IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JOYCE C. DELUCCA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 1384-N
	)	
KKAT MANAGEMENT, L.L.C., KKAT ACQUISITION COMPANY, II, L.L.C., KKAT ACQUISITION COMPANY, III, L.L.C., KKAT ACQUISITION COMPANY, IV, L.L.C., KKAT ACQUISITION COMPANY, V, L.L.C., KKAT ACQUISITION COMPANY, VI, L.L.C.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: December 7, 2005
Date Decided: January 23, 2006

Kenneth J. Nachbar, Esquire, Natalie J. Haskins, Esquire, MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Steven M. Kayman, Esquire, Caroline S. Press, Esquire, Isaac Nesser, Esquire, PROSKAUER ROSE, LLP, New York, New York, *Attorneys for Plaintiff.*

David C. McBride, Esquire, William D. Johnston, Esquire, Michele Sherretta, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; Leslie G. Fagen, Esquire, Marc Falcone, Esquire, Samuel M. Sheldon, Esquire, David E. Altschuler, PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP, New York, New York, *Attorneys for Defendants.*

STRINE, Vice Chancellor

Joyce DeLucca, a former employee and principal of Katonah Capital, L.L.C. ("Katonah"), brought this action seeking to enforce the advancement provisions in the "Operating Agreements" of the defendants in this case, the so-called "KKAT Companies." DeLucca wants the KKAT Companies to advance her legal fees and expenses in defending a lawsuit brought by affiliates of the KKAT Companies. Those affiliates — DeLucca's former employer, Katonah, and Kohlberg Capital, L.L.C. ("Kohlberg") — sued DeLucca in New York (the "New York Action"). DeLucca also requests an award of "fees on fees" incurred in bringing this action to enforce the mandatory advancement provision.

The case before me involves contractual advancement provisions that differ from those typically used by publicly-listed corporations in providing advancement rights to their officers and directors. Those provisions track the authorizing statute, 8 *Del. C.* § 145, and often extend advancement rights to persons who are sued by reason of the fact that they took action in a specified corporate capacity. Indeed, our Supreme Court recently provided useful guidance regarding the interpretation of such provisions in its decision in *Homestore, Inc. v. Tafeen*,[1] a decision that affirmed the approach that had been taken by this court in its prior opinions.[2]

Unlike the typical corporate advancement case, the present dispute involves limited liability companies and a different business context. Here, the KKAT Companies are affiliates of the controlling stockholder of Katonah, which is Kohlberg. Katonah was

[1] *Homestore, Inc. v. Tafeen*, 2005 WL 3091887 (Del. Nov. 17, 2005) (hereinafter, "*Tafeen*").
[2] *See, e.g.*, *Reddy v. Elec. Data Systems Corp.*, 2002 WL 1358761 (Del. Ch. June 18, 2002); *Perconti v. Thornton Oil Corp.*, 2002 WL 982419 (Del. Ch. May 3, 2002).

the investment manager for six structured investment funds (the "Katonah Funds" or "Funds") and DeLucca was the key money manager associated with the Funds. The KKAT Companies were formed by Kohlberg and DeLucca to invest in those same Funds, using monies of Kohlberg and DeLucca. In their Operating Agreement, each KKAT Company promised to indemnify affiliates of Kohlberg for any loss in "connection with or arising out of or related to" the Operating Agreement, the operations or affairs of a KKAT Company or Katonah Fund, or the operations, or affairs of Kohlberg if the loss was attributable to a KKAT Company or Katonah Fund so long as the affiliate did not act with fraud, gross negligence, or willfully violate the law. As to any claim that might give rise to indemnification, the KKAT Companies promised advancement.

On these cross-motions for judgment on the pleadings, DeLucca and the KKAT Companies duel over whether the New York Action implicates the contractual pledge of advancement. The New York Action involves claims that DeLucca breached fiduciary and contractual obligations she owed to Katonah and Kohlberg by, among other things, failing to hire another key money manager to help her manage the Katonah Funds, and then using that failure as leverage against Katonah and Kohlberg in negotiations with them. When those negotiations did not bear fruit, DeLucca allegedly exploited her own refusal to hire a qualified successor by, among other things, forming her own money management firm and seeking to use the absence of a successor to force Katonah into losing its status as portfolio manager of the Katonah Funds and to secure business for her new venture. In the course of that conduct, DeLucca is alleged to have improperly used proprietary information of not only Katonah, but of the KKAT Companies, on whose

behalf Kohlberg brought a claim in the New York Action. Not only that, the complaint in the New York Action (the "New York Complaint") repeatedly says that DeLucca misused confidential information regarding the Katonah Funds' investors, investments, and investment strategies and put her selfish concerns ahead of her duties to the investors in the Katonah Funds. At bottom, however, the claims against DeLucca in the New York Action are based on harm she supposedly caused to Katonah and Kohlberg, as her employers, rather than to the investors in the Katonah Funds or the KKAT Companies.

Because of that, the KKAT Companies say it is absurd to think that they are bound to advance funds to DeLucca. They ground this argument in a reading of the relevant Operating Agreements that superimposes the typical "corporate capacity" analysis on those Agreements despite its absence from the contractual text.

In this opinion, I agree with DeLucca that the KKAT Companies' disavowal of the plain language of the Operating Agreements is unconvincing. Because the Katonah Funds did not act through their own employees, but through Katonah, it is understandable that the Operating Agreements did not hinge the right to advancement on the entity for which the party seeking advancement acted. Instead, the Operating Agreements articulate a capacious and generous standard by providing indemnified parties with a right to advancement as to any claim in connection with, arising out of, or related to the Operating Agreements or operations or affairs of either the KKAT Companies or the Katonah Funds. By the plain terms of the New York Complaint, DeLucca is accused of misconduct that relates to operations or affairs of the Katonah Funds and the KKAT Companies. She is alleged to have wrongly refused to hire another competent manager

for the Katonah Funds, thereby leaving the Funds with only one qualified key-person. She is charged with misusing confidential information of both the KKAT Companies and the Funds, including information regarding the accounts of Katonah Fund investors and investment strategies used by the Funds.

Although the KKAT Companies would like me to read their Operating Agreements as including a requirement that any claim relating to the KKAT Companies and the Funds involve a claim for damages by those entities or one of their investors, the Operating Agreements do not contain any limiting language of that kind. That type of more limited indemnification would have been easy to draft and would have been crafted in far less expansive terms than were used in the Operating Agreements.

In other words, this 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. But it 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. Rather, it is the court's job to enforce the clear terms of contracts. Here, that duty requires that DeLucca's motion for judgment on the pleadings as to her entitlement to advancement be granted.

