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IN THE SUPREME COURT OF THE STATE OF DELAWARE

NORTHEASTERN AVIATION CORP., Defendant Below, Appellant, v. FRED L. PASTERNACK, 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 REPLY BRIEF

ECKERT SEAMANS CHERIN & MELLOTT, LLC
Gary W. Lipkin (Bar No. 4044)
Alexandra D. Rogin (Bar No. 6197)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
(302) 574-7400
glipkin@eckertseamans.com
arogin@eckertseamans.com

Attorneys for Defendant Below/Appellant Northeastern Aviation Corp.

OF COUNSEL:
Edward J. Longosz, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW
12th Floor
Washington, DC 20006-4604
(202) 659-6600

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INTRODUCTION

This case presents a novel issue not yet defined by the Delaware Supreme Court: who qualifies as an agent for purposes of indemnification under 8 *Del. C.* § 145? By Pasternack's definition, all those who may tangentially trace back an act to the existence of a relationship with a company have met that burden. However, such a broad reading goes well beyond the purpose of statutory indemnification under Delaware law.

Indeed, agency principles require a more restrictive approach when interpreting and applying § 145. *See Faciana v. Elec. Data Sys. Corp*., 829 A.2d 160, 170 (Del. Ch. 2003) ("the General Assembly conceived of the inclusion of agents within § 145 as having a fairly limited purpose."). Pasternack's request for indemnification in this case, and his briefing in support thereof, fails to recognize the significance of Delaware courts' guidance with respect to the distinction between one who acts not as a director, officer, or employee of a company, but instead as an alleged agent, who extends no authority on behalf of a company to bind that company to a third party. Here, the record is clear that Pasternack did not act as a director, officer, employee, or agent of Northeastern when he left the Drug Test, and then challenged the FAA's decision to revoke his individual pilot's certificates after he was considered to be a "refusal to test" in connection with the Drug Test.

As confirmed by his testimony in the proceedings associated with the FAA's revocation, Pasternack knew he was not operating with the best interests of Northeastern in mind when he left the Drug Test early. Instead, in challenging the revocation, his motivations were purely personal, tied to his individual interests in maintaining his ability to fly if he so chose, but also in maintaining his credentialing to serve as an aviation medical examiner, an occupation which significantly contributed to his income.

Therefore, Northeastern respectfully submits that an award of indemnification and fees on fees is not appropriate in this case where an independent contractor, who had not flown for Northeastern in eight months, took independent action outside the scope of his duties to Northeastern, and then challenged the FAA's decision to reprimand him personally (and not Northeastern), in connection with those actions. To allow otherwise would undermine the policy implications central to Delaware corporate law principles and interests. Therefore, Northeastern respectfully requests that this Honorable Court reverse the Delaware Court of Chancery's ruling in this case. (OB, Ex. 1).

ARGUMENT

I. Pasternack Did Not Act As an Agent of Northeastern When He Prematurely Left the Drug Test

Pursuant to the leading Delaware case regarding indemnification of agents, there can be no doubt that an agent's entitlement to indemnification requires meeting a higher standard than that which is applied to Delaware directors and officers. *See Fasciana*, 829 A.2d at 170. Pasternack seeks to avoid the holding of *Fasciana* on the basis that the Court determined that an attorney who did not interact with third parties was not an agent, stopping short of the "by reason of the fact" prong of the indemnification analysis. (AB at 32). However, Northeastern respectfully submits that the impact of *Fasciana* is not so limited. Instead, *Fasciana* provides important guidance, whereas here, indemnification is not available if Pasternack does not qualify as an agent (or employee) of Northeastern in connection with the acts for which he seeks indemnification.

