



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTHEASTERN AVIATION
CORP.,

Defendant Below,
Appellant,

v.

FRED L. PASTERNAK,

Plaintiff Below,
Appellee.

No. 192,2019

On appeal from the Court of
Chancery of the State of Delaware,
C.A. No. 12082-VCMR

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

This litigation arises out of Fred Pasternack's ("Pasternack"), failure to adhere to federal drug testing regulations governing all pilots operating in defined public safety positions. As a result of Pasternack's failure to comply, the Federal Aviation Administration (the "FAA") revoked Pasternack's pilot's certificate. (A175). Pasternack subsequently instituted a lengthy legal battle in his personal capacity to challenge the FAA's revocation of his individual certificate. (A175–76).

Eight years after the initial drug test (the "Drug Test"), and nearly two years after resolution of the FAA proceedings, Pasternack filed suit in the Court of Chancery of the State of Delaware, seeking to compel Northeastern Aviation Corp. ("Northeastern"), to indemnify him pursuant to its bylaws (which allow for indemnification to the extent permitted by the Delaware General Corporation Law) for the six years of litigation in which Pasternack engaged, in his individual capacity, regarding the revocation of his own pilot's certificate. *See* Ex. 1, Mem. Op. at 20. (A166; A173–77).

On March 8, 2018, the trial court entered the parties' Joint Pretrial Stipulation and Proposed Order. (A163–A222). In the Pretrial Stipulation, and during the pendency of litigation, Northeastern argued that Pasternack was not entitled to the indemnification he seeks under § 145(a) of the Delaware General Corporation Law, which provides:

A corporation shall have power to indemnify any person who was or is a party...to any...action, suit or proceeding...**by reason of the fact that the person is** or was a director, officer, **employee or agent of the corporation**...against expenses...actually and **reasonably incurred** by the person in connection with such action, suit or proceeding **if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation**....

8 *Del. C.* § 145(a) (emphasis added). (A203–16).¹ Specifically, Northeastern asserted that indemnification is not available because: (1) Pasternack was not acting as an employee or agent of Northeastern in failing to comply with the federal drug testing regulations; (2) Pasternack did not submit to the Drug Test or challenge the FAA’s revocation of his individual pilot’s certificate by reason of his relationship with Northeastern; (3) Pasternack’s actions were in opposition to Northeastern’s best interests; (4) the claim for indemnification was barred by the doctrine of laches; and (5) because Pasternack is not entitled to indemnification, fees on fees are not awardable. (A203–16; A388–A443).

On March 15–16, 2018, Northeastern presented trial testimony from multiple witnesses to support that Pasternack was not entitled to indemnification in this case. (A223–324). Following the conclusion of trial, the parties submitted post-trial briefing. (A325–443). On November 9, 2018, the trial court issued a Memorandum

¹ Pasternack seeks indemnification under 8 *Del. C.* § 145(a) in connection with his status as an employee or agent of Northeastern. He has not asserted a claim in his capacity as an owner of the company. Ex. 1, Mem. Op. at 29, n.153. (A180–82).

Opinion, finding in favor of Pasternack on the basis that Pasternack was acting as an agent of Northeastern, without reaching the issue of whether he was an employee of the company (the “Memorandum Opinion”). *See* Ex. 1. In reliance on the Memorandum Opinion, on April 8, 2019, the trial court issued a Final Order & Judgment, awarding both indemnification and fees on fees (the “Order”). *Id.*

As set forth herein, Northeastern respectfully submits that the trial court wrongly determined that Pasternack is entitled to indemnification, and improperly granted Pasternack an award of fees on fees in addition to indemnification damages. Northeastern respectfully avers that the lower court’s conclusions constitute factual and legal error, and therefore, should be reversed.

SUMMARY OF ARGUMENT

1. Indemnification is not warranted because Pasternack was not acting as an agent under 8 *Del. C.* § 145(a). Pasternack was not acting on behalf of Northeastern in appearing for and leaving the Drug Test early. The trial court’s award of indemnification fails to recognize that Pasternack appeared for the Drug Test to maintain his individual license. He could not—and did not—legally carry out any duties within the scope of his relationship with Northeastern at that time, nor was he extending any authority on behalf of Northeastern or otherwise acting as an agent of Northeastern.

2. Indemnification is not available because Pasternack’s actions were not carried out “by reason of” his relationship with Northeastern pursuant to 8 *Del. C.* § 145(a). Under § 145(a), indemnification may be permitted only when the individual is “a party to a proceeding by reason of the fact of [his] corporate position.” *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 213 (Del. 2005) (citing *Perconti v. Thornton Oil Corp.*, 2002 Del. Ch. LEXIS 51 (May 3, 2002)). Pasternack fails to establish a causal nexus between the FAA proceedings and his corporate function because he was not acting as an agent on behalf of Northeastern in his refusal to test, he exercised his own autonomy in his refusal to test, and he pursued the FAA’s revocation of his pilot’s certificate in his individual capacity, not “by reason of” his relationship with Northeastern.

3. Pasternack's actions were not carried out in a manner not opposed to Northeastern's best interests, as required by 8 *Del. C.* § 145(a). As a medical physician, aviation medical examiner, and prior aviation medical review officer, Pasternack was aware of the regulations governing drug testing, and what would constitute a refusal to test. However, he made the decision to leave the testing site early, and then waited nearly eight years to institute the present action. Not only did Pasternack unreasonably delay in asserting a claim for indemnification, but he failed to mitigate his damages in failing to attempt to resolve his matters without extensive proceedings, in which Northeastern could have aided, had it had a recognized interest by way of knowledge of a possible future claim for indemnification. Pasternack sought indemnification only as an afterthought, and had no interest of Northeastern in mind.

4. Pasternack's claim for indemnification should be barred by the doctrine of laches, which is "an equitable principle that operates to prevent the enforcement of a claim in equity where a plaintiff has delayed unreasonably in bringing suit...." *Gen. Video Corp. v. Kertesz*, 2008 WL 5247120, at *30 (Del. Ch. Dec. 17, 2008). Pasternack sat on his rights and waited nearly eight years to raise his claim. Northeastern has been prejudiced by its lost opportunity to participate in a meaningful way in the underlying proceedings, which could have reduced litigation

costs and fees to the point where the parties may not have chosen to proceed with trial. Therefore, his claims should be barred by the equitable doctrine of laches.

5. Pasternack is not entitled to indemnification, and therefore, fees on fees are not awardable. *See, e.g., Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 184 (Del. Ch. 2003) (right to fees on fees hinges upon success in the indemnification action).

STATEMENT OF FACTS

Pasternack seeks to have Northeastern indemnify him for his personal costs associated with years of litigation regarding his own pilot's license, which was revoked by the FAA for failure to comply with federally mandated drug testing requirements. *See* Ex. 1, Mem. Op. at 19–20.

Northeastern is a private aircraft charter and management company incorporated in Delaware. (A165–67). Four investors have ownership interests in Northeastern: Pasternack, Michael J. Russo (“Russo”), Francis X. Russo (“F. Russo”), and Michael A. Patti (“Patti”). (A166). Russo is the President and Director of Operations for Northeastern. (A299 at 226:20–227:24). While F. Russo, Patti, and Pasternack maintain ownership interests, unlike Russo, they do not participate in the daily operations of the company. (A304–05 at 248:19–249:6).

Northeastern operates via a staff of full time employed pilots. (A261 at 153:8–20). Northeastern also occasionally calls upon independent contractor, pay-for-service pilots to assist with filling in scheduling gaps. (*Id.*). The staff of employee pilots provide full time services, while a contract pilot has complete control over whether to ever accept a mission. (A243 at 83:7–84:4). In recent history, Pasternack acted only as a contract pilot, on an as needed basis, when he occasionally chose to accept a mission. (A236 at 56:14–22; A262 at 160:1–15).

Unlike an employed full time pilot, as a paid-for-service pilot, Pasternack received an IRS Form 1099 and was paid per flight if he ever chose to accept an assignment. (A173; A236 at 53:4–56:18). However, at the time of the Drug Test, Pasternack was not up to date on his licensing requirements and could not accept a mission from Northeastern at all. (A235 at 49:18–50:6). In fact, Pasternack had not flown for Northeastern in approximately eight months. (A236 at 53:20–24). Instead, Pasternack worked as a full time physician in New York City. (A229 at 27:10–28:3; A261 at 155:24–156:8).

Northeastern, and all pilots flying with Northeastern and similar companies, are subject to the provisions of Part 135 of the Federal Aviation Regulations (“FAR”). (A167). Part 135 governs non-scheduled charter flights like those offered by Northeastern and other companies. (*Id.*). All pilots flying under Part 135, regardless of the company, were required to comply with certain FAA regulations, including submission to random drug testing. (A235 at 49:6–22; A237 at 59:6–9). This was a requirement imposed upon all those who wished to be eligible to fly non-scheduled charter flights. (A235 at 49:6–22; A237 at 59:6–9).

The Department of Transportation (the “DOT”) regulates the procedural aspects of the drug testing. (A168). Specifically, the DOT regulates how to conduct the drug tests, which are applicable to “safety-sensitive” transportation employees, contractors, and even volunteers. (*Id.*) (citing 49 C.F.R. § 40.1).

In accordance with the regulations, professional contract services are often provided by outside facilities to carry out the testing. (A169; A264 at 165:3–10; A248 at 101:20–102:10). ChoicePoint, a medical review officer (“MRO”), and LABCORP, a blood and urine testing laboratory, provided these types of services to Northeastern and other Part 135 companies. (A169; A248 at 101:20–102:10).

In 2007, Northeastern learned that ChoicePoint selected Pasternack for random drug testing in accordance with the federal regulations that require testing of all pilots in safety-sensitive positions under Part 135. (A256 at 134:7–135:1; A237 at 58:22–59:8). On June 1, 2007, Pasternack was notified that he had been selected by ChoicePoint for the test. (A173). Because Pasternack did not have the requisite forms available to appear for the test, he did not immediately report, and Northeastern removed his name from their list of pilots eligible to provide contract services. (A256 at 135:2–14). On June 5, 2007, Pasternack did report for the Drug Test. (A173). However, after failing to produce a sufficient sample, he left the facility early. (*Id.*). He returned at a later time and produced a sufficient sample. (A175).

Where, like here, an individual “leaves the collection site before the collection process is complete [the collector] must discontinue the collection....**This is a refusal to test.**” 49 C.F.R. § 40.193 (emphasis added); 49 C.F.R. § 40.191(a)(2) (a refusal to test occurs when one “[f]ail[s] to remain at the testing site until the testing

process is complete...). Because Pasternack initially left the facility prior to providing a sufficient sample, ChoicePoint reported Pasternack to the FAA as a “refusal to test.” (A175; A248 at 101:24–102:19). On this basis, the FAA revoked Pasternack’s pilot’s certificate. (A175).

Pasternack was subsequently involved in extensive proceedings and an appeal to the United States Court of Appeals for the District of Columbia. (A175–76). Pasternack individually hired legal counsel and pursued these proceedings independent from his relationship at Northeastern. (A175). Pasternack never requested that Northeastern contribute to or pay for his defense. (*Id.*). It was not until years later, in 2015, that he sent a letter to Northeastern demanding reimbursement for his legal expenses. (A176).

In accordance with its bylaws, which incorporate by reference Delaware law, Northeastern has maintained that it is under no obligation to indemnify Pasternack, an independent contractor who did not refuse to take the Drug Test or challenge the FAA’s revocation by reason of any employment or agency relationship with Northeastern. (A388–443). Pasternack’s pay-for-services relationship with Northeastern did not rise to a level whereby he would be entitled to the significant benefit of indemnification, particularly where he was not flying for Northeastern when he failed to comply with the testing requirements and challenged the FAA’s determination as to his individual license. (*Id.*). That others actively engaged in

carrying out employment duties have been indemnified by Northeastern for their employment-related services does not entitle Pasternack, an independent contractor pursuing litigation in his individual capacity, to receive an additional six-figure indemnification benefit from Northeastern. (*Id.*).

Here, as set forth in the post-trial briefing, the trial and record evidence reflects that Pasternack is not an employee or agent of Northeastern, he did not leave the Drug Test in his capacity as an employee or agent of Northeastern, nor was he a party to the FAA proceedings by reason of his affiliation with Northeastern.² (*Id.*). Pasternack failed to establish the requisite causal connection because he was not certified to fly at the time, nor was he carrying out a mission for Northeastern. (*Id.*). Therefore, the evidence has shown that Pasternack is not entitled to indemnification. Accordingly, Northeastern respectfully requests that this Honorable Court reverse the Memorandum Opinion and the Order, and find that Pasternack is not entitled to indemnification or fees on fees in seeking such compensation.

² “Pasternack does not argue that he was acting as an officer or director at the time of the Drug Test.” Ex. 1, Mem. Op. at 22 n.120.

ARGUMENT

I. Pasternack Was Not Acting As an Agent of Northeastern in Failing to Comply with the Drug Test Requirements

A. Question Presented

Whether the Chancery Court erred in finding that Pasternack is entitled to indemnification because he was acting as an agent on behalf of Northeastern in appearing for and failing to comply with requirements of the Drug Test. This question was preserved, as it was presented to the trial court below. *See* Ex. 1. (A203).

B. Standard of Review

The determination of whether an agency relationship existed between Pasternack and Northeastern is a question of fact, which is reviewed for an abuse of discretion. *See WaveDivision Holdings, LLC v. Highland Capital Mgmt.*, 49 A.3d 1168, 1177 (Del. 2012); *Lingo v. Lingo*, 3 A.3d 241, 234–44 (Del. 2010). Insofar as this claim of error challenges the legal conclusion that Pasternack is entitled to indemnification under 8 *Del. C.* § 145, however, the Court shall review that ruling *de novo*. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 50 (Del. 2006); *Finger Lakes Capital Partners, LLC v. Honeoye Lake Acquisition, LLC*, 151 A.3d 450, 453 (Del. 2016). “Moreover, this case presents questions of statutory interpretation, also warranting *de novo* review.” *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 557–58

(Del. 2002) (citing *Moore v. Wilmington Housing Auth.*, 619 A.2d 1166, 1167 (Del. 1993)) (applying *de novo* review to indemnification provisions).

C. Merits of Argument

Northeastern respectfully submits that the trial court erred in awarding Pasternack indemnification in this case, as Pasternack was not acting as an agent of Northeastern in failing to comply with the requirements of the Drug Test.

“An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent.” *Cochran v. Stifel Fin. Corp.*, 2000 WL 286722, at *17 (Del. Ch. Mar. 8, 2000), *aff’d in pertinent part*, 809 A.2d 555 (Del. 2002). Delaware courts have held that given the policy implications of indemnification, § 145 embraces a more restrictive agency definition than that which is imposed by general common law. *See Fasciana*, 829 A.2d at 163. In *Fasciana*, the court explained:

The public policy served by authorizing...indemnification of...officers and directors is well-settled. Without affording this protection, corporations would find it difficult to retain high-quality directors and officers, especially ones willing to make socially useful decisions that involve economic risk. By authorizing the provision of indemnity...the General Assembly sought to encourage well-qualified persons to serve as directors and officers of Delaware corporations and, in that capacity, to be willing to commit their corporations, after the exercise of good faith and care, to risky transactions that promise a lucrative economic return.

The public policy served by permitting corporations to provide advancement and indemnification rights to agents is a bit less clear....

[I]t strikes me as [] likely that the General Assembly conceived of the inclusion of agents within § 145 as having a fairly limited purpose....[W]hat is most probable is that the General Assembly believed that corporations ought to be able to extend advancement and indemnification rights to outside contractors who acted on behalf of the corporation in dealings with third parties. That is, the General Assembly intended that the term agent be used in its most traditional sense as involving action by a person (an agent) acting on behalf of another (the principal) as to third parties.

Id. at 170–71 (citing *Cochran*, 2000 WL 286722, at *16). Thus, “the policy rationale of § 145’s coverage of agents logically extends to only those situations when an outside contractor [] can be said to be acting as an arm of the corporation vis-a-vis the outside world.” *Id.*

In light of this restrictive approach, “Delaware courts understandably proceed with caution in granting...indemnification to agents in general.” *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, at *8 (Del. Ch. June 23, 2008). A person may be considered an “agent” for purposes of indemnification under 8 *Del. C.* § 145 with respect to only “those acts within the scope of the agency that are fairly said to be the actions of the principal.” *Id.* at *5 (citing *Fasciana*, 829 A.2d at 171). Essentially, Pasternack must have been acting “on behalf of” Northeastern in his interactions with a third party. *See id.* This, Pasternack did not do in failing to comply with federal regulations regarding his individual pilot’s certificate.

At the core of the trial court’s decision with respect to this issue is that ChoicePoint was acting at the direction of Northeastern in: (1) requiring Pasternack

to appear for the Drug Test; (2) resuming testing after improperly leaving the facility; and (3) reporting the Drug Test results to ensure Northeastern's compliance with federal regulations. *See* Ex. 1, Mem. Op. at 23–27. This conclusion, however, fails to recognize that: (1) Pasternack appeared for the Drug Test to maintain his individual license; (2) Pasternack could not legally carry out any duties within the scope of his relationship with Northeastern at that time; and (3) Pasternack exercised a high degree of autonomy in his initial “refusal to test.” The trial court wrongly focused solely on the front-end selection of Pasternack's name from the pool of Part 135 pilots, while overlooking the entirety of events surrounding Pasternack's individual refusal to test and subsequent challenge to the FAA's revocation of his pilot's certificate.

1. Drug Testing is Required of All Pilots to Maintain the Certifications Necessary to Operate an Aircraft for Any Part 135 Carrier

Pasternack was not required to comply with the FAA regulations because he was affiliated with Northeastern. Rather, all pilots who wished to be available to provide services to any Part 135 carrier were required to undergo drug testing. (A237 at 59:9–9).

An analogy can be drawn between the facts in this case, and the requirement that other professionals maintain their own individual licenses to practice in their respective fields. For example, an attorney is generally required to complete

continuing legal education credits to practice law. This requirement is not imposed because the attorney works for a particular firm or organization, but because the attorney wishes to practice law, in general. Likewise, as a physician, Pasternack was surely required to keep current with his medical licensing requirements so that he could provide medical services to the public at large, not specifically because he wanted to work at any one particular hospital. That requirements may be different depending upon the types of services provided, (*e.g.*, surgery vs. internal medicine, compliance vs. litigation, or non-charter vs. charter flights), does not imply that one maintains their respective license because he provides those services to a specific organization. Moreover, that an individual has only provided services to one hospital, one law firm, or one Part 135 carrier does not indicate that he maintains his license solely as a means to provide services to that entity.

Likewise, that Pasternack was required to comply with FAA regulations to maintain his individual license to fly for any Part 135 carrier does not denote that he was acting on behalf of Northeastern in submitting to the Drug Test. Indeed, had he wished to ever provide services to any Part 135 carrier, he still would have needed to comply with those requirements. Nor was Pasternack acting on behalf of Northeastern when he prematurely left the drug testing facility. *See Fasciana*, 829 A.2d at 163 (to be found an agent, individual must have been acting on behalf of the

corporation). He was not extending any authority given to him by Northeastern at all.

The revocation of Pasternack's certificates by the FAA was a distinct consequence caused by Pasternack's individual failure to comply with federally mandated requirements. Therefore, Pasternack was not acting as an agent of Northeastern pursuant to 8 *Del. C.* § 145 in appearing for and failing to adhere to the federal drug testing regulations. He was acting on his own behalf.

2. Pasternack Was Not Acting As an Agent of Northeastern Where He Legally Could Not Perform Services for Northeastern

Pasternack did not act as an agent of Northeastern with respect to the Drug Test, as he legally could not provide pilot services to Northeastern at that time. Pasternack admits that because he was not current with licensing requirements, he could not operate an aircraft for Northeastern, let alone any Part 135 carrier. At trial, Pasternack testified as follows:

Q. Okay. Could you explain to the Court what "currency" is?

A. Well, it's certain requirements that need to be fulfilled with respect to the regulations in order to be able to fly under whatever part of the regulations one is flying under....So there are various tasks and requirements that need to be fulfilled in order to be legally able to fly.

Q. And at the time of your drug testing, you were not current. Is that correct?

A. That's correct....I was not current to fly Part 135.

Q. And Northeastern is a Part 135 company. Correct?

A. Correct.

Q. So, in other words, you could not fly for Northeastern at the time of your drug test. Is that correct?

A. I could not fly for Northeastern at the time of the drug testing under Part 135.

(A235 at 49:4–50:6). In fact, he believed that because he was not current, and could not fly for any Part 135 carrier, the drug test was not applicable to him. (A237 at 60:7–15). Pasternack himself argued in response to the FAA that he was not current, and therefore, was not a “covered employee” subject to drug testing under the federal regulations. Pasternack wrote:

[T]he key element is that, at the time I was selected, I was not current and was not immediately available to perform [a safety-sensitive function]...If the individual is not immediately available, then the individual is not subject to random testing. By virtue of my noncurrency, I was not only not immediately available but also might never have been available if I were unable to successfully perform the tasks needed to regain currency.

(A012–13). In fact, Pasternack had not accepted a mission from Northeastern in the eight months prior to the Drug Test. (A236 at 53:20–24). He did not believe that he should have been in the pool given his lack of currency. (A061 at 47:4–10).

If Pasternack could not perform services within the scope of his duties as a contract pilot with Northeastern, it cannot be that his appearance for the Drug Test, and refusal to test, could be considered “acts within the scope of the agency that are

fairly said to be the actions of the principal.” *Jackson*, 2008 WL 2487256 at *5 (citing *Fasciana*, 829 A.2d at 171). Instead, Pasternack’s role was more akin to one that Delaware courts have explained is *not* included within the concept of an “agent” under § 145: one where an individual has an employment relationship with a client, but does not act on that client’s behalf in relations with a third party. *See id.* Pasternack could not—and did not—act on behalf of Northeastern. Therefore, Northeastern respectfully submits that the trial court erred in finding Pasternack an agent of Northeastern.

3. Pasternack Exercised Autonomy in His Refusal to Test

Pasternack exercised a high degree of autonomy over his actions such that he cannot be said to have been acting as an agent of Northeastern. Here, the relevant inquiry turns on whether Pasternack was acting “on behalf of” Northeastern with respect to the Drug Test. *See Jackson*, 2008 WL 2487256, at *6 (citing *Fasciana*, 829 A.2d at 163). This question of agency is “not subject to absolute rules but, rather, turn[s] on the facts of the individual case.” *Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. 1997) (quoting *Sussex County v. Morris*, 610 A.2d 1354, 1360 (Del. 1992)).

The facts of this case support that indemnification is not warranted, as Pasternack was not acting as a director of Northeastern, his relationship with Northeastern was discrete and desultory, he acted in his individual capacity in failing

to comply with the requirements of the Drug Test, and he was not acting “on behalf of” Northeastern when he prematurely left the drug testing facility and individually challenged the revocation of his personal pilot’s certificate. *See Fasciana*, 829 A.2d at 163 (to be found an agent, individual must have been acting on behalf of the corporation).

As of 2007, Pasternack had no employment agreement with Northeastern. (A038 at 24:15–20). He received a Form 1099 (as opposed to salary) related to any flight mission he chose to accept, and he was not paid to attend the Drug Test. (A040 at 26:21–24; A172–73). He did not show up to the Drug Test in uniform. He was not current, and therefore could not pilot any missions for Northeastern. (A042 at 28:13–19). He could not recall being asked in 2007 to pilot any flights of Northeastern, and unlike employee pilots, he was not assigned a specific aircraft and had full control over whether to accept a mission, without repercussions. (A042 at 28:20–22; A262 at 160:1–23; A243–44 at 81:3–87:21). At that time, he received no salary, employee, insurance, retirement, unemployment, vacation, sick day or holiday benefits. (A044 at 30:5–31:18; A238 at 61:19–23; A172–73). He was not involved in management of the company. (A099 at 85:8–20). Pasternack had no office, no email address, and no locker at Northeastern. (A238 at 64:6–16). At that time, he had not had much of a relationship with the company at all, as he was working full time as a physician in New York City, and only chose to participate in

the aviation industry—if at all—when convenient to him. (A229 at 27:10–28:3; A261 at 155:24–156:8; A236 at 53:20–24).

These factors similarly support that Pasternack was not an employee of Northeastern, although the trial court did not address this issue, despite being raised by both parties as one requiring determination. *See* Ex. 1, Mem. Op. at 27 (“Because...Pasternack acted as Northeastern’s agent at the time of Drug Test, I need not address whether Pasternack was an employee of Northeastern at that time.”).³ (A177; A203). To the extent this Court finds that remand is warranted, the trial court must face the obvious fact that Pasternack was a paid-for-services contract pilot (terms used interchangeably by the parties to signify an independent contractor relationship), and for the many reasons set forth before the trial court, he was not an employee of Northeastern. (A245 at 89:1–3; A247 at 98:24–99:2; A261 at 155:19–23; A404–15).

Ultimately, Pasternack was neither an employee nor agent of Northeastern when he appeared for the Drug Test in his individual capacity as a pilot required to comply with the federal regulations governing all those who wished to maintain the certifications necessary to provide services to any Part 135 carrier. In failing to comply with the regulations, in what amounted to a “refusal to test,” Pasternack was

³ Northeastern respectfully submits that because Pasternack is not an agent of Northeastern, the trial court’s indemnification analysis was incomplete.

not “acting as an arm of the corporation vis-a-vis the outside world.” *Fasciana*, 829 A.2d at 171. He was not extending any authority provided by Northeastern.

