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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re PLATINUM-BEECHWOOD LITIGATION :	:	18-cv-6658 (JSR)
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B ASSET MANAGER, L.P. et al.,	:	
	:	
Plaintiffs,	:	
	:	
-v-	:	19-cv-4487 (JSR)
	:	
SENIOR HEALTH INSURANCE COMPANY OF :	:	<u>MEMORANDUM ORDER</u>
PENNSYLVANIA,	:	
	:	
Defendant.	:	
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JED S. RAKOFF, U.S.D.J.

On May 16, 2019, plaintiffs B Asset Manager, L.P. ("BAM I"), B Asset Manager II, L.P. ("BAM II"), Beechwood Bermuda International Ltd. ("BBIL"), Beechwood Re Investments, LLC ("BRILLC"), Beechwood Re Holdings, Inc. ("Beechwood Holdings"), BAM Administrative Services LLC ("BAM Admin"), Mark Feuer, Scott Taylor, and Dhruv Narain (collectively, the "Beechwood Parties") filed an action against defendant Senior Health Insurance Company of Pennsylvania ("SHIP") seeking advancement for expenses incurred in connection with Trott et al. v. Platinum Management (NY) LLC et al., 18-cv-10936-JSR (S.D.N.Y.) (the "Trott action"), Cyganowski v. Beechwood Re Ltd. et al., 18-cv-12018-JSR (S.D.N.Y.) (the "Cyganowski action"), and Schmidt v. B Asset Manager L.P. et al., Case No. 15-34287, 17-ap-3324 (Bankr.

S.D. Tex.) (the "Black Elk action"). ECF No. 1.<sup>1</sup> Shortly thereafter, the Beechwood Parties moved for summary judgment on their advancement claim. ECF No. 13. In the Memorandum Order dated July 8, 2019, this Court granted summary judgment and asked the parties to confer with each other to determine "what portion of the Beechwood Parties' expenses are eligible for advancement." In re Platinum-Beechwood Litigation, 2019 WL 2911934, at \*7 (S.D.N.Y. July 8, 2019). The parties failed to reach an agreement, however, and therefore the Court directed them to submit simultaneous written proposals regarding their respective allocation positions.

Now before the Court are those proposals as well as opposition briefs. See Defendant SHIP's Memorandum of Law in Support of its Position on Allocation, ECF No. 34 ("SHIP Memo"); Memorandum of Law in Support of the Beechwood Parties' Position on Allocation of Advanceable Litigation Expenses, ECF No. 35 ("Beechwood Memo"); Memorandum of Law in Opposition to SHIP's Position on Allocation and in Further Support of the Beechwood Parties' Position, ECF No. 39 ("Beechwood Opp."); Defendant SHIP's Memorandum of Law in Opposition to the Beechwood Parties' Position on Allocation and in Further Support of its Position on

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<sup>1</sup> Familiarity with the relevant background to these third-party actions is here assumed.

Allocation, ECF No. 40 ("SHIP Opp."). SHIP argues that 0% of the Beechwood Parties' expenses incurred in the third-party actions - or at most 1.3% of the expenses incurred by some, but not all, of the Beechwood Parties in the Trott action and 1.65% of the expenses incurred by them in the Cyganowski action - should be advanced. SHIP Memo 1, 28, 30. The Beechwood Parties argue that virtually all expenses should be advanced. Beechwood Memo 1.

For the reasons set forth below, this Court holds that (1) BAM Admin is entitled to advancement of 0% of its expenses incurred in connection with any third-party action, and (2) all other Beechwood Parties are entitled to advancement of (i) 0% of their expenses incurred in connection with the Black Elk action, (ii) 50% of their expenses incurred in connection with responding to Cyganowski's first amended complaint ("Cyganowski FAC") in the Cyganowski action, (iii) 0% of their expenses incurred in connection with responding to Washington National Insurance Company and Bankers Consec Life Insurance Company's third-party complaint ("WNIC TPC") in the Cyganowski action, (iv) 0% of their expenses incurred in connection with responding to SHIP's third-party complaint ("SHIP TPC") in the Cyganowski action, and (v) 35% of their expenses incurred in connection with the Trott action.

