IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Bradley K. Heppner, Plaintiff, v. Beneficient Company Holdings, L.P., Beneficient Company Group, L.L.C., and Beneficient, f/k/a The Beneficient Company Group, L.P., Defendants.	)	C.A. No. 2026-0749-DH

REPORT

Report: November 20, 2026
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HUME, IV, M.

Pot-Limit Omaha, better known as PLO, differs from Texas Hold'em poker by dealing each player four private cards rather than two, creating nearly three times as many possible five-card combinations. But, as any seasoned PLO player will tell you, more cards do not guarantee a winning hand. The same principle applies here, where a corporate founder, convicted of defrauding others of over a hundred million dollars, seeks advancement of his legal fees and expenses under multiple contractual sources. Each source presents a potential path to advancement. But a multitude of sources does not assure the outcome. Each must independently satisfy its governing requirements.

Although the relevant governing documents originally selected Delaware as their forum, two sources now point to Nevada. The parties dispute the proper forum and whether the requisite causal nexus exists between the founder's corporate roles and his criminal conduct. I find that two of the four alleged sources remain subject to Delaware jurisdiction and that the founder has established the required nexus under both. But this winning hand comes with a catch: both agreements contain insolvency provisions that may relieve the obligated entities of their duty to advance the plaintiff's legal fees and expenses. Whether those provisions excuse performance remains to be determined through the *Fitracks* process.

I. BACKGROUND[1]

A. The Parties

Bradley Heppner (the "Plaintiff") was the Founder, Chief Executive Officer, and Chairman of Defendant Beneficient.[2] Beneficient consists of three separate entities: Beneficient Holdings, L.P. ("BCH"), Beneficient Company Group, L.L.C. ("BCG"), and Beneficient f/k/a Beneficient Company Group, L.P. ("BEN") (collectively, "Beneficient" or "Defendants").[3]

BEN is a Nevada corporation but was a Delaware limited partnership prior to its June 2023 conversion.[4] BEN is also the managing member of BCG.[5] BCH is a Delaware limited partnership, and served as the primary holding company of

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[1] I draw the following facts from the pleadings and other documents of record. Unless otherwise noted, pleadings and their associated declarations and exhibits are cited by reference to items docketed in C.A. No. 2026-0749-DH. Citations are to Plaintiff's Verified Complaint for Advancement ("Compl."), available at Docket Item ("D.I.") 1; Defendants' Opening Brief in Support of Their Motion to Stay or Dismiss Plaintiff's Complaint ("MTD OB"), available at D.I. 11; Plaintiff's Answering Brief in Opposition to Defendants' Motion to Stay or Dismiss Plaintiff's Complaint ("MTD AB"), available at D.I. 17; Plaintiff's Opening Brief in Support of His Motion for Summary Judgment for Advancement ("MSJ POB"), available at D.I. 18; Defendants' Reply Brief in Support of Their Motion to Stay or Dismiss Plaintiff's Complaint ("MTD RB"), available at D.I. 22; Defendants' Opening Brief in Support of Their Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment ("MSJ DOB"), available at D.I. 23; and the transcript of oral argument on Defendants' Motion to Dismiss Plaintiff's First Amended Complaint in the parallel Nevada Action ("NV Tr."), available at D.I. 46, Ex. A.

[2] Compl. ¶ 11.

[3] *Id.* p. 1.

[4] *Id.* ¶ 7.

[5] *Id.* ¶ 14.

Beneficient's subsidiaries.[6] BCG is a Delaware limited liability company, a subsidiary of BEN, and currently serves as the general partner of BCH.[7] BCG held all of the limited partnership interests in BCH.[8]

B. Beneficient's Beginnings and the Need for Funding

Heppner created Beneficient with the purpose of offering liquidity solutions to people and institutions holding illiquid alternative assets, which at the time, left investors without any exit opportunities.[9] Beneficient's business model centered on acquiring and holding illiquid assets and their associated indirect economic rights in related trust structures.[10] In turn, Beneficient sought to generate fees and interest income from those trusts, a strategy that required substantial capital.[11] In 2017, Beneficient reorganized its capital structure and established a $141 million senior debt owed to HCLP Nominees, LLC ("HCLP").[12] HCLP is a shell company that operated through Heppner's family office for his personal benefit.[13]

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[6] *Id.* ¶ 12.

[7] *Id.* ¶ 13.

[8] *Id.*

[9] *Id.* ¶ 21.

[10] *Id.*

[11] *Id.*

[12] *Id.* ¶ 24.

[13] MTD OB pp. 4–5.

In 2018, GWG Holdings, Inc. ("GWG") acquired certain Beneficient common units via private auction.[14] GWG agreed to provide debt financing, cash, and stock to Beneficient throughout 2018.[15] Beneficient subsequently disclosed the HCLP debt to GWG, as well as Heppner's affiliation with HCLP.[16] In April 2019, Heppner became chairman and a director of GWG's board of directors.[17] Because of the overlap between GWG's and Beneficient's boards, GWG established a Special Committee composed of independent directors with the purpose of evaluating and approving transactions between the two companies.[18]

From May 2019 through May 2021, GWG's Special Committee approved numerous investments in Beneficient, including a $65 million capital infusion to Beneficient structured as an unsecured loan, a $79 million equity investment in Beneficient with $50 million allocated toward repayment of the HCLP debt, and a $61 million equity investment with $28 million designated for repayment of the HCLP debt.[19]

C. Heppner's Resignation and the Department of Justice Litigation

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[14] Compl. ¶ 23.

[15] *Id.*

[16] *Id.* ¶ 24.

[17] *Id.* ¶ 25.

[18] *Id.*

[19] *Id.* ¶ 27.

In 2020, the Securities and Exchange Commission (the "SEC") launched an investigation into GWG, focusing on its transactions with Beneficient.[20] Several years later, in June 2025, Heppner resigned as Beneficient's Chief Executive Officer and Chairman of the Board of Directors.[21]

On October 8, 2025, the United States Department of Justice (the "DOJ") indicted Heppner in the United States District Court for the Southern District of New York.[22] The indictment charged Heppner with conspiracy to commit wire fraud, wire fraud, conspiracy to commit securities fraud, making false statements to auditors, and making false entries in records.[23] The DOJ alleged that Heppner misrepresented material information to GWG's Special Committee to induce it to approve investments in Beneficient between May 2019 and March 2021.[24] The DOJ further alleged that, at Heppner's direction, Beneficient falsified documents naming Heppner's friend as HCLP's manager to conceal Heppner's actual control over

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[20] *Id.* ¶ 28.

[21] *Id.* ¶ 29.

[22] *Id.* ¶ 30.

[23] *Id.*

[24] *Id.* ¶ 32.

HCLP.[25] The DOJ also alleged that Heppner falsified Beneficient's October 2019 board meeting minutes, but ultimately dismissed the related charges.[26]

Heppner's criminal trial began in April 2026. Following trial, the jury found Heppner guilty on four of the five counts in the indictment.[27] On May 5, 2026, Heppner sent Beneficient's counsel a formal written demand seeking advancement of his legal fees and expenses incurred in defending the DOJ action.[28] Under the Ninth Amended and Restated Limited Partnership Agreement of BCH (the "BCH LP Agreement") BCH must promptly pay expenses and attorney fees incurred in connection with defending any suit within 30 days of the written demand.[29] This meant that Heppner could take no action while he waited for a response. Within this 30-day advancement window, Beneficient instead filed a declaratory judgment action in Nevada state court, seeking a declaration that Heppner had no right to advancement in connection with the DOJ action.[30]

D. The Purported Sources of Advancement

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[25] *Id.* ¶¶ 32–33.

[26] *Id.* ¶¶ 34–35.

[27] *Id.* ¶ 35.

[28] *Id.* ¶ 76.

[29] *Id.* Ex. A § 10.02(c).

[30] Compl. ¶ 79.

