

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ERIC PULIER,	:
	:
Plaintiff,	:
	:
v.	: Civil Action
	: No. 12005-CB
COMPUTER SCIENCES CORPORATION, a	:
Nevada Corporation, and CSC AGILITY	:
PLATFORM, INC., (F/K/A SERVICEMESH,	:
INC.,) a Delaware Corporation,	:
	:
Defendants.	:

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Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, May 12, 2016
11:30 a.m.

- - -

BEFORE: HON. ANDRE G. BOUCHARD, Chancellor

- - -

TELECONFERENCE
THE COURT'S RULING ON CROSS-MOTIONS FOR SUMMARY
JUDGMENT

CHANCERY COURT REPORTERS
500 North King Street
Wilmington, Delaware 19801
(302) 255-0521

1 APPEARANCES: (via telephone)

2 MARTIN S. LESSNER, ESQ.
3 TAMMY L. MERCER, ESQ.
4 DANIEL M. KIRSHENBAUM, ESQ.
Young, Conaway, Stargatt & Taylor LLP

5 -and-

6 MARK HOLSCHER, ESQ.
7 JAMES RAPORE, ESQ.
of the California Bar
8 Kirkland & Ellis LLP
for Plaintiff

9 JACOB R. KIRKHAM, ESQ.
10 Potter, Anderson & Corroon LLP

11 -and-

12 THOMAS E. O'BRIEN, ESQ.
13 HUNTER ALLEN, ESQ.
14 of the Texas Bar
15 Baker Botts LLP
16 for Defendants

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1 THE COURT: Good morning, counsel.
2 This is the Chancellor on the line. Could I have
3 appearances for the record, starting with whoever we
4 have on the line for the plaintiff?

5 MR. LESSNER: Good morning, Your
6 Honor. This is Marty Lessner on behalf of plaintiff
7 Eric Pulier. With me in my office is Tammy Mercer and
8 Daniel Kirshenbaum, and also on the phone from
9 Kirkland & Ellis is Mark Holscher and James Rapore.

10 THE COURT: All right. Good morning.
11 And who do we have on the line for the
12 defendants?

13 MR. KIRKHAM: Good morning, Your
14 Honor. This is Jacob Kirkham from Potter Anderson on
15 behalf of defendants Computer Sciences Corporation and
16 CSC Agility Platform. With me on the line are Tom
17 O'Brien and Hunter Allen, both of Baker Botts.

18 THE COURT: All right. Thank you.

19 MR. O'BRIEN: Your Honor, this is Tom
20 O'Brien with Baker Botts. B.C. Boren, who argued at
21 the hearing the other week, sends his apologies for
22 not being able to make the call this morning. He is
23 traveling abroad and is in a very different time zone.

24 THE COURT: That's fine. He'll have a

1 paper transcript to read from.

2 This is the time that I had set to
3 provide you a ruling on the cross-motions for summary
4 judgment filed by the plaintiff, Eric Pulier, and
5 defendants, Computer Sciences Corporation, which I'll
6 refer to as CSC, and Agility Platform, Inc., which was
7 formerly known as ServiceMesh, Inc. The motions
8 concern Pulier's demand for advancement from CSC and
9 ServiceMesh for claims asserted against him in a
10 separate action before me, Civil Action No. 11011-CB.

11 For reasons I will explain, I am
12 granting in part and denying in part the motions by
13 each side. The bottom-line effect of this ruling will
14 be to award Mr. Pulier advancement for his defense of
15 most but not all of the counts asserted against him in
16 the underlying action.

17 Let me start with some relevant
18 background information.

19 In October 2013, CSC entered into an
20 equity purchase agreement, or EPA, pursuant to which
21 CSC agreed to purchase all of the equity of
22 ServiceMesh, a company that Pulier had founded.

23 That transaction closed on
24 November 15, 2013, which I'll refer to as the closing.

1 After the closing, Pulier held the title of vice
2 president and general manager at CSC.

3 The consideration for the purchase was
4 comprised of a cash payment of about \$158 million and
5 an earnout payment of approximately \$98 million.

