UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-06658 (JSR)
MARTIN TROTT, et al., Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, et al., Defendants.	:	18-cv-10936 (JSR)
MELANIE L. CYGANOWSKI, et al., Plaintiffs, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-12018 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF THE BEECHWOOD PARTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ADVANCEMENT OF LITIGATION EXPENSES

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RULE

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Defendants Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd ("BRE"), B Asset Manager, L.P. ("BAM"), Beechwood Bermuda International, Ltd. ("BBIL"), Beechwood Re Investments, LLC ("BRILLC"), Mark Feuer, Scott Taylor, and Dhruv Narain (collectively, the "Beechwood Parties") submit this memorandum of law in support of their partial motion for summary judgment on their counterclaim for immediate advancement of expenses, including legal fees, that they have incurred to defend against the claims asserted by the Senior Health Insurance Company of Pennsylvania ("SHIP") in the instant action, captioned *Senior Health Insurance Company of Pennsylvania v. Beechwood Re Ltd., et al.*, Case No. 18-cv-06658 (JSR) (the "SHIP Action").[1]

PRELIMINARY STATEMENT

The Beechwood Parties have filed a counterclaim seeking the immediate advancement of over $1.5 million in expenses that they have incurred in defending against the SHIP Action. SHIP is asserting thirteen causes of action centered on the Beechwood Parties' performance of duties under three investment management agreements (the "IMAs"). Those very same IMAs expressly provide that SHIP "*shall . . . advance expenses, including legal fees*" incurred by the Beechwood Parties in connection with the defense of any such litigation. Under those clear and unambiguous provisions, the Beechwood Parties are entitled to immediate and ongoing advancement of any and all expenses incurred.

In the eight months since SHIP commenced the SHIP Action, the Beechwood Parties have been forced to expend considerable sums for their defense. SHIP has amended the complaint two times, requiring the Beechwood Parties to brief two motions to dismiss and an

[1] The expenses that the Beechwood Parties have incurred or might do so in defending claims in other actions are not a subject of this present motion, and the Beechwood Parties reserve all rights with respect to any such claims.

opposition to SHIP's untimely motion for leave to amend, five months into the litigation; SHIP also served over 60 document requests on the Beechwood Parties, covering nearly 50 transactions; and SHIP noticed 19 depositions, which, until recently, were scheduled to take place in January and February 2019. The cost of this work has been substantial: as of February 2019, the Beechwood Parties have incurred over $1.5 million in expenses (and counting), making advancement increasingly urgent.

In January and February of this year, the Beechwood Parties sent demand letters to SHIP seeking advancement. As required under the IMAs, they undertook to repay any advanced amounts if and to the extent that it is ever ultimately determined by this Court that indemnification for such expenses is not permitted. SHIP, however, rejected those demands. Neither of its professed bases for doing so was valid. Contrary to SHIP's assertions, it is well settled that a party is not excused from its advancement obligations simply because its complaint alleges acts or claims that would bar indemnification if ultimately proven at trial. It is equally well settled that an indemnification provision that applies "to the maximum extent provided by law," as here, covers disputes even between the contracting parties.

The purpose of advancement is to enable a party to defend itself in litigation. By its nature, therefore, the right to advancement is triggered at the *outset* of the case (once any preconditions are satisfied). Were it to come only at the end of the case, advancement would be useless, because the party would not be able to use the funds in the litigation itself. For that reason, many courts — including this Court, *see Ryu v. Hope Bancorp, Inc.*, 2018 WL 1989591 (S.D.N.Y. Apr. 26, 2018) (Rakoff, J.) — have not hesitated to grant summary judgment at an early stage of the case and to order advancement where appropriate. This is such a case. There are no material facts in dispute. The plain language of the IMAs, the allegations in SHIP's

complaints, and the Beechwood Parties' repayment undertakings all require SHIP to comply with its advancement obligations. SHIP's obligations are mandatory, immediate, and ongoing.