Chief Justice (then-Vice Chancellor) Strine defined the "central issue" of *Fasciana* as the "the breadth of the term 'agent' in 8 *Del. C.* § 145." 829 A.2d at 163; *see also* Karen L. Valihura & Robert J. Valihura, Jr., *Recent Developments in Indemnification and Advancement of Litig. Expenses*, 7 Del. L. Rev. 65, 75–76 (2004) ("The issue, which the court was required to address, concerned the breadth of the term 'agent' as used in section 145."). The *Fasciana* Court asked, as relevant to this case: "[W]hat definition of agent did the General Assembly intend to use in

drafting § 145?" 829 A.2d at 168. Importantly, that definition meant one which best advanced the purpose of the statute, which is to "encourage corporate officials to resist unjustified lawsuits and to encourage capable individuals to serve as corporate officials." *Id*. at 170, n.32 (citing *Mayer v. Exec. Telecard, Ltd*., 705 A.2d 220, 223 (Del. Ch. 1997); *Hibbert v. Hollywood Park, Inc*., 457 A.2d 339, 343–44 (Del. 1983); *Scharf v. Edgcomb Corp*., 1997 WL 762656, at *4 (Del. Ch. Dec. 4, 1997)).

For this reason, as set forth in the Opening Brief, the Court determined that the public policy interests behind § 145 require a more narrow and limited approach to agents, who should only be afforded indemnification when they are "acting as an arm of the corporation vis-à-vis the outside world." *Id*. at 170–71; *see also* 1 DEL. CORP. LAW AND PRACTICE § 16.02 (2018) ("the Court of Chancery narrowed the concept of 'agent' as used in Section 145"). The individual must have been "acting on behalf of another (the principal) as to third parties." 829 A.2d at 171. The actions must have been within the scope of the agency such that they "are fairly said to be the actions of the principal." *Jackson Walker L.L.P. v. Spira Footwear, Inc*., 2008 WL 2487256, at *8 (Del. Ch. June 23, 2008) (citing *Fasciana*, 829 A.2d at 171).

Accordingly, under *Fasciana*, for Pasternack to be considered an agent entitled to indemnification in this case, Northeastern must have consented to Pasternack acting on its behalf in extending authority to a third party, and Northeastern must have had the right to control and direct those acts. 829 A.2d at

169, n.30 (citing cases).[1] The record evidence simply does not reflect such a relationship in this case, given that Northeastern did not direct Pasternack to leave early from the Drug Test. In a case such as this, "Delaware courts understandably proceed with caution in granting…indemnification to agents…." *Jackson*, 2008 WL 2487256, at *8.

The "essence of an agency relationship is the delegation of authority from the principal to the agent which permits the agent to act not only for, but in the place of, his principal in dealings with third parties." *State Farm Mut. Auto. Ins. Co. v. Adamson Car & Truck Rental*, 2011 WL 2178638, at *3 (Del. Super. Ct. May 31, 2011) (citing *Fasciana*, 829 A.2d at 169–70, n.30). Here, Pasternack did not act for, or in the place of, Northeastern in his dealings with Labcorp or ChoicePoint, let alone the FAA with respect to their revocation proceedings.

Although Pasternack now urges the Court to look past his lack of currency (AB at 21–22), his currency status is relevant to this issue. Pasternack was an independent contractor pilot. Therefore, his duties included flying for Northeastern,

[1] The court relied on multiple sources of authority, including *Borders v. Townsend Assocs.*, 2002 WL 725266, at *5 (Del. Super. Ct. Apr. 17, 2002); *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57–58 (Del. 1997); *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, 1988 WL 32012, at *4 (Del. Super. Ct. Mar. 30, 2988); *Equitable Life & Cas. Ins. Co. v. Rutledge*, 454 P.2d 869, 873 (Ariz. App. Ct. 1969); *Wallace v. Sinclair*, 250 P.2d 154, 160 (Cal. App. Ct. 1952); 2A C.J.S. AGENCY §§ 2, 5 (1972); *Channel Lumber Co. v. Porter Simon*, 93 Cal. Rptr. 2d 482, 486 (Cal. App. Ct. 2000); RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958).

when and if he ever chose to accept a mission. Because he was not current, he could not fly for Northeastern, and therefore, he could not provide services to Northeastern. Accordingly, he could not carry out any authority on behalf of Northeastern, who at no time granted Pasternack authority to act outside the confines of his role as a contract pilot when he occasionally flew for Northeastern.[2] His duties to Northeastern began only once he chose to accept a mission. Because he was not current, he could not do so, and therefore, he could not act within the scope of his limited authority to fly.[3] His personal decision to leave early from the Drug Test, when he could not even work for Northeastern, therefore, cannot be "fairly said to be the actions of [Northeastern]." *Jackson*, 2008 WL 2487256. at *8 (citing *Fasciana*, 829 A.2d at 171).

