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)

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

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PRELIMINARY STATEMENT

SHIP sued the Beechwood Parties under the IMAs, but now realizes that it does not like the advancement provisions in those agreements, which require it to advance legal fees "to the maximum extent permitted by applicable law" for "all liabilities and losses" incurred in connection with "any pending or threatened litigation or proceeding." So SHIP does everything in its power to evade those obligations, resorting to bombast, purple prose, and meritless legal arguments. None of those tactics succeed. At this stage, SHIP has not proven any of its factual allegations, and it never will, because they are false through and through. But SHIP's advancement obligations, by definition, kick in now.

SHIP argues that the language of the advancement and indemnification provisions is not clear enough to cover inter-party claims. It ignores the inconvenient fact that a litany of courts, including this Court, have characterized identical language as "on its face . . . an expansive grant of mandatory indemnification and advancement rights" (*Ryu v. Hope Bancorp, Inc.*); "highly inclusive" (*Crossroads ABL LLC v. Canaras Capital Mgmt., LLC*); "unambiguous" (*Doran Jones, Inc. v. Per Scholas, Inc.*); and bearing the "literal import" of including inter-party claims (*Happy Kids, Inc. v. Glasgow*). SHIP spends half of its brief insisting that indemnification language must bear "unmistakable clarity," even though this Court called that standard a "misnomer." It spends the other half attacking Judge Caproni's decision in *Gramercy* that identical language in an investment management agreement "unambiguously" embraced inter-party claims. For all its bluster, SHIP does not cite a single case with similar language to the IMAs and, in its single-minded focus on *Gramercy*, ignores the multiple cases that do.

SHIP's alternative attempt to resist advancement by asserting that all of its claims are based on conduct that is not indemnifiable relies on one of the oldest fallacies in the book. Advancement is not indemnification, and whether the Beechwood Parties are ultimately found to

have engaged in conduct barring indemnification is immaterial. That is precisely why the IMAs require the Beechwood Parties to undertake to repay advanced expenses if it is *ultimately determined* that indemnification is inappropriate.

The remainder of SHIP's arguments attempt to circumvent or otherwise limit its advancement obligations, none of which change the inescapable conclusion: SHIP's advancement obligations are immediate, ongoing, and long overdue.

ARGUMENT

I. The Advancement And Indemnification Provisions Of The IMAs Plainly Cover Litigation Between The Parties

SHIP concedes that the advancement and indemnification provisions of the IMAs cover third-party claims against the Beechwood Parties. (Opp. 13.)[1] Yet it argues that they do not apply to inter-party claims between SHIP and the Beechwood Parties. SHIP is wrong.

At the outset, SHIP misstates the legal standard. There is no requirement that coverage of inter-party claims literally be stated with "unmistakable clarity." (*Contra* Opp. 9-12.) That is a "misnomer." *In re Refco Sec. Litig*, 890 F. Supp. 2d 332, 341 (S.D.N.Y. 2012) (Rakoff, J.) (quotation omitted). The question is simply whether the contract evidences an intent to cover claims by each party against the other. That is determined in the ordinary way, "from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Id.* (quotation omitted). SHIP pretends as if the only evidence of such intent comes from a single phrase in the IMAs, and as if the only legal support for that construction comes from Judge Caproni's decision in *Gramercy*. To the contrary, there is abundant support of both types.

First, ¶ 18(c) states that indemnification applies to "the maximum extent permitted by

[1] This present motion relates only to expenses incurred in this action by SHIP. The Beechwood Parties reserve all rights to seek advancement and indemnification from SHIP related to their defense of other actions, including the third-party actions currently pending in this Court.

applicable law." (Rule 56.1 Stmt. ¶ 14.) As then-District Judge Lynch explained in *Happy Kids, Inc. v. Glasgow*, the "literal import" of that provision is that indemnification covers claims between the parties, because inter-party indemnification is not prohibited by law. 2002 WL 72937, at *3 (S.D.N.Y. Jan. 17, 2002). *See also Gramercy Advisors, LLC v. Coe*, 2015 WL 13780603, at *5 (S.D.N.Y. Apr. 17, 2015); *Ryu v. Hope Bancorp, Inc.*, 2018 WL 1989591, at *3 (S.D.N.Y. Apr. 26, 2018) (Rakoff, J.) (indemnification to the "fullest extent" permitted by certificate and bylaws was "[o]n its face . . . an expansive grant of mandatory indemnification and advancement rights"). While SHIP devotes pages to attacking *Gramercy*, it completely ignores these holdings in *Happy Kids* and *Ryu*, evidently because it cannot rebut them.

