IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

J. MICHAEL STEPP,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 4427-VCS
	:	
HEARTLAND INDUSTRIAL PARTNERS, L.P., a Delaware Limited Partnership,	:	
	:	
Defendant.	:	

REPLY BRIEF IN SUPPORT OF DEFENDANT HEARTLAND INDUSTRIAL PARTNERS, L.P.'S MOTION TO DISMISS THE VERIFIED COMPLAINT

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DATED: May 8, 2009

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PRELIMINARY STATEMENT

Plaintiff J. Michael Stepp, the former Chief Financial Officer of bankrupt automotive parts supplier Collins & Aikman Corporation ("C&A"), brings suit against Heartland Industrial Partners, L.P. ("Heartland") for advancement and indemnification of legal expenses allegedly incurred in connection with various federal criminal, Securities and Exchange Commission ("SEC") and civil actions against him arising out of his alleged conduct at C&A. On April 8, 2009, Heartland moved to dismiss Mr. Stepp's complaint in its entirety. On the same day, Mr. Stepp moved for partial summary judgment on his claim for advancement. The parties filed answering briefs to each other's motions on April 20, 2009. This is Heartland's reply brief in support of its motion to dismiss.

Mr. Stepp's complaint must be dismissed in its entirety. Mr. Stepp's advancement claim fails because, as he concedes, Heartland's General Partner has not given its "prior written approval" for advancement as expressly required under Heartland's limited partnership agreement. As a result, Heartland is prohibited from making advances to Mr. Stepp.

Mr. Stepp argues that this provision is merely a ministerial function that confers no discretion on the General Partner. As demonstrated in Heartland's opening brief, and unrebutted in Mr. Stepp's answering brief, this argument is without merit. The plain and unambiguous meaning of the limited partnership agreement (also supported by every applicable canon of Delaware contract construction) prohibits advances that the General Partner has not approved.

Mr. Stepp's indemnification claim also fails because of his failure to plead compliance with all three requirements for indemnification under Heartland's Limited Partnership Agreement, which is reinforced by his refusal to certify compliance with those requirements. Moreover, the Limited Partnership Agreement mandates an inquiry into Mr. Stepp's underlying conduct that would be premature and cannot be undertaken at this time, in light of the myriad of other pending cases arising out of the same conduct, particularly the action filed against him by the SEC. The Court should, therefore, grant Heartland's motion and dismiss Mr. Stepp's complaint in its entirety.

ARGUMENT

Mr. Stepp does not dispute that the Delaware Revised Uniform Limited Partnership Act ("DRULPA") does not give anyone a right to the advancement of legal expenses. Nor does he dispute that, "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). Where, as here, a Limited Partnership Agreement is unambiguous, the Court will enforce it according to its terms. *See, e.g.*, *Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165, 172 (Del. Ch. 2002). Section 4.4 of the Limited Partnership Agreement prohibits Heartland from advancing legal expenses without the written approval of the General Partner. This provision should be enforced according to its terms and Mr. Stepp's claim should be dismissed.

I. THE CONTRACTUAL PROHIBITION AGAINST ADVANCES WITHOUT PRIOR "WRITTEN APPROVAL" OF THE GENERAL PARTNER MUST HAVE MEANING.

As demonstrated in Heartland's opening brief in support of its motion to dismiss, the only reasonable interpretation of section 4.4(b) of the Limited Partnership Agreement is that the term "prior written approval" has meaning. *See* Def. Op. Br. at 8-12. This is true for at least five reasons: (1) contract terms should be given their usual and ordinary meaning; (2) requiring advancement without the General Partner's prior written approval would render that contract term meaningless; (3) the Limited Partnership Agreement should be read as a whole, and the indisputably substantive nature

of the prohibition in section 4.4(b)*(ii)* defeats any contention that the exclusion in section 4.4(b)*(i)* is merely ministerial; (4) the specific term "[n]o advances shall be made … without the prior written approval of the General Partner" should govern over the general term "shall be advanced"; and (5) interpreting the Limited Partnership Agreement in a manner that gives the General Partner authority to withhold its written approval is consistent with Delaware law's presumption that advancement is within the discretion of an entity's governing body. *See id*. In his answering brief in opposition to defendant's motion to dismiss ("Pl. Ans. Br."), Mr. Stepp ignores several of these arguments and fails to meaningfully respond to the rest. *See* Pl. Ans. Br. at 7-10.

