UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Master Docket No. 1:18-cv-6658-JSR
This Filing Relates to: SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, v. BEECHWOOD RE LTD., et al., Defendants.	Case No. 1:18-cv-06658-JSR

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA'S OPPOSITION TO THE BEECHWOOD DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Their perfidy knows no bounds. Having already plundered hundreds of millions of SHIP's dollars, the Beechwood Defendants[1] now ask this Court to force SHIP, their victim, to advance on demand the unbridled fees and costs they say they are incurring in resisting the claims that SHIP was forced to bring against them for their flagrant breaches of contract, fraud, gross negligence, and willful misconduct.[2] The Beechwood Defendants base their unsupportable demands for advancement on the language of an indemnification clause repeated within Paragraph 18(c) in each of the three Investment Management Agreements (the "IMAs") through which they, acting as SHIP's investment advisors, defrauded SHIP.[3] Paragraph 18(c) contemplates advancement by SHIP (solely from the applicable IMA Account) of costs incurred by an indemnified party to defend a claim *that is an indemnified claim.* Paragraph 18(c), however, does not include any reference to claims between the contracting parties. Nor, by its express terms, does it apply to claims arising from any material violation of the IMAs, fraud, gross negligence, or willful misconduct. Despite this patent death knell to their attempt to extract more money from SHIP's policy-holder reserves, the Beechwood Defendants boldly assert that the language of the IMAs entitles them to indemnification and advancement as a matter of law, and they have moved for summary judgment in their favor on advancement.

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[1] "Beechwood Defendants" refers to Defendants B Asset Manager, L.P ("BAM"), Beechwood Bermuda International Ltd. ("BBIL"), Beechwood Re (in Official Liquidation) ("BRE"), Beechwood Re Investments, LLC ("BRILLC"), Mark Feuer, Scott Taylor, and Dhruv Narain.

[2] The Beechwood Defendants claim that they have already incurred $1,538,797.14 in fees and expenses as of the Beechwood Defendants' letters dated January 23, 2019, January 29, 2019, February 22, 2019, and March 19, 2019, respectively. SHIP 56.1 Resp. ¶¶ 24-28.

[3] As discussed, *infra*, Paragraph 18(c) contains two indemnification clauses. The first sets forth SHIP's obligation to indemnify Beechwood "Indemnified Parties." The second sets forth the obligation of the Adviser to indemnify SHIP, as the "Client."

The Beechwood Defendants' motion should be denied as there is no merit to their legal positions on indemnification or advancement, and they know it.[4] They most certainly are not entitled to judgment on advancement as a matter of law. First, any obligation of SHIP to advance litigation costs exists only as to claims that fit within the scope of claims that SHIP agreed to indemnify under Paragraph 18(c).[5] The claims that SHIP has brought against the Beechwood Defendants do not fall within that scope. Under the New York law that governs the IMAs, an indemnity clause in a contract cannot be construed to extend to legal fees incurred in actions between the contracting parties absent either an express undertaking or language that makes it "unmistakably clear" that the parties intended to "waive the benefit" of "the well-understood rule that parties are responsible for their own attorney's fees." *Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487, 492 (1989). Indemnity obligations are presumed to apply only to claims by third-parties and, in the absence of express language, that presumption is only rebutted where there is no possibility that the party seeking indemnity could have been subject to third-party claims at the time the contract was made. *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 344 (S.D.N.Y 2012). Any ambiguity in language or intent must be construed against indemnification

[4] Importantly, the Beechwood Defendants represented to Your Honor in open court that they had no counterclaims from the outset. SHIP 56.1 Resp. ¶ 36:

> THE COURT: How many depositions do you contemplate? MR. HARRIS: I think probably a smaller number. I would say 15 or so. Plaintiff – the plaintiff is – we don't at this point have counterclaims, so this is primarily being driven by the plaintiff."

Certainly they have long had and studied the IMAs. And no doubt the Beechwood Defendants also studied the law then and knew this application was baseless. So why eight months into the case bring this trumped up, "emergency" application? SHIP can only conclude it is yet another effort to drive up expense and delay while distracting from basic issues like the Beechwood Defendants incomplete document production.

[5] Specifically, the IMAs provide, in relevant part: "The Client shall, out of the assets of the Account, advance expenses, including legal fees, for which any Indemnified Party would be entitled by this Agreement . . . ." SHIP 56.1 Resp. ¶ 14.

of first party claims, as a matter of law. *Id.* at 349. If the indemnity provision "is subject to a reasonable interpretation one way or another, the agreement must be construed not to indemnify" inter-party claim expenses. *Id.* at 343.

The language of Paragraph 18(c) does not expressly provide for the indemnification of inter-party claims. Nor does it evidence intent in any manner, let alone with "unmistakable clarity," that SHIP promised to waive the benefits of the American rule and cover inter-party claims. To the contrary, the IMAs clearly manifest an intent not to include inter-party claims in the scope of SHIP' indemnity obligation. For example, Paragraph 18(c) expressly excludes claims arising not only out of the Beechwood Defendants' fraud, gross negligence, or willful misconduct, but also excludes claims arising from their material violation of the IMAs. As the Court recognized in *Refco*, where an indemnification clause applies to claims for *proper* performance it necessarily contemplates indemnification for third-party claims which, in turn, precludes a finding that the indemnification clause was intended to cover first-party claims. *Id.* at 345.

Further, the claims asserted by SHIP fall entirely outside the scope of claims that qualify for indemnification by SHIP under Paragraph 18(c), as those claims are expressly limited to claims for conduct "suffered or taken that is not in material violation of this Agreement and does not constitute fraud, gross negligence or willful misconduct." Here, each of SHIP's claims against each of the Beechwood Defendants is premised *only* on conduct that constitutes material violations of the IMAs, fraud, gross negligence, or willful misconduct and thus these claims are

not indemnifiable under the IMAs or, with respect to fraud, gross negligence, or willful misconduct, under New York law.[6]

In addition, even where advancement of expenses by SHIP is required, SHIP is not required to advance expenses from its general funds. SHIP is only required to advance expenses "out of the assets ***of the Account***." SHIP's Response to Local Rule 56.1 Statement ("SHIP 56.1 Resp."), ¶ 14. (emphasis added). The definitions in each IMA set forth that the "Account" is the custodial account established by SHIP and the Beechwood IMA Advisor with Wilmington Trust. Those Accounts no longer exist and, in any event, as of any date on which an advancement obligation is alleged to have arisen,[7] the only assets previously included in an "Account" that SHIP still holds are the illiquid investments made by the Beechwood Defendants that are largely in default. *Id.* ¶ 42. Hence, even if the Beechwood Defendants were somehow entitled to advancement in the first instance, the sole sources from which expenses are allowed to be advanced no longer exist and, even if it did, would consist only of illiquid investments that fail

[6] As SHIP's Second Amended Complaint describes, the Beechwood Defendants participated in, and perpetrated, a massive fraudulent scheme to create and operate the Beechwood entities in order to funnel insurance company reserves into the Ponzi-like scheme being operated by the Platinum Partner related funds, in order to prop up those funds and, thereby, enrich themselves and their related parties to SHIP's direct detriment. The IMAs were simply a convenient tool deployed in a ruse to gain access to SHIP's funds with the secret intent to use those funds in furtherance of their nefarious schemes. From beginning to end, the Beechwood Defendants concealed key facts, gave SHIP hollow reassurances, and intentionally misstated performance results and asset valuations, all while claiming and collecting unearned performance fees totaling tens of millions of dollars. SHIP's claims against the Beechwood Defendants are rooted exclusively in Defendants' material violations of the IMAs that were not undertaken in good faith and grow from their material breach of the obligations owed under the IMAs, and their elaborate fraud, gross negligence, and willful misconduct.

[7] The advancement obligation, where it exists, is not triggered until SHIP's receipt of an unsecured undertaking by an Indemnified Party to repay the advances if it is determined that indemnification was not permitted by law or authorized by the IMA. The first such undertaking was sent to SHIP on January 23, 2019. ECF 192, Beechwood Defendants' Rule 56.1 Statement ("Defs.' 56.1 Stmt.")

to provide the resources sufficient to pay the army of lawyers that the Beechwood Defendants have churning away at the effort to avoid liability for their egregious misconduct.

In sum, the indemnification provisions in the IMAs do not cover claims between the contracting parties. And even if this Court were to find that the indemnification provisions cover claims asserted between the parties, the actions of the Beechwood Defendants alleged in the Second Amended Complaint nevertheless are not indemnifiable, because they are all grounded in intentional misconduct and breach. Finally, even if that were not the case, advancement is limited under each IMA to a single Account that no longer exists and, in any event, would hold only illiquid investments that are largely in default. Accordingly, this Court should refuse the request of the Beechwood Defendants to divert even more of SHIP's assets to their personal benefit in the form of advancement and should deny their motion for partial summary judgment.

RELEVANT FACTUAL BACKGROUND

I. The Investment Management Agreements

In 2014 and 2015, SHIP entered into three separate IMAs with BBIL, BRE, and BAM. SHIP 56.1 Resp. ¶¶ 9-11. The IMAs define SHIP as the "Client" and the applicable Beechwood entity (BBIL, BRE, or BAM) as the "Adviser." *Id.* ¶ 14. Each IMA includes two indemnity provisions. *Id.* Under Paragraph 18(a) of each IMA, the "Indemnified Parties" are identified as the Adviser, its officers and affiliates.[8] *Id.* The indemnification rights and obligations of SHIP (as Client) and each Indemnified Party are set out in Paragraph 18(c) of each of the IMAs:

> To the maximum extent permitted by applicable law, each Indemnified Party shall be fully protected and indemnified by the Client, out of the assets of the Account,

[8] Paragraph 18(a) is a limitation of liability clause that purports to exculpate the Indemnified Parties from liability to, *inter alia*, SHIP for, *inter alia*, "any act or omission suffered or taken by such Indemnified Party in good faith in connection with its or his performance of the Adviser's duties or exercise of the Advisor's powers . . . that is not in violation of this Agreement and does not constitute fraud, gross negligence or willful misconduct . . . ." SHIP 56.1 Resp. ¶ 14.

> against all liabilities and losses (including amounts paid in respect of judgments, fine, 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 and with respect to any criminal action or proceeding***, without reasonable cause to believe his or its conduct was unlawful. The Client shall, ***out of the assets of the Account***, 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. To the maximum extent permitted by applicable law, each Client Indemnified Party shall be fully protected and indemnified by Adviser 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 such Client Indemnified Party by reason of a material violation by Adviser of this Agreement which violation (i) is determined by a court of competent jurisdiction (in a final non-appealable decision) to constitute fraud, gross negligence or the willful misconduct of the Advisor or (ii) arises as a result of any criminal action or proceeding against the Adviser where it is reasonably demonstrated in such action or proceeding that the Adviser had reasonable cause to believe its conduct was unlawful.

Id. (emphasis added).

On July 24, 2018, SHIP filed suit against the Beechwood Defendants in an action captioned *Senior Health Insurance Company of Pennsylvania v. Beechwood Re Ltd., et al*., Case No. 1:18-cv-6658-JSR (the "SHIP Action"). Defs.' 56.1 Stmt. ¶ 18. SHIP filed its First Amended Complaint on December 14, 2018, and its Second Amended Complaint on December 28, 2018. SHIP 56.1 Resp. ¶ 34. SHIP has asserted the following claims that remain against the Beechwood Defendants: (1) Breach of Contract against BBIL, BRE, BAM, and BRILLC; (2) Breach of Fiduciary Duty against all Defendants; (3) Fraud in the Inducement against BRE, BAM, BBIL, BRILLC, Feuer, Taylor, and Levy); (4) Fraud against all Defendants except Narain; (5) Constructive Fraud against all Defendants except Narain; (6) Civil Conspiracy against all Defendants; (7) Gross Negligence against all Defendants; (8) Unjust Enrichment as to Feuer,

Taylor, and Levy. *Id.* ¶ 35. All of SHIP's claims against the Beechwood Defendants, if proven, constitute "material violation(s) of this Agreement" that constitute "fraud, gross negligence or willful misconduct." *Id.* ¶¶ 14, 20-22.

On January 23, 2019, counsel for BBIL, BAM, BRILLC, Feuer, and Taylor sent a letter to SHIP demanding advancement of legal fees and expenses under Paragraph 18(c) of the IMAs. *Id.* ¶ 24. On January 29, 2019 counsel for BRE sent SHIP a letter demanding advancement, and on February 22, 2019 counsel for Narain sent SHIP a letter demanding the same. *Id.* ¶¶ 25-26. On January 28, February 1, and February 26, 2019, respectively, counsel for SHIP responded and declined the requests for advancement of legal fees and expenses. *Id.* ¶ 29. The language of Paragraph 18 of each of the IMAs does not provide for indemnification or advancement of expenses for claims asserted between the parties to the IMAs. *Id.* ¶ 31. Likewise, the conduct that forms the basis of SHIP's claims against the Beechwood Defendants is not indemnifiable under the language of the IMAs or under applicable New York law. *Id.*

II. The IMA Accounts

The assets that BAM, BBIL and BRE managed for SHIP pursuant to the three Investment Management Agreements ("IMAs") were maintained in accounts at Wilmington Trust Corporation (the "IMA Accounts"). *Id.* ¶ 39. On November 17, 2016, SHIP consolidated the three IMA Accounts into a single Wilmington Trust custodial account initially opened for the BAM IMA, titled "WT NA As Custodian Under Custody Agreement Dated 1/15/15 with Senior Health Insurance Company of Pennsylvania." *Id.* ¶ 40. After SHIP's assets were consolidated into the BAM IMA Account, the IMA Accounts for the BBIL and BRE IMAs were closed. *Id.* ¶ 41. As of January 23, 2019, when SHIP received the first demand for advancement and indemnification from counsel to the Beechwood Defendants, the majority of the assets held in the IMA Account

are illiquid assets, many of which are in default or are interests that are encumbered by ongoing efforts to unwind the complicated investment structure set up by Beechwood and its affiliates. *Id.* ¶ 42.

STANDARD OF REVIEW

Summary judgment is only appropriate "if 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. R. Civ. P. 56(a). The moving party has "[t]he burden of establishing the nonexistence of a genuine issue." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (internal citations and quotations omitted). In determining whether a genuine issue of material fact exists, the court must "resolve all ambiguities and draw all reasonable inferences against the moving party." *Ryu v. Hope Bancorp, Inc.*, 18 Civ. 1236 (JSR), 2018 WL 1989591, at *5 (S.D.N.Y. Apr. 26, 2018) (Rakoff, J.) (quoting *Fran Corp. v. United States*, 164 F.3d 814, 816 (2d Cir. 1999)). With respect to the Beechwood Defendants' asserted entitlement to advancement, based on the language of the IMAs and the applicable New York law, the Beechwood Defendants' claim for advancement fails as a matter of law and, therefore, the motion for summary judgment must be denied.

ARGUMENT

I. The Beechwood Defendants Are Not Entitled to Indemnification or Advancement of Any Expenses Incurred in Defense of Claims Brought Against Them by SHIP

A. The IMAs do not provide for inter-party indemnification

Where, as here, the contractual advancement obligation is limited to expenses incurred in defense of an indemnified claim, a claim of advancement is contingent upon the right to indemnification. *Abakan, Inc. v. Uptick Capital, LLC*, 943 F. Supp. 2d 410, 416 (S.D.N.Y. 2013) (denying defendant's motion for advancement of legal fees and expenses and concluding "only those fees that may ultimately be eligible for indemnification may be advanced"). Paragraph 18(c)

of the IMAs expressly limits advancement to "expenses, including legal fees, for which an Indemnified Party would be ***entitled by this Agreement to be indemnified***." (emphasis added). Because none of the claims asserted by SHIP against any Beechwood Defendant are entitled to indemnification under the IMAs, the motion for partial summary judgment seeking advancement must be denied. *Abakan*, 943 F. Supp. 2d at 417 ("Because the Court has determined that legal fees incurred by [Defendant] in the instant action are not eligible for indemnification, it also finds that [Plaintiff] is not obligated under the [] Agreement to advance legal expenses and fees to [Defendant] here.").

New York law could not be more clear. Under the decisional framework established in *Hooper*, a promise by one contracting party to indemnify the other for legal fees incurred in litigation between them must be expressly stated or clearly and unequivocally manifested within the four corners of the contract. *See Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487, 491-92 (1989) ("The court should not infer a party's intention to waive the benefit of the rule [that parties are responsible for their own attorney's fees] unless the intention to do so is unmistakably clear from the language of the promise."); *see also PPI Enterprises (U.S.), Inc. v. Del Monte Foods Co.*, Nos. 05-6885-cv (L), 05-7040-cv (CON), 2006 WL 3370698, at *1 (2d Cir. Nov. 20, 2006) ("[T]he test is whether the intent to indemnify is 'unmistakably clear from the language of the promise,' not whether the agreement could be read to provide for indemnification in a suit between the parties.") (internal citations omitted); *U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co.*, 369 F.3d 34, 77-78 (2d Cir. 2004) (clause not unmistakably clear where "the only thing that is unmistakably clear here is that we grapple with a contract term that is susceptible to two, equally valid interpretations. . . . In the final analysis, it is the Obligees who bear the heavy burden of persuading us to depart from the American Rule."); *Bridgestone/Firestone, Inc. v. Recovery Credit*

