

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-cv-24903-JB

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al,

Defendants.

**DEFENDANT RISHI KAPOOR’S MOTION TO DIRECT RECEIVER TO ADVANCE
LEGAL FEES AND COSTS AND MEMORANDUM OF LAW IN SUPPORT**

Defendant Rishi Kapoor (“Kapoor”), through undersigned counsel, hereby files his Motion to Direct Receiver to Advance Legal Fees and Costs and in support states as follows:

INTRODUCTION

This case is based on allegations that Kapoor defrauded investors in co-defendants Location Ventures, LLC (“Location Ventures”), Urbin, LLC (“Urbin”), and their affiliates and subsidiaries, including Urbin Coral Gables Partners, LLC, (“Urbin CG”), all real estate companies that invest in the development and operation of single-family homes, condominiums, and mixed-use projects in South Florida. Kapoor vigorously denies the allegations. The threat of other, parallel investigations loom on the horizon. The operating agreements of Location Ventures, Urbin, and Urbin CG (collectively, the “Operating Agreements”) all contain expansive indemnification provisions that additionally provide for the advancement of legal fees and costs to managers and members for use in defending against pending and threatened civil and criminal proceedings. Kapoor seeks an order directing the Receiver to comply with the Operating Agreements and advance his legal fees and costs to fund the defense of this case and to respond to other

investigations believed to involve the same facts and circumstances. Without the advancement of legal fees, Kapoor will be unable to properly defend himself in these matters. This Court should grant the relief requested, and the Receiver should be directed to make this a priority claim to be funded immediately.

FACTS

Kapoor is a member of Location Ventures, Urbin, and Urbin CG. All three companies have the following provisions in Article 8 of their Operating Agreements:

8.2 Indemnification.

(a) Subject to the limitations and conditions as provided in this Article 8, each Person (“**Indemnitee**”) who is made a party or is threatened to be made a party to 8.2 Indemnification, or is involved in any threatened, pending or completed claim, action, suit or proceeding, whether civil, criminal, administrative or arbitrative (a “**Proceeding**”), or any appeal in such a **Proceeding** or any inquiry or investigation that could lead to such a Proceeding, by reason of the fact that the Indemnitee was, at the time of the incident giving rise to the Proceeding, a Member, Manager, Guarantor or officer of the Company, shall be indemnified by the Company to the fullest extent permitted by the Act, as the same exists or may hereafter be amended (but in the case of any such amendment, only to the extent that such amendment permits the Company to provide broader indemnification rights than said law permitted the Company to provide prior to such amendment) against judgments, penalties (including without limitation excise and similar taxes and punitive damages, but not including penalties and taxes imposed on responsible persons for failure to deposit withheld taxes unless such responsible person acted in good faith with respect to such failure), fines, settlements and reasonable expenses (including, without limitation, attorneys’ fees) actually incurred by the Indemnitee in connection with such Proceeding.

(b) No potential or actual Indemnitee shall be entitled to indemnification pursuant to this Section 8.2 if matters for which such Indemnitee seeks indemnification were substantially caused by such Person’s (or its Affiliates) fraud, bad faith, material breach of this Agreement or any other agreement to which such person is a Party, breach of the duty of loyalty, gross negligence or willful or intentional misconduct.

8.4 Advancing Expense Payments.

Reasonable expenses (including reasonable legal fees and court costs) incurred by an Indemnitee in connection with a Proceeding, including those incurred in

attempting to challenge, dispute or settle a claim or charge prior to the commencement of any formal proceedings, shall be advanced by the Company prior to the final disposition of the Proceeding; provided that the Indemnitee and the Company shall first enter into an agreement containing a commitment by the Indemnitee to immediately repay such amount if it shall be determined that the Indemnitee was not entitled to be indemnified as authorized in Section 8.2.

As required by the Operating Agreements, Kapoor agrees to sign an agreement containing a commitment to immediately repay the amount advanced if, after the disposition of this case and any other covered investigations, it is determined he was not entitled to be indemnified. Beyond this, both Kapoor and his wife are willing, with Court approval, to secure the commitment to repay with a mortgage on their home at 7233 Los Pinos Boulevard, Coral Gables, which, under Florida law governing property owned as tenants by the entirety, is currently protected from seizure by unsecured judgment creditors such as the Receiver.¹ In the event the home is sold (*see* D.E. No. 94), Mr. and Mrs. Kapoor will agree to escrow any proceeds, over and above outstanding liens, they receive for repayment of any advanced legal fees, if and when appropriate.

