

ORIGINAL

IN THE SUPREME COURT OF OHIO

<p>WILLIAM WESTBROOK,</p> <p style="padding-left: 40px;">Plaintiff-Appellee,</p> <p style="padding-left: 80px;">v.</p> <p>VALERIE SWIATEK, et al.,</p> <p style="padding-left: 40px;">Defendants-Appellants,</p>	<p>: : : : : : : : : : : :</p>	<p>Supreme Court Case No. 09-0828</p> <p>On Appeal from the Delaware County Court of Appeals, Fifth Appellate District</p> <p>Court of Appeals Case Nos. 08CAE12-0078 & 08CAE12-0079</p>
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**MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANTS VALERIE SWIATEK, VICTORIA BONNER,
DEBORAH BONNER, ABL GROUP, LTD., ALUM CREEK, INC.,
RENNOB, INC., AND WHITTINGTON, INC.**

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**STATEMENT OF WHY THIS CASE IS
OF PUBLIC AND GREAT GENERAL INTEREST**

What is a plaintiff to do when a trial court orders it to immediately pay \$80,000 in attorney fees to a defendant, even though (1) it is not a sanction, (2) the defendant never filed a counterclaim for attorney fees, (3) never filed a motion for attorney fees, (4) the court never conducted an evidentiary hearing or trial, (5) the court received no evidence, and (6) the court relied solely on an oral certification of defendant's counsel?

What is a defendant in another action to do when the trial court orders it to immediately pay plaintiff tens of thousands of dollars in attorney fees (again, not a sanction) incurred by the plaintiff in *prosecuting* claims against the defendant while the lawsuit is ongoing, essentially ordering the funding of plaintiff's lawsuit?

What is a defendant to do when a trial court issues a ruling on the merits of a claim against the defendant resulting in an award of over \$240,000 that the defendant is then ordered to pay immediately, but with no trial, no evidentiary hearing, no witnesses, no affidavits, no evidence, no experts, and no dispositive motion?

All three of these things happened in these consolidated cases. No Ohio court has ever done what the trial court did in this case. Worse yet, no party has ever suffered such rulings that denied them several "substantial rights" *and then* suffered a deprivation of its statutory right to appeal. But that is what happened here.

What the trial court did here was to issue a mid-lawsuit money judgment basically on request. There is no principled difference between what happened here and a litigant asking a trial judge, "Judge, I know I haven't filed a counterclaim in this lawsuit, but I think you should just order the plaintiff to pay me all my attorney fees in this lawsuit" or "Judge, please give me a money judgment against the opposing party in the amount I tell

you concerning just my past fees, even though some of those fees were incurred in my suing the opposing party.”

When a trial court grants such requests without even a modicum of due process and when an appellate court then refuses to hear an appeal from such rulings, the public has a great general interest in knowing whether this could actually happen without recourse.

This case is also one of public and great general interest because it involves corporate by-laws that grant an officer of a company a right to an advancement of ongoing legal fees and reimbursement of past legal fees when the officer is being sued. Payment of an officer’s defense costs by the officer’s employer is not a new concept in Ohio. But what is new is the growing trend of officers claiming a right to advancement or reimbursement of fees even *when the company itself is suing that officer* for misbehavior.

Indeed, there are only two very recent appellate decisions that touch upon such advancement or reimbursement of officers being sued by their own companies - the instant action and MD Acquisition, LLC v. Myers, 173 Ohio App.3d 247, 2007-Ohio-3521 (Tenth District). This action involves an award of only past legal fees, “reimbursement.” In contrast, MD Acquisition dealt only with a true “advancement” order that the plaintiff start advancing attorney fees on a going forward basis.

The Fifth District’s ruling in this case has created a confusing legal landscape in this area. Where the Tenth District determined that an order for advancement is a “provisional remedy,” the Fifth District has ruled that it is not. Where the Tenth District determined that the advancement order in that case was not ripe for appeal because the trial court had *not* determined the amount of attorney fees to be advanced and had *not* established the procedures for advancement, the Fifth District determined that the trial court’s fee award was likewise not ripe for appeal, even though the court *had* determined the specific amount to be paid and *had* established the procedures for payment (by a date certain).

Indeed, if there are going to be more of these types of claims in Ohio courts, then now is the time to clarify the law so that the appellate courts give clear direction to the trial courts as to how these processes are to be handled.

STATEMENT OF THE CASE AND FACTS

A. INTRODUCTION

On December 10, 2008, the trial court awarded Appellee William Westbrook \$227,975.75 in attorney fees and \$12,976.31 in expenses (the “Fee Award”). The award was not issued in response to a motion for summary judgment. And while it was styled as an award for “advancement” of litigation expenses, the judgment entry did not actually order any “advancement” of fees to be made in the future. Rather, it only ordered a reimbursement of fees and expenses incurred by Westbrook during a past twenty-month period. The Court ordered that “Defendants shall pay these amounts to the Plaintiff by January 12, 2009.”

The court issued this award with no evidentiary hearing, no evidence, no motion for summary judgment, and without even a claim asserted (in the Whittington action) for fees.

B. THE CONSOLIDATED PROCEEDINGS

The Fee Award was issued in a consolidated action. While these actions were consolidated, they were “not merged into a single case but maintain[ed] their original identity.”¹ As will be discussed below, this is important.

1. The “Westbrook Action”

The action styled Westbrook v. Swiatek, et al.² (the “Westbrook Action”) was commenced by Appellee Westbrook in August 2006. Westbrook ultimately asserted fifteen counts concerning his claim to be an “oral” partner of the Appellants as to \$7 million in

¹ Judgment Entries of October 10, 2008, A-20.

² Trial Court Case No. 06 CVH-08-683.

commercial real estate owned by Appellants. He seeks the appointment of a receiver and other remedies relating to those properties. He only asserts those claims as a “partner” and not as a former officer of any of the corporate Defendants.

2. The “Whittington Action”

In August 2007, some of the companies that were named as defendants in the Westbrook Action filed a complaint against Michael Suhovecky and Westbrook in the Court of Common Pleas of Franklin County³ (the “Whittington Action”). That action had nothing to do with the real estate projects at issue in the Westbrook Action, but related to a severance agreement with Suhovecky. The complaint also alleged that while Suhovecky and Westbrook were both officers of the Appellant Companies, they concealed from the senior management certain information that caused damage to the companies.

In response to the filing of the Whittington Action, Westbrook filed a motion to dismiss or, in the alternative, to transfer venue. The Franklin County Court ordered that venue be transferred to Delaware County. Thereafter, Westbrook moved to consolidate the two actions and such motion was granted on July 21, 2008.

3. The Issue Of Advancement In The Whittington Action

The by-laws of the Appellant Companies have provisions governing when the companies will pay the defense costs of its officers when they are sued. Under certain circumstances, the by-laws allow for (1) “advancement” of defense costs on an ongoing basis while the lawsuit is pending, and (2) reimbursement of past defense costs.

Since the claims against Suhovecky included claims as an officer of the Bonner Companies, Suhovecky filed a counterclaim for advancement of legal fees. Shortly

³ Whittington, Inc., et al. v. William Westbrook, et al., Case No. 07-CV-010524.

thereafter, on October 23, 2007, he filed a motion for partial summary judgment claiming an immediate right to advancement of fees as the case was ongoing.

In contrast, Westbrook *did not file* a counterclaim for advancement in the Whittington Action. He only filed an answer. And at no time before or after consolidation did he file a motion in the Whittington Action for payment of fees. This is important because the trial court's Fee Award included an award of approximately \$80,000 in fees incurred by Westbrook solely in the Whittington Action.

4. The Issue Of Reimbursement In The Westbrook Action

On August 8, 2007, Defendants filed a first amended counterclaim against Westbrook that asserted four claims. Only one claim was related to his past position as an officer. Westbrook then filed an amended complaint in which he asserted claims for advancement and indemnification of legal fees pursuant to the by-laws of three counterclaimant companies. Instead of filing a motion for partial summary judgment for advancement of fees (as Suhovecky had done in Whittington), on August 28, 2007, Westbrook filed a "Motion for Hearing on Interim Award of Legal Fees and Expenses." Appellants opposed the motion, which remained pending for fourteen months.

To recap, by October 2008, the Whittington and Westbrook Actions had been consolidated, but "not merged into a single case." In Whittington, Westbrook had never asserted a counterclaim for advancement or reimbursement of fees and never filed a motion for such. In Westbrook, Westbrook filed an amended complaint that included a claim for advancement and reimbursement of fees, but never filed a motion for summary judgment. Rather, he only filed a "Motion for Hearing on Interim Award of Legal Fees."

5. Court Grants Westbrook's Motion

On October 2, 2008, the trial court granted Westbrook's "Motion for Hearing on Interim Award of Legal Fees and Expenses." The court also granted Suhovecky's partial

motion “for summary judgment” in the Whittington Action. (Appellants later settled with Suhovecky.) It then scheduled an “evidentiary hearing.” Importantly, the court noted that Westbrook had only requested attorney fees “in his *defense* of the *counterclaim* against him.”⁴ On October 15, 2008, Westbrook’s counsel served the fee statements as to which he sought reimbursement. They totaled \$708,000. They presented two big problems.

First, the statements had blended entries related to time incurred in the Whittington Action in which Westbrook had never asserted a claim for fees. Second, almost none of the other entries related to “defense.” Rather, they almost entirely related to Westbrook’s offensive actions against Appellants, including efforts to have a receiver appointed. As to this latter problem, Westbrook was told by the court on November 3, 2008, that he could not seek recovery of fees relating to his efforts to secure a receiver.