The policy considerations behind indemnification are not implicated by Pasternack’s independent decision to leave the testing facility to get to an appointment at the hospital with one of his medical patients. This was not a good faith, “socially useful” decision bearing on a “risky transaction[] that promise[d] a lucrative economic return” for Northeastern. *Fasciana*, 829 A.2d at 171–71. It was not a business decision regarding the interests of Northeastern at all.

Pasternack exercised his own autonomy to make a decision impacting his individual pilot’s certificates, which were ultimately revoked by the FAA, at a time when Pasternack could not provide pilot services to Northeastern. To provide indemnification to an independent contractor, who was not extending any authority of the company to a third party, would be contradictory to the policy behind indemnification in Delaware, and would serve to undermine the very reason many companies seek to incorporate in this State.

II. Pasternack's Actions Were Not Carried Out "By Reason Of" His Relationship with Northeastern

A. Question Presented

Whether the Chancery Court erred in finding that Pasternack is entitled to indemnification because he appeared for the Drug Test by reason of his agency status, despite the fact that he did not engage in the FAA proceedings by reason of his relationship with Northeastern. This question was preserved, as it was presented to the trial court below. *See* Ex. 1. (A203).

B. Scope of Review

To the extent this issue involves determinations of fact, those determinations are reviewed for an abuse of discretion. *Lingo*, 3 A.3d at 234–44. However, whether Pasternack acted “by reason of” his relationship with Northeastern “impl[ies] certain legal conclusions,” which the Court will “resolve de novo.” *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 83 (Del. 1998). “Therefore, while [the Court] must accept the factual findings of the trial court that are not clearly wrong, [the Court] will decide as a matter of law whether, on that factual record, [Pasternack] is entitled to the protections of Section 145(a) and [Northeastern’s] indemnification bylaw.” *Id.*

C. Merits of Argument

Northeastern respectfully submits that the trial court erred in finding that indemnification is warranted because Pasternack appeared for the Drug Test by reason of the fact of his agency status with Northeastern. As with the agency

determination, the trial court wrongfully associated causation with its finding that Pasternack was selected for drug testing solely because his name was in the pool of Northeastern pilots, and as a consequence of his refusal to test, he could no longer fly for Northeastern. *See* Ex. 1. According the Memorandum Opinion, but for Pasternack's relationship with Northeastern, Pasternack's refusal to test and the ensuing FAA proceedings would not have occurred. *See id.*

This analysis fails to recognize that Pasternack was not acting as an agent on behalf of Northeastern in his refusal to test, he exercised his own autonomy in his refusal to test, and that he pursued the FAA's revocation of his pilot's certificate, including his medical certificate, in his individual capacity, not "by reason of" his relationship with Northeastern. The nuanced significance of the causal connection between the FAA proceedings and Pasternack's agency status—or lack thereof—as opposed to his initial appearance for the Drug Test, is lost in the trial court's opinion.

Under § 145(a), indemnification may be permitted only when the individual is "a party to a proceeding by reason of the fact of [his] corporate position." *Homestore*, 888 A.2d at 213. It is well-established that "a 'causal connection or nexus' between the underlying proceeding and the 'corporate function or official [corporate] capacity'" is required. *Id.*

Courts "reject[] a broad-brush application of indemnification to individuals based solely on their holding a title or position enumerated in the statute." *FGC*

Holdings Ltd. v. Teltronics, Inc., 2007 Del. Ch. LEXIS 14, at *41 (Jan. 22, 2007).

To be entitled to indemnification, the subject proceeding must have been “brought as part of the claimant’s duties to the corporation.” *Id.* When the claims involve “purely the assertion of [] personal rights,” and “thus advance no interest of, or duty to [the company],” a claim for indemnification is without merit. *Id.* at *41–42. In this case, there is no causal relationship between the FAA proceedings and Pasternack’s duties with Northeastern; his involvement was purely personal.

Specifically, Pasternack did not submit to the Drug Test or leave early in his corporate capacity. Drug testing is a federal requirement for all pilots who chose to operate under Part 135, regardless of whether the pilot provides services to a specific company. (A237 at 58:22–59:1; A263 at 163:2–6; A313 at 284:5–12). The DOT requires that a random pool of individuals be set up to regulate such testing. (A255–56 at 132:15–133:3).

Pasternack appeared for the Drug Test after Northeastern notified him of the random selection by ChoicePoint because he was required to report to maintain his individual license, whether or not he chose to accept a mission for Northeastern. Despite the trial court’s finding, Pasternack had an independent requirement to complete the Drug Test if he wanted to maintain eligibility to fly for any Part 135 carrier; a failed test would result in the loss of his individual license and preclude him from providing contract services to any similar entity, which he had chosen not

to afford (and legally could not provide) to Northeastern in the eight months prior. (A237 at 58:22–59:8; A235 at 49:18–50:6).

In *Charney v. American Apparel, Inc.*, the court found that an officer did not act by reason of his employment with a company where the officer’s status was not necessary for the violations committed. 2015 WL 5313769, at *17 (Del. Ch. Sept. 11, 2015). Had the officer never been a director or employee, he still could have taken the exact same actions and exhibited the same behavior. *See id.*⁴ In *Hyatt v. Al Jazeera American Holdings*, the court further explained that the nexus required to satisfy the “by reason of” criteria exists if “corporate powers were used or necessary for the commission of the alleged misconduct....” 2016 WL 1301743, at *8 (Del. Ch. March 31, 2016).

Here, Pasternack could have presented for, and left prematurely from, any drug test had he chosen to remain eligible to fly for any Part 135 carrier. Likewise, no corporate powers were used or necessary in connection with his refusal to test. Thus, Pasternack was not a party to the FAA proceedings—which involved his own personal pilot’s certificates and medical certificate—as a result of his affiliation with Northeastern. Furthermore, it cannot be overlooked that Pasternack’s challenge to

⁴ While *Charney* is specific to contractual advancement and indemnification, the “by reason of” contract language was found to be equivalent to the phrase found in 8 *Del. C.* § 145(a). *See* 2015 WL 5313769, at *1.

the revocation was also meant to regain his ability to serve as an aviation medical examiner, a position not affiliated with his role at Northeastern. (A066 at 52:12–25).

Submission to the Drug Test was distinct from Pasternack’s limited duties with Northeastern as a contract pilot. He did not appear in any official capacity. The Drug Test did not involve any judgment or decision-making on behalf of Northeastern, which is a concern core to the policy implications behind affording indemnification to Delaware officers, directors, employees, and agents. *See Fasciana*, 829 A.2d at 170–171; *Dore v. Sweports, Ltd.*, 2017 WL 415469, at *18–19 (Del. Ch. Jan. 31, 2017) (indemnification not available for obligation that does not involve the exercise of judgment, discretion, or decision-making on behalf of the corporation).

As a contract pilot, Pasternack’s duties did not begin until he accepted a flight mission. (A247 at 98:10–16). He was not acting within the scope of a tour of duty in presenting for the Drug Test, for which he was not paid to appear. (A235 at 50:11–16). He presented to the Drug Test from the medical center he worked at, without wearing any Northeastern uniform or implying to a third party that he was acting on behalf of Northeastern. (A229 at 27:10–28:3; A238 at 64:17–21). *See Fasciana*, 829 A.2d at 171. Pasternack’s failure to involve Northeastern in the revocation proceedings, and his arguments to the FAA contesting his “covered employee”

status, reflect that Pasternack knew he was not present at the Drug Test on behalf of Northeastern. (A234 at 46:1–20).⁵

Moreover, it was not Northeastern that reported Pasternack's noncompliance to the FAA. As the MRO, ChoicePoint had control over the program and made the decision to consider Pasternack a refusal to test. (A248 at 102:2–19; A257 at 139:17–19). Northeastern had no authority over procedure or the final designation decision. Donna Schmitt, the representative for Northeastern's antidrug and alcohol program testified as follows:

Q. Do you have any authority to tell the drug testing facility how to handle a test such as Mr. Pasternack's?

A. No. They have their own procedure.

Q. Do you have any authority over or any control over the drug testing facility's administration of the drug test?

A. No.

Q. Do you have any authority to consent to the handling of Mr. Pasternack's drug tests in a particular manner?

A. No.

Q. Do you have any responsibility or authority to determine how to handle the fact that Mr. Pasternack left the facility during his drug test?

⁵ Northeastern has indemnified pilots when they were actively engaged in the scope of their services to Northeastern, *i.e.*, in connection with conducting flight missions. Pasternack was not engaged in a flight mission. Unlike the indemnified pilots, he was not flying.

A. No.

(A257 at 137:12–138:8). Likewise, although the lower court erroneously relied upon Pasternack’s testimony that Northeastern instructed LABCORP on whether it could resume testing, Peter Montemurro, who was contacted by LABCORP regarding Pasternack’s refusal to test, explained as follows:

Q. What if any control did you have over the lab?

A. None. It’s actually by design we have no control over the lab. The lab has its own purview and its own responsibilities.

Q. What if any ability do you have to tell the lab how to and when to administer drug tests?

A. None at all.

Q. What if any responsibility or ability do you have to advise the lab as to whether a pilot can come or go during a drug test?

A. None.

Q. In connection with Dr. Pasternack’s drug test, were you contacted by Dr. Pasternack or the lab when he went for the testing?

A. My recollection is that the lab is who contacted me. I don’t remember getting a call from Dr. Pasternack.

Q. And what was the nature of call from the lab?

A. The woman who called me from the lab told me that Northeastern had a pilot there for a test who was requesting to leave and return and that he had asked her to call me for permission to do that.

Q. And what was your response to that request?

A. ...At the time I really didn't know anything about drug testing requirements or the way things were, and I said that this was their area of responsibility and they should do whatever they think is appropriate and I'm not in a position to authorize anything.

(A263–64 at 164:23–166:12). It was then ChoicePoint, in its role as MRO, who deemed Pasternack a refusal to test. (A173).

While the trial court focused its analysis on the reason Pasternack first walked in to LABCORP, central to this issue is the relationship between Northeastern and the FAA proceedings. *See 8 Del. C. § 145(a)* (“A corporation shall have power to indemnify any person who was...a party...to any...proceeding...by reason of the fact that the person is or was a[n]...employee or agent of the corporation....”).

The FAA revoked Pasternack's individual pilot's certificate for failure to comply with federal regulations applying to all those who wish to maintain certification necessary to provide services to *any* Part 135 carrier. (A237 at 58:22–59:8). Northeastern had nothing to do with the proceedings; it was not independently penalized or investigated for Pasternack's refusal to submit to Drug Testing, and only Pasternack suffered consequences imposed by the FAA. (A248 at 103:4–104:20; A264 at 167:23–168:3). Pasternack appealed the FAA's revocation in his individual capacity, as a ruling against Pasternack provided no basis for the FAA to impose a penalty upon Northeastern. (A264 at 168:4–6). That Northeastern was not cited by the FAA supports the absence of an agency relationship.

Instead, Pasternack's engagement in the FAA proceedings was for purely personal reasons: to challenge the revocation of his own pilot's certificate. *See FGC Holdings Ltd.*, 2007 Del. Ch. LEXIS 14, at *41–42 (When the claims involve “purely the assertion of [] personal rights,” a claim for indemnification is without merit.”). The FAA proceedings were not initiated as a result of Pasternack's duties to the company, which began only when he accepted a flight mission. *See id.* at *41 (to be entitled to indemnification, the proceeding must have been “brought as part of the claimant's duties to the corporation”). Therefore, Pasternack cannot justify his indemnification claim under § 145, as he fails to satisfy the requisite element of causation. Accordingly, Northeastern respectfully submits that the trial court erred in granting Pasternack's request for indemnification.

III. Pasternack Did Not Act in Good Faith or In a Manner Not Opposed to Northeastern's Best Interests

A. Question Presented

Whether the Chancery Court erred in finding that Pasternack acted in good faith, or in a manner not opposed to Northeastern's best interests, where he failed to comply with the requirements of the Drug Test or disclose his intention to seek indemnification for many years. This question was preserved, as it was presented to the trial court below. *See* Ex. 1. (A204).

B. Scope of Review

While the trial court's factual findings with respect to whether Pasternack acted in good faith may involve determinations reviewed for an abuse of discretion, insofar as this claim of error challenges the legal conclusion that Pasternack is entitled to indemnification, the Court shall review that ruling *de novo*. *Lingo*, 3 A.3d at 234–44; *In re Walt Disney*, 906 A.2d at 50; *Finger Lakes*, 151 A.3d at 453; *Stifel*, 809 A.2d at 557–58 (citing *Moore*, 619 A.2d at 1167).

C. Merits of Argument

Northeastern respectfully submits that the trial court erred in finding that Pasternack acted in good faith, or in a manner not opposed to Northeastern's best interests, because Pasternack wrongfully left the initial Drug Test without complying with the applicable federal guidelines.