In an attempt to tie Pasternack to the company, Pasternack points out that a customer has no idea who is a full time pilot as opposed to a contract pilot—"the customer simply sees an agent of Northeastern." (AB at 10). This is exactly the point. Pasternack acts as an agent of Northeastern when he pilots trips for customers of Northeastern. There is no distinction in that cockpit. The scope of his authority

[2] It is undisputed that while Pasternack had ownership interests in Northeastern, he does not seek indemnification in his capacity as an owner or director of the company.

[3] Pasternack even argued that he was not a covered employee subject to the Drug Test in the FAA proceedings.

to act on behalf of Northeastern ends there. There are no customers at the drug testing facility; Pasternack did not arrive in uniform; he was not flying for Northeastern at that time.

Pasternack's argument that a negative Drug Test was needed to fly for Northeastern misses the point that Northeastern does not need Pasternack on its roster—it functioned well without his participation in the eight months prior. As evidenced by the FAA proceedings, failure to pass a screening is also antithetical to his personal license, which he needed to maintain to keep his medical aviation license, as well.

That negative drug screenings may be prerequisites to provide pilot services to Northeastern is immaterial, as is Pasternack's attempt to argue that the analogy to attorney and physician licensing requirements is off point. (AB at 20). That one is required to maintain licensing requirements to accept a job or a mission does not imply that the individual is transformed into an agent of that employer when he takes actions in connection with those prerequisites. To that end, Pasternack's counsel confirmed in the FAA proceedings: "We all know that it's a requirement as a pilot…to have a pre-employment drug test because you are going to perform a safety sensitive function." (AR020:9–11). The key word being: "pre-employment." To be considered an agent of the company, the individual must extend authority on behalf of the company, something Pasternack did not do when he chose to leave

early from the Drug Test, *prior* to accepting a mission for Northeastern. Instead, Pasternack defied the LabCorp employee's instructions not to leave before providing a sufficient sample, and did not protest when she told him she would have to notify Northeastern. (AR061–AR064).[4]

Likewise, the mere fact that Pasternack was placed into the random testing pool because he wanted to be available to fly for Northeastern does not automatically transform him into an agent of the company for every act. *See Cochran v. Stifel Fin. Corp*., 2000 WL 286722, at *16–17 (Del. Ch. Mar. 8, 2000), *aff'd in part, rev'd in part*, 809 A.2d 555 (Del. 2002) (the mere fact that one serves another at the request of the principal does not automatically make that person an agent of the principal). A finding of agency still requires a level of control and direction by the principal over the individual's actions. *See id*. Had Northeastern exercised direction and control over Pasternack, he would have been directed not to leave early from the Drug Test.

[4] Pasternack focuses on the fact that Northeastern did not prevent Pasternack from taking a second sample after the refusal to test. (AB at 34–35). However, Pasternack left the facility early without Northeastern's permission. His refusal to test stems from his decision to leave early. Whether Northeastern later did not object to a second sample is irrelevant to the initial refusal to test. (AR121–AR122, AR167) (testimony of MRO explaining that the refusal to test occurred after Pasternack first left the facility early); (AR125) (whether the employer allowed the patient to give a later specimen is irrelevant to the regulations governing what constitutes a refusal to test).

Nor did Northeastern exercise its control by extending any authority to Pasternack to act on its behalf. Pasternack acted only on his own behalf when he prematurely left the testing facility—a decision that does not implicate the policy interests behind indemnification. *See Fasciana*, 829 A.2d at 170–71. Following the logic and the guidance set forth by *Fasciana*, courts across jurisdictions have found that indemnification is not appropriate when one does not exercise some sort of managerial authority or discretion on behalf of a company, but instead acts on his own accord. *See, e.g.*, *Cohen v. Southbridge Park, Inc*., 848 A.2d 781, 791–92 (N.J. Super. Ct. 2004) (relying in part on *Fasciana* to interpret statute analogous to 8 *Del. C*. § 145). Relying on *Fasciana* and decisions from other state courts, the *Cohen* Court explained that the legislative purpose underlying indemnification would not be served if the definition of a corporate agent was expanded to those who may have a relationship with a company, but do not exercise authority or discretion on behalf of that company in relation to third parties. *See id*.

Simply put, and completely ignored by Pasternack in his Answering Brief, to provide indemnification to an independent contractor who was not extending any authority on behalf of the company to a third party, and who was individually reprimanded without consequence to the company, 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.

Therefore, Northeastern respectfully submits that the trial court erred in finding Pasternack an agent of Northeastern. *See Fasciana*, 829 A.2d at 171–71 (section 145 encourages the ability to retain high-quality directors and officers who are "willing to make socially useful decisions that involve economic risk," and who are "willing to commit their corporations, after the exercise of good faith and care, to risky transactions that promise a lucrative economic return.").

II. Pasternack Was Not an Employee of Northeastern

Pasternack goes to great lengths to argue that he should also be entitled to indemnification based on his alleged employee status, ignoring the fact that the Trial Court has not yet ruled on the issue as a factual matter, and instead relied solely on Pasternack's status as an agent as the basis for the Trial Court's decision.[5] (AB at 24–26). Perhaps this is because Pasternack realizes the faults in his agency arguments.

At all relevant times, Pasternack was an independent contractor, not an employee, involved in proceedings outside the scope of his affiliation with Northeastern.[6] The level of control exerted by the principal is an important consideration in making this distinction. *See Fisher*, 695 A.2d at 58.

> If the principal assumes the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract, a master/servant type of agency relationship has been created. If, however, the worker is not subject to that degree of physical control,

[5] Northeastern submits that it was error for the Trial Court to not consider this issue in light of the fact that the evidence demonstrates that Pasternack was not acting as an agent of Northeastern. Accordingly, employment would provide the only other basis for indemnification. However, Pasternack fails to meet that standard, too.

[6] Whether Pasternack fits the definition of "employee" under the FAR does not aid in this particular inquiry, as the FAR is over-inclusive in its definition, considering even volunteers to be "employees" for purposes of drug testing; although, as he argued in connection with the FAA proceedings, given his currency status, Pasternack could not be considered a "covered employee" under the FAR anyway. 14 C.F.R. § 120.7.

> but is subject only to the general control and direction by the contractee, the worker is termed an independent contractor.

Id. (citing *Gooden v. Mitchell*, 21 A.2d 197, 200–01 (Del. Super. Ct. 1941)). Delaware Courts look to the Restatement for guidance in determining the scope of the parties' employment relationship, if any. *Id*. (citing *White v. Gulf Oil Corp*., 406 A.2d 48, 51 (Del. 1979)). The Restatement sets forth multiple factors for consideration, including: the level of control exercised; the type of occupation; the level of skill required; and method of payment. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

As a contract pilot, Pasternack had full control over whether he provided services for Northeastern, including whether he accepted any flight missions. He was not assigned to a schedule, he was never required to accept a mission, and there were no repercussions for declining a mission. (A100 at 160:1–23). On the other hand, employee pilots had set schedules with designated days off. (A081 at 81:3–87:21). Employed pilots were assigned specific aircrafts, currency status was strictly monitored, and they could not turn down a mission. (*Id*.). Pasternack's relationship with the company (for which he had not flown in nearly a year) was far more distinct. (A076 at 64:6–16) (he had no office, email address, or locker at Northeastern). He

also had a distinct full-time occupation, and had the ability to provide pilot services to any other individual or company, within the confines of his license, at any time.[7]

The manner in which Pasternack was compensated further supports his status as an independent contractor. As a contract pilot, he did not receive a salary, but was paid per mission that he chose to accept. (A074 at 53:4–56:18). He did not have an employment contract, nor did he receive any benefits or paid time off. (A076 at 61:19–23; A010–11). He was paid by IRS Form 1099 and did not receive a W-2. (*Id.*). Employee pilots on the other hand, do receive a salary and benefits. (A099 at 153:8–154:14). As an example, pilot, Craig Jordan, initially received a salary and benefits when he was an employee with Northeastern, and then when he became a contract pilot, he received compensation on a per-flight basis like Pasternack. (A080 at 80:3–16; A084 at 94:1–15; A085-0086 at 100:17–101:9).[8]

Delaware courts have explained that while the label by which the parties to a relationship designate themselves is not controlling, the contractor designation, when combined with tax and payment implications, among other things, weighs in

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[7] For example, Pasternack also provided services for Skytoppers and Sky Tigers (A084 at 70:24–71:5); (AR467).

