

IN THE SUPREME COURT OF OHIO

MURRAY A. MILLER, et al.	)	CASE NO. 11-0024
	)	
Appellees	)	On Appeal from Trumbull County
	)	Court of Appeals, Eleventh
v.	)	Appellate District
	)	
SAM M. MILLER, et al.	)	Court of Appeals
	)	Case No. 2009-T-0061
Appellants	)	

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**MERIT BRIEF OF APPELLANT SAM M. MILLER**

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## STATEMENT OF FACTS

The issues in this case involve the interpretation of Ohio R.C. 1701.13(E)(5), which statute requires an Ohio corporation to advance the attorneys fees incurred by a corporate director who has been sued by the corporation's shareholders, by the corporation itself or by persons or entities outside of the corporation.

### **A. PLAINTIFFS' LAWSUIT**

This particular lawsuit, against Sam M. Miller, a director of Trumbull Industries, Inc. ("Trumbull"), an Ohio corporation, is a **derivative shareholder's action** filed in the Common Pleas Court of Trumbull County by two shareholders of Trumbull, Murray A. Miller and Samuel H. Miller. The thrust of the lawsuit is that Sam M. Miller breached his "fiduciary duty" as a director of the corporation by "usurping a business opportunity" with an entity known as Private Brand, rather than presenting that "opportunity" to Trumbull's board of directors. (Third Amended Complaint, ¶ 27)

Defendant Sam M. Miller's position is that he fully presented and disclosed the Private Brand "opportunity" to all of the directors of Trumbull on December 4, 2002, in the form of a nine-page, single-spaced memorandum. (Indeed, defendant's submittal of that memorandum to the Board - - which consisted of Sam M. Miller, his brother Kenneth Miller, and their two cousins, plaintiffs Murray A. Miller and Samuel H. Miller<sup>1</sup> - - has been expressly admitted by plaintiffs.) Two weeks later, on December 18, 2002, Murray A. Miller and Samuel H. Miller told Sam M. Miller that they ~~had no interest in participating in the Private Brand opportunity and that he should not~~ raise the issue with Trumbull's Board again. Accordingly, because the four-person board

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<sup>1</sup> Plaintiffs Murray A. Miller and Samuel H. Miller each own 25% of the shares of Trumbull. Defendant Sam M. Miller and his brother, Kenneth Miller, each own 25%.

of directors was equally divided - - with plaintiffs Murray and Samuel H. Miller on one side, and defendant Sam M. Miller and his brother on the other side - - the Board did not accept the opportunity. Sam M. Miller then proceeded to participate personally in the Private Brand venture.

Notwithstanding their explicit rejection of the Private Brand opportunity, Murray A. Miller and Samuel H. Miller, on February 24, 2003, filed this lawsuit, alleging that Sam M. Miller had “breached his fiduciary duty” by “usurping” the Private Brand opportunity. Plaintiffs further alleged that they were filing the lawsuit, “individually, as shareholders” of Trumbull, on “behalf of themselves and on behalf of all other shareholders similarly situated for the benefit of Trumbull,” because defendant Sam M. Miller had breached his “fiduciary duty of utmost loyalty and good faith” to Trumbull’s shareholders. (Third Amended Complaint, ¶ 27) That Amended Complaint, like all of plaintiffs’ previous and subsequent amended complaints, was verified in accordance with Rule 23.1 of the Ohio Rules of Civil Procedure. In short, this is a classic derivative shareholder’s action, in which plaintiffs are seeking an order of disgorgement of any and all “profits realized by defendant or which are the result of the business opportunity usurped \* \* \* by [defendant] which rightfully belonged to Trumbull.” (*Id.*, ¶ 32)

After filing their lawsuit, plaintiffs caused Trumbull to pay all of **their** legal fees and expenses herein, even though this is a derivative action brought by them as shareholders and even though the corporation’s board of directors never approved the payment of plaintiffs’ legal fees, let alone the filing of this lawsuit. See *Kenneth Miller v. Samuel H. Miller, et al.*, 2005 Ohio 5120 (11<sup>th</sup> Dist.) at ¶¶ 5 and 15. Nevertheless, Trumbull has continued paying **plaintiffs’** attorneys fees for the past eight years, at a cost to the corporation of more than \$600,000.

**B. DEFENDANT'S REQUEST THAT THE CORPORATION ADVANCE HIS LEGAL FEES AND EXPENSES**

On April 28, 2003, defendant Sam M. Miller formally requested Trumbull to pay **his** legal expenses in this matter "as they are incurred," pursuant to Ohio R.C. 1701.13(E)(5). That statute **requires** an Ohio corporation to advance the attorneys fees of a corporate director who has been sued for his or her alleged acts or omissions as a director, "as [those fees] are incurred," upon receipt of an undertaking signed by the director in which he or she agrees to do 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.

On September 13, 2005, defendant Sam M. Miller executed such an undertaking, worded in accordance with the statutory language. An initial payment of fees was then made by Trumbull to Sam Miller's attorneys. Plaintiffs, however, refused to allow Trumbull to make any further payments of defendant's legal expenses.

Instead, on December 11, 2006, plaintiffs filed with the Common Pleas Court a Motion for Declaratory Judgment in which they asked the Court to declare that defendant Sam M. Miller had no legal right to have his legal fees advanced by the corporation (notwithstanding the language of R.C. 1701.13(E)(5)) and that the single payment that had previously been made by Trumbull to defendant's attorneys should be returned to the corporation.

On January 22, 2007, the Common Pleas Court denied plaintiffs' motion and, instead, entered an Order stating that "defendant Sam M. Miller is entitled to have his \* \* \* attorneys' fees reimbursed from time to time by [Trumbull Industries], subject, however, to his reimbursement obligations under the corporate charter." The Order further provided that "**plaintiffs** [Murray A. Miller and Samuel H. Miller] are entitled to have **their** attorneys' fees funded by [Trumbull], subject, however, to the risk of reimbursement to [Trumbull], under the law. Their obligation of reimbursement is not necessarily dependent upon prevailing in this case, but is dependent upon convincing proof that [Trumbull] has derived a benefit in this case."

Some eight months later, in August, 2007, plaintiffs filed a Sixth Amended Complaint, **in which they added Trumbull Industries, Inc. as a party plaintiff**, although they continued to pursue this case as a derivative shareholder's action. The board of directors of Trumbull, however, has never voted to authorize the corporation to become a party to plaintiffs' derivative action. Thus, the adding of Trumbull as a party plaintiff in August, 2007, was a step taken solely and unilaterally by the attorneys for plaintiffs Murray Miller and Samuel H. Miller, without any corporate authorization.

On February 12, 2008, plaintiffs filed a Motion for Reconsideration of the Common Pleas Court's January 22, 2007 Order described above. In that Motion plaintiffs again argued that Trumbull had no obligation to pay the fees of defendant Sam M. Miller's counsel, Ulmer & Berne LLP. On June 30, 2008, the Common Pleas Court rejected that Motion and entered an order directing Trumbull to pay all of Ulmer & Berne's fees and costs from March 25, 2008 forward.

Trumbull did not comply with the latter order. Instead, on July 17, 2008, plaintiffs' counsel sent the Common Pleas Court a letter stating that Trumbull was "refus[ing] continued compliance with the Court's [January 22, 2007] judgment entry on [sic] indemnification." That letter further stated that "Trumbull Industries has no intention of purging its contempt," and requested the court to "issue an order holding Trumbull Industries in contempt of the indemnification judgment entry, impose a penalty against Trumbull Industries of \$250 and set a hearing on this matter, as required by law."

**C. PLAINTIFFS' APPEAL**

On July 24, 2008, the Common Pleas Court entered the order requested by plaintiffs, finding Trumbull Industries in contempt and imposing "a fine in the amount of five dollars per business day starting July 25, 2008." Three weeks later, on August 13, plaintiffs filed a notice of appeal to the Eleventh District Court of Appeals.

On May 4, 2009, the Court of Appeals dismissed plaintiffs' appeal on procedural grounds. The Court of Appeals held that, because the Common Pleas Court had not made a specific finding in its Order that "the contemnor ha[d] failed to purge itself" of the contempt, "the issue of contempt is not ripe for review."

On May 29, 2009, the Common Pleas Court entered an order correcting that procedural flaw (by making a specific finding that Trumbull had failed to purge itself of contempt), whereupon plaintiffs filed a new notice of appeal.

On November 22, 2010, the Eleventh District, in a two-to-one decision, held that "~~1701.13(E)(5) does not apply to this action~~" and that defendant Sam M. Miller is not entitled to have his legal expenses advanced during the pendency of this action. The Court of Appeals therefore reversed the trial court's order of contempt.

Each of the judges on the panel wrote a separate opinion. The first (or majority) opinion, written by Judge Cannon, asserted three separate reasons why R.C. 1701.13(E)(5) does not apply to this case. The second opinion, written by Judge Grendell, concurred “fully in the judgment and disposition of this case as set forth in the majority opinion,” but added an additional reason as to why 1701.13(E)(5) is inapplicable to this case, namely, the “business judgment rule.” The third opinion, written by Judge O’Toole, was a dissent in which Judge O’Toole concluded that 1701.13(E)(5) is mandatory and that “the trial court properly followed the law by ordering Trumbull Industries to pay the attorney fees of Sam M.”

