

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 7106

THE FUTURES GROUP, INC. and
GEOFF G. CRAMER,

Plaintiffs,

v.

DENIS BROSNAN,

Defendant.

ORDER ON ADVANCEMENT

1. On 19 January 2023, this Court granted Defendant’s Motion for Partial Summary Judgment and ordered The Futures Group, Inc. (“Futures”) to advance Denis Brosnan’s (“Brosnan”) Expenses¹ in this matter in accordance with Article VIII, ¶ 2 of its bylaws. *Futures Group v. Brosnan*, 2023 NCBC LEXIS 7, at *2 (N.C. Super. Ct. Jan. 19, 2023 (hereinafter, the “Advancement Order”). The Court instructed counsel to meet and confer in good faith to determine the amount of advanceable Expenses incurred by Brosnan to date and to establish a procedure for ongoing advancements. *Id.* at *15–16.

2. A status report from the parties provided to the Court via email on 9 February 2023 indicates that, although counsel have conferred, they have not been able to agree on either the amount of advanceable expenses already incurred or a procedure for ongoing advancements.

¹ Expenses are defined in the Futures’ bylaws as “expenses of every kind, including counsel fees.” (Bylaws, Article VIII, ¶ 4.)

3. Among other things, questions have arisen regarding whether, for advancement purposes, Expenses include costs and fees incurred with respect to the counterclaims brought by Brosnan. In addition, the parties disagree on the level of detail required to support advancement demands at this stage of the litigation.

4. On 20 February 2021, the Court held a conference via Webex to discuss the parties' status report. (ECF No. 111.) Having reviewed the parties' written submissions and considered the positions presented by counsel during the conference, it is apparent to the Court that the parties require the Court's assistance to establish advancement procedures with respect to this case. Accordingly, the Court ORDERS that advancement will proceed as follows:

- a) The senior member of the North Carolina bar appearing for each side will assume responsibility for addressing all advancement requests.
- b) With respect to advanceable Expenses incurred to date, counsel for Brosnan will provide Futures with detailed invoices identifying the Expenses for which advancement is requested. For each task billed, the invoices shall specify the date, the timekeeper, the billing rate, a general description of the work performed, and the total charge for that task. If an invoice has been paid by Brosnan, that fact and the date of payment shall be reflected on the invoice.
- c) Senior counsel for Brosnan shall also provide to Futures an affidavit stating that he has personally reviewed each entry on each invoice submitted, that the fees are consistent with North Carolina Rule of Professional Conduct

- 1.5, and that the fees are, in his professional judgment, reasonable and necessary for the representation of Brosnan with respect to the claims Futures has brought against him. The affidavit shall include the qualifications and hourly billing rate for each timekeeper whose time is reflected on the invoices.
- d) Should Futures object to any amounts demanded by Brosnan, it may put the objection in writing to Brosnan's counsel, citing any relevant case law, within ten days. Any objection not included in this writing is waived.
 - e) Brosnan may respond to Futures' objection in writing to Futures' counsel, citing any relevant case law, within ten days. Any response not included in this writing is waived.
 - f) Following receipt of Brosnan's response by Futures, senior North Carolina counsel for both parties shall have ten days in which they must meet and confer in a good faith effort to resolve the objection.
 - g) If the parties are still unable to resolve the objection regarding advanceable Expenses, they may brief their positions to the Court as follows: Brosnan may file a motion for payment of advanceable Expenses, including a brief and supporting materials. Any such motion must include the date(s) of the above-referenced conference between counsel, the names of the senior lawyers who attended, and a specific description of results achieved. Brosnan's brief may not exceed 2,500 words, and it may not include any arguments waived pursuant to subsection e, above. After first advancing

any amounts not in dispute, Futures may respond to Brosnan's motion within twenty days of its filing. Futures' response may be no more than 2,500 words, and it may not include any arguments waived pursuant to subsection d, above. Brosnan may file a reply brief within seven days of service of the opposition brief. A reply brief is limited to 1,000 words.

- h) The parties are advised that, with respect to advancement demands, and particularly with respect advancement demands supported by invoices paid by Brosnan prior to the Court's Advancement Order, the Court will not to conduct a granular review of each time entry and disbursement. *See, e.g., Danenberg v. Fittracks, Inc.*, 2012 Del. Ch. LEXIS 53, at **9 (2012). Furthermore, when determining the reasonableness of amounts sought, the Court will avoid second-guessing the professional judgment of counsel. *Id.* at **10.
- i) If Brosnan prevails on a motion for advancement, he may include the fees and costs incurred as a result of this process (proportionate to the extent of the success achieved) in a subsequent demand for advancement of Expenses.
- j) Expenses determined to be advanceable by the Court in response to a motion will be subject to pre-judgment interest from the date of the advancement demand, as well as to post-judgment interest from the date of the Court's order awarding the Expenses.

5. The parties shall follow the procedures outlined above with respect to advancement demands for Expenses that occur from this date forward, except that Brosnan may make demand for advancement only once every four months.

6. Nothing herein is intended to modify Futures' right to recover pursuant to the undertaking required by Futures' bylaws should it ultimately be determined that Brosnan is not entitled to be indemnified by Futures.

7. Advanceable Expenses shall not include Expenses resulting from the AIB Loan Guarantee Obligation (the "Irish debt" litigation), except those Expenses incurred to preserve—not to pursue—Brosnan's compulsory counterclaim, and those Expenses related to the monthly updates requested by the Court.

8. While advancement can be a difficult concept in circumstances like these, counsel are reminded of their duties as officers of the Court. Should conflicts continue, the Court will consider whether appointment of a referee at the parties' expense is necessary.

IT IS SO ORDERED, this the 24th day of February, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases