SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

FICUS INVESTMENTS, INC. and
PRIVATE CAPITAL GROUP, LLC,

Plaintiffs-Respondents,

-against-

PRIVATE CAPITAL MANAGEMENT, LLC, THOMAS B. DONOVAN, GERARD M. BAMBRICK, ESQ., BAMBRICK & RYAN, P.C., CHRISTOPHER CHALAVOUTIS, CHALAVOUTIS & CO. CPA'S PC, VIRGINA DONOVAN, PAMELA DONOVAN, MICHAEL BODE, ESQ., SCOTT BURGWIN, ALISSA GLADSTONE, PETER KAMRAN, JOHN KILEY, FIRST REO CORP., KIRBY ENTERPRISES I CORP., LANDPORT EQUITIES LTC REALTY CORP., M&O ENTERPRISES, PGA EQUITIES, PLAZA EQUITIES, PLAZA INVESTMENTS, PRIVATE CAPITAL CORP., PRIVATE CAPITAL SERVICING CORP., PRIVATE LENDER SERVICES CORP., PRIVATE LENDER WAREHOUSE CORP., PRIVATE CAPITAL MANAGEMENT GROUP OF NY LLC, DONOVAN FAMILY TR LLC, OCFF LLC, CARTER STREET HOLDING CORP., LUCY DIGIACOMO, GNOSIS LLC, GNOSIS IV LLC, JEN DEVELOPMENT I CORP., NPL PORTFOLIO CORP., NPL OPTION ACQUISITIONS LLCAND JOHN DOES 1-10

Defendants-Appellants.

THOMAS B. DONOVAN individually and derivatively on behalf of PRIVATE CAPITAL GROUP, LLC, PRIVATE CAPITAL MANAGEMENT LLC and PRIVATE CAPITAL MANAGEMENT CORP.

Counterclaim Plaintiffs,

-against-

FICUS INVESTMENTS, INC. and PRIVATE CAPITAL GROUP, LLC,

Counterclaim Defendants.

Index No. 600926/07
(Fried, J.)

AFFIRMATION OF RICHARD H. DOLAN

-against-

PRIVATE CAPITAL GROUP, LLC, PRIVATE CAPITAL MANAGEMENT, LLC and PRIVATE CAPITAL MANAGEMENT CORP.,

Nominal Defendants.

THOMAS B. DONOVAN individually and derivatively on behalf of PRIVATE CAPITAL GROUP, LLC, PRIVATE CAPITAL MANAGEMENT LLC, PRIVATE CAPITAL MANAGEMENT CORP. and PRIVATE CAPITAL MANAGEMENT GROUP OF NY, LLC

Third-Party Plaintiffs,

-against-

JOSEPH C. LEWIS, JEFFERSON R. VOSS, TYLER V. PIERCY, THOMAS B. YOUTH, LAWRENCE A. CLINE, GERARD BAMBRICK, JEROME Z. CLINE, ROUNDPOINT MORTGAGE CO. and PETER SCHANCUPP,

Third-Party Defendants.

-and-

PRIVATE CAPITAL MANAGEMENT, LLC and PRIVATE CAPITAL MANAGEMENT CORP.,

Nominal Defendants.

RICHARD H. DOLAN, an attorney duly admitted to the courts of this state, affirms under penalty of perjury, the following to be true:

1. I am a member of Schlam Stone & Dolan LLP ("SSD"), counsel to Defendant Thomas B. Donovan ("Donovan") in this action. I submit this affirmation in support of Donovan's motion for an order pursuant to CPLR § 4403: (a) rejecting the Amended Report of Special Referee Marilyn Dershowitz dated July 7, 2009 (the "Report"), to the extent that it disallowed the legal fees and disbursements ("Expenses") demanded by Donovan for the period January 1, 2008 through January 31, 2009, as beyond the scope of the advancement provisions of the Operating Agreement (the "Operating Agreement") of Plaintiff Private Capital Group, LLC (the "Company"); and (b) modifying the Report to require that the Company advance the requested Expenses, plus interest from the date of Donovan's initial demands, within ten calendar days of the Court's order resolving this motion.