Heppner contends that he is entitled to advancement from four sources: (1) the Second Amended and Restated Limited Partnership Agreement of BEN (the "BEN LP Agreement") and BEN Bylaws; (2) the BCH LP Agreement; (3) the Second Amended and Restated Limited Liability Company Agreement of BCG (the "BCG LLC Agreement"); and (4) the First and Second Amended and Restated Services Agreements (together, the "Services Agreements").

1. The BEN LP Agreement and Bylaws

a. The Pre-Conversion BEN LP Agreement

The BEN LP Agreement defines "Indemnitee" to include officers and directors of the General Partner.[31] Section 7.7(a) governs indemnification and provides coverage for losses, liabilities, and expenses arising from proceedings in which an Indemnitee is involved, or threatened to be involved, by reason of their status as Indemnitee.[32] This protection extends to civil, criminal, administrative, and investigative proceedings, regardless of whether the underlying conduct occurred before or after the agreement's execution.[33] Indemnification is unavailable, however, if:

> (A) there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that in respect of the matter

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[31] *Id.* Ex. C § 1.1(f).

[32] *Id.* § 7.7(a).

[33] *Id.*

> for which the Indemnitee is seeking indemnification pursuant to this Section 7.7, the Indemnitee acted or omitted from acting in bad faith or engaged in fraud or willful misconduct[.][34]

Section 7.7(b) governs the advancement of expenses, and reads

> (b) To the fullest extent permitted by law, expenses (including legal fees and expenses) incurred by an Indemnitee who is indemnified pursuant to Section 7.7(a) in appearing at, participating in or defending any claim, demand, action, suit or proceeding shall, from time to time, be advanced by the Partnership prior to a final and non-appealable determination that the Indemnitee is not entitled to be indemnified upon receipt by the Partnership of an undertaking by or on behalf of the Indemnitee to repay such amount if it ultimately shall be determined that the Indemnitee is not entitled to be indemnified as authorized in this Section 7.7. Notwithstanding the preceding sentence, except as otherwise provided in Section 7.7G) [sic], the Partnership shall be required to indemnify a Person described in such sentence in connection with any claim, demand, action, suit or proceeding (or part thereof) commenced by such Person only if (x) the commencement of such claim, demand, action, suit or proceeding (or part thereof) by such Person was authorized by the General Partner or (y) there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that such Person was entitled to indemnification by the Partnership pursuant to Section 7.7(j).[35]

Section 7.7(c) provides that the indemnification rights established by Section 7.7 are in addition to any other rights available to an Indemnitee under an agreement, insurance policy, vote of the holders of Outstanding Voting Units, law, equity, or otherwise.[36] These rights extend to actions taken both in the Indemnitee's official

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[34] *Id.*

[35] *Id.* § 7.7(b).

[36] *Id.* § 7.7(c).

capacity and in other capacities, and continue after the Indemnitee ceases serving in that capacity.[37]

Section 16.9 contains a forum-selection clause providing that:

> [A]ny claims, suits, actions or proceedings arising out of or relating in any way to this Agreement or any partnership interest . . . (regardless of whether such Disputes . . . are based on common law, statutory, equitable, legal or other grounds, or . . . are derivative or direct claims) . . . shall be exclusively brought in the Court of Chancery of the State of Delaware or, if such court does not have subject matter jurisdiction thereof, any other court located in the State of Delaware with Subject matter jurisdiction.[38]

b. The Post-Conversion BEN Bylaws

On June 6, 2023, BEN converted from a Delaware limited partnership to a Nevada corporation by filing a Certificate of Conversion with the Delaware Secretary of State.[39] The Certificate of Conversion preserves service of process in Delaware for proceedings involving obligations BEN incurred as a Delaware limited partnership and irrevocably appoints the Delaware Secretary of State as BEN's agent for service of process in those proceedings.[40] Following the conversion, BEN adopted new bylaws.[41]

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[37] *Id.*

[38] *Id.* § 16.9.

[39] *Id.* Ex. I pp. 1–2.

[40] *Id.* p. 2, ¶ 5.

[41] Compl. ¶ 48.

Article VIII of the BEN Bylaws provides indemnification and advancement rights to covered directors, officers, and employees of the corporation.[42] Section 8.1(a)(ii) requires Beneficient to indemnify Indemnitees, to the fullest extent permitted by Nevada law, against expenses, liabilities, and losses reasonably incurred in connection with covered proceedings, subject to specified limitations.[43]

Section 8.1(a)(iv) governs advancement and provides that an Indemnitee's expenses "must be paid by the Corporation or through insurance purchased and maintained by the Corporation . . . as such expenses are incurred and in advance of the final disposition of the Proceeding," upon receipt of an undertaking to repay those amounts if a court ultimately determines that the Indemnitee is not entitled to indemnification.[44] The same provision further requires Beneficient to indemnify an Indemnitee who is "successful on the merits or otherwise" in defending a proceeding, or any claim, issue, or matter therein, for attorneys' fees and expenses actually and reasonably incurred in that defense.[45]

Like Section 7.7(b) of the BEN LP Agreement, Section 8.1(a)(iv) of the BEN Bylaws provides for the advancement of expenses before final disposition of the

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[42] *Id.* Ex. D § 8.1(a)(i), (iv).

[43] *Id.* § 8.1(a)(ii).

[44] *Id.* § 8.1(a)(iv).

[45] *Id.*

proceeding.[46] The BEN Bylaws also specify that expenses must be paid as incurred and that repayment depends on an ultimate determination by a court of competent jurisdiction.[47] Section 8.1(a)(iii) preserves indemnification rights after an Indemnitee ceases serving in a covered capacity, while Section 8.1(c) provides that the indemnification and advancement rights afforded under Article VIII are nonexclusive of other available rights.[48]

The conversion also introduced a different forum-selection provision. While Section 16.9 of the BEN LP Agreement designates the Delaware Court of Chancery, or another Delaware court where appropriate, as the exclusive forum for covered disputes, Article XIII of the BEN Charter designates the Eighth Judicial District Court of Clark County, Nevada as the exclusive forum for derivative actions, fiduciary duty claims, disputes arising under Nevada law or the corporation's governing documents, and claims governed by the internal affairs doctrine, unless the corporation consents in writing to an alternative forum.[49]

2. The BCH LP Agreement

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[46] Compl. Ex. C § 7.7(b); Ex. D § 8.1(a)(iv).

[47] Compl. Ex. D § 8.1(a)(iv).

[48] *Id.* § 8.1(a)(iii), (c).

[49] MTD OB Ex. 6 Art. XIII.

The BCH LP Agreement defines "Indemnitee" broadly to include the partnership's general partner, certain current and former officers and directors, limited partners, persons serving other entities at the General Partner's request, and persons designated by the General Partner in its reasonable discretion.[50]

Section 10.02(a) grants Indemnitees indemnification rights to the fullest extent permitted by law for proceedings arising "by reason of his or her status as Indemnitee or by reason of any action alleged to have been taken or omitted to be taken by [the] Indemnitee in such capacity."[51] The provision excludes indemnification following a final, nonappealable judgment establishing bad faith, fraud, willful misconduct, or, in criminal matters, knowing unlawful conduct.[52] Section 10.02(e) further provides that "[t]he rights of indemnification in this Section 10.02 shall neither be exclusive of, nor be deemed in limitation of, any rights to which any person may otherwise be or become entitled or permitted by contract, this Agreement or as a matter of law[.]"[53]

Section 10.02(b) governs advancement, and requires BCH to "promptly pay expenses (including attorneys' fees)" incurred by an Indemnitee "in appearing at,

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[50] Compl. Ex. A § 1.01.

[51] *Id.* § 10.02(a).

