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Case No. 4227-VCL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DAVID A. STOCKMAN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 4227-VCL
	:	
HEARTLAND INDUSTRIAL PARTNERS, L.P., a Delaware limited partnership and HEARTLAND INDUSTRIAL GROUP, L.L.C., a Delaware limited liability company,	:	
	:	
Defendants.	:	

OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED AND SUPPLEMENTAL VERIFIED COMPLAINT

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DATED: March 13, 2009

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PRELIMINARY STATEMENT

On December 16, 2008, David A. Stockman, the former Chief Executive Officer of bankrupt automotive parts supplier Collins & Aikman Corporation ("C&A"), sued Heartland Industrial Partners, L.P. ("HIP") for advancement of legal expenses allegedly incurred in connection with various federal criminal, SEC and civil actions against him arising out of his alleged conduct at C&A. On January 8, 2009, HIP moved to dismiss the complaint and simultaneously filed an opening brief in support of its motion. On or about January 9, 2009, the United States Attorney for the Southern District of New York withdrew the criminal case against Mr. Stockman. On February 3, 2009, Mr. Stockman amended his complaint to assert a claim for indemnification of legal expenses allegedly incurred in connection with the federal prosecution, and also named as an additional defendant Heartland Industrial Group, L.L.C. ("HIG" and, together with HIP, "Heartland"). Both Mr. Stockman's claim for advancement and his new claim for indemnification must be dismissed.

Mr. Stockman's claim for advancement must be dismissed because HIP's limited partnership agreement specifically prohibits advancement of legal expenses "without the prior written approval of the General Partner." It is undisputed that the General Partner has not approved advancement of legal expenses to Mr. Stockman. As a matter of law, therefore, Mr. Stockman is not entitled to advancement of legal expenses from HIP. Mr. Stockman does not seek advancement from HIG.

Mr. Stockman's claim for indemnification must also be dismissed. To begin with, the indemnification claim against HIG must be dismissed because HIG's

limited liability company agreement contains a broad arbitration clause that precludes litigation of his indemnification claim against it in this Court. The claim for indemnification against HIP must be dismissed because Mr. Stockman has not alleged the necessary elements for indemnification under its governing agreement. HIP's limited partnership agreement conditions indemnification on the nature of the underlying conduct, not on the outcome of any particular proceeding. Thus, neither the limited partnership agreement nor anything in the Delaware Revised Uniform Limited Partnership Act entitles Mr. Stockman to indemnification merely because federal authorities decided not to prosecute their indictment. Instead, Mr. Stockman would be entitled to indemnification only if his conduct met the standards set forth in the governing limited partnership agreement, which he has not alleged. In any event, any determination of whether Mr. Stockman's conduct meets those standards is premature because the same conduct underlying the action for which he seeks indemnification underlies a civil SEC action and various civil suits. As a matter of law, therefore, Mr. Stockman's claim for indemnification is legally insufficient and premature.

Accordingly, the Court should dismiss Mr. Stockman's Amended Complaint in its entirety.

STATEMENT OF FACTS[1]

A. The Parties.

HIP is a Delaware limited partnership that maintains a portfolio of equity investments.[2] (Am. Compl. ¶ 5) HIG is a Delaware limited liability company and is HIP's Investment Manager.[3]

Plaintiff David A. Stockman was a founding member of HIP's General Partner (Heartland Industrial Associates L.L.C.) and was also the Managing Member of HIG (*Id.*) In June 2005, Mr. Stockman delegated his authority and roles at Heartland to others. (Am. Compl. ¶ 6) As a result, Mr. Stockman does not currently participate in the management of HIP's General Partner or HIG. (*Id.*)

B. The Pending Proceedings.

Heartland's largest single equity investment was in C&A. (Am. Compl. ¶ 7) In February 2001, Mr. Stockman joined the C&A board of directors. (*Id.*) In August 2002, he became Chairman and, in August 2003, he became C&A's Chief Executive Officer. (*Id.*) Mr. Stockman held these positions until May 2005, when C&A declared bankruptcy. (Am. Compl. ¶¶ 7-8)

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1 The facts are taken from the allegations in the First Amended and Supplemental Verified Complaint (the "Amended Complaint") and are assumed true only for the purposes of this Motion to Dismiss.

2 Unless otherwise noted, capitalized terms have the same meaning as in the Amended Complaint, the Limited Partnership Agreement and the Limited Liability Company Agreement.