**Standards for Advancement and Allocation**

In the Memorandum Order dated July 8, 2019, this Court held, based on the language of the applicable investment management agreements (the "IMAs"), that a party seeking advancement under the IMAs for expenses incurred in connection with the third-party actions are entitled to only those expenses "incurred by virtue of its . . . serving as an Indemnified Party" under the IMAs. In re Platinum-Beechwood Litigation, 2019 WL 2911934, at \*4 (S.D.N.Y. July 8, 2019).<sup>2</sup> Therefore, the Beechwood Parties are entitled to "indemnification (and therefore advancement) with respect to actions that are premised on conduct by [them] in the performance of [their] duties to SHIP under the IMAs." In re Platinum-Beechwood Litigation, 378 F. Supp. 3d 318, 328 (S.D.N.Y. 2019).

Furthermore, "[i]n resolving the parties' disputes, the Court looks primarily to the pleadings in the third-party actions." In re Platinum-Beechwood Litigation, 2019 WL 2911934, at \*8 (S.D.N.Y. July 8, 2019). Cf. Freeman Family LLC v. Park Ave. Landing LLC, C.A. No. 2018-0683-TMR, 2019 WL 1966808, at \*3 (Del. Ch. Apr. 30, 2019) ("Advancement cases are particularly appropriate for resolution on a paper record, as they

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<sup>2</sup> Unless otherwise indicated, in quoting cases all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

principally involve the question of whether claims pled in a complaint against a party trigger a right to advancement under the terms of a corporate instrument.”).

Lastly, “[t]o determine whether expenses incurred defending both covered and non-covered proceedings are subject to advancement, the operative test is: Would the disputed expenses have been incurred in defense of the covered proceeding even if there was no non-covered proceeding? If the answer is yes, then the disputed expenses are advanceable.” Weil v. VEREIT Operating Partnership, L.P., C.A. No. 2017-0613-JTL, 2018 WL 834428, at \*7 (Del. Ch. Feb. 13, 2018). The same logic applies to expenses incurred in connection with both advanceable and non-advanceable claims: if “work is useful for both types of claims, that work is entirely advanceable if it would have been done independently of the existence of the non-advanceable claims.” Mooney v. Echo Therapeutics, Inc., C.A. No. 10054-VCP, 2015 WL 3413272, at \*6 (Del. Ch. May 28, 2015).

### Analysis

#### **I. Whether BAM II, Beechwood Holdings, BRILLC, and BAM Admin Should Be Treated Separately**

SHIP argues that BAM II, Beechwood Holdings, BRILLC, and BAM Admin did not serve as SHIP’s investment managers under the IMAs, and so they are not entitled to advancement. SHIP Memo 10.

According to SHIP, BAM II is described in the third-party actions as an "investment advisor for Beechwood and its various investments" or as a vehicle to enrich Platinum, Beechwood, and insiders, not in any role as SHIP's investment manager. Id. at 10. According to SHIP, Beechwood Holdings is sued in its capacity as the owner of the common stock of Beechwood Re Ltd. Id. The same applies to BRILLC, the owner of the preferred shares of Beechwood Re Ltd. Id. In particular, SHIP argues that the allegations against BAM Admin involve transactions that were not made pursuant to any authority under the IMAs and that BAM Admin's actions were "taken as SHIP's collateral agent" under separate agreements. SHIP Memo 11; SHIP Reply 4.

This Court agrees with SHIP's view on BAM Admin's role, but disagrees with respect to the other three Beechwood entities. With respect to the former, BAM Admin's alleged misconduct in the Black Elk, Cyganowski, and Trott actions was performed in its capacity as a collateral agent to SHIP through separate agreements such as the Amended and Restated Agency Agreement - which does not contain an indemnification or advancement provision - rather than in its capacity as SHIP's investment manager pursuant to the IMAs. See, e.g., Declaration of R. Brian Seibert, ECF No. 37-2, Ex. 2. Therefore, BAM Admin is entitled to no indemnification, and thus no advancement. However, with

