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

OPENING BRIEF OF J. MICHAEL STEPP IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT

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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, Heartland filed a motion to dismiss the Complaint, together with a supporting opening brief. On the same day, Stepp filed a motion for partial summary judgment with respect to his advancement claim (First Cause of Action). This is Stepp's Opening Brief in support of that motion.

* * *

As demonstrated herein, Stepp is an "Indemnitee" under Heartland's Amended and Restated Limited Partnership Agreement, dated as of May 10, 2000 (the "Partnership Agreement"). Section 4.4(b) of the Partnership Agreement provides that expenses "*shall be advanced* by the Partnership . . . 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 be indemnified hereunder." (emphasis added). Stepp has provided Heartland the undertaking required by Section 4.4(b). Heartland, however, has refused to honor its mandatory advancement obligation. Relying upon language that states "[n]o advances shall be made by the Partnership under this Section 4.4(b) (i) without the prior written approval of the General Partner…," Heartland contends that Section 4.4(b) grants the General Partner discretion

to make advancement decisions. Heartland has further sought to impose conditions on any advancement to Stepp beyond the undertaking called for by Section 4.4(b).

As explained below, a proper reading of the Partnership Agreement permits only one reasonable construction – that advancement is mandatory, subject only to the ministerial "written approval" of the General Partner. Any other reading, including Heartland's attempt to engraft a discretion provision, conflicts with established principles of contract construction. Moreover, to the extent the language of Section 4.4(b) cannot be reconciled to give to effect to all of its provisions, any ambiguity must be resolved *against* Heartland, since the Partnership Agreement is not a negotiated contract. And finally, Heartland's attempt to impose additional conditions beyond the undertaking is without support of any kind in the Partnership Agreement and is therefore improper. Accordingly, Stepp is entitled to summary judgment on his First Cause of Action.

STATEMENT OF FACTS[1]

A. The Parties

Heartland is a Delaware limited partnership formed in 2000. (Compl. ¶ 3). The general partner of Heartland is Heartland Industrial Associates LLC (the "General Partner"). Heartland acquired and maintains a portfolio of equity investments, which included Collins & Aikman Corporation ("C&A"). C&A was in the business of supplying automotive parts to major manufacturers of automobiles. C&A filed for bankruptcy in 2005 and was liquidated in 2007. (*Id*.).

Plaintiff J. Michael Stepp ("Stepp") is a resident of Florida. At all relevant times, Stepp was a Senior Managing Director of Heartland and a director of C&A, and was also C&A's Vice President and Chief Financial Officer, and Vice Chairman of C&A's Board of Directors until he retired in October 2004. (Compl. ¶ 2). Stepp held such positions with C&A at the direction of Heartland. (*Id.* at ¶ 8; Stepp Aff. ¶ 4). Stepp is not, and has never been, a limited partner in Heartland, and had no role in the preparation of the Partnership Agreement. Indeed, Stepp did not commence his employment with Heartland until after the Partnership Agreement came into existence. *See* C&A's Schedule 14A, filed April 24, 2003, at 19 (attached as Exhibit A to the Affidavit of Daniel A. Mason, submitted herewith).

B. The Proceedings

Following the bankruptcy of C&A, Stepp was named as a defendant in a criminal proceeding and numerous civil proceedings filed in several different states.[2] On January 9, 2009,

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[1] The facts are taken from the Verified Complaint, the Affidavit of J. Michael Stepp submitted on March 30, 2009 (D. I. 5) and the Affidavit of Daniel A. Mason submitted herewith.

[2] Those proceedings are captioned as follows: *In re Collins & Aikman Corp. Securities Litig.*, 03-cv-71173 (E.D. Mich.); *Egleston v. Heartland Industrial Partners, L.P., et al.*, 06-cv-13555 (E.D. Mich.); *MainStay High Yield Corporate Bond Fund v. Heartland Industrial Partners, L.P.*,

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 interest of justice." (Compl. Ex. B). Stepp is continuing to defend himself with respect to the civil suits, which are in various stages of proceeding. (*See* Stepp Aff. ¶ 6). To date, Stepp has incurred over $1.8 million in fees and expenses that *remain unpaid*, and expects to incur substantial additional defense costs as he defends himself in the coming weeks and months. (*Id*. at ¶¶ 5-6).

