

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD  
LITIGATION

Master Docket No. 1:18-cv-06658-  
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

**PLAINTIFF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA'S  
RESPONSE TO THE BEECHWOOD DEFENDANTS' LOCAL RULE 56.1  
STATEMENT OF MATERIAL FACTS NOT IN DISPUTE AND  
COUNTERSTATEMENT OF UNDISPUTED MATERIAL FACTS**

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Pursuant to Local Rule 56.1, Plaintiff Senior Health Insurance Company of Pennsylvania (“SHIP”), respectfully submits the following Response to the Beechwood Parties’<sup>1</sup> Local Rule 56.1 Statement of Material Facts Not In Dispute [ECF 194] and Counterstatement of Undisputed Material Facts. This Response is submitted in support of SHIP’s Opposition to the Beechwood Parties’ Motion for Partial Summary Judgment for Advancement of Litigation Expenses. [ECF 192].

The documents and other materials cited in this Rule 56.1 Response Statement that were not previously submitted in support of the Beechwood Parties’ Rule 56.1 Statement are being submitted contemporaneously with the filing of this Response Statement as the Declaration of John Robison in Support of SHIP’s Opposition to the Beechwood Defendants’ Motion for Partial Summary Judgment, dated April 10, 2019 (the “Robison Decl.”).

### **THE PARTIES**

1. BRE is a reinsurance company domiciled in the Cayman Islands. (*See* SHIP’s Second Amended Complaint and Demand for Trial by Jury (Dkt. No. 84) (“SAC”) ¶ 39; Answer and Counterclaims of Defendants Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd., B Asset Manager, L.P., Beechwood Bermuda International Ltd., Beechwood Re Investments, LLC, Mark Feuer, Scott Taylor, and Dhruv Narain (Dk. No. 190) (“Answer”) ¶ 237.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 1.

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<sup>1</sup> For purposes of this Response to the Local Rule 56.1 Statement, SHIP adopts the definition of “Beechwood Parties” from the Defendants’ Motion for Partial Summary Judgment. For avoidance of doubt, the “Beechwood Parties” or “Beechwood Defendants” refers to Defendants B Asset Manager, L.P (“BAM”), Beechwood Bermuda International Ltd. (“BBIL”), Beechwood Re (in Official Liquidation) s/h/a Beechwood Re Ltd. (“BRE”), Beechwood Re Investments LLC (“BRILLC”), Mark Feuer, Scott Taylor, and Dhruv Narain.

2. BAM is a limited partnership incorporated in Delaware, which had its principal place of business in New York, New York. (SAC ¶ 40; Answer ¶ 238.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 2.

3. BBIL is domiciled in Bermuda. (SAC ¶ 41; Answer ¶ 239.)

**RESPONSE:** SHIP does not dispute the allegation in Paragraph 3.

4. BRILLC is a series limited liability company incorporated in Delaware, which had its principal place of business in New York, New York. (SAC ¶ 42; Answer ¶ 240.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 4.

5. Mark Feuer is domiciled in Lawrence, New York. (SAC ¶ 43; Answer ¶ 241.)

**RESPONSE:** SHIP does not dispute the allegation in Paragraph 5.

6. Scott Taylor is domiciled in New York, New York. (SAC ¶ 44; Answer ¶ 242.)

**RESPONSE:** SHIP does not dispute the allegation in Paragraph 6.

7. Dhruv Narain is domiciled in Purchase, New York. (SAC ¶ 46; Answer ¶ 243.)

**RESPONSE:** SHIP does not dispute the allegation in Paragraph 7.

8. SHIP is an insurance company domiciled in the Commonwealth of Pennsylvania with its principal place of business in Carmel, Indiana. (SAC ¶ 38; Answer ¶ 244.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 8.

### **THE IMAs**

9. SHIP and BBIL executed an Investment Management Agreement, dated as of May 22, 2014, between SHIP and BBIL (the "BBIL IMA"). (SAC ¶ 94; Answer ¶ 247 and Ex. 1.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 9 and does not dispute that Ex. 1 to the Answer appears to be a true and correct copy of the BBIL IMA. (ECF 190-1).

10. SHIP and BRE executed an Investment Management Agreement, dated as of June 13, 2014, between SHIP and BRE (the “BRE IMA”). (SAC ¶ 112; Answer ¶ 248 and Ex. 2.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 10 and does not dispute that Ex. 2 to the Answer appears to be a true and correct copy of the BRE IMA. (ECF 190-2).