respect to BAM II, Beechwood Holdings, and BRILLC, although they themselves were not parties to the IMAs, the indemnification and advancement provisions of the IMAs cover affiliates of the Beechwood parties to the IMAs. 18-cv-6658, ECF No. 193-1, Ex. 1, at 10-12; 18-cv-6658, ECF No. 193-1, Ex. 2, at 10-12; 18-cv-6658, ECF No. 193-2, Ex. 3, at 10-12 (collectively, "IMAs") (including "affiliates" as part of the definition of "Indemnified Parties"). Therefore, BAM II, Beechwood Holdings, and BRILLC are not categorically barred from being considered as SHIP's investment managers simply because they were not direct parties to the IMAs.

## **II. The Black Elk Action**

In the Memorandum Order dated August 20, 2019 in Levy v. Senior Health Insurance Company of Pennsylvania, 19-cv-3211-JSR (S.D.N.Y.) (the "Levy action"), the Court held that Levy's July 9, 2019 criminal conviction with respect to his Black Elk-related conduct in USA v. Nordlicht et al., 16-cr-00640-BMC (E.D.N.Y.) (the "criminal action") extinguished his advancement rights in the criminal action, because "the jury determined beyond a reasonable doubt that Levy was guilty of the three counts related to the so-called Black Elk scheme." 19-cv-3211, ECF No. 67, at 9, 13-14 (referencing IMAs 11-12).

The Court further held that, "[i]f Levy is not entitled to

advancement for expenses incurred in connection with defending against the Black Elk scheme in the criminal action, it follows that Levy is also not entitled to advancement for the expenses incurred in connection with [defending against the Black Elk-related allegations in other third-party civil actions at issue].” Id. at 10. This is because, “given that the jury has determined beyond a reasonable doubt that Levy is guilty of the three counts related to the Black Elk scheme, it is hard to imagine how his Black Elk-related conduct would not constitute ‘fraud, gross negligence or willful misconduct’ in the civil actions,” which means that, under the IMAs, no indemnification is allowed. Id. at 10-11 (referencing IMAs 10-11). See also S.T. Grand, Inc. v. City of New York, 32 N.Y. 2d 300, 303 (1973) (Under “New York law, a criminal conviction is prima facie evidence of the underlying alleged facts in a subsequent civil action.”).

The above also holds true for the Beechwood Parties that Levy collaborated with or directed to further the Black Elk scheme. The claims against the Beechwood Parties regarding the Black Elk scheme in the Black Elk and Trott actions are often premised on Levy’s conduct, and at a minimum identify Levy as one of the central figures coordinating and taking actions to further the Black Elk scheme. It seems more than likely that

Levy's actions will be imputed to the Beechwood Parties; and even if this were not so, the jury's verdict makes clear that the Black Elk scheme was fraudulent through and through, and there are a plenty of allegations implicating the Beechwood Parties' own actions independently of Levy's conduct. See, e.g., Second Amended Complaint, 17-ap-3324, ECF No. 122 ("Black Elk SAC") ¶¶ 86-89, 92-94, 96, 99, 101, 110, 119-22. See also Second Amended Complaint, 18-cv-10936, ECF No. 285 ("Trott SAC") ¶¶ 475, 486-87, 493, 500, 516-17. For these reasons, expenses incurred in connection with the Black Elk action are not advanceable.

### III. The Cyganowski Action

#### A. Cyganowski's First Amended Complaint

The claims in the Cyganowski FAC against the Beechwood Parties are rooted in the following types of alleged misconduct: (1) participating in "[s]ystematically misrepresenting and overvaluing the PPCO Funds' net asset value for the purpose of . . . paying certain select insiders of the PPCO Funds unearned fees, resulting in the payment of . . . unearned management and professional fees," First Amended Complaint, 18-cv-12018, ECF No. 83 ("Cyganowski FAC") ¶¶ 324(i), 335(i), 177-92, 262; and (2) participating in the December 2015 and March 2016 fraudulent conveyance transactions, Cyganowski FAC ¶¶ 221-58.

