Nos. 25-1462, 25-1469

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATTHEW VAN STEENWYK, Individually; as Trustee of Beneficiary of The Matthew Van Steenwyk GST Trust and The Matthew Van Steenwyk Issue Trust; as Co-Trustee of The Gretchen Marie Van Steenwyk-Marsh GST Trust and The Gretchen Marie Van Steenwyk-Marsh Issue Trust,

Plaintiff-Appellee,

v.

PAMELA PIERCE; PHILLIP GOBE; PHILIP LONGORIO; GENE DUROCHER; JOSEPH MCCOY; DANIEL CARTER; KIERAN DUGGAN,

Defendants-Appellants,

(for Continuation of Caption See Inside Cover)

On Appeal from the United States District Court
for the Central District of California
Case No. 2:20-cv-02375-FLA-AJR, Hon. Fernando L. Aenlle-Rocha

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF CORPORATE COUNSEL SUPPORTING APPELLANTS

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June 30, 2025

and

APPLIED TECHNOLOGIES ASSOCIATES, INC., a California corporation; ATA RANCHES, INC., a Delaware corporation; SCIENTIFIC DRILLING INTERNATIONAL, INC., a Texas corporation;

Nominal Defendants-Appellants,

and

KEDRIN E. VAN STEENWYK, in the following capacities: (1) individually; (2) as Executor of the Will of Elizabeth Van Steenwyk; and (3) as Successor Trustee of Survivor's Trust Created Under The Donald H. Van Steenwyk and Elizabeth A. Van Steenwyk 1996 Revocable Trust dated August 8, 1996, as amended, ADELAIDA CELLARS, INC., a California corporation,

Defendant-Appellant,

MATTHEW VAN STEENWYK, Individually; as Trustee of Beneficiary of The Matthew Van Steenwyk GST Trust and The Matthew Van Steenwyk Issue Trust; as Co-Trustee of The Gretchen Marie Van Steenwyk-Marsh GST Trust and The Gretchen Marie Van Steenwyk-Marsh Issue Trust,

Plaintiff-Appellee,

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KEDRIN E. VAN STEENWYK, in the following capacities: (1) individually; (2) as Executor of the Will of Elizabeth Van Steenwyk; and (3) as Successor Trustee of Survivor's Trust Created Under The Donald H. Van Steenwyk and Elizabeth A. Van Steenwyk 1996 Revocable Trust dated August 8, 1996, as amended,

Defendant-Appellant,

and

APPLIED TECHNOLOGIES ASSOCIATES, INC., a California corporation, Nominal Defendant; ATA RANCHES, INC., a Delaware corporation, Nominal Defendant; SCIENTIFIC DRILLING INTERNATIONAL, INC., Nominal Defendant;

Defendants-Appellees,

and

PAMELA PIERCE; PHILLIP GOBE; PHILIP LONGORIO; GENE DUROCHER; JOSEPH MCCOY; DANIEL CARTER; KIERAN DUGGAN, ADELAIDA CELLARS, INC., a California Corporation,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America and the Association of Corporate Counsel certify that each has no parent corporation and no publicly held corporation owns 10% or more of either organization's stock.

Dated: June 30, 2025
New York, New York

/s/ Anitha Reddy
Anitha Reddy

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Association of Corporate Counsel (ACC) is a global legal association that promotes the common professional and business interests of in-house counsel who work for corporations, associations, and other organizations through information, education, networking, and advocacy. Founded as the American Corporate Counsel Association in 1981, it has grown from a small organization of in-house counsel to a worldwide network of more than 47,000 in-house lawyers employed by over 10,000 corporations, associations, and other organizations in more

than 100 countries. It has long sought to aid courts, legislatures, regulators, and other law or policy-making bodies in understanding the role and concerns of in-house counsel, and is a frequent amicus participant in important cases affecting in-house counsel.