C. Stepp's Efforts To Secure Advancement From Heartland

In November 2005, Stepp provided notice to Heartland of the possible assertion of claims against him arising from his positions with C&A. (Compl. ¶ 11). Pursuant to the Partnership Agreement,[3] Stepp initially sought reimbursement of his fees and expenses incurred in the various proceedings from C&A's insurance policies. Some of Stepp's expenses were reimbursed under certain C&A director and officer (D & O) policies until the limits of such policies were exhausted. Thereafter, Stepp pursued coverage from Heartland's D & O insurer. Heartland's insurer, however, has advised Stepp that it will not pay defense costs of any insured (including Stepp) incurred *after* December 31, 2008, and only an unspecified percentage of such costs *prior* to that date. (Stepp Aff. ¶ 8). Heartland's insurer further advised Stepp that such payments for all insureds would exhaust the policy limits. (*Id*.). Stepp is aware of no other insurance available to fund his defense of the civil proceedings. (*Id*. at ¶ 9).

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et al., 07-cv-10542 (E.D. Mich.); *United States v. Stockman, et al.*, 07-cr-220 (S.D.N.Y.); *SEC v. Collins & Aikman Corp., et al.*, 07-cv-2419 (S.D.N.Y.); *Collins & Aikman Corp., et al. v. Stepp*, 07-5695 (E.D. Mich. Bankr.); *Collins & Aikman Corp., et al. v. Stockman, et al*., 07-cv-265 (D. Del.); and *Aurelius Capital Master, Ltd., et al. v. Stockman, et al.*, No. 081601483 (N.Y. Sup. Ct.). The operative complaints are attached as Exhibits B-I to the Affidavit of Daniel A. Mason, submitted herewith.

[3] Section 4.4(d) of the Partnership Agreements requires persons to first seek recovery under available indemnity or insurance policies prior to seeking indemnification from the Partnership.

On August 5, 2008, in anticipation of the likely future exhaustion of insurance proceeds, counsel for Stepp renewed a request made several years earlier to Heartland for advancement. (Compl. Ex. C). On November 17, 2008, Stepp provided Heartland a written undertaking to repay amounts advanced to him in the event it was ultimately determined that he was not entitled to indemnification. (Compl. Ex. I). In a series of letters from counsel for Heartland, Heartland has taken the position that the Partnership Agreement provides "discretion" to the General Partners as to whether to advance legal fees. (Compl. Ex. H (Letter from Jonathan Lerner to Mark Rosenberg, dated November 26, 2008); *see also* Compl. Ex. F). Heartland has further sought to condition any advancement to Stepp on conditions not found in the Partnership Agreement, including a security for Stepp's undertaking, written certifications as to Stepp's conduct, and a budget. (*See* Compl. Ex. F).

D. Heartland's Limited Partnership Agreement

Heartland is governed by the Partnership Agreement, which is expressly governed by Delaware law. (Compl. Ex. A § 11.8). The term "Indemnitee" is defined in Section 4.3 of the Partnership Agreement to include, among others, "any other person who serves at the request of the General Partner on behalf of the Partnership as an officer, director, partner, employee or agent of any other entities…." (*Id.* at § 4.3(a)). Stepp is an Indemnitee under the 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).[4]

Indemnification is addressed in Section 4.4 of the Partnership Agreement, which expressly contemplates that Indemnitees will be indemnified and held harmless by the

[4] Heartland has not contested (nor could it) that Stepp is an Indemnitee under Section 4.3(a).

Partnership "to the fullest extent permitted by law." (Compl. Ex. A § 4.4(a)). The advancement provision in issue (Section 4.4(b)) provides as follows:

> 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 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 be 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.

(*Id*. at § 4.4(b)) (emphasis supplied).

ARGUMENT

I. THE ONLY REASONABLE CONSTRUCTION OF THE DISPUTED PROVISION IS THAT ADVANCEMENT IS MANDATORY, SUBJECT ONLY TO MINISTERIAL "WRITTEN APPROVAL" BY THE GENERAL PARTNER

A. The Standard For Summary Judgment

Summary judgment will be granted to the moving party where there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). "Once the moving party has demonstrated such facts, and those facts entitle it to summary judgment, the burden shifts to the non-moving party to present specific facts showing that there is a genuine issue of fact for trial." *Del-Chapel Assocs. v. Conectiv*, 2008 Del. Ch. LEXIS 50, at *10 (Del. Ch.) (internal citations omitted).[5] To meet its burden of rebuttal, the non-moving party "may not rest upon mere allegations or denials…." Ct. Ch. R. 56(e); *see also Del-Chapel Assocs.*, 2008 Del. Ch. LEXIS 50, at *10; *accord XO Comm'ns, LLC v. Level 3 Comm'ns, Inc.*, 948 A.2d 1111, 1117 (Del. Ch. 2007).