The parties agree that only a subset of the latter conduct is relevant for advancement purposes. SHIP Memo 22-23; Beechwood Memo 8. However, the parties do not agree on how much weight should be given to the latter conduct versus the former conduct. The Beechwood Parties argue that "the 2015 and 2016 transactions are the basis of all of the Receiver's claims against the Beechwood Parties," Beechwood Memo 10, which SHIP calls "a farce," SHIP Reply 20. SHIP, in response, argues that the vast majority of alleged wrongdoings of the Beechwood Parties occurred during years prior to the December 2015 transactions. SHIP Memo 29-30.

Based on a review of the Cyganowski FAC, the Court's view is that approximately 75% of the Beechwood Parties' expenses in defending against the Cyganowski FAC is reasonably attributable to their participation in the December 2015 and March 2016 transactions. As against the Beechwood Parties, the three RICO claims rely on both types of conduct, the two securities fraud claims rely on the latter type only, and the two aiding and abetting claims rely on both types. Cyganowski FAC ¶¶ 272-340. Furthermore, in this Court's assessment, the main thrust of the Cyganowski FAC, especially among the claims that were not dismissed pursuant to the Order dated August 18, 2019, 18-cv-12018 ECF No. 380, relates to the December 2015 and March 2016

transactions, rather than the actions prior to December 2015.

The above 75% figure should, however, be reduced to account for the fact that some actions that the Beechwood Parties took in connection with the December 2015 and March 2016 transactions were for the benefit of other institutional investors, such as WNIC and BCLIC. As stated above, if "work is useful for both types of claims, that work is entirely advanceable if it would have been done independently of the existence of the non-advanceable claims." Mooney v. Echo Therapeutics, Inc., C.A. No. 10054-VCP, 2015 WL 3413272, at \*6 (Del. Ch. May 28, 2015). Here, there has been a substantial overlap of efforts and costs between defending claims related to SHIP and defending claims related to WNIC and BCLIC, although this overlap was necessarily more pronounced during the motion to dismiss stage rather than thereafter. Furthermore, the Cyganowski FAC generally groups SHIP, WNIC, and BCLIC together as if they carried out the allegedly wrongful actions in tandem. Given these factors, a further reduction by 25% appears reasonable. Accordingly, the Court concludes that 50% of the Beechwood Parties' expenses (other than BAM Admin's) incurred in connection with defending against the Cyganowski FAC should be advanced.

SHIP argues that even this portion is not advanceable, because a mere assertion that "SHIP's assets were invested" does

not establish the required "nexus" between the misconduct at issue and the Beechwood Parties' role as SHIP's investment managers under the IMAs. SHIP Reply 20; SHIP Memo 23-24. The Court disagrees with SHIP's interpretation of the Cyganowski FAC in this respect. The Cyganowski FAC clearly states that the Beechwood entities were acting for SHIP as its "investment manager" or "agent," Cyganowski FAC ¶¶ 228, 230, 233, 246, and accuses SHIP of taking active roles in ordering the alleged misconduct attributed to the Beechwood Parties, Cyganowski FAC ¶¶ 11, 113, 179, 259. The Cyganowski FAC is clear that the acts performed by the Beechwood Parties that allegedly harmed PPCO - "the issuance of the debt," "the acquisition of affiliate assets at inflated values," "the execution of security agreements, or the posting of collateral" - were performed at SHIP's direction. Cyganowski FAC ¶¶ 176, 181, 225, 240. These allegations sufficiently establish the nexus between the misconduct at issue and the Beechwood Parties' role as SHIP's investment managers to further SHIP's interests under the IMAs.

#### **B. WNIC and BCLIC's Third-Party Complaint**

The Beechwood Parties argue that they are entitled to advancement for 20% of expenses attributable to defending against the WNIC TPC. Beechwood Memo 13. This is because, they contend, the expenses incurred while defending against

indemnification and RICO claims in the WNIC TPC are either based on the same December 2015 and May 2016 transactions that SHIP is alleged to have directed under the IMAs, or based on the SHIP IMA investments that are a fundamental piece of WNIC and BCLIC's RICO claims against the Beechwood Parties. Id. at 13; SHIP Reply 10, 12.