6 CSC's second amended complaint in the
7 underlying action alleges that around the time that
8 the EPA was entered into, Pulier, acting on behalf of
9 ServiceMesh, entered into a side agreement with
10 several executives at Commonwealth Bank of Australia
11 Ltd., or Commonwealth, which was one of ServiceMesh's
12 major customers.

13 Under the alleged side agreement, in
14 exchange for payments to the executives, they would
15 cause Commonwealth to enter into contracts with
16 ServiceMesh during the EPA's measurement period to
17 artificially inflate ServiceMesh's revenue for that
18 period and, thus, increase the amount of the earnout
19 payment. CSC alleges that without this revenue, none
20 of the earnout payment would have been owed.

21 The underlying action was filed on
22 May 12, 2015. The operative complaint in that action
23 originally consisted of nine counts.

24 On April 29th of this year, following

1 briefing and argument on defendants' motions to
2 dismiss, I dismissed Count 6. Thus, I will not
3 consider that claim further in this ruling.

4 Another count I will not consider
5 today is Count 9, because it is only relevant to
6 defendant Shareholder Representative Services and not
7 to Pulier.

8 Thus, there are seven counts of the
9 underlying complaint that survived the motion to
10 dismiss that are relevant to today's ruling. Those
11 are Counts 1, 2, 3, 4, 5, 7, and 8.

12 Let me turn to the sources of
13 advancement that are at issue here. There are several
14 potential sources of advancement relevant to the
15 claims asserted against Pulier in the underlying
16 action.

17 First, Pulier asserts that he is owed
18 advancement under ServiceMesh's Amended and Restated
19 Bylaws dated November 14, 2011.

20 Section 6.1 of those bylaws states, in
21 relevant part: "The corporation shall, to the maximum
22 extent and in the manner permitted by the General
23 Corporation law of Delaware, indemnify each of its
24 directors and officers against expenses (including

1 attorneys' fees), judgments, fines, settlements, and
2 other amounts actually and reasonably incurred in
3 connection with any proceeding, arising by reason of
4 the fact that such person is or was an agent of the
5 corporation."

6 Section 6.4 of the ServiceMesh bylaws
7 governs the advancement of expenses for directors and
8 officers. It states: "The corporation shall pay the
9 expenses incurred in defending any proceeding in
10 advance of its final disposition, provided, however,
11 that the payment of expenses incurred by a director or
12 officer in advance of the final disposition of the
13 proceeding shall be made only upon receipt of an
14 undertaking by the director or officer to repay all
15 amounts advanced if it should be ultimately determined
16 that the director or officer is not entitled to be
17 indemnified under this Article or otherwise."

18 Pulier also signed an indemnification
19 agreement with ServiceMesh dated November 14, 2011.
20 That's found at the Kirshenbaum Affidavit Exhibit 23.
21 The identification agreement was terminated by
22 ServiceMesh at the closing.

23 The advancement rights provided in the
24 indemnification agreement are duplicative of those

1 provided under ServiceMesh's bylaws. Thus, to the
2 extent the advancement rights in ServiceMesh's bylaws
3 have been triggered for actions taken before the
4 closing, so too have the advancement rights in the
5 indemnification agreement.

6 CSC's certificate of incorporation and
7 bylaws also provide for indemnification and
8 advancement of its directors and officers. The
9 relevant provisions in CSC's certificate of
10 incorporation are contained in Article Fifteenth,
11 Sections (a) through (c), and the relevant provisions
12 in the bylaws are contained in Article Six, Sections
13 1, 2 and 3.

14 Turning to the procedural history of
15 this case, on August 27, 2015, about four months after
16 the underlying action was filed, Pulier's counsel sent
17 a letter to ServiceMesh and CSC demanding advancement
18 of fees incurred in defense of the underlying action.
19 This letter stated that it enclosed a written
20 undertaking by Pulier, but it does not appear that one
21 was enclosed.

22 On October 26, 2015, ServiceMesh and
23 CSC denied Pulier's demand for advancement from both
24 companies. That's reflected in the Kirshenbaum

1 Affidavit Exhibit 11. One of the reasons cited was
2 Pulier's failure to provide an undertaking.

3 On February 1, 2010, Pulier submitted
4 undertakings to repay both CSC and ServiceMesh. Those
5 documents are contained in the Kirshenbaum Affidavit
6 at Exhibits 12-A and 12-B.

