UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PLATINUM-BEECHWOOD LITIGATION	:	18-cv-6658 (JSR)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, -v- BEECHWOOD RE LTD., et al., Defendants.	:	18-cv-06658 (JSR)

MEMORANDUM OF LAW IN SUPPORT OF
THE BEECHWOOD PARTIES' MOTION FOR RECONSIDERATION

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PRELIMINARY STATEMENT

In its May 13, 2019 Opinion and Order, the Court denied the Beechwood Parties' motion for partial summary judgment seeking contractual advancement of inter-party litigation expenses against SHIP. Although the Court agreed that the investment management agreements ("IMAs") contained "expansive" language whose "plain meaning" might cover those expenses (Op. at 6-7), the Court invoked the presumption against inter-party indemnification, which it held the Beechwood Parties had not overcome. At the same time, the Court granted David Levy's motion for a preliminary injunction for the immediate advancement of his litigation expenses incurred in third-party actions.[1]

The Beechwood Parties now respectfully seek reconsideration of the Court's ruling on inter-party claims. For the sake of efficiency, they will not repeat their arguments based on the case law cited in their previous briefings, although the Court acknowledged that those cases pointed in support of their position. (*Id.* at 14 n.3.) Rather, they will focus on the Court's construction of the IMAs themselves, as the Court rejected the Beechwood Parties' reading for reasons that SHIP itself did not raise but which are incorrect under the plain text of the IMAs. First, the Court rejected the Beechwood Parties' argument that the text and structure of ¶ 18 makes clear that ¶ 18(c) covers inter-party claims, reasoning that the absence of indemnification language in one provision cut against inter-party coverage. (*Id.* at 13.) Second, the Court reasoned that it would be "bizarre" and "unusual" for the parties to design a scheme in which the Beechwood Parties would be entitled to advancement of legal expenses if sued by SHIP, but then

[1] The Beechwood Parties subsequently brought an action for advancement of their third-party litigation expenses, on the same grounds as Levy, in the separate action captioned *B Asset Manager, L.P. et al. v. Senior Health Insurance Company of Pennsylvania*, 19-cv-04487-JSR (S.D.N.Y.).

would have to repay those expenses and further indemnify SHIP for the latter's litigation expenses if SHIP ultimately prevailed in the suit. (*Id.* at 10.)

Respectfully, the Beechwood Parties submit that both of those determinations are incorrect. The only plausible reading of the IMAs makes clear that inter-party claims are covered.

STANDARD FOR RECONSIDERATION

Motions for reconsideration under Local Civil Rule 6.3 are committed to the sound discretion of the district court. A party seeking relief through such a motion must show that the court overlooked controlling law or facts "that might reasonably be expected to alter the conclusion reached by the court." *Schrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *see also Espinosa v. Delgado Travel Agency, Inc.*, 2007 WL 1222858, at *1-2 (S.D.N.Y. Apr. 24, 2007). That standard is met here.

ARGUMENT

I. The Plain Text and Structure of Paragraph 18(c) Demonstrate that It Covers Inter-Party Claims.

Although New York law creates a rebuttable presumption against finding inter-party indemnification, inter-party indemnification must be enforced when the context of a broad indemnification clause "suggest[s] that the contracting parties were specifically concerned with prospective litigation between themselves." *In re Refco Sec. Litig.*, 890 F. Supp. 2d 332, 341 (S.D.N.Y. 2012) (Rakoff, J.) (quoting *Luna v. Am. Airlines*, 769 F. Supp. 2d 231, 243-44 (S.D.N.Y. 2011)). That was the case here.

The IMAs reflect that the parties sought to address two specific scenarios in which SHIP might seek to hold Beechwood liable: (i) for loss SHIP might incur based on the Beechwood Parties' investment of SHIP funds under the IMAs, and (ii) for liability SHIP might face in third-

party suits related to Beechwood's conduct under the IMAs. These concerns find harmony in the interplay between both ¶ 18(a), which defines the entities and individuals covered by the indemnification and advancement obligations and sets forth limitations of liability, and ¶ 18(c), which sets forth the scope of the indemnification and advancement obligations.