SHIP also spends two pages arguing the implausible position that "to the maximum extent permitted by applicable law" somehow functions as "limiting" language here (Opp. 17-18), based on cases where a party sought to expand contractual indemnification to conduct that is not indemnifiable under New York law, and the courts treated the language as a kind of savings clause. Those cases have no bearing on the issue here—namely, the parties' intent to cover inter-party claims, as shown by their choice of language requiring the indemnification provisions to be read as broadly as the law will allow.

Second, the indemnification provision encompasses "*all* liabilities and losses" suffered by the Beechwood Parties, including "legal fees and expenses" incurred in connection with "*any* pending or threatened litigation or proceeding." (Mov. Br. 8; Rule 56.1 Stmt. ¶ 14 (emphasis added).) SHIP offers no response on this point whatsoever. By its plain language, "all" means all. Similarly, in a case involving a servicing agreement between the parties, the First Department held that a provision requiring the defendant to indemnify the plaintiff for "any and all claims, demands, actions, suits or proceedings" plainly included inter-party claims. *Crossroads ABL LLC v. Canaras Capital Mgmt., LLC*, 963 N.Y.S.2d 645, 647 (1st Dep't 2013).

Indeed, the court called this language "highly inclusive" as to the types of proceedings for which indemnification would be required, enough to merit summary judgment in favor of advancement. *Id*. As in *Crossroads*, the indemnification provision here is "highly inclusive," does not limit indemnification to specific types of proceedings, and does not contain any other provisions that would be rendered meaningless if indemnification were held to include inter-party claims. *Id.*; *Crossroads ABL, LLC v. Canaras Capital Mgmt., LLC*, 954 N.Y.S.2d 758, 758 (Sup. Ct. N.Y. Cty. 2012) (distinguishing *Hooper Assocs., Ltd. v. AGS Computs., Inc.*, 548 N.E.2d 903 (N.Y. 1989), on these bases).

Third, the overall structure of ¶ 18 makes clear that the phrase "all liabilities and losses" must include liabilities between the parties. Paragraph 18(a) (first sentence) provides that Beechwood shall not be "liable" for "any loss" to SHIP unless the underlying act or omission is a material violation of the IMAs by Beechwood and constitutes fraud, gross negligence, or willful misconduct. SHIP concedes that this provision includes litigation between the parties—*i.e.*, liabilities SHIP seeks to impose on Beechwood through litigation. (*See* Opp. 5 n.8.) Clearly, ¶ 18(a) and ¶ 18(c) are meant to be read in tandem, as they are subparagraphs of the same provision. Hence, when ¶ 18(c) provides that SHIP shall indemnify the Beechwood Parties for "all liabilities," except those resulting from a material violation of the IMAs and willful misconduct, "all" must include the liability already specified in ¶ 18(a). The court in *Gramercy* reached exactly the same conclusion analyzing similar provisions. 2015 WL 13780603, at *3-4.

SHIP's only response to all of this powerful evidence of the parties' intent is an argument both highly technical and unpersuasive. According to SHIP, the indemnification exclusion in ¶ 18(c) described above shows that inter-party claims are not covered, because supposedly there are no claims that SHIP could bring against the Beechwood Parties besides claims for material breaches of the IMAs and for fraud, gross negligence, and willful misconduct. (Opp. 12.) But

that is untrue. To begin with, not only *could* SHIP bring a claim that does not necessarily involve a material breach of the IMAs or fraud, gross negligence, and willful misconduct—but it actually *did*: breach of fiduciary duty (Count Four) and unjust enrichment (Count Thirteen). Neither one requires a finding of material breach, fraud, gross negligence, or willful misconduct.