Pasternack seeks indemnification under § 145(a), which requires that “the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.” 8 *Del. C.* 145(a).⁶ The purpose of the good faith limitation imposed by § 145 “is in part to ensure that corporate officials do not evade the consequences of their own misconduct in such a way that they are rewarded for or encouraged to violate applicable laws and to breach their fiduciary duties to the corporation.” *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *10 (Del. Ch. July 14, 2009).

Because the good faith limitation must be satisfied as a precursor to any indemnification in this case, the level of Pasternack’s “success” is not the only relevant inquiry; Pasternack must still satisfy the prerequisites set forth by

⁶ The trial court correctly noted that Pasternack did not seek indemnification under subsection (c), which mandates indemnification of officers and directors when they are “successful on the merits or otherwise.” Ex. 1, Mem. Op. at 29, n.153 (citing *Cochran*, 2000 WL 1847676, at *2 n.6 (highlighting the amendment of § 145(c) to remove mandatory indemnification of agents)); *but see Dore*, 2017 WL 415469, at *18 (extending subsection (c) indemnification to agents when authorized to the “fullest extent of the law”) (cited recently in a footnote in *Brown v. Rite Aid Corp.*, 2019 WL 2244738 (Del. Ch. May 24, 2019), but in a different setting). Even if mandatory indemnification were available, to the extent Pasternack may now seek to argue that subsection (c) applies, that issue has been waived, as it was not pleaded or raised prior to trial. *See Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397, at *16 (argument under § 145(a), raised for the first time in post-trial briefing, was waived because it was “unfair” and “too late” to preserve the argument); *In re PNB Holding Co. S’holders Litig.*, 2006 WL 2403999, at *22 n.117 (Del. Ch. Aug. 18, 2006) (argument raised in pre-trial brief was waived because discovery was closed and the parties had already shaped trial plans).

subsection (a). *See* 8 *Del. C.* § 145(d) (indemnification shall be made upon a determination that the person “has met the applicable standard of conduct set forth in subsection[] (a)...”).

Northeastern is not blind to Pasternack’s relative success in the underlying FAA proceedings and courts’ deference to such. Rather, Northeastern is compelled to respond to Pasternack’s presentation with respect to his conduct as it relates to the equitable considerations in this case.

While the lower court relies on the fact that Pasternack was “exonerat[ed]” in the underlying proceedings, and that he testified he was unaware that his departure would be deemed a refusal to test, *see* Ex. 1, it is undisputed that Pasternack did not follow regulatory protocol in leaving the testing facility prior to providing an adequate specimen. When an individual “leaves the collection site before the collection process is complete....[t]his is a refusal to test.” 49 C.F.R. § 40.193; 49 C.F.R. § 40.191(a)(2).

The FAA regulates drug testing as part of its statutory powers in “assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.” 49 U.S.C. § 40101(d) (2004). The elaborate regulatory scheme is meant to protect the public, and Pasternack’s refusal to test conflicts with that paradigm. Pasternack’s initial refusal to test therefore, cannot be said to be in the

overall best interests of Northeastern, pilots, and other passengers in terms of the safety of the public at large.

Furthermore, despite his plea for ignorance, as a medical physician, aviation medical examiner, and prior MRO (the same role served by ChoicePoint), Pasternack was likely aware of the regulations governing drug testing and a refusal to test. (A021–22 at 7:21–8:3). However, he made the decision to leave the testing site anyway. (A234 at 48:2–4; A264 at 165:15–166:15). After the test, Pasternack never followed up with Northeastern to discuss the results or ask anyone from Northeastern to investigate on his behalf. (A245–46 at 92:22–93:3; A264 at 166:13–22). Pasternack instead waited nearly eight years to bring his claim for indemnification, which was an unreasonable amount of time, and demonstrates that he knew it was not appropriate to leave the testing facility.

Not only did Pasternack unreasonably delay in asserting a claim for indemnification, but Pasternack failed to mitigate his damages. *See Ivize of Milwaukee, LLC v. Complex Litig. Support, LLC*, 2009 WL 1111179, at *12 n.50 (Del. Ch. Apr. 27, 2009) (citing *West Willow-Bay Court, LLC v. Robino Bay Court Plaza, LLC*, 2009 WL 458779, at *4 n.25 (Del. Ch. Feb. 23, 2009) (an injured party “will not be awarded damages for any loss that could be avoided.”)). Pasternack failed to attempt to resolve his matters without extensive administrative and legal proceedings, in which Northeastern could have aided, had it had a recognized

interest by way of knowledge of a possible future claim for indemnification. Although other remedies and alternatives may have existed, Pasternack chose to pursue extensive proceedings, even if that meant going through all of the proceedings and failing to get his pilot's certificates back. (A069; A114–15 at 100–01).

Given his MRO experience and delay in seeking indemnification, it is arguable that Pasternack knew he was wrong in leaving the facility; that the administrative action was justified; and that he was not an employee entitled to receive indemnification. This reflects the common law understanding that indemnification is not available where an agent knowingly commits a wrongful act. *See* R. Franklin Balotti & Jesse A. Finkelstein, 1 DEL. L. OF CORP. AND BUS. ORG. § 4.12 (2018) (citing RESTATEMENT (SECOND) OF AGENCY § 439 (1958); 42 C.J.S., INDEMNITY § 20 (1944)).

Pasternack sought indemnification only as an afterthought. He did not have Northeastern's interests in mind, and despite his ultimate success in the FAA proceedings, his "exoneration" did not serve to protect Northeastern's interests. Because Pasternack was a contract pilot, whose services were not necessary to Northeastern (who had a roster of full time pilots), and he did not actively fly for Northeastern, Northeastern had no further interest in Pasternack's pilot's certificate.

Pasternack's level of knowledge as a former MRO and failure to mitigate his alleged damages raise the question of whether he acted in a manner not opposed to the best interests of Northeastern. Therefore, Northeastern respectfully requests that the trial court's decision be reversed.

IV. Pasternack's Claim for Indemnification Should Be Barred by Laches

A. Question Presented

Whether the Chancery Court erred in finding that Pasternack's request for indemnification was timely where he failed to reveal his intent to seek indemnification for many years. This question was preserved, as it was presented to the trial court below. *See* Ex. 1. (A204; 214).

B. Scope of Review

The Supreme Court "reviews the interpretation and application of legal precepts, such as...the doctrine of laches, *de novo*." *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013) (citing *Reid v. Spazio*, 970 A.2d 176, 180, 182 (Del. 2009)).

C. Merits of Argument

Northeastern appeals the trial court's finding that Pasternack's claim for indemnification is not barred by the doctrine of laches. "Laches is an equitable principle that operates to prevent the enforcement of a claim in equity where a plaintiff has delayed unreasonably in bringing suit to the detriment of the defendant or third parties." *Gen. Video Corp.*, 2008 WL 5247120, at *30 (quoting Donald J. Wolfe, Jr. & Michael A. Pittenger, *CORP. AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 11.05, at 11–55). Laches is characterized by the "[d]elay in the assertion of a right under circumstances that make it unconscionable

for a court of equity to lend aid to its enforcement,” “negligent and unreasonable delay,” and “inexcusable delay.” *Id.* (quoting *Scotton v. Wright*, 117 A. 131, 136 (Del. Ch. 1922); *Bovay v. H.M. Byllesby & Col*, 12 A.2d 178, 190 (Del. Ch. 1940); *Wright v. Scotton*, 121 A. 69, 72 (Del. 1923)). Indeed, equity does not “aid[.]...those who [like Pasternack,] slumber on their rights.” *Id.* (quoting *Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982)).

Delaware courts have found that laches provides an equitable basis to bar a plaintiff’s claim, even, like here, when brought within the statute of limitations. *See, e.g., Vichi v. Koninklijke Phillips Elecs. N.V.*, 62 A.3d 26, 42 (Del. Ch. 2012) (courts may apply laches where the circumstances would make the imposition of the statutory time bar unjust). The length of delay is less important than the reasons for the delay, and the Chancery Court, sitting in equity, was not bound by the legal statute of limitations, and was entitled to consider concerns of conscience, good faith, reasonable diligence, and fairness. *See Houseman v. Sagerman*, 2015 WL 7307323, at *8 (Del. Ch. Nov. 19, 2015).

In *Gen. Video Corp.*, the court found laches applicable where the plaintiffs had full knowledge of their claims two years prior to bringing suit. 2008 WL 5247120, at *30. Although the limitations period had not yet run, the plaintiffs offered no “coherent explanation” for their delay, which had led to a change in position by the defendants. *See id.* Therefore, the court determined that even if the

plaintiffs had proved their claims, they would not have been entitled to any damages.

See id.

Here, the Drug Test took place in June of 2007. (A173). Pasternack became involved in contentious proceedings over the next six years. (A175–77). Northeastern was not a party to these proceedings, and Pasternack never sought guidance or assistance from Northeastern during those proceedings, which were finally resolved in 2013. (A175–76; A245 at 91:20–92:2).

Despite defending his personal interests for nearly six years, Pasternack sat on his rights to seek indemnification for nearly an additional two years when, for the first time, he wrote a letter to Russo seeking reimbursement for his legal expenses. (A177; A234 at 48:18–23). This came without warning, as no Northeastern employee was aware that Pasternack intended to seek indemnification in the eight years prior. (A304 at 245:1–18).

During this time, Pasternack had all the information required to know that he purportedly could have a claim for indemnification if he was successful on the merits of the underlying litigation. However, he sat on his rights for almost another two years after the FAA proceedings with knowledge of all facts that form the basis of the present indemnification action. *See Quereguan v. New Castle Cty.*, 2006 WL 1215193, at *6 (Del. Ch. Apr. 24, 2006) (“a plaintiff is chargeable with such knowledge of a claim as he or she might have obtained upon inquiry, provided the

facts already known to that plaintiff were such as to put the duty of inquiry upon a person of ordinary intelligence”) (quoting *Grand Lodge of Del., I.O.O.F. v. Odd Fellows Cemetery of Milford, Inc.*, 2002 WL 31716359, at *7 (Del. Ch. Nov. 18, 2002)).

In fact, Pasternack knew for some time that he intended to file suit, as evidenced by his retention of legal counsel and unwillingness to discuss the matter with Russo before filing the Complaint. (A304 at 247:11–248:5). As in *Gen. Video Corp.*, Pasternack has offered no “coherent explanation” for this delay. 2008 WL 5247120, at *30. His delay was especially egregious in light of his ownership interest in Northeastern and knowledge that the company would be adversely affected financially by his impending—but announced or discussed—legal proceedings.

Although the trial court found no prejudice to Northeastern as a result of Pasternack’s unaccounted for lack of due diligence, Northeastern has suffered prejudice in a multitude of ways. *See Houseman*, 2015 WL 7307323, at *8 (allowing the court to consider due diligence and the “leisurely” pursuit of claim in determining whether there has been an unreasonable delay). Northeastern was prejudiced by the fact that it did not participate in the extensive proceedings related to Pasternack’s pilot’s certificate, as Northeastern did not know there was any interest to protect prior to Pasternack making his claim for indemnification. Had Pasternack raised his

indemnification claim after the initial revocation, Northeastern may have been able to exercise its expertise and corporate powers to assist in negotiations with the FAA, resulting in the possibility of avoiding the costs of an appellate proceeding. For example, Northeastern would have recommended that Pasternack explore settlement options like a short suspension prior to full reinstatement—an option Northeastern had previously been able to assist other pilots in achieving. (A270 at 189:23–191:5; A271 at 193:12–17).

Although the trial court relies on the fact that Northeastern participated in the FAA proceedings to a limited extent, this participation was brought about solely by reason of a government subpoena for testimony. Had Northeastern had knowledge of a potential interest in the underlying proceedings, Northeastern would also have had the option of supporting Pasternack by presenting witness testimony and obtaining relevant documentation, which may have obviated the need for long and drawn out proceedings, in addition to mitigating the increase in burden on Northeastern in defending the present claims.

In *Houseman*, the court determined that the “[in]ability to pursue these rights, as [it] could have, had the suit been timely brought,” resulted in unfair prejudice to the defendant. 2015 WL 7307323, at *10 (Del. Ch. Nov. 19, 2015). This was compounded by the lost opportunity to recoup litigation costs as a result of the delay.

See id. Therefore, as a matter of equity, the court determined that laches applied, and it could not allow the claim to proceed. *See id.* at *11.

Likewise, in the present action, Northeastern has been prejudiced by its lost opportunity to participate in a meaningful way in the underlying proceedings, which could have reduced litigation costs and fees to the point where the parties may not have chosen to proceed with trial. Therefore, because of Pasternack's undue delay, which resulted in prejudice to Northeastern, Pasternack's claims should be deemed time barred, and the lower court's decision should be reversed.

