IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLES E. UNDERBRINK and JAMES H. HARRISON,	)	
Plaintiffs and Counterclaim Defendants,	)	
v.	)	Civil Action No. 2982-VCP
WARRIOR ENERGY SERVICES CORPORATION,	)	**PUBLIC VERSION**
Defendant and Counterclaim Plaintiff.	)	

MEMORANDUM OPINION

Submitted: December 11, 2007
Decided: May 30, 2008

Peter J. Walsh, Jr., Esquire, Abigail M. LeGrow, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; *Attorneys for Plaintiffs/Counterclaim Defendants Charles E. Underbrink and James H. Harrison*

Todd C. Schiltz, Esquire, WOLF, BLOCK, SCHORR AND SOLIS-COHEN, LLP, Wilmington, Delaware; David G. Radlauer, Esquire, Andrew R. Lee, Esquire, Sarah B. Belter, Esquire, JONES, WALKER, WAECHTER, POITEVENT, CARRÈRE & DENÈGRE, L.L.P., New Orleans, Louisiana; *Attorneys for Defendant/Counterclaim Plaintiff Warrior Energy Services Corp.*

PARSONS, Vice Chancellor.

Plaintiffs, Charles Underbrink and James Harrison, were directors of Warrior Energy Services Corp. ("Warrior") until April 19, 2006, when they stepped down in connection with a secondary public offering by Warrior (the "SPO"). Shortly before the SPO, on April 13, 2006, Warrior adopted amended and restated bylaws (the "2006 Bylaws"). Seven months after the SPO, Underbrink and Harrison, together with Warrior's other two pre-SPO directors, were sued in their capacity as directors of Warrior in a lawsuit that was already pending in Texas (the "Texas Proceeding").

The Texas Proceeding was initially filed in March 2005 by certain limited partners of two investments partnerships (the "St. James Partnerships") affiliated with Underbrink and Harrison. The St. James Partnerships' largest positions were in Warrior. After Harrison and Underbrink were sued in the Texas Proceeding in their capacity as Warrior directors, they sought advancement of their legal fees and expenses. Warrior, which had since been acquired by Superior Energy Services, Inc. ("Superior"), refused Underbrink's and Harrison's requests. Underbrink and Harrison then filed this action seeking an advancement of litigation expenses from Warrior pursuant to Section 145 of the Delaware General Corporation Law ("DGCL")[1] and the 2006 Bylaws.

Warrior challenges the validity of the 2006 Bylaws in general, and in particular the provisions granting Underbrink and Harrison mandatory retroactive advancement rights, arguing they were improperly adopted by Warrior's Board of Directors (the "Warrior

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[1] 8 *Del. C.* § 145. This court has jurisdiction over advancement actions pursuant to 8 *Del. C.* § 145(k).

Board" or the "Board") through unanimous written consent and without adequate consideration, and are void because those provisions were the product of self-dealing and are not entirely fair to Warrior. For the reasons stated in this opinion, I find Underbrink and Harrison are entitled to advancement for the Warrior-related litigation expenses associated with the Texas Proceeding.

I. FACTUAL BACKGROUND

These are the facts as I find them after trial.

A. The Parties

Plaintiff Underbrink was elected as a director of Warrior on April 1, 1998.[2] By letter dated April 18, 2006, he formally resigned as a director at 12:01 a.m. on April 19, 2006.[3] Underbrink practiced business law and finance at Faegre & Benson in Minneapolis, Minnesota for approximately five years, and then became involved in various business ventures. In the 1994-95 timeframe, he associated with a number of individuals to form the first of the St. James Partnerships.[4]

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2 JX 44 (Black Warrior Wireline Corp., 10-K, dated Apr. 12, 2005) at 40 (hereinafter "2005 Warrior 10-K"). Citations in the form "JX" refer to the parties' jointly numbered trial exhibits.

3 *See* JX 64.

4 *See* Tr. at 8-9 (Underbrink). Citations in this form ("Tr.") are to the transcript of the trial held on August 24, 2007, and indicate the page and, where it is not clear from the text, the witness testifying.

St. James Capital Partners, L.P. ("Capital Partners") and SJMB, L.P. ("Merchant Bankers") collectively constitute the St. James Partnerships; their general partners are St. James Capital Corp. ("SJCC") and SJMB, L.L.C. (collectively, the "St.

Plaintiff Harrison became a director of Warrior on February 25, 2003.[5] By letter dated April 18, 2006, he formally resigned as a director at 12:01 a.m. on April 19, 2006.[6] Before joining the St. James General Partners in 1998, Harrison was a manager at Ernst & Young LLP, where he had been employed as a CPA for eight years. Harrison served as the chief financial officer of the St. James General Partners during the events in question, and continues to work in that capacity.[7]

Warrior, previously known as Black Warrior Wireline Corp., is a Delaware corporation with is principal place of business in Columbus, Mississippi. It is a natural gas and oil well services company that provides cased-hole wireline and well intervention services to gas and petroleum exploration and production companies.[8] Before the SPO, Warrior had two other directors, William Jenkins and Robert McNally. During the relevant time period, Jenkins served as chief executive officer of Warrior and chairman of the Board.[9] In January 2006, McNally joined Warrior as executive vice president of

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James General Partners"). *See* Tr. at 9-14 (Underbrink); Underbrink Dep. at 5-6, 22-23.

5 2005 Warrior 10-K at 40.

6 *See* JX 27.

7 Tr. at 165-67 (Harrison).

8 *See* 2005 Warrior 10-K at 1.

9 *Id.* at 39.

finance and operations, and also became a director.[10] On September 22, 2006, Superior agreed to acquire Warrior; the merger was effected in December 2006.[11] McNally and Jenkins ceased to be directors after the merger.[12]

From June 1997 to February 1999, Warrior entered into a series of transactions where it sold convertible promissory notes and common stock purchase warrants to the St. James Partnerships. In December 1999 and February 2000, Warrior sold additional convertible promissory notes and common stock purchase warrants to one of the St. James Partnerships, among others.[13] As of December 31, 2005, the St. James Partnerships, Underbrink, and certain of Underbrink's family trusts and investment vehicles owned 86.3% of the outstanding shares of Warrior's common stock on a fully-diluted basis.[14]

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10 *See* McNally Dep. (July 25, 2007) at 15. Where multiple depositions of a single deponent have been lodged with the Court, the date of the cited deposition is indicated.

11 *See* Stip. ¶ 2. Citations in the form "Stip." refer to the stipulated facts recited in the Pre-trial Stip. and Order ("PTO") § II.

12 *See* Stip. ¶¶ 5-6.

13 *See* 2005 Warrior 10-K at 48. From June 1997 through February 2000, the St. James Partnerships invested over $20 million in Warrior. Stip. ¶ 13.

14 *See* JX 42 (Warrior SPO Prospectus, Apr. 18, 2006) at 24.

B. The Texas Proceeding

As of December 2000, the St. James Partnerships had significant losses. Investors had lost \$9.65 million of the \$23.37 million invested in St. James Capital Partners and \$5.74 million of the \$41.18 million invested in Merchant Bankers.[15]

In 2002, certain limited partners brought a lawsuit in the Circuit Court of Cook County (Chicago), Illinois against the St. James Partnerships, the St. James General Partners, Underbrink, and another principal officer of the general partners.[16] Many of those same limited partners later filed an action in Texas against KPMG, the auditor of the St. James Partnerships (the "Prior Texas Proceeding").[17] The St. James Partnerships, the St. James General Partners, Underbrink, Harrison, McNally, Jenkins, and Warrior were not named as defendants in the Prior Texas Proceeding. KPMG, however, named Underbrink and the St. James General Partners as responsible third parties in the Prior Texas Proceeding.[18]

In December 2004, St. James limited partners Eugene Crist and Marc Werner filed the original petition in the Texas Proceeding.[19] Initially, KPMG was the only defendant in the Texas Proceeding, which sought to recover the limited partners' losses in their

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15 *See* JX 80 (Capital Partners Quarterly Report, Dec. 31, 2000) at 6; JX 81 (Merchant Bankers Quarterly Report, Dec. 31, 2000) at 16.

16 Stip. ¶ 14.

17 *Id.* ¶ 15.

18 *See* Tr. at 22, 25 (Underbrink).

19 Stip. ¶ 16.

investments in the St. James Partnerships.[20] Underbrink understood from the plaintiffs' counsel that they had no intention of suing any of the St. James related parties because they were barred by the applicable statute of limitations.[21]

On March 7, 2005, however, the Texas Proceeding plaintiffs filed a First Amended Petition and Answer (the "First Amended Petition"), which added Underbrink, Capital Partners, and Merchant Bankers as defendants.[22] The claims against Underbrink related to St. James Partnerships investments he allegedly made in violation of the partnership agreements and to benefits he received through the St. James Partnerships' investments in Warrior.[23] The Texas Proceeding plaintiffs did not name Warrior and its directors, as directors of Warrior, as defendants until November 2006.

Nevertheless, the allegations in the First Amended Petition related sufficiently to Warrior for Underbrink to

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20 *See* JX 5 (Original Petition in the Texas Proceeding, dated Dec. 13, 2004 ("Original Petition")) ¶¶ 3, 6.

21 *See* Tr. at 25-26 (Underbrink). The underlying claim against KPMG was that it committed accounting and securities fraud, and that it "ratified, induced, facilitated, assisted and participated in the looting of the [St. James Partnerships] by their general partners . . . and management . . . ." Original Petition ¶¶ 1, 7.

22 *See* JX 6 (First Amended Petition, dated March 7, 2005) ¶ 3.

23 *See id.* ¶¶ 11, 64-77.

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The ultimate disclosure in Warrior's 10-K, however,

contained It stated in pertinent part:

> The St. James Partnerships, their general partners and [Underbrink] . . . were added as defendants in an amended complaint filed in March 2005 in Texas by two of the limited partners of the St. James Partnerships. . . . No claim has been asserted against the Company and the Company is not a defendant in the action. However, the complaint and the amended complaint in the action contain allegations that the Company participated with [Underbrink] in actions the plaintiffs allege were fraudulent and constituted securities violations. The Company has not concluded that it is probable that a claim will be asserted against it and does not believe that if a claim is asserted that there is a reasonable possibility that the outcome would be unfavorable to the Company or that any resulting liability would be material . . . . In the view of the Company, the allegations in the complaint and amended complaint relating to it to the extent those allegations relate to the Company or its participation in

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> the activities alleged against the defendants are baseless, without factual foundation and untrue.[26]

C. Warrior Conducts the SPO

In the middle of 2005, Warrior's financial advisor suggested Warrior conduct the SPO in lieu of a proposed sale. To engage in the SPO, Warrior exchanged stock with holders of derivative securities tied to Warrior. The principal holders of those derivatives were the St. James Partnerships and Underbrink family entities.[27]

The respective roles the Warrior directors played in the SPO are at issue in this action. Warrior admits, "the [SPO] was an immense undertaking for a company with no in house counsel, no CFO with capital finance experience[,] and only three directors . . . ."[28] Underbrink and Harrison took active roles in the SPO, and I find they provided valuable assistance to Warrior. Beginning in August 2005, Harrison helped negotiate and draft the recapitalization agreements, was involved in preparing the materials for the tender offer, contacted each of the warrant holders to explain the terms of the tender offer, attended drafting sessions for the S-1, was involved in litigation and due diligence associated with the contemporaneous acquisition of Bobcat Pressure Control Inc., and

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26 2005 Warrior 10-K at 28.