2. Filed herewith is the record of the proceedings before the Special Referee: the Report (Ex. 1); the transcript of the March 23, 2009 hearing (Ex. 2); the transcript of the April 15, 2009 hearing (Ex. 3); the transcript of the April 16, 2009 hearing (Ex. 4); and the 90 exhibits introduced at the hearings (Ex. 5). Unless otherwise specified, the matters set forth herein are based upon my personal knowledge. Capitalized terms have the meanings given to them in the Operating Agreement.

SUMMARY OF THE ARGUMENT

3. The Report should be rejected because the Referee applied the wrong legal standard in assessing Donovan's demand for advances.

4. The correct standard is set forth in the Operating Agreement, which created Donovan's right to advances and defines the scope of the Company's obligation to pay them. Section 3.4.3(a) of the Operating Agreement requires the Company to "advance funds to pay for or

reimburse the reasonable Expenses incurred by a Person who is a Party to a Proceeding because he or she is a Member, Manager or Officer" on two conditions, both of which this Court and the Appellate Division have already held are satisfied. Section 3.4.1(f) of the Operating Agreement defines "Party" as "an individual who was, is, or is threatened to be made a named defendant or respondent in a Proceeding." Section 3.4.1(g) defines "Proceeding" as "any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, arbitrative or investigative and whether formal or informal." And Section 3.4.1(d) defines "Expenses" as including, *inter alia*, all "reasonable counsel fees . . . incurred in connection with prosecuting, defending, preparing to prosecute or defend, investigating, being or preparing to be a witness in, or otherwise participating in, a Proceeding, including any appeals."

5. Donovan's status as a "Member, Manager or Officer" of the Company is relevant **only** in determining whether he is "is a Party to a Proceeding" because he held such a position. Both this Court and the Appellate Division have already determined that **Donovan has satisfied that condition**. *See Ficus Investments, Inc. v. Private Capital Mgmt. LLC*, 61 A.D.3d 1, 10, 872 N.Y.S.2d 93, 100 (1st Dep't 2009) (hereafter cited as "*Ficus I*"). Thus, the relevant "Proceeding" is **this** "action [or] suit," and "Expenses" include **any motions or other matters occurring** in this "action [or] suit" against which Donovan must defend.

6. In its April 24, 2008 Order and subsequent Orders on advances, this Court expressly instructed the Referee to apply this standard established by Section 3.4.3(a) in determining whether the demands were reimbursable. *See, e.g., Ficus v. Private Capital Management, LLC*, Order dated April 24, 2008 at 23 (referring "the factual inquiry as to: (a) which of the Expenses apply to Donovan; (b) which Expenses were incurred as a result of Donovan's being 'a Party to a Proceeding because he . . . is a[n] . . . Officer,' and (c) the reasonableness of such Expenses.") In affirming this Court's orders, the Appellate Division likewise pointed specifically to Section 3.4.3(a) as the

standard governing Donovan's demand for advances. *Ficus I,* 61 A.D.3d at 7-10, 872 N.Y.S.2d at 98-100.

7. Donovan submitted demands for advancement of the Expenses he has incurred in this action, the "Proceeding" to which he is a "Party" because he was an "Officer" (to wit, Chief Executive Officer) of the Company. The Special Referee rejected Donovan's demands for the advancement of some $2 million in Expenses based on her legal conclusion that they were incurred in connection with motions or hearings in which Donovan's conduct as Chief Executive Officer of the Company was not at issue. In short, the Special Referee added a new condition: Donovan was entitled to advancement of Expenses only if the particular subject matter of a motion or hearing within the "Proceeding" concerned Donovan's conduct as Chief Executive Officer, a standard which she sometimes phrased as requiring that an Expense be "necessitated" by Donovan's having been an officer.