7 On February 17, 2016, Pulier filed his
8 complaint in this action.

9 On April 1, 2016, 60 days after the
10 date of Pulier's undertaking, CSC sent a letter
11 stating that it denied any obligation to advance
12 expenses and that ServiceMesh was liable only to
13 advance funds for claims related to actions taken in
14 Pulier's capacity as an officer before the closing on
15 November 15, 2013.

16 Now I'm going to turn to the legal
17 analysis of the advancement claims. At the outset, I
18 note that neither party has presented any argument
19 that there is an issue of material fact to the
20 disposition of the pending cross-motions.
21 Accordingly, under Court of Chancery Rule 56(h), I
22 deem the motions to be the equivalent of a stipulation
23 for decision on the merits based on the record
24 submitted with the motions.

1 I also note that CSC, consistent with
2 its April 1st letter, concedes that Pulier is entitled
3 to advancement from ServiceMesh for the fraud claims
4 in Counts 3 and 4 of the underlying complaint insofar
5 as they concern actions Pulier took before the
6 closing, on which date CSC contends Pulier resigned as
7 a director and officer of ServiceMesh.

8 As I see it, there are essentially
9 three issues that need to be decided to sort through
10 Pulier's remaining claims for advancement.

11 First, was Pulier a director or
12 officer of ServiceMesh after the closing, such that he
13 is entitled to advancement for claims relating to
14 actions he may have taken in that capacity after that
15 date?

16 Second, was Pulier an officer of CSC
17 after the closing, such that he is entitled to
18 advancement from CSC for claims relating to actions he
19 may have taken in that capacity?

20 Third, to what extent do any of the
21 claims involve actions Pulier took in a personal
22 capacity such that he is not entitled to advancement
23 as a director or officer of ServiceMesh or CSC?

24 On the first question, which is a

1 factual question, I find from the evidence of record
2 that Pulier ceased to be a director or officer of
3 ServiceMesh on November 15, 2013, when he signed a
4 letter of resignation from those positions. That
5 letter is in the Kirkham Affidavit at Exhibit H.

6 That letter recites that Pulier would
7 continue to serve ServiceMesh after November 15, 2013,
8 as an employee. This status is confirmed by Pulier's
9 November 12, 2013, retention agreement with CSC, which
10 states that he will be an employee of ServiceMesh, as
11 a fully owned subsidiary of CSC, following the
12 closing. That's in the Kirshenbaum Affidavit at
13 Exhibit 25.

14 Under ServiceMesh's bylaws, officers
15 may be chosen by the board of directors and
16 subordinate officers may be appointed by the board or
17 the president of ServiceMesh.

18 Following Pulier's resignation, CSC,
19 as the new owners of ServiceMesh, elected a board of
20 directors of ServiceMesh, but it did not include
21 Pulier. That board in turn elected officers of
22 ServiceMesh, but none of them included Pulier. Those
23 documents are reflected in the Kirkham Affidavit at
24 Exhibits J and K.

1 Significantly, no documents were
2 identified in discovery demonstrating either that the
3 board of ServiceMesh, its president, or anyone else,
4 for that matter, appointed Pulier to any officer
5 position at ServiceMesh after the closing.

6 Having said that, I recognize that the
7 parties stipulated that Pulier's e-mail signature
8 continued to state after the closing that he was the
9 chief executive officer of ServiceMesh. He also
10 signed a letter of representation dated January 29,
11 2014, identifying himself as the CEO of ServiceMesh.
12 That's at Kirshenbaum Affidavit Exhibit 27.

13 However, given the unambiguous terms
14 of Pulier's November 15, 2013, resignation letter and
15 the absence of any document reflecting a subsequent
16 appointment for him to serve as an officer of
17 ServiceMesh, it is my conclusion from the record that
18 has been submitted to me for decision on the merits
19 under Rule 56(h) that Pulier ceased to be a director
20 or officer of ServiceMesh after November 15, 2013, and
21 that the documents dated thereafter that refer to him
22 as appear to have been mistaken references that
23 carried over from his pre-closing status.