27 Tr. at 37-39 (Underbrink).

28 DAB at 11. McNally, the fourth director, did not join Warrior until January 2006. Tr. at 46 (Underbrink).

worked with the company's accountants to prepare financial statements relating to Bobcat.[29] Underbrink also participated in much of the same activity.[30]

Commencing in October 2005, Warrior: (1) exchanged a portion of its outstanding warrants for shares of its common stock through an SEC registered tender offer; (2) completed a one-for-ten reverse stock split of shares of its common stock; and (3) entered into an agreement whereby the St. James Partnerships and the Underbrink family entities agreed to convert their convertible subordinated notes and accrued interest into shares of Warrior common stock, and sell those shares, their remaining warrants, and any other shares they owned to Warrior at the close of the SPO.[31] Concurrently, at the suggestion of McNally (who was then employed by Warrior's financial advisor), Warrior retained counsel, Baker Botts LLP, to advise Warrior, direct the recapitalization effort, and "lead" the SPO.[32]

On April 13, 2006, the Warrior Board, consisting of Underbrink, Harrison, McNally, and Jenkins, acting through unanimous written consent, approved a series of resolutions, including those necessary to effectuate the SPO. The Board

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29 *See* Tr. at 178-81 (Harrison). Bobcat was another energy services company Warrior acquired in December 2005. *See* Tr. at 46 (Underbrink).

30 *See* Tr. at 45-46 (Underbrink).

31 Warrior SPO Prospectus at 24; Tr. at 39 (Underbrink).

32 *See* McNally Dep. (July 25, 2007) at 33-34; Geddes Dep. at 16; Tr. at 183-84 (Harrison). John Geddes, a graduate of Columbia Law School, and a partner with Baker Botts in their corporate department, oversaw Baker Botts' work with Warrior. *See* Geddes Dep. at 7-8, 24.

contemporaneously adopted other resolutions, including the acceptance of Underbrink's and Harrison's resignations and the appointment of new directors (Gerald M. Hage, Robert L. Hollier, and John McNabb), all of which were to become effective on the first business day following the SPO. Most importantly for purposes of this litigation, the Board also adopted the 2006 Bylaws.[33]

Warrior commenced the SPO on April 18, 2006. The proceeds of the fully-subscribed offering were used to repay Warrior's outstanding indebtedness, including the equity and debt interests held by the St. James Partnerships, Underbrink, and the Underbrink family entities.[34] Thereafter, Harrison and Underbrink resigned from the Board effective April 19, 2006.

Despite the passage of more than a year since the filing of the First Amended Petition, the Texas Proceeding plaintiffs had not named Warrior or its directors as defendants. With the successful consummation of the SPO, the approximately $22 million invested in Warrior by the St. James Partnerships returned approximately $140 million to their limited partners.[35] Based on the success of the SPO, Underbrink and

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33 *See* JX 111 (Warrior Resolutions Adopted by Written Unanimous Consent, Apr. 13, 2006 ("April 13, 2006 Warrior Resolutions")) at 03464-67, 03474-75. The 2006 Bylaws are available at JX 157.

34 Warrior SPO Prospectus at 25; Tr. at 60 (Underbrink).

35 Tr. at 82 (Underbrink). As of March 31, 2006, limited partners of Merchant Bankers had received cumulative distributions equaling 256% of their original contributed capital; limited partners of Capital Partners had received approximately 134%. *See* JX 37 (Merchant Bankers Quarterly Report, Mar. 31, 2006) at 2; Tr. at 62 (Underbrink).

Harrison considered the possibility of Warrior and its directors being named as defendants in the Texas Proceeding increasingly unlikely. With the SPO pricing at the high end of the Warrior Board's expectations, Underbrink and Harrison also believed the returns to the St. James Partnerships might resolve the Texas Proceeding because the plaintiffs' damages would have been substantially reduced.[36]

D. The 2006 Bylaws

In connection with the SPO, Warrior's counsel and underwriters suggested several corporate governance related improvements. First, to fulfill regulatory listing requirements, Warrior needed a majority of independent directors. Underbrink and Harrison agreed to step down, partly because it would necessitate the recruitment of fewer independent directors than otherwise, and because it would signal a break between Warrior and the St. James Partnerships, whose relationship created a cloud over the SPO.[37] During the ensuing months, Jenkins recruited three new potential board members, Gerald Hage, John McNabb, and Robert Hollier.[38]

The second set of corporate governance improvements related to Warrior's bylaws. On November 3, 2005, Geddes, noting REDACTED

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36 *See* Tr. 57-58 (Underbrink); Tr. at 191-92, 214-15, 251-56 (Harrison). Warrior's other two directors at the time, McNally and Jenkins, concurred. *See* McNally Dep. (July 25, 2007) at 69, 87; Jenkins Dep. at 42-43. Jenkins was "shocked" the Texas Proceeding plaintiffs did not drop the lawsuit, and instead added Warrior and its directors to it. Jenkins Dep. at 45.

37 *See* Tr. at 40-41 (Underbrink); Tr. at 185-86 (Harrison).

38 Jenkins Dep. at 72-73.

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Because the SPO prospectus referenced the to-be-adopted 2006 Bylaws, the Warrior Board and its counsel REDACTED [41] On April 13, 2006, Warrior's counsel circulated board resolutions for the adoption of the 2006 Bylaws by written consent.[42] All four directors, Underbrink,

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39 JX 10 (Email from Geddes to Underbrink and Harrison, Nov. 3, 2005).

40 *See* Geddes Dep. at 26-27, 29-30.

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41 See Warrior SPO Prospectus at 88; Geddes Dep. at 73.

42 *See* JX 24 at P000346-47.

Harrison, McNally, and Jenkins, signed and delivered their consents that same day.[43] Thus, the 2006 Bylaws became effective on April 13, 2006.[44]

E. The Texas Proceeding plaintiffs add Warrior and its Directors as defendants

On November 21, 2006, seven months after the SPO, the plaintiffs in the Texas Proceeding filed a Seventh Amended Consolidated Petition (the "Seventh Amended Petition"), adding as defendants Warrior, Jenkins, Harrison, McNally, a financial advisor of Warrior, and Underbrink in his capacity as a Warrior director.[45] The Seventh Amended Petition alleged Warrior and the Board engaged in fraud, self-dealing, and breaches of fiduciary duty.[46]

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43 *See id.* at P000397; JX 25 (Email from Harrison to Geddes, Apr. 13, 2006) at P000404; JX 141 (Facsimile from Underbrink to Geddes, Apr. 13, 2006) at JG 00547.

44 Underbrink and Harrison assert the subsequent Warrior Board "approved" the 2006 Bylaws. *See* Pls.' Post-trial Opening Br. ("POB") at 22 (citing JX 117 (May 3, 2006 Warrior Board Meeting Minutes) at 6). Instead, the published meeting minutes indicate only that the new Board reviewed the 2006 Bylaws and republished them. JX 117 at 6. Warrior's answering brief and reply brief are labeled "DAB" and "DRB," respectively. Underbrink and Harrison's reply brief is labeled "PRB."

45 *See* Compl. Ex. B (Texas Proceeding Seventh Am. Pet.).

46 *See id.* at 18-28 (the claims challenged the following actions of Warrior and of the Board: (1) the failure to refinance certain Warrior convertible debt owned by Underbrink, his family, and affiliates; (2) Jenkins' employment agreement; (3) the payment of an elevated price for shares of Warrior stock owned by Bendover Corp.; and (4) Warrior's use of a poison pill to prevent the removal of SJMB as general partner of Merchant Bankers).

On December 12, 2006, the merger closed and Warrior became a wholly-owned subsidiary of Superior.[47] After the Seventh Amended Petition was filed, but before the consummation of the merger, representatives of Warrior discussed with representatives of Superior the implications of the Seventh Amended Petition.[48] Therefore, Superior had notice Warrior and its directors were defendants in the Texas Proceeding, and had full knowledge of Warrior's indemnification and advancement obligations under the 2006 Bylaws.[49]

On January 3 and 5, 2007, Underbrink and Harrison, respectively, sent letters to Warrior's CFO and Secretary, Ron Whitter, requesting advancement of their expenses, including attorneys' fees, incurred in the Texas Proceeding.[50] More than three months later, Warrior denied those requests.[51]

On May 4, 2007, Underbrink provided Warrior a written undertaking to:

> [R]eimburse [Warrior] for all Expenses (as defined in Section 16 of the Bylaws, including advances) paid by [Warrior] on my behalf if (a) it is determined pursuant to Article V or by final judgment that I am not entitled to be indemnified by [Warrior]; and (b) all appellate remedies related to that

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47 *See* JX 125.

48 *See* McNally Dep. (July 25, 2007) at 91.

49 *See also* Tr. at 297 (Alan Patrick Bernand). Bernand is senior executive vice president of Superior. *Id.* at 292.

50 *See* JX 56 and 29.

51 *See* JX 146, 147 (Letters from Warrior's counsel to Harrison's and Underbrink's counsel, respectively (Apr. 27, 2007)).

> determination or final judgment have expired or been exhausted.[52]

On May 16, 2007, Harrison submitted a similar written undertaking.[53] On May 22, 2007, Warrior again denied Plaintiffs' requests for advancement. Two days later, Underbrink and Harrison filed their Verified Complaint ("Complaint") in this action. In contrast to its treatment of Underbrink and Harrison, Superior (through Warrior) began advancing the legal fees and expenses of Warrior directors Jenkins and McNally for the Texas Litigation by July 2007 at the latest.[54]

F. Current Claims of the Texas Proceeding

Since the Seventh Amended Petition, the Texas Proceeding plaintiffs have amended their petition *seven* more times. The following table summarizes the claims asserted in the Texas Proceeding plaintiffs' Fourteenth Amended Petition, focusing on those relating to Warrior.

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52 JX 151, Ex. A (Letter from Underbrink to Whitter (May 4, 2007)).

