

IN THE SUPREME COURT OF OHIO

ORIGINAL

WILLIAM WESTBROOK, : Supreme Court Case No. 09-0828  
 :  
 Plaintiff-Appellee, : On Appeal from the Delaware County  
 : Court of Appeals, Fifth Appellate  
 -vs- : District  
 :  
 VALERIE SWIATEK, et al., : Court of Appeals Case Nos.  
 : 08CAE12-0078 & 08CAE12-0079  
 :  
 Defendants-Appellants. :

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**APPELLEE WILLIAM WESTBROOK'S  
MEMORANDUM IN OPPOSITION TO APPELLANTS'  
MOTION FOR STAY OF TRIAL COURT PROCEEDINGS  
TO ENFORCE ORDER PENDING APPEAL TO THIS COURT**

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Quintin F. Lindsmith (0018327)  
James P. Schuck (0072356)  
Natalie T. Furniss (0075329)  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, Ohio 43215  
Phone: 614.227.2300  
Fax: 614.227.2390  
Qlindsmith@Bricker.com  
Jschuck@Bricker.com  
Nfurniss@Bricker.com

*Attorneys for Appellants-Defendants*

O. Judson Scheaf, III (0040285)  
Scott A. Campbell (0064974)  
Michele L. Noble (0072756)  
Gabe Roehrenbeck (0078231)  
THOMPSON HINE LLP  
41 South High Street, Suite 1700  
Columbus, Ohio 43215  
Phone: 614.469.3200  
Fax: 614.469.3361  
Jud.Scheaf@ThompsonHine.com  
Scott.Campbell@ThompsonHine.com  
Michele.Noble@ThompsonHine.com  
Gabe.Roehrenbeck@ThompsonHine.com

Anthony M. Heald (0002095)  
HEALD & LONG  
125 North Sandusky Street  
Delaware, Ohio 43015  
Phone: 740.363.1369  
Fax: 740.369.1616  
TonyHeald@Heald-Long.com

*Attorneys for Appellee-William Westbrook*



## I. Introduction

This Court has already declined to accept jurisdiction in a case that is identical to this one. See *MD Acquisition, L.L.C., et al. v. Martin L. Myers et al.*, Ohio Supreme Court Case No. 2007-1604. In *MD Acquisition*, the Tenth District Court of Appeals—in an identical situation—held that a trial court’s order granting advancement of attorneys’ fees to an officer of a company pursuant to corporate bylaws was not a final, appealable order. *MD Acquisition, L.L.C. v. Myers* (10th Dist.), 2007-Ohio-3521, at ¶ 14. After the Tenth District dismissed their appeal for lack of subject-matter jurisdiction, the corporate plaintiffs sought a discretionary appeal with this Court, and asked it to accept jurisdiction over the following proposition of law: “A pretrial order requiring plaintiffs to advance the defendant’s attorney fees up to and through the trial is a provisional remedy that cannot be effectively corrected without immediate appeal pursuant to O.R.C. § 2505.02(B)(4).” (See *Memorandum in Support of Jurisdiction of Plaintiffs-Appellants MD Acquisition, LLC and Martin Designs, Inc.*, filed August 24, 2007, at 9.) ***This Court declined to accept jurisdiction.*** (See December 12, 2007 Entry (“Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.”).)

As in *MD Acquisition*, the trial court’s order in this case simply granted Mr. Westbrook’s motion for the advancement of his litigation fees and expenses, as required by the parties’ corporate Code of Regulations. Following the *MD Acquisition* decision, the Fifth District Court of Appeals dismissed the appeal for lack of a final, appealable order. The Appellants are now asking this Court to accept jurisdiction over the very same proposition of law which this Court refused to consider in *MD Acquisition*.