Services, Inc., 98 F.3d 13, 21 (2d Cir. 1996) (where clause is not "unmistakably clear" and may "easily be read as limited to third party actions," attorneys' fees are not indemnified); *Abakan*, 943 F. Supp. 2d at 416; *Refco*, 890 F. Supp. 2d at 343 (Rakoff, J.) ("[I]f the indemnity provision in this case is subject to a reasonable interpretation one way or another, the agreement must be construed not to indemnify . . . legal expenses in defending against [inter-party] claims."); *Luna v. American Airlines*, 769 F. Supp. 2d 231, 243-44 (S.D.N.Y. 2011) ("[T]he courts have generally declined to infer indemnification obligations arising from an indemnitee/indemnitor suit if the contractual language does not expressly refer to or explicitly contemplate such circumstances and the context does not suggest that the contracting parties were specifically concerned with prospective litigation between themselves."); *GEM Advisors, Inc. v. Corporacion Sidenor, S.A.*, 667 F. Supp. 2d 308, 329 (S.D.N.Y. 2009) ("[W]here a general indemnification provision does explicitly provide for indemnification for suits *between* the parties to the contract, a claim for such indemnification must fail.") (emphasis in original).

As the courts have explained, this exacting standard is necessary to protect the "American Rule," which recognizes that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper*, 74 N.Y.2d at 491; *see also U.S. Fidelity and Guar. Co.*, 369 F.3d at 75; *Refco*, 890 F. Supp. 2d at 340 (Rakoff, J.). "Promises to indemnify 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed' because 'the general American rule requires parties to bear their own litigation expenses.'" *Abakan*, 943 F. Supp. 2d at 415 (citing *Hooper*, 74 N.Y.2d at 491; *Happy Kids, Inc. v. Glasgow*, No. 01 CIV. 6434(GEL), 2002 WL 72937, at *2 (S.D.N.Y. Jan. 17, 2002)).

> Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-

> understood rule that parties are responsible for their own attorney's fees [courts] should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise. The promise should not be found "unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. Where a general indemnification provision does not explicitly provide for indemnification for suits *between* the parties to the contract, a claim for such indemnification must fail. In addition, in contexts in which contracting parties could have anticipated that they would be subject to third-party claims, courts apply a presumption against concluding that indemnification clauses cover litigation costs incurred in the court of resolving non-third-party claims.

Abakan, 943 F. Supp. 2d at 415 (internal citations and quotations omitted; emphasis in original).

In *Refco*, after carefully considering *Hooper* and its progeny, this Court identified the "principles of construction" that apply to agreements like the IMAs:

> 1. The presumption is that the agreement does not cover attorney fees in an action with the parties.
>
> * * *
>
> 2. A provision containing only broad language that does not unequivocally indicate that the parties intended to indemnify attorneys' fees in lawsuits between themselves will ordinarily not support a claim for indemnity in suits between the parties.
>
> * * *
>
> 3. On the other hand, if it is apparent that no third party claims were contemplated by the parties, then the agreement should be construed to provide indemnity for claims between the parties—otherwise the agreement would be superfluous.
>
> * * *
>
> 4. But legal expenses for a suit between the contracting parties are not indemnified where future third-party claims were possible at the time of the contract.
>
> * * *
>
> 5. Indemnification provisions that specifically distinguish third-party claims from interparty claims indicate an intent to cover claims between the parties ….

Refco, 890 F. Supp. 2d at 343-44 (collecting cases). Applying those principles to the IMAs, there can be no good faith argument that the Beechwood Defendants are entitled to indemnification for the costs of defending against SHIP's claims.

First, by law, the IMAs must be presumed ***not*** to cover the Beechwood Defendants' expenses in defending claims brought by SHIP. That presumption can only be overcome by

language that clearly and unequivocally manifests SHIP's intent to extend the indemnification obligation to legal expenses incurred by the Beechwood Defendants in a suit brought against them by SHIP. No such language exists within the IMAs. Here, as in *Refco*, the indemnify clause in the IMAs contains only broad language that does not does even mention, much less "unequivocally indicate," an intent to indemnify legal fees for inter-party claims. Because there is no language that either expressly requires or unequivocally indicates that SHIP promised to indemnify the Beechwood Defendants for expenses incurred if SHIP had to sue them, no such obligation can be inferred. *Id.* at 343, 349. Further, even "if the indemnity provision . . . is subject to a reasonable interpretation one way or another, the agreement must be construed not to indemnify [a party's] legal expenses in defending against [the other party's] claims." *Id.* at 343.

Second, the language of Paragraph 18(c) actually demonstrates the clear intent that no indemnity obligation attaches to a suit by SHIP, because the indemnity obligation extends only to conduct "that is not in material violation of [the IMA] and does not constitute fraud, gross negligence or willful misconduct." Putting aside acts that constitute fraud, gross negligence or willful misconduct, what acts would SHIP be entitled to bring against the Beechwood Defendants relating to the performance of the IMAs *other than* a material breach of the IMA? Indeed, Paragraph 18(a) of the IMAs expressly states that the Beechwood Defendants are not liable to SHIP, except for fraud, gross negligence, willful misconduct or breach of the IMAs. The only rational reading of Paragraph 18(c) is that it only requires SHIP to indemnify the Beechwood Defendants for claims arising out of their *proper* performance of the IMAs, a claim that could *only* be asserted by third-parties.

Third, even if some other rational reading were assumed, the language of Paragraph 18(c) clearly demonstrates that at the time the IMAs were executed, third-party claims stemming from

the Beechwood Defendants' performance under each agreement were possible. This mere "*possibility* of third party claims" compels the finding that the indemnity provision does not cover attorneys' fees in an action between the contracting parties. *Refco*, 890 F. Supp. 2d at 346 (emphasis in original).

