

IN THE SUPREME COURT OF OHIO

ORIGINAL

Murray A. Miller, *et al.*,

Appellees,

v.

Sam M. Miller, *et al.*,

Appellants.

Case No. 2011-0024

On Appeal from the
Trumbull County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2009-T-0061

AMICUS CURIAE OHIO STATE BAR ASSOCIATION'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Ohio State Bar Association (the “OSBA”) was the driving force behind the emergency adoption of the 1986 amendments to R.C. 1701.13 at issue here. *Ohio Passes Law to Curb Lawsuits Against Directors*, Corp. Fin. Wk., Dec. 1, 1986, at 4. Those amendments established significant director protections, including a default rule that Ohio corporations must advance litigation expenses on a director’s behalf. The General Assembly adopted them on an emergency basis to stem the flight of domestic corporations to jurisdictions with laws more amenable to attracting top-notch director talent. The decision below, however, eviscerates the 1986 legislation in a way that none of its supporters could have imagined, and threatens to recreate the conditions that originally led to its emergency adoption.

The OSBA’s interest in this case is thus the same interest that caused it to propose the 1986 legislation—namely, a powerful interest in ensuring that Ohio’s corporations can continue to attract and retain qualified directors. Many of the OSBA’s 26,000 members advise Ohio directors whose service benefits not just corporations, but “the corporation’s employees, suppliers, creditors, and customers,” “[t]he economy of the state and nation,” and their “[c]ommunity and societ[y].” R.C. 1701.59(E). Ohio corporations counseled by OSBA members rely on the director protections of the state’s corporate laws to attract top-flight directors, without whom Ohio businesses and the Ohio economy would suffer a severe competitive disadvantage. Members and their clients have relied on R.C. 1701.13 in drafting corporate charters and bylaws. In addition to their general civic interests as residents and taxpayers in a statewide economy that relies on sound corporate leadership, OSBA members bear professional responsibilities to promote the accurate and predictable interpretation of Ohio’s corporate laws. Consistent with its mission “to promote improvement of the law, our legal

system, and the administration of justice,” the OSBA respectfully submits this memorandum of amicus curiae in support of jurisdiction.

WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The General Assembly enacted R.C. 1701.13(E)(5)(a) in 1986, by emergency measure, to forestall the flight of Ohio corporations to other jurisdictions. Sponsored by, among many others, then-Senators Pfeifer and Cupp, the bill passed with “overwhelming” support. *See* Am.Sub.H.B. No. 902, 116th Gen. Assemb., Reg. Session (1985-1986); *Ohio Passes Law to Curb Lawsuits Against Directors*, Corp. Fin. Wk., Dec. 1, 1986, at 4. Among other things, R.C.

1701.13(E)(5)(a) establishes a default rule requiring Ohio corporations to advance attorney fees to directors, thereby serving a powerful state interest in attracting and retaining capable director talent for Ohio corporations. This benefits not only directors of Ohio corporations, but the general public, by preserving the revenues and good governance that flow from the continued domicile of Ohio corporations and the statewide economic benefits that flow from having Ohio corporations overseen by talented directors.

The decision below, if allowed to stand, would wreak havoc on this important provision and threaten to recreate the dangerous conditions that led to the 1986 legislation. It would do so by ignoring the text of the statute, the intentions of the legislators who enacted it, and the policy objectives that undergirded it. The Court of Appeals’ decision, moreover, is as novel as it is wrong—to our knowledge, no Ohio court in 25 years has suggested similar limitations on Ohio’s scheme for advancement of attorney fees. The result is even worse than nullification, because, in creating unprecedented exceptions to a formerly clear statute, the Court of Appeals has rendered unreliable any assurances a corporation might offer a prospective director, whether in reliance on the statutory default or by contract. This case is of high importance to the public and of great general interest, and the OSBA respectfully encourages the Court to grant review.

A. Consistent Application Of Ohio’s Default Rule For Advancement Of Attorney Fees Is Of Critical Importance To Ohio.

To fully understand the impact of the decision below, it is well to revisit events leading to enactment of the statute at issue here. In the early 1980s, directors of Ohio corporations faced increasing exposure to meritless lawsuits at great personal expense. Many directors were unwilling to serve on the boards of Ohio corporations. Corporations, in turn, began to leave the state, citing laws in other jurisdictions that were more amenable to attracting director talent. Edward A. Schrag, Jr., *Report of the Corporation Law Committee*, 59 Ohio St. B. Ass’n Rep. 1694, 1695 (1986). At the urging of the OSBA, the General Assembly enacted an “emergency measure” in 1986, citing “an urgent need to attract qualified individuals to serve as directors of corporations and to assure that corporations remain incorporated in this state rather than reincorporate in states with laws providing more favorable treatment of directors.” Section 10, Am.Sub.H.B. No. 902, Ohio Laws 6107, 6153.