8. This extra-contractual condition that she imposed was a pure legal error; the Company is required to pay **any** reasonable Expenses incurred by Donovan in a lawsuit which was brought against him by reason of his having been an Officer of the Company. It does not matter whether the Expenses are related to his being such an Officer, but only that the Expenses relate to his having to defend a lawsuit which was brought by reason of his having been an Officer. That legal error infected the Referee's entire analysis. For the same reasons that this Court rejected the Referee's addition of a "bonding" condition in her November 2008 report, the Court should reject her most recent attempt to rewrite the Operating Agreement to add new conditions on Donovan's advancement rights. *See Ficus v. Private Capital Mgmt.,* Order dated February 3, 2009 at 6 ("Nothing in this reference provided the Special Referee with the discretion to establish conditions under which payment should be made.").

9. The governing provisions of the Operating Agreement are clear and unambiguous, and thus its construction presents a question of law. Under the guise of interpreting the Operating Agreement, the Referee had no discretion to add or excise terms or distort the meaning of those used to make a new contract for the parties. Thus, the usual deference given to a referee's **factual** findings, if supported by the record, does not apply.

10. To the extent the Referee bolstered her legal conclusion by crediting the testimony of the Company's expert, that too was a legal error. Experts are not permitted to testify about questions of law, and it was error to allow the expert to testify on the construction of an unambiguous contract.

11. Finally, the Court should reject the Referee's proffered standard because it is (i) contrary to well-reasoned case law in Delaware construing similar provisions in other agreements, and (ii) is inconsistent with the Operating Agreement's purpose in providing for advancement of Expenses.

PROCEDURAL BACKGROUND

A. Prior Proceedings in this Court and the First Department.

12. On April 24, 2008, this Court entered an order (the "Advances Order") granting Donovan's motion requiring the Company to advance and reimburse him for the Expenses he incurred, and will continue to incur, in this action. The Advances Order did not award a specific monetary amount to Donovan but instead referred the motion to the Referee for an ongoing factual inquiry regarding whether Donovan's "Expenses were incurred as a result of Donovan's being 'a Party to a Proceeding because [he] . . . is a[n] . . . Officer' (Operating Agreement § 3.4.3); and (c) the reasonableness of such expenses." (Advances Order at 23.)

13. On January 20, 2009, the First Department affirmed the Advances Order, holding that Donovan had the right to receive advances because he was being sued in this action on account

of his having been an officer of the Company. *See Ficus I.* On June 25, 2009, the First Department affirmed an order of this Court confirming a November 2008 Report of Special Referee Dershowitz recommending that the Company advance all the Expenses sought by Donovan, even though the lawyers who were representing Donovan in connection with these Expenses had also been representing other defendants in this action who were not entitled to advancement of their Expenses by the Company. *See Ficus Inv., Inc. v. Private Capital Mgmt., LLC*, 63 A.D.3d 611, __ N.Y.S.2d __ (1st Dep't 2009) ("*Ficus II*"). The First Department explained that this Court's rejection of Plaintiffs' demand that Donovan's fees be allocated was both "equitable" and "consistent with the purpose of advancing legal fees." The First Department rejected the Company's argument that some prorating of Donovan's Expenses was required on account of his counsel's having represented other defendants who were not entitled to advancement of their Expenses.

B. <u>The Advances Hearing Before Referee Dershowitz.</u>

14. The Referee held an evidentiary hearing on March 23, April 15, and April 16, 2009. Donovan called John M. Lundin, a partner at SSD. The Plaintiffs called John Silas Hopkins, III, an attorney who no longer practices law. Over Donovan's objections, the Company was permitted to introduce Hopkins' live testimony as expert testimony along with various iterations of his expert's report. Donovan introduced Exhibits marked A through G and I through M. The Company introduced Exhibits 1 through 77.

