UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 23-24903-CIV-JB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.,

Defendants.

____/

RECEIVER'S RESPONSE TO KAPOOR'S MOTION TO DIRECT RECEIVER TO ADVANCE LEGAL FEES AND COSTS

Bernice C. Lee, as Receiver ("Receiver") over the companies listed herein (each a "Receivership Company" and collectively, the "Receivership Companies")[1] in this action, responds and objects to Defendant Rishi Kapoor's Motion to Direct Receiver to Advance Legal Fees and Costs and Memorandum of Law in Support ("Indemnification Motion") (DE#107). Kapoor is not entitled to advancement of fees and costs because:

(1) Kapoor's claim for indemnification is a pre-receivership obligation that should not be prioritized over the interests of other creditors of and investors in the Receivership Companies by requiring immediate advancement; and

[1] The "Receivership Companies" include: Location Ventures, LLC, URBIN, LLC, Patriots United, LLC; Location Properties, LLC; Location Development, LLC; Location Capital, LLC; Location Ventures Resources, LLC; Location Equity Holdings, LLC; Location GP Sponsor, LLC; 515 Valencia Sponsor, LLC; LV Montana Sponsor, LLC; URBIN Founders Group, LLC; URBIN CG Sponsor, LLC; 515 Valencia Partners, LLC; LV Montana Phase I, LLC; Stewart Grove 1, LLC; Stewart Grove 2, LLC; Location Zamora Parent, LLC; URBIN Coral Gables Partners, LLC; URBIN Coconut Grove Partners, LLC; URBIN Miami Beach Partners, LLC; and URBIN Miami Beach II Phase 1, LLC.

(2) Kapoor's proposal to secure his undertaking to reimburse the Receivership Companies if he is ultimately not entitled to indemnification is illusory.

BACKGROUND

On December 27, 2023, the Securities and Exchange Commission ("S.E.C.") filed a Complaint (unsealed at DE#14) and an Emergency Motion for Asset Freeze and Other Relief ("Asset Freeze Motion") (DE#6) against Rishi Kapoor, which asserted and evidenced that Mr. Kapoor had raised approximately $93 million from more than 50 investors for investment in residential and mixed-use real estate projects through a series of material misrepresentations and omissions in violation of the Securities Act and the Exchange act and relevant rules promulgated thereunder. The Asset Freeze Motion describes how Mr. Kapoor, among other things: (1) misrepresented his cash investment in Location Ventures LLC, misrepresented the size of his real estate portfolio, and omitted material information about his prior business; (2) intentionally understated construction and other estimated costs and withheld information from investors; (3) regularly commingled investor funds and transferred funds between entities despite representations that each of the entities and projects were separate and distinct investments; and (4) misappropriated at least $4.3 million of investor funds.

On December 28, 2023, the Court entered a Sealed Order (DE#10) (later unsealed) granting the Asset Freeze Motion, upon finding that the S.E.C. had made a sufficient and proper showing by presenting a *prima facie* case showing a reasonable approximation of the likely disgorgement award against Mr. Kapoor of at least $4.3 million. Mr. Kapoor had indicated an intention to dissolve the Asset Freeze Order, and the Court on February 2, 2024 issued an Order scheduling a show cause hearing for February 28, 2024 ("Show Cause Order") (DE#66). Mr. Kapoor then moved to extend the asset freeze and to re-schedule the show cause hearing (DE#81), which was

rescheduled to March 25, 2024 (DE#86) and has now been deferred indefinitely with Mr. Kapoor's consent following the status conference conducted on March 21, 2024.

On January 5, 2024, the S.E.C. filed an Expedited Motion for Appointment of Receiver, Asset Freeze and Other Relief Against the Company Defendants ("Receiver Motion") (DE#16). On January 12, 204, the Court entered an order granting the Receiver Motion ("Order Appointing Receiver") (DE#28). The Order Appointing Receiver freezes all Receivership Property, directs the Receiver to take custody and control of all Receivership Property, directs the Receiver to use Receivership Property only for the benefit of the Receivership Estates, enjoins any other person from making any claim against the Receivership Companies or Receivership Property, and directs the Receiver "to develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property (the "Liquidation Plan")" (DE#28). Accordingly, all Receivership Property and all claims against Receivership Property and the Receivership Companies are under this Court's jurisdiction.

The receivership is less than three months old, and the process of identifying, marshaling and liquidating the Receivership Companies' assets, as well as the process of identifying and reviewing all potential claims against and interests in the Receivership Companies, is ongoing. Nonetheless, it is abundantly clear that there will be substantial claims asserted against the Receivership Companies: the S.E.C.'s Complaint alleges that the Receivership Companies solicited over $90 million in investments from investors; in addition, there are several millions of dollars of loans made to the Receivership Companies, many of which ostensibly encumber different real estate projects; there are construction lien claims asserted against several of the projects; there are millions of dollars of customer deposits for purchases of units in projects that remain uncompleted; and various other claims will likely be asserted against the Receivership

Companies. The liquid assets of the Receivership Companies are vastly insufficient to satisfy all those claims, and the ultimate result of liquidation of the real property assets and pursuit of potential litigation claims is, at present, uncertain. Accordingly, any immediate payment on account of any unsecured claim asserted against the Receivership Companies with receivership funds is likely to give a "priority" to such claim, to the detriment of the other creditors of and investors in the Receivership Companies who are to be addressed in a Liquidation Plan.

THE INDEMNIFICATION MOTION

On March 20, 2024, Mr. Kapoor filed the Indemnification Motion, in which he seeks an order directing the Receiver to advance to Mr. Kapoor his legal fees and costs to fund his defense of this case and "to respond to other investigations believed to involve the same facts and circumstances." (DE#107 at 1-2). The Indemnification Motion is based on contractual indemnification provisions contained in the Operating Agreements of Location Ventures, LLC, Urbin LLC, and Urbin Coral Gables Partners, LLC. Each of these Operating Agreements was executed prior to the receivership, and all the actions giving rise to the claims for which Mr. Kapoor seeks indemnification occurred prior to the receivership. The Operating Agreements provide that "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."

As a condition of advancing expenses, the Operating Agreements require that the indemnitee "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." Mr. Kapoor proposes to address the requirement in the Operating Agreements by providing a mortgage on the property located at 7233 Los Pinos Boulevard, Coral Gables (the "Los Pinos Property") in which he currently resides, which is owned by an entity called 7233 Los Pinos, LLC,[2] and which is subject to pending foreclosure proceedings. (DE#107 at 3).

Prior to filing the Indemnification Motion, Mr. Kapoor had filed a Motion to Stay State Court Proceedings and Permit Sale of Asset Subject to Asset Freeze ("Stay Motion") (DE#94), in which he (1) acknowledged that the Los Pinos Property was subject to the Asset Freeze Order; (2) asked this Court to stay the pending foreclosure action against the Los Pinos Property for six months; and (3) asked the Court to approve a listing agreement for the Los Pinos Property under which Mr. Kapoor's wife, Jennie Frank Kapoor, would be the listing agent and receive a share of any sale commission, subject to Court approval of a final offer to purchase the property.[3]

Then, just five days after filing the Indemnification Motion, Mr. Kapoor caused 7233 Los Pinos, LLC to hire bankruptcy counsel and file a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Florida. (See Composite Exhibit "A"). The initial filings indicate that bankruptcy counsel received a $10,000 retainer, and that the $1,738

[2] The Los Pinos Property is owned by 7233 Los Pinos, LLC, which in turn is owned by Kapoor, LLC, neither of which is a Receivership Company. Mr. Kapoor claims that Kapoor LLC is owned by him and his wife Jennie Frank Kapoor as tenants by the entireties.

[3] The Receiver has already advised Mr. Kapoor's counsel and the Court that the Receiver does not object to a sale of the Los Pinos Property for fair market value provided that (1) the terms of sale are fully disclosed to the Receiver and approved in advance of sale: (2) no insider is participating in the sale in any capacity (including as a listing agent); (3) any net proceeds are escrowed pending a determination as to entitlement in the Receivership action; and (4) the SEC likewise consents to the sale and terms thereof. (DE#98).

filing fee would be paid separately and could be charged to Mr. Kapoor's personal credit card (which would be a violation of the Asset Freeze Order).

DISCUSSION

1. Kapoor's Indemnification Claim is a Pre-Receivership Obligation Not Entitled to Priority.

Kapoor acknowledges that there is "limited case law" addressing the entitlement to advancement of indemnification costs in the receivership context, and further candidly acknowledges that the case law is mixed. (Indemnification Motion, pp. 6-7). Yet even this may overstate his position. In support of Kapoor's claim for advancement, the Indemnification Motion cites only to *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1995) and *Sec. & Exch. Comm'n v. Illarramendi*, No. 3:11cv78, 2014 WL 545720 (D. Conn. Feb. 10, 2014). Both cases are clearly distinguishable.

Ridder directed advancement of defense costs only upon determining that the sole issue properly before the lower court was the appellants' contractual and statutory entitlement to advance payment: "The insolvency proceeding itself was not before the district court, and the impact, if any, of a grant of injunctive relief was not only a matter for other tribunals to decide, but, on this record, purely speculative." *Ridder*, 47 F.3d at 87-88. Here, to the contrary, Kapoor has filed his Indemnification Motion in this S.E.C. equity receivership proceeding, in which this Court has jurisdiction over all the Receivership Companies' assets and all claims that may be asserted against them. Accordingly, this Court – unlike the court in *Ridder* – is expressly responsible for considering the equities – or lack thereof – of requiring that the insolvent Receivership Entities make current payment of Mr. Kapoor's legal expenses, to the detriment of all the other creditors of and investors in the Receivership Companies.

Moreover, while in *Ridder* the movants "made a strong showing that, unless defense costs were advanced to them, their ability to defend … would be irreparably harmed," *Id.* at 87, Mr. Kapoor has made no such showing here, instead only perfunctorily claiming in one sentence that "Without the advancement of legal fees, Kapoor will be unable to properly defend himself in these matters." (DE#107 at 2). That assertion is belied by the fact that Mr. Kapoor has had representation in this matter from its inception, has already indicated his intention to seek to dissolve the Asset Freeze Order, has filed multiple motions seeking affirmative relief from this Court (DE#89, DE#94) and objections to relief sought by the Receiver (DE#95), and just last week arranged the payment of a $10,000 retainer to bankruptcy counsel to put 7233 Los Pinos, LLC into bankruptcy.

Mr. Kapoor also argues that in *Illarramendi*, the court, applying Delaware law, "rejected the bankruptcy analogy to a receivership as unpersuasive," and, relying on other cases affording administrative priority to indemnification claims, found that advancement claims should also receive administrative priority. (DE#107 at 607). *Illarramendi* is likewise distinguishable on multiple grounds.

First, *Illarramendi* did indeed reject the "bankruptcy analogy," but the Eleventh Circuit Court of Appeals has not, and for good reason. *See Bendall v. Lancer Mgmt. Group, LLC*, 523 F. Appx. 554 (11th Cir. Jul. 9, 2013); *Sec. & Exch. Comm'n v. Lauer*, No. 03-80612, 2012 WL 12892398 (S.D. Fla. Sep. 25, 2012). In *Bendall*, the court noted that "Given that a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, we will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context." *Id.* at 557, citing *Sec. & Exch. Comm'n v. Elliott*, 953 F.2d 1560, 1567, 1572-73 (11th Cir. 1992). Specifically analogizing to bankruptcy, the court determined that indemnification rights asserted

under pre-receivership agreements were "claims" which were subject to, and had to be filed under, a claim management order entered in the receivership case. *Id.* at 558.[4] Since the movants failed to timely submit their claims under the claims management order, the Eleventh Circuit affirmed the trial court's denial of former directors' motions for indemnification. Similarly here, any indemnification or advancement right asserted by Mr. Kapoor arising from pre-receivership Operating Agreements is simply a "claim" which will be addressed in a Liquidation Plan, and should not be entitled to any greater priority at the expense of other claimants by compelling immediate advancement.