On January 4, 2011, defendant Sam M. Miller filed with this Court a notice of appeal and a memorandum in support of jurisdiction. On April 6, 2011, this Court accepted defendant’s appeal.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

##### **Proposition of Law No. 1:**

**R.C. 1701.13(E)(2) and (E)(5) provide, respectively, for (a) the post-litigation indemnification and (b) the current advancement of attorneys fees incurred by a corporate director who has been sued by the corporation or by any of the corporation’s shareholders. Contrary to the holding of the Court of Appeals, those statutory provisions are not limited to - - and, indeed, have no application to - - a lawsuit filed by a director to secure a benefit for the corporation.**

**A. THE STRUCTURE OF R.C. 1701.13(E)**

**1. The Provisions for Post-Litigation Indemnification of Legal Fees**

R.C. 1701.13(E) establishes two separate mechanisms for the payment or reimbursement by an Ohio corporation of the attorneys fees incurred by a corporate director who has been sued for his or her conduct in that capacity.

The first of those two mechanisms - - which is set forth in divisions (1), (2), and (3) of R.C. 1701.13(E) - - is permissive and allows the corporation to **indemnify** the director **after** the litigation (or threatened litigation) has been concluded and the director "has been successful on the merits." Those three divisions read as follows:

(E)(1) A corporation **may indemnify** or agree to indemnify any person 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, **other than an action by or in the right of the corporation**, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding, **if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation**, and, with respect to any criminal action or proceeding, if he had no reasonable cause to believe his conduct was unlawful. 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, create a presumption that the person did not act in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

(2) A corporation **may indemnify** or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or **suit 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, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorneys' fees, actually and reasonably **incurred by him in connection with the defense or settlement** of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect to any of the following:

(a) **Any claim, issue, or matter as to which such person is adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation** unless, and only to the extent that, the court of common pleas or the court in which such action or suit was brought determines, upon application, that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court shall deem proper;

(b) Any action or suit in which the only liability asserted against a director is pursuant to section 1701.95 of the Revised Code.

(3) To the extent that a director, trustee, officer, employee, member, manager, or agent **has been successful on the merits** or otherwise in defense of any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim, issue, or matter therein, ~~he shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the action, suit, or proceeding.~~

It should be noted that the principal difference between division (1) and division (2) is that the latter division applies to suits against directors or officers that are

filed either by the corporation itself or by corporate shareholders. Thus, division (2) applies to any director or officer who has been a party to any “action or suit brought by or in the right of the corporation to procure a judgment in its favor.” Division (1), on the other hand, applies to a director or officer who has been a party to an action or suit “**other than** an action by or in the right of the corporation” - - in other words, a suit by a person or entity outside of the corporation.

It should further be noted that the Ohio General Assembly took divisions (1), (2) and (3) virtually word for word from subparagraphs (a), (b) and (c) of Section 145 of the Delaware General Corporation Law, a fact which was specifically acknowledged by the Eleventh District panel. See footnote 2 of Judge O’Toole’s dissenting opinion, stating that the “language in R.C. 1701.13(E)(1), (2) and (3) is nearly identical to those provisions of the Delaware statute dealing with indemnification of officers, directors, employees and agents, 8 Del. C. Section 145(a), (b) and (c).”

2. **The Provision For Advancement of Legal Fees During the Course of the Litigation**

Unlike the indemnification provisions of divisions (1), (2) and (3), the second mechanism provided by 1701.13(E) for the payment of attorneys fees is **mandatory**, is **limited to directors** and requires the corporation to advance a director’s attorneys fees and expenses during the course of the litigation “**as they are incurred,**” rather than waiting until after the director has been “successful on the merits” (see division (3)), so long as certain conditions are met. That advancement mechanism is found in division **(E)(5)** of the statute - - which division was added to 1701.13(E) by the General Assembly in **1986** - - and reads as follows:

(5)(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.

There are several things that should be noted about this "advancement" statute.

First, unlike the indemnification provisions of divisions (1), (2) and (3), quoted above at pp. 6-8, division (5) is not duplicative of any Delaware statute. Delaware does have an "advancement" statute - - namely, Section 145(e) of the Delaware Corporation Law - - but it is not mandatory. Rather, 145(e) of the Delaware Code states that attorneys fees "incurred by an officer or director of the corporation in defending" any suit or proceeding "**may** be paid by the corporation in advance of the final disposition."

Second, as pointed out by the Court of Appeals for the Tenth District in *MD Acquisition L.L.C. v Myers*, 173 Ohio App.3d 247 (2007) (¶ 6), "[a]dvancement of litigation expenses for corporate officers and directors, while related to (and often a

precursor of) indemnification, **is a distinct remedy**” from indemnification, which, as discussed above, is provided for in divisions (1), (2) and (3).

Third, it is obvious from its wording that the intent of division (5) is to cover **any** lawsuit filed against a director that is based on his or her position as director, regardless of whether that lawsuit was filed by the corporation itself, by shareholders of the corporation, or by a person or company outside of the corporation. Thus, division (5) begins with language stating that it applies to “an action, suit or proceeding referred to in division (E)(1) or (2) of this section.” As pointed out above, divisions (E)(1) and (E)(2) allow Ohio corporations to provide **post-litigation indemnification** to directors, officers and other employees. As further explained above, the primary difference between those two indemnification provisions is that division (E)(2) covers suits against a director or officer “by or in the right of the corporation to procure a judgment in its favor” - - in other words, suits brought either by the corporation itself or by a shareholder of the corporation as a derivative action to recover in the name of the corporation. See *MCI Telecommunications Corp. v. Wanzer*, 1990 Del. Super. LEXIS 222, holding that the language “actions by or in the right of the corporation,” as used in the Delaware indemnification statute, includes both “derivative actions” and “direct actions by a corporation.” Accord: *Hydro-Dynamics v. Pope*, 146 Ariz. 586, 708 P.2d 70, 71 (1985), stating that a “shareholder derivative suit is by its nature an action ‘by or in the right of the corporation.’ 19 Am. Jr. 2d, *Corporations* § 528.” See also Rule 23.1 of the Ohio Rules of Civil Procedure, stating that a derivative action is brought to “enforce a right of a corporation.”<sup>2</sup> Division (E)(1), on the other hand, allows post-litigation indemnification

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<sup>2</sup> As this Court is well aware, shareholder derivative actions against a corporate director usually allege that the corporate director committed an act or omission that

of attorneys fees incurred by a director who was sued in a proceeding “other than an action by or in the right of the corporation” - - in other words, a suit filed against a director by a person or entity outside of the corporation.

Fourth, the purpose of the “advancement” statute is quite clear. As stated in *Reddy v. Electronic Data Systems Corp.*, 2002 Del. Ch. LEXIS 69, affirmed 820 A.2d 371 (Del. 2003), it “is not uncommon for corporate directors, officers and employees to be sued for breach of the fiduciary duty of loyalty, and to have to defend claims that they took official action for the primary purpose of directing corporate resources to their own pocketbooks.” Courts have therefore repeatedly stated that advancement statutes provide corporate directors 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. Tafeen*, 888 A.2d 204, 211 (Del. 2005). Accordingly, the availability of such relief is deemed to be “an inducement for attracting capable individuals into corporate service.” (*Ibid.*) See, in this regard, *Ridder v. CityFed Financial Corp.*, 47 F.3d 85, 87 (3rd Cir. 1991), where the U.S. Court of Appeals for the Third Circuit stated that the “statutory provisions authorizing the advancement of defense costs \* \* \* plainly reflect a legislative determination to avoid deterring qualified persons from accepting responsible positions with financial institutions for fear of incurring liabilities in excess of their means;” and *Westbrook v. Swiatek*, 2010 Ohio 2868 at ¶ 24 (5<sup>th</sup> Dist.), stating that “[i]ndemnification and advancement statutes were enacted to attract qualified candidates into corporate service

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constituted a breach of the fiduciary duty that the director owed to the corporation. Derivative shareholder actions therefore frequently seek a judgment ordering the director to disgorge to the corporation (or to the “disinterested” shareholders, if the corporation is closely held) any profits or other moneys that the director realized as a result of that breach of fiduciary duty.

by protecting their personal assets from depletion by litigation that results from that service and to develop sound corporate management.”

**B. THE TRIAL COURT’S ADVANCEMENT ORDER, AND THE COURT OF APPEALS’ REVERSAL**

Given the mandatory language of division (E)(5) (“attorneys fees incurred by a director in defending the action \* \* \* **shall** be paid by the corporation as they are incurred”), it is manifest that the Common Pleas Court acted correctly when, in January, 2007, it ordered Trumbull Industries to pay the attorneys fees incurred by director Sam M. Miller. (See Appx. pp. 24-25) After all, this derivative action, brought by two shareholders of a corporation against a director for breach of fiduciary duty (for allegedly usurping for himself a corporate “opportunity”), is certainly “an action, suit or proceeding referred to in division \* \* \* (E)(2)” of R.C. 1701.13, namely, “a suit by or in the right of the corporation to procure a judgment in its favor, by reason of the fact that [defendant] is or was a director. . .”

Indeed, the Court of Appeals majority expressly acknowledged (in ¶ 46 of its Opinion) that the language “by or in the right of a corporation,” as used in division (E)(2), encompasses “a shareholder derivative action.” (See also the authorities quoted on page 11 above.)

