

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

**LOREN MITCHELL
MAGISTRATE IN CHANCERY**

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RE: *Minnie Sarwal v. Nephrosant, Inc.*
C.A. No. 2026-0756-LM

Dear Counsel:

This letter resolves the pending cross-motions for summary judgment. The cross motions present three issues under the parties' Indemnification Agreement: (1) whether Section 12(d)'s success requirement limits Plaintiff's right under Section 8 to advancement of expenses incurred in defending claims asserted by the Company;

¹ This report was originally issued under seal and the parties were given an opportunity to request redactions within five (5) days. To date, neither party has requested redactions of the final report. Thus, this report is being reissued publicly with the same findings and recommendations.

(2) whether Plaintiff may receive advancement for work that supported both her affirmative claims and her defense of the Company's claims; and (3) the extent to which Plaintiff may recover fees incurred enforcing her advancement rights in this action.

For the reasons explained in this letter, I find that Section 12(d)'s success requirement governs only the ultimate indemnification of expenses incurred in enforcing rights under the Agreement. It does not make success in an underlying action a condition to advancement under Section 8. Plaintiff is therefore entitled to advancement of the fees and expenses she has reasonably incurred defending claims the Company asserted against her, subject to her undertaking to repay those amounts if it is ultimately determined that she is not entitled to indemnification. That includes fees for work that also advanced her affirmative claims, to the extent the work was reasonably necessary to her defense. She is not entitled to advancement of fees attributable solely to her affirmative claims.

Accordingly, Plaintiff's motion for summary judgment is granted in part. Defendant's cross-motion for summary judgment is granted only to the extent it seeks a determination that fees attributable solely to Plaintiff's affirmative claims are not advanceable and is otherwise denied. Plaintiff is entitled to fees-on-fees in proportion to her success in this action. This is my final report.

I. FACTUAL BACKGROUND

Nephrosant, Inc. (“Defendant” or the “Company”) is a Delaware corporation that was formed to develop and commercialize a non-invasive urine test known as QSant.² Dr. Minnie Sarwal (“Plaintiff”) formed the Company on March 7, 2017, and began serving on the Company’s Board of Directors (the “Board”) and as Chief Executive Officer (“CEO”).³

A. The Indemnification Agreement

Plaintiff and the Company executed an Indemnification Agreement (“the Agreement”) on October 29, 2020.⁴ The Agreement identifies Plaintiff as the “Indemnitee” and states that the Company will indemnify and advance expenses⁵

² Docket Item (“D.I.”) 1 ¶ 19; D.I. 15 at 2.

³ D.I. 1 ¶ 19; D.I. 13 at 14.

⁴ D.I. 1 ¶ 5.

⁵ See D.I. 16, Ex. 1(The Agreement defines expenses (hereinafter “Expenses”) as “all reasonable and actually incurred attorneys’ fees, retainers, court costs, transcript costs, fees and costs of experts, witness fees, travel expenses, duplicating costs, printing and binding costs, telephone charges, postage, delivery service fees, and all other disbursements or expenses of the types customarily incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigating, being or preparing to be a witness in, or otherwise participating in, a Proceeding. Expenses also include (i) Expenses incurred in connection with any appeal resulting from any Proceeding, ””, and (ii) for purposes of Section 12(d), Expenses incurred by Indemnitee in connection with the interpretation, enforcement or defense of Indemnitee’s rights under this Agreement or under any directors’ and officers’ liability insurance policies maintained by the Company... .”).

incurred by Plaintiff in any Proceeding⁶, subject to certain limitations and exclusions. Section 3 of the Agreement addresses indemnification where Plaintiff is, or is threatened to be made, a party to a Proceeding by or in the right of the Company.

Section 3 of the Agreement states:

The Company shall indemnify Indemnitee in accordance with the provisions of this Section 3 if Indemnitee is, or is threatened to be made, a party to or a participant in any Proceeding by or in the right of the Company to procure a judgment in its favor. Pursuant to this Section 3, Indemnitee shall be indemnified to the fullest extent permitted by applicable law against all Expenses actually and reasonably incurred by Indemnitee or on Indemnitee's behalf in connection with such Proceeding or any claim, issue or matter therein, if Indemnitee acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Company. No indemnification for Expenses shall be made under this Section 3 in respect of any claim, issue or matter as to which Indemnitee shall have been adjudged by a court of competent jurisdiction to be liable to the Company, unless and only to the extent that the Delaware Court of Chancery or any court in which the Proceeding was brought shall determine upon application that, despite the adjudication of liability but in view of all the