In this opinion, I reject the other arguments of the KKAT Companies against DeLucca's motion and also find that she is, per the teaching of *Stifel v. Cochran* and its

progeny,[3] entitled to an award of fees on fees. The amount of past expenses she is owed is an issue for later determination.

I. Factual Background

A. The Relationships Among DeLucca, Kohlberg, The KKAT Companies, And The Katonah Funds

Unfortunately, resolving this dispute requires an explanation of the relationship among a series of affiliates of Kohlberg, which is the eponymous creation of its controlling person, James Kohlberg. Allegedly, Kohlberg has a variety of business interests. This case focuses on only one: the interest of Kohlberg connected to the Katonah Funds.

Kohlberg sought to make money in two ways from the Katonah Funds, which are structured investment funds specializing in collateral debt obligations that were each established by it and DeLucca.

First of all, Kohlberg sought to receive fees for acting as the investment manager of the Katonah Funds. To that end, Kohlberg established Katonah itself and owns a controlling interest in that firm. Katonah was the entity that was a party to the Fund Services Agreements ("FSAs")[4] regarding the Katonah Funds and made the investment decisions for the Funds. DeLucca was employed, beginning in late 1999 or early 2000, as a Portfolio Manager and Managing Principal of Katonah. The parties do not dispute that DeLucca was critical to the success of the Funds, as she was the principal face to the

[3] *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) (hereinafter, "*Stifel*"); *Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *7 (Del. Ch. Jan. 30, 2004); *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178, 181-3 (Del. Ch. 2003).
[4] The actual agreements entered into by the parties have a variety of names.

Funds' investors and the sole key-person under the FSAs. Indeed, as we shall see, it was DeLucca's uniquely important role at the Funds that in large measure ultimately inspired the events giving rise to the current dispute.

The second way in which Kohlberg sought to make money out of the Funds was by investing its own cash in them. To that end, the KKAT Companies were established. Each KKAT Company was established to invest in a particular Katonah Fund.[5] Kohlberg is the principal owner and investment manager of each of the KKAT Companies. James Kohlberg is their Managing Member. In connection with her employment at Katonah, DeLucca became a Member of and contributed capital to each of the KKAT Companies.

Distilled down, then, DeLucca was the Managing Member of Katonah. Katonah was the entity that served as the portfolio manager for each of the Katonah Funds. Meanwhile, the KKAT Companies were investors in the Katonah Funds. A majority of Katonah and the KKAT Companies is owned by Kohlberg, which was in turn controlled by James Kohlberg.

B. The New York Action

The New York Action for which DeLucca seeks advancement of her defense costs was filed by Kohlberg and Katonah as plaintiffs. In the New York Complaint, a claim is also asserted on behalf of the KKAT Companies by Kohlberg and Katonah through authority delegated by James Kohlberg, who is authorized to prosecute claims as its Managing Member. The following recitation drawn from the New York Complaint

[5] KKAT Management is an exception. It was established to act as the general partner in KKAT Acquisition. All parties agree that exception is immaterial here.

summarizes the conduct that DeLucca allegedly engaged in that gave rise to the claims against her in the New York Action.

According to that Complaint, the dispute between DeLucca and her former employer arises out of apparent success. By 2003, there were six Katonah Funds. Kohlberg became concerned that the managerial ranks at Katonah were too thin to responsibly manage the Funds. As things stood, DeLucca was the sole "key-person" at Katonah designated under the terms of the FSAs between Katonah and the Katonah Funds.[6] In the event that she became incapacitated or left Katonah's employment, the Katonah Fund investors in all but one of the Funds would have the ability to terminate the FSAs for cause unless an approved replacement was proposed by Katonah within a specified time period and was not objected to by a majority of the investors. Kohlberg sought to remedy this vulnerability. Under the terms of the FSAs, Katonah was provided sixty days to propose a replacement for DeLucca that was acceptable to the investors, and the investors were not permitted to unreasonably withhold their approval.[7] But, if a certain number of investors objected, a default would result that would allow the trustees of the Katonah Funds to appoint a new fund manager.

Therefore, Kohlberg suggested that Katonah add a second key-person with strong portfolio management capabilities. DeLucca was given the responsibility of conducting

[6] The FSAs for Katonah Funds I, III, IV, V, and VI contained provisions allowing for termination of the FSA if DeLucca left Katonah for specified reasons and no adequate replacement was hired. These termination provisions have been termed "key-person provisions" in this litigation.

[7] These were the "key-person provisions" for Katonah Funds III, IV, V, and VI. The terms in the FSA for Katonah Fund I differ slightly, providing 30 days and not placing limits on investors withholding approval. The FSA for Katonah Fund II does not have a key-person provision.

the search for this key-person. According to the New York Complaint, DeLucca "failed to search for anyone."[8] In the summer of 2004, Katonah and Kohlberg informed DeLucca that if she failed to begin a search, then they would conduct the search without her. DeLucca retained a personnel search firm but interviewed none of the candidates identified by the firm. She formally suspended the search in December 2004.[9]

The basic premise of the New York Action is that DeLucca "secretly formulated and attempted to implement a scheme to seize control of Katonah's assets for her own benefit"[10] and subsequently resigned from Katonah, creating a risk of a default that would allow the Katonah Funds to replace Katonah as investment manager. This scheme allegedly began shortly after Katonah and Kohlberg expressed dissatisfaction with DeLucca's search in the summer of 2004. Her first action in furtherance of this scheme was an alleged "economic equivalent of a demand for the surrender of Katonah's assets."[11] In November 2004, Katonah and Kohlberg allege that she issued an ultimatum in the form of alternative ways to run Katonah, all of which would have enhanced her control over Katonah and some of which would have required major additional capital investments by Kohlberg. Kohlberg rejected the alternatives.

During this same period in 2004, Katonah and Kohlberg were approached by two entities interested in purchasing Katonah. Because of its frustration with DeLucca, Kohlberg was interested in the possibility of extricating itself from involvement with the

[8] NY Compl. ¶ 6.
[9] NY Compl. ¶ 36.
[10] NY Compl. ¶ 3.
[11] NY Compl. ¶ 37.

Katonah Funds. Katonah therefore entered into confidential negotiations with the prospective buyers and ultimately forged a letter of intent involving a possible sale of Katonah for approximately $40 million. Consistent with the objective of selling, Kohlberg informed DeLucca that she and the other Katonah employees should focus on negotiating their employment deals with the prospective buyers. DeLucca met with the prospective buyers on three occasions. But, she allegedly interfered with the ability of other Katonah employees to meet with the prospective buyers by canceling a meeting with the prospective buyers and then establishing conditions for meetings between the prospective buyers and Katonah employees. DeLucca purportedly also made disparaging remarks to the employees and others about the consequences of the proposed sale of Katonah. The sale of Katonah ultimately fell apart, and the prospective buyers terminated their letter of intent with Kohlberg in February 2005.