A. Permitting The General Partner To Withhold Or Give Its Approval Is The Only Reasonable Interpretation Of Section 4.4(b) That Gives Meaning And Effect To All Of Its Provisions.

Both parties agree that "a limited partnership agreement should not be construed in a way that would render terms meaningless." Def. Op. Br. at 9; Pl. Ans. Br. at 7. However, as demonstrated in Heartland's opening brief, Mr. Stepp's interpretation would render the "prior written approval" provision meaningless. Def. Op. Br. at 9. Mr. Stepp disagrees, and responds in his answering brief that "it is Heartland's interpretation of the advancement provisions (not Stepp's) that would render certain terms meaningless." Pl. Ans. Br. at 7-8. He is wrong for two reasons.

First, Mr. Stepp's argument is the one that renders a term meaningless, not Heartland's. Mr. Stepp seeks a court order directing Heartland to advance legal expenses in spite of the fact that the General Partner has not given "prior written approval." If such an order could be granted, then obviously the provision explicitly prohibiting advances

without the prior written approval of the General Partner is meaningless. Moreover, if "prior written approval" is merely a ministerial function that cannot be withheld, it likewise lacks meaning. Mr. Stepp has not (and cannot) dispute these facts.

Mr. Stepp's argument rests primarily on the term "shall" in section 4.4(b). Pl. Ans. Br. at 8; Compl. Ex. A § 4.4(b). As demonstrated in Heartland's opening brief, the term "shall be advanced" is conditioned on two indisputably substantive requirements: "No advances shall be made … (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." Ex. A § 4.4(b)(i-ii). The substantive nature of the prohibition in section 4.4(b)(ii) defeats any contention that the requirement of "prior written approval" in section 4.4(b)(i) is "ministerial only," or "that advancement is mandatory." Pl. Ans. Br. at 9. Indeed, section 4.4(b)(ii) bars advancement in any "action brought against an Indemnitee by a Majority in Interest of the Limited Partners." Mr. Stepp does not (and cannot) dispute that section 4.4(b)(ii) is a substantive requirement that proves advancement is *not* mandatory in all circumstances. Likewise, advancement is *not* mandatory unless the General Partner has given its "prior written approval" under section 4.4(b)(i). Thus, the term "shall" does not support the conclusion that advancement is mandatory.

Mr. Stepp further contends that *In re Cencom Cable Income Partners, L.P. Litig.*, Consol. C.A. No. 14634, 2000 Del. Ch. LEXIS 10 (Del. Ch. Jan. 27, 2000), supports his argument. *See* Pl. Ans. Br. at 9. He is wrong. In *Cencom*, the limited partnership agreement had a provision similar to section 4.4(b), which provided that

expenses "shall" be advanced "provided that" the "action is initiated by a third party who is not a Limited Partner." *Id.* at 23. In *Cencom*, plaintiffs moved to enjoin the advancement of expenses required in connection with suits brought by limited partners. The general partner argued that it had the inherent discretion, notwithstanding the specific prohibition against advancement of expenses for litigation brought by a limited partner, to grant advancement to itself. *Id.* at *25-26. This Court "reject[ed] the defendant's arguments wholesale." *Id.* at *24. *Cencom*, in fact, supports Heartland's argument that *both* sections 4.4(b)(i) *and* 4.4(b)(ii) are substantive requirements which must be given meaning and effect. Indeed, *Cencom* also confirms that interpreting the term "shall" as requiring mandatory advancement when there are limiting provisions would "render[] the limitation[s] on the Indemnitee wholly illusory." *Id.* at *25. Thus, Mr. Stepp's attempt to write these two substantive requirements out of section 4.4 lacks all merit.