⁶ See D.I. 16, Ex. 1 at 3 (The Agreement defines 'Proceeding' broadly to include "any threatened, pending or completed action, suit, arbitration, mediation, alternate dispute resolution mechanism, investigation, inquiry, administrative hearing or proceeding, whether brought in the right of the Company or otherwise and whether of a civil, criminal, administrative or investigative nature, including any appeal therefrom... in which Indemnitee was, is or will be involved as a party, a potential party, a non-party witness or otherwise by reason of (i) the fact that Indemnitee is or was a director or officer of the Company, (ii) any action taken by Indemnitee or any action or inaction on Indemnitee's part while acting as a director or officer of the Company, or (iii) the fact that he or she is or was serving at the request of the Company as a director, trustee, general partner, managing member, officer, employee, agent or fiduciary of the Company or any other Enterprise....").

circumstances of the case, Indemnatee is fairly and reasonably entitled to indemnification for such expenses as the Delaware Court of Chancery or such other court shall deem proper.⁷

Section 8 of the Agreement addresses when the Company is obliged to make advancements to Plaintiff and states:

The Company shall advance the Expenses incurred by Indemnatee in connection with any Proceeding prior to its final disposition, and such advancement shall be made as soon as reasonably practicable, but in any event no later than 90 days, after the receipt by the Company of a written statement or statements requesting such advances from time to time (which shall include invoices received by Indemnatee in connection with such Expenses but, in the case of invoices in connection with legal services, any references to legal work performed or to expenditure made that would cause Indemnatee to waive any privilege accorded by applicable law shall not be included with the invoice). ... Indemnatee hereby undertakes to repay any advance to the extent that it is ultimately determined that Indemnatee is not entitled to be indemnified by the Company. This Section 8 shall not apply to the extent advancement is prohibited by law and shall not apply to any Proceeding (or any part of any Proceeding) for which indemnity is not permitted under this Agreement, but shall apply to any Proceeding (or any part of any Proceeding) referenced in Section 7(b) or 7(c) prior to a determination that Indemnatee is not entitled to be indemnified by the Company.⁸

The Agreement also identifies circumstances where Plaintiff is excluded from receiving indemnification and advancement. Section 7 of the Agreement states:

⁷ D.I. 16, Ex. 1 at 4.

⁸ D.I. 16, Ex. 1 at 5-6.

Notwithstanding any provision in this Agreement, the Company shall not be obligated under this Agreement to make any indemnity in connection with any Proceeding (or any part of any Proceeding): (a) for which payment has actually been made to or on behalf of Indemnitee under any statute, insurance policy, indemnity provision, vote or otherwise, except with respect to any excess beyond the amount paid; ... (d) initiated by Indemnitee, including any Proceeding (or any part of any Proceeding) initiated by Indemnitee against the Company or its directors, officers, employees, agents or other indemnitees, unless (i) the Company's board of directors authorized the Proceeding (or the relevant part of the Proceeding) prior to its initiation, (ii) the Company provides the indemnification, in its sole discretion, pursuant to the powers vested in the Company under applicable law, (iii) otherwise authorized in Section 12(d) or (iv) otherwise required by applicable law; or (e) if prohibited by applicable law.⁹

The relevant portions of Section 12 of the Agreement sets out other conditions and limitations to indemnification or advancement, and states:

- (a) Subject to Section 12(e), in the event that (i) a determination is made pursuant to Section 10 of this Agreement that Indemnitee is not entitled to indemnification under this Agreement, (ii) advancement of Expenses is not timely made pursuant to Section 8 or 12(d) of this Agreement, (iii) no determination of entitlement to indemnification shall have been made pursuant to Section 10 of this Agreement within 90 days after the later of the receipt by the Company of the request for indemnification or the final disposition of the Proceeding, (iv) payment of indemnification pursuant to this Agreement is not made (A) within ten days after a determination has been made that Indemnitee is entitled to indemnification or (B) with respect to indemnification pursuant to Sections 4, 5 and 12(d) of this Agreement, within 30 days after receipt by the Company of a

⁹ D.I. 1, Ex. A at 5.

written request therefor, or (v) the Company or any other person or entity takes or threatens to take any action to declare this Agreement void or unenforceable, or institutes any litigation or other action or proceeding designed to deny, or to recover from, Indemnatee the benefits provided or intended to be provided to Indemnatee hereunder, Indemnatee shall be entitled to an adjudication by a court of competent jurisdiction of his or her entitlement to such indemnification or advancement of Expenses....

