

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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|-------------------------------------------|---|-------------------|
| SALVATORE F. SODANO,                      | ) |                   |
|                                           | ) |                   |
| Plaintiff,                                | ) |                   |
|                                           | ) |                   |
| v.                                        | ) | C.A. No. 3418-VCS |
|                                           | ) |                   |
| AMERICAN STOCK EXCHANGE LLC,              | ) |                   |
| a Delaware limited liability company, and | ) |                   |
| FINANCIAL INDUSTRY REGULATORY             | ) |                   |
| AUTHORITY, INC., a Delaware corporation,  | ) |                   |
|                                           | ) |                   |
| Defendants.                               | ) |                   |

MEMORANDUM OPINION

Date Submitted: April 25, 2008

Date Decided: July 15, 2008

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**STRINE, Vice Chancellor.**

## I. Introduction

In this advancement action, Salvatore Sodano, the former CEO and Chairman of the American Stock Exchange LLC (the “Amex”) seeks advancement of his legal expenses for a Securities and Exchange Commission administrative proceeding brought against him as a result of actions he took in his capacity at the Amex. Sodano seeks advancement from both the Amex and the Financial Industry Regulatory Authority, Inc. (“FINRA”), the successor entity to the National Association of Securities Dealers, Inc. (the “NASD”), which owned the Amex at the time Sodano was its CEO and Chairman. The NASD owned the Amex for a relatively brief period of time, acquiring it in 1998 and selling it in 2003. Sodano was an NASD executive when the NASD acquired the Amex in 1998 and, starting in 1999, was asked by the NASD to serve as the Amex’s CEO and Chairman, while still retaining an executive position at the NASD. At the time Sodano assumed his new roles at the Amex, he signed an employment agreement with both the Amex and the NASD.

A cloud of regulatory problems and SEC investigations hovered over the Amex during Sodano’s tenure. The NASD ultimately decided to exit the business of operating stock exchanges and agreed to sell the Amex to its members in 2003. As part of that sale, Sodano, the Amex, and the NASD negotiated agreements to terminate Sodano’s employment with those organizations. The negotiations of those separation agreements took place over more than one year, roughly the same amount of time it took to complete the sale of the Amex. During that negotiation period, numerous material events took place, including Sodano’s continued involvement as a witness in SEC proceedings

against the Amex, a suit against Sodano and the Amex board members, among others, over the proposed sale of the Amex, and the issuance of a Wells Notice to Sodano informing him that the SEC intended to institute an administrative proceeding against him personally for his actions during his tenure at the Amex.

The primary issue in this action is whether, against the backdrop of those events, Sodano preserved his advancement right under the NASD Certificate. At the heart of that dispute is Sodano's separation agreement with the NASD, which stated that the NASD "will indemnify [him] . . . to the fullest extent permitted by . . . the NASD's organizational documents."<sup>1</sup> The parties agree that Sodano had an advancement right under the NASD Certificate of Incorporation but dispute whether the words "indemnify . . . to the fullest extent permitted by . . . the NASD's organizational documents" in Sodano's separation agreement with the NASD confer upon him the right to advancement for a covered proceeding or only the right to after-the-fact reimbursement for any costs he fronted once the proceeding is concluded and Sodano shows that he is entitled to "ultimate indemnification."<sup>2</sup> Consistent with the broad use of the term "indemnification" in the NASD Certificate, including its use as the title of the article that grants not only the right to ultimate indemnification but also the right to advancement, I find that the language in Sodano's separation agreement with the NASD preserved his right to advancement because it referred to "indemnify" in the broad sense of that word, as one

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<sup>1</sup> JX 23 ("NASD Settlement Agreement and Release") § 4.

<sup>2</sup> For the sake of clarity, I use the term "ultimate indemnification" to refer to the determination, after the final conclusion of a covered proceeding, whether Sodano meets the standard for indemnification under the NASD Certificate of Incorporation or otherwise (i.e., under § 145 of the Delaware General Corporation Law).

that encompasses both the concepts of ultimate indemnification and of advancement. That conclusion is supported by case law finding that “indemnification” used in the broad sense can encompass an advancement right. It is also supported by the frequent use of “indemnification” in the broad sense by numerous lawyers and business people involved in the transactions surrounding Sodano’s separation agreement. In fact, the NASD’s lead negotiator was not even aware of the difference between advancement and ultimate indemnification. Moreover, that conclusion is consistent with the fact that it would have been foolish for Sodano to give up his advancement right given the circumstances taking place concurrently with the negotiations over the separation agreement. Had either party thought that Sodano was relinquishing his right to advancement, it would have been a material event for that party and there is no evidence in the record suggesting that either party reacted to such a noteworthy occurrence.

The other issue in dispute is whether the NASD, having been found to owe advancement to Sodano, is only secondarily liable for Sodano’s legal expenses. The NASD Certificate grants Sodano advancement rights because he was serving at the Amex at the request of the NASD, but it also states that its advancement obligation in that circumstance “shall be reduced by any amount [Sodano] may collect as indemnification or advancement from” the Amex.<sup>3</sup> The Amex argues that I should interpret that provision solely as preventing Sodano from recovering his legal fees twice and that I should treat the Amex and the NASD as equal co-indemnitors who each should be responsible for fifty percent of Sodano’s advancement. But I agree with the NASD that

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<sup>3</sup> JX 31 (“NASD Certificate”) Art. Fifth(h).

the better interpretation of the NASD's Certificate provision is that the NASD is only secondarily liable for advancement in situations where the advancement obligation arises solely from the NASD's request that an individual serve at another entity. The NASD's Certificate provision creates a hierarchical obligation such that Sodano must first seek to collect from the Amex and the NASD will only be responsible to the extent Sodano is unable to collect from the Amex. That reading fits the language of the relevant provision and corresponds with the common sense notion that because the obligation arises in the first instance because of Sodano's exposure to covered proceedings as a result of his conduct at the Amex, the Amex should be primarily liable for providing advancement for those proceedings. The Amex has agreed that it is obliged to advance Sodano's legal expenses and stated that it has the funds to do so. Therefore, there is no need for Sodano to rely on the NASD's advancement obligation at this time and the Amex shall advance Sodano's legal fees in accordance with its obligation. The NASD, however, is secondarily liable for advancement of Sodano's legal fees, to the extent the Amex becomes unable to meet its obligation to provide advancement to Sodano.

## II. Factual Background<sup>4</sup>

### A. Sodano's Roles At The NASD And The Amex

Sodano is a former officer and director of the NASD and the Amex. Sodano joined the NASD in 1997 as its Chief Financial Officer. The NASD, now known as

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<sup>4</sup> The parties have stipulated to a trial on the paper record. These facts are the facts as I find them based on the submitted record and the inferences I draw from that record. *See MFC Bancorp Ltd. v. Equidyne Corp.*, 844 A.2d 1015, 1016 n.1 (Del. Ch. 2003) ("I am free to draw inferences from the paper record in the same manner as I would have after a trial with live testimony.").

FINRA,<sup>5</sup> regulates brokers and others in the securities industry. The NASD also formerly owned the NASDAQ, a large electronic stock market. In 1998, the NASD expanded its role in the stock market industry by acquiring the Amex. Sodano played a key role in negotiating the NASD's acquisition of the Amex. But Sodano's involvement with the Amex did not end with its acquisition by the NASD. In September 1999, the NASD requested that Sodano serve as the Amex's CEO and Chairman of the Board of Governors. In connection with Sodano's new roles at the Amex, he signed an employment agreement with both the NASD and the Amex on September 21, 1999 (the "Sodano Employment Agreement").<sup>6</sup> That Agreement covered Sodano's roles as CEO and Chairman of the Amex and his position as the NASD's COO, a position he had been appointed to earlier in 1999. Sodano continued in those roles through the end of 2004. He also served as Vice-Chairman of the NASD's Board of Governors from November 2000 to December 2004.