Second, the Delaware Chancery Court has itself rejected *Illarramendi*'s rationale, finding that the argument for administrative priority of advancement expenses "ignores the difference between a corporate entity in the ordinary course and one in receivership." *Andrikopoulos v. Silicon Valley Innovation Co., LLC*, 120 A.3d 19 (Ct. Chancery Del. 2015). The *Andrikopoulos* court held that advancement claims should be treated the same as claims of other unsecured creditors for four reasons:

> (1) While the policy in favor of advancement is important, so is the successful winding up of a corporation or other business entity. In receivership, the relative importance of advancement as an inducement to officers to serve is diminished. In addition,

[4] The *Illarramendi* court appears to have been laboring under some substantial misapprehensions about the operation of bankruptcy law and the analogies to receivership cases. The *Illaramendi* court states that "Although there are parallels between the goals of receiverships and bankruptcy courts to distribute limited assets, the goal of this Receivership is to wind up operations of the Estate and compensate the victims of Illarramendi's fraud, not to promote the rehabilitation of a business." *Illarramendi*, 2014 WL 545720 at *8. But bankruptcies can be either reorganizations or liquidations, and the principle underlying the treatment of claims remains the same in both: pre-bankruptcy claims are not entitled to priority, and only the expenses of administering the case are. The *Illarramendi* court also appeared to believe that advancement could be considered an administrative expense "depending on the temporal point of reference" because the lawsuit for which advancement was sought was filed post-receivership. *Id.* But the Eleventh Circuit in *Bendall* appropriately recognized that such a contingent right to payment "exists upon the signing of the agreement," and need not be currently enforceable to be considered a pre-receivership "claim." *Bendall*, 523 F.Appx. at 558.

giving priority to advancement could undermine the receiver's ability to pursue claims against former management.

(2) There is "substantial force" to the idea that the pre-receivership entity and the receivership entity are meaningfully different: they are managed by different individuals for different purposes and governed by different rules. Though receiverships are not bound by bankruptcy law, the distinction is important in receiverships as well. Advancement claims are contractual and arise from pre-receivership transactions; in that respect they are no different from other creditors' claims.

(3) The court must balance the existence of advancement rights against the realities of insolvent entities. "Market-based solutions" (i.e., insurance) may already exist to ameliorate the challenges of balancing these interests.[5]

(4) The "reality of practical administration" weighs in favor of treating advancement claims the same as other unsecured creditors. Otherwise, the court would then have to further consider "super-priority" for the Receiver's fees and professionals and determine what other "essential" expenses warrant such treatment, creating the danger of "becoming embroiled in time-consuming, line-item accounting disputes."

Id. at 25-26. *See also Henson v. Sousa*, No. 8057-VCG, 2015 WL 4640415 (Ct. Chancery Del. Aug. 4, 2015) (advancement not appropriate because of the interests of other creditors; the importance of inducing people to serve in management is diminished, and allowing advancement could undermine the receiver's ability to pursue claims against former management); *Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC*, No. 16-CV-6848, 2018 WL 6172404 (E.D.N.Y. Nov. 25, 2018) (under Delaware law, claims for advancement are treated the same as other unsecured claims, citing *Andrikopoulos* and *Henson*).

Magistrate Judge Goodman recently issued a Recommendation in an S.E.C. receivership case specifically adopting *Andrikopoulos*, *Henson*, and *Platinum* as "squarely on point" in holding that a former officer of a company in receivership was not entitled to an order compelling advancement of legal fees, but rather that he "can submit a claim for indemnification of his legal

[5] Mr. Kapoor apparently never procured D&O liability insurance for any of the Receivership Companies.

fees to be adjudicated with other investor and unsecured creditor claims at such time as the Receiver establishes a claims process and knows the amount of funds he has to distribute." *See Sec. & Exch. Comm'n v. BKCoin Mgmt., LLC*, No. 23-CV-20719 DE#136, p. 27 (copy attached as Exhibit "B").

Andrikopoulos, *Henson*, *Platinum* and *BKCoin* are soundly reasoned decisions recognizing why, in the receivership context, claims for immediate advancement of indemnification costs should be denied, and instead submitted to the same claims process as other investor and unsecured creditor claims. They are also consistent with the Eleventh Circuit's treatment of indemnification rights as pre-receivership claims that are subject to the same procedures as other unsecured claims against the receivership companies. To do otherwise would afford special treatment to Mr. Kapoor's claims at the expense of the victim investors and creditors.

2. Kapoor's Proposed Undertaking to Reimburse the Receivership Companies is Illusory.

The right to advancement under the Operating Agreements is conditioned upon the indemnitee entering into an agreement with a commitment to immediately repay any advances if it is determined that the indemnitee was not entitled to indemnification. For obvious reasons, any such commitment from Mr. Kapoor would be illusory. Mr. Kapoor is accused of misrepresenting his cash investment in Location Ventures, intentionally misstating his companies' operating budgets, commingling and improperly transferring investor funds, and misappropriating over $4 million of such funds for his own personal benefit. If the S.E.C. prevails on its claims against him, then it is almost certain that such claims will be found to have been substantially caused by Mr. Kapoor's 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, such that Mr. Kapoor will not be entitled to indemnification. If so, it is also almost certain that the S.E.C. will be entitled to disgorgement of millions of dollars from Mr. Kapoor.

It is similarly certain that the S.E.C.'s disgorgement claim, which it asserts to be at least $4.3 million, will exceed the value of Mr. Kapoor's assets: in the Sworn Accounting provided by Mr. Kapoor on February 22, 2024, he listed only two bank accounts with a total of $2 in them; the Los Pinos Property, with a value of $5,638,969 (which does not reflect the mortgage of Los Pinos Acquisition, LLC which secures a debt of approximately $5.3 million, plus mechanics liens of approximately $100,000, leaving minimal if any equity);[6] a 72-foot yacht with a value of $5.2 million (which likewise does not reflect a mortgage of approximately $4.2 million plus interest and other fees); and jewelry, art and furniture with no stated value. Mr. Kapoor's inability to perform any "commitment" to repay advances is further reason to deny any such request. *See In re Villas of Windmill Point II Prop. Owners Ass'n, Inc.*, No. 19-20400, 2021 WL 814118 (Bankr. S.D. Fla. Mar. 2, 2021) ("Movants' stated inability to finance litigation undermines their request [for advancement].")

To address the issue, Mr. Kapoor proposes in the Indemnification Motion to provide a mortgage on the Los Pinos Property. That proposal is likewise illusory.

First, it is far from clear that there is any equity in the Los Pinos Property: his Sworn Accounting a little more than a month ago valued it at approximately $5.6 million, while in the recent bankruptcy filing he claims it is worth in excess of $8 million. The property is subject to a mortgage securing a debt which is in default and accruing interest at a rate of 25%, with a per diem

---

[6] In an earlier Sworn Accounting, Mr. Kapoor listed the Los Pinos Property as having an approximate value of $8.5 million, with liabilities of $4,481,250.

asserted by the lender of $3,069.35. To the extent there is any equity, it is being very quickly consumed by the interest accrual as Mr. Kapoor continues to delay selling the property.

Second, a mortgage does nothing to assure "immediate" repayment; rather, it would require the Receiver to file a foreclosure action, satisfy a substantial senior loan, foreclose out other possible interests, and conduct a foreclosure sale before realizing any funds.

Third, the Receiver and the S.E.C. likely already have claims against the Los Pinos Property as a result of Mr. Kapoor's use of funds improperly derived from the Receivership Companies to acquire, improve, or pay down the indebtedness on the Los Pinos Property. Mr. Kapoor effectively proposes to "repay" the Receivership Companies with that which may already belong to them.

And fourth, as noted above, Mr. Kapoor caused 7233 Los Pinos, LLC, the entity that owns the Los Pinos Property, to file a bankruptcy petition. That filing is likely a violation of the Asset Freeze Order, and in any event the Los Pinos Property remains subject to the Asset Freeze Order (as Mr. Kapoor has already acknowledged it is). But even if 7233 Los Pinos LLC remains in bankruptcy, any pledge of a lien on its property would require bankruptcy court approval in addition to relief from the Asset Freeze Order, and there would be no bankruptcy purpose whatsoever for that entity to pledge an interest in its property to secure the personal obligation of Mr. Kapoor to repay fees advanced to him by the Receivership Companies. Accordingly, Mr. Kapoor very well may have tied his own hands in being able to deliver on the promise of this illusory lien.

CONCLUSION

For the foregoing reasons, the Receiver respectfully submits that Mr. Kapoor's motion to require the Receiver to advance legal fees and costs for his defense of the SEC's action and any

other proceeding should be denied. Mr. Kapoor can submit a claim for indemnification of his legal fees to be adjudicated with other investor and unsecured creditor claims at such time as the Receiver establishes a claims process and knows the amount of funds she has to distribute.

Respectfully submitted,

KOZYAK TROPIN & THROCKMORTON, LLP
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134
Tel: (305) 372-1800
Fax: (305) 372-3508
Email: dlr@kttlaw.com

By: */s/ David L. Rosendorf*
David L. Rosendorf
Florida Bar No. 996823

Counsel for Bernice C. Lee, Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via CM/ECF upon all counsel of record this 3rd day of April, 2024.

By: */s/ David L. Rosendorf*
David L. Rosendorf

COMPOSITE EXHIBIT A

Fill in this information to identify your case:

United States Bankruptcy Court for the:

SOUTHERN DISTRICT OF FLORIDA

Case number *(if known)* ____________ Chapter **11**

☐ Check if this an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

06/22

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. Debtor's name

7233 Los Pinos, LLC

2. All other names debtor used in the last 8 years

Include any assumed names, trade names and *doing business as* names

3. Debtor's federal Employer Identification Number (EIN)

99-2101477

4. Debtor's address

Principal place of business

299 Alhambra Circle
Suite 510
Miami, FL 33134
Number, Street, City, State & ZIP Code

Miami-Dade
County

Mailing address, if different from principal place of business

7233 Los Pinos Boulevard,
Miami, FL 33143
P.O. Box, Number, Street, City, State & ZIP Code

Location of principal assets, if different from principal place of business

Number, Street, City, State & ZIP Code

5. Debtor's website (URL)

6. Type of debtor

■ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))

☐ Partnership (excluding LLP)

☐ Other. Specify:

Debtor **7233 Los Pinos, LLC** Case number (*if known*)
Name

7. Describe debtor's business

A. *Check one:*

☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))

■ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))

☐ Railroad (as defined in 11 U.S.C. § 101(44))

☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))

☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))

☐ Clearing Bank (as defined in 11 U.S.C. § 781(3))

☐ None of the above

B. *Check all that apply*

☐ Tax-exempt entity (as described in 26 U.S.C. §501)

☐ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. §80a-3)

☐ Investment advisor (as defined in 15 U.S.C. §80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes.

____

8. Under which chapter of the Bankruptcy Code is the debtor filing?

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

Check one:

☐ Chapter 7

☐ Chapter 9

■ Chapter 11. *Check **all** that apply*:

- ☐ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $3,024,725. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
- ☐ The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000, **and it chooses to proceed under Subchapter V of Chapter 11.** If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
- ☐ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
- ☐ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.

☐ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?
If more than 2 cases, attach a separate list.

■ No.
☐ Yes.

District		When		Case number	
District		When		Case number	

Debtor **7233 Los Pinos, LLC** Case number (*if known*)
Name

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

■ No
☐ Yes.

List all cases. If more than 1, attach a separate list

Debtor ______ Relationship ______
District ______ When ______ Case number, if known ______

11. Why is the case filed in *this district?*

Check all that apply:

■ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

☐ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

■ No
☐ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

☐ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? ______

☐ It needs to be physically secured or protected from the weather.

☐ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

☐ Other ______

Where is the property? ______
Number, Street, City, State & ZIP Code

Is the property insured?

☐ No
☐ Yes. Insurance agency ______
Contact name ______
Phone ______

Statistical and administrative information

13. Debtor's estimation of available funds .

Check one:

■ Funds will be available for distribution to unsecured creditors.
☐ After any administrative expenses are paid, no funds will be available to unsecured creditors.

