IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DAVID A. STOCKMAN,	:	
	:	
Plaintiff,	:	
	:	C.A. No. 4227-VCL
v.	:	
	:	
HEARTLAND INDUSTRIAL PARTNERS, L.P.,	:	
	:	
Defendant.	:	

OPENING BRIEF IN SUPPORT OF DEFENDANT HEARTLAND INDUSTRIAL PARTNERS, L.P.'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

David A. Stockman, the former Chief Executive Officer of bankrupt automotive parts supplier Collins & Aikman Corporation, has sued Heartland Industrial Partners, L.P. for advancement of legal expenses to be incurred in various criminal, SEC and civil proceedings that arose out of his alleged conduct at C&A. Heartland'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.

Accordingly, the Court should dismiss Mr. Stockman's Complaint.

STATEMENT OF FACTS[1]

A. The Parties.

Defendant Heartland Industrial Partners, L.P. ("Heartland") is a Delaware limited partnership that maintains a portfolio of equity investments on behalf of its Limited Partners.[2] (Complaint ¶ 3)

Plaintiff David A. Stockman was a founding member of Heartland's General Partner, Heartland Industrial Associates L.L.C., and the Managing Member of Heartland's Investment Manager, Heartland Industrial Group, L.L.C. (Complaint ¶ 3) In June 2005, Mr. Stockman delegated his authority and roles at Heartland to others. (Complaint ¶ 3) As a result, Mr. Stockman does not currently participate in the management of Heartland's General Partner.

B. The Pending Proceedings.

One of Heartland's equity investments was in Collins & Aikman Corporation ("C&A"). (Complaint ¶ 4) In February 2001, Mr. Stockman joined the C&A board of directors. In August 2002, he became Chairman of the C&A board, and in August 2003, he became C&A's Chief Executive Officer. (Complaint ¶ 4) Mr. Stockman held these positions until May 2005, when C&A declared bankruptcy. (Complaint ¶¶ 4-5)

Mr. Stockman has been named as a defendant in civil and criminal actions (the "Proceedings") "in his capacity as, or because of his service as, a director and/or officer

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1 The facts are taken from the allegations in the Verified Complaint (the "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 Complaint or the Limited Partnership Agreement.

of C&A."[3] (Complaint ¶ 5) Mr. Stockman has incurred and will incur legal expenses in defending these Proceedings. (Complaint ¶ 6) C&A's and Heartland's directors and officers insurance policies have been exhausted. (Complaint ¶¶ 6, 20) Mr. Stockman sent a letter to Heartland on October 29, 2008 demanding that Heartland advance his legal expenses. (Complaint ¶ 13) Heartland sent Mr. Stockman a letter on November 21, 2008 rejecting Mr. Stockman's unconditional demand. (Complaint ¶ 14)

C. The Limited Partnership Agreement.

Heartland 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"). (Complaint ¶ 1; attached hereto as Exhibit A[4]) 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:

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[3] 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). (Complaint ¶ 5)

[4] The Limited Partnership Agreement is a confidential non-public document. Heartland has filed a Motion to Allow Filing Under Seal of Exhibit A. Heartland will file Exhibit A after that motion is ruled upon.

> 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.

(Complaint ¶ 8) (emphasis added).

Mr. Stockman concedes that the General Partner has not given written approval for advances to him. (Complaint ¶¶ 14-15, 22)

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

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 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 in the absence of 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. The second sentence unequivocally states that "[n]o advances shall be made by the Partnership under

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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 *(cont'd)*

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 controlling 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, and cannot 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 …."

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 simply that "[t]he plain language of section 4.4(b) does not give the General Partner the discretion to withhold advancement …." (Complaint ¶ 22) 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

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expenses; noting that a mandatory advancement bylaw should "expressly ... state its intention to mandate the advancement by the corporation ….").

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 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 Complaint provides no basis to dispute) that any advancement right created by the first sentence of section 4.4(b) is qualified by both 4.4(b)(i) and 4.4(b)(ii). *See In re Cencom*, 2000 Del. Ch. LEXIS 10, at *23 (denying advancement under limited partnership

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[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).

[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).

agreement which provided that expenses "shall" be advanced "provided that" the "action is initiated by a third party who is not a Limited Partner" where claims were initiated by Limited Partners).

Additionally, read as a whole, the indemnification and advancement provisions in section 4.4 demonstrate that the parties knew how to draft a mandatory provision and that section 4.4(b)(i) qualifies the right to advancement. *Radiancy, Inc. v. Azar*, C.A. No. 1547-N, 2006 Del. Ch. LEXIS 13, at *6 (Del. Ch. Jan. 23, 2006) ("The parties knew, as demonstrated by the more inclusive indemnification provision, how to draft language that provides mandatory advancement for directors, officers, *and* employees or agents serving at the request of Radiancy, Inc. They chose not to do so.") (emphasis in original). Like the provisions at issue in *Radiancy*, Heartland's Limited Partnership Agreement contains a broad indemnification provision limited only by standard prerequisites and also provides a more narrow advancement provision that prohibits advancement without the General Partner's approval. *See id.*; *see also Advanced Mining*, 623 A.2d at 84 ("[I]ndemnification rights and rights to advancement of possibly indemnifiable expenses [are] legally quite distinct types of legal rights.").

Third, as with all Delaware contracts,[9] specific terms in limited partnership agreements 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 4.4(b) ensures that the General Partner can reject advancement demands by persons to whom advancement would be inappropriate.

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[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.").

CONCLUSION

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

Respectfully submitted,

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