

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

Productivity Technologies Corporation,

Plaintiff,

Civil No. 16-cv-13088

v.

Jesse Levine, Julius Levine, and Julius
S. Levine Revocable Trust FBO Julius
S. Levine,

Honorable David M. Lawson
Magistrate Elizabeth A. Stafford

Defendants.

Jesse Levine; Julius Levine

Counter-Plaintiffs,

v.

Productivity Technologies Corporation;
Samuel Seidman; and Arthur Stupay,

Counter-Defendants.

Jesse Levine and Julius Levine,
derivatively on behalf of Productivity
Technologies Corporation,

Counter-Plaintiffs,

v.

Samuel Seidman and Arthur Stupay,

Counter-Defendants,

-and-

Productivity Technologies Corporation,

Nominal Counter-Defendant.

**JESSE LEVINE’S MOTION FOR PARTIAL JUDGMENT ON THE
PLEADINGS AS TO PTC’S REQUIREMENT TO ADVANCE LEGAL
EXPENSES UNDER THE PTC BYLAWS (COUNT III OF
COUNTERCLAIMS)**

Pursuant to Fed. R. Civ. P. 12(c), Jesse Levine (“Jesse”), by and through his attorneys, RJ Landau Partners PLLC, hereby submits this Motion for Partial Judgment on the Pleadings as to Count III (Declaratory Judgment) of the Levine Family’s Counterclaims for the advancement of legal expenses under the PTC bylaws, and states as follows:

1. In August 2016, Delaware companies Productivity Technologies Corporation (“PTC”) and Atlas Technologies, LLC (“Atlas”) initiated wide-ranging actions against Jesse (a director and officer of PTC) alleging that Jesse breached his duties to PTC and Atlas starting in 2011. Jesse has unequivocally denied all allegations of wrongdoing made by PTC and Atlas, and Jesse has been forced to incur significant expenses in defending these actions (and his good name). The pleadings are now closed, and even if PTC’s “well-pleaded material allegations” are taken as true, Jesse is “nevertheless clearly entitled to judgment” as to PTC’s requirement to advance Jesse’s legal expenses. *See JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007); *see also* Fed. R. Civ. P 12(c).

2. Under the undisputed bylaws of PTC, PTC is required to advance all expenses (including attorney’s fees) incurred by Jesse (a director or officer of PTC) in defending these actions upon an undertaking of Jesse to repay such amount if it

ultimately shall be determined that he is not entitled to be indemnified under the PTC bylaws. (Ex. 1, Article VII, Section 5, attached to pleadings as Doc # 29-6.) An undertaking by Jesse is the only condition of this broad advancement provision, and is not disputed that Jesse has made such an undertaking. (Ex. 2.) PTC, however, has refused to honor its bylaws despite having received an undertaking from Jesse to repay any amounts should it ultimately be determined that Jesse is not entitled to indemnification. As a result, Jesse has personally incurred more than \$300,000 in attorney's fees through September 30, 2017 in defending these far-reaching actions. (Landau Declaration, attached as Ex. A.)

3. Mandatory advancement provisions like the one in the PTC bylaws are common, and they advance Delaware policy “that corporate officials should be able to defend not only their pocketbooks, but also their good names.” *Barrett v. Am. Country Holdings, Inc.*, 951 A.2d 735, 744 (Del. Ch. 2008). Regrettably, case law shows that it is also common for Delaware companies like PTC to refuse to honor clear mandatory advancement provisions—despite the harm to stockholders. *See, e.g., id.* at 747 (“The accumulation of cases like this, where the stockholders get it coming and going because of the corporation’s refusal to honor mandatory advancement contracts, is regrettable, and at some point, a case of sufficient dollar value will arise such that a board is sued for wasting the corporation’s resources by putting up a clearly frivolous defense.”).

4. Case law has repeatedly and uniformly rejected efforts by corporations like PTC to avoid their obligations under clear advancement provisions, and the plain language of the PTC bylaws and the pleadings leave no genuine issue of material fact that Jesse is entitled to the advancement of all of his legal expenses incurred in defending the actions by PTC and Atlas. Jesse has borne the burden of these expenses for over a year, and the time has come for PTC to live up to its obligations plainly stated in the PTC bylaws. Jesse respectfully requests that the Court enter judgment on the pleadings as to PTC's requirement to advance legal expenses under the PTC bylaws and order PTC to promptly pay and advance these expenses under terms the Court deems just.