- (b)... In the event that a determination shall have been made pursuant to Section 10 of this Agreement that Indemnatee is not entitled to indemnification, any judicial proceeding or arbitration commenced pursuant to this Section 12 shall be conducted in all respects as a de novo trial, or arbitration, on the merits, and Indemnatee shall not be prejudiced by reason of that adverse determination. In any judicial proceeding or arbitration commenced pursuant to this Section 12, the Company shall, to the fullest extent not prohibited by law, have the burden of proving Indemnatee is not entitled to indemnification or advancement of Expenses, as the case may be.
- (c) ...
- (d) To the extent not prohibited by law, the Company shall indemnify Indemnatee against all Expenses that are incurred by Indemnatee in connection with any action for indemnification or advancement of Expenses from the Company under this Agreement or under any directors' and officers' liability insurance policies maintained by the Company to the extent Indemnatee is successful in such action, and, if requested by Indemnatee, shall (as soon as reasonably practicable, but in any event no later than 90 days, after receipt by the Company of a written request therefor) advance such Expenses to Indemnatee, subject to the provisions of Section 8.
- (e) Notwithstanding anything in this Agreement to the contrary, no determination as to entitlement to indemnification shall be

required to be made prior to the final disposition of the Proceeding.¹⁰

B. The First Delaware Action

On March 11, 2022, Plaintiff resigned from her position as CEO and became the Company's Chief Scientific Advisor, pursuant to a transition agreement between the parties.¹¹ The next month, the Company's Board of Directors created a special committee to investigate issues concerning the QSant test (the "Investigation").¹² Plaintiff alleges that the Investigation produced no adverse findings or action against Plaintiff.¹³ Defendant alleges that the Investigation found that Plaintiff committed serious wrongdoing and caused significant harm to the Company.¹⁴ The investigation concluded in June 2022 and, the next month, Plaintiff resigned from her positions as Chief Scientific Advisor and as a director of the Company.¹⁵

On February 21, 2023, Plaintiff, represented by Bayard P.A., and later Potter Anderson & Corroon LLP ("PAC"), filed a claim against the Company in this Court,

¹⁰ D.I. 16, Ex. 1 at 9-10.

¹¹ D.I. 1 ¶ 19.

¹² D.I. 15 at 7.

¹³ D.I. 1 ¶ 20.

¹⁴ D.I. 13 at 15.

¹⁵ D.I. 1 ¶ 19.

seeking indemnification for legal fees and expenses incurred related to the Investigation (the “First Delaware Action”).¹⁶ The Company responded on March 27, 2023, asserting counterclaims (the “Counterclaims”), alleging that: (1) Plaintiff did not act in good faith and in the best interests of the Company regarding the Investigation; (2) the Company is entitled to set off any amount owed to Plaintiff; and (3) Plaintiff breached fiduciary duties owed to the Company. Defendant also asserted a counterclaim alleging that Plaintiff committed computer-related offenses under 11 *Del. C. §§ 931 et seq.* but later removed this claim after the Court dismissed it.¹⁷ A trial was held on May 26 and 27, 2026 in the First Delaware Action.¹⁸ Subsequently, the parties participated in a post-trial oral argument on October 9, 2026.¹⁹

The Company’s Board of Directors did not authorize the First Delaware Action before Plaintiff’s initiation of the action.²⁰

¹⁶ D.I. 1 ¶ 21.

¹⁷ D.I. 1 ¶ 21; D.I. 15 at 7.

¹⁸ D.I. 15 at 10.

¹⁹ D.I. 15 at 10.

²⁰ D.I. 15 at 7.

C. The California Action

On February 21, 2023, Plaintiff, represented by Alto Litigation, initiated arbitration proceedings in California in order to seek severance benefits from the Company (the “California Action”).²¹ On November 12, 2024, the Company responded by filing a cross-complaint and asserting eight cross-claims (the “Cross-Claims”), including (i) declaratory relief, (ii) breach of contract, (iii) misappropriation of trade secrets, (iv) unauthorized computer access and fraud, (v) violation of Computer Fraud and Abuse Act, (vi) conversion, (vii) breach of fiduciary duties, and (viii) unfair competition.²² The Company filed an additional Cross-Claim on December 30, 2024, asserting tortious interference with prospective economic advantage.²³

The Company’s Board of Directors did not authorize the California Action before Plaintiff’s initiation of proceedings.²⁴

²¹ D.I. 1 ¶ 23; D.I. 15 at 8.

²² D.I. 1 ¶ 23; D.I. 15 at 8.

²³ D.I. 1 ¶ 23; D.I. 15 at 8.

²⁴ D.I. 16 at 8.

