IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF J. MICHAEL STEPP IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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NATURE AND STAGE OF THE PROCEEDINGS

On March 17, 2009, J. Michael Stepp ("Stepp") filed a Verified Complaint seeking an order compelling the advancement of legal expenses incurred by him in various legal proceedings relating to his former positions with defendant Heartland Industrial Partners, L.P. ("Heartland") and Collins & Aikman Corporation. The Complaint also seeks an order requiring Heartland to indemnify Stepp for fees and expenses incurred in successfully defending a now dismissed criminal proceeding. Finally, the Complaint seeks an award of attorney's fees and costs incurred in the prosecution of this action.

Pursuant to an agreed-upon schedule, on April 8, 2009, Stepp filed a motion for partial summary judgment with respect to his advancement claim (First Cause of Action), together with a supporting opening brief. On that same day, Heartland filed a motion to dismiss the Complaint, together with a supporting opening brief. This is Stepp's answering brief in opposition to Heartland's motion to dismiss.

* * *

Rather than comply with the terms of its Partnership Agreement, Heartland has manufactured specious arguments in an attempt to avoid it advancement and indemnification obligations. As demonstrated herein, this Court should reject these arguments and order Heartland to comply with its contractual obligations. First, Heartland attempts to set forth an interpretation of the Partnership Agreement that provides the General Partner with unfettered discretion with respect to its advancement obligations. This strained interpretation contradicts the plain language of the Partnership Agreement, which expressly provides Stepp with mandatory advancement rights. Second, Heartland contends that Stepp's indemnification claim should be dismissed because (i) Stepp "failed to allege that his conduct met the requirements for indemnification required by the governing agreement;" and (ii) the claim is "premature because

numerous other active proceedings are pending against Mr. Stepp." (Heartland Op. Br. 12-15). As explained below, these arguments are contrary to the plain language of the Partnership Agreement, contrary to Delaware law, and contrary to the public policy of this State. Heartland's motion to dismiss is utterly without merit and should be denied.

STATEMENT OF FACTS

Plaintiff Stepp hereby incorporates the Statement of Facts from his opening brief in support of his motion for partial summary judgment, filed April 8, 2009, as if fully set forth herein. (*See* Stepp Op. Br. at 3-6). For purposes of responding to Heartland's motion to dismiss, the well-pleaded allegations of the Complaint also include the following.

A. The Proceedings

Following the bankruptcy of C&A,[1] Stepp was named as a defendant in a criminal proceeding and numerous civil proceedings (the "Proceedings") filed in several different states. On January 9, 2009, the lone criminal proceeding was dismissed based on the United States Attorney's conclusion that further prosecution of Stepp and others "would not be in the interests of justice." (Compl. Ex. B at 2). Stepp has incurred and continues to incur fees and expenses in defense of the Proceedings. (Compl. ¶¶ 6, 27).

B. Stepp's Efforts To Secure Advancement and Indemnification From Heartland

As explained in plaintiff's opening brief, Stepp took all of the necessary steps to secure advancement as provided for in the Partnership Agreement. (*See* Stepp Op. Br. at 4-5). Heartland, however, has sought to condition any advancement to Stepp on terms not found in the Partnership Agreement. (*Id*. at 5; *see also* Compl. ¶ 13).

On January 9, 2009, Stepp's counsel informed counsel for Heartland of the dismissal of the Criminal Proceeding. (Compl. ¶ 16). On January 22, 2009 and March 10, 2009, Stepp further put Heartland on notice of its obligation to indemnify him for defense costs in connection with the successful defense of the Criminal Proceeding. (*Id*. ¶ 17). Heartland has refused without justification to honor its indemnification obligation to Mr. Stepp. (*Id*.).

[1] Capitalized terms not defined herein shall have the same meaning ascribed to them in Stepp's opening brief in support of his motion for partial summary judgment.

C. Heartland's Limited Partnership Agreement

The relevant provisions of the Partnership Agreement that relate to Stepp's advancement claim are set forth in Section 4.4(b) and are discussed in Stepp's opening brief. (*See* Stepp Op. Br. at 5-6).

Stepp is an Indemnitee under Section 4.3(a) Partnership Agreement because he was a Senior Managing Director of Heartland and served as an officer and director of C&A at the direction of Heartland, and is or was a party to the criminal and civil proceedings by reason of such positions. (Compl. ¶ 8). Indeed, Heartland does not dispute that Mr. Stepp qualifies as an Indemnitee under the Partnership Agreement. (Heartland Op. Br. at 4 n.4).

The indemnification provision in issue is set forth in Section 4.4(a) of the Partnership Agreement:

> 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 Companies 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.

(Compl. Ex. A § 4.4(a) (emphasis in original)).

Stepp is entitled to indemnification for expenses related to the Criminal Proceeding because (as alleged) (1) he has been successful on the merits or otherwise; and (2) he has no reasonable cause to believe that his conduct was unlawful. (Compl. ¶ 29).

ARGUMENT

I. THE APPLICABLE STANDARD[2]

A court may not grant a motion to dismiss for failure to state a claim under Court of Chancery Rule 12(b)(6) unless it can first "determine with 'reasonable certainty' that a plaintiff could prevail on no set of facts that can be inferred from the pleadings." *Solomon v. Pathe Commc'ns Corp*., 672 A.2d 35, 38 (Del. 1996) (citation omitted). "All well-pleaded factual allegations made in the complaint are to be accepted as true," and the Court "must draw all reasonable inferences in favor of the non-moving party…." *In re infoUSA, Inc. S'holders Litig.*, 953 A.2d 963, 983 (Del. Ch. 2007) (citation omitted).

Accordingly, the Court must accept as true all of plaintiff's well-pleaded allegations of fact, and it must draw all reasonable inferences from those allegations in favor of plaintiff. "[D]ismissal is inappropriate unless the 'plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.'" *Id.* (*citing In re Gen. Motors (Hughes) S'holder Litig*., 897 A.2d 162, 168 (Del. 2006)). Moreover, where (as here) the claims concern the interpretation of written agreements, "the court will only grant the motion to dismiss in favor of the defendants if those written agreements may only be reasonably read in the manner advanced by [the defendants]." *Levy v. Hayes Lemmerz Int'l, Inc.*, 2006 Del. Ch. LEXIS 68, at *16 (Del. Ch.) (Exhibit A hereto); *see also Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996) ("Dismissal is

[2] Tellingly, Heartland's opening brief altogether ignores the legal standard that the Court is required to consider in deciding a motion to dismiss, further demonstrating that Heartland cannot prevail on its motion under the facts alleged in the Complaint.

proper only if the defendants' interpretation [of the limited partnership agreement] is the *only* reasonable construction as a matter of law.") (emphasis in original) (citations omitted).[3]

For the reasons explained below, Stepp has adequately pleaded his entitlement to advancement and indemnification under a reasonable reading of the provisions of the Partnership Agreement and, therefore, the Court should deny Heartland's motion to dismiss in its entirety.

II. PLAINTIFF'S COMPLAINT SUFFICIENTLY STATES A CLAIM FOR ADVANCEMENT

For the reasons explained in his opening brief, Stepp respectfully submits that he is entitled to summary judgment on his advancement claim. (*See* Stepp Op. Br. at 7-14). For purposes of responding to Heartland's motion to dismiss, however, plaintiff's complaint at the very least states a claim that is sufficient to satisfy the liberal pleading standards of this Court. Simply stated, the plain language of Section 4.4(b) can and should be read to make advancement mandatory, rather than discretionary as Heartland urges. And to the extent the language of Section 4.4(b) is deemed ambiguous, it must be construed against Heartland. Either way, Stepp is entitled to advancement, and Heartland's attempt to avoid its advancement obligation should be rejected.

A. The Advancement Provision Can And Should Be Interpreted In A Way That Gives Effect To Every Term.

As Heartland acknowledges in its opening brief, "a limited partnership agreement should not be construed in a way that would render terms meaningless." (Heartland Op. Br. at 9).[4] Yet that is precisely what Heartland urges this Court to do. Indeed, it is Heartland's

[3] All unreported decisions not found in Stepp Op. Br. and/or Heartland Op. Br. are attached as exhibits hereto.

[4] *See also Council of the Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.")

interpretation of the advancement provisions (not Stepp's) that would render certain terms meaningless.

Section 4.4(b) contains language rendering advancement mandatory – "Expenses reasonably incurred by an Indemnitee in defense or settlement of any claim that may be subject to a right of indemnification hereunder *shall be advanced* by the Partnership…." (Compl Ex. A. § 4.4(b)) (emphasis added).[5] Thus, advancement is mandatory. Section 4.4(b) also provides for ministerial approval designed to ensure appropriate procedures have been followed and there is no double recovery: "No advances shall be made by the Partnership under this Section 4.4(b) (i) without the prior written approval of the General Partner…." (*Id.*). Heartland's interpretation that this ministerial approval provision grants unfettered discretion to the General Partner, however, would render the mandatory advancement language completely meaningless.[6] Advancement under Section 4.4(b) cannot be both mandatory, as expressly provided for, while

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(citation omitted); *Julian v. E. States Constr. Serv.*, 2008 Del. Ch. LEXIS 86, at *21 (Del. Ch.) (same); *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 Del. Ch. LEXIS 154, at *48-49 (Del. Ch.) ("Delaware courts do prefer to interpret contracts to give effect to each term rather than to construe them in a way that renders some terms repetitive or mere surplusage.") (citation omitted); *Delta & Pine Land Co. v. Monsanto Co.*, 2006 Del. Ch. LEXIS 171, at *14-15 (Del. Ch.) ("contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless'") (citations omitted).

[5] *See Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212-13 (Del. 2005) (bylaws stating that "The Corporation *shall* pay all expenses … in advance" provided mandatory right to advancement) (emphasis in original); *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 823 (Del. 1992) ("The Agreement … renders the corporations' duty mandatory in providing that expenses *shall* be paid in advance.") (emphasis added); *Schoon v. Troy Corp.*, 948 A.2d 1157, 1169 (Del. Ch. 2008) ("[t]his court must first note that the word 'shall' in section 9 establishes a right to mandatory advancement") (citation omitted); *Brown v. LiveOps, Inc.*, 903 A.2d 324, 328 (Del. Ch. 2006) (finding that "plain terms of the indemnification agreement and the company's bylaws [*i.e.*, "[Defendant] shall advance all expenses"] provide for mandatory advancement ...").

[6] According to Heartland, the General Partner is "entitled to control advancement decisions in its discretion without challenge either from limited partners or from employees." (Heartland Op. Br. at 11). This is a red herring. Here, advancement is mandatory and is not subject to challenge provided the procedural requirements have been met.

still be subject to the discretion of the General Partner. Indeed, the only interpretation that gives effect to all of the language of Section 4.4(b) is Stepp's, *i.e.*, that advancement is mandatory and the approval ministerial only. (*See* Stepp Op. Br. at 10-12).

In its opening brief, Heartland cites *In re Cencom Cable Income Partners, L.P. Litig.*, 2000 Del. Ch. LEXIS 10 (Del. Ch.), for the proposition that Section 4.4(b)(i) "would be meaningless" if the General Partner "did not have the right to withhold its approval of advances…." (Heartland Op. Br. at 9-10). To the contrary, *Cencom* actually supports Stepp's position, holding that a general partner lacks discretion with respect to advancement decisions where such discretion is not expressly conferred by the partnership agreement.

In *Cencom*, the limited partners brought a class action against the general partner asserting breaches of fiduciary duty, and sought to enjoin the general partner from advancing itself litigation expenses from partnership funds. The Court held that the partnership agreement expressly precluded advancement when the limited partners were plaintiffs. 2000 Del. Ch. LEXIS 10, at *24-25. The Court went on to reject the general partner's argument that it had discretion to decide whether to advance defense costs, notwithstanding the plain language of the agreement. *Id*. at *25-26. As was the case in *Cencom*, the General Partner here lacks discretion to decide whether to provide advancement.

Moreover, conspicuously absent from the approval section of Section 4.4(b) is the word "discretion." Heartland's interpretation would essentially have the Court read that word into Section 4.4(b). Had the drafter of the Partnership Agreement intended that the General Partner would have discretion in approving advancement, as he did in other provisions of the Partnership Agreement (*see* Compl. Ex. A § 11.12(b)), the drafter could have so provided. *See DeLucca v. KKAT Mgmt., L.L.C.*, 2006 Del. Ch. LEXIS 19, at *7 (Del. Ch.) ("[I]t 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.").

