



THE SUPREME COURT OF THE STATE OF DELAWARE

NORTHEASTERN AVIATION
CORP.,

Defendant Below,
Appellant,

v.

FRED L. PASTERNAK,

Plaintiff Below,
Appellee.

C.A. No. 192,2019

Court Below: Court of Chancery
of the State of Delaware,
C.A. No. 12082-VCMR

APPELLEE'S CORRECTED ANSWERING BRIEF

Dated: July 19, 2019

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NATURE OF PROCEEDINGS

The record below establishes and the Court of Chancery correctly held that (i) Appellee Fred L. Pasternack (“Pasternack”) was an agent of Appellant Northeastern Aviation Corp. (“Northeastern” or the “Company”), (ii) Pasternack was ordered to submit to a random drug test by Northeastern only because he was a Northeastern pilot that Northeastern included in its pool of employees subject to random drug testing, and (iii) Pasternack’s negative drug test results and his complete exoneration from the FAA’s erroneous revocation of his pilot’s license—following appeals to the D.C. Circuit—were achieved in good faith and in Northeastern’s best interest, or, at a minimum, not opposed to it.

In its attempt to find reversible error, Northeastern engages in some sleight of hand. Northeastern posits that Pasternack submitted to the drug test due to a generalized duty to test—and not by reason of his affiliation with Northeastern—and that he did so motivated only by his personal interest in maintaining his pilot’s license. There is, however, no generalized duty to submit to drug testing for a pilot to maintain a license. Rather, as the Court of Chancery determined, the obligation to test is employer-specific. If Northeastern had not used Pasternack as a pilot, placed him in its pool of employees subject to testing and ordered him to appear for a drug test, Pasternack would not been subject to the ensuing proceedings commenced by the Federal Aviation Administration (“FAA”) and resulting

monetary losses. The Court of Chancery additionally determined that Pasternack's submission to the drug test was in Northeastern's interests because Northeastern, in order to maintain its federally-granted certificate to operate charter flights, was required to submit a certain percentage of its employees to drug testing every calendar quarter.

On the issue of good faith, Northeastern argues that Pasternack violated regulatory protocol, yet ignores the D.C. Circuit's decision entering judgment in Pasternack's favor and finding no violation. Northeastern also argues that Pasternack's constructive failure to test demonstrates that his conduct was at odds with the interests of the regulatory scheme requiring drug testing—the safety of the flying public. But, Pasternack tested negative for drugs and Northeastern offers no evidence, because there is none, that Pasternack's behavior in any way compromised the safety of the flying public.

Regarding laches, Northeastern's argument reduces to the proposition that it should have been afforded advance warning of Pasternack's claim to indemnity (which was unripe until the D.C. Circuit's final ruling) so that it possibly could have participated in the FAA proceedings (which it did adversely to Pasternack) and possibly could have shortened the FAA proceedings (with no non-speculative indication of what it would or could have done to achieve that). Not only did Northeastern fail to identify any legal basis for its wishful right to participate in or

direct the underlying proceedings as a pre-condition to indemnification, its after-the-fact assertions about what it would have or could have done had it so participated are hypothetical and speculative. Speculation having been brushed aside, the Court of Chancery properly determined that Northeastern failed to demonstrate any prejudice that would warrant the application of laches to Pasternack's claims for indemnification, which was brought within the analogous statute of limitations.

For these reasons, and as set forth below, this Court should affirm the Court of Chancery's rulings.

SUMMARY OF ARGUMENT

1. **Denied.** As a pilot for Northeastern, Pasternack was deemed a safety-sensitive employee under applicable FAA regulations. In that capacity, he was subject to Northeastern's direction and control and therefore an agent for purposes of 8 *Del. C.* § 145(a). That control extended to Northeastern's orders to take the drug test and the consequences that flowed from it. Northeastern conceded that Pasternack's temporary lapse in certain training requirements had no impact on his status as a pilot for Northeastern or on his inclusion among Northeastern pilots subject to drug testing.

2. **Denied.** In order for Northeastern to comply with its own regulatory requirements, it placed Pasternack's name, along with the names of other Northeastern pilots, in a pool of employees subject to random drug testing. A "service agent" of Northeastern, ChoicePoint, randomly selected Pasternack's name from that pool, so advised Northeastern of that selection and Northeastern instructed Pasternack to report for testing. Outside of his affiliation with Northeastern, Pasternack was not required to submit to random drug testing.

3. **Denied.** Pasternack's conduct in leaving the drug testing facility, which he did with implied permission and only after the facility indicated it would need to contact Northeastern, was not contrary to Northeastern's interests. Pasternack tested negative for drugs, and the D.C. Circuit overturned the revocation

of his pilot's license. Pasternack had no obligation to accept an unjust penalty or other sanction so that Northeastern could avoid its indemnification obligation to Pasternack. Northeastern had no right to participate in and/or direct the disposition of Pasternack's defense. Regardless, Northeastern did participate in the FAA proceedings, and its representatives testified adversely to Pasternack.

4. **Denied.** After Pasternack's claim for indemnification ripened, he made a request for indemnification and, when Northeastern ignored that request, commenced the underlying action within the analogous statute of limitations. Northeastern failed to offer evidence of any non-speculative prejudice as a result of delay.

5. **Denied.** Because Pasternack is entitled to indemnification, he is likewise entitled to fees-on-fees, without which the award of indemnification is rendered meaningless.

STATEMENT OF FACTS

A. The Parties

Pasternack has been a licensed pilot since 1965. (A105 at ¶2). He served honorably in the United States Air Force and the Air National Guard, retiring with the rank of Colonel, and, until June 2007, he had flown commercial flights for Northeastern for decades. (*Id.*, A226 at 13-15).

Northeastern, a Delaware corporation, is a commercial air transport company operating out of Republic Airport in Farmingdale, New York. (A165 at ¶3).

B. Northeastern's Business And Pasternack's 27-Year Tenure At The Company

Northeastern filed its Certificate of Incorporation on or around December 21, 1978. (A165 at ¶4). At all relevant times, Northeastern operated its own charter flight service under Part 135 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 135 ("Part 135"), which regulatory framework is summarized below. (A225 at 12).

Pasternack was a Northeastern pilot and served as Chief Pilot for the Company in the 1980s. (A226 at 13-14). When Northeastern became a Part 135 operator, it had only two pilots: Pasternack and Michael Russo—the founder of the Company—who in addition to being a director, has been the Director of Operations and President since inception. (*See id.* at 15-16; A299 at 226-27). Over time, Northeastern hired additional pilots. (A226 at 16). As Chief Pilot, Pasternack oversaw the conduct of

all other Northeastern pilots. Later, Pasternack served as a pilot in command—the person ultimately responsible for the conduct of the flight—and then as a second in command pilot. (*Id.* at 15). Pasternack served in that capacity through and including the years 2005-2006. (*Id.*).