Nevertheless, only six paragraphs later (in ¶ 52 of their Opinion), the Court of Appeals majority suddenly concluded “that **(E)(2)** is **inapplicable**” to this case, “as that section relates to reimbursement for a director **who seeks to procure a judgment in favor of the corporation.**” In other words, the Court of Appeals majority construed (E)(2) as allowing post-trial indemnification only where the director was the person bringing the lawsuit rather than the person being sued. Therefore, since division

(E)(5), by its express terms, only applies to the types of actions that are referred to in (E)(1) or (E)(2), and since (E)(2) is applicable only to directors who have sought “to procure a judgment in favor of the corporation,” the majority concluded that (E)(5) (providing for advancement) is inapplicable to director Sam M. Miller.

This holding by the Court of Appeals majority makes absolutely no sense. Nothing in the language of division (E)(2) (quoted above at page 8) warrants the conclusion that that division was intended to provide for the post-litigation indemnification of attorneys fees incurred by a director only in an **action brought by a director to procure a judgment in favor of the corporation**. To the contrary, division (E)(2) expressly states that a corporation “may indemnify” a corporate director “against expenses. . . incurred [by the director]. . . in connection with the **defense or settlement** of” an action or suit filed or threatened against him. There is no rational basis for reading the statute the other way around, i.e., as applying to cases in which the director is **the plaintiff**, as the Eleventh District has done. The Eleventh District has therefore given both division (E)(2) and division (E)(5) an interpretation that literally stands those two divisions on their head. For the end-result of that interpretation is that neither advancement nor indemnification will henceforth be available to a director of an Ohio corporation **who has been sued** for breach of fiduciary duty, even though providing advancement and indemnification to such directors was clearly the purpose of both of those statutory provisions.

**Proposition of Law No. 2:**

**The mandatory duty of advancement imposed on Ohio corporations by division (E)(5) of R.C. 1701.13 is not limited to cases in which a director is alleged to have committed acts or omissions on behalf of the corporation.**

Division (E)(5) of R.C. 1701.13 begins with the following language: “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. . .” Citing this language, the Court of Appeals majority stated (correctly) that, in order to receive an “advancement” of attorneys fees under division (E)(5), a director must have been sued for an “act or omission” on his or her part. (Opinion, ¶ 50) However, the majority then went on to hold that “[t]he only logical interpretation of this provision” is that such an “act or omission” **must have been “on behalf of the corporation”** before a director is entitled to receive the benefit of either division (E)(5) (advancement of attorneys fees during the pendency of the litigation) or, for that matter, division (E)(2) (post-lawsuit indemnification). (Opinion, ¶ 50). Applying this “logical interpretation” to the instant case, the Court of Appeals majority concluded that director Sam M. Miller was not entitled to the protection of division (E)(5) because

Sam M. has **not** been sued as a result of any act or omission **on behalf of the corporation**. Instead, as outlined in their complaint, appellants claim Sam M. is liable for those acts done on behalf of a separate corporation [Private Brands], allegedly in contravention of his fiduciary duties as a director of Trumbull Industries.

(Opinion, ¶ 50). These allegations of “harm to the corporation as a result of a violation of [Sam M.’s] duties to the corporation,” continued the majority, are “inapposite to an ‘act or omission’ **on behalf** of the corporation.” (*Id.*, ¶ 53)

Here, again, the Court of Appeals has stood the statute on its head. Nowhere in division (E)(1), division (E)(2) or division (E)(5) does the statute say (or even imply) that those divisions apply only to suits involving acts or omissions committed by a director "on behalf of the corporation." Nor can such an interpretation be inferred. To the contrary, division (E)(5) was specifically designed to provide directors with interim financial relief if they are sued for a breach of fiduciary duty (see cases cited at pp. 11-12 above), and the essence of almost every breach of fiduciary duty claim against a director is that the director acted **contrary** to the interests of the corporation (rather than **on behalf** of the corporation). See, for example, *Wing Leasing Inc. v. M&B Aviation, Inc.*, 44 Ohio App.3d 178, 181 (10<sup>th</sup> Dist. 1988), stating that the "principles which govern the fiduciary relationship between a corporation and its directors include a duty of good faith, a duty of loyalty, a duty to refrain from self-dealing and a duty of disclosure." A director's breach of any of these fiduciary duties usually involves his having acted to further his own personal interests rather than having acted to further the interests of the corporation. If, then, the Court of Appeals' interpretation of divisions (E)(1), (E)(2) and (E)(5) is allowed to remain in effect, that interpretation will prevent a corporate director from ever again requiring the corporation to pay his or her attorneys fees when he or she is sued for breach of fiduciary duty.

Moreover, whether the plaintiffs' complaint alleges that defendant Sam Miller acted "on behalf of himself," "on behalf of Private Brand" or "on behalf of Trumbull Industries" is irrelevant insofar as the applicability of division (E)(5) is concerned. The thrust of plaintiffs' lawsuit is that, in "usurping" a corporate opportunity for himself, Miller breached a fiduciary duty that he owed to Trumbull Industries, and that allegation of breach of fiduciary duty is what triggered the applicability of the

advancement statute, regardless of the defendant's motive.<sup>3</sup> As stated in *Reddy v. Electronic Data Systems Corp.*, 2002 Del. Ch. LEXIS 69 (2002):

It is not uncommon for corporate directors, officers, and employees to be sued for breach of the fiduciary duty of loyalty, and to have to defend claims that they took official action for the primary purpose of diverting corporate resources to their own pocketbooks. . . . Therefore, it is highly problematic to make the advancement right of such officials dependent on the motivation ascribed to their conduct by the suing parties. To do so would be to largely vitiate the protections afforded by § 145 and contractual advancement rights.

**Proposition of Law No. 3:**

**In order for a corporation to avoid the mandatory duty imposed by R.C. 1701.13(E)(5), the corporation must have included in its articles of incorporation or code of regulations a specific statement that the provisions of division (E)(5) do not apply to it.**

As noted earlier, division (E)(5) begins with the following language:

(5)(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 \* \* \* .

It should therefore be clear that the only way that a corporation can avoid the mandatory requirements of (E)(5), relating to the advancement of a director's attorneys fees as they are incurred, is to comply with the "opt out" procedure set forth in the quoted language. This means that a corporation must insert, either in its articles or in

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<sup>3</sup> As stated in *Prodan v. Hemeyer*, 80 Ohio App.3d 735, 744 (8<sup>th</sup> Dist., 1992), "The doctrine of corporate opportunity is a corollary of the undivided loyalty rule. The rule, which prohibits a director or officer from placing himself in a position of conflicting loyalties and subsequently violating his primary duty to the corporation, naturally prevents the director from appropriating an opportunity from the corporation."

its code of regulations, an article or regulation that “specifically refers” to division (E)(5) of R.C. 1701.13 and expressly states that the provisions of that division “do not apply to the corporation.”

In the instant case, the Court of Appeals majority acknowledged that Trumbull Industries never adopted such an “opt out” article or regulation. (Opinion, ¶ 57) Hence, the Court of Appeals should have held that the “advancement” obligations imposed by division (E)(5) are mandatory insofar as Trumbull is concerned. Instead, the majority held exactly the opposite. Citing a statement by a U.S. district judge in *James River Management Company v. Kehoe*, 674 F.Supp.2d 745 (E.D. Va. 2009), that any interpretation of division (E)(5) as requiring a specific “opt out” provision in a corporation’s articles or code of regulations would be “incongruous,” the Court of Appeals majority adopted the Virginia judge’s holding that “the statute cannot be read to mandate advancement as the default rule for all employees under all circumstances.” (Opinion, ¶ 57) The majority thus agreed with the Virginia judge that the “better policy” construction of division (E)(5) is that “advancement is mandated **only** when” a corporation has included in its articles of incorporation a provision **allowing** the corporation to **indemnify** a director for his legal fees after the case has been concluded (see 674 F.Supp.2d at 753). The Ohio corporation (James River Insurance Company) that was involved in the Virginia case had no such indemnification provision in its articles. Therefore, applying his “better policy” construction, the Virginia district judge held that the advancement provisions of (E)(5) had no application to that corporation.

That interpretation, of course, was absolutely wrong, because it was the exact opposite of what division (E)(5) expressly says. See, in this regard, the 1986

Committee's Comments to R.C. 1701.13, published in Page's Ohio Revised Code Annotated, which states:

Unless the corporation's articles or regulations specify that division (E)(5)(a) does not apply to the corporation, the amendment to this division **requires** the advancement of a director's expenses upon receipt of an undertaking by him (1) to repay if it is determined that his conduct was such that monetary damages would have been recoverable under Section 1701.59 and (2) to cooperate with the corporation.

Judge O'Toole, in the instant case, therefore had it right when she stated, in her dissent:

Since the Articles of Incorporation do not expressly *preclude* advancement of legal fees, Trumbull Industries must comply with the mandatory provisions of R.C. 1701.13(E)(5)(a).

(Opinion, ¶ 74)

In addition, the Court of Appeals majority ignored the fact that if Trumbull Industries had been the Ohio corporation that was before the Virginia district court in *James River Management*, the Virginia district judge would have held that (E)(5) was mandatory insofar as Trumbull was concerned. The reason for this is that, unlike James River Insurance Company (the Ohio company actually involved in the Virginia case), the articles of incorporation of Trumbull Industries **do** contain an indemnification provision for directors (and officers) who have been sued. Indeed, the Court of Appeals majority expressly acknowledged that fact in ¶¶ 54 and 55 of its Opinion, pointing out that Article Sixth of Trumbull's articles of incorporation states, in pertinent part, that:

Any person who at any time shall serve, or shall have served, as director, officer or employee of the corporation . . . shall be saved harmless and indemnified by this corporation of all costs and expenses, including but not limited to counsel fees. . . reasonably incurred in connection with the defense of any claim, action, suit or proceeding. . . in which he or they may be involved by

virtue of such position with or by direction of this corporation . . .