Heartland also attempts to construe the written approval clause within Section 4.4(b) as more specific than the mandatory advancement language, citing to the principle that "specific terms in a limited partnership agreement control over general ones." (Heartland Op. Br. at 11) (citation omitted). This argument is inapt both legally and factually. The first sentence of Section 4.4(b) expressly provides that advancement is mandatory by using the term "shall," while the second sentence purports to require approval by the General Partner for advancement. Neither sentence can reasonably be read as providing any more specificity than the other, and, as explained in Stepp's opening brief (Stepp Op. Br. at 10-11), the written approval clause does not limit Stepp's right to advancement. Heartland's characterization of approval being an "exception[]" to the "shall" language is plainly wrong – it is a ministerial procedural clause, not an exception to advancement.

Further, the principle favoring specific language is only applicable where contractual language is inconsistent. *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1185 (Del. 1992) (holding that the principle inapplicable where "there is no inconsistency between [the provisions] which requires that one section take precedence over the other"). These two sentences are not necessarily inconsistent, as they may be read together to create mandatory advancement with ministerial approval by the General Partner.

B. Any Ambiguity Must Be Construed Against Heartland

To the extent that the Court finds the provisions to be ambiguous, that ambiguity must be resolved against Heartland. As explained in Stepp's opening brief (*see* Stepp Op. Br. at 12-13), it is well-settled that ambiguous language in a partnership agreement must be construed

against the partnership, without resort to extrinsic evidence.[7] *See Delphi Easter Partners Ltd. P'ship v. Spectacular Partners, Inc.*, 1993 Del. Ch. LEXIS 159, at *5-6 (Del. Ch.) ("[I]n construing contractual language under DRULPA conferring rights of indemnification, courts should interpret language so as to achieve where possible the beneficial purposes that indemnification can afford…. Those benefits include the allocation of certain risks at the outset of a contractual relation in order to make the contractual structure feasible or more attractive to participants.") (citations omitted); *see also Kuroda v. SPJS Holdings, L.L.C.*, Del. Ch., C.A. No. 4030-CC, Chandler, C., Mem. Op. at 14 (Apr. 15, 2009). (Exhibit B hereto). Accordingly, if Section 4.4(b) is ambiguous, Heartland's motion must be denied, and Stepp is entitled to summary judgment on his advancement claim.

III. STEPP HAS STATED A CLAIM FOR INDEMNIFICATION OF EXPENSES INCURRED IN THE CRIMINAL PROCEEDING

Heartland asserts two bases for dismissing Stepp's claim for indemnification, neither of which has merit. First, Heartland claims that Stepp has "failed to allege that his conduct met the requirements for indemnification required by the governing agreement." (Heartland Op. Br. at 12-14.) This argument is belied by the plain language of Section 4.4(a), which provides for three alternative (and not cumulative) standards for evaluating the Indemnitee's underlying conduct. Further, to the extent such language is deemed ambiguous, it must be construed against Heartland and in favor of Stepp. Second, Heartland asserts that Stepp's indemnification claim is "premature because numerous other active proceedings are

[7] Indeed, in the very case that Heartland cites for the proposition that specific terms in a limited partnership agreement control over general terms, the Court applied the doctrine of *contra proferentem* to the agreement and resolved ambiguities against the defendant general partners. *See Katell v. Morgan Stanley Group, Inc.*, 1993 Del. Ch. LEXIS 92, at *13-14 (Del. Ch.) ("Even assuming that a reasonable person would consider the Partnership Agreement ambiguous due to this language, however, classic rules of contract construction resolve the ambiguity in favor of plaintiffs… any ambiguities in the Partnership Agreement should be resolved against the general partners who drafted the contract") (citation omitted).

pending against Mr. Stepp…." (*Id*. at 14-15). This argument is contrary to Delaware law and should be rejected.

