

ORIGINAL

IN THE SUPREME COURT OF OHIO

Murray A. Miller, *et al.*,

Appellees,

v.

Sam M. Miller, *et al.*,

Appellants.

Case No. 2011-0024

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

Court of Appeals  
Case No. 2009-T-0061

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REPLY BRIEF OF AMICUS CURIAE THE OHIO STATE BAR ASSOCIATION  
IN SUPPORT OF APPELLANT SAM M. MILLER

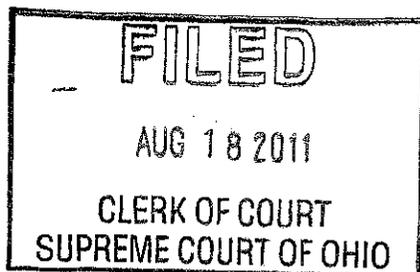
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## INTRODUCTION

Despite agreeing that the Court of Appeals erred in construing R.C. 1701.13(E)(5)(a), Appellees ask this Court to ignore the errors of the court below as “peripheral” and “irrelevant” to what Appellees now argue is “the fundamental question presented in this appeal—whether Ohio law requires Trumbull to advance defense costs for Sam M. [Miller] where he was sued for usurping a business opportunity he became aware of and pursued as [an officer] outside the corporate boardroom.” (Appellees’ Br. 24 (emphasis omitted).) According to Appellees, section (E)(5)(a) “applies only to directors who have been sued as a result of acts taken in their capacity as directors.” (*Id.* at 2.) Because Sam M. Miller (“Sam M.”) was sued for usurping a corporate opportunity in his capacity as an officer, Appellees argue, section (E)(5)(a) does not apply.

Appellees, however, never made that argument in the trial court or in the Court of Appeals. Instead, they consistently maintained that Sam M. was sued for breaching fiduciary duties he owed as a director of Trumbull Industries, which is why the Court of Appeals issued an opinion that assumed Sam M. was sued for breaching duties he owed as a director. Rather than arguing that section (E)(5)(a) did not apply because Sam M. acted in his “officer” capacity, Appellees asserted that advancement was inappropriate because Sam M. did not act “on behalf of” Trumbull, but “on behalf of” Private Brand. Because reviewing courts do not consider questions not presented to, much less addressed by, the courts below, this Court should decline to address Appellees’ new argument and should reverse the decision below.

In all events, Appellees’ new argument also fails on the merits. Section (E)(5)(a) applies to any “action, suit, or proceeding referred to in” section (E)(1) or (E)(2). Those provisions “refer to” actions in which a director is sued “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” in some other capacity, R.C. 1701.13(E)(1)-(2), not just those alleging liability

based on acts taken in the director's "director" capacity. Indeed, as the Chairman of the OSBA Corporation Law Committee that proposed the amendment made clear, section (E)(5)(a) "requires a corporation to advance expenses to a director who is also an officer when that person is sued in his capacity as an officer." Edward A. Schrag, Jr., et al., *Director and Officer Liability and Indemnification: The Ohio Approach* (1988), 20 U. Tol. L. Rev. 1, 47 n.143. Section (E)(5)(a) thus cannot be strictly limited, as Appellees contend, to directors sued for acts taken in their capacity as directors.

Appellees' reading of section (E)(5)(a), if accepted, would transform a statute enacted to protect directors from the financial burdens of defending the wide variety of claims brought against them into a provision that requires advancement in only a narrow set of cases. It also would permit a corporation to avoid its obligation to advance litigation expenses whenever it is alleged that a director acted in a "nondirector" capacity, destroying the reliability of Ohio's mandatory advancement regime. Accordingly, this Court should reject Appellees' argument that section (E)(5)(a) applies only to directors sued in their capacity as directors.

