UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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I. The Only Reasonable Interpretation Of ¶ 18 Is That It Provides Indemnification For Inter-Party Claims.

Remarkably, SHIP has submitted an opposition brief on a matter of contractual interpretation without actually opposing Beechwood's contractual interpretation. SHIP does not grapple with the construction that Beechwood puts forward; it does not explain why the analysis is incorrect; it does not even bother to quote a single word from ¶ 18(a), ¶ 18(c), or any other provision in the IMAs. Rather, SHIP simply complains that Beechwood's argument is too "complicated" and "multi-step[ped]," as if that sufficed to reject it. (Opp. Br. at 1.) It seems SHIP literally cannot come up with a single substantive objection to Beechwood's demonstration.

Beechwood's opening brief made two targeted points about ¶ 18, both showing that the agreement provides for inter-party indemnification:

1. The first sentence of ¶ 18(c) provides for indemnification of all losses, including legal expenses, incurred by Beechwood in connection with serving SHIP under the IMAs. That provision was designed to work hand-in-hand with the first sentence of ¶ 18(a), as demonstrated by the fact that both address situations where Beechwood acted in good faith, and 39 out of their last 40 words are identical. Therefore, if the first sentence of ¶ 18(a) covers inter-party claims—which both sides concede it does—*then the first sentence of ¶ 18(c) must too*. And if there was any doubt that the first sentence of ¶ 18(c) reaches at least as broadly as ¶ 18(a), the expansive language of the former ("maximum extent permitted by applicable law," "all liabilities and losses," "any pending or threatened litigation") clinches it.

2. The Court thought it cut against this argument that the second sentence of ¶ 18(a) mentions (in parentheses) indemnification of litigation expenses, while the first sentence does

not. But the Court overlooked the fact that they cover different situations.[1] The second sentence applies when Beechwood is found to have acted in bad faith, so it was necessary to spell out that Beechwood's liability extends even to SHIP's litigation expenses (including to third parties). By contrast, the first sentence applies when Beechwood is found to have acted in good faith, so it was obvious that there would be no liability for litigation expenses, or anything else. In any event, the absence of that parenthetical language in the first sentence is of little moment. The key term in each sentence is that there shall be no liability for "any loss" or "any liability," depending on which party is in the right, and the parenthetical is just an elaborative gloss on those terms. There is no basis to suppose that they mean something different at the beginning of ¶ 18(a) than at the end.

These textual and structural arguments overcome the presumption against inter-party indemnification. They satisfy Beechwood's burden to show "from the language and purpose of the entire agreement and the surrounding facts and circumstances" that a promise to indemnify is "clearly implied." *Hooper Assocs. v. AGS Computs.*, 74 N.Y.2d 487, 491-92 (1989).

SHIP does not respond to any of these points. Instead, it launches superficial objections and straw-man attacks, all of them easily refuted. SHIP objects because the opening brief stated that the structure of ¶ 18 could be seen more easily once the "excess verbiage is stripped away." (Opp. Br. at 3 (quoting Beechwood Br. at 5.) *Of course* that did not literally mean the Court

[1] SHIP charges the Beechwood Parties with "retread[ing]" old ground (Opp. Br. at 3), but that is plainly not so. The Court had two main objections to finding inter-party coverage under the IMAs, neither of which SHIP raised. It is completely fair game for Beechwood to explain in a motion for reconsideration why those objections were incorrect. Asking the Court to reconsider a ruling that overlooked important facts is the very purpose of such a motion. And it is just what SHIP did when it asked the Court to reconsider its December 6, 2018 Opinion and Order dismissing SHIP's civil conspiracy claim with prejudice, which the Court did in fact do. (Doc. No. 83 at 3-4 ("With respect to the civil conspiracy claim, . . . SHIP's motion raises considerations that the Court previously overlooked.").)

should ignore any part of the contract. It just meant that beneath the seeming complexity of ¶ 18, the relationship between the parts is evident.[2] SHIP also takes issue with the "bracketed numbers" and "line breaks" that Beechwood used to illustrate how the two functional parts of ¶¶ 18(a) and (c) work together. (*Id.* at 4.) It is hard to fathom SHIP's basis for this gripe—even elementary-school students diagram sentences to unpack their meaning. The fact that ¶ 18 is intricate does not show that the agreement is "ambiguous" or that it does not rebut the presumption against inter-party indemnification. As this Court has noted in the context of another agreement, "the mere fact that [a contract] may be complex or imperfect does not render the contract ambiguous." *In re Trusteeship Created by JER CRE CDO 2005-1, Ltd.*, 2013 WL 6916912, at *1 (S.D.N.Y. Dec. 31, 2013) (Rakoff, J.).