[52] *Id.*

[53] *Id.* § 10.02(e).

participating in or defending any action, suit or proceeding in advance of the final disposition of such action, suit or proceeding," including appeals, upon presentation of an undertaking to repay the amounts advanced if the Indemnitee is ultimately determined not to be entitled to indemnification.[54]

Unlike the advancement provisions discussed above, Section 10.02(f) expressly limits BCH's indemnification and advancement obligations to the extent that the Partnership "will remain solvent, as determined by the General Partner in its reasonable discretion, after payment of such obligations," and provides that "thereafter any such obligation shall terminate."[55]

Section 11.10 governs dispute resolution. Although Section 11.10(a) generally requires covered disputes to be resolved through arbitration in Wilmington, Delaware, Sections 11.10(b) and (c) designate the Delaware Court of Chancery as the exclusive judicial forum for specified proceedings in aid of arbitration and for disputes determined not to be subject to arbitration or where the arbitration provision is not enforced.[56]

3. The BCG LLC Agreement

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[54] *Id.* § 10.02(b).

[55] *Id.* § 10.02(f).

[56] *Id.* § 11.10(a)–(c).

Under the BCG LLC Agreement, "Indemnitee" is defined to include "any Person who is or was . . . an officer or director of the Managing Member, any former Managing Member or any Group Member."[57] Under Section 7.6(a), BCG must indemnify qualifying Indemnitees for expenses and liabilities arising from threatened, pending, or completed proceedings, including criminal proceedings, by reason of their status as Indemnitees.[58] Indemnification is unavailable, however, if a final, nonappealable judgment determines that the Indemnitee acted in bad faith, engaged in fraud or willful misconduct, or in a criminal matter, acted with knowledge that the conduct was unlawful.[59]

Section 7.6(b) governs advancement and provides that

> [t]o the fullest extent permitted by law, expenses (including legal fees and expenses) incurred by an Indemnitee who is indemnified pursuant to Section 7.6(a) in appearing at, participating in or defending any claim, demand, action, suit, or proceeding shall, from time to time, be advanced by the Company prior to a final and non-appealable determination that the Indemnitee is not entitled to be indemnified upon receipt by the Company of an undertaking by or on behalf of the Indemnitee to repay such amount if it ultimately shall be determined that the Indemnitee is not entitled to be indemnified as authorized in this Section 7.6.[60]

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[57] *Id.* Ex. B § 1.1.

[58] *Id.* § 7.6(a).

[59] *Id.*

[60] *Id.* § 7.6(b).

Thus, advancement requires an undertaking to repay the amounts advanced if the Indemnitee ultimately is determined not to be entitled to indemnification.[61] Section 7.6(c) provides that the indemnification rights are nonexclusive of other rights available under agreements, insurance, law, equity, or otherwise, and continue after an Indemnitee ceases to serve in that capacity.[62] Further, Section 7.6(j) permits an Indemnitee to sue for unpaid advancement if a written claim remains unpaid for thirty days and places the burden of proving nonentitlement on BCG.[63]

Like the BCH LP Agreement, the BCG LLC Agreement contains a solvency limitation, which reads:

> Notwithstanding anything to the contrary set forth in this Section 7.6, any indemnification or advancement obligation of the Company under this Agreement shall only be satisfied to the extent that the Company will remain solvent, as determined by the Managing Member, after payment of such obligations, and thereafter any such obligation shall terminate.[64]

Section 15.9 also contains a forum-selection clause, which provides that covered disputes, unless the Managing Member agrees otherwise in writing, "shall be exclusively brought in the Court of Chancery of the State of Delaware or, if such

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[61] *Id.*

[62] *Id.* § 7.6(c).

[63] *Id.* § 7.6(j).

[64] *Id.* § 7.6(l).

court does not have subject matter jurisdiction thereof, any other court located in the State of Delaware with subject matter jurisdiction."[65]

4. The Services Agreements

The First Services Agreement, later amended in 2022, became effective June 1, 2017, and identifies four contracting entities: Bradley Capital Company, L.L.C. ("Bradley Capital"), BCG, BCH, and Beneficient Management Counselors, L.L.C.[66] Effective June 6, 2023, the Second Services Agreement replaced the First Services Agreement and identified BEN in place of BCG.[67]

Both agreements contain substantially identical advancement provisions under Section 6.3(b), requiring the Firm under the First Services Agreement, and the Company under the Second Services Agreement, to pay or cause a Group member to pay qualifying Indemnitees' expenses, including reasonable attorneys' fees, incurred in defending and investigating civil or criminal proceedings before their final disposition.[68] Both condition advancement on an undertaking to repay those amounts if a final adjudication establishes that the Indemnitee is not entitled to

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[65] *Id.* § 15.9.

[66] *Id.* Ex. E pmbl. & recitals. Bradley Capital Company received payment for Plaintiff's executive duties.

[67] *Id.* Ex. F pmbl. & recitals.

[68] Compl. Ex. E § 6.3(b); Ex. F § 6.3(b).

indemnification.[69] Similarly, Section 6.3(c) of both agreements establishes an order of priority for potentially duplicative indemnification payments, placing primary liability on the Firm or Company, respectively, and secondary liability on applicable Group members.[70]

The agreements differ, however, in their governing-law and forum-selection provisions.[71] Section 7.3(a) of the First Services Agreement selects Delaware law, while Section 7.3(b) requires covered proceedings to be brought in the state or federal courts located in New Castle County, Delaware.[72] By contrast, Section 7.3(a) of the Second Services Agreement selects Nevada law, while Section 7.3(b) provides that the parties "submit and consent to the exclusive jurisdiction, including removal jurisdiction, of the state and federal courts located in Clark County, Nevada for any action or proceeding relating to this Agreement or the provision of the Services."[73]

E. Procedural Posture

Heppner filed a Verified Complaint for Advancement on June 5, 2026.[74] Beneficient moved for dismissal on June 19, to which Heppner responded by moving

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[69] Compl. Ex. E § 6.3(b); Ex. F § 6.3(b).

[70] Compl. Ex. E § 6.3(c); Ex. F § 6.3(c).

[71] Compl. Ex. E § 7.3(a)–(b); Ex. F § 7.3(a)–(b).

[72] Compl. Ex. E § 7.3(a)–(b).

[73] *Id.* Ex. F § 7.3(a)–(b).

[74] Compl.

for summary judgment.[75] Beneficient then cross-moved for summary judgment.[76] I held oral argument on the Motion to Dismiss and Cross Motions for Summary Judgment on September 29.[77] During oral argument, Plaintiff presented information challenging Defendants' insolvency claim. Defendants objected to this information. On October 16, Plaintiff's counsel wrote to the Court with an update.[78] There, Plaintiff responds to Beneficient's claims that paying advancement would render BCH and BCG insolvent.

Beneficient also informed the court that Quinn Emanuel sought and ultimately obtained permission to withdraw as Heppner's counsel in the DOJ litigation following a "fundamental disagreement" and an "irreconcilable conflict" concerning Heppner's sentencing.[79] Beneficient argues that this development moots the present advancement action.[80] Beneficient further contends that Heppner's request for coverage under its 2019 directors' and officers' liability insurance tower could also moot this action if the insurers provide coverage.[81] Alternatively, Beneficient

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[75] D.I. 11, 18.

[76] D.I. 23.

[77] *See* D.I. 38.

[78] D.I. 39.

[79] D.I. 40 p. 2.

[80] *Id.* p. 3.

[81] D.I. 40 p. 3.

requests that the Court stay this action pending the insurers' coverage determination.[82]

On October 20, 2026, the Eighth Judicial District Court of Clark County, Nevada heard oral argument on Heppner's and Bradley Capital Company, LLC's motion to dismiss Beneficient's First Amended Complaint.[83] Heppner argued that the claims concerning BCG and BCH belonged in Delaware because separate agreements containing Delaware forum-selection clauses governed those entities.[84] He maintained that the Second Services Agreement neither superseded those agreements nor extinguished the subsidiaries' independent advancement obligations.[85] As to the claims concerning Beneficient, Heppner argued that his advancement rights accrued when the underlying conduct occurred, before Beneficient converted to a Nevada corporation, and that the conversion did not eliminate his right to pursue those claims in Delaware.[86]

Beneficient contended that its current governing documents designate Nevada as the proper forum and that the Second Services Agreement required Heppner to

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[82] *Id.*

[83] D.I. 41.

