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IN THE COURT OF CHANCERY OF THE STATES OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROBERT M. COCHRAN;	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 17350
	)	
STIFEL FINANCIAL CORPORATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: November 30, 2000
Date Decided: December 13, 2000

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STRINE, Vice Chancellor

This opinion resolves cross-motions for summary judgment brought in a complicated indemnification case. In a previous opinion,[1] the court resolved a panoply of difficult issues, some of which the parties now seek to revisit.

In this opinion, the court concludes that plaintiff Robert M. Cochran is entitled to summary judgment as to certain claims against him that he successfully defended. Defendant Stifel Financial Corporation agreed to indemnify Cochran to the "full extent" permitted by Delaware law if he was sued by "reason of the fact" that he served as a director, officer, and employee of Stifel Financial's wholly-owned subsidiary, Stifel Nicolaus & Company, Inc. Because 8 Del. C. § 145(c) would *require* Stifel Financial to indemnify one of its own directors and officers if he was successful in identical circumstances to Cochran's, I conclude that Stifel Financial is *permitted* by 8 Del. C. § 145(f) to indemnify Cochran under Delaware law and thus required to indemnify him as a matter of contract.[2]

But I grant summary judgment for Stifel Financial as to others of Cochran's claims. These claims seek to have Stifel Financial indemnify

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[1] *Cochran v. Stifel Financial Corp.*, Del. Ch., C.A. No. 17350, mem. op., Strine, V.C. (Mar. 8, 2000) [hereinafter *Cochran I*].

[2] In large measure, I already decided the issue that determines this aspect of the motion in *Cochran I*, mem. op. at 38-46, and rely upon that opinion's reasoning in support of my conclusion.

Cochran for a judgment and other costs he suffered in litigation with Stifel Nicolaus based on his breach of his employment contract and a related promissory note. As to these claims, this court concludes that Cochran's contractual claims against Stifel Nicolaus were not brought "by reason of" his service in indenxnfication-eligible positions at Stifel Nicolaus "at the request of" Stifel Financial. "By reason of" claims, are essentially claims that challenge conduct by the party seeking indemnity in his official corporate capacities. By contrast, St-ifel Nicolaus's claims alleged that Cochran breached his personal contractual obligations to Stifel Nicolaus. Holding that Stifel Financial must indemnify Cochran for the costs he incurred in living up to his end of his employment agreements with Stifel Nicolaus would rewrite those agreements and render many of Cochran's purported duties thereunder illusory. Rational contracting parties could not have believed that Stifel Financial would "'request" Cochran's service at its wholly-owned Stifel Nicolaus subsidiary and yet agree to pick up any liability Cochran incurred as a result of his breach of his employment contracts.

I. Factual Background

Plaintiff Robert M. Cochran was a director, officer, and employee of Stifel, Nicolaus & Co., Inc. ("Stifel Nicolaus"), who concluded his career

with Stifel Nicolaus as Executive Vice President in Stifel Nicolaus's Oklahoma City Municipal Bond Underwriting Department (the "Municipal Bond Department").

Stifel Nicolaus is a wholly-owned subsidiary of defendant Stifel Financial Corporation ("Stifel Financial"). In his amended complaint, Cochran seeks indemnification from Stifel Financial pursuant to 8 Del. C. § 145(a) and (c) and Stifel Financial's indemnification bylaw (the "Indemnification Bylaw"). The Indemnification Bylaw states:

> *The Corporation [Stifel Financial] shall indemnify to the* **full** *extent authorized by law any person made or threatened to be made a party to any action, suit or proceeding,* whether criminal, civil, administrative or investigative, *by reason of the fact that he* . . . is or was a director, officer or employee of the Corporation or any predecessor of the Corporation or serves or *served any other enterprise as a director, officer or employee at the request of the Corporation* or any predecessor of the Corporation.[3]

Therefore, in all respects relevant to this motion, the Indemnification Bylaw covers the same actions that would be covered by subsections (a), (b), and (c) of § 145 of Title 8; that is, actions brought against Cochran "by reason of the fact" that he served Stifel Nicolaus at the request of Stifel Financial.

Cochran left the employ of Stifel Nicolaus involuntarily in August of 1994. Since that time, Cochran has been named as a defendant in a criminal

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[3] Stifel Financial's Amended And Restated By-Laws § 6.4 (Compl. Ex. A) (emphasis added) [hereinafter Indemnification Bylaw].

proceeding brought by the United States Attorney's office in Oklahoma (the "Criminal Proceeding"), a defendant in a civil enforcement suit brought by the Securities and Exchange Commission (the "SEC Case"), and a defendant in an arbitration action brought against him by Stifel Nicolaus (the "Arbitration").

Because this motion turns on the substance and current status of the Criminal Proceeding and the Arbitration,[4] I turn to a basic description of each of them.

A. <u>The Criminal Proceeding</u>

The Criminal Proceeding involved numerous counts of criminal fraud asserted against Cochran by the United States government. The alleged fraud involved certain third-party contracts that Cochran caused Stifel Nicolaus to enter into in connection with bond issues in which Stifel Nicolaus represented the issuer. These third-party contracts allegedly were not disclosed to the issuers.

[4] The SEC Case involves allegations that Cochran violated various provisions of the federal securities laws while acting in his official capacities at Stifel Nicolaus Cochran has already paid a $100,000 civil penalty and agreed to a belts-and-suspenders permanent injunction prohibiting him from committing violations of the federal securities laws in the future. Several of the SEC's claims against him remain to be tried. Earlier in the case, Cochran sought indemnification of a portion of the costs of the SEC's investigation of him, on the theory that the SEC's investigation was related to the Criminal Proceeding. At this stage, Cochran does not contend that this claim can be resolved by a summary judgment motion.

Cochran was convicted on numerous counts of fraud at trial. But his conviction was overturned on appeal by the United States Court of Appeals for the Tenth Circuit[5] and the dismissal of the charges against him has now become final.

Cochram now seeks summary judgment against Stifel Financial requiring it to indemnify him for costs and expenses in the Criminal Proceeding. He bases his current motion solely on the: Indemnification Bylaw and not on the provisions of the version of § 145(c) that applies to this case. The prior version of § 145(c) that applies to this action requires a corporation to indemnify its agent if the agent is successful on the merits or otherwise of an action falling under § 145(a) or (b).[6]

Because Cochran admits that he cannot, on the current record, demonstrate that he acted as Stifel Financial's agent, Cochran's current

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[5] *United* States *v. Cochran*, 109 F.3d 660 (10th Cir. 1997).

[6] Because of the timing of the conduct at issue, Cochran can rely upon the version of 8 Del. C. § 145(c) that existed before July 1, 1997 to support his claim. *See Cochran I*, mem. op. at 39 & 11.60, Section 145(c) then stated:

> To the extent that a director, officer, employee *or agent* of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

2 R. F. BALOTTI & J. A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 145, at IV-44 (3d ed. 1998) [hereinafter BALOTTI & FINKELSTEIN] (*quoting* 8 Del. C. § 145(c), effective July 1, 1994) (emphasis added). The statute has since been amended to, among other things, remove the requirement for mandatory indemnity of agents. *Id.*

motion is based solely on the Indemnification Bylaw. Under his reading of that Bylaw, Cochran argues that so long as Stifel Financial could lawfully indemnify him for success in defending the Criminal Proceeding, it has contractually obligated itself to do so.

B. The Arbitration

Stifel Nicolaus brought the Arbitration pursuant to § 9(c) of Cochran's employment contract with the company ("the Employment Contract"). In the Arbitration, Sti-fel 'Nicolaus made four claims:

(1) that Cochran had breached the Employment Contract by refusing to repay Stifel Nicolaus portions of the monthly draws he had received in 1994 that exceeded the annual compensation to which he was ultimately entitled under the formula contained in § 3 of the Contract (the "Excess Compensation Cla m");

(2) that Cochran had breached the Employment Contract by refusing to repay an incentive note (the "Promissory Note") which under the Contract became payable when Cochran's employment was terminated for cause in conformity with § 7(a) of the Employment Contract (th: "Promissory Note Claim");

(3) that Cochran had breached his fiduciary duties to Stifel Nicolaus and was required to indemnify Stifel Nicolaus for any harm it suffered as a resul t of his misconduct (the "Breach of Duty Claim"); and

(4) that Cochran had breached the non-compete provisions of the Employment Contract (the "'Non-Compete Claim").

A five-day arbitration hearing was held in September 1996. In early October, the Arbitration panel issued its decision (the "Arbitration Award").

Stifel Nicolaus prevailed on its Excess Compensation and Promissory Note Claims and was awarded in excess of $1 .25 million. The Arbitration panel, however, rejected Stifel Nicolaus's Breach of Duty Claim. Stifel Nicolaus voluntarily withdrew the Non-Compete Claim, allegedly because Cochran's refusal to respond to discovery requests left Stifel Nicolaus without the evidence needed to support this Claim.

Stifel Nicolaus then filed an action in federal court to confirm the arbitration award. Cochran 'objected to confirmation on several grounds. On May 6, 1997, the federal district court: (1) rejected Cochran's objections because he had not filed a motion to vacate, modify, or correct the Arbitration Award within 90 days of its issuance; (2) confirmed the Arbitration Award; and (3) entered a judgment for Stifel Nicolaus at the level of the Award (the "Judgment").[7] Cochran did not appeal the Judgment and the Judgment is therefore final in every sense.

The Judgment is therefore also "'entitled to force and effect for all purposes, e.g., collateral estoppel, *res judicata*, or full faith and credit.'" As Stifel Nicolaus points out without rebuttal from Cochran, the Arbitration

[7] *Stifel, Nicolaus & Co., Inc. v. Cochran*, No. 4:97-MC-0007, mem. a 1-2, Jackson, J. (E.D. Mo. May 7, 1997) (*citing* 9 U.S.C. § 12 & *Domino Group, Inc. v. Charlie Parker Memorial Foundation*, 985 F.2d 417, 419 (8th Cir. 1993)).

[8] *Sutch v. State Farm Mut. Auto. Ins. Co.*, Del. Supr., 672 A.2d 17, 21 (1995).

Award necessarily depended on certain subsidiary findings, which Cochran may not now dispute. They include the facts that:

- Cochran was properly terminated for cause under § 7(a) of the Employment Contract.

- Because Cochran was properly terminated for cause, he was required to repay the outstanding balance of the Promissory Note, or $550,000.

- Under a proper calculation of his compensation for 1994 under the formula contained in the Employment Contract, Cochran received excess compensation of $552,000 which he was obligated to repay by the terms of § 3(b) of the Employment Contract.[9]

Stifel Financial seeks summary judgment against Cochran's indemnification claims as to the Excessive Compensation, Promissory Note, and Non-Compete Claims. Its primary argument in support of this motion is that those claims were not brought against Cochran "by reason of" his service in indemnification-eligible positions at Stifel Nicolaus; instead, those claims are alleged to have been brought solely to enforce contractual commitments Cochran made in his personal capacity.

Stifel Financial does not seek summary judgment on its Breach of Duty Claim, which was unsuccessful, because it acknowledges that the Breach of Duty Claim was brought against Cochran "by reason of his" his

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[9] The court has reviewed those parts of the voluminous Arbitration Record cited by the parties and agrees with Stifel Financial's assertion that these and other issues were necessarily decided by the Arbitrators. *See* Stifel Financial S.J. Br. at 13-14, 45-46.

service in his official capacities at Stifel Nicolaus. Because he prevailed on that Claim, Cochran does, however, seek summary judgment for himself as to the Breach of Duty Claim under the Indemnification Bylaw, but not under § 145(a) or (c).[10]

II. The Parties' Key Arguments And The Relevant Procedural Standard

The parties have filed numerous briefs and have raised many arguments. At bottom, however, the motions can be distilled into two important contentions: (1) that Stifel Financial is entitled to summary judgment as to the Excessive Compensation, Promissory Note, and Non-Compete Claims because those Claims were not brought against Cochran "by reason of" his service in his indemnifiable capacities: and (2) that Cochran must be granted summary judgment as to the Criminal Proceeding and the Breach of Duty Claim under the Indemnification Bylaw because of his success in defending those matters.

In addressing these contentions, I apply the familiar standard under Court of Chancery Court Rule 56. Under that standard, summary judgement should be granted where there are no genuine issues of material fact and the

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[10] As can be seen from these approaches, the parties have both taken the position that where separate claims brought in one action can be sensibly segregated for purposes of analyzing whether indemnity is owed, the court may do so *See, e.g., Merritt-Chapman & Scott Corp. v. Wolfson,* Del. Super., 321 A.2d 138, 141 (1974) (taking this approach).

movant is entitled to judgment as a matter of law.” The facts must be viewed in the light most favorable to the non-moving party and the moving party has the burden of demonstrating that no material question of fact exists.[12] When a moving party has properly supported its motion, however, the non-moving party must submit admissible evidence sufficient to generate a factual issue for trial or suffer an adverse judgment.“’

Here, virtually none of the parties’ arguments turn on disputed facts. Instead, the parties’ competing motions hinge on their divergent views of the governing legal principles.

III. Legal Analvsis

A. Is Stifel Financial Entitled To Summary Judgment On Cochran’s Claims For Indemnification For The Excessive Compensation, Incentive Note, And Non-Compete Claims?,

In *Cochran I*, the court concluded that Cochran could press his claim for indemnifkation under 8 Del. C. § 145(a) as to the Judgment against him on Stifel Nicolaus’s Excessive Compensation and Incentive Note claims even though, if Cochran ultimately succeeded, that might result Stifel Financial indemnifying Cochran for judgments he owed to Stifel Financial’s

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[11] *See, e.g., Williams v. Geier*, Del. Supr., 671 A.2d 1368, 1375 (1996).

[12] *Tanzer v. Int'l Gen. Indus., Inc.*, Del. Ch., 402 A.2d 382, 385 (1979) (*citing Judah v. Delaware Trust Co.*, Del. Supr., 378 A.2d 624, 632 (1977)).

[13] *Id.*; Ch. Ct. R. 56(e).

wholly-owned subsidiary Stifel Nicolaus.'" With discernible reluctance, I concluded that the Excessive Compensation and Incentive Note claims asserted by Stifel Nicolaus could not be considered an action "by or in the right of" Stifel Financial itself within the meaning of 8 Del. C. § 145(b).[15]

In so concluding, however, I also noted:

> In rejecting Stifel Financial's argument, I, of course, in no way imply that Cochran will ultimately be entitled to indemnity for the Compensation and Promissory Note judgments. For example, if Cochran knowingly took excessive or unearned compensation or failed to repay sums he clearly owed on a promissory note, then his conduct would not have been in good faith or in the best interests of Stifel Financial. Cochran could not simultaneously act in bad faith toward Stifel Nicolaus while acting in good faith towards Stifel Financial when he bases his claim to indemnification on Stifel Financial's alleged request that he serve Stifel Nicolaus as a director, employee, and officer.
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> In this respect, I also have grave doubt that a person can sign a binding agreement with a wholly-owned subsidiary, commit himself to abide by the contract, and then refuse as a matter of economic reality (by seeking indemnity from the subsidiary's parent) to repay sums that the relevant decisionmaker under the contract had ruled were owed to the subsidiary. In such a situation, the key purpose of § 145 (and its predecessor) — "to permit corporate executives to be indemnified in situations where the propriety of their actions as corporate officials is brought under attack" — is not implicated.

[14] *Cochran I*, mem. op. at 26-35.

[15] *Id.* I decline Stifel Financial's belated invitation to revisit this conclusion. The fact that Cochran acknowledges that a dollar gained by Stifel Nicolaus in litigation is a benefit to its singular owner, Stifel Financial, does not thereby convert any lawsuit by Stifel Nicolaus into one "by or in the right" of Stifel Financial. This conflation of parent and subsidiary is hotly contested by Stifel Financial when such a conflation injures it, but is advocated when conflation serves Stifel Financial's goal of denying Cochran indemnification. For example, if Stifel Nicolaus and Stifel Financial are one and the same entity as a matter of law, that would also appear to nullify Stifel Financial's objection to Cochran's claim for indemnification under § 145(c).

> Here, for example, it appears that Cochran bound himself to an employment contract and a promissory note with Stifel Nicolaus that contained arbitration clauses. Although § 145(a) contains expansive language governing actions against a person "by reason of the fact that the person" was serving another corporation "at the request of the parent,'" the obvious intent of the statute is to govern actions against such a person as a result of his actions in his off cial capacity. When a person signs an employment agreement or promissory note with the corporation he serves, he is, one would think, acting as an individual. To the extent that a dispute about his compliance with such an agreement later arises, it would appear to be "by reason of the fact that the person" allegedly breached his individual obligation to the corporation, and not "by reason of the fact that the person" incidentally was serving the corporation in a position "at the request of" another corporation.
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> Rut because this precise argument was not made by Stifel Financial and therefore 1 have not had the benefit of briefing on this question and because its resolution may turn on the substance of the underlying contracts, I cannot dismiss the complaint on this basis."[16]

Stifel Financial has therefore understandably based its current summary judgment n-lotion on an argument that the Excessive Compensation, Promissory Note, and Non-Compete Claims did not involve claims that arose "by reason of the fact that" Cochran was serving Stifel Nicolaus as a "director, officer, employee, or agent" at the request of Stifel Financial.[17] Rather, Stifel Nicolaus contends that the Excessive Compensation, Promissory Note, and Non-Compete Claims are quintessential examples of a dispute between an employer, Stifel Nicolaus,

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[16] *Cochran I*, mem. op. at 36-38 (citations omitted).

[17] 8 Del. C. § 145(a), (b); *see also* Indemnification Bylaw (same princip e)

and an employee, Cochran, who was acting entirely in his personal capacity. If Stifel Financial is correct, then Cochran is not eligible for indemnification for these Claims under § 145(a) or (c) or the Indemnification Bylaw.

Cochran responds to Stifel Financial's argument with a recourse to plain language. Because Cochran's status as a director, officer, and employee of Stifel Nicolaus was essential to the Excessive Compensation, Promissory Note Claims, and Non-Compete Claims, Cochran wonders how Stifel Financial can contend that those Claims were not asserted against him "by reason of the fact" that he held those capacities at Stifel Nicolaus.

Although Cochran's argument has some linguistic plausibility, that is its only virtue. When a corporate officer signs an employment contract committing to fill an office, he is acting in a personal (capacity in an adversarial, arms-length transaction. To the extent that he binds himself to certain obligations under that contract, he owes a personal obligation to the corporation. When the corporation brings a claim and proves its entitlement to relief because the officer has breached his individual obligations, it is problematic to conclude that the suit has been rendered an "official capacity" suit subject to indemnification under § 145 and implementing bylaws. Such a conclusion would render the officer's duty to perform his side of the contract in many respects illusory.

In contracting with Stifel Nicolaus, Cochran bound himself to important personal obligations. Those obligations included a commitment to: (1) repay any excessive 'compensation he received within ten days after he was provided proper notice by Stifel Nicolaus; (2) repay the balance of the Promissory Note in the event that he was terminated for cause in accordance with the Agreement; (3) not to compete with Stifel Nicolaus for one year after his contract was terminated; and (4) arbitrate any disputes arising out of the Agreement.

As a matter of law., Stifel Financial's decision to elect Cochran as a member of the Stifel Nicolaus board of directors is deemed a "request" by Stifel Financial to have Cochran serve Stifel Nicolaus in all his capacities — as a director, officer, and employee." But it is inconceivable that Stifel Financial "requested" Cachran to serve Stifel Financial under employment contracts that., by operation of the Indemnification Bylaw, implicitly

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[18] This request is deemed to exist under law *under* the teaching of the Supreme Court's decision in *Von Feldt* because Cochran was elected to the Stifel Nicolaus board by virtue of Stifel Financial's votes. *Von Feldt v. Stifel Financial Corp.*, Del. Supr , 714 A.2d 79, 84-85 (1998). For purposes of simplicity, the *Von Feldt* court refused to distinguish among a subsidiary officer's roles and held that the election of the subsidiary officer to the subsidiary's board was sufficient evidence that the parent requested the service of the subsidiary officer in all his capacities at the subsidiary. *Id.* Therefore, this court ought to be cautious to hold that the implications of that request are greater than is necessary to serve the clear statutory purposes of § 145, as articulated in *Von Feldt*. To hold that the parent corporation is (1) subject to a finding that it requested the subsidiary officer's service and (2) must indemnify the subsidiary officer when he fails to live up to his personal contractual obligations to the subsidiary turns a relationship of mutual obligation between the parent and subsidiary officer into an imbalanced one unfairly tilted in favor of the subsidiary officer.

required Stifel Financial to indemnify Cochran for any "good faith" breaches of those contracts that he *committed*.[19] Rather, the only plausible conclusion is that Stifel Financial expected that the terms of Cochran's employment contracts with Stifel Nicolaus would be paramount and exclusive as to any claims for breach of those contracts, absent a pro-vision in those contracts to the contrary. That is, if Stifel Financial is deemed by law to have "requested" Cochran':; service at Stifel Nicolaus in all of his capacities, so too should it be deemed to be an implied beneficiary of his employment contract-a beneficiary entitled to have Cochran live up to his bargain with Stifel Nicolaus without assistance from Stifel Financial itself.[20]

Had the parties intended Cochran to be held harmless for excessive compensation he had been paid by Stifel Nicolaus through indemnification by Stifel Financial, surely it would have been clearer to simply state that in the Employment Contract. Similarly, had the parties intended that Cochran be permitted (by virtue of indemnification frorn Stifel Financial) not to repay the Promissory Note in the event of his contractually proper termination for cause, the Note could have said this.

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[19] In this regard, I note that Cochran specifically pleads that Stifel Financial reviewed and approved his Employment Agreement.

[20] *See supra* note 18.

Rut the acceptance of Cochran's argument rewrites his employment contracts in just this manner. Requiring Stifel Financial to indemnify Cochran for judgments he owes to Stifel Nicolaus based on his breach of his contractual duties subverts the contractual arrangement between Cochran and Stifel Nicolaus. It leaves Stifel Nicolaus without a genuine remedy against Cochran.[21]

Such a result could not have been reasonably contemplated by Cochran when he entered into the Employmenr Agreement and signed the Promissory Note. Cochran is a sophisticated businessman and cannot have rationally believed that Stifel Financial would indemnify him if he breached

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[21] It can, of course, be argued that the good faith requirement of 8 Del. C. § 145(a) provides Stifel Nicolaus with some protection. But the good faith test fits poorly with Cochran's Employment Contract. For example, Cochran was to receive healthy advances that were subject to repayment if his office's end-of-the-year results did not reach a sufficient level of profitability, regardless of whether he performed admirably otherwise. Does the good faith test apply to Cochran's decision to accept the advances in the first place? Or to his decision not to repay them? If it is the former, it makes little sense because the Employment Contract contemplated that advancements might well exceed the ultimate salary due. If it is the latter, Stifel Financial's alternative argument entitles them to summary judgment. Because the dispute resolution mechanism under the contract has produced a final judgment requiring Cochran to repay the Excess Compensation, what is his good faith reason for asking Stifel Financial to pay his judgment for him? Since Stifel Financial wholly owns Stifel Nicolaus, Cochran surely knows that this allows him to keep his excess compensation at the expense of Stifel Nicolaus — a result that is clearly "opposed to the best interests of the corporation." 8 Del. C. § 145(a).

And if Cochran contends that the good faith test should be applied to Cochran's decision to contest liability, that argument supports the conclusion that permitting indemnification would rewrite the contract. Rather than being responsible for any breach, Cochran would only be responsible for breaches that he could not contest in good faith. If the parties intended such an unusual standard to apply, that standard would have found expression in the language of Cochran's contracts with Stifel Nicolaus.

his own contractual obligations to Stifel Financial's corporate child, Stifel Nicolaus.

Thus, I hold that the Excessive Compensation, Promissory Note, and Non-Compete Claims were not brought against Cochran "by reason of the fact" that he was serving in indemnification-eligible positions at Stifel Nicolaus, but "by reason of the fact" that he had allegedly breached a personal contractual obligation he owed to Stifel Nicolaus. As such, Cochran is not entitled to indemnification for these Claims under § 145 or the Indemnification Bylaw.

This conclusion does not undermine the purpose of § 145 in any discernible manner. Section 145 serves to encourage: capable persons to serve in important corporate capacities 'by guaranteeing that they will receive reimbursement for expenses they incur in defending suits that challenge their conduct as corporate officials.[22] This central purpose is not endangered by a determination that corporate officials are bound to live up to the personal undertakings they make in their employment contracts with the corporations they serve.[23] Corporate officers and the corporations who employ them have

[22] *Von Feldt*, 714 A.2d at 84; *Essential Enterprises Corp. v. Automatic Steel Products. Inc.*, Del. Ch., 164 A.2d 437, 441 (1960).

[23] *Cf. Sorenson v. Overland Corp.*, 142 F. Supp. 354, 358-59 (D.Del. 1956) (where former director and officer had successfully defended a shareholder suit attacking his personal conduct in negotiating his employment contract and options, the court held that no indemnification was owed him because the challenged transactions had been entered into in the officer's individual

a great deal of flexibility in allocating the economic risks that arise out of their employment relationships. This opinion simply recognizes that corporate officers who accept a particular employment arrangement must accept the obligations that go along with the benefits of that arrangement.[24]

Nor has Cochran persuaded me that the Judgment attributable to the Excessive Compensation and Promissory Note Claims is indemnifiable because of the unique nature of those Claims. I address each of these Claims in turn.

According to Cochran, the primary reason he had to repay compensation to Stifel Nicolaus is because Stifel Nicolaus charged

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capacity in an arm's length transaction with the corporation), *aff'd*, 242 F.2d 70 (3d.Cir. 1957); *Grove v. Daniel Valve Co.*, 874 S.W.2d 150, 155 (Tex. App. 1994) (dictum stating "an employment contract is indeed a personal benefit, much like the sale of one's own stock in a company, and does not coincide with the employee's substantive work furthering the corporation's business activities."); *Bensen v. American Ultramar Ltd.*, No. 92CIV4420, 1996 WL 435039, at *3, M.J. (S.D.N.Y. Aug. 2, 1996) (holding that a plaintiff was not entitled to indemnification under corporate provisions similar to § 145 where the claims at issue involved pension payments he had received because those payments involved personal conduct the plaintiff had undertaken as an individual contracting with the corporation; in so ruling, the court stated that 8 Del. C. § 145 "does not cover transactions that are purely personal."); *Minami Int'l Corp. v. Clark*, No. 88CIV2135, 1992 WL 58838, at *1, Walker, J. (S.D.N.Y. Mar. 16, 1992) (Under New York indemnification statute similar to § 145, holding that the statute was not "designed to provide indemnification for officers of the corporation who are sued for breach of their contractual obligations to the corporation."); *Tilden of New Jersey, Inc. v. Regency Leasing Sys., Inc.*, 237 A.D.2d 431 (N.Y. App. Div. 1997) ("Inasmuch as the action against the defendant is based upon a personal guaranty, the action is brought against him 'by reason of the fact that he was a director or officer of the corporation' within the meaning of that phrase as employed in [the New York indemnification statute].").

[24] In so ruling, I in no way rule out the possibility that indemnification would be appropriate in a situation where a corporate officer was required to defend the validity of his employment contract from an attack by third-parties. Such a situation is very different than requiring a corporate officer to pay any damages to his employing corporation resulting from his own breaches of a contract that he entered into his personal capacity.

Cochran's Municipal Bond Department with expenses related to investigations and litigation inspired by Cochran's conduct as an officer and employee of Stifel Nicolaus. As a result, Cochran contends that the Excess Compensation Claim in fact was brought by "reason o f" Cochran's performance of his o fficial duties.

I am unpersuaded by this argument. In his Employment Agreement, Cochran bound himself to a formula for determining his compensation. That formula was tied to the performance of the Municipal 3ond Department, and involved a calculation based on the profitability of that Department. That calculation necessarily involved the expenses of the Department, including "non-operating charges, such as charges and reserves for pending or threatened claims and other proceedings."[25] Having contracted in this manner and having received a determination by the co ntractual decisionmakers (the Arbitrators) that the contractual formula dictated the conclusion that he had been overpaid, Cochran is now bound to live up to his contractual duty to repay the excess compensation he received. The fact that the contractual fox-mu a involved factors that depend to some extent on Cochran's own behavior does not thereby transmogrify a dispute over his

[25] Employment Agreement § 3(e).

personal contractual obligations into an official capacity suit indemnifiable under § 145 and Stifel Financial's Indemnification Bylaw.[26]

Likewise, the Promissory Note Claim is not indemnifiable because it is also grounded wholly on Cochran's breach of his contractual duties. The Arbitrators found that Cochran had been properly terminated for cause. Cochran signed a Promissory Note that obligated him to repay the Note if he was terminated for cause. It was Cochran's refusal to live up to his personal contractual commitment to repay the Promissory Note that led to the Judgment against him. This refusal did not involve any official act by Cochran in his capacities at Stifel Nicolaus.[27]

For these various reasons, I grant Stifel Financial's motion for summary judgment as to these Claims.[28]

13. Is Cochran Entitled To Indemnification By Virtue Of His Success In Defending the Criminal Proceeding And Stifel Financial's Breach Of Duty Claim?

Cochram bases his summary judgment motion as to the Criminal Proceeding and the Breach of Duty Claim on the Indemnification Bylaw,

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[26] As noted previously, Stifel Financial does not argue that the Breach of Duty Claim was not brought against Cochran "by reason of" his service in indemnifiable capacities at Stifel Nicolaus.

[27] The Non-Compete Claim obviously involves allegations about Cochran's post-employment conduct that do not plausibly relate to conduct taken in his former statuses at Stifel Nicolaus.

[28] Because I have resolved the motion in favor of Stifel Financial on the grounds stated, I do not reach its other arguments as to why summary judgment is appropriate, except to the extent noted in note 21, *supra*.

which requires Stifel Financial to indemnify him "'to the full extent authorized by law." Like the Delaware Supreme Court did in analyzing this provision in the *Von Feldt* case, I construe the plain language of this provision as requiring Stifel Financial to indemnify Cochran if such indemnity would be permissible under the Delaware General Corporation Law ("DGCL").[29] That is, if the DGCL does not forbid such indemnification, such indemnity is authorized, or in other words, permissible.[30]

In accordance with this court's earlier opinion in *Cochran I*, Cochran argues that two subsections of § 145 support his contention. The first is § 145(f), which provides that the indemnification rights "provided by, or granted pursuant to" other subsections of § 145 "shall not be deemed exclusive of any other rights to which those seeking indemnification . . . may be entitled under any bylaw, agreement, . or otherwise . . . ." In *Cochran*

[29] *Von Feldt*, 714 A.2d at 81. In fairness to Stifel Financial, the Supreme Court, in dictum, read this breadth as mandating indemnity in circumstances where § 145(a) and (b) provided for permissive indemnity. *Id*. The Supreme Court, however, was not confronted with a situation where the party claiming indemnity satisfied the criteria of § 145(c) but was not within the class of persons to which that subsection required the provision of mandatory indemnification. Nor did the Court consider the effect of § 145(f). As such, *Von Feldt* does not address the issue this case presents.

[30] *See* BLACK'S LAW DICTIONARY 122 (5th ed. 1979) (defining "authorize" as meaning, among others things, giving "a right or authority to act" and "permit[ting] a thing to be done in the future," and noting that "authorized" is "sometimes construed as equivalent to 'permitted'"); BLACK'S LAW DICTIONARY 129 (7th ed. 1999) (defining "authorize" as "[t]o give legal authority; to empower" or "[t]o formally approve; to sanction")

I, this court noted that learned commentators have construed § 145(f) as suggesting "that a corporation's decision to provide broader indemnification rights should not be disturbed unless those broader rights are 'contrary to the limitation or prohibitions set forth in the other section 145 subsections, other statutes, court decisions, or public policy . . . .'"[31]

The other relevant subsection that Cochran relies upon is § 145(c). That subsection mandates that corporations indemnify present or former directors and officers who have been "'successful on the merits or otherwise" in the defense of any action covered by § 145(a) or (b) Cochran notes that the statute therefore requires that a corporation indemnify its chief executive officer if he is acquitted of a crime on a technicality in a proceeding within the scope of § 145(a), regardless of whether the CEO acted in good faith. The same would be true if an action for breach of fiduciary duty brought against the CEO were dismissed on non-merits grounds. Because a corporation must indemnify even its CEO in these circumstances based on his mere attainment of success in conformity with § 145(c), Cochran argues that § 145(f) surely permits Stifel Financial to indemnify Cochran when he meets that same statutory success standard. And if it is permissible for Stifel

[31] *Cochran I*, mem. op. at 47 (*quoting* E. Norman Veasey et al., *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification and Insurance*, 42 BUS. LAW. 399, 415 (1987)) [hereinafter "*Veasey*"].

Financial to do so, Cochran contends that it has bound itself to do so, by the clear operation of the Indemnification Bylaw.

In examining Cochrarr's argument, it is essential to recognize that Cochran has established, as a matter of law, that were he a director or officer of Stifel Financial, his right to indemnification as to the Criminal Proceeding and the Breach of Duty Claim would be mandatory. A party eligible for mandatory indemnification under § 145(c) must demonstrate two key elements: (1) that the matter at issue was covered by § 145(a) or (b); and (2) that the party was successful on the merits or otherwise.

Here, Cochran has made both showings. First, the Criminal Proceeding and the Breach of Duty Claim both fall within the scope of § 145(a). Stifel Financial does not contest that the Criminal Proceeding tits within the reach of § 145(a) And unlike the other Claims in the Arbitration Case, the Breach of Duty Claim rested on allegations that Cochran had breached fiduciary duties he owed to Stifel Nicolaus. As a result, the Breach of Duty Claim was brought "by reason of' Cochran's service in his various capacities at Stifel Nicolaus.

Second, Cochran's attainment of the success standard is also undisputed. Although Cochran may not have emerged from the Criminal Proceeding with his reputation intact, he did ernerge from that proceeding

with an acquittal on all counts against him. That outcome is sufficient to satisfy the success standard of 8 Del. C. § 145(c), which simply requires "success[] on the merits or otherwise."[32] Likewise, the Arbitrators found for Cochran on the merits of Stile1 Financial's Breach of Duty Claim, which was asserted against him in the Arbitration.[33]

Thus, Cochran has proven that If he were a director or officer of Stifel Financial, § 145(c) would require Stifel Financial to indemnify him. Because Delaware law would *require* Stifel Financial to indemnify even its own CEO in circumstances identical to Cochran's, Cochran contends that indemnification of him is *permissible* by virtue of § 145(f) since indemnifying him would not offend any Delaware public policy. And because Stifel Financial's Indemnification Bylaw requires it to indemnify Cochran if it can lawfully do so, it is therefore bound to do so.

In responding to this argument, Stifel Financial repeats the same argument that was rejected by this court in its earlier opinion in *Cochran I.* Put simply, Stifel Financial argues that Cochran cannot be indemnified for

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[32] *Merritt-Chapman & Scott*, Del. Super., 321 A.2d at 141

[33] As noted previously, because of the timing of the conduct at issue, Cochran's § 145(c) claim is based on the version of the statute that existed before July 1, 1997. *See Cochran I*, mem. op. at 39. The statute has since been amended to remove the requirement for mandatory indemnity of agents. *Id.*

his successful defense of these claims unless he first satisfies the good faith standard contained in subsections (a) and (b) of § 145.

Stifel Financial makes this argument irrespective of the fact that in *Cochran I*, the court fully explained the reasons why it did not accept Stifel Financial's argument.[34] I do not intend to burden the reader with a repetition of all of the court's earlier reasoning, which I incorporate by reference herein.[35] Although I recognize that the issue presented is a difficult one, about which reasonable minds can differ, I continue to adhere to my prior reasoning. Suffice it lo say that the court concludes that because Delaware law would require Stifel Financial to indemnify its CEO if he were to have achieved the same result as Cochran did as a defendant in the Criminal Proceeding and Breach of Duty action without an examination of the CEO's good faith, § 145(f) of the Delaware General Corporation Law permits Stifel Financial to indemnify Cochran in the identical circumstances. Because: Delaware permits such indemnification, Stifel Financial is contractually bound to provide it.[36]

It is useful to set forth this reasoning in a more illustrative way. Imagine the following scenario. Suppose Cochran had told Stifel Financial

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[34] *Id.* at 45-53

[35] *Id*

[36] *Id.*

that he would not continue at Stifel Wicolaus unless he was given the sarne right to indemnity that he would have as a director and officer of Stifel Financial itself. Why, Cochran reasoned, should he continue to be afforded second-class indemnification rights simply because he worked at Stifel Financial's wlholly-owned subsidiary, which was very important to Stifel Financial's overall success? Hence, assume Cochran demanded and received a contract with the following key provisions: (1) Cochran would serve as a director, officer, and employee of Stifel Nicolaus, a wholly-owned subsidiary whose performance is important to Stifel Financial; and (2) in partial exchange for his service at Stifel Nicolaus, S tifel Financial would indemnify Cochran if he met the success standard of § 14 5(c) in an action brought against him by "reason of his" service at Stifel Nicolaus. That is, assume the contract would give Cochtan the same indemnification rights as if he were a director and officer of Stifel Financial itself.

Given the existence of § 145(c) and (f), the court fails to see how such a contract would violate Delaware public policy. If such an explicit contract would be valid because the indemnification it provided was not inconsistent with Delaware public policy,[37] and thus authorized by § 145(f), the provision

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[37] *See* 8 Del. C. § 145(c)

of the identical indemnification pursuant to a maximally expansive bylaw is not contrary to Delaware law, either.

By contrast, if adopted, Stifel Financial's approach means that Delaware law *requires* Delaware corporations to indemnify its most important officers (e.g., CEO's) in circumstances where Delaware law simultaneously *outlaws* the provision of indemnity to persons who merely serve another corporation "at the request" of the indemnifying corporation. As in the previous motion practice, Stifel Financial fails to explain why this distinction is logical and why the judicial adoption of this distinction does not intrude on the opportunity for private ordering legislatively granted by § 145(f).[38]

As a fall back, Stifel Financial also pleads that the Indemnification Bylaw, although written maximally, had a less expansively intended scope. Stifel Financial contends (without citation to reliable evidence) that my prior ruling is inconsistent with the legitimate expectations of "hundreds" of corporations like it, which all had assumed (it confidently asserts) that a

[38] Stifel Financial argues that the General Assembly's recent decision to restrict the scope of legislatively-dictated mandatory indemnification thereby constituted an implicit decision to restrict the degree of contractual flexibility afforded to corporations by § 145(f). As noted in *Cochran I*, mem. op. at 46-51, the court does not read the legislative history the same way. As important, the court believes that judicial restraint requires the court to refrain from imposing a judicial ban on private ordering that the General Assembly, by virtue of § 145(c) and (f), cannot be deemed to have clearly imposed itself.

good faith requirement was; -implicit in their maximally broad indemnification bylaws.[39] That is, Stifel Financial and these other (unidentified) corporations believed that only the permissive indemnification provided for in § 145(a) and (b) would fall within the ambit of a bylaw providing indemnity to reference to "'the full extent authorized by law."

The answer to any problem Stifel Financial contends is posed by this court's plain meaning interpretation of i ts maximally broad Bylaw is simple: the affected corporations can redraft their indemnification bylaws to be more precise. If they wish to extend indemnification only tc the extent consistent with the standard permitted 'by § 145(a) and (b) of Title 8, they should redraft their bylaws in that more narrow fashion.[40] When a parent corporation has not done so and has promised to provide indemnification to the fullest extent permitted by Delaware law, it has no basis to feel aggrieved when a court requires it to provide indemnification when: (i) a party serving another corporation at the parent corporation's request, (ii) who is covered by the: parent corporation's indemnification provision, (iii)

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[39] Stifel Financial Reply Br. In Opp. To Plaintiff's Summary Judgment Motion at 28.

[40] Although the maximal nature of the Bylaw is plain, arguably the doctrine of *contra preferentem* would mandate that any ambiguity be resolved against the exclusive drafter, Stifel Financial, and in favor of Cochran's reasonable construction of the Bylaw. It does not appear that the Bylaw was a negotiated instrument. Because the Bylaw is so expansively drafted and because Cochran failed to raise this point, however, I need not address the applicability of this interpretative doctrine.

shows that the corporation would have been required under § 145(c) to indemnify its own CEO in the identical circumstances for the claims at issue.[41]

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[41] Stifel Financial points to two cases that it contends are inconsistent with my reasoning in *Cochran I*. In my view, neither case adopts reasoning irreconcilable with mine.

The first case is *Advanced Mining Systems, Inc. v. Fricke*, Del. Ch., 623 A.2d 82 (1992). In that case, Chancellor Allen held that a bylaw in all relevant respects identical to Stifel Financial's Indemnification Bylaw did not mandate the advancement of litigation expenses. The Chancellor's holding was premised upon his belief that "indemnification rights and rights to advancement of possibly indemnifiable expenses [were] legally quite distinct types of legal rights." *Id.* at 84. As such, he did not believe that a reasonable person could read the bylaw at issue requiring indemnification to the full extent permitted by the DGCL as also requiring the corporation to accord the plaintiff the legally distinct right of advancement. *Id.* at 85.

The second action is *Mayer v. Executive Telecard, Ltd*, Del. Ch., 705 A.2d 220 (1997). In that case, Vice Chancellor Jacobs held that a bylaw similar to Stifel Financial's bylaw (except in one critical respect mentioned below) did not obligate the company to pay the attorneys' fees and costs the plaintiff incurred in successfully pressing his indemnification claim. The opinion does reason that to determine whether so-called "fees for fees" were permitted by the DGCL, one had to look to § 145(a) and § 145(a) did not contemplate awards of fees for fees. *Id.* at 224. But the opinion also rests on another twice-stated rationale. That rationale is that an action for indemnification is not an action that falls under § 145(a) or (b) in the first instance. Because the bylaw at issue required that the underlying action be one within the scope of § 145(a) or (b), that rationale meant that the plaintiff's claim did not fall within the scope of the bylaw at issue. *Id.* at 221, 224. Thus, there is an alternative rationale for the court's ruling that is consistent with the reasoning of *Cochran I*.

But the most important reason why *Mayer* is not inconsistent with *Cochran I* was the fact that the bylaw at issue in *Mayer* only extended indemnity to the furthest extent permitted by "subsections (a) through (e)" of the DGCL. *Id.* at 225 n.7. Because Vice Chancellor Jacobs held that none of those subsections authorized "fees for fees," the plaintiff lost. In so ruling, Vice Chancellor Jacobs was careful to note that § 145(f) might support a bylaw providing for fees for fees. *Id.*

Therefore, I believe that both *Advanced Mining and Mayer* can be distinguished. Both cases deal with claims for forms of relief (advancement and fees for fees) that, to a large degree, were different in kind, rather than degree, from traditional indemnity. Tha is not the case here. More fundamentally, neither case addresses the force of § 145(f), which has been interpreted by distinguished commentators as expressly authorizing private ordering absent a violation of some express public policy otherwise reflected in § 145. *See Veasey*, 42 BUS. LAW. at 415. I remain unable to see the damage to a legislatively-articulated public policy that occurs if a corporation indemnifies a person in "at the request of" position if that person meets the success standard of § 145(c). If good faith is a fundamental public policy requirement for all indemnification, why does the statute not apply that requirement to the most important fiduciaries who serve corporations when they are successful on the merits or otherwise?

For all these reasons, I therefore grant Cochran's motion for summary judgment on his claim for indemnity as to the Criminal Proceeding and the Breach of Duty Claim A resolution of the amount of such indemnity must await either an agreement of' the parties or further proceedings.

IV. Conclusion

Stifel Financial's motion for summary judgment as to the Excessive Compensation, Promissory Note, and Non-Compete C aims is GRANTED. Cochran's motion for summary judgment as to the Criminal Proceeding and the Breach of Duty Claim:; is GRANTED. Stifel Financial's motion to dismiss Cochran's claim for indemnity as to the Criminal Proceeding and the Breach of Duty Claim under 8 Del. C. § 145(c) is deferred because there is no need to decide it.[42] To the extent that Stifel Financial otherwise sought summary judgment or dismissal on other grounds that were already decided in *Cochran 1,* its motion is denied. Likewise, Cochran admits that his claim

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Although the court might well prefer an invariable good faith requirement, it cannot impose that requirement when the statute itself contemplates the provision of indemnity beyond that mandated or set forth by the provisions of § 145, *see* 8 Del. C. § 145(f), and when § 145(c) expressly dictates indemnification to directors and officers without a showing of good faith In so holding, the court recognizes that reasonable minds can disagree about this outcome and that dictum in other cases, including *Mayer* itself, 705 A.2d at 224 n.6, suggests a different approach.

[42] The basis for that motion is that Cochran's amended complaint again fails to state facts that, if true, support an inference that he acted as Stifel Financial's agent in his capacities at Stifel Nicolaus.

for "fees for fees" was dismissed in *Cochran* I and that his reiteration of that claim in his amended complaint must also be dismissed.

The parties shall confer and submit an agreed-upon order that implements this ruling. Moreover, because the court hopes that this decision has focussed the remaining issues in the case, the court requests that the parties schedule an office conference within two weeks to determine the manner in which the rest of this litigation shall proceed.