COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

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RE: *William R. Huff, et al. v. Longview Energy Company*
Civil Action No. 8453-CS

Dear Counsel:

The plaintiffs, William Huff and Richard D'Angelo, seek indemnification from the defendant, Longview Energy Company ("Longview"), a Delaware corporation that they serve on as directors. Their claim to indemnity arises in an unusual context. As a matter of undisputed fact, a Texas court entered a judgment against Huff, D'Angelo, and Riley-Huff Energy Group, LLC ("Riley-Huff") as a result of a breach of fiduciary duty committed by Huff and D'Angelo in connection with their usurpation of a corporate opportunity.[1] The corporate opportunity belonging to Longview related to property interests in Eagle Ford, a large area of land in south Texas with known formations of shale oil.[2] As a remedy for that breach, the jury imposed not only a constructive trust in favor of Longview on the profits and ownership of Riley-Huff's interests in Eagle Ford,

[1] Compl. ¶¶ 7-8.
[2] *Id*. Ex. B ¶¶ 32-33 (First Amended Petition).

but a damage award of $95 million against Huff and D'Angelo.[3] Huff and D'Angelo have appealed the judgment of the Texas court.[4]

As things thus stand, Huff and D'Angelo are adjudicated as having breached their fiduciary duty of loyalty to Longview and the action for which they seek indemnification is not over, because they themselves are appealing it. Despite the pending appeal, Huff and D'Angelo have brought an action seeking indemnification on the ground that they there were "successful" within the meaning of 8 *Del. C.* § 145(c) because Longview had originally asserted eight counts against them, but ultimately decided at trial to just present a single straightforward breach of fiduciary claim for usurpation of corporate opportunity to the jury.[5] Analogizing to cases in which a corporate fiduciary sought indemnification because specific criminal counts were dismissed even though the fiduciary was found guilty on other charges,[6] Huff and D'Angelo claim that they were partially successful despite suffering what on its face appears to be a devastating defeat.[7] They also claim that their success is locked in, because if they win on appeal, and the case is remanded for a new trial, Longview will be precluded under Texas law from pressing all of its theories

[3] *Id*. Ex. D (Amended Final Judgment).
[4] Defs.' Opening Br. Ex. 7 (Notice of Appeal).
[5] Compl. ¶¶ 6-9.
[6] *See, e.g.*, *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. Super. Ct. 1974) ("*Merritt-Chapman II*").
[7] Pls.' Ans. Br. 17-23.

against Huff and D'Angelo in connection with the Texas action except the one on which it obtained important and substantial success the first time around.[8]

This case now comes before the court on Longview's motion to dismiss or stay. The motion to dismiss is granted on the ground that is most sensitive to the important interests at stake. Huff and D'Angelo are trying to extend precedent relating to indemnification under 8 *Del. C.* § 145(c) developed in the context of a criminal action[9] to the civil context where corporate fiduciaries are found liable for a serious breach of fiduciary duty of loyalty and substantial economic damages to the company. According to Huff and D'Angelo, Longview's decision not to ask the jury to address all the various legal characterizations that might have applied to the fiduciaries' alleged misconduct means that they were "successful."[10] Given that there is a regrettable proliferation of counts in all business litigation, and it is often possible to characterize claims for breach of fiduciary duty in various ways, Huff and D'Angelo's theory is one that the court must address carefully.

By attempting to press this theory in advance of the completion of the Texas proceeding, the plaintiffs are pursuing a claim for indemnification in an unfair way.

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[8] *Id*. at 23-26.

[9] *E.g.*, *Merritt-Chapman II*, 321 A.2d at 141 (reasoning that "[i]n a *criminal action*, any result other than conviction must be considered success" (emphasis added)).

[10] *See, e.g.*, *Waltuch v. Conticommodity Servs., Inc.*, 88 F.3d 87, 96 (2d Cir. 1996) ("In a criminal case, conviction on a particular count is obvious failure, and dismissal of the charge is obvious success. In a civil suit for damages, however, there is a monetary continuum between complete success (dismissal of the suit without any payment) and complete failure (payment of the full amount of damages requested by the plaintiff).").