Two days later, at the “evidentiary hearing,” Westbrook’s counsel served revised exhibits that reduced the attorney fees to \$227,975.75. Indicating that it did not want to review the entire fee application, the court stated:

All I want you [Westbrook’s counsel] to do is stand up and say, in good faith, that during the time period we’re talking about, that they’re all related to the defense of the claim, or go spend some time and highlight all the ones that you claim are.

Westbrook’s counsel then explained generally his process of editing the fee statements and concluded, “And based upon that, your Honor, I can certify to the Court in good faith, that Mr. Westbrook’s fees *for purely defensive measures* in this case amount to \$227,975.75.”

After further discussion, the court stated:

Okay. Alright, and I just can’t see why we need to have an expert come in and talk about the reasonableness of the fees. It makes absolutely no sense to me and I really don’t understand why we need to waste so much time and money to depose him, but, obviously, the hourly rate, you’re not

⁴ October 2 Decision, A-11-12. (Emphasis added.)

going to argue about that. The argument is the amount of time spent on each task, I assume, right?

Defendants' counsel then made a number of objections to the proceedings, including the court's lack of jurisdiction to award fees in the Whittington Action where no claim had been raised. He also objected that the remaining time entries still included numerous offensive entries. While Westbrook brought an expert with him, the court asked:

So what's your opinion on the necessity of having Mr. McDonald [Westbrook's fee expert] testify? ... Do you feel that Mr. McDonald's testimony is necessary, number one?

Mr. Scheaf responded, "I don't feel that it's necessary." He added, "I think my certification, in good faith, to the court should be the end of the debate." The court concluded:

Mr. Scheaf has already stood up and said these are all in good faith bills as a result of defending the action as an officer and they're reasonable and they're necessary and that's all I need. I don't need a third person telling me, especially in a situation on the advancement on the fees.

Appellants' counsel pled with the court, "At some point, we got to have a little due process over this." But no testimony was offered or taken.

Defendants' counsel requested the opportunity to have time to review the "scaled-down" fee statement and proposed that he would color code the entries based upon the nature of the objections, *e.g.*, one color indicating Whittington time; another color indicating "offensive" work. The court accepted this proposal and indicated that it would then set another hearing. But no other hearing was held.

Importantly, at the hearing of November 5, the court limited the period of recoverable fees from February 23, 2007 (when the Defendants' original counterclaim was filed) to October 31, 2008, by which time all officer-related claims against Westbrook had been dismissed. By the court cutting off future fees, this was no longer an "advancement" proceeding, but only a special proceeding for "reimbursement" of past legal fees. As will be discussed below, this is important to the jurisdictional issue.

On November 12, 2008, Defendants filed a brief in response to Westbrook's revised fee application, arguing (1) that the court had no jurisdiction to award fees in Whittington where Westbrook had not commenced a civil action for such fees, (2) that Westbrook had never filed a motion for summary judgment in the Westbrook Action, (3) that the court could not award "advancement" of legal fees where there were no longer any claims pending relating to Westbrook's officer position, and (4) that therefore counsel's oral representations were legally meaningless.⁵

The court issued a decision on December 10, 2008, and accepted none of Defendants' objections:

Plaintiff's counsel has certified to the Court that the fees incurred in the defense of the counterclaim total \$227,975.75, and the expenses incurred in defense of the counterclaim total 12,976.31. Based upon the case law cited by the parties, the Court determines that a certification from counsel that the fees and expenses requested were incurred *in defending the counterclaims* is sufficient for the Court to award advancement of reasonable fees and expenses. (Emphasis added.)

The court then ordered Defendants to "pay these amounts [totaling \$240,952] to the Plaintiff by January 12, 2009." (Underlined date in original.)

On December 30, 2008, Defendants filed a notice of appeal from the trial court's judgment entry of December 10, 2008. On January 30, 2009, Appellee Westbrook filed a motion to dismiss which was opposed by Appellants by memorandum filed February 19, 2009. On April 13, 2009, the Fifth District issued a judgment entry dismissing the appeal.

⁵ They also pointed out that most of the remaining time entries were devoted to (1) the Whittington Action, (2) the receivership appeal, e.g., "continue drafting and editing Mr. Westbrook's motion to dismiss appeal," (3) a new dispute that erupted between the parties in September 2007, long after Westbrook stopped being an officer, and (4) numerous entries that were clearly for offensive work, e.g., "revise and finalize first amended complaint."

Its four-paragraph ruling made only one legal finding: “We find the issue of attorneys fees and the remainder of the case are intertwined and not ancillary.”⁶

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

First Proposition Of Law: Where a trial court issues an order that is essentially a gratuitous order awarding a defendant attorney fees where no counterclaim was asserted by that defendant, where no motion for fees was filed by the defendant, and with no trial, no evidentiary hearing, no testimony, and no evidence, such an order is clearly a final appealable order “that affects a substantial right made in a special proceeding” pursuant to R.C. § 2505.02(B)(2) and is also a “provisional remedy” that meets the requirements of R.C. § 2505.02(B)(4).

This proposition of law concerns what Appellants will call the “Whittington side” of the Fee Award, concerning the Whittington time entries. Remember that Westbrook filed his motion for an award of fees only in the Westbrook Action and long before the two actions were consolidated. Remember also that the trial court had expressly held that while the two cases were consolidated, they kept “their original identity.” Yet, Westbrook never modified his motion after consolidation. And where he had asserted a claim for fees in his amended complaint in the Westbrook Action, he never asserted a counterclaim for fees in the Whittington Action. Westbrook nonetheless included in his subsequent fee application blended time entries for work done solely in the Whittington Action, totaling approximately \$80,000.

Defendants repeatedly objected to Whittington time being included, pointing out that a court exceeds its jurisdiction when it enters a money judgment with no claim

⁶ On April 27, 2009, Westbrook filed a motion to show cause for contempt concerning Appellants’ non-payment of the Fee Award. Appellants filed their response on May 12, 2009, pointing out that a money judgment is not enforceable by contempt and that the correct method of enforcement is dismissal of all remaining counterclaims (if the order is valid to begin with). On May 15, 2009, the trial court found Appellants to be in contempt, and imposed self-executing fines of \$100,000 and incarceration for any failure to cure. That finding of contempt has been appealed.

pending. But the court not only included the \$80,000 in Whittington fees in the \$240,000 award, it also ordered that it be paid immediately. As there was no claim asserted by Westbrook in the Whittington Action, so then there was no disposition of a claim. As there was no disposition of a claim, there could be no Civil Rule 54(B) certification.

Yet, that part of the Fee Award that awarded Whittington time, the “Whittington side,” was clearly a “final order” under R.C. § 2505.02(B)(2), because it was “an order that affects a substantial right made in a special proceeding.” A “substantial right” is defined as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles the person to enforce or protect.” R.C. § 2505.02(B)(1).

An immediate taking of property without *any* due process is a denial of substantial rights under both Due Process Clauses of the United States and Ohio Constitutions. In Re: Nineteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litigation (C.A.1, 1992), 982 F.2d 603. Once the trial court elected to convene a fee hearing, “the hearing format itself had to be fair” and “the process must contain at least the procedural minima that the Due Process Clause requires.” Id. at 614-615.

It is also a denial of rights under Ohio Civil Rules 2 (there is one form of action; a civil action), 3 (claims must be brought in a civil action), 13 (governing counterclaims), and 56 (governing summary judgment). It is also a denial of rights under the common law of Ohio. First Bank of Marietta v. Roslovic & Partners, Inc. (2000), 138 Ohio App.3d 533; 545 (“[A] determination that the attorney fees are reasonable ... can only be made through the evidentiary process.”); Brannon & Associates v. Barnard (Dec. 31, 1997), 2d Dist. App. No. 16693, 1997 Ohio App. LEXIS 5935, at *7 (“... expert testimony is required to establish the reasonableness of the fee.”); Perry v. LTD Steel Company (1992), 84 Ohio App.3d 670; 681 (finding an attorney fee award without evidentiary hearing “was insufficient”), and Sadler v. Richmond Heights General Hospital (May 2, 1991), 8th Dist. App. No. 59483, 1991 Ohio

App. LEXIS 1970, at *4 (“the trial court’s failure to conduct a hearing regarding the issue of reasonable attorney fees is sufficient grounds to reverse” the fee award).

And the denial of these substantial rights was clearly made in a special proceeding based upon R.C. § 1701.13, which governs when and how corporations can make advancements or reimbursements of the attorney fees of officers.

There is likewise no question that the Fee Award is a “provisional remedy” under R.C. 2505.02(A)(3)), as it is “a proceeding ancillary to an action.” Community First Bank & Trust v. Dafoe, 108 Ohio St.3d 472, 2006-Ohio-1503, ¶ 26 (defining “ancillary” proceedings as “separate procedures tied to a main action, acting in furtherance of the main action, but with their own lives.”) Even the MD Acquisition court determined that such a fee award is a provisional remedy. (In apparent conflict and with no explanation, the Fifth District held that “...the issue of attorney fees and the remainder of the case are intertwined and not ancillary.” By ruling that the award was “not ancillary,” it was presumably ruling that the Fee Award was not a “provisional remedy.”)

A “provisional remedy” is appealable when it meets two “additional requirements” of R.C. 2505.02(B)(4)(a) and (b). As to the first requirement, the Fee Award “in effect determines the action with respect to the provisional remedy and prevents a judgment in the action favoring the appealing party with respect to the provisional remedy.” R.C. 2505.02(B)(4)(a). That is exactly what we have here. Unlike in MD Acquisition where the amount of fees had not been determined and the conditions of payment had not been set, here, the final amount has been determined and ordered paid. As such, the provisional remedy has been determined.