This Court disagrees and holds that none of the expenses incurred in defending against the WNIC TPC are advanceable. The indemnification claims against the Beechwood Parties relate to the Beechwood Parties' liability, as joint tortfeasors with WNIC and BCLIC, with respect to the reinsurance trust assets entrusted to the Beechwood Parties by WNIC and BCLIC under the Reinsurance Agreements with Beechwood Re Ltd., which has nothing to do with the assets entrusted by SHIP to the Beechwood Parties under the IMAs with certain Beechwood Parties. With respect to WNIC and BCLIC's RICO claims, the WNIC TPC does not discuss the Beechwood Parties in their capacity as investment managers to SHIP; rather, the RICO claims concern the Beechwood Parties' allegedly fraudulent activities targeted at institutional investors including SHIP, WNIC, and BCLIC. 18-cv-12018, ECF No. 75 ("WNIC TPC") ¶¶ 789, 796.

### **C. SHIP's Third-Party Complaint**

BBIL and BAM I argue that they are entitled to advancement

of expenses incurred in connection with defending against SHIP's indemnification claim. Beechwood Memo 14. They argue that "[f]or advancement purposes, [SHIP's indemnification claim] is considered a third-party claim, not an inter-party claim, because SHIP's indemnification claim is merely an extension of [Cyganowski's] action." Id.<sup>3</sup>

The Court disagrees with the Beechwood Parties' view that, for advancement purposes, an inter-party indemnification claim magically converts to a third-party claim. Technically, the SHIP TPC asks for declaratory judgment, against BBIL and BAM I, that SHIP is "entitled to indemnification for the conduct alleged against it in the [Cyganowski action], including all amounts paid in respect of judgments, fines, penalties or settlement of litigation, and its legal fees and expenses reasonably incurred

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<sup>3</sup> To support this view, the Beechwood Parties rely on In re Bridge Construction Services of Florida, Inc., 2016 WL 4625687, at \*3 (S.D.N.Y. Sept. 6, 2016), which, in their view, stands for the proposition that Hooper - a New York case that barred indemnification for an interparty claim - "did not bar indemnification for attorneys' fees incurred in dispute between parties over how much one should pay other for costs of settling third-party claim." Id. However, that interpretation of In re Bridge is incorrect: the court there allowed an inter-party indemnification claim of attorney's fees incurred while defending against a third-party action, in large part because the underlying indemnification clause was "markedly broader" than the indemnification clause at issue in Hooper, not because an inter-party indemnification claim was somehow converted to a third-party claim. In re Bridge, 2016 WL 4625687, at \*3.

in connection with the pending litigation.” 18-cv-12018, ECF No. 195 (“SHIP TPC”) ¶ 468. It is true that BBIL and BAM I may have to analyze the Receiver’s claims against SHIP, but at the end of the day this declaratory judgment claim comes from SHIP, not from Cyganowski.

In the Opinion and Order dated May 13, 2019, this Court made it clear that Paragraph 18 of the IMAs does not permit indemnification of expenses incurred in inter-party litigations. In re Platinum-Beechwood Litigation, 378 F. Supp. 3d 318, 323-26 (S.D.N.Y. 2019). Permitting advancement or indemnification of BBIL and BAM I’s expenses incurred in connection with their defense of SHIP’s declaratory judgment claim would be an end-run around the language of the IMAs and this Court’s prior ruling.

#### **IV. The Trott Action**

The parties agree that the Trott SAC is “not as blunt” as the Cyganowski FAC in “accusing SHIP of directing these transactions.” Beechwood Memo 19; SHIP Reply 12. This mutual observation is confirmed by this Court’s reading of the Trott SAC and the Cyganowski FAC as well. Based on the following transaction-by-transaction analysis of the Trott SAC, this Court holds that 35% of the Beechwood Parties’ expenses (except for BAM Admin’s) incurred in connection with the Trott action should be advanced.