14. Estimated number of creditors

■ 1-49	☐ 1,000-5,000	☐ 25,001-50,000
☐ 50-99	☐ 5001-10,000	☐ 50,001-100,000
☐ 100-199	☐ 10,001-25,000	☐ More than100,000
☐ 200-999		

15. Estimated Assets

☐ $0 - $50,000	■ $1,000,001 - $10 million	☐ $500,000,001 - $1 billion
☐ $50,001 - $100,000	☐ $10,000,001 - $50 million	☐ $1,000,000,001 - $10 billion
☐ $100,001 - $500,000	☐ $50,000,001 - $100 million	☐ $10,000,000,001 - $50 billion
☐ $500,001 - $1 million	☐ $100,000,001 - $500 million	☐ More than $50 billion

16. Estimated liabilities

■ $0 - $50,000	☐ $1,000,001 - $10 million	☐ $500,000,001 - $1 billion

☐ $50,001 - $100,000	☐ $10,000,001 - $50 million	☐ $1,000,000,001 - $10 billion
☐ $100,001 - $500,000	☐ $50,000,001 - $100 million	☐ $10,000,000,001 - $50 billion
☐ $500,001 - $1 million	☐ $100,000,001 - $500 million	☐ More than $50 billion

Debtor **7233 Los Pinos, LLC**
Name

Case number (*if known*)

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **March 25, 2024**
MM / DD / YYYY

X **/s/ Rishi K. Kapoor**
Signature of authorized representative of debtor

Rishi K. Kapoor
Printed name

Title **Authorized Representative**

18. Signature of attorney

X **/s/ Mark S. Roher**
Signature of attorney for debtor

Date **March 25, 2024**
MM / DD / YYYY

Mark S. Roher
Printed name

Law Office of Mark S. Roher, P.A.
Firm name

1806 N. Flamingo Road
Suite 300
Pembroke Pines, FL 33028
Number, Street, City, State & ZIP Code

Contact phone **(954) 353-2200** Email address **mroher@markroherlaw.com**

178098 FL
Bar number and State

Fill in this information to identify the case:	
Debtor name	**7233 Los Pinos, LLC**
United States Bankruptcy Court for the:	**SOUTHERN DISTRICT OF FLORIDA**
Case number (if known):	

☐ Check if this is an amended filing

Official Form 204

Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders

12/15

A list of creditors holding the 20 largest unsecured claims must be filed in a Chapter 11 or Chapter 9 case. Include claims which the debtor disputes. Do not include claims by any person or entity who is an insider, as defined in 11 U.S.C. § 101(31). Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

Name of creditor and complete mailing address, including zip code	Name, telephone number and email address of creditor contact	Nature of claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of claim If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
				Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
AM Studio Design LLC 1200 NE 97th St. Miami, FL 33138		**7233 Los Pinos Blvd., Coral Gables, FL 33134 Debtor has obtained a Broker's Value Opinion valuing the property in excess of $8 Million.**		**Unknown**	**$5,638,969.00**	**Unknown**
Arras Corp dba Arras Air Conditioning 255 NE 69th St. Unit B Miami, FL 33138		**7233 Los Pinos Blvd., Coral Gables, FL 33134 Debtor has obtained a Broker's Value Opinion valuing the property in excess of $8 Million.**		**Unknown**	**$5,638,969.00**	**Unknown**
Italkraft 2900 NW 77th Ct. Doral, FL 33122		**Kitchen and bar cabinetry**				**$0.00**
J&P Tiles, Inc. 9830 SW 77th Ave. #105 Miami, FL 33156		**Tiles**	**Disputed**			**$0.00**

Debtor **7233 Los Pinos, LLC**
Name

Case number *(if known)*

Name of creditor and complete mailing address, including zip code	Name, telephone number and email address of creditor contact	Nature of claim (for example, trade debts, bank loans, professional services,	Indicate if claim is contingent, unliquidated, or disputed	Amount of claim If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
				Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
Los Pinos Acquistion, LLC 2511 Anderson Road Miami, FL 33134		**7233 Los Pinos Blvd., Coral Gables, FL 33134 Debtor has obtained a Broker's Value Opinion valuing the property in excess of $8 Million.**	**Unliquidated Disputed**	**Unknown**	**$5,638,969.00**	**Unknown**
Paramount Finishes LLC 6555 Powerline Rd. Suite 311 Fort Lauderdale, FL 33309		**7233 Los Pinos Blvd., Coral Gables, FL 33134 Debtor has obtained a Broker's Value Opinion valuing the property in excess of $8 Million.**		**Unknown**	**$5,638,969.00**	**Unknown**
The Piso Project LLC 1825 Ponce De Leon Blvd. Suite 65 Miami, FL 33138		**7233 Los Pinos Blvd., Coral Gables, FL 33134 Debtor has obtained a Broker's Value Opinion valuing the property in excess of $8 Million.**		**Unknown**	**$5,638,969.00**	**Unknown**

AM Studio Design LLC
1200 NE 97th St.
Miami, FL 33138

Arras Corp
dba Arras Air Conditioning
255 NE 69th St.
Unit B
Miami, FL 33138

Italkraft
2900 NW 77th Ct.
Doral, FL 33122

J&P Tiles, Inc.
9830 SW 77th Ave.
#105
Miami, FL 33156

Jason R. Alderman, Esq.
The Alderman Law Firm
9999 NE 2nd Ave., Suite 211
Miami, FL 33138

Los Pinos Acquistion, LLC
2511 Anderson Road
Miami, FL 33134

Paramount Finishes LLC
6555 Powerline Rd.
Suite 311
Fort Lauderdale, FL 33309

The Piso Project LLC
1825 Ponce De Leon Blvd.
Suite 65
Miami, FL 33138

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:

7233 LOS PINOS, LLC

Debtor.
_____________________________________/

Case No. 24-_______________

Chapter 11

APPLICATION TO EMPLOY COUNSEL RETROACTIVE TO PETITION DATE

Debtor-in-Possession, 7233 LOS PINOS, LLC ("Debtor"), respectfully requests an order of the court authorizing the employment of Mark S. Roher, Esq. of the law firm of Mark S. Roher, P.A. a/k/a The Law Office of Mark S. Roher, P.A. to represent the debtor in this case retroactive to the Petition Date and states:

1. On March 25, 2024, (the "Petition Date"), the Debtor filed a voluntary petition under chapter 11 of the United States Bankruptcy Code.

2. The Debtor desires to employ Mark S. Roher, Esq. of the law firm of Mark S. Roher, P.A. a/k/a The Law Office of Mark S. Roher, P.A. as attorney in this case.

3. The Debtor believes that the attorney is qualified to practice in this court and is qualified to advise the Debtor on its relations with, and responsibilities to, the creditors and other interested parties.

4. The professional services the attorney will render are summarized as follows:

(a) To give advice to the Debtor with respect to its powers and duties as Debtor in possession and the continued management of its business operations;

(b) To advise the Debtor with respect to its responsibilities in complying with

the U.S. Trustee's Operating Guidelines and Reporting Requirements and with the rules of the Court;

(c) To prepare motions, pleadings, orders, applications, adversary proceedings, and other legal documents necessary in the administration of the case;

(d) To protect the interest of the Debtor in all matters pending before the Court;

(e) To represent the Debtor in negotiation with its creditors in the preparation of a plan.

5. To the best of the Debtor's knowledge, neither said attorney nor said law firm have any connection with the creditors or other parties in interest or their respective attorneys. Neither said attorney nor said law firm represent any interest adverse to the Debtor.

6. Attached to this motion is the (i) proposed attorney's affidavit demonstrating Mark S. Roher, Esq. of the law firm of Mark S. Roher, P.A. a/k/a The Law Office of Mark S. Roher, P.A. are disinterested as required by 11 U.S.C. §327(a) and a verified statement as required under Bankruptcy Rule 2014 and (ii) the retainer agreement signed by the Debtor on dated April 10, 2022 for the representation.

7. The Debtor respectfully requests an order authorizing retention of Mark S. Roher, P.A. a/k/a The Law Office of Mark S. Roher, P.A. pursuant to 11 U.S.C. §§ 327 and 330 retroactive to the Petition Date.

7233 LOS PINOS, LLC
By: Rishi K. Kapoor
Authorized Representative of 7233 Los Pinos, LLC and the Manager of Kapoor LLC the Authorized Member of 7233 Los Pinos, LLC

Dated this 25th day of March, 2024.

LAW OFFICE OF MARK S. ROHER, P.A.
Proposed Counsel for Debtor
1806 N. Flamingo Road, Suite 300
Pembroke Pines, Florida 33028 (Main Office)
-and-
5660 Strand Court, Unit #A51
Naples, FL 34110-3343 (Satellite Office)
Email: mroher@markroherlaw.com
Telephone: (954) 353-2200

By: */s/ Mark S. Roher*
Mark S. Roher
Florida Bar No. 178098

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2024, a true and correct copy of the foregoing was served by CM/ECF on all parties receiving notice by this method.

/s/ Mark S. Roher
Mark S. Roher

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:

7233 LOS PINOS, LLC

Debtor.
_______________________________________/

Case No. 24-_______________

Chapter 11

SWORN DECLARATION OF PROPOSED
ATTORNEY FOR DEBTOR IN POSSESSION

Mark S. Roher, Esq., being duly sworn, says:

1. I am an attorney admitted to practice in the State of Florida, the United States District Court for the Southern District of Florida and qualified to practice in the U.S. Bankruptcy Court for the Southern District of Florida since 1999.

2. I am the President and sole shareholder of the law firm of Mark S. Roher, P.A. a/k/a The Law Office of Mark S. Roher, P.A. ("MSRPA") with offices located at 1806 N. Flamingo Road, Suite 300, Pembroke Pines, FL 33028.

3. Neither I nor the firm represent any interest adverse to the Debtor, or the estate, and we are disinterested persons as required by 11 U.S.C. §327(a).

4. Except for the continuing representation of the Debtor, neither I nor the firm has or will represent any other entity in connection with this case.

-remainder of page intentionally left blank-

5. There are no pre-petition fees owed.

I DECLARE UNDER PENALTY OF PERJURY THAT THE ABOVE-STATEMENTS ARE TRUE AND CORRECT.

/s/ Mark S. Roher
Mark S. Roher

Law Office of Mark S. Roher, P.A.

1806 N. Flamingo Road, Suite 300 | Pembroke Pines, Florida 33028 | P: 954-353-2200 | F: 877-654-0090 | E: mroher@markroherlaw.com
www.markroherlaw.com

March 23, 2024

Via Email therishikapoor@gmail.com
7233 Los Pinos, LLC
c/o Kapoor LLC, Authorized Member
By and Through Rishi K. Kapoor, its Manager
299 Alhambra Circle
Suite 510
Coral Gables, FL 33134

Re: *Representation in Chapter 11 Bankruptcy Proceeding*

Dear Mr. Kapoor:

This is a contract for legal services entered into between Mark S. Roher, P.A. a/k/a The Law Office of Mark S. Roher, P.A. (hereinafter referred to as "MSRPA") and **7233 Los Pinos, LLC** (hereinafter referred to as the "Bankruptcy Client"), based on the terms and conditions set forth in the paragraphs below:

1. **Purpose and Scope of Engagement**: MSRPA will be representing the Bankruptcy Client with respect to the matter described herein. The purpose of this engagement is to represent the Bankruptcy Client in its Chapter 11 bankruptcy case to be filed in the United States Bankruptcy Court for the Southern District of Florida, Miami Division (hereinafter referred to as "THE MATTER").

MSRPA will perform all acts on Bankruptcy Client's behalf which are necessary and appropriate to this representation. Such representation shall include (1) preparation and filing of the Petition, Schedules, Statement of Financial Affairs and other related forms (based on information supplied to MSRPA by the Bankruptcy Client); (2) attendance at all meetings of creditors, hearings, pretrial conferences, and trials in the case or any litigation arising in connection with the case, whether in state or federal court (unless a separate retainer agreement for any specific litigation matter is entered into and approved by the Bankruptcy Court); (3) preparation, filing and presentation to the Bankruptcy Court of any pleadings requesting relief; (4) preparation, filing and presentation to the court of a disclosure statement and plan of reorganization under Chapter 11 of the Bankruptcy Code; and (5) review of claims made by creditors or interested parties, preparation and prosecution of any objections to claims as appropriate; and (6) preparation and presentation of a final accounting and motion for final decree closing the bankruptcy case.

Case 24-12797-RAM Doc 3-2 Filed 03/25/24 Page 3 of 4

If at any time MSRPA is required to take any action in THE MATTER and MSRPA is unable to obtain instructions from the Bankruptcy Client, it authorizes MSRPA to take such actions as are necessary to protect its interests.

2. **Lawyers Providing Services**: The legal services will be performed by Mark S. Roher, Esq.