Moreover, this Court should not dismiss this appeal as improvidently granted. Appellees suggest that, because Sam M. seeks advancement of "legal fees he incurred as a result of his own misconduct" (Appellees' Br. 1), this Court should not provide guidance regarding the proper interpretation of R.C. 1701.13(E)(5)(a) in the context of this case. But directors nearly always seek advancement of fees incurred in defending alleged misconduct—section (E)(5)(a) was enacted to protect directors against the financial burden of defending precisely such allegations. This case thus presents a prime opportunity to clarify directors' right to advancement under section (E)(5)(a). Accordingly, this Court should address the issues accepted for review and reaffirm directors' broad entitlement to advancement by reversing the Court of Appeals' decision.

## ARGUMENT

Appellees' contention that R.C. 1701.13(E)(5)(a) applies only to those directors "sued as a result of acts taken in their capacity as directors" must be rejected. Appellees never made that argument to the courts below, and should not be permitted to do so for the first time in this Court. Contrary to the implication of Appellees' position, moreover, the Court of Appeals never considered whether section (E)(5)(a) is limited to directors sued "for acts taken in their capacity as directors." The court instead assumed that Sam M. was being sued for allegedly breaching duties owed as a director.

Even if Appellees had argued to the courts below that section (E)(5)(a) does not require a corporation to advance litigation expenses incurred by directors sued for acts taken in an officer capacity, Appellees would not prevail. In arguing that section (E)(5)(a) applies "only to directors sued as a result of acts taken in their capacity as directors," Appellees completely ignore the "by reason of the fact" standard established by section (E)(5)(a)'s explicit reference to sections (E)(1) and (E)(2). And the provisions Appellees assert support their interpretation of section (E)(5)(a) are irrelevant to a director's eligibility for advancement. Appellees' position also undermines the purpose for which section (E)(5)(a) was enacted, because it both narrows the scope of a statute intended to extend additional protection to directors and, by conditioning a director's right to advancement on a plaintiff's allegations, it renders the right to advancement a nullity.

Similarly unpersuasive is Appellees' assertion that section (E)(5)(a) does not require a corporation to advance expenses a director incurs in defending a suit brought by the corporation. Section (E)(5)(a) mandates advancement of a director's litigation expenses in actions "by or in the right of the corporation," even when, as here, the corporation claims the director acted contrary to the corporation's interests.

**I. This Court should not address Appellees’ argument that R.C. 1701.13(E)(5)(a) “applies only to directors sued as a result of acts taken in their capacity as directors.”**

Appellees argue that section (E)(5)(a) “applies only to directors who have been sued as a result of acts taken in their capacity as directors” and, because Sam M. was sued for usurping a corporate opportunity in his capacity as an officer, section (E)(5)(a) does not apply. (Appellees’ Br. 2, 37.) Prior to filing this brief, however, Appellees maintained that Sam M. was sued for breach of his fiduciary duties as a director. For example, in their complaint, they alleged that Sam M. “failed to offer the Private Brand business opportunity to Trumbull *at a meeting of its Board of Directors* in direct violation of Ohio law” and that, because he “competed directly with Trumbull Industries, Inc., . . . [he] breached his fiduciary duty as a *Director* of Trumbull.” (6th Am. Compl. ¶¶ 38, 53 (emphases added).) In the Court of Appeals, Appellees continued to characterize this suit as one involving claims against Sam M. for breach of fiduciary duties he owed as a director of Trumbull. For example, Appellees argued that “Sam M. Miller is being sued for intentionally and recklessly breaching duties he owed to Trumbull Industries because he failed to act on behalf of the corporation . . . in reckless disregard to his duties *as a director* of Trumbull Industries.” (Appellants’ Court of Appeals Br. 13 (emphasis added).) And in concluding their brief, Appellees emphasized that “Sam M. Miller has been sued for actions involving breaches of his fiduciary duty *as a director* of Trumbull Industries.” (*Id.* at 21 (emphasis added).)