> [L]egal expenses for a suit between the contracting parties are not indemnified where future third-party claims were possible at the time of the contract. *See, e.g., Bridgestone/Firestone, Inc.*. 98 F.3d at 21 (where indemnification clause is not "unmistakably clear" that it covers counsel fees in breach-of-contract action and "may easily read as limited to third-party actions", fees not indemnified). The question is not whether third party claims are highly likely or meritorious, but whether there is a "potential" for such claims. *Goshawk Dedicated Ltd. v. Bank of New York*, 2010 WL 1029547, at *10 (S.D.N.Y. March 15, 2010) ("[T]he potential for third-party claims means that the contractual indemnification provisions cannot definitively by read to refer to non-third-party claims, and thus the parties' intent to indemnify such claims is not unmistakably clear.").

Id. at 344.

Paragraph 18(c) clearly contemplates the possibility of third-party claims, because the kinds of "liabilities and losses" subject to indemnification include "fines, penalties, and settlements." SHIP 56.1 Resp. ¶ 14. Those kinds of losses and liabilities certainly would include claims or investigations by third-parties. Because "there was at the time of contracting the potential for third party claims arising from [] performance" under the IMAs, the "*Hooper Association* presumption that the indemnity provision does not cover attorney fees in an action between the contracting parties" is triggered. *Refco*, 890 F. Supp. 2d at 346.

Finally, where an indemnity provision is "subject to a reasonable interpretation one way or another," New York law requires the agreement "be construed to exclude recovery of attorney fees in suits between contracting parties." *Id*. at 349; *e.g.*, *U.S. Fidelity and Guar. Co.*, 369 F.3d at 74; *PPI Enters. (U.S.), Inc.*, 2006 WL 3370698, at *1. Thus, even if Defendants could offer a plausible interpretation of the indemnity provision—which they do not—courts still adhere to the

presumption that parties must bear their own legal expenses. *Refco*, 890 F. Supp. 2d at 349, 355. New York law firmly establishes that a "court should not infer a party's intention [to indemnify parties to the agreement] unless the intention to do so is unmistakably clear from the language of the promise." *Hooper*, 74 N.Y.2d at 492; *e.g.*, *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 200 (2d Cir. 2003); *Bridgestone/Firestone, Inc*, 98 F.3d at 20-21. Such an intention is not unmistakably clear.

For all of these reasons, the law compels the conclusions that SHIP is not obligated to indemnify the Beechwood Defendants for any expenses incurred in any suit against them by SHIP; that they therefore have no right of advancement from SHIP; and that their motion for partial summary judgment must be denied. In attempt to avoid that result, the Beechwood Defendants argue that the mere inclusion of the words "***to the fullest extent permitted by law***" at the outset of Paragraph 18(c) magically transforms the indemnity language and demonstrates the parties' unmistakable mutual intent to impose inter-party indemnification on SHIP. They rest that argument on *Gramercy Advisors, LLC v. Coe*, an unpublished decision that has never been cited by any court for its analysis and application of *Hooper*. *See* No. 13-CV-9069 (VEC), 2015 WL 13780603 (S.D.N.Y. Apr. 17, 2015).

Gramercy recognized the "unmistakably clear" *Hooper* requirement, and notes that "neither the *Hooper* holding nor anything in the [laws of New York] *prohibits* such [inter-party] indemnification, and courts applying New York law have awarded such indemnification." *Id.* at *2 (quoting *Happy Kids*, 2002 WL 72937, at *3). *Gramercy* then asserts that anticipation of "the possibility of third party claims is not dispositive of whether the parties also intended for the indemnification provisions" to apply to interparty claims. *Id.* at *2. For that statement, *Gramercy*

cites only itself in *Gramercy Advisors, LLC v. Coe*, wherein it quoted from *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp*.

When one actually reads the opinion in *Mid-Hudson*, however, it did not turn on the significance of the possibility of third-party claims. 418 F.3d 168, 178-79 (2d Cir. 2005) Rather, it involved the differences in the language of two indemnification clauses contained in the agreement at issue there. The original indemnity provision had, by addendum, been modified to require the defendant to indemnify the plaintiff broadly and without limitation for "actions of any kind or nature arising, growing out of, or otherwise connected with any activity under this Agreement." When compared to the original, narrower indemnity provision, the broader, revised provision in the agreement "indicated 'unmistakably,' *Hooper*, 74 N.Y.2d at 492, that the parties intended for it to apply to 'actions of any kind or nature,' including actions between the parties." *Mid-Hudson*, 418 F.3d at 178-79.

Citing (but not applying) the *Hooper* analysis, *Gramercy* found that the agreement in that case "unambiguously" required one party to the agreement (Gramercy) to indemnify the other (Coe), merely because it broadly applied to all claims asserted against Gramercy, except claims for willful misconduct. In that regard, the *Gramercy* court referenced, and the Beechwood Defendants seize upon in isolation, the phrase "to the fullest extent permitted by law" in introducing the indemnity clause. That conclusion, which has never been relied upon or cited by another court, was wrong, for several reasons.

First, *Mid-Hudson* found that the contrasting scope of the parties' original and then expansively modified indemnity clauses demonstrated the intent that the broader clause apply to claims by one party against the other. No such circumstance existed in *Gramercy* and no such analysis was made. *Gramercy* simply concluded that broad indemnification equates to inter-party

indemnification. That, however, is not the holding of *Hooper* or any other court. Nor can it be. *Hooper* is grounded in "the general rule, [that] attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper*, 74 N.Y.2d at 491. Because attorneys' fees are not otherwise recoverable, it must be "unmistakably clear" that the parties intended to override this general rule. *Id.* at 492; *see also Refco*, 890 F. Supp. 2d at 340. That intent may be found in the distinctions in scope between indemnification clauses in an agreement. Indeed, this Court recognized that in *Refco*. 890 F. Supp. 2d at 344-47.

