

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

CHARLES B. GRACE, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	<b>C.A. No. 8348-VCN</b>
	:	
ASHBRIDGE LLC, a Delaware	:	
limited liability company,	:	
	:	
Defendant.	:	

**MEMORANDUM OPINION**

Date Submitted: September 5, 2013  
Date Decided: December 31, 2013

R. Montgomery Donaldson, Esquire and Lisa Zwally Brown, Esquire of Montgomery, McCracken, Walker & Rhoads, LLP, Wilmington, Delaware, and Gregory M. Harvey, Esquire of Montgomery, McCracken, Walker & Rhoads, LLP, Philadelphia, Pennsylvania, Attorneys for Plaintiff.

Christopher J. Curtin, Esquire of MacElree Harvey, Ltd., Wilmington, Delaware, and Alfred A. Gollatz, Esquire of MacElree Harvey, Ltd., West Chester, Pennsylvania, Attorneys for Defendant.

NOBLE, Vice Chancellor

Plaintiff is the co-trustee of a family trust that held, among other assets, the shares of a Delaware corporation that was later converted into the Defendant, a Delaware limited liability company. Plaintiff also is, and was, the chairman, a member of the governing boards, and a member or shareholder of the limited liability company and its predecessor corporation. When the trustees of the family trust filed two accountings in a Pennsylvania court, family member beneficiaries of the trust filed objections that in part alleged breaches of fiduciary duty by the trustees and diminution in value of the trust's interest in the corporation due to imprudent investments, improper loans, and self-dealing transactions by Plaintiff. Because of the offices Plaintiff held in the Defendant and its predecessor corporation, Plaintiff asserts he is entitled to advancement and indemnification from the Defendant for his defense to the objections, a failed mediation, and the present action.

Plaintiff's amended complaint is a patchwork of facts and allegations that provides an outline of what transpired but omits certain key details. In response to Plaintiff's initial complaint, which was even scarcer in detail, the Defendant moved for a more definite statement to understand better the grounds upon which Plaintiff claimed his rights to advancement and indemnification. Although Plaintiff clarified certain allegations, the Court cannot, as a matter of law, grant relief upon those grounds as set forth in his amended complaint. Because Plaintiff sought

relief only under the operating agreement of the successor entity limited liability company even though the sole allegations in the objections involve the predecessor corporation and a related entity, the Court cannot order the limited liability company to make advancement and to indemnify based upon the alleged wrongs relating to those distinct entities. Plaintiff's complaint is dismissed for the reasons that follow.<sup>1</sup>

## I. BACKGROUND

Charles B. Grace, Jr. ("Grace" or the "Plaintiff") became one of several co-trustees of a family trust (the "Residuary Trust") settled upon the death of his father, Charles B. Grace, in 1969. The Residuary Trust included cash, real property, and preferred and common shares of the family-owned Heintz Investment Company. Heintz Investment Company was renamed the Ashbridge Corporation in 1981.<sup>2</sup> Ashbridge Corporation, a Pennsylvania corporation, merged with and into Ashbridge Partners, LLC, a Delaware limited liability company, on December 31, 2008. On that same day, it changed its name to Ashbridge LLC (the "Defendant").<sup>3</sup>

Grace is a member of Defendant and was a shareholder of Ashbridge Corporation before its merger into Defendant. Grace also serves on the Board of

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<sup>1</sup> In December 2013, Grace moved to further amend and supplement his amended complaint. As discussed in Part III.E., although the Court approves his unopposed motion, his supplemental allegations do not alter the Court's conclusions.

<sup>2</sup> Pl.'s Verified Am. Compl. ("Am. Compl."), Exs. A, B ¶¶ I.1-5 ("Objections").

<sup>3</sup> Am. Compl. ¶¶ 2-3.

Managers and as chairman of Defendant; he likewise was the chairman and a member of the governing board of the predecessor entity, Ashbridge Corporation.<sup>4</sup>

The trustees of the Residuary Trust filed two accountings to which its beneficiaries, Eugene G. Grace, III, Eugene G. Grace, IV, Andrea Grace, and Alexandra Grace (the “Beneficiary Objectors”), filed objections on September 4, 2012 (the “Objections”) in the Court of Common Pleas of Chester County, Pennsylvania, Orphans’ Court Division (the “Orphans’ Court Proceeding”).<sup>5</sup> The Objections asserted

1. As set forth above, the trustees breached their fiduciary duty in directing, approving, consenting to and/or acquiescing in the formation and operation of AIM;<sup>6]</sup>
2. Objectants object to the diminution in value of the trust’s ownership interest in Ashbridge Corporation as reflected in the Accounting as a result of trustee Charles Grace’s imprudent investments, improper loans and/or reckless and wanton self-dealing transactions, all of which were made in complete disregard to the rights and interests of the trust’s beneficiaries, and all of which the remaining trustees failed to prevent, monitor, and/or remedy.
3. Objectants object to BNY Mellon’s fees and commissions in the amount of \$154,826.99 in regard to BNY Mellon’s breaches of fiduciary duty concerning trustee Charles Grace’s imprudent investments, improper loans and reckless and wanton self-dealing transactions to the substantial detriment of the assets of the trust.<sup>7</sup>

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<sup>4</sup> *Id.* ¶ 1.