Summary judgment is a particularly appropriate means of resolving advancement disputes because "the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought." *Senior Tour Players 207 Mgmt. Co. LLC v. Golftown 207 Holding Co. LLC*, 853 A.2d 124, 126-27 (Del. Ch. 2004) (internal citations omitted); *accord Morgan v. Grace*, 2003 Del. Ch. LEXIS 113, at *3-4 (Del. Ch.); *Sun-Times Media Group, Inc. v. Black*, 954 A.2d 380, 389 (Del. Ch. 2008); *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 Del. Ch. LEXIS 82, at *12-13 n.36 (Del. Ch.) (noting that in resolving advancement disputes, "rarely is resort to parol evidence appropriate or even helpful…") (internal citations omitted).

[5] A compendium of unreported decisions is being filed simultaneously herewith.

Heartland has not contested (nor could it) that the underlying proceedings give rise to advancement claims and that Stepp is an "Indemnitee" within the meaning of Section 4.4(b). Rather, Heartland asserts that Section 4.4(b) gives the General Partner discretion to permit or deny advancement, notwithstanding the first sentence of Section 4.4(b) making advancement mandatory. Thus, the only issue presented by this motion is one of law, and that is the proper construction of Section 4.4(b).

B. The Rules For Construing Section 4.4(b)

In interpreting partnership agreements, including advancement provisions, the Court will "apply the familiar canons of contract interpretation." *Sun-Times Media Group,* 954 A.2d at 389 (citing *Citadel Holding Corp. v. Roven,* 603 A.2d 818, 822 (Del. 1992)); *see also Interactivecorp v. Vivendi Universal, S.A.,* 2004 Del. Ch. LEXIS 90, at *30 (Del. Ch.). Accordingly, the Court must seek to discern the plain meaning of the provision's language, as viewed from the perspective of an objective third party. *See, e.g., Reinhard & Kreinberg v. Dow Chem. Co.*, 2008 Del. Ch. LEXIS 39, at *7 (Del. Ch.) (Delaware law "adheres to an objective theory of contracts and interprets words according to their common meaning as they would be understood by a reasonable, third-party observer.") (internal citations omitted); *Sassano v. CIBC World Mkts. Corp*., 948 A.2d 453, 462 (Del. Ch. 2008) (Delaware adheres to the objective theory of contract interpretation). To the extent possible, the Court should harmonize and reconcile seemingly-conflicting contractual provisions, thereby interpreting the contract so as to give meaning and effect to each term. *See, e.g., 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.") (citation omitted); *Julian v. E. States Constr. Serv*., 2008 Del. Ch. LEXIS 86, at *21 (Del. Ch.) ("when interpreting a contractual provision, a court

attempts to reconcile all of the agreement's provisions when read as a whole, giving effect to each and every term"); *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).

Significantly, because the Heartland Partnership Agreement is not the product of bilateral negotiation between Stepp and Heartland, but rather is the sole responsibility of the Partnership, any ambiguity must be resolved against Heartland. *SI Mgmt. L.P. v. Wininger,* 707 A.2d 37, 43 (Del. 1998) (holding that "the principle of *contra proferentem* applies" to limited partnership agreements which a party thereto "had no hand in drafting").[6] And, to the extent Section 4.4(b) is deemed ambiguous, resort to extrinsic evidence is improper as a secondary technique of construction. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 2000 Del. Ch. LEXIS 146, at *25 (Del. Ch.), *rev'd on other grounds*, 817 A.2d 160 (Del. 2002); *see also Arvida/JMB Partners, L.P. v. Vanderbilt Income & Growth Assocs*., 1997 Del. Ch. LEXIS 79, at *16 (Del. Ch.). As this Court observed in *Gotham Partners, L.P.*:

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[6] *See also In re Nantucket Island Assocs. Ltd. P'ship Unitholders Litig.*, 810 A.2d 351, 361 (Del. Ch. 2002) (applying "interpretative principle of construction against the drafter" and suggesting that "the court is required to resolve ambiguities against the drafting general partner…"); *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 309 (Del. Ch. 2002) ("when a court is asked to construe a limited partnership agreement drafted solely by the corporate general partner, it will resolve all ambiguities against the general partner as drafter…"); *Gotham Partners, L.P., v. Hallwood Realty Partners, L.P.*, 795 A.2d 1, 24 n.26 (Delc. Ch. 2001). ("Ambiguities in a partnership agreement drafted solely by a general partner must be resolved against the general partner.") (citations omitted); *Arvida/JMB Partners, L.P. v. Vanderbilt Income & Growth Assocs*., 1997 Del. Ch. LEXIS 79 (Del. Ch.) (construing ambiguous language against general partner); *Katell v. Morgan Stanley Group, Inc*., 1993 Del. Ch. LEXIS 92, at *14 (Del. Ch.) (resolving potentially ambiguous provisions "in favor of plaintiffs," as "any ambiguities in the Partnership Agreement should be resolved against the general partners who drafted the contract") (citation omitted).