In the present case, the "competing clauses" analysis works *against* the Beechwood Defendants. Unlike in *Mid-Hudson*, the two clauses in the IMAs are harmonious. Under Paragraph 18(c), SHIP must indemnify the Beechwood Defendants with respect to claims asserted against them for conduct that does ***not*** amount to a material violation of the IMA, fraud, gross negligence, or willful misconduct (*i.e.*, claims arising out of their *proper* performance of their obligations). In that same paragraph, the Beechwood Defendants are required to indemnify SHIP with respect to claims against SHIP arising from conduct of the Beechwood Defendants that ***does*** amount to a material violation of the IMA, fraud, gross negligence, or willful misconduct (*i.e.*, claims arising out of their *improper* performance of their obligations). As such, under the clauses, SHIP only bears the obligation for claims that arise from the Beechwood Defendants' *proper* performance. That reality makes unmistakable the intent that the Beechwood Defendants' expansive reading is wrong. How could SHIP assert claims against the Beechwood Defendants for their *proper* performance? Unmistakably, the intent is no indemnity for Beechwood for inter-party claims. The Beechwood Defendants' reading is thus unreasonable and, as such, (even putting aside the presumption against indemnity) must be rejected. *Eli Lilly Do Brasil, Ltda. v. Federal*

Express Corp., 502 F.3d 78, 82 (2d Cir. 2007) (citing *Restatement (Second) of Contracts* § 203(a) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.")).

Second, New York courts have repeatedly recognized that the phrase "to the fullest extent permitted by law" is, in fact, a *limiting* clause, rather than one that broadens indemnification. *See, e.g.*, *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204, 209-10 (2008) (holding "the phrase 'to the fullest extent permitted by law' ***limits*** rather than expands a promisor's indemnification obligation") (emphasis added); *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 508 (S.D.N.Y. 2004) (concluding the phrase "to the fullest extent permitted by law" in the indemnification provision "contains language ***limiting*** liability" to that permitted under the applicable NY statute) (emphasis added); *Dutton v. Charles Pankow Builders, Ltd.*, 745 N.Y.S.2d 520, 521 (1st Dep't) (holding "to the fullest extent permitted by law" in the agreement "calls for partial, not full, indemnification" because such language is "***limiting*** the subcontractor's obligation to that permitted by law "). Thus, the phrase "to the fullest extent permitted by law" is interpreted to *save* indemnification provisions that would otherwise be void for indemnifying a party for its own negligence in violation of public policy. *Murphy v. Columbia Univ.*, 773 N.Y.S.2d 10, 13-14 (1st Dep't 2004) ("The indemnification agreement between defendants and third-party defendant did not violate [New York law], in that the obligation was 'to the fullest extent permitted by applicable law,' and should be read to give the provision effect, rather than in a manner that would render it void.") (internal citations omitted); *Brooks*, 11 N.Y.3d at 210; *Madeira*, 315 F. Supp. 2d at 508; *Dutton*, 745 N.Y.S.2d at 520; *Lesisz v. Salvation Army*, 837 N.Y.S.2d 238, 240 (2d Dep't 2007); *Balladares v. Southgate Owners Corp.*, 835 N.Y.S.2d 693, 697-98 (2d Dep't 2007).

Thus, where each of the IMAs state: "***To the maximum extent permitted by applicable law***, each Indemnified Party shall be fully protected and indemnified by the Client, out of the assets of the Account, against all liabilities and losses," this phrase is included to ensure the provision is not rendered void against public policy. Under New York law, parties cannot limit liability where, "in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing." *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y.2d 377, 384-85 (1983). In other words, "[a]n exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances. Under announced public policy, it will not apply to exemption of willful or grossly negligent acts." *Baidu, Inc. v. Register.com, Inc.*, 760 F. Supp. 2d 312, 318 (S.D.N.Y. 2010) (agreement stated "liability is limited to the maximum extent permitted by law"); *see also Soja v. Keystone Trozze, LLC*, 964 N.Y.S.2d 731, 732 (3d Dep't) (parties agreed "to the fullest extent permitted by law, to limit the liability of [defendant] . . . to [plaintiffs] . . . for any and all claims"); *My Play City, Inc. v. Conduit Ltd.*, 589 F. App'x 559, 562 (2d Cir. 2014) (agreement limited defendant's liability "to the fullest extent possible under applicable law"). Therefore, the phrase "to the maximum extent permitted by applicable law" is not—as the Beechwood Parties claim—an indication that the parties unmistakably intended inter-party indemnification. Instead, the phrase is used to save broad limitations of liability that would otherwise violate applicable New York law.

Third and finally, the *Gramercy* analysis fails, because it conflates an insurer's duty to defend its insured in an insurance policy with the indemnification obligations between parties to a commercial contract. Notably, the *Gramercy* Court apparently accepted and relied on – without discussion – the parties' citations to insurance cases in which a liability insurer had a duty to defend its insured. *See Gramercy Advisors*, 2015 WL 13780603, at *2. However, an insurer's duty to

defend its insured in a policy is not analogous to a commercial contract's indemnity provision. As an initial matter, liability insurance policies such as those referred to by *Gramercy* contain specific language broadly giving an insurer a "duty to defend" its insured from all claims whether fraudulent or real. *Dresser-Rand Co. v. Ingersoll Rand Co.*, No. 14 Civ. 7222(KPF), 2015 WL 4254033, at *6 (S.D.N.Y. July 14, 2015) ("[I]t is well settled that an insurance company's duty to defend is broader than its duty to indemnify. Indeed, the duty to defend is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest . . . a reasonable possibility of coverage.'") (citing *Auto. Ins. Co. of Hartford v. Cook*, 7 N.Y.3d 131, 137 (2006)). No such language is present here. Further, in the insurance context, "where a contract of insurance includes the duty to defend or to pay for the defense of its insured, that duty is a 'heavy' one. This duty is independent of the ultimate success of the suit against the insured." *In re Worldcom, Inc. Sec. Litig*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005) (internal citations omitted).