First Scheme in the Trott SAC

*Golden Gate Oil, LLC* ("Golden Gate"). On February 26, 2014, the Platinum and Beechwood entities and individuals, including the Beechwood Parties (collectively, the "Platinum-Beechwood Trott Defendants"), caused BAM Admin, acting as agent for certain Beechwood reinsurance trusts, to buy a loan that one of PPVA's subsidiaries, Precious Capital, had extended to Golden Gate. Trott SAC ¶ 416. Even though these defendants knew that Golden Gate faced operational and financial difficulties, BAM Admin bought the loan at par in order to "provide[] the Platinum Defendants with a basis upon which to justify their valuation of that investment as reported to PPVA." Id. ¶ 419.

The Court holds that no advancement is warranted for expenses in connection with the Golden Gate investment for the following reasons: (1) the Golden Gate investment took place before the first IMA was signed on May 22, 2014, see 18-cv-6658, ECF No. 193-1, Ex. 1 ("BBIL IMA"), at 1, (2) BAM Admin was acting as agent for certain Beechwood reinsurance trusts unrelated to SHIP's investment, and (3) there is no specific allegation that SHIP's subsequent investment through the IMAs helped further PPVA's alleged overvaluation, contrary to the Beechwood Parties' assertion, see Beechwood Reply 17.

*PEDEVCO Corp.* ("PEDEVCO"). On March 7, 2014, the Platinum-

Beechwood Trott Defendants "caused a subsidiary of PPVA . . . as well as certain Beechwood Entities to purchase certain senior secured notes . . . issued by PEDEVCO." Trott SAC ¶ 428. Only PPVA's subsidiary was required to make continuing loans to PEDEVCO, and PPVA's subsidiary's interests were subordinated to those of the Beechwood entities. Id. ¶¶ 429-31. Furthermore, in 2016, the Beechwood entities made another investment in PEDEVCO that further subordinated PPVA's interest, and PEDEVCO began experiencing revenue shortfalls because of falling oil prices and other operational issues. Id. ¶¶ 432-33.

The March 7, 2014 transaction took place before the first IMA was signed, see BBIL IMA 1, but the 2016 investment would have likely involved investment of SHIP's funds by the Beechwood Parties acting in their capacity as SHIP's investment managers. Thus, some, but less than half, of the expenses related to the PEDEVCO investment should be advanced.

*Implant Sciences Corporation ("IMSC")*. Similar to the PEDEVCO transaction, in March 2014 the Platinum-Beechwood Trott Defendants caused BAM Admin to refinance a \$20 million loan that DMRJ Group LLC ("DMRJ"), a PPVA subsidiary, had made to IMSC. Id. ¶ 436. Just like the PEDEVCO notes, defendants caused DMRJ to subordinate its interests to BAM Admin. Id. ¶ 426.

The Court holds that no advancement is warranted here. This

transaction took place before the first IMA was signed, see BBIL IMA 1, and there is no specific allegation that SHIP's investment through the IMAs helped continuing this subordination, contrary to the Beechwood Party's assertion, see Beechwood Reply 17.

*Northstar Offshore Group, LLC* ("Northstar"). In determining advancement allocation of Levy's expenses, this Court previously held that "there is no indication that Levy's role as SHIP's investment manager was necessary to any subsequent misconduct, all of which appears to be attributable to Platinum," denying advancement of Levy's expenses related to the Northstar investment. 18-cv-6658, ECF No. 534, at 27-28. Both parties agree that, based on this holding, no advancement is warranted for the Beechwood Parties in the present case, but they disagree as to whether the overall allocation percentage should be reduced as a result. SHIP Memo 16; Beechwood Reply 17. This Court agrees with the Beechwood Parties' view that there should be no reduction in the advancement percentage as a result of excluding advancement for Northstar. The allocation percentage is determined by dividing advanceable expenses by total expenses. If the total expenses are not increased (i.e., the Beechwood Parties are not incurring additional costs with respect to the Northstar investment), then there is no need to

reduce the allocation percentage.