Consistent with the complaint and Appellees’ arguments to the Court of Appeals, the court below assumed that Sam M. was sued for acts “allegedly in contravention of his fiduciary duties *as a director*.” *Miller v. Miller*, 190 Ohio App.3d 458, 2010-Ohio-5662, 942 N.E.2d 438, at ¶ 50 (emphasis added). It therefore did not—as Appellees’ argument misleadingly implies—deny advancement because it found Sam M. acted in his capacity as an officer. (Appellees’ Br. 2,

33-34.) The Court of Appeals instead concluded that Sam M. was not entitled to advancement because the complaint “claim[s] that Sam M. is liable for those acts done *on behalf of a separate corporation,*” not “any ‘act or omission’ on behalf of [Trumbull].” *Miller* at ¶ 50 (emphasis added). The court below believed “the alleged actions at issue were not taken in Sam M.’s capacity as a director” *id.* at ¶ 58, not because Sam M. was sued in his “officer” capacity, but because he was sued for acts “done on behalf of a separate corporation,” *id.* at ¶ 50. In other words, the court distinguished between acts taken by Sam M. in his “capacity as a director” of Trumbull and his acts “on behalf of a separate corporation,” *id.* at ¶ 50, 58, not Sam M.’s director and officer roles within Trumbull. In fact, that is how Appellees previously described the Court of Appeals’ holding to this Court, asserting that “[t]he court of appeals rejected Sam M.’s request for advancement because Sam M. was not sued because of acts or omissions done on behalf of Trumbull Industries, but because of acts or omissions done on behalf of Private Brand.” (Appellees’ Mem. in Opp’n to Jurisdiction at 4.)

“Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed.” *State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St.3d 78, 81, 679 N.E.2d 706. Appellees never argued in the courts below that section (E)(5)(a) does not apply because Sam M. was sued for acts taken in his capacity as an officer. Nor did the Court of Appeals in any way consider the merits of that position. Accordingly, this Court may decline to address Appellees’ argument.

**II. In all events, R.C. 1701.13(E)(5)(a) requires advancement of a director’s litigation expenses incurred in defending any action “referred to in” section (E)(1) or (E)(2), not solely where a director is sued for acts taken in his capacity as director.**

Even if Appellees had maintained throughout this litigation (or at any time before their merit brief to this Court) that section (E)(5)(a) “applies only to directors who have been sued as a result of acts taken in their capacity as directors,” and the court below had denied advancement

on the grounds that Sam M. acted in his capacity as an officer, Appellees' argument would fail. Section (E)(5)(a) explicitly contemplates advancement of a director's litigation expenses even when the director is not "sued as a result of acts taken in his capacity as a director." Moreover, Appellees' proposed standard would narrow the protection afforded to directors, contrary to the purpose for which section (E)(5)(a) was enacted. Further, by allowing a plaintiff to defeat a director's right to advancement by merely alleging that the director did not act in his "director capacity" but in some other capacity, prospective directors have no assurance that advancement guarantees in Ohio will exist when called upon.

**A. There is no support for Appellees' position that section (E)(5)(a) "applies only to directors who have been sued as a result of acts taken in their capacity as directors."**

Appellees' argument that section (E)(5)(a) applies only to directors "sued as a result of acts taken in their capacity as directors" (Appellees' Br. 2, 37) has no basis in the statute's text. Nowhere does section (E)(5)(a) refer to the capacity in which a director acted. The plain language of section (E)(5)(a) requires a corporation to advance expenses a director "incur[s] . . . in defending the action, suit, or proceeding" "referred to in division (E)(1) or (2)." R.C. 1701.13(E)(5)(a); see Edward A. Schrag, Jr., Report of the Corporation Law Committee (1986), 59 Ohio St. B. Ass'n Rep. 1694, 1697 (setting forth an earlier draft of section (E)(5)(a) that provided "expenses . . . incurred by a director in defending any action, suit, or proceeding referred to in subdivisions (E)(1) and (E)(2) of this section shall be paid by the corporation, as incurred"). Sections (E)(1) and (E)(2) together refer to "any threatened, pending, or completed action," "whether civil, criminal, administrative, or investigative," brought against a director "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 [or entity]." R.C. 1701.13(E)(1)-(2).