Indeed, even the IMAs recognize that SHIP could bring actions against the Beechwood Parties other than for breach or fraud. Paragraph 18(a) limits the Beechwood Parties' liability to SHIP for acts besides material violations and fraud, negligence, and willful misconduct. If the latter defined the entire universe of possible claims that SHIP could ever bring, then the limitation contained in ¶ 18(a) would be entirely illusory. It would pretend to grant a legal protection against something that could never happen. Notwithstanding SHIP's conduct in this lawsuit, one may assume that SHIP was not acting so deceptively when it agreed to the IMAs.

Even more devastating to its argument, SHIP has misunderstood the indemnification exclusion in ¶ 18(c). It does not exclude indemnification for *claims* of material breach or fraud. It excludes indemnification for *actions* that are proven to be in material violation or to constitute fraud. If SHIP brings a claim of material breach but fails to prove it, there is still indemnification (and thus a right to advancement) to the Beechwood Parties. It is a pure logical fallacy to assert that SHIP need only indemnify the Beechwood Parties for claims arising out of the latter's proper performance, which is "a claim that could *only* be asserted by third parties." (Opp. 12 (emphasis in original).) The truth is that SHIP must also indemnify the Beechwood Parties for claims of misconduct that SHIP *will fail to prove*—like all of the claims it is bringing here.[2]

[2] This conclusion is bolstered—not undermined—by the fact that ¶ 18(c) exempts from indemnification material violations of the IMAs, for it makes no sense that the parties would exclude material violations of the IMAs from the indemnification provision if the provision did not otherwise cover inter-party claims. *See Happy Kids*, 2002 WL 72937, at *4 ("If the agreement were implicitly intended to apply only to actions brought by third parties, there would be no need to exclude actions brought by the director.").

Thus, SHIP's six-page assault on *Gramercy* is beside the point, because *Gramercy* is only one of many cases supporting the Beechwood Parties' entitlement to inter-party advancement based on the language of the IMAs here. SHIP's critique is also flat-out wrong. SHIP claims that *Gramercy* "simply concluded that broad indemnification equates to inter-party indemnification" (Opp. 15-16), but the court conducted a detailed textual analysis of the IMAs before concluding that the parties intended to cover inter-party claims. 2015 WL 13780603, at *3-4. SHIP's long diatribe about *Gramercy*'s citations to insurance law (Opp. 18-19) is likewise totally inapposite: in the portion of the opinion analyzing whether the parties intended to cover inter-party claims, the court did not cite *a single insurance case*. *Gramercy*, 2015 WL 13780603, at *3-4. SHIP's assertion that *Gramercy* has never been cited for its analysis of *Hooper* (Opp. 14) is also highly misleading: the court's predecessor decision in the case has been cited multiple times, including for its core holding. The magistrate judge in *Doran Jones, Inc. v. Per Scholas, Inc.*, 2017 WL 2197100, at *5 (S.D.N.Y. May 2, 2017), for example, observed that language providing for indemnification to the "fullest extent" allowed or permitted by law is "well-worn language relied on by generations of corporate lawyers" to indicate intent to cover inter-party claims. *See Gramercy Advisors, LLC v. Ripley*, 2014 WL 4188099, at *10 (S.D.N.Y. Aug. 25, 2014).

None of the authority that SHIP cites undercuts the Beechwood Parties' entitlement to advancement. The analysis here is entirely consistent with the principles articulated in *In re Refco*. The textual evidence described above and in the Beechwood Parties' moving brief shows that the "language and purpose of the entire agreement" supports coverage of inter-party claims. 890 F. Supp. 2d at 341 (quotation omitted). *Refco* itself came out differently only because the indemnification provision there had none of the indicators here that the parties intended to cover

inter-party claims, while also featuring additional provisions that contraindicated coverage.[3] Likewise, the remainder of SHIP's cases involved highly dissimilar contractual provisions that led the courts to conclude that the parties did not intend to cover inter-party claims, and are completely inapposite here.[4]

II. Advancement Is Not Barred Merely Because SHIP Alleges Acts Or Claims That Would Prevent Indemnification If Proven At Trial

SHIP next argues that the Beechwood Parties are not entitled to advancement because all of its claims supposedly fall within the indemnification exclusion. (Opp. 21.) That argument misapprehends the fundamental distinction between advancement and indemnification.