3. **The Bankruptcy Client's Obligations**: MSRPA will endeavor to represent the Bankruptcy Client's interests vigorously and efficiently. For MSRPA to provide these services effectively, the Bankruptcy Client agrees to disclose fully and accurately all pertinent facts and keep MSRPA apprised of all developments in THE MATTER. MSRPA will rely on the completeness and accuracy of that information when performing services on the Bankruptcy Client's behalf. The Bankruptcy Client agrees to cooperate fully with MSRPA and agrees to timely comply with all court orders, discovery requests and other requests by the U.S. Trustee, Bankruptcy Court or any party-in-interest. The Bankruptcy Client understands that attendance at a meeting of creditors subsequent to the filing of the bankruptcy petition is mandatory and that failure to attend such meeting of creditors would lead to the dismissal of the bankruptcy proceeding. The Bankruptcy Client also agrees to notify MSRPA of any address or telephone number changes.

The Bankruptcy Client acknowledges that any and all statements regarding the Bankruptcy Client's assets, liabilities and financial affairs are signed under penalty of perjury and are required to be true and correct to the best of Bankruptcy Client's knowledge. The Bankruptcy Client understands that any person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury, either orally or in writing, in connection with a bankruptcy case is subject to a fine, imprisonment, or both. All information supplied by the Bankruptcy Client in connection with his or her bankruptcy case is subject to examination by the Attorney General acting through the Office of the United States Trustee, the Office of the United States Attorney, and other components and employees of the United States Department of Justice.

4. **Fee Arrangement**: The Bankruptcy Client will be charged on an hourly fee basis, at the rate of $500.00 for Mark S. Roher, P.A. on behalf the Bankruptcy Client and a fee advance/retainer, in the amount of **$10,000.00** shall be transferred into MSRPA's trust account prior to the bankruptcy filing (the "Fee Advance"). The chapter 11 filing fee in the amount of $1,738.00 must be paid separately and can be charged to a personal credit card belonging to Rishi Kapoor.

Application of the Fee Advance to post-petition fees and costs are subject to Bankruptcy Court approval and will be held in trust pending such Bankruptcy Court order. Furthermore, MSRPA may request that the Bankruptcy Client pay certain costs directly, such as filing fee(s), court reporter costs, mediation costs or copying/mailing costs through outside copy services. Bankruptcy Client shall also be responsible for reimbursing MSRPA for usual and customary costs such as postage, overnight delivery, copying charges at $0.25 per page and for parking.

Therefore, to be clear, the $10,000.00 Fee Advance above is merely an advance on the fees to be incurred in THE MATTER. It is not a flat fee. In all likelihood, additional funds will be due and owing to MSRPA on account of THE MATTER, given the complexity of the legal work involved. Once

the $10,000.00 Fee Advance is exhausted, the Bankruptcy Client will be expected and agrees to pay any amounts that come due and owing over and above that amount, as set forth above.

My hourly rate, as set forth above, is based on years of experience, specialization and training, practice, level of professional attainment, and overhead cost.

Where the expenses involve payment to persons outside MSRPA, MSRPA may request that the Client pay the expenses directly. If a cost is incurred, the Client authorizes MSRPA to advance the cost on the Client's behalf, if MSRPA is holding sufficient funds in its trust account.

The Bankruptcy Client understands that it is the practice of MSRPA to charge not less than 1/10 of an hour for each telephone call, email or text message made and received, no matter how short its duration.

Furthermore, the Bankruptcy Client's obligation to pay the fees and costs outlined herein are not contingent on the outcome of the Bankruptcy Client's bankruptcy proceeding. That is, if the case is dismissed or converted or the case otherwise does not result in a favorable outcome, then the Bankruptcy Client is still responsible for payment to MSRPA.

5. **Right to Terminate/Withdraw**: The Bankruptcy Client understands and agrees that if a fee due MSRPA is not paid within the terms described in paragraph 4, including the payment of any requested fee advance or cost deposit, then MSRPA has the right to terminate working on THE MATTER and to file a motion to withdraw as the Bankruptcy Client's attorneys based upon said non-payment. Furthermore, if MSRPA and the Bankruptcy Client disagree on the procedural or substantive defense/strategy of the bankruptcy proceeding, which results in irreconcilable differences, then MSRPA may, in its sole discretion, seek to withdraw as the Bankruptcy Client's attorneys at that time. The Bankruptcy Client hereby consents to permit MSRPA to withdraw as its counsel under those or any other circumstances. Bankruptcy Court approval shall be required to effectuate any withdrawal.

If you have any questions, please do not hesitate to contact me. If the foregoing is acceptable, please acknowledge that you have reviewed it, understand it, and desire to retain MSRPA on the basis of the terms of this agreement by signing and delivering to us the signed agreement (by facsimile, if possible, and by U.S. Mail). MSRPA recommends that the Bankruptcy Client keep a copy of this agreement in its file.

Very truly yours,

Mark S. Roher

The Bankruptcy Client has read this entire agreement, understands it, and agrees to all of its terms. By signing below, the Bankruptcy Client further acknowledges that MSRPA has made no guarantees or assurances concerning the outcome of THE MATTER.

Rishi K. Kapoor, individually, understands, acknowledges and expressly agrees that MSRPA shall not represent him in his individual capacity and if the need so arises, that he will have to retain separate counsel in the MATTER.

By:______________________________ Date: 03.24.24

7233 Los Pinos, LLC
c/o Kapoor LLC, Authorized Member
By and Through Rishi K. Kapoor, its Manager

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 23-CV-20719-SCOLA/GOODMAN

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BKCOIN MANAGEMENT, LLC, *et al.*,

Defendants.
_______________________________________/

REPORT AND RECOMMENDATIONS ON DEFENDANT
KANG'S MOTION FOR A LIMITED LIFT OF THE STAY OF LITIGATION

Defendant Min Woo Kang a/k/a "Kevin" Kang ("Kang") filed the instant motion seeking a limited lift of the stay "to allow [him] to file a complaint for indemnification and advancement of attorneys' fees, or in the alternative, for an order requiring that the Receiver should advance [his] attorneys' fees and costs as required under [the First Amended and Restated Limited Partnership Agreement dated August 28, 2020 ("Agreement")] with BKCoin Capital LP [("BKCoin Capital")]." [ECF No. 109-1, p. 2].[1] Michael I. Goldberg, in his capacity as the Court-appointed Receiver ("Receiver"), filed a response in opposition [ECF No. 113] and Kang filed a reply [ECF No. 118]. Kang also

---

[1] The Undersigned cites to the pagination generated by CM/ECF, which appears in the headers of all court filings.

filed an [amended] notice of supplemental authority [ECF No. 134] concerning the Delaware Chancery Court's ruling in *Jeffries v. Abercrombie & Fitch Co.*, No. 2023-1211-PAF (Del. Ch. Mar. 8, 2024).[2]

Senior United States District Judge Robert N. Scola, Jr. referred this motion to the Undersigned "for either an order or a report and recommendations, consistent with 28 U.S.C. § 636(b)(1), Federal Rule of Civil Procedure 72, and Rule 1 of the Local Magistrate Judge Rules." [ECF No. 110]. As explained below, the Undersigned **respectfully recommends** that Judge Scola **deny** Kang's motion.

I. Background

On February 23, 2023, the SEC commenced this action against Defendants BKCoin Management, LLC ("BKCoin Management"), Kang, BKCoin Capital, BK Offshore Fund, LTD., BKCoin Multi-Strategy Master Fund, Ltd., BKCoin Multi-Strategy Fund, LP, BKCoin Multi-Strategy Fund Ltd., and Bison Digital LLC, asserting that Defendants violated various sections of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940 and for unjust enrichment against certain Defendants. [ECF No. 1].

The SEC sought and obtained the appointment of the Receiver. [ECF Nos. 4; 8].

---

[2] The Undersigned struck Kang's initial notice of supplemental authority because it exceeded the word limit set forth in S.D. Fla. L.R. 7.8. [ECF No. 133]. He did not call his corrected submission an amended or supplemental filing, though.

The Court's Order stayed certain proceedings:

> 30. As set forth in detail below, **the following proceedings**, excluding the instant proceeding and all police or regulatory actions and actions of the Commission related to the above-captioned enforcement action, **are stayed until further Order of this Court**:
>
> > **All civil legal proceedings of any nature**, including, but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, **or other actions of any nature involving:** (a) the Receiver, in his capacity as Receiver; (b) any Receivership Property, wherever located; (c) **any of the Receivership Defendants and Relief Defendants, including subsidiaries and partnerships; or, (d) any of the Receivership Defendants and Relief Defendants' past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity of any nature**, whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise . . . .

[ECF No. 8, ¶ 30 (emphasis added)].

On March 24, 2023, Kang sent a letter to the Receiver, demanding advancement of legal fees and indemnification. [ECF No. 109-4]. The letter specifically identified the instant action and *Canto v. BKCoin Mgmt., LLC*, No. 1:22-cv-08858-JPO (S.D.N.Y.) ("*Canto* lawsuit").[3] It demanded $154,842.00 in already-incurred expenses and future

---

[3] The *Canto* lawsuit is an investor-filed class action, asserting many of the same assertions alleged against Khan in the instant action. *Compare* [ECF No. 1] *with* [ECF No. 107-6].

advancement of expenses from the Receiver, citing §§ 4.03(b) and (e) of the Agreement. *Id.*

Kang's letter was accompanied by a signed undertaking to repay any advance in the event Kang is not entitled to indemnification. It states, in its entirety, as follows:

<u>UNDERTAKING OF KEVIN KANG</u>

> Pursuant to the Amended LP Agreement, I, Kevin Kang, undertake to repay any expenses advanced to me to the extent that it is ultimately determined that I am not entitled to be indemnified.

Id. at 4.

On March 30, 2023, the Receiver sent a letter denying Kang's request. [ECF No. 109-5]. The letter stated that "the Receiver ha[d] concluded that under the terms of the Agreement and the circumstances, the Receivership [E]ntities [were] not required to and [would] not advance [ ] Kang any funds for his legal expenses or any other expenses." *Id.* at 2.

The letter provided two reasons for this determination. <u>First</u>, it noted that "the Receivership [E]ntities' obligation to advance funds for expenses to [ ] Kang [was], under the express terms of the Agreement, **limited to partnership assets**." *Id.* (citing §§ 1.01 and 403(d) of the Agreement (emphasis added)). It noted that although the term "Partnership assets" was not defined by the Agreement, the term "Available Assets" was limited to:

> the excess of (a) Distributable Cash and other property to be distributed pursuant to Section 8.01 and Temporary Investments over (b) the sum of (i)

Investment Expenses, (ii) amounts paid or payable in respect of any loan or other Indebtedness of the Partnership and (iii) the amount of reserves established by the General Partner as contemplated by Section 3.02(n).

Id. (quoting § 1.01 of the Agreement).

The letter states that the Receiver's investigation "unequivocally revealed that **the only funds the Receivership [E]ntities possess are directly traceable to investor funds**" and "[could not] be considered Partnership assets under the definition of Available Assets set forth above, or under any reasonable definition of the term Partnership assets, since they properly belong to investors." *Id.* at 3 (emphasis added). Thus, the Receiver asserted that there were *no* funds from which to pay Kang's expenses. *Id.* ("[B]ecause the Receivership [E]ntities do not possess Partnership assets with which to advance funds for expenses to [ ] Kang, we are not required to do so under Section 4.03(d) of the Agreement, and we will not be doing so.").

Second, the letter noted that:

> the Receivership [E]ntities [were] not required to indemnify [ ] Kang for **"any act or omission with respect to which a court of competent jurisdiction . . . has issued a final and non-appealable decision, judgment or order that such act or omission resulted from . . . bad faith, gross negligence, willful misconduct, fraud or a material breach of this Agreement."**

Id. (quoting § 4.03(b) of the Agreement). It further noted that "[i]t [was] undisputed that the Securities and Exchange Commission and private parties have alleged numerous acts of fraud, willful misconduct, and bad faith against [ ] Kang" and that "the Receiver's

investigation ha[d] yielded significant evidence of [ ] Kang's fraud." *Id.* The letter concluded that "it [was] highly likely that even if the Receivership [E]ntities had Partnership assets to advance to [ ] Kang, he would have to repay them" and expressed doubt that "the Receivership [E]ntities could recover any advanced funds from [ ] Kang in the likely event he is found to have committed fraud." *Id.* For these reasons, the Receiver refused Kang's request for the advancement of litigation expenses.