D. The Demands for Advancement

On February 26, 2026, PAC, on behalf of Plaintiff, made a letter demand for advancement upon the Company, seeking \$221,286.62 for legal fees and expenses incurred in defending against the Counterclaims in the First Delaware Action.²⁵ PAC also sought advancement of legal fees and expenses incurred in defending against the Cross-Claims in the California Action.²⁶ The letter stated that Plaintiff was not seeking advancement of fees and expenses related to Plaintiff's affirmative claims for indemnification in the First Delaware Action, at the time.²⁷

Between March and June of 2026, Plaintiff made four additional demands for advancement upon the Company, seeking attorneys' fees and expenses incurred in defending against the Counterclaims in the First Delaware Action and the Cross-Claims in the California Action.²⁸ The demands were respectively dated: March 13, 2026; March 17, 2026; April 17, 2026; and June 2, 2026.²⁹

²⁵ D.I. 1 ¶ 27; D.I. 1, Ex. B.

²⁶ D.I. 1 ¶ 27. Ex. 6.

²⁷ D.I. 1 ¶ 28; D.I. 15 at 8-9.

²⁸ D.I. 1 ¶¶ 30–36; D.I. 15 at 9.

²⁹ D.I. 1 ¶¶ 30–36; D.I. 15 at 9.

On May 29, 2026, the Company responded to Plaintiff's demands by denying that Plaintiff was entitled to indemnification due to bad faith conduct and because Plaintiff initiated the proceedings at issue.³⁰ Plaintiff alleges that the Company's stated reasons for denial are without merit.³¹

E. Procedural Posture

Plaintiff initiated this action on June 8, 2026, seeking advancement and indemnification of expenses incurred from the First Delaware Action and the California Action (together, the "Underlying Actions"), as well as fees-on-fees.³² Defendant filed an Answer on July 2, 2026, asserting that the Complaint failed to state a claim upon which relief may be granted, that Plaintiff's claims are barred under the Agreement, and that Plaintiff's claims are not yet ripe.³³

On August 21, 2026, Plaintiff filed a Motion for Summary Judgment and Defendant cross-moved for Summary Judgment.³⁴ On October 2, 2026, the Court

³⁰ D.I. 16 at 9-10.

³¹ D.I. 1 ¶ 35.

³² See D.I. 1.

³³ See D.I. 13.

³⁴ See D.I. 15; D.I. 16.

held oral argument on the parties' Cross-Motions for Summary Judgment and took the matter under advisement.³⁵

II. ANALYSIS

A. Defendant's Cross-Motion for Summary Judgment

Plaintiff and the Company agree that the Underlying Actions fall within the types of Proceedings that may be advanced under the Agreement, and that the attorney's fees and costs incurred in the Underlying Actions fall within the types of Expenses that may be advanced under the Agreement.³⁶ The parties divide the attorneys' fees and expenses for which Plaintiff seeks advancement into three categories: (1) solely related to affirmative claims in the Underlying Actions ("Affirmative Fees"); (2) addressing both Plaintiff's affirmative claims and the Counterclaims and Cross-Claims asserted in the Underlying Actions ("Mixed Fees"); and (3) solely related to the Counterclaims and Cross-Claims asserted in the Underlying Actions ("Defensive Fees").³⁷ At oral argument, the parties asked the Court to determine (i) whether Plaintiff is entitled to advancement for Expenses incurred in connection with the First Delaware Action; (ii) whether Plaintiff is entitled to Mixed-Fees; and (iii)

³⁵ D.I. 27.

³⁶ Transcript of Oral Argument ("Tr.") at 5.

³⁷ Tr. at 26-27.

whether Plaintiff is entitled to fees-on-fees for this proceeding.³⁸ The parties also agree that under Section 12(b) of the Agreement, the Company bears the burden to show that Plaintiff is not entitled to advancement.³⁹

1. Standard of Review

Summary judgment is only appropriate where the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.⁴⁰ Under Court of Chancery Rule 56(i), where parties have cross-moved for summary judgment, without disputing any material fact, the Court may consider the motions as a stipulation for decision on the merits based on the record submitted with the motions.⁴¹ For advancement claims, the scope of such proceedings is generally summary in nature and limited to entitlement based on the “corporation’s own uniquely crafted advancement provisions.”⁴²

³⁸ Tr. at 5-6.

³⁹ Tr. at 5.

⁴⁰ Ct. Ch. R. 56(c); *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

⁴¹ Ct. Ch. R. 56(i).

⁴² *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 213 (Del. 2005); *see AHS N.M. Holdings, Inc. v. Healthsource, Inc.*, 2007 Del. Ch. at *11, 2007 WL 431051; *Rhodes v. bioMerieux, Inc.*, 2024 WL 669034, at *7 (Del. Ch. Feb. 19, 2024) (“Summary judgment is an appropriate way to resolve advancement disputes because ‘the relevant question turns on the application of the terms of the corporate instruments setting forth the purported right to advancement and the pleadings in the proceedings for which advancement is sought.’”).