Accordingly, the Beechwood Parties respectfully request that this Court enter an order requiring SHIP to: (a) immediately advance to the Beechwood Parties the $1,538,797.14 in expenses already incurred in connection with this action; and (b) within five business days of any future demand under the IMAs, advance all future expenses incurred in connection with the defense of this action that the Beechwood Parties undertake to repay, in accordance with the IMAs.

STATEMENT OF UNDISPUTED FACTS

In mid-2014 and early 2015, SHIP entered into three investment management agreements with BBIL, BRE, and BAM, as well as a side-letter with BRILLC (collectively, the "IMAs"). (Rule 56.1 Stmt. ¶¶ 9-12.) Under the IMAs, the parties agreed that the Beechwood Parties would invest SHIP's capital in various assets, and SHIP would receive a guaranteed annual investment return. As part of their agreement, SHIP agreed to indemnify the Beechwood Parties for all acts or omissions taken in connection with their performance of the IMAs, and to advance to the Beechwood Parties any expenses, including legal fees, that they incurred in defending litigation based on any such acts or omissions.

Paragraph 18(c) of each of the IMAs sets forth these indemnification and advancement obligations. As to indemnification, it provides:

> To the maximum extent permitted by applicable law, each Indemnified Party [i.e., Beechwood] shall be fully protected and indemnified by the Client [i.e., SHIP] . . . against all liabilities and losses (including amounts paid in respect of judgments, fines, penalties or settlement of litigation, and legal fees and expenses reasonably incurred in connection with any pending or threatened litigation or proceeding) suffered by virtue of its or his serving as an Indemnified Party with respect to any action or omission suffered or taken that is not in material violation of this Agreement and does not constitute fraud, gross negligence or willful misconduct . . . .

(*Id.* ¶ 14.) In the same subparagraph, as to advancement, it provides:

> The Client [i.e., SHIP] ***shall . . . advance expenses, including legal fees***, for which any Indemnified Party would be entitled by this Agreement to be indemnified upon receipt of an unsecured undertaking by such Indemnified Party to repay such advances if it is ultimately determined by a court of proper jurisdiction that indemnification for such expenses is not permitted by law or authorized by this Agreement . . . .

(*Id.* (emphasis added).)

The term "Indemnified Parties" is defined to include "the Adviser [i.e., BBIL, BRE, and BAM] . . . or any director, officer, partner, member, stockholder, controlling person, employee or agent of the Adviser or its subsidiaries or any such sub-advisor, or any of their affiliates [i.e., BRILLC, Feuer, Taylor, and Narain]." (*Id.* ¶ 13.) Each of the IMAs also provides that the advancement and indemnification provisions shall survive termination of the IMAs. (*Id.* ¶ 16.)

On July 24, 2018, SHIP commenced the SHIP Action, seeking to hold the Beechwood Parties liable for acts and omissions that they allegedly took in connection with their duties, or exercise of their powers under, the IMAs. (*Id.* ¶ 18.) SHIP has twice amended its complaint. (*Id.*) In each of the complaints, SHIP has alleged that the Beechwood Parties breached the IMAs by a variety of acts and omissions that trigger these provisions, including failing to deliver the promised investment returns; failing to protect SHIP's invested funds or equivalent assets; not complying with the investment policies, guidelines, and restrictions in the IMAs; and acting to SHIP's financial detriment in the way they managed the investments. (*Id.* ¶ 19.) SHIP further alleged that the Beechwood Parties breached their fiduciary duties under the IMAs, and committed acts constituting fraud, constructive fraud, civil RICO, civil conspiracy, and gross negligence and were unjustly enriched by reason of benefits received in connection with the IMAs. (*Id.* ¶ 20.) The Beechwood Parties deny that they engaged in any action or omission that was in material violation of the IMAs or that constitutes fraud, gross negligence, or willful

misconduct. (*Id.* ¶ 23.)