24 This finding is potentially relevant

1 to three claims: Counts 3, 4, and 5.

2 I'll start with Count 5. It alleges
3 that Pulier breached a retention agreement he signed
4 in November 2013 governing his continued employment
5 with ServiceMesh after the closing. Specifically, in
6 Count 5, CSC contends that Pulier breached certain
7 policies of CSC he was obligated to follow after the
8 closing, entitling CSC to various forms of relief.

9 Count 5 challenges actions taken by
10 Pulier only after the closing. For this reason, he is
11 not entitled to advancement for those actions under
12 ServiceMesh's bylaws because they only cover actions
13 taken in Pulier's capacity as a director or officer of
14 ServiceMesh, which ended on the closing date.

15 The question still remains whether
16 Pulier would be covered for Count 5 under CSC's
17 charter, which I will address in a few moments.

18 As I mentioned earlier, CSC concedes
19 that Pulier is entitled to advancement for Counts 3
20 and 4 under ServiceMesh's bylaws to the extent those
21 claims relate to his pre-closing conduct, but CSC asks
22 me to make an allocation of coverage based on the
23 fact, which I have now found, that he ceased to be a
24 director or officer of ServiceMesh after the closing.

1 I decline to do so. In Danenberg
2 versus Fitracks, Inc., the Court confronted similar
3 questions of allocating advancement between claims for
4 conduct which took place before and after a merger.
5 Specifically, the Court had to analyze claims that
6 representations made by Danenberg, the former CEO of a
7 footwear technology company, to the buyer of that
8 company were materially false. Some of those
9 statements had been made pre-closing, while he was
10 still an officer and entitled to advancement, and
11 others had been made after closing, when he resigned
12 from those capacities.

13 The Court in Danenberg held that, "the
14 allegations regarding Danenberg's pre-merger conduct
15 and their necessary implications underpin the
16 third-party complaint to such a degree that Danenberg
17 is entitled to advancements for 100 percent of his
18 fees and expenses for defending against the Underlying
19 Action. It is not possible at this stage to parse
20 between pre- and post-merger representations or among
21 causes of action such that a lesser allocation would
22 be appropriate."

23 That logic applies here in my view
24 because it would be impossible at this stage, as a

1 practical matter, to separate out which parts of
2 Pulier's legal defense expenses are applicable to
3 specific allegations concerning pre-closing fraud and
4 post-closing fraud within Counts 3 and 4.

5 Indeed, from my reading of the
6 complaint, the gravamen of the underlying complaint
7 relates to the entry into the side agreement with
8 Commonwealth, which most likely occurred before the
9 closing. CSC argued as much rather vigorously when
10 seeking to avoid dismissal of its claims under the
11 EPA.

12 While some misstatements and omissions
13 concerning the side agreement may have occurred after
14 the closing, it is simply not practicable to attempt
15 to tease out a specific allocation of the defense
16 costs on that theory.

17 Therefore, consistent with the
18 rationale of Danenberg, I am awarding full advancement
19 to Pulier from ServiceMesh for Counts 3 and 4.

20 Finally, I will address an additional
21 argument Pulier made at last week's hearing; namely,
22 that if Pulier was serving as an officer of
23 ServiceMesh after the closing, he would separately be
24 entitled to advancement from CSC under its charter and

1 bylaws for actions taken during that period. Because
2 I found that Pulier was not a ServiceMesh officer
3 after closing, that argument fails for lack of a
4 factual premise.

5 The second major question I need to
6 address today is whether Pulier was ever an officer of
7 CSC such that he would be entitled to advancement
8 under its certificate of incorporation or bylaws.
9 This issue is governed by Nevada law.

10 In my view, under a straightforward
11 reading of CSC's governing documents, Pulier was never
12 an officer of CSC and, thus, is not entitled to
13 advancement from CSC under its charter and bylaws.

14 Under Nevada Revised Statute
15 78.130(3), "All officers must be natural persons and
16 must be chosen in such manner, hold their offices for
17 such terms and have such powers and duties as may be
18 prescribed by the bylaws or determined by the board of
19 directors."

