

# SUPREME COURT OF THE STATE OF NEW YORK

## NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN  
Justice

PART 3

Index Number : 115387/2008  
 TMR BAYHEAD SECURITIES, LLC  
 vs.  
 AEGIS TEXAS VENTURE FUND II  
 SEQUENCE NUMBER : 004  
 OTHER RELIEFS

115387/08  
 INDEX NO. 65034702  
 MOTION DATE 12/23/11  
 MOTION SEQ. NO. 004

The following papers, numbered 1 to 3, were read on this motion to/for specific performance

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

No(s). 1

Answering Affidavits — Exhibits \_\_\_\_\_

No(s). 2

Replying Affidavits \_\_\_\_\_

No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 5-2-12

Eileen Bransten J.S.C.  
**HON. EILEEN BRANSTEN**

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X

HOLLY SCHEPISI, NEIL McPHERSON, KEVIN  
DRAGAN, BRETT HICKEY, AEGIS ALABAMA  
VENTURE FUND, LP, AEGIS ALABAMA  
VENTURE FUND GP, LLC, AEGIS TEXAS  
VENTURE FUND II, LP, and AEGIS TEXAS  
VENTURE FUND II GP, LLC,

Plaintiffs,

-against-

TODD ROBERTS and TMR BAYHEAD  
SECURITIES, LLC,

Defendants.

-----X

TMR BAYHEAD SECURITIES, LLC and TODD  
ROBERTS,

Plaintiffs,

-against-

AEGIS TEXAS VENTURE FUND II, LP, AEGIS  
TEXAS VENTURE FUND II GP, LLC, AEGIS  
ALABAMA VENTURE FUND, LP, and AEGIS  
ALABAMA VENTURE FUND GP, LLC,

Defendants.

-----X

**BRANSTEN, J:**

Motion sequence number 009 under Index Number 650344/08 (“Merits Action”), and  
motion sequence number 004 under Index Number 115387/08 (“Advancement Action”), are  
consolidated for disposition.

Index No. 650344/08  
Motion Date: 12/23/11  
Motion Seq. No.: 09

Index No. 115387/08  
Motion Seq. Nos.: 04

In the Merits Action, plaintiffs seek damages and equitable relief from defendants Todd Roberts (“Roberts”) and TMR Bayhead Securities, LLC (“Bayhead”), based upon defendants’ alleged misappropriation of \$550,000 from the plaintiff investment funds (“Fund Entities”). The Fund Entities were owned and managed by Roberts, the individual plaintiffs, and nonparty Brett Hickey. Hickey was named as a plaintiff in the original complaint.

In the Advancement Action, Roberts and Bayhead seek specific performance compelling the Fund Entities to comply with their contractual obligation to reimburse and advance legal fees and costs incurred in the Merits Action. In its decision and order dated November 12, 2010, this court granted Roberts’s motion for partial summary judgment in the Advancement Action, subject to certain distribution limits (“11/12/10 Order”). Months later, in April 2011, the Fund Entities advanced Roberts’s counsel \$100,000, pursuant to the 11/12/10 Order.

By letter dated September 15, 2011, Roberts’s counsel requested an additional advancement of \$95,494.71. Counsel included with the request attorney time entry invoices for the period March 1, 2011 through August 31, 2011 (the “Second Advancement Request”). The parties exchanged several letters in the fall of 2011, disputing the merits of the Second Advancement Request.

Meanwhile, in October 2011, the plaintiffs in the Merits Action moved (motion sequence numbers 007 and 008) for partial summary judgment on the core causes of action of the amended complaint and for dismissal of Roberts’s counterclaims (together, the “Pending Motions”).