Katonah and Kohlberg further allege that DeLucca went much further than simply scuttling the sale of Katonah. During the period when she was thwarting the sale, DeLucca also is alleged to have plotted to form a venture that would compete with Katonah and —worst of all — usurp Katonah's place as manager of its own babies, the Katonah Funds. To accomplish this end, DeLucca supposedly shared confidential and proprietary information with a third-party while she was "sitting at her desk in Katonah's offices."[12] This information included Katonah's income, management fee estimates, cash flow data, employee salaries, business plans and budgets, and interest accrued on Kohlberg promissory notes. The third party with whom she shared this information

[12] *Id.*

ultimately provided financial support for her competing venture, Kingsland. To further support her desire to start her own asset management firm, DeLucca allegedly approached a group of Katonah employees to gain their support, having already discouraged them from forging a relationship with the party to which Kohlberg wanted to sell Katonah.

Eventually, on January 25, 2005, DeLucca resigned from Katonah without notice. Shortly after her resignation, six other Katonah employees followed suit. In the wake of her resignation, Katonah alleges that DeLucca made offers to all Katonah employees to join Kingsland, her new firm. DeLucca's resignation created the risk of a key-person default under the terms of the FSAs between Katonah and the Funds.

Katonah further alleges that DeLucca began to solicit Katonah Fund investors, which she was able to do as a result of her access to confidential Katonah information. Through her employment at Katonah, she was privy to certain non-public information, including key investor contacts and the terms under which investors invested in the Katonah Funds. Additionally, Katonah alleges that DeLucca has misused other Katonah trade secrets in the operation of Kingsland, including information about the quality of Katonah Fund investments made, the results of proprietary research and analysis, and Katonah's credit models that are used to project risk in investment opportunities. Not only that, the New York complaint alleges that DeLucca misused information of the KKAT Companies in violation of the terms of the Operating Agreements of each of the KKAT Companies — a violation that James Kohlberg, as Managing Member of the KKAT Companies, authorized Katonah and Kohlberg to assert.

The New York Complaint pleads several specific counts, styled as "Causes of Action" in apparent New York parlance, against DeLucca arising out of this course of conduct:

- Count One alleges that DeLucca breached confidentiality agreements with Katonah and the KKAT Companies.

- Count Two alleges that DeLucca breached her contractual obligations to Katonah by engaging in competing activities while still employed at Katonah.

- Count Three alleges that DeLucca's course of conduct violated fiduciary duties she owed to Katonah and Kohlberg.

- Count Four alleges that DeLucca misappropriated trade secrets, including the terms under which investors participate in the Katonah Funds.

- Count Five alleges that DeLucca tortiously interfered with Kohlberg's and Katonah's prospective relationship with the party to which they were seeking to sell Katonah and has more generally injured their ability to sell Katonah.

- Finally, Count Six alleges that DeLucca tortiously interfered with Katonah's and Kohlberg's relationship with the investors in the Katonah Funds.

Although the New York Complaint does not seek damages on behalf of investors in the Katonah Funds, it does make the following relevant allegations:

- "Kohlberg is the . . . largest investor in the Katonah Funds."[13]

- "In flagrant breach of her contractual and fiduciary duties to Katonah, and Katonah's investors, and Kohlberg, DeLucca has secretly formulated and attempted to implement a scheme to seize control of Katonah's assets for her own benefit."[14]

[13] NY Compl. ¶ 2.
[14] NY Compl. ¶ 3.

- "Katonah and Kohlberg, the largest investor in the Katonah Funds . . . came to believe that adding an additional key-person was in the best interests of all Katonah investors, because this addition would provide greater stability and continuity in the management of the Katonah Funds. [They], therefore, asked DeLucca to conduct a search for a portfolio manager or assistant portfolio manager of sufficient stature to be approved by Katonah investors as a second key-person . . . ."[15]

- "DeLucca's assault on Katonah is also impeding Katonah's ability to attract a high quality portfolio manager suitable to serve as the new contractually designated key-person and to attract supporting staff to replace the defectors who followed DeLucca out of the firm. DeLucca's scheme is thus contrary to the interests of the investors in Katonah's Funds."[16]

- "DeLucca's [refusal to hire a new key-person was intentional because she] had plans to use that leverage . . . to take control of Katonah's assets, and that plan took priority over her duties to Kohlberg, Katonah, and the investors in the funds managed by Katonah. Rather than lose her opportunity to take control, DeLucca simply failed to execute the task she had been assigned by senior management, placing her personal interests ahead of her duties to Kohlberg, Katonah and investors in the funds managed by Katonah."[17]

It also bears repeating that the New York Complaint specifically alleges that DeLucca misused information regarding the Katonah Funds. This information allegedly included, among other things, the identity of and terms of investment by Fund investors, the nature and quality of investments made by the Funds, and the results of proprietary research done for the Funds by Katonah.

II. Procedural Framework

This matter is before me now on cross-motions for judgment on the pleadings. DeLucca argues that the plain language addressing advancement in the Operating

[15] NY Compl. ¶ 5.
[16] NY Compl. ¶ 13.
[17] NY Compl. ¶ 34.

Agreements of the KKAT Companies entitles her to advancement of her reasonable costs in defending the New York Action. The KKAT Companies argue just the opposite, that the Operating Agreements clearly foreclose DeLucca's advancement claim.

The procedural framework for addressing these motions is familiar. Advancement cases are particularly appropriate for resolution on a paper record, as they principally involve the question of whether claims pled in a complaint against a party (such as the New York Complaint against DeLucca) trigger a right to advancement under the terms of a corporate instrument (such as the Operating Agreements of the KKAT Companies).[18] And although advancement provisions in corporate instruments often are of less than ideal clarity, rarely is resort to parol evidence appropriate or even helpful, as corporate instruments addressing advancement rights are often crafted without the involvement of the parties who later seek advancement and often with little negotiation between any contending parties at all. Those factors are not problematic, however, as they tend to reinforce the legal policy of this State, which strongly emphasizes contractual text as the overridingly important guide to contractual interpretation.[19]

On this motion under Rule 12(c), that means I must examine closely the terms of the Operating Agreements that were incorporated by reference into DeLucca's

[18] *Weinstock v. Lazard Debt Recovery GP, LLC*, 2003 WL 21843254, at *2 (Del. Ch. Aug. 8, 2003) ("[a]s in most advancement disputes . . . the relevant question turns on the application of the relevant terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought").