Second, Heartland's interpretation does give meaning and effect to all provisions. The term "shall" provides for advancement unless the General Partner withholds its "prior written approval" or the suit is "an action brought against an Indemnitee by a Majority in Interest of the Limited Partners."[1] Compl. Ex. A § 4.4(b)(i-

[1] Mr. Stepp asserts that "Heartland's interpretation [is that section 4.4(b)(i)] grants *unfettered* discretion to the General Partner." Pl. Ans. Br. at 8 (emphasis added). This is not so. The General Partner must exercise its discretion consistent with the Limited Partnership Agreement and DRULPA. However, as Mr. Stepp has challenged the General Partner's decision to impose certain conditions on advancement based only on his interpretation of the Limited Partnership Agreement and not as a violation of the Limited Partnership Agreement, as a breach of the implied covenant of good faith and fair dealing or on any other cognizable legal grounds, his complaint must be dismissed.

ii); *see also In re Cencom*, 2000 Del. Ch. LEXIS 10, at *23. Thus, under Heartland's interpretation, all provisions of section 4.4(b) are given meaning and effect.

B. Inclusion Of The Term "Discretion" In Section 4.4(b) Would Be Redundant And Other Provisions Of The Limited Partnership Agreement Illustrate The Parties Knew How To Provide For Advancement Without Discretion.

Mr. Stepp argues that "conspicuously absent from the approval section of Section 4.4(b) is the word 'discretion.'" Pl. Ans. Br. at 9. As explained in Heartland's answering brief to Mr. Stepp's motion for partial summary judgment (Def. Ans. Br.), inclusion of the term discretion would be redundant in light of section 4.2 of the Limited Partnership Agreement, which provides the General Partner with the "power … to carry out *any and all the objects and purposes of the Partnership* and *to perform all acts … in its sole discretion … in accordance with and subject to the other terms of this Agreement*." *See* Def. Ans. Br. at 9. Moreover, the reference in Mr. Stepp's answering brief to Section 11.12 is equally unavailing because Section 11.12 simply defines the General Partner's "'discretion' or … grant of similar authority or latitude." *See* Pl. Ans. Br. at 9; Def. Ans. Br. at 9-10. Both these sections reinforce the conclusion that the General Partner has the authority and discretion to withhold its written approval for advancement.

Moreover, a review of other provisions in the Limited Partnership Agreement compels the same conclusion. Specifically, contrasting the advancement provision in section 4.4 (b) with the advancement provision in section 5.4(f) demonstrates that section 4.4(b) instills the General Partner with discretion.

Section 5.4(f) sets forth the advancement obligations with respect to members of the LP Advisory Committee (the "LPAC"). The LPAC is a committee consisting of representatives of the limited partner investors in Heartland. The LPAC is charged with certain tasks, including providing guidance to the General Partner. Consistent with the advisory role of the LPAC, the Limited Partnership Agreement grants broad advancement rights to its members. Specifically, section 5.4(f) provides that:

> Expenses reasonably incurred by a member of the LP Advisory Committee in defense or settlement of any claim that may be subject to a right of indemnification hereunder shall be advanced promptly by the Partnership prior to the final disposition thereof upon receipt of a written request by such member along with an undertaking by or on behalf of such member to repay such amount to the extent that it shall be determined ultimately that such member is not entitled to be indemnified hereunder.

Thus, section 5.4(f) requires simply: (i) a written request made to the General Partner; and (ii) providing an undertaking. Section 5.4(f) does not require "written approval" of the General Partner prior to advancing any funds, and does not have any other prerequisites. In other words, section 5.4(f) provides an unqualified right of advancement to members of the LPAC in precisely the form to which Mr. Stepp contends he is entitled to under section 4.4.

Thus, the parties knew how to draft an advancement provision that did not provide the General Partner with discretion – they did so for members of the LPAC in section 5.4. A different regime, however, was purposely selected for individuals provided a qualified right of advancement pursuant to section 4.4(b). In those cases, the party seeking advancement can only receive the requested advancement after "the prior written approval of the General Partner." Reading the Limited Partnership Agreement as

a whole clearly demonstrates that section 4.4(b) provides the General Partner with discretion, and is not intended to be a purely ministerial function, as Mr. Stepp contends. If the required approval were intended to be ministerial, the drafters would simply have required a "written request" be made, as is the case in section 5.4.