2. Delaware Law Allows Corporations To Create Contractual Prerequisites To Advancement

Corporations may specify terms and conditions upon which officials may receive advancement through contract.⁴³ “In determining whether to award advancement, the Court will look to the plain meaning of the advancement provisions in the governing instruments.”⁴⁴ Accordingly, when analyzing a corporation’s agreement to provide advancement, a court applies the same principles used in construing and interpreting other contracts.⁴⁵ The right to advancement is contractual, governed by the terms of the parties’ operative agreement.⁴⁶ As such, whether a party is entitled to advancement will depend on the language that the parties chose to include in the governing agreement.⁴⁷ Those provisions, however, are read against the settled principle that advancement is a right distinct from, and narrower than, indemnification: it is a right to have defense expenses paid as they are incurred, before the merits are resolved, subject to repayment if the indemnitee is ultimately

⁴³ *Gorodetskiy v. Honeywell International Inc.*, 2026 WL 1091872, at *3 (Del. Ch. Feb. 3, 2026)(citing *Homestore*, 888 A.2d at 212).

⁴⁴ *Rhodes v. bioMerieux, Inc.*, 2024 WL 669034, at *7 (Del. Ch. Feb. 19, 2024).

⁴⁵ *Gorodetskiy*, 2026 WL 1091872, at *3.

⁴⁶ *Shawn T. Kaleta v. GSP Prime Holdings, LLC*, 2026 WL 1481878 at *8.

⁴⁷ *Id.*

found not entitled to indemnification.⁴⁸ Because that right exists to fund a defense while the merits remain unresolved, the Court will not read lightly an advancement provision to require the indemnitee to prevail on the merits first.

The Court will determine whether the advancement sought falls within the advancement provisions the parties adopted.⁴⁹ Here, Plaintiff and the Company dispute whether Plaintiff's claim for advancement in connection with the First Delaware Action satisfies the requirements set by the Agreement.⁵⁰ Resolution of that issue will turn on the language of the relevant provisions and the nature of the claims asserted in the Underlying Actions.

3. The Structure Of The Indemnification Agreement

The Agreement establishes a framework governing advancement of Expenses. Section 8 of the Agreement obligates the Company to advance Expenses for covered Proceedings to Plaintiff, once Plaintiff makes a written request for such advancement.⁵¹ Section 7(d) relieves the Company of its obligations with respect to

⁴⁸ *Homestore*, 888 A.2d at 212; *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, (Del. 2005); *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *5 (Del. Ch. June 18, 2002), *aff'd*, 820 A.2d 371 (Del. 2003).

⁴⁹ *Homestore, Inc.*, 888 A.2d at 212.

⁵⁰ D.I. 21 at 11.

⁵¹ *See* D.I. 16, Ex. 1 at 5-6.

any Proceeding, “or any part of any Proceeding,” initiated by Plaintiff without prior Board authorization, unless, among other exceptions, the indemnity is “otherwise authorized in Section 12(d).”⁵² Section 8, in turn, provides that the advancement obligation does not apply to any Proceeding “(or any part of any Proceeding)” for which indemnity is not permitted under the Agreement.⁵³ Section 12(d) requires the Company to indemnify Plaintiff for Expenses incurred in actions she brings to enforce her rights to indemnification or advancement under the Agreement “to the extent [that Plaintiff] is successful in such action[.]”⁵⁴ Finally, Section 12(e) provides that, “[n]otwithstanding anything in this Agreement to the contrary,” “no determination as to entitlement to indemnification shall be required to be made prior to the final disposition of the Proceeding.”⁵⁵

The nature of the parties’ dispute is based on how these provisions interact. Plaintiff contends that Section 8 and Section 12 entitle her to advancement of attorneys’ fees and costs incurred in connection with any action for indemnification or advancement of Expenses from the Company, without a showing of success on

⁵² D.I. 16, Ex. 1 at 5.

⁵³ See D.I. 16, Ex. 1 at 5; D.I. 16, Ex. 1 at 10.

⁵⁴ D.I. 16, Ex. 1 at 10.

⁵⁵ D.I. 16, Ex. 1 at 10.

the merits in the Underlying Actions.⁵⁶ Plaintiff argues that this entitlement stems from the language contained in Section 8, which states that the Company shall advance Expenses for a covered Proceeding prior to its final disposition, and the language of Section 12(e), which states that “no determination as to entitlement to indemnification shall be required to be made prior to the final disposition of the Proceeding.”⁵⁷

Defendant argues that the contract should be read as a whole and that, although Plaintiff may have a Section 8 right to advancement in certain Proceedings, she may not automatically receive advancement for Proceedings for indemnification that she herself initiated against the Company.⁵⁸ Defendant argues that the carveout provisions of Section 7(d) and Section 12(d), when read together, do not require the Company to advance Expenses to Plaintiff unless she is successful in the underlying First Delaware Action.⁵⁹

The Court is not persuaded by the Company’s reading. As applied here, the Agreement distinguishes between the portions of the Underlying Actions initiated

⁵⁶ Tr. at 7-8.