C. The Regulatory Framework In Which Northeastern Operates

In the early 1980s, Northeastern transitioned its business model from a lessor of commercial aircraft to an operator of charter flights under Part 135, which mandates that carriers like Northeastern assume responsibility for operational control over the flights that they conduct. (A167 at ¶¶12-13).

Northeastern also is subject to over-arching Department of Transportation (“DOT”) regulations that apply to multiple federal agencies that regulate the common carriage of passengers. (A228 at 22-23; A255 at 130, 132; A256 at 133). As a condition of maintaining its Part 135 certificate, Northeastern was required to conduct random drug testing. (A228 at 22-23; A170 at ¶21).

As of June 2007, Northeastern had in place a random drug testing program mandated by the applicable DOT and FAA regulations. (A255 at 129-30). Under this regime, Northeastern was required, as an “employer,” to subject its safety-sensitive “employees,”¹ like Pasternack, to random drug testing. In furtherance of this requirement, Northeastern enlisted the assistance of “service agents.” These

¹ (A168-69 at ¶¶14-17).

service agents included the facility where Pasternack's sample for drug testing was collected, LABCORP, and the consortium acting as the medical review officer ("MRO") that erroneously deemed Pasternack a refusal to test, ChoicePoint. Regulations define "service agent" as "[a]ny person or entity, other than an employee of the employer, who provides services to employers and/or employees in connection with DOT drug and alcohol testing requirements." (A168-69 at ¶17).

What service agents may do is limited; certain functions are reserved for the employer. For example, the regulations dictate to service agents:

(i) you must not make a determination that an employee has refused a drug or alcohol test. This is a non-delegable duty of the actual employer. You may, however, provide advice and information to employers regarding refusal-to-test issues.

(A169-70 at ¶19) (emphasis added).²

Because he performed safety-sensitive functions as a pilot, Pasternack was a "covered employee" and therefore included in the pool of Northeastern personnel subject to random drug testing under its program. (A256 at 134). At that time, Pasternack was not conducting flights for any other Part 135 carrier.³ (A228 at 23). Accordingly, Pasternack was subject to random drug testing solely by virtue of his

² There are exceptions to this limitation that do not apply here. (A169-70 ¶19).

³ Even if Pasternack had been conducting flights for another Part 135 carrier, Northeastern would have included him in its pool of safety-sensitive employees as a precaution. (A258 at 143).

inclusion in a pool of Northeastern “employees” (*i.e.*, personnel serving in a safety sensitive function), who, in turn, were subject to drug testing upon selection from that pool. (A228 at 23-24).

D. Northeastern Exercises Control Over Its Pilots

Northeastern is required to maintain strict operational control over the conduct of its pilots. (*Id.* at 215-16). This regime is contained in Northeastern’s General Operations Manual (“GOM”), which provides policies that apply to all Northeastern employees. (A227-28 at 20-21; JX16). The GOM creates a chain of command among Northeastern’s personnel. (A273 at 202-03; A274 at 206-08). Since inception, Russo has been Director of Operations and reports to nobody other than himself. (A260 at 150; A273 at 202, A306 at 255; B62 at 104; B98 at 16-17). He also is the Company’s President, Chairman of the Board and owner of 25% of Northeastern’s equity. (A305-06 at 251, 254).

Underneath Russo, the Chief Pilot is the immediate supervisor of the Company’s pilots. (A273 at 204). Once a flight is airborne, the pilot in command, who reports to the Chief Pilot, is fully responsible for the flight, which includes giving orders and instructions to the second in command. (A227 at 18; A273 at 204-05). For most of his later tenure at Northeastern, Pasternack, now in his mid-70’s, was a second in command pilot (A226 at 13-15).

All of Northeastern's pilots are functionally identical and appear the same to the public. (A268 at 182-83). Northeastern regulates the personal appearance of its pilots and requires that they wear a uniform. (A228 at 22; A268 at 183; A274 at 206-08; B20). Northeastern separately regulates the conduct and decorum of its pilots, including by implementing and enforcing policies that require pilots to behave in a manner, on and off duty, which does not reflect poorly on themselves or the Company and its customers. (A268 at 183; A274 at 206-08). From a customer's perspective, that customer would have no idea whether a particular pilot was part-time, full-time or any other designation—the customer simply sees an agent of Northeastern. (A268 at 183).

Northeastern had an interest in ensuring that all of its pilots were properly trained and in demonstrating that to federal regulators. (A272 at 200). Northeastern, accordingly, required that all of its pilots attend regular training regardless of their status as full-time or part-time. (A229 at 25; A267 at 178). The Company paid for these trainings. (A229 at 25-26; A267 at 178). Pilots did not receive any extra pay to attend the required trainings. (A251 at 113-14; A267 at 179). Pilots that did not complete the required trainings or testing would be terminated or not permitted to fly for Northeastern. (A229 at 26; A277 at 218).

Just as Northeastern had an interest in ensuring that its pilots were properly trained, it had an interest in ensuring that its pilots were drug and alcohol free and

demonstrating that to federal regulators. (A272 at 200). One of the steps taken to enforce and protect this Company interest was to subject pilots to severe consequences if they violated Northeastern's drug and alcohol policies, including the immediate suspension of pilots who refuse to submit to a drug or alcohol test. (A275 at 212; A277 at 218; B21 at § 3.10(c)(5)). These policies were applicable to "all pilots" and were in place "[e]ver since a drug testing program was required." (A273 at 201; A275 at 211).

E. The Drug Test

Pasternack's name was included in the pool of employees required to be randomly drug tested because Northeastern's Flight Department Administrator, Donna Schmitt, had submitted Pasternack's name to ChoicePoint as one of Northeastern's pilots. (A256 at 133; A258 at 142-43). Schmitt was notified by ChoicePoint that Pasternack was randomly selected for that particular calendar quarter. (A256 at 134-35). On June 1, 2007, Schmitt then called Pasternack to inform him of his selection and instructed him to report for drug testing. (A229 at 26-27). Schmitt's instruction is the only reason that Pasternack reported for the Drug Test. (A259 at 146).

After speaking with Schmitt, Pasternack realized that he could not locate a custody and control form ("CCF form") embossed with Northeastern's information. (A229 at 7; A256 at 135). That Northeastern form had to be provided to the

collection site at the time of the Drug Test to create a chain of custody paper trail. (A229 at 27). Pasternack notified Schmitt, she mailed the appropriate form to him and instructed him to go to the test once he received it. (*Id.* at 27-28). Pasternack received the form late in the afternoon on June 4, 2007, by which time the collection site was closed. (*Id.*) Pasternack went to LABCORP the following day at approximately 1:00 p.m. (*Id.*).