B. The Regulatory Troubles At The Amex And The NASD's Decision To Exit The Exchange Business

The Amex is a Self-Regulatory Organization under the Securities Exchange Act of 1934 and thus has certain responsibilities for ensuring compliance with the federal securities laws. In 1999, the SEC's Office of Compliance Inspections and Examinations performed an inspection of the Amex's order handling practices and issued an inspection

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<sup>5</sup> FINRA is a non-governmental regulator of securities firms in the United States. It was formed in July 2007 through the consolidation of the NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. For the sake of simplicity, I will refer to the NASD and its successor entities, including FINRA, as the NASD.

<sup>6</sup> JX 17.

report. In part as a result of that 1999 inspection report, the SEC instituted administrative proceedings against the Amex and several other exchanges. The Amex settled that proceeding by entering a consent order with the SEC and agreeing to improve their regulatory programs.

Around the same 2000 to 2001 timeframe, the NASD decided to exit the exchange business. That decision involved attempting to sell the Amex. In June 2003, Amex announced that it had reached an agreement in principle to sell the Amex to GTCR Golder Rauner, LLC, a Chicago-based private equity firm (the “GTCR Transaction”). The combination of the proposed GTCR Transaction and the change in control provisions in Sodano’s Employment Agreement led to discussions between Sodano, the NASD, and GTCR over the terms of Sodano’s separation from the NASD. Sodano retained Kenneth Raskin, of White & Case, to negotiate the terms of his separation. Raskin also represented the Amex’s general counsel, Michael Ryan, in parallel negotiations. The bulk of the negotiations over Sodano’s separation were between Raskin and the NASD’s outside counsel, Andrea Rattner and Ira Bogner of Proskauer Rose.

Within days after the announcement of the GTCR Transaction, Amex’s SEC troubles resurfaced. On June 26, 2003, the SEC notified the Amex that the SEC had commenced a formal investigation into the Amex’s regulatory programs, specifically its compliance with the previous consent order (the “SEC Investigation”).

The GTCR Transaction ultimately fell through, but the NASD continued with its plan to sell the Amex despite the pending SEC Investigation. On November 3, 2003, the NASD announced that it had reached an agreement to sell the Amex to the Amex

Membership Corporation (the “AMC Transaction”). The AMC Transaction would close on December 31, 2004. Before that closing, Sodano negotiated the terms of his separation from the NASD and the Amex.

C. The Terms Of Sodano’s Separation From The Amex And The NASD

Sodano received approximately \$22 million from the NASD as part of the terms of the NASD Settlement Agreement and Release that he signed around the time the AMC Transaction closed on December 31, 2004.<sup>7</sup> The NASD Settlement Agreement and Release set forth the settlement of the payments and benefits due to Sodano under his Employment Agreement, including a specific section that provided Sodano certain indemnification rights. Under the General Release, Sodano released substantially all his claims against the NASD. The General Release contained certain carve-outs, and, as will soon become clear, the scope of those carve-outs are a key issue in this lawsuit.

1. Sodano’s Advancement And Ultimate Indemnification Rights Under The Amex LLC Agreement And The NASD Charter

Before delving into the details of the NASD Settlement Agreement and Release, it is worth noting that before Sodano separated from the NASD, he was entitled to both advancement and ultimate indemnification under both the Amex LLC Agreement and the NASD Certificate of Incorporation.<sup>8</sup> Therefore, the default negotiating posture and understanding going into the negotiations over the NASD Settlement Agreement and Release was that Sodano was entitled to advancement of his legal expenses. Specifically

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<sup>7</sup> Sodano and the NASD executed the Settlement Agreement on December 23, 2004. Sodano and the NASD executed the General Release, which is Exhibit B to the Settlement Agreement, on January 4, 2005.

<sup>8</sup> NASD Certificate Art. Fifth; JX 15 (Amex LLC Agreement) at § 6.3.

with respect to the NASD, Article Fifth of its Certificate, which is titled “Indemnification; Governor Liability,” provides advancement and ultimate indemnification rights to NASD employees serving at the request of the NASD at other entities. Article Fifth(f) of the NASD Certificate states that the “indemnification provided by this Article Fifth” shall continue as to those who have ceased their roles at the NASD.<sup>9</sup> The NASD acknowledges that, absent the NASD Settlement and Release, Sodano would have been entitled to advancement under Article Fifth.<sup>10</sup> Implicit in that acknowledgement is that the term “indemnification” as used in Article Fifth(f) — that is, the NASD’s own Certificate — encompasses the narrower subsidiary right of advancement, and not simply a right to ultimate indemnification.

Article Fifth of the NASD Certificate contains another provision that, as will become clear, is material to the dispute between the NASD and the Amex. That provision, Article Fifth(h), states:

(h) The NASD’s obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise, or non-profit entity.

Although acknowledging that the default going into the negotiation of the NASD Settlement Agreement and Release was that Sodano had a right to advancement from the NASD, the NASD has been clear that that its obligation to advance fees to Sodano was subject to the limitations of Article Fifth(h).

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<sup>9</sup> NASD Certificate Art. Fifth(f).

<sup>10</sup> Tr. of Oral Argument (Apr. 25, 2008) (“Tr.”) at 102.

## 2. The NASD Settlement Agreement And Release

The NASD Settlement Agreement contains a specific provision granting Sodano indemnification rights. The Indemnification Provision states in full:

4. Indemnification/D&O Insurance. [NASD] will indemnify you for any liability (including but not limited to, all reasonable legal fees and out-of-pocket expenses) you incur arising from your actions or omissions prior to the closing of the [AMC] Transaction as an employee, officer, director, governor or other service provider of NASD or Amex to the fullest extent permitted by law and NASD's organizational documents. While any potential liability exists (but no less than six years) following closing of the [AMC] Transaction, NASD will maintain a director's and officer's liability insurance policy covering you in the same amount and to the same extent as NASD's officers, directors and governors.<sup>11</sup>

In the General Release, Sodano grants the NASD a broad general release of all claims that he might have against the NASD. Without limiting the generality of the release, the General Release contains a list of the types of claims that Sodano releases under that General Release, including "any claim for attorney's fees, costs, disbursements and the like (other than as provided in Section 2 [fees for negotiating and preparing the Settlement] and Section 6 [fees for enforcement of the Settlement Agreement] of the [NASD Settlement] Agreement)" (the "Attorneys' Fees Subsection").<sup>12</sup> Absent from the Attorneys' Fees Subsection, however, is any carve-out for or reference to § 4 of the Settlement Agreement, the Indemnification Provision. The General Release also prohibits Sodano from instituting or facilitating any proceeding against the NASD for claims that he released as part of the General Release.<sup>13</sup>

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<sup>11</sup> NASD Settlement Agreement and Release § 4.

<sup>12</sup> General Release § 1(b)(iv).

<sup>13</sup> *Id.* § 1(c).

Notwithstanding the General Release's broad general release, its nonexclusive discussion of released claims, and Sodano's agreement not to initiate or facilitate any proceeding against the NASD, the General Release contains several specific carve-outs. The two carve-outs at dispute here are as follows:

Notwithstanding any other provision of this General Release to the contrary, this General Release does not apply to:

...

(iv) any action you take in connection with fulfilling your fiduciary duties to Amex or any action you take to defend yourself against any claim against you or threatened against you for breach of your duties in connection with your employment with Amex or NASD (the "Duties Carve-Out"); and

(v) your rights to indemnification and to director's and officer's liability insurance coverage under Section 4 of the [NASD Settlement] Agreement and to reimbursement under Section 6 of the [NASD Settlement] Agreement (the "Indemnification Carve-Out").<sup>14</sup>

### 3. The Key Events During The Negotiation Of The NASD Settlement And Release

The terms of the NASD Settlement and Release were negotiated starting after the GTCR Transaction was announced in June 2003 and concluded with the execution of the NASD Settlement and Release at the end of 2004.<sup>15</sup> Many material events took place during that time period that influenced the final terms of the NASD Settlement and Release. The first material event was the SEC's indication in late November 2003 that it intended to take testimony from Sodano as part of the SEC Investigation. Sodano retained Latham & Watkins to represent his interests, and the Amex indicated to Sodano that it would advance "the reasonable expenses (including attorneys' fees and expenses)

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<sup>14</sup> *Id.* § 1(d).