<sup>5</sup> *Id.* ¶ 5.

<sup>6</sup> Grace does not explain the relationship of Ashbridge Investment Management, LLC (“AIM”) to Ashbridge LLC in his amended complaint. The Court concludes, based on the Amended Complaint and the Objections, that AIM is an affiliate of the Ashbridge entities.

<sup>7</sup> Objections ¶¶ II.1-3.

The Objections also describe various background transactions, including that AIM was founded in 1992; that in or about 2001, Ashbridge Corporation was induced to make cash transfers to AIM in a variety of ways; and that in or about April 2010, a private wealth management and family services company acquired the assets of AIM with consideration to have been delivered around April 2013 based on the performance of the AIM assets.<sup>8</sup> The Objections only refer to the actions of Grace, Ashbridge Corporation, and AIM. Ashbridge Corporation's successor entity, the Defendant, is not mentioned even once.

Although the dispute primarily concerns the Objections, Grace also sought reimbursement of expenses from the Defendant before the Objections were filed. On June 8, 2011, Grace purportedly provided an undertaking to the Defendant as required by Section 10.4 of its operating agreement;<sup>9</sup> however, Grace does not explain why or upon what grounds he sought advancement and indemnification on that occasion.<sup>10</sup> On December 23, 2011, counsel to Defendant's Board of

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<sup>8</sup> *Id.* ¶¶ I.10-14.

<sup>9</sup> No fully signed copy of the operating agreement of Ashbridge LLC has been located, although Grace states that the operating agreement has been effective since December 31, 2008. Counsel to Ashbridge LLC's Board of Managers provided a written opinion on the enforceability of Ashbridge LLC's operating agreement, though it is purportedly privileged.

<sup>10</sup> This alleged fact without an explanation is a pattern in Grace's complaints. He repeatedly refers to past incidents without explaining the underlying circumstances or fully providing context. *See, e.g.*, Am. Compl. ¶¶ 10 ("Grace . . . provided an undertaking to repay," but Grace declines to explain for what expenses he sought advancement and indemnification); 12 ("[The Board's counsel] referred to two invoices that Reed Smith had sent to Charles Grace," but Grace declines to explain the nature of the legal services in question); 21, 26 (Grace explains his rights to advancement and indemnification are "supported by the Bylaws of Ashbridge Corporation" without explaining how or why such rights are supported by those bylaws or even quoting the

Managers (the “Board”) wrote to Defendant’s long-time outside counsel (“Reed Smith”) stating the Board would not pay Reed Smith for legal services performed after June 15, 2011, and that Reed Smith had represented both Defendant and Grace without obtaining the informed consent of the Board.<sup>11</sup>

After retaining new counsel, Grace contacted the Board’s counsel again in November 2012 regarding advancement and indemnification. On December 6, 2012, the Board’s counsel advised the Board that it was not obligated to authorize advancement and indemnification to Grace. At the December 19, 2012 meeting of the Board, it declined to consider Grace’s request for advancement and indemnification.

On February 22, 2013, Grace filed a laconic initial complaint in this Court seeking advancement and indemnification under Ashbridge LLC’s operating agreement. In response, the Defendant sought a more definite statement which

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pertinent sections); 21 (Grace describes “other expenses in a mediation that was conducted pursuant to leave granted by the Judge of the Orphans’ Court Division,” but declines to provide any other facts about such mediation, such as when it occurred or why such mediation is indemnifiable); 14, 23 (Grace describes “claims threatened against him by Eugene G. Grace, IV,” but declines to provide any further context or explanation as to what the content of such claims was or why Ashbridge LLC should indemnify Grace for such threatened claims); *supra* note 6 (Grace refers to AIM in a quotation, but declines to explain what the entity is or its relationship to Ashbridge LLC).

<sup>11</sup> In that same letter, the Board’s counsel also declined to pay costs for two invoices that Reed Smith had sent to Grace and that Grace had paid and submitted to Ashbridge LLC seeking advancement and indemnification. Grace states that he does not seek judicial relief for those two invoices even though he believes he is entitled to payment because “the litigation effort required to test the validity of [the reason asserted by the Board’s outside counsel] is not justified by the relatively small dollar amount of those two invoices paid by Charles Grace personally.” Am. Compl. ¶ 12.

might clarify the theory under which Grace claimed his entitlement to advancement and indemnification. Grace filed a Verified Amended Complaint on April 12, 2013 (the “Amended Complaint”) and on that same day provided a hand-delivered undertaking for expenses in the Orphans’ Court Proceeding, this current action, a failed mediation, and “any other litigation claims asserted against [Grace] by [the Beneficiary Objectors].”<sup>12</sup>

Defendant Ashbridge LLC moved to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. Earlier this month, Grace moved for leave to file a verified amended and supplemented complaint (the “Motion to Supplement”) based upon additional developments in the Orphan’s Court Proceeding.<sup>13</sup>

## II. CONTENTIONS

Grace argues he is entitled to advancement and indemnification under Section 10.4 of Ashbridge LLC’s operating agreement<sup>14</sup> for attorneys’ fees and

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<sup>12</sup> *Id.*, Ex. F. In Grace’s Amended Complaint, he mentions this undertaking in what is apparently a chronologically-based narrative as though it occurred before the Board’s counsel advised the Board it need not pay Reed Smith on December 23, 2011. Am. Compl. ¶ 11. However, the letter in the exhibit is dated April 12, 2013, the same date the Amended Complaint was filed in this Court.

<sup>13</sup> Grace’s motion to amend and supplement his Amended Complaint is unopposed. The supplemental allegations are considered in Part III.E. of this memorandum opinion.

<sup>14</sup> Section 10.4, in pertinent part, provides:

10.4 Indemnification. Any Person made, or threatened to be made, a party to any action or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such Person is or was (i) a Member or Manager, or (ii) an employee, officer, director, manager, shareholder or partner of the

other costs in this Delaware action and in the Orphans' Court Proceeding.<sup>15</sup> Grace further asserts he is entitled to indemnification for "other expenses in a mediation that was conducted pursuant to leave granted by the Judge of the Orphans' Court Division"<sup>16</sup> and that his "substantive rights" to advancement and indemnification "are supported by" the bylaws of Ashbridge Corporation.<sup>17</sup>

The Defendant argues that Grace has failed to state a claim for advancement or indemnification because he was made a party to the Orphans' Court Proceeding "by reason of the fact" that Grace is a co-trustee of the Residuary Trust and that Defendant's operating agreement does not extend advancement or indemnification rights to predecessor entities or affiliates.<sup>18</sup> The Defendant further argues that Grace cannot seek indemnification or advancement for certain actions taken in his

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Company or any Member or Manager (collectively, the "Indemnified Persons"), shall be indemnified by the Company for any losses or damage sustained with respect to such action or proceeding, and the Company shall advance such Indemnified Person's reasonably related expenses to the fullest extent permitted by law. . . . The Company may indemnify other Persons of the Company. . . . The Company shall pay the expenses (including attorneys' fees and disbursements) incurred in good faith by an Indemnified Person in advance of the final disposition of any action or proceeding, upon receipt of an undertaking by or on behalf of the Indemnified Person to repay the amount if it is ultimately determined that such person is not entitled to be indemnified by the Company pursuant to this Section 10.4. . . .

Am. Compl., Ex. C § 10.4.

<sup>15</sup> Am. Compl. ¶¶ 21, 26.

<sup>16</sup> *Id.* ¶ 21.

<sup>17</sup> *Id.* ¶¶ 21, 26.

<sup>18</sup> Def.'s Opening Br. in Supp. of its Mot. to Dismiss the Verified Am. Compl. at 16-20.



“personal,” as opposed to his “official,” capacity and that certain expenses Grace claims have not been identified or described in the Amended Complaint.<sup>19</sup>

### III. ANALYSIS

The Defendant has moved to dismiss Grace’s Amended Complaint pursuant to Court of Chancery Rule 12(b)(6). In assessing such a motion, the Court

should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as “well pleaded” if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.<sup>20</sup>

The reasonable conceivability standard asks whether there is a “possibility” of recovery.<sup>21</sup> However, the Court need not “accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.”<sup>22</sup> Failure to plead facts supporting an element of a claim precludes entitlement to recovery and constitutes grounds to dismiss that claim.<sup>23</sup> Furthermore, “a claim may be dismissed if allegations in the complaint or in the

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<sup>19</sup> *Id.* at 20-22.