5. Pursuant to Local Rule 7.1(a), concurrence from counsel for PTC was sought, but Jesse did not obtain concurrence. Jesse first requested advancement in September 2016 and has on multiple occasions attempted to resolve the issue of advancement without intervention by the Court. (*See, e.g.*, Exhibit 3-8.)

WHEREFORE, for the reasons set forth above and in the accompanying Brief in Support, Jesse respectfully requests that the Court:

- a. Order that PTC pay all Jesse's legal expenses, including attorney's fees, incurred to date in defending against this action and the Atlas action;

- b. Order that PTC advance all Jesse's future legal expenses, including attorney's fees, incurred in defending against this action and the Atlas action;
- c. Such other and further relief as this court deems just.

Respectfully submitted,

Dated: November 17, 2017

By: /s/ Christopher A. Merritt

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**BRIEF IN SUPPORT OF JESSE LEVINE'S MOTION FOR PARTIAL
JUDGMENT ON THE PLEADINGS AS TO PTC'S REQUIREMENT TO
ADVANCE LEGAL EXPENSES UNDER THE PTC BYLAWS (COUNT III
OF COUNTERCLAIMS)**

STATEMENT OF ISSUE PRESENTED

- I. Whether PTC must advance all Jesse's litigation expenses, including attorney's fees, incurred in defending against the PTC and Atlas actions under the mandatory terms of the PTC bylaws.

Jesse answers: YES.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

8 Del. C. § 145(e)

Barrett v. Am. Country Holdings, Inc., 951 A.2d 735 (Del. Ch. 2008)

Citadel Holding Corp. v. Roven, 603 A.2d 818, 824 (Del. 1992)

Danenberg v. Fittracks, Inc., 58 A.3d 991 (Del. Ch. Mar. 5, 2012)

DeLucca v. KKAT Mgmt., 2006 Del. Ch. LEXIS 19 (Del. Ch. Jan. 23, 2006)

Higgins v. SPX Corp., 2006 U.S. Dist. LEXIS 36301 (W.D. Mich. June 5, 2006)

Homestore, Inc. v. Tafeen, 886 A.2d 502 (Del. 2005)

Marino v. Patriot Rail Co. LLC, 131 A.3d 325 (Del. Ch. 2016)

Reddy v. Elec. Data Sys. Corp., 2002 Del. Ch. LEXIS 69 (Del. Ch. June 18, 2002)

Fed. R. Civ. P. 12(c)

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I. INTRODUCTION

PTC initiated this action and a related action (through its company Atlas) against Jesse (a director and officer of PTC) based on allegations that Jesse breached his duties to PTC. The PTC bylaws, as expressly authorized by Delaware law, require mandatory advancement of legal expenses incurred by a director or officer in defending any action upon receipt of an undertaking by the director or officer to repay such amount if it is determined that the director or officer is not entitled to indemnification. Jesse provided such an undertaking to PTC, and PTC had no discretion to refuse advancement upon receipt of this undertaking. In violation of the clear terms of the PTC bylaws (and a large body of case law uniformly enforcing similar advancement provisions), PTC has refused Jesse's requests for advancement and unreasonably multiplied these proceedings.

As a result of PTC's dereliction of its contractual obligations, Jesse has been forced to pay in excess of \$300,000 in defense of the wide-ranging and scattershot actions filed against Jesse by PTC and Atlas (together the PTC and Atlas complaints contain some 370 paragraphs and 20 counts regarding actions allegedly taken by Jesse since 2011). PTC's indefensible actions have completely deprived Jesse of the value of his advancement rights (and harmed PTC stockholders), and Jesse respectfully requests that the Court order PTC to promptly pay and advance all

expenses incurred by Jesse in defending these actions (including the pursuit of counterclaims advanced to defeat the claims of PTC and Atlas).