53 JX 152, Ex. A (Letter from Harrison to Whitter (May 16, 2007)).

54 *See* Jenkins Dep. at 11, 14-16; McNally Dep. (July 25, 2007) at 9-10, 96. Furthermore, Superior provided advanced indemnification for Jenkins and McNally despite not having received a written undertaking from either of them. *See id.*

Count No.	Defendants	Allegations
1	SJMB LLC, Harrison, and Underbrink	The named defendants committed fraud and breached their fiduciary duty to SJMB. Only one of the five specified activities relate to Warrior: "self dealing transactions at Warrior, including . . . the failure to renegotiate or retire senior subordinated debt and approving the change of control provision in Jenkins' employment agreement."[55]
3-5	St. James General Partners, Underbrink, Harrison, Jenkins, McNally, Warrior, and Warrior's financial advisor	3. The named defendants violated Texas securities laws by offering to sell to and then purchase from SJMB Warrior stock as part of the SPO, at a price depressed by self-dealing, fraud, and defendants' breaches of fiduciary duty. Defendants misrepresented the nature of their actions in selling stock owned by Merchant Bankers and failed to notify Merchant Bankers of material information in connection with the sale. 4. Warrior and the Warrior directors committed statutory fraud when, in connection with the SPO, they made false representations of material fact and false promises to act, to induce SJMB to sell its Warrior stock. 5. The named defendants committed common law fraud by failing to fulfill their duty to disclose material facts, with the intent to induce action or inaction by SJMB.
6	Warrior	Warrior breached the Recapitalization Agreement between Warrior and SJMB.
7	Warrior's financial advisor	Warrior's financial advisor tortiously interfered with the contract between Warrior and SJMB.
8-9	St. James General Partners, Underbrink, Harrison, Jenkins, McNally, Warrior, and Warrior's	8. Underbrink, Harrison, and SJCC knowingly participated in breaches of fiduciary duty by making affirmative representations and taking active steps to conceal breaches of fiduciary duties. Warrior, Jenkins, Warrior's financial advisor, and McNally participated in, ratified, induced, and facilitated the breach of fiduciary

[55] *See* Fourteenth Am. Pet. ¶ 101, *available* at Letter from Abigail M. LeGrow, Pls.' counsel, to the Court (Mar. 12, 2008) Ex.

	financial advisor	duties. Of particular import is Underbrink's and Harrison's approval of Jenkins' employment contract that was allegedly designed to reduce the likelihood the general partners of the St. James Partnerships would be replaced. 9. The named defendants ratified, participated in, facilitated, aided and abetted, induced and conspired to breach the partnership agreements, breach the duties of the general partners and management, and/or make fraudulent and negligent misrepresentations.

On March 25, 2008, the court in the Texas Proceeding granted nonsuit in favor of Underbrink and Harrison with respect to counts 3, 4, 5, and 9 of the Fourteenth Amended Petition.[56] Later, on April 23, 2008, the court dismissed Harrison completely from the Texas Proceeding.[57]

G. Procedural History of this Action

On May 24, 2007, Underbrink and Harrison filed this action after Defendant Warrior refused their requests for advancement of their expenses in defending the Texas Proceeding. On June 22, 2007, this Court entered a scheduling order which called for expedited discovery and set trial for August 24, 2007.

Warrior filed its Answer on June 22, 2007, along with a counterclaim, which it amended on August 9, 2007, alleging Plaintiffs breached their fiduciary duties by adopting the 2006 Bylaws. This case was tried before me on August 24, 2007. After

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56 *See* Letter from Todd C. Schiltz, counsel to Warrior, to the Court (Apr. 7, 2008) Ex. A (Order Granting Pls.' Mot. For Partial Nonsuit Without Prejudice).

57 *See* Letter from Peter J. Walsh, Pls.' counsel, to the Court (Apr. 25, 2008) Ex. A (Order Granting Notice of Voluntary Nonsuit Without Prejudice of Harrison).

extensive posttrial briefing, I heard argument on December 11, 2007. Since then, the Texas Proceeding plaintiffs amended their petition several times, resulting ultimately in the Fourteenth Amended Petition filed in March 2008.

H. Parties' Contentions

Underbrink and Harrison contend Warrior has breached its obligation to provide them mandatory advancement under the 2006 Bylaws. In that respect, they seek to recover the expenses incurred by them to date in connection with the Texas Proceeding, including costs and attorneys' fees, as well as pre-judgment and post-judgment interest. Underbrink and Harrison further seek an order requiring Warrior to pay them the full amount of all expenses they reasonably incur in connection with the Texas Proceeding from the date of this Court's judgment until the entry of final and complete judgment in the Texas Proceeding. In addition, Plaintiffs also ask for an award of their expenses (including costs and attorneys' fees) in prosecuting this action.[58]

Warrior denies Underbrink and Harrison are entitled to any relief, and contends the 2006 Bylaws are invalid. In the alternative, Warrior argues Underbrink and Harrison's requested recovery, including their attorneys' fees and expenses in prosecuting this action, "should be limited because many of the claims in the Texas Proceeding have nothing to do with Plaintiffs' status as former directors of Warrior."[59]

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[58] *See* PTO at 11-12.

[59] PTO at 12.

II. ANALYSIS

A. Advancement

"Advancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings."[60]

"A company's bylaws are contractual in nature."[61] Thus, "indemnification is a right conferred by contract, under statutory auspice."[62] Section 145 of the DGCL provides the statutory framework for when and how a corporation may provide advancement to an officer, director, employee, or agent of the corporation.[63] "[T]he indemnification statute should be broadly interpreted to further the goals it was enacted to

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60 *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005).

61 *Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *2 (Del. Ch. Mar. 28, 2008) (citing *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 928 (Del. 1990)).

62 *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 559 (Del. 2002).

63 *See* 8 *Del. C.* § 145. As to advancement, Section 145(e) states:

> Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

achieve," which are to "promote the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served if they are vindicated," and "encourage capable [persons] to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve."[64]

Courts use the tools of contract interpretation when construing bylaw provisions relating to indemnification and advancement.[65] In that context, Delaware courts "simultaneously apply the patina of section 145's policy."[66] As discussed in the next part, Warrior's bylaws state it shall advance expenses "to the fullest extent permitted by law."[67] Therefore, to the extent the 2006 Bylaws are valid, the plain terms of those

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64 *Cochran*, 809 A.2d at 561 (quoting RODMAN WARD, JR., EDWARD P. WELCH, & ANDREW J. TUREZYN, FOLK ON DELAWARE GENERAL CORPORATION LAW § 145 (4th ed. 2001)).

65 *See, e.g., Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983); *Gentile v. Single Point Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001); *Reinhard & Kreinberg*, 2008 WL 868108, at *2. "In the interpretation of charter and by-law provisions, 'courts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its creation and adoption.'" *Centaur Partners*, 582 A.2d at 928 (quoting *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990)).

66 *Reinhard & Kreinberg*, 2008 WL 868108, at *2.

67 2006 Bylaws Art. V, §§ 1-2.

bylaws provide for mandatory advancement to the broadest extent possible under Delaware law.[68]

B. Warrior's Advancement Provisions Provide for Mandatory Advancement

There is no dispute Warrior's advancement provisions under the 2006 Bylaws provide for mandatory retroactive advancement. In this part, I summarize the relevant textual provisions.

Because Warrior's mandatory advancement provision references proceedings where directors may seek indemnification, I begin with Warrior's indemnification provision. Under Article V, Section 1 of the 2006 Bylaws:

> The Corporation shall, to the fullest extent permitted by applicable law in effect on the date of effectiveness of these Bylaws, and to such greater extent as applicable law may thereafter permit, indemnify and hold the Indemnitee harmless from and against any and all losses, liabilities, claims, damages and, subject to Article V, Section 2 (Expenses), Expenses . . . arising out of any event or occurrence related to the fact that the Indemnitee is or was a director or Officer of the Corporation . . . and such indemnification shall continue as to an Indemnitee who has ceased to be a director, Officer, employee or agent . . . .[69]

The 2006 Bylaws define "Indemnitee" as including "any ... director of the Corporation who is, or is threatened to be made, a witness in or a party to any Proceeding by reason of his Corporate Status whether the basis of such proceeding is alleged action in an official

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68 *See Brown v. LiveOps, Inc.*, 903 A.2d 324, 328 (Del. Ch. 2006).

69 2006 Bylaws Art. V, § 1.

capacity as such [a] … director or in any other capacity while serving as such a[] . . . director."[70]

Thus, a director is entitled to indemnification in any action or proceeding brought "by reason of his Corporate Status" "arising out of any event or occurrence related to the fact [he] is or was a director." That language is consistent with the statutory language contained in 8 *Del. C.* § 145(a), which authorizes indemnification when a person is made or threatened to be made a party to an action or proceeding "by reason of the fact" that the person is or was a director. The "by reason of the fact" standard, or the "official capacity" standard, is interpreted broadly and in favor of indemnification and advancement.[71]

Within that context, Warrior's mandatory advancement provision states in its entirety:

> In the event of any threatened or pending Proceeding in which the Indemnitee is a party or is involved and that may give rise to a right of indemnification under this Article V, following written request to the Corporation by the Indemnitee, the Corporation shall promptly pay to the Indemnitee amounts to cover Expenses reasonably incurred by Indemnitee in such Proceeding in advance of its final disposition upon the receipt by the Corporation of (i) a written undertaking executed by or on behalf of the Indemnitee providing that the Indemnitee will repay the advance if it shall ultimately be determined that the

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70 *Id.* § 16.

71 *See Weaver v. ZeniMax Media, Inc.*, 2004 Del. Ch. LEXIS 10, at *9-11 (Jan. 30, 2004) (citing *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *4 (Del. Ch. May 3, 2002)).

> Indemnitee is not entitled to be indemnified by the Corporation as provided in these Bylaws and (ii) satisfactory evidence as to the amount of such Expenses.[72]

Thus, the 2006 Bylaws mandate advancement of expenses incurred in any proceeding that may give rise to a right to indemnification.[73]

C. Are the Advancement Bylaws Valid?

Warrior contends Plaintiffs may not seek advancement under the 2006 Bylaws for the following reasons: (1) the Bylaws were not properly adopted pursuant to Warrior's 1992 Bylaws; (2) the Bylaws' retroactivity provision is invalid for lack of consideration; (3) Plaintiffs' adoption of the Bylaws was a breach of their fiduciary duty to Warrior; and (4) Plaintiffs have not satisfied the prerequisites to advancement because of a faulty undertaking. I address each of these arguments in turn.

1. Were the 2006 Bylaws properly adopted by the Warrior Board through unanimous written consent?

Warrior contends the 2006 Bylaws were not properly adopted because the pre-merger Warrior Board enacted them by written consent, instead of at a meeting.