Roberts now moves (in motion sequence number 009 in the Merits Action) for a stay of the Pending Motions until the Fund Entities comply with their advancement obligations as set forth in the 11/12/10 Order. Roberts also moves (in motion sequence number 004 in the Advancement Action) for an order requiring the Fund Entities to: pay the Second Advancement Request and all similarly supported future requests for advancement in the Merits Action; accept invoices generated by Roberts's counsel, accompanied by counsel's good faith representation that the amounts relate to services provided to Roberts's defense in the Merits Action, as sufficient support for future requests for advancement; advance legal fees and costs incurred on Roberts's behalf in connection with his counterclaims and in defending against affirmative claims in the Merits Action, and legal fees and costs associated with securing advancement in the Advancement Action; and require the Fund Entities to provide detailed substantiation sufficient to support any purported inability to pay such advancements.

On November 29, 2011, the court heard arguments on the motions presently before the court. The court then indicated that, if there were substantial compliance with the 11/12/10 Order, then the Pending Motions would be heard on January 18, 2012. As of the date of this decision, the Pending Motions are not fully submitted and are not before the court.

### Analysis

#### Choice of Law

In their briefs, the parties rely primarily upon Delaware law, and New York cases construing Delaware law, but have not undertaken a choice of law analysis. It is undisputed that Aegis Texas Venture Fund II, LP and Aegis Texas Venture Fund II GP, LLC are Delaware entities. While Aegis Alabama Venture Fund GP, LLC and Aegis Alabama Venture Fund, LP are Alabama entities, the parties do not dispute that both Alabama and New York courts look to Delaware law for guidance on advancement issues. *Mitchell Co. v. Campus*, 2009 WL 532246, \*4 n3, 2009 US Dist LEXIS 16694, \*14 n3 (S.D. Ala. 2009) (in analyzing “corporate advancement,” stating that “the Court has reviewed persuasive case law from other courts, including the state courts of Delaware where corporate issues are regularly litigated”); *Ficus Invs. Inc. v. Private Capital Mgt. LLC*, 61 A.D.3d 1, 9 (1st Dep’t 2009) (“Delaware courts have had ample opportunity to address these issues of indemnification for and advancement of expenses and, although not binding as to ... New York law, their holdings can be instructive”).

#### Advancement

The function of an “advancement case is not to inject [the] court as a monthly monitor of the precision and integrity of advancement requests,” and the court should “not perform the task of playground monitor, refereeing needless and inefficient skirmishes in the sandbox.” *Underbrink v. Warrior Energy Services Corp.*, 2008 WL 2262316, \*16, 2008 Del.

Ch. LEXIS 65, \*67 (Del. Ch. 2008) (internal quotation marks and citations omitted). In *Underbrink*, the court required the plaintiffs to “submit a good faith estimate of expenses incurred to date to address the precise allegations that trigger [their] advancement right.” *Id.* at \*17, \*68-69 (internal quotation marks and citations omitted). The court acknowledged that “[s]ome level of imprecision is inherent in the retrospective application of this task,” and, as a safeguard to “ensure the integrity of this process,” required the plaintiffs’ attorneys to “provide a sworn affidavit certifying their good faith, informed belief that the identified litigation expenses relate solely to defense activity to address those allegations for which [Plaintiffs are] owed advancement.” *Id.* at \*17, at \*69. The court ordered the plaintiffs to “follow the same procedures for any future expenses for which they seek advancement.” *Id.*

In *Citadel Holding Corp. v. Roven* (603 A.2d 818, 826 [Del. 1992]), in granting advancement, the Delaware court held that the plaintiff was required to advance the defendant’s defense costs. The court explained that the plaintiff:

may test the reasonableness of any advances demanded and, as he has conceded before this Court, [the defendant] will be subject to a final determination of indemnification. In other words, at some point in the future, pursuant to his written promise ..., [the defendant] may be forced to give [the plaintiff] a full accounting of his expenses and repay any funds which it is determined he is not entitled to receive under the indemnification provisions of the Agreement.