<sup>20</sup> *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011).

<sup>21</sup> *Id.* at 537 n.13.

<sup>22</sup> *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

<sup>23</sup> *Crescent/Mach I P’rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000).

exhibits incorporated into the complaint effectively negate the claim as a matter of law.”<sup>24</sup>

Limited liability companies are broadly authorized under 6 *Del. C.* § 18-108 to grant indemnification rights through their operating agreements.<sup>25</sup> Similarly, the Delaware Limited Liability Company Act confers upon contracting parties “nearly unfettered contractual discretion in determining whether to grant advancement.”<sup>26</sup> When interpreting advancement and indemnification provisions in a limited liability company agreement, a Delaware court will follow ordinary contract interpretation principles. Thus, “[w]hen the language of a . . . contract is clear and unequivocal, a party will be bound by its plain meaning, because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented . . . .”<sup>27</sup>

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<sup>24</sup> *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

<sup>25</sup> That section provides:

Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.

<sup>26</sup> *Donohue v. Corning*, 949 A.2d 574, 578 (Del. Ch. 2008) (citing 6 *Del. C.* § 18-108).

<sup>27</sup> *Seaford Golf & Country Club v. E.I. duPont de Nemours & Co.*, 925 A.2d 1255, 1261 n.14 (Del. 2007).

*A. Does Ashbridge LLC's Operating Agreement Require Advancement and Indemnification for Ashbridge Corporation or AIM?*

Because the advancement and indemnification obligations of a limited liability company are determined by its operating agreement, the Court must evaluate Section 10.4 of the Defendant's operating agreement upon which Grace bases his claim. The Defendant argues Section 10.4 does not require indemnification for the Orphans' Court Proceeding because Grace requests advancement and indemnification for acts taken on behalf of predecessor and affiliate organizations, rather than for acts taken on behalf of Ashbridge LLC.<sup>28</sup>

Because the Objections make allegations involving only Ashbridge Corporation and AIM, Grace must demonstrate that the Defendant's advancement and indemnification provision retroactively applies to predecessor entities or affiliates in order to prevail on his claims under Defendant's operating agreement. The plain language of the agreement prevents Grace from doing so. The pertinent terms of the operating agreement provide:

10.4 Indemnification. Any Person made, or threatened to be made, a party to any action or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such Person is or was (i) a Member or Manager, or (ii) an employee, officer, director, manager, shareholder or partner of the Company or any Member or Manager (collectively, the "Indemnified Persons"), shall be indemnified by the Company for any losses or damage sustained with respect to such action or proceeding, and the Company shall

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<sup>28</sup> Although the Defendant makes additional arguments which may have merit, because the Court's analysis here is dispositive, the Court does not fully consider those arguments.

advance such Indemnified Person’s reasonably related expenses to the fullest extent permitted by law. . . . The Company may indemnify other Persons of the Company. . . . The Company shall pay the expenses (including attorneys’ fees and disbursements) incurred in good faith by an Indemnified Person in advance of the final disposition of any action or proceeding, upon receipt of an undertaking by or on behalf of the Indemnified Person to repay the amount if it is ultimately determined that such person is not entitled to be indemnified by the Company pursuant to this Section 10.4. . . .<sup>29</sup>

The operating agreement defines “the Company” to encompass only Ashbridge LLC,<sup>30</sup> and such definition does not include predecessor entities. Thus, under the plain terms of the agreement, Grace must plead that he held a specific office or otherwise had a relationship with Ashbridge LLC or with one of its managers or members. The Objections for which Grace claims he is entitled to advancement and indemnification do not mention Ashbridge LLC, but instead assert various acts of mismanagement related to Ashbridge Corporation and AIM.<sup>31</sup>

The plain language of Defendant’s operating agreement requires a party seeking advancement or indemnification from Ashbridge LLC to demonstrate

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<sup>29</sup> Am. Compl., Ex. C § 10.4.

<sup>30</sup> *Id.* § 1.17 (“‘Company’ shall mean the limited liability company hereby established in accordance with this Agreement by the parties hereto, as such limited liability company may from time to time be constituted.”). The plain language of the definition functions prospectively as of the date on which the agreement was executed.

<sup>31</sup> If the Objections had not used a defined term of “Ashbridge” to stand in for “Ashbridge Corporation,” one wonders if Grace would have filed a complaint in this Court. He either would have had to amend every quote from the Objections through the heavy use of brackets or would have made had to find an alternate legal theory, which may have been challenging given his apparent reluctance to plead directly advancement and indemnification under the bylaws of Ashbridge Corporation.

some relationship to the limited liability company.<sup>32</sup> The allegations in the Objections do not even mention the Defendant, and thus the plain language of Section 10.4 does not require advancement or indemnification for the Orphans' Court Proceeding.