Subparagraphs (a) and (c) of ¶ 18 each contain two functional parts (with bracketed numbers and line breaks added here for clarity), which parallel and complement one another:

> **¶ 18(a). [1]** 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 Client . . . 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.
>
> **[2]** None of the Client or any of the Client's shareholders (all 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 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 caused to believe its conduct was unlawful.
>
> **¶ 18(c). [1]** To the maximum extent permitted by applicable law, each Indemnified Party shall be fully protected and indemnified by the Client . . . against all liabilities and losses (including amounts paid in respect of judgments, fines, penalties or settlement of litigation, and legal fees and expenses reasonably incurred in connection with any pending or threatened litigation or proceeding) suffered by virtue of its or his serving as an Indemnified Party with respect to any

> action or omission suffered or taken that is not in material violation of this Agreement and does not constitute fraud, gross negligence or willful misconduct, and with respect to any criminal action or proceeding, without reasonable cause to believe his or its conduct was unlawful.[2]
>
> **[2]** 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 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 caused to believe its conduct was unlawful.

(*See* Doc. No. 193.01-02, Declaration of Steven H. Holinstat, dated March 29, 2019, Ex. A (Answer Exs. 1-3).)

While lengthy, these provisions are clearly designed to work in tandem, and together evidence the parties' joint intention to address litigation between themselves. The subparagraphs deal with two different but related topics. Paragraph 18(a) addresses *liability* between Beechwood and SHIP. Paragraph 18(c) addresses *indemnification* between Beechwood and SHIP. Within each of those subparagraphs, there is a further and parallel division. The first sentence of each (¶ 18(a)[1] & ¶ 18(c)[1]) provides the rule for situations where it is determined

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[2] An additional sentence appears at this point in the agreement that covers advancement:

> **[1a].** 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 expense is not permitted by law or authorized by this Agreement.

While that provision is central to the Beechwood Parties' motion for summary judgment, the question at issue in this reconsideration motion is whether the indemnification provision covers inter-party claims.

that Beechwood acted *in good faith*.[3] The second sentence of each (¶ 18(a)[2] & ¶ 18(c)[2]) provides the rule for situations where it is determined that Beechwood did *not* act in good faith. The pairing of these first sentences is evident from the fact that the condition in both ("act or omission . . . that is not in material violation of this Agreement . . . .") is set forth in virtually identical language. The same is true for the second sentences.

When these provisions are placed side by side, and the excess verbiage is stripped away, the structure of the overall agreement becomes evident:

(A) If it is determined that the Beechwood Parties acted in good faith, then they will not be liable to SHIP for any resulting loss or liability. (¶ 18(a)[1].) Furthermore, the Beechwood Parties will be indemnified for any loss that they incurred in defending against any such claims—so long as the loss occurred by virtue of their roles under the IMAs (and any other conditions are satisfied). (¶ 18(c)[1].)

(B) On the other hand, if it is determined that Beechwood did not act in good faith, then the opposite outcome applies. SHIP will not be liable for any loss that it suffered—a roundabout way of saying that Beechwood will have to bear that loss. (¶ 18(a)[2].) Furthermore, SHIP will be indemnified (by Beechwood) for all loss that SHIP suffered. (¶ 18(c)[2].)[4]

The conclusion is inescapable, therefore, that the agreement contemplates indemnification (and advancement) for inter-party claims between the Beechwood Parties and SHIP. As both sides recognize, ¶ 18(a)[1] is concerned with inter-party claims: it says that the

[3] The term "good faith" (and its opposite, "not in good faith") is used here as a shorthand for the longer contractual language in ¶¶ 18(a) and (c), namely an act or omission 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." Obviously, the contractual language controls.

[4] Only the "Advisers" (IMA signatories BBIL, BRE, and BAM) have the affirmative indemnification obligation under ¶ 18(c), and so references to "Beechwood" in this paragraph are to only those entities.

Beechwood parties are not liable to SHIP if they acted in good faith. By both its language ("[t]o the maximum extent permitted by law . . . all liabilities and losses . . . with respect to any action or omission suffered") and the obvious structural parallel, ¶ 18(c)[1] must go at least that far—and, indeed, further—to cover *any* situation where the Beechwood Parties are saddled with losses (including legal fees) because of their actions under the IMAs. It would make no sense—and there is no textual or structural basis—to distinguish between situations where the Beechwood Parties incurred those losses and legal fees because SHIP sued them or because some third party did so. The focus of both provisions is on the character of Beechwood's conduct as SHIP's agent, not who files the action. And once indemnification is possible, then advancement is triggered. (¶ 18(c)[1a].) Significantly, advancement only goes one way: there is no provision for Beechwood to advance expenses to SHIP.