*Id.*

Here, Roberts submits the affirmation of his attorney, Keara Bergin (Bergin), stating that the Second Advancement Request “represents the actual fees remaining unpaid in

connection with [her] firm's work in representing Mr. Roberts between March 1 through August 31, 2011." Bergin Aff., ¶ 33. Bergin states that all of the "time entries for work done by [her] firm in these matters during that time period ... were ... included in the invoices provided as an attachment to [her] September 15, 2011 letter—everything was included (other than certain redactions to protect work product and attorney-client privilege)." *Id.*, ¶ 34.

With her affirmation, Bergin submits a copy of her September 15, 2011 letter. That letter states that it "represents counsel's good faith determination of the amounts incurred in excess of amounts paid by third parties," and that "[t]he enclosed invoices reflect work done and payments made, including those advanced by your clients, from March 2011 through August 2011." *Id.*, Ex. E. Attached to this letter are four invoices, comprised of 41 pages of itemized time billing entries for Roberts's account. Each entry indicates: the date and description of the work performed; the number of hours worked, billable rate, and total amount charged to Roberts; and what appear to be the initials of the individual who performed the work. *Id.*

In addition to the Second Advancement Request, Bergin states that, "although not yet billed or included in the advancement request, [her] firm has incurred substantial additional fees and expenses since September 1, 2011 for which Mr. Roberts will seek advancement (current estimate is approximately \$35,000)." Bergin Aff., ¶ 36. Having submitted a good faith affirmation from his attorney, supported by documentary evidence, Roberts has shown that he is entitled to the Second Advancement Request, pursuant to the 11/12/10 Order.

In opposition, the Advancement Action defendants make several arguments, none of which are persuasive. First, defendants argue that they complied with the court's instruction, at the March 31, 2011 oral argument, to demonstrate "substantial compliance" with the 11/12/10 Order by advancing Roberts \$100,000. 3/31/11 Tr., Dragan Aff., Ex. A, at 18. The 11/12/10 Order ordered the Fund Entities to advance Roberts "his specific legal fees and expenses incurred" in the Merits Action. 11/12/10 Order, at 13. The Fund Entities' advancement of \$100,000 did not extinguish the 11/12/10 Order, and the Fund Entities' advancement obligations remain ongoing during the life of the Merits Action. *See, e.g., Weaver v. ZeniMax Media*, 2004 WL 243163, \*7 n44, 2004 Del Ch LEXIS 10, \*26 n44 (Del. Ch. 2004) (in the context of advancement, "the burden of the underlying litigation is ongoing and accumulating").

The Fund Entities also suggest that Roberts's exhaustion of a \$1 million insurance policy, together with their \$100,000 initial advancement, constitutes substantial compliance. The Fund Entities fail to explain how the insurance funds have any bearing on their advancement obligations. Therefore, while the Fund Entities ultimately, and delinquent, complied with the court's instruction at the March 31, 2011 oral argument, they must *continue* to comply with the 11/12/10 Order or be subject to contempt.

Second, the Fund Entities argue that Roberts's Second Advancement Request is unreasonable, in light of the \$100,000 already paid by the Fund Entities and the \$1 million in insurance proceeds Roberts received. Although Roberts's counsel submitted time and billing invoices that itemize Roberts's legal fees, the Fund Entities fail to identify a single



billing entry that is unreasonable. Moreover, none of the cases cited by the Fund Entities supports their argument that the Second Advancement Request – or even *future* advancement requests by Roberts – are unreasonable. For instance, the Fund Entities rely upon *Underbrink v. Warrior Energy Services Corp.* (2009 WL 536904, \*5, 2009 Del Ch LEXIS 26, \*16 [Del. Ch. 2009]) in support of their statement that advancement is inappropriate for expenses that are “undocumented, duplicative, or simply unreasonable.” However, the Fund Entities fail to identify any such expenses, and, therefore, their reliance on *Underbrink* is unpersuasive.