Advancement allows a "*potential* indemnitee" to cover litigation expenses "regardless of whether he will ultimately be entitled to indemnification." *Ryu*, 2018 WL 1989591, at *3 (citation omitted). It is well settled that a party cannot escape its advancement obligations by asserting that its claims involve conduct which would bar indemnification if proven at trial, and courts routinely order advancement in the face of allegations by an indemnitor that the

[3] For example, in *Refco*, the indemnification provision did not provide for indemnification to the "maximum" or "fullest" extent permitted by law. Here, it does. In *Refco*, a reference to "attorneys' fees" was omitted from the indemnification provision only with respect to the party seeking indemnification but not the party from whom it was sought. Here, the indemnification provision in favor of the Beechwood Parties explicitly references attorneys' fees.

[4] *See, e.g.*, *PPI Enters. (U.S.), Inc. v. Del Monte Foods Co.*, 2006 WL 3370698, at *1 (2d Cir. Nov. 20, 2006) (indemnification provision gave indemnitor right to choose indemnitee's counsel and join in defense of claims); *Abakan, Inc. v. Uptick Capital, LLC*, 943 F. Supp. 2d 410, 416 (S.D.N.Y. 2013) (indemnification provision contained notice and assumption of defense provisions); *Luna v. Am. Airlines*, 769 F. Supp. 2d 231, 245 (S.D.N.Y. 2011) (indemnification provision contained assumption of defense provision and other provisions "typical of agreements that contemplate the prospect of third-party litigation"); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 74 (2d Cir. 2004) (attorneys' fees award inappropriate where parties' contract did not expressly mention them); *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 21 (2d Cir. 1996) (indemnification provision was limited to distinct activity by collection agency that could "easily be read as limited to third party actions" by persons from whom the agency demanded money); *GEM Advisors, Inc. v. Corporación Sidenor, S.A.*, 667 F. Supp. 2d 308, 329 (S.D.N.Y. 2009) (no indication parties intended to cover inter-party claims).

indemnitee committed conduct that would not be indemnified if proven. (*See* Mov. Br. 9-10 (citing cases).) This includes *Gramercy*, where the defendant accused the plaintiff of fraud and sought to escape its advancement obligations on that basis.[5] Were it any other way, there would never be advancement. The indemnitor could always plead around it by making allegations of conduct excepted from indemnification. And the hallmark requirement that a party receiving advancement must undertake to repay advanced expenses if it is ultimately determined that indemnification is not appropriate would be entirely superfluous. (Mov. Br. 10.) All of SHIP's claims relate to the Beechwood Parties' alleged acts and omissions in connection with the IMAs, and SHIP cannot escape its clear contractual advancement obligations by asserting that it has alleged conduct which—if proven—would bar indemnification.

III. SHIP's Remaining Arguments Are Red Herrings

SHIP makes a series of half-hearted arguments aimed at avoiding summary judgment or limiting its advancement obligations. None is remotely persuasive.

1. SHIP argues that summary judgment is inappropriate because a dispute remains as to the reasonableness of the fees incurred. (Opp. 22.) That is not a ground to resist summary judgment. *Ryu*, 2018 WL 1989591, at *12 (granting summary judgment on advancement and then transferring case for determination of fees and to establish a summary procedure for advancement going forward); *Gramercy*, 2015 WL 13780603, at *5.[6] If requested, the

[5] SHIP attempts to discredit the decision in *Gramercy* by accusing the court of ignoring "settled" law that a party cannot invoke insurance common law to require a non-insurer to advance litigation expenses in ongoing litigation based on an indemnification provision alone. (Opp. 21 n.10.) That was not the case there. The IMA in *Gramercy* had an explicit advancement provision. The court did not invent one from common-law insurance principles.

[6] Moreover, in the IMAs, "reasonableness" is a stated requirement of indemnification (referring to "legal fees and expenses reasonable incurred") but not of advancement (referring to "legal fees" alone). (Rule 56.1 Stmt. ¶ 14.)