11. SHIP and BAM executed an Investment Management Agreement, dated as of January 15, 2015, between SHIP and BAM (the “BAM IMA”). (SAC ¶ 129; Answer ¶ 249 and Ex. 3.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 11 and does not dispute that Ex. 3 to the Answer appears to be a true and correct copy of the BAM IMA. (ECF 190-3).

12. SHIP entered into a side letter with BRILLC, dated as of January 15, 2015, between SHIP and BAM (the “Side Letter,” and together with the BBIL IMA, the BRE IMA, and the BAM IMA, the “IMAs”). (SAC ¶ 134; Answer ¶ 249 and Ex. 4.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 12 and does not dispute that Ex. 4 to the Answer appears to be a true and correct copy of the BRILLC Side Letter. (ECF 190-4). SHIP disputes that the existence of the Side Letter presents a material fact that is relevant for purposes of the Beechwood Defendants’ Motion for Partial Summary Judgment.

13. Subparagraph (a) of paragraph 18 (titled “Liability”) of the each of the IMAs states in pertinent part as follows:

(a) . . . none of the Adviser [i.e., the Beechwood entity] or its subsidiaries or any sub-advisor engaged by the Adviser 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 (all of the foregoing persons and entities being referred to collectively as “Indemnified Parties” and individually as an “Indemnified Party”) shall be liable to . . . the Client [i.e., SHIP] . . . for 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 Adviser's powers under this Agreement, including, without limitation, any loss arising out of any investment or act or omission . . . that is not in material violation of this Agreement and does not constitute fraud, gross negligence or willful misconduct . . . .

(Answer ¶ 250 and Exs. 1-3.)

**RESPONSE:** SHIP does not dispute that the allegation in Paragraph 13 includes a portion of the language of Paragraph 18(a) of the BBIL, BRE and BAM IMAs and responds further that each of the three IMAs are documents which speak for themselves. (See ECF 190-1 through 190-3). To the extent the Beechwood Parties claim that such language is also present in the Side Letter which the Beechwood Parties have included in their definition of IMAs, SHIP disputes that any such language is included in the Side Letter. (ECF 190-4).

14. Subparagraph (c) of paragraph 18 of the each of the IMAs states in pertinent part as follows:

(c) To the maximum extent permitted by applicable law, each Indemnified Party [*i.e.*, the Beechwood entity] 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 . . . . 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 . . . .

(Answer ¶ 251 and Exs. 1-3.)

**RESPONSE:** SHIP does not dispute that the allegation in Paragraph 14 includes a portion of the language of Paragraph 18(c) of the BBIL, BRE and BAM IMAs and responds further that each of the three IMAs are documents which speak for themselves. Paragraph 18 states in full:

(a) Except as required by applicable law, none of the Adviser or its subsidiaries or any sub-advisor engaged by the Adviser 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 (all of the foregoing persons and entities being referred to collectively as “Indemnified Parties” and individually as an “Indemnified Party”) shall be liable to the Account, any contributor of assets to the Account, the Client or any of the Client’s shareholders for 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 Adviser’s powers under this Agreement, including, without limitation, any loss arising out of any investment or act or omission in the execution of transactions for the Account, 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 that his or its conduct was unlawful. None of the Client or any of the Client’s shareholders (all of the foregoing persons and entities being referred to collectively as “Client Indemnified Parties” and individually as a “Client Indemnified Party”) shall be liable for any liability or loss (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 Adviser 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.

(b) Except as required by applicable law, the Adviser shall have no responsibility (i) with respect to any assets of the Client other than those of the Account or (ii) for any loss incurred by reason of any act or omission of any broker or dealer, the Custodian or any other authorized representative with respect to the Account provided that, with respect to losses incurred by reason of any act or omission of any broker or dealer, the Custodian or any other authorized representative, such damages or loss did not result from the fraud, gross negligence or willful misconduct of or by the Adviser. Except as required by applicable law, the Adviser shall have no

responsibility for any loss resulting from anything done or omitted to be done in good faith reliance on any written instructions from the Client or any authorized representative thereof provided always that in obtaining such instructions the Adviser acts in good faith, without negligence and in accordance with this Agreement. Except as required by applicable law, the Adviser shall not be liable for any delay in the performance of its duties under this Agreement caused by factors beyond its reasonable control provided that the Adviser shall take reasonable steps to prevent or mitigate any loss, damage or failure arising out of such circumstances.

(c) 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 (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 Adviser 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.