To date, this action has necessitated significant efforts by the Beechwood Parties and forced them to incur substantial legal fees. Among other things, the Beechwood Parties have briefed two motions to dismiss and an opposition to SHIP's motion for leave to amend; responded to, and continue to respond to, SHIP's 60+ document requests on the Beechwood Parties, covering nearly 50 transactions; served document requests on SHIP and reviewed SHIP's productions; exchanged multiple meet-and-confer letters with SHIP; opposed three motions to quash third-party subpoenas, one in this Court and two in the Southern District of Indiana; and, until mid-January, prepared for the over 20 depositions noticed by the parties in January and February 2019. (*Id.* ¶ 28.) Through February 2019, the Beechwood Parties had incurred at least $1,538,797.14 in expenses relating to this case, and those expenses continue to mount. (*Id.* ¶¶ 24-28.)

On January 23, 2019, BBIL, BAM, BRILLC, Feuer, and Taylor sent SHIP a letter in accordance with the IMAs notifying SHIP that: (a) the commencement and continued prosecution of the SHIP Action had triggered the indemnification and advancement provisions in Paragraph 18 of each of the IMAs; (b) BBIL, BAM, BRILLC, Feuer, and Taylor had incurred at least $1,195,621.05 in expenses, including attorneys' fees, in defending the SHIP Action; and (c) BBIL, BAM, BRILLC, Feuer, and Taylor were undertaking to repay any advanced amounts if and to the extent that it is ultimately determined by a court of proper jurisdiction that indemnification for such expenses is not permitted by law or authorized by the IMAs. (*Id.* ¶ 24.) BRE did the same shortly thereafter (seeking advancement of $68,977.24), as did Narain (seeking advancement of $129,400.50[2]). (*Id.* ¶¶ 25-26.)

[2] On March 19, 2019, counsel for Narain sent SHIP and its counsel an updated letter explaining that Mr. Narain's February 22, 2019 letter had included an incorrect amount of expenses due to a

SHIP responded to these letters, stating its refusal to comply with its contractual indemnification and advancement obligations under the IMAs. (*Id.* ¶ 29.) SHIP attempted to justify its refusal by asserting that the alleged conduct, if proven, would not be indemnifiable under the IMAs and that the IMA indemnification provisions do not apply to actions between SHIP and the Beechwood Parties. (*Id.* ¶ 30.) Because SHIP repeatedly invoked "New York law" to support its position, the Beechwood Parties requested that SHIP provide the specific authority it was relying upon, to "avoid any unnecessary disputes." (*Id.* ¶ 31.) SHIP did not respond. (*Id.* ¶ 32.)

On March 15, 2019, the Court granted in part and denied in part the Beechwood Parties' motion to dismiss the Second Amended Complaint. (Dkt. No. 183.) Contemporaneous with the filing of this motion, the Beechwood Parties answered the Second Amended Complaint and asserted counterclaims against SHIP for breach of the IMAs' advancement provisions and breach of contract and fraud in connection with a $50 million surplus note transaction. (Dkt. No. 190.) This motion for partial summary judgment relates only to the counterclaims for advancement (Counts One and Two).[3]

STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.

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calculation error and informing SHIP that the correct amount of expenses incurred by Mr. Narain in the SHIP Action as of February 22, 2019 was $274,198.85. (Rule 56.1 Stmt. ¶ 27.) Counsel for Narain informed SHIP and its counsel that Mr. Narain was undertaking to repay any advanced amounts if and to the extent that it is ultimately determined by a court of proper jurisdiction that indemnification for such expenses is not permitted by law or authorized by the IMAs and requested a response by March 26, 2019. (*Id.*)

[3] The Beechwood Parties' Answer and Counterclaims is annexed as Exhibit A to the Declaration of Steven H. Holinstat in Support of the Beechwood Parties' Partial Motion for Summary Judgment for Advancement of Litigation Expenses, dated March 20, 2019.