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72 2006 Bylaws Art. V, § 3.

73 Furthermore, because of its acquisition by Superior, the 2006 Bylaws place the burden of proof on Warrior for its decision to reject Plaintiffs' request for advancement. The 2006 Bylaws state in pertinent part: "[i]f a Change of Control shall have occurred, in any judicial proceeding commenced pursuant to this Section 10, the Corporation shall have the burden of proving that the Indemnitee is not entitled to indemnification or advancement of Expenses, as the case may be." *Id.* § 10. "'Change of Control' means . . . [t]he acquisition by any individual, entity or group . . . of 20% or more of . . . the then outstanding shares of common stock of [Warrior] . . . ." *Id.* § 16(i). Because Superior purchased more than 20% of Warrior, Superior's acquisition of Warrior qualifies as a "Change of Control" under the 2006 Bylaws' definition.

Plaintiffs reply that Section 141(f) of the DGCL permitted the 2006 Board to amend the Bylaws by unanimous written consent.

Once a corporation has received payment for its stock, its bylaws may be amended only by stockholders unless the power to amend also is conferred upon the board through the corporation's certificate of incorporation.[74] Warrior interprets Article IX of its 1992 Bylaws, which states that "The Board of Directors shall have the power to adopt, alter and repeal the By-Laws of the Corporation at any regular or special meeting of the Board . . . ,"[75] as precluding the Board from amending the bylaws by any means other than a meeting. For that assertion, Warrior cites *Moon v. Moon Motor Car Co.*, which held bylaws adopted at a special meeting were invalid when directors had power only to make amendments at a regular meeting.[76] *Moon*, however, was decided before the adoption of

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74 *See* 8 *Del. C.* § 109(a). The parties do not dispute Warrior's charter had such an authorization. *See* DAB at 30; PRB at 19.

75 JX 59 (1992 Bylaws) Art. IX. The full text of Article IX states:

> The Board of Directors shall have the power to adopt, alter and repeal the By-Laws of the Corporation at any regular or special meeting of the Board, subject to the power of the stockholders to alter or repeal any By-Law adopted or altered by the Board of Directors. By-Laws may be adopted, altered or repealed by the stockholders by the vote of the holders of a majority of the outstanding shares entitled to vote thereon provided that notice of the proposed adoption, alteration or repeal shall have been given in the notice of such meeting of stockholders.

76 151 A. 298, 301 (Del. Ch. 1930).

8 *Del. C.* § 141(f) in 1967,[77] which allows directors to take action through unanimous written consent.[78] Thus, the decision in *Moon* does not preclude the Warrior Board from amending its bylaws by unanimous written consent, provided it may do so consistently with Section 141(f).[79]

Warrior's next argument, seemingly in the alternative, focuses on the language in Section 141(f) limiting board action by unanimous written consent if the ability to take such action is "otherwise restricted by the certificate of incorporation or bylaws."[80] Warrior contends Article IX's affirmative grant of power to the Board to amend the 1992 Bylaws in a regular or special meeting is also, implicitly, a restriction on its ability to effect such an amendment through written consent. Warrior cites no precedent for this assertion, and the Court is not aware of any. Warrior's interpretation effectively would require a bylaw that expressly authorizes amendment of the bylaws by written consent before the board could proceed in that manner.

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77 *See* 56 Del. Laws 168 (1967).

78 Section 141(f) states in pertinent part, "Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors . . . may be taken without a meeting if all members of the board . . . consent . . . ." 8 *Del. C.* § 141(f).

79 Warrior has not shown the 2006 Bylaws were adopted by less than unanimous written consent. *Cf. Solstice Capital II, Ltd. P'ship v. Ritz*, 2004 Del. Ch. LEXIS 39, at *3-4 (Apr. 6, 2004) (invalidating board action because it was taken by less than unanimous written consent and otherwise needed to be done at a meeting of the board).

80 *See* DRB at 2; *see also* Posttrial Tr. at 75-77. Citations in the form "Posttrial Tr." are to the transcript of the argument held on December 11, 2007.

Warrior's challenge to the validity of the Board's adoption of the 2006 Bylaws by written consent lacks merit because it does not comport with a fair reading of the Bylaws or with the policy underlying Section 141(f). Despite its incantation of several well-recognized principles of contract interpretation, Warrior's interpretation of the 1992 bylaws as restricting the ability of the Board to amend the 2006 Bylaws by unanimous written consent is flawed and unpersuasive. Among other things, Warrior relies on the principle that specific language in a contract should control over general language.[81] The general language Warrior refers to appears in Section 141(f) of the DGCL and Article III, § 6 of Warrior's 1992 bylaws, both of which authorize the Board to act by unanimous written consent.[82] The specific language appears in Article IX of the 1992 bylaws, which empowers the board to make amendments to the bylaws "at any regular or special meeting of the Board, subject to the power of the stockholders to alter or repeal any By-law adopted or altered by the Board of Directors."

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81 DAB at 31 (citing *DCV Holdings, Inc. v. Conagra, Inc.*, 889 A.2d 954, 961 (Del. 2005)).

82 Article III, § 6 of the 1992 Bylaws affirms that "[i]n addition to meeting in person, the Board of Directors may conduct its business by (i) written action by unanimous consent of its members ...." Warrior refers to the 1992 Bylaws, even though it amended those bylaws in 1998, because the 1998 amendments also were effected by unanimous written consent and thus are invalid, according to Warrior. There are no material differences in the language of the 1992 and 1998 bylaws as it relates to the issues currently before me. *See* JX 1 (Warrior Bylaws adopted May 27, 1998) Art. III, § 6 and Art. IX.

The language from Article IX that Warrior relies on may be sufficient to require the Board to make any amendment to the bylaws at a meeting, but it does not restrict the Board's ability under Article III, § 6 and Section 141(f) to take such action by unanimous written consent. Section 141(f) provides in pertinent part: "*Unless otherwise restricted by the certificate of incorporation or bylaws*, any action *required* or permitted *to be taken at any meeting of the board of directors* ... may be taken without a meeting if all members of the board ... consent thereto in writing ...."[83] Viewing Articles III and IX of the 1992 Bylaws together in the context of Section 141(f), the Board would be precluded from amending the Bylaws by written consent only if such action was "otherwise restricted by the certificate of incorporation or the bylaws." No one argues the certificate imposes such a restriction.[84] Thus, the issue is whether the Bylaws restrict the Board from effecting a bylaw amendment by unanimous written consent.

I find nothing in the Warrior Bylaws that reasonably could be read as "otherwise restricting" the power of the Board to amend the bylaws by unanimous written consent. Section 141(f) explicitly provides that, absent such a restriction, the mere fact that the bylaws might require a board to take an action at a meeting does not preclude the board from taking the same action by unanimous written consent. At most, Article IX imposes such a requirement. Further, Warrior's interpretation of Article IX of the 1992 Bylaws as precluding Warrior's directors from amending the Company's bylaws by unanimous

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83 8 *Del. C.* § 141(f) (emphasis added).

84 *See* JX 61 (Def.'s Resp. to Req. for Admission) No. 67.

written consent would undermine the policy behind Section 141(f). In enacting that statute, the Legislature recognized that "meetings should be required except where the decision is so clear that the vote is unanimous and in writing."[85] Thus, I find the Warrior Board validly amended the 1992 and 1998 bylaws through unanimous written consent, and that the Board did not need to a hold a meeting to adopt the 2006 Bylaws.

Warrior has conceded that should this Court find the Board could act through unanimous written consent

> then the only portion of the Bylaws which Warrior seeks to have declared invalid is any provision or reading of Article V which makes or purports to make the Bylaws retroactive and/or makes or purports to make advancement mandatory with respect to acts which occurred prior to the adoption of the Bylaws.[86]

I next address these aspects of Warrior's challenge to the validity of the 2006 Bylaws.

2. Did Warrior receive consideration for the 2006 Bylaws?

Warrior contends "Plaintiffs cannot obtain advancement for their pre-April 13, 2006 conduct because Warrior did not receive any consideration in exchange for agreeing to provide retroactive mandatory advancement."[87] Warrior failed to cite any precedent in which a court invalidated a board-approved bylaw providing for retroactive mandatory advancement, or any bylaw for that matter, for lack of consideration.

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85 *Solstice Capital*, 2004 Del. Ch. LEXIS 39, at *4; R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, 1 THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS ("BALOTTI & FINKELSTEIN") § 4.8[F] (3d ed. Supp. 2008).

86 DAB at 32 n.20 (citing 2006 Bylaws Art. V, § 14).

87 *Id.* at 32.

Warrior contends there was no consideration because Harrison and Underbrink approved no actions as directors at the time of or after passage of the 2006 Bylaws, which granted them mandatory retroactive advancement rights. Thus, according to Warrior, it "received no continued service from Plaintiffs following the adoption of the Bylaws."[88] The Bylaws were amended on April 13, 2006; Underbrink and Harrison stepped down as directors on April 19, 2006. Thus, even assuming consideration was necessary for the passage of the mandatory advancement provision,[89] Warrior received five additional days of service as consideration. The fact that Underbrink and Harrison only agreed to serve for a few additional days is irrelevant. "Absent fraud or unconscionability, the adequacy of consideration is not a proper subject for judicial scrutiny."[90]

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88 DRB at 4.

89 Delaware courts have found advancement to function primarily as a benefit to the corporation, and not to the directors. "Rights to . . . advancement are deeply rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person's employment and more as a desirable mechanism to manage risk in return for greater corporate benefits." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005) (citing DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 8-2). Advancement policies have been found to be valuable because they "encourage[] corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005) (discussing indemnification, but noting advancement is an important corollary of indemnification).

90 *Acker v. Transurgical, Inc.*, 2004 Del. Ch. LEXIS 49, at *15 (April 22, 2004) (quoting *Apfel v. Prudential-Bache Sec., Inc.*, 600 N.Y.S.2d 433, 435 (N.Y. 1993)); *see also Ryan v. Weiner*, 610 A.2d 1377, 1381-84 (Del. Ch. 1992) ("It is [the] general rule, recited by courts for well over a century, that the adequacy or

Furthermore, while the Warrior Board did not approve any transactions between the passage of the 2006 Bylaws and Plaintiffs' resignations, many of the necessary components for the SPO were approved simultaneously with the approval of the 2006 Bylaws on April 13, 2006.[91] Moreover, after they approved the 2006 Bylaws, both Harrison and Underbrink signed Warrior's S-1 registration statement with the SEC on April 14, 2006.[92]

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fairness of the consideration that adduces a promise or a transfer is not alone grounds for a court to refuse to enforce a promise or to give effect to a transfer."); *In re Limited, Inc. S'holders Litig.*, 2002 Del. Ch. LEXIS 28, at *33 (Mar. 27, 2002) ("It is well-settled that 'courts are ill-fitted to attempt to weigh the adequacy of consideration under the waste standard or, *ex post*, to judge appropriate degrees of business risk.'" (quoting *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000)).