Kang now seeks a limited lift of the litigation stay "to allow [him] to file a complaint for indemnification and advancement of attorneys' fees, or in the alternative, for an order requiring that the Receiver should advance [his] attorneys' fees and costs as required under [the Agreement]." [ECF No. 109-1, p. 2].

The Receiver opposes the relief requested on three grounds: (1) the Agreement limits the assets that may be used to indemnify legal fees and the Receiver does not possess those assets; (2) "Delaware's public policy in favor of advancement of legal fees for corporate officers gives way to the public policy of not diminishing scarce Receivership assets in cases such as this one, particularly where the corporate officer is accused of the fraud that caused the appointment of a [r]eceiver"; and (3) the three-factor test for lifting the stay strongly weighs against lifting the stay of litigation against the Receivership Entities. [ECF No. 113, p. 2].

Case 1:23-cv-24903-BB Document 132 Entered on FLSD Docket 03/23/2024 Page 7 of 40

II. Analysis

Kang maintains that "[a]s a former partner of BKCoin Capital[ ], [he] is entitled to both advancement and indemnification for 'reasonable legal and other professional fees' connected to defending against any claim pursuant to the [Agreement]." [ECF No. 109-1, p. 2]. He cites to sections 4.03(b) and (e) of the Agreement, which state as follows:

> **Section 4.03 Liability for Acts and Omissions**.
>
> ***
>
> **(b) To the fullest extent permitted by applicable law, the Partnership shall and does hereby agree to indemnify and hold harmless each Covered Person from and against** any damages, costs, losses, claims, liabilities, actions, and **expenses (including reasonable legal and other professional fees and disbursements and all expenses reasonably incurred investigating, preparing, or defending against any claim whatsoever, judgment, fines, and settlements (collectively "Indemnification Obligations") incurred by such Covered Person arising out of or relating to this Agreement**, the Investment Management Agreement, or any entity in which the Partnership invests (including, without limitation, any act or omission as a director, officer, manager or member of an Affiliate of the Partnership), **except in the case of any act or omission with respect to which a court of competent jurisdiction (or other similar tribunal) has issued a final and non-appealable decision, judgment or order that such act or omission resulted from such Covered Person's bad faith, gross negligence, willful misconduct, fraud or a material breach of this Agreement or the Investment Management Agreement**. The indemnity set forth herein shall not apply to an internal dispute among the Covered Persons to which the Partnership is not a party. The provisions set forth in this Section 4.03(b) shall survive the termination of this Agreement.
>
> ***

Case 1:23-cv-20719-RNS Document 112 Entered on FLSD Docket 03/28/2024 Page 8 of 41

(e) Expenses reasonably incurred by a Covered Person in defense or settlement of any claim that may be subject to a right of indemnification hereunder shall be advanced by the Partnership prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of such Covered Person to repay such amount to the extent that it is ultimately determined that such Covered Person is not entitled to be indemnified hereunder. The termination of a proceeding or claim against a Covered Person by settlement or a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that any Covered Person's conduct constituted bad faith, gross negligence, willful misconduct, fraud, or a material breach of this Agreement or the Investment Management Agreement.

[ECF No. 109-3, §§ 4.03(b), (e) (emphasis added)].

The Agreement defines the term "Covered Person" as:

the General Partner (including, without limitation, the General Partner in its role as Tax Matters Partner and, if applicable, in its capacity as a special limited partner or a former general partner), the Investment Manager, each of their Affiliates, any officers, directors, managers, employees, shareholders, partners, members, agents and consultants of any of the foregoing."

Id. at § 1.01 ("Definitions") (emphasis added). It is governed by Delaware law and includes a New York venue provision. *Id.* at §§ 17.02, 17.03.

Kang argues that because he "was a manager of the General Partner, BKCoin [Management]," he falls within the Agreement's definition of a "Covered Person." [ECF No. 109-1, p. 4]. He further states that he "was required to obtain counsel immediately to defend against accusations 'arising out of or relating to this Agreement, the Investment Management Agreement, or any entity in which the Partnership invests (including,

without limitation, any act or omission as a director, officer, manager or member of an Affiliate of the Partnership)[.]'" *Id.* at 6 (quoting § 4.03(b) of the Agreement).

He states that he has incurred legal fees and costs in connection with the instant action and the *Canto* lawsuit filed "against BKCoin [Management], Carlos Betancourt, and Kevin Kang alleging breaches of fiduciary duty in connection with the management of [Canto's] funds that were in a separately managed account, and certain loan agreements." *Id.* (citing *Canto,* No. 1:22-cv-08858-JPO (S.D.N.Y.), ECF No. 3).

For these reasons, Kang asserts that, under the Agreement, he is entitled to advancement of his legal fees and indemnification.

a. The Meaning of "Partnership Assets" in Section 4.03(d) of the Agreement

At the outset, the parties disagree on the meaning of "Partnership assets" in section 4.03(d) of the Agreement, which states, in its entirety: "(d) The satisfaction of any indemnification pursuant to this <u>Section 4.03</u> **shall be from and limited to Partnership assets**." [ECF No. 109-3, § 4.03(d) (underline emphasis in original; bold emphasis added)].

The Receiver contends that, assuming Kang is a "Covered Person" under the Agreement, there are no available funds from which to pay Kang's indemnity and advancement because the Agreement states that "[t]he satisfaction of any indemnification pursuant to this <u>Section 4.03</u> shall be from and limited to Partnership assets." [ECF No. 113, p. 7 (quoting § 4.03(d) of the Agreement (emphasis in Agreement))].

He explains his position as follows:

> The term "Partnership [a]ssets" is not defined in the Agreement. The term "Partnership" is defined in Article 1, which circuitously defines "Partnership" as the limited partnership referred to in the Agreement. ECF No. 107-3 at 10 of 48. However, that sheds no light on what "Partnership [a]ssets" means. **The only time the term "assets" is defined anywhere in the Agreement is at "Available Assets" in Article 1, defined as "the excess of (a) Distributable Cash and other property to be distributed pursuant to Section 8.01 and Temporary Investments over (b) the sum of (i) Investment Expenses, (ii) amounts paid or payable in respect of any loan or other Indebtedness of the Partnership and (iii) the amount of reserves established by the General Partner as contemplated by Section 3.02(n)."** ECF No. 107-3 at 4 of 48.
>
> Reference to the term "Distributable Cash" (defined at ECF No. 107-3 at 6 of 48) and the remainder of that definition show **the term "Available Assets" plainly refers to assets of the partnership in excess of any amounts to be distributed to the limited partners (who are the investors)**, expenses, other indebtedness, or reserves. Across seven Receivership Entities, **investors invested $100 million; yet, the Receiver has only recovered less than $10 million of those funds.** Of the cash recovered to date, **only a fraction of those funds were in accounts in the name of BKCoin Capital**. Even worse, **given the extensive commingling across funds, the Receiver and his accounting professionals are not in a position at this time to determine the source of those cash assets or verify that they truly originated from BKCoin Capital investors**. Accordingly, **there is no way any funds the Receiver currently possesses could be considered "Available Assets" -- i.e., assets in excess of BKCoin Capital investor funds**. The Receivership owes more than $90 million it does not have to the investors of the <u>seven</u> Receivership Entities, and so far, the rampant commingling has made it near impossible to determine what assets comprise the BKCoin Capital-specific assets. **Because the Receiver possesses only assets which rightfully belong to defrauded investors, Section 4.03(d) of the Agreement makes it clear the Receiver is not obligated to indemnify or advance Kang's legal fees**.

Id. at 7–8 (underline emphasis in original; bold emphasis added).

Kang argues that the Receiver's position -- that there are no funds available to pay for advancement or indemnification -- is based on a misinterpretation of the Agreement:

> [T]he Receiver improperly alleged that there were no assets available for indemnification and advancement: "the Receivership [E]ntities' obligation to advance funds for expenses to [ ] Kang is, under the express terms of the Agreement, limited to partnership assets. Agreement at Section 4.03(d): 'The satisfaction of any indemnification pursuant to this Section 4.03 shall be from and limited to Partnership assets' (emphasis added)." **Notwithstanding the definition of "Partnership" in Section 1.01 of the Amended LP Agreement, which as discussed above defines "Partnership" as BKCoin Capital[ ], the Receiver insisted that it was unclear what "Partnership [a]ssets" meant under Section 4.03**. Instead, the Receiver pointed to the defined term "Available Assets," which refers to funds available for distribution to the partners in BKCoin Capital[ ], which is distinct from the Partnership assets from which [ ] Kang is entitled to advancement of fees and indemnification.

[ECF No. 109-1, pp. 8–9 (internal citations omitted)]. Kang states that "the proper definition of "Partnership [a]ssets" encompasses all of the assets of BKCoin Capital[ ]" and therefore, "there are ample funds available for advancement." *Id.* at 10.

The Receiver contends that "Kang's claim is illogical both legally and practically." [ECF No. 113, p. 9]. He argues that:

> From a legal standpoint, Kang's interpretation would render the limiting clause of Section 4.03(d) superfluous and unnecessary. The Agreement defines "Partnership" as the limited partnership referred to in the Agreement. ECF No. 107-3 at 10 of 48. **If Kang's interpretation of the Agreement were correct, that would mean BKCoin Capital could use any asset in the Partnership's possession or control to advance and indemnify legal fees. There would be no need for Section 4.03(d) to specify "Partnership [a]ssets" because the broad definition of "Partnership" in Article 1 would already allow any partnership asset to go towards**

advancement and indemnification.

Id. (emphasis added).

The Receiver notes that Delaware law recognizes the "well-established principle of contract interpretation . . . that courts should not interpret contracts in a way that renders any portion superfluous, but rather interpret them in a way that gives effect to all parts of a contract." *Id.* (collecting cases). Thus, the Receiver reasons that "[b]ecause Kang's interpretation would render Section 4.03(d) superfluous, it contravenes Delaware law." *Id.* at 10.

He notes that "Kang's broad interpretation contradicts Section 4.03(d), which by its very language is intended to *limit* the assets the Partnership can use to advance and indemnify legal fees: '[t]he satisfaction of any indemnification pursuant to this <u>Section 4.03</u> shall be from and *limited to* Partnership assets.'" *Id.* (quoting § 4.03(d) (underline emphasis in Agreement; italic emphasis in Response)). Thus, it was the clear intent of the drafters "to limit what assets the partnership could use in this circumstance." *Id.*

Lastly, the Receiver contends that, as a practical matter, Kang's interpretation of the Agreement "makes no sense" because "[i]t would allow [ ] BKCoin Capital to use *any* asset, no matter where or how Kang or anyone else obtained it, to advance and indemnify his legal fees" and "would reward Kang for defrauding investors out of tens of millions of dollars by forcing the Receiver to use even *more* investor money to pay for Kang's

defense to the fraud charges with absolutely no guarantee of repayment in the event it turns out Kang is not entitled to indemnification." *Id.* (emphasis in original).

In his reply, Kang asserts that a plain reading of the Agreement supports his position that he is entitled to indemnification and advancement of fees. [ECF No. 118, p. 4]. He argues that "[t]he Receiver uses an improper definition of the assets available for advancement and indemnification under Section 4.03(d) in an attempt to ignore the obligation for indemnification." *Id.* at 4–5.

He argues that the term "Partnership assets" in section 4.03(d) means only those assets of BKCoin Capital:

> Section 4.03(d) of the Amended LP Agreement states that "satisfaction of any indemnification pursuant to this Section 4.03 shall be from and limited to Partnership assets." . . . **Section 1.01 of the . . . Agreement defines "Partnership" as "the limited partnership referred to in this Agreement, as it may from time to time be constituted[;]" in other words, BKCoin Capital [ ] . . . . The Receiver attempts to ignore the plain definition in Section 4.03(d) by ignoring the . . . Agreement's definition of "Partnership."** As the Receiver is well aware, there were multiple entities under the BKCoin umbrella. **The clause that indemnification "shall be from and limited to Partnership [a]ssets" clearly cabins indemnification under the . . . Agreement to only those assets of BKCoin Capital [ ]** and not, for example, BKCoin Multi-Strategy Fund, LP.

Id. at 5 (emphasis added).

Kang accuses the Receiver of "cherry-pick[ing] the definition of 'Available Assets' from the [Agreement]" and argues that "[i]t is illogical to pluck this specific definition

from the section that is connected to distributions to investors and transpose it into the definition of available assets for indemnification and advancement." *Id.* at 5–6.