3 Heartland Industrial Group, L.L.C. was not named in Mr. Stockman's original Complaint, and was served with the First Amended and Supplemental Verified Complaint on February 9, 2009.

Mr. Stockman has been named as a defendant in civil and criminal actions (the "Proceedings") because of his conduct in his capacity as an officer of C&A.[4] (Am. Compl. ¶ 8) Mr. Stockman has incurred legal expenses in defending these Proceedings. (Am. Compl. ¶ 9) C&A's and Heartland's directors and officers insurance policies have been exhausted. (*Id*.) On October 29, 2008, Mr. Stockman sent a letter to Heartland demanding that Heartland advance his legal expenses. (Am. Compl. ¶ 18) Heartland sent Mr. Stockman a letter on November 21, 2008 asking for additional information to evaluate Mr. Stockman's claim. (Am. Compl. ¶ 19) On December 16, 2008, without providing any of the information requested, Mr. Stockman commenced this action for advancement. On January 8, 2009, Heartland moved to dismiss Mr. Stockman's complaint for advancement.

On January 9, 2009, the United States Attorney for the Southern District of New York filed a *nolle prosequi* as to the indictment against Mr. Stockman. (Am. Compl. ¶ 23) On January 15, 2009, Mr. Stockman sent a letter to Heartland, requesting indemnification for the fees and expenses incurred in the Criminal Proceeding. (*Id*.) Heartland sent Mr. Stockman a letter on January 21, 2009, requesting certain

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[4] These actions are alleged to include: *United States v. Stockman, et al.*, 07-Cr-220 (BSJ) (S.D.N.Y.); *SEC v. Collins & Aikman Corp., et al.*, 1:07-CV-02419 (SAS) (S.D.N.Y.); *K.J. Egleston v. Heartland Industrial Partners, L.P., et al.*, Case No. 2:06- cv-13555 (including consolidated cases) (E.D. Mich.); *MainStay High Yield Corporate Bond Fund v. Heartland Industrial Partners, L.P., et al.*, 07-cv-10542 (E.D. Mich.); *Collins & Aikman Corp., et al. v. Stockman, et al.*, 07-cv-265 (SLR) (D. Del.); *Aurelius Capital Master, Ltd., et al. v. Stockman, et al.*, No. 081601483 (N.Y. Sup. Ct.); *In re Collins & Aikman Corp., et al.*, Case No. 05-55927 (SWR) (E.D. Mich. Bankruptcy) (including several adversary proceedings). (Am. Compl. ¶ 8)

documentation relating to the criminal proceeding and Mr. Stockman's underlying conduct. (Am. Compl. ¶ 24)

C. HIP's Limited Partnership Agreement.

HIP is governed by an Amended and Restated Limited Partnership Agreement of Heartland Industrial Partners, L.P. dated as of May 10, 2000 (the "Limited Partnership Agreement," attached hereto as Exhibit A). (Am. Compl. ¶ 2) The Limited Partnership Agreement is governed by Delaware law. (Ex. A, § 11.8) Advancement of legal expenses is governed by section 4.4(b) of the Limited Partnership Agreement, which provides:

> Expenses reasonably incurred by an Indemnitee[5] in defense or settlement of any claim that may be subject to a right of indemnification hereunder shall be advanced by the Partnership prior to the final disposition thereof upon receipt of an undertaking by or on behalf of the Indemnitee to repay such amount to the extent that it shall be determined ultimately that such indemnitee is not entitled to [sic] indemnified hereunder. ***No advances shall be made by the Partnership under this Section 4.4(b) (i) without the prior written approval of the General Partner*** or (ii) in connection with an action brought against an Indemnitee by a Majority in Interest of the Limited Partners.

(Am. Compl. ¶¶ 2, 12; Ex. A, § 4.4(b)) (emphasis added)

Mr. Stockman concedes that the General Partner has not given written approval for advances to him. (Am. Compl. ¶¶ 16, 19)

Indemnification of legal expenses is governed by section 4.4(a) of the Limited Partnership Agreement, which provides:

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[5] Mr. Stockman asserts that he qualifies as an "Indemnitee" under Section 4.3(a) of the Limited Partnership Agreement. (Am. Compl. ¶ 7) For purposes of this Motion to Dismiss, Heartland does not dispute this assertion.