91 *See* JX 111 (April 13, 2006 Warrior Resolutions) (board resolutions approving a public offering of common stock, filing of registration statement and prospectus with the SEC, underwriting agreement, use of proceeds of public offering, governing documents including audit committee charter and compensation committee charter, and the 2006 Bylaws).

92 *See* JX 155 (Warrior Form S-1/A Registration Statement, Apr. 14, 2006) at 02251.

I find unpersuasive Warrior's response that the Board completed much of the work underlying the SPO before the April 13 passage of the 2006 Bylaws, and, as a result, that work represents, at most, past consideration and could not support the mandatory retroactive advancement rights. *See* DRB at 4 (citing *Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1232 (Del. Ch. 2000) ("Past consideration, as opposed to true consideration, however, cannot form the basis for a binding contract.")). Moreover, in the context of executive compensation, Delaware courts recognize an exception to the general rule barring retroactive consideration. In *Zupnick v. Goizueta*, this court found compensation given in consideration for previously completed performance was not improper "[w]here the amount awarded is not unreasonable in view of the services rendered." 698 A. 2d 384, 388 (Del. Ch. 1997) (quoting *Blish v. Thompson Automatic Arms Corp.*, 64 A. 2d 581, 606 (Del. 1948)).

Thus, even assuming arguendo that, in the circumstances of this case, consideration was required to support the Board's amendment of Warrior's bylaws to provide for mandatory retroactive advancement rights, I find Warrior failed to meet its burden to show the challenged amendment lacked sufficient consideration.[93] I therefore reject this aspect of Warrior's argument.

3. Are Warrior's mandatory advancement provisions subject to entire fairness review?

As part of its counterclaim, Warrior contends the 2006 Bylaws are void *ab initio* because their adoption was a breach of Underbrink's and Harrison's fiduciary duties to Warrior and its shareholders. Warrior contends that Underbrink and Harrison were interested in the passage of the 2006 Bylaws because they benefited directly from the mandatory advancement provision, and that the Bylaws were not fair to Warrior.

"The power to make and amend the bylaws of a corporation has long been recognized as an inherent feature of the corporate structure."[94] "[B]ylaw amendments are

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93 Warrior's vague assertion the Board's approval of the disputed resolutions constituted merely a "ministerial" action is unconvincing. *See* DRB at 5. Warrior's characterization denigrates all formal board action by Delaware corporations and ignores the substantial responsibility, and concomitant liability, taken on by directors. Furthermore, although a substantial amount of work in support of the SPO predated the Board's decision to approve the SPO and the 2006 Bylaws, the Board still had the power to reject those resolutions or otherwise alter them. *See* 8 *Del. C.* § 141(a) ("The business and affairs of every corporation . . . [are] managed by or under the direction of a board of directors . . . .").

94 *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985) (citing 8 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4176 (rev. perm. ed. 1982)).

presumed to be valid unless they are unreasonable."[95] As with any other action taken by a board of directors, the Warrior Board had to exercise its fiduciary duties of care and loyalty when it approved the mandatory retroactive advancement provision as part of the 2006 Bylaws.[96]

a. The Business Judgment Rule

"The affairs of Delaware corporations are managed by their board of directors, who owe to shareholders duties of *unremitting* loyalty."[97] Officers and directors are protected by the business judgment rule, "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[98] The business judgment rule applies when a decision of the directors is questioned, and the analysis is primarily a process inquiry. "Courts give deference to directors' decisions

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95 *Orloff v. Shulman*, 2005 Del. Ch. LEXIS 184, at *50 (Nov. 23, 2005) (citing *Frantz Mfg.*, 501 A.2d at 407).

96 *See Tafeen v. Homestore, Inc.*, 2004 Del. Ch. LEXIS 38, at *44 n.71 (Mar. 22, 2004) ("Given the high incidence of advancement proceedings, directors should be mindful of their fiduciary duties to stockholders, and the possibility of stockholder action, when reviewing and adopting advancement and indemnification bylaws."). Analogously, decisions "to advance litigation costs in the absence of a bylaw mandate are governed by the business judgment of the board of directors." *Orloff*, 2005 Del. Ch. LEXIS 184, at *49 n.78 (citing *Havens v. Attar*, 1997 Del. Ch. LEXIS 12 (Jan. 30, 1997)).

97 *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 2007 Del. Ch. LEXIS 120, at *10 (Aug. 15, 2007) (citing *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998)).

98 *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

reached by a proper process, and do not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself."[99]

The burden is on the party challenging the decision to establish facts rebutting the presumption.[100] Generally, that party must allege sufficient facts from which the court could reasonably infer (1) a majority of the individual directors were interested or beholden or (2) the challenged transaction was not otherwise the product of a valid exercise of business judgment.[101] If a plaintiff fails to rebut the business judgment rule, "a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'"[102]

b. Should the Board's passage of the 2006 Bylaws be subject to entire fairness review?

Warrior asserts, "[a]t the outset, Plaintiffs received an immediate benefit when they approved the Bylaws. Before April 13, 2006, they had no right to mandatory retroactive advancement from Warrior. Thus, the granting of these enhanced rights conferred an immediate and substantial benefit on Plaintiffs."[103] Underbrink and

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99 *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 49 (Del. 1997) (citations omitted).

100 *Aronson*, 473 A.2d at 812 (citing *Puma v. Marriott*, 283 A.2d 693, 695 (Del. Ch. 1971)).

101 *See Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (citing *Aronson*, 473 A.2d at 814).

102 *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

103 DRB at 7.

Harrison do not deny they received benefits.[104] That they received benefits from a mandatory advancement bylaw, however, does not necessarily implicate *Weinberger's* less deferential entire fairness standard of review.[105] Underbrink and Harrison respond that the Board's decision to pass the 2006 Bylaws, including the mandatory retroactive advancement provision, deserves deferential business judgment review.[106]

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104 *See* Posttrial Tr. at 14.

105 *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

106 Underbrink and Harrison argue that "[u]nless the counterclaim is firmly rejected as both procedurally improper and without basis, future litigants may be encouraged to assert such claims in contravention of the strong policy disfavoring the injection of extraneous matters in summary proceedings." PRB at 17. In that context, the Supreme Court has stated, "to be of any value to the executive or director, advancement must be made promptly, otherwise its benefit is forever lost because the failure to advance fees affects the counsel the director may choose and the litigation strategy that the . . . director will be able to afford." *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005). The unique facts of this case caused me to be wary of dismissing Warrior's counterclaim on procedural grounds. Moreover, I considered Warrior's claim that the advancement provision was in fact an advancement of litigation expenses for a particular proceeding to be not only colorable and appeared deserving of analysis on its merits, but also sufficiently unique as to be unlikely to encumber future proceedings. *Cf. Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *28-29 (June 18, 2002) (rejecting defendant's argument for estoppel due to the plaintiff director's unclean hands because such a "rule would turn every advancement case into a trial on the merits of the underlying claims of official misconduct."). Still, with the benefit of hindsight, the degree to which my decision to hear Warrior's breach of fiduciary duty claims has contributed to the length of time it has taken to resolve this matter confirms the wisdom of the strong policy disfavoring the injection of extraneous matters into summary advancement proceedings.

Furthermore, because I find there was no breach of fiduciary duty, I need not address whether Superior, as the alleged real defendant in interest, has standing to pursue a counterclaim against Plaintiffs. *See* PRB at 18 (citing *Tooley v. Donaldson Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), for the proposition

In *Orloff v. Shulman*, the plaintiffs alleged "the defendants approved [a mandatory advancement bylaw and a § 102(b)(7) charter provision] under the threat of imminent litigation, and breached their fiduciary duties by self-interestedly protecting themselves against litigation that they knew would soon name them as defendants."[107] With respect to the mandatory advancement bylaw, the court held the plaintiffs pled "no facts which suggest that the bylaw amendment at issue is unreasonable in this case. Therefore, it is not subject to further scrutiny by this court."[108] Citing *Havens v. Attar*,[109] the court limited its holding, however, to situations in which "plaintiffs challenge the adoption of a bylaw that requires the corporation to advance litigation costs sometime in the future rather than challenging the directors' decision to advance particular litigation expenses."[110]

In *Havens*, the plaintiffs argued the defendant directors breached their duties of care and loyalty in advancing litigation expenses in the absence of a mandatory

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that Warrior's (Superior's) counterclaim is a derivative claim extinguished by Superior's acquisition of Warrior).

107 2005 Del. Ch. LEXIS 184, at *20-21 (Nov. 23, 2005). There, the provisions in question were approved several months after a shareholder's books and records request under 8 *Del. C.* § 220. *See id.*

108 *Id.* at *50 (citing *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)). In that regard, the court further noted, "[b]ylaw amendments mandating litigation advances are a fundamental part of Delaware's policy to encourage qualified people to serve as corporate directors." *Id.* at *49-50.

109 *Havens v. Attar*, 1997 Del. Ch. LEXIS 12 (Jan. 30, 1997).

110 *Orloff*, 2005 Del. Ch. LEXIS 184, at *49.

advancement provision.[111] The court first noted "a board's decision to accept an undertaking and to advance expenses is left to the business judgment of the board in the absence of a by-law specifically providing for mandatory advancement."[112] In the context of advancing particular litigation expenses, and on a preliminary injunction record, the court found plaintiffs likely would succeed in rebutting the presumption of the business judgment rule because the defendant directors "fail[ed] to consider the potential magnitude of expenses or damages or the ability of the defendant directors to repay any funds ultimately advanced."[113] In fact, the defendant directors failed to present evidence "rebutting plaintiffs' claim that the defendant directors failed to obtain or consider *any* information pertaining to [that] decision . . . ."[114]

The issue presented in this case is whether *Orloff* or *Havens* is more apposite in determining the appropriate standard of review to apply to the Board's adoption of the mandatory retroactive advancement provision. In *Orloff*, the court held the adoption of such a provision even in the face of an imminent threat of litigation is subject to

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111 *See Havens*, 1997 Del. Ch. LEXIS 12, at *39, 43-44.

112 *Id.* at *43; *see also Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992) ("Section 145(e) leaves to the business judgment of the board . . . whether the undertaking proffered in all of the circumstances, is sufficient to protect the corporation's interest in repayment and whether . . . advancement of expenses would on balance be likely to promote the corporation's interests.").

113 1997 Del. Ch. LEXIS 12, at *46.