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

A. PTC's mandatory obligation to advance legal expenses.

The Certificate of Incorporation for PTC states that the corporation shall indemnify persons to the full extent of Delaware law and the corporation shall advance expenses by any officer or officer in any action for which such person may be entitled to indemnification:

The Corporation, to the full extent permitted by Section 145 of the GCL, as amended from time to time, shall indemnify all persons whom it may indemnify pursuant thereto. Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative, or investigative action, suit or proceeding for which such officer or director may be entitled to indemnification hereunder shall 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 he is not entitled to be indemnified by the Corporation as authorized hereby.

(Certificate, VIII.B, Doc # 29-6, Pg ID 1334).

Article VII of the PTC bylaws provides further specifics regarding PTC's mandatory obligations regarding indemnification and advancement of legal expenses. Under Article VII, Section 1,

The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation)

by reason of the fact that he or she is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit or proceeding if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Corporation[.]

(Ex. 1, Article VII, Section 1 (emphasis added.) Under Article VII, Section 2:

The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that he or she is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another Corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him or her in connection with the defense or settlement of such action or suit if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interest of the Corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

(Ex. 1, Article VII, Section 2 (emphasis added.)

Indemnification of legal expenses under Article VII, Section 1 (for actions not by PTC) and Section 2 (for actions by PTC) requires a determination on the merits by a court or disinterested board or stockholders. (Ex. 1, Article VII, Sections 3 and

4.) Section 5, however, provides for the advance of legal expenses incurred by an officer or director prior to any determination:

Expenses (including attorneys' fees) incurred by an officer or director of the Corporation in defending any civil, criminal, administrative or investigative action, suit or proceeding shall 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 officer or director to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Corporation as authorized in this Article. Such expenses (including attorneys' fees) incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

(Exhibit 1, Bylaws, Article VII, § 5 (emphasis added).)¹

On October 5, 2017, Jesse provided PTC with an undertaking to repay any amounts advanced for which it is later determined Jesse is not entitled to indemnification under the PTC bylaws. (Exhibit 2). Jesse's request for advancement was denied by PTC. (Exhibit 7.) To date, Jesse has incurred in excess of \$300,000 in defense of the PTC and Atlas actions. (Landau Declaration, attached as Ex. A.)

¹ Under Article VII, Section 6 of the PTC bylaws, the indemnification and advancement of expenses under the PTC bylaws "shall not be deemed exclusive of any other rights to which those seeking advancement or expenses may be entitled under any . . . agreement[.] Count III of the Levine Family's Counterclaims further addresses the Levine Family's separate rights to advancement under the 2011 Atlas LLC Agreement. The Levine Family does not waive any of its rights under the 2011 Atlas LLC Agreement by way of the fact that Jesse has filed this motion to enforce his separate rights under the PTC bylaws at this time.

B. Undisputed allegations in the pleadings and procedural background.

PTC is a Delaware corporation and the sole member of Atlas. (PTC’s Verified First Amended Complaint (“PTC AC”), Doc # 18, ¶¶ 2, 10, attached as Ex. 9.)² On August 25, 2016, PTC and Atlas filed two related actions against Jesse alleging that Jesse “took advantage” of PTC and Atlas beginning in 2011.³ PTC alleges *inter alia* that:

- “In his role as a member of the Board, Jesse owes certain fiduciary duties to PTC, including the duties of care, loyalty, good faith, and fair dealing.” (Ex. 9, PTC AC, ¶ 14.)
- “In his role as Secretary and officer of PTC, Jesse owes certain fiduciary duties to PTC, including the duties of care, loyalty, good faith, and fair dealing.” (*Id.*, ¶ 16.)
- “In his role as an officer and member of the Board of PTC, Jesse owed certain fiduciary duties to PTC, including the duties of care, loyalty, and the implied covenant of good faith and fair dealing.” (*Id.*, ¶ 112.)
- “As is set forth herein, including by falsely claiming warrants, improperly filing liens, not acting in the best interests of PTC, obtaining, improperly using, converting, misappropriating, and/or failing to return PTC’s property, Jesse in bad faith knowingly and intentionally breached those duties.” (*Id.*, ¶ 113.)
- “Further, as set forth in Exhibit B (Verified Second Amended Complaint), and all of the factual allegations in Exhibit B are hereby incorporated by reference, Defendant Jesse breached his fiduciary duties to PTC, including breaching his duty of loyalty, in bad faith committing intentional misconduct, in bad faith knowingly violating the law, and/or deriving an improper personal benefit.” (*Id.*, ¶ 114.)