He further argues that "the definition of Partnership [a]ssets necessarily must be broader than Available Assets" because "[e]ven if BKCoin Capital [ ] had allegedly insufficient funds for distribution to investors, that would be no reason to deny advancement and indemnification under Delaware law." *Id.* at 6 (citing *Agspring Holdco, LLC v. NGP X US Holdings, L.P.*, No. CV 2019-0567-JRS, 2022 WL 170092, at *7 (Del. Ch. Jan. 19, 2022) for "the general rule that inability to pay is not a justification for avoiding a binding, final advancement obligation").

The Undersigned agrees with the Receiver's interpretation of section 4.03(d). "[U]nder Delaware law, when interpreting contracts, courts give[ ] meaning to every word in the agreement and avoid[ ] interpretations that would result in superfluous verbiage." *Presidio, Inc. v. Closson*, No. CV 22-494-CFC, 2022 WL 17846561, at *2 (D. Del. Dec. 22, 2022), *dismissed*, No. 23-1021, 2023 WL 9107301 (3d Cir. Aug. 30, 2023) (internal quotation marks omitted); *Priority Healthcare Corp. v. Aetna Specialty Pharmacy, LLC*, 590 F. Supp. 2d 663, 668 (D. Del. 2008) ("[A] contract should not be read so as to render any terms or provisions meaningless." citing 11 Williston on Contracts § 32:5 (4th ed.)).

Kang's interpretation of the Agreement -- that "Partnership assets" means the assets of BKCoin Capital -- would render superfluous section 4.03(d), which is intended

to designate and limit where the funds to satisfy the section 4.03 obligations come from: "(d) The satisfaction of any indemnification pursuant to this Section 4.03 **shall be from and limited to Partnership assets**." [ECF No. 109-3, § 4.03(d) (underline emphasis in original; bold emphasis added)]. The Undersigned is not persuaded by Kang's argument that section 4.03(d) is intended to distinguish between BKCoin Capital's assets as opposed to the assets of entities under the BKCoin umbrella because there is no reason to believe that the Agreement contemplates that the assets of other BKCoin umbrella entities would otherwise be available to satisfy the section 4.03 obligations of BKCoin Capital.

The Receiver also seeks to have any ambiguities construed against Kang, as the drafter of the Agreement, "under well-established Delaware law holding that ambiguities in contracts and partnership agreements are construed against the drafter." [ECF No. 113, pp. 11–12 (citing cases)]. The Receiver argues that because Kang was "the co-founder and one of two managing members of BKCoin Management, the general partner of BKCoin Capital" [ECF No. 1, ¶¶ 8, 20], he "was intricately involved in the management and operation of BKCoin Management and BKCoin Capital, and had primary responsibility for implementation of the Agreement." *Id.* at 12.

Moreover, the Receiver maintains that the fact that he has stepped into the shoes of BKCoin Management does not alter this principle of contract interpretation. *Id.* (citing *Andrikopoulos v. Silicon Valley Innovation Co., LLC*, 120 A.3d 19, 25 (Del. Ch. 2015), *aff'd*, 142

A.3d 504 (Del. 2016) for the proposition that ("[T]here is substantial force to the idea that the pre-receivership and the receivership entity are meaningfully different: they are managed by different individuals for different purposes and are governed by different rules."). Thus, the Receiver argues that "to the extent there is any ambiguity in the Agreement as to what assets are to be used to advance and indemnify legal fees, that ambiguity should be construed against Kang and in favor of the Receiver." *Id.*

Kang did not address this argument in his reply.[4] *See Conden v. Royal Caribbean Cruises Ltd.*, No. 20-22956-CIV, 2021 WL 4973533, at *7 (S.D. Fla. June 21, 2021) (finding that the defendant conceded counterarguments raised in the plaintiff's response by not addressing the counterargument in its reply); *W. Flagler Assocs., Ltd. v. City of Miami*, 407 F. Supp. 3d 1291, 1297 (S.D. Fla. 2019) ("The [d]efendant abandoned its argument regarding the [p]laintiff's standing because its [r]eply failed to address any of the [ ] arguments or authority." (collecting cases)). Thus, to the extent that there is an ambiguity in section 4.03(d), it should be construed against Kang.

---

[4] In his *motion*, Kang does cite to two cases for the proposition that public policy favors resolving any ambiguity in favor of advancement and indemnification. [ECF No. 109-1, p. 12]. But he does not in his Reply respond to the Receiver's counterargument that under these circumstances, where Kang was a co-founder and a managing member of BKCoin Management, any ambiguities in the Agreement should be construed against him.

b. Unclean Hands

The Receiver also invokes Kang's purported unclean hands as grounds for denying Kang's request:

> **Kang's unclean hands in demanding funds from the Receivership under these circumstances also weighs against the Court allowing him to have even one penny of Receivership money**. *SEC v. Illarramendi*, Case No. 3:11-cv-78, 2014 WL 545720 at *9 (D. Conn. Feb. 10, 2014); *see also Illarramendi*, 2014 WL 8019048 at *11–12 (D. Conn. Mar. 27, 2014) (post-hearing order declining to order receiver to advance three movants' legal fees regardless of their contractual right to indemnification and advancement because movants' claims for advancement were barred by unclean hands where movants transferred funds to their accounts ahead of SEC enforcement action). **The [m]otion claims, without justification, that Kang does not have unclean hands; however, as recently as September 28, 2023, Kang was moving funds out of a known Receivership Entity hardware wallet in violation of the Asset Freeze Order (ECF No. 9) and returned the funds only upon receiving a letter from the SEC instructing him to do so**. Much like the *Illarramendi* case, **this alone should suffice to reject Kang's claim for advancement**. *See Illarramendi*, 2014 WL 8019048 at *11–12 (finding after a three-day evidentiary hearing that two of the movants' unclean hands in helping themselves to Receivership funds barred advancement of their legal fees – the third movant withdrew his motion). Thus, *Illarramendi* stands for the fact that a [d]efendant such as Kang, whose unclean hands in this case are well established, is not entitled to advancement of legal fees from scarce Receivership resources.

Id. at 11 (footnotes omitted; emphasis added).

Not surprisingly, Kang disputes the unclean hands assertion. [ECF No. 118, pp. 6–7].[5] He notes that "at no point has the Receiver provided **any evidence** to support this baseless allegation that these were misappropriated investor funds." *Id.* (emphasis added).

Kang argues that *Illarramendi* is different from our case because in *Illarramendi* "the movants surreptitiously transferred $2.9 million for their legal fees before making the claim for advancement, and did not advise the SEC that they had done so," but in the instant case, "Kang openly paid his attorneys prior to the Receiver's and the SEC's involvement, and his counsel informed the Receiver that he had done so." *Id.*

Kang further adds that "the Receiver cannot demonstrate that the transferred funds are investor funds." *Id.* Concerning the removal of funds from the hardware wallet, Kang notes that "[t]he full amount of funds were immediately returned to the wallet, and [he] did not intend to violate the asset freeze order." *Id.*

---

[5] Kang notes that the Receiver did not raise this argument in response to Kang's letter seeking indemnification and advancement of fees. [ECF No. 118, p. 6 ("This is the first time the Receiver has raised this particular claim despite being fully and timely informed about the payment to [ ] Kang's counsel prior to the appointment of the Receiver.")]. But Kang does not argue that the Receiver is limited to only those arguments raised in his letter or is otherwise precluded from raising this argument. Therefore, the Undersigned will consider the Receiver's unclean hands argument. *See United States Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n.13 (11th Cir. 2007) (refusing to address a "perfunctory and underdeveloped argument" with no citation to legal authority and collecting cases).

Case 1:23-cv-24903-JB Document 116 Entered on FLSD Docket 03/08/2024 Page 19 of 41

At this juncture and based on the information in the parties' briefings, the Undersigned agrees with Kang that the instant case is distinguishable from *Illarramendi*. In *Illarramendi*, the receiver accused the movants of "engag[ing] in impermissible self-help when . . . they withdrew more than $2.9 million from [a fund] to satisfy outstanding legal fees and to provide retainers to law firms representing them." 2014 WL 545720, at *4. They took "these withdrawals . . . without notice to or authorization from the [f]und's directors, and just days after the SEC sent . . . [a] notice, advising that an enforcement action was imminent." *Id.* Moreover, the *Illarramendi* Court noted that "even if the transfers had been the result of a good-faith misunderstanding, once that misunderstanding was corrected, [the] [m]ovants did not act to reverse their actions and drew down those retainers after being expressly told that doing so was not authorized." 2014 WL 8019048, at *11.

"In evaluating the unclean hands doctrine, courts look only to whether a party has engaged in inequitable conduct in seeking advancement, and not whether its conduct in the underlying suit was inequitable." *Illarramendi*, 2014 WL 545720, at *10 (citing *Tafeen v. Homestore, Inc.*, No. CIVA. 023-N, 2004 WL 556733, at *6 (Del. Ch. Mar. 22, 2004), *aff'd*, 888 A.2d 204 (Del. 2005)). Here, Kang did not hide the payments to his counsel and he returned the funds to the wallet. It may well be that additional facts come to light that bring this case closer to the facts of *Illarramendi*. But, at this point, and based on the facts

proffered in the parties' briefs, the Undersigned concludes that the circumstances here do **not** trigger the unclean hands exception recognized in *Illarramendi*.

c. Delaware Public Policy

Concerning Kang's undertaking, the Receiver notes that if "a judg[ ]ment for fraud is entered against [Kang] in either the [instant action] or the [*Canto*] class action lawsuit[,] [t]here is absolutely no guarantee Kang would be able to make good on this undertaking[.]" [ECF No. 113, p. 10 n.4]. Thus, the Receiver argues that "[e]ven if the undertaking were legally sufficient, **it would be highly inequitable to give it any credibility or weight given the lack of a guarantee of repayment in it**." *Id.* (emphasis added).

Kang argues that the Receiver's second ground for denying his request -- that it is highly unlikely that Kang would be able to repay the Receiver if it is later determined he is not entitled to indemnification -- is inconsistent with Delaware law. [ECF No. 109-1, p. 9]. He states that Delaware law merely requires a party "to furnish an undertaking in order to receive an advancement" and that "[t]here is no requirement for parties to secure the undertaking or show their immediate ability to repay the advance." *Id.* at 9 (citing *Blankenship v. Alpha Appalachia Holdings, Inc.*, No. CV 10610-CB, 2015 WL 3408255, at *29 (Del. Ch. May 28, 2015)). Kang reasons that because he provided the Receiver with an

undertaking in accordance with section 4.03(e) of the Agreement, the Receiver is required to advance Kang's legal fees. *Id.* at 9–10.

Delaware law favors advancement and indemnification provisions. *See Illarramendi*, 2014 WL 545720, at *5 ("There is no dispute that Delaware law, which governs the [agreements], favors indemnification and the advancement of attorney's fees for public policy reasons."). As one court explained:

> Mandatory advances, like indemnification, serve the salutary purpose of encouraging qualified persons to become or remain as directors of Delaware corporations, by assuring them, *ex ante*, that they may resist lawsuits that they consider meritless, free of the burden of financing (at least initially) their own legal defense. *See Essential Enterprise Corp. v. Automatic Steel Prods., Inc.*, Del.Ch., 164 A.2d 437, 441–42 (1960). That policy would be undermined if the corporation is permitted to rewrite its mandatory advance indemnification contract to condition such advances upon the furnishing of security or upon a demonstration that the officer or director-recipient has the monetary resources to satisfy his or her undertaking.

In re Cent. Banking Sys., Inc., No. C.A. 12497, 1993 WL 183692, at *3 (Del. Ch. May 11, 1993)).

Nonetheless, the Receiver argues that even if "Delaware law and policy favor advancement and indemnification of corporate officer legal fees," "that principle is altered when the corporation is in receivership." [ECF No. 113, p. 13]. The Receiver relies on *Andrikopoulos*, 120 A.3d at 23–26, *Henson v. Sousa*, No. CV 8057-VCG, 2015 WL 4640415, at *2 (Del. Ch. Aug. 4, 2015), and *Sec. & Exch. Comm'n v. Platinum Mgmt. (NY) LLC*, No.

16-CV-6848 (BMC), 2018 WL 6172404, at *3–4 (E.D.N.Y. Nov. 25, 2018) in support of his argument that the Court should not order him to advance Kang's legal fees. *Id.* at 13–15.