[8] That Russo is considered an employee despite receiving a Form 1099 and being paid on a per flight basis is immaterial, as Russo is paid an annual salary in connection with his primary, full time employment as Director of Operations of Northeastern, which is only supplemented by separate, part time contract flights in addition to his annual salary. (A137–38 at 227:1–228:23).

favor of a finding that a non-employee relationship existed. *See Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 Del. Ch. LEXIS 15, at *83–84 (Jan. 29, 2010). Here too, Pasternack's contractor status, lack of benefits, and tax/payment terms support that he was not an employee, which is underscored by the fact that he was not paid for attending the Drug Test, as would a full time employee by virtue of the fact that he or she would receive full salary for the day and would not need to take personal time off.

Pasternack argues that there is no record evidence that any Northeastern pilot was paid for attending any drug test or training. (AB at 33). This is incorrect. The record is clear that Pasternack was not paid for his time to attend Northeastern trainings or the Drug Test, and he would have "paid" for that time off by virtue of a reduction in the day's pay, while full time employees do receive their full salary for that day of training or testing. (A085 at 53:4–7; A083 at 90:1–10; A105 at 178:3–7).

Finally, that Pasternack was subject to company regulations, only when on duty, does not compel a finding that he was an employee. In fact, it would be unreasonable to assert a bright line rule that any person subject to higher authority cannot be an independent contractor. On the contrary, Delaware courts have found persuasive the explanation in a similar context that:

> where the owner[] is present…indicates to the independent contractor where to dig the ditch and how deep to dig it, periodically checks to

> make sure the depth is accurate and marks the area establishing the location of the lateral…, such conduct amounts to nothing more than the furnishing of specifications for the job. Imparting such instructions to the independent contractor did not demonstrate control by the owner over the manner and means of accomplishing the digging. Instead, the owner was merely exercising his right to supervise the general result….

Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619, 622 (Del. Super. Ct. 1974) (citing *Darling v. Burrone Brothers, Inc*., 292 A.2d 912, 916–17 (Conn. 1972)). The *Seeney* court held that "[t]here can be no liability, therefore, where [a principal's] supervisory controls do not exceed those controls necessary to assure that the results of the contractor's work comply in technical detail with the plans and specifications prepared by the [principal], and where the [principal] is under no duty to supervise the particular procedures utilized to achieve the end result." *Id*. at 624 (citing cases).

Likewise, in the instant action, Pasternack was required to comply with federal and overarching company regulations to ensure safe aviation services while on a mission. However, unlike employed pilots, contract pilots were required to regulate their own compliance with FAA regulations, they were not beholden to the operator's schedule, and they would handle their own training prerequisites.[9] (A081 at 82:22–83:9; A085 at 98:6–9; A089 at 116:6–19).

[9] As another example, Uber drivers are considered independent contractors despite having to abide by licensing requirements, prerequisites to drive for Uber, company policies, and other safety regulations.

Ultimately, it was Pasternack's choice to provide contract services for Northeastern instead of entering into an employment relationship, as his full time occupation was as a physician. (A067 at 27:10–28:3; A099 at 155:24–156:8). As evidenced by his absence from Northeastern in the eight months prior to the Drug Test, Pasternack merely chose to participate in the aviation industry when convenient to him. (A074 at 53:20–24; A099 at 155:24–156:8). As a paid-for-services pilot, it was mutually agreed upon and understood that Pasternack's relationship with Northeastern was that of an independent contractor, as this is the well-recognized generic term for an independent contractor in the aviation industry. (A100 at 159:16–24).

Given this mutual understanding and supporting record evidence, Pasternack was not an employee of Northeastern pursuant to 8 *Del. C.* §145, and he is not entitled to indemnification in connection with the FAA's revocation of his individual pilot's certificates. Therefore, should the Court consider this issue, Northeastern respectfully submits that Pasternack is not entitled to indemnification on the basis of an employer-employee relationship, either.