² To avoid any possible confusion and aid in the Court’s review of the pleadings, the operative pleadings pertinent to this motion are attached to this motion as exhibits.

³ PTC and Atlas also assert claims against Jesse’s father (Julius) and Julius’s Trust (collectively the “Levine Family”) as a result of these allegations against Jesse.

The Atlas allegations in Case No. 16-cv-13085, which are incorporated into PTC's complaint, include *inter alia* that:

- “In his role as Chief Executive Officer of Atlas, Jesse owed certain fiduciary duties to Atlas, including the duties of care, loyalty, good faith, and fair dealing.” (Atlas’s Verified Third Amended Complaint (“Atlas 3AC”), Atlas Doc # 45, ¶ 16, attached as Ex. 10.)
- “In his role as a Manager of Atlas, Jesse owed certain fiduciary duties to Atlas, including the implied contractual covenant of of [sic] good faith and fair dealing.” (*Id.*, ¶ 18.)
- “In his role as Chief Executive Officer of Atlas, Jesse owed certain fiduciary duties to Atlas, including the duties of care, loyalty, good faith, and fair dealing.” (*Id.*, ¶ 201.)
- “In his role as a Manager of Atlas, Jesse owed duties to Atlas, including the implied covenant of good faith and fair dealing to Atlas.” (*Id.*, ¶ 202.)
- “As is set forth herein, by obtaining, improperly using, converting, misappropriating, failing to return, and/or concealing Atlas’ funds, whether by fraud or otherwise, and improperly executing the Secret Mortgage, Jesse in bad faith breached those duties.” (*Id.*, ¶ 204.)

Based on the above allegations by PTC and Atlas relating to Jesse’s alleged breach of duties to PTC and Atlas, PTC and Atlas brought claims against Jesse relating to Jesse’s right to a warrant for PTC shares (PTC Count I); shares in PTC (PTC Counts II and III); failing to act in the best interests of PTC or Atlas (PTC Counts IV and VI and Atlas Counts I-VII and X-XII); filing UCC liens (PTC Count V and Atlas Counts VIII and IX); and filing a mortgage (Atlas Counts XIII-XIV).⁴

⁴ The Court dismissed PTC Count IV. (Doc # 25, Pg ID 941.)

After the Court issued rulings on the Levine Family's motions to dismiss, the Levine Family (on August 9, 2017) filed answers and counterclaims in defense of these actions denying any wrongdoing by Jesse and bringing a number of counterclaims against Atlas, PTC, and PTC's controlling directors, Samuel Seidman and Arthur Stupay.⁵ (Verified First Amended Answer and Counterclaims ("Levine PTC Counterclaims"), Doc # 29, attached as Ex. 11; Verified First Amended Answer and Counterclaims ("Levine Atlas Counterclaims"), Atlas Doc # 48, attached as Ex. 12.) The Levine Family's counterclaims arise out of the subject matter of the numerous claims brought against Jesse by PTC and Atlas, including counterclaims relating to the contracts that Atlas and PTC allege were used to "take advantage" of Atlas and the actions of PTC's controlling directors in initiating these actions (Levine PTC Counterclaims, Counts I-III, and VI-VII and Levine Atlas Counterclaims, Counts I-II); and Jesse's warrant and the shares of PTC (Levine PTC Counterclaims, Counts IV-V, and X).

In support of Count III in the Levine PTC Counterclaims, the Levine Family alleges that:

- "Copies of [PTC's certificate of incorporation and bylaws] are attached as Exhibit 6, and incorporated herein." (Ex. 11, Levine PTC Counterclaims, Pg ID 1223, ¶ 66.)
- "Under PTC's bylaws, PTC agreed to advance expenses and legal fees to Jesse incurred in defending any civil action,

⁵ The Levine Family amended these pleadings as a matter of course on August 21, 2017.

including the related Atlas action, upon receipt of an undertaking to repay such amounts if it shall be determined he is not entitled to indemnification under PTC's governing documents." (*Id.*, Pg ID 1264, ¶ 221.)