114 *Id.* at *44 (emphasis added); *see also id.* at *46 ("[D]efendants have not pointed to any evidence that would allow me to conclude, on the basis of the facts before me, that plaintiffs would face even a remote chance of failing on the merits.").

deferential business judgment review. The court in *Havens* subjected a decision to provide advancement in the absence of a mandatory advancement bylaw to entire fairness review based upon the plaintiff's showing that the decision was not the product of a valid exercise of business judgment. The facts of this case more closely resemble the situation in *Orloff*; I therefore hold that *Orloff* provides the applicable standard.

Warrior points to no less than fifteen different factual findings that, it contends, indicate Underbrink and Harrison "knew that they were being targeted as directors of Warrior."[115] None of those proposed factual findings, however, show Underbrink and Harrison faced something more than an "imminent threat of litigation" for actions taken by them as Warrior directors (*e.g.*, they were not named defendants in the Texas Proceeding) such that the Board, when it enacted the 2006 Bylaws, was in fact advancing litigation expenses for a particular proceeding.[116]

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115 DRB at 10-11.

116 Warrior's contention Underbrink and Harrison were interested when the Warrior Board approved the 2006 Bylaws conflicts with its repeated assertion that matters involving the St. James Partnerships predominate in the Texas Proceeding. *See, e.g.*, Letter from counsel for Warrior to the Court, at 2 (Apr. 7, 2008) ("the [Texas Proceeding] focuses on Underbrink and Harrison's conduct as fiduciaries of the St. James entities and not on their activities as Warrior directors."); Letter from Todd C. Shiltz to the Court (Mar. 13, 2008) ("[T]he focus of the [Texas Proceeding] remains on Underbrink and Harrison's conduct as fiduciaries of the St. James partnerships."). Implicitly, Warrior acknowledges the naming of Underbrink and Harrison as defendants in the Texas Proceeding , in their capacity as directors of Warrior, was not a foregone conclusion as of April 2006, because the Texas Proceeding involved largely claims relating to action taken in their capacities as fiduciaries to the St. James Partnerships.

Rather than review all of the factual findings Warrior would rely on, I briefly discuss Warrior's strongest contentions. Citing the original petition in the Texas Proceeding, Warrior contends "every petition filed in the [Texas Proceeding] before the [2006] Bylaws were adopted identified Warrior directors by name and alleged that they breached their fiduciary duties as directors of Warrior."[117] While true, those allegations do not create more than an imminent threat of litigation. Warrior also cites

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[119] Underbrink's statement does not imply Warrior, or Underbrink for that matter, was then the target of a particular litigation, but instead suggests, at most, he was subject to an imminent threat of litigation.[120]

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117 DRB at 10 (citing JX 5 (Texas Proceeding Original Petition) ¶¶ 10, 38, 48, 63, 67, 73). Warrior also notes Underbrink was a named defendant in the Texas Proceeding's First Amended Petition. *See id.* (citing First Amended Petition). That Underbrink was a named defendant in his capacity as a fiduciary to the St. James Partnerships, however, is immaterial to whether he faced more than an imminent threat of litigation as a Warrior director. Similarly, Warrior's citation of the First Amended Petition's reference to Harrison and Jenkins' activities as Warrior directors does not demonstrate more than an imminent threat of litigation.. *See id.*

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120 Warrior's subsequent disclosure in the 2005 Warrior 10-K that it "has not concluded that it is probable that a claim will be asserted against it," in fact supports this conclusion. 2005 Warrior 10-K at 28.

Unrelated to the Texas Proceeding, Warrior contends a stockholder demand by the Bendover Corporation also rendered the Directors interested. Beginning on November 17, 2005, Bendover submitted a series, ultimately totaling eighteen, of document requests, some of which related to the SPO, Plaintiffs, and Warrior's relationship with the St. James Partnerships.[121] Thereafter, on March 14, 2006, Bendover made a demand upon the Warrior Board that it take a number of corrective actions (the "Bendover Demand") and threatened to bring a shareholder's derivative suit if corrective action was not taken.[122] The Bendover Demand alleged, among other things, that Underbrink, Jenkins, and Harrison breached their fiduciary duties to Warrior. I find, however, the Bendover Demand was nothing more than an imminent threat of litigation.[123] Warrior has only demonstrated that "Bendover was threatening to sue."[124]

Thus, as in *Orloff*, I find Warrior is "challeng[ing] the adoption of a bylaw that requires the corporation to advance litigation costs sometime in the future rather than

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[121] *See* JX 60 (Warrior Board Minutes (Mar. 16, 2006));

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[122] *See* JX 73 (Bendover Demand) at 1, 6.

[123] Moreover, Warrior cites no case, and I am aware of none, for its assertion that a demand is "the equivalent of a lawsuit . . . ." Posttrial Tr. at 56. Arguably, the threat posed by the Bendover Demand was not even imminent. If its demand was rejected, and Bendover disagreed with that decision, Bendover would have to institute a lawsuit contending the Board's rejection of the demand was unlawful. *See Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996).

[124] Tr. at 225 (Harrison).

challenging the directors' decision to advance particular litigation expenses."[125] Under *Orloff*, Warrior's mandatory advancement provision would be valid unless it was "unreasonable."[126] Warrior has not shown any basis for me to conclude the passage of the 2006 Bylaws, relating to mandatory retroactive advancement, would not be fair to the corporation in the circumstances of this case.[127] The mandatory advancement provision was passed as part of updating Warrior's bylaws in preparation for the SPO; REDACTED and there is no suggestion the provision is otherwise unreasonable.

The adoption of the 2006 Bylaws regarding mandatory advancement is therefore subject to deferential business judgment review. On that basis, I find the 2006 Bylaws to have been properly adopted and the retroactive mandatory advancement provisions at issue to be valid.

D. The Sufficiency of Underbrink's and Harrison's Undertakings

Where a bylaw clearly creates a right to mandatory advancement, the right is enforceable upon satisfaction of the prerequisites, including the appropriate form of

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125 *Orloff*, 2005 Del. Ch. LEXIS 184, at *49.

126 *Id.* at *50.

127 *See also* BALOTTI & FINKELSTEIN § 4.12[D] ("Section 145(e) is a legislative statement that a transaction advancing litigation expenses is fair to the corporation if the statute is followed.").

undertaking as specified in the bylaws.[128] Under the 2006 Bylaws, Underbrink and Harrison must provide "a written undertaking executed by or on behalf of the Indemnitee providing that the Indemnitee will repay the advance if it shall *ultimately* be determined that the Indemnitee is not entitled to be indemnified by the Corporation as provided in these Bylaws."[129] In addition, Article V, Section 4 of the 2006 Bylaws provides:

> *Repayment of Advances or Other Expenses.* The Indemnitee agrees that the Indemnitee shall reimburse the Corporation for all Expenses paid by the Corporation in defending any Proceeding against the Indemnitee *in the event* and only to the extent *that it shall be determined pursuant to the provisions of this Article V or by final judgment or other final adjudication under the provisions of any applicable law that the Indemnitee is not entitled to be indemnified by the Corporation for such Expenses.*[130]

Warrior contends Underbrink's and Harrison's undertakings failed to comply with the 2006 Bylaws because they include the limitation that Plaintiffs will not repay amounts advanced until "all appellate remedies related to [a determination that he is not entitled to indemnification] have expired or been exhausted."[131] Warrior argues the 2006 Bylaws "do not give Plaintiffs the right to exhaust all appellate remedies before they have to repay amounts improperly advanced nor do they allow Plaintiffs to modify, limit or

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128 *See Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001) ("any agreement on the part of a corporation to provide advancement rights should be construed according to its terms"); BALOTTI & FINKELSTEIN § 4.12[D].

129 2006 Bylaws Art. V, § 3 (emphasis added).

130 *Id.* Art. V, § 4 (emphasis added).

131 *See* DAB at 43 (citing JX 39 (Harrison Undertaking); JX 57 Ex. A (Underbrink Undertaking)).

restrict the circumstances under which Plaintiffs will repay improper advances."[132] Underbrink and Harrison disagree, contending the 2006 Bylaws authorize advancement until a "final disposition" of the proceeding.[133]

Warrior's mandatory advancement provision states Warrior "*shall* promptly pay to the Indemnitee amounts to cover Expenses reasonably incurred by Indemnitee in such Proceeding in *advance of its final disposition* upon the receipt" of an undertaking and proof of expense.[134] Thus, Warrior's mandatory advancement provision requires advancement of eligible expenses up until the time of "final disposition." The parties dispute the meaning of "final disposition." The phrase is found both in Section 145 and in the relevant provisions of the 2006 Bylaws, but is otherwise undefined. Warrior contends "final disposition" should be read as meaning "final judgment" in the sense of a trial court's issuance of an order clearly defining the parties' rights and leaving nothing for future determination.[135] Warrior, however, cites no precedent or evidence for reading "final disposition" to mean "final judgment."

Although Section 3 of Article V of the 2006 Bylaws refers to "final disposition" as the point up to which Underbrink and Harrison could receive advancement, Section 4

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132 DAB at 43.

133 *See* PRB at 27.

134 2006 Bylaws Art. V, § 3 (emphasis added).

135 *See* DRB at 24 (citing *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 579 (Del. 2002) ("A final judgment is generally defined as one that determines the merits of the controversy or defines the rights of the parties and leaves nothing for future determination or consideration.")).

refers to a "final judgment or other final adjudication that the Indemnitee is not entitled to be indemnified as an event which would trigger an obligation of the Indemnitee." The differences between this language and the reference to an "ultimate[] determin[ation]" in the portion of Article V, Section 3 relating to the undertaking raise potentially interesting issues regarding when exactly an Indemnitee's obligation to repay an advance under Warrior's bylaws arises. For purposes of this opinion, however, I need not resolve all of those issues. The question before me is much narrower -- *i.e.*, whether the form of the undertakings Underbrink and Harrison submitted to Warrior in May 2007, and to which Warrior did not object in any meaningful way until August 2007, are deficient and provide a basis for denial of their requests for advancement. I hold they are not and that Warrior's defense based on the form of the undertaking lacks merit.

I find the construction of Sections 3 and 4 of Article V of the 2006 Bylaws implicit in Plaintiffs' undertaking to be that the ultimate determination of whether they are entitled to be indemnified by Warrior does not occur until "all appellate remedies related to [that determination if it goes against them] have expired or been exhausted." I further find that construction to be at least colorable and that Plaintiffs' undertaking reflects an intent on their part to defer their obligation to repay any amounts advanced to them to the latest time permitted under Article V. In the words of Section 4, that would be until such time as it would "be determined pursuant to the provision of [] Article V or by final judgment or other final adjudication under the provisions of any applicable law that [they are] not entitled to be indemnified by the Corporation for such Expenses."