III. Pasternack Fails to Establish the Causal Connection Necessary to Entitle Him to an Award of Indemnification

Pasternack was not made a party to the FAA proceedings "by reason of the fact" that he was an agent of Northeastern. *See* 8 *Del. C.* § 145(a). As an initial matter, he was not an agent of Northeastern, and therefore could not have been made a party to any action "by reason of" any agency relationship. *See id.*

While both the Trial Court and Pasternack rely upon the relationship between Pasternack's presentation to the Drug Test and his relationship to Northeastern, Northeastern respectfully submits that to do so would be a misinterpretation of the indemnification statute. (AB at § II).[10] Instead, the focus must be on the connection between the FAA proceedings and the relationship, if any, with Northeastern. The reason Pasternack was made a party to the FAA proceedings is because the FAA revoked his individual pilot's certificates after the refusal to test, an action which did not occur within the course and scope of Pasternack's limited duties to Northeastern.

Northeastern is not blind to courts' broad interpretation of the indemnification statute. (AB at 27). However, Northeastern submits that Pasternack has failed to demonstrate a causal connection between the FAA proceedings and any sort of act

[10] Pasternack asserts in his Answering Brief that the causal connection is established because the regulations required him to take the test to be able to work for Northeastern, Northeastern directed him to appear for the test, and LabCorp administered the test for Northeastern. These are all front-end inquiries that do not consider the importance of the entire record, or provide a glossed over picture.

within the scope of any official or corporate capacity. *See Homestore, Inc. v. Tafeen*, 888 A.2d 204, 214 (Del. 2005) (requiring a causal connection between the proceedings and the individual's "corporate function or official [corporate] capacity").

Pasternack asserts that Northeastern's reliance on the legal propositions of *FGC Holdings Ltd. v. Teltronics, Inc.* is without merit because there are some factually distinguishing characteristics in that case. 2007 Del. Ch. LEXIS 14, at *41 (Jan. 22, 2007). Indeed, the basis for this appeal is that there is no factually parallel case on point. Nevertheless, the legal propositions of the cited case law stand true. To be entitled to indemnification, the subject proceeding must have been "brought as part of the claimant's duties to the corporation," and indemnification is not warranted for claims involving "purely…personal rights." *Id*. at *41–42. Here, not only was Pasternack not operating in any capacity—let alone an official capacity—in connection with his initial refusal to test, but as a result of that act, the FAA revoked his airline transport pilot certificate, flight instructor certificate, and ground instructor certificate, most of which had no connection to Northeastern. (AR006).

As a consequence of the FAA's revocation, Pasternack was terminated as an aviation medical examiner, which was a substantial part of his medical practice. (AR392). Pasternack was dependent on his aviation medical examiner position for income. (AR409–AR410). Had the FAA not revoked his certificates, he testified

that he would have pursued his aviation medical examiner career, and a pilot position with a separate entity, Sky Tigers. (AR467–AR468). It was these personal rights and interests at stake with the FAA's revocation of his individual certificates, which did not result from a decision to exercise or extend any authority on behalf of Northeastern.[11]

Pasternack goes on to assert that because Russo was previously indemnified in connection with a suspension order, he too is entitled to indemnification in this case. (AB 39). Yet, the circumstances surrounding the indemnification of Russo and other pilots, who were actively engaged in flight missions, highlights just why Pasternack was not entitled to indemnification in this case. In fact, it militates against Pasternack's position.

With respect to Russo and another Northeastern pilot, Steve Tursi, the two were actually conducting a flight that became subject to FAA investigation in connection with a decision on where to conduct an emergency landing. (A301–A302 at 235:6–240:24). Another pilot, Michael Kamish, was indemnified in connection with an issue regarding whether he met rest requirements in accepting a

[11] Pasternack argues that Northeastern testified against him in the FAA proceedings. (AB at 5). This is simply not the case. Northeastern representatives were required to respond to FAA trial subpoenas and did so. There was not attempt to, or interest in, testifying negatively against Pasternack. On the other hand, Pasternack's team could have interviewed and requested assistance from Northeastern representatives in connection with his case, but failed to do so.

flight for Northeastern. (A271 at 195:9–18). Likewise, in the case of Mr. Ballerini, he was investigated for flying with information missing from his flight log. (A272 at 198:5–199:6). Northeastern also provided indemnification in a case where it was alleged that a pilot flew a mission for Northeastern without adequate training. (*Id*. at 200:2–6). Unlike Pasternack, each of these pilots were actively engaged in a tour of duty. To indemnify a pilot who is actually flying would be consistent with the intent of 8 *Del. C.* § 145. Pasternack was not.