V. Pasternack Is Not Entitled to Fees on Fees

A. Question Presented

Whether the Chancery Court erred in finding that Pasternack is entitled to fees on fees where his underlying claim for indemnification fails. This question was preserved, as it was presented to the trial court below. *See* Ex. 1. (A217).

B. Scope of Review

Whether “fees on fees” are warranted is a question that involves application of legal precepts, which the Supreme Court reviews, *de novo*. *See Levey*, 76 A.3d at 768 (citing *Reid*, 970 A.2d at 180, 182).

C. Merits of Argument

Pasternack submits that the trial court erred in awarding indemnification in this case. For the reasons discussed herein, Pasternack has failed to establish the requisite elements of 8 *Del. C.* § 145(a). Because indemnification is not available, Pasternack is not entitled to fees on fees in connection with his claim. *See Fasciana*, 829 A.2d at 184 (right to fees on fees hinges upon success in the indemnification action). Therefore, Northeastern respectfully requests that the lower court’s decision to award indemnification, and fees on fees, be reversed.

CONCLUSION

Based on the foregoing, and the trial evidence, the record reflects that Pasternack is neither entitled to indemnification nor fees on fees. He was not an employee or agent of Northeastern acting in his official capacity when he left the Drug Test early. Pasternack brought the subsequent proceedings for purely personal reasons to protect his own individual interests and pilot's certificates. Pasternack's actions were not carried out in the best interests of Northeastern, especially in light of his unreasonable delay and failure to mitigate damages. Therefore, Northeastern respectfully requests that this Honorable Court reverse the trial Court's decision to award Pasternack indemnification and fees on fees.

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Dated: June 10, 2019

Exhibit 1



THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRED L. PASTERNAK,)
)
Plaintiff,)
)
v.) C.A. No. 12082-VCMR
)
NORTHEASTERN AVIATION)
CORP.,)
)
Defendant.)

MEMORANDUM OPINION

Date Submitted: August 17, 2018
Date Decided: November 9, 2018

Paul D. Brown, Joseph B. Cicero, and Stephanie H. Dallaire, CHIPMAN BROWN CICERO & COLE, LLP, Wilmington, Delaware; Cynthia S. Arato and Daniel J. O'Neill, SHAPIRO ARATO LLP, New York, New York; *Attorneys for Plaintiff.*

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MONTGOMERY-REEVES, Vice Chancellor.

In this case, Plaintiff, a pilot, seeks indemnification from Defendant, the aircraft charter and management company for which he flew planes. The underlying dispute for which Plaintiff seeks indemnification of legal fees and expenses arose in connection with the pilot's participation in random drug testing. The regulations governing the operations of the company require that the company submit a random selection of its pilots for drug testing. The company informed the pilot that he had been randomly selected. The pilot reported, as instructed, to the testing site and provided a sample, but the volume was insufficient to complete testing. Rather than waiting at the testing site until he could provide an adequate sample for testing, the pilot informed the drug test collector that he needed to attend an appointment but would return to complete the testing. The pilot left, and he returned a few hours later to complete the test. With the permission of the aircraft company, the collector resumed the test. The pilot's test results were negative for drugs, but the medical review officer determined that the pilot refused to take the test by leaving before the test was complete, resulting in an automatic failure of the drug test. As a result, the Federal Aviation Administration issued an emergency order and revoked the pilot's certificate to fly. The pilot challenged this finding through two levels of appeal. In the final resolution of the case, the Court of Appeals for the D.C. Circuit held that there was insufficient evidence to determine whether the collector gave the pilot

permission to leave and reversed the revocation. Thus, the pilot prevailed in his challenge.

Thereafter, the pilot sought indemnification for the legal expenses associated with those proceedings under the company's bylaws. The bylaws provide for mandatory indemnification for directors, officers, employees, and agents to the extent permitted by the Delaware General Corporation Law. Plaintiff argues that he is entitled to indemnification because he is an employee or agent of the company; his status as an employee or agent stems from his actions on behalf of the company and the company's control of those actions; he took the drug test by reason of his role as a pilot at the company; and he acted at all times in the best interest of or not opposed to the interests of the company. The aircraft company responds that it need not provide indemnification because Plaintiff (1) was neither an employee nor an agent because he was not acting in his pilot role during the drug test, (2) was not subjected to the drug test by reason of his affiliation with the company, and (3) did not act in good faith or in the best interests of the company when he prematurely left the drug test. Additionally, the company argues that the doctrine of laches bars Plaintiff's claims.

In this opinion, I hold that Plaintiff is an agent of the company, that he took the drug test by reason of his affiliation with the company, and that he acted in good faith and in a manner, at the very least, not opposed to the best interests of the

company. Thus, the company must indemnify the pilot and pay fees-on-fees, and laches does not bar Plaintiff's claims.

I. BACKGROUND

The facts in this opinion reflect my findings based on admitted allegations in the pleadings, stipulated facts, trial testimony of five witnesses, and thirty-nine documentary exhibits.¹

A. The History of Northeastern and Its Evolution

Michael J. Russo and two other individuals started Northeastern Aviation Corp. ("Northeastern" or the "Company") in December 1978.² Northeastern operated as a Delaware corporation with its principal place of business at Republic Airport in Farmingdale, New York.³ Initially, the Company leased aircraft to a single small commuter airline.⁴ Northeastern employed no pilots at that time.⁵ Fred

¹ Citations to the trial transcript are in the form "Tr. # (X)" with "X" representing the surname of the speaker. Joint Trial Exhibits are cited as "JX #." Facts drawn from the Joint Pretrial Stipulation and Order are cited as "PTO ¶ #." Unless otherwise indicated, citations to the parties' briefs are to post-trial briefs. After initially identifying individuals, I reference surnames without honorifics or regard to formal titles such as "Doctor." I intend no disrespect.

² JX 1; PTO ¶¶ II.4-.5; *see* JX 30, at NEA00035, -37, -39.

³ PTO ¶ II.3.

⁴ Tr. 11:22-12:2 (Pasternack).

⁵ Tr. 12:23-13:7 (Pasternack).

L. Pasternack joined Northeastern in November 1980.⁶ He became a stockholder, a director, and an officer of Northeastern, but Pasternack worked primarily as a medical doctor.⁷

In 1983, Northeastern's single customer went bankrupt; in response, Northeastern changed its business model and started operating as an aircraft charter and management company.⁸ As a charter flight operator, Northeastern was and is regulated under Part 135 of the Federal Aviation Administration ("FAA") regulations ("Part 135").⁹

Russo and Pasternack initially served as Northeastern's only pilots.¹⁰ But Northeastern grew during the 1980s, hired more pilots, and established a hierarchy for its staff.¹¹ In 1984, Pasternack became Northeastern's Chief Pilot, a position required by FAA regulations.¹² The Chief Pilot oversees the conduct of other pilots

⁶ JX 30, at NEA00044.

⁷ *Id.* at NEA00044, -94, -95; PTO ¶ II.1.

⁸ Tr. 12:3-16 (Pasternack).

⁹ 14 C.F.R. Pt. 135 (entitled "Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons on Board Such Aircraft"); Tr. 12:14-22 (Pasternack).

¹⁰ Tr. 15:20-16:1 (Pasternack).

¹¹ Tr. 13:7-9, 16:2-7 (Pasternack).

¹² JX 32, at FLP001463; Tr. 85:8-12 (Jordan); Tr. 150:18-22 (Montemurro); Tr. 227:1-6 (Russo).

within the company.¹³ The Chief Pilot reports directly to Russo, the Director of Operations, investigates any accident or incident, and acts as a liaison for Northeastern to the FAA.¹⁴ Pasternack remained the Chief Pilot until approximately 1987.¹⁵ After 1987, he continued to pilot flights for Northeastern, but not in the supervisory role of Chief Pilot.¹⁶ Despite Pasternack's recent service to Northeastern as a pilot and previously as Chief Pilot, no written employment agreement or agency agreement exists between him and Northeastern.¹⁷

Russo has been the President and Director of Operations of Northeastern since 1978.¹⁸ Although Russo no longer pilots flights for Northeastern,¹⁹ he actively

¹³ Tr. 21:19-20 (Pasternack).

¹⁴ JX 16, at NA000560; Tr. 84:17-85:1 (Jordan). *See generally* JX 16, at NA000560.

¹⁵ Tr. 14:1-3 (Pasternack).

¹⁶ Tr. 15:2-9 (Pasternack).

¹⁷ Tr. 61:13-23 (Pasternack); Tr. 183:9-20, 184:14-18 (Montemurro); *see also* Tr. 187:16-188:3 (Montemurro) (testifying that he was unaware of any agreement disclaiming Pasternack's employee or agency status). Similarly, in 2007, Russo did not have an employment agreement with Northeastern, despite his service to Northeastern as a pilot and as Director of Operations. Tr. 188:18-23 (Montemurro). Today, the Chief Pilot must be an employee of the company. JX 16, at NA000711 ("Tier I personnel are direct employees" of Northeastern.); Tr. 227:15-16 (Russo). The record does not show whether that was true in 1984, but because the Chief Pilot has responsibility for the conduct of other employed pilots, it seems likely that the Chief Pilot would be an employee.

¹⁸ JX 16, at NA000707; JX 30, at NEA00095.

¹⁹ Tr. 228:16-19 (Russo).

manages the Company, making a majority of the business decisions for the Company.²⁰

B. Northeastern Now

Since 1986, the ownership of Northeastern and its Board of Directors have remained unchanged.²¹ Four stockholders, including Russo and Pasternack, each own twenty-five percent of Northeastern.²² Both Russo and Pasternack serve on the Board of Directors; Russo serves as President, and Pasternack serves as a Vice President.²³

Northeastern provides two types of pilots for its charter flights.²⁴ Its pilots are either full-time pilots or “on-demand” pilots.²⁵ Northeastern assigns full-time pilots a tour of duty, which means that for a specified time (for example, twenty days²⁶)

²⁰ Tr. 233:6-9 (Russo); *see, e.g.*, Tr. 245:24-246:14 (Russo).

²¹ PTO ¶ II.7.

²² *Id.*

²³ *Id.* ¶ II.6.

²⁴ Tr. 80:17-81:2 (Jordan); *see* Tr. 85:19-86:3 (Jordan) (testifying that part of the Chief Pilot’s role is to “provid[e] a set of qualified pilots to management or charter sales in order to staff aircraft”).

²⁵ Tr. 80:17-81:2 (Jordan).

²⁶ Tr. 153:10-14 (Montemurro).

the pilot must remain fit to pilot a flight.²⁷ During that time, Northeastern requires that the full-time pilot be available for any flight Northeastern assigns to him or her.²⁸ Pilots may not drink alcoholic beverages during a tour of duty.²⁹ If a pilot becomes ill during the tour of duty, the pilot must inform Northeastern that he or she is not medically fit to fly.³⁰ Northeastern classifies its full-time pilots as employees and issues them W-2 forms.³¹ Full-time pilots receive a salary, are not paid per flight, and are not paid beyond their usual salary for compliance activities like training and drug testing.³² Northeastern provides full-time pilots benefits such as health insurance, life insurance, vacation and sick time, and paid personal days.³³

²⁷ Tr. 89:16-24 (Jordan).

²⁸ Tr. 160:24-161:6 (Montemurro). Pilot qualifications are for specific types of aircraft, and a pilot must be qualified to fly the specific aircraft used for a flight. *See* Tr. 52:22-53:3, 55:12-20, 57:8-16 (Pasternack); Tr. 234:4-8, 262:4-5 (Russo).

²⁹ JX 16, at NA000569 (“The use of intoxicants, including beer and wine, by . . . flight crewmembers, while scheduled as available for duty, is prohibited.”); *see* 14 C.F.R. § 91.17 (prohibiting pilots from consuming any alcoholic beverage within eight hours of flying).

³⁰ JX 16, at NA000568 (“Crewmembers have an individual responsibility for personal disqualification from flight status under conditions of medical deficiency All pilots are required to notify the Director of Operations of any change in their flying status.”).

³¹ Tr. 84:11-13 (Jordan).

³² Tr. 113:19-22 (Jordan); Tr. 179:2-9 (Montemurro).

³³ Tr. 94:1-15 (Jordan).

Northeastern utilizes its on-demand pilots differently. Northeastern contacts one of its on-demand pilots if it is unable to staff a flight with full-time pilots.³⁴ The on-demand pilot then may, at his or her discretion and without justification, accept or decline the assignment.³⁵ To accept the assignment, the pilot must be fit to pilot the flight.³⁶ After accepting the assignment, the on-demand pilot, just like a full-time pilot, must “comply with the regulatory requirements for that [flight]” and with Northeastern’s applicable policies.³⁷ In other words, after an on-demand pilot accepts the assignment, there is no functional difference between the full-time pilot and the on-demand pilot.³⁸ There remain, however, administrative differences; Northeastern issues each on-demand pilot an IRS Form 1099, and the pilots do not receive any employment benefits.³⁹ Northeastern pays its on-demand pilots per flight,⁴⁰ but like full-time pilots, Northeastern does not pay its on-demand pilots for

³⁴ Tr. 96:22-97:3 (Jordan).