[19] *See, e.g.*, *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003) ("[u]nder standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract"); *City Investing Co. Liquidating Trust v. Continental Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993) ("If a writing is plain and clear on its face . . . the writing itself is the sole source for gaining an understanding of intent"); *Demetree v. Commonwealth Trust Co.*, 1996 WL 494910, at *3-4 (Del. Ch. Aug. 27, 1996).

complaint.[20] Under Delaware law, the "proper interpretation of language in a contract, while analytically a question of fact, is treated as a question of law both in the trial court and on appeal,"[21] and "judgment on the pleadings . . . is a proper framework for enforcing unambiguous contracts."[22] I will "initially focus solely on the language of the contract itself,"[23] and if the contract language in dispute is unambiguous, then its "plain meaning alone dictates the outcome."[24] For the reasons I have mentioned, the existence of ambiguity in the advancement context usually has a different consequence than in a situation when the court is trying to interpret a bilaterally negotiated commercial contract. Here, for example, neither of the parties suggests that useful parol evidence exists anywhere, and, further, neither of the parties argues that the contract language is ambiguous.

Moreover, another interpretative principle comes into play. Delaware has a strong public policy in favor of assuring key corporate personnel that the corporation will bear the risks resulting from performance of their duties on the grounds that such a policy best encourages responsible persons to occupy positions of business trust, so Delaware courts have read indemnification contracts to provide coverage when that is reasonable.[25]

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[20] *See McMillan v. Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000); *In re Lukens Inc. Shareholders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999).
[21] *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991) (citation omitted).
[22] *Paxson Comm.*, 2005 WL 1038997, at *5.
[23] *Chambers v. Genesee & Wyoming, Inc.*, 2005 WL 2000765, at *5 (Del. Ch. Aug. 11, 2005).
[24] *Id.*
[25] *Perconti*, 2002 WL 982419, at *3. *See, e.g.*, *VonFeldt v. Stifel Financial Corp.*, 714 A.2d 79, 84 (Del. 1998) (disregarding an attempt to narrowly construe DGCL § 145).

III. Legal Analysis

As will be discussed next, this advancement dispute differs from those that typically arise under the Delaware General Corporation Law ("DGCL").[26] In § 145 of the DGCL, corporations are authorized to "indemnify any person who was or is a party or is threatened to be made a party . . . by reason of the fact that the person is or was a director, officer, employee, or agent of the corporation." Corporate charters and bylaws providing for indemnification and advancement rights therefore have tended to track the statute and often hinge the right to advancement on whether a corporate officer is being sued by reason of the fact that she took action in her official corporate capacity. Several recent decisions of this court dilated on the meaning to be given to provisions of that sort, a line of cases that was recently affirmed in the Supreme Court's decision in Tafeen.[27]

Here, however, DeLucca is claiming a right to advancement under the Operating Agreements of limited liability companies, the KKAT Companies. The Operating Agreements of the KKAT Companies that I will now discuss do not employ the same "by reason of the fact . . ." provisions as were at issue in *Tafeen* and its predecessors. The basic task of the court is, however, the same as in a corporate advancement case.

I must determine: 1) whether DeLucca is within the class of persons who are generally covered by the Operating Agreement's advancement provisions; 2) whether she has suffered losses of the kind that are generally eligible for advancement; and 3) whether those losses were incurred in connection with a legal proceeding for which advancement

[26] 8 *Del. C.* § 101 *et seq.*
[27] *See, e.g.*, *Reddy*, 2002 WL 1358761; *Perconti*, 2002 WL 982419.

is due her under the Operating Agreements. The contractual provision to which that three-part analysis applies is § 4.4 of the Operating Agreements[28] and reads in pertinent part as follows:

> The Company shall, to the full extent permitted by applicable laws, indemnify and hold harmless each of the Indemnified Persons from and against any and all Losses to which such Indemnified Person may become subject . . . in connection with or arising out of or related to: (A) this Agreement or the operations or affairs of the Company or the Target Company; or (B) the operations or affairs of the Investment Manager to the extent that such Losses are attributable to the Company or the Target Company or their respective operations or affairs; in each case, whether or not an Indemnified Person continues to serve in the capacity giving rise to its or his or her status as an Indemnified Person at the time any such Losses are paid or incurred; provided, that the foregoing indemnification shall not include or apply to the extent that any Losses are determined by a final decision . . . of a court . . . to have resulted from the fraud, gross negligence or willful violation of law of or by such Indemnified Person. In the event that any Indemnified Person becomes involved in any capacity in any action, proceeding or investigation in connection with any matter that may result in the indemnification contemplated above, the Company will periodically advance to or reimburse such Indemnified Person for its legal and other expenses . . . as incurred in connection therewith . . . []to the extent that any Indemnified Person may be entitled to indemnification with respect to any Loss, such Indemnified Person first shall be required to seek indemnification and/or insurance benefits from the Target Company before seeking indemnification from the Company pursuant to this Section 4.4.

More precisely, tracking § 4.4, I must ascertain whether: 1) DeLucca is an "Indemnified Person," 2) who has become subject to "Losses" that 3) are connected with, arise out of, or relate to the operations and affairs of the KKAT Companies or the

[28] This provision is identical in the various Operating Agreements at issue, except for the provision in the Operating Agreement of KKAT Management, which differs in a non-material way.

Katonah Funds. DeLucca and the KKAT Companies argue about each one of these issues and therefore I take them in turn.

A. DeLucca Is An Indemnified Person Under The Operating Agreements

Section 1.1 of the Operating Agreements states that "Indemnified Person . . . has the meaning ascribed thereto in Section 4.3." The pertinent portion of § 4.3 defines "Indemnified Persons" as the "Managing Member, the Investment Manager, any Affiliate . . . or any . . . director, officer, employee . . . or Affiliate of any of the foregoing Persons."

In order to accurately determine whether DeLucca qualifies as an Indemnified Person, it is important to trace the defined terms. First, in § 1.1 the "Managing Member" is defined as "James A. Kohlberg" and the "Investment Manager" is defined as "Kohlberg & Co., L.L.C." The key term "Affiliate" is defined as "with respect to any Person, any Person directly or indirectly controlling, controlled by or under common control with, such first Person."[29] Control, for the purposes of an affiliate, is "the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of Securities, by contract or otherwise."[30]

Despite the KKAT Companies' frivolous argument to the contrary, DeLucca is clearly an Indemnified Person for purposes of the Operating Agreements. By the plain words of the New York Complaint, DeLucca was Katonah's Portfolio Manager and

[29] *Id.*
[30] *Id.*

Managing Principal until her resignation. The New York Complaint thus strongly suggests that, as Managing Principal, she was also an officer, if not a director, of that LLC. In any event, DeLucca was clearly an employee of an Affiliate of Kohlberg, the Investment Manager under the Operating Agreements. The New York Complaint alleges that Kohlberg is the majority stockholder in Katonah, and Katonah therefore easily qualifies as an Affiliate of Kohlberg because of its voting control.