> To the fullest extent permitted by law, the Partnership agrees to indemnify and save harmless each of the Indemnitees from and against any and all claims, liabilities damages, losses, costs and expenses (including amounts paid in satisfaction of judgments, in compromises and settlements, as fines and penalties and legal or other costs and reasonable expenses of investigating or defending against any claim or alleged claim) of any nature whatsoever, known or unknown, liquidated or unliquidated, that are incurred by any Indemnitee and or to which such Indemnitee may be subject by reason of its activities on behalf of the Partnership or in furtherance of the interest of the Partnership or otherwise arising out of or in connection with the affairs of the Partnership, its Portfolio Companies or any Alternative Vehicle, including acting as a director of a Portfolio Company or the performance by such Indemnitee of any of the General Partner's responsibilities hereunder or the Investment Manager's responsibilities under the Advisory Agreement or otherwise in connection with the matters contemplated herein or therein; ***provided, that: (i) an Indemnitee shall be entitled to indemnification hereunder only to the extent that such Indemnitee's conduct (A) was in or was not opposed to the best interests of the Partnership, (B) in the case of a criminal action or proceeding, the Indemnitee had no reasonable cause to believe his conduct was unlawful, or (C) did not constitute fraud, bad faith, willful misconduct, gross negligence, a violation of applicable securities laws or any material breach of the Agreement or the Advisory Agreement (which has not been cured within 30 days after due notice), and except that nothing herein shall constitute a waiver or limitation of any rights which a Partner or the Partnership may have under applicable securities laws or other laws and which may not be waived;*** and (ii) the Partnership's obligations hereunder shall not apply with respect to (x) economic losses or tax obligations incurred by any Indemnitee as a result of such Indemnitee's ownership of an interest in the Partnership or in Portfolio Company or (y) expenses of the Partnership that an Indemnitee has agreed to bear; and provided, further, that any amount payable by the Partnership to, or on behalf of, an Indemnitee pursuant to this Section 4.4 as a result of any settlement of a claim against such Indemnitee in an amount in excess of $1 million, shall be subject to prior approval of the LP Advisory Committee.

(Am. Compl. ¶¶ 3, 11; Ex. A, § 4.4(a) (emphasis added))

Mr. Stockman does not allege that his conduct at C&A qualifies for indemnification under the standards described in the Limited Partnership Agreement. (*See, e.g.*, Am. Compl. ¶ 24)

D. HIG's Limited Liability Company Agreement.

HIG is governed by an Amended and Restated Limited Liability Company Agreement of Heartland Industrial Group, L.L.C. dated as of January 1, 2001 (the "LLC Agreement"). (Am. Compl. ¶ 3, attached hereto as Exhibit B) The LLC Agreement is governed by Delaware law. (Ex. B, § 10.5) The LLC Agreement contains a broad arbitration provision, which provides:

> Any dispute, controversy or claim arising out of or relating to this Agreement or to the Company's affairs or the rights or interests of the Members, or the breach or alleged breach of this Agreement, whether arising during the Company term or at or after its dissolution and the winding up of its affairs, shall be settled by arbitration in New York City (or, if applicable law requires some other forum, then such other forum) in accordance with the rules then obtaining of the American Arbitration Association. If the parties to any such controversy are unable to agree upon an arbitrator or arbitrators, then an arbitrator shall be appointed in accordance with such rules. The parties consent to the nonexclusive jurisdiction of the Supreme Court of the State of New York, and of the United States District Court for the Southern District of New York, for all purposes in connection with any such arbitration. The parties agree that any process or notice of motion or other application to any such courts, and any paper in connection with any such arbitration, may be served by certified mail, return receipt requested, or by personal service or in such other manner as may be permissible under the rules of the applicable court or arbitration tribunal, provided a reasonable time for appearance is allowed.

(Ex. B § 10.1)

ARGUMENT

I. AS A MATTER OF LAW, THE LIMITED PARTNERSHIP AGREEMENT FORECLOSES MR. STOCKMAN'S CLAIM FOR ADVANCEMENT.

The Delaware Revised Uniform Limited Partnership Act ("DRULPA") does not provide a right to the advancement of legal expenses. To be sure, a right to advancement may be provided by contract, but "absent a clearly worded bylaw or contract making advancement mandatory, Delaware law leaves the decision whether to advance expenses to the business judgment" of the entity's governing body. *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1008 (Del. Ch. 2007).[6] Accordingly, a claim for advancement should be dismissed absent a clearly worded contract making advancement mandatory. *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 593 (Del. Ch. 2006).