Case law supports this result. Successor corporate entities are generally not liable for the actions of the corporate officers of predecessor entities or affiliates, when a fundamental change in identity has occurred. For the purposes of advancement and indemnification, Delaware law considers a conversion from a limited liability company to a corporation to be a "fundamental change in identity."<sup>33</sup> Underpinning this conclusion is the logic that "[l]imited liability companies and corporations differ in important ways, most pertinently in regard to indemnification: mandating it in the case of corporate directors and officers who successfully defend themselves, but leaving the indemnification of managers or officers of limited liability companies to private contract."<sup>34</sup> Thus, the *Bernstein* court held that a party seeking advancement, who was a former manager of the

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<sup>32</sup> Even then, an analysis into whether or not the person was made a party to the suit "by reason of the fact" of her relationship to the corporate entity as opposed to her role as a trustee would be central to determining whether or not the corporate entity would be required to make advancement or to provide indemnification.

<sup>33</sup> *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1009 (Del. Ch. 2007) (recognizing, nevertheless, that a "highly authoritative" District of New Jersey case supported the retroactive application of advancement and indemnification rights where the only change to a re-incorporated entity was to alter its state of incorporation and where such change was considered technical and without impact to the corporation's identity).

<sup>34</sup> *Id.* at 1009-10.

limited liability company and current director of the corporation, was only entitled to advancement under the terms of the corporation's bylaws. The bylaws did not retroactively create such a right for that person during his tenure as a member of the predecessor limited liability company.<sup>35</sup>

The logic motivating *Bernstein* is dispositive here as well. The change of the entity from Ashbridge Corporation to Ashbridge LLC was a fundamental change in identity. The advancement and indemnification scheme of Ashbridge Corporation's bylaws was re-written into contractual terms in Ashbridge LLC's operating agreement in a manner that substantially altered the rights and obligations of the parties.<sup>36</sup> Thus, the same result reached in *Bernstein* applies here, and "[t]his court will not rewrite a contract by reading words into it that the parties clearly did not intend."<sup>37</sup> The Court will therefore not impose retroactive obligations on a limited liability company when the plain language of its operating agreement would not permit predecessor or affiliate liability and when the

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<sup>35</sup> *Id.* at 1010.

<sup>36</sup> A cursory comparison of Ashbridge Corporation's bylaws and Ashbridge LLC's operating agreement reveals numerous differences between the two. Although not a holding, a brief inspection appears to indicate that the bylaws mandatorily indemnify only officers, directors, and other persons designated by the board (though the board may elect to indemnify others), while the operating agreement would indemnify members or managers, or employees, officers, directors, managers, shareholders or partners of Ashbridge LLC or of any member or manager; the bylaws explicitly disclaim that they will indemnify a party if he or she initiated the proceeding or was an intervenor or amicus curiae, unless the board approves it, while the operating agreement has no such disclaimer; and the bylaws have a set of provisions mandating arbitration and the operating agreement has no such arbitration requirement. *Compare* Am. Compl., Ex. E §§ 7.01-7.12, *with* Am. Compl., Ex. C § 10.4.

<sup>37</sup> *Bernstein*, 953 A.2d at 1010.

indemnification schemes of the predecessor corporation and successor limited liability company differ.<sup>38</sup>

### B. *Grace's Additional Arguments Are Unpersuasive*

Grace makes additional arguments that do not salvage his claims.<sup>39</sup> Grace first explains that the series of cases including *Homestore*,<sup>40</sup> *Reddy*,<sup>41</sup> and *Perconti*<sup>42</sup> articulates the broad nature and outer limits of the phrase “by reason of the fact” as used in Delaware advancement and indemnification claims. He then argues that because Ashbridge LLC uses the same term of art, it follows that Grace is entitled to indemnification. Unfortunately, Grace’s accurate recitation of Delaware law fails to acknowledge the important counterpoint to these broad rights: that Delaware law allows entities to limit the scope of advancement and indemnification rights as well.<sup>43</sup> Grace’s argument fails because he only describes

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<sup>38</sup> The Court expresses no opinion upon whether a successor entity could be responsible for indemnifying or granting advancement based upon the bylaws or operating agreement of a predecessor entity. As discussed in greater detail below, Grace has not alleged that Ashbridge Corporation’s bylaws entitle him to advancement and indemnification and thus that issue is not before the Court.