Further, because Warrior did not object to the form of Underbrink's and Harrison's undertakings contemporaneously with its initial denial of their request for advancement and did not specify, even generally, the basis for their later objection until August 2007, shortly before trial, I reject Warrior's argument that Plaintiffs should be denied advancement for lack of a proper undertaking. Instead, I hold that Plaintiffs' undertaking is sufficient, but that it merely preserves their right to defer any required repayment to the full extent authorized by Article V of the 2006 Bylaws. At this point, I need not decide the precise extent of those rights in terms of the impact on the timing of their repayment obligation of any appeal from a determination that Plaintiffs are not entitled to indemnification. If a concrete dispute on that issue arises at some future time and the Bylaws properly are held to require repayment before the exhaustion of all appeals, Plaintiffs will be obligated by the Bylaws and their undertaking, as I have construed it, to abide by that ruling.

E. For Which Claims in the Texas Proceeding May Underbrink and Harrison Receive Advancement?

Underbrink and Harrison's right to receive the costs of their defense in advance does not depend upon the merits of the claims asserted against them.[136] Instead, the terms of Article V of the 2006 Bylaws control. Section 1 of Warrior's indemnification article explicitly states Warrior "shall . . . indemnify . . . the Indemnitee . . . from and against any

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136 *See Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *29 n.27 (June 18, 2002) (quoting *Ridder v. Cityfed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1995)).

. . . claims . . . arising out of any event or occurrence related to the fact that the Indemnitee is or was a director of . . . [Warrior] . . . ."[137] Section 3 goes on to mandate advancement for all reasonable expenses incurred in any such proceeding in advance of its final disposition.[138]

1. Are some of Underbrink's and Harrison's claims for advancement moot now that those claims have been dismissed in the Texas Proceeding?

Warrior contends that because several of the claims for which Underbrink and Harrison seek advancement recently were decided in their favor, their claim to recover their expenses as to those claims in this action is moot and properly should be made in an indemnification action.[139] In support, Warrior cites then Vice Chancellor and now Justice Jacobs' oral ruling in *Haseotes v. Cumberland Farms, Inc.*[140] for the broad proposition that advancement is denied when the underlying claim has been adjudicated, even if the plaintiff seeking advancement was successful in the underlying action.

Warrior overstates the ruling in *Haseotes*. The plaintiff in that case sought advancement for two claims and indemnification for another. In determining the plaintiff was not entitled to advancement of a tax claim, the Court considered the equities of allowing advancement when the plaintiff waited eight months before demanding advancement, the claim had been adjudicated, and the claim ultimately may not have

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137 2006 Bylaws Art. V, § 1.

138 *Id.* Art. V, § 3.

139 *See* Letter from Schiltz, counsel to Warrior, to the Court (Apr. 7, 2008).

140 C.A. No. 14921 (Del. Ch. July 23, 1996) (TRANSCRIPT).

been indemnifiable.[141] In the same ruling, however, then Vice Chancellor, now Justice Jacobs also awarded advancement on a different claim that already had proceeded to judgment, and for which there was no equitable or other basis to decline advancement.[142]

In contrast to the tax claim in *Haseotes*, Warrior points to nothing in the record here indicating that either Harrison or Underbrink proceeded with their advancement claim in a dilatory or otherwise inequitable fashion. Rather, shortly after being named as defendants in their capacity as Warrior directors in the Seventh Amended Petition in the Texas Proceeding, Plaintiffs formally requested advancement of their litigation expenses. Furthermore, Harrison and Underbrink have been *successful* at least in part in the underlying litigation; this is not a situation where a director is seeking advancement of expenses for litigation which he has lost.

Advancement actions are meant to be summary proceedings.[143] Although Warrior's defenses and counterclaim are colorable, were I now to deny Harrison and Underbrink's advancement request because of their success in the underlying litigation, I effectively would reward Warrior for pressing its counterclaim and other defenses, which have drawn out this advancement action. It would be inequitable to deny advancement to

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141 *Id.* at 5-7; *see also Yuen v. Gemstar-TV Guide Int'l, Inc.*, 2004 Del. Ch. LEXIS 96, at *9-10, 10 n.14 (June 30, 2004) ("A court of equity will consider the equities (and equitable defenses) in adjudicating [advancement] claims before it . . . .") (citing *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770 (Del. Ch. 1998); *Tafeen v. Homestore, Inc.*, 2004 Del. Ch. LEXIS 38 (Mar. 16, 2004)).

142 *See Haseotes*, C.A. No. 14921, at 7-8 (TRANSCRIPT).

143 *See, e.g.*, *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005).

Harrison and Underbrink because they ultimately succeeded in portions of the Texas Proceeding shortly before the conclusion of this advancement action. This is especially true when the prolonged nature of this action is due, in part, to Warrior's, and not Plaintiffs', litigation strategy.

2. Are Underbrink and Harrison entitled to advancement for all of their expenses incurred in the Texas Proceeding after the Seventh Amended Petition?

Underbrink and Harrison request "their fees and expenses incurred after the Seventh Amended Petition was filed."[144] Their request encompasses not only defending those claims and allegations against them by reason of their corporate status as directors of Warrior, but also those claims related solely to their positions within the St. James Partnerships.[145]

As discussed earlier, under the 2006 Bylaws, a director is entitled to indemnification in any action or proceeding brought "by reason of his Corporate Status" "arising out of any event or occurrence related to the fact [he] is or was a director." The 2006 Bylaws mandate advancement of expenses incurred in any proceeding that may give rise to a right to indemnification. Underbrink and Harrison contend they ought to be advanced *all* of their expenses in defending themselves in the Texas Proceeding, even those incurred by them in defending claims which are not made by reason of their status

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144 Pls.' Pre-trial Br. at 22.

145 *See id.* at 23.

as Warrior directors.[146] Warrior replies that the advancement of expenses for defending claims unrelated to Plaintiffs' status as directors would be unreasonable. I agree.

Under both 8 *Del. C.* § 145 and the 2006 Bylaws Article V, §§ 2-3 Warrior's obligation to advance expenses is subject to a reasonableness requirement.[147] A claim not "arising out of any event or occurrence related to the fact [the claimant] is or was a director" would not qualify for indemnification under Article V, § 1. In seeking advancement for expenses related to the defense of claims not brought by reason of the fact they were directors of Warrior, Plaintiffs are asking for advancement of expenses for which indemnification is not possible. I find such a request unreasonable under the terms of the 2006 Bylaws.[148] Underbrink and Harrison are only entitled to advancement of expenses incurred in defending against claims brought "by reason of [their] Corporate Status" with Warrior and "arising out of any event or occurrence related to the fact [each of them] is or was a director."

3. For which expenses are Underbrink and Harrison entitled to receive advancement ?

The parties dispute which claims are subject to advancement. For purposes of implementing the ruling in the previous Part, a guiding principle is that "if there is a

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146 *See* PRB at 24-25. Plaintiffs contend the costs associated with defending the Texas Proceeding after the filing of the Seventh Amended Petition "will likely be primarily, if not entirely, directed to the Warrior-related allegations." *Id.* at 25.

147 *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992).

148 In that regard, the Supreme Court has held that "a demand for advances of costs incurred during a legal proceeding the subject of which was totally unrelated to the business of [the corporation] would clearly be unreasonable." *See id.*

nexus or causal connection between any of the underlying proceedings … and one's official corporate capacity, those proceedings are 'by reason of the fact' that one was a corporate officer, without regard to one's motivation for engaging in that conduct."[149] "This connection is established if the corporate powers were used or necessary for the commission of the alleged misconduct."[150] "Further, the requisite nexus can be established even if the cause of action does not specify a claim of breach of fiduciary duty owed to the corporation."[151]

At this point, however, the record is not sufficiently developed to enable the Court to examine the individual claims as they have evolved since the Seventh Amended Petition to determine which claims and expenses, at which time, relate to Underbrink's and Harrison's status as directors of Warrior. Moreover, "the function of a § 145(k) advancement case is not to inject this court as a monthly monitor of the precision and integrity of advancement requests."[152] Delaware courts "will not perform the task of playground monitor, refereeing needless and inefficient skirmishes in the sandbox."[153]

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149 *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005).

150 *Bernstein v. Tractmanager, Inc.*, 2007 Del. Ch. LEXIS 172, at *20 (Nov. 20, 2007) (citing *Brown v. Liveops, Inc.*, 903 A.2d 324, 329 (Del. Ch. 2006); *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *6 (Del. Ch. May 3, 2002)).

151 *Id.* (citing *Perconti*, 2002 WL 982419, at *7 & n.35).

152 *Fasciana v. Electronic Data Sys. Corp.* (*Fasciana I*), 829 A.2d 160, 177 (Del. Ch. 2003).

153 *Reinhard & Kreinberg*, 2008 WL 868108, at *5.

"[A] balance of fairness and efficiency concerns would seem to counsel deferring fights about details until a final indemnification proceeding."[154]

In addition to disputing which claims are subject to advancement, the parties also dispute which expenses are subject to advancement. As I understand them, Underbrink and Harrison contend all expenses incurred in defending against Warrior-related claims are subject to advancement, while Warrior contends only Warrior-related issues are subject to advancement.[155] Under the 2006 Bylaws, expenses not "arising out of any event or occurrence related to the fact the claimant is or was a director" are not subject to advancement.[156] Conversely, if some, but not all, of the conduct underlying a claim relates to the fact Underbrink or Harrison was a director of Warrior, advancement for expenses associated with defending that aspect of the claim would be appropriate.

With that guidance in mind, Underbrink and Harrison "shall submit a good faith estimate of expenses incurred to date to address the precise allegations that trigger [their] advancement right."[157] Some level of imprecision is inherent in the retrospective application of this task. In "order to ensure the integrity of this process, [Plaintiffs'] attorneys shall provide a sworn affidavit certifying their good faith, informed belief that the identified litigation expenses relate solely to defense activity to address those

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154 *Fasciana I*, 829 A.2d at 177.

155 *Compare* DRB at 25-26 *with* PRB at 26.

156 2006 Bylaws Art. V, § 1.

157 *Fasciana I*, 829 A.2d at 177.

allegations for which [Plaintiffs are] owed advancement."[158] Plaintiffs shall follow the same procedures for any future expenses for which they seek advancement.