[84] NV Tr. 7:18–8:16.

[85] *Id.* 9:16–11:20.

[86] *Id.* 14:10–17:13.

pursue advancement from the parent company before seeking payment from its subsidiaries.[87] The court largely denied the motion to dismiss, concluding that the Nevada forum-selection provisions supported jurisdiction over the claims concerning Beneficient and BCH.[88] At the same time, the court granted the motion to dismiss Count III, concerning BCG, in light of BCG's forum-selection provision.[89]

II. ANALYSIS

A. The Motion to Dismiss

There are four potential sources of advancement: the BEN LP Agreement[90] and BEN Bylaws[91]; the BCH LP Agreement[92]; the BCG LLC Agreement[93]; and the Services Agreements.[94] The parties disagree about the applicable forum provisions between the BEN LP Agreement and the BEN Bylaws, and the First and Second Services Agreements. I first address Defendants' Motion to Stay or Dismiss Plaintiff's Complaint. Defendants contend that forum-selection provisions in the

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[87] *Id.* 20:20–21:16, 20:20–26:19.

[88] *Id.* 33:19–35:10.

[89] *Id.* 35:11–22.

[90] Compl. Ex. C.

[91] *Id.* Ex. D.

[92] *Id.* Ex. A.

[93] *Id.* Ex. B.

[94] *Id.* Exs. E, F.

BEN Charter[95] and the Second Services Agreement[96] apply and make Nevada the appropriate forum. Plaintiff argues that Delaware was preserved as the forum in the BEN LP Agreement[97] and First Services Agreement.[98]

"The proper procedural rubric for addressing a motion to dismiss based on a forum-selection clause is found under Rule 12(b)(3), improper venue. Although Delaware courts have, in the past, framed a forum-selection clause analysis as jurisdictional in some sense, recent cases have all proceeded under Rule 12(b)(3)." *In re Bay Hills Emerging P'rs I, L.P.*, 2018 WL 3217650, at *4 (Del. Ch. July 2, 2018) (quoting *Bonanno v. VTB Hldgs., Inc.*, 2016 WL 614412, at *5 (Del. Ch. Feb. 8, 2016)). The Court applies an approach similar to Rule 12(b)(6) when considering a motion to dismiss for improper venue under Rule 12(b)(3). *Simon v. Navellier Series Fund*, 2000 WL 1597890, at *5 (Del. Ch. Oct. 19, 2000). However, "the court is not shackled to the plaintiff's complaint and is permitted to consider extrinsic evidence from the outset." *Bay Hills*, 2018 WL 3217650, at *2 (quoting *Troy Corp. v. Schoon*, 2007 WL 949441, at *2 (Del. Ch. Mar. 26, 2007)). The standard for a Rule 12(b)(6) motion is familiar to the parties:

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[95] MTD OB Ex. 6.

[96] Compl. Ex. F.

[97] *Id.* Ex. C.

[98] *Id.* Ex. E.

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and [(iv)] dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."

Savor, Inc. v. FMR Corp., 812 A.2d 894, 896–97 (Del. 2002) (citation modified).

The reasonable conceivability standard grants a plaintiff all "reasonable inferences that logically flow from the face of the complaint" but does not obligate the Court "to accept every strained interpretation of [plaintiff's allegations]." *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)). The Court will "ignore conclusory allegations that lack specific supporting factual allegations." *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

B. Nevada Is the Proper Forum Under the BEN Bylaws, BEN Charter, and BEN LP Agreement.

The BEN LP Agreement's forum-selection provision required that proceedings arising out of the Agreement be brought in the Delaware Court of Chancery, or if the Court of Chancery lacked subject matter jurisdiction, another Delaware court having subject matter jurisdiction.[99] When BEN converted from a Delaware limited partnership to a Nevada corporation, it filed a Certificate of

[99] Compl. Ex. C § 16.9.

Conversion.[100] This provision permitted service of process in Delaware for suits arising from obligations BEN LP incurred while organized as a Delaware limited partnership.[101] As a Nevada corporation, BEN has a charter that provides forum selection in the Eighth Judicial District Court of Clark County, Nevada, for actions, suits, or proceedings brought to interpret, apply, enforce, or determine the validity of the charter's articles or BEN Bylaws.[102] BEN's Bylaws provided for indemnification and advancement.[103]

Plaintiff contends that since the underlying conduct arose pre-conversion, the BEN LP Agreement forum-selection provisions apply. In support, he points to 6 *Del. C.* § 17-219(g):

> The conversion of a limited partnership out of the State of Delaware in accordance with this section and the resulting cessation of its existence as a limited partnership of the State of Delaware pursuant to a certificate of conversion to non-Delaware entity shall not be deemed to affect any obligations or liabilities of the limited partnership incurred prior to such conversion or the personal liability of any person incurred prior to such conversion, nor shall it be deemed to affect the choice of law applicable to the limited partnership with respect to matters arising prior to such conversion.

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[100] *Id.* Ex. I.

[101] *Id.*

[102] MTD OB Ex. 6.

[103] Compl. Ex. D § 8.1(a)(i)–(iv).

Plaintiff also points to this Court's ruling in *Bernstein v. TractManager*, where the Court held that "the right to indemnification or advancement for claims that arose during the life of the LLC continues to be governed by the terms of the old operating agreement." 953 A.2d 1003, 1005 (Del. Ch. 2007).

Defendants argue that Plaintiff has no vested forum right and that the BEN Charter and Bylaws governing at the time his advancement rights arose determine the appropriate forum. *See Sylebra Cap. P'rs Master Fund, Ltd. v. Perelman*, 2020 WL 5989473, at *10 (Del. Ch. Oct. 9, 2020) (stating that forum-selection bylaws, like other forum-selection clauses, are presumed valid and enforceable); *City of Providence v. First Citizens BancShares, Inc*., 99 A.3d 229, 241 (Del. Ch. 2014) (providing that forum-selection bylaws regulate where a suit may be filed, not whether a party may file suit or what type of remedy the party may receive).

Plaintiff's cited authority is inapposite. Under 6 *Del. C.* § 17-219, conversion does not affect the obligations or liabilities of the transitioning limited partnership. So too here. Indemnification and advancement obligations found under the BEN LP Agreement are preserved. The company still has an obligation to provide indemnification and advancement as before. But forum selection is not an obligation. As this Court held in *City of Providence*, forum-selection clauses regulate the location of the action, not viability or remedies. *City of Providence*, 99 A.3d at 241. And the Plaintiff has no vested right to a particular forum. The

conversion from Delaware LP to Nevada corporation also brought with it an amendment to the forum-selection clause. "[T]his Court has held that where a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment." *Kidsco v. Dinsmore*, 674 A.2d 483, 492 (Del. Ch. 1995) (citing *Roven v. Cotter*, 547 A.2d 603, 608 (Del. Ch. 1988)). Plaintiff knew that the forum could change. Indeed, not only was Plaintiff aware, but he signed the Certificate of Conversion and is listed on BEN's charter.[104]

Plaintiff argues that the Certificate of Conversion makes Delaware the forum for suits against the former BEN because, in compliance with 6 *Del. C.* § 17-219(e)(6), it allows service of process on the former BEN in Delaware and names the Secretary of State as its agent to accept service. The Plaintiff conflates service of process with forum selection and offers no authority to suggest that service of process affects forum selection. The service of process requirement does not mandate that Delaware is the required forum for litigation. The certificate of conversion's service of process requirement ensures that the LP remains amenable to suit in Delaware for pre-conversion acts. While this presumes that Delaware is the forum, it does not guarantee that it will remain so. Parties may choose a different

[104] Compl. Ex. I; MTD OB Ex. 6.

forum. "Delaware courts afford a great deal of respect to a plaintiff's choice of forum, and this respect should be even more stalwart where both parties have agreed in advance to a forum by contractual provision." *Aveta v. Colon*, 942 A.2d 603, 607 (Del. Ch. 2008) (footnote and citations omitted). "To escape the reach of a forum selection clause on grounds that it is unreasonable or unjust, the avoiding party 'bears a heavy burden to demonstrate that enforcement here would place it at an unfair disadvantage or otherwise deny it its day in court.'" *Mack v. Rev. Worldwide, Inc.*, 2020 WL 7774604, at *6 (Del. Ch. Dec. 30, 2020) (quoting *Sylebra Cap. P'rs Master Fund Ltd. v. Perelman,* 2020 WL 5989473, at *11 (Del. Ch. Oct. 9, 2020)). Plaintiff has made no argument that it is unreasonable or unjust here. The forum-selection clause is valid, and Nevada is the chosen forum.