A. Stepp Has Sufficiently Pleaded Compliance With Section 4.4(a)

Under a reasonable interpretation of the Partnership Agreement, Stepp is entitled to indemnification for the dismissed Criminal Proceeding. As Section 4.4(a) provides for mandatory indemnification through use of the phrase "shall be entitled to indemnification," the burden rests with Heartland "to demonstrate that the indemnification mandated is not required." *VonFeldt v. Stifel Fin. Corp.*, 1999 Del. Ch. LEXIS 131, *9-11 (Del. Ch.) (Exhibit C hereto) (holding that the adoption by a corporation of a mandatory indemnification bylaw will place the burden of proof in any ensuing litigation concerning its application upon the corporation to demonstrate why it should not be required to indemnify). Heartland does not come close to meeting its heavy burden.

Stepp's right to mandatory indemnification is conditioned only on whether his underlying conduct satisfied one of three referenced criteria. Section 4.4(a) reads in pertinent part:

> 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 . . . of any nature whatsoever . . . 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…

(Compl. Ex. A, § 4.4(a) (emphasis added)). The presence of the disjunctive word "or," instead of the conjunctive word "and," makes clear that the criteria are not cumulative.[8] Rather, the Partnership Agreement provides three alternative bases by which the Indemnitee's conduct may be measured, with subsection (B) expressly applicable "in the case of a criminal action or proceeding…." *Id.* Accordingly, in seeking indemnification for costs associated with the dismissed Criminal Proceeding, Stepp has pleaded that he "had no reasonable cause to believe that his conduct was unlawful." (Compl. ¶ 29.). Indeed, the United States Attorney concluded that further prosecution of Stepp and others "would not be in the interests of justice." (Compl. Ex. B at 2).

In its opening brief, however, Heartland conclusorily asserts that "the only reasonable interpretation of [Section 4.4(a)] is that all three requirements must be met." (Heartland Op. Br. at 14.). Such an interpretation directly contradicts the plain language of the provision and is a blatant attempt by Heartland to rewrite the Partnership Agreement.[9] *See DeLucca*, 2006 Del. Ch. LEXIS 19, at *7 ("[I]t 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."). Further, as explained above, any ambiguity in the Partnership Agreement must be construed

[8] The drafter's inclusion of the word "or" rather than "and" appears deliberate, in that it departs from the more familiar formulation of a conduct-based limitation on indemnification. *Cf.* 8 *Del. C.* § 145(a) (only allowing indemnification "if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, ***and***, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful") (emphasis added).

[9] Even if compliance with subsections (A) or (C) were necessary (which it is not) Heartland's brief ignores the indisputable fact that the dismissal of the Criminal Proceeding forecloses any negative finding regarding those subsections. As the Criminal Proceeding has been dismissed, there of course has not been (and cannot be) any adverse determination as to subsections (A) or (C).

against Heartland and in favor of Stepp. *See SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998).

Remarkably, Heartland also claims that Mr. Stepp refused to sign a certification that his conduct complied with the "three requirements" for indemnification. (Heartland Op. Br. at 13) (*citing* Compl. Ex. F, G). Not only is this statement disingenuous, it is factually incorrect and attempts to impose further conditions on Stepp's right to indemnification that simply do not exist. First, Stepp was never asked by Heartland to provide any certification with respect to his right to indemnification. The letters cited in Heartland's opening brief concern Stepp's right to advancement, *not* his right to indemnification. Indeed, these letters were sent last year, well before Stepp even made a claim for indemnification. Second, Section 4.4(a) of the Partnership Agreement does not require (explicitly or implicitly) an Indemnitee to provide certification prior to receiving indemnification. Nor does the indemnification provision provide the General Partner with any discretion to require such a certification. *Cf. Thompson v. Williams Cos*., 2007 Del. Ch. LEXIS 112, at *3, *18-19 (Del. Ch.) (Exhibit D hereto) (holding that a corporation's Board of Directors could require certification where the relevant bylaw made advancement contingent upon "such terms and conditions, if any, as the Board of Directors deems appropriate") (footnote omitted).