In *Martinez v. Regions Fin. Corp.* (2009 WL 2937102, \*3, 2009 Del Ch LEXIS 162, \*8 [Del. Ch. 2009]), also cited by the Fund Entities, the court acknowledged that the advancing party “should not be required to pay fees and expenses whose reasonableness cannot be appropriately proven.” The *Martinez* decision does not support the conclusion that the Second Advancement Request is unreasonable. Rather, the *Martinez* court “specified a procedure in [its] accompanying order to enable a review of any objections to the reasonableness of ... requests for payment,” and the court stated its expectation “that the parties will not abuse that procedure,” cautioning “that both parties [should] proceed in good faith and not waste the time and resources of the Court with needless disputes.” *Id.* at \*9. In the instant decision, the court adopts similar procedures for Roberts and the Fund Entities to utilize in complying with the 11/12/10 Order, as set forth in the ordering language below.

Third, the Fund Entities argue that Roberts’s counsel has not properly allocated legal fees and expenses between Roberts and Bayhead, but was required to do so because Bayhead

did not seek advancement of legal fees and expenses and the 11/12/10 Order was limited to the relief requested by Roberts. However, Bergin's affirmation states that she "reviewed the work done between March 1 and August 31, 2011 to consider the extent to which, if any, an allocation between Mr. Roberts and Bayhead was required for the purposes of making a request for advancement of Mr. Roberts's costs by the Entities," and she claims to have "concluded, in good faith, that the work done was attributable to Mr. Roberts and would not have been different or less if Bayhead had not been named a defendant." Bergin Aff., ¶ 35. At this juncture, Bergin's good faith affirmation is all that was required. *Underbrink*, 2008 WL 2262316, \*16, 2008 Del Ch LEXIS 65, \*67. Moreover, no allocation is necessary when the "expenses reflected legal work that was performed by ... law firms for [the defendant's] benefit and would have been performed regardless [of] whether the firms also represented the other defendants." *Ficus Invs. v. Private Capital Mgt., LLC*, 63 A.D.3d 611, 612 (1st Dep't 2009) (construing Delaware law).

Fourth, the Fund Entities argue that Roberts has not properly allocated legal fees and expenses between Roberts's defense of the Merits Action and his counterclaims. In construing the contract language "in defending" – in the instant action, the language is: "expenses (including legal fees) incurred ... in defending any claim, demand, action, suit, or proceeding" – used for advancement, courts have construed counterclaims to be "defensive and thus captured within the 'in defending' limitation." *Zaman v. Amedeo Holdings, Inc.*,

2008 WL 2168397, \*33-34, 2008 Del Ch LEXIS 60, \*114-115 (Del. Ch. 2008) citing *Citadel Holding Corp.*, 603 A.2d at 824 (including counterclaims that “are necessarily part of the same dispute and were advanced to defeat, or offset”).

Here, the Fund Entities themselves affirmatively represented to the court, in their September 23, 2011 letter in the Merits Action, that most of Roberts’s counterclaims “simply assert the converse of the facts alleged [*sic*] the Complaint and thus raise the same factual and legal issues as the summary judgment motion.” Therefore, the Fund Entities concede that Roberts’s counterclaims are part of the same dispute, thereby undermining the Fund Entities’ argument concerning allocation of legal fees and expenses for Robert’s counterclaims. Accordingly, Roberts is entitled to advancement for both his counterclaims and the defense of claims asserted against him.

Fifth, the Fund Entities argue that Roberts is not entitled to legal fees and expenses incurred in prosecuting the Advancement Action. A litigant is entitled to an award of “fees on fees” upon the success of the advancement claim, unless the indemnification provision excluded such fees. *DeLucca v KKAT Mgt.*, 2006 WL 224058, \*15, 2006 Del Ch LEXIS 19, \*52 (Del. Ch. 2006). “Allowing indemnification for the expenses incurred by a director in pursuing his indemnification rights gives recognition to the reality that the corporation itself is responsible for putting the director through the process of litigation.” *Jackson Walker L.L.P. v. Spira Footwear, Inc.*, 2008 WL 2487256, \*9, 2008 Del Ch LEXIS 82, \*37-38 (Del. Ch. 2008). It also “prevents a corporation from using its ‘deep pockets’ to wear down a

former director, with a valid claim to indemnification, through expensive litigation.” *Id.* Having succeeded on his summary judgment motion in the Advancement Action, Roberts is entitled to advancement of legal fees and expenses relating to securing advancements in the Advancement Action.