He contends that "[t]he situation here mirrors the circumstances in the three cases cited above" and highlights the following similarities:

> As in those cases, **the Receivership has extremely limited funds** at this point to satisfy the claims of investors and other creditors and forensic accounting is still ongoing as the extensive commingling of funds has made it difficult to ascertain what funds are specific to BKCoin Capital versus other Receivership Entities. As in those cases, with the focus of the Receivership on winding up affairs and distributing assets to investors, **the policy justification for advancement of legal fees -- attracting qualified officers to serve -- is diminished**. As in those cases, **depleting the already limited funds available for investors could impede the Receiver's ability to collect more funds and pursue claims** against third parties holding investor funds. Therefore, under the rationale of those three cases, Kang should not get to "jump the line" in front of the very investors he defrauded. Nor should he be able to further diminish Receivership funds to pay his legal fees in advance. As in the three cases above, **the Court may hold that Kang can submit a claim for indemnification of his legal fees to be adjudicated with other investor and unsecured creditor claims at such time as the Receiver establishes a claims process and knows the amount of funds he has to distribute**.

Id. at 15 (footnote omitted; emphasis added).

Kang distinguishes *Andrikopoulos* on the ground that the two former officers brought an advancement action against the company and "[t]he defunct company's only assets were claims against the company's own former officers and directors, including the two who sought advancement." [ECF No. 118, p. 8]. Thus, as the *Andrikopoulos* Court noted, "the former officers' claims for advancement 'seriously could undermine, if not

entirely eliminate, the ability of companies in receivership to pursue claims against former management.'" 120 A.3d at 25. Kang notes that, in the instant case, "[he] has not engaged in litigation against the BKCoin-related entities outside of this indemnification and advancement proceeding and the BKCoin-related entities have not commenced any litigation against him." [ECF No. 118, p. 8].

Kang also notes that although the court in *Platinum Mgmt. (NY) LLC*, 2018 WL 6172404 relied on *Andrikopoulos* in denying the requests for advancements by former officers, two of those former officers were later acquitted in the related criminal case. *Id.* at 9. Thus, Kang argues that:

> [i]f the Receiver's broad interpretation of *Andrikopolous* were to prevail, former officers will be denied their contractual rights and forced to choose between defending themselves against criminal and civil charges—or they will be forced to concede cases despite their innocence—to avoid incurring exorbitant legal costs they may be unable to afford.

Id. For this reason, he argues that "this case is governed squarely by Delaware's stated public policy concern favoring advancement as 'an inducement for attracting capable individuals into corporate service[;]' otherwise, individuals will avoid corporate service, lest they end up in this trap." *Id.* (quoting *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005)).

He does not address the third case cited by the Receiver, *Henson*, 2015 WL 4640415.

In *Andrikopoulos*, the court addressed advancement claims in the context of a receivership. 120 A.3d at 19. The "only assets [of the company in receivership] [were] contingent claims against the [c]ompany's former officers and directors." *Id.* at 20. Two individuals in a case filed by the receiver sought advancement of their legal expenses. *Id.* The parties ultimately stipulated to the individuals' entitlement to advancement and the validity of their employment agreement. *Id.* The court was left to decide "to what extent, if any, [the individuals'] advancement claims [were] entitled to priority as against the other claims asserted against [the company] in the receivership." *Id.*

In addressing this issue, the court noted that: "(1) there [was] no controlling Delaware authority; (2) the Delaware statutes on receivership provide[d] minimal guidance; (3) the *Illarramendi* decision and Delaware's strong policy in favor of advancement point[ed] in one direction; and (4) a strong analogy between receiverships and bankruptcy point[ed] in the other direction." *Id.* at 25. Ultimately, the *Andrikopoulos* Court determined that "advancement claims should be treated the same as the claims of other unsecured creditors." *Id.*

The court provided <u>four</u> reasons for this conclusion. "*First*, while advancement [was] important, so [was] the successful winding up of a corporation or other business entity." *Id* (emphasis supplied). The court acknowledged Delaware's public policy in

favor of advancements, but noted that it had diminished importance in the context of a receivership:

> In the usual receivership context, however—and especially in receiverships like this one—there is no long-term horizon; the focus is on winding up the entity's affairs. As such, **the relevant importance of the policy justification of advancement as an inducement to attract qualified individuals to manage the company is diminished**. Additionally, granting administrative priority to advancement claims, such as [the] claims here, seriously could undermine, if not entirely eliminate, the ability of companies in receivership to pursue claims against former management.

Id. (emphasis added).

Second, although the court did not find the bankruptcy analogy as strong as advocated by the company, it nonetheless recognized that "there [was] substantial force to the idea that the pre-receivership entity and the receivership entity [were] meaningfully different: they are managed by different individuals for different purposes and are governed by different rules." *Id.* at 25–26. Because "[a]dvancement obligations are contractual in nature and generally arise from pre-receivership transactions[,]" "[i]n that respect, they [were] no different from other creditors' claims." *Id.* at 26.

Third, in addressing the individuals' contention that treating advancements the same as unsecured creditor claims "frustrate[d] the expectations of advancement legitimately held by former corporate officers and directors," the court noted that "[m]arket-based solutions already may exist for ameliorating the challenges that may arise in this area[,]" including insurance. *Id.* at 26.

Fourth, "the reality of practical administration weigh[ed] in favor of treating advancement claims the same as the claims of other unsecured creditors." *Id*. The court noted that if advancement claims were entitled to administrative priority, then there would be the issue of whether the receiver's fees would be entitled to super-priority. This would open the door to "other 'necessities,' such as a bookkeeper, office space, a rental car, etc." which would "embroil[ ] [the court] in time-consuming, line-item accounting disputes." *Id.* Based on these considerations the *Andrikopoulos* Court determined that advancement claims should be treated like claims of other unsecured creditors.

The two other cases cited by the Receiver rely on *Andrikopoulos*. In *Henson*, the court determined that an "advancement [was] not appropriate" for two reasons: (1) there was a dispute concerning the existence of the agreement providing for the advancement and (2) the court adopted the rationale of *Andrikopolous* for treating advancement claims the same as claims by unsecured creditors. 2015 WL 4640415, at *1–2.

Similarly in *Platinum Mgmt. (NY) LLC*, the former officers of an LLC in receivership sought the payment of legal fees incurred in the defense of a criminal matter. In denying the former officers' motion to compel advancement, the court noted that the LLC "owe[d] lots of money to people and entities that it lacks sufficient funds to pay, which [was] why it [was] in receivership" and that "[t]he former officers ha[d] shown no compelling reason why they should get to jump the line." 2018 WL 6172404, at *1. Citing *Andrikopolous* and

Henson, the *Platinum Mgmt.* Court noted that "[u]nder Delaware law, claims for advancement of legal fees are treated the same as the claims of other unsecured creditors." *Id.* at *3.

As noted above, Kang seeks to distinguish *Andrikopoulos* on the ground that "one of the primary rationales for the court's decision in Andrikopolous was that the former officers' claims for advancement 'seriously could undermine, if not entirely eliminate, the ability of companies in receivership to pursue claims against former management.'" [ECF No. 118, p. 8 (quoting *Andrikopoulos*, 120 A.3d at 25)]. He also noted that unlike the individuals in *Andrikopoulos*, he is not engaged in any litigation with any BKCoin-related entities. But, as outlined above, the *Andrikopoulos* Court provided four grounds for its rationale and there is nothing in the *Andrikopoulos* decision to suggest that the court's holding was limited to only instances where advancement claims would seriously undermine or eliminate a receiver's ability to pursue claims.

Kang does not seek to distinguish *Platinum Mgmt. (NY) LLC* on its facts; he merely notes that two of the officers who were denied advancement were later acquitted in the criminal case. Lastly, and as already noted, Kang does not address *Henson*.

Andrikopoulos, *Henson*, and *Platinum Mgmt. (NY) LLC* address requests for advancement in the context of a receivership and are squarely on point. The Court should **deny** Kang's request for an order compelling advancement of legal fees for the reasons

stated in those cases. As the Receiver suggests, “the Court may hold that Kang can submit a claim for indemnification of his legal fees to be adjudicated with other investor and unsecured creditor claims at such time as the Receiver establishes a claims process and knows the amount of funds he has to distribute.” [ECF No. 113, p. 15].

d. Sixth Amendment Argument

Without citation to legal authority, Kang argues that his Sixth Amendment right to counsel may be infringed if his legal fees are not advanced:

> Kang’s contractual rights to indemnification are of paramount importance in this case given that the SEC—the government’s civil enforcement arm for securities violations—froze all of [ ] Kang’s assets, which will eventually force [ ] Kang into having to act *pro se*. [ ] Kang, a lay person, will then have to face the quandary of defending himself, while trying to simultaneously avoid potentially incriminating himself. Such an outcome could ultimately jeopardize a potential criminal case against [ ] Kang, and thereby infringes on his Sixth Amendment right to counsel.

[ECF No. 118, pp. 9–10]. But Kang does not cite any legal authority for this argument. As noted above, the Court will not consider underdeveloped arguments that are not supported by any legal authority. *See Astrue*, 495 F.3d 1272, 1287 n.13 (refusing to address a “perfunctory and underdeveloped argument” with no citation to legal authority and collecting cases).

Moreover, “[e]ven in a criminal case, the Supreme Court has upheld the constitutionality of freezing a defendant’s assets and precluding their use for payment of attorney’s fees.” *S.E.C. v. Current Fin. Servs.*, 62 F. Supp. 2d 66, 67 (D.D.C. 1999) (citing

United States v. Monsanto, 491 U.S. 600 (1989) and *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)); *see also Platinum Mgmt. (NY) LLC*, 2018 WL 6172404, at *3 (rejecting Sixth Amendment argument and noting that "[s]ince a receiver [was] not a governmental actor, the Sixth Amendment [did] not protect against the actions of a receiver").

In sum, for the reasons discussed above, the Undersigned **respectfully recommends** that the District Court **deny** Kang's request for an Order "direct[ing] the Receiver to advance [ ] Kang his attorneys' fees and defense costs associated with [the instant action and the *Canto* lawsuit]." [ECF No. 109-1, p. 10].

e. Three-Factor Test

Kang also seeks "a limited lift of the stay on litigation to allow [him]" to file an action and enforce his contractual rights in New York state court. *Id.*[6] Some courts apply

[6] Section 17.03 of the Agreement states, in part, as follows:

> **Section 17.03 Submission to Jurisdiction. The parties hereby agree that any suit, action, or proceeding seeking to enforce any provision** of, or based on any matter arising out of or in connection with, **this Agreement** or the transactions contemplated hereby, whether in contract, tort, or otherwise, **shall be brought exclusively in the federal or state courts located in New York County of the State of New York, and that any cause of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of New York**.

[ECF No. 109-3, § 17.03 (emphasis added)].

the following three-factor test in determining whether to lift a litigation stay in a receivership:

> (1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim.

S.E.C. v. Wencke, 742 F.2d 1230, 1231 (9th Cir. 1984); *see also S.E.C. v. Complete Bus. Sols. Grp., Inc.*, No. 20-CIV-81205-RAR, 2022 WL 20703936, at *1 (S.D. Fla. Mar. 3, 2022) (applying three-factor *Wencke* test in denying motion to lift litigation stay). "The movant bears the burden of proving that the balance of the factors weighs in favor of lifting the stay." *United States v. JHW Greentree Cap., L.P.*, No. 3:12-CV-00116 VLB, 2014 WL 2608516, at *4 (D. Conn. June 11, 2014).

Kang contends that he meets all three factors supporting the lifting of the stay. [ECF No. 109-1]. The Receiver questions whether the three-factor test applies to the circumstances here: where a *defendant* (as opposed to a non-party) is seeking to sue the Receiver. [ECF No. 113, p. 16 n.8 ("The *Wencke* [C]ourt and other courts have used this test when an outside third party seeks to lift a litigation stay against a [r]eceivership, not when a defendant in the case seeks to sue the [r]eceiver. Therefore, as a threshold matter, it is not clear whether the *Wencke* test even applies here.")]. Nonetheless, "[f]or the sake

of simplicity," the Receiver assumes this test applies here and argues that all three factors favor the Receiver (not Kang). *Id.*

i. First Factor: Balancing of Interests of the Receiver and Kang

"The first factor—whether the moving party will suffer substantial injury—" "is essentially a balancing of [the movant]'s interest with the interests of the [r]eceivership." *S.E.C. v. Stanford Int'l Bank Ltd.*, 465 F. App'x 316, 321 (5th Cir. 2012) (citing *S.E.C. v. Stanford Int'l Bank Ltd.*, 424 F. App'x 338, 341 (5th Cir. 2011)); *S.E.C. v. Illarramendi*, No. 3:11CV78 JBA, 2012 WL 234016, at *5 (D. Conn. Jan. 25, 2012) ("The first *Wencke* factor balances the interests of the [r]eceiver in preserving the status quo against the interests of the moving party.").