Section (E)(5)(a) is thus explicit about the actions to which it applies—those brought against a director “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, officer, trustee, employee, member, manager, or agent” of another organization. And that language plainly requires a corporation to advance a director’s litigation expenses even where the director is sued for acts that were not “taken in his capacity as a director.” For example, a case in which a director is sued for “serving . . . as a . . . trustee . . . of another corporation” would not allege any “act taken in the director’s capacity as a director.” The same is true of proceedings brought against a director “by reason of the fact that he is or was a[n] . . . officer.” But because such actions are “referred to in” sections (E)(1) and (E)(2), a corporation is required to advance expenses a director incurs in defending those actions under section (E)(5)(a). As the Chairman of the OSBA Corporation Law Committee that proposed the amendment explained, section (E)(5)(a) “requires a corporation to advance expenses to a director who is also an officer when that person is sued *in his capacity as an officer*.” Schrag, 20 U. Tol. L. Rev. at 47 n.143 (emphasis added). Section (E)(5)(a) therefore cannot be, as Appellees argue, applicable “only to directors who have been sued as a result of acts taken in their capacity as directors.”<sup>1</sup> (Appellees’ Br. 2.)

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<sup>1</sup> Appellees assert in their brief that Sam M. “is not entitled to advancement of defense costs because, *as the OSBA correctly recognized*, Sam M.’s conduct as a Trumbull corporate officer is not subject to the mandatory advancement regime of R.C. 1701.13(E)(5)(a).” (Appellees’ Br. 34 (citing OSBA Br. 22) (emphasis added).) That is a blatant mischaracterization of the OSBA’s position. The OSBA never “recognized” that section (E)(5)(a) is inapplicable to directors who, like Sam M., are sued for conduct taken as officers. Instead, the OSBA noted that “[a]dvancement for officers is governed solely by section (E)(5)(b), which unlike (E)(5)(a) is a *permissive, optional* advancement statute with no bearing on mandatory advancement for directors.” (OSBA Br. 22.) But that is not the same as saying that a director who is also an officer is excluded from the scope of section (E)(5)(a) by virtue of his status as an officer, as Appellees’ argument misleadingly implies.

Moreover, courts interpreting similar “by reason of the fact” language have rejected a narrow interpretation of that phrase. “[I]f there is a nexus or causal connection between any of the underlying proceedings [for which advancement is sought] and one’s official corporate capacity, those proceedings are ‘by reason of the fact’ that one was a corporate [official].” *Homestore, Inc. v. Tafeen* (Del. 2005), 888 A.2d 204, 214. That nexus is established even where a corporate official is sued for engaging in “personal trading in the corporate stock [that] was *not related to the scope of the officer’s employment or his corporate responsibilities.*” *Perconti v. Thornton Oil Corp.* (Del. Ch. May 3, 2002), No. Civ.A. 18630-NC, 2002 WL 982419, at \*5 (emphasis added). Suits brought against a director “‘by reason of the fact’ that he was a director” also include those alleging misconduct related to the director’s formation of a competing enterprise “*after his termination as a director and officer of the company*”—i.e., alleged wrongful acts not taken in the director’s “official capacity.” *Brown v. LiveOps, Inc.* (Del. Ch. 2006), 903 A.2d 324, 329. Thus, actions brought “by reason of the fact” of a director’s corporate service are not limited to lawsuits challenging acts taken in a director’s capacity as a director. See *Heffernan v. Pac. Dunlop GNB Corp.* (C.A.7 1992), 965 F.2d 369, 372 (“[W]e find no support in the language and purpose of [a] . . . statute [authorizing indemnification for directors sued ‘by reason of the fact’ that they are directors] for the defendants’ argument that it limits indemnification to suits asserted against a director for breaching a duty of his directorship.”).