<sup>15</sup> A parallel negotiation of the Amex Settlement Agreement took place during the same time. That Agreement is not in dispute because the Amex acknowledges that it owes Sodano advancement.

incurred by [him] that are directly related to the SEC investigation” if he signed an undertaking to repay the advanced expenses if it was ultimately determined that he was not entitled to indemnification.<sup>16</sup> Sodano provided the required undertaking in February 2004. At around the same time, Sodano and the NASD signed a term sheet regarding his separation from the NASD.<sup>17</sup> The term sheet made no mention of continued advancement or ultimate indemnification.<sup>18</sup>

Likewise, the original draft of the NASD Settlement Agreement and Release, which was forwarded from Bogner (the NASD’s counsel) to Raskin (Sodano’s counsel) on February 20, 2004, contained broad release language and did not explicitly carve-out Sodano’s right to advancement or ultimate indemnification.<sup>19</sup> The first time any express reference to indemnification entered the NASD Settlement Agreement and Release was in the revised draft sent by Sodano’s counsel to the NASD’s counsel on April 8, 2004.<sup>20</sup> By that time, the Amex board members who were not also board members of the NASD had become nervous about liability concerns related to the AMC Transaction. Those Amex board members had asked for and received assurance that the NASD would provide indemnification for any actions related to their service on the Amex board.<sup>21</sup>

That request for indemnification turned out to be prescient because Sodano and the Amex

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<sup>16</sup> JX 83.

<sup>17</sup> JX 33 (NASD); *see also* JX 2 (Sodano’s term sheet with Amex that also made no mention of indemnification or advancement).

<sup>18</sup> *Id.*

<sup>19</sup> JX 75.

<sup>20</sup> JX 81 at FINRA 6469, 6477. The April 8, 2004 draft NASD Settlement Agreement and Release contained an indemnification provision that was substantially similar to the final Indemnification Provision and a General Release carve-out for that Indemnification Provision that was substantially similar to the final Indemnification Carve-Out.

<sup>21</sup> JX 74.

board members, among others, were sued in the New York Supreme Court in March 2004 (the “Alpert Action”).<sup>22</sup> The Alpert Action sought a preliminary injunction against a vote on the AMC Transaction and asserted various direct and derivative claims arising out of the AMC Transaction.<sup>23</sup> Ultimately, the preliminary injunction was denied and the other claims were dismissed.<sup>24</sup> But the Alpert Action drew the attention of Sodano and his counsel to the issue of advancement and ultimate indemnification under the Amex LLC Agreement and possibly the NASD Charter.<sup>25</sup> In fact, the comments Sodano provided his counsel on the original draft of the NASD Settlement Agreement and Release were made approximately one week after Sodano and his counsel communicated about the right to receive advancement and ultimate indemnification for the Alpert Action. Next to the phrase in the draft General Release indicating that Sodano was releasing his rights to any attorneys’ fees, Sodano specifically wrote in that he “[would] not release indemnity protection by Delaware law or D&O protection.”<sup>26</sup>

Negotiations over the NASD Settlement Agreement and Release continued throughout the fall of 2004, with Ryan (the Amex’s general counsel) becoming involved

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<sup>22</sup> JX 30.

<sup>23</sup> One of the primary issues in the Alpert Action was the amount of compensation that Sodano would receive for his separation from the NASD and the Amex. Throughout the negotiation of the NASD Settlement Agreement and Release, Sodano knew that the size of his compensation would be a potential source of litigation against him. *See, e.g.*, JX 106 (September 24, 2003 New York Post article stating that “[w]hile Sodano’s bonanza pales in comparison with [former NYSE CEO and Chairman Richard] Grasso’s \$187.5 million payout, it is likely to raise the ire of Amex members, who have seen the value of their stakes decline”).

<sup>24</sup> *See Alpert v. Nat’l Ass’n of Sec. Dealers, LLC*, 801 N.Y.S.2d 229 (N.Y. Sup. Ct. 2004).

<sup>25</sup> JX 84 at WC 2840 (March 22, 2004 email from Sodano’s counsel to Sodano discussing his indemnification rights, including “indemnification on a pay-as-you-go-basis” — that is, advancement).

<sup>26</sup> JX 70 at SS4295.

in negotiating the scope of his General Release. Ryan, who was also represented by Raskin, was the impetus for adding the Duties Carve-Out to his and Sodano's General Releases. Ryan was concerned that he not release his right to defend himself against any claims brought against him for actions in his role at Amex.<sup>27</sup> Although there was much back and forth over the Duties Carve-Out, even in the final days before the Agreement was signed, it ultimately ended up in the NASD Settlement Agreement and Release.

The final material event that occurred during the negotiation of the NASD Settlement Agreement and Release was the SEC's issuance of Wells Notices to Sodano and Ryan during early November 2004.<sup>28</sup> The Wells Notices put Sodano and Ryan on notice that the SEC staff was planning to recommend to the Commission that civil enforcement proceedings be instituted against them. The Wells Notices were undoubtedly on the minds of the parties during the final negotiations of the NASD Settlement Agreement and Release. In fact, at the SEC's suggestion, Sodano and Ryan's transaction bonuses, which in Sodano's case represented \$3 million of the \$22 million in compensation that he would receive, were escrowed pending the conclusion of the SEC's investigation and the payment of any penalties or fines.<sup>29</sup>

#### 4. The Parties' Subjective Views Of The Negotiation Process

Having described how the relevant provisions entered the NASD Settlement Agreement and Release during the negotiation process and the external events that took place during that process, I now detail the subjective views of those involved in the

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<sup>27</sup> JX 46 (email from Bogner to the NASD's general counsel detailing Ryan's concerns).

<sup>28</sup> JX 50 at AM1419 (November 11, 2004 Amex press release on the Wells Notices).

<sup>29</sup> See JX 119 (email from AMC's counsel discussing the escrow arrangement).

process about whether Sodano retained the advancement right he had under the NASD Certificate. But before detailing those views, I note that there is scant evidence that the parties actually communicated their subjective views to anyone on the other side of the negotiations. Unless those views were expressed to the other side, they are of no relevance as an interpretive aid.<sup>30</sup> The only alleged communication between the two sides about the scope of the corporate protections that Sodano was retaining was a short conversation between Sodano and then-NASD Chairman and CEO Robert Glauber. Sodano cannot recall exactly when during the negotiation process that conversation took place, but he alleges that he told Glauber that he wanted to make sure that he retained “all [his] corporate protections for all [his] actions, both of NASD and Amex.”<sup>31</sup>

The subjective view of Raskin, Sodano’s lead negotiator, matches the sentiment that Sodano expressed to Glauber. Raskin knew that Sodano wanted to retain all the corporate protections he had going into the negotiation of the NASD Settlement Agreement and Release — including his right to advancement and ultimate indemnification under the NASD Certificate.<sup>32</sup> According to Raskin, that intention was repeatedly brought to the forefront of both Sodano and Raskin’s minds each time another

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<sup>30</sup> See *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14, 54 (Del. Ch. 2001) (“The court’s examination of the parol evidence is merely a continuation of an effort to discern the parties’ intentions. Therefore, the subjective beliefs of the parties about the meaning of the contractual language are generally irrelevant. Where one of the parties, however, expresses its beliefs to the other side during the negotiation process or in the course of dealing after consummation, such expressions may be probative of the meaning that the parties attached to the contractual language in dispute.”)

<sup>31</sup> Sodano Dep. at 159; see also *id.* at 46 (same). The NASD did not depose Glauber to rebut Sodano’s testimony.

<sup>32</sup> Raskin Dep. at 58 (indicating that Sodano told him that he “wanted to be fully protected with respect to litigation expenses”).

event — for example, the Alpert Action or the Wells Notices — foreshadowed potential litigation expenses for Sodano.<sup>33</sup> In translating those concerns to the language of the NASD Settlement Agreement and Release, Raskin explained that “the reference to [the NASD’s] organizational documents [in the Indemnification Provision] was to cover any protections that [Sodano] had in the organizational documents.”<sup>34</sup> When questioned why he did not specifically include the term “advancement” in the NASD Settlement Agreement and Release, Raskin explained:

The organizational documents in total referred to indemnification and advancement and other things. There was no need, in my view, to specifically refer to advancement or anything else once we referred to organizational documents. . . . I am sure that [the NASD’s counsel] had a copy of the organizational documents. We knew what they included, I’m sure they knew what they included, and there was no need to be more specific because the reference was to the organizational documents in toto.<sup>35</sup>

Consistent with Raskin and Sodano’s subjective view that the NASD Settlement Agreement and Release preserved all Sodano’s corporate protections under the NASD Certificate, the NASD’s negotiators did not focus on the difference between advancement and ultimate indemnification. Stated differently, this is not a situation where the NASD intended to negotiate contractual terms whereby Sodano, who had been sued in the Alpert Action and had just received a Wells Notice, would forsake his right to advancement while retaining his right to ultimate indemnification. Rattner, the NASD’s lead negotiator, acknowledged that although the parties negotiated over “indemnification,”

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<sup>33</sup> See, e.g., Raskin Dep. at 36 (Alpert Action); *id.* at 62 (Wells Notices).

<sup>34</sup> Raskin Dep. at 36.

<sup>35</sup> Raskin Dep. at 58-59; see also Sodano Dep. at 135 (“When we make reference to indemnification, we use it as an all-inclusive term.”).

they never discussed what they meant when they used that term and that she was not aware of the distinction between advancement and ultimate indemnification.<sup>36</sup> The only evidence in the record that the NASD points to in suggesting that it intended for the NASD Settlement Agreement and Release to cut off Sodano's right to advancement is statements by Grant Callery, the NASD's general counsel, and Todd Diganci, the NASD's CFO, that they understood the difference between advancement and ultimate indemnification.<sup>37</sup> Nothing in the record, however, indicates that Callery or Diganci (or anyone else on the NASD side of the negotiations) actually came out of the negotiations believing that the NASD Settlement Agreement and Release had eliminated Sodano's right to advancement.<sup>38</sup>

5. The Parties Have Frequently Referred To The Term "Indemnification" As Encompassing Both The Right To Advancement And Ultimate Indemnification

In evaluating the parties' differing views over whether the term "indemnification" as used in the NASD Settlement Agreement and Release encompasses both the right to advancement and the right to ultimate indemnification, it is informative to consider the instances in which the parties involved in the actions related to this dispute used "indemnification" in its broader sense to refer to both the concepts of advancement and ultimate indemnification. A non-comprehensive list of those occasions includes:

- Article Fifth of the NASD Certificate is titled using "Indemnification" even though it creates both advancement and ultimate indemnification rights. Even, the

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<sup>36</sup> Rattner Dep. at 128-129.

<sup>37</sup> Callery Dep. at 175; Diganci Dep. at 56.

<sup>38</sup> See Tr. at 58 (NASD's counsel admitting this upon questioning).

NASD has grudgingly acknowledged that Article Fifth(f), the provision extending “indemnification provided by this Article Fifth” to covered individuals who have ceased their roles at the NASD, uses “indemnification provided by this Article Fifth” to mean both advancement and ultimate indemnification.

- The December 1, 2003 letter from the Amex to Sodano explained that he was entitled to advancement and ultimate indemnification under the “Indemnification Provisions” of Amex’s LLC Agreement and the DGCL.<sup>39</sup>
- The February 2004 letters from the non-NASD Amex Governors to the NASD seeking to substantiate that their protections from the NASD in light of the concerns they had about the Amex stated that they believed the NASD would “indemnify” them for their service at its subsidiary.<sup>40</sup> This resulted in an NASD board action item that referred only to “indemnification” of the Amex Governors and the NASD board minutes indicated that the NASD’s general counsel stated the “NASD management is recommending that the [non-NASD Amex Governors] . . . be indemnified to the same extent as if they were entitled to indemnification under NASD’s Certificate of Incorporation.”<sup>41</sup> Consistent with the broad use of “indemnification,” the final NASD board resolution granted the non-NASD Amex

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<sup>39</sup> JX 83.

<sup>40</sup> JX 19.

<sup>41</sup> JX 19; JX 74 at FINRA 37810.

Governors both the right to advancement and the right to ultimate indemnification.<sup>42</sup>

- The May 2004 White & Case memorandum to Sodano analyzing his rights to advancement and ultimate indemnification under the NASD Certificate was titled simply “indemnification.”<sup>43</sup>
- The October 2004 email from the Amex Membership Corporation’s outside counsel to Raskin observed that the “Amex LLC Agreement . . . has very favorable *indemnification* provisions that, among other things, provide for mandatory advancement of expenses of indemnifiable claims.”<sup>44</sup>

D. The SEC Commences An Administrative Proceeding Against Sodano And This Dispute Develops

Even after the AMC Transaction closed at the end of 2004, the Amex continued to advance Sodano’s expenses related to the SEC Investigation. But those expenses began to increase materially in 2007. On March 22, 2007, the SEC instituted administrative proceedings against Sodano alleging that the “Amex’s regulatory deficiencies resulted in large part from Sodano’s failure to pay adequate attention to regulation, to put in place an oversight structure, to ensure the regulatory staff was properly trained, and to dedicate sufficient resources to ensure that the Exchange was meeting its regulatory

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<sup>42</sup> The actual NASD board resolution granted the non-NASD Amex Governors both advancement and ultimate indemnification after the Amex’s Delaware counsel changed the language of the proposed board resolution to make clear that “indemnification” included both advancement and ultimate indemnification. JX 62.

<sup>43</sup> JX 84.

<sup>44</sup> JX 88 (emphasis added).

obligations.”<sup>45</sup> An administrative hearing was scheduled for September 2007, but on August 20, 2007 the presiding Administrative Law Judge granted Sodano’s motion to dismiss the charges as a matter of law. The SEC filed an appeal, which was pending at the time of the oral argument for this action.

On August 24, 2007, less than a week after the charges against Sodano had been dismissed, the Amex notified Sodano that it would not pay his legal expenses because those expenses were excessive.<sup>46</sup> The expenses at issue were Sodano’s counsel’s June 2007 fees, fees that reflected the preparation for Sodano’s upcoming administrative hearing. In October 2007, Sodano responded by requesting that the NASD advance his expenses under the NASD Settlement Agreement and Release.<sup>47</sup> When the NASD refused, Sodano brought this action on December 14, 2007 seeking advancement from the Amex and the NASD.

A week later, on December 21, 2007, Sodano filed a Notice of Summons in New York state court against Raskin and White & Case to preserve any potential malpractice claim he might have relating to Raskin’s negotiation of the NASD Settlement Agreement and Release. No complaint has been filed in that action, and the parties to that action entered a tolling agreement in February 2008, under which Sodano dismissed that action without prejudice.<sup>48</sup>

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<sup>45</sup> JX 10 (Order Instituting Administrative Proceedings) ¶ 6.

<sup>46</sup> The reasonableness of Sodano’s legal expenses are not at issue in this action because the parties have reached an agreement covering that issue.

<sup>47</sup> JX 122.

<sup>48</sup> JX 91.

### III. Requested Relief<sup>49</sup>

The parties agreed to a trial on the paper record. Sodano requests an order requiring the Amex and the NASD to advance his unpaid legal expenses related to the SEC administrative proceeding against him and an order that the Amex and the NASD advance future legal expenses related to that proceeding consistent with a reasonableness agreement reached by the parties. Sodano also requests pre-judgment interest from the NASD and post-judgment interest from the NASD and the Amex. Finally, Sodano seeks “fees on fees” for the costs of prosecuting this action.

The Amex requests an order that the NASD is required to advance Sodano’s legal expenses. The Amex also seeks an order that the Amex and the NASD equally share the cost of paying Sodano’s unpaid and future advancement, subject to contribution or refund after an adjudication of the cross-claims the Amex and the NASD have brought against each other. Likewise, the Amex seeks to reserve all fees on fees claims between the Amex and the NASD until their cross-claims are resolved. The Amex seeks an order that the NASD is solely responsible for Sodano’s fees on fees. The NASD counters by seeking an order that it has no obligation to advance Sodano’s legal fees and that it also has no obligation to pay fees on fees to Sodano. The NASD further requests an order that the Amex pay all of the NASD’s legal expenses related to this action.

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<sup>49</sup> The relief requested by the parties is taken from the April 25, 2008 Stipulation and Order.

#### IV. Legal Analysis

##### A. The Effect Of The NASD Settlement Agreement And Release On Sodano's Right To Advancement From The NASD

The NASD acknowledges that Sodano had an advancement right under the NASD Certificate before the parties executed the NASD Settlement Agreement and Release. The relevant issue, therefore, is whether Sodano released those rights by signing the NASD Settlement Agreement and Release. The NASD Settlement Agreement and Release contains a New York choice of law provision and thus I apply New York contract law principles in interpreting that Agreement.<sup>50</sup> The general principles of contract interpretation apply to releases.<sup>51</sup> “The scope and meaning of a release will be determined by the manifested intent of the parties.”<sup>52</sup> In other words, the “meaning and coverage [of a release] necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given.”<sup>53</sup>

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<sup>50</sup> NASD Settlement Agreement and Release § 5(c).

<sup>51</sup> *Mangini v. McClurg*, 249 N.E.2d 386, 389 (N.Y. 1969); see also 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 73:7 (4th ed. 2003) (“[A]s a general principle, the rules of interpretation that are applicable to contracts generally are equally applicable to releases.”).

<sup>52</sup> *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261, 263 (2d Cir. 1965) (applying New York law); see also *IBP*, 789 A.2d at 54 (Del. Ch. 2001) (“Like Delaware, New York follows traditional contract law principles that give great weight to the parties’ objective manifestations of their intent in the written language of their agreement.”); 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 73:9 (4th ed. 2003) (“As is the case with any contract, the scope and meaning of a release is generally governed by the intent of the parties as expressed in their written document.”).

<sup>53</sup> *Cahill v. Regan*, 5 N.Y.2d 292, 299 (1959). Sodano also cites *Cahill* for the proposition that “a release may not be read to cover matters which the parties did not desire or intend to dispose of.” *Id.* Sodano suggests that under *Cahill*, the NASD Settlement Agreement and Release cannot be read as relinquishing his advancement right because he did not intend to relinquish that right. I read *Cahill* more narrowly than Sodano does. *Cahill* dealt with whether a general

“The threshold question in a dispute over the meaning of a contract is whether the contract terms are ambiguous.”<sup>54</sup> If the contractual language is unambiguous, then extrinsic evidence will not be considered.<sup>55</sup> But, if the contractual language is ambiguous, the court may resort to extrinsic evidence to determine the parties’ intent.<sup>56</sup> Under New York law, contractual language is ambiguous if it is “capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.”<sup>57</sup> In contrast, contractual language is unambiguous if it has “‘a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.’”<sup>58</sup>

#### 1. The Effect Of The Indemnification Provision On Sodano’s Right To Advancement From The NASD

Here, the critical question is whether the Indemnification Provision and the Indemnification Carve-Out preserve Sodano’s right to advancement under the NASD

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release signed as part of a suit over machinery covered a patent that was not even in existence at the time the general release was signed. *Id.* *Cahill* is distinguishable from this case because here the parties clearly understood that the NASD Settlement and Release was intended to address the corporate protections provided to Sodano by the NASD. See *Ackoff-Ortega v. Windswept Pac. Entm’t Co.*, 120 F. Supp. 2d 273, 282 (S.D.N.Y. 2000) (interpreting and distinguishing *Cahill* in a similar manner). Regardless, the scope of *Cahill* is not critical here.

<sup>54</sup> *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 59, 66 (2d Cir. 2000) (applying New York law).

<sup>55</sup> *Teitelbaum Holdings, Ltd. v. Gold*, 396 N.E.2d 1029, 1032 (N.Y. 1979) (“[M]atters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.”).

<sup>56</sup> *Stage Club Corp. v. W. Realty Co.*, 622 N.Y.S.2d 948, 950-51 (N.Y. App. Div. 1995).

<sup>57</sup> *Seiden Assocs. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992) (quotation and citation omitted).

<sup>58</sup> *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (quoting *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978)).

Certificate. Sodano contends that the language in the Indemnification Provision that the NASD “will indemnify [him] . . . to the fullest extent permitted by law *and the* NASD’s organizational documents” and the language in the Indemnification Carve-Out that Sodano was not releasing his “rights to indemnification” under the Indemnification Provision unambiguously maintained his right to advancement. The NASD counters that the same language unambiguously does not preserve Sodano’s right to advancement, and when combined with Sodano’s general release of any claims against the NASD, results in Sodano having released his advancement right.

The key issue is the meaning of “indemnify . . . to the fullest extent permitted by law *and the* NASD’s organizational documents.” Put simply, does “indemnify” as used in the NASD Settlement Agreement mean solely ultimate indemnification and not advancement, or does “indemnify” mean both advancement and ultimate indemnification? The NASD contends that indemnify means ultimate indemnification only. It points out that Delaware law has consistently treated advancement and ultimate indemnification as distinct rights<sup>59</sup> and argues that if the Agreement was intended to preserve Sodano’s advancement and ultimate indemnification rights, the parties could have easily written “advance and indemnify.” Sodano counters that the Agreement uses “indemnify . . . to the fullest extent permitted by . . . NASD’s organizational documents” as an all inclusive term that includes both the concepts of advancement and ultimate

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<sup>59</sup> See, e.g., *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 589 (Del. Ch. 2006) (noting that Delaware law “has maintained for a generation that the terms advancement and indemnification are not synonymous” and that “[b]ecause rights to indemnification and advancement differ in important ways, [Delaware] courts have refused to recognize claims for advancement not granted in specific language clearly suggesting such rights.”).

indemnification, just as the NASD Certificate titles the article granting both advancement and ultimate indemnification rights using the term “indemnification” without also using the term “advancement.”

The question of whether “indemnification” as used in an agreement encompasses both advancement and ultimate indemnification is not novel. In *Weinstock v. Lazard Debt Recovery GP, LLC*, this court held that language stating that the “indemnification provided by this Section 2.06” shall continue as to former affiliates included the right to advancement as well as ultimate indemnification.<sup>60</sup> The court reasoned that the language “indemnification provided by this Section 2.06” included both advancement and ultimate indemnification because the “entirety of § 2.06 addresses indemnification broadly and treats the right to receive payments of expenses in advance as a subsidiary component.”<sup>61</sup> Likewise, in *Greco v. Columbia/HCA Healthcare Corp.*, this court interpreted a fees on fees provision in a certificate stating that the corporation shall indemnify a covered corporate official’s “costs and expenses incurred in connection with successfully establishing his or her right to indemnification” as granting fees on fees for advancement proceedings as well as ultimate indemnification proceedings.<sup>62</sup> In so holding, the court rejected the defendants’ argument that the term “indemnification” should be read narrowly to exclude fees on fees for advancement proceedings. The court noted that the certificate itself used the term “indemnification” broadly by using “indemnification” and

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<sup>60</sup> 2003 WL 21843254, at \*4 (Del. Ch. Aug. 8, 2003). Also noteworthy is that Section 2.06 was entitled simply “indemnification” even though it provided for both advancement and ultimate indemnification.

<sup>61</sup> *Id.*

<sup>62</sup> 1999 WL 1261446 at \*13 (Del. Ch. Feb. 12, 1999).

not “advancement” in the title of several subsections that dealt with both advancement and ultimate indemnification and explained that “the term ‘indemnification’ could refer to both ‘indemnification’ and ‘advancement’ in the certificate where that would make sense and be linguistically economical.”<sup>63</sup>

Here, as in *Weinstock* and *Greco*, the best reading of the language “indemnify . . . to the fullest extent permitted by law and the NASD’s organizational documents” in the NASD Settlement Agreement and General Release is that the parties intended that language to cover both advancement and ultimate indemnification. The language “indemnify . . . to the fullest extent permitted by . . . the NASD’s organizational documents” is best read in reference to the NASD Certificate. The NASD Certificate uses “indemnification” both broadly to encompass both advancement and ultimate indemnification and narrowly to cover ultimate indemnification only. The broad uses of “indemnification” include titling the article that grants both advancement and ultimate indemnification using only “indemnification” and using the language “indemnification provided by this Article Fifth” in extending both advancement and ultimate indemnification rights to former corporate officials.<sup>64</sup> The narrow uses of

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<sup>63</sup> *Id.*; cf. *Nakahara v. NS 1991 Am. Trust*, 739 A.2d 770, 779 n.52 (Del. Ch. 1998) (“Although indemnification and advancement are distinct rights, they are related concepts that are commonly addressed in neighboring statutory provisions.”) (emphasis omitted).

<sup>64</sup> Likewise, one would suspect that the NASD intended to use “indemnify” broadly to limit both the advancement and ultimate indemnification rights of covered persons who initiate proceedings in the following subsection:

(g) Notwithstanding the foregoing, but subject to Article Fifth (j), the NASD shall be required to indemnify any person identified in Article Fifth (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.  
NASD Certificate Art. Fifth(g).

“indemnification” include among other things, the actual creation of the ultimate indemnification right.<sup>65</sup> That the language in the NASD Settlement Agreement and Release is a reference to the broad use of “indemnification” is clear from that language’s reference to “indemnify to the *fullest extent* permitted by . . . the NASD’s organizational documents.” Moreover, the NASD admits that the most analogous phrase in the NASD Certificate — “the indemnification provided by this Article Fifth” — refers to “indemnification” broadly, in the sense that it encompasses both the advancement and ultimate indemnification rights granted under that Article.

Although I believe that the clear intention of the parties evident in the language of the NASD Settlement Agreement and Release and the NASD Certificate referred to by that language was that Sodano would retain both his advancement and ultimate indemnification rights under the NASD Certificate, I acknowledge that the NASD makes a non-sanctionable argument that “indemnify . . . to the fullest extent permitted by law and the NASD’s organizational documents” could be interpreted as referring only to ultimate indemnification and not advancement.<sup>66</sup> But turning to the extrinsic evidence relevant to the interpretation of the language in the NASD Settlement Agreement and

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<sup>65</sup> That is, as required under Delaware law, the NASD Certificate specifically *creates* the distinct rights to ultimate indemnification and advancement. NASD Certificate Art. Fifth(a), (b).

<sup>66</sup> For this reason, I do not attach any weight to Sodano’s recent decision to file a placeholder malpractice suit against Raskin. Like almost any written document, the NASD Settlement Agreement and Release could have been drafted more precisely by, for example, specifically referring to advancement. But it is not inconsistent for Sodano to preserve his ability to recover from Raskin for any damages resulting from a potential infelicity in the Agreement while at the same time arguing that the language in the Agreement was well written enough to achieve what he and Raskin intended.

Release does not help the NASD and in fact only confirms that the language was intended to cover both advancement and ultimate indemnification.

The reality of the negotiation is that the default before the execution of the NASD Settlement Agreement and Release was that Sodano was entitled to advancement and ultimate indemnification from the NASD. During the negotiation and before the Agreement was finalized, Sodano was sued in the Alpert Action and received a Wells Notice. Everyone involved knew that it was likely that Sodano would continue to incur legal expenses related to his tenure at the Amex (and the NASD) and that those expenses would likely be substantial. During the negotiation period, the non-NASD Amex Governors indicated their concern about future litigation and the ability of the Amex to pay their potential legal expenses by seeking advancement and ultimate indemnification from the NASD. Sodano would have had to have fallen off the proverbial turnip truck to have given up his right to advancement from the NASD at that point. And doing so would have been a big deal to both Sodano and the NASD. The evidence does not support such a momentous event. There was no end zone celebration by the NASD over achieving an important contractual concession. In fact, Rattner, the NASD's lead negotiator did not even understand the difference between advancement and ultimate indemnification. But what she did understand is that when the parties negotiated over indemnification to the fullest extent of the NASD's Certificate, Sodano was retaining the broadest extent of his indemnification rights under the NASD Certificate, not materially reducing his existing rights by forsaking his right to advancement.

This is also consistent with Sodano’s very vague and general recollection of a conversation with Glauber, the NASD Chairman and CEO at that time. Sodano says he asked Glauber “to make sure that [he] was availed to all [his] corporate protections for all [his] actions, both of [the] NASD and [the] Amex,”<sup>67</sup> and that Glauber agreed.<sup>68</sup> I do not view that conversation as of great importance because it was, even according to Sodano, a brief conversation that he cannot place in time and neither he nor Glauber were involved in the actual negotiations over the language of the NASD Settlement Agreement and Release.<sup>69</sup> But that such a conversation was brief and non-memorable as to time tends to support the conclusion that the parties intended the Agreement to preserve Sodano’s existing rights under the NASD Certificate rather than alter an important pre-existing right with a negative economic effect on Sodano. Likewise, the NASD’s decision not to obtain testimony from Glauber contradicting Sodano’s testimony on that

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<sup>67</sup> Sodano Dep. at 159.

<sup>68</sup> *Id.* at 53.

<sup>69</sup> Sodano argues that his conversation with Glauber triggers the forthright negotiator principle. *See United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007); *IBP*, 789 A.2d 14. The forthright negotiator principle applies with the most force when a negotiator drafts particular contractual language, clearly expresses to the other side what she believes the language accomplishes, and the other side accepts the language into the contract without contradicting the drafter’s meaning. *See IBP*, 789 A.2d at 60-61; *see also United Rentals*, 937 A.2d at 841-44. Here, Sodano and Glauber were distant from the key scrivener of the NASD Settlement Agreement and Release. It may be that Sodano asked Glauber to ensure, as a general matter, that Sodano keep all the existing protections afforded to him by the NASD and the Amex, and that Glauber said he would do so. But Sodano cannot even place that vague conversation in time, much less relate the chronology of that conversation to the specific back-and-forth between the key negotiating parties — Raskin for Sodano and Rattner for the NASD — over the language of the NASD Settlement Agreement and Release relevant to whether Sodano preserved a right to receive advancement from the NASD. At best, therefore, the Sodano-Glauber conversation has some evidentiary force in that it suggests that another key NASD official, Glauber, did not come out of the negotiations over the NASD Settlement Agreement and Release believing that the Agreement had relieved Sodano of his pre-existing right to advancement under the NASD’s Certificate.

discussion suggests that such a conversation took place, or at least would have been consistent with what the NASD knew about the circumstances surrounding and the purposes behind the NASD Settlement Agreement and Release.<sup>70</sup>

Returning to the contractual language, it strikes me as implausible that sophisticated parties<sup>71</sup> would eliminate a pre-existing advancement right, especially in these circumstances, by agreeing to contractual language that indemnifies Sodano to the fullest extent of the NASD's Certificate when that Certificate uses "indemnification" broadly to encompass both advancement and ultimate indemnification. That is particularly the case where "indemnification" was consistently being used by both the business people and the lawyers involved in the relevant events to refer to both advancement and ultimate indemnification.

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<sup>70</sup> Cf. *United Rentals*, 937 A.2d at 841 (discussing testimony from two business executives from one side of the transaction that they held a very clear belief about the issue at the heart of the contractual interpretation dispute).

<sup>71</sup> The NASD argues that, to the extent the language in the Indemnification Provision is ambiguous, I should apply the doctrine of contra proferentem to construe that language against Sodano because he drafted that language. The contra proferentem doctrine is not applicable here because the terms of the NASD Settlement Agreement and Release were negotiated by sophisticated parties who were represented by counsel. See, e.g., *Citibank, N.A. v. 666 Fifth Avenue Ltd. P'ship*, 769 N.Y.S.2d 268, 269 (N.Y. App. Div. 2003) ("The ambiguities are not, however, to be construed against defendant by reason of its having drafted the initial version of the leases, since the lease agreements ultimately entered into resulted from extensive negotiations in which both parties, each a commercially sophisticated entity, were represented by counsel, and plaintiff failed to show that it 'had no voice in the selection of [the leases'] language.'") (quoting *67 Wall St. Co. v. Franklin Nat'l Bank*, 371 N.Y.S.2d 915, 333 (1975)). Moreover, the doctrine of contra proferentem is a doctrine of last resort. See, e.g., *Schering Corp. v. Home Ins. Co.*, 712 F.2d 4, 10 n.2 (2d Cir. 1983) (applying New York law and stating that "*contra pr[o]ferentem* is used only as a matter of last resort, after all aids to construction have been employed but have failed to resolve the ambiguities in the written instrument").

## 2. The Effect Of The Attorneys' Fees Subsection And The Duties Carve-Out On Sodano's Right To Advancement From The NASD

The parties make two other arguments that I will address briefly. Both arguments are premised on the fact that provisions in the NASD Settlement Agreement and Release that do not address advancement or even ultimate indemnification provide an answer to the dispute over whether Sodano preserved his right to advancement. The NASD contends that the provision in the General Release listing attorneys' fees as part of the claims that Sodano was releasing without specifically excepting advancement indicates that Sodano released his right to advancement under the NASD Certificate. That reading of the attorneys' fees language is unconvincing.

For starters, that interpretation would extend to the ultimate indemnification of attorneys fees such that the Indemnification Provision in the NASD Settlement Agreement would be eviscerated by a clause in a subsection of the General Release. Taken to its logical conclusion that interpretation of the Attorneys' Fees Subsection would result in the Indemnification Provision only serving to indemnify Sodano from any judgment against him rather than also indemnifying his attorneys' fees. Moreover, even if one were to accept that interpretation of the Attorneys' Fees Subsection, the Indemnification Provision would be saved by the Indemnification Carve-Out. The use of "[n]otwithstanding any other provision of this General Release" at the start of the Indemnification Carve-Out resolves any conflict between that Provision and the

Attorneys' Fees Subsection by indicating that the Indemnification Carve-Out trumps.<sup>72</sup>

Thus, the Indemnification Provision is not subject to the General Release and the Indemnification Provision controls the question of whether Sodano preserved his right to advancement.

Sodano makes an equally strained argument that the Duties Carve-Out preserved his right to advancement. Sodano bases that argument on his belief that the language stating that the General Release did not apply to “any action [Sodano] take[s] to defend [him]self against any claim against [him] . . . for breach of [his] duties in connection with [his] employment with Amex or NASD” preserved Sodano’s right to advancement. Specifically, Sodano argues that in *Majkowski v. American Imaging Management Services, LLC* this court observed that “defend” might suggest the creation of an advancement right.<sup>73</sup> But *Majkowski* was merely observing that contractual language that requires an indemnitor “defend” an indemnitee “comes closer to suggesting the active employment of attorneys and continual payment as the attorneys’ fees are incurred” than “indemnify and hold harmless.”<sup>74</sup> The language in the Duties Carve-Out is much different. The Duties Carve-Out does not create a requirement that the NASD defend Sodano (or preserve such an existing right) but rather it creates an exception to the General Release to ensure that Sodano will not violate the NASD Settlement Agreement and Release by defending himself in an action related to his capacity at the NASD or the

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<sup>72</sup> See *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995) (applying New York law and determining that the use of notwithstanding language at the beginning of a clause means that that clause trumps otherwise inconsistent clauses).

<sup>73</sup> *Majkowski*, 913 A.2d at 589 n.39.

<sup>74</sup> *Id.*

Amex. For example, the Duties Carve-Out would allow Sodano to participate in a proceeding against the NASD if necessary to defend himself without violating the immediately preceding section in the General Release that precludes such action.

In other words, the Duties Carve-Out is designed to prevent Sodano from breaching the NASD Settlement Agreement and Release by defending himself rather than allocating the costs for such a defense. That reading is bolstered by the fact that the very next carve-out, the Indemnification Carve-Out, answers the question of when the NASD will be responsible for Sodano's defense costs.<sup>75</sup> Were I to read the Duties Carve-Out in the manner advocated by Sodano, the Indemnification Carve-Out and related Indemnification Provision would become surplusage.<sup>76</sup>

B. The Effect Of Article Fifth(h) On The NASD's Responsibility To Advance Sodano's Legal Expenses

The Amex and the NASD dispute the effect of Article Fifth(h) of the NASD Certificate. Article Fifth(h) states:

(h) The NASD's obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise, or non-profit entity.

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<sup>75</sup> See, e.g., *Oakgrove Constr., Inc. v. Genesee Valley Nurseries, Inc.*, 834 N.Y.S.2d 822, 823 (N.Y. App. Div. 2007). ("Where there are general and special provisions relating to the same thing, the special provisions control, even if there is an inconsistency between the special provisions and the general provisions.") (internal quotation and citation omitted).

<sup>76</sup> See, e.g., *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 845 N.E.2d 1265, 1267 (N.Y. 2006) ("A contract should be read to give effect to all its provisions.") (internal quotation and citation omitted).

Both parties agree that the claims underlying Sodano's request for advancement relate to actions brought against him as a result of his former service at the Amex and not at the NASD. Thus, the NASD's obligation to advance funds to Sodano is subject to Article Fifth(h). Notably, Article Fifth(h) would not have been relevant if the SEC administrative proceeding against Sodano was based on his service at the NASD itself. In that circumstance, Sodano's right to advancement would not be subject to any language limiting the NASD's obligation to advance if another entity was required to and capable of providing advancement.

The NASD contends that Article Fifth(h) indicates that it is only secondarily liable for advancement or ultimate indemnification of legal fees resulting from actions taken by individuals in their capacity at another entity. Therefore, in the NASD's view, Sodano must first seek to collect advancement from the Amex and the NASD is only liable to the extent Sodano cannot collect from the Amex. Stated differently, the NASD interprets Article Fifth(h) as providing a backstop only in circumstances where the entity for whom the individual was providing services cannot satisfy the advancement or ultimate indemnification obligation. The Amex, on the other hand, contends that it and the NASD are equal co-indemnitors on individuals sent by the NASD to provide services to the Amex and that the only purpose and effect of Article Fifth(h) is to prevent a double recovery of advancement or ultimate indemnification. The Amex therefore contends that it and the NASD, as co-indemnitors, should each pay fifty percent of Sodano's advancement.

The best interpretation of Article Fifth(h) is that the NASD is secondarily liable to Sodano for the advancement of his expenses. I interpret the language stating that the NASD's obligation "shall be reduced by any amount such person may collect" to imply a duty on behalf of Sodano to seek advancement from the Amex and to reduce the NASD's obligation by the amount Sodano may actually collect from the Amex.<sup>77</sup> That reading makes sense because Article Fifth(h) is only implicated in situations, such as this one, where the obligation to advance expenses arises in the first instance from the individual's service at another entity.<sup>78</sup> In other words, the hierarchical nature of the obligation mirrors the nature of the individual's service. This interpretation therefore captures the relevant business dynamic.<sup>79</sup> In a situation such as this one, Sodano's conduct that resulted in the SEC proceedings was taken in his roles at the Amex.

That the Amex is responsible for his legal expenses if it has the ability to fully meet them is rational and consistent with one of the primary purposes for forming subsidiary corporations — confining the costs and liabilities of a particular line of business. It is natural that an entity (such as the NASD) that made the business decision

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<sup>77</sup> One interesting question about the effect of a provision such as Article Fifth(h) in the context of an advancement dispute where the entity with primary liability refuses to honor its advancement obligation is whether the entity with secondary liability is required to begin advancing funds to the corporate official upon a demand and a demonstration of the primary obligor's refusal, and protect itself solely through subrogation to the rights and claims the corporate official has against the entity with primary liability. That issue is not at dispute in this action and prudence weighs against commenting on it without the aid of briefing.

<sup>78</sup> The hierarchical nature of Article Fifth(h) is evident not only in the limitation on when it applies, but also in the mechanics of how it allocates liability — it reduces the NASD's obligation by the *entire amount* that the individual may collect from the other entity.

<sup>79</sup> Candidly, the Amex recognized this and attempted to cast blame on the NASD for Sodano's actions at the Amex that ultimately led to the SEC proceedings. See Amex Op. Br. at 39; Tr. at 96-98. But upon questioning at oral argument, the Amex's counsel acknowledged that the SEC proceedings solely related to Sodano's roles at the Amex. Tr. at 96-98.

to operate a subsidiary as a separate entity (like the Amex) would want to retain the distinction between those entities and have the subsidiary entity be primarily liable for obligations resulting from actions taking place at the subsidiary level. Likewise, it makes sense that an employer like the NASD would promise an employee like Sodano who it was seconding to a subsidiary like the Amex that the NASD would act solely as a backstop insurer if the Amex could not fulfill its advancement and ultimate indemnification duties to him. Such an assurance provides peace of mind to the employee that the parent corporation has his back. Without such assurances, employees with leverage might refuse to take on duties at troubled subsidiaries or ones with limited financial resources. The decision to backstop a subsidiary's obligations to provide advancement and ultimate indemnification rights to an employee of the subsidiary for covered proceedings arising solely out of the employee's service at the subsidiary, however, is very different from the decision to assume a primary or co-equal liability. Taking on such an equal obligation is akin to a direct capital contribution to the subsidiary. Here, Article Fifth(h) makes clear that the NASD is only backstopping the advancement and ultimate indemnification of its officials when it sends them to serve at another entity and an advancement or ultimate indemnification obligation arises out of the actions taken by that official *at the other entity*, a result consistent with the manner in which parent and subsidiary entities transact business. Importantly, that backstop protection extends only to the person serving at the request of the NASD at another entity, and not to that entity itself.

Unlike the interpretation that the NASD is only secondarily liable, the Amex's contention that it and the NASD are co-indemnitors who should split the cost of Sodano's

advancement equally is not plausibly grounded in the language of the NASD's Certificate and its evident intent. Rather, it is based on this court's holding in *Chamison v. HealthTrust, Inc.* that co-indemnitors who both contractually agreed to indemnify a corporate official without in any way indicating a hierarchy between the two sources of indemnification should split indemnification costs equally.<sup>80</sup> Without any reference in the contracts as to how the parties intended to split the indemnification costs, the court sensibly looked to § 145 of the Delaware General Corporation Law for guidance and found that the General Assembly did not create any "primary-secondary hierarchy among § 145 indemnitors."<sup>81</sup> The court noted that the General Assembly's "silence makes it impossible to choose the more obligated indemnitor of two contractually obligated indemnitors."<sup>82</sup> But *Chamison* is not applicable here precisely because the NASD Certificate does indicate a hierarchical intent in splitting advancement and ultimate indemnification costs.<sup>83</sup>

Likewise, the policy concern raised by the Amex that a hierarchical advancement scheme encourages entities to refuse to honor their advancement obligations is not applicable here. Frankly, I do not see how interpreting Article Fifth(h) as hierarchical adds any additional incentive for entities in the position of the Amex to refuse to honor

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<sup>80</sup> 735 A.2d 912, 926 (Del. Ch. 1999) ("Viewing HealthTrust and Tenet as equal obligors, it is only fair to make them share the indemnity obligation ratably, i.e., by each paying half.").

<sup>81</sup> *Id.* at 924.

<sup>82</sup> *Id.* at 925.

<sup>83</sup> Section 145(e) allows a corporation to advance the costs of litigation to corporate officials. 8 Del. C. § 145(e). That "allowance is permissive, not mandatory" and therefore "a corporation is free to limit the terms of advancement and even preclude advancement entirely." *Brooks-McCollum v. Emerald Ridge Serv. Corp.*, 2004 WL 1752852, at \*2 (Del. Ch. July 29, 2004) (emphasis omitted).

their advancement obligations. *Chamison* makes clear that a co-indemnitor who pays more than its fair share has a right to seek contribution from its fellow co-indemnitor.<sup>84</sup> Other cases similarly indicate that a company's advancement or ultimate indemnification obligation is not reduced merely because a volunteer advances or indemnifies the relevant expenses.<sup>85</sup> The same rationale would apply to prevent primary indemnitors under provisions such as Article Fifth(h) from avoiding their obligations by refusing to pay when they have the ability to make the payment and thereby shifting liability to the secondary indemnitor. If an entity like the Amex simply refused to honor its *clear* primary obligation to advance, a secondary obligor who honors its duties should have the right to recover fully against the primary obligor. Given the reasoning behind the Supreme Court's holding in *Cochran*, the secondary obligor forced by a primary obligor to file such a suit would also have a plausible claim for automatic "fees on fees."<sup>86</sup> Regardless, the policy concerns are clearly not at issue here because the Amex has agreed that it owes Sodano advancement and stated that it has the financial resources to fulfill that obligation. Its understandable desire to stick its former parent with half the bill, however, provides no basis for me to ignore the clear intent of Article Fifth(h).

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<sup>84</sup> *Chamison*, 735 A.2d at 926; see also *Levy v. HLI Operating Co., Inc.*, 924 A.2d 210, 222 (Del. Ch. 2007) ("*Chamison* instructs that when an indemnitor, pursuant to section 145, fully satisfies a joint indemnification obligation it shares with a co-indemnitor covering the same indemnitee and the same challenged activity, the indemnitor must sue the co-indemnitor on a theory of contribution."). See generally *id.* at 219-21 (explaining the differences between indemnification, contribution, and subrogation).

<sup>85</sup> See *DeLucca v. KKAT Mgmt., L.L.C.*, 2006 WL 224058, at \*9 (Del. Ch. Jan. 23, 2006); see also *Schoon v. Troy Corp.*, 948 A.2d 1157, 1175-76 (Del. Ch. 2008).

<sup>86</sup> *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002).

Furthermore, interpreting Article Fifth(h) as making the parent corporation (the NASD) secondarily liable for the advancement and ultimate indemnification obligations of officials serving at another entity (a subsidiary, the Amex) at the NASD's request does not contravene this state's policy in favor of advancement and ultimate indemnification rights. As explained above, such an interpretation is consistent with the business realities of a parent entity asking an official to serve at a subsidiary entity. This is not, for example, a situation where the NASD enacted Article Fifth(h) to offload its advancement and ultimate indemnification obligations on an unrelated entity who happened to provide advancement and ultimate indemnification rights to the same official.<sup>87</sup> Article Fifth(h) is a common sense, measured use of the freedom to contract for advancement rights under § 145 in a manner consistent with the business realities of parent-subsidary relations and the expectations of the parties involved. Given that, it is therefore unsurprising that the Amex LLC Agreement also contains a nearly identical provision governing Amex officials who serve at Amex's request at other entities.<sup>88</sup>

### C. Fees On Fees

Having vindicated his right to advancement, Sodano is entitled to fees on fees.<sup>89</sup> The question here is what percentage of those fees should be paid by each defendant. The vast majority of Sodano's expenses in seeking to secure his advancement right involved establishing that he preserved his advancement right in the NASD Settlement Agreement and Release. That issue was the primary focus of Sodano's briefs and likely

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<sup>87</sup> Cf. *DeLucca*, 2006 WL 224058, at \*9.

<sup>88</sup> Amex LLC Agreement § 6.3(h).

<sup>89</sup> See *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002).

generated substantial expenses because it necessitated comprehensive discovery of the facts and circumstances involved in negotiating that Agreement. Those expenses could have been avoided had the NASD acknowledged that Sodano preserved his advancement right in a manner similar to the way the Amex acknowledged that it owed advancement to Sodano. On the other hand, the Amex is responsible for causing the dispute over the reasonableness of Sodano's fees. That dispute precipitated Sodano being left without a source for advancement and continued to be at issue until just before oral argument in this case. Furthermore, the Amex is responsible for the Article Fifth(h) dispute that, while not at the heart of Sodano's briefing and discovery, undoubtedly increased his expenses in this litigation. Balancing those factors, and giving particular weight to the Amex's role in causing the lawsuit to be filed and the NASD's role in causing the bulk of Sodano's briefing and discovery in the lawsuit, leads me to the conclusion that the Amex should bear one-third of Sodano's fees and the NASD should bear two-thirds of Sodano's fees. The Amex and the NASD shall bear their own fees.

#### V. Conclusion

For the foregoing reasons, the Amex shall advance Sodano's unpaid legal expenses and advance any future legal expenses incurred in the SEC administrative proceedings against Sodano in accordance with the parties' reasonableness agreement. Sodano shall be entitled to post-judgment interest from the Amex at the legal rate pursuant to 6 *Del. C.* § 2301. Consistent with this decision, the NASD is secondarily liable for advancement and indemnification of Sodano's legal fees, to the extent the Amex becomes unable to meet its obligation to provide advancement and indemnification

to Sodano. Sodano shall submit a conforming final judgment, upon notice and approval as to form, within ten days.