*Montsant Partners, LLC* ("Montsant"). In January 2015, the Platinum-Beechwood Trott Defendants caused Montsant, a PPVA subsidiary, to acquire all of Beechwood's Black Elk notes - effectively worthless - at an inflated price and to pledge valuable assets as collateral for the loan used to make the acquisition. Trott SAC ¶¶ 516-28. To finance these transactions, the Platinum-Beechwood Trott defendants caused Montsant to "borrow" \$33.5 million at 12% interest from SHIP via a loan administered by Beechwood (the "2015 Montsant Loan"). *Id.* ¶ 523.

Unlike in the case of Northstar, a portion of the alleged misconduct here is attributable to the Beechwood Parties' role as SHIP's investment managers. For instance, the 2015 Montsant Loan relied entirely on SHIP's funds that were likely invested to further SHIP's interests under the IMAs. Therefore, the Court disagrees with SHIP's assertion that "[a]s with Northstar, the misconduct alleged with respect to the Montsant Transactions is attributed to Platinum." SHIP Memo 17. For this reason, a portion of expenses related to defending claims based on the Montsant investment should be advanced.

*Black Elk scheme.* As discussed above, no advancement is warranted for the Black Elk scheme.

Second Scheme in the Trott SAC

*Montsant*. The Platinum-Beechwood Trott Defendants directed Montsant to grant liens to the Beechwood entities on the remaining valuable PPVA assets. Trott SAC ¶¶ 556-60.

Although SHIP's assets were not directly used, this granting of liens was an effort that Beechwood made, in part, to add additional collateral and enhance the position of the investment that Beechwood had made on behalf of its client SHIP. For this reason, the Court holds that some portion of the expenses related to defending claims rooted in the Montsant transaction in the Second Scheme should be advanced.

*Nordlicht Side Letter*. Around January 13, 2016, Nordlicht, on behalf of PPVA, signed a letter that obligated PPVA to apply any proceeds from the IMSC sale toward the satisfaction of Golden Gate's debt - which was at near default  $\frac{1}{2}$  to BAM I and BAM II, without any consideration to PPVA or its subsidiaries. Trott SAC ¶¶ 573, 576.

Like the Northstar investment discussed above, this transaction concerns conduct attributable to Nordlicht, rather than to the Beechwood Parties in their capacity as SHIP's investment managers. The Beechwood Parties' role as SHIP's investment managers was not necessary for Nordlicht to sign this letter to encumber PPVA assets. However, for the same reason stated above in case of Northstar, there should be no reduction

in the overall allocation percentage.

*March 2016 Restructuring.* In March 2016, the Platinum-Beechwood Trott Defendants engaged in a series of transactions that restructured several pre-existing obligations, “whereby all the benefits flowed directly” to certain Beechwood entities and to the detriment of PPVA. Id. ¶ 584. The restructuring included Montsant and Golden Gate. Id. ¶¶ 585-93. And these transactions appear to be executed, in part, to enhance the position of SHIP’s IMA investments. See, e.g., id. ¶ 591 (securing pledge for repayment of 2015 Montsant Loan); id. ¶ 592 (amending SHIP’s Golden Gate loan); id. ¶ 593 (securing guaranty from Montsant for amounts owed to SHIP by Golden Gate); id. ¶ 594 (securing guaranty from PPVA of amounts owed to SHIP by Golden Gate and Montsant); id. ¶¶ 602-03 (resale of the uncollectable Northstar debt from SHIP to PPVA at par). Furthermore, \$21.4 million worth of Northstar notes were transferred from SHIP to PPVA by an assignment agreement executed by BAM I as SHIP’s “investment manager.” Assignment Agreement, dated March 21, 2016, by and between SHIP and PPVA Oil and Gas, LLC, Declaration of Stacey P. Eilbaum, ECF No. 38-10, Ex. J, at 5. These restructuring transactions show the Beechwood Parties’ effort to, in part, add additional collateral and enhance the position of the investments that they had made on behalf of their client.