While at LABCORP on June 5, 2007, Pasternack followed the instructions provided by the collector, Theresa Montalvo, and provided a urine sample. (A230 at 30). However, Montalvo informed Pasternack that the amount of urine he had provided was insufficient and that he should wait to provide another sample. (*Id.*). Pasternack waited for 10-15 minutes at LABCORP but realized he had an appointment at his office at 2:00 p.m. and he needed to return there to keep the appointment. (*Id.*). Pasternack informed Montalvo that he needed to leave but that he would come back to provide an additional urine sample. (*Id.* at 31). Montalvo asked Pasternack when he planned to return and also noted that she would have to contact Northeastern. (*Id.*). Pasternack acknowledged the requirement and informed her that he would return the following morning. (*Id.*).

However, later that same afternoon, Pasternack needed to urinate and decided to return to LABCORP then and provide the sample, since the site was nearby. (*Id.* at 31-32). When he returned to LABCORP, Montalvo explained that she would not

accept a second sample until she got authorization from Northeastern. (*Id.* at 32). Montalvo indicated that she had called Northeastern and was waiting for a reply. (*Id.*). While Montalvo was waiting, Pasternack called Northeastern himself in an attempt to accelerate the process. (*Id.*) Schmitt was not working that day. (A259 at 146). Instead, Pasternack spoke with Peter Montemurro, Northeastern's General Manager, and Montemurro subsequently spoke with Montalvo. (A231 at 33). Following her conversation with Montemurro, Montalvo had Pasternack provide a second specimen. (*Id.*)⁴

On June 10, 2007, Schmitt contacted Pasternack and informed him that he had been deemed a "refusal to test." (*Id.* at 33-34). This resulted in an order issued by the FAA, revoking Pasternack's pilot's certificates. (*Id.* at 35).

F. The Underlying Proceedings

By orders dated November 20, 2007 and May 20, 2008, the FAA revoked Pasternack's airmen's certificates on the grounds that he was a "refusal to test." (B25 at ¶13). The FAA initiated administrative proceedings against Pasternack (the "FAA Proceedings") by filing its revocation orders as a complaint in front of the

⁴ Following her conversation with Montemurro, Montalvo understood that she had authority to proceed with the testing. (*See* B5). It would have made no sense to authorize a second collection if, based on Pasternack's prior departure, he already was deemed a refusal to test by his employer.

National Transportation Safety Board (“NTSB”). (*Id.* at ¶14). In response, Pasternack retained counsel. (A231 at 35-36).

After a two-day hearing in July 2008, an administrative law judge issued an oral decision affirming the revocation of Pasternack’s certificates. (B10-18). Following two appeals to the United States Court of Appeals for the D.C. Circuit, that court reversed the revocation, A232 at 39-40, holding:

After careful review of the record in this case, we find that the Board’s conclusion, that Dr. Pasternack lacked permission to leave the testing facility and, thus, “refused” a mandatory drug test, fails for lack of substantial evidence. We hold that, considering the entire record, substantial evidence does not support the NTSB’s determination that the collector did not impliedly give Dr. Pasternack permission to leave. We are therefore constrained to reverse the decision of the Board, vacate its Order, and grant the petition for review.

Pasternack v. Huerta, 513 Fed. App’x 1 (D.C. Cir. 2013).

G. Pasternack Requests Indemnification From Northeastern, and Then Is Forced to File Suit

Northeastern’s bylaws provide that “[t]he corporation shall indemnify its officers, directors, employees and agents to the extent permitted by the General Corporation Law of Delaware.” (A166).

On October 20, 2015, Pasternack sent a letter to Northeastern requesting that Northeastern indemnify him for the legal expenses he incurred in successfully defending himself in the FAA Proceedings. (A177). Northeastern acknowledged

receipt of Pasternack's letter and stated, "[w]e are checking into this matter and will get back to you in the near future." (*Id.*). Northeastern never responded further. (A177; A234 at 45; A314 at 287-88). Pasternack filed suit, and after a two-day trial, the trial court found in favor of Pasternack, holding that he (1) was an agent of Northeastern, (2) took the Drug Test by reason of his affiliation with Northeastern, (3) acted in good faith and in a manner, at the very least, not opposed to the best interests of Northeastern, and (4) was entitled to indemnification and fees-on-fees.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT PASTERNAK WAS AN AGENT UNDER NORTHEASTERN'S MANDATORY INDEMNIFICATION BYLAW

A. Question Presented

Whether the Court of Chancery correctly held that Pasternack was an agent for purposes of Northeastern's mandatory indemnification bylaw when he was subject to Northeastern's direction and control and appeared for the Drug Test on Northeastern's orders and to serve Northeastern's interests in complying with its own regulatory requirements. (Preserved: Op. 23-27; B168-81, 203-14).⁵

B. Scope of Review

The Court of Chancery's finding of agency is a question of fact, reviewed for abuse of discretion. *WaveDivision Holdings, LLC v. Highland Capital Mgmt.*, 49 A.3d 1168, 1177 (Del. 2012).

C. Merits of Argument

The trial court correctly concluded that Pasternack was Northeastern's agent. Agency is a relationship "created when one party consents to have another act on its behalf, with the principal directing and controlling the acts of the agent." *Cochran*

⁵ The Court of Chancery's post-trial opinion ("Op.") is attached at Exhibit 1 to Appellant's Opening Brief ("AOB").

v. Stifel Fin. Corp., 2000 WL 286722, at *17 (Del. Ch. Mar. 8, 2000).⁶ A determination of agency depends “on the facts of the individual case.” *Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. 1997). In the context of Section 145, an agent is indemnifiable in “those situations when an outside contractor...can be said to be acting as an arm of the corporation vis-à-vis the outside world.” *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 163 (Del. Ch. 2003).

The trial court determined that Pasternack fit this contextualized definition of agent. As a Northeastern pilot, Pasternack interacted with and presented to the flying public in exactly the same way as other Northeastern pilots. And, like all such pilots, Pasternack was subject to Northeastern’s direction and control in the performance of his duties.

Northeastern does not attempt to refute this finding of agency. Rather, Northeastern argues that Pasternack was not acting “on behalf of” Northeastern in his interactions with a third party when he purportedly “fail[ed] to comply with federal regulations regarding his individual pilot’s certificate.” (AOB 14).⁷

⁶ Analogously, in analyzing whether one is an “employee” versus an “independent contractor,” the touchstone is the principal’s control or ability to control. *See, infra*. p. 24-5).

⁷ Northeastern argues that “[a]t the core of the trial court’s decision with respect to” its finding of agency “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.” (AOB 14). This line of argument appears to be either a distraction or a misapprehension of what the record

Northeastern's argument is flawed factually and legally. Factually, as the trial court found, Pasternack was acting on behalf of Northeastern when he reported for and tested negative as a result of the Drug Test. (Op. 25-27). Legally, as the D.C. Circuit found, Pasternack did not fail to comply with federal regulations because he temporarily departed the drug testing facility with implied consent and the FAA acted arbitrarily and capriciously in revoking his pilot's license.