Amici have a strong interest in this case. All states have made the policy determination that corporate indemnification and advancement of litigation expenses encourages capable individuals to serve as corporate directors and officers. As is permitted by state corporate law, corporations often adopt bylaws and enter into agreements with corporate officials that confirm their rights to indemnification and advancement. The enforcement of these valid agreements is critical to ensuring effective indemnification and advancement rights for corporate officials, thereby realizing the policy goal of encouraging corporate service.[1]

[1] No party or counsel for any party authored this brief in whole or in part, and no one other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

The defendants are directors and officers of corporations that elected to indemnify them against litigation expenses, and to advance those expenses during the pendency of a proceeding, including any appeals, to the fullest extent permitted by law. That choice is not only reflected in the corporations' bylaws, but also memorialized in the defendants' indemnification agreements. And those bylaws and agreements are entirely consistent with, and expressly authorized by, the indemnification statutes of the states in which the corporations are incorporated.

In the order on appeal, the district court nonetheless permanently enjoined the companies from paying, advancing, or reimbursing any attorneys' fees or costs incurred by defendants for claims in which defendants were found liable at trial—even though the litigation remains pending on appeal.

This Court should vacate the injunction and enforce the indemnification agreements in accordance with their terms. A defendant's right to indemnification cannot be conclusively determined until the final disposition of the case—because a defendant is entitled to

indemnification if he or she finally prevails, and even in some circumstances when he or she does not. And the enforcement of contractually-agreed advancement rights throughout the pendency of a proceeding is essential to ensure a defendant's ability to mount a vigorous defense regardless of his or her financial circumstances.

Every state in the country authorizes corporations to indemnify directors and officers for actions brought against them by reason of their corporate service, and to advance their expenses until the final disposition of the action, including any and all appeals. And every state does that because these protections are important to attract capable individuals to serve as directors and officers, regardless of their financial circumstances.

Here, the district court's order forces defendants to bear their own litigation expenses at a time of perhaps their greatest need: when appealing an adverse judgment in the trial court. The statutes and ensuing indemnification agreements that the district court disregarded are structured precisely to avoid this inequitable result.

ARGUMENT

I. STATE CORPORATE LAW AND SOUND POLICY SUPPORT THE ENFORCEMENT OF CORPORATE INDEMNIFICATION AND EXPENSE ADVANCEMENT AGREEMENTS IN ACCORDANCE WITH THEIR TERMS

"Indemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service." 3A William Meade Fletcher et al., Fletcher Cyc. Corp. § 1344 (2024).

State corporate law thus uniformly authorizes corporations to indemnify their directors and officers for expenses incurred in litigation brought against them in their capacity as directors and officers. "[E]very state in the union has enacted statutes setting limits on the extent to which corporations chartered in that state may indemnify their officials," thereby "seeking to provide the assurance of indemnification to such officials if they have conducted themselves within certain acceptable guidelines." John F. Olson, Josiah O. Hatch, & Ty R. Sagalow, *Director & Officer Liability: Indemnification & Insurance* § 4:5 (2024) [hereinafter Olson et al., *D&O Indemnification*]; *see also* 3A William Meade Fletcher

et al., Fletcher Cyc. Corp. § 1344 (2024) ("All states have enacted statutes addressing the indemnification of directors, officers, and agents.").

The ubiquity of state indemnification statutes reflects the general recognition that the incentives created by indemnification are beneficial. State indemnification statutes thus generally seek to promote twin policy interests: (1) attracting capable individuals to serve as directors and officers by providing reasonable protections against personal liability in litigation, and (2) protecting shareholders by imposing minimum standards for the permissible indemnification and advancement of litigation expenses. *See* Olson et al., *D&O Indemnification* § 4:5 (discussing the statutory balancing of these policy interests).

The California and Texas indemnification statutes—the two statutes at issue in this case—are no different in their aims. The Legislative Committee comments to Cal. Corp. Code § 317 explain that "[t]he purpose of the indemnification provisions in the new law is to provide sufficient flexibility to afford reasonable protection for directors and officers while imposing safeguards which adequately protect the shareholders in the granting of indemnification." And as a treatise of Texas corporate law explains, the Texas code "contains liberal provisions

for the indemnification of directors and others" because the "[t]he policy argument in favor of a broad indemnification statute is compelling: if desirable persons are to be persuaded to accept directorships or other positions they must be given assurance that their personal assets will not be depleted by the cost of defending claims that often turn out to be groundless." 20A Elizabeth S. Miller & Robert A. Ragazzo, *Tex. Prac., Bus. Orgs.* § 36:17 (3d ed. 2024).