Perhaps more troubling is the Appellants’ instant motion to stay the trial court’s order. Given that the Court has previously declined jurisdiction in an identical case, the Appellants do

not, and cannot, provide any good reason as to why this Court should nonetheless stay the trial court's order. Indeed, the point of corporate advancement provisions (such as the ones at issue in this case) is to ensure the *advancement* of litigation expenses *as they are incurred*, and before the litigation concludes. The point of the Appellants' pending motion to stay (like their already-rejected motions to stay in the two lower courts) is to prevent Mr. Westbrook from ever enjoying the benefit of his right to advancement—a right which the trial court has already correctly declared that he has. If this Court grants the Appellants' motion to stay, it would have the practical effect of allowing them to escape their advancement obligations altogether. Mr. Westbrook would be forced to continue defending against the Appellants' counterclaims without the funds to which he is legally entitled to finance that defense. This inequity of litigation resources, which the Appellants by their motion seek to perpetuate, is exactly what corporate advancement provisions are designed to eliminate. The Appellants' motion to stay is an invitation to turn advancement law on its head, and this Court should reject that invitation.

Both the trial court and the Fifth District have already properly declined to stay the trial court's order. Mr. Westbrook respectfully requests this Court to do the same.

## **II. Analysis**

### **A. Procedural History Relating To The Advancement Orders.**

In February 2007, August 2007, and August 2008, the Appellants filed counterclaims against Mr. Westbrook based on actions that he allegedly took when he served as an officer of the corporate Defendants. The Defendants' respective Codes of Regulations provided that Mr. Westbrook was entitled to advancement of his legal fees and expenses spent in the defense of those counterclaims. Thus, Mr. Westbrook sought, directly from the Appellants, advancement of his fees and expenses incurred defending against the counterclaims. The Appellants refused. That led to the following sequence of events, none of which are in dispute:

- **August 28, 2007:** Mr. Westbrook moves for a hearing on an interim award of his legal fees and expenses spent defending against the Defendants' counterclaims filed in the Delaware and Franklin County, Ohio Courts of Common Pleas. (*See Motion Of William Westbrook For Hearing On Interim Award Of Legal Fees And Expenses* (the "Motion for Advancement").)
- **October 2, 2008:** The trial court enters the *Judgment Entry Granting The Plaintiff's Motion For Hearing On Interim Award Of Legal Fees And Expenses And Judgment Entry Granting Defendant Suhovecky's Motion For Partial Summary Judgment And Judgment Entry Setting Evidentiary Hearing On Advancement Of Litigation Expenses* (the "October Advancement Order"), which grants the Motion for Advancement and sets the requested hearing for November 5, 2008.

The trial court properly ruled that the Appellants' counterclaims were based upon actions that Mr. Westbrook allegedly took as an officer of the Defendants. (October Advancement Order at 11.) The trial court further held that the Defendants' Code of Regulations, at Sections 5.01 and 5.05, required the Defendants to advance Mr. Westbrook his attorneys fees and expenses for the defense of the counterclaims. (*Id.*)

Sections 5.01 and 5.05 of the Code of Regulations provide that any fees and expenses incurred by a director or officer in defending a civil proceeding brought "by reason of the fact" that he is or was serving as a director or officer of the corporation "shall be paid by the corporation in advance of the final disposition of such action" if the "officer or director shall first agree, in writing, to repay all amounts so paid in respect of any claim, issue or other matter asserted in such action, suit or proceeding in defense of which he shall not have been successful on the merits or otherwise," which Mr. Westbrook did. (October Advancement Order at 5-6 (emphasis supplied).)

- **November 5, 2008:** The trial court conducts the hearing on the amount of fees and expenses to be advanced.
- **December 10, 2008:** The trial court enters the *Judgment Entry Clarifying The Court's October 2, 2008 Judgment Entry And Judgment Entry Awarding Advancement Of Litigation Expenses To Westbrook*, directing Defendants to advance to Mr. Westbrook \$240,952.06, on or before January 12, 2009 (the "Order To Advance").
- **December 30, 2008:** The Defendants appeal the Order To Advance to the Delaware County Court of Appeals, Fifth Appellate District.
- **January 7, 2009:** The Defendants file in the trial court their *Motion To Stay Enforcement Of Judgment Entry Awarding Advancement Of Litigation Expenses To Plaintiff Westbrook* (the "Trial Court Motion To Stay").