The 1986 amendments to R.C. 1701.13 supplemented Ohio’s indemnification provisions by establishing the mandatory requirement that corporations “shall” advance litigation expenses to directors as they are incurred, unless the articles or regulations of the corporation specifically and with reference to R.C. 1701.13 opt out of the statutory default. R.C. 1701.13(E)(5)(a). Though a director ultimately may have to repay any advanced expenses depending on the outcome, initial advancement of expenses was intended to be entirely independent of, and unconditioned by, a director’s ultimate eligibility for full indemnification.¹

¹ Unlike the indemnification provisions of the statute, which authorize corporations to reimburse expenses retroactively, R.C. 1701.13(E)(1) & (2), mandatory advancement was intended to provide a reliable and largely unconditional guarantee that corporations would advance expenses (subject to later repayment) *as incurred* during the pendency of derivative litigation, entirely independent of the limiting conditions in the indemnification provisions. R.C. 1701.13(E)(8) (“The authority of a corporation to indemnify persons pursuant to division (E)(1) or (2) of this section does not limit the payment of expenses as they are incurred . . .”).

This default rule furthers critical policy objectives, helping Ohio attract and retain capable directors by supplying a reliable advancement regime. “[A]dequate legal representation often involves substantial expenses during the course of the proceeding and many individuals are willing to serve as directors only if they have the assurance that the corporation has the power to advance those expenses.” 2 Model Bus. Corp. Act. Ann. § 8.53 cmt. at 8-425 (4th ed. Supp. 2009). “Mandatory advances, like indemnification, serve the salutary purpose of encouraging qualified persons to become or remain” directors “by assuring them, ex ante, that they may resist lawsuits that they consider meritless, free of the burden of financing (at least initially) their own legal defense.” *In re Cent. Banking Sys., Inc.* (Del. Ch. May 11, 1993), No. CA 12497, 1993 WL 183692, at *3; *see also Homestore, Inc. v. Tafeen* (Del. 2005), 888 A.2d 204, 211 (“Advancement is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service.”).

Mandatory advancement also enhances the integrity of litigation outcomes involving directors, who remain perpetually in the line of fire from claimants “apt to second-guess boardroom decisions in the courts.” Richard A. Myers, Jr., *Where Have All The Directors Gone: Corporate Director and Officer Liability and Coping with the Insurance Crisis*, 36 Clev. St. L. Rev. 575, 575 (1988). Advancement ensures that justice is done where beleaguered directors are unable personally to finance a defense against meritless claims. *See In re HealthSouth Corp. Sec. Litig.* (11th Cir. 2009), 572 F.3d 854, 865 (“[I]n the absence of fee advancement, an innocent officer or director might have difficulty proving his innocence . . .”).

Consistent enforcement of Ohio’s advancement provisions benefits not only directors and corporations, but also the general public. If qualified directors will not serve Ohio corporations, those corporations will incorporate elsewhere, to the detriment of all who benefit from

corporations being domiciled in Ohio. Further, in Ohio, the public's interest in corporate leadership is uniquely direct, because Ohio's corporate laws give directors the discretion to consider, in addition to the best interests of the corporation and its shareholders, "[t]he interests of the corporation's employees, suppliers, creditors, and customers," "[t]he economy of the state and nation," and "[c]ommunity and societal considerations." R.C. 1701.59(E). These constituencies—communities, employees, and customers of Ohio corporations—have a powerful interest in attracting the strongest possible candidates to serve as corporate stewards of that public trust.

B. The Decision Below Throws Ohio's Advancement Provisions Into Turmoil.

Since 1986, the advancement provisions in R.C. 1701.13(E)(5)(a) have been critical to promoting these public interests. As the urgent tone of House Bill 902 indicates, Ohio corporations are placed at a severe disadvantage in attracting appropriately capable directors in the absence of clear, reliable provisions for advancement.