Therefore, the Court holds that the expenses related to defending claims based on the March 2016 restructuring transactions should be advanced to some extent.<sup>4</sup>

*Agera*. On June 9, 2016, the Platinum-Beechwood Trott Defendants caused Principal Growth Strategies LLC ("PGS") to transfer certain convertible notes - in which PPVA held an indirect interest - to AGH Parent LLC ("AGH Parent") for allegedly inadequate consideration. Trott SAC ¶¶ 631-59. In addition, approximately \$60 million of the purchase price to PGS was paid in the form of Class C Units in AGH Parent. *Id.* ¶ 660. Roughly \$35 million of these Class C Units were subject to redemption in exchange for \$35 million in debt or partnership interests held by the Beechwood entities. *Id.* ¶ 661. The Beechwood entities exercised this redemption right in January 2017 and transferred to PGS distressed debt obligations that had

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<sup>4</sup> SHIP raises an objection that "the only means by which any of the transactions in question could have been accomplished was through individuals acting as the authorized representatives of PPVA and the applicable PPVA subsidiary, not SHIP, which had no control over those entities." SHIP Memo 19. SHIP's lack of authority over these entities may be true, but it does not preclude the possibility that the Beechwood Parties also worked with them together in their capacity as SHIP's investment advisors. For instance, in entering into a series of agreements to amend the 2015 Montsant Loan, both Montsant - by individuals who were acting as authorized representative of PPVA - and BAM I - as an investment manager of SHIP - would have had to negotiate, execute, and sign those agreements.

a face value of \$35 million in exchange for Class C Units held by PGS. Id. ¶¶ 663-67. The Beechwood entities subsequently sold these interests in AGH Parent to a third party, and PGS was left with the distressed debt obligations. Id. ¶¶ 668-70.

Clearly, not only were Agera investments made using SHIP's assets, but also such investments and related transactions involved the Beechwood Parties' role as investment managers to SHIP. See, e.g., id. ¶ 643 ("[T]he Platinum Defendants, working in concert with the Beechwood Defendants and SHIP, caused PGS to transfer its interest in the Agera Note to AGH Parent LLC"); id. (AGH Parent was "controlled directly by the Platinum Defendants and Beechwood Defendants and for the benefit of SHIP"); id. ¶ 644 (SHIP "work[ed] in tandem with Beechwood to the detriment of PPVA."). Even SHIP admits that some indemnification is warranted in this instance. SHIP Memo 26-28. However, the allocation percentage should be reduced to account for the undisputed fact that \$50 million of SHIP's investment in AGH Parent was not through any of the three IMAs.

Finally, all of the above advanceable allocation in the Trott action should be reduced to account for the fact that the Beechwood Parties took the above actions for the benefit of not only SHIP, but also other institutional investors, such as WNIC and BCLIC. As stated above in the context of the Cyganowski FAC,

reducing the above advancement allocation by half is not warranted, because there is a substantial overlap between claims regarding their actions as SHIP's investment managers and claims regarding their actions taken for the benefit of other institutional investors.

Putting all of these together and balancing the various considerations, this Court holds that 35% of the Beechwood Parties' expenses (except for BAM Admin's) incurred in connection with the Trott action should be advanced.

**Conclusion**

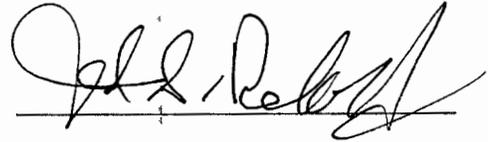
In sum, this Court holds that (1) BAM Admin is entitled to advancement of 0% of its expenses incurred in connection with each of the third-party actions, and (2) all other Beechwood Parties are entitled to advancement of (i) 0% of their expenses incurred in connection with the Black Elk action, (ii) 50% of their expenses incurred in connection with the Cyganowski FAC in the Cyganowski action, (iii) 0% of their expenses incurred in connection with the WNIC TPC in the Cyganowski action, (iv) 0% of their expenses incurred in connection with the SHIP TPC in the Cyganowski action, and (v) 35% of their expenses incurred in connection with the Trott action.

These payments should be made within 14 days of the date of this Memorandum Order, and, if there is any disagreement as to

the exact dollar amounts, counsel for the relevant parties should bring these disputes to the Court by a joint telephone call no later than 10 days from the date of this Memorandum Order.

SO ORDERED.

Dated: New York, NY  
September 5, 2019



JED S. RAKOFF, U.S.D.J.