C. Nevada Is the Proper Forum Under the First and Second Services Agreements.

BEN executed the First Services Agreement with Bradley Capital on June 1, 2017.[105] The First Services Agreement provides indemnification and advancement rights for Plaintiff.[106] It also contains choice of law and forum-selection

[105] Compl. Ex. E.

[106] *Id.* § 6.3.

provisions.[107] The First Services Agreement selected Delaware law and designated Delaware as the forum.[108]

BEN executed the Second Services Agreement with Bradley Capital on June 6, 2023, in conjunction with BEN's conversion to a Nevada corporation.[109] The indemnification and advancement provisions of the Second Services Agreement are substantially similar to the First Services Agreement. The Second Services Agreement also contained choice of law and forum-selection clauses in section 7.3.[110] The Second Services Agreement selects Nevada law to govern within the forum of Clark County, Nevada.[111]

As with the Bylaws argument, Defendants contend that the Court should dismiss the advancement request under the Second Services Agreement because it designates Nevada as the forum for an action, not Delaware.[112] Defendants argue that this was the operative agreement in place when Plaintiff made the advancement claim.[113]

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[107] *Id.* § 7.3.

[108] *Id.* § 7.3(a)–(b).

[109] *Id.* Ex. F.

[110] *Id.*

[111] *Id.* § 7.3(a)–(b).

[112] *Id.* § 7.3.

[113] MTD RB p. 4.

Plaintiff argues that his rights to advancement vested when the alleged conduct took place, and that this was pre-conversion. In support, he cites DGCL Section 145 where advancement "shall not be eliminated or impaired by an amendment to . . . the certificate of incorporation or the bylaws after the occurrence of the act or omission that is the subject of the . . . action, suit or proceeding for which . . . advancement of expenses is sought."[114] But this argument ignores the fact that we are not dealing with a Delaware corporation. BEN was a Delaware limited partnership. It is now a Nevada corporation. Section 145 is inapplicable. Even if Section 145 applied, it would not aid Plaintiff here. The right to advancement is not eliminated or impaired. Indeed, the Second Services Agreement expressly preserves the rights and obligations. Plaintiff again conflates his right to advancement with his right to a forum. To be certain, even though Plaintiff's conduct that underlies the advancement may have taken place pre-conversion, his rights to advancement for that period are preserved in the Second Services Agreement (and similarly, in the BEN Bylaws). But, as discussed previously, forum selection is not a vested right.

Plaintiff cites this Court's ruling in *Household Int'l, Inc. v. Eljer Indus., Inc.* to support his suggestion that forum selection is a legal right. 1994 WL 469169, at *4 (Del. Ch. Aug. 12, 1994) ("Such a substantive legal right might be created, for

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[114] 8 *Del. C.* § 145(f).

example, by a contract provision designating a particular forum as the exclusive forum for resolution of disputes arising under the contract."). But *Household* was not a case involving a forum-selection clause. *Id.* at *1 ("In addressing this question I note preliminarily that plaintiff alleges no contract right to litigate the Superior Court case exclusively in this jurisdiction."). *Household* makes this distinction clear: "[C]ases in which parties agree as part of a negotiated contract to resolve disputes arising under the contract in a designated jurisdiction or tribunal would present a materially different issue than does this motion." *Id.*

But the operative rule that Plaintiff cites is what is before the Court now: the forum selection in the Second Services Agreement does give the parties a contract right to an action in Nevada *vis-à-vis* another jurisdiction. The difference is that the right is not vested. When the Second Services Agreement became the operative agreement, the contract right to a forum changed from Delaware to Nevada. So, while Plaintiff's right to advancement and indemnification is preserved for pre-conversion conduct, the forum is not a vested right and changed when the Second Services Agreement was enacted. Nevada is the proper forum for both the BEN Bylaws (superseding the BEN LP Agreement) and the Second Services Agreement (superseding the First Services Agreement). The Motion to Dismiss Counts III, IV, V, VIII, and IX is granted.

D. Delaware Is the Proper Forum Under the BCG LLC Agreement and BCH LP Agreement.

1. The Duplicative Indemnity Obligations Clause Does Not Change Plaintiff's Entitlement to Advancement.

The Second Services Agreement contains a section entitled "Duplicative Indemnity Obligations."[115] It reads:

> Duplicative Indemnity Obligations. Solely for purposes of clarification, and without expanding the scope of indemnification pursuant to this Section 6.3, the Parties intend that, to the maximum extent permitted by applicable law, as between the Company and its affiliates, this Section 6.3 shall be interpreted to reflect an ordering of liability for potentially overlapping or duplicative indemnification payments, with the Company having primary liability, and any member of the Group, as applicable, having only secondary liability. The possibility that an Indemnitee may, receive indemnification payments from an Entity or any Subsidiary of the Company shall not restrict the Company from making payments under this Section 6.3 to an Indemnitee that is otherwise eligible for such payments, but such payments by the Company are not intended to relieve an Entity or any Subsidiary of the Company from any liability that it would otherwise have to make indemnification payments to such Indemnitee and, if an Indemnitee that has received indemnification payments from the Company actually receives duplicative indemnification payments from an Entity or any Subsidiary of the Company, such Indemnitee shall repay the Company to the extent of such duplicative payments. If, notwithstanding the intention of this Section 6.3(c), an Entity's or any Subsidiary of the Company's obligation to make indemnification payments to an Indemnitee is relieved or reduced under applicable law as a result of payments made by the Company pursuant to this Section 6.3, the Company shall have, to the maximum extent permitted by law, a right of subrogation against (or contribution from) such Entity or any Subsidiary of the Company for amounts paid by the Company to an Indemnitee that relieved or reduced the obligation of such Entity or any Subsidiary of the Company to such Indemnitee. Each Indemnitee agrees to execute all papers required and take all action necessary to secure such rights, including execution of such documents as are

[115] Compl. Ex. F § 6.3(c).

> necessary to enable the Company to bring suit to enforce any such rights in accordance with the terms of such relevant document. The Company shall pay or reimburse all expenses actually and reasonably incurred by the Indemnitee in connection with such subrogation subject to Section 6.3(b).[116]

Defendants argue that this section is an "ordering provision" and that "any alleged advancement obligations of BCH or BCG are . . . subordinated to those of [post-conversion] Beneficient."[117] Plaintiff argues that the Duplicative Indemnity Obligations section "does not operate as a jurisdictional prerequisite to suit against BCG and BCH."[118] Defendants clarify that the section is not a jurisdictional bar to the action nor does it relieve BCG and BCH of their obligations.[119] Defendants instead argue that the BCG and BCH claims should be stayed because they are only secondarily liable under the section.

Plaintiff argues that Section 6.3(c) is intended to prevent double recovery and overlapping payments from multiple Beneficient entities.[120] He notes that this section provides a right of subrogation to BEN that would be rendered meaningless

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[116] *Id.*

[117] MTD OB p. 10.