R. Civ. P. 56(a). To obtain declaratory judgment, the moving party must demonstrate the existence of an actual case or controversy, and "the controversy must be 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment' and must 'have taken on a fixed and final shape so that a court can see what legal issues it is deciding.'" *See Ryu v. Hope Bancorp, Inc.*, 2018 WL 1989591, at *3 (S.D.N.Y. Apr. 26, 2018) (Rakoff, J.) (quoting *Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 300-01 (S.D.N.Y. 2012)).

ARGUMENT

THE BEECHWOOD PARTIES ARE ENTITLED TO ADVANCEMENT OF ALL EXPENSES THEY HAVE INCURRED IN CONNECTION WITH SHIP'S LAWSUIT.

Under the plain language of the IMAs — the very same ones that SHIP is seeking to enforce — the Beechwood Parties are entitled to advancement of all expenses they have incurred in connection with the SHIP Action. The controlling language of the IMAs provides for indemnification and advancement of expenses as follows:

> To the maximum extent permitted by applicable law, each Indemnified Party shall be fully protected and indemnified by the Client . . . against all liabilities and losses (including amounts paid in respect of judgments, fines, penalties or settlement of litigation, and legal fees and expenses reasonably incurred in connection with any pending or threatened litigation or proceeding) suffered by virtue of its or his serving as an Indemnified Party with respect to any action or omission suffered or taken that is not in material violation of this Agreement and does not constitute fraud, gross negligence or willful misconduct . . . . ***The Client shall . . . advance expenses, including legal fees, for which any Indemnified Party would be entitled by this Agreement to be indemnified*** upon receipt of an unsecured undertaking by such Indemnified Party to repay such advances if it is ultimately determined by a court of proper jurisdiction that indemnification for such expenses is not permitted by law or authorized by this Agreement . . . .

(Rule 56.1 Stmt. ¶ 14 (emphasis added).)

That provision fits these facts like a glove. The term "Client" refers to SHIP. (*Id.* ¶ 15.) The term "Indemnified Party" is defined to include all "Advisers" (encompassing BAM, BRE, and BBIL (*id.* ¶ 16)), "affiliates" (BRILLC (*id.*)), present officers (Feuer and Taylor (*id.*)), and

former officers (Narain, who was previously an officer of BAM (*id.*)) — in other words, all of the Defendants.

Paragraph 18(c) expressly states that advancement extends to all expenses for which there would be indemnification (subject to the unsecured undertaking). That includes all "legal fees and expenses reasonably incurred in connection with any pending or threatened litigation or proceeding" suffered by any Beechwood party as an indemnified party. (*Id.* ¶ 14.) Since SHIP's Second Amended Complaint (like its predecessors) seeks to hold the Beechwood Parties liable for acts or omissions that they allegedly took in connection with their duties under the IMAs, all expenses incurred in defending against that action are subject to indemnification, and therefore must be advanced immediately.

The duty to advance expenses is broad, and a complaint should be liberally construed in favor of advancement. *Gramercy Advisors, LLC v. Coe*, 2015 WL 13780603, at *4 (S.D.N.Y. Apr. 17, 2015), *clarified by* 2015 WL 13780602 (S.D.N.Y. June 10, 2015). Advancement is appropriate if there is even a "reasonable possibility" that a claim asserted against the party seeking advancement could be covered by the indemnification provision. *Id.* (citing *Euchner-USA, Inc. v. Hartford Cas. Ins. Co.*, 754 F.3d 136, 141 (2d Cir. 2014)); *see also One Reason Rd., LLC v. Seneca Ins. Co.*, 83 N.Y.S.3d 235, 238 (2d Dep't 2018) ("If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action." (citation and internal quotation marks omitted)). That "reasonable possibility" is more than satisfied here, where SHIP has alleged a number of claims that do not require a finding of material breach, fraud, gross negligence, or willful misconduct against the Beechwood Parties, including breach of contract (non-material), breach of fiduciary duty, and unjust enrichment.