As to the second requirement, the Fee Award does not afford “a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4)(b). Just as the issuance of a wrongful

injunction is immediately appealable because of the daily irreparable harm being suffered, so the order for a seizure of property without any due process is daily irreparable harm that no later proceeding can undo.

In summary, the "Whittington side" of the Fee Award was clearly appealable.

Second Proposition Of Law: Where a trial court labels an award of attorney fees as an "advancement," but where the substance of what is before the trial court can only be "reimbursement" of past legal fees, the character of which cannot be changed by whatever label is put on them by the trial court, and where the trial court issues a substantive order that represents a final determination of past attorney fees to be paid and orders that those fees be paid with no dispositive motion pending, with no evidentiary hearing, with no evidence, and with no testimony, such an order is a "final order" from which an appeal can be taken.

This proposition of law concerns what Appellants will call the "Westbrook side" of the Fee Award involving the Westbrook time entries. The threshold problem here is one of the trial court's own making. Remember that Westbrook filed his motion for fees in August 2007. At that time, he was seeking true "advancement" of legal fees to be paid on a going forward basis. The trial court elected not to issue any ruling on Westbrook's motion until October 2, 2008, when it granted Westbrook's motion. But by that time, the officer-based claim in the counterclaim against Westbrook had been dropped two months earlier. This meant that the only fees that Westbrook could now seek to recover were past fees, as there were no longer any officer-related claims pending against him.

Ignoring this reality, Westbrook, in all of his subsequent pleadings including his filings in the Fifth District, maintained a pretend position that he was still seeking "advancement." The trial court willingly accepted such pretending by styling the Fee Award as an "advancement" of fees and acting as if the summary procedures that normally apply to true "advancement" still applied. Here is the problem with that.

It is undisputed that the legal term “advancement” means paying *ongoing fees in advance*. Gary v. Beazer Homes USA, Inc. (June 11, 2008), Del. Ch. No. 3537-VCS, 2008 Del. Ch. LEXIS 72 (describing advancement of fees as a “forward-looking obligation” while reimbursement is a backward-looking provision). An order for payment of only past fees that have already been incurred and no future fees is one for “reimbursement.” Id.

In a true case of “advancement,” it is common that a court will set up a summary procedure for payment of future fees on a monthly basis, so that the court does not have to have an evidentiary fee hearing every month. The process requires that the officer’s counsel submits the fee statement along with an affidavit of counsel that the fees were incurred within the scope of the defense of the officer. See, e.g., Fasciana v. Elec. Data Sys. Corp. (Del.Ch. 2003), 829 A.2d 160, 177 (“[I]n order to ensure the integrity of this process, Fasciana’s attorneys shall provide *a sworn affidavit* certifying... that the identified litigation expenses *relate solely to defense* activity... .”) Westbrook’s own counsel described this procedure to the trial court while pretending the matter still dealt with advancement:

On a going forward basis, and the way the case law really reads and we cited to in the brief, this is supposed to work that you’re [the court] not a billing monitor; we’re not going *to come back here monthly* with cross-examining lawyers. Only to certify to you, in good faith, that this is what we have incurred in defense of these claims. ... Otherwise, *we’re going to be here every month* doing this exercise and that’s not what the law is. (November 5 Trspt., p. 15; emphasis added.)

But these summary procedures *are never* employed for a *one-time* order of reimbursement of only *past* fees. To do so would make no sense. There is no need “to come back here monthly” for a one-time award of past fees.

When the only thing before the court is a final determination of past fees and with future fees cut off by the court’s own order, the only procedure to follow is the one required

for any final determination of reasonable attorney fees: An evidentiary hearing and expert testimony. First Bank of Marietta, supra, Brannon & Associates, supra, and Sadler, supra.

But in this case, the court used in a “reimbursement” proceeding the summary procedures applicable only to an “advancement” proceeding. It ordered immediate reimbursement of almost a quarter million dollars (1) without an evidentiary hearing, (2) without expert testimony, (3) without evidence, (4) without a motion for summary judgment, and (5) relying solely upon an “oral certification” of counsel. (Even in “advancement” proceedings, courts require an affidavit of counsel, not an “oral” representation.)

If the court had held the required hearing, it would have learned the fees applied for included numerous entries for offensive efforts, such as “drafting and editing Mr. Westbrook’s motion to dismiss appeal,” “revised and finalized First Amended Complaint,” and “Conferred ... regarding making conversion claim, for which punitive damages would be available.” As it stands, the court has ordered the Appellants to pay thousands of dollars of fees incurred by Westbrook for the *prosecution* of his claims against them.

And by doing this, the court denied Appellants the same substantial rights described above in the same special proceeding described above. The court’s Fee Award as to the “Westbrook side” of the order was likewise a “final order” pursuant to R.C. § 2505.02(B)(2).

For the same reasons cited above, the “Westbrook side” of the Fee Award is likewise a provisional remedy that is appealable pursuant to R.C. § 2505.02(B)(4)(a) and (b). It is a “provisional remedy” that “in effect determines the action with respect to the provisional remedy and prevents a judgment in the action favoring the appealing party with respect to the provisional remedy.” R.C. 2505.02(B)(4)(a). It likewise does not afford “a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.” R.C. 2505.02(B)(4)(b).

As to this last prong, in addition to the daily denial of due process, there is also the fact that the Fee Award orders that monies be paid *now*, including fees incurred in the *prosecution* of the claims against Appellants. This essentially requires Appellants to provide funding for Westbrook's ongoing prosecution of claims against Appellants, handing him a resource that he can use against the Appellants *now*. That cannot be changed later with a reversal; he will have already used that resource against the Appellants.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court accept jurisdiction.

Respectfully Submitted,



Quintin F. Lindsmith (0018327)

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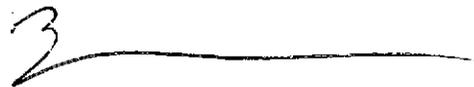
Counsel for Appellants

CERTIFICATE OF SERVICE

I do hereby certify that a true copy of the foregoing document was served, via regular U.S. Mail, this 28th day of May, 2009, upon:

O. Judson Scheaf, Esq.
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Quintin F. Lindsmith (0018327)

APPENDIX

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

WILLIAM WESTBROOK,

Plaintiff,

VS.

VALERIE SWIATEK, et al.,

Defendants.

:
:
:
:
:

Case No. 06 CV H 08 0683

JUDGE EVERETT H. KRUEGER

COMMON PLEAS COURT
DELAWARE COUNTY OHIO
FILED
2008 OCT -2 AM 11:36
JAN ANTONOPLOS
CLERK

**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**

This matter is before the Court upon the Plaintiff's, William Westbrook ("Westbrook"), Motion for Hearing on Interim Award of Legal Fees, filed on August 28, 2007. The Defendants, Alum Creek, Inc., Rennob, Inc., and Whittington, Inc. ("Corporate Defendants") filed a memorandum in opposition on September 14, 2007. Westbrook filed a reply thereto on September 25, 2007. On October 16, 2007, the Court deferred ruling on Westbrook's Motion for Hearing on Interim Award of Legal Fees and Expenses until the Fifth District Court of Appeals rendered its decision on the appeal from the Court's orders appointing a receiver.

Also before the Court is the Defendant's, Michael Suhovecky ("Suhovecky"), Motion for Partial Summary Judgment on Counts I and II of his Counterclaim seeking the advancement of litigation expenses, filed on October 23, 2007. Suhovecky's motion was filed in the Franklin County Common Pleas Court before the *Whittington, Inc., et al. v. Westbrook, et al.* case was transferred to the Delaware County Common Pleas Court and consolidated with the *Westbrook v. Swiatek, et al.* case. The Corporate Defendants filed a

memorandum in opposition on November 9, 2007. Suhovecky filed a reply thereto on November 16, 2007.

On July 23, 2008, the Court set Westbrook's and Suhovecky's motions for non-oral hearing on August 6, 2008. None of the parties filed additional documents for the Court's review by this deadline. However, on September 26, 2008, Suhovecky filed a Notice of Supplemental Authority in Support of Motion for Partial Summary Judgment on Claim for Advancement. On the same day, the Corporate Defendants filed a memorandum in response to the supplemental authority. Since these documents were filed after the August 6, 2008 non-oral hearing date, the Court will not consider the supplemental authority or the memorandum in response in its determination of the motions. For the reasons that follow, the Court grants Westbrook's Motion for Hearing on Interim Award of Legal Fees and Expenses and grants Suhovecky's Motion for Partial Summary Judgment.

I. Background Information

Westbrook is a former officer of the Corporate Defendants. Westbrook filed a complaint against the Defendants on August 1, 2006. Westbrook filed a first amended complaint on August 9, 2007, and a second amended complaint on February 12, 2008. The Defendants filed a counterclaim against Westbrook on February 23, 2007. The Defendants filed a first amended counterclaim on August 8, 2007, and a second amended counterclaim on August 12, 2008. In their counterclaims, the Defendants allege breach of contract and breach of fiduciary duty. The Corporate Defendants allege that Westbrook breached the provisions of the Memo of Understanding relating to "sour deals." In addition, the Corporate Defendants allege that Westbrook breached his fiduciary duty to the purported partnership by failing to perform his obligations as Project Manager to assure that the contingencies in the contract with Dominion Homes would be met and by taking action to cause the collapse of the sale of property to Dominion Homes.