(ECF 190-1 through 190-3). To the extent the Beechwood Parties claim that such language is also present in the Side Letter which the Beechwood Parties have included in their definition of IMAs, SHIP disputes that any such language is included in the Side Letter. (ECF 190-4).

15. SHIP is the “Client” under the IMAs. (Answer Exs. 1-3 at 1.)

**RESPONSE:** SHIP does not dispute the allegation contained in Paragraph 15.

16. Each of the Beechwood Parties is an “Indemnified Party,” as that term is defined in Paragraph 18(a) of each of the IMAs: (a) BAM, BRE, and BBIL are “Advisers” under their respective IMAs with SHIP; (b) BRILLC is a current affiliate of BAM, BRE, and BBIL; (c) Feuer and Taylor are present or former officers of each of BAM, BBIL, and/or BRE; and (d) Narain is a former officer of BAM. (SAC ¶¶ 8, 27, 64-66, 68, 98, 116, 133, 199, 2245, 348, 359, 379, Answer ¶ 252 and Exs. 1-3 at 1.)

**RESPONSE:** SHIP does not dispute that Paragraph 18 of each of the IMAs includes a definition of Indemnified Parties and responds further that each of the three IMAs are documents which speak for themselves. (ECF 190-1 through 190-3). To the extent the Beechwood Parties claim that such language is also present in the Side Letter which the Beechwood Parties have included in their definition of IMAs, SHIP disputes that any such language is included in the Side Letter. (ECF 190-4).

17. Paragraph 17 of each of the IMAs provides that Paragraph 18 shall survive any termination of the IMAs. (Answer ¶ 253 and Exs. 1-3.)

**RESPONSE:** SHIP does not dispute the allegations contained in Paragraph 17.

**The SHIP Action**

18. On July 24, 2018, SHIP commenced the action captioned *Senior Health Insurance Company of Pennsylvania v. Beechwood Re Ltd., et al.*, Case No. 1:18-cv.-6658-JSR (the “SHIP Action”) against the Beechwood Parties, and has twice amended its complaint. (Answer ¶ 254 and Exs. 5-7.)



**RESPONSE:** SHIP does not dispute the allegations in Paragraph 18 but disputes that these allegations are material to the Beechwood Parties' Motion for Partial Summary Judgment.

19. The SAC alleges that BAM, BBIL, and BRILLC have breached the IMAs by: (a) failing to deliver the promised, guaranteed investment returns; (b) failing to protect and return SHIP's invested funds, or equivalent assets, upon SHIP's demand; (c) not complying with the investment policies, guidelines, and restrictions in the IMAs; (d) placing SHIP's funds into investments and related-party transactions that were highly speculative, not adequately secured, opaque, and not appropriately disclosed to SHIP; (e) failing to have sufficient controls in place to secure SHIP's interests; and (f) favoring their own financial interests and those of their affiliates, to SHIP's financial detriment, in the manner in which they managed the investment of SHIP's funds. (SAC ¶¶ 1-5, 25-26, 28-32, 36-37, 93-275, 282-317; Answer ¶ 255.) The same general allegations were also made in SHIP's original and First Amended Complaints. (*See* Answer Exs. 5-6.)

**RESPONSE:** For the purpose of responding to the Beechwood Parties' Local Rule 56.1 Statement, SHIP does not dispute the allegations in Paragraph 19 but states that the Second Amended Complaint is a document that speaks for itself. Responding further, SHIP disputes that the allegations in Paragraph 19 are material for purposes of the Beechwood Parties' Motion for Partial Summary Judgment. SHIP states it has asserted claims against the Beechwood Parties for:

- 1) Breach of Contract;
- 2) Breach of Fiduciary Duty;
- 3) Fraud in the Inducement;
- 4) Fraud;
- 5) Constructive Fraud;

- 6) Civil Conspiracy;
- 7) Violations of civil RICO;
- 8) Gross Negligence; and
- 9) Unjust Enrichment.

(ECF No. 84, SAC).

20. The SAC further alleges that the Beechwood Parties breached their alleged fiduciary duties arising under and in connection with the performance of the IMAs, and committed acts constituting fraud, constructive fraud, civil RICO, civil conspiracy, and gross negligence in connection with the Beechwood Parties' performance of the IMAs and were unjustly enriched by reason of benefits received in connection with the IMAs. (SAC ¶¶ 318-404; Answer ¶ 256.) The same general allegations were also made in SHIP's original and First Amended Complaints. (*See* Answer Exs. 5-6.)