15. The hearing concerned six advances demands covering work performed in the thirteen-month period January 1, 2009 through January 31, 2009.[1] (*See* Exs. 1-8 to the Mar. 19, 2009 Aff. of John M. Lundin ("Lundin Aff."), admitted at the hearing as Defendant's Ex. A.) The total amount of Expenses sought by Donovan for this thirteen-month period was $3,828,708.49 out of $4,241,373.99 in invoiced Expenses. (Lundin Aff. ¶ 4.)

[1] The demands were dated November 11, 2008, November 26, 2008, December 11, 2008, January 9, 2009, January 22, 2009, February 10, 2009, February 27, 2009 and March 2, 2009.

16. Of the $3,828,708.49 in Expenses sought by Donovan, the Company disputed $2,294,371.95. Of this disputed amount, approximately **87 percent** of the disputed amount turned the Company's legal claim that work related to the following motions, appeals and pretrial discovery in this action were not subject to advances under the Operating Agreement because they were not necessitated by his being an Officer of the Company:

Reducing fees for discovery by 55%	$540,446.36
Reducing EPIQ electronic discovery Invoices by 55%	$121,870.99
Reducing Stroz Friedberg bills by 55%,	$90,479.52
Books and records contempt motion:	$504,014.75
Cline e-mail proceedings	$419,698.00
Receivership Motion and Appeal	$107,389.00
Emergency motions regarding advances	$69,462.75
Plaintiffs' motion to permit the Company to begin repaying Ficus self-interested loans	$59,138.75
"Financial analysis"	$37,206.00
SSD efforts to assert charging lien against recovery of advances	$25,588.50
Motion to quash Ravage deposition subpoena	$11,755.00
Motion to quash subpoena to Greenberg Traurig	$11,358.00
Motion to quash subpoena to Schancupp	$6,634.50

(*Id.* ¶ 5; *see also* Mar. 16, 2009 Corrected Amended and Supplemental Aff. and Report of John Silas Hopkins, III ("Hopkins Report") ¶¶ 171-76, admitted at the hearing as Plaintiffs' Ex. 4.)

17. These disputes accounted for **$2,005,042.12.**[2] Of this amount, **$1,464,159.11** was accounted for by disputes with respect to only **three** categories: whether Donovan was entitled to advances for work performed with respect to: (a) the Cline e-mail hearing; (b) books and records

[2] There was also a dispute between the parties relating to whether Expenses sought by Donovan for six discrete items were reasonable for work that both parties agreed were advanceable. Donovan contended that all of these fees were reasonable and should have paid, whereas the Company contended that $237,090.58 of these Expenses were unreasonable. (Lundin Aff. ¶ 7; Hopkins Report ¶ 171.) The Referee found that all of these $237,090.58 in Expenses were reasonable, except for the $119,073 in Expenses objected to by the Company concerning the advances hearings and appeal. (Report at 8.) Donovan is not challenging any of these factual findings. Finally, there was a dispute between the parties relating to how much should have been deducted for 17 categories of tasks that both parties agreed were not advanceable. SSD had already excluded $412,665.50 from its demands, while the Company argued for exclusions of $463,301.25. Thus, the total amount in dispute was only $50,635.75. (Lundin Aff. ¶ 8; Hopkins Report ¶ 171.) The Referee credited all the deductions recommended by Plaintiffs relating to these tasks, except a $198,632 deduction relating to Expenses concerning counterclaims and third-party claims, thereby concluding that the reasonable value of the Expenses relating to these non-advanceable tasks was $264,669.25, instead of the amount of $463,301.25 urged by the Company. (Report at 7-8.) Donovan is not challenging any of these factual findings.

contempt hearing; and (c) 55% of the work on pre-trial discovery. With respect to pre-trial discovery, the Company argued that Donovan should receive an advance for only 45% of the work by his attorneys as well as third party vendors. (Lundin Aff. ¶ 6; Hopkins Report ¶¶ 171-76.)

