

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

DONALD F. PARSONS, JR.  
VICE CHANCELLOR

New Castle County CourtHouse  
500 N. King Street, Suite 11400  
Wilmington, Delaware 19801-3734

Date Submitted: November 4, 2008

Date Decided: February 24, 2009

Peter J. Walsh, Jr., Esquire  
Potter Anderson & Corroon LLP  
1313 N. Market Street  
P.O. Box 951  
Wilmington, DE 19899-0951

Todd C. Schiltz, Esquire  
WolfBlock LLP  
Wilmington Trust Center, Suite 1001  
1100 N. Market Street  
Wilmington, DE 19801

Re: *Charles E. Underbrink and James H. Harrison v.  
Warrior Energy Services Corporation*, Civil Action  
No. 2982-VCP

Dear Counsel:

This action for advancement of attorneys' fees and expenses incurred by Plaintiffs Charles E. Underbrink and James H. Harrison in connection with what has been referred to as the Texas Proceeding from Defendant, Warrior Energy Services Corporation ("Warrior"), is currently before me on Plaintiffs' supplemental demands for advancement and reimbursement of fees on fees, filed October 17, 2009 (the "First Supplemental Demand"), and Plaintiffs' second supplemental demands for fees on fees, filed

January 20, 2009 (the “Second Supplemental Demand”). Warrior has objected to portions of both the First and Second Supplemental Demands.

In the First Supplemental Demand, Plaintiff Underbrink seeks an advance of \$795,472.61 for fees and disbursements incurred in the Texas Proceeding, including interest, since the time covered by Underbrink’s initial demand, dated June 13, 2008, through the end of the trial of the first phase of the Texas Proceeding.<sup>1</sup> That figure includes almost \$300,000 in expenses and represents approximately 63.5% of the additional fees and expenses incurred by the defendants in the Texas Proceeding through August 15, 2008. Warrior’s objections pertain to all aspects of Underbrink’s request for a supplemental advance of \$795,472.61. By way of compromise, however, Warrior offered to pay \$75,000, or approximately 10% of the fees incurred, while reserving its right to challenge even that amount in the contemplated proceeding before a Special Master to address all remaining disputes among the parties as to the implementation of the advancement ruling reflected in this Court’s Memorandum Opinion entered on May 30, 2008.<sup>2</sup>

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<sup>1</sup> The attorneys’ fees for which Underbrink seeks advancement generally relate to work performed from May 23, 2008 through August 15, 2008. The time period for which expenses incurred in the Texas Proceeding are claimed in the First Supplemental Demand is less clear and may be a matter of dispute. Warrior did not object to other aspects of the First Supplemental Demand.

<sup>2</sup> *Underbrink v. Warrior Energy Servs. Corp.*, 2008 WL 2262316 (Del. Ch. May 30, 2008).

Having carefully considered the submissions of the parties as to Plaintiffs' First Supplemental Demand, I grant the demand in part and deny it in part for the reasons stated in this letter opinion. In particular, I order Warrior to pay Underbrink 30% of the attorneys' fees and expenses incurred through August 15, 2008, as opposed to the 63.5% requested, which amounts to \$375,813.83.<sup>3</sup> Consistent with my comments at the October 6, 2008 hearing and the Interim Advancement Order entered on October 10, 2008 ("Interim Order"), this ruling is without prejudice to the parties' ability to pursue their respective arguments as to any disputed fees and expenses before the Special Master.

Plaintiffs' Second Supplemental Demand seeks fees on fees and covers work performed by Underbrink's Delaware and Texas counsel between October and December 2008. The Demand sought \$33,148.34 for work performed by Plaintiffs' Delaware counsel and \$24,710.38 for work performed by Underbrink's Texas counsel. Warrior has agreed to pay the fees of Delaware counsel in accordance with the Interim Order, but objects to the fees sought by Texas counsel. Having considered the submissions of the parties on the latter issue, I order Warrior to advance 50% of the disputed amount

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<sup>3</sup> In computing this number, the Court did not attempt to break out interest separately. That would have been difficult, if not impossible, based on the limited information provided by Plaintiffs in support of their First Supplemental Demand. The amount awarded is in the same proportion to the \$795,472.61 requested as 30% bears to 63.5%.

requested in the Second Supplemental Demand based on the fees and expenses of Underbrink's Texas counsel, or a total of \$12,355.19.