Here, Mr. Stockman claims that section 4.4(b) of the Limited Partnership Agreement entitles him to mandatory advancement, based exclusively on the first sentence of section 4.4(b) (which provides generally that Expenses "shall be advanced" to Indemnitees). In advancing this contention, Mr. Stockman ignores entirely the second sentence of section 4.4(b), which expressly qualifies the first sentence. Indeed, the second sentence unequivocally states that "[n]o advances shall be made by the

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[6] *See also Havens v. Attar*, C.A. No. 15134, 1997 Del. Ch. LEXIS 147, at *1-2 (Del. Ch. Nov. 5, 1997) (noting that the Court of Chancery has "held that absent a specifically worded by-law providing for mandatory advancement, 8 *Del. C.* § 145(e) 'leaves to the business judgment of the board the task of determining whether … advancement of expenses would on balance be likely to promote the corporation's interests'"); *Advanced Mining Sys., Inc. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992) (denying motion to compel advancement of legal expenses, noting that a mandatory advancement bylaw should "expressly ... state its intention to mandate the advancement by the corporation ….").

Partnership under this section 4.4(b)" in two specific circumstances. The first circumstance is "without the prior written approval of the General Partner …." (Ex. A, § 4.4(b)) (The second circumstance, not applicable here, is "in connection with an action brought against an Indemnitee by a Majority in Interest of the Limited Partners.") (*Id.*) Mr. Stockman's Complaint concedes, as it must, that the General Partner has not approved his request for advancement. Thus, the plain language of section 4.4(b) forecloses Mr. Stockman's advancement claim because his complaint does not allege that he has obtained "the prior written approval of the General Partner" and the Limited Partnership Agreement therefore explicitly requires that "[n]o advances shall be made …." (*Id.*)

Despite this unequivocal contractual prohibition on advancement absent the General Partner's advance approval, Mr. Stockman appears to contend that this plain language does not mean what it says. Without explanation, he alleges *ipse dixit* that "[t]he plain language of section 4.4(b) does not give the General Partner the discretion to withhold advancement …." (Am. Compl. ¶ 36) Of course, this allegation is merely a legal conclusion and need not be accepted as true at the pleading stage. *Grobow v. Perot*, 539 A.2d 180, 187 (Del. 1988). In any event, Mr. Stockman's contention is demonstrably wrong for several reasons.

To begin with, Delaware courts give clear words their usual and ordinary meaning, without resort to extrinsic evidence. *Continental Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1236 (Del. Ch. 2000). Indeed, this Court has repeatedly held that language of a limited partnership agreement must be read "literal[ly]" and "precisely." *In*

re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig., 810 A.2d 351, 361 (Del. Ch. 2002); *In re Mesa Ltd. P'ship Preferred Unitholders Litig.*, Consol. C.A. No. 12243, 1991 Del. Ch. LEXIS 214, at *13 (Del. Ch. Dec. 10, 1991); *Boesky v. CX Partners, L.P.*, C.A. Nos. 9739, 9744, 9748, 1988 Del. Ch. LEXIS 60, at *27 (Del. Ch. Apr. 28, 1988); *see also Interactivecorp v. Vivendi Universal S.A.*, C.A. No. 20260, 2004 Del. Ch. LEXIS 90, at *30 (Del. Ch. June 30, 2004) ("If the contract is clear on its face, the court will rely solely on the clear, literal meaning of those words.") (citation omitted). On its face, section 4.4(b)(i) in no uncertain terms prohibits advances without the prior written approval of the General Partner. That should be the end of the matter.

Although there is no need to reach them, other recognized principles of Delaware contract construction buttress the plain language of section 4.4(b)(i). *First*, as with all Delaware contracts,[7] a limited partnership agreement should not be construed in a way that would render terms meaningless. *See United States Cellular Inv. Co. v. Bell Atl. Mobile Sys., Inc.*, C.A. No. 12984, 1994 Del. Ch. LEXIS 37, at *5-6 (Del. Ch. Mar. 11, 1994) (holding that an interpretation that renders a section of the partnership agreement meaningless "is not preferred and cannot prevail as a matter of law on a motion to dismiss"), *aff'd*, 677 A.2d 497 (Del. 1996). Here, section 4.4(b)(i) provides that "no advances shall be made … without the prior written approval of the General Partner." (Ex. A, § 4.4(b)(i)) If the General Partner did not have the right to withhold its approval

[7] *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) ("Under general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless.") (citation omitted).

of advances, then section 4.4(b)(i) would be meaningless. *See In re Cencom Cable Income Partners, L.P. Litig.*, Consol. C.A. No. 14634, 2000 Del. Ch. LEXIS 10, at *24 (Del. Ch. Jan. 27, 2000) ("I find that [such a] reading of this provision would render the limiting language completely superfluous.").