³⁵ Tr. 97:4-6, 98:6-9 (Jordan).

³⁶ Tr. 98:13-16 (Jordan).

³⁷ Tr. 98:13-23 (Jordan); Tr. 163:7-11 (Montemurro).

³⁸ Tr. 99:19-100:1 (Jordan); Tr. 163:7-11, 182:20-24 (Montemurro).

³⁹ *See* PTO ¶¶ II.28-.37; Tr. 162:9-122 (Montemurro).

⁴⁰ Tr. 154:1-8 (Montemurro).

compliance activities like training or drug testing.⁴¹ Northeastern classifies these on-demand pilots as independent contractors.⁴²

All pilots, whether full-time or on demand, must comply with applicable regulations to maintain their status as Part 135 pilots for Northeastern.⁴³ This compliance includes completion of regular training and an evaluation of flying skills.⁴⁴ It also includes compliance with Northeastern's drug testing program.⁴⁵ If pilots fail to comply with any applicable FAA or DOT regulations, they may not pilot any Northeastern flights.⁴⁶ In addition to these regulations, certain Northeastern policies apply to both full-time and on-demand pilots.⁴⁷ For example, all pilots must complete Northeastern's flight and ground training program annually; if a pilot fails to complete this training, he or she may not pilot any flights for Northeastern.⁴⁸ Additionally, all pilots must wear Northeastern uniforms during

⁴¹ See Tr. 156:16-22 (Montemurro).

⁴² Tr. 153:17-20 (Montemurro).

⁴³ Tr. 94:16-22, 95:8-10 (Jordan).

⁴⁴ Tr. 94:23-95:7 (Jordan).

⁴⁵ Tr. 182:12-15, 218:11-20 (Montemurro).

⁴⁶ See, e.g., Tr. 218:11-20 (Montemurro).

⁴⁷ Tr. 201:3-15 (Montemurro).

⁴⁸ JX 16, at NA000580; Tr. 157:9-18 (Montemurro).

flights, and it therefore is not apparent to passengers whether an individual pilot is full-time or on demand.⁴⁹

Pasternack flew for Northeastern as an on-demand pilot. He did not receive the benefits enjoyed by full-time pilots, such as vacation or sick benefits, paid personal days, paid holidays, health insurance benefits, life insurance benefits, workers' compensation benefits, unemployment compensation benefits, or participation in any type of retirement plan through Northeastern.⁵⁰ He received an IRS Form 1099, not a W-2.⁵¹

C. Northeastern's Regulatory Environment

"In 1983, Northeastern began operating its own charter flight service . . . under Part 135"⁵² This operation falls under Department of Transportation ("DOT") and FAA regulations.⁵³ Part 135 regulates charter flight service operators like Northeastern.⁵⁴

⁴⁹ JX 16, at NA000567; Tr. 22:10-11 (Pasternack); Tr. 183:1-8 (Montemurro).

⁵⁰ PTO ¶¶ II.28-.35; Tr. 162:9-22 (Montemurro).

⁵¹ PTO ¶¶ II.36-.37.

⁵² *Id.* ¶ II.9.

⁵³ *Id.* ¶¶ II.9, II.14.

⁵⁴ 14 C.F.R. Pt. 135.

Under Part 135, Northeastern must assume responsibility for operational control over the flights it conducts.⁵⁵ “Operational control” means exercising “authority over initiating, conducting or terminating a flight.”⁵⁶

Under DOT regulations, to maintain its Part 135 certificate, Northeastern must conduct random alcohol and drug testing of its pilots.⁵⁷ DOT regulations—specifically, 49 C.F.R. Pt. 40 (“Part 40”)—prescribe the procedures that Northeastern must follow in administering drug and alcohol testing.⁵⁸ Part 40 allows Part 135 operators to use “service agents” for drug and alcohol testing.⁵⁹ A “service agent,” in this context, provides services to the operator (Northeastern) and its pilots in connection with DOT drug and alcohol testing requirements.⁶⁰

⁵⁵ “Each certificate holder is responsible for operational control and shall list, in the manual required by § 135.21, the name and title of each person authorized by it to exercise operational control.” 14 C.F.R. § 135.77.

⁵⁶ 14 C.F.R. § 1.1.

⁵⁷ *See* 14 C.F.R. § 135.251 (2009) (recodified at 14 C.F.R. § 120.35). Part 135 requires random drug testing of all individuals who perform safety-sensitive functions for the charter flight operator (in this case, Northeastern). 49 C.F.R. § 40.3. Under the statutory framework, both pilots and maintenance workers perform safety-sensitive functions, and therefore, Northeastern includes both in its pool for random drug testing. Tr. 129:3-10 (Schmitt); Tr. 163:2-6 (Montemurro). Because Pasternack’s only safety-sensitive role was as a pilot, I focus solely on pilots.

⁵⁸ *See* 14 C.F.R. § 120.103; 49 C.F.R. Pt. 40.

⁵⁹ *See* 49 C.F.R. § 40.3.

⁶⁰ *Id.*

Service agents include, among other things, laboratories and medical review officers.⁶¹ LabCorp, the laboratory where Pasternack reported for his drug and alcohol test, was a service agent of Northeastern.⁶² ChoicePoint was another service agent and provided services to Northeastern as a medical review officer.⁶³

Part 40 also limits what service agents may do.⁶⁴ Barring specific exceptions,⁶⁵ none of which apply here, service agents may “not make a determination that [a pilot] has refused a drug or alcohol test. This is a non-delegable duty” of Northeastern.⁶⁶

⁶¹ *Id.*

⁶² PTO ¶ II.18.

⁶³ *Id.* ¶ II.27; Tr. 35:1-9 (Pasternack); Tr. 179:17-180:13 (Montemurro). A medical review officer acts as “an independent and impartial ‘gatekeeper’” in the drug-testing process, provides feedback to the flight operators, and confirms the laboratory’s drug test results. 49 C.F.R. § 40.123(a), (b) (entitled “What are the MRO’s responsibilities in the DOT drug testing program?”).

⁶⁴ 49 C.F.R. § 40.355; PTO ¶ II.19.

⁶⁵ 49 C.F.R. § 40.355(j) (“As an exception to paragraph (i) of this section, [a service agent] may make a determination that [the pilot] has refused a drug or alcohol test, if: (1) [The service agent] schedule[d] a required test for an owner-operator or other self-employed individual, and the individual fails to appear for the test without a legitimate reason; or (2) [An MRO service agent] determine[d] that an individual has refused to test on the basis of *adulteration or substitution.*” (emphasis added)).

⁶⁶ 49 C.F.R. § 40.355(i).

D. Pasternack's Drug Test

In June 2007, Northeastern had a random drug testing program in place as required by the applicable FAA and DOT regulations.⁶⁷ Northeastern submitted a list of its pilots, including Pasternack,⁶⁸ to Choice Point, and Choice Point used that list to randomly select individuals for drug testing.⁶⁹ Choice Point contacted Donna Schmitt, Northeastern's Flight Department Administrator and Designated Employer Representative, and informed her that Pasternack had been selected for random drug testing.⁷⁰

On June 1, 2007, Schmitt instructed Pasternack to report to LabCorp for his drug test (the "Drug Test").⁷¹ Pasternack realized that he did not have a custody and control form ("CCF Form") embossed with Northeastern's information.⁷² LabCorp requires the CCF Form to complete the Drug Test.⁷³ Pasternack informed Schmitt, and Schmitt mailed a new CCF Form to him and instructed him to report for the

⁶⁷ PTO ¶ II.26.

⁶⁸ *Id.* ¶ II.27; Tr. 164:1-3 (Montemurro).

⁶⁹ PTO ¶ II.27.

⁷⁰ Tr. 127:17-19, 128:15-129:10, 134:20-135:1 (Schmitt).

⁷¹ PTO ¶ II.38.

⁷² Tr. 27:12-24 (Pasternack).

⁷³ *See id.*

Drug Test after he received the CCF Form.⁷⁴ Pasternack received the CCF Form, and on June 5, 2007, shortly after 1:00 p.m., Pasternack reported to LabCorp to provide a urine sample for the Drug Test.⁷⁵

At LabCorp, Pasternack followed the instructions of the LabCorp collector, Theresa Montalvo.⁷⁶ After Pasternack provided a sample, Montalvo informed him that the amount of urine he had provided was insufficient.⁷⁷ She instructed him to wait at the LabCorp facility until he was able to produce another sample.⁷⁸ Pasternack waited for approximately ten or fifteen minutes and then recalled that he had a 2:00 or 2:30 p.m. appointment with one of his medical patients.⁷⁹ He informed Montalvo that he needed to leave but that he would return the next day to complete the Drug Test.⁸⁰ Montalvo explained that she would need to call Northeastern, but

⁷⁴ Tr. 27:24-28:3 (Pasternack); Tr. 145:17-20 (Schmitt).

⁷⁵ PTO ¶ II.39.

⁷⁶ *Id.* ¶ II.41.

⁷⁷ *Id.* ¶ II.42; Tr. 30:12-15 (Pasternack).

⁷⁸ PTO ¶ II.42.

⁷⁹ *Id.* ¶ II.43; Tr. 30:19-31:2 (Pasternack).

⁸⁰ PTO ¶ II.43.

she did not explain that Pasternack's departure would result in his Drug Test being deemed a "refusal to test."⁸¹

Pasternack's appointment was approximately eight blocks away.⁸² After the appointment, he decided to return to LabCorp to complete the Drug Test that same afternoon.⁸³ LabCorp required that Northeastern first give its authorization to resume the Drug Test.⁸⁴ Although Schmitt, Northeastern's Designated Employer Representative, would have been the appropriate Northeastern representative to contact, Schmitt was not at work that day,⁸⁵ and Montalvo spoke with Peter Montemurro, Northeastern's General Manager.⁸⁶ She asked Montemurro to give permission, on behalf of Northeastern, to resume Pasternack's Drug Test after he returned.⁸⁷ Unfamiliar with drug testing requirements, Montemurro instructed

⁸¹ See Tr. 31:13-14 (Pasternack).

⁸² Tr. 32:1-2 (Pasternack).

⁸³ Tr. 31:22-32:3 (Pasternack).

⁸⁴ Tr. 32:9-12 (Pasternack).

⁸⁵ Tr. 146:3-9 (Schmitt).

⁸⁶ JX 16, at NA000707; Tr. 165:15-20 (Montemurro).

⁸⁷ Tr. 165:21-166:2 (Montemurro).

Montalvo to “do whatever [she] think[s] is appropriate.”⁸⁸ Montalvo continued the Drug Test, and Pasternack provided a sufficient sample at that time.⁸⁹

A few days later, ChoicePoint, in its role as medical review officer, deemed Pasternack’s Drug Test a “refusal to test” because Pasternack left LabCorp before he completed the Drug Test.⁹⁰ On June 10, 2007, Schmitt informed Pasternack of this result.⁹¹ ChoicePoint determined that Pasternack failed the Drug Test solely due to the refusal to test;⁹² Pasternack’s sample tested negative for drugs.⁹³

After the Drug Test, Pasternack did not pilot any flights for Northeastern.⁹⁴

E. The Underlying FAA Proceeding

On November 20, 2007, the FAA revoked Pasternack’s pilot’s certificates on the ground that he refused to test.⁹⁵ Pasternack retained counsel to represent him in

⁸⁸ Tr. 166:6-11 (Montemurro).

⁸⁹ PTO ¶ II.45.

⁹⁰ *Id.* ¶ II.46; *see* Tr. 35:1-9 (Pasternack).

⁹¹ Tr. 33:19-34:1 (Pasternack).

⁹² Tr. 35:10-13 (Pasternack); Tr. 181:24-182:6 (Montemurro).

⁹³ Tr. 181:17-23 (Montemurro).

⁹⁴ Tr. 169:5-8 (Montemurro); *see also* Tr. 213:4-23 (Montemurro).

⁹⁵ Compl. ¶ 13.

the administrative proceeding and to challenge the FAA revocation.⁹⁶ During the administrative proceedings, the FAA called ten witnesses, including employees of Northeastern.⁹⁷ Administrative Law Judge Fowler affirmed the FAA’s revocation.⁹⁸ Pasternack appealed the decision, initially to the National Transportation Safety Board (“NTSB”) and then to the United States Court of Appeals for the D.C. Circuit.⁹⁹ The D.C. Circuit remanded to the NTSB, which in turn remanded the matter to Judge Fowler for credibility determinations.¹⁰⁰

After Judge Fowler upheld and the NTSB affirmed Judge Fowler’s original decision, Pasternack filed a second appeal with the D.C. Circuit.¹⁰¹ The D.C. Circuit held that because there was insufficient evidence to show whether the collector (Montalvo at LabCorp) impliedly gave Pasternack permission to leave, Pasternack’s departure was not a “refusal to test” and the NTSB’s decision was arbitrary and

⁹⁶ PTO ¶ II.47.