> It is only when [the objective] approach [to contractual interpretation] does not yield an unambiguous result that the court will resort to secondary techniques of construction. In the limited partnership context, those secondary [construction] methods fall into two primary categories. Where a limited partnership agreement was drafted exclusively by the general partner, *the court will interpret ambiguities against the drafter, rather than examine extrinsic evidence.* But if a limited partnership agreement was the product of negotiations among the parties, the court will resolve an ambiguity by examining relevant extrinsic evidence. The Partnership Agreement here appears to fall into the former category and was exclusively crafted by the General Partner.

2000 Del. Ch. LEXIS 146, at *25-26 (*citing* Martin I. Lubaroff & Paul M. Altman, LUBAROFF & ALTMAN ON DELAWARE LIMITED PARTNERSHIPS § 11.1, at 11-3-11-4 (Supp. 2000)) (emphasis added; internal citations omitted). Such is the case here where the Partnership Agreement was not the product of negotiations between Stepp and Heartland.

C. Section 4.4(b) Can Be Construed Reasonably to Give Meaning To All Of Its Terms

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(a)) (emphasis added). It goes on to state, however: "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.*). The only sensible reading of Section 4.4(b) – which gives meaning to both provisions – is that the "written approval" is ministerial only. The use of the word "written" suggests a record-keeping function, consistent with other provisions of the Partnership Agreement granting the General Partner such responsibility. (*See, e.g. id*. at §§ 7.1-7.3).

The "approval" provision cannot reasonably be read to grant the General Partner "discretion" in approving advancement, as Heartland contends.

First, and most significantly, to read an element of discretion into the General Partner approval provision would negate completely the mandatory language of Section 4.4(b). Such an interpretation would contravene the basic rule of contract construction that prohibits a reading which renders plain language illusory or meaningless. *Delta & Pine Land Co.*, 2006 Del. Ch. LEXIS 171, at *14-15 ("contracts must be interpreted in a manner that does not render any provision 'illusory or meaningless'") (citation omitted); *see also W. Willow-Bay Court, LLC*, 2007 Del. Ch. LEXIS 154, at *48-49. Advancement under Section 4.4(b) cannot be both mandatory, as expressly stated, yet still be subject to the whim of the General Partner. The only reading that gives effect to all of the language of Section 4.4(b) is Stepp's. Heartland's attempt to impose an element of discretion must fail because it cannot be squared with the plain language "shall be advanced by the Partnership." *See Acierno v. Folsom*, 337 A.2d 309, 313 (Del. 1975) (In light of other provisions of law, "the requisite approval by the County Council of subdivision plans approved by the Planning Department . . . must be deemed to be a ministerial act.") (citation omitted).

Second, the approval provision nowhere contains the word "discretion." Yet that term appears prominently elsewhere in the Partnership Agreement in describing the powers of the General Partner. (*See* Compl. Ex A § 4.2). So significant is the use of that term in the Partnership Agreement that Section 11.12(b) describes what a "Person" (which includes the General Partner) may consider when making a decision in its "sole discretion," "sole and absolute discretion" or "discretion." (*Id.* at §11.12(b)). Clearly, had the drafter of the Partnership Agreement intended that the General Partner would have discretion in approving

advancement, the tools were at hand to so provide.[7] Instead, Section 4.4(b) says nothing about the General Partner's discretion, suggesting that the written approval required is ministerial only.

Third, the specific mention in Section 4.4(b) of the type of undertaking in order to qualify for mandatory advancement, together with the absence of any mention of any other criteria beyond being an "Indemnitee," demonstrates that it was not the drafter's intention to give the General Partner discretion to require undertakings of different type or to impose additional, unstated requirements. To accept Heartland's position would mean that the General Partner could make completely arbitrary advancement decisions. It could, for example, approve the advancement of one Indemnitee, yet deny advancement to another individual situated similarly to the person to whom advancement was approved. Obviously, a construction of Section 4.4(b) that invites such an inequitable result should be avoided. *Katell*, 1993 Del. Ch. LEXIS 92, at *14-15 (where an agreement's language is susceptible to two constructions, the "fair, customary" interpretation "must be preferred" over the "inequitable, unusual" interpretation) (quoting *Holland v. Nat'l Automotive Fibres, Inc*., 194 A. 124, 127 (Del. Ch. 1937)).