Hence, even under the constricted (and erroneous) interpretation given to (E)(5) by the Virginia district judge, advancement is mandated by that division insofar as the directors of Trumbull Industries are concerned. Nevertheless, the Court of Appeals - - quite bewilderingly - - held that the advancement statute does **not** apply to Trumbull, even though Trumbull's articles **do not** expressly negate advancement (as the statute requires an Ohio corporation to do if that corporation wishes to "opt out") and even though Trumbull's articles **do** contain an express indemnification provision (as required by the Virginia district judge's misinterpretation of (E)(5).)<sup>4</sup>

Thus, the net effect of the Court of Appeals holding is that division (E)(5) of R.C. 1701.13 no longer applies to **any** Ohio corporation, regardless of what language is (or is not) found in the articles of incorporation. For if a corporation's articles **do not** provide for post-litigation indemnification (like the Ohio corporation involved in the *James River Management* case), that corporation is not subject to division (E)(5), per the Virginia judge's decision. If, on the other hand, the articles of incorporation **do** allow for post-litigation indemnification, that corporation also is not subject to division (E)(5) per the Court of Appeals holding in the instant case. Thus, we have here yet another

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<sup>4</sup> When, after oral argument, plaintiffs brought the *James River Management* case to the Court's attention (by means of a Notice of Supplemental Authority), defendant Sam Miller filed a Response. In that Response, defendant pointed out not only that the Virginia district judge was wrong in concluding that division (E)(5) applied only to corporations that provided in their articles of incorporation for post-litigation indemnification of director's attorneys fees, but also that Trumbull Industries' articles do provide for indemnification - - unlike the articles of the Ohio corporation involved in the *James River Management* case. The Court of Appeals majority, however, paid no heed to that factual distinction, even though it expressly recognized that "Trumbull Industries' Articles of Incorporation \* \* \* do provide for indemnification." (Opinion, ¶ 54)

“interpretation” of (E)(5) by the Court of Appeals majority that vitiates that statute entirely.

**Proposition of Law No. 4:**

**A corporation’s mandatory duty under R.C. 1701.13(E)(5) to advance the legal fees of a director who has been sued for breach of fiduciary duty is not limited to directors who are alleged to have engaged in conduct that is protected by the business judgment rule.**

**A. THE CONCURRING JUDGE’S ERRONEOUS ATTEMPT TO LIMIT THE ADVANCEMENT STATUTE TO CONDUCT PROTECTED BY THE BUSINESS JUDGMENT RULE**

One of the two judges in the majority, Judge Grendell, filed a concurring opinion in which she put forward an additional reason as to why division (E)(5) does not apply to the claims being asserted by plaintiffs against director Sam M. Miller. According to Judge Grendell, “the plaintiffs’ allegations against the director are solely for actions taken in violation of the duty of good faith and contrary to the best interests of the corporation, specifically breach of his fiduciary duties to the corporation and its shareholders, fraud and usurpation of a business opportunity.” (Opinion, ¶ 63) “Such allegations,” continued Judge Grendell, “place the director’s conduct outside the protection of the business judgment rule, as codified in R.C. 1701.59(B),” and allegations of conduct “outside the protection of the business judgment rule” are “beyond the application of R.C. 1701.13(E)(5).” (*Ibid.*)

In support of this conclusion, Judge Grendell asserted that the **indemnification** provisions of R.C. 1701.13 - - namely, divisions (E)(1) and (E)(2) - - allow post-litigation indemnification only to a director who has been found to have “acted in good faith and in a manner he reasonably believed to be in or not opposed to the

best interests of the corporation.” This statutory language parallels that of the business judgment rule, as codified in R.C. 1701.59(B), which requires a director to perform his or her duties “in good faith” and “in a manner not opposed to the best interests of the corporation.” Judge Grendell concluded that this similarity in wording means that a director whose conduct violated the “business judgment rule” - - because it was not “in good faith” or because it was “opposed to the best interests of the corporation” - - is not entitled to indemnification under 1701.13(E)(1) or (E)(2). Carrying this reasoning one step further, Judge Grendell concluded that if a director is not entitled to indemnification under (E)(1) or (E)(2) (because his or her conduct violated the “business judgment rule”), the director is also not entitled to “advancement” of his or her fees under (E)(5) if a director is **alleged** to have engaged in conduct that violated that rule.

There are a number of things wrong with this reasoning.

In the first place, Judge Grendell failed to distinguish between (a) the circumstances that exist when a director asserts a claim for **indemnification** of attorneys fees under (E)(1) or (E)(2) after a lawsuit has been concluded and (b) the circumstances that exist when a director seeks **advancement** of fees under (E)(5) while the case is still pending. Under (E)(1) and (E)(2), a director is entitled to post-litigation indemnification only if he or she “succeeds on the merits” (see division (E)(3)) **and** “if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.” (See divisions (E)(1) and (E)(2).) Under division (E)(5), however, there are no such limitations. To the contrary, a corporation’s advancement obligations under division (E)(5) are triggered by the **allegations** of the complaint, not by the final result of the lawsuit. See, in this regard, *U.S. v. Stein*, 452 F.Supp.2d 230, 272 (S.D.N.Y. 2006), where the District Court described “the line of Delaware cases that distinguishes

between advancement and indemnification and requires companies to advance the cost of defending claims that **allege** wrongs to the companies, even lawsuits brought by companies themselves against former officers and directors.” The “fundamental principle,” stated the Court, is that a “company that undertakes to advance defense costs may not avoid that obligation by claiming that the litigation against its former employee for which the employee seeks advancement of defense costs accuses the employee of conduct that, **if proved**, would foreclose indemnification or establish a breach of the employment contract or of a fiduciary or other duty owed to the company.” Thus, division (E)(5) of the Ohio statute provides that, when a suit is filed against a director that **alleges** that the director engaged in fraud or committed a breach of fiduciary duty, the corporation is required to make advance payments of the director’s attorneys fees as soon as the director signs the “undertaking” required by that division, regardless of whether the corporation believes that the allegations are true or not. See, for example, *Radiancy, Inc. v. Azar*, 2006 Del. Ch. LEXIS 13, where the Chancery Court stated that it is “no answer to an advancement action, as either a legal or logical matter, to say 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.**”

In other words, Judge Grendell overlooked the critical distinction between (a) a “**claim**” or allegation of breach of fiduciary duty and (b) a **judgment** of breach of fiduciary duty entered after a trial on the merits. If a **judgment** of breach of fiduciary duty is entered **against** a director - - or if the director has been found not to have “acted in good faith,” etc. - - the director cannot claim the protection of the “business judgment rule,” and he or she cannot obtain from the corporation **indemnification** of attorneys fees under divisions (E)(2) or (E)(1). However, a mere **claim** of breach of fiduciary duty

contained in a complaint against a director has no such consequences insofar as division (E)(5) is concerned. As stated by the U.S. Court of Appeals for the Third Circuit in *Ridder v. CityFed Financial Corp.*, 47 F.3d 85, 89 (3<sup>rd</sup> Cir. 1995), applying Delaware law, the right of corporate officers and directors “to receive the costs of defense **in advance** does not depend upon the merits of the claim asserted against them, and is separate and distinct from any right of indemnification they may **later** be able to establish.” Accord: *Morgan v. Grace*, 2003 Del. Ch. LEXIS 113, stating that the “value of the right to advancement is that it is granted or denied while the underlying action is pending. The advancement of legal fees should be seen as a decision to advance credit and does not in any way affect the underlying action.”

To the same effect is *Reddy v. Electric Data Systems Corp.*, 2002 Del. Ch. LEXIS 69 at \*29, affirmed 820 A.2d 371 (2003), where the Delaware Chancery Court stated that the “clear authorization of advancement rights [under the Delaware statute] presupposes that the corporation will front the expenses **before any determination is made of the corporate official’s ultimate right to indemnification.**” As stated by the **Delaware Supreme Court in *Kaung v. Cole National Corp.***, 884 A.2d 500, 509 (Del. 2005), “[w]hether a corporate officer has a right to indemnification is a decision that must necessarily await the outcome of the investigation or litigation. Section 145(e) of the [Delaware statute] **fills the gap by permitting advancement, so the corporation may shoulder these interim costs.**”

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This same distinction exists under the Ohio statutes.

It should therefore be manifest that the conditions and limitations of the indemnification statute (division (E)(2)), relied upon by Judge Grendell, should not be applied to, or “read into,” the advancement statute (division (E)(5)). Indeed, conflating

the indemnification and advancement statutes in such a manner “blurs the distinct purpose of advancement provisions” (*Morgan v. Grace*, 2003 Del. Ch. LEXIS 113 at \*8), which purpose, in the words of the Delaware Supreme Court in the *Kaung* decision quoted above, is to have the corporation “shoulder these interim costs” until after the case has been completed. Judge O’Toole, in her dissenting opinion, was therefore absolutely correct when she stated (in ¶ 71) that “[a] director cannot claim the protection of the business judgment rule and obtain from the corporation indemnification of his attorney fees under R.C. 1701.13(E)(2) if a judgment of breach of fiduciary duty is entered against him. However, a **claim** of a breach of fiduciary duty against a director does not have the same consequences under either R.C. 1701.59(D) [the business judgment rule statute] or R.C. 1701.13(E)(5)(a). Thus, the claims of a breach of fiduciary duty and other misconduct made against Sam M. were sufficient to trigger Trumbull Industries’ duty to advance his attorney fees.”