20 Article IV, Section 1 of CSC's bylaws,
21 entitled "Principal Officers," states in relevant part
22 that "the officers of the Corporation shall be elected
23 by the Board of Directors and shall be a Chief
24 Executive Officer, a President, a Secretary and a

1 Treasurer."

2 Article IV, Section 2, entitled "Other
3 Officers," goes on to state that, "the Board of
4 Directors may also elect one or more Vice Presidents,
5 Assistant Secretaries and Assistant Treasurers, and
6 such other officers and agents, as it shall deem
7 necessary."

8 Pulier argues that the permissive
9 language in Section 2 leaves open the possibility that
10 one may be appointed an officer of CSC other than
11 through election by CSC's board. Pulier argues, in
12 effect, that anyone who is a vice president
13 necessarily must be an officer and that because he
14 carried the title of vice president and general
15 manager of CSC after the closing, he necessarily must
16 have been an officer of CSC during that period.

17 Pulier further argues that CSC must
18 have viewed him as an officer because CSC's marketing
19 materials, such as its website, listed him on its
20 "Management" page and identified him as a member of
21 its "Executive Leadership." Documents supporting
22 those references are found at the Kirshenbaum
23 Affidavit at Exhibits 7 and 8. None of those
24 materials, however, referred to Pulier as an officer.

1 Thus, they are irrelevant in my view.

2 Finally, Pulier makes the alternative
3 argument that the CSC board did appoint him as an
4 officer by virtue of a board resolution that defined
5 the term "Authorized Officer" to mean "the President,
6 any Executive Vice President, any Vice President, the
7 Treasurer, the Secretary and any Assistant Treasurer
8 or Assistant Secretary of the Corporation."

9 CSC argues in opposition that Sections
10 1 and 2 of Article IV of its bylaws plainly provide
11 that officers must be elected by the board. According
12 to CSC, Section 1 lists those officers that the board
13 must elect, and Section 2 provides that the board may
14 elect other officers, including vice presidents, but,
15 in either event, the essential requirement to become
16 an officer is that an individual must be elected by
17 the board to such a position.

18 CSC's interpretation leaves open the
19 possibility that individuals carrying the title of
20 vice president may not be officers. To that end, CSC
21 has submitted evidence indicating, one, that it
22 elected five individuals with the title of vice
23 president as officers during Pulier's tenure with CSC
24 but Pulier was never elected as an officer during that

1 time period; and, two, that during the same time
2 period, over 80 other individuals, including Pulier,
3 held the title of vice president but were not elected
4 as officers by the board. That evidence comes in the
5 form of interrogatory responses that are attached to
6 the Kirkham Affidavit as Exhibit X.

7 In my view, CSC has offered the only
8 reasonable construction of CSC's bylaws. The only
9 provision that states who must be an officer of CSC is
10 found in Article IV, Section 1. The permissive
11 language in Article IV, Section 2 provides that the
12 board may also elect other officers as it deems
13 necessary, and it gives a nonexclusive list of what
14 positions such officers might hold, which include the
15 position of vice president. Logically, however, that
16 language does not require the inverse inference that
17 merely because an individual holds the title of vice
18 president, he or she must be an officer. To the
19 contrary, the plain words and structure of the bylaws,
20 in my view, make clear that individuals only become
21 officers of CSC through board election.

22 I also reject Pulier's alternative
23 argument based on the "Authorized Officers" resolution
24 I quoted from earlier. That resolution was made by

1 CSC's board in connection with the signing of the EPA.
2 The plain terms of that resolution reflect that the
3 term "Authorized Officer" had a limited meaning
4 referring to individuals who were authorized to
5 negotiate and sign documents and take actions for the
6 specific purpose of consummating CSC's acquisition of
7 ServiceMesh. The resolution did not, in my view,
8 result in the election of officers with plenary
9 authority, which is addressed in the bylaw provisions
10 I have already discussed.

11 Because I have found that Pulier was
12 not an officer of CSC, he is not entitled to
13 advancement from CSC for actions taken after the
14 closing as a CSC employee. This means that CSC is not
15 required to advance Pulier's expenses for Count 5,
16 which I covered before as to ServiceMesh, or for Count
17 7, which asserts a claim against Pulier for breach of
18 fiduciary duty as an employee of CSC under Nevada law.