Despite these important statutory objectives, the decision of the court below undermines any assurance that advancement guarantees in the state of Ohio will exist when called upon. To have any meaning, mandatory advancement provisions must be consistently and reliably enforced. *See Homestore*, 888 A.2d at 218 ("[T]he public policy . . . will only be achieved if the promissory terms of advancement contracts are enforced by courts even when corporate officials . . . are accused of serious misconduct."). Without consistent enforcement, advancement provisions become "a nullity." *United States v. Weissman* (S.D.N.Y. June 16, 1997), No. S2 94 CR. 760 (CSH), 1997 WL 334966, at *16. "[A]n optional provision authorizing advances is likely to provide no protection at all when it is needed the most. Recognizing this, sophisticated directors insist that advances should be made mandatory to the maximum extent possible."

Robert W. Hamilton & Jonathan R. Macey, *Cases and Materials On Corporations: Including*

Partnerships and Limited Liability Companies 959 (10th ed. 2007). Indeed, the very purpose of mandatory advancement is to provide assurance to a potential director.

Worse than simply eradicating the default rule—which, for the innumerable Ohio corporations and their directors who have reasonably relied on it in crafting bylaws and charters, would certainly be bad enough—the Court of Appeals has injected a pervasive uncertainty into the enforcement of advancement guarantees for directors in Ohio. The decision below is at odds with all of the objectives discussed above. It threatens to wreak havoc on what has been for twenty-five years a consistent and reliable scheme, by calling into question four previously clear aspects of the law.

First, the court below held that a director seeking advancement must be the derivative *plaintiff* (seeking to procure a judgment in favor of the corporation) rather than *defendant* in the underlying litigation. If allowed to stand, that holding would turn onto its head a statute that was meant to protect directors when they are *defendants* in lawsuits.

Second, the decision below permits a plaintiff to nullify a director's right to advancement simply by alleging a breach of a fiduciary duty. It invents a novel test for when a corporation must honor formerly mandatory advancement guarantees, holding that where a director is alleged to have breached a fiduciary duty, the director could not have been acting "on behalf of the corporation" and advancement is therefore unenforceable. The statute, however, plainly recognizes that directors require advancement to refute groundless allegations of wrongdoing arising "by reason of the fact that he is or was a director . . . of the corporation," regardless of how a plaintiff may style allegations in a complaint.

Third, the Court of Appeals held that there can be no advancement if the corporation's charter is silent on advancement. That amounts to nothing less than a rewriting of the statute.

More importantly, it calls into question the well-settled statutory assumptions on which countless corporate charters were drafted.

Fourth, according to the concurring opinion below, there can be no advancement if a plaintiff merely alleges that the director's conduct is unprotected by the business-judgment rule. But advancement of attorney's fees cannot depend on whether a plaintiff alleges that a director's actions fell outside the business-judgment rule—those sorts of allegations are the norm in this type of litigation.

In short, the decision below throws settled expectations regarding advancement into turmoil. It enshrines uncertainty in the application and enforcement of a statute that was passed to create reliable assurances that expenses will be advanced. It promises to vitiate the public interests that led to R.C. 1701.13's enactment. Accordingly, the OSBA respectfully urges the Court to grant review.

STATEMENT OF THE CASE AND FACTS

The OSBA adopts the statement of the case and facts presented in Appellant Sam M. Miller's memorandum in support of jurisdiction.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: R.C. 1701.13(E)(5) provides for the current advancement (subject potentially to later repayment) of attorney's fees incurred by a corporate director who has been sued by the corporation or by any of the corporation's shareholders and directors.

R.C. 1701.13(E)(5) provides for advancement of attorney's fees in litigation referred to in the indemnification provisions of R.C. 1701.13(E)(1) and (2). R.C. 1701.13(E)(2), in turn, covers litigation brought "in the right of the corporation" and authorizes indemnification "against expenses . . . incurred . . . in connection with the defense or settlement of such action or suit."

The Court of Appeals inexplicably held that indemnification under R.C. 1701.13(E)(2), and therefore advancement under section (E)(5), is limited to litigation where a director “seeks to procure a judgment in favor of the corporation”—i.e., where the director is the one suing on behalf of the corporation rather than the one being sued on behalf of the corporation. *Miller v. Miller*, 11th Dist. No. 2009-T-0061, 2010-Ohio-5662, at ¶ 52. That was obvious error.