⁵⁷ *Id.*; D.I. 16, Ex. 1 at 5-6.; D.I. 16, Ex. 1 at 10.

⁵⁸ *See* Tr. at 27-29; D.I. 16, Ex. 1 at 5-6.

⁵⁹ *See* Tr. at 27-29; D.I. 16, Ex. 1 at 5; D.I. 16, Ex. 1 at 10.

by Plaintiff and the claims initiated by the Company.⁶⁰ Section 7(d), read with Section 8, excludes advancement for the unauthorized portions initiated by Plaintiff.⁶¹ Section 12(d) separately conditions ultimate indemnification of enforcement Expenses on Plaintiff's success.⁶² Section 12(d) requires the Company to "indemnify" Plaintiff for Expenses incurred in enforcing her rights under the Agreement "to the extent [she] is successful in such action."⁶³ The subject of Section 12(d) is the fees Plaintiff incurred in this action to enforce her rights to indemnification or advancement, *i.e.*, fees-on-fees. Delaware courts routinely enforce such provisions and award fees-on-fees in proportion to the indemnitee's success.⁶⁴ Section 12(d) specifically addresses Expenses incurred in an action seeking indemnification or advancement from the Company.⁶⁵ Its success requirement concerns indemnification of those enforcement Expenses. The

⁶⁰ D.I. 16, Ex. 1 at 5.

⁶¹ *Id.*; D.I. 16, Ex. 1 at 5-6.

⁶² D.I. 16, Ex. 1 at 10.

⁶³ *Id.*; *see supra* note 4 (defining Expenses, "for purposes of Section 12(d)," to include Expenses incurred "in connection with the interpretation, enforcement or defense of Indemnitee's rights under this Agreement").

⁶⁴ *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 561-62 (Del. 2002); *Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 178, 185 (Del. Ch. 2003).

⁶⁵ D.I. 16, Ex. 1 at 10.

provision does not impose a success requirement on advancement under Section 8 of Expenses incurred defending the Counterclaims or Cross-Claims.

The Company's reading would be difficult to reconcile with Section 8's timing and repayment provisions. Section 8 requires the Company to advance Expenses "prior to [the Proceeding's] final disposition," no later than 90 days after a written request, and conditions advancement on Plaintiff's undertaking "to repay any advance to the extent that it is ultimately determined that Indemnitee is not entitled to be indemnified."⁶⁶ An undertaking to repay presupposes that payment is made before entitlement is determined. Section 12(e) confirms the point. Its prefatory clause, "[n]otwithstanding anything in this Agreement to the contrary," gives Section 12(e) priority over conflicting provisions; it does not subordinate Section 12(e) to them.⁶⁷ Conditioning advancement of defense Expenses on success in an Underlying Action would postpone payment until after disposition and would leave little operative role for Section 8's repayment undertaking. Section 8 also does not identify success in the underlying proceeding as the event triggering its 90-day

⁶⁶ D.I. 16, Ex. 1 at 5–6.

⁶⁷ D.I. 16, Ex. 1 at 5.

payment period. As such, the Court declines to adopt a reading that renders those provisions surplusage.⁶⁸

The provision that actually limits advancement for proceedings Plaintiff initiated is Section 7(d), read together with Section 8. Section 7(d) excludes any Proceeding “or any part of any Proceeding” initiated by Plaintiff without prior Board authorization, and Section 8 does not apply to any Proceeding “(or any part of any Proceeding)” for which indemnity is not permitted.⁶⁹ The Board did not authorize either Underlying Action.⁷⁰ Expenses attributable solely to Plaintiff’s affirmative claims are not advanceable under Section 8 because those claims were initiated by Plaintiff without prior Board authorization and fall within Section 7(d).⁷¹ Such Expenses may qualify for indemnification under Section 12(d) only to the extent she succeeds in the applicable enforcement action.⁷² Section 7(d) applies to a ‘Proceeding (or any part of any Proceeding)’ initiated by Plaintiff. Plaintiff initiated her affirmative claims, but the Company initiated the Counterclaims and Cross-

⁶⁸ See *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).

⁶⁹ D.I. 16, Ex. 1 at 5–6.

⁷⁰ D.I. 15 at 7; D.I. 16 at 8.

⁷¹ D.I. 16, Ex. 1 at 5–6; D.I. 15 at 7; D.I. 16 at 8.

⁷² D.I. 16, Ex. 1 at 10.