19 Based on the two rulings I've made so
20 far, I have covered four of the seven claims at issue:
21 Counts 3, 4, 5, and 7. That leaves counts 1, 2, and
22 8.

23 Count 1 alleges Pulier breached his
24 contractual duty to indemnify CSC for breaches of

1 representations and warranties in the EPA.

2 Count 2 alleges Pulier breached the
3 implied covenant of good faith and fair dealing in the
4 EPA.

5 Count 8 basically restates the claims
6 for indemnification in Count 1 against Shareholder
7 Representative Services on behalf of the broad class
8 of equityholder indemnitors, one of whom is Pulier.

9 CSC argues that the actions Pulier
10 took that underlie Counts 1, 2 and 8 were all personal
11 to Pulier and were not undertaken by reason of the
12 fact that he was a director or officer of ServiceMesh
13 before the closing.

14 In making this argument, defendants
15 rely heavily on then-Vice Chancellor Strine's 2000
16 decision in Cochran versus Stifel Financial Corp.

17 In Cochran, the Court of Chancery
18 granted plaintiff's demands for indemnification, not
19 advancement, against his former employer regarding
20 claims that he had breached his fiduciary duties to a
21 subsidiary of that employer. The Court denied demands
22 for indemnification by plaintiff as to liability for
23 breaches of his employment contract, however.

24 Vice Chancellor Strine held that "when

1 a corporate officer signs an employment contract
2 committing to fill an office, he is acting in a
3 personal capacity in an adversarial, arm's-length
4 transaction. To the extent that he binds himself to
5 certain obligations under that contract, he owes a
6 personal obligation to the corporation." Those
7 obligations included repaying excessive compensation
8 and the balance of a promissory note. This aspect of
9 the Cochran decision was affirmed by the Delaware
10 Supreme Court.

11 In 2002, Vice Chancellor Strine had
12 occasion to reexamine his holding in Cochran in the
13 Reddy versus Electronic Data Systems case. There, the
14 defendant corporation, EDS, argued that Reddy's claims
15 for advancement were barred under Cochran to the
16 extent he sought advancement for claims that he
17 breached his employment and incentive compensation
18 agreements.

19 Vice Chancellor Strine rejected the
20 argument, distinguishing Cochran on two important
21 grounds. First, he found that, unlike in Cochran, the
22 case involved "a situation in which the officer's
23 alleged breach of his employment agreements was argued
24 to be the identical conduct that was also averred to

1 be a breach of fiduciary duty."

2 Second, he emphasized the contextual
3 difference between a claim for advancement and a claim
4 for indemnification, explaining that because EDS still
5 would be able to recover advanced expenses at the
6 indemnification stage if Reddy were found to have not
7 been entitled to payment of those expenses, there was
8 less risk of providing a windfall to an undeserving
9 party.

10 The Vice Chancellor balanced the
11 diminished risk of a windfall against the policy
12 favoring advancement to directors and officers,
13 stating as follows: "Because these limitations on
14 Reddy's ultimate right to indemnification provide
15 sufficient protection to EDS, it is not necessary or
16 advisable to apply the reasoning of Cochran to his
17 advancement case, especially because such an extension
18 would undermine the policy objectives of Section 145.
19 As the Supreme Court noted in its Cochran decision,
20 the 'invariant policy' behind Section 145 'is to
21 promote the desirable end that corporate officials
22 will resist what they consider unjustified suits and
23 claims, secure in the knowledge that their reasonable
24 expenses will be borne by the corporation they have

1 served if they are vindicated.' If EDS's argument
2 were adopted here, that policy objective would be
3 frustrated."

4 In 2014, then-Master LeGrow examined
5 the distinction between allegations concerning an
6 advancement plaintiff's personal and official
7 capacities in Rizk versus Tractmanager, Inc. There, a
8 former CEO sought and was awarded advancement on
9 several underlying claims that defendants tried to
10 characterize as being tied only to his individual, and
11 not corporate capacity, including claims under an
12 employment agreement and for contractual
13 indemnification.

14 The Master's Report awarded
15 advancement on all claims, holding that even though
16 the former CEO was being sued for representations he
17 made as a seller, the underlying allegations in those
18 counts of the complaint necessarily implicated his
19 conduct as CEO, and thus "create the necessary causal
20 connection between the [indemnification] Action and
21 [his] official capacity."