By its plain language, R.C. 1701.13(E)(2) covers circumstances where a director seeking indemnification will be or has been named a defendant in the underlying litigation. That is why section (E)(2) authorizes indemnification “against expenses . . . incurred . . . in connection with *the defense* or settlement of such action or suit.” R.C. 1701.13(E)(2) (emphasis added). The court below never explained (nor could it) how a statute that covers expenses incurred in *the defense* of a suit could have been meant to cover only expenses incurred in *the prosecution* of a suit.

The legislative history confirms that the General Assembly intended to authorize corporations to indemnify directors against expenses incurred in defending, rather than prosecuting, litigation. When section (E)(2) was adopted in 1955, the OSBA Corporation Law Committee² explained that the legislature sought “to indemnify . . . directors and officers *who are sued* by reason of serving the corporation as a director or officer against the *expenses*

² Ohio courts properly rely on comments of the committee of the Ohio State Bar Association that recommended the legislation in ascertaining the meaning of a statute. *See, e.g., Armstrong v. Marathon Oil Co.* (1987), 32 Ohio St.3d 397, 406, 513 N.E.2d 776 (finding “[s]ignificant[]” the comments of “the Ohio State Bar Association Committee which recommended the addition of the definitions” at issue in the case); *Dorfmeier v. Dorfmeier* (1954), 69 Ohio Law Abs. 15, 123 N.E.2d 681, 683 (referencing the “comment by the Probate and Trust Law Committee of the Ohio State Bar Association” in analyzing the meaning of the statutory provision at issue); *see also* Edward A. Schrag, Jr., Roger E. Lautzenhiser, & Shawn M. Flahive, *Director and Officer Liability and Indemnification: The Ohio Approach*, 20 U. Tol. L. Rev. 1, 28 n.83 (1988) (noting Ohio courts’ examination of OSBA committee comments in ascertaining legislative intent).

incurred by them in defending themselves.” 17 Ohio Rev. Code Ann. § 1701.13 cmt. at 62 (2009) (emphases added).

The Court of Appeals’ contrary interpretation ignores not only the plain language of the statute and its legislative history, but basic principles of corporation law. Section (E)(2) cannot be limited, as the court below believed, to actions brought by directors “in the right of the corporation (i.e., a shareholder derivative action),” *Miller*, at ¶ 46, because directors are not generally able to bring derivative suits in the first instance. Only shareholders have that power. *See, e.g.,* Civ.R. 23.1 (describing a derivative action as an action “brought by one or more *legal or equitable owners of shares* to enforce a right of a corporation,” and requiring that the complaint allege “that *the plaintiff was a shareholder* at the time of the transaction of which he complains”) (emphases added); *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 107, 548 N.E.2d 217 (“A shareholder’s derivative action is brought by a shareholder in the name of the corporation to enforce a corporate claim.”). A director might conceivably sue in an alternative capacity as a shareholder, if he or she owns shares. But a director cannot bring a derivative suit solely in his or her capacity as director—which is the only situation in which indemnification and advancement would be available under the Court of Appeals’ interpretation.

Proposition of Law No. 2: The mandatory duty of advancement accepted by Ohio corporations under section (E)(5) of R.C. 1701.13 is not nullified by the unproven allegations of claimants.

The Court of Appeals further erred by holding that section (E)(5) is limited to cases in which a director is sued as a result of an “act or omission on behalf of the corporation.” *Miller*, at ¶ 50. Once again, the court ignored the plain language of the statute. Section (E)(5)(a) does not require, as a condition of advancement, that the underlying litigation resulted from a director’s act or omission *on behalf of* the corporation. Rather, section (E)(5)(a) restricts the actions in which advancement is available to litigation related to a director’s role *as a director*.

The underlying litigation for which a director seeks advancement must be an action “referred to in division (E)(1) or (2).” Both sections (E)(1) and (2) refer to actions involving a director as a party “by reason of the fact that he is or was a director . . . of the corporation.” Delaware courts have established a well-reasoned test for determining when a suit arises “by reason of the fact” that a defendant is a director and is therefore entitled to advancement. “[I]f there is a nexus or causal connection between any of the underlying proceedings [for which advancement is sought] and one’s official corporate capacity, those proceedings are ‘by reason of the fact’ that one was a corporate officer.” *Homestore*, 888 A.2d at 214. Accordingly, a corporation must advance a director’s litigation expenses if there is a “nexus or causal connection” between a director’s official capacity and the underlying proceedings for which the director seeks advancement.³