<sup>39</sup> Grace also argues in his answering brief that claims of excessive compensation are indemnifiable under Delaware law. Because the Court does not rely on Ashbridge LLC’s argument that Grace cannot be indemnified as a result of the allegations in the Objections that Grace was excessively compensated, it need not address the issue.

<sup>40</sup> *Tafeen v. Homestore, Inc.*, 2005 WL 789065 (Del. Ch. Mar. 29, 2005), *aff’d*, 888 A.2d 204 (Del. 2005).

<sup>41</sup> *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761 (Del. Ch. June 18, 2002).

<sup>42</sup> *Perconti v. Thornton Oil Corp.*, 2002 WL 982419 (Del. Ch. May 3, 2002).

<sup>43</sup> See *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 562 (Del. 2002) (explaining that corporations are not “unduly punished” by broad advancement and indemnification provisions because they are “free to tailor” their indemnification provisions to avoid undesirable results); *Paolino v. Mace Sec. Int’l, Inc.*, 985 A.2d 392, 401 (Del. Ch. 2009) (describing broad, mandatory

the state of the law if an entity does not tailor its advancement or indemnification provision. He does not explain how Section 10.4 entitles him to a remedy when Defendant's operating agreement is narrower than the outer boundaries of the law.

Grace also argues that his substantive rights to advancement and indemnification are "supported by" the bylaws of Ashbridge Corporation and the operating agreements of Ashbridge Partners, LLC and Ashbridge LLC.<sup>44</sup> This "supported by" language is not an allegation which pleads a sufficient basis for recovery under the predecessor corporation's bylaws. The Amended Complaint does not explain to the Court what it means to have rights of advancement and indemnification "supported by" a corporation's bylaws, and Grace fails to explain how those documents entitle him to relief under such provisions. The Defendant, when it moved for a more definite statement of facts, clearly identified the deficiencies in Grace's initial complaint.<sup>45</sup> Grace, in amending his complaint, was

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advancement rights that corporations continue to grant or leave in place, "despite repeated suggestions by this Court that the rights be more narrowly tailored . . .").

<sup>44</sup> Grace never seriously argues that the operating agreement of Ashbridge Partners, LLC, which existed for less than a day, entitles him to recovery. Thus, the Court directs its attention to Ashbridge Corporation's bylaws.

<sup>45</sup> Ashbridge LLC's Motion for More Definite Statement and Motion to Dismiss reads in part:

8. Charles Grace does allege that Section 10.4 is the same provision as in an earlier Operating Agreement of a "predecessor," of Ashbridge Partners, LLC. Charles Grace does not attach the predecessor's agreement, does not state how long that agreement was effective, and does not state why that agreement has any role in this matter.

9. With exception of one date in the Objections relating to the sale of the assets of AIM, the Objections relate to Charles Grace's conduct as a Trustee before the date of the Operating Agreement.



given a full opportunity to plead his case completely. Grace did not avail himself of this opportunity, except to add a phrase to the Amended Complaint stating the rights of advancement and indemnification of the bylaws of Ashbridge Corporation are “virtually identical to the rights provided in Section 10.4” of Defendant’s operating agreement.

Under Delaware’s well-pleaded complaint standard, though a complaint need only provide “general notice of the claim asserted,”<sup>46</sup> it is nonetheless true that “[c]onclusions . . . will not be accepted as true without specific allegations of fact to support them.”<sup>47</sup> Grace’s argument that certain rights are “supported by” Ashbridge Corporation’s bylaws is likely deficient because it fails to provide general notice of the claim asserted, though the Court’s conclusion does not depend on this analysis. Grace’s “supported by” language is conclusory and is not supported by specific allegations of fact explaining how Grace complied with the advancement and indemnification provisions of the Ashbridge Corporation bylaws.

Plaintiff’s “virtually identical” language in the Amended Complaint also fails to state a claim. The exhibit incorporated into the complaint negates Grace’s

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10. The Verified Complaint does not limit the request for advancement for matters occurring after the date of the Operating Agreement and does not provide sufficient information about the predecessors, or otherwise reveal, why advancement and indemnity applies to matters occurring before that date.

Def.’s Mot. for More Definite Statement and Mot. to Dismiss ¶¶ 8-10.

<sup>46</sup> *Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (quoting *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

<sup>47</sup> *Pathe Commc’ns*, 672 A.2d at 38.

claim that Ashbridge Corporation’s bylaws are “virtually identical” because even a cursory comparison of the two texts reveals that they are different in a number of respects.<sup>48</sup> Thus, the Court must dismiss Grace’s claim based upon the predecessor entity’s bylaws.