Rather than address section (E)(5)(a)’s direct reference to the “by reason of the fact” standard in sections (E)(1) and (E)(2), Appellees disregard that portion of the statutory text entirely. In other words, their argument that section (E)(5)(a) applies only to directors “sued as a result of acts taken in their capacity as directors” is not even a purported interpretation of the “by reason of the fact” standard. (Nor could it be because, as just explained, courts have found a

director is sued “by reason of the fact” of his corporate service even where the director is not sued for acts taken in his capacity as a director.) Appellees’ “capacity” standard is instead a new creation developed through reliance on irrelevant statutory provisions.

Appellees first contend that, because both repayment of advanced expenses under section (E)(5)(a) and monetary liability of directors under R.C. 1701.59(D) are conditioned on a finding that the director’s conduct “involved an act or omission undertaken with deliberate intent to cause injury . . . or undertaken with reckless disregard for the best interests of the corporation,” R.C. 1701.59(D) and section (E)(5)(a) should be read consistently. And because R.C. 1701.59(F)(1) says that R.C. 1701.59(D) does not affect “the duties” of “[a] director who acts in any capacity other than the director’s capacity as a director,” according to Appellees, that same limitation must apply to section (E)(5)(a).

Appellees’ argument is unpersuasive. Section (E)(5)(a) does not mention R.C. 1701.59(D) or R.C. 1701.59(F)(1). Instead, section (E)(5)(a) specifically states that it applies to actions, suits, and proceedings “*referred to in division (E)(1) or (E)(2),*” those brought against a director “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” in another capacity. Moreover, R.C. 1701.59(F)(1) shows that the General Assembly knew how to limit the applicability of a statutory provision to a director “act[ing] in . . . the director’s capacity as a director.” And it did so *only* for R.C. 1701.59(D).<sup>2</sup> There is no similar condition on the applicability of section (E)(5)(a), even though section (E)(5)(a) was enacted in the same amendment.

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<sup>2</sup> Additionally, as Appellant points out in his reply brief, R.C. 1701.59(F)(1) was not intended to restrict the availability of advancement, but “[t]o allay the fears expressed on behalf of minority shareholders” that the protections extended to directors in the 1986 amendments “might unintentionally facilitate oppression of minority shareholders of a close corporation by

It is unsurprising that both section (E)(5)(a) and R.C. 1701.59(D) contain the “reckless disregard” or “deliberate intent” standard. The General Assembly enacted these provisions at the same time, and both were intended to provide directors with additional protection from the financial burdens associated with litigation brought against them. Nonetheless, they limit a director’s financial exposure in different ways. Section (E)(5)(a)(i) restricts the circumstances under which a director must *repay* advanced *litigation expenses*, while R.C. 1701.59(D) narrows the cases in which a director is *liable* for monetary *damages*.

For the same reasons, it would not be “nonsensical,” as Appellees argue, for the General Assembly to have decided that section (E)(5)(a) should apply to a broader set of directors than R.C. 1701.59(D). In fact, that would be the case even under Appellees’ proposed reading of section (E)(5)(a). For example, R.C. 1701.59(D) “does not affect a director’s potential liability in actions that arise under federal law.” Schrag, 20 U. Tol. L. Rev. at 31. Section (E)(5)(a), however, requires advancement of expenses incurred by a director in defending “*any* threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative,” including actions alleging federal-law violations. R.C. 1701.13(E)(1)-(2) (emphasis added). Thus, a director sued under federal law either for “acts taken in his capacity as a director,” as Appellees argue, or by reason of the fact that he is or was a director, is entitled to advancement, subject to repayment only if the court finds he acted “with deliberate intent to cause injury to the corporation or . . . with reckless disregard for the best interests of the corporation.” R.C. 1701.13(E)(5)(a)(i). But that same director would not be entitled to the protections of R.C. 1701.59(D). Consequently, because section (E)(5)(a) necessarily applies to a