On August 8, 2007, the Corporate Defendants filed a complaint in the Franklin County Common Pleas Court against Westbrook and Suhovecky. Suhovecky is also a former officer of the Corporate Defendants. In their complaint, which has been re-classified as a counterclaim in the instant action, the Corporate Defendants allege fraud against Westbrook and Suhovecky; breach of contract and fraud in the inducement against Suhovecky; and breach of fiduciary duty against Westbrook. The Corporate Defendants claim that Westbrook and Suhovecky each had an affirmative duty to disclose to the Corporate Defendants material information that would affect the financial condition of the corporations, but that Westbrook and Suhovecky concealed material facts from the Corporate Defendants for personal gain.

Suhovecky filed a counterclaim against the Corporate Defendants on September 19, 2007, seeking a declaratory judgment that the Corporate Defendants are obligated under Article Five of the Code of Regulations to provide indemnification and immediate and ongoing advancement of litigation expenses to Suhovecky. This matter is now before the Court upon Westbrook's Motion for Hearing on Interim Award of Legal Fees and Expenses, filed on August 28, 2007, and Suhovecky's Motion for Partial Summary Judgment, filed on October 23, 2007.

II. Standard of Review

The construction and interpretation of the bylaws is a question of law for this Court. *Gentile v. SinglePoint Financial, Inc.* (2001), 788 A.2d 111, 113. Moreover, the determination of whether a corporate official is entitled to advancement of attorneys' fees is often decided as a matter of law based upon motion practice. *DeLucca v. KKAT Management, LLC* (Jan. 23, 2006), Del. Ch. No. Civ.A. 1384-N, 2006 WL 224058.

III. Law and Analysis

Both Westbrook and Suhovecky argue that they are entitled to advancement of litigation expenses pursuant to Article Five of the Codes of Regulations of the Corporate Defendants. The codes of regulations of each of the Corporate Defendants – Alum Creek, Inc., Rennob, Inc., and Whittington, Inc. – are identical as to Article Five. Westbrook and Suhovecky rely on sections 5.01 and 5.05 of Article Five to support their arguments that they are entitled to advancement of litigation expenses.

The Corporate Defendants argue that the codes of regulations are modeled on R.C. 1701.13(E), which does not provide for advancement of litigation expenses to Westbrook and Suhovecky. In addition, the Corporate Defendants argue that the codes of regulations expressly disallow advancement of expenses where the corporation itself is suing the officer.

Article Five of the Codes of Regulations governs indemnification and insurance. Westbrook and Suhovecky contend that Sections 5.01 and 5.05 of the Corporate Defendants' codes of regulations mandate advancement of litigation expenses to any officer or director who is sued for action taken in official corporate capacity.

Westbrook and Suhovecky argue that Section 5.01 provides for indemnification of litigation expenses even when the corporation files the suit. Section 5.01 addresses indemnification, providing:

The corporation shall indemnify any officer or director of the corporation who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (including, without limitation, any action threatened or instituted by or in the right of the corporation), by reason of the fact that he is or was a director, officer, employee, agent or volunteer of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, agent or volunteer of another corporation (domestic or foreign, nonprofit or for profit),

limited liability company, partnership, joint venture, trust or other enterprise, against expenses (including, without limitation, attorneys' fees, filing fees, court reporters' fees and transcript costs), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if his act or omission giving rise to any claim for indemnification under this Section 5.01 was not occasioned by his intent to cause injury to the corporation or by his reckless disregard for the best interests of the corporation, and in respect of any criminal action or proceeding, he had no reasonable cause to believe his conduct was unlawful. It shall be presumed that no act or omission of a person claiming indemnification under this Section 5.01 that gives rise to such claim was occasioned by an intent to cause injury to the corporation or by a reckless disregard for the best interests of the corporation and, in respect of any criminal matter, that such person had no reasonable cause to believe his conduct was unlawful; the presumption recited in this Section 5.01 can be rebutted only by clear and convincing evidence, and the termination of any action, suit or proceeding by judgment, order, settlement or conviction, or upon a plea of nolo contendere or its equivalent, shall, not, of itself, rebut such presumption.

This section requires the Corporate Defendants to indemnify any officer or director for litigation expenses when the officer or director is sued for activities undertaken while in his corporate capacity. Westbrook and Suhovecky argue that they have been sued for alleged actions they took while in their corporate representative capacities. The Corporate Defendants admit that Westbrook and Suhovecky were "at all relevant times" corporate officers. However, the Corporate Defendants argue that Section 5.01 contains general indemnification provisions modeled after R.C. 1701.13(E)(1) and applies to circumstances other than when the corporation is suing an officer.

Section 5.05 provides for payment of litigation expenses in advance of final disposition of the lawsuit. Section 5.05 provides:

The provisions of Section 1701.13(E)(5)(a) of the Ohio Revised Code do not apply to the corporation. Expenses (including, without limitation, attorneys' fees, filing fees, court reporters' fees and transcript costs) incurred in defending any action, suit or proceeding referred to in Section 5.01 shall be paid by the

corporation in advance of the final disposition of such action, suit or proceeding to or on behalf of the officer or director promptly as such expenses are incurred by him, but only if such 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 if it is proved by clear and convincing evidence in a court of competent jurisdiction that, in respect of any such claim, issue or other matter, his relevant action or failure to act was occasioned by his deliberate intent to cause injury to the corporation or his reckless disregard for the best interests of the corporation, unless, and only to the extent that, the Court of Common Pleas of Delaware County, Ohio or the court in which such action or suit was brought shall determine upon application that, despite such determination, and in view of all the circumstances, he is fairly and reasonably entitled to all or part of such indemnification.

This section requires the Corporate Defendants to advance attorneys' fees, filing fees, court reporters' fees and transcript costs as they are incurred by the former officer or director, notwithstanding the final disposition of the lawsuit.

The Corporate Defendants argue that Section 5.05 only concerns advancement for expenses "referred to in Section 5.01." The Corporate Defendants argue that this section plainly does not apply to claims referred to in Section 5.02, which they argue is the section governing this action since the Corporate Defendants have sued former officers of the corporations. Section 5.02 addresses court-approved indemnification, providing:

Anything contained in the Regulations or elsewhere to the contrary notwithstanding:

(A) the corporation shall not indemnify any officer or director of the corporation who was a party to any completed action or suit instituted by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee, agent or volunteer of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, agent or volunteer of another corporation (domestic or foreign, nonprofit or for profit), limited liability company, partnership, joint venture, trust or other enterprise, in respect of any claim, issue or matter asserted in such action or suit as to

which he shall have been adjudged to be liable for an act or omission occasioned by his deliberate intent to cause injury to the corporation or by his reckless disregard for the best interests of the corporation, unless and only to the extent that the Court of Common Pleas of Delaware County, Ohio or the court in which such action or suit was brought shall determine upon application that, despite such adjudication of liability, and in view of all the circumstances of the case, he is fairly and reasonably entitled to such indemnity as such Court of Common Pleas or such other court shall deem proper; and

(B) the corporation shall make any such unpaid indemnification as is determined by a court to be proper as contemplated by this Section 5.02.

The Corporate Defendants argue that Section 5.02 plainly states that where the corporation itself sues a former officer, the corporation is not obligated to pay the officer's attorneys' fees to help him defend against the corporation. The Corporate Defendants also argue that no other section of the bylaws governs the circumstances where the corporation is suing one of its former officers. Westbrook and Suhovecky argue that Section 5.02 does not bar their claims for advancement of litigation expenses because this section applies only when there has been a final judgment against a corporate officer or director finding that the officer or director either intended to harm the corporation or did so through reckless disregard for the corporation's best interests.

The Corporate Defendants' reliance on Section 5.02 is misplaced since this section only applies after there has been a judgment. Section 5.02 bars indemnification only after an officer or director has been adjudged liable, although the Court may still deem indemnification proper. Since there has not been a final judgment against Westbrook or Suhovecky, Section 5.02 does not apply.

In contrast to Section 5.02, Section 5.01 provides for indemnification of any officer who was or is a party to a pending action by reason of the fact that he is or was a director, officer, or employee. The language of Section 5.01 includes, "without limitation, any action

threatened or instituted by or in the right of the corporation.” Section 5.05 states that expenses “incurred in defending any action, suit or proceeding referred to in Section 5.01 shall be paid by the corporation in advance of the final disposition of such action.” Since the Corporate Defendants’ action is a suit “referred to in Section 5.01,” advancement of fees and expenses is mandatory under the codes of regulations.

The Corporate Defendants also argue that Ohio law does not allow for advancement when the corporation is suing an officer. Article Five of the Code of Regulations is modeled after, but is not identical to, R.C. 1701.13(E), which governs indemnification and advancement of fees by the corporation. Regarding advancement, R.C. 1701.13(E)(5) provides:

(a) Unless at the time of a director’s act or omission that is the subject of an action, suit, or proceeding referred to in division (E)(1) or (2) of this section, the articles or the regulations of a corporation state, by specific reference to this division, that the provisions of this division do not apply to the corporation and unless the only liability asserted against a director in an action, suit, or proceeding referred to in division (E)(1) or (2) of this section is pursuant to section 1701.95 of the Revised Code, expenses, including attorney’s fees, incurred by a director in defending the action, suit, or proceeding shall be paid by the corporation as they are incurred, in advance of the final disposition of the action, suit, or proceeding, upon receipt of an undertaking by or on behalf of the director in which he agrees to do both of the following:

(i) Repay such amount if it is proved by clear and convincing evidence in a court of competent jurisdiction that his action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation;

(ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding.