State indemnification statutes uniformly require a corporation to indemnify a director or officer who has prevailed in litigation. 2 William E. Knepper & Dan A. Bailey, *Liab. of Corp. Officers & Dirs.* § 20.03 (8th ed. 2024) [hereinafter Knepper & Bailey, *D&O Liability*]; *see, e.g.*, Cal. Corp. Code § 317(d); Tex. Bus. Orgs. Code Ann. § 8.051. They also, however, generally permit a corporation to indemnify a director or officer for litigation expenses even when the individual has not prevailed in the litigation, as long as the individual has met the minimum standard of conduct for indemnification. *See, e.g.*, Cal. Corp. Code § 317(c); Tex. Bus. Orgs. Code Ann. § 8.101. As one treatise explains, "[s]tatutory indemnification is usually dependent on the person having acted in good faith and in a manner he or she reasonably believed to be in or not

opposed to the best interests of the corporation." Knepper & Bailey, *D&O Liability* § 20.08. Because "[a] person is seldom 'wholly successful' in defending a suit" and "[m]ost modern litigation is settled," "[t]he permissive indemnification category is of enormous practical importance." 20A Miller & Ragazzo, *Tex. Prac., Bus. Orgs* § 36:17 (3d ed. 2024).

In addition to ultimate rights to indemnification, state indemnification statutes also include provisions for the advancement of litigation expenses, generally subject to an undertaking by the recipient to repay the advanced funds if indemnification is ultimately found impermissible upon the final disposition of the litigation. *See, e.g.*, Cal. Corp. Code § 317(f); Tex. Bus. Orgs. Code Ann. § 8.104. Advancement of litigation expenses "provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigations and legal proceedings, regardless of whether the individual will be entitled to indemnification." 3A William Meade Fletcher et al., Fletcher Cyc. Corp. § 1344 (2024) (footnotes omitted). The right to expense advancement is

thus "an especially important corollary" to the right of indemnification. *Homestore, Inc.* v. *Tafeen*, 888 A.2d 204, 211 (Del. 2005).

It is undisputed that here, defendants served as directors or officers of corporations that elected—as the corporations were statutorily authorized to do—to indemnify them, and to advance their expenses, to the fullest extent permitted by California and Texas law. That corporate decision was reflected in the corporations' bylaws and expressly agreed to in standard indemnification and advancement agreements with each defendant. 3-ER-305 (ATA bylaws); 3-ER-319 (SDI bylaws); *see, e.g.*, 2-ER-234–45 (indemnification and advancement agreement).[2]

Such agreements are routinely enforced in accordance with their terms by courts across the country, as required by substantially similar state indemnification statutes. *See, e.g.*, *Homestore*, 888 A.2d at 218 (enforcing agreement to advance expenses to corporate officer accused of criminal securities fraud). Neither the agreements in this case, nor the provisions of the California and Texas indemnification statutes, are

[2] As relevant to the issues on appeal, the indemnification agreements for both companies' directors and officers are identical. *See* Appellants' Br. 7 n.1. For simplicity's sake, this brief refers to the single agreement appearing at 2-ER-234–45.

unusual. Rather, both the agreements and statutory provisions at issue here are typical of indemnification and advancement agreements broadly and of other states' indemnification statutes. The district court's decision to nonetheless determine defendants' entitlement to indemnification before the final disposition of the case, and to enjoin advancement of expenses during the pendency of the litigation, was highly irregular and cannot be justified by either the text of the governing statutes or that of the agreements.

II. THE INJUNCTION ENTERED BY THE DISTRICT COURT WAS CONTRARY TO THE TERMS OF THE GOVERNING INDEMNIFICATION STATUTES AND AGREEMENTS

In enjoining the corporations for which defendants served from making any payments to indemnify them or advance their litigation expenses, the district court made two equally fundamental errors. First, it concluded that the finding of liability for breach of fiduciary duty established that defendants had engaged in conduct for which they could not be indemnified. And second, it concluded that such a finding of liability, although still subject to appeal, could provide a basis for disqualifying defendants from any further advancement of litigation expenses during the appeal. Neither conclusion can be squared with the

plain language of the governing indemnification statutes or defendants' indemnification agreements.