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(continued...)

the majority in violation of the latter’s fiduciary duty.” Forrest B. Weinberg, *The Close Corporation Under Ohio Law* (1987), 35 Clev. St. L. Rev. 165, 169 n.20).

broader scope of directors than R.C. 1701.59(D), there is no reason to import the limitations of R.C. 1701.59(D) into section (E)(5)(a).<sup>3</sup>

Also unavailing is Appellees' assertion that section (E)(5)(a) imposes a "requirement that the 'subject of the action' must be 'a director's act or omission'" and, accordingly, section (E)(5)(a) applies only to lawsuits "challenging a director's conduct as a director." (Appellees' Br. 30). Section (E)(5)(a) does not say "a director's act or omission taken in his capacity as a director," nor is there any indication that is what the General Assembly meant. Moreover, Appellees' argument relies on the same flawed statutory interpretation underlying the Court of Appeals' conclusion that section (E)(5)(a) applies only where a director is sued for an "act or omission on behalf of the corporation." The application of section (E)(5)(a) does not depend on the *type of act* the director committed, but instead on the *type of action, suit, or proceeding* brought against the director. Section (E)(5)(a)'s reference to "the time of the director's act or omission that is the subject of the action, suit, or proceeding referred to in" section (E)(1) or (E)(2) merely establishes the relevant point for evaluating whether the corporation has opted out of section (E)(5)(a)—it does not restrict the cases for which section (E)(5)(a) mandates advancement of a director's litigation expenses.

Appellees' final argument also lacks merit. According to Appellees, because an officer's entitlement to advancement is governed by the permissive advancement statute in R.C.

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<sup>3</sup> Nor does the 1986 Corporation Law Committee Report's reference to the standard set forth in R.C. 1701.13(E)(5)(a)(i) as the "1701.59 test" demonstrate any intention to make the two provisions applicable to the same types of litigation. (Appellees' Br. 31). The reference to the "1701.59 test" was not part of early drafts of the statute, nor does it appear in the final version of R.C. 1701.13(E)(5)(a). See Schrag, 59 Ohio St. B. Ass'n Rep. at 1697-98. Instead, the Committee simply used the phrase "1701.59 test" as shorthand to refer to the "reckless disregard" or "deliberate intent" standard that governs both repayment of expenses advanced to directors, as well as directors' personal liability for monetary damages resulting from breaches of fiduciary duty.

1701.13(E)(5)(b), *requiring* advancement for an officer would be inconsistent with section (E)(5)(b). Appellees assert section (E)(5)(a) therefore must be limited to suits “challenging a director’s conduct as a director” to “harmonize[]” it with section (E)(5)(b). (Appellees’ Br. 32.) But requiring advancement of litigation expenses to an officer who is also a director is not contrary to section (E)(5)(b). Directors may serve multiple roles within a corporation and, so long as they are directors, section (E)(5)(a) requires a corporation to advance their litigation expenses in any action “referred to in” section (E)(1) or (E)(2), regardless of the capacity in which they are sued.

**B. Appellees’ novel “acts taken in their capacity as directors” standard undermines the core guarantees of section (E)(5)(a) and destroys the reliability of Ohio’s mandatory advancement regime.**

In addition to lacking support in the statute’s plain language, Appellees’ reading of the statute is inconsistent with the purpose for which the General Assembly enacted section (E)(5)(a). As extensively discussed in the OSBA’s prior briefing, section (E)(5)(a) was enacted as part of an emergency measure in response to the “director liability crisis.” Schrag, 20 U. Tol. L. Rev. at 5. In proposing the 1986 amendment, the Corporation Law Committee emphasized that “it [was] extremely dangerous for anyone to serve as a director in today’s litigious climate, given the . . . dramatic increase in claims *and in the variety of claims* against directors.” Schrag, 59 Ohio St. B. Ass’n Rep. at 1694 (emphasis added). Section (E)(5)(a) was enacted to protect directors “from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved” in defending such claims. *Homestore*, 888 A.2d at 211.<sup>4</sup>