II. CONTRA PROFERENTEM DOES NOT APPLY BECAUSE THE LIMITED PARTNERSHIP IS UNAMBIGUOUS.

Mr. Stepp also argues that, if the Limited Partnership Agreement is ambiguous, the ambiguity should "be construed against the partnership, without resort to extrinsic evidence." Pl. Ans. Br. at 10-11. As Mr. Stepp acknowledges, the Court need not reach this argument because there is no ambiguity in the Limited Partnership Agreement. Pl. Ans. Br. at 11 ("Accordingly, *if* Section 4.4(b) is ambiguous ….") (emphasis added). However, as explained in Heartland's answering brief to Mr. Stepp's motion for partial summary judgment, even if the Court were to find that section 4.4(b) is ambiguous, the doctrine of *contra proferentem* does not apply here, and the Court should look first to extrinsic evidence because Mr. Stepp's entire relationship with Heartland was negotiated between sophisticated parties. *See* Def. Ans. Br. at 13.

III. MR. STEPP IS NOT ENTITLED TO INDEMNIFICATION FROM HEARTLAND.

In its opening brief in support of its motion to dismiss, Heartland demonstrated that Mr. Stepp's claim for indemnification must be dismissed both because he has failed to allege that his conduct met the standards for indemnification required by the governing agreements, and, because any attempt to determine whether Mr. Stepp is entitled to reimbursement of expenses incurred in connection with the Criminal

Proceeding would be premature, in light of the many other proceedings pending against Mr. Stepp that call into question precisely the same conduct. *See* Def. Op. Br. at 12-14. Mr. Stepp contends that: (1) it is not his burden to plead that he is entitled to indemnification; (2) under his reading of section 4.4(a) he has sufficiently plead that he is entitled to indemnification because only one of the three requirements of that section apply to a criminal proceeding; (3) his refusal to certify compliance with these three requirements is factually incorrect; and (4) his claim is timely. *See* Pl. Ans. Br. at 10-17. He is wrong on all four counts.

A. Mr. Stepp Has The Burden To Plead Conduct That Meets The Standards Required By The Limited Partnership Agreement.

Mr. Stepp asserts that, even though he did not plead that his conduct "was in or was not opposed to the best interests of the Partnership … or … 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," his claim should not be dismissed because with the "use of the phrase 'shall be entitled to indemnification,' the burden rests with Heartland 'to demonstrate that the indemnification mandated is not required.'" Pl. Ans. Br. at 12 (citations omitted). Mr. Stepp's assertion is wrong for two reasons.

First, it is axiomatic that the plaintiff bears the burden to "plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks." *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Because Mr. Stepp has failed to plead even a conclusory allegation that he acted in good faith and that his actions were not opposed to

the best interests of the Partnership, he has failed to plead facts which plausibly suggest that he will ultimately be entitled to indemnification.[2] Therefore, his claim should be dismissed. *Second*, the Limited Partnership Agreement places the burden squarely on an Indemnitee by permitting indemnification "only to the extent that" certain contractual requirements are satisfied. Thus, to state a claim for relief under the Limited Partnership Agreement, Mr. Stepp must – but did not – allege that those contractual requirements are satisfied.

B. Mr. Stepp Has Not Alleged That His Conduct Met The Three Standards Required By The Limited Partnership Agreement.

On its face, section 4.4(a) of the 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…." (Am. Compl. Ex. A, § 4.4(a)) Mr. Stepp concedes that he has not plead that he satisfies all three requirements for indemnification under the Limited Partnership

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[2] In support of his argument, Mr. Stepp relies on *Vonfeldt v. Stifel Financial Corp.*, C.A. No. 15688, 1999 WL 413393, at *1 (Del. Ch. June 11, 1999). In that case, Chancellor Chandler noted that "[g]enerally speaking, the burden of proof with respect to a plaintiff's claim rests with the plaintiff." *Id.* at *3. The only reason the Court departed from that general rule was because, unlike the present case, the bylaw in *Vonfeldt* did not expressly require that actions be taken in good faith and in the best interests of the corporation. *Id.* In fact, plaintiff argued that good faith was "irrelevant," but the Court disagreed, holding that the bylaw "does not discharge the good faith requirement; it only shifts the burden on this issue to the corporation." *Id.*

Agreement. *See* Pl. Ans. Br at 13.[3] Instead, he contends that he must allege only one of them. *See* Pl. Ans. Br. at 12-13.