(b) Expenses, including attorney’s fees, incurred by a director, trustee, officer, employee, member, manager, or agent in defending any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, may be paid by the corporation as

they are incurred, in advance of the final disposition of the action, suit, or proceeding, as authorized by the directors in the specific case, upon receipt of an undertaking by or on behalf of the director, trustee, officer, employee, member, manager, or agent to repay such amount, if it ultimately is determined that he is not entitled to be indemnified by the corporation.

In this case, however, Westbrook and Suhovecky are claiming a right to advancement under the corporations' codes of regulations, and not under R.C. 1701.13(E). The codes of regulations do not include the same requirement that a director "[r]easonably cooperate with the corporation concerning the action, suit or proceeding" that is contained in R.C. 1701.13(e)(5)(a)(ii).

The Corporate Defendants argue that R.C. 1701.13(E)(5) allows advancement unless the regulations of the corporation state that the provisions of the division do not apply. The Corporate Defendants submit that the codes of regulations state that the provisions of R.C. 1701.13(e)(5)(a) do not apply. Therefore, the Corporate Defendants contend that the codes of regulations do not provide for advancement of litigation expenses to Westbrook and Suhovecky.

It is clear that the codes of regulations provide that the provisions of R.C. 1701.13(E)(5)(a) do not apply. However, the terms of the codes of regulations provide for advancement of litigation expenses nonetheless. Moreover, the codes of regulations provide for mandatory advancement without the requirement that the officer or director cooperate with the corporation concerning the action, as contained in R.C. 1701.13(E)(5)(a)(ii). There is nothing in R.C. 1701.13(E) that precludes the Corporate Defendants from drafting their codes of regulations in this way. In fact, R.C. 1701.13(E)(6) provides for corporations granting rights in addition to any of those listed in the statute. Thus, while the codes of regulations expressly provide that the provisions of R.C. 1701.13(E)(5)(a) do not apply to the corporation, they also expressly provide that the

corporation shall advance litigation expenses incurred by an officer or director in defending any action, suit or proceeding referred to in Section 5.01.

When the Corporate Defendants adopted their codes of regulations, they expressly amended R.C. 1701.13(E) to require indemnification of officers and/or directors for litigation expenses even when the corporation brings the suit. The Corporate Defendants also amended R.C. 1701.13(E)(5)(a) to provide for advancement without the requirement that the officer or director cooperate with the corporation in the action. In addition, the Corporate Defendants amended R.C. 1701.13(E)(5) to provide a right to advancement, instead of it being a discretionary decision of the Board.

Finally, the Corporate Defendants argue that the codes of regulations should be construed to avoid absurd results. The Corporate Defendants submit that it is an absurd result that a corporation would be obligated to advance an officer or director his attorney fees in a case where the corporation is suing that officer for intentionally harming the corporation. However, courts in other states with similar indemnification and advancement statutes have held that advancement serves an important purpose and does not violate public policy.

Advancement is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service. Advancement 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.

Homestore, Inc. v. Taffeen (Del. 2005), 888 A.2d 204, 211; see also *Westar Energy, Inc. v. Lake* (D.Kas. 2007), 493 F.Supp.2d 1126. Accordingly, the Court finds that construing the Corporate Defendants' codes of regulations as written does not create absurd results.

a. Westbrook's Motion for Hearing on Award of Legal Fees and Expenses

Westbrook moves the Court to schedule a hearing on the amount of legal fees and expenses payable to him by the Corporate Defendants. Westbrook is entitled to a hearing to determine the amount of expenses if he is entitled to advancement of these expenses from the Corporate Defendants.

Section 5.01 of the codes of regulations obligates the Corporate Defendants to indemnify any officer or director for litigation expenses when the claims against the officer or director arise "by reason of the fact that he is or was a director [or] officer. . . ." The Corporate Defendants brought actions against Westbrook for alleged actions that he took while in his corporate representative capacity. The Corporate Defendants do not dispute that Westbrook is a former officer of the corporations. Therefore, Section 5.01 applies as to the claims asserted by the Corporate Defendants against Westbrook.

Section 5.05 obligates the Corporate Defendants to advance litigation expenses. The language of Section 5.05 provides for advancement of litigation expenses prior to final disposition of the suit. The codes of regulations do not mirror the language of R.C. 1701.13(E); rather, the Corporate Defendants amended the language of R.C. 1701.13(E) to allow for advancement of litigation expenses to officers and directors who are sued by the corporations. Thus, the codes of regulations entitle Westbrook to advancement of litigation expenses prior to final disposition in this case.

Westbrook has satisfied the conditions precedent to advancement of litigation expenses. The Corporate Defendants' obligation to advance litigation expenses is qualified only by the requirement in Section 5.05 that 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. . . ." On August 8, 2007, counsel for Westbrook requested that the

Corporate Defendants advance Westbrook's attorneys fees and costs in his defense of the counterclaims against him. 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 Codes of Regulations. Therefore, the Court finds that Westbrook is entitled to the advancement of legal fees and expenses by the Corporate Defendants.

b. Suhovecky's Motion for Partial Summary Judgment

Suhovecky requests summary judgment on his claim for a declaratory judgment that the Corporate Defendants are obligated under Article Five of the Code of Regulations to provide immediate and ongoing advancement of litigation expenses to him.

In disposing of the summary judgment motion, the Court must follow Civ.R. 56(C), which provides in relevant part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that ***there is no genuine issue as to any material fact*** and that ***the moving party is entitled to judgment as a matter of law***. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

(Emphasis added.) The burden of proof to establish that there is no genuine issue as to any material fact is on the moving party. See *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93, 662 N.E.2d 264. "The moving party cannot discharge its initial burden * * * by making a conclusory assertion that the nonmoving party has no evidence to prove its case. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 145, 677 N.E.2d 308 (quoting *Dresher*, 75 Ohio St.3d at 293). Instead, "the moving party must be able to specifically point

to some evidence of the type listed in Civ.R. 56(C), which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Id.* Once the moving party's initial burden of proof has been met, "the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the moving party." *Id.*

Section 5.01 of the codes of regulations obligates the Corporate Defendants to indemnify any officer or director for litigation expenses when the claims against the officer or director arise "by reason of the fact that he is or was a director [or] officer. . . ." The Corporate Defendants brought an action against Suhovecky for alleged actions that he took while in his corporate representative capacity. The Corporate Defendants do not dispute that Suhovecky is a former officer and director of the corporations. Therefore, Section 5.01 applies as to the claims asserted by the Corporate Defendants against Suhovecky.

Section 5.05 obligates the Corporate Defendants to advance litigation expenses. The language of Section 5.05 provides for advancement of litigation expenses prior to final disposition of the suit. The codes of regulations do not mirror the language of R.C. 1701.13(E); rather, the Corporate Defendants amended the language of R.C. 1701.13(E) to allow for advancement of litigation expenses to officers and directors who are sued by the corporations. Thus, the codes of regulations entitle Suhovecky to advancement of litigation expenses prior to final disposition in this case.

Suhovecky has satisfied the conditions precedent to advancement of litigation expenses. The Corporate Defendants' obligation to advance litigation expenses is qualified only by the requirement in Section 5.05 that 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

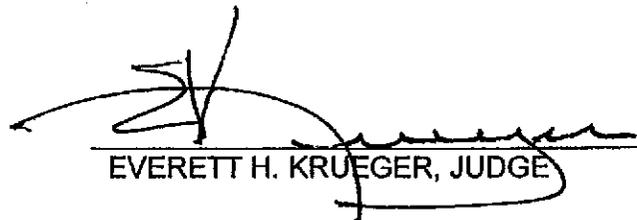
the merits or otherwise. . . ." On September 7, 2007, counsel for Suhovecky requested that that Corporate Defendants advance Suhovecky's litigation expenses associated with his defense of the claims asserted against him. Suhovecky also executed an "Assurance of Repayment" at that time, in which he agreed to repay all amounts paid to him pursuant to the terms provided in Section 5.05 in the Codes of Regulations.

The Court finds that there are no genuine issues of material fact and that reasonable minds can come to but one conclusion and that conclusion is that Suhovecky is entitled to advancement of litigation expenses by the Corporate Defendants.

IV. Conclusion

The Court hereby GRANTS Westbrook's Motion for Hearing on Interim Award of Legal Fees and Expenses. The Court also hereby GRANTS Suhovecky's Motion for Partial Summary Judgment. The Court hereby schedules an Evidentiary Hearing to determine the amount of litigation expenses payable to both Westbrook and Suhovecky on **November 5, 2008 at 1:00 p.m.**

Dated: October 1, 2008


EVERETT H. KRUEGER, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

cc: O. JUDSON SCHEAF III, 41 SOUTH HIGH STREET, SUITE 1700, COLUMBUS, OH 43215
QUINTIN F. LINDSMITH, 100 SOUTH THIRD STREET, COLUMBUS, OH 43215
ANTHONY M. HEALD, 125 NORTH SANDUSKY STREET, DELAWARE, OH 43015
ROBERT M. KINCAID, JR., 65 EAST STATE STREET, SUITE 2100, COLUMBUS, OH 43215-4260

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

WILLIAM WESTBROOK, :
 :
 Plaintiff, : Case No. 06 CV H 08 0683
 :
 VS. :
 :
 VALERIE SWIATEK, et al., : JUDGE EVERETT H. KRUEGER
 :
 Defendants. :