- **January 12, 2009:** Nothing happens. The Defendants neither comply with the Order To Advance, nor obtain a stay from any Court of their obligation to obey that order.
- **February 12, 2009:** The trial court enters the *Judgment Entry Denying Defendants' Motion To Stay Enforcement Of Judgment Entry Awarding Advancement Of Litigation Expenses To Plaintiff Westbrook* (“Decision Denying Stay”), rejecting all of the Defendants’ arguments in their Trial Court Motion To Stay.
- **February 16, 2009:** Mr. Westbrook’s counsel writes to defense counsel, insisting upon advancement in light of this Court’s Decision Denying Stay. (*See* Correspondence from Scott A. Campbell to Quintin F. Lindsmith, dated February 16, 2009.) The Defendants never respond.
- **February 18, 2009:** The Defendants move the Delaware County Court of Appeals, Fifth Appellate District, to stay enforcement of the Order To Advance (the “Appeals Court Motion To Stay”).
- **April 13, 2009:** In Case Nos. 08-CAE-12-0078 and 08-CAE-12-0079, the Delaware County Court of Appeals, Fifth Appellate District, enters a Judgment Entry (a) dismissing Defendants’ appeal for lack of subject matter jurisdiction, and (b) dismissing as moot Defendants’ Appeals Court Motion To Stay, in light of the absence of subject matter jurisdiction.
- **April 30, 2009:** The trial court issues its *Judgment Entry Scheduling Show Cause Hearing*, in which the trial court ordered the Defendants to appear at a hearing on May 13, 2009 to show cause as to why they should not be held in contempt for failing to obey the Order To Advance.
- **Today:** Twenty months since his initial motion, and two years after the first counterclaim was asserted, the Defendants have not advanced Mr. Westbrook a single penny for the defense of the counterclaims.<sup>1</sup>

This Court should reject the Appellants’ latest attempt to further delay the advancement to which he is entitled.

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<sup>1</sup> In the interest of minimizing bulk, and because the facts are not disputed, Mr. Westbrook did not attach the numerous motions, decisions, and other documents referenced in this timeline. To the extent the Court would like to review these filings, all of them are available Delaware County Clerk’s website, at <http://www.delawarecountyclerk.org/pa.urd/pamw6500.display>. Alternatively, Mr. Westbrook will gladly provide them to this Court at its request.

**B. The Advancement Orders Are Not Final Appealable Orders.**

This Court should deny the motion to stay because, as the Fifth District properly held, the interlocutory orders from which the Appellants purport to appeal are not final, appealable orders. *Westbrook v. Swiatek* (Apr. 13, 2009), 5th Dist. App. Nos. 08CAE-12-0078 and 08CAE-12-0079.

In dismissing the Appellants' appeal, the Fifth District properly applied the case of *MD Acquisition, L.L.C. v. Myers*, 2007-Ohio-3521, in which the Tenth District Court of Appeals—in an identical situation—held that a trial court's order granting advancement of attorneys fees to an officer pursuant to corporate bylaws was not a final appealable order. *Id.* ¶ 14. Specifically, the appeals court held that the trial court's judgment "requiring advancement by appellants of [appellee's] litigation expenses in the underlying case is neither an order that affects a substantial right in the action and in effect determines the action nor an order granting a provisional remedy that prevents a subsequent judgment in the action in favor to the appealing party with respect to the provisional remedy." *Id.* ¶ 14.

Indeed, in the trial court's Order denying the Appellants' motion to stay, the court properly observed that, "in reviewing the case law provided by the parties in briefing the issue of advancement of litigation fees, it is the Court's position that the December 10, 2008 Judgment Entry Awarding Advancement of Litigation Expenses to Westbrook is not a final appealable order." The orders appealed from do not determine Mr. Westbrook's action and/or prevent a judgment in the Appellants' favor, and instead leave issues unresolved and contemplate that further action must be taken.