Mr. Stepp's reading that he need satisfy only one requirement is unreasonable. The language and context of the provision make clear that, although joined by the term "or," all three requirements must be met.[4] As indicated in a case relied upon by Mr. Stepp, good faith and acting in the best interests of the partnership are indispensable requirements for indemnification. *Cf. Vonfeldt v. Stifel Fin. Corp.*, C.A. No. 15688, 1999 WL 413393, at *2 (Del. Ch. June 11, 1999) ("It should now be clear that, as far as § 145 is concerned, Delaware corporations lack the power to indemnify a party who did not act in good faith or in the best interests of the corporation."). This policy underlying indemnification from Delaware corporations, on which Mr. Stepp seeks to rely, serves to reinforce the conclusion that the Limited Partnership Agreement requires compliance with all three requirements. *See* Pl. Ans. Br. at 13 n.8 (noting 8 *Del. C.* § 145 allows indemnification only if all three requirements are met). As Mr. Stepp has

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[3] Mr. Stepp, in a footnote, makes the cursory argument that, because a *nolle prosequi* was filed in the Criminal Proceeding, there "has not been (and cannot be) any adverse determination as to subsections (A) or (C)." Pl. Ans. Br. at 13 n.9. Mr. Stepp is wrong, because a *nolle prosequi* can be filed for numerous reasons and does not constitute any finding as to the conduct underlying the charges against him.

[4] *See Johnson v. Northern Indiana Pub. Serv. Co.*, 844 F. Supp. 466, 469 (N.D. Ind. 1994) ("It has been held that the disjunctive 'or' usually, but not always, separates words or phrases in the alternate relationship ….") (quoting Norman Singer, Statutes and Statutory Const. § 21.14 (5th ed. 1992)); *Smith v. Our Lady of the Lake Hosp., Inc.*, 624 So. 2d 1239, 1249 (La. App. 1st Cir. 1993) ("[I]n a civil context, 'and' may mean 'or' and vice versa."); *Pryor Oldsmobile/GMC Co. v. Tennessee Motor Vehicle Comm'n*, 803 S.W.2d 227, 230 (Tenn. Ct. App. 1990) ("[T]he word 'or' is sometimes interpreted as conjunctive in a given context … require[ing] all of the listed activities.").

failed to allege facts that plausibly suggest compliance with all three requirements, his fundamental failure of pleading requires dismissal of his complaint.

C. Mr. Stepp's Failure To Certify That His Conduct Complied With The Three Requirements For Indemnification Reinforces His Pleading Deficiency.

As noted in Heartland's opening brief, "Mr. Stepp refused to sign a certification that his conduct complied with these three requirements." *See* Def. Op. Br. at 13; Compl. Ex. F, Ex. G. Mr. Stepp interprets this one line reference as a distinct argument as to why indemnification is inappropriate and asserts that the statement is "disingenuous" and "factually incorrect." *See* Pl. Ans. Br. at 14. The Court need only look to the correspondence Mr. Stepp attached to his complaint to confirm the factual basis for Heartland's statement. *See* Compl. Ex. F, Ex. G. Moreover, Mr. Stepp's refusal to certify that his conduct complied with the three requirements, which Heartland requested as a condition for advancement, reinforces the conclusion that, at best, a claim for indemnification is not yet ripe here.

D. Any Adjudication Of Mr. Stepp's Indemnification Claim Would Be Premature.

Finally, as demonstrated in Heartland's opening brief, any attempt to determine whether Mr. Stepp 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. Stepp, *including a proceeding brought by the SEC* that calls into question precisely the same conduct that led to the criminal indictment. *See* Def. Op. Br. at 15. Mr. Stepp counters that this Court's opinion in *Levy v. Hayes Lemmerz International, Inc.* mandates a different result. C.A. No. 1395, 2006

Del. Ch. LEXIS 68 (Del. Ch. Apr. 5, 2006). For the three reasons discussed below, it does not.