MEMORANDUM OF LAW IN SUPPORT

I. The Operating Agreements Entitle Kapoor to Advancement of Legal Fees

In the context of corporate or LLC indemnification provisions, “Advancement” refers to the right to immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings. Advancement is an especially important corollary to the doctrine of indemnification, but it is a

¹ As explained in Kapoor’s pending Motion to Stay State Court Proceedings and Permit Sale of Asset Subject to Asset Freed (D.E. No. 94), 7233 Los Pinos Boulevard is owned by Los Pinos, LLC which, in turn, is wholly owned by owned by Kapoor, LLC. Kapoor, LLC is wholly owned by Rishi Kapoor and Jennie Frank Kapoor, his wife, as tenants by the entireties. Under Florida law, a creditor of one spouse cannot collect against property owned by spouses as tenants by the entireties. Further, if the tenants by the entireties wholly own an LLC which owns property, that property is also protected. See *In re Romagnoli*, 631 B.R. 807 (Bankr. S.D. Fla. 2021) (under Florida law, debtor's interest in limited-liability company was tenancy by entirety property).

distinct and independent right.² See, e.g., *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509-10 (Del. 2005) (“While the rights to indemnification and advancement are correlative, they are still discrete and independent rights, with the latter having a much narrower scope.”); *In re Ransome Grp. Inv'rs I, LLLP*, 424 B.R. 547, 553-54 (Bankr. M.D. Fla. 2009) (“A partner's right to an advancement of expenses under a partnership agreement is separate and distinct from his right to indemnification.”). Advancement thus “is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service.” *Homestore v. Tafeen*, 888 A.2d 204,218 (Del. 2005). That is to say, “[a]dvancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings.” *Id.*

Some courts have described advancement as an extension of credit, “the final repayment of which is conditioned on whether the corporate official is ultimately entitled to indemnification.” See, e.g., *Adelphia Commns. Corp. v. Rigas*, 323 B.R. 345, 375 (Bankr. S.D.N.Y. 2005) (“Advancement is species of loan – ‘essentially simply a decision to advance credit’ – to an officer or director pending later determination of that person's right to receive and ultimately retain indemnification. The corporation retains the right to be repaid all sums advanced if the individual is ultimately not shown to be entitled to indemnification.”). Because indemnification rights typically require that the indemnitee acted in good faith, an indemnification dispute cannot be resolved until after the merits of the underlying controversy are decided. By contrast, advancement “is a right whereby a potential indemnitee has the ability to force the company to pay his litigation expenses as they are incurred regardless of whether he will ultimately be entitled to

² The majority of case law on the subject of advances arises out of Delaware. Florida courts regularly turn to Delaware when it comes to issues of corporate law, including advancement. See, e.g., *Int'l Ins. Co. v. Johns*, 847 F.2d 1447, 1459 n. 22 (11th Cir. 1989) (“Florida courts have relied upon Delaware corporate law to establish their own corporate doctrines”).

indemnification.” *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 586 (Del. Ch. 2006).

Even the likelihood that the indemnification will not be permitted at the end of the case is irrelevant to the right of advancement. See, e.g., *DeLucca v. KKAT Mgmt., L.L.C.*, C.A. No. 1384-N, 2006 WL 224058, (Del. Ch. Jan. 23, 2006) (“Indeed, it is precisely in the circumstance when a business official is accused of serious wrongdoing that the right to advancement is critical, as that right secures the funds for the official to defend herself.”); *Bergonzi v. Rite Aid Corp.*, C.A. No. 20453-NC, 2003 WL 22407303, (Del. Ch. Nov. 3, 2003) (finding that former officer who pled guilty to embezzlement was still entitled to advancement pending entry of criminal judgment, at which times funds must be repaid; entry of a guilty plea, before sentencing, is not a final disposition.)

Here, paragraph 8.4 of the Operating Agreements is mandatory. The use of the word “shall” in a document clearly indicates a mandatory provision rather than a permissive one. *Sonus-USA, Inc. v. Thomas W. Lyons, Inc.*, 966 So. 2d 992, 993 (Fla. 5th DCA 2007). The Operating Agreements require the advancement of “reasonable legal fees and court costs” subject only to a prior commitment by the Indemnitee “to immediately repay such amount if it shall be determined that the Indemnitee was not entitled to be indemnified as authorized in Section 8.2.”

Accordingly, under the Operating Agreements, Kapoor is entitled to advancement of his reasonable legal fees and costs incurred in connection this case and any threatened parallel proceedings *unless and until* there is determination that he is not entitled to indemnification because those matters were substantially caused by his fraud or bad faith. And such a determination would, of course, require proof and a final disposition of this and any other covered matters.

II. **The Advancement of Legal Fees to Kapoor Should Be Treated as an Administrative Priority of the Receivership Estate**

It is Kapoor's position that his entitlement to mandatory advancement of legal fees should receive administrative priority rather than be treated on par with the claims of other unsecured creditors and paid *pro rata* when the estate is liquidated —at which point the “advanced” funds will likely serve little purpose as the matters being litigated and investigated may well have concluded. While there is limited case law addressing the issue of advancements in the receivership context, there is support for Mr. Kapoor's position. For example, in *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir.1995), the District Court had refused to grant an injunction directing a receiver to immediately advance payment of the defendant's legal fees based on what it perceived as the strength of the case against the defendant and its concern with potential harm to other creditors.