A. A finding of breach of fiduciary duty is insufficient to establish that the defendant is not entitled to indemnification

As explained above, state indemnification statutes generally do not limit a corporation's ability to indemnify directors and officers to claims on which the directors and officers have prevailed. Rather, they authorize corporations to indemnify directors and officers even if their defense of a claim has been unsuccessful, as long as the individual has met the minimum standard of conduct specified in the statute.

Here, the district court assumed that the jury's finding for plaintiff on his claims of breach of fiduciary duty against defendants was equivalent to a finding that defendants engaged in non-indemnifiable conduct. But that assumption is contrary to the provisions of both the California and Texas indemnification statutes—and contrary to the language of state indemnification statutes in general.

As is typical of such statutes, neither the California statute nor the Texas statute prohibits a corporation from indemnifying a director or officer simply because the director or officer has been found to have breached his or her fiduciary duties. The California statute provides that

"[a] corporation shall have power to indemnify any" agent of the corporation against litigation expenses "actually and reasonably incurred in connection with the proceeding if that person acted in good faith and in a manner the person reasonably believed to be in the best interests of the corporation and, in the case of a criminal proceeding, had no reasonable cause to believe the conduct of the person was unlawful." Cal. Corp. Code § 317(b).

Even if a judgment has been entered against the defendant in the proceeding, that loss cannot by itself establish that the defendant has not met the standard of conduct requisite for indemnification. The California statute makes that clear by expressly providing that "[t]he termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in the best interests of the corporation or that the person had reasonable cause to believe that the person's conduct was unlawful." Cal. Corp. Code § 317(b).

The Texas statute likewise excludes from the scope of indemnifiable conduct only certain enumerated and specific breaches of duty—not all

breaches of fiduciary duty. Indemnification is prohibited only when the person "has been found liable for: (A) willful or intentional misconduct in the performance of the person's duty to the enterprise; (B) breach of the person's duty of loyalty owed to the enterprise; or (C) an act or omission not committed in good faith that constitutes a breach of duty owed by the person to the enterprise." Tex. Bus. Orgs. Code Ann. § 8.102(b)(3).

The district court nonetheless repeatedly held that the jury's verdicts against the defendants on the breach-of-fiduciary-duty claims were enough to establish that defendants had engaged in conduct that could not be indemnified as a matter of law under either statute. That determination appears to have resulted from the district court's mistaken impression that a finding of a breach of fiduciary duty is necessarily a finding of bad-faith conduct. Or put another way, that only bad-faith acts may support liability for breach of fiduciary duty.

But state corporate law—in every jurisdiction—has long distinguished between conduct, such as gross negligence, that is undertaken in good faith yet constitutes a breach of fiduciary duty, and bad-faith conduct. As the Delaware Supreme Court has explained, "grossly negligent conduct, without more, does not and cannot constitute

a breach of the fiduciary duty to act in good faith." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 65 (Del. 2006). That is because, as the court emphasized, "the fiduciary duties"—of "care and good faith—are legally separate and distinct." *Id.* at 65 n. 104.

To conclude—wrongly—that a breach of fiduciary duty is necessarily a breach of the particular duty of good faith, the district court invoked a statement in *Plate* v. *Sun-Diamond Growers*, 275 Cal. Rptr. 667 (Cal. Ct. App. 1990). Noting that California's indemnification statute "corresponds in part to language" in the Model Business Corporation Act's indemnification provision, "as do indemnification statutes in other states," the *Plate* court noted that "[t]he policy considerations behind those statutes are that persons who serve the corporation in good faith should, in the absence of certain conduct (fraud, breach of fiduciary duties, etc.) be free from liability for corporate acts." *Id.* at 671.

The district court appears to have interpreted this reference to "policy considerations" to mean that California's indemnification statute prohibits indemnification of even good-faith conduct if it constituted a breach of fiduciary duty. But in interpreting the specific text of the California indemnification statute, the *Plate* decision went on to make

clear that the statute permits indemnification as long as the defendant acted in good faith, even if his or her conduct breached a fiduciary duty. As the *Plate* court held, the statutory "prerequisites to indemnification, that the agent acted in good faith and with a reasonable belief that the activity was in the best interests of the corporation, allows for indemnification even where the agent was negligent or committed some error," but "prohibit[] indemnification in cases of bad faith or intentional wrongdoing." *Id.* at 672. Contrary to the district court's ruling, the jury's finding that defendants breached their fiduciary duties was thus insufficient to establish that defendants were disqualified from indemnification under the plain language of either the California or Texas statutes.