JAN ANTONOPoulos
 CLERK
 2008 OCT 10 PM 2:10
 COMMON PLEAS COURT
 DELAWARE COUNTY, OHIO
 FILED

**JUDGMENT ENTRY DENYING PLAINTIFF'S COMBINED MOTION TO STRIKE
DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT AND SECOND
AMENDED COUNTERCLAIM AND MOTION FOR DEFAULT JUDGMENT**
AND
**JUDGMENT ENTRY DENYING PLAINTIFF'S MOTION TO DISREGARD AND STRIKE
AS MOOT DEFENDANTS' MOTION FOR DEFAULT JUDGMENT**
AND
**JUDGMENT ENTRY DENYING DEFENDANTS' MOTION FOR DEFAULT JUDGMENT
AGAINST WILLIAM WESTBROOK**
AND
**JUDGMENT ENTRY GRANTING PLAINTIFF'S MOTION TO FILE REPLY TO
"COMPLAINT" ORIGINALLY FILED IN FRANKLIN COUNTY COMMON PLEAS COURT**

This matter is before the Court upon the Motion of the former Whittington Plaintiffs, now Swiatek Corporate Defendants, Whittington, Inc., Alum Creek, Inc., ABL Group, Ltd., and Rennob, Inc., for Default Judgment Against William Westbrook, filed on May 29, 2008. The Plaintiff, William Westbrook ("Westbrook") filed a memorandum in opposition on June 3, 2008. The Corporate Defendants filed a reply thereto on June 13, 2008. The Court set this matter for an Oral Hearing on August 13, 2008. Present at the hearing were Attorneys Scott Campbell and Gabe Roehrenbeck on behalf of Westbrook, Attorney Rodger Eckelberry on behalf of Defendant Michael Suhovecky, and Defendant Valerie Swiatek and her counsel, Quintin Lindsmith.

Also before the Court is Westbrook's Motion to File Instantly a Reply to the "Complaint" of Whittington, Inc., Alum Creek, Inc., ABL Group, Ltd., and Rennob, Inc. which was originally filed in the Franklin County Court of Common Pleas on August 8, 2007, filed

on July 31, 2008. The Defendants filed a memorandum in opposition to this motion on August 13, 2008. Westbrook filed a reply thereto on August 18, 2008.

While the above motions were pending, Westbrook filed a Motion to Disregard and Strike as Moot the Counterclaiming Defendants' Motion for Default Judgment Against Plaintiff William Westbrook on August 14, 2008. The Defendants filed a memorandum in opposition on August 29, 2008. Westbrook filed a reply thereto on September 4, 2008. In addition, on August 18, 2008, Westbrook filed a Combined Motion to Strike Defendants' Answer to Plaintiff's Second Amended Complaint and Counterclaimants' Second Amended Counterclaim against Plaintiff and for Default Judgment Against Defendants on His Second Amended Complaint. The Defendants filed a memorandum in opposition on September 8, 2008. Westbrook filed a reply thereto on September 17, 2008.

I. Westbrook's Combined Motion to Strike Defendants' Answer to Westbrook's Second Amended Complaint and Counterclaimants' Second Amended Counterclaim Against Westbrook and for Default Judgment Against Defendants

The Court will first address Westbrook's Combined Motion to Strike the Defendants' Answer to his Second Amended Complaint and Defendants' Second Amended Counterclaim and for Default Judgment. Westbrook argues that the Defendants failed to timely file or seek leave of Court to file their answer to Westbrook's Second Amended Complaint. Westbrook filed his Second Amended Complaint on February 12, 2008. Instead of filing an answer, the Defendants filed a Motion to Dismiss the Second Amended Complaint, or Alternatively, for Summary Judgment on February 26, 2008. The Defendants did not file their answer to the Second Amended Complaint until August 12, 2008. Westbrook argues that Civ.R. 12(A)(2) does not toll the time for answering an amended complaint when the time remaining to respond to the original pleading has already passed.

Civ.R. 15(A) provides that “[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.” Westbrook asserts that since no time remained for the Defendants to respond to Westbrook’s original complaint when the Second Amended Complaint was filed, the Defendants had only fourteen days to answer the Second Amended Complaint, and not fourteen days after the Court ruled on the Motion to Dismiss. Therefore, Westbrook asserts that the Defendants’ answer to the Second Amended Complaint was due on February 26, 2008 and that the Defendants needed to seek leave of Court and show excusable neglect in order to file an answer out-of-time, which the Defendants did not do. Thus, Westbrook asserts that the Court must strike the Defendants’ out-of-time answer and enter default against the Defendants on Westbrook’s Second Amended Complaint.

In response, the Defendants first argue that Westbrook’s motion is untimely pursuant to Loc.R. 31.01, which provides that “the party entitled to a judgment by default shall promptly apply in writing to the trial judge within thirty days after the date upon which the defaulting party should have pled or otherwise defended.” Thus, the Defendants argue that if Westbrook believed the Defendants should have filed their answer to the Second Amended Complaint by February 26, 2008, their motion for default judgment should have been filed no later than March 27, 2008. However, Westbrook did not file the motion until August 18, 2008. The Court notes that both parties have failed to strictly adhere to the Local Rules and that it is within the Court’s discretion to require strict compliance with the Local Rules. Therefore, the Court will not deny Westbrook’s motion on the basis that it was not filed in strict compliance with Loc.R. 31.01.

Next, the Defendants argue that Westbrook’s Second Amended Complaint was only a “supplemental pleading” since it “set[] forth transactions or occurrences or events which

have happened since the date of the pleading sought to be supplemented." Civ.R. 12(E). Thus, the Defendants argue that their response to the pleading was not a required response, but only a permitted response. The Defendants assert that Civ.R. 12(E) states that if a court expects a responsive pleading, it will order one. Therefore, the Defendants argue that they were permitted to file a motion to dismiss and an answer if they wanted to, but that they were not required to file an answer to the pleading because the Court never ordered the Defendants to do so within a specified time. However, this argument is incorrect since the Court's February 12, 2008 Order Granting Plaintiff Leave to File Second Amended Complaint ordered the Defendants to file a response within fourteen days of the order.

In addition, the Defendants argue that they cannot be in default because the Court has already held that they answered Counts 1-13 and Count 15 of the Second Amended Complaint. Both parties, as well as the Court, have treated Westbrook's Second Amended Complaint as an amended pleading. The Court will continue to treat the pleadings in the same manner that the parties and the Court have been treating the pleadings all through the case. Since an amended pleading supersedes the original pleading, the Defendants were required to timely file a response to the Second Amended Complaint. *Ross v. Cincinnati Transit Co.* (1956), 101 Ohio App. 81, 136 N.E.2d 760, paragraph one of the syllabus.

The Defendants further argue that even if the Second Amended Complaint is not a supplemental pleading, Ohio courts have held that a defendant is not required to answer an amended pleading while a motion to dismiss that pleading is pending. The Court finds this argument persuasive based upon Ohio case law.

Ohio courts have held that the filing of a Civ.R. 12 motion tolls the running of the twenty-eight day answer period. See *Houser v. Anders* (May 22, 1979), 4th Dist. No. 682,

1979 WL 206813. In *Hardy v. Chagrin Valley Med. Corp.* (Dec. 24, 1987), 8th Dist. No. 53249, 1987 WL 30390, *2, the Eighth District Court of Appeals held that the appellant was not entitled to default judgment because "all parties properly responded to the appellant's first amended complaint through either an answer and/or a motion to dismiss pursuant to Civ.R. 12." Moreover, in *Anderson v. Cincinnati Ins. Co.* (May 15, 1987), 6th Dist. No. E-86-45, 1987 WL 11033, the Sixth District Court of Appeals reversed the trial court's decision granting declaratory judgment where the appellant never had a chance to file an answer because its Civ.R. 12(B)(6) motions to dismiss the complaint and amended complaint were pending. Implicit in the Sixth District's holding is that it was proper for the appellant to file a motion to dismiss the amended complaint and to file an answer after judgment was entered on that motion.

Accordingly, the Court finds that Ohio law does not bar the Defendants from filing an answer to Westbrook's Second Amended Complaint after judgment was entered on their Motion to Dismiss the Second Amended Complaint. Since the Defendants' answer to the Second Amended Complaint is not barred as untimely, the Court will not strike the answer to the Second Amended Complaint or the Second Amended Counterclaim and Westbrook is not entitled to default judgment. Therefore, the Court DENIES Westbrook's Motion to Strike the Defendants' Answer to his Second Amended Complaint and Defendants' Second Amended Counterclaim and for Default Judgment Against Defendants.

II. Westbrook's Motion to Disregard and Strike as Moot the Counterclaiming Defendants' Motion for Default Judgment Against Westbrook

Next, the Court will address Westbrook's Motion to Disregard and Strike as Moot the Defendants' Motion for Default Judgment. Westbrook submits that the Second Amended Counterclaim filed by the Defendants on August 12, 2008 supersedes the counterclaims previously filed by the Defendants, including the counterclaims on which the Defendants

moved for default on May 29, 2008. Westbrook argues that the Defendants abandoned the previously-filed counterclaims when they did not include them in their Second Amended Counterclaim filed on August 12, 2008. Therefore, Westbrook asserts that since there are no counterclaims on which the Court can now enter default, the Court should disregard and strike as moot the Corporate Defendants' Motion for Default Judgment against him.

The Corporate Defendants argue that while the Court re-aligned the pleadings in this case, it did not order a merger of the pleadings. Rather, the Corporate Defendants assert that the Court consolidated the actions for efficiency and convenience and that the former Whittington complaint (now classified as a counterclaim in the instant action) is a separate pleading. In response, Westbrook argues that the Corporate Defendants' claims are compulsory counterclaims that cannot be asserted in a stand-alone pleading.