Plaintiff’s “supported by” statements are best understood as Grace’s attempt to “have it both ways.” His submissions to the Court appear to reflect a desire to avoid providing the substance of Ashbridge Corporation’s bylaws, while seeking to preserve some opportunity to argue the point in subsequent briefings should Grace later find it to be expedient.<sup>49</sup>

Finally, in a supplemental brief submitted to the Court, Grace asserts that two of the objections were stayed in the Orphans’ Court Proceeding because the court there lacked jurisdiction over issues which would determine the internal affairs of business entities. Grace therefore argues that he could not have been made party to the Orphans’ Court Proceeding as a result of his role as one of the trustees of the Residuary Trust.<sup>50</sup> This argument is also unavailing. Although the

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<sup>48</sup> *See supra* note 36.

<sup>49</sup> Grace later attempted to alter the battleground when he began justifying his rights to advancement and indemnification under the bylaws of Ashbridge Corporation, even arguing that Ashbridge LLC failed to comply with those bylaws by not moving for arbitration as the bylaws require. Pl.’s Answering Br. in Opp’n to Def.’s Mot. to Dismiss the Verified Am. Compl. at 12-13 (“AB”). Grace for the first time offered a set of arguments explaining his entitlement to indemnification under Ashbridge Corporation’s bylaws in his answering brief and thus the Court cannot understand how he can argue that Ashbridge LLC should have moved to compel arbitration when that claim was not asserted in the Amended Complaint.

<sup>50</sup> Pl.’s Supp. Br. in Further Opp’n to Def.’s Mot. to Dismiss the Verified Am. Compl. at 1-4.

Court does not necessarily agree with Grace's conclusions, even if Grace's characterization is correct, it does nothing to contradict the clear language of Ashbridge LLC's operating agreement requiring a claim related to Defendant rather than its predecessor entity or affiliates.<sup>51</sup>

The Court may grant a motion to dismiss where the exhibits incorporated into the complaint effectively negate the claim as a matter of law. Because the operating agreement under which Grace claims advancement and indemnification does not, by its unambiguous language, grant him the relief he seeks, the Court grants Ashbridge LLC's motion to dismiss all claims arising out of the Orphans' Court Proceeding.

### *C. Must Ashbridge LLC Indemnify Grace for the Mediation?*

Grace claims he is also entitled to indemnification under Defendant's operating agreement for a mediation that he has not described. Grace is not entitled to relief on this claim because he has not pleaded any facts explaining his entitlement to relief or provided notice of his claims to Defendant. His Amended Complaint fails to describe the mediation or to make the vaguest of allegations about the factual circumstances underlying it. The first time Grace even mentions the undescribed mediation is in Count I in which he states in a conclusory manner

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<sup>51</sup> Although the court in the Orphans' Court Proceeding referred to the entities as "Ashbridge LLC and its predecessors," the phrase is shorthand used by the court in response to motion practice originating from the Objections. Such a reference to the different iterations of the Ashbridge entities does not change the fact that no allegation in the Objections names Ashbridge LLC which thus denies Grace his claimed relief.

that he is entitled to expenses for the mediation.<sup>52</sup> The Court need not accept these conclusory allegations unsupported by specific facts and thus dismisses this claim as well.

*D. Must Ashbridge LLC Pay Costs Related to the Delaware Action?*

Because Grace is, as a matter of law, not entitled to advancement and indemnification under the unambiguous terms of the operating agreement and because his allegations surrounding the mediation fail to state a claim, he cannot recover for the costs incurred in pursuing this action.

*E. Grace's Amended and Supplemented Complaint Fails to State a Claim*

On December 12, 2013, Grace moved to amend and supplement his Amended Complaint.<sup>53</sup> Court of Chancery Rule 15(d) permits the Court to allow a “party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented,”<sup>54</sup> if such supplemental claims “relate to the original claims.”<sup>55</sup>

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<sup>52</sup> Even in his answering brief, Grace fails to correct this deficiency, referring to the mediation only to state: “If this Court orders indemnity and advancement, Plaintiff will establish that the mediation for which indemnity is sought was directed to the factual issues alleged in the Objections involving Ashbridge Corporation and Ashbridge LLC.” AB at 8. Grace seemingly misunderstands the litigation process in that he must provide at least vague allegations of his entitlement to relief. He cannot simply promise the Court that if it orders the relief he seeks that he will then demonstrate or make an initial allegation explaining his entitlement.

<sup>53</sup> The new allegations are supplemental because they add developments since the Amended Complaint was filed.

<sup>54</sup> Ct. Ch. R. 15(d).