Northeastern claims that 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." (OAB 15). To support its theory, Northeastern recycles three arguments that repeatedly have been made, refuted and rejected properly by the trial court—that Pasternack (i) took the Drug Test to maintain his "individual" license, (ii) could not fly for Northeastern at the time of the Drug Test due to a lapse in "currency," and (iii) exercised autonomy when he supposedly refused to test. (AOB 15). The trial court

shows and what the trial court found. First, ChoicePoint did not require Pasternack to appear for testing; Choice point notified Northeastern that Pasternack had been selected and then Northeastern required Pasternack to be tested. Second, not only did Pasternack not improperly leave the facility, but ChoicePoint had nothing to do with testing at the facility; only LABCORP did. Third, ChoicePoint's reporting the test results as a refusal was clearly a violation of the applicable federal regulations. (A169-70 at ¶19).

overlooked nothing.

1. Pasternack's Interest in Protecting His Airmen's Certificates Does Not Disturb the Trial Court's Finding of Agency

The Court below correctly found that Pasternack was an agent of Northeastern. As a pilot for Northeastern, he was subject to Northeastern's direction and control, as mandated by federal law. From the perspective of the flying public, Pasternack was no different than any other Northeastern pilot. Northeastern does not seriously dispute these factual findings on which the Court below predicated its finding of agency. Rather, Northeastern contends that Pasternack somehow ceased to be an agent (or was not acting as an agent) when he temporarily departed the drug testing facility with the implied permission of the collector.

Northeastern's argument is that Pasternack took the Drug Test in order to preserve his own pilot's license and would have been subject to random drug testing if he flew for *any* Part 135 air carrier. The fact that a consequence of Pasternack not appearing for the Drug Test was a possible revocation of his license does not undercut a finding of agency. Rather, it underscores Northeastern's control in that the consequences for not complying with the principal's directive—loss of airmen's certificates—were extreme. Northeastern directed Pasternack to appear for testing to satisfy its own compliance with the regulatory requirement to send safety-sensitive employees for testing, and thus to the benefit of Northeastern.

Northeastern ignores that any pilot's obligation to submit to random drug

testing is *employer-specific*. And this case is about Pasternack’s actual affiliation with Northeastern, not a hypothetical (and, in fact, non-existent) affiliation with a different Part 135 carrier. Only pilots flying for or applying to fly for a *specific* Part 135 carrier are required to undergo drug testing. Northeastern offered no evidence—because there is none—that Pasternack was flying for or applying to fly for another Part 135 carrier or engaging in any other aviation industry conduct whatsoever that separately subjected him to drug testing. Northeastern’s false analogies to attorney CLE and doctors’ licensing are off point. (AOB at 15-16). They are completely unlike the employer-specific nature of the Part 135 testing regime, which places the onus on employers to test their employees.

As the Court below also found, Pasternack’s temporary departure from the drug testing facility (which, according to the D.C. Circuit, did not violate applicable FAA regulations) was not an intervening act that severed his agency. The Court below correctly focused on the reasons that Pasternack reported for the Drug Test in the first instance—his inclusion in Northeastern’s pool of safety-sensitive employees and his selection for random drug testing by Northeastern’s service agent, ChoicePoint.

[Northeastern’s argument] 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.

(Op. 29). In any event, Pasternack continued to be an agent with respect to the

departure because once he was at the facility, everything that happened was a direct consequence of his agency, which is highlighted by the fact that LABCORP said it had to and did contact Northeastern in connection with Pasternack's temporary departure and following resumption of the test.

2. Pasternack's Lack of "Currency" at the Time of the Drug Test is Irrelevant

Northeastern asserts that Pasternack was not an agent because he was not current with certain training requirements and therefore could not fly for Northeastern at the time of the Drug Test. (AOB 17). This ignores Northeastern's own testimony. As explained by Northeastern's then Chief Pilot, "temporary changes in flight status do not effect [sic]" a pilot's inclusion in the drug testing pool because, "as long as [the pilot is] still employed by Northeastern Aviation," Northeastern could quickly "re-qualify" that pilot, who then could fly for Northeastern. (B6-7). According to the Chief Pilot, this "happens quite often." (*Id.*) As a result, temporary lapses in currency do not keep pilots out of Northeastern's drug testing pool or off of Northeastern's roster of pilots. Pasternack's lack of currency *had no impact on his continuing to be a pilot for Northeastern and no impact on his inclusion in the pool of safety-sensitive employees.* (See A251 at 114-15; A258 at 144; A259 at 145; B2-4).

In the FAA Proceedings, the FAA argued that even if Pasternack was not current, he was nevertheless subject to drug testing. Northeastern makes much of

the fact that Pasternack argued in the FAA Proceedings that his lack of currency should have compelled the opposite conclusion—that he should not have been included in Northeastern’s pool of safety-sensitive employees subject to random drug testing. (AOB 18).⁸ This, however, was a position argued against by Northeastern’s Flight Department Administrator and also by its General Manager during the FAA Proceedings. (B2-4, 6-7). The FAA rejected Pasternack’s position and upheld the subsequently overturned revocation orders.

The issue is not Pasternack’s ability or inability to fly for Northeastern under Part 135 but whether Northeastern considered him to be (i) properly included in the drug testing pool and (ii) properly selected for random drug testing in order to comply with Northeastern’s own regulatory requirement to submit its safety sensitive employees to random drug testing, both of which Northeastern did.

3. Northeastern’s Attempt to Shift Focus to Pasternack’s Temporary and Regulatory-Compliant Departure from the Drug Testing Facility is Unavailing

Here, Northeastern confuses the analysis of what constitutes agency or employment. The trial court applied recognized factors and concluded that Pasternack was an agent largely because Pasternack was subject to Northeastern’s direction and control and presented to the public as an agent of the company. But

⁸ This is a position that Pasternack advanced after studying the regulations; at the time of the Drug Test, he assumed he was subject to testing and dutifully reported. (A60-61 at 46-47; A241 at 74).

the trial court did not stop there. The court also analyzed the facts surrounding the reason for Pasternack's inclusion in and selection from Northeastern's drug testing pool and his being directed by Northeastern to report to the Drug Test. As a result of the analysis, the court concluded that Pasternack appeared for the Drug Test as part of Northeastern's own regulatory requirements. So, even in the specific context of reporting to the Drug Test, Pasternack was acting on behalf of Northeastern.

Instead of confronting this analysis squarely, Northeastern sidesteps it and tries to argue that the trial court erred because Pasternack supposedly left the drug testing facility in violation of applicable regulations and then defended the revocation of his license in his personal capacity. The fact that Pasternack had "autonomy" to leave the facility temporarily is of no consequence.⁹ It is a truism that he had free will but the issue, in large part, is the consequence of not appearing as ordered by Northeastern. Regardless, Pasternack was at the testing facility only because he was an agent of Northeastern. And, the record demonstrates that he was an agent even with respect to his departure because LABCORP had to contact Northeastern. (A230 at 30, 32; A231 at 33; B5).