Claims.⁷³ The fact that those Company claims were asserted in actions Plaintiff commenced does not, by itself, make Plaintiff the initiator of those claims. The exclusion therefore applies to Plaintiff's affirmative claims but not to her defense of the Counterclaims and Cross-Claims. Delaware courts apply "initiated by" exclusions claim by claim, and an indemnitee who defends claims brought by the corporation is not the initiator of those claims merely because she commenced the litigation in which they were asserted.⁷⁴

The Company's assertion that Plaintiff did not act in good faith does not defeat advancement at this stage. Section 3 makes good faith relevant to ultimate Indemnification for a Proceeding by or in the right of the Company, while Section 8 provides for advancement before final disposition, subject to repayment is ultimately determined not to be entitled to Indemnification.⁷⁵ The Company's protection against advancing funds to an indemnitee who is ultimately found not entitled to

⁷³ D.I. 1 ¶ 21

⁷⁴ See *Citadel Hldg. Corp. v. Roven*, 603 A.2d 818, 822-24 (Del. 1992); see also *Zaman v. Amedeo Hldgs., Inc.*, 2008 WL 2168397, at *33-37 (Del. Ch. May 23, 2008); *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 401-03 (Del. Ch. 2009).

⁷⁵ D.I. 16, Ex. 1 at 4.

indemnification is the undertaking to repay in Section 8.⁷⁶ Accordingly, the Court declines to adopt the Company's interpretation of the Agreement.

4. Section 12(d)'s Success Requirement Does Not Condition Advancement

Plaintiff contends that she is entitled to advancement, regardless of her success in the Underlying Actions, based on Delaware advancement law.⁷⁷ In Plaintiff's Answering Brief in Opposition to Nephrosant's Cross-Motion for Summary Judgment, she cites to *Reddy v. Elec. Data Sys. Corp.*, to argue that requiring Plaintiff to demonstrate her success on the merits at the advancement stage would "largely vitiate" her contractual advancement rights. 2002 WL 1358761, at *5 (Del. Ch. June 18, 2002).⁷⁸ Plaintiff argues that this is not a proper consideration at the advancement stage.⁷⁹ The Court agrees. As recognized in *Reddy*, requiring an indemnitee to demonstrate success on the merits at the advancement stage would "largely vitiate" the advancement right, whose purpose is to fund the defense while the merits are being litigated.⁸⁰

⁷⁶ See *Homestore*, 888 A.2d at 212; *Reddy*, 2002 WL 1358761, at *5.

⁷⁷ See Tr. at 40; D.I 22 at 2.

⁷⁸ D.I 22 at 2.

⁷⁹ *Id.*

⁸⁰ *Reddy v. Elec. Data Sys. Corp.*, 2002 WL 1358761, at *5 (Del. Ch. June 18, 2002).

The Company's reliance on Section 12(d) does not change that result. Section 12(d) addresses actions to enforce the Agreement and requires the Company to "indemnify [Plaintiff]....to the extent [Plaintiff] is successful in such action."⁸¹ That is a condition on indemnification of the Expenses Plaintiff incurs enforcing her rights under the Agreement. It does not condition advancement under Section 8 of the Expenses she incurs defending claims the Company asserted against her.⁸² Where advancement is a contractual right, the Court will enforce the right as provided in the governing document.⁸³ Here, the Agreement provides for advancement before final disposition, subject only to Plaintiff's undertaking to repay.

5. Plaintiff Is Entitled To Advancement Of Mixed Fees To The Extent Necessary To Her Defense

Having addressed the contractual interpretation of the Agreement, the Court will now address the application of the Agreement provisions to the specific advancement sought by Plaintiff. Plaintiff does not seek a determination of entitlement to Affirmative Fees in this action, and the parties agree she is entitled to

⁸¹ D.I. 16, Ex. 1 at 10.

⁸² *Id.*

⁸³ *Gorodetskiy*, 2026 WL 1091872, at *3.

Defensive Fees. The remaining question is whether, and to what extent, Plaintiff is entitled to advancement of Mixed Fees.⁸⁴

The Company argues that, under the Agreement, it need not advance fees for actions Plaintiff initiated against it unless she succeeds in the underlying action.⁸⁵ Plaintiff asserts that Section 12(d)'s success requirement does not apply to Mixed Fees.⁸⁶ The Company has not carried its burden under Section 12(b).⁸⁷ For the reasons above, Section 12(d) does not condition advancement on success, and Section 7(d) excludes only the part of each Underlying Action that Plaintiff initiated: her affirmative claims. The Company must therefore advanced Mixed Fees, but the question remains on how much.⁸⁸

The parties contend that there is a “complete overlap” between their claims in the First Delaware Action.⁸⁹ Plaintiff argues that such overlap requires the Company to advance all fees incurred in the First Delaware Action.⁹⁰ The Company argues that

⁸⁴ Tr. at 47.