⁹⁷ *Id.* ¶ II.48; Tr. 91:10-19 (Jordan); Tr. 164:9-18 (Montemurro).

⁹⁸ PTO ¶ II.48.

⁹⁹ Tr. 38:21-39:5 (Pasternack).

¹⁰⁰ Tr. 39:5-13 (Pasternack).

¹⁰¹ Tr. 39:15-16; 39:22-40:2 (Pasternack).

capricious.¹⁰² On March 22, 2013, the D.C. Circuit reversed the decision of the NTSB, also reversing the revocation of Pasternack’s pilot’s certificates.¹⁰³

F. Pasternack’s Demand for Indemnification and This Litigation

At no point during the underlying FAA proceedings did Pasternack make any demands for indemnification from Northeastern for attorneys’ fees.¹⁰⁴ Over two years after the conclusion of the FAA proceeding, on October 20, 2015, Pasternack sent a letter to Northeastern requesting indemnification for approximately \$140,000 in legal fees and expenses he incurred in defending himself during the FAA proceedings.¹⁰⁵ His letter requests indemnification under Northeastern’s bylaws, which, according to Pasternack’s letter, “provide that employees shall be indemnified to the full extent allowed under Delaware law.”¹⁰⁶

Northeastern’s corporate governance documents, including its bylaws (the “Bylaws”), have been in effect since 1980 or earlier¹⁰⁷ and remain unchanged since

¹⁰² *Pasternack v. Huerta*, 513 F. App’x 1 (D.C. Cir. 2013); Tr. 40:10-14 (Pasternack).

¹⁰³ *Pasternack*, 513 F. App’x 1; Tr. 40:3-7 (Pasternack).

¹⁰⁴ PTO ¶ II.50; Tr. 48:18-23, 65:10-16 (Pasternack); Tr. 168:7-18 (Montemurro); Tr. 245:13-17 (Russo); *see* Tr. 44:7-14 (Pasternack); Tr. 244:2-21, 288:17-289:10 (Russo).

¹⁰⁵ JX 21, at NEA00135.

¹⁰⁶ *Id.*

¹⁰⁷ PTO ¶ II.8.

incorporation.¹⁰⁸ The Bylaws contain an indemnification provision: “The corporation shall indemnify its officers, directors, employees and agents to the extent permitted by the General Corporation Law of Delaware.”¹⁰⁹

Northeastern responded to Pasternack’s request via letter on November 3, 2015.¹¹⁰ In that letter, Northeastern stated that it will “check[] into this matter and . . . get back to [Pasternack] in the near future.”¹¹¹ Northeastern never substantively responded to Pasternack’s letter.¹¹²

On March 7, 2016, Pasternack filed his Verified Complaint for Indemnification against Northeastern.¹¹³ This Court held a two-day trial in this matter on March 15 and 16, 2018.

II. ANALYSIS

“To succeed at trial, ‘Plaintiff[] . . . ha[s] the burden of proving each element . . . of each of his causes of action against [the] Defendant . . . by a

¹⁰⁸ *Id.*; *see* Tr. 11:7-15 (Pasternack).

¹⁰⁹ JX 29, at NEA00030.

¹¹⁰ JX 21; PTO ¶ II.52.

¹¹¹ JX 21.

¹¹² PTO ¶ II.53; Tr. 45:1-5 (Pasternack); Tr. 288:1-6 (Russo).

¹¹³ JX 22.

preponderance of the evidence.”¹¹⁴ “Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not.”¹¹⁵

A. Northeastern Aviation Must Indemnify Pasternack Under Its Mandatory Indemnification Bylaw

Pasternack seeks indemnification under Northeastern’s Bylaws for legal fees and expenses he incurred in defending himself in the underlying FAA proceedings.¹¹⁶ The Bylaws’ indemnification provision states, “The corporation shall indemnify its officers, directors, employees and agents to the extent permitted by the General Corporation Law of Delaware.”¹¹⁷ Section 145(a) of the Delaware General Corporation Law sets out the relevant requirements for indemnification by a corporation:

A corporation shall have power to indemnify any person who was or is a party . . . to any threatened, pending or

¹¹⁴ *S’holder Representative Servs. LLC v. Gilead Scis., Inc.*, 2017 WL 1015621, at *15 (Del. Ch. Mar. 15, 2017) (quoting *inTEAM Assocs., LLC v. Heartland Payment Sys., Inc.*, 2016 WL 5660282, at *13 (Del. Ch. Sept. 30, 2016)), *aff’d*, 177 A.3d 610 (Del. 2017).

¹¹⁵ *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

¹¹⁶ Compl. ¶¶ 27-33.

¹¹⁷ JX 29, at NEA00030.

completed action, suit or proceeding, whether civil, criminal, administrative or investigative . . . by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, . . . against expenses (including attorneys' fees) . . . actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation¹¹⁸

Thus, the evidence must show that (1) Pasternack was a party to a threatened, pending, or completed action, suit, or proceeding by reason of the fact that he was a director, officer, employee, or agent of Northeastern; (2) the action, suit, or proceeding was brought neither by nor in the right of the corporation; (3) he actually and reasonably incurred legal expenses in connection with the action, suit, or proceeding; and (4) he “acted in good faith and in a manner [he] reasonably believed to be in or not opposed to the best interests of the corporation.”¹¹⁹

The parties dispute (1) whether Pasternack was an agent or employee of Northeastern,¹²⁰ (2) whether Pasternack’s participation in the underlying FAA proceedings was “by reason of the fact” of his affiliation with Northeastern, and

¹¹⁸ 8 *Del. C.* § 145(a).

¹¹⁹ *Id.*

¹²⁰ Pasternack does not argue that he was acting as an officer or director at the time of the Drug Test. *See generally* Pl.’s Opening Br. 30-43 (arguing only that Pasternack was an employee or an agent-independent contractor).

(3) whether Pasternack acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation.¹²¹

1. Pasternack was an agent of Northeastern

The party seeking indemnification under Section 145(a) must be a director, officer, employee, or agent. Pasternack asserts that he is an employee or agent.¹²² “An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent.”¹²³ “It is well settled that questions of agency are not subject to absolute rules but, rather, turn on the facts of the individual case.”¹²⁴

Then-Vice Chancellor, now-Chief Justice, Strine discussed agency as it relates to Section 145 in *Fasciana v. Electronic Data Systems Corp.*¹²⁵ As he explained, to serve the policy rationale of Section 145, this Court limits agency in

¹²¹ Def.’s Answering Br. 9. Defendant also argues that Pasternack failed to mitigate his legal expenses. *Id.* The parties stipulated that the reasonableness of Pasternack’s legal expenses will be addressed, if necessary, separately from the determination of indemnification. PTO 18 n.3; Post-Trial Hr’g Tr. 32:20-22. Any dispute regarding mitigation of legal expenses will be addressed in that process.

¹²² Pl.’s Opening Br. 30-43.

¹²³ *Cochran v. Stifel Fin. Corp.*, 2000 WL 286722, at *17 (Del. Ch. Mar. 8, 2000) (quoting *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997)), *aff’d in pertinent part*, 809 A.2d 555 (Del. 2002).

¹²⁴ *Fisher*, 695 A.2d at 61 (quoting *Sussex Cty. v. Morris*, 610 A.2d 1354, 1360 (Del. 1992)).

¹²⁵ 829 A.2d 160, 163 (Del. Ch. 2003).

the indemnification context to “only those situations when an outside contractor . . . can be said to be acting as an arm of the corporation vis-à-vis the outside world.”¹²⁶ Further, the underlying proceeding must result from the purported agent’s “conduct on behalf of the corporation.”¹²⁷

When applying this definition of agency in the context of a Part 135 charter flight operator, all pilots, whether full-time or on demand, are agents for the operator when piloting a flight. Northeastern, as the Part 135 carrier, “authorizes” the pilot to “exercise operational control” of a flight.¹²⁸ The pilot is “acting as an arm of the corporation vis-à-vis” Northeastern’s passengers, air traffic controllers, and ground crew.

Northeastern’s General Operations Manual (the “Manual”) supports this conclusion. It states explicitly that “[Northeastern] retains responsibility for the operational control of aircraft operations, and thus the safety of each flight conducted under its Certificate and Operations Specifications, including the actions of all direct employees and agents.”¹²⁹ “All flight crewmembers will be either a Direct

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 14 C.F.R. § 135.77.

¹²⁹ JX 16, at NA000708.

Employee or an Agent for [Northeastern].”¹³⁰ The Manual repeats this explicit statement: “[All crewmembers] are either employees or agents of [Northeastern].”¹³¹

Defendant concedes this point but tries to distinguish the conduct of a pilot during a flight from the conduct of a pilot during a drug test. Defendant argues that Pasternack acted as an agent only when he was piloting a flight and not during other tasks such as taking the Drug Test. Defendant posits that Pasternack was not acting on behalf of Northeastern when Pasternack appeared for the Drug Test.¹³²

The record shows otherwise. Northeastern provided the names of all its pilots to its service agent ChoicePoint.¹³³ Northeastern designated Pasternack as one of its pilots.¹³⁴ ChoicePoint randomly selected, from all of Northeastern’s pilots, which pilots must be tested to satisfy Northeastern’s regulatory obligations for the calendar quarter.¹³⁵ In June 2007, ChoicePoint informed Northeastern that Pasternack had

¹³⁰ *Id.*

¹³¹ *Id.* at NA000712.

¹³² Def.’s Answering Br. 24.

¹³³ Tr. 132:7-133:12 (Schmitt).

¹³⁴ Tr. 87:22-88:5 (Jordan); Tr. 164:1-3 (Montemurro). Defendant argues that Pasternack was not subject to random drug testing because he was not current with regard to training requirements. This argument does not explain why Northeastern kept Pasternack in the pool of pilots, thus making him subject to random drug testing. *See* Tr. 86:4-17 (Jordan) (testifying that Northeastern uses its list of pilots as a compliance tracking tool).

¹³⁵ Tr. 133:6-15 (Schmitt).

been randomly selected.¹³⁶ Schmitt, Northeastern's Designated Employer Representative, instructed Pasternack to report for the drug test at LabCorp.¹³⁷ When Pasternack informed Schmitt that he did not have the requisite CCF Form, Schmitt sent him a new form and instructed him to report to LabCorp as soon as he received it.¹³⁸ Northeastern and ChoicePoint took these actions to ensure Northeastern's compliance with FAA and DOT regulations.¹³⁹

Pasternack complied with the instructions he received from Northeastern and ChoicePoint. When Pasternack left the facility, he believed he did so with the implied permission of the collector at the facility, Theresa Montalvo.¹⁴⁰ Montalvo then contacted Northeastern.¹⁴¹ When Pasternack returned to resume the drug test, Montalvo refused to resume testing until she received authorization from Northeastern to do so¹⁴² because it was Northeastern's nondelegable duty to

¹³⁶ Tr. 134:20-135:1 (Schmitt).

¹³⁷ Tr. 145:14-16 (Schmitt).

¹³⁸ Tr. 145:17-146:2 (Schmitt).

¹³⁹ *See* 14 C.F.R. § 135.251 (2009) (recodified at 14 C.F.R. § 120.35).

¹⁴⁰ *See* PTO ¶¶ II.43-.44.

¹⁴¹ Tr. 165:15-19 (Montemurro).

¹⁴² Tr. 32:9-12 (Pasternack).

determine whether Pasternack could continue the Drug Test.¹⁴³ By reporting for the Drug Test and by complying with Northeastern and ChoicePoint’s instructions, Pasternack acted on behalf of Northeastern to ensure Northeastern’s compliance with the FAA and DOT regulations. Pasternack acted as an arm of Northeastern vis-à-vis the FAA and the DOT. Thus, Pasternack acted as Northeastern’s agent during the Drug Test.

Because I conclude that Pasternack acted as Northeastern’s agent at the time of Drug Test, I need not address whether Pasternack was an employee of Northeastern at that time.

2. Pasternack appeared for the Drug Test by reason of the fact of his agency status with Northeastern

The party seeking indemnification must be a party to a proceeding by reason of the fact of his corporate function.¹⁴⁴ There must be a “causal connection or nexus between [the underlying proceeding] and [Pasternack’s] corporate function or ‘official [corporate] capacity.’”¹⁴⁵ “The phrase ‘by reason of’ can be equated to ‘by virtue of,’ ‘by force of,’ or ‘by the authority of.’”¹⁴⁶

¹⁴³ 49 C.F.R. § 40.355(i).

¹⁴⁴ *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *4 (Del. Ch. May 3, 2002).