The KKAT Companies' argument that Katonah is not an affiliate of Kohlberg because Katonah's FSAs with the Funds placed limits on its discretion fails the straight face test in light of the plain language of the Affiliate definition in the Operating Agreements. According to the New York Complaint, Kohlberg could unilaterally decide to sell Katonah. But when seeking to avoid advancement, Kohlberg has the KKAT Companies argue to this court that Katonah is not even an Affiliate of Kohlberg. And lest the KKAT Companies disclaim responsibility for this clear inconsistency, it must be remembered that the New York Complaint asserts a claim on their behalf at the instance of Katonah and Kohlberg, which alleged that they were authorized to act in the name of the Managing Member of the KKAT Companies, i.e., in the name of James Kohlberg. In that same complaint, Kohlberg expressly identifies the KKAT Companies as being its affiliates.

Why the KKAT Companies bothered to make this argument is even less clear when one recognizes that DeLucca also qualifies as an Affiliate of their Managing Member, James Kohlberg. In their answer in this case, the KKAT Companies admitted that "Katonah is controlled directly or indirectly by James Kohlberg, a principal of

Kohlberg and the Managing Member of each of the Defendants."[31] Therefore, DeLucca is indisputably an Indemnified Person.

B. Must DeLucca Prove She Suffered Losses Before She Is Entitled To Advancement?

DeLucca, as an Indemnified Person, must have "legal and other expenses," i.e., Losses, in order to seek advancement. The KKAT Companies contend that DeLucca's legal fees have been paid by her company, Kingsland, rather than by her, and that the payment of the fees by Kingsland therefore prevents DeLucca from now seeking those fees from them. The argument advanced by the KKAT Companies is not one consistent with the policy underlying Delaware law.[32] By the plain terms of the New York Complaint, the KKAT Companies admit that Kingsland is a company owned by DeLucca. She has caused that company to bear her expenses in a situation when the KKAT Companies owed her advancement rights and is thereby suffering the economic costs of that decision.

As important, to embrace the KKAT Companies' argument would provide a perverse incentive. If a person owed advancement rights could find an affluent aunt, best friend, or other third party to front her defense costs, she would thereby forfeit her right

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[31] Answ. ¶ 3.

[32] *See Stifel*, 809 A.2d at 561 *quoting* DGCL § 145 ("[t]he 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 . . . if they are vindicated'"); *Weaver v. ZeniMax Media Inc.*, 2004 WL 243163, at *7 (Del. Ch. Jan. 30, 2004) (applying the *Stifel* indemnification language to advancement by stating the policy is intended to encourage "corporate officers to defend suits they consider unjustified without the worry of how to fund their defense"); *see also Tafeen v. Homestore, Inc.*, 2005 WL 1314782, *3 (Del. Ch. May 26, 2005), *aff'd*, 886 A.2d 502 (Del. 2005) (discussing the concern that wrongful denial of advancement by a corporation can compromise an officer or director's ability to defend herself in litigation due to cost concerns).

to seek recompense from the party that should have been advancing those costs on the grounds that she was not "out of pocket" herself even though she was obliged to repay her benefactor. That would be inequitable and reward the refusal to honor promises of advancement. The incentives for such refusal are already abundant, as the *Tafeen* line of cases well illustrates, and there is no legal or equitable justification for adding to them by embracing the KKAT Companies' present argument. To do so would encourage indemnitors to use the leverage of a denial of advancement to deprive indemnitees of appropriate legal advice, putting them under pressure to settle disputes not because of the merits, but because of doubts about whether they could obtain competent defense counsel.

C. Are DeLucca's Losses Being Incurred In Connection With Legal Claims For Which Advancement Is Owed Under § 4.4?

DeLucca rests her justification for advancement on § 4.4 of the Operating Agreements, which describes the circumstances when the various KKAT Companies will "indemnify and hold harmless each of the Indemnified Persons."

The language of § 4.4 requires the KKAT Companies to "periodically advance to or reimburse such Indemnified Person for its legal and other expenses . . . as incurred in connection" with "any matter that may result in the indemnification contemplated" earlier in § 4.4. That, of course, leads to the key question: what indemnification is contemplated? Section 4.4 contemplates indemnification for losses "in connection with or arising out of or related to: (A) [the Operating] Agreement[s] or the operations or affairs of the [KKAT Companies] or the [Katonah Funds]; or (B) the operations or affairs

of [Kohlberg] to the extent that such Losses are attributable to the [KKAT Companies] or the [Katonah Funds] or their respective operations or affairs."

DeLucca rests her claim for advancement on the plain words of § 4.4 and the New York Complaint. She points out that § 4.4 uses capacious terms in defining the scope of indemnification it grants. For starters, § 4.4 constitutes a promise to indemnify "to the fullest extent permitted by law," an expression of the intent for the promise of indemnity to reach as far as public policy will allow. Likewise, § 4.4 uses far-reaching terms often used by lawyers when they wish to capture the broadest possible universe. To wit, § 4.4 covers Losses arising out of, connecting with or simply relating to:[33]

- The Operating Agreements; **OR**
- The operations of the KKAT Companies; **OR**
- The affairs of the KKAT Companies; **OR**
- The operations of the Katonah Funds; **OR**
- The affairs of the Katonah Funds; **OR**
- The operations of Kohlberg to the extent that the loss is attributable to the KKAT Companies or the Katonah Funds or their operations or affairs; **OR**

[33] In the context of arbitration, both the Supreme Court and this court have found, on several occasions, this precise type of language to be broad in scope. *See Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002) (finding that an arbitration clause requiring the parties to submit "any dispute, controversy, or claim arising out of or in connection with" the agreement to arbitration was broad in scope); *see also CAPROC Manager, Inc. v. Policemen's & Firemen's Retirement System of the City of Pontiac*, 2005 WL 937613, at *2 (Del. Ch. Apr. 18, 2005) (finding an arbitration clause requiring "[a]ny dispute or controversy arising under [the] Agreement" to be submitted to binding arbitration was broad in scope and noting that other Delaware courts have found "arising under" language to be broad in scope); *The Town of Smyrna v. Kent County Levy Court*, 2004 WL 2671745, at *2 (Del. Ch. Nov. 9, 2004) ("there is no question that the arbitration clause found in the Agreement is broad, as it covers all claims 'arising out of' or 'related to' the Agreement").