22 This Court's recent decision in Hyatt
23 versus Al Jazeera American Holdings II, LLC addressed
24 the same issue on a fact pattern very similar to this

1 case.

2 In Al Jazeera, the Court held that
3 plaintiffs were entitled to advancement for claims for
4 indemnification against an escrow account,
5 notwithstanding the fact that those obligations were
6 undertaken in their capacities as former
7 equityholders.

8 Adopting the reasoning in
9 Tractmanager, the Court found that because "the
10 underlying basis of the [indemnification claims]
11 create a significant likelihood that [plaintiffs] will
12 be forced to defend actions that they took as officers
13 and directors in order to successfully defend the
14 Counterclaims and vindicate their rights to the funds
15 in escrow," plaintiffs were entitled to be advanced
16 100 percent of their expenses with regard to those
17 counts.

18 In my opinion, the logic underlying
19 Reddy, Tractmanager, Al Jazeera, and other decisions
20 they discuss, supports the conclusion that Pulier is
21 entitled to advancement from ServiceMesh for Counts 1,
22 2 and 8, because the factual underpinnings of those
23 claims are closely related to conduct that Pulier is
24 alleged to have taken in his official capacity as a

1 director and officer of ServiceMesh before the
2 closing. Thus, the necessary nexus or causal
3 connection to his official duties has been
4 established.

5 Indeed, it would be an odd result not
6 to provide advancement for these claims given that one
7 reason that they were not dismissed was based on CSC's
8 argument that Pulier had taken action on behalf of
9 ServiceMesh to cause ServiceMesh to enter into the
10 side agreement, which caused breaches of various
11 representations and covenants in the EPA. Thus, to
12 defend Counts 1, 2 and 8, Pulier will be forced to
13 defend actions that, by CSC's own admission, he took
14 as one authorized to act on behalf of ServiceMesh,
15 which logically implicates his positions as a director
16 and/or officer of ServiceMesh.

17 I am not persuaded by CSC's argument
18 that these cases should not apply because regardless
19 of whom CSC's sued for indemnification under the EPA,
20 be it Pulier, Shareholder Representatives Services, or
21 other former equityholders, they each would have to
22 make arguments as to the underlying allegations of
23 conduct by Pulier, which would not change the capacity
24 in which they had agreed to indemnify.

1 The critical distinction is that none
2 of those other persons received the contractual
3 protections that Pulier did and, as this Court has
4 recognized on numerous occasions, a fundamental reason
5 for enforcing advancement rights in the first place is
6 so that directors and officers can serve in those
7 positions, secure in the knowledge that the
8 corporation will absorb the costs of defending their
9 honesty and integrity when challenged.

10 To summarize, I find that Pulier is
11 entitled to advancement for five of the seven counts
12 at issue: Counts 1, 2, 3, 4 and 8, but that he is not
13 entitled to advancement for Counts 5 and 7. Based on
14 that split, Pulier would be entitled to advancement
15 for a little over 70 percent of his defense costs.

16 However, based on my familiarity with
17 the complaint from going through the motion to dismiss
18 process, some additional weight should be given, in my
19 view, to the fact that the vast majority of the
20 allegations in the complaint and indeed the heart of
21 the case concern Pulier's actions in entering into the
22 side agreement on behalf of ServiceMesh. Accordingly,
23 in my opinion, he is entitled to advancement for
24 80 percent of his reasonable expenses to defend

1 against the underlying litigation.

2 I am now going to turn to Pulier's
3 request for fees-on-fees. I previously read into the
4 record Section 6.4 of ServiceMesh's bylaws, so I'm not
5 going to repeat that, but I do want, for context, to
6 read into the record another relevant provision, which
7 is Section 6.5.

8 The first part of that provision
9 states, "If a claim for identification or payment of
10 expenses under this Article VI is not paid in full
11 within sixty days after a written claim therefor has
12 been received by the corporation the claimant may file
13 suit to recover the unpaid amount of such claim and,
14 if successful in whole or in part, shall be entitled
15 to be paid the expense of prosecuting such claim."