**C. Delaying Further Mr. Westbrook's Right To Advancement Is Inimical To The Strong Public Policy Behind Advancement Provisions.**

As the trial court properly explained, there are strong and compelling public policy reasons to enforce advancement provisions and require the *immediate* funding of litigation costs. (See October Advancement Order at 10.) Specifically, “[a]dvancement provides corporate officials with *immediate interim relief* from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings.” *Id.* (emphasis added) (citing to *Homestore, Inc. v. Tafeen* (Del. 2005), 888 A.2d 204, 211). Here, in February and August 2007, the Appellants filed counterclaims and amended counterclaims against Mr. Westbrook—counterclaims which are still pending (other than those counterclaims which the trial court has already properly dismissed). Although the trial court has held that Mr. Westbrook is entitled to advance payment of his attorneys fees in defending those counterclaims, and specifically ordered the Appellants to make such advancement by January 12, 2009, the Appellants have yet to advance Mr. Westbrook one penny of the several hundred thousand dollars which he has incurred defending those claims. The very purpose of advancement provisions is the up-front advancement of litigation costs.

Moreover, Mr. Westbrook agreed to repay any amounts advanced should it ultimately be determined that advancement was improper. (See October Advancement Order at 12 (“Westbrook executed an ‘Assurance of Repayment’ at that time, in which he agreed to repay all amounts paid to him pursuant to the terms provided in Section 5.05 in the Code of Regulations.”).) Thus, the Appellants are fully and adequately protected by Mr. Westbrook’s promise to repay any amounts advanced to him in the event of a judicial finding (in the form identified in the corporate bylaws) that he should be required to do so. Indeed, in their corporate bylaws, the Appellants specifically contemplated that defense expenses would be advanced

before the end of litigation, and that an advancement order might be subject to reversal; and they provided themselves with a remedy in that event (*i.e.*, the ability to enforce an assurance of repayment). The instant motion is another effort to renege on that commitment, vitiating the right altogether.

The case law which the Appellants cite in support of their stay request has no relation to a court's consideration of a stay of an order advancing attorneys' fees. They argue at considerable length that this Court can stay the order—which they have disobeyed for four months—without ever explaining why the Court should do so. In fact, courts have denied motions to stay advancement orders because of the very important public policy purpose which advancement promises serve. *See Homestore, Inc. v. Tafeen* (Del. Ch. 2005), 886 A.2d 502. In *Homestore*, the Delaware Chancery Court held that the plaintiff was entitled to the immediate payment of more than \$3.9 million pursuant to a corporate advancement provision. *Id.* at 503. The defendant appealed and filed a motion to stay the advancement order with the trial court, which motion the trial court promptly denied. *Id.* The defendant then applied to the appellate court for a stay. *Id.* The appeals court recognized that “to further delay its advancement obligations would be inimical to the public policy of . . . affording advancement” and denied the motion for a stay. *Id.* (emphasis added). The best solution was to allow the plaintiff “to claim the advancement that is due to him, and if on appeal the Supreme Court believes that he was not entitled to such monies, then he then be required to pay such monies back.” *Id.*; *see also United States v. Stein* (S.D.N.Y. 2006), 452 F. Supp.2d 230, 273 (“If a right to advancement of defense costs exists, the inherent nature of the right is to receive the funds as the defense costs are incurred. Postponement of determination whether such a right exists would render the right meaningless. By the time a decision were reached, the underlying proceeding would be over—

the occasion for advancing defense costs would have passed and its purpose would have been defeated.”).

A stay would effectively eviscerate Mr. Westbrook’s right to advancement and deprive him of litigation funds to which the trial court has found he is entitled under the Appellants’ corporate bylaws.