- "Jesse and Julius agreed to repay advanced amounts if it shall be determined that they are not entitled to indemnification under the 2011 LLC Agreement. Upon receipt of this undertaking, PTC and Atlas were required to advance expenses to the Levines." (*Id.*, Pg ID 1262, ¶ 211.)
- "PTC and Atlas refused to advance expenses in violation of the terms of the 2011 LLC Agreement and Delaware law." (*Id.*, Pg ID 1262, ¶ 212.)

PTC filed an answer to this counterclaim, and responded to these allegations as follows:

- "Plaintiff admits that purported internal documents referenced in ¶ 66 are attached as Exhibit 6, which speak for themselves. Plaintiff denies any remaining allegations as untrue." (PTC Verified Answer ("PTC Answer"), Doc # 32, attached as Ex. 13, ¶ 66.)
- "Plaintiff states that the PTC bylaws speak for itself. Denied as untrue in the manner and form alleged." (*Id.*, ¶ 221.)
- "Plaintiff admits that Jesse and Julius sent such a letter to PTC's counsel on or about December 29, 2016, but Plaintiff denies any remaining allegations as untrue." (*Id.*, ¶ 211.)
- "Plaintiff admits that is has not advanced expenses to Jesse and Julius, and denies any remaining allegations as untrue." (*Id.*, ¶ 212.)

On August 10, 2017, the Court issued an Amended Case Management and Scheduling Order setting the discovery cutoff for January 2018 and the deadline for dispositive motions for February 16, 2018. (Doc # 28.) On September 21, 2017, the Court ordered facilitation with Former Judge Steven Rhodes to be completed before

January 18, 2018 (and the parties scheduled facilitation for January 9, 2018). (Doc # 35).⁶

III. ARGUMENT

Under the undisputed bylaws of PTC, PTC is required to advance all expenses (including attorney's fees) incurred by Jesse (a director or officer of PTC) in defending actions in which Jesse is a party by reason of the fact he is an agent of PTC or another company at the direction of PTC (i.e., Atlas) upon an undertaking of Jesse to repay such amount if it is ultimately determined that he is not entitled to be indemnified under the PTC bylaws. (Ex. 1, Article VII, Sections 1; 2; and 5.) PTC has no discretion to refuse Jesse's demand for advancement, and issues of advancement "are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party [such as the PTC and Atlas claims against Jesse] trigger a right to advancement under the terms of a corporate instrument [such as the PTC bylaws]." *DeLucca v. KKAT Mgmt.*, 2006 Del. Ch. LEXIS 19, * 20-21 (Del. Ch. Jan. 23, 2006).⁷ Based on a review of the pleadings and the PTC bylaws, Jesse is entitled to judgment on the

⁶ Given the nature of this issue (and the increasing expenses being incurred in defense of these actions), Jesse brings this motion prior to court-ordered facilitation. Waiting until after the close of discovery to raise this issue would further deprive Jesse of the value of advancement.

⁷ All unpublished opinions are attached as Appendix A.

pleadings as to PTC's requirement to advance Jesse's legal expenses in defending the actions by PTC and Atlas. *See JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007); *see also* Fed. R. Civ. P 12(c).

A. Under Delaware law, there is a strong policy of allowing mandatory advancement for legal expenses.

Pursuant to 8 Del. C. § 145(e), corporations may provide for the advancement of litigation expenses of its officers and directors:

Expenses (including attorneys' fees) incurred by an officer or director of the corporation 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 of the corporation or by persons serving at the request of the corporation as directors, officers, employees or agents of another corporation, partnership, joint venture, trust or other enterprise may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

8 Del. C. § 145(e). "The language of section 145(e) is permissive, in that advanced litigation expenses may be paid at the corporation's election. However, when a corporation warrants that it shall pay its employees' litigation costs in advance, all discretion is lost; the corporation's duty to pay becomes mandatory." *See Higgins v. SPX Corp.*, 2006 U.S. Dist. LEXIS 36301, *5 (W.D. Mich. June 5, 2006). Further, "when advanced litigation expenses are mandatory, the only prerequisite to

receiving advanced litigation expenses is the officer's promise to the corporation that he will pay it back if he is later disentitled to indemnity." *Id.* at *6.