**RESPONSE:** For the purpose of responding to the Beechwood Parties' Local Rule 56.1 Statement, SHIP does not dispute the allegations in Paragraph 20 but states that the Second Amended Complaint is a document that speaks for itself. Responding further, SHIP disputes that the allegations in Paragraph 20 are material for purposes of the Beechwood Parties' Motion for Partial Summary Judgment. SHIP states it has asserted claims against the Beechwood Parties for:

- 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 for Narain;
- 5) Constructive Fraud against all Defendants except for Narain;

- 6) Civil Conspiracy against all Defendants;
- 7) Gross Negligence against all Defendants; and
- 8) Unjust Enrichment as to Feuer, Taylor, and Levy.

(ECF No. 84, SAC; ECF No. 184, Mot. to Dismiss Order).

21. In sum, SHIP's Complaint seeks to hold the Beechwood Parties liable for acts or omissions they have taken in connection with their duties, or exercise of their powers under, the IMAs. (SAC ¶¶ 1-5, 25-26, 28-32, 36-37, 93-275, 282-404; Answer ¶¶ 255-257.)

**RESPONSE:** Responding to the allegations included in Paragraph 21, SHIP disputes the allegation to the extent it purports to characterize SHIP's claims in this litigation. The Second Amended Complaint is a document which speaks for itself. SHIP responds further that SHIP's Second Amended Complaint seeks to hold the Defendants liable for, among others, their (a) material violations of the IMAs, (b) deceptive and fraudulent conduct, (c) gross negligence, and (d) willful misconduct. Each of the claims that SHIP has asserted against the Beechwood Parties relate to conduct which is not indemnifiable under the IMAs or under New York law. (*See generally* ECF 84, SHIP SAC).

22. To the extent the Beechwood Parties took or failed to take any of the actions described in the Complaint, they did so in connection with their performance of their respective duties, or their exercise of their respective powers, under the IMAs. (Answer ¶ 258.)

**RESPONSE:** Responding to the allegations included in Paragraph 22, SHIP disputes the allegation to the extent it purports to characterize SHIP's claims in this litigation. SHIP responds further that the allegations in Paragraph 22 do not assert a statement of material fact but instead assert a legal conclusion relating to the Beechwood Defendants' defenses against SHIP's claims. SHIP responds further that SHIP's Second Amended Complaint seeks to hold the Defendants

liable for, among others, their (a) material violations of the IMAs, (b) deceptive and fraudulent conduct, (c) gross negligence, and (d) willful misconduct. Each of the claims that SHIP has asserted against the Beechwood Parties relate to conduct which is not indemnifiable under the IMAs or under New York law.

23. The Beechwood Parties dispute that they took, or failed to take, any action that was in material violation of the IMAs or that constitutes fraud, gross negligence, or willful misconduct. (Answer ¶ 259.)

**RESPONSE:** For the limited purpose of responding to the Beechwood Defendants' Motion for Partial Summary Judgment, SHIP does not dispute the allegation contained in Paragraph 23. SHIP disputes that this allegation asserts a material fact that is relevant to the Beechwood Defendants' claim for advancement, however, as the language of Paragraph 18 of the IMAs does not provide for indemnification or advancement of expenses for claims asserted between the parties to the IMAs. (ECF 190-1, ¶ 18; ECF 190-2, ¶ 18; ECF 190-3, ¶ 18).

**The Beechwood Parties' Advancement Demands**

24. On January 23, 2019, counsel for BBIL, BAM, BRILLC, Feuer, and Taylor sent SHIP and its counsel 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 have 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. (Answer ¶ 260 and Ex. 8.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 24 but disputes that these allegations assert material facts that are material for purposes of the Beechwood Defendants' Motion for Partial Summary Judgment. SHIP responds further that Exhibit 8 to the Answer is a document which speaks for itself. (ECF 190-8). SHIP disputes that \$1,195,621.05 (the amount that BBIL, BAM, BRILLC, Feuer, and Taylor claim to have incurred in expenses) is reasonable.

25. On January 29, 2019, counsel for BRE sent SHIP and its counsel 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) BRE has incurred at least \$68,977.24 in expenses, including attorneys' fees, in defending the SHIP Action; and (c) BRE 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. (Answer ¶ 261 and Ex. 9.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 25 but disputes that these allegations assert material facts that are material for purposes of the Beechwood Defendants' Motion for Partial Summary Judgment. SHIP responds further that Exhibit 9 to the Answer is a document which speaks for itself. (ECF 190-9). SHIP disputes that \$68,977.24 (the amount that BRE claims to have incurred in expenses) is reasonable.