¹⁴⁵ *Id.* (third alteration in original) (quoting *Cochran v. Stifel Fin. Corp.*, 2000 WL 1847676, at *6 (Del. Ch. Mar. 8, 2000)).

¹⁴⁶ *Id.*

Northeastern determined, in compliance with FAA and DOT regulations, who was in the pool of pilots subject to random drug testing.¹⁴⁷ Schmitt informed Pasternack that he was selected to submit to a random drug test and instructed him to report for the Drug Test.¹⁴⁸ Pasternack reported to the Drug Test by reason of the instructions he received from Schmitt. Although Pasternack, as an on-demand pilot, could refuse a flight assignment, he could not refuse to take the Drug Test. The consequence of such a refusal would be that Pasternack could no longer pilot flights for Northeastern.¹⁴⁹

Additionally, Pasternack had no independent individual requirement to complete the Drug Test. His sole reason for attending the Drug Test was his affiliation with Northeastern, a Part 135 charter flight operator.¹⁵⁰ But for Pasternack's affiliation with Northeastern, there would have been no reason for him to initiate the Drug Test. In short, Northeastern instructed Pasternack to report for the random drug test, and Pasternack did so by reason of that instruction.

¹⁴⁷ Tr. 180:18-20 (Montemurro).

¹⁴⁸ PTO ¶ II.38.

¹⁴⁹ Tr. 217:6-11 (Montemurro).

¹⁵⁰ Tr. 143:17-20 (Schmitt).

Defendant argues that Pasternack prematurely left the testing facility for his own reasons, not on behalf of Northeastern.¹⁵¹ Pasternack left the LabCorp facility because he had an appointment in connection with his work as a medical doctor.¹⁵² This argument, however, ignores Pasternack’s reason for appearing for the Drug Test, which is solely attributable to his affiliation with Northeastern. But for that relationship, the “refusal to test” and underlying FAA proceeding would not have occurred. Pasternack appeared for the Drug Test by reason of the fact of his agency relationship with Northeastern.

3. Pasternack acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of Northeastern

Section 145(a) requires that the party seeking indemnification “acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation.”¹⁵³ Northeastern argues that Pasternack acted in a

¹⁵¹ Def.’s Answering Br. 24-25.

¹⁵² PTO ¶ II.43; Tr. 30:19-31:2 (Pasternack).

¹⁵³ 8 *Del. C.* § 145(a). Although Section 145(c) mandates indemnification when the party seeking indemnification was “successful on the merits or otherwise in defense of any action, suit, or proceeding,” this mandate applies only to directors and officers. *See Cochran*, 2000 WL 1847676, at *2 n.6 (noting the amendment of Section 145(c) in 1994 to remove mandatory indemnification of agents). The parties agree that Pasternack was not acting in his role as director or officer in connection with the Drug Test or the subsequent proceedings. Def.’s Answering Br. 1-2; *see generally* Pl.’s Opening Br. 3-14.

manner opposed to the best interests of Northeastern when he prematurely left the Drug Test to attend an appointment related to his work as a medical doctor and completely unrelated to his affiliation with Northeastern and also when he pursued extensive administrative and legal proceedings to challenge the FAA's revocation.¹⁵⁴

According to Northeastern, Pasternack, as a medical doctor and as a former medical review officer, should have known the consequences of his actions—namely, that the Drug Test would be deemed a “refusal to test.”¹⁵⁵ The D.C. Circuit, however, held that there was insufficient evidence to show that Pasternack left the Drug Test without the implied permission of the LabCorp collector.¹⁵⁶ Further, Pasternack credibly testified that he was unaware that ChoicePoint would deem his departure a refusal to test.¹⁵⁷ Northeastern points to no credible evidence to the contrary. Pasternack, therefore, did not act in a manner opposed to Northeastern's best interests when he left the Drug Test.

Additionally, at trial, Russo testified that a pilot's failed drug test negatively impacts the carrier's reputation.¹⁵⁸ Pasternack's challenge to the FAA's revocation

¹⁵⁴ Def.'s Answering Br. 35-38.

¹⁵⁵ *Id.* at 37.

¹⁵⁶ *Pasternack v. Huerta*, 513 F. App'x 1 (D.C. Cir. 2013).

¹⁵⁷ Tr. 34:6-13 (Pasternack).

¹⁵⁸ Tr. 274:21-275:3 (Russo).

and his ultimate exoneration served to protect Northeastern's reputation. Further, if Pasternack had not challenged the revocation, he would not be allowed to serve Northeastern as a pilot. His protection of Northeastern's reputation and his service to Northeastern were in the best interests, or at a minimum, not opposed to the best interests, of Northeastern.

Because Pasternack has shown that he acted as an agent of Northeastern when appearing for the Drug Test, that he appeared for the Drug Test by reason of the fact of his agency status, and that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of Northeastern, he is entitled to mandatory indemnification as provided by Northeastern's Bylaws.¹⁵⁹

B. Pasternack Timely Requested Indemnification

Defendant argues that despite Pasternack's commencement of this indemnification action within the analogous three-year statute of limitations, Pasternack's claim must be denied on the basis of laches.

"[L]aches generally requires the establishment of three things: first, knowledge by the claimant; second, unreasonable delay in bringing the claim, and

¹⁵⁹ The parties have stipulated that the reasonableness of Pasternack's legal expenses will be addressed, if necessary, separately from the determination of indemnification. PTO 18 n.3; Post-Trial Hr'g Tr. 32:20-22.

third, resulting prejudice to the defendant.”¹⁶⁰ A plaintiff’s “action will be barred by laches only if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of his claim within the time allowed by law.”¹⁶¹

Defendant argues that Plaintiff’s unreasonable delay in filing this action unfairly prejudiced the Company.¹⁶² “[U]nreasonable delay involves consideration of whether the plaintiff acted with the degree of diligence that fairness and justice require.”¹⁶³ Northeastern claims that had Pasternack requested indemnification before the conclusion of the underlying proceeding, Northeastern would have participated in the proceeding to Pasternack’s benefit.¹⁶⁴

First, Plaintiff’s indemnification claim was not ripe until the conclusion of the underlying FAA proceeding in March 2013.¹⁶⁵ Second, Northeastern cites no authority supporting its purported right to participate in the underlying

¹⁶⁰ *Reid v. Spazio*, 970 A.2d 176, 182-83 (Del. 2009) (quoting *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 210 (Del. 2005)).

¹⁶¹ *Id.* at 183.

¹⁶² Def.’s Answering Br. 46.

¹⁶³ *Houseman v. Sagerman*, 2015 WL 7307323, at *8 (Del. Ch. Nov. 19, 2015).

¹⁶⁴ Def.’s Answering Br. 46.

¹⁶⁵ *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 509 (Del. 2005) (“Whether a corporate officer has a right to indemnification is a decision that must necessarily await the outcome of the investigation or litigation.”).

proceedings.¹⁶⁶ I am aware of no such authority in Delaware, and Northeastern's Bylaws do not establish this right. Third, despite its claim that it was unable to participate in the underlying FAA proceeding, Northeastern did, in fact, participate in the underlying FAA proceeding. Northeastern representatives testified in the underlying FAA proceeding.¹⁶⁷

In support of its argument, Northeastern discusses *Houseman v. Sagerman*.¹⁶⁸ In *Houseman*, this Court focused on prejudice suffered by the defendants in determining that the plaintiffs' delay was unreasonable. Mrs. Houseman's justifications for the delay in filing her claim (that she could not accurately calculate the monetary amount at issue, that she wanted to avoid the expense of a second litigation, and that this Court would likely stay the action pending resolution of a related action in another jurisdiction) "ignore the concern that the Defendants may suffer prejudice by the Plaintiffs' delay."¹⁶⁹ In this action, Defendant fails to show that Pasternack's delay in filing his claim offends fairness and justice or prejudices Northeastern. Northeastern merely conjectures that Pasternack's delay is attributable to the integrity of his claim. Northeastern fails to point to any prejudice

¹⁶⁶ See Def.'s Answering Br. 46.

¹⁶⁷ Tr. 91:10-19 (Jordan); Tr. 164:9-18 (Montemurro).

¹⁶⁸ 2015 WL 7307323 (Del. Ch. Nov. 19, 2015).

¹⁶⁹ *Id.* at *9.

it suffered after March 2013, when Pasternack’s indemnification claim became ripe.¹⁷⁰

I do not find that “unusual conditions or extraordinary circumstances” are present that “make it inequitable to allow the prosecution of [Pasternack’s] claim within the time allowed by [the analogous statute of limitations].”¹⁷¹ I therefore hold that Pasternack filed this action within a reasonable time after the underlying proceeding concluded and that laches is inapplicable here.

C. Pasternack Is Entitled to Fees-on-fees

It is well settled in Delaware law that when a claimant prevails on an indemnification claim, an award of fees-on-fees is permissible.¹⁷² Northeastern provides indemnification “to the extent permitted by the General Corporation Law of Delaware.”¹⁷³ To give full effect to Section 145, an award of fees-on-fees is not only permissible, but appropriate in light of the language of Northeastern’s indemnification provision and the policy of Section 145. This policy “eschew[s a] narrow construction of the statute,” and “without an award of attorneys’ fees for the

¹⁷⁰ See Def.’s Answering Br. 46-47.

¹⁷¹ *Reid*, 970 A.2d at 183.

¹⁷² *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561-62 (Del. 2002); *Levy v. HLI Operating Co.*, 924 A.2d 210, 225 (Del. Ch. 2007).

¹⁷³ JX 29, at NEA00030.

indemnification suit itself, indemnification [is] incomplete.”¹⁷⁴ Had Northeastern desired to avoid payment of fees-on-fees, it could have tailored its indemnification provision to exclude such payments.¹⁷⁵ It did not. Thus, Pasternack’s request for an award of fees-on-fees is granted.

III. CONCLUSION

For the foregoing reasons, I conclude that Pasternack has shown that he is entitled to (1) indemnification under Northeastern’s bylaws and (2) fees-on-fees under Delaware law. Additionally, Defendant has not shown that the doctrine of laches applies.

The parties shall confer and advise the Court within thirty days of this opinion whether any outstanding matters remain that require the Court’s attention. If not, this opinion will serve as the final order of the Court.

IT IS SO ORDERED.

¹⁷⁴ *Stifel Fin. Corp.*, 809 A.2d at 561.

¹⁷⁵ *See id.* at 561-62.



GRANTED

EFiled: Apr 08 2019 11:33AM EDT
Transaction ID 63141775
Case No. 12082-VCMR



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

FRED L. PASTERNAK,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 12082-VCMR
)	
NORTHEASTERN AVIATION)	
CORP., a Delaware corporation,)	
)	
Defendant.)	

[PROPOSED] FINAL ORDER & JUDGMENT

WHEREAS, on March 7, 2016, Plaintiff Fred L. Pasternack (“Plaintiff”) filed a Verified Complaint against Defendant Northeastern Aviation Corp. (“Defendant”);

WHEREAS, on September 16, 2016, Defendant filed an Answer to Verified Complaint;

WHEREAS, on March 15 and 16, 2018, the Court held a trial; and

WHEREAS, on November 9, 2018, the Court issued a Memorandum Opinion, concluding that Plaintiff has shown that he is entitled to (1) indemnification under Northeastern’s bylaws and (2) “fees-on-fees” under Delaware law.

IT IS HEREBY ORDERED as follows:

1. Plaintiff is entitled to indemnification in the amount of \$142,396.40.

2. Plaintiff is awarded his “fees-on-fees” incurred in this litigation, totaling \$301,701.29, which when combined with the indemnification amount of \$142,396.40, equals a judgment in the amount of \$444,097.69.

3. Post-judgment interest shall accrue on the amount of \$444,097.69 at the legal rate in accordance with 6 *Del. C.* § 2301, with such accrual beginning from the date of the entry of this Final Order and Judgment.

4. The attorney of record for Plaintiff shall forthwith forward to the Prothonotary of the Superior Court of each county of this State a certified copy of this Final Order and Judgment, which shall be entered by the Prothonotary in the same amount and form and in the same books and indexes as judgments and orders in accordance with 10 *Del. C.* § 4734. After the entry thereof, the portions of this Final Order and Judgment calling for the payment of money shall have the same force and effect as though the Final Order and Judgment had been entered by the Superior Court.

IT IS SO ORDERED this ____ day of _____, 2019.

Vice Chancellor Tamika Montgomery-Reeves

This document constitutes a ruling of the court and should be treated as such.

Court: DE Court of Chancery Civil Action

Judge: Tamika Montgomery-Reeves

File & Serve

Transaction ID: 63141175

Current Date: Apr 08, 2019

Case Number: 12082-VCMR

Case Name: CONF ORD/ Fred L. Pasternack v. Northeastern Aviation Corp.

Court Authorizer: Montgomery-Reeves, Tamika

/s/ Judge Montgomery-Reeves, Tamika