Their unique theory necessarily requires an analysis of the completed Texas proceeding to determine the extent of success. Under settled principles of Delaware law, "indemnification claims do not typically ripen until after the merits of an action have been decided, and all appeals have been resolved."[11] The blithe argument of Huff and D'Angelo that it is certain that Longview has forever waived any right to press its other theories simply because it filed no appeal from a final judgment giving the corporation a seemingly huge victory is not one that can be accepted in advance of a final appellate decision by the Texas courts and a complete record.[12] If the Texas appellate courts remand for a new trial, it is by no means facially obvious that they will limit Longview's ability to present all of its theories simply because it proceeded more economically in the first trial. Nor does it make sense, or is it even possible, for the court to determine the extent of Huff and D'Angelo's success and to award any indemnification until the Texas action is fully completed.[13] By its nature, indemnification requires a careful analysis of

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[11] *Hampshire Gp. Ltd. v. Kuttner*, 2010 WL 2739995, at *53 (Del. Ch. July 12, 2010) (citation omitted); *accord Paolino v. Mace Sec. Int'l, Inc.*, 2009 WL 4652894, at * 4 ("It is generally premature to consider indemnification prior to the final disposition of the underlying action." (citation omitted)).

[12] *E.g.*, *Sun-Times Media Grp., Inc. v. Black*, 954 A.2d 380, 401 (Del. Ch. 2008) (describing a rule that permitted indemnification after "a final judgment at the trial court level" as "odd, complex, inefficient, and capricious").

[13] *E.g.*, *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *9 (Del. Ch. Oct. 19, 2000) ("As a matter of litigative efficiency, it makes little sense for this court to decide claims for indemnification - as opposed to claims for advancement of litigation expenses - in advance of a non-appealable final judgment. There is simply too great a risk that the appellate courts will take a different view than the trial court for it to make much sense to grapple with indemnification claims until the underlying litigation is concluded with finality.").

the record in the underlying action and the piecemeal approach taken by Huff and D'Angelo inevitably requires some consideration of exactly how partial the success was (an imprecise inquiry at best), which cannot be fairly determined until the underlying action is finally completed.[14] To do so in advance of a final determination of the underlying action would also risk the need to reopen this action to revise the court's decision because the decision was wrong, precisely because it was based on a hazardous and unwarranted guess as to how the underlying action would come out, rather than a considered judgment of the record of the underlying action as it exists only after it is finally determined by a judgment that is no longer subject to the possibility of appeal.[15]

Finally, although, as Huff and D'Angelo point out, 8 *Del. C.* § 145(c) does not turn on any good faith standard, its plain terms do address successful litigants.[16] Corporate fiduciaries who, unless they overturn a jury verdict, owe the corporation nearly $100 million and must yield to the company's substantial property rights, because they have been adjudicated to have breached their fiduciary duties, are not in an equitable position to ask this court to allow them to prematurely seek a money damages claim from

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[14] *E.g.*, *Sun-Times Media Grp.*, 954 A.2d at 403 ("The adjudication of [indemnification claims] on a stage-by-stage basis would be astoundingly wasteful and a clear signal of design failure." (citation omitted)).

[15] *Navellier*, 2000 WL 1597890, at * 9 (noting that addressing indemnification claims after a final non-appealable disposition "will reduce the chance that the court will engage in a wasteful exercise in predictive justice, only to see its work undone later").

[16] *See* 8 *Del. C.* § 145(c) ("To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action . . . such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.").

the corporation to which they owed a duty of loyalty. Summing up who owes what as between Huff and D'Angelo on the one hand, and Longview on the other, should be done on a settled record, and it would be inequitable to give Huff and D'Angelo some leg up by accelerating their right to indemnification by disregarding settled law.

For all these reasons, Longview's motion to dismiss the complaint without prejudice because it does not state a ripe claim is GRANTED. IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Chancellor

LESJr/eb