The Court was troubled that a parenthetical in ¶ 18(a)[2] expressly provides for the indemnification of litigation expenses, while ¶ 18(a)[1] does not. The Court believed that this point undercut the Beechwood Parties' argument, because it meant that "the only provision in Paragraph 18 that indisputably applies to inter-party claims" is also the one that does not cover indemnification of legal expenses. (Op. at 13.) As the analysis above shows, that concern is not well-founded.

First, it is not at all odd or surprising that ¶ 18(a)[1] does not provide for indemnification of litigation expenses. Paragraph 18(a)[1] is a limitation of liability to SHIP where Beechwood is found to have acted in good faith. There is no need to address indemnification, because that provision already says that Beechwood will not owe SHIP anything. As for *Beechwood's* expenses, that is covered in ¶ 18(c)[1], which states that "to the maximum extent permitted by applicable law," the Beechwood Parties shall be "fully protected and indemnified" against "all liabilities and losses," including "legal fees and expenses"—again, extremely broad language

that is intended to include the type of loss identified in ¶ 18(a)[1], as well as third-party losses and liabilities.

Second, the fact that ¶ 18(a)[2] does mention litigation expenses is not odd or surprising. Unlike ¶ 18(a)[1], this provision addresses the situation where Beechwood is found not to have acted in good faith. In that situation, it is highly relevant to set forth that SHIP will not be liable for any liability or loss that Beechwood caused (meaning that Beechwood will assume that liability), including any litigation expenses that SHIP incurred in defending against third-party actions.

Third, no inference should be drawn from the mere omission of the parenthetical.[5] The parenthetical is a non-exclusive list, not a definition. Where it appears in ¶ 18(a)[2], ¶ 18(c)[1], and ¶ 18(c)[2], it is merely a gloss on the words "any liability or loss." The equivalent words "any loss" appear in ¶ 18(a)[1]. There is no reason to think that the words "any loss" mean anything different in any of those provisions.

For all these reasons, it is clear that the parties intended to provide one consistent rule: if Beechwood acted in good faith in discharging its duties to SHIP, it is not liable to SHIP and all of its costs are indemnified, however and wherever incurred. If Beechwood did not act in good faith, then it is liable to SHIP and all of SHIP's costs are indemnified, again however and wherever incurred.

II. There Is Nothing "Unusual" or "Bizarre" about Inter-Party Indemnification Here.

In its Opinion and Order, the Court was also troubled by the prospect that SHIP might advance litigation expenses to Beechwood at the outset, only for Beechwood to repay those funds and further indemnify SHIP for the latter's litigation expenses if SHIP ultimately prevailed

[5] ". . . 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 . . ."

in proving that Beechwood acted improperly. (Op. at 10.) Accordingly, the Court found it unlikely that the parties would have contemplated inter-party indemnification. (*Id.*) That analysis flipped the relevant inquiry on its head, however, and overlooked the fundamental purpose of the indemnification and advancement provisions in ¶ 18(c).

As the Court acknowledged, the central legal question here does not turn on advancement per se, but on whether the Beechwood Parties "would be entitled *to indemnification* for expenses incurred in litigation with SHIP." (*Id.* at 7 (emphasis added and quotation marks omitted).)[6] There is nothing unusual or bizarre about the indemnification arrangement contained in the IMAs. SHIP must indemnify the Beechwood Parties for "all liabilities and losses" suffered "by virtue of" their roles under the IMAs so long as they acted in good faith, whether or not those liabilities and losses are incurred in litigation directly with SHIP or in third-party lawsuits. Similarly, Beechwood (i.e., the IMA signatories) must indemnify SHIP for "all liabilities and losses" SHIP suffers if Beechwood did not act in good faith. Which rule applies will be determined at the end of the relevant litigation.