⁸⁵ D.I. 21 at 18.

⁸⁶ D.I. 22 at 17.

⁸⁷ D.I. 16, Ex. 1 at 9.

⁸⁸ D.I. 21 at 18-22; D.I. 22 at 16-19.

⁸⁹ D.I. 22 at 18.

⁹⁰ D.I. 21 at 18-22.

the obligation to advance Mixed Fees is “not as simple as looking at who is defending and who is prosecuting” and cites to *Paolino v. Mace Security International, Inc.*, to argue that an “all-or-nothing proceeding-based analysis is contrary to Delaware’s public policy.” 985 A.2d 392 (Del. 2009).⁹¹ The Court agrees with the Company on this point.. Because the Agreement’s reference to any “part” of a Proceeding, Expenses must be evaluated according to the work performed and the claims that work reasonably served.

A Mixed Fee is therefore advanceable to the extent the work would have been reasonably necessary to defend the Counterclaims or Cross-Claims even if Plaintiff had not pursued her affirmative claims. Work attributable solely to Plaintiff’s affirmative claims is not advanceable. The fact that particular work also supported an affirmative claim does not make the defense-related portion non-advanceable.⁹²

In the First Delaware Action, the first Counterclaim alleges that Plaintiff did not act in good faith or in the Company’s best interest in connection with the Investigation.⁹³ Plaintiff’s good faith is also an element of her affirmative

⁹¹ D.I. 21 at 19.

⁹² See *Roven*, 603 A.2d at 824 (claims “necessarily part of the same dispute” and advanced “to defeat, or offset,” the claims against the indemnitee are covered); see also *Danenberg v. Fittracks, Inc.*, 58 A.3d 991, 999-1000 (Del. Ch. 2012).

⁹³ D.I. 1 ¶ 21; D.I. 15 at 7.

indemnification claim for indemnification under Section 3. Work devoted to that common issue would have been necessary to Plaintiff's defense regardless of the affirmative claim, so it is advanceable. The same task-based inquiry applies to work claimed in connection with the Cross-Claims in the California Action. The parties shall apply these principles to Plaintiff's outstanding demands in good faith, using the procedure described in *Danenberg v. Fittracks*.⁹⁴

B. Plaintiff's Motion for Summary Judgment And Request For Fees-On-Fees

Plaintiff also moves for summary judgment on her advancement claim.⁹⁵ Summary judgment is an appropriate method to decide an advancement dispute where, as here, the relevant question must be determined by applying the terms of the governing corporate documents which set forth the right to advancement.⁹⁶

For the above reasons, Plaintiff has satisfied the prerequisites to advancement under Section 8. Plaintiff submitted written demands seeking advancement of Expenses incurred defending the Counterclaims and Cross-Claims. Section 8 contains Plaintiff's undertaking to repay advances to the extent she is ultimately

⁹⁴ See *Fittracks, Inc.*, 58 A.3d at 991.

⁹⁵ D.I. 16.

⁹⁶ *Gorodetskiy*, 2026 WL 1091872, at *6.

determined not to be entitled to indemnification. The Company did not make the requested advances within Section 8's 90-day period. Plaintiff therefore satisfied the contractual prerequisites to advancement for covered Defensive Fees and Mixed Fees.⁹⁷ Accordingly, Plaintiff's motion for summary judgment is granted in part, as set forth above.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is **GRANTED IN PART**. Plaintiff is entitled under Section 8 to advancement of Defensive Fees and of Mixed Fees to the extent the underlying work would have been reasonably necessary to her defense of the Counterclaims and Cross-Claims independently of Plaintiff's affirmative claims. Plaintiff is not entitled to advancement of Affirmative Fees attributable solely to claims she initiated without prior Board authorization. Defendant's Cross-Motion for Summary Judgment is **GRANTED** as to the non-advancement of Affirmative Fees and is otherwise **DENIED**.

Plaintiff is also entitled to fees-on-fees under Section 12(d) in proportion to her success in this action, in an amount to be determined.⁹⁸ This is a Final Report

⁹⁷ D.I. 1 ¶¶ 27–36; D.I. 16 at 9–10.

⁹⁸ See *Fasciana*, 829 A.2d at 185.

under Court of Chancery Rule 144. Any party who wishes to file exceptions to this report must file their notice of exceptions within three business days.

If no exceptions are filed, the parties shall meet and confer and submit a proposed order implementing this decision that includes a plan for resolving fee disputes consistent with the procedures used in *Danenberg v. Fittracks*.⁹⁹

Respectfully submitted,

/s/ *Loren Mitchell*

Magistrate in Chancery

⁹⁹ See *Fittracks, Inc.*, 58 A.3d at 1003–04.