Northeastern argues that "[i]n failing to comply with the regulations"

⁹ Northeastern's argument that Pasternack's temporary departure from the Drug Test was not "socially useful," AOB 22, makes little sense. That was the alleged wrong; advancement and indemnity law does not require the plaintiff to prove that the alleged wrong was socially useful. Of course, Pasternack's clean drug test, exoneration and defense of Northeastern's reputation were socially useful.

Pasternack was not acting as Northeastern's agent. (AOB at 21-22). Northeastern's argument might have some force if Pasternack had lost in the FAA proceedings, but he prevailed and the D.C. Circuit vindicated his departure.

Curiously, Northeastern cites to numerous factors that it contends support a finding that Pasternack was not an employee, even though the trial court did not base its award of indemnification on such a finding. (AOB 20-21). In any event, the factors listed by Northeastern are not controlling.

The manner of payment (*i.e.*, by W2 or 1099) is not determinative. *See Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1094, 1096 (Del. 2006) (finding individual was an employee even where payments were recorded as "subcontractor" payments and listed as "contracted labor" on employer's tax returns). While Pasternack was paid on a per flight basis, notably, Russo is paid via a 1099 but is considered a full-time employee, despite the fact that he is paid, like Pasternack, on a per flight basis. (A309 at 265-68).

Contrary to Northeastern's delineated factors, most of the key factors applied to determine employee status support a finding that Pasternack was an employee of Northeastern. *See Fisher v. Townsends, Inc.*, 695 A.2d 53, 59 (Del. 1997). The primary inquiry is "[t]he extent of control which, by the agreement, the master may exercise over the details of the work." *See, e.g., Gooden v. Mitchell*, 21 A.2d 197, 201 (Del. 1941); *E.I. Du Pont de Nemours Co. v. I.D. Griffith Inc.*, 130 A.2d 783,

784 (Del. 1957); *see also* Restatement (Second) of Agency § 220, cmt. a. Northeastern controlled every aspect of Pasternack's work as a pilot; it was required to do so by federal regulations. *See supra* Statement of Facts § D. This is consistent with the trial court's finding of agency.

In his post-trial briefing, Pasternack explained how the following additional factors from the Restatement (Second) of Agency also support a finding of employee status:

Whether or not the one employed is engaged in a distinct occupation or business: Although Pasternack practiced medicine during the time he served as a pilot for Northeastern, Pasternack did not operate his own piloting business (as a true independent contractor would). *See Falconi*, 902 A.2d at 1100-01. Similarly, Pasternack did not hold himself out as the owner of a distinct business. He flew Northeastern's planes for customers at Northeastern's direction, subject to Northeastern's control, rules and regulations.

The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision: Flying aircraft is highly specialized and conducted under close supervision.

The skill required in the particular occupation: While piloting airplanes involves a specialized skill, in the case of Northeastern, that would not distinguish Pasternack from any other of its pilots. *See* Restatement (Second) of Agency § 220, cmt. i. Serving as a pilot was a function of Northeastern's business.

Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work: There is no dispute that Northeastern supplies the instrumentalities, tools and place of work (*i.e.*, airplanes, flight equipment, hangar, etc.). (A249 at 106). Northeastern owned, leased or otherwise contracted for the planes and other equipment used to service its customers. (*Id.* at 106). Northeastern's customer service department—not its pilots—interfaced with customers for purposes of booking and coordinating the charter flights. (*Id.* at 15-16, 152.) Northeastern determined other material aspects

of the flights, such as where to park the planes at the destination airports and where to fuel the planes. (*Id.* at 18-20.) Northeastern also coordinated and arranged meals, transportation and lodging for crewmembers when on overnight flights. (*Id.*) *See* Restatement (Second) of Agency § 220, cmt. k. Northeastern also paid for Pasternack's flight training. (A229 at 25-26; A267 at 178). Pasternack was not required to carry any of his own insurance; Northeastern carried insurance policies to cover its flight operations. (A251 at 114).

The length of time for which the person is employed: Pasternack continuously was employed as a part-time pilot by Northeastern for decades. (A226 at 13-15).

Whether or not the work is a part of the regular business of the employer: There is no dispute that the operation of charter flights comprises Northeastern's regular business.

Whether or not the parties believe they are creating the relation of master and servant: Pasternack certainly considered himself to be an employee of Northeastern. (A226 at 13). Moreover, under the applicable DOT and FAA regulations, Northeastern was Pasternack's employer and Pasternack was Northeastern's employee. (*See, e.g.*, A168-69 at ¶17).

(B170-79).

The trial court properly determined that Pasternack was an agent of Northeastern.

II. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT PASTERNAK WAS SUBJECTED TO THE FAA PROCEEDINGS BY REASON OF HIS AFFILIATION WITH NORTHEASTERN

A. Question Presented

Whether the Court of Chancery correctly held that Pasternack was subjected to the Drug Test by reason of his affiliation with Northeastern when (i) Northeastern, to comply with its own regulatory requirements, placed Pasternack in its pool of pilots subject to random testing, (ii) Pasternack reported to the test on Northeastern's orders, and (iii) but for Pasternack's affiliation with Northeastern he would not have been subject to the test. (Preserved: Mem. Op. 27-29; B182-87, 215-224).

B. Scope of Review

Whether Pasternack was subjected to the Drug Test "by reason of the fact" of his Northeastern agency is a mixed question of law and fact. The Court of Chancery's factual findings regarding Pasternack's relationship and affiliation with Northeastern, as well as the reasons he was subjected to the Drug Test are entitled to deference and should not be overturned unless "clearly wrong." *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 82-83 (Del. 1998). To the extent that the Court must interpret the "reason of the fact" language in Section 145(a) of the General Corporation Law, however, review is *de novo*. *Id.* at 83-85.

C. Merits of Argument

Delaware courts construe the phrase “by reason of the fact” both “broadly and in favor of indemnification.” *Weaver v. ZeniMax Media, Inc.*, 2004 Del. Ch. LEXIS 10, at *9 (Del. Ch. Jan. 30, 2004). Under Delaware law, a person is a party to a proceeding “by reason of the fact” that the person is an employee or an agent of a corporation if there is a “nexus or causal connection between the . . . proceeding[] . . . and [the] official corporate capacity [of the person].” *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 204, 214 (Del. 2005).

The FAA Proceedings arose from the Drug Test that (i) federal regulations required Pasternack to take as an employee performing safety-sensitive functions for Northeastern, (ii) Northeastern ordered Pasternack to take, and (iii) LABCORP, as Northeastern’s service agent, administered to him for Northeastern. While Pasternack did protect his own rights by challenging the result of the Drug Test, the need to protect those rights arose from his attempt to fulfill an obligation that existed only because he was an employee or an agent of Northeastern.