**D. The Appellants Have Never Even Offered To Post An Adequate Supersedeas Bond.**

As this Court explained in *State, ex rel. Ocasek v. Riley* (1978), 54 Ohio St.2d 488, 490, and as the Appellants themselves admit in their motion to stay (at 6), Ohio law requires them to post an “adequate” supersedeas bond. The Appellants have failed to post any bond whatsoever—either in the trial court, in the Fifth District, or in this Court. To date, the Appellants *have not even offered* to post an adequate bond. Instead, they have suggested that they supposedly have assets to pay the orders at the conclusion of their (improper) appeal; alternately, they have suggested that they will post a “nominal” bond.

This discussion of the bond and the Appellants’ incredible wealth, which discussion consumes most of their motion, misses the point entirely. Tellingly, the Appellants cite to no case anywhere in America where a court ordered a bond as a substitute for advancement. Here, the trial court properly recognized that *no* amount of a supersedeas bond is adequate, as any bond, no matter how high, would eviscerate the very purpose of Mr. Westbrook’s advancement right. By the time this Court ultimately rules, the remaining proceedings will likely be at an end. The occasion for advancing defense costs to Mr. Westbrook will have passed and its purpose will have been defeated.

Indeed, as explained in the *Homestore* decision, a supersedeas bond pending appeal of an advancement order is insufficient because a bond does not address the “irreparable harm to [the

plaintiff] because, by delaying payment, it would eliminate the value of advancement (as opposed to indemnification) altogether.” *Homestore, Inc.*, 888 A.2d at 505 (emphasis added).

The Appellants simply ignore this effect of a stay and wrongly contend that no supersedeas bond should be required because the Appellants have assets to pay the orders at the conclusion of their (improper) appeal. (Motion to Stay at 6-7.) That argument is ironic. The very objective of an advancement order is to provide for the up-front payment of litigation expenses; when a lawsuit is brought by the corporation itself, the advancement provision prevents the corporation from using its deep pockets to wear down corporate officers. *See Stifel Fin. Corp. v. Cochran* (Del. 2002), 809 A.2d 555, 561 (holding that courts should give “full effect” to indemnification provisions to prevent “a corporation from using its ‘deep pockets’ to wear down a former director, with a valid claim to indemnification, through expensive litigation”).

The Appellants ask this Court to consider their own financial assets—their deep pockets—as the reason why they should not be required to advance the fees. As the *Stifel* court explained, however, the very purpose of an advancement provision is to erase the competitive imbalance in favor of those with dramatically deeper pockets—not to perpetuate that competitive imbalance, as the Appellants ask this Court to do.

### **III. Conclusion**

Mr. Westbrook seeks only those rights promised to him under the clear language in the companies’ regulations—advancement of his litigation expenses, and as the trial court has already held. Granting a stay of the trial court’s advancement order would allow the Appellants to evade their own corporate bylaws. The Court should reject the Appellants’ motion to stay.

Respectfully submitted,



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O. Judson Scheaf, III (0040285)

Scott A. Campbell (0064974)

Michele L. Noble (0072756)

Gabe Roehrenbeck (0078231)

THOMPSON HINE LLP

41 South High Street, Suite 1700

Columbus, Ohio 43215-3435

Phone: 614.469.3200

Fax: 614.469.3361

Anthony M. Heald (0002095)

HEALD & LONG

125 North Sandusky Street

Delaware, Ohio 43015

Phone: 740.363.1369

Fax: 740.369.1616

*Attorneys for Appellee William Westbrook*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of May, 2009, a copy of the foregoing was served by regular U.S. Mail, postage pre-paid, upon the following:

Quintin Lindsmith  
Natalie Furniss  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
qlindsmith@bricker.com  
nfurniss@bricker.com

*Attorneys for Appellants*

Robert M. Kincaid, Jr.  
Rodger Eckelberry  
Baker & Hostetler  
65 East State Street  
Columbus, Ohio 43215

*Attorney for Michael Suhovecky*



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An Attorney for Appellee