In stark contrast with that broad duty to defend in insurance policies, "New York law on construing indemnity agreements is essentially hostile to claims that the agreement covers attorney fees in a suit between the contracting parties." *Refco*, 890 F. Supp. 2d at 340 (Rakoff, J.). As this very Court has recognized, under the "American Rule," "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Id.* (quoting *Hooper*, 74 N.Y.2d at 491).

In *Dresser-Rand Co.*, the court addressed this exact issue. There, the court addressed the question of whether the "exceedingly broad" duty to defend exists outside the insurance context. The court stated that:

> This question is hardly novel; indeed, contractually indemnified parties frequently invite courts in New York to import a similarly

> expansive duty to defend into agreement outside the insurance context. Courts have, with few exceptions, declined this invitation.

Dresser-Rand Co. v. Ingersoll Rand Co., 2015 WL 4254033 at *6. (collecting cases). The court concluded that, under New York law, "the 'duty to defend' is presumed only in insurance policies; the common law imposes no such duty on contractual indemnitors more generally." *Id.* at *7.

Similarly, to the extent there is ambiguity in an insurance policy, "such ambiguity is read against the insurer." *In re WorldCom, Inc.*, 354 F. Supp. 2d at 464. Here, however, if the indemnity provision is "subject to a reasonable interpretation one way or another, the agreement must be construed ***not*** to indemnify against [a party's] legal expenses…" *Refco*, 890 F. Supp. 2d at 343. Accordingly, the Beechwood Defendants' and *Gramercy*'s reliance on insurance cases involving an insurer's duty to defend its insured is misplaced.

There is simply no basis on which the IMAs can be read to evidence an "unmistakable intent" by SHIP to indemnify the Beechwood Defendants for the fees they incur in defending a claim brought against them by SHIP. Both the law and the language of the IMAs compel the opposite conclusion.

II. SHIP's Claims Are Not Indemnifiable Claims and Are Not Included in the Advancement Obligation

Even if the IMAs provided for inter-party indemnification by SHIP —which they do not— the indemnification obligation applies only to liability and losses arising from conduct (i) undertaken in their role as Advisors under the IMA that (ii) "is not in material violation of the IMA and does not constitute fraud, gross negligence or willful misconduct." SHIP 56.1 Resp. ¶ 14. "The Client shall, out of the assets of the Account, advance expenses, including legal fees, for which any Indemnified Party ***would be entitled by this Agreement to be indemnified.***" *Id.* (emphasis added). Thus, the Beechwood Defendants are only entitled to indemnification (and by extension, advancement of legal fees and expenses) if the claims for which they demand

indemnification and advancement of expenses involve conduct that is not a material violation of the IMAs and is "does not constitute fraud, gross negligence, or willful misconduct." *Id.*

SHIP has only brought claims for material breaches of the IMAs and duties owed under the IMAs and for fraud, gross negligence, and willful misconduct. The Beechwood Defendants ignore this limitation, asserting that the "duty to advance" is "broad" and "liberally construed." ECF No. 192, Defs.' Mot. for Partial Summ. J., 8.[9] The cases cited by the Beechwood Defendants are inapposite, however, because they do not rely on language comparable to the IMAs or do not apply the New York standard. *See, e.g.*, *Ficus Invs., Inc. v. Private Capital Mgmt., LLC*, 872 N.Y.S.2d 93 (1st Dep't 2009) (applying Florida law); *Ryu*, 2018 WL 1989591, at *5 (Rakoff, J.) (involving advancement to a former officer under corporate bylaws where agreement contained no carve-out for indemnifying certain conduct). Even *Gramercy* recognizes that an inter-party indemnity obligation does not apply if the other party's lawsuit "falls into a category of lawsuit that was excluded" from indemnity.[10] *Gramercy Advisors, LLC v. Coe*, 2015 WL 13780603, at *4.

[9] In addition to the utter lack of any language requiring a duty to defend, the Beechwood Defendants also make no showing whatsoever as to why they have a legitimate "emergency" that must be remedied by advancement. Appropriately for today, we can all now see for real that the Beechwood Defendants are a black hole into which they seek to bewitch us to throw further money. They have, however, extensive insurance limits that cannot yet reasonably have been exhausted.

[10] *Gramercy* goes on to analyze that issue under the wrong standard, by treating the indemnifying party like an insurer with a duty to defend policy. However, it is settled law in New York that even in cases where there is duty to defend wording, a non-insurer's duty to defend is no broader than its duty to indemnity. *See Cuomo v. 53rd & 2nd Assoc., LLC*, 975 N.Y.S.2d 53 (1st Dep't 2013) ("Plaza's motion for an order requiring Sage to defend it must be denied as premature, since Sage is a non-insurer, and its duty to defend is not broader than its duty to indemnify."); *JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC*, 957 N.Y.S.2d 45 (1st Dep't 2012) ("CIC's duty to defend is not broader than its duty to indemnify"); *Inner City Redevelopment Corp. v. Thyssenkrupp El. Corp.*, 913 N.Y.S.2d 29 (1st Dep't 2010) ("As defendant Thyssenkrupp is not an insurer, its duty to defend its contractual indemnitee is no broader than its duty to indemnify.").

Because SHIP's claims do not fit within the scope of indemnified claims and, thus, are not subject to advancement, the Beechwood Defendants claims for indemnification and advancement fail as a matter of law and their motion for summary judgment must be denied. To do otherwise would be to ignore the plain language of the IMAs and read the limiting language out of the contracts.