Sixth, the Fund Entities argue that Roberts and Bayhead have refused to turn over documents regarding their claims for advancement, such as documents showing Roberts’s claim on the \$1 million insurance policy. The Fund Entities fail to provide any legal support for their suggestion that insurance payments received by Roberts would affect the Fund Entities’ contractual obligation of advancement. Nor do the Fund Entities do anything more than “speculate” about the existence of insurance for Bayhead and the possibility of Roberts secretly “drawing upon insurance provided through Bayhead.” Fund Entities’ Opp. Brief, at 21. Therefore, this argument is unpersuasive.

Seventh, the Fund Entities argue that they have reached the certified capital company (“CAPCO”) advancement limits as set forth in the 11/12/10 Order. That Order limited distributions “by the Texas entities to one percent per calendar year of the amount of certified capital the Texas entities initially received as investment,” and limited distributions by the Alabama entities to “two and one half percent annually of the certified capital.” 11/12/10 Order, at 13-14. The Fund Entities’ argument is limited to “[t]he total possible budget for professional fees for a given year” for Aegis Texas Venture Fund II, LP (Texas II Fund), and their claim that the Texas II Fund closed with approximately \$27 million in capital, 1% of

which would be \$270,000 for professional fees. Fund Entities' Opp. Brief, at 21; Dragan Aff., ¶ 59. Of the \$270,000, the Fund Entities claim that, "[i]n the past," approximately \$40,000 have been used to cover amounts owed to auditors, tax accountants, fund trustees, regulators, and counsel, leaving only \$230,000 theoretically available for this litigation. Dragan Aff., ¶ 61.

As a preliminary matter, the Fund Entities rely upon the conclusory and unsupported statement in Kevin Dragan's affidavit that "the Fund Entities' litigation budget for 2011 had been exhausted." Dragan Aff., ¶ 45. While Roberts submits the Texas II Fund's financial statements from 2007 through 2010, showing "Professional Fees" allocations of \$272,539 in 2010 (Bergin Aff., Ex. I, at 3), the Fund Entities fail to submit any evidence of their budget or allocations for 2011, or any evidence substantiating their purported inability to advance funds from the Fund Entities' 2011 litigation budget. Nor do the Fund Entities dispute that they will be able to make advancement payments out of the 2012 budget. In fact, the Fund Entities suggest that the Texas II Fund alone could conceivably advance up to \$115,000 "for any given year," assuming that the theoretical \$230,000 available annually is divided evenly. Dragan Aff., ¶ 63.

Moreover, the Fund Entities' argument is limited to the available funds of the Texas II Fund. The Fund Entities fail to submit any evidence substantiating their statements that Aegis Alabama Venture Fund, LP "cannot afford to pay out any additional legal fees for this litigation" (Dragan Aff., ¶ 65), and that Aegis Texas Venture Fund II GP, LLC and Aegis

Alabama Venture Fund GP, LLC “do not themselves have any assets available for distribution, and ... do not owe any specific advancement obligations to Roberts.” Dragan Aff., ¶ 67. In short, the Fund Entities’ reliance upon regulatory caps is supported solely by conclusory statements, without evidentiary support, and, therefore, is unpersuasive.