26. On February 22, 2019, counsel for Narain sent SHIP and its counsel 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) Narain has incurred at least \$129,400.50 in expenses, including attorneys' fees, in defending the SHIP Action; and (c) 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. (Answer ¶ 262 and Ex. 10.)

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 26 but disputes that these allegations are material for purposes of the Beechwood Defendants' Motion for Partial Summary Judgment. SHIP responds further that Exhibit 10 to the Answer is a document which speaks for itself. (ECF 190-10). SHIP disputes that \$129,400.50 (the amount that Narain claims to have incurred in expenses) is reasonable or accurate, particularly given the fact asserted in Paragraph 27 of the Beechwood Defendants' Rule 56.1 Statement. Narain is currently being represented by two law firms in this litigation. SHIP disputes that it is reasonable for SHIP to be required to indemnify or advance expenses to Narain for the engagement of multiple law firms.

27. 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 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. (Answer ¶ 265 and Ex. 15; Farrell Decl. ¶ 8.) 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.

**RESPONSE:** SHIP does not dispute the allegations in Paragraph 27 but disputes that these allegations assert material facts that are material for purposes of the Beechwood Defendants' Motion for Partial Summary Judgment. SHIP responds further that Exhibit 15 to the Answer is a document which speaks for itself. (ECF 190-15). SHIP disputes that \$274,198.85 (the amount

that Narain claims to have incurred in expenses) is reasonable and also disputes that it is an accurate calculation of the expenses, given the fact asserted in Paragraph 26 of the Beechwood Defendants' Rule 56.1 Statement. Narain is currently being represented by two law firms in this litigation. SHIP disputes that it is reasonable for SHIP to be required to indemnify or advance expenses to Narain for the engagement of multiple law firms.

28. The Beechwood Parties contend that the tasks undertaken that resulted in the \$1,538,797.14 in expenses, including attorneys' fees, included, *inter alia*: (a) investigating the allegations set forth in SHIP's initial, First Amended and Second Amended Complaints (Dk. Nos. 1, 76, and 84); (b) preparing papers in support of motions to dismiss SHIP's initial Complaint and Second Amended Complaint, respectively, and arguing those motions before the Court; (c) preparing papers in opposition to Plaintiff's motion for leave to amend to its First Amended Complaint; (d) preparing Rule 26.1 statements; (e) preparing discovery requests, including requests for the production of documents and interrogatories, on behalf of the Beechwood Parties; (f) responding to discovery requests, including requests for the production of documents and interrogatories, by SHIP, including the collection, review and production documents in response to such requests; (g) engaging in meet and confer sessions concerning the deficiency of SHIP's responses to the Beechwood Parties discovery requests and alleged deficiency of the Beechwood Parties' responses to SHIP's discovery requests; (h) preparing, serving, and following up on subpoenas to various third parties, and, in one case, responding to motions to quash subpoenas in Indiana and before this Court; (i) preparing deposition notices and preparing for the over 20 depositions noticed by the parties for January and February 2019; (j) preparing for mediation and settlement discussions; and (k) preparing for and attending various telephonic and in-person conferences before the Court. (Holinstat Decl. ¶ 4; Farrell Decl. ¶ 4; Jureller Decl. ¶ 4.)

**RESPONSE:** For the limited purpose of responding to the Beechwood Defendants' Motion for Partial Summary Judgment, SHIP does not dispute the allegations contained in Paragraph 28. SHIP disputes that the allegations included in Paragraph 28 include material facts that are relevant to the Beechwood Defendants' claim for advancement, however, as the language of Paragraph 18 of the IMAs does not provide for indemnification or advancement of expenses for claims asserted between the parties to the IMAs and therefore the itemization of tasks undertaken by counsel to the Beechwood Parties over the course of this litigation is not relevant to the Beechwood Parties' Motion for Partial Summary Judgment. (ECF 190-1, ¶ 18; ECF 190-2, ¶ 18; ECF 190-3, ¶ 18). SHIP disputes that \$1,538,797.14 (the amount that the Beechwood Defendants claim to have incurred in expenses) is reasonable or accurate given the Beechwood Defendants' own conflicting statements regarding expenses incurred by Narain. *See* ¶¶ 26, 27, *supra*.

29. On January 28, February 1, and February 26, 2019, respectively, SHIP's counsel responded to the above January 23, January 29, and February 22, 2019 letters, and stated that SHIP was refusing to comply with its contractual indemnification and advancement obligations under the IMAs. (Answer ¶ 263 and Exs. 11-13.)