B. A finding of liability still subject to appeal is insufficient to establish that the defendant is not entitled to advancement of expenses and indemnification

The district court was equally wrong to conclude that it could find defendants were not entitled to advancement of expenses and indemnification based on findings of liability still subject to appeal. To the contrary, the governing statutes authorized, and the governing agreements required, the advancement of expenses through the final

disposition of the case. And because the defendants' entitlement to indemnification depends on the final disposition of the case, it cannot be determined when the case is still subject to appeal.

1. All states authorize advancement of expenses as integral to effective indemnification rights

The indemnification statutes of every state—not just those of California and Texas—authorize a corporation to advance litigation expenses to corporate agents who have indemnification rights. *See* Olson et al., *D&O Indemnification* § 4:14. In doing so, all state indemnification statutes recognize expense advancement as "an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service," by providing "immediate interim relief from the personal out-of-pocket financial burden" of litigation expenses. *Homestore*, 888 A.2d at 211.

California's experience—typical of that of other states—is instructive. Before the California indemnification statute was amended in 1975, the "[p]rior law permit[ted]" indemnification "only where such indemnity is approved by the court after the case is concluded." *See* Legislative Committee comments to Cal. Corp. Code § 317. "The practical effect of these restrictive provisions [was] to force an official or employee

of the corporation who is being sued as such to enter into some settlement of the action regardless of how confident he and the corporation may be that the action is without merit." *Id.* The 1975 amendment sought to address this deleterious effect by "provid[ing] that a corporation may advance 'expenses' . . . prior to the final disposition of such proceeding upon the receipt of an undertaking that the agent will reimburse the corporation unless it is ultimately determined that the agent is entitled to indemnification." *Id.*; *see* Cal. Corp. Code § 317(f) (advancement provision). As the legislative commentary explained, "[t]he purpose of the indemnification provisions in the new law"—including the new advancement provision—"is to provide sufficient flexibility to afford reasonable protection for directors and officers while imposing safeguards which adequately protect the shareholders in the granting of indemnification." Legislative Committee comments to Cal. Corp. Code § 317.

Accordingly, "[t]he right to advancement is a time-sensitive remedy" designed to free a director or officer from the pressure to compromise his or her defense, or settle, due to a lack of financial resources. *Gandhi-Kapoor* v. *Hone Cap. LLC*, 305 A.3d 707, 713 (Del. Ch.

2023). "A lack of timely advancement prejudices the covered person's ability to defend the underlying litigation, potentially resulting in irremediable consequences, such as an adverse judgment or a conviction." *Id.*; *see also Tafeen* v. *Homestore, Inc.*, 2005 WL 1314782, at *3 (Del. Ch. May 26, 2005), *aff'd*, 886 A.2d 502 (Del. 2005) ("the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford"). Therefore, courts have recognized, "[c]learly, to be of any value to the executive or director, advancement must be made promptly" or its benefits will be "forever lost." *Tafeen*, 2005 WL 1314782, at *3 (denying corporation's application to stay advancement of expenses pending appeal).

The California indemnification statute, like that of Delaware, provides that "[e]xpenses incurred in defending any proceeding may be advanced by the corporation prior to the final disposition of the proceeding upon receipt of an undertaking by or on behalf of the agent to repay that amount if it shall be determined ultimately that the agent is not entitled to be indemnified as authorized in this section." Cal. Corp. Code § 317(f); *see* Del. Code Ann. tit. 8, § 145(e) (similarly authorizing a corporation to pay "[e]xpenses . . . in advance of the final disposition of

such action, suit or proceeding upon receipt of [such] an undertaking"); Olson et al., *D&O Indemnification* § 5:38 ("The provision of the California statute authorizing advancement of defense expenses is generally comparable in scope to the same provision in the Delaware statute.").