The court notes that “[t]he advancement of legal fees does not *ipso facto* mean that the defendant companies will have to indemnify the plaintiffs” (*Morgan v. Grace*, 2003 WL 22461916, \*3 n21, 2003 Del Ch LEXIS 113, \*14 n21 [Del. Ch. 2003]), and, as indicated in the 11/12/10 Order, Roberts would be required to return any advanced funds if the allegations against him are proved and he is not entitled to indemnification. As discussed above, the Advancement Action defendants “may test the reasonableness of any advances demanded,” and any advances “will be subject to a final determination of indemnification.” *Citadel Holding Corp.*, 603 A.2d at 826. However, the Fund Entities should be cautioned “about nitpicking reasonable tactical choices” made by Roberts’s counsel, unless the Fund Entities “can show that those choices are unmistakably unreasonable, in the sense that they involve clear abuse,” with the understanding that pressing such arguments will result in the court permitting additional “discovery into the fees and expenses” incurred by the advancing party itself. *DeLucca*, 2006 WL 224058, \*16 n42, 2006 Del Ch LEXIS 19, \*54 n42.

“[T]o be of any value to the executive or director, advancement must be made promptly, otherwise its benefit is forever lost because the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be

able to afford.” *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005). Given that “[a]dvancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings” (*Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 [Del. 2005]), it would be improper for the Pending Motions to be heard until the Fund Entities have complied with their advancement obligations. For the foregoing reasons, the Pending Motions will not be heard until the Fund Entities have complied with their advancement obligations pursuant to this decision and order and the 11/12/10 Order.

### **Order**

Accordingly, it is hereby

ORDERED that motion sequence number 009, under Index Number 650344/08, for a stay, pursuant to CPLR 2201, is denied; and it is further

ORDERED that motion sequence number 004, under Index Number 115387/08, is granted and:

1. Defendants Aegis Texas Venture Fund II, LP, Aegis Texas Venture Fund II GP, LLC, Aegis Alabama Venture Fund, LP, and Aegis Alabama Venture Fund GP, LLC shall:
  - a. within 30 days, pay plaintiff Todd Roberts’s outstanding request for advancement of \$95,494.71;

- b. advance legal fees and costs incurred on behalf of plaintiff Todd Roberts in connection with his counterclaims and his defense of affirmative claims asserted against him, and legal fees and costs associated with securing advancement from defendants in the prosecution of this advancement action;
2. With respect to future claims for advancement, counsel for plaintiff Todd Roberts shall submit to defendants copies of invoices for fees and expenses incurred in the related action, *Schepisi v. Roberts* (Index Number 650344/08), accompanied by counsel's good faith representation that the amounts reflected therein are for services provided to Todd Roberts in the defense of that action. Within 30 days of any such submission, defendants shall remit to counsel for Roberts the total requested in those invoices, unless defendants dispute the reasonableness of the invoices. If defendants dispute the reasonableness of the invoices submitted, defendants shall (i) remit the undisputed amount within 20 days of submission of the invoices to defendants, (ii) advise Roberts in writing, with specificity, of any and all disputes respecting the reasonableness of the invoices ("Objections") within 20 days after the date the invoices were submitted to it, and (iii) simultaneously file those Objections with the court. If defendants claim inability to pay advancement, pursuant to regulation of certified capital companies or for any other reason, defendants shall: (i) advise



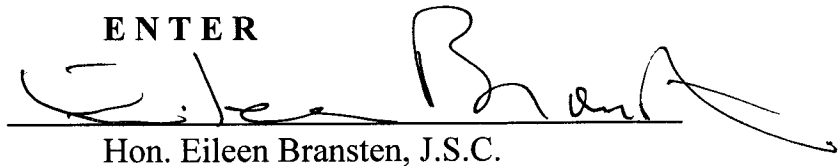
Roberts in writing, with specificity, of the reasons for such inability to pay, providing detailed substantiation sufficient to support their claimed inability to pay ("Payment Objections") within 20 days after the date the invoices were submitted to it, and (ii) simultaneously file those Payment Objections with the court. If there are any disputes arising from the Objections or the Payment Objections, the court will schedule a telephone conference to resolve them; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on June 5, 2012, at 10 A.M.

This constitutes the decision and order of the court.

Dated: New York, New York  
May 2, 2012

**ENTER**



Hon. Eileen Bransten, J.S.C.