As noted above, the Court will continue to treat the pleadings in the same manner that the parties and the Court have been treating the pleadings all through the case. All of the parties, and the Court, have treated the claims in the consolidated actions as distinct. Although the Court re-aligned the parties and re-classified the claims when it consolidated the Whittington action with the instant action, the Court did not order the claims to be merged. "When two cases are consolidated, pursuant to Civ.R. 42(A), they are not merged into a single case but maintain their original identity." *Transcon Builders, Inc. v. City of Lorain* (1976), 49 Ohio App.2d 145, 359 N.E.2d 715, syllabus. Thus, while this Court found that both the Whittington action and the instant action contain common questions of law and fact, the Court did not declare the Whittington claims to be compulsory counterclaims or order that the two actions be merged. Indeed, the parties have continued to file pleadings treating the claims as distinct and they have engaged in limited discovery related to the re-classified counterclaims only.

The Court determines that the Defendants were not required to plead the counterclaims (former Whittington complaint) in their Second Amended Counterclaim relating to Westbrook's Second Amended Complaint in order to preserve them. The Court finds that these claims have not been abandoned. Therefore, the Court hereby DENIES Westbrook's Motion to Disregard and Strike as Moot the Defendants' Motion for Default Judgment.

III. Swiatek Corporate Defendants' Motion for Default Judgment Against Westbrook and Westbrook's Motion to File Instantly a Reply to the Corporate Defendants' Counterclaim, Originally Filed as Complaint in Franklin County

The Court will address together the Corporate Defendants' Motion for Default Judgment Against Westbrook and Westbrook's Motion to File Instantly a Reply. The Corporate Defendants argue that Westbrook has failed to timely file an answer to their Whittington complaint, which has been re-classified as a counterclaim in the consolidated case. The Defendants originally filed a complaint in the Whittington action in the Franklin County Common Pleas Court on August 8, 2007. In response to the complaint, Westbrook filed a motion to dismiss for lack of subject matter jurisdiction, or in the alternative, to transfer venue to Delaware County Common Pleas Court, on September 21, 2007. The Franklin County Common Pleas Court entered its decision granting Westbrook's motion to transfer venue on February 14, 2008.

This Court previously held that Westbrook was required to file his answer twenty-eight days from receipt of the notice that the case had been transferred on April 14, 2008. This Court also struck the Motion for Definite Statement filed by Westbrook on May 12, 2008 as a successive Civ.R. 12 pleading that is not permitted by the Civil Rules. Thus, the Corporate Defendants move the Court to grant default judgment against Westbrook on the re-classified counterclaims. The Corporate Defendants argue that Westbrook cannot now

file an untimely answer because he cannot show excusable neglect. The Corporate Defendants assert that an attorney's oversight or misunderstanding of the law does not constitute excusable neglect.

Westbrook counters that the Corporate Defendants failed to timely file their Motion for Default Judgment pursuant to Loc.R. 31.01. As the Court noted above, both parties have failed to strictly adhere to the Local Rules and the Court has discretion regarding whether to require strict compliance with the Local Rules. Therefore, the Court will not deny the Corporate Defendants' motion on the basis that it was not filed in strict compliance with Loc.R. 31.01.

Westbrook also argues that the Court may permit him to file a reply if his failure to do so resulted from excusable neglect. Westbrook argues that he had a good faith belief that filing his motion for definite statement in response to the re-classified counterclaims was proper. Even though the Court determined that the motion for definite statement was not a proper response to the re-classified counterclaims, Westbrook argues that the claims should be decided on their merits. Westbrook also asserts that the Corporate Defendants will not suffer any prejudice if he is permitted to file his reply.

Pursuant to Civ.R. 6(B)(2), the Court may extend the time to file an answer or response upon motion of the party "where the failure to act was the result of excusable neglect." It is within the trial court's discretion to determine whether leave should be granted. *Marion Production Credit Assoc. v. Cochran* (1988), 40 Ohio St.3d 265, 271, 533 N.E.2d 325. "[T]he determination of whether neglect was excusable or inexcusable "must of necessity take into consideration all the surrounding facts and circumstances." *Id.* (citing *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 79, 514 N.E.2d 1122. "Courts must also remain mindful of the admonition that cases should be decided upon their merits, where possible, rather than on procedural grounds." *Id.*

Westbrook argues that his failure to file a reply to the re-classified counterclaims was a result of his good faith belief that his motion for definite statement was a proper response pursuant to Civ.R. 12. The Corporate Defendants argue that Westbrook is unable to show excusable neglect because his failure to file a response was not beyond his control. The Corporate Defendants cite *Porter, Wright, Morris & Arthur, LLP v. Frutta Del Mondo, Ltd.*, 10th Dist. No. 08AP-69, 2008-Ohio-3567, for the proposition that "excusable neglect is not present if the party seeking relief could have prevented the circumstances from occurring." However, this case dealt with a Civ.R. 60(B) motion for relief from judgment. Ohio courts have held that "[a]lthough excusable neglect cannot be defined in the abstract, the test for excusable neglect under Civ.R. 6(B)(2) is less stringent than that applied under Civ.R. 60(B)." *Doepker v. Willo Security, Inc.*, 5th Dist. No. 2007 CA 00184, 2008-Ohio-2008, ¶ 22 (citing *State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs.* (1990), 72 Ohio St.3d 464, 466, 650 N.E.2d 1343).

In this case, Westbrook filed a motion to dismiss for lack of subject matter jurisdiction, or, in the alternative, to transfer venue to the Delaware County Court of Common Pleas in response to the "complaint" filed by the Corporate Defendants in the Franklin County Court of Common Pleas. The Franklin County Court of Common Pleas granted Westbrook's motion to transfer and the case was transferred on April 14, 2008. On May 12, 2008, the proper date for Westbrook's response to the "complaint," Westbrook filed a motion for definite statement of the complaint. This Court ultimately ruled that the motion for definite statement was a successive Civ.R. 12 motion that was not proper. Westbrook subsequently moved the Court for leave to file a response to the "complaint", which has been re-classified as counterclaims.

Westbrook submits that the facts and circumstances in this case are procedurally unique and that there is no Ohio case law directly on point. However, Westbrook submits

that this case is more factually similar to the case of *Nat'l Bank of Toledo v. Michaelis* (Nov. 6, 1981), 6th Dist. No. L-81-089, 1981 WL 5812, than any case cited by the Corporate Defendants. In *Michaelis*, the defendant filed a Civ.R. 12 motion to dismiss in response to the plaintiff's complaint. After the trial court denied the motion to dismiss, the defendant filed a motion for reconsideration, which was ultimately denied. Ten days later, the defendant filed his answer to the complaint, and one day after that he filed a counterclaim. The plaintiff filed motions to strike the untimely answer and counterclaim, which the trial court granted. The court of appeals reversed the trial court's decision, holding, in part, that the defendant had indicated a good faith attempt to comply with the rules of procedure despite his incorrect belief that he had additional time to file an answer due to his filing a motion for reconsideration. The court of appeals also considered the lack of prejudice to the plaintiff.

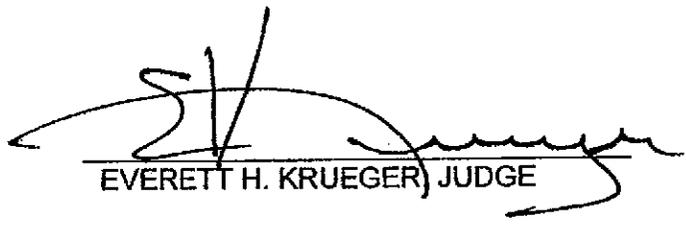
Considering the facts and circumstances of the instant case, the Court finds that Westbrook's failure to timely file a reply to the Corporate Defendants' re-classified counterclaims constitutes excusable neglect. Westbrook has demonstrated a good faith attempt to comply with the Rules of Civil Procedure and his intention to defend himself in the action brought by the Corporate Defendants. The Court cannot say that Westbrook has displayed a willful disregard for the judicial system. Rather, it is clear from the record in this case that Westbrook has shown his intention to defend the action brought the Corporate Defendants, albeit by way of one too many Civ.R. 12 motions. In addition, the Court finds that there is no showing of prejudice to the Corporate Defendants. The parties have been engaging in discovery on the re-classified counterclaims and the parties did not oppose Counterclaim Defendant Suhovecky's motion to continue the trial date.

Pursuant to Civ.R. 6(B)(2), Westbrook will be granted leave to file his reply to the Corporate Defendants' re-classified counterclaims *instanter*. The Court hereby GRANTS

Westbrook's Motion to File Instantly a Reply to the "Complaint" of Whittington, Inc., Alum Creek, Inc., ABL Group, Ltd., and Rennob, Inc. which was originally filed in the Franklin County Court of Common Pleas on August 8, 2007. The Court notes that the Clerk of Courts improperly filed-stamped Westbrook's Reply on August 18, 2008. However, the Reply will be deemed filed as of the date of this entry.

Since the Court has granted Westbrook leave to file a reply to the re-classified counterclaims, the Corporate Defendants are not entitled to default judgment against Westbrook. Accordingly, the Court hereby DENIES the Motion of the former Whittington Plaintiffs, now Swiatek Corporate Defendants, Whittington, Inc., Alum Creek, Inc., ABL Group, Ltd., and Rennob, Inc., for Default Judgment Against William Westbrook.