## I. BACKGROUND

In the Memorandum Opinion, I held that Underbrink and Harrison were entitled to advancement of the attorneys' fees and expenses they incurred in the Texas Proceeding "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.'"<sup>4</sup> In addition, I held that Plaintiffs were entitled to recover their fees on fees in connection with their litigation of this advancement action to that point. Thereafter, Harrison and Underbrink submitted detailed requests for their fees and expenses in the Texas Proceeding through May 2008 and their fees on fees in connection with this action. Warrior objected to those requests on a number of grounds.

On October 6, 2008, I heard arguments on Plaintiffs' initial advancement requests and made several rulings regarding them. As a result, on October 10, 2008, I entered the Interim Order, which directed Warrior to advance, with interest, 80% of the requested fees and expenses incurred in the Texas Proceeding by Harrison's counsel and 60% of the requested fees and expenses incurred by Underbrink's counsel through May 2008.<sup>5</sup> I also awarded Plaintiffs 100% of the fees on fees they requested to that point.

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<sup>4</sup> *Underbrink*, 2008 WL 2262316, at \*16.

<sup>5</sup> The advancement fees and percentage allocations specified in the Interim Order are not final, but rather are subject to further modification and refinement by a

At the October hearing, two additional issues were raised: (1) advancement of fees and expenses in the Texas Proceeding from May 23, 2008 until August 15, 2008, and (2) “fees on fees” based on the more recent proceedings in this advancement litigation. The Interim Order required Plaintiffs to file a “good faith estimate” of the additional fees and expenses for which they seek advancement or reimbursement for “fees on fees,” and Warrior promptly to file any objections to the supplemental demand. In addition, the Interim Order provided:

Warrior shall pay any portion of the fees and expenses requested in the Supplemental Demand to which it does not specifically object within five (5) business days of filing its objection to the Supplemental Demand. If Warrior files an objection to the Supplemental Demand, the Court may schedule a hearing to consider the Supplemental Demand and any objections raised by Warrior and, if appropriate, refer any disputes regarding the Supplemental Demand to the Special Master.<sup>6</sup>

The First and Second Supplemental Demands and Warrior’s objections to each of them were filed pursuant to this procedure. Having concluded a hearing is not necessary to resolve the pending issues, I address those issues below and order Warrior to pay the advancement and fees on fees amounts indicated.

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Special Master to be agreed upon by the parties, who will hear and determine any disputes regarding the details of the advancement sought by Plaintiffs.

<sup>6</sup> Interim Order ¶ 10.

## II. ANALYSIS

### A. First Supplemental Demand

Plaintiff Underbrink requests advancement of \$795,472.61 in attorneys' fees and expenses incurred in the Texas Proceeding through August 15, 2008. Underbrink arrived at this demand by totaling all the fees and expenses incurred during the relevant time period in the Texas Proceeding and then taking a percentage of that number based on an estimate of how much of the testimony of the witnesses used at trial pertained to Warrior-related issues. Underbrink determined that percentage to be 63.5 based on the following methodology. Underbrink's counsel reviewed the testimony of each witness whose testimony was introduced at trial, either in person or by deposition, determined the percentage of time each witness devoted to Warrior-related issues, and then computed the average of those percentages.<sup>7</sup>

The efficacy of this methodology is not immediately apparent. The method differs from the arguments Underbrink advanced in support of the allocation used in his previous demand for advancement. The prior method focused on the claims asserted in the Texas

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<sup>7</sup> Supplemental Advancement Demand and General Description of Work Performed by Dobrowski, L.L.P. ("Underbrink's First Supplemental Demand") at 3. According to Underbrink, some witnesses' testimony dealt solely with Warrior-related claims and thus were assigned 100%, while other witnesses spent no time discussing Warrior-related claims and thus were assigned 0%. *Id.* Additionally, Underbrink avers that the 63.5% "in reality is probably too conservative because the vast majority of the witness/trial preparation outside of the actual trial time was weighted much more heavily toward the Warrior-related claims because of the Plaintiffs' emphasis on them in their claimed damage models." *Id.*

Proceeding and the damages sought on the various claims. Moreover, Underbrink failed to provide any legal support for the witness-based allocation he now espouses as virtually the sole basis for the requested advancement.