**RESPONSE:** Responding to the allegations included in Paragraph 29, SHIP does not dispute that SHIP's counsel responded to the Beechwood Parties' letter requests for indemnification on January 28, February 1, and February 26, respectively. SHIP disputes that it has refused to comply with its contractual obligations under the IMAs. Responding further, SHIP asserts that 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 ECF 190-1, ¶ 18; ECF 190-2, ¶ 18; ECF 190-3, ¶ 18). Likewise, the conduct that forms the basis for SHIP's claims



against the Beechwood Defendants is not indemnifiable under the language of the IMAs or under New York law.

30. SHIP asserted that it was not required to advance expenses to the Beechwood Parties because it has the alleged conduct which, 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. (Answer Exs. 11-13.)

**RESPONSE:** SHIP does not dispute the allegations contained in Paragraph 30 of the Local Rule 56.1 Statement and also responds that that 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. (ECF 190-1, ¶ 18; ECF 190-2, ¶ 18; ECF 190-3, ¶ 18). Likewise, the conduct that forms the basis for SHIP's claims against the Beechwood Defendants is not indemnifiable under the language of the IMAs or under New York law.

31. Because SHIP repeatedly invoked New York law to support of its refusal to comply with its advancement obligations, on January 29, 2019, the Beechwood Parties requested that SHIP provide the specific authority it was relying upon to "avoid any unnecessary disputes." (Answer ¶ 268 and Ex. 14.)

**RESPONSE:** SHIP disputes that the allegations contained in Paragraph 31 of the Local Rule 56.1 Statement contain facts that are material to the Beechwood Defendants' Motion for Partial Summary Judgment. The IMAs are each documents which speak for themselves. As previously explained, 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. (ECF 190-1, ¶ 18; ECF 190-2, ¶ 18; ECF 190-3, ¶ 18). Likewise, the conduct that forms the basis for SHIP's claims against the Beechwood Defendants is not indemnifiable under the language of

the IMAs or under New York law. Responding further, SHIP states that no provision of any of the IMAs requires SHIP to provide legal authority to the Beechwood Parties to support SHIP's interpretation of the provisions of the IMAs.

32. SHIP did not respond to this request. (Holinstat Decl. ¶ 8.)

**RESPONSE:** SHIP does not dispute the allegation contained in Paragraph 32.

**SHIP'S COUNTERSTATEMENT OF UNDISPUTED MATERIAL FACTS**

33. In addition to the \$270 million of SHIP's assets that the Beechwood Defendants managed under the terms of the IMAs, in June 2016, SHIP also placed \$50 million of its assets into an investment in Agera Energy, LLC. This investment was made separate and apart from the IMAs. (ECF No. 84, SAC ¶¶ 26, 37, 236).

34. SHIP filed its First Amended Complaint on December 14, 2018, and its Second Amended Complaint on December 28, 2018. (ECF No. 76, First Am. Compl.; ECF No. 84, SAC.).

35. 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. (ECF No. 84, SAC; ECF No. 184, Mot. to Dismiss Order).

36. The Beechwood Defendants represented to this Court on September 7, 2018 that they had no counterclaims against SHIP. Specifically, counsel for the Beechwood Defendants stated:

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.

(ECF No. 57, September 7, 2018 Hearing Transcript, at 9:6-10).

37. 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.” (See ECF 190-1, ¶18; ECF 190-2, ¶ 18; ECF 190-3, ¶ 18(c))

38. To the extent the Beechwood Defendants are entitled to indemnification or advancement, the IMAs require that payment of those expenses be made “out of the assets of the Account.” (ECF 190-1, ¶ 18; ECF 109-2, ¶ 18; ECF 190-3, ¶ 18).

39. The assets that BAM, BBIL and BRE managed for SHIP pursuant to the IMAs were maintained in accounts at Wilmington Trust Corporation (the “IMA Accounts”). (ECF 109-1, ¶¶ 1-2 18; ECF 190-2, ¶¶ 1-2; ECF 190-3, ¶¶ 1-2; Robison Decl. ¶ 3).

40. 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.” (Robison Decl. ¶ 4).

41. After SHIP’s assets were consolidated into the BAM IMA Account, the IMA Accounts for the BBIL and BRE IMAs were closed. (Robison Decl. ¶ 5).

42. 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. (Robison Decl. ¶ 6).

Dated: April 10, 2019

Respectfully submitted,

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TO: All Counsel of Record