D. Any Ambiguity Must Be Construed Against Heartland Without Resort to Extrinsic Evidence

As demonstrated above, Section 4.4(b) can and should reasonably be read to reconcile all of its provisions. To the extent the first and second sentences are deemed to create an ambiguity, however, that ambiguity must be resolved against Heartland. *SI Mgmt. L.P.*, 707

[7] Where a particular term is employed elsewhere within a contract or agreement, its absence from a given provision may be deemed intentional and deliberate. *See, e.g., Katell*, 1993 Del. Ch. LEXIS 92, at *13 (interpreting a limited partnership agreement, and suggesting that if a clause where meant to have a certain meaning, "the drafters could have noted such by using more specific language," such as one particular phrase "found in similar constructions elsewhere in the Partnership Agreement…"); *Chrysler Corp. v. Airtemp Corp*., 426 A.2d 845, 850 (Del. Super. Ct. 1980) (holding that if an agreement's clause were intended to have a described effect, then "a specific reference by the name used elsewhere in the Agreement . . . rather than the phrase [actually used] would have sufficed, and no reason for the use of such imprecise language in its place has been given").

A.2d at 43; *see also* note 5, *supra*. It is now well-settled that ambiguous language in a partnership agreement will be construed against the partnership under the principle of *contra proferentem*. *Id.*; *see generally* LUBAROFF & ALTMAN ON DELAWARE LIMITED PARTNERSHIPS, § 11.1. Moreover, because the Partnership is responsible for the language arguably in conflict, Heartland cannot resort to extrinsic evidence in an effort to rewrite the mandatory advancement provision. *Gotham Partners, L.P.*, 2000 Del. Ch. LEXIS 146, at *25 ("Where a limited partnership agreement was drafted exclusively by the general partner, the Court will interpret ambiguities against the drafter, rather than examine extrinsic evidence.") (citation omitted). Thus, any attempt by Heartland to introduce extrinsic evidence of the drafter's intent should be rejected. Simply put, the consequences of the Partnership's failure to provide a completely lucid advancement provision must be borne by Heartland. And since there is no basis to override the otherwise mandatory language of Section 4.4(b), judgment should be entered in Stepp's favor.

II. HEARTLAND'S ATTEMPT TO IMPOSE "CONDITIONS" ON ADVANCEMENT MUST ALSO BE REJECTED

As noted above, in correspondence Heartland has attempted to impose conditions on any advancement to Stepp. (*See e.g.* Compl. Ex. I). The plain language of Section 4.4(b) requires only that an Indemnitee provide a particular undertaking, which Stepp did months ago. Nowhere does the Partnership Agreement require "security to support the undertaking" (*see id.*) or any of the other conditions Heartland has sought to impose arbitrarily. In similar circumstances, this Court has stated that if an indemnitor had wanted to require security or other conditions to advancement, it could have so provided in the operative agreement. *See, e.g., Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212 (Del. 2005) (noting that "corporations may specify by bylaw or contract the terms and conditions upon which present and former corporate officials may receive advancement, *e.g.*, proof of an ability to repay or the posting of a secured bond")

(citation omitted); *Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *13 (Del. Ch.) (corporation "cannot point to its own drafting failures as a defense to [a subsequent] advancement claim….") Nor did Heartland contractually empower the General Partner to impose conditions at his discretion. *Cf. Radiancy, Inc. v. Azar*, 2006 Del. Ch. LEXIS 13, at *7 n.1 (Del. Ch.) (involving a permissive advancement provision providing that "expenses incurred . . . may be so paid in advance upon such terms and conditions, if any, as the Board of Directors deems appropriate") (citation omitted). Having drafted a mandatory advancement provision that fails to state that the General Partner has any discretion in approving requests for advancement, Heartland cannot now arbitrarily impose additional conditions for advancement to Stepp. Similar efforts to re-write advancement provisions have been consistently rejected. *See, e.g.*, *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 Del. Ch. LEXIS 19, at *6-7 (Del. Ch.) ("[T]his is yet another case in which defendants in an advancement case seek to escape the consequences of their own contractual freedom. Regretting the broad grant of mandatory advancement they forged on a clear day, they seek to have the judiciary ignore the plain language of their contracts and generate an after-the-fact judicial contract that reflects their current preference.").

CONCLUSION

For the foregoing reasons, J. Michael Stepp respectfully requests that the Court grant his motion for partial summary judgment.

Respectfully submitted,

/s/ Peter J. Walsh, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8rd day of April, 2009, a copy of the foregoing was served via *email* on the following counsel:

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