18. For purposes of this motion, we accept the Company's calculation of the amounts in each of these categories. The only issue is whether, under Section 3.4.3(a) of the Operating Agreement, Donovan was entitled to advances for any of those services, all of which were disallowed by the Special Referee based on the erroneous legal standard described above.

C. <u>The Report.</u>

19. The Report adopted the legal opinions reached by Mr. Hopkins, and accepted in part and rejected in part Mr. Hopkins' factual opinions concerning the reasonableness of various Expenses demanded by Donovan. The Report took as a given, contrary to the standard in the Operating Agreement, that Expenses were only reimbursable if they were "necessitated" by Donovan's having been an Officer of the Company. (*See, e.g.*, Report at 2 ("Mr. Hopkins in his testimony supports plaintiff's argument that attorney fees sought for discovery and email hacking were not matters which came about as a result of Donovan being an officer of the plaintiff, and were therefore not properly advanceable and would not be reimbursable."); *id.* at 3 (The Cline e-mail "hearings are obviously highly significant to Donovan. And, they grew out of this case wherein he was sued [by reason of being an Officer]. However that [the hearings] arose of this action is not necessarily sufficient to mandate that the fees engendered by these hearings are advanceable."); *id.* at 4 ("Still [Donovan] seeks fees for defense of these actions which are, by Donovan's own admissions for his personal benefit, and not in his role as CEO of the corporation.").)

20. The Referee concluded that all the Expenses relating to the motions, appeals and pretrial discovery listed in Paragraph 16 above, which Mr. Hopkins opined, as a matter contract interpretation, were not subject to advances at all and which totaled $2,005,042.12, were not subject

to advancement. (Report at 7.) After the Referee issued her initial report, the parties agreed that it contained substantial mathematical and other errors. The parties submitted a stipulation to the Referee to correct those errors, and on July 7, 2009, she issued an Amended Report—the Report—correcting them. In the Report, the Referee added up all the deductions suggested by the Company that she credited ($2,388,779.37) and subtracted them from the amount invoiced by SSD ($4,241,373.99) to arrive at a total recommended award of $1,852,594.62. Given that the Company had already paid SSD a total of $1,695,404.28, the net amount due and owing to SSD based on the recommendations in the Report was $157,190.34, which the Company paid SSD on July, 7, 2009.

ARGUMENT

I. THE REFEREE APPLIED THE WRONG LEGAL STANDARD IN ASSESSING DONOVAN'S DEMAND FOR ADVANCES

A. The Referee Misinterpreted the Operating Agreement.

21. The Referee's disallowance of most of the Expenses was based on her legal conclusion that the Operating Agreement required Donovan to show that the subject matter of each hearing, motion or item of pre-trial discovery concerned Donovan's work as Chief Executive Officer or was otherwise "necessitated" by his status as an Officer. This was error.

22. In *Ficus I*, the First Department found that Donovan was entitled to advances because this action was a Proceeding to which he became a party-defendant because he was a former officer of the Company. This is now the law of the case. Thus, the Referee was only required to determine whether (a) the Expenses for which Donovan sought advances were incurred as part of his defense in this action—a fact which the Company did not dispute with respect to the Expenses at issue on this motion; and (b) whether those Expenses were reasonable in amount, given the nature of the case, the requirements of the litigation and the work performed.[3]

[3] To the extent the Referee made factual findings regarding the reasonableness of the nature and extent of the work for which Donovan sought advances, we accept those findings.