The purpose of mandatory advancement provisions is "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." *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005) (quotation omitted). Mandatory advancement provisions also advance Delaware policy "that corporate officials should be able to defend not only their pocketbooks, but also their good names." *Barrett v. Am. Country Holdings, Inc.*, 951 A.2d 735, 744 (Del. Ch. 2008).

Mandatory advancement provisions also address the fact that "human beings . . . have a natural inclination to deny advancement to . . . directors and officers if they perceive those individuals as having harmed the corporation." *Marino v. Patriot Rail Co. LLC*, 131 A.3d 325, 343 (Del. Ch. 2016) (emphasis added). It is common for corporate parties to "find religion" and argue for narrow interpretations of broadly written advancement provisions. *See In re Massey Energy Co. Derivative & Class Action Litig.*, 2011 Del. Ch. LEXIS 83, *99, n. 174 (Del. Ch. May 31, 2011) (citation omitted). "But when an advancement provision is, by its plain terms, expansively written and mandatory, it will be enforced as written." *DeLucca*, 2006

Del. Ch. LEXIS 19 at *45-46. Further, courts will not relieve corporations of the burdens of their bylaws:

Regretting the broad grant of mandatory advancement they forged on a clear day, they seek to have the judiciary ignore the plain language of their contracts and generate an after-the-fact judicial contract that reflects their current preference. But it is not the job of a court to relieve sophisticated parties of the burdens of contracts they wish they had drafted differently but in fact did not. Rather, it is the court's job to enforce the clear terms of contracts. Here, that duty requires that DeLucca's motion for judgment on the pleadings as to her entitlement to advancement be granted.

Id. at *6-7. Courts unanimously reject self-serving attempts to avoid clear advancement provisions, and Delaware judges have commented that controlling directors of corporations that breach clear duties to advance expenses have likely committed corporate waste. *See Barrett*, 951 A.2d at 737, 747 (“[S]tockholders will now endure not only the cost of [defense], but also the costs needlessly run up by the corporation because it chose to assert a baseless and illogical defense that wasted...resources....”).

B. The right to advancement is independent of the ultimate right to indemnification.

Advancement and indemnification are distinct legal rights. The right to advancement is determined independently from, and without regard to, whether a party will ultimately be entitled to indemnification. *See Barrett*, 951 A.2d at 744. Whereas indemnification requires a determination on the merits, “[a]dvancement 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.” *Tafeen*, 888 A.2d at 211 (emphasis added); *see also Morgan v. Grace*, 2003 Del. Ch. LEXIS 113, *4 (Del. Ch. Oct. 29, 2003) (“The value of the right to advancement is that it is granted or denied while the underlying action is pending.”).

Nor does the right to advancement go away when the company “from which advancement is sought is alleging [a person] has committed perfidious acts against it. Indeed, it is precisely in the circumstance when a business official is accused of serious wrongdoing that the right to advancement is critical, as that right secures the funds for the official to defend [himself].” *DeLucca*, 2006 Del. Ch. LEXIS at *38-39. For to make advancement dependent on the suing parties’ *allegations* “would be to largely vitiate the protections afforded by § 145” and make the promise of advancement “an illusory one.” *Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, *16-17 (Del. Ch. June 18, 2002). Therefore, alleged motivations, such as greed, ascribed to the party seeking advancement are irrelevant. *Id.* at *14-16. Nor is it relevant that a party would not be entitled to indemnification in the event the allegations against the party are determined to be true. *See Morgan*, 2003 Del. Ch. LEXIS 113 at *8-9. This is because advancement of legal fees is akin to “a decision to advance credit and does not in any way affect the underlying action.” *Id.* at *4.