[118] MTD AB p. 20.

[119] MTD RB p. 9.

[120] MSJ POB pp. 31–32.

if the parties intended the section to relieve BCG and BCH of their obligations entirely.[121]

Defendants read too much into the section. The section does not apply to advancement. Section 6.3 subsection (a) is entitled "Indemnification."[122] Subsection (b) is entitled "Advancement" and uses both "indemnification" and "advancement" in the subsection.[123] Subsection (c) references section 6.3 but only discusses indemnification payments.[124] "The use of different language in sections of a contract indicates that the distinction is intentional." *Soleimani v. Hakkak*, 2024 WL 1593923, at *6 (Del. Ch. Apr. 12, 2024) (citing *Williams Cos., Inc. v. Energy Transfer LP*, 2020 WL 3581095, at *12 n.123 (Del. Ch. July 2, 2020)). Therefore, the drafters intended to give distinct meaning to indemnification and advancement. The absence of "advancement" in Section 6.3(a) and (c) means that the duplicative indemnification section was to apply only to indemnification payments, not advancement.

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[121] MSJ POB p. 33.

[122] Compl. Ex. F § 6.3(a).

[123] *Id.* § 6.3(b).

[124] *Id.* § 6.3(c).

Even if the section applied to advancement, it does not support Defendants. Section 6.3(c) begins with the disclaimer: "Solely for purposes of clarification."[125] Rather than creating additional rights for either side, the provision merely clarifies the order of liability, stating that "this section 6.3 shall be interpreted to reflect an ordering of liability for potentially overlapping or duplicative indemnification payments, with the Company having primary liability, and any member of the Group, as applicable, having only secondary liability."[126] If the clause ended after "ordering of liability," then Defendants' argument may have merit. But it clarifies that it relates to overlapping or duplicative payments, not obligations.

The subsection even contemplates what will take place if duplicate payments are made: "If an Indemnitee that has received indemnification payments from the Company actually receives duplicative indemnification payments from an Entity or any Subsidiary of the Company, such Indemnitee shall repay the Company to the extent of such duplicative payments."[127] The section acknowledges that payment may come from different sources simultaneously. It specifically does not relieve "an Entity or any Subsidiary of the Company from any liability."[128] The purpose is

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

to prevent duplicate payments from entities with overlapping obligations, not to forestall distinct advancement payments.

Finally, both the BCG LLC Agreement and BCH LP Agreement contain non-exclusivity provisions. The BCG LLC Agreement states:

> The indemnification provided by this Section 7.6 shall be in addition to any other rights to which an Indemnitee may be entitled under any agreement, insurance, pursuant to any vote of the holders of Outstanding Membership Interests entitled to vote on such matter, as a matter of law, in equity or otherwise.[129]

Likewise, the BCH LP Agreement provides that "the rights of indemnification provided in this Section 10.02 shall neither be exclusive of, nor be deemed in limitation of, any rights to which any person may otherwise be or become entitled or permitted by contract, this Agreement or as a matter of law."[130] As defined, both BCG and BCH independently allocate advancement. Therefore, each source of advancement is concurrent and not limited by the others. Defendants contend that I should stay the BCG and BCH advancement claims pending the resolution of the Nevada action.[131] But that does not comport with public policy in favor of advancement and would defeat the purpose. "This Court has long recognized that a delay in recognizing advancement rights may ultimately render those rights

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[129] *Id.* Ex. B § 7.6(c).

[130] *Id.* Ex. A § 10.02(e).

[131] MTD OB p. 28.

illusory." *Perryman v. Stimwave Techs. Inc.*, 2020 WL 2465720, at *4 (Del. Ch. May 13, 2020). The Duplicative Indemnity Clause does not change Plaintiff's right to advancement from each source. It only affects the ultimate payment if entitlement is determined.

2. The BCG and BCH Obligations Are Not Affected by the Nevada Court's Ruling on a Motion to Dismiss.

The Nevada Court denied Heppner's Motion to Dismiss related to the BEN Bylaws and the Second Services Agreement.[132] The court reserved its decision on the BCG claim pending further consideration of whether to dismiss or stay that claim.[133] It denied the Motion to Dismiss related to BCH, stating:

> [T]he Court denies the Count — the Motion to Dismiss as to Count IV. There is, in my — I was going to say my opinion, but my ruling, I guess, it is significant that BCH is a party to the Second Services Agreement, which has, you know, 7.3, in particular B here, the submission to jurisdiction clause. So, the Court denies the Motion as to BCH in Count IV.[134]

The Nevada court did not provide additional details. A closer look at the Second Services Agreement shows that BCH was a party, but not for the purposes of the indemnification or advancement here. The Preamble to the Second Services

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[132] NV Tr. 34:9–10.

[133] *Id.* 35:11–22.

[134] *Id.* 35:2–10. The Nevada court issued an Order consistent with the oral ruling, including granting the Motion Dismiss related to BCG and denying it for BCH. D.I. 48, Ex. A.

Agreement sets forth the parties. It is between Bradley Capital ("Provider") and post-conversion BEN ("Company"), along with other entities including BCH.[135] Section 6.3(a)(i) provides that:

> Subject to the limitations set forth in this Section 6.3, each Indemnitee shall be indemnified to the fullest extent permitted by law by the Company against any losses, claims, damages, liabilities, and expenses (including reasonable attorneys' fees, judgments, fines, penalties and amounts paid in settlement).[136]

The Second Services Agreement requires BEN to compensate an indemnitee. This is made clearer by the next subsection:

> (ii) BCH shall indemnify and hold harmless Provider from and against any and all losses, damages, liabilities, judgments, awards, penalties, interest, fines, costs and fees or any other expenses of whatever kind, including reasonable attorneys' fees, incurred by Provider, as a result of any third-party claim, demand, suit, action, investigation, allegation or any other proceeding made in connection with, or otherwise related to, directly or indirectly, any (A) air travel expenses incurred by BCH prior to the Effective Date in connection with the operation of the Dassault Aviation model Falcon 2000 aircraft with manufacturer's serial number 188 and United States Federal Aviation Administration nationality and registration markings N317M, including all attached or related engines, avionics, equipment, accessories, and records (collectively, the "Aircraft"), or (B) enforcement action, audit, or regulatory action by any governmental body relating to BCH's use of the Aircraft prior to the Effective Date.[137]

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[135] Compl. Ex. F pmbl.

[136] *Id.* § 6.3(a)(i).

[137] Compl. Ex. F § 6.3(a)(ii).

BCH is a party to the services agreement but only to indemnify Heppner (through Bradley Capital) for expenses incurred as a result of a third-party claim related to air travel expenses or an enforcement action related to BCH's use of an aircraft. BCH was a party to the agreement for a limited purpose, and that purpose was not related to this advancement matter. Thus, it does not change the forum related to the advancement claim against BCH. Nor does the "ordering provision" confer forum on Nevada for the BCH advancement obligations. As previously explained, the ordering provision applies to indemnification, not advancement. Further, it does not change the forum of the underlying advancement in the BCH LP Agreement.

E. The Solvency Conditions in the BCG and BCH Agreements Are Not Litigated at the Entitlement Stage.

Both the BCG LLC Agreement and BCH LP Agreement contain clauses that condition satisfaction of advancement or indemnification on the solvency of the entity. The BCG LLC Agreement provides:

> Notwithstanding anything to the contrary set forth in this Section 7.6, any indemnification or advancement obligation of the Company under this Agreement shall only be satisfied to the extent that the Company will remain solvent, as determined by the Managing Member, after payment of such obligations, and thereafter any such obligation shall terminate.[138]

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[138] Compl. Ex. B § 7.6(l).