Currently, Kang has no ongoing legal fees associated with the *Canto* lawsuit because that case has been stayed. [ECF No. 109-1, p. 11 n.3]. Nonetheless, he states that he "has already incurred legal fees in connection with the *Canto* lawsuit and [the instant action] and cannot continue to properly defend himself [in the instant action] without advancement and indemnification of his fees and costs." *Id.* at 11. Kang also anticipates that criminal charges may be filed against him. *Id.* For all these reasons, Kang argues that he will suffer substantial injury if the stay is not lifted.

In contrast, the Receiver argues that:

> Lifting the stay against the Receivership to allow Kang to pursue costly and time-consuming litigation over his legal fees would **run the risk of**

> **significantly diminishing the limited resources available to compensate the investors Kang defrauded**. Considering Kang's misconduct caused the present circumstances, the Receiver's interest in avoiding such litigation and proceeding unfettered to collect as much money for defrauded investors as possible far outweighs the potential harm to Kang.

[ECF No. 113, p. 18 (emphasis added)].

In his reply, Kang reiterates that he will "fac[e] substantial injury if the stay is not lifted[,]" noting that he "cannot continue to properly defend himself against the SEC Complaint without advancement and indemnification of his fees and costs." [ECF No. 118, p. 10].

In addressing the first factor, the Court must balance competing interests:

> A receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant. Nevertheless, an appropriate escape valve, which allows potential litigants to petition the court for permission to sue, is necessary so that litigants are not denied a day in court during a lengthy stay.
>
> A district court should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate. At the same time, . . . the interests of litigants also need to be considered.

United States v. Acorn Tech. Fund, L.P., 429 F.3d 438, 443 (3d Cir. 2005).

The Undersigned finds that, on balance and at this procedural point, the first factor weighs in favor of the Receiver. As noted in the Receiver's response, lifting the stay to allow Kang to pursue his New York action would result in time-consuming litigation and

divert the Receiver's resources from recovering funds for the defrauded investors. Allowing Kang to proceed with his lawsuit would cause significant disruption to the Receiver's work.

The Undersigned has also taken into consideration Kang's asserted harm in continuing to incur legal fees to defend against the instant action. At present, no criminal charges have been filed against Kang (and if charges are brought and he qualifies, then he would be entitled to court-appointed counsel). Moreover, the *Canto* lawsuit has been stayed and Kang acknowledges that he is not presently incurring legal fees in that case.[7]

Taking these competing interests into account, the Undersigned finds that the first factor weighs in favor of the Receiver and supports the continuation of the stay.

ii. Second Factor: Time in the Course of the Receivership at Which the Motion to Lift the Stay Was Filed

The second factor requires the Court to consider "the time in a receivership in which a motion to lift a litigation stay is made." *United States v. JHW Greentree Cap., L.P.*, No. 3:12-CV-00116 VLB, 2014 WL 2608516, at *7 (D. Conn. June 11, 2014). "There is no 'clear cut-off date after which a stay should be presumptively lifted,' and the inquiry is

---

[7] Recently, Alejandro Canto filed a renewed motion seeking to lift the litigation stay as to Carlos Betancourt. [ECF No. 135]. But the motion concerns *Betancourt,* not Kang. *Id.* at 19 ("Canto respectfully requests that the Court allow him to intervene in this manner and further requests that the Court partially lift the stay of litigation as to [ ] Betancourt, and any other relief deemed just and proper.").

Case 1:23-cv-24903-JB Document 113 Entered on FLSD Docket 03/28/2024 Page 34 of 40

'inherently case-specific.'" *Schwartzman v. Rogue Int'l Talent Grp., Inc.*, No. CIV.A. 12-5255, 2013 WL 460218, at *3 (E.D. Pa. Feb. 7, 2013). "The timing factor is fact-specific and 'based on the number of entities, the complexity of the scheme, and any number of other factors.'" *JHW Greentree Cap., L.P.*, 2014 WL 2608516, at *7 (quoting *S.E.C. v. Stanford Int'l Bank Ltd.*, 424 F. App'x 338, 341 (5th Cir. 2011)).

Kang argues that "[t]he Receiver has had ample time to identify assets and 'explore the affairs of the entities,' and it will not be harmed by a limited lift of the stay of litigation." [ECF No. 109-1, p. 12]. He notes that the Receiver is in the process of completing a thorough forensic analysis of the Receivership Entities and the Receivership Property; he has filed a liquidation plan for the Receivership Property; and has uncovered substantial cash, real property, and crypto-related assets. *Id.* at 12. Thus, Kang reasons that given the steps the Receiver has already taken, "a temporary lift of the stay to allow [ ] Kang to enforce his contractual rights to indemnification and advancement of fees will not harm the Receiver." *Id.* at 12. On the other hand, Kang notes that he "has a contractual right to indemnification and advancement of fees and will be greatly harmed if he cannot enforce those rights." *Id.* at 13.

The Receiver takes a different view. He argues that this factor "overwhelming[ly] favors [him]." [ECF No. 113, p. 18]. He notes that he:

> is still involved in the lengthy and cumbersome process of unwinding the several entities over which the Court appointed him, including their

> relationships with each other and third parties. He has retained accounting and legal professionals to help him identify and account for numerous accounts across various banks and cryptocurrency institutions. **He is still *early* in the process of identifying those assets and determining how to recover them (including identifying third parties against whom to pursue claims); how to value them; and how to liquidate them for the benefit of defrauded investors**.

Id. at 18–19 (emphasis added). The Receiver also points out that he has had to engage the services of forensic cryptocurrency experts and that Kang's own alleged uncooperativeness has impeded the Receiver's efforts. *Id.* at 19 ("Importantly, Kang himself has frustrated those efforts by refusing to give the Receiver access to the hardware wallet containing hundreds of thousands of dollars of crypto assets for the benefit of investors.").

The Receiver notes that he "still has not identified all potentially recoverable assets or third parties who may owe the Receivership funds for the benefit of defrauded investors" and that "[d]efending against a lawsuit from Kang poses a serious threat of disrupting those efforts and depleting funds which the Receiver could otherwise distribute to defrauded investors." *Id.*

In his reply, Kang argues that the Receiver has had sufficient time (and success) in identifying assets and that "Kang's brief lift of the stay of litigation will not interfere with the Receiver's efforts." [ECF No. 118, p. 11]. He notes that "[he] merely seeks a limited lift of the stay to allow him to enforce his contractual rights to indemnification and

advancement of fees through a declaratory action that will not require any discovery or elaborate motion practice by the Receiver." *Id.* He also notes that "[a]lthough the Receiver cites cases in which the stay was not lifted despite the fact that the Receivership had been in existence much longer, none of those cases involve the limited stay that [ ] Kang is seeking in this case." *Id.* at n.6.

"Generally, courts are reluctant to lift litigation stays early in a receivership where lifting a stay would disrupt the receiver's duty to organize and understand its assets." *JHW Greentree Cap., L.P.*, 2014 WL 2608516, at *7 (collecting cases). On the other hand, "a lift of the stay is more palatable later in a receivership's lifetime, **after the receiver has had sufficient time to conduct its duties**." *Id.* at *8 (emphasis added).

In *Schwartzman*, for instance, the court observed that a receivership that was approximately 28 months old had been in place for "a relatively short period of time for a receivership," and found that because the "receivership [was] at an early stage and the [r]eceiver [was] still collecting relevant information, this factor weigh[ed] in favor of maintaining the stay." No. CIV.A. 12-5255, 2013 WL 460218, at *3 (E.D. Pa. Feb. 7, 2013). Here, the receivership has been in place for approximately one year. This is a relatively short period of time for the Receiver to exercise his duties, particularly given the complexities of this case, where Defendants engaged in commingling of assets and the Receiver has had to retain the services of several professionals to assist him in carrying

out his duties. The Undersigned thus concludes that this factor weighs in favor of the Receiver.

iii. Third Factor: Merits of Kang's Claim

The third factor requires the Court to consider the merits of the movant's underlying claim. In making this assessment, "[a] district court need only determine whether the party has colorable claims to assert which justify lifting the receivership stay." *Acorn Tech. Fund, L.P.*, 429 F.3d at 444 (citing *Wencke*, 742 F.2d at 1232). "However, even meritorious claims may not tip the scales in favor of lifting a litigation stay where the first and second prongs . . . favor the receiver." *JHW Greentree Cap., L.P.*, 2014 WL 2608516, at *9.

As expected, the parties disagree on the merits of Kang's underlying claim. Kang contends that he has a meritorious claim for advancement and indemnification under Delaware law. [ECF No. 109-1, p. 13]. He notes that the Agreement provides for his advancement and indemnification and that he has already provided the Receiver with an undertaking. *Id.* Moreover, he states that "Delaware law requires advancement and indemnification under contract regardless of the allegations." *Id.* (citing *Blankenship*, 2015 WL 3408255, at *29).

Conversely, the Receiver argues that Kang does not have a meritorious claim for the advancement of his legal fees and indemnification based on the language of the

Agreement and "under Delaware law and public policy." [ECF No. 113, pp. 20–21]. The Receiver further argues that "even if the Court were to find some merit to Kang's potential lawsuit against the Receiver (and it should not)," it is immaterial because where "the first two factors weigh in favor of the Receiver, the Court can and still should deny the Motion to lift the stay under the *Wencke* test." *Id.* at 21.

For the reasons discussed above, the merits of Kang's underlying claim are questionable. Nonetheless, this factor requires that the Court determine only whether Kang has a *colorable* claim. *Acorn Tech. Fund, L.P.*, 429 F.3d at 444. Even assuming that Kang does have a colorable claim, the Court should not lift the stay given the weight of the first and second factors. *See Schwartzman*, 2013 WL 460218, at *3 ("assuming the underlying claims [were] colorable . . . , the [c]ourt conclude[d] that lifting the stay [was] not warranted due to the weight of the other factors"); *Acorn Tech. Fund, L.P.*, 429 F.3d at 443–44 ("[V]ery early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver's duties."). Thus, Kang has not met his burden of demonstrating that the *Wencke* factors support lifting the litigation stay.

In sum, for the reasons discussed above, the Undersigned **respectfully recommends** that the District Court **deny** Kang's request to lift the litigation stay to allow him to proceed with his New York action.

III. Kang's Supplemental Authority

As noted above, Kang also filed a notice of supplemental authority [ECF No. 134], concerning the Delaware Chancery Court's ruling in *Jeffries v. Abercrombie & Fitch Co.*, No. 2023-1211-PAF (Del. Ch. Mar. 8, 2024). The Delaware court stamped the word "GRANTED" over a proposed order granting the plaintiff's summary judgment motion. [ECF No. 134-1, p. 1 (capitalization in original)]. The accompanying document states that "[t]he motion is granted for the reasons stated in the court's ruling at the conclusion of today's hearing on the motion." *Id.* at 2. But Kang does not attach a copy of the hearing transcript; he attaches only the opening brief in support of the plaintiff's summary judgment motion. [ECF No. 134-2]. Thus, the grounds upon which the Delaware court granted the motion are not ascertainable from Kang's filing.

In any event, Kang's motion should be **denied** for the reasons already stated in this Report and Recommendations.

IV. Conclusion

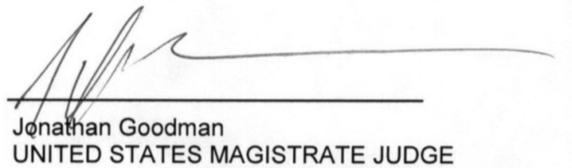
For the reasons stated above, the Undersigned **respectfully recommends** that the District Court **deny** Kang's motion [ECF No. 109].

V. Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with

the District Judge. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on March 26, 2024.



<u>Copies furnished to</u>:
The Honorable Robert N. Scola, Jr.
All Counsel of Record