Warrior objects to Underbrink's claim for advancement of 63.5% of the identified fees and expenses incurred in the Texas Proceeding on several different grounds. Ultimately, however, Warrior offers to advance only \$75,000, or approximately 10%, of the amount Underbrink seeks. Rather than providing a cogent factual or legal basis for its \$75,000 number, Warrior simply asserts that it makes the offer in a "spirit of compromise."<sup>8</sup> I turn, therefore, to the major objections interposed by Warrior and the justifications proffered by Underbrink to determine an appropriate amount of advancement for the work and expense referenced in the First Supplemental Demand.

As stated in the Memorandum Opinion in this action:

[T]he 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. Delaware courts will not perform the task of playground monitor, refereeing needless and inefficient skirmishes in the sandbox. A balance of *fairness and efficiency* concerns would seem to counsel deferring fights about details until a final indemnification proceeding.<sup>9</sup>

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<sup>8</sup> Obj. of Warrior Energy Servs. Corp. to Pls.' Suppl. Demand for Advancement ("Def.'s Obj.") at 25.

<sup>9</sup> *Underbrink*, 2008 WL 2262316, at \*16 (internal punctuation and citations omitted) (emphasis added).

Mindful of this and the broad discretion the Court of Chancery maintains in determining the amount of attorneys' fees to be advanced,<sup>10</sup> I have concluded that the 63.5% allocation requested by Underbrink is not justified, and that a more appropriate allocation of the fees and expenses during the period covered by the First Supplemental Demand is 30%. A brief summary of the reasons for my decision follows.

Underbrink's First Supplemental Demand for advancement as to the Texas Proceeding seeks just over \$500,000 in attorneys' fees and close to \$300,000 in expenses.<sup>11</sup> Although there is some overlap, Warrior raises different objections as to the requested fees, as opposed to the expenses. Thus, I address each of those categories separately.

### **1. Attorneys' Fees**

I find Underbrink's demand for 63.5% of the attorneys' fees he incurred in the Texas Proceeding during the relevant period excessive for several reasons. First, Underbrink failed to explain adequately the merits of his method of determining the appropriate allocation based on the relative amount of time the various trial witnesses spent testifying about Warrior-related issues. Nor did Underbrink cite any legal

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<sup>10</sup> *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506-07 (Del. 2005) (citing *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 547 (Del. 1998)).

<sup>11</sup> According to Warrior, the First Supplemental Demand for expenses includes thousands of dollars in expenses incurred before the May 30, 2008 date of the Memorandum Opinion. Def.'s Obj. at 16 n.9. To the extent that is true, Plaintiffs offered no explanation for their failure to include those expenses in their initial advancement demand.



precedent approving use of that method. As a matter of logic, the percentage of time the trial witnesses spent testifying about matters subject to advancement might be a relevant factor in determining the amount of advancement, but it is only one of a number of relevant factors.<sup>12</sup> Moreover, it is not an obvious indicator of what Underbrink's lawyers focused on when they were not in court. Nevertheless, Underbrink relied solely on the percentage of witness time and his counsel's affidavits of good faith to justify his claim for over \$500,000 in attorneys' fees. In that sense, Plaintiffs' showing is hardly compelling.