B. Stepp's Indemnification Claim Is Ripe For Adjudication

Heartland contends that a determination as to whether Stepp is entitled to indemnification for the criminal proceeding is premature "because numerous other active proceedings are pending against Mr. Stepp, calling into question precisely the same conduct that led to the criminal indictment." (Heartland Op. Br. at 14.) Heartland's extreme interpretation is contrary to Delaware law. Indeed, this argument has been previously considered and rejected by this Court. *See Levy v. Hayes Lemmerz Int'l, Inc.*, 2006 Del. Ch. LEXIS 68 (Del. Ch.).

In *Levy*, the plaintiffs – former directors of the defendant corporation – sought indemnification under the corporation's bylaws for amounts paid in settlement of various class action claims, notwithstanding an ongoing SEC investigation regarding the same underlying conduct. *Id*. at *1. Pursuant to Section 145, their indemnification was contingent upon the Board's "investigation as to whether the indemnitee has acted in good faith, and in a manner reasonably believed to be in or not opposed to the best interests of the corporation." *Id*. at *41 (citation omitted). The corporation moved to dismiss, asserting (in part) that although the class action claims had been settled and resolved, "the determination of whether the plaintiffs acted in 'good faith' and in the 'best interests' of [the corporation], as required by Sections 145(a) and (d) of the Delaware General Corporation Law, cannot responsibly be made until the SEC concludes its investigation of the underlying accounting irregularities and financial restatements that gave rise to the class action." *Id*. at *33-34. The corporation therefore argued that "the plaintiffs' rights to indemnification for their class action claims have . . . not yet accrued, because they potentially still face related SEC action on the same underlying facts." *Id*. at *36.

The Court summarily rejected the corporation's argument in *Levy*. First, the Court held that as the corporation's bylaws utilized "standard indemnification language" and provided for indemnification "for any action, 'whether civil, criminal, administrative, or investigative,'" such language "clearly implies that indemnification is to be treated on a case-by-case basis: a party may be indemnified for a civil action, and may also seek indemnification for a later criminal action, if it arises." *Id*. at *34. (citation omitted). The Court rejected the notion that a party would have to wait for the completion of each and every cause of action before it could receive indemnification:

> To read this language to mean that in any case where multiple causes of action could be raised the indemnified party must wait

> for all relevant statutes of limitations to run, or for all other possible causes of action to be disposed of, is to eviscerate the important right of indemnification on which Delaware corporations rely to secure qualified people to serve on their boards.

Id. at *34-35. The plaintiffs had "suffered an indemnifiable injury" through resolution of the class action claims that was "separate from any injury they may suffer as a result of the pending SEC investigation." *Id*. at *39 (footnote omitted). Accordingly, the Court held that plaintiffs were entitled to indemnification for the class action settlement. *See also Zaman v. Amedeo Holdings, Inc*., 2008 Del. Ch. LEXIS 60, at *71 (Del. Ch.) (Exhibit E hereto) (holding that whether the indemnitees were ultimately successful in a parallel state action did not justify delay in determining indemnification for the concluded federal action).

Here, section 4.4(a) of the Partnership Agreement states that an Indemnitee will be indemnified "from and against any and all claims, liabilities, damages, losses, costs and expenses . . . of any nature whatsoever…." (Compl. Ex. A, § 4.4(a)). As in *Levy* and *Zaman*, the language of the Partnership Agreement clearly provides for indemnification on a case-by-case basis. Accordingly, the existence of an ongoing civil or SEC action against Stepp concerning the same underlying conduct as the Criminal Proceeding does not preclude indemnification as to Stepp's current indemnification demand.

Not only is Heartland's strained interpretation of the indemnification provisions contrary to existing precedent, it is contrary to the public policy of this State in favor of indemnification to protect innocent covered persons. *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) ("The invariant policy of Delaware legislation on indemnification 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.'"). Under Heartland's interpretation, an adverse

determination in a civil action would eliminate an indemnification right from a related criminal action, notwithstanding the lower burden of proof in the civil action. This simply cannot be the law in Delaware.

Stepp has adequately pleaded his entitlement to indemnification under the Partnership Agreement, and Stepp's claim for indemnification is timely under Delaware law. Accordingly, Heartland's motion to dismiss Stepp's indemnification claim should be denied.

CONCLUSION

For the foregoing reasons, J. Michael Stepp respectfully requests that the Court deny defendant's motion to dismiss the complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2009, a copy of the foregoing was served via *email* on the following counsel:

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