23. Specifically, the Operating Agreement requires only that Donovan be a party to a "Proceeding"—*i.e.*, the "action [or] suit." The parties' use of the word "Party" in the Operating Agreement along with its express definition in Section 3.4.1 underscores the Referee's error: while it is normal to speak of a party to an action, that term simply does not apply to the myriad motions, discovery demands and the like that occur in every civil action. Once a determination was made that Donovan is a party to this Proceeding because he was an Officer of the Company—a finding made by this Court in the Advances Order and the First Department in *Ficus I*—the question for determination by the Referee was whether the Expenses for which Donovan is seeking advancement were reasonable and were incurred in his defense of this action. As this Court held in its Order of February 3, 2009 (quoted above at Paragraph 8), rejecting the Referee's addition of a "bonding" condition in her first report pursuant to the Advances Order, the Referee did not have the discretion to add new conditions to Donovan's advancement rights under the Operating Agreement or otherwise to rewrite the Operating Agreement. *See also 85th St. Restaurant Corp. v. Sanders,* 194 A.D.2d 324, 326, 600 N.Y.S.2d 1, 3 (1st Dep't 1993); *Roberts v. Harkins*, 292 So. 2d 603, 605-06 (Fla. 2d Dist. Ct. App. 1974) (citing "well-established rule that where the parties to a contract have selected the language contained therein, and where that language is clear and unambiguous, the courts are without authority to rewrite the terms of the agreement to give them a meaning other than the one expressed" (internal quotation marks and citation omitted)).

24. The governing provisions of the Operating Agreement are clear and unambiguous, and thus its construction presents a question of law. *Taussig v. Clipper Group*, LP, 13 A.D.3d 166, 167, 787 N.Y.S.2d 10, 11 (1st Dep't 2004) ("The interpretation of an unambiguous contract is a question of law for the court ."). Under the guise of interpreting the Operating Agreement, the Referee had no discretion to add or excise terms or distort the meaning of those used to make a new

contract for the parties.[4] *Teichman v. Community Hosp. of W. Suffolk*, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474 (1996); *Morlee Sales Corp. v. Mfr's Trust Co.*, 9 N.Y.2d 16, 19, 210 N.Y.S.2d 516, 518 (1961). Thus, the usual deference given to a referee's factual findings, if supported by the record, does not apply.

25. Rather than follow the unambiguous provisions of the Operating Agreement, the Company's expert latched on to a snippet from this Court's February 19, 2009 Order, stating that the demands had to be reformatted so that a determination could be made regarding whether Donovan's Expenses "reasonably related to work necessitated by virtue of Donovan's being an officer of" the Company. (*See, e.g.,* Apr. 15, 2009 Hr'g Tr. at 276 ("My opinion is that the work on the Books and Records Contempt matter was not necessitated by reason of Donovan being an officer of [the Company]."); *id.* at 266 ("My conclusion is that [Expenses relating to the Cline e-mail hearing were] not necessitated by Donovan being an officer of [the Company]."); *id.* at 298 ("My opinion is that neither the work on the motion for receiver nor the work on the appeal was work that was necessitated by reason of Donovan being an officer of [the Company]."); *see also* Mar. 23, 2009 Hr'g Tr. at 17 (Plaintiffs' counsel argument in his opening statement that this Court "said we have to determine whether the charges are reasonably related to work necessitated by virtue of Donovan being an officer at [the Company].").) The Referee accepted the Company's argument that this Court's use of the word "necessitated" in the February 19 Order imposed a new condition on Donovan's right to advancements nowhere found in the Operating Agreement, and modified the Court's prior Advances Order, which had already been affirmed by the First Department. For example:

- In discussing whether Expenses incurred by Donovan in connection with the books and records contempt hearing and the Cline e-mail hearing were advanceable, the

[4] Despite the clarity of the Advances Order (at 10-12 and 23) and the Appellate Division's affirmance (*Ficus I*, 61 A.D.3d at 8-9, 872 N.Y.S.2d at 99), the Referee also mistakenly looked to Section 3.4.2(a), governing indemnification, instead of Section 3.4.3(a), governing advances. (*See* Report at 2.)

Referee stated that, even though these Expenses "grew out of this case wherein [Donovan] was sued," the fact that "they arose out of this action is not necessarily sufficient to mandate that the fees engendered by these hearings are advanceable." (Report at 4.)

