

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

WILLIAM B. CHANDLER III  
CHANCELLOR

COURT OF CHANCERY COURTHOUSE  
34 THE CIRCLE  
GEORGETOWN, DELAWARE 19947

Submitted: September 23, 2009  
Decided: October 1, 2009

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Re: *BabyAge.com, Inc. v. Weiss*  
Civil Action No. 4576-CC  
*Weiss v. BabyAge.com, Inc.*  
Civil Action No. 4590-CC

Dear Counsel:

I have carefully reviewed the briefs in support of and in opposition to Mr. Weiss' motion for leave to file a First Supplemented Verified Complaint for Advancement. In addition, I have considered the motion to overturn Mr. Grover Brown's determination regarding advancement. Following is my decision on both motions.

## I. BACKGROUND

The plaintiff, Mr. Weiss, seeks this Court's leave to file a First Supplemented Verified Complaint for Advancement under Court of Chancery Rule 15(d). Defendant BabyAge opposes the filing of a supplemented complaint, primarily on the grounds that a trial on Mr. Weiss' advancement claim is near and supplementing the claim at such a late date will prejudice BabyAge.

## II. ANALYSIS

Court of Chancery Rule 15(d) permits a party, with leave of the Court, to file a supplemental pleading setting forth new claims that have arisen since the original pleading was filed, provided the new claims relate to the original claims.<sup>1</sup> A motion to supplement should be freely granted and can be denied only if the plaintiff inexcusably delayed making its request *and* the defendant is prejudiced as a result.<sup>2</sup> In opposing the motion to supplement, the defendant bears the burden of proving inexcusable delay and resulting prejudice.<sup>3</sup>

In this case, Mr. Weiss seeks to add a new claim to his original complaint. The new claim is for advancement of legal fees incurred in pursuit of his counterclaims against BabyAge. His original complaint makes a claim for advancement of legal fees incurred defending against BabyAge's request for a

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<sup>1</sup> *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 668 F. Supp. 906, 922 (D. Del. 1987).

<sup>2</sup> *Agilent Techs., Inc. v. Kirkland*, 2009 WL 119865, at \*5 (Del. Ch. 2009).

<sup>3</sup> *See id.*

judicial determination that his employment was properly terminated. The new claim is sufficiently related to the original claim in that both claims request advancement of legal fees incurred as a result of the continuing dispute between Mr. Weiss and BabyAge.

In opposing Mr. Weiss' motion to supplement, BabyAge bears the burden of proving that Mr. Weiss' motion is untimely *and* that BabyAge will be prejudiced if the motion is granted. For the following reason, the Court finds that BabyAge has not adequately shown that it will be prejudiced if Mr. Weiss' motion is granted.

BabyAge argues that it will be prejudiced because granting supplementation would open the door to full discovery of the merits of Mr. Weiss' counterclaims and would require lifting the stay on non-225 issues on the eve of trial. This argument misperceives the nature of an advancement action, which focuses only on "whether claims pled in a complaint against a party . . . trigger a right to advancement under the terms of a corporate instrument."<sup>4</sup> The corporate instrument involved here is BabyAge's by-laws, specifically the section(s) that deal with legal fee advancement. Accordingly, the Court will be able to determine whether Mr. Weiss is entitled to advancement by examining (i) his claims against BabyAge, (ii) the by-laws' advancement section(s), and (iii) relevant Delaware law. It is not necessary for BabyAge to engage in extensive discovery of Mr.

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<sup>4</sup> *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at \*6 (Del. Ch. 2006).

Weiss' counterclaims. Such discovery, if necessary at all, will be permitted after the Section 225 and advancement issues are resolved and will aid the Court in determining whether Mr. Weiss should ultimately be indemnified for any advancement expenses he receives, but it is not appropriate at this time.

### **III.**

BabyAge's motion to reverse or overturn Mr. Brown's determination, as outlined in his September 9, 2009 letter, is denied without prejudice. Mr. Brown determined that BabyAge should pay the fees for work completed in May and June, 2009. At the trial on October 13 and 14, I will address the advancement issue for post-June 2009 work, as well as all other payments in dispute. In the meantime, BabyAge shall advance the sums identified by Mr. Brown immediately.

### **IV. CONCLUSION**

For the foregoing reasons, Mr. Weiss' Motion to File a First Supplemented Verified Complaint for Advancement is granted. The Court will determine at trial, or shortly thereafter, whether Mr. Weiss is entitled to advancement of legal fees for (i) defending BabyAge's request for a judicial determination that his employment was properly terminated and (ii) pursuing his counterclaims against BabyAge. The payments as determined by Mr. Grover Brown shall be made immediately.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in cursive script that reads "William B. Chandler III". The signature is written in black ink and includes a horizontal line under the "III" at the end.

William B. Chandler III

WBCIII:arh