- The affairs of Kohlberg to the extent that the loss is attributable to the KKAT Companies or the Katonah Funds or their operations or affairs.

Equally notable is the use of the broad terms "operations" and "affairs."[34] Not only that, it is not required by the language of § 4.4 that Losses connect with, arise out of, or relate to both the "operations and affairs" of the KKAT Companies or the Katonah Funds, or Kohlberg to the extent that loss was attributable to the KKAT Companies or the Katonah Funds or their respective "operations and affairs." Rather, it is sufficient that the Losses connect with, arise out of, or relate to either the "operations" or the "affairs" of either the KKAT Companies or the Katonah Fund.

From this plain text of § 4.4, DeLucca proceeds to the plain words of the New York Complaint. By any measure, she says, she is incurring Losses to defend against claims connected, arising out, of, or at the very least, related to the "affairs" of the Katonah Funds. After all, the New York Complaint alleges that she: 1) failed to hire another key-person to manage the Katonah Funds, to the detriment of its investors; and 2) misused confidential information regarding the Funds, including information regarding its investments, investment strategies, and investors. These same allegations, she also avers, would relate to the operations of the Katonah Funds. Indeed, DeLucca accurately points out that the New York Complaint is permeated with allegations indicating that her

[34] In addition to the broad scope created by "in connection with," "relating to," and "arising out of," operations and affairs are, by definition, broad terms as well. "Operation" is defined to mean, among other things, "the act or process of operating or functioning." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1233 (4th ed. 2000). "Affair" is defined even more broadly as "business dealings; a concern; a business; a matter to be attended to." THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 22 (9th ed. 1995).

entire scheme of supposedly wrongful conduct was conjured up and executed at the very time when she was on duty as the key-person at the Katonah Funds. All of the information and expertise she possessed and supposedly misused related to the Katonah Funds themselves.

Likewise, by its plain terms, the New York Complaint also contains a claim that connects with, arises out of, and relates to the KKAT Companies. Count One of the New York Complaint alleges that DeLucca's misuse of information relating to the Katonah Funds breached confidentiality obligations she owed to the KKAT Companies under their Operating Agreements. For that reason, DeLucca argues she has experienced Losses with a sufficient relation to the KKAT Companies themselves to justify advancement, especially given that the misuse of confidential information is so pervasive to all of the claims in the New York Complaint.[35]

Finally, DeLucca notes that Kohlberg, in the New York Complaint, alleges that it suffered harm as a result of DeLucca's conduct related to the operations or affairs of the Katonah Funds and the KKAT Companies. As such, she claims that she is facing losses that, at the very least, relate to the "affairs" of Kohlberg "to the extent that such Losses are attributable to the [KKAT Companies] or [Katonah Funds] or their respective operations or affairs."

[35] I also surface another connection here that raises a possible factual issue. The New York Complaint is ambiguous about whether Kohlberg's attempt to sell Katonah for $40 million also contemplated the sale of the KKAT Companies. It seems more than plausible that it did, as otherwise Kohlberg would be left investing its capital in investment funds it no longer managed. I do not so find but note it as another reason that, after discovery, advancement by the KKAT Companies might be required. Because other reasons already exist, the factual exploration of that avenue in this litigation is unnecessary.

In the face of this plain reading of § 4.4, the KKAT Companies raise two principal arguments. The first argument essentially consists in the proposition that § 4.4 cannot be read in a plain and literal manner lest an absurd result ensue. To support that argument, the KKAT Companies argue that it is a "startling proposition" that § 4.4 could be read to indemnify DeLucca against claims that she "ruined her employer by, for example, unlawfully stealing . . . information . . . or tortiously interfering with and scuttling a $40 million transaction."[36] That sort of writing, however, does not involve cogent argumentation; it simply involves an attempt to avoid the hard task of contract interpretation by smearing the party seeking indemnity. As the Supreme Court just made clear in *Tafeen*, the right to advancement does not go away simply because the entity from which advancement is sought is alleging that the plaintiff has committed perfidious acts against it. Indeed, it is precisely in the circumstance when a business official is accused of serious wrongdoing that the right to advancement is critical, as that right secures the funds for the official to defend herself.

Underneath the KKAT Companies' overheated rhetoric is a more serious, non-textual argument. They argue that § 4.4 must be read as implicitly incorporating a requirement that Losses derive from a claim of harm filed on behalf of the Katonah Funds or the KKAT Companies, or by their stockholders or members, acting as plaintiffs in that precise capacity. That is, even if a claim relates to the operations or affairs of the Katonah Funds or the KKAT Companies, DeLucca is not entitled to advancement unless the claim specifically seeks relief for those entities or their owners in that capacity.

[36] Def. Op. Br. at 26-7.

Because the New York Complaint does not seek any relief for the Katonah Funds themselves, or on behalf of the investors in those Funds in that specific capacity, the KKAT Companies say that no advancement is due to DeLucca. And, although the KKAT Companies reluctantly concede that the New York Complaint does seek relief on behalf of the KKAT Companies themselves, they argue that their claim in the New York Action is such a trifling part of that litigation that only a de minimis amount of advancement, if any at all, is actually due. In pressing this point, the KKAT Companies try to lean on jurisprudence from the corporate context that explicates what it means for a person to be sued "by reason of" her official corporate capacity.

At first blush, there is some appeal to the KKAT Companies' argument. The mind does initially recoil at the notion that the KKAT Companies could have an obligation to advance funds for DeLucca to defend herself against claims by her former employer, Katonah, and its controlling stockholder, Kohlberg, when those claims do not seek monetary damages on behalf of the Katonah Funds or the KKAT Companies. But after deeper consideration, that immediate reaction is mistaken.

Several reasons justify that conclusion. First and most important, § 4.4 is simply not written in a manner consistent with the KKAT Companies' argument. It would have been easy to make advancement contingent and available to DeLucca only in a situation when she is accused of causing injury to the KKAT Companies themselves or to the Katonah Funds. Section 4.4 is not written in that manner. Likewise, § 4.4 is not written so as only to capture claims brought against DeLucca when she was acting specifically in some official capacity on behalf of either the KKAT Companies or the Katonah Funds. It

is not necessary, then, that DeLucca be acting in her capacity at the Katonah Funds, only that the Losses have the necessary relationship to one of the named entities, such as the Katonah Funds. That is, § 4.4 recognizes that Indemnified Persons could be involved in conduct that relates to or connects with the KKAT Companies or the Katonah Funds through their employment with an Affiliate of Kohlberg, such as Katonah. That is altogether natural because it was Katonah, as an entity, and Kohlberg, as an entity, that were the investment managers of the Funds and the KKAT Companies, respectively. For that reason, both Katonah and Kohlberg fit within the definition of Indemnified Persons.