Second, Underbrink and his counsel did not respond to Warrior's request for an explanation of how they determined the percentage of time each witness spent testifying on Warrior-related issues. The analysis Warrior performed on a subset of the witnesses suggests that it might have been based on the mere mention of Warrior in the testimony. Based on the issues involved in the Texas Proceeding and the fact that several of the defendants were Warrior stockholders, such an approach clearly would be overinclusive. I assume Underbrink determined the specific percentages he claimed for the various witnesses in a more reliable way. Still, the failure to provide that information to Warrior, as requested, detracts from the persuasiveness of Underbrink's demand. Warrior further undermined that demand by pointing to several facts regarding the witnesses' testimony

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<sup>12</sup> Plaintiffs' initial advancement demand demonstrates this point through its reliance on an analysis of the claims and the relative damages sought by the plaintiffs in the Texas Proceeding, rather than an allocation of witness time.

that create doubts about the accuracy of Underbrink's allocation of time to Warrior-related issues.

A review of the claims remaining for trial in the first phase of the Texas Proceeding also suggests that the amount of attorney time spent on Warrior-related issues was significantly less than the 63.5% Underbrink claims. The operative complaint in the Texas Proceeding contained nine claims that arguably related to Warrior.<sup>13</sup> As to Underbrink and Harrison, Plaintiffs in this advancement action, the only claims tried in Texas were Counts One and Nine. According to Warrior, at most one of the five actions on which Count One is based related to Warrior. In addition, the jury questionnaire asked the jurors to decide whether the defendants, including Underbrink, breached their fiduciary duties with respect to fourteen different transactions. By Warrior's count only three of those transactions, at most, related to Warrior;<sup>14</sup> from my own review of the jury questionnaire, the number might be four, but probably not much higher than that. Further, I note that a significant portion of the damages initially sought against Underbrink in the Texas Proceeding related to Warrior's seemingly successful secondary public offering. By the end of May 2008, however, the claim based on that transaction had been decided on summary judgment.

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<sup>13</sup> *Underbrink*, 2008 WL 2262316, at \*5.

<sup>14</sup> Those transactions are the 2004 refinancing, the approval of Jenkins' employment agreement, and Underbrink's receipt of warrants and a loan guarantee. *See* Def.'s Obj. at 13.

Based on these considerations, I conclude that Underbrink's First Supplemental Demand supports an advancement to him of 30% of the total attorneys' fees incurred during the period covered by the Demand, as opposed to the 63.5% requested. Consistent with the Interim Order, this amount shall be paid by Warrior promptly, but is subject to modification at a later date in the contemplated, detailed proceedings before the Special Master.

## **2. Expenses**

Underbrink's request for expenses approaches \$300,000, and makes up more than a third of the total advancement sought for the Texas Proceeding in the First Supplemental Demand. Warrior first objects to this request because Underbrink did not divide the expenses among the various defendants in the Texas Proceeding or in accordance with the several different capacities in which he participated in that litigation, besides as a former Warrior director. Indeed, Underbrink himself "split" a limited number of expenses with two of the other Texas defendants. For example, the First Supplemental Demand includes a line item for "copy expenses allocated to Underbrink by Gibbs & Brun[s]" in the amount of \$33,905.33. Gibbs & Brun[s] represented SJCC and SJMB, two entities that are not entitled to advancement from Warrior, and Gibbs & Brun[s] "split" the copying expenses they incurred on behalf of their clients and

Underbrink based on instructions from Harrison.<sup>15</sup> I agree that some reduction based on the general lack of such an allocation is appropriate.

As in the case of his attorneys' fees, Underbrink seeks advancement of 63.5% of the expenses that are the subject of the First Supplemental Demand.<sup>16</sup> Warrior challenged the 63.5% figure for the same reasons discussed previously. In addition, Defendant notes that a third or more of the expenses for which Underbrink seeks advancement in the First Supplemental Demand stem from the services provided by four expert witnesses and a private investigator,<sup>17</sup> none of whom testified at trial. Yet, Warrior convincingly argues that only one of those experts, Douglas Rudley, a business valuation expert who rendered opinions relating to Warrior's public offering, provided services that are subject to advancement.

Further, Warrior contends that certain of the expenses for which advancement is sought are undocumented, duplicative, or simply unreasonable. In its opposition, Warrior

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<sup>15</sup> Def.'s Obj. Ex. P.