Second, as with all Delaware contracts,[8] a limited partnership agreement should be read as a whole. *Hillman v. Hillman*, 910 A.2d 262, 270 (Del. Ch. 2006). Here, other provisions of the Limited Partnership Agreement reinforce the plain meaning of section 4.4(b)(i). Indeed, the substantive nature of the limitation established by the second qualification – section 4.4(b)*(ii)* – confirms that the written approval by the General Partner mandated by section 4.4(b)*(i)* also was intended to create a substantive limitation on any advancement created by section 4.4(b). Under section 4.4(b)(ii), no advances shall be made in connection with an action brought against an Indemnitee by a majority in interest of the limited partners. Because section 4.4(b)(ii) plainly creates an entire class of cases in which advancement is prohibited, it cannot be disputed (and the Amended Complaint provides no basis to dispute) that any advancement right created by the first sentence of section 4.4(b) is qualified by the second sentence. *See In re Cencom*, 2000 Del. Ch. LEXIS 10, at *23 (denying advancement under limited partnership agreement, which provided that expenses "shall" be advanced "provided that" the "action

[8] "[P]roper interpretation of a provision often requires the court to read the contract as a whole and derive the meaning of particular clauses from the context of other terms." *In re TD Banknorth S'holders Litig.*, 938 A.2d 654, 665 n.28 (Del. Ch. 2007) (citation omitted).

is initiated by a third party who is not a Limited Partner" where claims were initiated by limited partners).

Third, as with all Delaware contracts,[9] specific terms in a limited partnership agreement control over general ones. *Katell v. Morgan Stanley Group, Inc.*, C.A. No. 12343, 1993 Del. Ch. LEXIS 92, at *11-12 (Del. Ch. June 8, 1993). Here, the first sentence of section 4.4(b) provides generally for advancement to Indemnitees, but the second sentence creates two specific exceptions. Those specific exceptions expressly apply to advances "under this Section 4.4(b)." (Ex. A, § 4.4(b)) Accordingly, the specific exceptions in the second sentence plainly limit the general right established by the first sentence.

Finally, the two-part structure of section 4.4(b) – a right to advancement for the General Partner's employees subject to approval of the General Partner itself – makes perfect sense in the context of a limited partnership and is consistent with the presumption under Delaware law that advancement decisions lie within the discretion of the entity's governing body. Acting together, the two sentences make clear that the General Partner will be entitled to control advancement decisions in its discretion without challenge either from limited partners or from employees. Thus, the first sentence of section 4.4(b) protects the General Partner from claims by limited partners who object to the use of limited partnership funds to make advances, and the second sentence of section

[9] *See DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) ("Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.").

4.4(b) ensures that the General Partner can reject advancement demands by persons to whom advancement would be inappropriate.

II. MR. STOCKMAN IS NOT ENTITLED TO INDEMNIFICATION FROM HIP.

A. Mr. Stockman Has Not Alleged That His Conduct Met The Standards Required By The Limited Partnership Agreement.

Mr. Stockman's Amended Complaint against HIP for indemnification must also be dismissed because he has failed to allege that his conduct met the standards for indemnification required by the governing agreements.

As a limited partnership, HIP is governed by the DRULPA. The indemnification provision of the DRULPA, Section 17-108, "defers completely to the contracting parties to delimit rights and obligations with respect to indemnification …." *Delphi Easter Partners L.P. v. Spectacular Partners, Inc.*, C.A. No. 12409, 1993 Del. Ch. LEXIS 159, at *4 (Del. Ch. Aug. 6, 1993); 6 *Del. C.* § 17-108 (stating that indemnification under the Act is discretionary, but "[s]ubject to such standards and restrictions … set forth in [the] partnership agreement ..."). Thus, unlike the Delaware General Corporation Law, the DRULPA does not mandate indemnification upon "success on the merits or otherwise" in an "action, suit or proceeding." *Compare* 8 *Del. C.* § 145 *with* 6 *Del. C.* § 17-108. *Cf. Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1009-10 (Del. Ch. 2007) ("Limited liability companies and corporations differ in important ways, most pertinently in regard to indemnification: mandating it in the case of corporate directors and officers who successfully defend themselves, but leaving the

indemnification of managers or officers of limited liability companies to private contract.").[10]

Here, the Limited Partnership Agreement does not mandate indemnification merely upon success in any particular proceeding. Rather, an Indemnitee's entitlement to indemnification turns on the nature of the underlying conduct from which the proceeding arose, not the outcome of the proceeding. Because the governing indemnification provisions are conduct-based and not outcome-based, HIP must indemnify Mr. Stockman only if his conduct satisfied the contractual standard – which the Amended Complaint conspicuously fails to aver.

