to address a couple
22 ancillary issues. There's is this question about the
23 threat of reasserting of the claim for breach of
24 fiduciary duty. The plaintiffs originally were

1 entitled to indemnification for that. It's obvious
2 that that is a covered claim.

3 When that claim was dismissed, they
4 became entitled to success-on-the-merits
5 indemnification. I am glad that the parties resolved
6 that by themselves, because this is one where it's
7 textbook. It's bar review material.

8 So while there's technically nothing
9 for me to do on this today, I just want to share with
10 you all that I really don't want there to be a fight
11 if the breach of fiduciary duty claim is reasserted.
12 You only owe fiduciary duties "by reason of." So it
13 is clearly "by reason of."

14 Now, it sounds like you all are taking
15 care of this, but please think before you bother me or
16 anybody else with that issue.

17 In terms of threatened claims, in
18 general, Article VII specifically picks up threatened
19 claims. Right now, it doesn't sound like there are
20 any fees or expenses that have been incurred that
21 could be on threatened claims. I guess Mr. Correa
22 said there was an hour looking at the statute or
23 something like that, but I'm going to view that as de
24 minimis.

1 Mr. Dudderar has represented that this
2 Georgia bad faith issue won't go forward if the
3 plaintiffs win here. And as far as I'm concerned,
4 plaintiffs have. So at least for now, that issue is
5 moot. So I'm not going to get into that, other than
6 to say the provision talks about threatened claims, so
7 if there is ultimately a threatened claim that is "by
8 reason of," it's going to be covered.

9 The final issue is fees on fees.
10 Plaintiffs are entitled to success-on-the-merits
11 indemnification in terms of this action for
12 advancement.

13 There's been some dispute over the
14 Heyman firm's engagement letter and the terms that are
15 set up in there. They are consistent with the
16 engagement that was approved by the Delaware Supreme
17 Court in IAC InterActive versus O'Brien in 2011. So I
18 believe that that arrangement is fine and is
19 advanceable.

20 What I want the parties to do, and
21 I'll ask Mr. Hirzel to do this in the first instance,
22 is to please take the lead on drafting an order that
23 holds that these counterclaims are advanceable and
24 grants plaintiffs success-on-the-merits

1 indemnification for everything incurred to date.

2 That should be a simple one-pager,
3 maybe two-pager, but probably a one-pager, if you
4 don't go nuts on the recitals. Mr. Dudderar can take
5 a look at it. I'm sure he won't agree with it as to
6 substance, but as long as he agrees with it as to
7 form, we'll get that on file.

8 Then in terms of addressing the
9 amounts, I want a Fittracks procedures order. If you
10 all could put that in place, you can go forward in
11 terms of processing the specifics through the Fittracks
12 procedures. I will only deal with any disputes about
13 amounts to the extent they come up.

14 I'm sorry, Mr. Hirzel, I should have
15 asked Mr. Nelson to draft the order. I apologize.

16 I didn't mean to ignore you,
17 Mr. Nelson. If Mr. Hirzel wants to dump all of that
18 on you, as I'm sure he will, it was not a specific
19 directive to him.

20 The bottom line is I want the
21 Delawareans for the plaintiffs' side to take the lead
22 on these matters, working with Mr. Dudderar, and then
23 we'll go forward.

24 Let me start with you all. Do you

1 have any questions for me?

2 MR. CORREA: No questions, Your Honor.

3 THE COURT: All right.

4 Mr. Dudderar, I know you don't agree
5 with the ruling. I'm not asking for reargument. Do
6 you have any questions about the actual implementation
7 or substance of it or anything like that?

8 MR. DUDDERAR: I don't.

9 THE COURT: Thank you, everyone, for
10 coming in today. I appreciate your time. And I'll
11 look forward to getting those things from you so we
12 can continue moving this action forward.

13 Everyone who traveled from out of
14 town, please have a safe trip home, and thank you for
15 coming in.

16 We stand in recess.

17 (Court adjourned at 11:58 a.m.)

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CERTIFICATE

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3 I, JEANNE CAHILL, RDR, CRR, Official
4 Court Reporter for the Court of Chancery of the State
5 of Delaware, do hereby certify that the foregoing
6 pages numbered 3 through 84 contain a true and correct
7 transcription of the proceedings as stenographically
8 reported by me at the hearing in the above cause
9 before the Vice Chancellor of the State of Delaware,
10 on the date therein indicated.

11 IN WITNESS WHEREOF I have hereunto set
12 my hand at Wilmington, Delaware, this 12th day of
13 December, 2018.

14
15
16 /s/ Jeanne Cahill

17 Jeanne Cahill, RDR, CRR
18 Official Chancery Court Reporter
19 Registered Diplomat Reporter
20 Certified Realtime Reporter
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24