For advancement to be of any value, it must be made promptly, and the value is “forever lost” if a corporation is allowed to be “derelict in its contractual protection of its directors/officers” in the hopes of “forc[ing] its directors/officers to compromise their own litigations in the face of cost concerns.” *See Tafeen v. Homestore, Inc.*, 2005 Del. Ch. LEXIS 77, *8 (Del. Ch. May 26, 2005). If, however, it is *later* determined that an official is not entitled to indemnification, he will be required to repay the advanced funds. *See DeLucca*, 2006 Del. Ch. LEXIS at *44.

C. The PTC bylaws require PTC to advance legal expenses incurred by Jesse.

A claim for advancement is determined by the pleadings and the language of the corporate document or contract giving rise to advancement rights. *Marino v. Patriot Rail Co. LLC*, 131 A.3d 325, 346 (Del. Ch. 2016). As authorized by Delaware law, the PTC bylaws provide for mandatory advancement of the litigation expenses of officers and directors of PTC (like Jesse) if they may be entitled to indemnification. (Exhibit 1, Bylaws, Article VII, § 5.) The purpose of indemnification and advancement provisions like those in the PTC bylaws is “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.” *See Tafeen*, 886 A.2d at 505.

While Jesse unequivocally denies the allegations made by PTC and Atlas against himself (and the Levine Family), the content of these (false) allegations is undisputed. PTC and Atlas have accused Jesse (a director and officer) of breaching his duties to PTC and Atlas and engaging in “intentional fraud in [his] official capacities [and Jesse has] a clear right to have [his] fees advanced to defend [himself] against those charges.” *See Barrett*, 951 A.2d at 747. If Jesse is successful on the merits in his defense of these actions (which he intends to be), he will be entitled to indemnification from PTC because the PTC and Atlas actions arise by reason of the fact that he was a director or officer of PTC or Atlas (a company controlled by PTC). (Exhibit 1, Bylaws, Article VII, § 1 (Atlas action) and § 2 (PTC action)). *See Tafeen*, 888 A.2d at 214 (requiring only a “nexus or causal connection” between the actions and the official capacity of person seek advancements capacity).

In fact, according to PTC’s complaint, all claims raised in the PTC and Atlas action directly relate to Jesse’s capacity as a director or officer of PTC. (Ex. 9, PTC AC, ¶¶ 112-114 (incorporating all allegations by PTC and Atlas into claim that Jesse breached duties as director and officer of PTC.) Because Jesse may ultimately be entitled to indemnification in these actions, the PTC bylaws require that the legal expenses incurred by Jesse in defending these actions be paid by PTC upon receipt of an undertaking by Jesse to repay advanced funds if it shall be ultimately determined that he is not entitled to be indemnified by PTC. *Greco v. Columbia/HCA*

Healthcare Corp., 1999 Del. Ch. LEXIS 24, 33-34 (Del. Ch. Feb. 11, 1999) (“At some point, a court is going to determine whether Columbia or Greco is ‘in the right’ regarding these matters. This court, however, has a much more narrow task. In performing that task, I cannot assume that Greco is guilty of the acts alleged by Columbia in the FSS litigation.”). Receipt of such an undertaking is the only condition of Jesse’s right to advancement.⁸ *E.g.*, *Higgins*, 2006 U.S. Dist. LEXIS 36301 at *5; *DeLucca*, 2006 Del. Ch. LEXIS 19 at *45-46.

Jesse has provided PTC with the required undertaking (Ex. 2), however, PTC has continued to refuse to advance *any* legal expenses incurred by Jesse in defending these actions. In refusing to honor the PTC bylaws, PTC has denied Jesse the benefit of his rights to advancement without any good faith basis for doing so. Given the animus between Jesse (as a director and major PTC stockholder) and the current controlling directors of PTC (Samuel Seidman and Arthur Stupay) it is “natural human reaction” for PTC’s current directors to resist payment to Jesse, but that does not justify the refusal to comply with a mandatory advancement provision. *See Greco*, 1999 Del. Ch. LEXIS 24, at *32 (“An indemnification dispute between a corporation and a former officer is in many respects akin to a corporate divorce

⁸ The PTC bylaws give PTC discretion as to advancement to “other employees and agents” but not directors or officers. (Exhibit 1, Bylaws, Article VII, § 5.)

proceeding. Emotions run high, feelings are frayed, and former friends and colleagues find themselves at odds.”).