In this respect, it must be remembered that the KKAT Companies were specific purpose vehicles that invested in particular Katonah Funds. The broad rights of advancement and indemnification they provide run to James Kohlberg, Kohlberg, and Katonah, perhaps as a method for Kohlberg, which has broader interests, to concentrate its risks and costs for its overall Katonah Funds initiative in its Affiliates involved in that initiative. In that vein, it is worth mentioning that § 3.1(p) of the Operating Agreements provides James Kohlberg, as Managing Member, with the broad right to purchase insurance to cover:

> any Person individually against all claims and liabilities of every nature arising by reason of being, holding, having held, or having agreed to hold office as, a partner, member, officer, employee, agent, investment adviser or manager, or independent contractor of or consultant to the [KKAT Companies], the [Katonah Funds] or any of their respective Affiliates . . . including any action . . . that may constitute negligence . . . *whether or not* the [KKAT Companies], the [Katonah Funds] or their respective Affiliates would have the power to indemnify such Person against such liability.

Although the KKAT Companies argue that it is absurd to think that they would have promised money managers like DeLucca advancement rights in cases like this, the absurdity is not at all obvious to me. Because there might be limitations on the extent to which the Katonah Funds themselves could indemnify Katonah and its key personnel, it would have been rational for Kohlberg to provide coverage of that kind itself, through the entities whose capital it had devoted to those same Funds. By this means, Kohlberg could provide a form of self-insurance and provide protection that would help its Katonah affiliate attract quality talent. In other words, it is conceivable that Kohlberg did not want to obligate itself at the parent company level to provide indemnity and insurance to the employees of Katonah and wished to upstream the cash flow from Katonah so that Katonah itself would retain relatively little capital, and therefore used the KKAT Companies as the provider of coverage for itself and for the employees it attracted to work for Katonah. Such an approach might not be optimal — that is for businesspersons to judge — but it is certainly not irrational.

Also undercutting the absurdity argument is the protection built into § 4.4. That section is not a blank check. If, in the end, DeLucca is found liable for implementing an intentional scheme to harm Katonah and Kohlberg by intentionally breaching her contractual and fiduciary duties and by concealing her conduct from them, she will be required to repay the funds advanced to her by the KKAT Companies. Given that and the prior considerations identified, it is hardly absurd for the KKAT Companies to have promised persons like DeLucca a right of advancement when accused of misconduct relating to the affairs or operations of the Katonah Funds.

In saying so, I, of course, eschew the KKAT Companies' post-hoc approach. Instead, in addressing their absurdity contention, I consider what a rational controller of an investment fund complex might have believed prudent in setting up the complex. As an inducement to employment, it is not illogical for a controller like Kohlberg to promise employees of Katonah that the entities established by the controller to invest in the Katonah Funds would provide them with advancement so that they could defend themselves against charges of misconduct relating to the Funds. That would offer employees confidence that they could fairly defend against charges of misconduct relating to the Funds, but reserve to the KKAT Companies a right of reimbursement if the employee was found to have acted in a manner that disentitles her to ultimate indemnity. One cannot reasonably assess contracts such as these by adopting the after-the-fact posture of an angry employer, furious that it might have to pay the turncoat's defense, which adamantly believes that it has been betrayed by someone it trusted and rewarded.

Time and again, this court, and recently our Supreme Court in *Tafeen*, has pointed out that sage businesspersons who wish to avoid situations like this must exercise the contractual freedom afforded to them under Delaware law to delimit the circumstances in which they are obliged to advance funds to, or ultimately indemnify, employees and other officials. There is no requirement that advancement provisions be written broadly or in a mandatory fashion. But when an advancement provision is, by its plain terms, expansively written and mandatory, it will be enforced as written. Section 4.4 is such a provision and its terms encompass the claims in the New York Complaint. That Complaint alleges a concerted plan by DeLucca in which all of the conduct relates to the

affairs of the Katonah Funds. Because the improper scheme DeLucca is accused of executing is an integrated one that relies on various accusations of misconduct, all of which relate to the affairs of the Katonah Funds (e.g., refusing to hire another key-person to manage the Funds, misusing confidential information about the Fund's investors, investments, and investment strategy, and refusing to negotiate in good faith with a person who hoped to continue to employ her as the key-person for the Funds), there is no rational basis for concluding that DeLucca should not receive advancement for all of the claims against her. All of them accuse her of misconduct during office hours when her duties were to act as the key-person at the Funds.

Lastly, I must address the KKAT Companies' other argument against advancement. This consists in the proposition that the indemnification provided for in § 4.4 does not extend to direct claims filed by Kohlberg or the KKAT Companies against otherwise Indemnified Persons. The reason for this is that § 4.3 states that:

> Indemnified Persons shall not be liable to the Company, any Member or the Target Company or any . . . member . . . of any of them for any claims, damages, losses, expenses or liabilities of any nature whatsoever, including, but not limited to, legal fees and expenses (collectively, "Losses"), to which the Company, any Member or the Target Company or any . . . member . . . of any of them may become subject in connection with or arising out of or related to this Agreement or the operation and affairs of the Company or the Target Company, unless and only to the extent that it is determined by a final decision . . . of a court . . . that such Losses resulted from the fraud, gross negligence or willful violation of law of or by such Indemnified Person . . . .

According to the KKAT Companies, DeLucca can only receive indemnification under § 4.4 if the claims against her fall within the liability exclusion of § 4.3. Candidly, I cannot grasp the KKAT Companies' argument because, frankly, it does not have any

foundation in the text of the Operating Agreements. The only dependence of § 4.4 on § 4.3 is in the definition of Losses, which simply refers to the terms "claims, damages, losses, expenses or liabilities of any nature, whatsoever, including, but not limited to, legal fees and expenses . . . ." By using the defined term Losses, § 4.4 does not limit an Indemnified Person to receiving advancement or indemnification only for Losses incurred in connection with Losses covered by the liability exclusion of § 4.3. Rather, § 4.4 plainly grants advancement and indemnification for Losses to which an Indemnified Person becomes subject that fit within the categories in § 4.4(A) and § 4.4(B).