(Rule 56.1 Stmt. ¶¶ 19-21; Second Amended Complaint ("SAC") ¶¶ 282-317, 318-326, 399-404.)

To be sure, SHIP will claim that the Beechwood Parties should not ultimately be entitled to indemnification, if their conduct is found to be in material violation of the IMAs or to "constitute[] fraud, gross negligence or willful misconduct." (Rule 56.1 Stmt. ¶ 14.) But even if SHIP were correct (which it is not), that is immaterial at this stage. As this Court has explained, "[i]ndemnification and advancement of legal fees are two distinct corporate obligations." *Ryu*, 2018 WL 1989591, at *3 (Rakoff, J.) (alteration in original; citation and internal quotation marks omitted). The former depends on the merits of the underlying controversy; the latter does not. Advancement "is a right whereby a *potential* indemnitee has the ability to force the company to pay his litigation expenses as they are incurred regardless of whether he will ultimately be entitled to indemnification." *Id.* (emphasis in original) (citation omitted). Its purpose is to provide covered parties with the resources necessary to defend claims asserted against them, which would be thwarted were they required to prove their ultimate entitlement to indemnification in order to receive it. *Ficus Invs., Inc. v. Private Capital Mgmt., LLC*, 872 N.Y.S.2d 93, 99 (1st Dep't 2009). Accordingly, advancement is not barred merely because a complaint alleges acts or claims that would prevent indemnification if proven at trial. *See Gramercy Advisors, LLC v. Ripley*, 2014 WL 4188099, at *10 (S.D.N.Y. Aug. 25, 2014) ("[Parties] cannot escape their obligation to advance costs by pleading fraud."); *Ficus*, 872 N.Y.S.2d at 99 (advancement obligation did not "depend on whether or not the officer will eventually be indemnified").

The express language of the advancement provision underscores this point. It requires the Beechwood Parties to undertake to "*repay*" advanced expenses if it is ultimately determined

that indemnification is inappropriate. The obvious implication is that SHIP is required to advance expenses up front, even if it might be determined later that the Beechwood Parties have to return them. *See, e.g.*, *Gramercy*, 2015 WL 13780603, at *5 (advancement required where investment management agreement provided for an "undertaking . . . to repay . . . to the extent that it shall be determined ultimately that [Plaintiffs are] not entitled to be indemnified" (emphasis added)); *Crossroads ABL LLC v. Canaras Capital Mgmt., LLC*, 963 N.Y.S.2d 645, 647 (1st Dep't 2013) (undertaking to repay "in the event it is ultimately determined by a court of competent jurisdiction" that indemnification is not proper meant that defendant was required to advance plaintiff's legal fees "[u]ntil that question is ultimately resolved"); *Ficus*, 872 N.Y.S.2d at 99 (same).

There is no question that indemnification and advancement apply even to expenses that arise out of litigation between the contracting parties themselves. Paragraph 18(c) provides for indemnification "[t]o the maximum extent permitted by applicable law." (Rule 56.1 Stmt. ¶ 14.) As courts have found on repeated occasions, the "literal import" of this contractual language is to include inter-party claims. *Happy Kids, Inc. v. Glasgow,* 2002 WL 72937, at *3 (S.D.N.Y. Jan. 17, 2002); *see also Gramercy*, 2015 WL 13780603, at *5 (investment management agreement which provided indemnification "[t]o the fullest extent permitted by law" extended to inter-party claims).