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<sup>4</sup> Appellees argue that “the 1986 amendments to Ohio corporate law did not begin or end with the mandatory advancement provision at issue in this appeal.” (Appellees’ Br. 29). That is true, but irrelevant. It is undisputed that the mandatory advancement regime was enacted as part of the 1986 amendments to address the director crisis then existing for Ohio corporations. And it is that provision, not the other changes made to Ohio corporate law in 1986, that is at issue in this appeal.

Appellees' proposed standard would eliminate that protection. Restricting directors' right to advancement to cases in which they are sued "as a result of acts taken in their capacity as directors" would preclude advancement in the precise circumstances it was enacted to govern, because it would render section (E)(5)(a) inapplicable to the numerous cases involving breach-of-fiduciary-duty claims against directors that are based on acts other than those taken in a director's capacity as a director. E.g., *Wing Leasing, Inc. v. M&B Aviation, Inc.* (1988), 44 Ohio App.3d 178, 182 (addressing breach-of-fiduciary-duty claim based on allegations the defendant "created . . . a competing business [and] removed \$1,000 from [the corporation]'s checking account to facilitate [a] purchase [by his competing business]"); *Holiday Props. Acquisition Corp. v. Lowrie*, 9th Dist. Nos. 21055, 21133, 2003-Ohio-1136, at ¶ 45 (addressing claim that a director breached his fiduciary duties by diverting the corporation's customers to his own business, and by engaging in "activities on company time that were geared toward starting his own competing interest"). And a director who is sued for alleged wrongdoing committed after he leaves the corporation's employment would never be entitled to advancement—a director cannot "act in his capacity as a director" if he is no longer a director.

What is more, conditioning a corporation's obligation to advance a director's litigation expenses on whether the director acted in his capacity as a director invites abuse on a vast scale. Simply by alleging that a director committed wrongdoing in a capacity other than as a director, a plaintiff could sever a defendant director from his or her right to advancement. In fact, that is exactly what has happened in this case. Trumbull Industries, by not opting out of section (E)(5)(a) in its articles or regulations, agreed to advance litigation expenses to a director sued "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" in some other capacity. Nonetheless, now that

Sam M., a director, has been sued for usurping a corporate opportunity—an allegation that clearly implicates fiduciary duties he owes to the corporation as a director—Trumbull claims it is not required to advance Sam M.’s litigation expenses, because Sam M. was sued “for usurping a business opportunity he became aware of and pursued as the Vice President of Sales and Marketing outside the corporate boardroom.” (Appellees’ Br. 24.)

Allowing advancement to be so readily defeated is contrary to the reliability necessary to fulfill the purpose of section (E)(5)(a)—ensuring that Ohio corporations can attract and retain qualified directors. Directors who serve on corporate boards agree to act as fiduciaries of the corporation and, in return, corporations promise to advance litigation expenses directors incur in defending suits related to their corporate service. In accepting positions as directors of Ohio corporations, hundreds of individuals like Sam M. have relied on section (E)(5)(a), and the corporation’s decision not to opt out of that provision, to protect them against the financial burden of defending suits arising by reason of the fact of their corporate service.