16 Reading Section 6.4 and Section 6.5 of
17 the bylaws together and taking into account Delaware
18 case law, which permits the Court to use its
19 discretion to award fees in proportion to the results
20 obtained, I conclude that Pulier is entitled to
21 80 percent of the expenses he incurred to prosecute
22 this case after February 1, 2016.

23 I am not persuaded that Pulier is
24 barred from seeking fees-on-fees because he originally

1 demanded advancement in August 2015 but did not submit
2 his undertaking until February 2016.

3 Section 6.5 of ServiceMesh's bylaws do
4 not mention an undertaking in the provision entitling
5 directors and officers to sue, and it would be
6 inequitable in my view to deny Pulier fees-on-fees
7 given that, except for its limited concession
8 concerning parts of Counts 3 and 4, CSC vigorously
9 opposed Pulier's advancement demand and put him to the
10 task of litigating to vindicate his advancement
11 rights.

12 That said, consistent with the Court's
13 holding in Wong versus USES Holding Corp., I find that
14 Pulier's right to advancement was not fully vested
15 until he provided an undertaking consistent with
16 Section 6.4 of the bylaws and, accordingly, the time
17 period for measuring fees-on-fees should begin to run
18 from February 1, 2016, the date of his undertaking.

19 Pulier is also entitled to pre- and
20 post-judgment interest at the applicable Delaware
21 statutory rate, consistent with the foregoing rulings.

22 Now let me talk about how we're going
23 to implement all of this. I am directing the parties
24 to submit a form of order implementing these rulings

1 and setting forth procedures for going forward that
2 will be consistent with the order I entered in
3 Konstantino versus AngioScore, Inc. That order can be
4 found at Docket No. 87 in Civil Action 9681-CB.

5 I believe there was an amendment, by
6 the way, to that order that counsel may want to take
7 into consideration as well to get the final version of
8 it correct.

9 That order, as you will find,
10 essentially follows the methodology that was utilized
11 in the Danenberg versus Fittracks case.

12 I'm not ruling at this time on the
13 reasonableness or appropriateness of the amount of
14 legal fees that Pulier has incurred in defending
15 himself in the underlying action to date, and I ask
16 that the parties set a protocol for resolving any
17 disputes related to any such questions in accordance
18 with the protocol that was used in AngioScore.

19 I will add, I have very little
20 patience for trivial fights about advancement
21 expenses. As you will see in the protocol, there will
22 be a methodology if there are genuine disputes going
23 forward about these matters, but there is going to be
24 an obligation to advance a set amount without regard

1 for any objections that may be raised in accordance
2 with the AngioScore order. And I would hope that the
3 parties work together in good faith so that these type
4 of disputes are kept to a minimum, with the guidance
5 that I have provided.

6 Does anybody have any questions for me
7 at this point?

8 MR. LESSNER: No, Your Honor.

9 MR. KIRKHAM: No, Your Honor. I don't
10 have any questions.

11 THE COURT: All right. So I'd like
12 you to get a copy of this transcript, which I imagine
13 will be ready fairly soon, and within five days of
14 getting the transcript, submit the form of order to me
15 in the manner I've prescribed.

16 Have a good day, counsel.

17 MR. LESSNER: Your Honor? Was that
18 five business days, Your Honor?

19 THE COURT: If you want five business
20 days, you've got it. You're the one that wants the
21 money.

22 MR. LESSNER: I'm not saying we don't
23 get it done shorter, but I wanted to clarify that.

24 THE COURT: Have a good weekend.

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MR. LESSNER: Thank you, Your Honor.

MR. KIRKHAM: Thank you.

(Conference adjourned at 12:14 p.m.)

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CERTIFICATE

I, JEANNE CAHILL, RDR, CRR,
Official Court Reporter for the Court of Chancery of
the State of Delaware, do hereby certify that the
foregoing pages numbered 3 through 32 contain a true
and correct transcription of the proceedings as
stenographically reported by me at the hearing in the
above cause before the Chancellor of the State of
Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set
my hand at Wilmington, Delaware, this 16th day of May,
2016.

/s/ Jeanne Cahill

Jeanne Cahill, RDR, CRR
Official Chancery Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter