

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 SUMMARY ORDER
5

6 THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER
7 AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY
8 OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY
9 OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED
10 CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES
11 JUDICATA.
12

13 At a stated term of the United States Court of Appeals for
14 the Second Circuit, held at the Daniel Patrick Moynihan United
15 States Courthouse, 500 Pearl Street, in the City of New York, on
16 the 20th day of November, two thousand and six.
17

18 PRESENT:
19

20 Hon. John M. Walker, Jr.,
21 Hon. Robert A. Katzmann,
22 Hon. Reena Raggi,
23 Circuit Judges.
24

25 -----X
26

27 PPI Enterprises (U.S.), Inc.,
28

29 Plaintiff,
30

31 v.
32

33 Del Monte Foods Company,
34

35 Defendant-Third-Party-Plaintiff-Fourth-Party-Defendant-
36 Counter-Defendant-Appellee,
37

38 Morgan Stanley & Co., Inc.,
39

40 Defendant,
41

42 v.
43

Nos. 05-6885-cv (L),
05-7040-cv (CON)
44

45 W.R. Huff Asset Management Co., LLC,
46 W.R. Huff Asset Management Co., L.P.,
47

1 Third-Party-Defendants-Fourth-Party-Plaintiffs-
2 Counterclaimaints-Appellants,

3
4 Charterhouse Equity Partners, L.P.,

5
6 Third-Party-Defendants-Fourth-Party-Plaintiffs-
7 Counterclaimants.*

8
9 -----X

10
11 **APPEARING FOR APPELLANTS:** WILLIAM G. MCGUINNESS, Fried,
12 Frank, Harris, Shriver &
13 Jacobson LLP (Maria Moukides,
14 on the brief), New York, New
15 York.

16
17 **APPEARING FOR APPELLEE:** HOWARD S. ZELBO, Cleary
18 Gottlieb Steen & Hamilton LLP
19 (Breon S. Peace, of counsel),
20 New York, New York.

21
22 Appeal from the United States District Court for the
23 Southern District of New York.

24 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED** that the
25 judgment of the district court be and it hereby is **AFFIRMED**.

26 W.R. Huff Asset Management Co., LLC, and W.R. Huff Asset
27 Management Co., L.P., (collectively, "Huff") appeals the district
28 court's order entered on December 5, 2005, (Barbara S. Jones,
29 Judge), granting summary judgment to Del Monte Food Company ("Del
30 Monte") on Huff's claims that Del Monte owed Huff indemnification
31 for expenses it incurred in defending claims brought against it
32 by Del Monte. We assume familiarity with the facts and
33 procedural history of this case.

34 Huff argues, first, that section 7.3 of the agreement at
35 issue (the "agreement") should be construed to provide
36 indemnification for claims lodged by Del Monte, the indemnitor,
37 against Huff, the indemnitee. The agreement provides that it
38 shall be governed in all relevant respects by New York law.
39 Under New York law, "court[s] should not infer a party's
40 intention [to indemnify another] unless the intention to do so is
41 unmistakably clear from the language of the promise." Hooper

* This caption varies from the official caption, which is incorrect in certain respects. The Clerk of the Court is directed to amend the official caption accordingly.

1 Assocs., Ltd., v. AGS Computers, Inc., 74 N.Y.2d 487, 492 (1989);
2 see Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 200 (2d
3 Cir. 2003); Bridgestone/Firestone, Inc. v. Recovery Credit
4 Servs., Inc., 98 F.3d 13, 20-21 (2d Cir. 1996).

5 In this case, the language of the agreement does not
6 unmistakably provide for the indemnification of claims between
7 the parties. Particularly telling are subsections 7.3(b)(i) and
8 (ii), which provide, respectively, that Del Monte has the right
9 to approve its indemnitees' choice of counsel in any covered
10 claim and require Del Monte to cooperate in the defense of
11 actions brought against indemnitees and indemnitees to procure
12 Del Monte's consent before settling any covered claim. These
13 provisions are typical of an agreement "which contemplate[s]
14 reimbursement when the indemnitee is required to pay damages on a
15 third-party claim." Hooper, 74 N.Y.2d at 492; see Oscar Gruss,
16 337 F.3d at 200 (finding provisions in agreement regarding
17 indemnitee's right to separate counsel and indemnitor's rights to
18 notice and assumption of defense show agreement was meant to
19 cover third-party claims only). Huff's attempt to cast these
20 provisions in a light that could justify their application here
21 is unavailing because the test is whether the intent to indemnify
22 is "unmistakably clear from the language of the promise,"
23 Hooper, 74 N.Y.2d at 492, not whether the agreement could be read
24 to provide for indemnification.

25 Huff contends, second, that Del Monte's bylaws, which make
26 mandatory Maryland's permissive corporate indemnification
27 statute, Md. Code Ann., Corps. & Ass'ns § 2-418(b)(1) (2005),
28 provide the indemnification sought. Section 2-418(b)(1) applies
29 only to directors. Undeterred by the fact that it is not, and
30 never was, a director of Del Monte, Huff maintains that it is
31 entitled to indemnification because Del Monte actually sued Huff
32 "by reason of [the] service" of its two board member designees.
33 Huff rests its indemnification theory on Heffernan v. Pacific
34 Donlup GNB Corp., 965 F.2d 369 (7th Cir. 1992). Heffernan is
35 inapposite. In Heffernan, the Seventh Circuit concluded that
36 even if the express language of a complaint does not reference
37 the defendant's status as a director, he may nonetheless be
38 entitled to indemnification if the substance of the complaint
39 indicates he was sued "by reason of the fact that" he was a
40 director. Id. at 372-73. As the district court aptly put it,
41 "Heffernan most clearly stands for the proposition that where a
42 single person, acting both as a director and as a private
43 individual, can show that, contrary to the language of the
44 complaint, he was sued 'by reason of' his status as a director,
45 that person may be entitled to the indemnification due a
46 director, assuming, of course, that he is otherwise qualified."
47 As is the case under the Delaware statute analyzed in Heffernan,

1 status as a director is a prerequisite to indemnification under
2 Maryland law. See Md. Code Ann., Corps. & Ass'ns § 2-418(b)(1)
3 ("A corporation may indemnify any director made a party to any
4 proceeding by reason of service in that capacity . . .").
5 Because Huff was not a director of Del Monte, it is not entitled
6 to indemnification.

7 We have reviewed Huff's remaining arguments and find them to
8 be without merit. For the reasons set forth above, the judgment
9 of the District Court for the Southern District of New York is
10 hereby **AFFIRMED**.

11
12 FOR THE COURT:

13 Thomas W. Asreen, Acting Clerk
14

15
16 By: _____

17 Richard Alcantara, Deputy Clerk