The Third Circuit reversed, observing that:

Appellants made a strong showing that, unless defense costs were advanced to them, their ability to defend the RTC action would be irreparably harmed. Appellee made no contrary showing, and the district court did not base its holding upon the absence of irreparable harm, but rather upon a comparison between the harm to appellants and the perceived harm to other creditors of CityFed. Here again, however, we conclude that the district court addressed the wrong issue. The only issue before the district court was whether appellants were entitled to advance payment of the cost of defense of the RTC action.

Id., 47 F.3d at 87 (3d Cir. 1995).

In *S.E.C. v. Illarramendi*, 2014 WL 545720 (D.Conn. Feb. 10, 2014), another case involving a receivership, the defendant, like Mr. Kapoor, was party to an agreement entitling him to mandatory advancement of legal fees. The receiver denied his request for an advance of fees from the receiver, analogizing its responsibility to that of a bankruptcy court. *Id.* The court, applying Delaware law, rejected the bankruptcy analogy to a receivership as unpersuasive, explaining that “receivership should not be used as an alternative to bankruptcy,” and that courts have “disapproved of district courts using receivership as a means to process claim forms and set

priorities among various classes of creditors.” *Id.* Relying on other cases from various courts around the country that afforded administrative priority to mandatory indemnification claims in the receivership context, the *Illarramendi* court concluded that, like indemnification, advancement also should receive administrative priority. *Id.* The same result should apply here.

Other cases have held that advancement expenses in a receivership are treated on par with the claims of other unsecured creditors and paid *pro rata*. In *Andrikopoulos v. Silicon Valley Innovation Company, LLC*, 120 A.3d 19 (Del. Ch. 2015), the court considered both *Illarramendi* and *Ridder* but concluded in its broad discretion, that advancement expenses should be treated on par with the claims of other unsecured creditors. The court concluded that granting administrative priority to advancement claims seriously could undermine, if not entirely eliminate, the ability of companies in receivership to pursue claims against former management. *Id.* In *Henson v. Sousa*, WL 4640415 (Del. Ch. Aug. 4, 2015), the court denied a request for advancement in part because there was no contractual right to advancement, and in part agreed with the *Andrikopoulos* court that “granting administrative priority to advancement claims seriously could undermine, if not entirely eliminate, the ability of companies in receivership to pursue claims against former management.” *Id.* In *S.E.C. v. Platinum Mgmt. (NY) LLC*, 2018 WL 6172404 (E.D.N.Y. Nov. 25, 2018), the court determined that former officers’ rights to advancement of legal fees in a criminal action did not have priority over the claims of unsecured creditors.

This Court has broad discretion to balance the equities and determine that Kapoor’s advancement claim should have administrative priority. Without an advancement these funds, Kapoor, like the defendant in *Ridder*, will be irreparably harmed in that he will be unable to properly defend himself in either this case or other covered investigations. Kapoor agrees to enter into an agreement to repay an amount if it is determined he should not be indemnified. More

importantly, he is willing to include a mortgage on 7233 Los Pinos, currently protected as a tenants by entireties property, or escrow any proceeds from the sale 7233 Los Pinos, as security for any necessary repayment.³ This minimizes any risk of loss to the Estate and distinguishes this case from the cases in which advances were treated on par with the claims of other unsecured creditors and paid *pro rata* for risk of loss to the receivership estate. This Court should grant the relief requested, and the Receiver should make this a priority claim to be funded immediately.

WHEREFORE, Defendant Rishi Kapoor respectfully requests that this Court grant his request for advancement of attorney's fees and costs, and any further relief this Court deems just and proper.

Local Rule 7.1(a)(3) Certification of Pre-Filing Conference

Counsel for Kapoor has conferred with counsel for the Commission and with the Receiver and her counsel. Both the Commission and the Receiver oppose this Motion.

Respectfully submitted,

SHAHADY & WURTENBERGER, P.A.

/s/ Fred A. Schwartz

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³ 7233 Los Pinos is, at present, the subject of a foreclosure lawsuit. The lender is seeking approximately \$5.4 million in principle, interest, and fees. A local realtor has done a comparative market analysis and the house is listed for sale at \$8.49 million. Lender's friendly appraiser has appraised the house at approximately \$7.3 million. A sale at either value will leave well more than \$1.5 million to repay any advance.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 20, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Fred A. Schwartz
Fred A. Schwartz

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 23-24903-CIV-BECERRA

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

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RISHI KAPOOR, et al.,

Defendant.

**{Proposed} ORDER ON MOTION TO DIRECT RECEIVER
TO ADVANCE LEGAL FEES AND COSTS**

THIS CAUSE is before the Court on the Defendant, KAPOOR's, Motion to Direct Receiver to Advance Legal Fees and Costs and the Court, being otherwise duly advised it is hereby,

ORDERED AND ADJUDGED that the Motion is **GRANTED**.

SIGNED in Chambers in Miami, Florida, this ____ day of _____, 2024.

HONORABLE JACQUELINE BECERRA
Chief United States District Judge

Copies to:

Counsel of record