Because the pleadings establish that Jesse may be entitled to indemnification in the PTC and Atlas actions, no further analysis is needed, and, importantly (given the positions taken by PTC to date), the fact that PTC and Atlas allege that Jesse committed misconduct (which Jesse denies) is irrelevant. *See Reddy*, 2002 Del. Ch. LEXIS 69, at *17 (“[T]his court has often been required to uphold the indemnification and advancement rights of corporate officials accused of serious misconduct, because to do otherwise would undermine the salutary public policies served by § 145.”).

D. The PTC bylaws require PTC to advance all legal expenses incurred by Jesse in defending these actions.

Pursuant to the unambiguous language of the PTC bylaws, PTC is required to advance Jesse all his litigation expenses (including attorney’s fees) incurred “in defending” the PTC and Atlas actions. Expenses incurred “in defending” is construed broadly when determining a party’s right to advancement, and includes expenses in asserting affirmative defenses and counterclaims to respond to and negate the numerous allegations and claims against Jesse. *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992). This is because Delaware cases recognize the “common sense proposition that when someone has been sued and is defending against claims, part of that defense frequently involves the assertion of affirmative

defenses and counterclaims. *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 399-400 (Del. Ch. Dec. 8, 2009).

The counterclaims raised by Jesse relate directly to the subject matter of the claims raised by PTC and Atlas and were advanced to defeat the claims against Jesse. Therefore, all expenses incurred in bringing these compulsory counterclaims must be advanced under the PTC bylaws. *See Roven*, 603 A.2d at 824. Further, to the extent there are any “granular” disputes regarding any of the specific counterclaims raised by Jesse, this is not reason to deny advancement, and these issues are more properly addressed at the *later* indemnification stage. *See Thompson v. ORIX USA Corp.*, 2016 Del. Ch. LEXIS 84,*15 (Del. Ch. June 3, 2016).

Likewise, the fact that PTC and Atlas also sued Jesse’s father Julius and his trust, does not affect (or reduce) Jesse’s right to advancement. *Danenberg v. Fittracks, Inc.*, 58 A.3d 991, 998 (Del. Ch. 2012). Jesse is a named defendant in all 20 Counts raised in the PTC and Atlas complaints, therefore, all expenses incurred in defense of these actions would have been incurred “if [Jesse] were the sole defendant” and must be advanced under the PTC bylaws. *See id.* at 999. Moreover, even if there was a legitimate question regarding the allocation of expenses between Jesse and his father (there is not), under Delaware law, these types of allocation arguments are deferred until the amount of indemnification is to be determined. *Id.* at 998.

To date, Jesse has incurred legal expenses in excess of \$300,000 in defense of the wide-ranging actions filed by PTC and Atlas, and PTC's continued refusal to advance these expenses deprives Jesse of the value of advancement under the PTC bylaws (and violates Delaware law). Jesse respectfully requests that the Court enforce the clear terms of the PTC bylaws and order PTC to advance all of Jesse's expenses associated with these actions, including Jesse's expenses in pursuing his right to advancement, or "fees on fees."⁹ *Barrett*, 951 A.2d at 746; *see also Danenberg v. Fittracks, Inc.*, 2012 Del. Ch. LEXIS 4, *18 (Del. Ch. Jan. 3, 2012).

IV. CONCLUSION

Regardless of the (baseless) allegations and claims against Jesse by PTC and Atlas, the PTC bylaws provide Jesse with vested rights to the advancement of legal expenses incurred in defense of these actions. For the reasons stated in this brief and the accompanying motion, Jesse respectfully requests that its motion be granted, and all expenses (including attorney's fees) incurred in defense of these actions be paid and advanced by PTC promptly under terms that the Court deems just.

Dated: November 17, 2017

Respectfully submitted,

By: /s/ Christopher A. Merritt
Richard J. Landau (P42223)
Christopher A. Merritt (P70924)
RJ LANDAU PARTNERS PLLC

⁹ Jesse's right to advancement extends until the final, non-appealable conclusion of these actions. *See Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 404-405 (Del. Ch. 2008).

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record in this matter.

By: /s/ Christopher A. Merritt
Christopher A. Merritt (P70924)