But under Appellees’ standard, a prospective director would have no guarantee that the corporation could not later avoid its promise to advance litigation expenses by claiming the director acted in a nondirector capacity. And that concern is not limited to inside directors, as Appellees argue. (Appellees’ Br. 35-36.) A corporation could just as easily defeat an outside director’s right to advancement. Rather than asserting that the director acted as an officer or employee, the corporation could characterize an outside director’s wrongdoing as “personal” misconduct. In either case, “a director could be forced to bear the costs of unfounded, harassing litigation just because the particular cause of action does not [allege acts taken in a director’s capacity as a director], regardless of the connection between the suit and [his] service as a director.” *Heffernan*, 965 F.2d at 374. Conditioning advancement on the capacity in which the

director is sued thus would elevate form over substance, a result that this Court has found impermissible. E.g., *WCI Steel, Inc. v. Testa*, 129 Ohio St.3d 256, 2011-Ohio-3280, at ¶ 36 (“[We] have not judged the sufficiency of assignments of error . . . merely by their form of words.”).

**III. Section (E)(5)(a) applies to suits brought by a corporation against a director for conduct that harmed the corporation.**

Appellees argue that, “if the court of appeals’ judgment is reversed, Sam M. will . . . impos[e] a ruinous obligation on Trumbull to pay hundreds of thousands of dollars in legal fees to defend against the claim asserted on its behalf that Sam M. usurped Trumbull’s business opportunity.” (Appellees’ Br. 36.) In other words, Appellees argue that section (E)(5)(a) should not apply to suits in which the corporation itself is suing a director for alleged wrongdoing that harmed the corporation.

While Appellees may find it unfair that Trumbull must advance expenses Sam M. incurs to defend himself against Trumbull’s own claim, that is exactly what section (E)(5)(a) requires. As explained in the OSBA’s opening brief, section (E)(5)(a) mandates advancement in actions “referred to in” section (E)(2)—those “by or in the right of the corporation.” That is true even when the corporation claims that the director acted contrary to the interests of the corporation. Indeed, a corporation suing a director virtually always alleges that the director’s conduct harmed the corporation, and “it is in those very cases that the right to advancement attaches most strongly.” *Radiancy, Inc. v. Azar* (Del. Ch. Jan. 23, 2006), No. Civ. A 1547-N, 2006 WL 4762868, at \*1. Although this Court might be “sympathetic to the ‘admittedly maddening aspect’ of advancing legal funds to a [director] in his defense of alleged wrongdoings against the company,” advancement “is regularly allowed in the corporate setting independent of the underlying claim against the party seeking advancement.” *Morgan v. Grace* (Del. Ch. Oct. 29,

2003), No. Civ. A 20430, 2003 WL 22461916, at \*2 n.18. “Case law quite clearly demonstrates” that a corporation must advance fees “in the face of allegations of extreme misconduct . . . , even when such allegations . . . are made by the corporation itself.” Richard A. Rossman, et al., *A Primer on Advancement of Defense Costs: The Rights and Duties of Officers and Corporations* (2007), 85 U. Det. Mercy L. Rev. 29, 31.

It is also worth noting that Trumbull was not required to adopt a mandatory advancement regime. Trumbull could have provided in its articles or regulations that section (E)(5)(a) would not apply. And it could have created an alternative standard for advancing directors’ litigation expenses, one that would have denied advancement where Trumbull itself was the plaintiff, or could have refused to provide any right to advancement at all. It did none of those things, however, and chose to offer broad protection to its directors by adopting the mandatory advancement regime in section (E)(5)(a). Having convinced Sam M. to serve as a director by promising to advance his litigation expenses, subject of course to potential later repayment, it cannot now avoid that commitment by claiming Sam M. acted contrary to the interests of the corporation.

## **CONCLUSION**

For the foregoing reasons, this Court should reject Appellees' new argument that section (E)(5)(a) applies only to directors sued for acts taken in their capacity as directors. Appellees' position is inconsistent with the plain language of the statute and undermines the purpose for which section (E)(5)(a) was enacted. To ensure that Ohio corporations remain able to attract and retain qualified directors, this Court should reverse the judgment of the Court of Appeals and reaffirm Ohio's mandatory advancement regime for directors of Ohio corporations.

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Respectfully submitted,

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