Directly in point is the pronouncement of the U.S. Court of Appeals for the Third Circuit in *Ridder v. CityFed Financial Corp.*, 47 F.3d 85, 87 (3<sup>rd</sup> Cir. 1991), with respect to the Delaware advancement statute. Stated the Third Circuit:

The statutory provisions authorizing the advancement of defense costs, conditioned upon an agreement to repay if a right of indemnification is not later established, plainly reflect a legislative determination to avoid deterring qualified persons from accepting responsible positions with financial institutions for fear of incurring liabilities greatly in excess of their means, and to enhance the reliability of litigation-outcomes involving directors and officers of corporations by assuring a level playing field. It is not the province of judges to second-guess these policy determinations.

**B. THE CONCURRING JUDGE'S ERRONEOUS INTERPRETATION OF THE "REASONABLE COOPERATION" UNDERTAKING**

At page 10 of their Memorandum in Opposition to Jurisdiction, plaintiffs-appellees "concede[d] that Judge Grendell's position with respect to the business judgment rule" was "misplaced" and "would find little support in Ohio law." Nevertheless, plaintiffs-appellee then proceeded to argue that Judge Grendell "noted correctly that [appellant] Sam M. could not reasonably cooperate with Trumbull Industries because that corporation's interest, and those of Sam are completely opposed." Therefore, the written commitment that defendant Sam M. Miller gave to the corporation, in accordance with subparagraph (ii) of division (E)(5), "cannot be satisfied in the present case." (Opinion, ¶ 64)

This additional purported reason as to why division (E)(5) should not be applied to the instant case, however, is also erroneous.

First of all, Trumbull Industries has no active role in the instant lawsuit. As pointed out earlier in this Brief, this case began as (and continues to be) a derivative shareholder's action brought by two shareholders (who together own 50% of the stock) against one of the corporate directors (who, with his brother, owns the other fifty percent). It was not until August, 2007 - - eight months after the entry of the January 22, 2007 Common Pleas Court Order directing Trumbull Industries to advance defendant's legal fees and four-and-a-half years after commencement of this action - - that plaintiffs filed a Sixth Amended Complaint in which they **purported** to add Trumbull Industries as a new party plaintiff (see page 4 above). Since, however, Trumbull's Board of Directors has been divided, two to two, on almost every issue for many years (with one set of Miller cousins opposing the other set), the Board never voted to authorize Trumbull

Industries being made a party to this lawsuit. The filing of the Sixth Amended Complaint, adding Trumbull as a plaintiff, was therefore a step taken **solely** by the attorneys representing plaintiffs Murray A. Miller and Samuel H. Miller and **not** by the corporation itself.

Secondly, to suggest that defendant Sam Miller cannot “cooperate” with the corporation in this lawsuit is to assume that Trumbull Industries has some independent existence or interest that enables it to act independently of the two warring sets of directors and shareholders. It does not. As the Common Pleas Court has repeatedly recognized, the board is “hopelessly deadlocked on every issue presented in this case.” (Appx. 27) Hence, the corporation is incapable of taking any “corporate action” in connection with this litigation that would cause the “corporation” to request the cooperation of defendant Sam M. Miller.

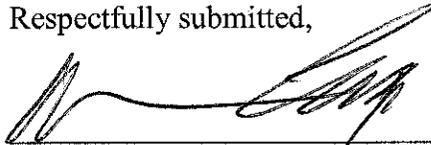
Thirdly, there is no evidence that defendant Sam M. Miller has failed to “cooperate” with the corporation with respect to this lawsuit.

Fourthly, there is nothing in the statute that indicates what is meant by the phrase “reasonable cooperation,” as used in division (E)(5), or what happens if, after a defendant director gives his written “undertaking” that he will “reasonably cooperate,” the corporation (or members of the board) asserts that the director has **not** “reasonably cooperated” with the corporation. Can the corporation then cease payments to the director’s attorney, simply by making such an assertion? If that be the rule, then a corporation would have an easy excuse for avoiding the mandatory requirements of division (E)(5).

**CONCLUSION**

For all of the reasons set forth above, the decision of the Court of Appeals should be reversed and the order of contempt entered by the Common Pleas Court should be reinstated.

Respectfully submitted,



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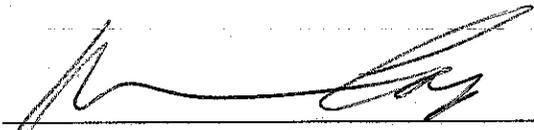
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IN THE SUPREME COURT OF OHIO

11-0024

MURRAY A. MILLER, et al.	)	
	)	
Appellees	)	On Appeal from Trumbull County
	)	Court of Appeals, Eleventh
v.	)	Appellate District
	)	
SAM M. MILLER, et al.	)	Court of Appeals
	)	Case No. 2009-T-0061
Appellants	)	

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**NOTICE OF APPEAL  
OF APPELLANT SAM M. MILLER**

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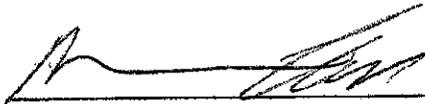
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TRUMBULL INDUSTRIES, INC.

**Notice of Appeal of Appellant Sam M. Miller**

Appellant Sam M. Miller hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Trumbull County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals case No. 2009-T-0061 on November 22, 2010.

This case is one of public or great general interest.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail on this 3<sup>rd</sup> day of January, 2011, to appellees counsel:

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COURT OF APPEALS

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TRUMBULL COUNTY, OH  
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IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al., : OPINION  
Plaintiffs-Appellants, :  
- vs - : CASE NO. 2009-T-0061  
SAM M. MILLER, et al., :  
Defendants-Appellees. :

Civil Appeal from the Court of Common Pleas, Case No. 2003 CV 433.

Judgment: Reversed and remanded.

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*Michael N. Ungar, Marvin L. Karp, Lawrence D. Pollack, and Brad A. Sobolewski, Ulmer & Berne, L.L.P., 1100 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113 (For Defendant-Appellee Samuel M. Miller).*

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TIMOTHY P. CANNON, J.

{¶1} Appellants, Murray A. Miller ("Murray"), Sam H. Miller ("Sam H."), and Trumbull Industries, Inc. ("Trumbull Industries"), appeal from the May 29, 2009 judgment entry of the Trumbull County Court of Common Pleas, finding Trumbull Industries in contempt.

{¶2} The following facts and procedural history were taken from appellants' last appeal with this court, *Miller v. Miller*, 11th Dist. No. 2008-T-0076, 2009-Ohio-2092.

{¶3} Trumbull Industries sells plumbing supplies, including vitreous china. Two sets of cousins own Trumbull Industries' common stock: brothers Murray and Sam H. comprise one set, and brothers Sam M. and Ken Miller comprise the other set.

{¶4} On February 24, 2003, appellants, Murray and Sam H., as shareholders, directors, and/or officers of Trumbull Industries, filed a complaint for injunctive relief and damages against appellees, Samuel M. Miller ("Sam M.") and Daniel R. Umbs ("Umbs"). Sam M. is the sole trustee of the Samuel M. Miller Revocable Living Trust, which owns 25 percent of the outstanding voting shares of Trumbull Industries. Sam M. is vice president of sales and marketing for Trumbull Industries and serves as the company's plumbing products manager. Umbs is the former president of Briggs Plumbing Products, Inc. ("Briggs"), a supplier to Trumbull Industries.

{¶5} According to the complaint, Jacuzzi, Inc. ("Jacuzzi") entered into a contract with Briggs in 2002, in which Briggs would supply plumbing products to Jacuzzi. Umbs negotiated the Jacuzzi contract on behalf of Briggs. Sometime later in 2002, Umbs negotiated a contract to sell plumbing products to Jacuzzi on terms more favorable than those in the contract between Briggs and Jacuzzi.

{¶6} Sam M. became involved with Umbs in his efforts to sell plumbing products to Jacuzzi, which came to be known as "Private Brand." It was alleged that Sam M.'s involvement was not disclosed to appellants until December 4, 2002. Apparently, Sam M. informed appellants and shareholders of Trumbull Industries, by memorandum, of a "business opportunity" involving the operation of a business that

would market private brand plumbing and related products for sale to manufacturers and possibly other wholesalers, including Jacuzzi. The memorandum indicated that Private Brand "would source products from imported and domestic suppliers and re-brand these products under various brand names." Sam M. called this business opportunity the "Brand Company project." Appellants immediately objected and demanded that Sam M. cease and desist his involvement. However, appellants allege in their complaint that Sam M. did not comply but, rather, has been actively involved with Umbs in the Brand Company project.

{¶7} On February 10, 2003, Briggs filed a lawsuit against Umbs in the United States District Court for the District of South Carolina. At that time, appellants allege they discovered that Umbs had purportedly been acting on behalf of Trumbull Industries in his dealings with Jacuzzi.

{¶8} On April 28, 2003, appellees filed an answer to the complaint. Appellants later filed numerous amended complaints.

{¶9} On June 17, 2003, Sam M. filed a motion to compel appellants to repay and reimburse to Trumbull Industries all attorney fees and expenses.