- In concluding that Expenses relating to the books and records hearings were not advanceable, the Referee stated that, if the books and records belonged to Donovan, his "actions [were] outside the scope of his employment"; alternatively, if the books and records belonged to the Company, Donovan "engaged in a deliberate defalcation of his duties." (*Id.*)

- In concluding that Expenses relating to the Cline e-mail hearings were not advanceable, the Referee stated that (i) "Donovan had accessed the email of Mr. Cline to protect his personal properties, again, not for any benefit to the company, and after he had resigned as the CEO of the corporation"; and (ii) "these activities would demonstrably be well outside the scope of his activities on behalf of the corporation as well as this suit by the corporation." (*Id.* at 5.)

- In concluding that Expenses relating to the Cline e-mail hearing and the books and records contempt hearing were not advanceable, the Referee stated that (i) "[t]he acts of hacking email and removal and non-disclosure of books and records occurred well after that resignation and were never, even arguably, intended for the benefit of anyone but . . . Donovan"; (ii) Donovan "surely did not act as an officer of the corporation in the removal of books and records from the corporate premises in the face of an order precluding the removal of any corporate related documents; and (iii) Donovan "hacked into Mr. Cline's email to ensure the preservation of his personal assets, having nothing to do with the plaintiff corporation." (*Id.* at 6.)

26. The Referee never applied the standard in Section 3.4.3(a) of that Operating Agreement: whether Donovan's Expenses were reasonable in amount and were incurred because he is a defendant in this lawsuit. Because the legal standard applied by the Referee in assessing Donovan's demands for advancement was contrary to the governing provisions of the Operating Agreement, the referral to the Referee in the Advances Order and holding in *Ficus I*, the Report's conclusions based on that erroneous standard should be rejected by this Court.

B. The Referee's Interpretation of the Operating Agreement Would Lead to Absurd Results and Thus Should Be Rejected.

27. The interpretation of the Operating Agreement adopted by the Referee also should be rejected because it would lead to the absurd results. *See In re Lipper Holdings, LLC,* 1 A.D.3d 170, 171, 766 N.Y.S.2d 561, 562 (1st Dep't 2003) ("[a] contract should not be interpreted to produce a

result that is absurd"); *see also Siegel v. Whitaker*, 946 So. 2d 1079, 1083 (Fla. 5th Dist. Ct. App. 2006) (same). Donovan's status as a former officer of the Company does not necessitate his putting on any defense at all, or engaging in any pretrial discovery or contesting any of the many motions brought against him by Plaintiffs. There is no necessary connection between being an Officer of a company and asserting a defense in a lawsuit, as the two are unrelated to each other. For example, an officer can, if he wants, default in a litigation and assert no defense at all. Thus, the Referee's conclusion that, to determine whether any given Expense is advanceable, one must conduct an analysis every time Donovan makes a motion, propounds a discovery request, seeks to compel discovery, etc. to determine whether these activities were necessitated by his being a former officer of the Company has no basis in law, and if adopted, would effectively defeat the purpose of the advancement provisions in the Operating Agreement.

28. The Referee's alternative ground for disallowing the requested advances—that Donovan was not entitled to advances because his defense against the Company's claims and the many motions in this action was for his "personal" benefit rather than the benefit of the Company—makes even less sense. Where, as here, the Company is suing a former office on allegations of theft and dishonesty, the Company will always contend that the former officer's defense is for his "personal" benefit and against the interests of the Company. It would be absurd to allow artful pleading alone to defeat a contractual entitlement to advances.

29. Moreover, in *Ficus I*, the First Department affirmed this Court's earlier conclusion that advances cannot be denied because a former officer has been accused of misconduct. *See, e.g., Ficus I,* 61 A.D.3d at 10, 872 N.Y.S.2d at 100 ("Mere allegations of theft will not relieve the Company of its obligation to advance expenses, and a request for advances is not meant to become an adjudication of the merits of the case against the officer."). Thus, the Referee's reliance on Donovan's alleged misconduct also ignored the law of this case.