III. Even Assuming the Beechwood Defendants Were Entitled to Indemnification, Summary Judgment is Not Appropriate

A. The Beechwood Defendants Have Not Established Reasonable Attorneys' Fees

Even if the Beechwood Defendants were entitled to advancement of legal fees and expenses, disputes of fact remain as to the reasonableness and amount of fees incurred. The IMAs limit indemnification to "legal fees and expenses ***reasonably incurred*** in connection with any pending or threatened litigation or proceeding." SHIP 56.1 Resp. ¶ 14 (emphasis added). The Beechwood Defendants have made no attempt to provide an accounting of their legal fees and expenses aside from attaching correspondence with SHIP's counsel, which include only total amounts of legal fees and expenses allegedly incurred. Defs.' 56.1 Stmt. ¶¶ 24-28. Moreover, even the Beechwood Defendants are unclear as to the total amount of fees owed. For example, on February 22, 2019, counsel for Defendant Narain originally claimed $129,400.50 in incurred expenses. *Id.* ¶¶ 26. Then, counsel for Defendant Narain followed up on March 19, 2019, asserting the first amount was now "incorrect . . . due to a calculation error" and the actual amount was $274,198.85. *Id.* ¶ 27. Defendants have provided no detailed explanation as to the amount of fees incurred and SHIP has no way of determining the reasonableness of these fees. Thus, SHIP should be permitted to review the fees and costs incurred by the Beechwood Defendants. *See Ryu*, 2018 WL 1989591, at *12 (Rakoff, J.) (requiring a determination of "what fees have been incurred thus far and establish[ing] a summary procedure for the advancement of fees going forward").

B. Legal Fees and Expenses Must Be Apportioned

If it were determined that the Beechwood Defendants are entitled to indemnification of legal fees and expenses, the amount must be limited only to those claims that do not allege a material violation of the IMAs or are not premised on acts that "[do] not constitute fraud, gross negligence or willful misconduct." SHIP 56.1 Resp. ¶ 14. In addition, SHIP's allegations relating to the Agera transaction are not limited to the Beechwood Defendants' conduct under the IMAs. Therefore, the Beechwood Defendants cannot be entitled to indemnification in connection with defending against SHIP's allegations regarding the Agera transaction. Where "considerable overlap of issues and legal work" exists in defending indemnifiable and non-indemnifiable claims, courts apportion the attorneys' fees, permitting advancement only for those causes of action subject to indemnification. *See Happy Kids*, 2002 WL 72937, at *4-5 (requiring defendant's counsel to establish separate billing matters to apportion legal fees between fraud and breach of fiduciary duty where breached of fiduciary duty was indemnifiable, but fraud was not). Therefore, the Beechwood Defendants—if they were entitled to advancement—must apportion their attorneys' fees as determined by the Court.

C. No Practicable Method of Advancement Exists

The language of the IMAs explicitly limits the form of payment for indemnifying the Beechwood Defendants. The IMAs provide that indemnification is to be paid "***out of the assets of the Account***." SHIP 56.1 Resp. ¶ 14 (emphasis added). The assets of the accounts, however, are illiquid investments that cannot be converted to cash to cover advancement. Thus, no practicable payment method (*i.e.*, cash) for advancement exists. In addition, the BBIL and BRE Accounts were consolidated with the SHIP BAM Account in October of 2016, meaning those Accounts no longer exist. As the Court is well-aware, this litigation stems from Beechwood's

mismanagement and misconduct in relation to SHIP's assets. Now, ironically, the Beechwood Defendants are demanding payment of over $1.5 million and counting out of the very assets in which the Beechwood Defendants placed SHIP's funds, knowing full well the valuations were inflated or outright false. Therefore, because no method of payment other than "the assets of the Account" is contemplated under the IMAs, satisfaction of payment is impossible.

D. Any "Undertaking" to Repay Advanced Legal Fees and Expenses Would Result in the Beechwood Defendants' Likely Inability to Repay

Even if the Beechwood Defendants had a right to indemnification and a corollary right to advancement (which they do not), the Court should deny any award of advanced legal fees and expenses because any unsecured "undertaking" to repay would be a sham. It is virtually impossible that the Beechwood Defendants would be able to repay advanced legal costs since Beechwood Re is in Official Liquidation and the Beechwood Defendants are entrenched in related litigation before this Court. If the Beechwood Defendants were unable to repay advanced legal fees, SHIP would be effectively indemnifying the Beechwood Defendants for their own misconduct, which contradicts not only the language of the indemnification provision but New York public policy. *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985) ("Indemnification agreements are unenforceable as violative of public policy . . . to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury.").

E. Defendants Waived Any Right to Advancement

Under New York law, waiver is "the voluntary and intentional abandonment of a known right." *Kroshnyi v. United States Pack Courier Servs., Inc.*, 771 F.3d 93, 111 (2d Cir. 2014) (internal quotations and citations omitted). An implied waiver exists "where a party exhibits such conduct or failure to act as to evince an intent not to claim the purported advantage." *Id.* (internal quotations and citations omitted). SHIP filed its Complaint in this action on July 24, 2018, and

despite itemizing all of the tasks that their counsel have undertaken over the course of the past eight months in their Motion, the Beechwood Defendants thought so little of their contrived right to advancement that they did not seek advancement of legal costs until six months into this litigation on January 23, 2019. In that interim period, SHIP has conducted the litigation, made strategic decisions, and incurred substantial costs without any hint that the Beechwood Defendants believed they were entitled to advancement or indemnification. All that has changed in the Beechwood Defendants' level of anxiety because they are, it seems, running out of insurance proceeds, but the existence of insurance would not preclude a claim for indemnification. The tardiness of the Beechwood Defendants' assertion of a right to indemnity and advancement speaks volumes as to their belief in their own argument. The tardiness also constitutes a waiver, impliedly or otherwise, of any such right to advancement.

CONCLUSION

For all these reasons, SHIP respectfully requests that this Court deny the Beechwood Defendants' motion for partial summary judgment.

Dated: April 10, 2019

Respectfully submitted,

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