Similarly, the BCH LP Agreement specifies:

> Notwithstanding anything to the contrary set forth in this Section 10.02, any indemnification or advancement obligation of the Partnership under this Agreement shall only be satisfied to the extent that the Partnership will remain solvent, as determined by the General Partner in its reasonable discretion, after payment of such obligations, and thereafter any such obligation shall terminate.[139]

Plaintiff argues that the solvency issue is to be determined at the indemnification stage.[140] But that approach could eliminate the purpose of the insolvency provision altogether. Under that rubric, if entitlement were determined, the Defendants would have to provide advancement, potentially rendering BCG and BCH insolvent before the clauses could be considered.

But that does not mean that Defendants prevail. The two insolvency clauses are substantially the same. Each provides, "any indemnification or advancement obligation . . . shall only be satisfied to the extent that the [entity] will remain solvent."[141] "Delaware adheres to the "objective" theory of contracts—a contract's construction should be that which would be understood by an objective, reasonable third party. Clear and unambiguous language should be given its ordinary and usual

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[139] *Id.* Ex. A § 10.02(f).

[140] MTD AB p. 34 ("Indeed, Delaware courts have consistently held that defenses like insolvency are not properly litigated in an advancement proceeding at all – and must instead be litigated at the indemnification stage.").

[141] Compl. Ex. A § 10.02(f); Ex. B § 7.6(l).

meaning." *Sterling Prop. Hldgs. Inc. v. New Castle County*, 2013 WL 1821594, at *6 (Del. Ch. Jan. 28, 2013) (citations omitted). While the Court will look to enforce agreements in light of the drafters' intent, it considers "objective acts (words, acts and context)" the best evidence of that intent. *Id.* at *6 (quoting *MBIA Ins. Corp. v. Royal Indem. Co.*, 426 F.3d 204, 210 (3d Cir. 2005)).

This does not extinguish advancement at the entitlement stage. The clear, unambiguous language distinguishes between the obligation, which concerns entitlement to advancement, and the satisfaction of that obligation, which requires payment. Indeed, the clauses say the obligation will only be "satisfied" to the extent that the entity will be solvent. Implicit in this is that the Court first determine entitlement (an obligation) before the parties can turn to satisfaction. The "to the extent" language creates the potential for partial payment of advancement expenses.[142] If the Court determines that Plaintiff has a right to advancement and that BCG and BCH owe an obligation, the parties will proceed to the *Fitracks* process. *Danenberg v. Fitracks, Inc.*, 58 A.3d 991 (Del. Ch. 2012). It is there that the Court would determine the parties' dispute over solvency. Based on the foregoing, the Defendants' Motion to Dismiss Counts I, II, VI, and VII is DENIED.

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[142] The two clauses differ in one respect. While both leave the determination of solvency to a manager, the BCH LP Agreement includes the phrase "in its reasonable discretion" regarding that manager's decision.

F. *McWane* Is Inapplicable.

The Defendants argue that the McWane doctrine governs Heppner's claims. *McWane Cast Iron Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970). I have found that the claims under the BEN documents and the Services Agreements are properly heard in Nevada under forum-selection clauses. Both the BCH LP Agreement and the BCG LLC Agreement contain forum-selection clauses establishing Delaware as the proper forum. "Forum-selection clauses are presumptively valid in Delaware and [Ingres Corp. v. CA, Inc.] holds that such a clause displaces the traditional default presumptions under McWane." *ASDC Hldgs., LLC v. The Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*, 2011 WL 4552508, at *6 (Del. Ch. Sept. 14, 2011). Therefore, the forum-selection clauses control and Delaware is the appropriate forum under both the BCH and BCG documents.

G. The Motions for Summary Judgment

Under Court of Chancery Rule 56(h), "[w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." Here, the parties have cross-moved for summary judgment, and neither has argued that there is any issue of material fact

that would prevent the Court from deciding the motions as a matter of law based on the record the parties submitted. "Accordingly, the Court will decide the parties' cross-motions as a matter of law based on that record." *Camden-Wyoming Sewer & Water Auth. v. Town of Camden*, 2017 WL 4119045, at *4 (Del. Ch. Sep. 18, 2017).

1. Plaintiff's Conduct Was "By Reason Of" Plaintiff's CEO and Board Roles at BCG and BCH.[143]

Having dismissed the counts arising under the BEN LP Agreement, BEN Bylaws, and the Services Agreements on forum selection grounds, I turn to the parties' arguments regarding BCG and BCH on Cross-Motions for Summary Judgment. Plaintiff claims to be an indemnitee under BCG's LLC Agreement as an officer or director of the Managing Member.[144] He was to be indemnified in claims, demands, actions, suits, or proceedings where he is involved, "by reason of its status as an Indemnitee whether arising from acts or omissions to act occurring on, before or after the date of this Agreement."[145]

He asserts he is an indemnitee under the BCH LP Agreement as an officer or director of the General Partner.[146] Plaintiff is to be indemnified for actions, suits, or

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[143] Defendants made the same argument in their Motion to Dismiss. MTD OB p. 30. However, Defendants focus their argument on the BEN Bylaws and the Services Agreements. I have dismissed those Counts for other reasons.

[144] Compl. Ex. B § 1.1(e).

[145] *Id.* § 7.6(a).

[146] *Id.* Ex. A § 1.01(g).

proceedings brought "by reason of his or her or its status as an Indemnitee or by reason of any action alleged to have been taken or omitted to be taken by Indemnitee in such capacity."[147]

A primary point of dispute between the parties is whether Plaintiff was acting by reason of his role at the Beneficient entities when he committed the underlying conduct. Defendants contend that Plaintiff was acting in roles at GWG and HCLP separate from his roles and corporate powers at the Beneficient entities in connection with the conduct charged in the indictment.[148] I look to the underlying pleadings to make that determination. *Marino v. Patriot Rail Co.*, 131 A.3d 325, 346 (Del. Ch. 2016) ("The scope of an individual's advancement rights normally turns on the pleadings in the underlying litigation that trigger the advancement right.").

The underlying Indictment reflects that Heppner's roles at the Beneficient entities were integral to the alleged criminal conduct.[149] The following excerpts from the Indictment connect Plaintiff in his roles at the Beneficient entities to the underlying alleged criminality. Each reflects that Heppner, by reason of his unique position and status at the Beneficient entities, engaged in the alleged criminal conduct:

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[147] *Id.* § 10.02(a).

[148] MSJ DOB p. 3.

[149] MSJ POB, Fletcher Aff. Ex. 4 ("Ind.").

- "In order to obtain a payout for himself, BRADLEY HEPPNER, the defendant, created a $141 million debt owed to HCLP from his private company, Beneficient." . . . "HEPPNER then made false and misleading statements to a special committee of GWG's board of directors to induce them to authorize investments by GWG in Beneficient, so Beneficient could make payments on the debt purportedly owed to HCLP."[150]
- "Heppner… directed Beneficient employees to send these false and misleading materials to the auditor."[151]
- "Heppner falsified the minutes from an October 2019 Beneficient Board meeting."... "Heppner later caused the falsified Board minutes to be sent to the SEC."[152]
- "...Heppner engaged in a scheme to defraud GWG into transferring funds to Beneficient…"[153]
- "In or about 2019, in the Southern District of New York and elsewhere, BRADLEY HEPPNER, the defendant, willfully and knowingly, being a

[150] Ind. ¶ 2.
[151] *Id.* ¶ 20.
[152] *Id.* ¶ 22.
[153] *Id.* ¶ 24.

director and an officer of an issuer under the Securities and Exchange Act of 1934…"[154]

"[I]f there is a nexus or causal connection between any of the underlying proceedings . . . and one's official corporate capacity, those proceedings are 'by reason of the fact' that one was a corporate officer, without regard to one's motivation for engaging in that conduct." *Homestore v. Taffeen*, 888 A.2d 205, 214 (Del. 2005) (citing *Perconti v. Thornton Oil Corp.*, 2002 WL 982419, at *3–5 (Del. Ch. May 3, 2002)). A nexus or causal connection "is established if the corporate powers were used or necessary for the commission of the alleged misconduct." *Bernstein v. TractManager, Inc.*, 953 A.2d 1003, 1011 (Del. Ch. 2007) (citing *Brown v. LiveOps, Inc.*, 903 A.2d 324, 329 (Del. Ch. 2006)). Plaintiff's conduct was by reason of the fact of his roles at the Beneficient entities.