{¶10} On March 1, 2004, appellants filed a motion for default judgment and/or sanctions. Appellees filed a response on March 19, 2004. The trial court denied appellants' motion for default judgment on April 15, 2004.

{¶11} Appellants filed a motion for sanctions on April 19, 2004. Appellants filed another motion, entitled "Motion for Sanctions (Default Judgment)," on November 5, 2004. On December 6, 2004, appellees filed a memorandum in opposition to appellants' motion for sanctions.

{¶12} Appellees filed a motion for summary judgment on September 7, 2005. On October 3, 2005, appellants filed a memorandum in opposition. Appellees filed a reply on October 18, 2005.

{¶13} A hearing was held on appellants' "Motion for Sanctions (Default Judgment)" on December 19, 2005.

{¶14} Pursuant to his decision, the magistrate determined appellants' motion to be well-taken in part. The magistrate indicated that appellees shall reimburse appellants for their reasonable and necessary attorney fees and expenses. Also, the magistrate determined that Umbs is entitled to summary judgment in his favor as a matter of law on the claims made by appellants for usurpation of a business opportunity and breach of fiduciary duty. As to all other claims, the magistrate indicated that appellees' motion for summary judgment should be denied.

{¶15} On December 15, 2006, appellees filed a motion for declaratory judgment on the issue of legal fees. Also on that date, appellants filed a motion for declaratory judgment on the issue of appellees' right to indemnification of attorney fees.

{¶16} Pursuant to its January 22, 2007 judgment entry, the trial court determined that Sam M. is entitled to have his attorney fees reimbursed from time to time by Trumbull Industries. The trial court further ordered that appellants are entitled to have their attorney fees funded by Trumbull Industries, subject to the risk of reimbursement to Trumbull Industries under the law.

{¶17} On February 6, 2007, Sam M. filed a motion for reconsideration and request for clarification of the trial court's January 22, 2007 judgment entry, which was denied by the trial court on May 18, 2007. It was from that judgment that Sam M. filed a

notice of appeal with this court, case No. 2007-T-0065, to which appellants filed a cross-appeal. On September 28, 2007, this court dismissed the appeal and cross-appeal due to lack of a final, appealable order. *Miller v. Miller*, 11th Dist. No. 2007-T-0065, 2007-Ohio-5212.

{¶18} On February 12, 2008, appellants filed a motion for reconsideration and request for clarification with respect to the trial court's January 22, 2007 judgment entry regarding the right to indemnification of attorney fees and its May 18, 2007 judgment entry. On April 18, 2008, Sam M. filed an opposition to appellants' motion for reconsideration, as well as a motion for the trial court to clarify its January 22, 2007 judgment entry.

{¶19} Pursuant to its June 30, 2008 judgment entry, the trial court ordered Trumbull Industries to pay Sam M.'s attorney fees and costs incurred from March 25, 2008. It indicated that all of Sam M.'s attorney fees incurred before March 25, 2008, shall be paid in accordance with the January 22, 2007 order.

{¶20} On July 17, 2008, appellants' counsel sent the trial court a letter, indicating Trumbull Industries' refusal to abide by the court's June 30, 2008 order to pay the invoices from Ulmer and Berne, L.L.P.

{¶21} On July 24, 2008, Sam M. filed a motion for the trial court to reconsider or clarify its January 22, 2007 order as it applies to the \$240,000 that he was required to reimburse to Trumbull Industries and to Ulmer and Berne through March 24, 2008.

{¶22} A hearing was held on July 24, 2008.

{¶23} Pursuant to its July 24, 2008 judgment entry, the trial court found Trumbull Industries in contempt of its January 22, 2007 judgment. The trial court allowed

Trumbull Industries to purge itself of contempt by paying all amounts due for the legal bills incurred on behalf of Sam M. in the amount of \$138,972.51 by 3:00 p.m. on July 24, 2008. In the event that Trumbull Industries failed to purge itself of contempt by the specified date and time, the trial court indicated that it would impose a sanction against Trumbull Industries in the amount of \$5.00 per business day commencing July 25, 2008. It is from that judgment that appellants filed a second appeal, case No. 2008-T-0076.

{¶24} On May 4, 2009, this court dismissed the appeal. *Miller v. Miller*, 11th Dist. No. 2008-T-0076, 2009-Ohio-2092. The majority opinion specifically indicated that “[t]he contempt entry in the instant matter, however, does not rise to one of finality. Pursuant to the record before us, again, there has been no finding by the trial court that the contemnor has failed to purge itself and an actual imposition of a penalty or sanction.” *Id.* at ¶32. Thus, this court determined that the July 24, 2008 judgment was not final and appealable. *Id.* at ¶33.

{¶25} On May 11, 2009, Trumbull Industries filed a motion to impose sanctions.

{¶26} Pursuant to its May 29, 2009 judgment entry, the trial court sustained the motion to impose sanctions and found that Trumbull Industries had not purged itself of contempt. The trial court imposed sanctions for contempt upon Trumbull Industries in the amount of \$5.00 per business day. The matter was stayed by the trial court pending appellate review of the contempt citation. It is from the May 29, 2009 order of contempt that appellants filed the present appeal, asserting the following assignment of error for our review:

{¶27} “The trial court abused its discretion when it ruled that Trumbull Industries must indemnify Sam M. Miller for his attorney fees.”

{¶28} Appellants present two issues: (1) Sam M. violated his corporate duties and did not act in the best interest of Trumbull Industries, as well as the trial court failed to address R.C. 1701.13; and (2) Trumbull Industries’ Articles of Incorporation do not envision reimbursement of a director’s attorney fees while a litigation is pending.

{¶29} Initially, we note that appellants are appealing from the May 29, 2009 order of contempt. \*\*\*\* [I]n a contempt proceeding, a reviewing court must uphold the trial court’s decision absent a showing that the court abused its discretion. *Winebrenner v. Winebrenner* (Dec. 6, 1996), 11th Dist. No. 96-L-033, 1996 Ohio App. LEXIS 5511, at 7, citing *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75. An abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11.

{¶30} Although appellants are appealing from the order of contempt, their main focus is on the January 22, 2007 order, directing Trumbull Industries to pay Sam M.’s attorney fees during the pendency of the litigation. In ordering such payment, the trial court applied R.C. 1701.13(E)(5)(a). Thus, we must determine whether the trial court’s application of the foregoing statute was erroneous as a matter of law.

{¶31} “In Ohio, as in every other state, the long-established principle is that directors of a corporation have an obligation to the corporation which is in the nature of that of a fiduciary. A director’s obligation to the corporation includes two separate duties: loyalty and care. \*\*\* The formation of these duties is codified in R.C.

1701.59(B)[.]” *Stepak v. Schey* (1990), 51 Ohio St.3d 8, 11-12 (Holmes, J., concurring).  
(Internal citations and footnotes omitted.)

{¶32} A standard of care is provided under R.C. 1701.59(B), which provides, in pertinent part:

{¶33} “A director shall perform the director’s duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. \*\*\*.”

{¶34} “In evaluating a director’s compliance with the duty of care, Ohio courts follow the ‘business judgment rule,’ and will not usually inquire into the wisdom of actions taken by the director in the absence of fraud, bad faith or abuse of discretion.” *Stepak, supra*, at 12-13 (Holmes, J., concurring).

{¶35} According to the 1986 Committee comment, “[t]he addition to division (B) [of R.C. 1701.59] conforms it to division (E) of Sec. 1701.13, which, among other things, provides for director indemnification.”

{¶36} With respect to appellants’ first issue, R.C. 1701.13(E) provides, in part:

{¶37} “(1) A corporation may indemnify or agree to indemnify any person 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, other than an action by or in the right of the corporation, by reason of the fact that he is or was a director, officer, employee, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee,

member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit, or proceeding, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, if he had no reasonable cause to believe his conduct was unlawful. 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, create a presumption that the person did not act in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, he had reasonable cause to believe that his conduct was unlawful.

{¶38} "(2) A corporation may indemnify or agree to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending, or completed action or suit 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, or agent of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer, employee, member, manager, or agent of another corporation, domestic or foreign, nonprofit or for profit, a limited liability company, or a partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the defense or settlement of such action or suit, if he acted in good faith and in a manner he reasonably believed to be in

or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any of the following:

{¶39} "(a) Any claim, issue, or matter as to which such person is adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless, and only to the extent that, the court of common pleas or the court in which such action or suit was brought determines, upon application, that, despite the adjudication of liability, but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the court of common pleas or such other court shall deem proper;

{¶40} "(b) Any action or suit in which the only liability asserted against a director is pursuant to section 1701.95 of the Revised Code.

{¶41} "(3) To the extent that a director, trustee, officer, employee, member, manager, or agent has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in division (E)(1) or (2) of this section, or in defense of any claim, issue, or matter therein, he shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him in connection with the action, suit, or proceeding.

{¶42} \*\*\*\*

{¶43} "(5)(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:

{¶44} "(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;

{¶45} "(ii) Reasonably cooperate with the corporation concerning the action, suit, or proceeding."

{¶46} R.C. 1701.13(E)(1), (2), and (3) permit the corporation to indemnify a director after the litigation against the director, or threatened litigation, has been concluded and the director has been successful on the merits.<sup>1</sup> R.C. 1701.13(E)(1) applies to an action filed against a director or officer by a third party who is outside of the corporation (i.e., an action for negligence or other torts). R.C. 1701.13(E)(2) applies to an action "by or in the right of the corporation" (i.e., a shareholder derivative action). As such, the language in R.C. 1701.13(E)(1), (2), and (3) is permissive.

