IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EMERGING EUROPE GROWTH FUND, L.P., and HORIZON CAPITAL GP LLC, a Delaware limited liability company,	)	
Plaintiffs,	)	C.A. No. 7936-VCP
v.	)	
IHOR FIGLUS,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: December 21, 2012
Decided: March 28, 2013

Richard P. Rollo, Esq., Kevin M. Gallagher, Esq., RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; *Attorneys for Plaintiffs.*

George Pazuniak, Esq., PAZUNIAK LAW OFFICE LLC, Wilmington, Delaware; *Attorneys for Defendant.*

PARSONS, Vice Chancellor.

This case is before me on the plaintiffs' request for advancement of attorneys' fees. The plaintiffs include a Delaware limited partnership and its general partner. The defendant is a limited partner of the partnership. The plaintiffs allege that the defendant distributed confidential partnership information to a newspaper reporter in violation of the partnership agreement. In December 2012, I granted a preliminary injunction prohibiting the defendant from disclosing the partnership's nonpublic or confidential information. In addition to requesting a preliminary injunction, the plaintiffs sought advancement of their attorneys' fees under a provision of the subscription agreement the defendant entered into in association with becoming a limited partner. For the reasons discussed below, I conclude that the plaintiffs have not demonstrated that the indemnification provision in the subscription agreement entitles them to advancement of their attorneys' fees in this action. I therefore deny without prejudice plaintiffs' request for advancement.

I. BACKGROUND

A. The Parties

Plaintiff Emerging Europe Growth Fund, L.P. ("EEGF" or the "Partnership") is a Delaware limited partnership formed to make equity and debt financing investments in privately held companies in Ukraine and Moldova. Plaintiff Horizon Capital GP, LLC ("HCG" or the "General Partner," and collectively with EEGF, "Plaintiffs") is a Delaware limited liability company and the general partner of EEGF.

Defendant Ihor Figlus ("Figlus" or "Defendant") is a limited partner of EEGF. Figlus previously was married to non-party Natalie A. Jaresko. Jaresko is a co-founder of HCG and is the chief executive officer of EEGF.

B. Facts[1]

1. Figlus's investment in EEGF

Figlus and Jaresko married in 1989. In February 2006, the couple jointly invested $150,000 in EEGF. Later that year, in September, they invested an additional $1.1 million in EEGF. Figlus and Jaresko divorced in 2010. They currently hold their interests in EEGF jointly, pending a settlement of their assets.

At the time of their initial investment in EEGF, Figlus and Jaresko submitted an executed subscription agreement to EEGF (the "Subscription Agreement"). Section 8 of the Subscription Agreement contains an indemnification provision under which the limited partner, or "Subscriber," must indemnify the Partnership in certain circumstances (the "Indemnification Provision").[2] Section 14 of the Subscription Agreement states that any Subscriber to the Subscription Agreement authorizes the General Partner to execute and file a signed copy of EEGF's partnership agreement (the "Partnership Agreement") on the Subscriber's behalf. The Subscription Agreement also contains a provision

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1 The facts recited in this Memorandum Opinion are derived from Plaintiffs' Verified Complaint ("Compl.") and from the depositions, affidavits, and other evidence submitted in connection with Plaintiffs' motion for a preliminary injunction.

2 *See* Compl. Ex. B, Subscription Agreement. The text of the Indemnification Provision is set forth *infra* Part II.A.

whereby Figlus represented and warranted that he "ha[d] carefully read . . . the Partnership Agreement."[3] Figlus, however, now admits that he did not read the Partnership Agreement or the Subscription Agreement before executing the Subscription Agreement.[4] The Partnership Agreement contains a confidentiality provision in Section 14.14 (the "Confidentiality Provision"), which states in relevant part:

> (a) Each Limited Partner shall not disclose, or permit any of its directors, employees, partners, managers, members, officers, representatives, advisors or Affiliates to disclose, information which is non-public information furnished by the General Partner regarding the General Partner and the Partnership . . . (including any information regarding any Person in which the Partnership holds, or contemplates acquiring, any Portfolio Investments) received by such Limited Partner pursuant to this Agreement . . . .[5]

2. Figlus discloses information to a newspaper reporter

Shortly after the divorce, in late January 2011, Figlus requested information from Lenna Koszarny, the CFO of HCG. He requested information regarding EEGF and several loans Figlus and Jaresko had secured from HCG affiliate Horizon Capital Associates, LLC ("HCA") to finance the couple's investment commitments to EEGF (the "Loans").[6] In February 2011, Koszarny provided Figlus with the Subscription

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3 Compl. Ex. A, Partnership Agreement, § 7(e).

4 Figlus Dep. 10, 12, 15, 29 & 31.

5 Partnership Agreement § 14.14(a).

6 Gallagher Aff. Ex. A tab 46. Two entities extended loans to Figlus and Jaresko: HCA and Horizon Capital Associates II, LLC. *Id.* I refer to both collectively as "HCA."

Agreement, the Partnership Agreement, and several other documents, including financial statements containing allegedly confidential EEGF information. In response to a later request by Figlus in September 2011, Koszarny sent Figlus an audited financial statement and several capital accounts and quarterly reports.[7] Lastly, in December 2011, Koszarny sent Figlus the security agreement that Figlus and Jaresko executed to secure the Loans (the "Security Agreement"), and copies of two promissory notes.[8] Figlus understood that the information Koszarny sent was confidential.[9]

As Figlus was making these requests, he came into contact with Mark Rachkevych, a reporter at the Kyiv Post, on a matter unrelated to this case. At the time, Figlus allegedly was concerned that the Loans were improper.[10] Because he had no money to investigate the Loans, Figlus decided to inform Rachkevych of his suspicions and have Rachkevych investigate the propriety of the Loans. Over the next five months, Figlus and Rachkevych engaged in video conversations regarding EEGF. Ultimately, Figlus provided Rachkevych with copies of a number of documents related to EEGF, including the Partnership Agreement, the Security Agreement, audited EEGF financial statements, promissory notes executed between HCG and Figlus and Jaresko, an EEGF Investment Proceeds Distribution statement, and an EEGF Funding Notice, which

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7 *Id.* tab 70.

8 *Id.* tab 86.

9 *Id.* tabs 45, 70.

10 Figlus does not challenge the propriety of the Loans in this action, nor does he allege that he ever determined that the Loans were illegal.

included the names of the EEGF limited partners and their respective capital commitments to EEGF.[11] Figlus and Rachkevych have acknowledged that at least some of these documents were not publicly available.[12]

On October 5, 2012, HCG delivered a cease and desist letter to Figlus on behalf of EEGF demanding that he immediately discontinue disclosing confidential information regarding EEGF.[13] Three days later, HCG sent another letter to Figlus demanding that he return all copies of any nonpublic documents that EEGF or HCG had provided to him pursuant to Section 14.14(b) of the Partnership Agreement.[14] Despite receiving and reading the two letters,[15] Figlus continued to discuss EEGF with Rachkevych until at least October 11, 2012.[16]

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[11] Def. Figlus' Resp. to Pls.' First Set of Interrogs. No. 7; Gallagher Aff. Ex. A tabs 85–88.

[12] Figlus Dep. 210 ("Q. So you would agree with me it was non-public? A. Yes."); Gallagher Aff. Ex. A tab 184 (stating Rachkevych's concern in an email to Figlus that it would look like they were "after [Jaresko]" because Rachkevych's information was "based on documents that aren't publicly available received from her ex-husband [*i.e.*, Figlus]").

[13] Gallagher Aff. Ex. D.

[14] *Id.* Ex. E. Section 14.14(b) of the Partnership Agreement states, in relevant part, that HCG or EEGF may "require such Limited Partner to return any copies of information provided to it by the General Partner or the Partnership."

[15] Figlus Dep. 236.

[16] Gallagher Aff. Ex. A tab 184.

C. Procedural History

On October 10, 2012, Plaintiffs filed a complaint in this Court (the "Complaint") and moved for a temporary restraining order ("TRO") and for expedited proceedings. On October 16, 2012, I granted both motions and temporarily enjoined Defendant and his agents from disclosing any nonpublic information regarding EEGF or HCG. I entered an Order reflecting that ruling on October 19. On December 12, Plaintiffs moved for a preliminary injunction. In that motion, Plaintiffs also sought advancement from Defendant of their attorneys' fees incurred as a result of this suit pursuant to the Indemnification Provision. On December 21, I heard argument on Plaintiffs' motion. Although I granted the motion for a preliminary injunction at that time, I took under advisement Plaintiffs' request for advancement of their attorneys' fees. This Memorandum Opinion constitutes my ruling on that request.

D. Parties' Contentions

Plaintiffs seek advancement of their attorneys' fees on a number of theories. First, Plaintiffs argue that this action is based on Figlus's breach of the Partnership Agreement and that the language of the Indemnification Provision is such that, although that provision is contained in the Subscription Agreement, it applies to breaches of the Partnership Agreement. Second, Plaintiffs contend that this case arises from Defendant's "false representation or warranty" within the Subscription Agreement that he had read the Partnership Agreement. According to Plaintiffs, if Figlus had read the Partnership Agreement as he represented he had, he would have known the terms of the Confidentiality Provision and would not have disclosed information to a third party in

violation of that provision. Finally, Plaintiffs assert that the Indemnification Provision is triggered by Defendant's direct breaches of the Subscription Agreement. These alleged breaches include disputing that Figlus was bound by the Confidentiality and Indemnification Provisions, and contesting the validity of the power of attorney that was granted to the General Partner in the Subscription Agreement to execute the Partnership Agreement on Figlus's behalf. These actions, Plaintiffs contend, violate Figlus's contractual obligations under the Subscription Agreement, because, by entering the Subscription Agreement, Figlus agreed that both the Subscription Agreement and the Partnership Agreement are valid and enforceable against him in accordance with their terms.

Figlus makes a number of arguments against Plaintiffs' claims for advancement. He argues that the Subscription Agreement provides for advancement only of "losses, claims, damages, or liabilities," and that this language does not encompass the attorneys' fees that Plaintiffs voluntarily are incurring in this case. Defendant also contends that the Indemnification Provision does not apply to this action at all. Specifically, Figlus avers that this lawsuit is based on his alleged breach of the Partnership Agreement and that the Indemnification Provision does not apply to a lawsuit arising out of or based upon a breach of that agreement. This is because, according to Figlus, the Partnership Agreement is not a "document *furnished to* the General Partner or the Partnership by the Subscriber." In addition, Defendant asserts that his alleged breach of the Partnership Agreement did not occur, as he argues it must, "in connection with the offering of" his limited partnership interest. Defendant also challenges as too speculative Plaintiffs'

argument that if Figlus had read the Partnership Agreement he would not have breached the Confidentiality Provision. Therefore, Figlus maintains that this case does not "arise out of" his false representation that he had read the Partnership Agreement. Finally, Defendant denies that this case arises out of any direct breach of the Subscription Agreement.

II. ANALYSIS

Delaware limited partnerships are governed by the Delaware Revised Uniform Limited Partnership Act ("DRULPA").[17] The Indemnification Provision at issue here is not contained in the parties' Partnership Agreement but in the related Subscription Agreement. This distinction, however, has no practical effect on the interpretive approach this Court employs. DRULPA "is broadly empowering and deferential to the contracting parties' wishes regarding indemnification and advancement."[18] Thus, the parties' negotiated-for provision deserves the same deferential treatment whether it is found in a subscription agreement or a limited partnership agreement governed by DRULPA.

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[17] *See* 6 *Del. C.* ch. 17.

[18] *Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *16 (Del. Ch. Sept. 10, 1999) (citing *Delphi Easter P'rs Ltd. P'ship v. Spectacular P'rs, Inc.*, 1993 WL 328079, at *1–2 (Del. Ch. Aug. 6, 1993)).

This Court consistently has held that advancement and indemnification, although related, are "distinct types of legal rights."[19] The right to advancement ordinarily is not dependent upon a determination that the party in question ultimately will prevail or be entitled to indemnification.[20] In the context of a limited partnership, entitlement to advancement of attorneys' fees is determined by interpreting the contractual advancement provisions in the partnership agreement.[21] In this case, as noted, the contractual Indemnification Provision appears in the Subscription Agreement, not in the Partnership Agreement.

When interpreting a contract, the court's role is to effectuate the parties' intent based on "the parties' words and the plain meaning of those words where no special meaning is intended."[22] Delaware courts adhere to the objective theory of contracts.[23] That is, the court should construe the contract based on how it "would be understood by

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19 *Senior Tour Players 207 Mgmt. Co. v. Golftown 207 Hldg. Co.*, 853 A.2d 124, 128 (Del. Ch. 2004) (citing *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *9 (Del. Ch. June 18, 2002)).

20 *Id.*

21 *See Homestore, Inc. v. Tafeen*, 888 A.2d 204, 213 (Del. 2005) ("The scope of an advancement proceeding is usually summary in nature and limited to determining the issue of entitlement in accordance with the . . . uniquely crafted advancement provisions.").

22 *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006).

23 *Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citing *NBC Universal v. Paxson Commc'ns Corp.*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

an objective reasonable third party."[24] A contract should be read as a whole and interpreted to reconcile all of its provisions, if possible.[25]

When a contract is clear and unambiguous, Delaware courts give effect to the plain meaning of its terms and provisions.[26] A contract "is not rendered ambiguous simply because the parties do not agree upon its proper construction."[27] Rather, it is ambiguous only if the provisions in the agreement are "reasonably or fairly susceptible to different interpretations or may have two or more meanings."[28] In particular, "[a]mbiguity does not exist where the court can determine the meaning of a contract 'without any other guide than the knowledge of the simple facts on which, from the nature of language in general, its meaning depends.'"[29]

Where only one party is responsible for drafting an agreement, courts may interpret the agreement against the drafting party under the doctrine of *contra proferentum*.[30] This is because the drafter is "better able to clarify unclear contract terms

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24 *Id.*

25 *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996).

26 *Osborn*, 991 A.2d at 1159–60.

27 *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

28 *Id.*

29 *Id.* (quoting *Holland v. Hannan*, 456 A.2d 807, 815 (D.C. 1983)).

30 *Osborn*, 991 A.2d at 1160; *see also SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42 (Del. 1998) (holding that ambiguous terms in a partnership agreement drafted only by the general partner should be construed against the general partner under the

in advance so as to avoid future disputes and therefore should bear the drafting burden."[31] The *contra proferentum* doctrine should not be used as a short cut for interpreting an ambiguous contractual provision.[32] Nevertheless, it can be used to protect the reasonable

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principle of *contra proferentum*). Plaintiffs claim that *contra proferentum* should not apply here because the Partnership Agreement contains a provision that expresses the parties' intent to circumscribe this interpretive tool. Section 14.5 of the Partnership Agreement states:

> It is the intention of the parties that every covenant, term, and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any party (notwithstanding any rule of law requiring an Agreement to be strictly construed against the drafting party), it being understood that the parties to this Agreement are sophisticated and have had adequate opportunity and means to retain counsel to represent their interests and to otherwise negotiate the provisions of this Agreement.

This provision appears to be reasonable in the context of an agreement among sophisticated parties; therefore, I would give it effect in interpreting the Partnership Agreement. The crux of this dispute, however, does not require an interpretation of the Partnership Agreement. It is the Subscription Agreement that contains the Indemnification Provision, and the Subscription Agreement does not contain a provision similar to Section 14.5 of the Partnership Agreement. In construing the Indemnification Provision, therefore, it would be appropriate to resort, if necessary, to the general rule that courts interpret an ambiguous agreement against the drafting party. Resort to this interpretive canon is not necessary here, however, because the parties' intent can be determined based on the plain meaning of the words used in the Subscription Agreement.

31 *Bank of N.Y. Mellon v. Commerzbank Capital Funding Trust II*, – A.3d –, 2013 WL 1136821, at *9 (Del. 2013) (quoting *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 398–99 (Del. 1996)) (alterations omitted).

32 *Id.*

expectations of investors but only as a "last resort" when other interpretive approaches fail to resolve an ambiguity.[33]

A. The Indemnification Provision

The Subscription Agreement's Indemnification Provision states in relevant part:

> The Subscriber will, to the fullest extent permitted by applicable law, indemnify each Indemnified Party and the Partnership against any losses, claims, damages or liabilities to which any of them may become subject in any capacity in any action, proceeding or investigation arising out of or based upon any false representation or warranty, or breach or failure by the Subscriber to comply with any covenant or agreement made by the Subscriber herein, or in any other document furnished to the General Partner or the Partnership by the Subscriber in connection with the offering of the Interests. The Subscriber will reimburse each Indemnified Party and the Partnership for legal and other expenses (including the cost of any investigation and preparation) as they are incurred in connection with any such action, proceeding or investigation.[34]

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[33] *Id.*; *see also Kaiser*, 681 A.2d at 395 ("Where, as here, the ultimate purchaser of the securities is not a party to the drafting of the instrument which determines her rights, the reasonable expectations of the purchaser of the securities must be given effect."); *Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009) ("The *contra proferentum* approach protects the reasonable expectations of people who join a partnership or other entity after it was formed and must rely on the face of the operating agreement to understand their rights and obligations when making the decision to join.").

[34] Subscription Agreement § 8. Section 4.7(a) of the Partnership Agreement defines "Indemnified Party" to include the General Partner, HCG. Capitalized terms used in the Subscription Agreement and not otherwise defined in the Subscription Agreement have the meaning assigned to them in the Partnership Agreement. *Id.* § 1.

Figlus does not dispute that this provision, by requiring the reimbursement of expenses *as they are incurred*, is a provision for advancement as well as indemnification.[35] I agree that this provision provides each Indemnified Party and the Partnership the right to advancement. In addition, the Provision expressly contemplates the reimbursement *of legal and other expenses*. I conclude, therefore, that Plaintiffs potentially could be entitled to advancement of their attorneys' fees in this case.

Defendant argues, to the contrary, that because Plaintiffs voluntarily decided to incur their attorneys' fees in this case, those fees cannot qualify as "losses, claims, damages, or liabilities" under the Indemnification Provision. This argument does not comport with the plain language of the provision. The provision does not limit expenses subject to advancement to those arising from "defending" a lawsuit or from involuntarily being subject to suit.[36] Rather, it expressly contemplates indemnification against "any losses, claims, damages or liabilities to which [each Indemnified Party or the Partnership] may become subject *in any capacity*."[37] Thus, the Indemnification Provision unambiguously provides for the advancement of attorneys' fees in circumstances where

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35 *See Maskowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 582 (Del. Ch. 2006) ("Advancement . . . is a right whereby a potential indemnitee has the ability to force a company to pay his litigation expenses *as they are incurred*" (emphasis added)).

36 *See Citadel Hldg. Corp. v. Roven*, 603 A.2d 818 (Del. 1992) (construing an advancement provision that allowed for advancement of costs and expenses incurred by the party "in defending" an action, suit, proceeding, or investigation).

37 Subscription Agreement § 8 (emphasis added).

the provision applies. Hence, if the provision applies, *i.e.*, if this is an action "arising out of or based upon" one of the circumstances identified in the Indemnification Provision, Plaintiffs would be entitled to advancement by Figlus of their attorneys' fees incurred in connection with the lawsuit.

B. Nature of Plaintiffs' Claims

The Indemnification Provision identifies three circumstances that an action must arise out of or be based upon for the Provision to apply: (1) the Subscriber made any false representation or warranty; (2) the Subscriber breached, or failed to comply with, any covenant or agreement the subscriber made in the Subscription Agreement; or (3) the Subscriber breached, or failed to comply with, any covenant or agreement the Subscriber made in any other document furnished to the General Partner or the Partnership by the Subscriber in connection with the offering of the Interests.[38]

This action arises out of and is based upon Figlus's alleged breach of the Partnership Agreement's Confidentiality Provision. The eleven-page Complaint alleges that Figlus breached only the Partnership Agreement, not the Subscription Agreement. The Complaint plainly provides that Plaintiffs brought suit to stop Figlus from disseminating the Partnership's confidential information, to recover the Partnership's confidential information, to recover damages, and to recover their attorneys' fees as they are incurred in connection with this action.

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[38] "Interest" is defined in the Subscription Agreement as a limited partnership interest in the Partnership.

I consider first, therefore, Plaintiffs' argument that Figlus is required to advance Plaintiffs' attorneys' fees because of his alleged breach of the Partnership Agreement. The Indemnification Provision would apply to such a breach, under the third circumstance set out above, if the Partnership Agreement is "any other document furnished to the General Partner or the Partnership by the Subscriber in connection with the offering of the Interests."[39] Figlus argues both that the Partnership Agreement is not a document "furnished to" HCG or EEGF and that Plaintiffs' claims do not relate to a breach that is "in connection with the offering of Interests."[40]

C. Figlus's Alleged Failure to Comply with the Terms of the Partnership Agreement

I consider first whether the Partnership Agreement was "furnished to" EEGF pursuant to Section 14 of the Subscription Agreement. Section 14 states in relevant part:

> The Subscriber hereby constitutes and appoints the General Partner as its true and lawful representative and attorney-in-fact, in its name, place, and stead to make, execute, sign and file the Partnership Agreement, any amendments thereto required in order to effectuate any change in the membership of the Partnership or pursuant to the terms of the Partnership Agreement and all such other instruments, documents and certificates which may from time to time be required by [law].[41]

Notably, this Section does not state with whom the General Partner will file the Partnership Agreement. Nevertheless, according to this appointment of the General

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39 Subscription Agreement § 8.

40 *See* Def.'s Answering Br. in Opp'n to Pls.' Mot. for Prelim. Inj. 29.

41 Subscription Agreement § 14.

Partner as Figlus's attorney-in-fact, Plaintiffs maintain that HCG executed and filed a Partnership Agreement on Defendant's behalf. On the present motion, Figlus does not challenge that assertion. Thus, I assume for purposes of Plaintiffs' request for advancement that Figlus, through HCG, executed, signed, and filed the Partnership Agreement.

Defendant does argue that the Partnership Agreement was not "furnished to" EEGF or HCG within the meaning of the Indemnification Provision. To support this contention, Figlus relies on language in the Subscription Agreement that states that "the Subscriber has been *furnished with* . . . the Partnership Agreement."[42] Figlus contends that he cannot furnish to EEGF a document that EEGF acknowledged was furnished to him. Plaintiffs disparage this distinction. They argue that they can furnish a document to the Subscriber who then executes it and furnishes it, or gives it, back to the Partnership.

Reading the Subscription Agreement as a whole, however, I find that Figlus's construction is the more reasonable interpretation of the Indemnification Provision. Synonyms for "furnish" include "supply," "provide," "equip with whatever is necessary or useful," or "give."[43] If this term were considered in isolation, its plain meaning possibly could support Plaintiffs' argument that it simply denotes a form of exchange.

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42 *Id.* § 7(d) (emphasis added).

43 Webster's New World Dictionary 566 (2d ed. 1986); *see also* New Oxford Am. Dictionary 705 (3d ed. 2010) ("Supply someone with (something); give (something) to someone; be a source of; provide."); Black's Law Dictionary 804 (4th ed. 1968) ("To supply or provide."). The word "furnish" does not appear in the Ninth Edition of Black's Law Dictionary.

On the other hand, the synonyms could be construed to indicate that what the party is "supplying" or "providing" is something that will enrich the receiving party with more information than it had in the first place.[44] In this regard, the word more appropriately would apply to, for example, the Subscriber's Prospective Investor Questionnaire than to a signed Partnership Agreement.[45] Indeed, the way in which the parties used the phrase "furnish to" in the Subscription Agreement itself appears to give those words the distinct meaning that Figlus asserts the parties intended.

First, in Section 1, the Agreement states that "a copy of [the Partnership Agreement] has been *furnished to* the Subscriber."[46] Again in Section 7(e), the Subscriber attests that he "has been *furnished with*, and has carefully read, the Private Placement Memorandum and the Partnership Agreement."[47] Then, in Section 6, the Subscriber agrees "to *furnish to* the General Partner all information that the General

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44 *See* Black's Law Dictionary 804 (including definitions such as "[f]or use in the accomplishment of a particular purpose" and "[i]mplying some degree of active effort to accomplish the designated end").

45 *See* Compl. Ex. B. Exhibit B contains three documents that make up EEGF's "Subscription Booklet": (1) the Subscription Agreement, (2) a Prospective Investor Questionnaire, and (3) two copies of a Signature Page. In the Prospective Investor Questionnaire, the Subscriber provides information from which the General Partner determines whether the Subscriber is a permissible investor. According to the Subscription Booklet, "[t]he Partnership does not intend to register the Interests under the Securities Act of 1933 . . . but rather intends to offer and sell the Interests pursuant to an exemption from registration thereunder which limits the types of investors that may be permitted to purchase the Interests." *Id.* at 2.

46 Subscription Agreement § 1 (emphasis added).

47 *Id.* § 7(e) (emphasis added).

Partner has requested in this Subscription Agreement."[48] Thus, the Agreement expressly delineates the type of information or documentation the Subscriber will "furnish to" the General Partner. This information includes proof that the Subscriber is an "accredited investor" as defined in Regulation D under the Securities Act of 1933 and a "qualified purchaser" as defined in the Investment Company Act of 1940.

Based on these provisions, I read Section 8 as applying to the documents that the Subscriber agrees in the Subscription Agreement to furnish to the General Partner or the Partnership. It does not appear to me that an objective, reasonable third-party investor would understand from the language in Section 8 that the Partnership Agreement was such a document, and that he thereby was agreeing to indemnify and provide advancement rights to the Partnership if the Partnership initiated a lawsuit against him based on an alleged breach of the Partnership Agreement. Reasonably read, the third clause of the Indemnification Provision requires the Subscriber to indemnify the Partnership for its expenses as they are incurred if the Partnership suffers losses, claims, damages, or liabilities because the Subscriber provided false information when it "furnished to" the Partnership information based on which the Partnership accepted the Subscriber's investment.[49]

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[48] *Id.* § 6 (emphasis added).

[49] *See Seibold v. Camulos P'rs LP*, 2012 WL 4076182, at *28 (Del. Ch. Sept. 17, 2012) (interpreting a similar provision and finding that the contract contemplates—and a reasonable person would expect—only "limited circumstances under which [the] Subscriber would provide 'other documents' to

In addition, although Section 14 authorizes the General Partner to "make, execute, sign and file" the Partnership Agreement on behalf of the Subscriber, I am not convinced by Plaintiffs' arguments that there is any basis from which this Court reasonably could infer from the language of the Subscription Agreement that the parties meant the term "file" as used in Section 14 to be a synonym for having the Subscriber, through the General Partner, furnish a document to the Partnership within the meaning of the Indemnification Provision. Furthermore, Section 14 does not state with whom the Agreement will be filed, and the Indemnification Provision requires that the "other document" be "furnished to the General Partner or the Partnership." Thus, I conclude that Figlus's interpretation of "furnish to" is the only reasonable interpretation when the agreement is read as a whole and all of its provisions are reconciled.[50]

I also consider noteworthy that the Subscriber would be exposed to much broader liability if he agreed to indemnify the Partnership for a lawsuit based on or arising out of an alleged breach of the eighty-four page Partnership Agreement. In that circumstance, a limited partner could be required to advance the Partnership's attorneys' fees if the Partnership could cobble together any argument that the limited partner is not complying with that Agreement. The potential for abuse by the Partnership in such circumstances is

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[the Partnership]" such as "documents [] the General Partner may reasonably require to verify that the Subscriber qualifies as an eligible investor").

[50] *See Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996) ("[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.").

manifest. At a minimum, the record should be clear that the parties to the agreement in question truly were sophisticated and operated on a level playing field. In this case, we have the unusual circumstance that a divorce settlement is proceeding contemporaneously with this lawsuit. Figlus's ex-wife is a founder of the Partnership and an officer of the General Partner, both Plaintiffs in this action. Figlus avers that he offered to resolve the case and to strictly comply with the Confidentiality Provision but that Plaintiffs insisted on pursuing the action at his expense to dispossess him of his interest in the Partnership to the benefit of his ex-wife. At this stage, of course, these are merely allegations and I express no opinion as to the truth of any of Defendant's allegations.

Moreover, Plaintiffs have directed the Court to no case, and the Court has found no case, where an advancement provision such as the one here has been enforced against a limited partner based on that partner's breach of the partnership agreement. This does not mean that such a provision could not have been agreed to or that the Court would not enforce it. It does suggest, however, that the situation before me is uncommon. Under these circumstances, Plaintiffs have not made a sufficient showing that the Indemnification Provision at issue here applies to claims for a breach of the Partnership Agreement. Their argument is based on an overly expansive reading of that provision, when the meaning Plaintiffs now claim easily could have been made explicit. For example, if the parties intended that the Subscriber indemnify the Partnership for breaches of the Partnership Agreement, that intent more clearly could have been

expressed by including an appropriate indemnification provision in the Partnership Agreement.[51]

Hence, I conclude, based on Plaintiffs' arguments at this preliminary stage, that it is not reasonable to construe the statement "any other document furnished to the General Partner or the Partnership" to include the Partnership Agreement. Accordingly, I also conclude that the Indemnification Provision does not apply to an action arising out of a breach of the Partnership Agreement. Based on this ruling, I need not consider Defendant's additional argument that the alleged breach of the Partnership Agreement was not "in connection with the offering of the Interests."

D. Figlus's Alleged Failure to Comply with the Terms of the Subscription Agreement

In the alternative, Plaintiffs argue that the Indemnification Provision applies due to Figlus's direct breaches of the Subscription Agreement, including (1) the false representation that Figlus had read the Partnership Agreement, and (2) Figlus's failure to comply with the Subscription Agreement provision acknowledging that the Subscription Agreement and Partnership Agreement are enforceable against the Subscriber in accordance with their terms. I do not find either of these arguments persuasive.

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[51] *Cf. Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."). Indeed, the Partnership Agreement contains indemnification and advancement provisions whereby the Partnership provides the General Partner, among others, broad indemnification and advancement rights. *See* Partnership Agreement § 4.7.

To accept Plaintiffs' first additional argument would require an interpretation that piles inference upon inference. If Figlus had read the Partnership Agreement, it does not follow that he would not have disseminated information that Plaintiffs might consider to be nonpublic confidential information. It also does not follow that, if Figlus had read the Partnership Agreement, Plaintiffs never would have had to bring this suit based on an alleged breach of that Agreement. As an initial matter, Plaintiffs and Defendant still disagree as to what information in Figlus's possession is subject to the Confidentiality Provision. For example, Defendant argues that the Confidentiality Provision only prohibits disclosure of information that meets four criteria: information that is (1) nonpublic, (2) furnished by the General Partner, (3) regarding the Partnership, *and* (4) received by the limited partner pursuant to the Partnership Agreement. Defendant denies that all of the information at issue in this case meets these four criteria. As one example, Figlus contests whether the information he received from Koszarny was "furnished by the General Partner." In that regard, he argues that Koszarny represented HCA, not the General Partner, HCG.[52]

In addition, Plaintiffs rely on Figlus's deposition testimony to support their position. During Figlus's deposition, the following exchange took place:

> Q. Had you known what your contractual obligations were, you wouldn't have knowingly breached them. If you believed you behaved in a manner that was consistent with them, you would have done that, I am submitting to you. So the fact that you didn't read some of the materials, would you

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[52] *See* Gallagher Aff. Ex. A tab 46; *see also* Tr. 31–32, 37–38.

> agree with me that that is one of the reasons we are here today?
>
> MR. PAZUNIAK: Objection.
>
> A. Yes, one of the reasons.[53]

Plaintiffs submit that, through this testimony, Figlus conceded that his failure to read certain partnership materials led Plaintiffs to sue him. Even if I viewed this exchange as a "concession," Figlus's opinion on this point is by no means determinative. I consider it entirely speculative to infer from the cited testimony that Figlus would not have engaged in any activity that Plaintiffs might interpret as a breach of the Partnership Agreement. Indeed, Figlus's statement that he would not "have knowingly breached" his contractual obligations does not support a reasonable inference as to whether Plaintiffs still might have sued him based on the parties' potentially differing interpretation of what constitutes a breach of those obligations. Furthermore, Figlus's response to Plaintiffs' leading question is consistent with his litigation position. Figlus has defended Plaintiffs' motions for a TRO and preliminary injunction based on the idea that now that he is represented by counsel, he better understands his obligations under the Confidentiality Provision, and he will not disseminate confidential Partnership information. On the limited record currently before me, therefore, I reject Plaintiffs' argument that this action arises out of Figlus's false representation that he read the Partnership Agreement.

Lastly, I do not agree that this action arises out of or is based upon Figlus's breach of Subscription Agreement Section 7(g) which states: "[T]his Subscription Agreement

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[53] Figlus Dep. 319–20.

constitutes, and the Partnership Agreement when executed and delivered will constitute, a valid and binding agreement of the Subscriber, enforceable against the Subscriber in accordance with its terms." Plaintiffs argue that, as part of his defense, Figlus has contested the validity of several Subscription Agreement and Partnership Agreement provisions. According to Plaintiffs, this defense is inconsistent with Section 7(g). Thus, they argue, this action arises out of Figlus's failure "to comply with any covenant or agreement made by the Subscriber [in the Subscription Agreement]."[54] This position strains the language of the Indemnification Provision to the breaking point. Figlus's reaction to Plaintiffs' claim for breach of the Partnership Agreement cannot define what those claims arose out of or were based upon.

Plaintiffs' claims in this action, as set forth in the Complaint, are straightforward and rest solely on Figlus's alleged breach of the Partnership Agreement's Confidentiality Provision. In fact, Plaintiffs concede this point, but argue, nevertheless, that they did not learn of Figlus's breaches of the Subscription Agreement until after taking discovery.[55] To justify their failure to amend the Complaint to include their new theories before now, Plaintiffs rely on the expedited nature of these proceedings.

It is true that this litigation is at an early stage. Thus far, we have proceeded on an expedited basis primarily at Plaintiffs' request, with a TRO issuing six days after Plaintiffs filed the Complaint and moved for a TRO and for expedited proceedings.

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[54] Subscription Agreement § 7(g).

[55] Pls.' Reply Br. in Further Supp. of Their Mot. for Prelim. Inj. 21–22.

Within just over two months after I granted the TRO, the parties fully briefed and presented oral argument on Plaintiffs' related motion for a preliminary injunction. And, at the conclusion of that argument, I entered an appropriate preliminary injunction.

Thus, this litigation has proceeded relatively rapidly and is still in its preliminary stages. Moreover, Plaintiffs' made their request for advancement in connection with their motion for a preliminary injunction. I granted the preliminary injunction in part based on the possibility of irreparable harm to Plaintiffs if Figlus continued to disclose their confidential information. With regard to Plaintiffs' request for advancement, however, there has been no showing of potential irreparable harm. To the contrary, the evidence adduced thus far demonstrates that Figlus could not mount his defense if forced to advance Plaintiffs attorneys' fees. In addition, this case includes the unusual circumstance of contemporaneous divorce proceedings. There are also numerous factual issues yet to be resolved. In these circumstances, including the absence of a pleading reflecting Plaintiffs' current theories for their advancement claim, the balance of the equities on the issue of advancement does not favor Plaintiffs.

In sum, Plaintiffs have not demonstrated that their interpretation of the Indemnification Provision, *i.e.*, that it applies to an alleged breach of the Partnership Agreement, is a reasonable one. Moreover, I cannot agree that this action, as currently pled, arises out of or is based on any failure by Defendant under the Subscription Agreement. Considering the expedited and preliminary nature of these proceeding, however, I do not preclude the possibility that Plaintiffs could amend the Complaint to include allegations of breach of the Subscription Agreement and, perhaps, ultimately

succeed on a claim for advancement. Alternatively, Plaintiffs could pursue indemnification after a trial.

III. CONCLUSION

For the foregoing reasons, I deny Plaintiffs' request for advancement of their attorneys' fees without prejudice.

IT IS SO ORDERED.