Dated: October 10, 2008


EVERETT H. KRUEGER) JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

cc: QUINTIN F. LINDSMITH, 100 SOUTH THIRD STREET, COLUMBUS, OH 43215
O. JUDSON SCHEAF III, 10 WEST BROAD STREET, SUITE 700, COLUMBUS, OH 43215-3435
ROBERT M. KINCAID JR, 65 EAST STATE STREET, SUITE 2100, COLUMBUS, OH 43215
ANTHONY M. HEALD, 125 NORTH SANDUSKY STREET, DELAWARE, OH 43015

Ca

IN THE COURT OF COMMON PLEAS, DELAWARE COUNTY, OHIO

WILLIAM WESTBROOK, :
 :
 Plaintiff, :
 :
 VS. :
 :
 VALERIE SWIATEK, et al., :
 :
 Defendants. :

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317-320

Case No. 06 CV H 08 0683

JUDGE EVERETT H. KRUEGER

JAN ANTONOPLOS
CLERK

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COMMON PLEAS COURT
DELAWARE COUNTY OHIO
FILED

JUDGMENT ENTRY CLARIFYING THE COURT'S OCTOBER 2, 2008 JUDGMENT ENTRY AND JUDGMENT ENTRY AWARDING ADVANCEMENT OF LITIGATION EXPENSES TO WESTBROOK

This matter is before the Court upon the Defendants', Valerie Swiatek, et al., Motion Requesting Clarification of Judgment Entry Granting Plaintiff's Motion for Hearing on Interim Award of Legal Fees and Expenses, filed on November 4, 2008. This matter is also before the Court on the amount of legal fees and expenses to be advanced to the Plaintiff, William Westbrook. The Court held a hearing on the issue of the amount of the legal fees and expenses to be advanced on November 5, 2008. On the same day, the Plaintiff filed a hearing brief. The Court also permitted the parties to file post-hearing briefs on the issues. The Defendants filed their post-hearing brief on November 12, 2008. The Plaintiff filed his memorandum in response to the Defendants' brief on November 19, 2008.

The Defendants argue that there is no lawful basis to award Westbrook his legal fees in the *Whittington* action because Westbrook did not file a counterclaim seeking recovery of his fees in that action. The claims originally filed in the *Whittington* action have now been dismissed. The Plaintiff argues that the *Whittington* action was transferred to Delaware County and consolidated with the instant action. This all took place before Westbrook even filed an answer to the claims. There was already pending before the Court a motion for advancement of legal fees in the instant case when the *Whittington* case was



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transferred and consolidated. Thus, when the Court rendered its Judgment Entry on October 2, 2008 granting the Plaintiff's Motion for Hearing on Interim Award of Legal Fees and Expenses, the Court determined that Westbrook was entitled to advancement of litigation fees and expenses related to his defense of the counterclaims asserted by the Defendants. The Defendants had asserted counterclaims against Westbrook in the instant action and in the *Whittington* action. Since the *Whittington* action was consolidated with the instant action and the claims against Westbrook were re-classified as counterclaims, the Court's October 2, 2008 Judgment Entry clearly and properly awarded Westbrook advancement of litigation fees and expenses for his defense of all counterclaims against him in the action, which at the time included those claims originally filed in the *Whittington* action. Therefore, in clarification of the Court's October 2, 2008 Judgment Entry, Westbrook is entitled to advancement of litigation fees and expenses for his defense of the counterclaims filed against him in both the instant action and in the former *Whittington* action.

The Defendants further argue that there is no legal basis to award Westbrook his legal fees in the instant action because Westbrook did not bring a legal claim for advancement and then move for summary judgment on the claim. The Defendants argue that the motion for a hearing filed by Westbrook does not provide a lawful basis for recovery of legal fees. The Plaintiff argues that the Court has already addressed the motion for advancement of legal fees and expenses on its merits and the Civil Rules of Procedure and justice require that the Court proceed to rule on the amount of fees to be advanced. The Court agrees that this issue has already been determined by the Court and the Defendants' argument amounts to a request for the Court to reconsider its October 2, 2008 Judgment Entry rather than a request for clarification. The Court will not reconsider its October 2, 2008 decision to award advancement of legal fees and expenses.

The Defendants also argue that since they have dismissed all of the claims against Westbrook based on his status as a former officer, Westbrook is no longer entitled to advancement of fees, but only indemnification for past legal fees. The Defendants submit that Westbrook can only seek indemnification now because he can no longer demonstrate that he is continuing to defend against a counterclaim that arises from his status as a former officer. The Plaintiff argues that in any advancement situation there is some retroactive aspect to the amounts sought. The Plaintiff also argues that he moved for advancement early in this case when he was defending against and would be continuing to defend against claims that arose from his status as a former officer. Indeed, when this Court rendered its October 2, 2008 Judgment Entry, the Court determined that Westbrook was entitled to advancement of his litigation fees and expenses for defending against the claims asserted by the Defendants. However, due to the timing of the Court's decision on this issue, Westbrook has not been advanced the fees and expenses that should have been properly advanced to him pursuant to the Corporate Defendants' by-laws. Therefore, the Court will order advancement of litigation fees and expenses as provided in the October 2, 2008 Judgment Entry.

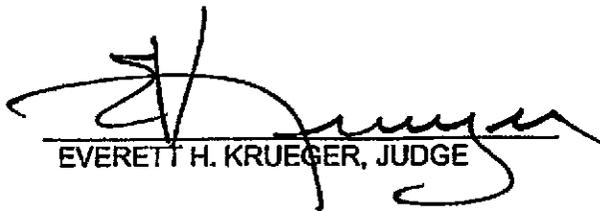
The Defendants also contend that numerous entries on Plaintiff's counsel's fee statements are not recoverable. The Defendants color-coded Plaintiff's counsel's fee statements to indicate which fees the Defendants submit are not recoverable and the various reasons for which the Defendants contend the fees are not recoverable. The Plaintiff argues that a line-by-line review of the fee statements is inappropriate at the advancement stage. Rather, the Plaintiff submits that in order to receive an award of advancement of litigation fees and expenses, counsel need only certify to the Court that the fees were incurred for activity identified in the advancement provision of the by-laws of the Corporate Defendants. Plaintiff's counsel has certified to the Court that the fees incurred in

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the defense of the counterclaim total \$227,975.75, and the expenses incurred in defense of the counterclaim total 12,976.31. Based upon the case law cited by the parties, the Court determines that a certification from counsel that the fees and expenses requested were incurred in defending the counterclaims is sufficient for the Court to award advancement of reasonable fees and expenses.

Accordingly, the Court hereby awards at this time advancement of fees to the Plaintiff from the Defendants in the amount of \$227,975.75, and advancement of expenses to the Plaintiff from the Defendants in the amount of \$12,976.31. The Defendants shall pay these amounts to the Plaintiff by January 12, 2009. The payment of these amounts is subject to the assurance of repayment executed by Westbrook. The Court hereby defers the final hearing on indemnification until after the trial occurs in this case.

Dated: December 9, 2008


EVERETT H. KRUEGER, JUDGE

The Clerk of this Court is hereby Ordered to serve a copy of this Judgment Entry upon the following by Regular Mail, Mailbox at the Delaware County Courthouse, Facsimile transmission

cc: O. JUDSON SCHEAF III, 41 SOUTH HIGH STREET, SUITE 1700, COLUMBUS, OH 43215
QUINTIN F. LINDSMITH, 100 SOUTH THIRD STREET, COLUMBUS, OH 43215
ANTHONY M. HEALD, 125 NORTH SANDUSKY STREET, DELAWARE, OH 43015

This document sent to each attorney/party by:
 ordinary mail
 fax
 attorney mailbox
 certified mail
Date: 12/10/08 By: [Signature]

Court of Appeals
Delaware Co., Ohio
 I hereby certify that the within be a true
 copy of the original on file in this office.
FIFTH APPELLATE DISTRICT
 Jan Antonoplos, Clerk of Courts
 By MCline Deputy

WILLIAM WESTBROOK
 Plaintiff-Appellee

CASE NO. 08 CAE 12 0078
 08 CAE 12 0079

-vs-

JUDGMENT ENTRY

VALERIE SWIATEK, ET AL.
 Defendant-Appellants

COURT OF APPEALS
 DELAWARE COUNTY, OHIO
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 JAN ANTONIOPLOS
 CLERK

This matter came before the Court upon Appellee's Motion to Dismiss for lack of a final, appealable order. Appellants have filed a response in opposition. Ohio law provides that appellate courts have jurisdiction to review only the final orders or judgments of inferior courts in their district. See, generally, Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed.

The order being appealed requires Appellants to pay attorney fees to Appellee. The trial court's order is labeled in relevant part, "Judgment Entry Awarding Advancement of Litigation Expenses to Westbrook." The underlying litigation remains pending although certain counterclaims filed by Appellants have been dismissed.

Appellants argue the entry awarding attorney fees is ancillary to the claims which remain. Further, Appellants argue the fact they have dismissed certain counterclaims makes the award of attorney fees an indemnification award rather

than an advancement of fees. We find the issue of attorneys fees and the remainder of the case are intertwined and not ancillary. For this reason, the motion to dismiss is granted.

Appellants have also filed a Motion to Stay Enforcement of the trial court's judgment which is denied as moot in light of our dismissal of this case.

MOTION TO DISMISS GRANTED.

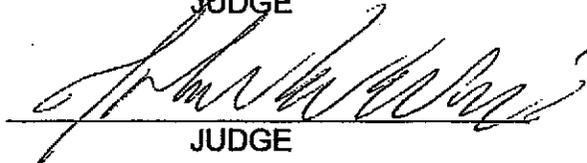
MOTION TO STAY DENIED AS MOOT.

APPEAL DISMISSED.

COSTS TO APPELLANTS.


JUDGE


JUDGE


JUDGE