{¶47} The language in R.C. 1701.13(E)(5)(a) is mandatory. That section provides that the payment of attorney fees incurred by a director "shall be paid by the corporation as they are incurred."

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1. The comparable Delaware provision is contained in subparagraph (e) of 8 Del. C. Section 145. Ohio courts have looked to Delaware cases construing the provisions of 8 Del. C. Section 145 when asked to interpret and apply the comparable provisions of R.C. 1701.13(E). See *MD Acquisition, L.L.C. v. Myers*, 173 Ohio App.3d 247, 2007-Ohio-3521, at ¶7.

{¶48} Appellees cite to numerous cases from Delaware to assist this court in its interpretation of R.C. 1701.13(E). "Although the Ohio and Delaware statutes are similar, both structurally and respecting the verbiage used, the statutes are not identical. \*\*\* [T]he key difference between the two statutes is that the Ohio statute's advancement provision states that, for a suit referenced in division 1701.13(E)(1) or (E)(2) (respecting indemnification), expenses 'shall be paid \*\*\* as they are incurred, in advance of the final disposition of the action' unless the corporation specifically states that it does not wish to confer advancement rights. \*\*\*. The Delaware advancement provision (8 Del. Code 145(e)), by comparison, does not mention the prior indemnification provisions (id. 145(a)-(b)) within the same statute, and states that fees and expenses 'may be paid \*\*\* in advance of the final disposition of such action.' \*\*\*." (Emphasis sic.) *James River Mgmt. Co. v. Kehoe* (E.D.Va.2009), 674 F.Supp.2d 745, 753. Notably, "(n)o Delaware corporation is required to provide for advancement of expenses." Id. at 754. (Citation omitted.)

{¶49} Although R.C. 1701.13(E)(5)(a) is mandatory in its application, it is not applicable under the factual scenario as alleged in appellants' complaint. R.C. 1701.13(E)(5)(a) is limited to payment of legal expenses as incurred by a director who is the subject of a suit. In this case, there are two threshold requirements to invoke this statute for the benefit of the director named in the suit. First, the director must have been sued as a result of an "act or omission." R.C. 1701.13(E)(5)(a). Second, the litigation must be "an action, suit, or proceeding referred to in division [R.C. 1701.13] (E)(1) or (2)." Id.

{¶50} As acknowledged by appellees' counsel at oral argument, "act or omission" does not mean any "act or omission" by the director. The only logical interpretation of this provision is that it be an "act or omission" of a director on behalf of the corporation. In this case, Sam. M. has not been sued as a result of any "act or omission" on behalf of the corporation. Instead, as outlined in their complaint, appellants claim Sam M. is liable for those acts done on behalf of a separate corporation, allegedly in contravention of his fiduciary duties as a director of Trumbull Industries.

{¶51} Additionally, division (E)(5) of R.C. 1701.13 refers to the indemnification division in (E)(1) and (2). Therefore, the litigation must be "an action, suit, or proceeding referred to in division (E)(1) or (2)." R.C. 1701.13. Both (E)(1) and (2) are applicable only if the director "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the corporation[.]"

{¶52} Based on the facts as alleged in the instant case, it is evident that (E)(2) is inapplicable, as that section relates to reimbursement for a director who seeks to procure a judgment in favor of the corporation.

{¶53} Similarly, (E)(1) is inapplicable to this case, as that section applies to cases "other than an action by or in the right of the corporation[.]" Based on the allegations in the complaint, this case is clearly contemplated by the exclusionary language contained in R.C. 1701.13(E)(1). Any other interpretation has the potential to result in a significant injustice to the corporation and any of the remaining shareholders. The complaint alleges harm to the corporation as a result of a violation of his duties to the corporation. This is inapposite to an "act or omission" *on behalf of* the corporation.

{¶54} We further note that the trial court's January 22, 2007 judgment entry failed to include any reference to Trumbull Industries' Articles of Incorporation. Trumbull Industries' Articles of Incorporation do not provide for advancement of a director's attorney fees; however, they do provide for indemnification. Article Six states, in pertinent part:

{¶55} "Any person who at any time shall serve, or shall have served, as director, officer or employee of the corporation, or of any other business or firm at the request of the Board of Directors or management of this corporation \*\*\* shall be saved harmless and indemnified by this corporation of all costs and expenses, including but not limited to counsel fees, amounts paid in settlement, judgments and interest on judgment and court costs, reasonably incurred in *connection* with the defense of any claim, action, suit or proceeding \*\*\* *in which he or they may be involved by virtue of such position with or by direction of this corporation[.]*" (Emphasis added.)

{¶56} Indemnification is not available under Trumbull Industries' Articles of Incorporation, inter alia, "where there is final adjudication that such person has been guilty of gross neglect or willful misconduct in the performance of duty" or where "such person shall be required to disgorge any amounts realized to [Trumbull Industries] or any other business or firm, or any contracts, transactions, offers or acts of this corporation shall be rescinded, nullified or otherwise voided."

{¶57} Appellees argue that in the absence of an advancement provision in the articles of incorporation, as contemplated by R.C. 1701.13(E)(5)(a), the advancement of fees is mandatory. This argument has been considered and rejected by the Eastern District of Virginia in *Kehoe*, supra. The court stated, "[a]lthough division (E)(5) could be

read as granting corporations the *authority* to opt out of advancement, it would be incongruous to require corporations to 'opt in' to indemnification, the underlying remedy that advancement is meant to enhance, but 'opt out' of the corollary advancement remedy." (Emphasis sic.) Id. at 753. "A corporation may choose to advance expenses even when it provides no underlying right of indemnification \*\*\*. But, all in all, the statute cannot be read to mandate advancement as the default rule for all employees under all circumstances." Id. at 754.

{¶58} Further, as we previously noted, the alleged actions at issue were not taken in Sam M.'s capacity as a director of Trumbull Industries.

{¶59} Based on the foregoing, the trial court improperly ordered Trumbull Industries to pay the attorney fees of Sam M.

{¶60} For the foregoing reasons, appellants' sole assignment of error is well-taken. The judgment of the Trumbull County Court of Common Pleas is hereby reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion.

DIANE V. GRENDALL, J., concurs with Concurring Opinion,  
COLLEEN M. O'TOOLE, J., dissents with Dissenting Opinion.

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DIANE V. GRENDALL, J., concurs with a Concurring Opinion.

{¶61} I concur fully in the judgment and disposition of this case as set forth in the majority opinion. I write separately, however, to emphasize that the inapplicability of

R.C. 1701.13(E)(5) in the present circumstances rests on that statute's incorporation of the "business judgment rule."

{¶62} Under R.C. 1701.13(E)(5), a director shall be reimbursed for expenses, including attorney fees, when he is the subject of a "an action, suit, or proceeding referred to in division (E)(1) or (2) of this section." Divisions (E)(1) and (2) provide for indemnification by the corporation where the director is the subject of an action, suit, or proceeding, "if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation." A director's obligations to the corporation are set forth in R.C. 1701.59(B): "A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances."

{¶63} In the present case, the plaintiffs' allegations against the director are solely for actions taken in violation of the duty of good faith and contrary to the best interests of the corporation, specifically breach of his fiduciary duties to the corporation and its shareholders, fraud, and usurpation of a business opportunity. These allegations place the director's conduct outside the protection of the business judgment rule, as codified at R.C. 1701.59(B), and, therefore, beyond the application of R.C. 1701.13(E)(5). *Gries Sports Ents., Inc. v. Cleveland Browns Football Co., Inc.* (1986), 26 Ohio St.3d 15, 20 (the protections of the business judgment rule "can only be claimed by disinterested directors whose conduct otherwise meets the tests of business

judgment"; "this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally").

{¶64} There are further conditions on which the application of R.C. 1701.13(E)(5) depend which cannot be satisfied in the present case. In order to have the corporation pay a director's expenses during the pendency of a suit, the director must execute an undertaking in which he agrees, among other things, to "[r]easonably cooperate with the corporation concerning the action, suit, or proceeding." R.C. 1701.13(E)(5)(a)(ii). Given the circumstances of the present case, it is evident that it is impossible for the director to reasonably cooperate with the corporation concerning the action inasmuch as the corporation's and the director's interests are opposed. Cf. *Westbrook v. Swiatek*, 5th Dist. No. 2009 CAE 05 0048, 2010-Ohio-2868, at ¶24 ("a corporation may be reluctant to advance funds to an officer who is perceived by the corporation as being unfaithful, or fear the funds will never be paid back").

{¶65} The director/appellees claim that, at the time the undertaking was executed, Trumbull Industries was a not a party to the action. This argument is unavailing in that Trumbull Industries is currently a party to the action and was a party at the time the trial court held it in contempt for failing to pay the director's fees. This argument is also disingenuous in that it ignores the reality that the corporation is comprised of four persons: the plaintiffs, and the director and his brother, thus forestalling action in the name of the corporation. Under the statute, however, the focus

is not on whether the action is pursued in the name of the corporation, but, rather, whether the director's conduct falls within the parameters of the business judgment rule.

{¶66} In the present case, the allegations are based solely on conduct outside these parameters. Accordingly, R.C. 1701.13(E)(5) does not apply and the director is not entitled to have his expenses paid during the pendency of this action.