Given the lack of relationship between Northeastern, and the decision to leave early from the Drug Test, and the FAA's resulting revocation of personal pilot's certificates, the requisite element of causation is lacking. Therefore, indemnification is not available pursuant to 8 *Del. C.* § 145. *See Charney v. Am. Apparel, Inc.*, 2015 WL 5313769, at *17 (Del. Ch. Sept. 11, 2015) ("by reason of" element not satisfied where officer's status was not necessary for the violations committed); *Hyatt v. Al Jazeera Am. Holdings*, 2016 WL 1301743, at *8 (Del. Ch. Mar. 31, 2016) (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….").

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

While Northeastern does not dispute that Pasternack ultimately prevailed in the FAA proceedings, and that standing alone may be dispositive in many settings, Northeastern is compelled to address Pasternack's claimed innocence and naivety with respect to his actions, as the good faith limitation of § 145 in meant "to ensure that corporate officials do not evade the consequences of their own misconduct in such a way that they are rewarded for…violat[ing] applicable laws…." *Stockman v. Heartland Indus. Partners, L.P.*, 2009 WL 2096213, at *10 (Del. Ch. July 14, 2009).

Pasternack argues that it is pure speculation to suggest that he was aware of the regulations regarding what would be considered a refusal to test. (AB at 38). His own testimony and sworn affidavit completely rebut that claim.

First, Pasternack represented to the LabCorp technician that he was aware of the procedures regarding the Drug Test because he was an ex-MRO.[12] (AR066). He was also a senior aviation medical examiner and independent medical sponsor for the FAA. (AR250). Pasternack took substantial training covering what would or would not amount to a refusal to test. (AR210–AR213; AR252–AR253). One of the MROs involved in the case was surprised that Pasternack had left early from the

[12] During the FAA investigation, Pasternack initially told investigators that he was not an MRO, but it was later revealed that he had actually been an MRO for three different companies for at least sixteen years. (AR250).

Drug Test given his training and knowledge. When confronted about this, Pasternack responded to the MRO that he should have known better. (AR168). Pasternack even admitted in a sworn affidavit executed in connection with the FAA investigation that his conduct constituted a refusal to test upon leaving the collection site, before the testing process was concluded. (AR248–AR249). His self-proclaimed knowledge and experience of FAA medical practice were aggravating factors to the FAA's decision.[13] (AR284).

Despite his extensive background knowledge and own admission that he knew his conduct would be considered a refusal to test, Pasternack waited nearly eight years to bring his claim for indemnification, which was an unreasonable amount of time, and further underscores that he knew it was not appropriate to leave the testing facility. Never did he have Northeastern's interests in mind, only his own, for which he continues to hold superior to the company he is part owner of in asserting this exceptionally delayed claim for indemnification. This also runs afoul of the equitable principals of laches. *See, e.g., Vichi v. Koninkklijke 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).

[13] One of the FAA investigators also believed that Pasternack was not forthcoming during the process, and exhibited a level of arrogance. (AR285).

Accordingly, indemnification (and fees on fees) is not an appropriate remedy in this case. Therefore, Northeastern respectfully requests the Delaware Chancery Court's decision be reversed.

CONCLUSION

As set forth more fully in Appellant's Opening Brief, based on the foregoing, and the trial evidence, the record reflects that Pasternack is neither entitled to indemnification nor fees on fees. Therefore, Northeastern respectfully requests that this Honorable Court reverse the trial Court's decision to award Pasternack indemnification and fees on fees in this case.

ECKERT SEAMANS CHERIN & MELLOTT, LLC

By: */s/ Gary W. Lipkin*

Gary W. Lipkin (DE No. 4044)
Alexandra D. Rogin (DE No. 6197)
222 Delaware Avenue, 7th Floor
Wilmington, DE 19801
302-574-7400
arogin@eckertseamans.com
glipkin@eckertseamans.com
Attorneys for Defendant Below/Appellant Northeastern Aviation, Corp.

Word Count: 5,408

OF COUNSEL:
Edward J. Longosz, II
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW
12th Floor
Washington, DC 20006-4604
(202) 659-6600

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