Advancement just addresses the *timing* of payment, not the scope of the obligation. If it is not bizarre that the "direction" of indemnification will ultimately depend on which side is held to be in the right, then the parties' decision to provide advancement on top cannot make it so. As mentioned above, it is noteworthy that the parties provided only for one-way advancement—from SHIP to Beechwood. That was plainly a deliberate decision, one of the few (if not only) instances of a non-symmetric obligation in ¶ 18.

[6] The Beechwood Parties have argued that the presumption against inter-party indemnification under New York law established in *Hooper Assocs., Ltd. v. AGS Computs., Inc.*, 548 N.E.2d 903 (N.Y. 1989), does not apply to advancement (as opposed to indemnification) in the first instance. *See Crossroads ABL, LLC v. Canaras Capital Mgmt., LLC*, 954 N.Y.S.2d 758, 758 (Sup. Ct. N.Y. Cty. 2012). While they reserve all their rights with respect to that argument, they are not challenging in this motion for reconsideration the Court's decision not to apply this standard.

Furthermore, as an empirical matter, there is nothing unusual about the payment structure contemplated here. In every case where there is both inter-party indemnification and advancement—*see, e.g.*, *Gramercy Advisors, LLC v. Coe*, 2015 WL 13780603, at *5 (S.D.N.Y. Apr. 17, 2015); *Happy Kids v. Glasgow*, 2002 WL 72937, at *3 (S.D.N.Y. Jan. 17, 2002); *Crossroads ABL LLC v. Canaras Capital Mgmt.*, LLC, 963 N.Y.S.2d 645, 647 (1st Dep't 2013)—the possibility of the "whipsaw" effect identified by the Court will be present and indeed hardwired into the agreement.

Finally, inter-party advancement is particularly sensible here given that the "Indemnified Parties" entitled to advancement include individual officers and employees, not just the Beechwood companies.[7] The contracting parties were evidently concerned about scenarios in which SHIP would seek to hold Beechwood (including present and former officers and employees) liable for investments made under the IMAs—investments that collectively totaled $270 million. (*See* Doc. No. 241 at ¶ 33.) The purpose of advancement is to provide indemnified parties with the resources necessary to defend claims asserted against them. Here, inter-party advancement would provide protection not just to the Beechwood companies, but also to their employees who would not have the resources of a giant company like SHIP to defend themselves against claims that SHIP could make based on the millions it was investing under the IMAs.[8] Unfortunately, SHIP has done just that—suing several present and former Beechwood

[7] The whipsaw effect of repayment of advanced legal expenses and further indemnification of SHIP's expenses that troubled the Court does not apply to officers and employees, who (unlike the IMA signatories) are not bound by the indemnification obligations to SHIP in the IMAs.

[8] *See Ficus Invs., Inc. v. Private Capital Mgmt., LLC*, 872 N.Y.S.2d 93, 99 (1st Dep't 2009) ("[O]ne of the beneficial purposes behind both indemnification and advancement is to help attract capable individuals into corporate service by easing the burden of litigation-related expenses."); *see also United States v. Stein*, 435 F. Supp. 2d 330, 335 (S.D.N.Y. 2006) (stating that "[t]he law has long recognized that litigation can be expensive and that it could prove difficult to obtain the services of competent employees unless they are protected against the cost of lawsuits that arise out of the employers' business"), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

officers and employees between this action and SHIP's recently-filed third party complaint in *Cyganowski v. Beechwood Re Ltd. et al.*[9] Above all else, inter-party advancement ensures that each of these individuals has a fair opportunity to defend himself against SHIP's charges.

CONCLUSION

For all the foregoing reasons, the Beechwood Parties respectfully request that the Court grant their motion for reconsideration and grant their advancement claim in its entirety.

Dated: June 7, 2019

Respectfully submitted,

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[9] *SHIP v. Beechwood Re Ltd. et al*, Case No. 18-cv-06658 (S.D.N.Y.), Doc. No. 84 (suing Mark Feuer, Scott Taylor, Dhruv Narain, and David Levy); *Cyganowski v. Beechwood Re Ltd. et al.*, Case No. 18-cv-12018 (S.D.N.Y.), Doc. No. 195 (suing additional former officers and employees of Beechwood).

CERTIFICATE OF SERVICE

It is hereby certified that on this 7th day of June, 2019, a copy of the foregoing was served through the Court's electronic filing system to all parties who have entered an appearance in this adversary proceeding:

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