The crux of Northeastern’s argument on the “by reason of the fact” analysis is that the trial court erroneously found a causal connection between Pasternack’s affiliation with Northeastern and his appearance at the Drug Test,¹⁰ and in support

¹⁰ Northeastern accuses the trial court of not appreciating subtle distinctions in causation between the FAA proceedings and Pasternack’s agency, on the one hand, and Pasternack’s appearance for the Drug Test and his agency, on the other.

of that argument relies on *FGC Holdings Ltd. v. Teltronics*, 2007 Del. Ch. LEXIS 14 (Del. Ch. Jan. 22, 2007) (AOB 25). In that case, the claimant, FGC, was the purchaser of preferred stock of the defendant corporation. The relevant certificate of designations permitted the holder to designate a director. FGC sued Teltronics to compel it to recognize its designee and in connection therewith sought fees and costs under Section 145. In denying indemnification under Section 145, the Court observed that the designee was not a director when he sued and therefore could not have been seeking to obtain a corporate benefit that he was duty-bound to pursue. Rather, FGC sought to enforce its contractual right to seat a director. *Id.* at *39-*51. So while *FGC* does address the proposition that there must be a causal connection between the underlying proceedings and the indemnitee's duties to the corporation, Northeastern's reliance on *FGC* is misplaced because that case involved a plaintiff initiating an underlying proceeding against the corporation and seeking indemnification for that offensive action, but in those circumstances a putative indemnitee can recover only if the proceeding is brought as part of the claimant's fiduciary duties to the corporation. *See FGC*, 2007 Del. Ch. LEXIS 14, at *40-41

Northeastern's assignment of error starts from the proposition that Pasternack was "not acting as an agent on behalf of Northeastern in his refusal to test." (AOB 24). This rests on the false premise that Pasternack refused to test. As found by the D.C. Circuit, he did not refuse to test. *Pasternack v. Huerta*, 513 Fed. App'x 1.

(citation omitted). Here, *FGC* is not illustrative because, among other reasons, Pasternack was the respondent, and not subject to the heightened burden for offensive actions.

Notwithstanding Northeastern's misplaced reliance on *FGC*, its causation argument suffers from a more fundamental flaw because it rests on a false premise: that Pasternack had some generalized obligation to be tested for drugs and that he did so for personal reasons. (AOB 25). To the contrary, it was *only* due to Pasternack's affiliation with Northeastern that he was subjected to the Drug Test and forced to challenge the revocation of his certificates. As the trial court found:

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. 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.

(Op. 28).

While it is true that all pilots who fly for Part 135 carriers are subject to random drug testing, it is equally true that any pilot's obligation to test is *tied to a specific employer* who places the pilot's name in a pool of employees subject to drug testing.¹¹ Part 135 carriers subject their pilots to random testing in order to comply

¹¹ Northeastern skirts this issue and argues instead that "Pasternack could have presented for, and prematurely left from, any drug test had he chosen to fly for any Part 135 carrier." (AOB 26). This is a hypothetical; it is not what happened in this

with the carrier's *own regulatory requirements*. The FAR's drug testing requirements are employer-centric and place the onus on the employer to ensure that its safety sensitive employees are drug tested. (A170 at ¶21). Northeastern was no exception. Pasternack would not have been a party to the FAA Proceedings if he were not a pilot for Northeastern—and thus acted as an agent for Northeastern. (*See, e.g.*, A252 at 119-20; A256 at 134; A258 at 144; A267 at 180; A314 at 285-86). Pasternack was not required to take a drug test just because he was a pilot; rather, federal regulations required—and Northeastern ordered—him to take the drug test specifically because he held a safety-sensitive position with Northeastern. (*See* A256 at 133-34; A258 at 142). The misconduct that Pasternack allegedly committed and had to defend against in the FAA Proceedings—constructively refusing to take a drug test—occurred while he was performing his official duties as a Northeastern agent by reporting to the Drug Test as ordered by Northeastern. That constitutes the required nexus. *See, e.g., Reddy v. Elec. Data Sys. Corp.*, 2002 Del. Ch. LEXIS 69, at *20 (Del. Ch. June 18, 2002).

case. Pasternack flew for no other Part 135 carrier, was subject to drug testing solely due to his affiliation with Northeastern, and was forced to defend the erroneous suspension of his license solely due to that same affiliation. For this reason, Northeastern's reliance on *Charney v. American Apparel, Inc.*, 2015 WL 5313769 (Del. Ch. Sept. 11, 2015) and *Hyatt v. Al Jazeera American Holdings*, 2016 WL 1301743 (Del. Ch. Mar. 31, 2016) is misplaced. Those cases are further distinguishable for the reasons set forth in Pasternack's Reply Post-Trial Brief (B222-24).

Northeastern next cites to *Fasciana* and *Dore v. Sweports, Ltd.*, 2017 Del. Ch. LEXIS 19 (Del. Ch. Jan. 31, 2017), for the proposition that indemnification for agents should be supported only when the agents exercise judgment or decision-making on behalf of the corporation. But *Fasciana* did not involve an analysis of the “by reason of the fact” prong of a Section 145 claim. Rather, the court analyzed whether plaintiff, a lawyer for the defendant corporation, was an “agent” entitled to advancement. With respect to most of the claims at issue, the court concluded that the lawyer was not an agent because the allegations in an underlying federal indictment accused the lawyer of assisting a corporate officer in acts of improper internal accounting, but did not involve the lawyer’s interaction with third parties. 829 A.2d at 172-73.¹² Here, the trial court found that Pasternack, as a Northeastern pilot, interacted with and represented Northeastern to the flying public. (Op. 24) The trial court also found that reporting to the Drug Test on the orders of Northeastern—with a Northeastern CCF form in hand—was among Pasternack’s duties to Northeastern and also was done to assist Northeastern in complying with its own regulatory obligations. (Op. 26-28).

¹² The *Fasciana* court was hesitant to conclude facially that an attorney—regularly considered to be an agent of the client—was automatically an agent for purposes of Section 145. Instead the court took a more limited approach and determined that an attorney is an agent for purposes of Section 145 when interacting with third parties on behalf of the client. Here, the trial court determined that Pasternack was an agent in precisely that way.

Finally, Northeastern points to *Dore v. Sweports*, 2017 Del. Ch. LEXIS 19, at *58, but for much the same reason *FGC* is inapplicable, it is similarly unhelpful. There, indemnification was denied to plaintiffs who brought offensive claims against the corporation in furtherance of plaintiffs' individual contract rights as lenders to the corporation.

In a further attempt to ascribe error to the trial court's findings, Northeastern argues that Pasternack's duties to Northeastern did not commence until he accepted a flight and that he did not report to the Drug Test in connection with a particular flight. (AOB 27). This ignores the entire purpose and mandatory nature of the drug testing regime, which is designed to protect the flying public and therefore inextricably linked to flight activity, not to specific flights. That Pasternack was not paid separately to attend the Drug Test is irrelevant.¹³ There is no record evidence that *any* Northeastern pilot was paid simply for attending drug testing, or even training. (A251 at 113-14; A267 at 179). Whether Pasternack was in a pilot's uniform when he reported as ordered for drug testing is irrelevant. Donning a uniform is not what makes one a pilot, nor does it define when one is engaging in conduct by reason of that status. Northeastern ascribes significance to the fact that Pasternack did not "involve Northeastern in the revocation proceedings." (AOB 27).