Beechwood Parties will submit their bills to the Court for in-camera review.

2. Next, SHIP argues that if the Beechwood Parties are entitled to indemnification on any claims, the Court should apportion fees and expenses between covered claims and non-covered claims, the latter asserting material violations of the IMAs, fraud, gross negligence, or willful misconduct. (Opp. 23.) That argument relies on a false premise, because (as explained in Point II above), the Beechwood Parties are entitled to advancement even for claims that, if proven, would bar indemnification. *See, e.g.*, *Gramercy*, 2015 WL 13780603, at *4 n.3 (fraud claims subject to advancement); *Crossroads*, 954 N.Y.S.2d at 758 (claims for bad-faith breach of duty of good faith and fair dealing, fraudulent inducement, and others subject to advancement).[7]

3. SHIP asserts that even if it is ordered to advance fees and expenses, there is "no practicable method" to do so, because it is only required to advance fees from the "assets of the [IMA] Account[s]," and the remaining assets in the IMA accounts are illiquid. (Opp. 23.) That is a brazen claim. First, the IMAs specifically refer to the assets "of" the IMA Accounts, not assets *in* them. Since seizing control of the IMA accounts in November 2016, SHIP has [redacted] (Resp. to Rule 56.1 Counterstmt. ¶ 42 & Eilbaum Decl. Ex. 2 (SHIP's self-styled [redacted] dated March 31, 2018).) Second, even if the IMAs limited advancement to assets presently *in* the IMA Accounts, it would be outrageous for SHIP to benefit because it has siphoned assets out of the accounts to avoid its obligations—obligations which explicitly survive the termination of the

[7] SHIP's claim that its allegations regarding the Agera transaction were not related to the Beechwood Parties' actions under the IMAs does not hold water. (Opp. 23.) SHIP did make a direct $50 million investment in AGH Parent outside of the IMAs, but it also invested in Agera in the same transaction through the IMAs. (SAC ¶ 221.) Moreover, even as to the former, SHIP alleges that the Beechwood Parties breached fiduciary duties "arising out of the relationship created by [the IMAs]." (Dkt. 72 at 11 (citation omitted)).

IMAs. (*See* Rule 56.1 Stmt. ¶ 17.) To the extent SHIP's dissipation of assets frustrated the purpose of the advancement provisions or otherwise violated SHIP's contractual obligations, the Beechwood Parties may seek additional remedies after the Court orders advancement.[8] In any event, this entire issue relates to enforcement of the judgment on advancement, not the Beechwood Parties' substantive right to it.

4. Without any citation to the IMAs or supporting case law, SHIP asserts that any undertaking by the Beechwood Parties to repay advanced amounts would be a "sham" because the Beechwood Parties might not be able to repay those amounts. (Opp. 24.) The Court should ignore SHIP's self-serving speculation. The IMAs do not require the Beechwood Parties to make a showing of ability to repay advanced amounts to receive advancement. To the contrary, the parties specifically contracted for an *unsecured* undertaking as the advancement trigger.

5. SHIP's final argument is completely meritless. With the costs in defending this litigation mounting, the Beechwood Parties demanded advancement in January 2019. SHIP rejected those demands and then repeatedly sought to delay briefing on the dispute. Nothing in the Beechwood Parties' conduct comes close to evidencing a "voluntary and intentional abandonment" of their right to seek advancement. *Kroshnyi v. United States Pack Courier Servs., Inc.*, 771 F.3d 93, 111 (2d Cir. 2014). Unsurprisingly, SHIP does not cite a single case where a party seeking advancement in ongoing litigation was found to have waived it.

CONCLUSION

For all the foregoing reasons, the Beechwood Parties respectfully request that the Court grant their motion for partial summary judgment on their advancement claim in its entirety.

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[8] [redacted] (Resp. to Rule 56.1 Counterstmt. ¶ 42 & Eilbaum Decl. Ex. 2.) It cannot just throw its hands up and say that these assets are "illiquid" to avoid advancement.

Dated: April 17, 2019

Respectfully submitted,

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