In *Gramercy*, 2015 WL 13780603, a case with almost identical facts to those here, the court endorsed every one of these arguments. The plaintiffs there sought advancement of fees they were incurring in defending a separate lawsuit brought by the defendants, which accused the plaintiffs of deficient performance under an investment management agreement. Similar to SHIP's complaint, the defendants in *Gramercy* were asserting claims for breach of fiduciary

duty, negligence, and fraud, among others. The investment management agreement provided for indemnification "[t]o the fullest extent permitted by law" and advancement of expenses "upon receipt of an undertaking . . . to repay the amount advanced to the extent it shall be determined ultimately that the [plaintiffs are] not entitled to be indemnified hereunder." *Id.* at *1, 3 (alterations in original).

The *Gramercy* court granted the plaintiffs' motion for summary judgment on advancement and ordered immediate advancement. It rejected the defendants' argument that the advancement provision did not apply to inter-party claims, holding that the language "to the fullest extent permitted by law" showed otherwise. It also rejected the defendants' argument that advancement was not required because claims for fraud and other misconduct, if proven, would not be indemnifiable, holding that "the existence of some claims that extended beyond Defendants' duty to indemnify did not negate their duty to defend a lawsuit that included covered claims." *See id.* at *4 n.3.

Finally, it is appropriate for this Court to grant relief now and order SHIP to advance fees immediately. Each of the Beechwood Parties triggered the relevant provision of the IMAs by demanding advancement of their expenses and making the required undertaking. *See, e.g.*, *id.* at *6-7 (letter undertaking to repay amounts advanced sufficient to satisfy undertaking requirement). Once that occurred, the obligation to advance expenses "attache[d] 'contemporaneous[ly]' with the accrual of those expenses." *United States v. Weissman*, 1997 WL 539774, at *12 (S.D.N.Y. Aug. 28, 1997); *see also PFT Tech., LLC v. Wieser*, 10 N.Y.S.3d 548, 549 (2d Dep't 2015) (defendant entitled to "immediate" reimbursement and advancement of legal expenses). Paragraph 18(c) requires that SHIP "shall" advance expenses, meaning that its advancement obligations are mandatory and immediate upon receipt of that undertaking.

Summary judgment is proper because there are no material facts in dispute and the meaning of the IMAs is a question of law. In similar cases, both this Court and other courts have ordered advancement on summary judgment. *See Ryu*, 2018 WL 1989591, at *12 (granting summary judgment on plaintiff's advancement claim); *Gramercy*, 2015 WL 13780603 (granting summary judgment on plaintiffs' advancement claim); *Ficus*, 872 N.Y.S.2d at 99 ("[A]n advancement proceeding is summary in nature and . . . . [t]he detailed analysis required of such claims is both premature and inconsistent with the purpose of a summary proceeding." (internal quotation marks omitted)). The Beechwood Parties are entitled to that relief under the plain language of the IMAs and SHIP has no legitimate grounds to oppose.

CONCLUSION

For all the foregoing reasons, the Beechwood Parties respectfully request that this Court grant their motion for partial summary judgment on their advancement claim and enter an order:

(a) requiring SHIP to immediately advance: (i) to BBIL, BAM, BRILLC, Feuer, and Taylor, $1,195,621.05 in expenses that they have already incurred in connection with their defense of the SHIP Action; (ii) to BRE, $68,977.24 in expenses that it has already incurred in connection with its defense of the SHIP Action; and (iii) to Narain, $274,198.85 in expenses that he has already incurred in connection with his defense of the SHIP Action;

(b) requiring SHIP, within five business days of any future demand under the IMAs, to advance to the Beechwood Parties all expenses, including attorneys' fees, that they represent they have incurred in connection with their defense of the SHIP Action, subject to their unsecured undertaking to repay such amounts if it is ultimately determined by a court of proper jurisdiction that indemnification for such expenses is not permitted by law or authorized by the IMAs; and

(c) granting the Beechwood Parties such other and further relief as this Court deems just and proper.

Dated: March 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on this 20th day of March, 2019, a copy of the foregoing was served through the Court's electronic filing system to all parties who have entered an appearance in this adversary proceeding:

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