The Texas indemnification statute similarly authorizes the advancement of expenses "in advance of the final disposition of the proceeding" upon receipt of an undertaking to repay the expenses if the defendant is ultimately determined to be disqualified from indemnification. Tex. Bus. Orgs. Code Ann. § 8.104(a); *see also* 20A Miller & Ragazzo, *Tex. Prac., Bus. Orgs* § 36:17 (3d ed. 2024) ("unless advance indemnification was permitted, an undesirable distinction would be drawn between directors with large financial resources who could invest funds in an adequate defense and those without such resources, who could not").

As courts and commentators have recognized, the statutory right to advancement is "separate and distinct" from the statutory right to indemnification. *Allergia, Inc.* v. *Bouboulis*, 229 F. Supp. 3d 1150, 1157 (S.D. Cal. 2017) (discussing California indemnification statute); *Homestore*, 888 A.2d at 212 (discussing Delaware indemnification

statute). That is because "[t]he advancement provision . . . does not require any . . . determination" that the agent is entitled to indemnification. *Allergia*, 229 F. Supp. 3d at 1155. Rather, "an agent is entitled to advancement . . . if advancement is provided for by the corporation and the agent provides an undertaking." *Id.* at 1157.

Importantly, that entitlement to advancement extends to the "final disposition" of a proceeding. Cal. Corp. Code § 317(f); Tex. Bus. Orgs. Code Ann. § 8.104(a); Del. Code Ann. tit. 8, § 145(e). Or in other words, "the final, non-appealable resolution" of the proceeding. *Sun-Times Media Grp., Inc.* v. *Black*, 954 A.2d 380, 390 (Del. Ch. 2008). As courts have explained, "[t]he most logical reading of the text is that advancement must be provided until the underlying action, suit, or proceeding is finally resolved or disposed of, in the sense that its outcome is not subject to further disturbance"—"[b]ecause it is only at that point that the ultimate determination that the recipient either was or was not entitled to indemnification can be made." *Id.*; *see also Theriot* v. *Bourg*, 691 So. 2d 213, 227-28 (La. Ct. App. 1997) ("a case reaches its 'final disposition' once all avenues of appeal are exhausted"); *Lussier* v. *Mau-Van Dev., Inc.*, 667 P.2d 830, 834 (Haw. Ct. App. 1983) ("trial court's

determination which is pending disposition on appeal is not a 'final disposition' of the proceeding").

As the Delaware Court of Chancery has explained, allowing a corporation to refuse to honor its commitment to advance expenses through the exhaustion of all appeals would yield "odd, complex, inefficient, and capricious" results. *Sun-Times,* 954 A.2d at 401. Most important, letting the corporation avoid its contractual obligation would leave the corporate official to depend on whatever personal resources he or she can muster "at the time the official most needs funds to pay appellate costs to attempt to defeat" an adverse judgment. *Id.*

Here, it is undisputed that the statutory requirements were met—the corporations authorized advancement of expenses to the fullest extent permitted by law and further agreed to do so in specific agreements with each defendant. Each company's bylaws expressly authorized the indemnification and advancement of expenses to the fullest extent permitted by either the California or Texas indemnification statute.[3] Consistent with the bylaw provisions, the companies also

[3] ATA's bylaws provide for indemnification of its directors and officers "to the fullest extent permitted by Section 317 of the California Corporation Code." 3-ER-305 (ATA bylaws). SDI's bylaws similarly make mandatory

entered into indemnification and advancement agreements with defendants. Each of those agreements confirms that both companies determined "it is reasonable, prudent and necessary for the Company contractually to obligate itself to indemnify and advance expenses to such persons to the fullest extent permitted by applicable law, so that they will continue to serve the Company free from undue concern that they will not be so indemnified." 2-ER-235, at Background § C(2).

The agreements also make clear that the defendants' rights to indemnification in relation to a particular proceeding may be determined only "after exhaustion of all appeals therefrom." 2-ER-238, at § 3(c). And they make equally clear that the corporation must advance expenses incurred "in connection with the investigation, defense, settlement *or appeal* of any Proceeding." 2-ER-238–39, at § 5 (emphasis added).

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the indemnification permitted under Texas law and confirm that the company "agrees to advance the reasonable expenses of a director or an officer upon such director's or officer's compliance with the requirements" of the indemnification laws. 3-ER-319 (SDI bylaws).