On its face, section 4.4(a) of the HIP Limited Partnership Agreement permits indemnification "only to the extent that such Indemnitee's conduct (A) was in or was not opposed to the best interests of the Partnership, (B) in the case of a criminal action or proceeding, the Indemnitee had no reasonable cause to believe his conduct was unlawful, or (C) did not constitute fraud, bad faith, willful misconduct, gross negligence, a violation of applicable securities laws or any material breach of the Agreement or the Advisory Agreement…." (Ex. A, § 4.4(a)) Mr. Stockman has not alleged that his conduct complied with these requirements. That fundamental failure of pleading requires dismissal of the Amended Complaint.

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[10] The Limited Liability Corporation Act contains a similar indemnification provision as the DRULPA. *See, e.g., Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC*, 853 A.2d 124, 127 n.5 (Del. Ch. 2004) (noting that limited liability companies and limited partnerships "are governed by a statute that gives the contracting parties broad authority in setting their indemnification provisions").

B. Any Adjudication Of Mr. Stockman's Indemnification Claim Would Be Premature.

In all events, any attempt to determine whether Mr. Stockman is entitled to reimbursement of expenses incurred in connection with the Criminal Proceeding would be premature because numerous other active proceedings are pending against Mr. Stockman, calling into question precisely the same conduct that led to the criminal indictment. Under the Limited Partnership Agreement, Mr. Stockman will be entitled to indemnification only if he proves that his conduct met the specific standards established in the Limited Partnership Agreement. But that conduct that is still the subject of numerous civil suits and an active SEC civil action that have not yet been adjudicated. It would be premature and duplicative to attempt to determine here whether Mr. Stockman acted in bad faith, with gross negligence or committed securities fraud, when those very same questions are already being litigated in other courts. *See, e.g., SEC v. Collins & Aikman Corp., et al.*, 1:07-CV-02419 (SAS) (S.D.N.Y.) (alleging that Stockman's conduct at Collins & Aikman violated the Securities Act and the Exchange Act) (attached hereto as Exhibit C).

III. HIG'S LIMITED LIABILITY COMPANY AGREEMENT REQUIRES THAT ANY CLAIM AGAINST IT BE PURSUED ONLY IN ARBITRATION.

On its face, Section 10.1 of the LLC Agreement broadly requires arbitration of any dispute arising out of or relating to the LLC Agreement or HIG's affairs. Mr. Stockman's claim for indemnification arises out of or relates to the LLC Agreement because the claim is based on section 3.4 of the LLC Agreement. *See, e.g.,*

Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 155 (Del. 2002). Thus, any indemnification claim against HIG may be pursued only in arbitration. *See, e.g.*, *Mehiel v. Solo Cup Co.*, C.A. No. 851-N, 2005 Del. Ch. LEXIS 66, at *25 n.47 (Del. Ch. May 13, 2005) (raising issue of subject matter jurisdiction *sua sponte* and dismissing claims subject to arbitration provision); *Yuen v. Gemstar-TV Guide Int'l, Inc.*, C.A. No. 398-N, 2004 Del. Ch. LEXIS 96, at *6 (Del. Ch. June 30, 2004) (granting motion to dismiss because the "arbitration provisions found in the parties' agreements apply to the advancement claims").

In combination, these provisions require that before suing in this Court, Mr. Stockman must first pursue his claim against HIG in arbitration.[11] Accordingly, the Amended Complaint must be dismissed.

[11] Even if there were some possible dispute about whether Mr. Stockman's claim against HIG for indemnification was arbitrable (which there is not), the threshold question of whether that dispute is arbtirable is for the arbitrator, not this Court, to decide. Delaware law follows the majority federal rule and requires that arbitrability must be determined by an arbitrator where the parties' agreement "generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006).

CONCLUSION

For the foregoing reasons, the Court should dismiss Mr. Stockman's Amended Complaint.

Respectfully submitted,

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