The Court of Appeals’ standard is both legally and practically flawed. The court generated its novel “on behalf of the corporation” standard in large part by importing conditions from the indemnification statutes, *Miller*, at ¶ 51-52. Unlike the indemnification provisions of sections (E)(1) and (2), however, which authorize a corporation to wait until allegations of bad faith are tested before reimbursing expenses, the advancement statute *independently* requires advancement, regardless of the ultimate availability of indemnification, R.C. 1701.13(E)(8), and provides that advanced expenses must under certain conditions be repaid, R.C. 1701.13(E)(5)(a)(i). These conditions on indemnification, put simply, are only appropriate

³ Under R.C. 1701.13(E)(5)(a), Sam M. would be entitled to advancement. He was “made a party” to the derivative action and has incurred legal expenses “by reason of the fact that he is a director” of Trumbull Industries. His activities related to the Private Brands venture allegedly are improper only because of his role as a director of Trumbull Industries. See *Homestore*, 888 A.2d at 214; see also *Brown v. LiveOps, Inc.* (Del. Ch. 2006), 903 A.2d 324, 328 (determining that Brown was entitled to advancement because “the claims asserted against Brown in the underlying action . . . are directly related to Brown’s status as cofounder, officer, and director”).

with respect to determining *repayment* on the back end of an action, not eligibility for advancement itself up front.

As a practical matter, therefore, the condition introduced by the Court of Appeals moots the function of advancement entirely. Simply by alleging that a director usurped a corporate opportunity or otherwise breached a fiduciary duty—as is alleged in virtually all derivative cases—a plaintiff can sever a director from his or her right to advancement, because such (alleged) actions would not be deemed “on behalf of the corporation.” Section (E)(5)(a), however, was intended to *require* advancement of a director’s litigation expenses in “nearly all situations.” Deborah Cahalane, *1986 Ohio Corporation Amendments: Expanding the Scope of Director Immunity*, 56 U. Cin. L. Rev. 663, 675 (1987). As the Chairman of the OSBA Corporation Law Committee that proposed the amendment explained, “[a]s a result of [the addition of R.C. 1701.13(E)(5)(a)], an Ohio corporation *in most cases*” must advance expenses to a director “that are incurred in defending *any* action.” Schrag, *et al.*, 20 U. Tol. L. Rev. at 47 (emphases added). If the allegations are ultimately vindicated, a director may be required to repay the advanced monies—in which case an *ex post* analysis determines a director’s right to indemnification. Advancement, however, is extremely time-sensitive, and with any delay “its benefit is forever lost because the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford.” *Homestore, Inc., v. Taffeen* (Del. 2005), 886 A.2d 502, 505. Accordingly, advancement is broadly required *ex ante*, and the truth of any allegations is left for later-stage determinations of repayment and indemnification. The Court of Appeals’ holding, by contrast, presumes the truth of all allegations *ex ante*, and renders the advancement statute inoperative whenever plaintiffs allege (as is done in virtually all cases) a breach of fiduciary duty.

Proposition of Law No. 3: For a corporation to avoid the mandatory duty imposed by R.C. 1701.13(E)(5), the corporation must include in its articles of incorporation or code of regulations a specific statement that the provisions of R.C. 1701.13(E)(5) do not apply to that corporation.

The Court of Appeals further erred by holding that there can be no advancement if the corporation's charter is silent on advancement. *See Miller*, at ¶ 57. That is the opposite of what the statute says. It could not be clearer that, if a corporate charter is silent as to advancement, the default rule requiring advancement applies. R.C. 1701.13(E)(5)(a) ("Unless . . . 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," "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 . . .").⁴

Even if the statute were the least bit unclear (which it is not), the legislative history of section (E)(5)(a) removes any doubt. In summarizing an early version of section (E)(5)(a), the Chairman of the OSBA Corporation Law Committee stated that advancement for directors would be mandatory, but that "shareholders can amend the corporation's articles or regulations to make the proposal inapplicable." Schrag, 59 Ohio St. B. Ass'n Rep. at 1694. The OSBA Corporation Law Committee's official comment to R.C. 1701.13(E)(5)(a) also confirms that, "[u]nless the