That § 4.3 and § 4.4 might provide overlapping protections to Indemnified Persons as to certain classes of claims does not mean that § 4.4 should not be given the independent significance its own words clearly contemplate. Rather, it appears that the drafters of the Operating Agreements sought to give the broadest possible protection to Indemnified Persons by according them both immunity from certain liability claims made by entities and persons within the Kohlberg family of entities, by promising broad indemnification rights in an even larger classes of disputes, and by authorizing the KKAT Companies to purchase insurance to cover Indemnified Persons for an even broader universe of possible claims. Had the drafters intended to make the indemnity rights granted by § 4.4 of the Operating Agreements precisely co-extensive with the liability immunity rights granted in § 4.3, they would have said so. They did not.

For all these reasons, I conclude that DeLucca is an Indemnified Person who is incurring Losses that qualify for advancement under § 4.4.

D. Was DeLucca Required To Seek Advancement From The Katonah Funds Before Seeking Advancement From The KKAT Companies?

Based on § 4.4 of the Operating Agreements, the KKAT Companies allege that DeLucca was required to seek advancement from the Katonah Funds before looking to the KKAT Companies. In pertinent part, § 4.4 provides: "To the extent that any Indemnified Person may be entitled to indemnification . . . such Indemnified Person first shall be required to seek indemnification . . . from the Target Company . . . ."

The problems with this argument are two-fold. First, although the subject of advancement is dealt with in § 4.4, which deals generally with indemnification, advancement is generally considered to be "legally quite distinct."[37] The terms of § 4.4 do not conflate the right to ultimate indemnification and the right to advancement in a clear manner that obligates DeLucca to first seek advancement from the Katonah Funds or from an insurance policy before looking to the KKAT Companies. Moreover, because of the time-sensitive nature of the advancement right, and the distinctive nature of that right from the right of ultimate indemnity, one would expect there to be explicit language expressing the duty of a party otherwise entitled to advancement to look to other sources first.

Second, the KKAT Companies have not cited to any provision of the relevant instruments of the Katonah Funds suggesting that they provide DeLucca with a right to

[37] *Advanced Mining Sys. v. Fricke*, 623 A.2d 82, 84 (Del. Ch. 1992) (". . . I consider indemnification rights and rights to advancement of possibly indemnifiable expenses to be legally quite distinct types of legal rights"); *see also Kaung*, 884 A.2d at 509-10 ("[w]hile the rights to indemnification and advancement are correlative, they are still discrete and independent rights . . .").

advancement. I have little doubt that DeLucca would be happy to receive advancement from the Funds if Katonah wishes to provide it to her because there is a legal requirement for the Funds to do so. Having provided no basis for me to believe that DeLucca had a rational justification for seeking advancement under the Funds' governing instruments, the KKAT Companies are not entitled to defer their own advancement obligation. DeLucca cannot be required to perform an act that is, from the get-go, futile.

E. Is DeLucca Entitled To "Fees On Fees" Incurred In Bringing This Action To Enforce The Advancement Provision?

In addition to seeking advancement and reimbursement of fees associated with the New York Action, DeLucca also seeks her reasonable legal fees and expenses associated with bringing this action to enforce the advancement provision. As discussed below, DeLucca is entitled to an award of fees on fees due to the success of her advancement claim.

Under Delaware law as articulated in *Stifel*, DeLucca is entitled to an award of litigation expenses for bringing this advancement action.[38] The only way out of the *Stifel* "fees on fees" award was for the KKAT Companies "to tailor their indemnification . . . to exclude 'fees on fees,' if that [was] a desirable goal."[39] The Operating Agreements clearly did not limit indemnification in the manner required by *Stifel*; in fact, § 4.4 uses precisely the expansive language used in *Stifel* — "The Company shall, to the full extent permitted by applicable laws, indemnify and hold harmless." Oddly, the KKAT

[38] *Stifel*, 809 A.2d at 561 ("Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation").
[39] *Id*. at 561-62.

Companies contend that this was not expansive, but rather limiting, language. That is simply not the case. The KKAT Companies chose to indemnify certain Persons for certain Losses "to the full extent" of Delaware law. This provision in no way suggests that without the "to the full extent" language, the KKAT Companies would somehow be indemnifying much more conduct; rather, it evinces a clear intent to extend coverage as broadly as the law allows. And, although the KKAT Companies argue that their status as LLCs counsels for not following *Stifel* here, I discern no rational basis for creating a conflict between the default rules of construction between corporations and LLCs on this question, which arises regularly in both contexts.

The KKAT Companies also argue that an award of fees on fees is dependent upon the outcome of the New York Action, which indicates a fundamental misunderstanding of the nature of this action to enforce the advancement provision. The pertinent question now is not whether DeLucca may later be found to have engaged in fraud, gross negligence or willful conduct that would require her to return advanced funds, but rather whether she has succeeded in this action by demonstrating that the KKAT Companies denied her advancement to which she was entitled. The merits of the underlying New York Action are irrelevant to whether fees on fees must be awarded here and now.[40] She is entitled to indemnification for fees on fees by proving her entitlement to advancement

[40] *Weinstock*, 2003 WL 21843254, at *7.

in this litigation.[41] Therefore, an award of fees on fees will be complete at the end of the advancement litigation.

IV. Conclusion[42]

For the foregoing reasons, DeLucca's motion for judgment on the pleadings as to her entitlement to advancement and fees on fees is GRANTED, and the KKAT Companies' motion is DENIED. The parties shall meet and confer within the next thirty days in a good faith attempt to determine the amount of Losses that DeLucca has reasonably incurred and to establish an efficient procedure for ongoing advancement. Delaware counsel shall be directly involved in that process. In the event that the parties cannot reach agreement — which should be unlikely if the subject is approached with rational and objective business and legal judgment — the parties shall report to the court on their proposal for how the remaining disputes should be resolved. IT IS SO ORDERED.

[41] *Stifel*, 809 A.2d at 561; *see also Kaung*, 884 A.2d at 509; *Fasciana v. Electronic Data Systems Corp.*, 829 A.2d 178, 179 (Del. Ch. 2003).

[42] The KKAT Companies have raised a frivolous defense of laches. DeLucca sought advancement within three months of the filing of the New York Action. Moreover, the KKAT Companies have prematurely questioned the reasonableness of some of the legal expenses incurred by DeLucca. That subject is for later proceedings. In that regard, the KKAT Companies should be cautious about nitpicking reasonable tactical choices made by DeLucca's counsel in the New York Action. Unless they can show that those choices are unmistakably unreasonable, in the sense that they involve clear abuse, the KKAT Companies should be chary about raising concerns. To the extent that they press such arguments, discovery into the fees and expenses incurred by them and their affiliates in the New York Action and in this case will be permitted.