F. Underbrink and Harrison are Entitled to Their Reasonable Attorneys' Fees

Underbrink and Harrison seek their attorneys' fees for prosecuting this advancement action. They cite well-settled Delaware precedent supporting the award of such fees, as well as the 2006 Bylaws which mandate an award of fees in the event of successful litigation in pursuit of advancement rights.[159]

As the Supreme Court noted in *Stifel Financial Corp. v. Cochran*, "indemnification for expenses incurred in successfully prosecuting an indemnification suit is permissible under § 145(a), and therefore 'authorized by law.'"[160] The Court held that when a corporation's bylaws provide for indemnification "to the fullest extent permitted by law" that corporation must indemnify a director for his "fees on fees" in pursuing an action to vindicate his indemnification rights.[161]

> Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is

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158 *Id.* Similarly, Delaware courts recognize "the unambiguous fact that corporations that voluntarily extend to their officers and directors the right to indemnification and advancement under 8 *Del. C.* § 145 have a duty to fulfill their obligations under such provisions with good faith and dispatch." *Radiancy, Inc. v. Azar*, 2006 Del. Ch. LEXIS 13, at *1-2 (Jan. 23, 2006).

159 *See* POB at 33-34.

160 *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002).

161 *Id.*

> responsible for putting the director through the process of litigation. Further, giving full effect to § 145 prevents a corporation from using its "deep pockets" to wear down a former director, with a valid claim to indemnification, through expensive litigation. Finally, corporations will not be unduly punished by this result. They remain free to tailor their indemnification bylaws to exclude "fees on fees," if that is a desirable goal.[162]

The same policy considerations justifying allowance of fees on fees for indemnification equally support an award of fees for the successful prosecution of advancement claims as well.[163]

Moreover, Article V, Section 10 of the 2006 Bylaws provides Underbrink and Harrison with a contractual right to their attorneys' fees. Section 10 provides that directors can recover *all* of their *reasonable* attorneys' fees if they are at least partially successful in prosecuting an action for advancement, as Plaintiffs here have been.[164] The

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162 *Cochran*, 809 A.2d at 561-62.

163 *See Weaver v. ZeniMax Media, Inc.*, 2004 Del. Ch. LEXIS 10, at *22 (Jan. 30, 2004) (citing *Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *32 (June 18, 2002); *Fasciana v. Elec. Data Sys. Corp.* (*Fasciana II*), 829 A.2d 178, 182 (Del. Ch. 2003); *Weinstock v. Lazard Debt Recovery GP*, 2003 Del. Ch. LEXIS 83, at *22 (Aug. 1, 2003)).

164 Article V, Section 10 of the 2006 Bylaws states in pertinent part:

> In the event that the Indemnitee, pursuant to this Section 10, seeks a judicial adjudication to enforce his rights under … this Article V, the Indemnitee shall be entitled to recover from the Corporation . . . any and all Expenses actually and reasonably incurred by him in such judicial adjudication, but only if he prevails therein. If it shall be determined in such judicial adjudication that the Indemnitee is entitled to receive part but not all of the indemnification or advancement of Expenses sought, the Indemnitee shall be entitled to recover

parties disagree, however, as to whether Underbrink and Harrison may recover all of their fees in litigating this action, or only a proportional amount based on the degree to which they have succeeded.

"Both [DGCL] § 145 and bylaw provisions like that adopted by [Warrior] are subject to an implied reasonableness requirement."[165] Indeed, Section 10's mandate of an award of Underbrink and Harrison's attorneys' fees is explicitly limited to those "*reasonably* incurred by [them] in such judicial adjudication."[166] Consistent with the holding in *Fasciana II*, I conclude based on the reasonableness requirement in Section 10, as well as *Cochran*'s admonition that awards of fees on fees are conditioned on the successful prosecution of an underlying § 145 action, that Underbrink and Harrison should only be entitled to advancement of those expenses reasonably proportionate to the level of success they achieved in this action.[167]

> from the Corporation . . . any and all Expenses actually and *reasonably* incurred by him in such judicial adjudication.

(Emphasis added).

165 *Fasciana II*, 829 A.2d at 184 (citing *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992)).

166 2006 Bylaws Art. V, § 10 (emphasis added). Plaintiffs interpret Section 10 to grant them their "entire costs of litigation." PRB at 29. Taken to its extreme, however, that construction would read out the explicit, and implicit, reasonableness requirement.

167 *See Fasciana II*, 829 A.2d at 184. Vice Chancellor Strine further noted:

> Limiting fees on fees awards by imposing a proportionality requirement encourages parties seeking advancement or indemnification to raise only substantial claims and

This advancement action has focused on Warrior's defenses and counterclaim, and for the most part has not involved a substantive dispute as to which claims or expenses are properly subject to advancement. The vast majority of the litigation involved Warrior's effort to avoid payment of its advancement obligation altogether. In that regard, Plaintiffs have been overwhelmingly successful. The only material point on which Warrior prevailed was that Plaintiffs are not entitled, in the abstract, to advancement on *all* expenses they have incurred in the Texas Proceeding since the filing of the Seventh Amended Petition. On the limited record before me, I cannot say to what extent Plaintiffs will be entitled to advancement as to expenses they have incurred or will incur in the Texas Proceeding. The range of possible outcomes is broad, and will have to await Plaintiffs' submissions of their requests for advancement of specific expenses. The reasonableness of the positions the parties take as to those requests may well affect their future ability to obtain fees on fees, if the requests engender further litigation. With respect to the adjudication of this action to date, however, I hold Plaintiffs are entitled to recover all of the attorneys' fees and expenses they actually and reasonably incurred in this "judicial adjudication."[168]

> encourages corporations to compromise worthy claims (lest they suffer a fees on fees award) and resist less meritorious claims (knowing that success will bar a fees on fees recovery for the plaintiff).

Id.

168 2006 Bylaws Art. V, § 10.

G. Pre-judgment and Post-judgment Interest

Underbrink and Harrison also seek an award of pre-judgment and post-judgment interest. Warrior did not address Plaintiffs' request for interest in either its briefing or at argument.

"In Delaware, prejudgment interest is awarded as a matter of right. Such interest is to be computed from the date payment is due."[169] "The purpose of prejudgment interest is to compensate plaintiffs for losses suffered from the inability to use the money awarded during the time it was not available."[170] A party seeking advancement is entitled to interest from the date on which the party "specified the amount of reimbursement demanded and produced his written promise to pay."[171]

In *Citrin v. International Airport Centers LLC*, the court distinguished between expenses incurred before the plaintiff's first demand, and those incurred after the demand. The court granted pre-judgment interest on those expenses incurred before demand as of the date of demand because the sums became final on that date, and granted

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169 *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 826 (Del. 1992) (citing *Moskowitz v. Mayor & Council of Wilmington*, 391 A.2d 209 (Del. 1978) (internal citation omitted)).

170 *Trans World Airlines, Inc. v. Summa Corp.*, 1987 Del. Ch. LEXIS 373, at *3 (Jan. 21, 1987) (citing *Felder v. Anderson, Clayton & Co.*, 159 A.2d 278, 287 (Del. Ch. 1960); *Universal City Studios, Inc. v. Francis I. du Pont & Co.*, 334 A.2d 216, 222 (Del. 1975)), *aff'd*, 540 A.2d at 409-10.

171 *Roven*, 603 A.2d at 826 n.10.

interest on those expenses incurred later from the date they were paid.[172] Using the same rationale, I grant Underbrink and Harrison's request for pre-judgment interest on those expenses properly subject to advancement, compounded quarterly[173] at the legal rate under 6 *Del. C.* § 2301(a).[174] For those expenses subject to advancement, but incurred

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172 *See Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1168 (Del. Ch. 2006) (citing *Roven*, 603 A.2d at 826). As to expenses incurred after the plaintiff's demand, but not actually submitted to the defendant, the court observed:

> Arguably, in the advancement context, pre-judgment interest should not run for some reasonable period during which the responding entity could review the invoices and process payments, say thirty days, and not from the very day payment demands are initially made. The reality, however, is that advancement suits do not arise from situations when responding entities are processing requests for advancement in a commercially timely manner. Therefore, *Roven's* slightly more generous approach to starting the pre-judgment interest clock might be seen as providing a healthy incentive for responding entities not to deny advancement in cases when they have clearly promised it.

Id. at n.15.

173 "Although Delaware courts traditionally have disfavored compound interest, the Court of Chancery has discretion to award compound interest." *Estate of Carpenter v. Dinneen*, 2008 Del. Ch. LEXIS 40, at *91 (Mar. 26, 2008) (citing *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 173 (Del. 2002)). As the Supreme Court observed in *Gotham Partners*, "the rule or practice of awarding simple interest, in this day and age, has nothing to commend it -- except that it has always been done that way in the past." 817 A.2d at 173 (quoting *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 929 (Del. Ch. 1999)).

174 *See Schoon v. Troy Corp.*, 2008 Del. Ch. LEXIS 36, at *42 (Mar. 28, 2008) (applying legal rate of interest when neither party carried its burden of proof with respect to the applicable rate of interest) (citing *Henke v. Trilithic, Inc.*, 2005 WL 2899677, at *13 (Del. Ch. Oct. 28, 2005); *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 909 (Del. Ch. 1999)).

before the date of Plaintiffs' undertakings, pre-judgment interest shall run from the date of their respective undertakings;[175] those expenses subject to advancement incurred after the undertakings will accrue pre-judgment interest from the date they were paid.

Delaware courts routinely grant post-judgment interest in advancement cases.[176] Because Warrior has made no persuasive showing otherwise, I grant post-judgment interest on the full amount of the judgment, including that part comprised of pre-judgment interest,[177] compounded quarterly at the legal rate under 6 *Del. C.* § 2301(a).

III. CONCLUSION

For the reasons set forth in this opinion, Underbrink's and Harrison's requests for advancement of their reasonable litigation expenses in connection with the Texas Proceeding is granted. Warrior's counterclaim for breach of fiduciary duty is dismissed with prejudice. Underbrink and Harrison's request for their attorneys' fees and expenses in the prosecution of this action also is granted, as is their request for pre- and post-judgment interest.

Plaintiffs shall submit a detailed request for attorneys' fees and expenses, together with any supporting materials, within ten (10) days from the date of this opinion.

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175 Underbrink and Harrison gave their undertakings, along with a detailed invoice of their expenses, on May 4, 2007 for $124,685.72 and May 16, 2007 for $50,000, respectively. *See* JX 151, Ex. A; JX 152, Ex. A.

176 *See, e.g.*, *Tafeen v. Homestore, Inc.*, 2005 Del. Ch. LEXIS 41, at *17, 29 (Mar. 29, 2005) (approving special master's recommendation to grant post-judgment interest); *Roven*, 603 A.2d at 826 n.9; *May v. Bigmar, Inc.*, 838 A.2d 285, 292 (Del. Ch. 2003).

177 *See Brandin v. Gottlieb*, 2000 Del. Ch. LEXIS 97, at *101 (July 13, 2000).

Warrior shall file any opposition to that request within ten (10) days after receipt of it. Plaintiffs shall circulate a proposed form of order and final judgment to opposing counsel for review, and the parties shall file a joint or, if necessary, separate proposed forms of order and final judgment within twenty (20) days of the date of this opinion.