2. The district court improperly disregarded the clear terms of the governing indemnification statutes and agreements in enjoining the advancement of expenses pending appeal

Notwithstanding defendants' satisfaction of the statutory and contractual prerequisites to advancement rights, the district court considered an injunction against advancement necessary to protect the corporations. 1-ER-29. In the district court's view, the injunction was justified because "[d]efendants do not appear to be financially capable of reimbursing those costs" if, after appeal, it is ultimately determined that they are not entitled to be indemnified. *Id.*

But as shown above, both the California and Texas statutes condition a corporation's authority to agree to advance expenses only on the receipt of an undertaking to repay those expenses if indemnification is ultimately adjudged unavailable, not on any evidence of defendants' ability to repay advanced expenses. And the corporations elected to advance expenses to the fullest extent permitted by law—a choice they did not have to make. The district court's decision thus disregards the clear terms of the indemnification statutes, the indemnification agreements the corporations freely entered into, and the policy and reliance interests that the statutes and the agreements both serve.

Contrary to the district court's view, *Johnson* v. *Couturier*, 572 F.3d 1067 (9th Cir. 2009), does not stand for the proposition that "courts enjoin indemnification and advancement of costs despite contractual obligations therefor." *See* 1-ER-26 (citing *Johnson* v. *Couturier*, 572 F.3d 1067 (9th Cir. 2009)). The decision instead stands for a much narrower proposition, one with no application to this case. In *Johnson*, this Court found that the indemnification agreements at issue were void, not as a matter of state law, but because the California indemnification statute was preempted by federal law, namely ERISA, 29 U.S.C. § 1001 *et seq*. *See Johnson*, 572 F.3d at 1078. As the Court held, because the standard of conduct necessary to qualify for indemnification under the state statute was lower than the standard of care owed by ERISA fiduciaries, the indemnification agreements "effectively limit[ed]" the defendants' liability under ERISA and were therefore preempted by it. *Id.*

Critically, the *Johnson* Court expressly recognized that "California allows advancement of defense costs upon receipt of an undertaking," and explained that "all [defendants] submitted the requisite undertakings, thus apparently rendering advancement of their defense costs enforceable under state law." *Id.*; *see also Allergia*, 229 F. Supp. 3d at

1156 & n.2 (citing *Johnson* in support of its holding that Cal. Corp. Code § 317(f) authorizes a corporation to advance expenses upon only receipt of the requisite undertaking). Here too, all defendants have submitted the requisite undertakings. And there is no contention that their agreements are preempted by ERISA. Accordingly, the statutory and contractual advancement rights of defendants here are enforceable as a matter of state law.

On-point authority shows just the opposite of what the district court asserted: courts require corporations to honor their agreements to advance expenses, not renege when the payment obligation is upon them. For example, in *In re Central Banking System, Inc.*, 1993 WL 183692 (Del. Ch. May 11, 1993), the corporation sought to require the director to "demonstrate financial responsibility as a condition to receiving advances," even though the only condition provided in the defendant's indemnification agreement was receipt of an undertaking—just as the district court did here. *Id.* at *3. The court enforced the indemnification agreement as written, holding that the corporation could not belatedly insist that the director "furnish appropriate security or demonstrate financial responsibility as a condition to receiving advances" when it

"ha[d] the undoubted power to require" the inclusion of those conditions in its contractual undertaking to advance expenses, but failed to do so. *Id.*

So too here. The corporations for which defendants served could have chosen to extend advancement rights more limited than those permitted by statute. But having elected to enter into contracts committing them to advance expenses to the fullest extent permitted by state law, the corporations are bound by those contracts.

Moreover, the district court's view that protection of corporations justifies the imposition of additional conditions to advancement, contrary to the terms of the governing agreements, ignores the legislative judgment embodied in the indemnification statutes. By authorizing corporations to agree to advance expenses upon receipt of only an undertaking to repay them, the statutes reflect a determination of the minimum condition necessary to protect shareholders. And the corporations' decision to extend advancement upon only that minimum condition likewise reflects an entity-specific judgment of the benefits of offering the broadest permissible advancement rights. Nothing in state

indemnification statutes gives a court the power to rewrite indemnification agreements because it disagrees with those judgments.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order enjoining the payment of expenses to defendants in accord with their indemnification agreements.

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June 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
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9th Cir. Case Numbers: 25-1462, 25-1469

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