¹³ It is noteworthy that Pasternack did not pay for the Drug Test. While not stated in the record, the obvious payor is Northeastern.

As indemnitor, Northeastern had no right to be involved in or influence the proceedings. Northeastern witnesses, however, did give testimony adverse to Pasternack in the proceedings.

In a final attempt to disturb the trial court's conclusion that Pasternack was subject to the Drug Test by reason of his affiliation with Northeastern, Northeastern seeks to disavow its relationship with its own "service agents." Northeastern takes the position that it did not have control over the Drug Test and was not qualified to and did not actually give the collector at LABCORP, Montalvo, permission to proceed with Pasternack's test. (OAB 29-30). The testimony of Northeastern's witnesses is irrelevant and wrong. Federal regulations require Northeastern to exercise the ultimate level of control—the determination whether an employee refuses to test. (A169 at ¶19) ("...you must not make a determination that an employee has refused a drug or alcohol test. This is a non-delegable duty of the actual employer").

The fact that Montalvo refused to proceed with Pasternack's test until she received what she considered to be approval from Northeastern is consistent with the applicable federal regulations, which dictate that it was Northeastern's non-delegable duty to determine whether or not there has been a refusal to test. (A169 at ¶19). Accordingly, it makes perfect sense for a "service agent," such as LABCORP, to inquire of Northeastern whether it was authorized to proceed with

collecting a second specimen from Pasternack, who had previously left the facility.

As Pasternack learned later, leaving the facility was deemed to be a refusal to test by ChoicePoint. Here, too, Northeastern cannot seek to distance itself from the Drug Test by pointing out that ChoicePoint made the erroneous “refusal to test” determination. (*See* AOB 30). That was a clearly defined violation of applicable federal regulations, which specifically prohibited ChoicePoint from making the refusal to test determination. (A169 at ¶19).

III. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT PASTERNAK ACTED IN GOOD FAITH OR, AT A MINIMUM, IN A MANNER NOT CONTRARY TO NORTHEASTERN'S INTERESTS

A. Question Presented

Whether the Court of Chancery correctly held that Pasternack, having (i) been exonerated by the D.C. Circuit, (ii) tested negative for drugs and (iii) left LABCORP temporarily with the understanding that such departure was permissible, acted in good faith or, at least, not contrary to Northeastern's interests. (Preserved: Op. 29-31; B188-91, 224-28).

B. Scope of Review

A determination of good faith, or lack thereof, is a question of fact. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund*, 624 A.2d 1199, 1208-09 (Del. 1993). The Court of Chancery's discretionary factual findings should not be disturbed unless they are "clearly wrong and justice requires their overturn." *Hudak v. Procek*, 806 A.2d 140, 149 (Del. 2002).

C. Merits of Argument

Northeastern points to no record evidence demonstrating error in the trial court's determination that Pasternack acted in Northeastern's best interest, or at a minimum, not opposed to its interests. Tellingly, the judge in the FAA Proceedings acknowledged that the technical "refusal to test" determination was a close call:

... the real issue here is did the conduct of Respondent Pasternack constitute a refusal to take the test. The FAA says it did[.] ... I can see both sides of the picture here in this proceeding. This may be a case of first impression. I believe that it is, and one that could, and very well may be, decided in an opposite respect ultimately to my decision.

(A175-76 ¶48). This is not indicative of an indemnitee purposefully acting contrary to the interests of the corporation.

The D.C. Circuit vindicated the position that Pasternack had been advocating through the FAA Proceedings. It held that the NTSB should not have concluded that Pasternack “lacked permission to leave the testing facility and, thus, ‘refused’ a mandatory drug test,” and that its decision was arbitrary and capricious. *Pasternack v. Huerta*, 513 Fed. App’x 1 (D.C. Cir. 2013). This should end the inquiry.

Northeastern nevertheless argues that Pasternack acted in bad faith because it is “undisputed that Pasternack did not follow regulatory protocol in leaving the testing facility prior to providing an adequate specimen.” (AOB 34). Not only is this disputed, it wholly ignores the decision of the D.C. Circuit. The regulations cited by Northeastern do not impose strict liability. Rather, they imply that an employee may depart a testing facility prior to completion of the test with permission. (*See* B128) (providing that a refusal to test could be based on failure to leave a collection site *without permission*). This is consistent with the finding of the D.C. Circuit that Pasternack had implied permission to leave, which he believed he had at the time. (A174 at ¶¶43-44; A231 at 34; Op. 30).

Northeastern proceeds to suggest—without offering one shred of record evidence—that the flying public’s safety was compromised by Pasternack’s conduct. (AOB 34). To the contrary, Pasternack did not refuse to test. He tested negative on the day he reported to LABCORP as ordered by Northeastern. (A175 ¶45). Pasternack did not disregard the orders of Northeastern, he was not insubordinate and he did not try to evade the consequences of his own (alleged and overturned) misconduct. *Cf. Stockman v. Heartland Indus. Partners L.P.*, 2009 Del. Ch. LEXIS 131, at *40 (Del. Ch. July 14, 2009).

Northeastern next speculates that Pasternack “was likely aware of regulations governing drug testing and a refusal to test.” (AOB 35). But, as Pasternack testified, he was not a MRO at the time in question. (A224 at 7). But, even if he had been, Pasternack would have known leaving a testing facility with permission is not a refusal to test. Northeastern also chides Pasternack for not following up with Northeastern after receiving the results of the Drug Test. (AOB 35). While also untrue (Pasternack did speak with the Flight Department Administrator about the results, *see* B8-9), Northeastern fails to identify what that might have accomplished or its significance.

Although mitigation of damages is not a concept applied to actions under Section 145, Northeastern relies on *Ivize of Milwaukee, LLC v. Complex Litig. Support, LLC*, 2009 Del. Ch. LEXIS 55 (Del. Ch. April 27, 2009), a general contract

action, for its argument that Pasternack's good faith is in question because he did not mitigate his damages. Northeastern cannot point to a case requiring an indemnified party to attempt to "avoid" an indemnifiable loss. The only way to avoid a loss in a Section 145 proceeding would be for the prospective indemnified party not to defend the underlying proceeding, or to accept a settlement or judgment against the indemnitee's own interest in order to save the indemnitor money. Requiring such is not the law and would completely eviscerate Section 145. Ironically, Northeastern might have mitigated the impact of the FAA Proceedings by testifying in support of Pasternack, not against him.¹⁴ In this same vein, Northeastern contends that it is "arguable that Pasternack knew he was wrong in leaving the facility...." (AOB 36). Not only is this more speculation, it is contrary to actual evidence—the trial court's finding that "Pasternack credibly testified that he was unaware that ChoicePoint would deem his departure a refusal to test." (Op. 30).