First, as a threshold matter, *Levy* was analyzed under 8 *Del. C.* § 145. As noted above, the Limited Partnership Agreement differs materially from section 145 because it does not contain the phrase "successful on the merits or otherwise in defenses of any action, suit or proceeding … or in defense of any claim, issue or matter therein, such person shall be indemnified …." 8 *Del. C.* § 145(c). While under the DGCL, success on the merits or otherwise mandates indemnification, the Limited Partnership Agreement instead provides for indemnification in relation to the defense of any "claim or alleged claim ... [that an Indemnitee] may be subject [to] by reason of its activities" Ex. A § 4.4(a). Thus, because it is the underlying conduct that is at issue, not success on the merits or otherwise, Mr. Stepp's claim is premature.

Second, even if the analysis in *Levy* were applicable here, *Levy* is factually distinguishable from the present case. Plaintiffs in *Levy* sought indemnification after a final, binding, non-appealable settlement. As the Court explained, "[i]f the SEC pursues a claim, and if that claim is ever brought to trial, it can have no legal effect whatsoever on the settlement reached by the outside directors and their insurers with the class action plaintiffs." *Levy*, 2006 Del. Ch. LEXIS 68, at *40. Here, however, the issue is not whether the criminal action is final and complete, but whether Mr. Stepp's conduct qualifies for indemnification. The *nolle prosequi* is not a decision on the merits and is not a conclusion that Mr. Stepp's conduct was in conformity with the requirements set forth in the Limited Partnership Agreement for indemnification. While the Court in *Levy*

concluded that the company could not await the completion of an SEC *investigation* in a case where none of the plaintiffs had even received a Wells Notice, here there is an actual pending *civil enforcement action* brought by the SEC against Mr. Stepp and others concerning the same alleged conduct that was at issue in the criminal action for which Mr. Stepp seeks indemnification. Because the indemnification provisions here are conduct-oriented and not linked to the completion of an action, and because the conduct for which Mr. Stepp is seeking indemnification is currently being actively litigated in several other cases, including an SEC enforcement action, Mr. Stepp's reliance on *Levy* is misplaced.

Finally, Mr. Stepp's appeal to public policy does not save his claim. Mr. Stepp does not dispute that Delaware law "defers completely to the contracting parties to create and 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 ..."). *Id*. at 3. Mr. Stepp also does not dispute that, 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. *See Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1009-10 (Del. Ch. 2007). Instead, Mr. Stepp, in an attempt to salvage his indemnification claim, argues that Heartland's interpretation "is contrary to the public policy of this State in favor of indemnification to protect innocent

covered persons." Pl. Ans. Br. at 16. Mr. Stepp is wrong for two reasons. *First*, any general public policy in favor of indemnification is trumped in this context by the express statement of legislative policy contained in DRULPA that it is "the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements." 6 *Del. C.* § 17-1101(c). *Second*, the Limited Partnership Agreement contains express contract provisions that bar indemnification unless certain requirements are met.

In essence, Mr. Stepp's argument is a request for this Court to import 8 *Del. C.* § 145(c) into DRULPA. That is not a job for this Court, but for the legislature, which has already explicitly chosen a different regime to govern indemnification in the limited partnership context. *See* 6 *Del. C.* §§ 17-108; 17-1101. The Limited Partnership Agreement does not mandate indemnification merely upon success in any particular proceeding, but conditions an Indemnitee's entitlement to indemnification on the nature of the underlying conduct from which the proceeding arose. Because the governing indemnification provisions are conduct-based and not outcome-based, Heartland must indemnify Mr. Stepp only if his conduct satisfied the contractual standard – which his complaint conspicuously fails to aver.

CONCLUSION

For the foregoing reasons, the Court should grant Heartland's motion to dismiss.

Respectfully submitted,

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DATED: May 8, 2009