<sup>16</sup> Warrior also objects that Underbrink now seeks reimbursement for expenses incurred as long as eighteen months ago, when the expenses from before the May 30, 2008 date of the Court's Memorandum Opinion should have been addressed in his earlier demand for advancement. The reason for this arguably belated request is unclear, but I have not reduced my advancement award on that basis. If necessary, the parties may explore that issue further before the Special Master.

<sup>17</sup> Notably, in Plaintiffs' initial advancement demand, Underbrink asserted that he "retained two experts (Rudley and Nicoletti) who addressed many of the issues raised in these Warrior-related claims." Def.'s Obj. Ex. F at 2.

identified approximately \$20,000 of expenses for which the proffered documentation appears inadequate. I generally have taken that fact into consideration in deciding the current dispute, but will leave it to the Special Master to deal with objections to individual expense items.<sup>18</sup> Neither advancement nor indemnification is appropriate for expenses that cannot be appropriately proven. I also note that a relatively small, but not insignificant, percentage of the claimed expenses appear to be unreasonable. For example, Underbrink included approximately \$19,000 for first class airline tickets, an expense generally considered unreasonable.<sup>19</sup>

Taking account of all of these factors, I find that Underbrink has failed to justify his claim for advancement of 63.5% of the expenses referenced in the First Supplemental Demand. As with the claim based on the attorneys' fees allegedly incurred in the Texas Proceeding during the relevant period, the record does not support a percentage allocation of expenses anywhere near the claimed 63.5%. Rather, I conclude that an advancement based on 30% of the expenses incurred is appropriate until such time as the Special Master can address any remaining disputes over specific aspects of Underbrink's advancement claim. Thus, Warrior promptly shall pay to Underbrink an advance of 30%

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<sup>18</sup> Similarly, I note the apparent existence of some duplication in the claimed expenses. Although Warrior's showing in that regard is not sufficient to materially affect my decision here, the parties may pursue their respective arguments on the challenged items before the Special Master.

<sup>19</sup> As noted by Warrior, courts in a number of jurisdictions outside Delaware have held that reimbursement of first class airfare is unreasonable. *See* Def.'s Obj. at 22 n.19 (citing cases).

of the requested \$294,272.46 in expenses together with 30% of the identified attorneys' fees.

### **B. Second Supplemental Demand**

The only disputed aspect of the Second Supplemental Demand relates to Underbrink's claim for \$24,710.38 in fees on fees for work performed by his Texas counsel pertaining to this action in Delaware. Warrior objects that at least some of the work covered by this demand was performed in connection with the Texas Proceeding and not for purposes of the Delaware action. Warrior also argues that Underbrink improperly seeks to require it to pay for fees and expenses arising out of Warrior's demand that the partnerships affiliated with Underbrink contribute to any payments Warrior makes to Plaintiffs in satisfaction of its indemnification obligation. I find Warrior's objections plausible, but it is difficult on the current record to determine efficiently and with much precision how much of the claimed time and expenses related to reimbursable versus nonreimbursable matters. Accordingly, I award Underbrink advancement of only 50% of the disputed amount he has requested in the Second Supplemental Demand.

### **III. CONCLUSION**

For the foregoing reasons, I grant in part, and deny in part, Plaintiffs' First and Second Supplemental Demands, as follows:

1. As to the disputed aspects of the First Supplemental Demand, Warrior shall pay within ten (10) days of the date of this letter opinion and order 30% of the identified attorneys' fees and expenses, for a total of \$375,813.83.

2. As to the disputed aspects of the Second Supplemental Demand, Warrior shall pay within ten (10) days of the date of this letter opinion and order \$12,355.19.

The Court assumes all undisputed items from the First and Second Supplemental Demands have been paid. Any and all further disputes regarding the amount of any advancement claimed now or in the future pursuant to the Memorandum Opinion or otherwise are hereby referred to the Special Master to be appointed under the terms of the Interim Order.

**IT IS SO ORDERED.**

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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