⁴ Courts applying statutes similar to R.C. 1701.13(E)(5)(a) recognize that advancement is mandatory unless a corporation in its organizational documents opts out of the default advancement provision. For example, Minnesota's advancement provision provides that, "if a person is made or threatened to be made a party to a proceeding, the person is entitled . . . to payment . . . by the corporation, . . . including attorneys' fees and disbursements, incurred by the person in advance of the final disposition of the proceeding," subject to any provision of the articles or bylaws limiting or imposing conditions on advancement. Minn.Stat. Ann. 302A.521, subs. 3, 4. Applying Minnesota law, the Eighth Circuit determined that "advances are mandatory unless the corporation chooses to alter this scheme." *Barry v. Barry* (8th Cir. 1994), 28 F.3d 848, 851. The Minnesota Court of Appeals recently confirmed that, "unless otherwise specified in a corporation's articles of incorporation or bylaws, . . . advancement [is] mandatory." *Asian Women United of Minn. v. Leindecker* (Minn. Ct. App. 2010), 789 N.W.2d 688, 692.

corporation's articles or regulations specify that division (E)(5)(a) does not apply to the corporation," section (E)(5)(a) "requires the advancement of a director's expenses." 17 Ohio Rev. Code Ann. § 1701.13 cmt. at 61 (2009). The Court of Appeals' contrary holding is plainly erroneous.

Proposition of Law No. 4: A corporation that has acceded to the mandatory duty under R.C. 1701.13(E)(5) to advance the legal fees of a director cannot later escape its obligation on the basis that a plaintiff has alleged conduct unprotected by the business-judgment rule.

The concurring judge below concluded that there can be no advancement if a plaintiff merely alleges that the director's conduct is unprotected by the business-judgment rule. *See Miller*, at ¶ 63 (Grendell, J., concurring). The concurrence reasoned that "R.C. 1701.13(E)(5)" provides for advancement in actions "referred to in division (E)(1) or (2)." *Id.* at ¶ 62. Because sections (E)(1) and (2) authorize indemnification only if the corporate official "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation," the concurrence found that a similar restriction exists on the right to advancement. *Id.* at ¶ 62-63. The concurring opinion thus would limit a corporation's obligation to advance litigation expenses under section (E)(5)(a)—and a corporation's authority to provide advancement to all corporate officials under section (E)(5)(b)—to circumstances in which the corporation would have authority to indemnify that official.

There is no basis in either section (E)(5)(a) or section (E)(5)(b), however, for concluding that section (E)(5) "incorporates" the standards governing indemnification in sections (E)(1) and (2). Although the advancement provisions of section (E)(5) refer to sections (E)(1) and (2), those references describe the *types of actions* in which a director's expenses must be advanced. Neither section (E)(5)(a) nor section (E)(5)(b) states that a director must satisfy the requirements of sections (E)(1) and (2) in order to receive advancement. Moreover, section (E)(8)—which the court below failed to discuss—explicitly states that the "[t]he authority of a corporation to

indemnify persons pursuant to division (E)(1) or (2) of this section does not limit the payment of expenses as they are incurred” R.C. 1701.13(E)(8).

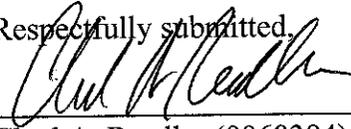
A corporate official is not required “to prove that his or her conduct met an applicable standard, or that the allegations in the underlying legal proceeding are untrue” in order to receive advancement. Richard A. Rossman, *et al.*, *A Primer on Advancement of Defense Costs: The Rights and Duties of Officers and Corporations*, 85 U. Det. Mercy L. Rev. 29, 33 (2007). A corporation cannot void its guarantee of mandatory advancement by claiming that “the corporation now believes the fiduciary to have been unfaithful. Indeed, it is in those very cases that the right to advancement attaches most strongly.” *Radiancy, Inc. v. Azar* (Del. Ch. Jan. 23, 2006), No. Civ.A. 1547-N, 2006 WL 224059, at *1 ; *see also Reddy v. Elec. Data Sys. Corp.* (Del. Ch. June 18, 2002), No. CIV.A. 19467, 2002 WL 1358761, at *5 (“[I]t is highly problematic to make the advancement right of such officials [sued for breach of the fiduciary duty of loyalty] dependent on the motivation ascribed to their conduct by the suing parties.”).

CONCLUSION

The Court should accept jurisdiction over this case.

Date: January 6, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Amicus Curiae Ohio State Bar Association's Memorandum in Support of Jurisdiction was served by email and by U.S. mail upon the following counsel on January 6, 2011:

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