When his license was suspended, Pasternack remedied a wrong, just as Russo sought to do when fighting a suspension order. (A311 at 274-75). Indeed, Russo himself was motivated to fight a suspension order from the FAA to protect the

¹⁴ Even more ironic is the fact that had Northeastern appropriately discharged its "non-delegable duty" and determined itself, as the D.C. Circuit did, that Pasternack was not a refusal to test, Northeastern not only could have mitigated the impact of the FAA Proceedings, it could have avoided them altogether.

Company's reputation and to vindicate himself. (*Id.* at 273) (fighting the suspension order against him because "the finding of a violation is detriment [sic] only – not only to myself but to Northeastern as well" and "it was my requirement as an employee not to accept something that was incorrect just to make it end. I wanted it to go to conclusion [sic] to prove that it was incorrect and that the principal ops inspector that issued it had a vendetta that he was following.").

Pasternack did nothing wrong, as determined by the D.C. Circuit. To get to that conclusion, Pasternack defended not only his interest in reversing the revocation of his airmen's certificates, but, as the trial court found, those efforts "served to protect Northeastern's reputation." (Op. 31). Nothing in the record is sufficient to overturn the trial court's findings that Pasternack acted in good faith, or at a minimum, not contrary to Northeastern's interests.

IV. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT PASTERNAK’S CLAIM WAS FILED TIMELY

A. Question Presented

Whether the Court of Chancery correctly held that Northeastern failed to carry its burden to establish that (i) Pasternack unreasonably delayed in filing his indemnification action within the analogous statute of limitations and (ii) Northeastern was unfairly prejudiced. (Preserved: Op. 31-34; B189-90, 228-31).

B. Scope of Review

Successful invocation of laches requires a defendant to demonstrate that plaintiff unreasonably delayed in filing suit and that the delay unfairly prejudiced defendant. *Hudak v. Procek*, 806 A.2d at 153. “What constitutes unreasonable delay and prejudice are questions of fact that depend on the totality of the circumstances.” *Id.* On appeal, the Court will disturb the Court of Chancery’s discretionary findings of fact only if they are “clearly wrong and justice requires their overturn.” *Id.* at 149. The interpretation and application of laches, however, is subject to *de novo* review in certain circumstances. *See Levey v. Brown Asset Mgmt., LP*, 76 A.3d 764, 768 (Del. 2013) (citing *Reid v Spazio*, 970 A.2d 176, 180 (Del. 2009)).

C. Merits of Argument

The Court of Chancery looks to analogous statutes of limitations when applying laches. Delaware law treats a claim for indemnification under a

corporation's bylaws as a contractual claim subject to Delaware's 3-year statute of limitations under 10 *Del. C.* § 8106. The statute of limitations on a claim for indemnification does not begin to run until the underlying proceedings are finally resolved, including all appeals. *Branin v. Stein Roe Inv. Counsel, LLC*, 2015 WL 4710321, at *4 (Del. Ch. July 31, 2015). The D.C. Circuit entered judgment for Pasternack on March 22, 2013, *Pasternack v. Huerta*, 513 Fed. App'x 1. At that time, Pasternack's indemnification claim ripened and the statute of limitations for that claim did not expire until March 22, 2016. *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005). Pasternack requested indemnification on October 22, 2013 and filed his Verified Complaint for Indemnification in this Court on March 7, 2016. (A177; A1).

Northeastern's only substantive challenge to the trial court's determination that Pasternack's claim was timely is a repeat of previously rejected claims of prejudice. Northeastern's claims are either unsupported by the law and/or products of speculation. (Op. 33-34) ("Northeastern merely conjectures that Pasternack's delay is attributable to the strength of his claim. Northeastern fails to point to any prejudice it suffered after...Pasternack's indemnification claim became ripe.") Absent prejudice, there is no basis to apply laches. *See Reid v. Spazio*, 970 A.2d 176, 182-83 (Del. 2009). Northeastern argues that Pasternack's delay was inequitable because he knew the company would be adversely financially impacted

by his legal proceedings. (AOB 41). Assuming success by a covered person, any indemnification action has an adverse financial impact on the company. This cannot be deemed prejudice for purposes of a laches analysis.

Despite Northeastern's claim that it "suffered prejudice in a multitude of ways," OAB 41, what it essentially continues to argue is that it should have had an opportunity to participate in the underlying FAA Proceedings. As recognized by the trial court, Northeastern cites no authority for the proposition that it was so entitled. (Op. 32-33). Simply because it was a potential indemnitor does not mean that Northeastern was entitled to participate in or otherwise direct Pasternack's defense. Coupled with this is the suggestion that Northeastern might have been able to "assist" Pasternack with a settlement option like a suspension prior to a full reinstatement of his license. (AOB 42). Pasternack had no obligation to consider such a speculative "settlement." And, the irony in Northeastern's argument is that its representatives, including those who testified in the case below, did testify in the FAA Proceeding and did so adversely to Pasternack. To now suggest that Northeastern might have done otherwise and actually supported Pasternack's defense is not plausible.¹⁵ More importantly, it is legally irrelevant.

¹⁵ That Northeastern would have assisted Pasternack is further belied by Russo's trial testimony. (A313 at 282) (espousing the view that it was "common sense to the world" that Pasternack's request for indemnification was invalid).

V. THE COURT OF CHANCERY CORRECTLY DETERMINED THAT PASTERNAK IS ENTITLED TO FEES-ON-FEES

A. Question Presented

Whether the Court of Chancery correctly held that Pasternack was entitled to fees-on-fees, without which an award of indemnification would be incomplete, when Northeastern's mandatory indemnification bylaw contains no restrictions on fees-on-fees. (Preserved: Op. 34-35; B193-94).

B. Scope of Review

A successful indemnitee is entitled to fees-on-fees absent a tailoring of the corporation's indemnification provision to exclude fees-on-fees. *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561-62 (Del. 2002). If further review of Northeastern's mandatory indemnification bylaw is warranted, such review is *de novo*. *Hill Int'l, Inc. v. Opportunity Partners LP*, 119 A.3d 30, 37 (Del. 2015).

C. Merits of Argument

If this Court affirms Pasternack's entitlement to indemnification, then affirmance of the trial court's award of fees-on-fees should follow. *Stifel Financial Corp. v. Cochran*, 809 A.2d at 561. Upon affirmance, Pasternack intends to make a supplemental fees-on-fees application to cover the expense of this appeal and requests a limited order of remand so he can present an application to the Court of Chancery.

CONCLUSION

For the foregoing reasons, Pasternack respectfully requests that this Honorable Court affirm the judgment of the Court of Chancery.

Dated: July 19, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the following counsel of record via File and Serve*Xpress* on the 19th day of July, 2019 on the following:

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