<sup>55</sup> *BabyAge.com, Inc. v. Weiss*, 2009 WL 3206487, at \*1 (Del. Ch. Oct. 1, 2009).

Because leave to supplement or amend “[a]s a general rule, . . . is freely given,”<sup>56</sup> and because the Defendant does not oppose the motion,<sup>57</sup> the Court grants Grace’s motion. However, for the reasons that follow, his amended and supplemented complaint also fails to state a claim.

This is so because the additional information he seeks to submit does not alter the Court’s analysis or conclusions set forth above. In the Motion to Supplement, Grace argues that the petition to lift stay and for leave to file amended objections filed by the Beneficiary Objectors on October 2, 2013 in the Orphan’s Court Proceeding is material to the instant litigation. This is so because, “although [the petition] disingenuously denies that the claims asserted against the Plaintiff concern ‘the internal affairs of Ashbridge LLC,’ [it] impliedly concedes that the claims stated by the [Beneficiary Objectors] against the Plaintiff would ordinarily be the subject of a shareholders [sic] derivative action . . . .”<sup>58</sup> Grace also attaches

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<sup>56</sup> *Blaustein v. Lord Baltimore Capital Corp.*, 2013 WL 1810956, at \*9 (Del. Ch. Apr. 30, 2013).

<sup>57</sup> Letter of Christopher J. Curtin, Esquire to the Court, dated Dec. 24, 2013.

<sup>58</sup> Pl.’s Mot. for Leave to File a Verified Am. and Supplemented Compl. at 3. Grace summarizes his reason to amend and supplement as follows:

The [Beneficiary Objectors’] characterization in the October 2 filings (Exhibits I and J to the proposed Supplemented Pleading) of their claims against Plaintiff as being claims that could be the subject of a shareholders derivative action is relevant and material to the issue in the above captioned action as to whether the claims asserted against Plaintiff relate to and arise from the internal affairs of Ashbridge LLC and its predecessors or whether, as contended by the Company, those claims arise only from Plaintiff’s status as a co-Trustee of the Residuary Trust.

proposed Exhibits H-K to be submitted with his proposed amended and supplemented complaint.<sup>59</sup> Grace does not request any modification to Count I or Count II of the Amended Complaint.

Grace's Motion to Supplement has two primary shortcomings. First, Grace has only directed the Court to proposed amendments to the Objections, which were denied by the Pennsylvania court. Thus, the Objections to which Grace initially directed the Court remain the Objections for which advancement and indemnification are sought. The Court need not rely on this particular issue to determine that Grace's amended and supplemented complaint fails to state a claim. The second, dispositive problem with Grace's updated complaint is that nothing within the Beneficiary Objectors' proposed objections mentions Ashbridge LLC.<sup>60</sup> The proposed objections are limited to issues related to Ashbridge Corporation and AIM. Thus, even if they were accepted in the Pennsylvania proceeding, Grace's

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*Id.* at 5. The Court also notes that the full quotation Grace quotes in this portion of his motion comes from the Beneficiary Objectors' petition to lift stay and for leave to file amended objections, and not the proposed amended objections, and reads "the internal affairs of Ashbridge LLC or its predecessors." *Id.*, Ex. I ¶ 7. The Court understands this language to be used for ease of reference in the motion practice arising from the Objections and does not alter the fact that no mention of Ashbridge LLC may be found in the proposed amended objections.

<sup>59</sup> Those exhibits are, respectively, the Order of June 21, 2013, sustaining two jurisdictional objections of Grace against the Objections; the Petition to Lift Stay and for Leave to File Amended Objections of the Objectants, filed October 2, 2013; the proposed Amended Objections; and the Order of October 30, 2013 denying the Objectants' petition and reaffirming the prior stay. *Id.*, Exs. H-K. Grace also attaches a clean and redlined version of his proposed amended and supplemented complaint.

<sup>60</sup> The fact that some filings originating from the Objections refer to Ashbridge LLC and its predecessors does not alter the fact that the Objections and the proposed amended objections do not include specific allegations regarding Ashbridge LLC.

modified complaint fails to state a claim. He again has not demonstrated some connection between the proposed objections and the Defendant. Grace also declined to plead a theory of successor liability based on a connection to Ashbridge Corporation.

Because the exhibits and additional allegations of fact attached to or contained within Grace's proposed amended and supplemented complaint fail to state a claim under a reasonable conceivability standard, though Grace's motion to supplement is granted, his modified complaint is nonetheless dismissed.

#### **IV. CONCLUSION**

For the reasons set forth above, the Court grants Grace's motion to supplement and grants Ashbridge LLC's motion to dismiss. An implementing order will be entered.