II. There Is Nothing "Bizarre" About The Payment Arrangement Contemplated By The IMAs.

SHIP misapprehends the Court's other concern about inter-party indemnification and therefore offers nothing but non-sequiturs in response.

The Court thought it doubtful that the parties designed an indemnification regime that might create a "whipsaw" effect: in a suit brought by SHIP, the Beechwood Parties would be entitled to advancement, but then if they lost, they would have to reimburse SHIP for those litigation expenses *and* further indemnify SHIP for its own expenses. In their opening brief, the Beechwood Parties argued that this arrangement is not "bizarre" at all. The Court overlooked the fact that it is a consequence of two features of the IMAs: (a) the parties agreed to inter-party indemnification, which is ordinarily awarded at the end of the suit, and (b) the parties also agreed to one-way advancement—that SHIP must advance any legal fees to Beechwood (but not the

[2] Indeed, the opening brief specifically stated: "Obviously, the contractual language controls." (Beechwood Br. at 5 n.3.)

other way around) to which they would be entitled to be indemnified. It is the latter feature that mainly drives the "advancement plus repayment" structure, and that provision is *explicitly* spelled out in the IMAs. (*See* ¶ 18(c) (providing advancement from SHIP to Beechwood but not Beechwood to SHIP).) Moreover, this kind of structure is present in many cases where there is both inter-party indemnification and advancement. (*See* Beechwood Br. at 9 (citing *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)).)

SHIP responds that fee-shifting arrangements are disfavored under the American Rule, and that is why the Beechwood Parties' position here should be rejected. (Opp. Br. at 5.) But it was the one-way advancement, not the indemnification, feature of the IMAs that fueled the Court's objection. The Beechwood Parties answered SHIP's point above, explaining that the ordinary tools of contractual interpretation show that ¶ 18(c) must cover (and unambiguously covers) inter-party indemnification.

In addition, the Beechwood Parties offered another powerful reason why advancement plus repayment is not a bizarre arrangement: Beechwood's individual officers and directors needed protection in the event SHIP chose to sue them personally, and they lacked the resources to defend themselves. That is in fact exactly what happened here: SHIP brought a bewildering array of claims against Beechwood's current and former employees, including breach of fiduciary duty, fraud, civil conspiracy, unjust enrichment, and RICO. Pointedly, the Court has already thrown out some of those claims, like RICO, as meritless. (Doc. Nos. 184, 292.) It is transparently fair and equitable for SHIP to bear the cost incurred in defending against those baseless claims.

SHIP questions why it would have any interest in indemnifying Beechwood employees, and it tries to distinguish cases where a company was obliged to indemnify its own officers and employees. (SHIP also claims, bafflingly, that the Beechwood Parties somehow misrepresented the record.) (Opp. Br. at 6.) That completely misses the point. Those cases simply showed that advancement is a particularly important protection for individual officers and employees who do not have the resources to defend against the potentially astronomic claims that may be brought against them.[3] Indeed, it is a basic tenet of agency law—not just the employer-employee relationship—that a principal must indemnify and advance expenses incurred by his agent in defending a lawsuit arising from the agency relationship. *See United States v. Stein*, 435 F. Supp. 2d 330, 354 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).[4] The IMAs expressly contemplate that Beechwood will act as SHIP's agent (¶ 23 of each of the IMAs is an "Agency Appointment"), just as they contemplate that SHIP may seek to hold Beechwood liable for investments made on SHIP's behalf, as SHIP's agent, under the IMAs. SHIP's litigation against its former agent for investments made on SHIP's behalf presents the very circumstance for advancement that was contemplated by the IMAs.

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.

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[3] SHIP attempts to put itself on par with the individual officers and employees it is suing by emphasizing its negative capital surplus. (Opp. Br. at 6 n.2.) That does not begin to show that the *resources* available to SHIP are comparable to theirs. SHIP oversees a $2.6 billion portfolio. *Levy v. Senior Health Ins. Co. of Pa.*, 19-cv-03211 (S.D.N.Y.), Doc. No. 22 at 10 n.16. It has proven itself more than capable of funding a multi-million-dollar litigation campaign against its former agents and their employees.

[4] And state statutes providing for indemnification of corporate officers have their roots in these basic agency principles. *Stein*, 435 F. Supp. 2d at 354.

Dated: June 28, 2019

Respectfully submitted,

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