There is a nexus between Plaintiff's exercise of his corporate powers at the Beneficient entities and the underlying charges. In short, Plaintiff used his position with the Beneficient entities and the corporate powers associated with them to accomplish his alleged criminal acts. He convinced GWG's special committee to invest in Beneficient to give himself access to the funds in his Beneficient role. He directed Beneficient employees to assist his fraudulent activity. He falsified

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[154] *Id.* ¶ 33.

Beneficient Board minutes. He was identified in his role as a director and officer of an issuer under the Securities and Exchange Act. Plaintiff lied to an auditor hired by Beneficient in order to hide his control over HCLP and Beneficient-associated trusts.[155]

The BCG LLC Agreement contains no carveout that might except Defendants from payment due to Plaintiff's conduct. The BCG LLC Agreement provides:

> [T]hat the Indemnitee shall not be indemnified and held harmless if there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that in respect of the matter for which the Indemnitee is seeking indemnification pursuant to this Section 7.6, the Indemnitee acted or omitted from acting in bad faith or engaged in fraud or willful misconduct or, in the case of a criminal matter, acted with knowledge that the Indemnitee's conduct was unlawful.[156]

Plaintiff is awaiting sentencing in the underlying matter, so no court has entered a final, nonappealable judgment. The BCH LP Agreement contains a clause like the BCG LLC Agreement:

> [P]rovided that such Indemnitee shall not be entitled to indemnification hereunder if there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that, in respect of the matter for which the Indemnitee is seeking indemnification pursuant to this Section 10.02, the Indemnitee acted in bad faith or engaged in fraud or willful misconduct or, in the case of a criminal matter, acted with knowledge that the Indemnitees' conduct was unlawful.[157]

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[155] *Id.* ¶ 17.

[156] Compl. Ex. B § 7.6.

[157] *Id.* Ex. A § 10.02(a).

Again, there has not been a final, non-appealable judgment that would trigger this section.

2. Insolvency Will Be Addressed at the *Fitracks* Stage.

Having found entitlement to advancement from BCG and BCH, I must consider how to deal with the insolvency provisions. The issue appears to be one of first impression. Typically, once entitlement is found, it would not be considered again in the *Fitracks* process. Yet the language of the insolvency clauses parses obligation (entitlement) from satisfaction (payment). Thus, having found entitlement, we will move forward to the *Fitracks* process. But in this case the insolvency clauses still provide a trap door at the *Fitracks* stage where the obligation could be terminated. Both clauses provide for termination of the obligation if the required payment would render the entity insolvent.[158] The clauses' "to the extent" language leaves open the possibility of partial payment. The procedure comports with the contractual language of the Agreements. The Court will determine entitlement separately from payment while addressing solvency before requiring BCG or BCH to satisfy their advancement obligations. Under the circumstances, the most appropriate place for that determination is in the *Fitracks* procedure.

H. Conflict of Interest

[158] Compl. Ex. B § 7.6(l); Ex. A § 10.02(f).

Defendants allege that Plaintiff's Delaware Counsel has a conflict of interest because attorneys from the same firm withdrew from the underlying matter, citing a "fundamental disagreement" and an "irreconcilable conflict" concerning Heppner's sentencing.[159] I wrote to the parties on October 26 and asked Defendants for their position regarding how this matter was substantially related to the criminal matter and how Plaintiff's interests were adverse.[160] I also asked Plaintiff's counsel whether the conflict of interest in the criminal matter created an imputed conflict of interest here.[161]

Defendants contend that this advancement matter and the criminal appeal are "inextricably intertwined" because this matter sought the legal fees for the criminal matter.[162] For his part, Plaintiff's counsel informed the Court that his firm sought to withdraw in the criminal matter "due to disagreements about sentencing."[163] Quinn Emanuel's attached Motion to Withdraw in the criminal matter indicates that they moved to withdraw because of "a fundamental disagreement relating to (i) Mr. Heppner's sentencing submission and (ii) his sentencing more generally."[164] The

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[159] D.I. 40 p. 2. Defendants have not filed a motion seeking removal of Plaintiff's counsel.
[160] D.I. 42.
[161] D.I. 42.
[162] D.I. 45.
[163] D.I. 43.
[164] *Id.* Ex. A p. 1.

Motion went on to state, "Mr. Heppner informed Quinn Emanuel that he is not comfortable proceeding with Quinn Emanuel as his counsel in light of the breakdown of the relationship and disagreements about sentencing strategy."[165]

Based on the foregoing, I do not find evidence of a conflict of interest in this matter. The most relevant *Delaware Lawyers' Rules of Professional Conduct* (the "DLRPC") are Rules 1.7, 1.9, and 1.10. But Rule 1.7 contemplates a conflict of interest between concurrently represented clients, not the same client in different matters. I do not find it applicable under these circumstances. Rule 1.9 prohibits representation of a person in a matter substantially related to that of a prior client where the person's interests are materially adverse to those of the prior client. Again, the Rule addresses conflicts between different clients. Rule 1.10 addresses an imputed conflict of interest across one law firm. That too requires a prohibition under Rules 1.7 or 1.9.

I disagree with Defendants that this advancement proceeding and the criminal sentencing are so inextricably intertwined as to create a conflict. While they are connected, a criminal sentencing and advancement for legal fees could not be more different. Heppner could reasonably disagree with his counsel's approach to sentencing in his criminal proceeding while remaining satisfied with that same

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[165] *Id.* p. 6.

counsel's representation in this advancement proceeding. It is clear the concerns that led to Quinn Emanuel's withdrawal before sentencing were cabined to that proceeding. This proceeding is unaffected. Defendants do not argue that Quinn Emanuel's representation prejudices the fairness of these proceedings.[166] Indeed, Plaintiff has averred that Heppner has consented in writing to Quinn Emanuel's continued representation.[167] Unless the challenged conduct would prejudice the fairness of the proceedings, a trial court does not have authority to enforce the DLRPC regarding attorney conduct. *Dollar Tree, Inc. v. Dollar Express, LLC*, 2017 WL 5624298, at *7 (Del. Ch. Nov. 21, 2017). That authority rests with our Supreme Court and the Office of Disciplinary Counsel.

I. Fees-On-Fees

Fees on fees are "an inherent right of the party materially successful in asserting a claim for indemnification or advancement." *Weaver v. ZeniMax Media, Inc.*, 2004 WL 243163, at *7 (Del. Ch. Jan. 30, 2004). If a corporation wishes to avoid the obligation to pay fees on fees, "it must *expressly* preclude any such right." *Centrella v. Avantor, Inc*., 2024 WL 3249274, at *18 (Del. Ch. July 1, 2024), *aff'd,* 341 A.3d 505 (Del. 2025). Our law is concerned with the actual success achieved,

[166] D.I. 40, 45.

[167] D.I. 43 p. 2.

not "with which theory a party prevails on when it comes to apportioning fees on fees for varying levels of success." *Id.* at *19. Plaintiff "prevailed in his request for advancement, but not on all points." *Marino*, 131 A.3d at 350. Plaintiff is entitled to fees on fees in proportion to his success in this matter. *Id.* I found that Plaintiff is entitled to advancement for counts I, II, VI, and VII. The fact that the entities related to those counts may be insolvent and ultimately may not be required to satisfy their advancement obligations does not diminish Plaintiff's entitlement and the fees on fees associated with enforcing his rights.

III. CONCLUSION

For these reasons, Counts III, IV, V, VIII, and IX are dismissed. Plaintiff's Motion for Summary Judgment is granted for Counts I, II, VI, and VII. This is a Final Report pursuant to Court of Chancery Rule 144.