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COLLEEN M. O'TOOLE, J., dissents with Dissenting Opinion.

{¶67} I respectfully dissent.

{¶68} With respect to appellants' first issue, R.C. 1701.13(E)(1), (2), and (3) permits the corporation to indemnify a director after the litigation against the director, or threatened litigation, has been concluded and the director has been successful on the merits. As such, the language in R.C. 1701.13(E)(1), (2), and (3) is permissive.<sup>2</sup> The language in R.C. 1701.13(E)(5)(a), however, is mandatory. Again, that section provides that the payment of attorney fees incurred by a director "shall be paid by the corporation as they are incurred."<sup>3</sup> Thus, pursuant to the mandatory language contained in R.C. 1701.13(E)(5)(a), I believe the trial court properly followed the law by ordering Trumbull Industries to pay the attorney fees of Sam M.

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2. R.C. 1701.13(E)(1) applies to an action filed against a director or officer by a third party who is outside of the corporation (i.e., an action for negligence or other torts). R.C. 1701.13(E)(2) applies to a shareholder derivative action or an action by the corporation itself against the director or officer (i.e., an action for breach of fiduciary duty). The language in R.C. 1701.13(E)(1), (2), and (3) is nearly identical to those provisions of the Delaware statute dealing with indemnification of officers, directors, employees, and agents, 8 Del. C. Section 145 (a), (b), and (c).

3. The comparable Delaware provision is contained in subparagraph (e) of 8 Del. C. Section 145. However, the major distinctions between the Delaware and Ohio provisions are that Delaware's advancement provision is permissive and extends to officers and directors, whereas Ohio's advancement provision is mandatory and is limited to directors. Nevertheless, Ohio courts have looked to Delaware cases construing the provisions of 8 Del. C. Section 145 when asked to interpret and apply the comparable provisions of R.C. 1701.13(E). See *MD Acquisition, L.L.C. v. Myers*, supra, at ¶7.

{¶69} Appellants assert that in light of the claims of fraud and breach of fiduciary duty made against Sam M., he cannot satisfy the requirements of the business judgment rule.

{¶70} R.C. 1701.59(D), the "business judgment rule," provides in part: "[a] director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's 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."

{¶71} Both R.C. 1701.59(D) and R.C. 1701.13(E)(5)(a), the subparagraph at issue in the instant case, deal with the financial obligations that can be imposed on a director who loses a breach of fiduciary duty lawsuit. Again, pursuant to R.C. 1701.13(E)(5)(a), when a suit is filed against a director engaged in fraud or breach of a fiduciary duty (i.e., referred to in division (E)(1) and (2)), the corporation is required to make advance payments of the director's attorney fees. A director cannot claim the protection of the business judgment rule and obtain from the corporation indemnification of his attorney fees under R.C. 1701.13(E)(2) if a *judgment* of breach of fiduciary duty is entered against him. However, a *claim* of a breach of fiduciary duty against a director does not have the same consequences under either R.C. 1701.59(D) or R.C. 1701.13(E)(5)(a). Thus, the *claims* of a breach of fiduciary duty and other misconduct made against Sam M. were sufficient to trigger Trumbull Industries' duty to advance his attorney fees.

{¶72} In addition, I believe appellants' reliance on *Endres Floral Co. v. Endres* (Feb. 9, 1995), 5th Dist. No. 93AP100071, 1995 Ohio App. LEXIS 1388, is misplaced since the

appellant in that case sought indemnification under R.C. 1701.13(E)(2), and it did not involve the advancement provision of R.C. 1701.13(E)(5)(a), which is at issue in the case sub judice.

{¶73} I believe appellants' first issue is without merit.

{¶74} With regard to their second issue, I note that the trial court's January 22, 2007 order was properly authorized by the mandatory provisions of R.C. 1701.13(E)(5)(a) and does not mention Trumbull Industries' Articles of Incorporation. Since the Articles of Incorporation do not expressly *preclude* advancement of legal fees, Trumbull Industries must comply with the mandatory provisions of R.C. 1701.13(E)(5)(a).

{¶75} I believe appellants' second issue is without merit.

{¶76} For the foregoing reasons, as I would affirm the judgment of the trial court, I respectfully dissent.

STATE OF OHIO )  
 )SS.  
COUNTY OF TRUMBULL )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

MURRAY A. MILLER, et al.,  
Plaintiffs-Appellants,

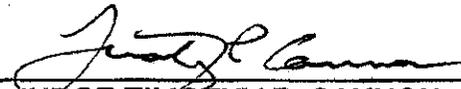
JUDGMENT ENTRY

- vs -

CASE NO. 2009-T-0061

SAM M. MILLER, et al.,  
Defendants-Appellees.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion. Costs to be taxed against appellees.

  
\_\_\_\_\_  
JUDGE TIMOTHY P. CANNON

DIANE V. GRENDALL, J., concurs with Concurring Opinion,  
COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

**FILED**  
COURT OF APPEALS

NOV 22 2010

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al.	)	CASE NO. 2003-CV-433
	)	
Plaintiffs	)	JUDGE THOMAS P. CURRAN
	)	
vs.	)	JUDGMENT ENTRY
	)	
SAMUEL M. MILLER, et al.	)	
	)	
	)	
Defendants	)	
	)	
	)	

This cause is before on the Court upon motion of plaintiff, Trumbull Industries, Inc., to impose sanctions for its failure to pay defendant Sam M. Miller's attorney's fees. On January 22, 2007, this Court ordered Trumbull Industries to pay defendant Miller's attorney's fees from time to time. On July 24, 2008, this Court found Trumbull Industries in contempt of the January 22, 2007 order by failure to pay Sam M. Miller's attorney's fees. This Court gave Trumbull Industries an opportunity to purge itself of contempt. Trumbull Industries has not purged itself of contempt. On May 1, 2009, the Eleventh District Court of Appeals ruled that this Court had not yet imposed the contempt sanction upon Trumbull Industries. Trumbull Industries's Motion to Impose Sanction for Contempt is therefore well-taken and sustained.

It is ORDERED, ADJUDGED and DECREED this Court imposes sanctions for contempt upon Trumbull Industries, Inc. in the amount of \$5.00 per business day. There is no just reason for delay

pursuant to Civ. R. 54(B) and this order is final and appealable.

May 29, 2009  
Date

Thomas P. Curran  
Judge Thomas P. Curran

2009/05/29 11:27 AM

IN THE COURT OF COMMON PLEAS  
TRUMBULL COUNTY, OHIO

MURRAY A. MILLER, et al.

Plaintiffs,

vs.

SAMUEL M. MILLER, et al.

Defendants.

>

CASE NO.: 2003-CV-433

JUDGE: THOMAS P. CURRAN  
(ON ASSIGNMENT)

**OPINION AND JUDGMENT ENTRY**  
**REGARDING RIGHT TO**  
**INDEMNIFICATION OF ATTORNEYS'**  
**FEES**

This case involves cross motions for Declaratory Judgment on the issue of indemnification for attorneys' fees in relation to the captioned litigation matter. Plaintiffs, Murray A. Miller, Samuel H. Miller and Trumbull Industries, Inc. (TII), claim that they and only they are entitled to indemnification, whereas the separate defendant Samuel M. Miller is not so entitled. On the other hand the Defendants have filed their motion claiming that Samuel M. Miller, alone, should be indemnified with respect to his attorneys' fees in defending this litigation. The motions are sought pursuant to Civil Rule 57. The relevant corporation, from whom reimbursements are sought, is TII.

Because the Board of Directors of TII is hopelessly deadlocked on every issue presented in this case, this court renders the following rulings, pending the outcome of this litigation.

1. The separate defendant Samuel M. Millar is ORDERED to reimburse TII, forthwith, without interest, seventy-five per cent of the aggregate sum of \$320,091.05, being the sum of \$240,068.29. (This court has determined tentatively that of the total moneys advanced for the payment of the defendants' fees to date, 25% is attributable to the defense of Samuel M. Miller, since there are four defendants in this case. This court will revisit this issue when the "business opportunity" verdict is rendered.
2. The separate defendant Samuel M. Miller is entitled to have *his, and only his*, attorneys' fees reimbursed from time to time by TII, subject, however, to his reimbursement obligations under the corporate charter.
3. The plaintiffs are entitled to have their attorneys' fees funded by TII, subject, however, to the risk of reimbursement to TII, under the law. Their obligation of reimbursement is not necessarily dependent upon prevailing in this case, but is dependent upon convincing proof that TII has derived a benefit in this case.

SO ORDERED this 22<sup>d</sup> day of January 2007

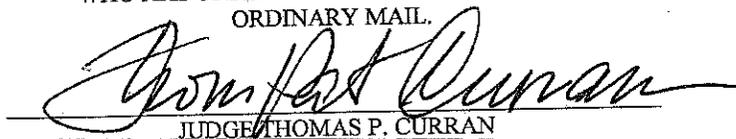


JUDGE THOMAS P. CURRAN  
On Assignment, Art. IV, Sec. 6  
Ohio Constitution

TRUMBULL COUNTY  
CLERK OF COURTS

2007 JAN 22 P 3:28

TO THE CLERK OF COURTS: YOU ARE ORDERED  
TO SERVE COPIES OF THIS JUDGMENT ON ALL  
COUNSEL OF RECORD OR UPON THE PARTIES  
WHO ARE UNREPRESENTED FORTHWITH BY  
ORDINARY MAIL.



JUDGE THOMAS P. CURRAN