C. The Referee Ignored the Rule of Inclusion that is Now the Law of the Case.

30. The Referee also erred in failing to apply the "rule of inclusion" developed by the Delaware courts and applied by the Referee herself in her November 2008 report addressing Donovan's initial demand for advances, by this Court and by the First Department.

31. The Delaware cases addressing demands for advances by corporate officers—which this Court and the First Department have found persuasive in this context—consistently have upheld the demand where those Expenses relate to the officer's defense even if the same Expenses also related to and were incurred to support the officer's affirmative claims against the corporation. Specifically, in the context of allocating litigation expenses where some claims are subject to advances and others are not, Delaware's courts have repeatedly held that no allocation is necessary even where an attorney's performance of a task incidentally benefits a non-advanceable claim and especially in the face of a good faith affidavit from the attorney for the party seeking advances that the same work would have been performed for the claim that was subject to advances. *See Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992) (advancing fees related to compulsory counterclaims "necessarily part of the same dispute" for which the director was sued); *Kreinberg v. Dow Chem. Co.*, 2008 WL 868108, at *5 (Del. Ch. Ct. Mar. 28, 2008) (company must reimburse former officer for activity undertaken in connection with his defense to the company's claims, even if such activity may also have been of use in connection with his counterclaims); *Radiancy, Inc. v. Azar*, 2006 Del. Ch. LEXIS 13, at *13 (Del. Ch. Jan. 13, 2001) ("to the extent that issues involved in Counts I and II of the counterclaim mirror the allegations in the plaintiff's complaint, those issues are subject to advancement").

32. The Referee's November 2008 report had adopted and applied that "rule of inclusion," in rejecting the Company's demand that the fees incurred by Donovan's attorneys be allocated among the various defendants, and only a pro rata portion be deemed advanceable. The

Referee's November 2008 report concluded: "To the extent others received a benefit it does not negate the work that was done on behalf of Donovan, the singular defendant for whom Justice Fried ordered a hearing with regard to advancement of fees."

33. In *Ficus II*, the First Department accepted the good faith assessments of Donovan's counsel that these same Expenses would have been incurred if they had been representing only Donovan and even though his co-Defendants (who were not entitled to advances) also benefited from this work. In applying this "rule of inclusion," the First Department found that this Court's decision was fully supported by the record and was "consistent with the purpose of advancing legal fees." Thus, this "rule of inclusion" is now the law of the case.

34. There is certainly no meaningful distinction between the Plaintiffs' argument in the first advances hearing (which was rejected by the Referee, this Court, and now the Appellate Division) that a *pro rata* allocation was required for the fees incurred by the attorneys representing Donovan and other defendants because work that was done for Donovan also benefitted those other defendants, and the arguments made by the Company and accepted by the Referee that an allocation must be made between tasks that the Company claims are compensable by advances and tasks that the Company claims are not compensable, where, as here, the subject matter of Donovan's affirmative defenses and his counterclaims are the same. Indeed, at the hearing, even Hopkins agreed that any work in furtherance of Donovan's affirmative defenses was properly subject to advances. (*See* Apr. 16, 2009 Hr'g Tr. at 467.) In other words, the "rule of inclusion" applied in the cases cited above required the rejection of the Company's allocation argument in this context just as it did there.

II. THE CATEGORIES EXCLUDED BY THE REFREE AS A MATTER OF LAW WERE SUBJECT TO ADVANCEMENT

35. The Referee excluded ten categories of Expenses that are properly subject to advancements under the correct legal standard that the Referee should have applied.

A. Pretrial Discovery.

36. The Referee excluded as a matter of law $752,796.87 of Expenses for Donovan's pre-trial discovery work, by improperly crediting Hopkins' arbitrary conclusion that 55% of Donovan's discovery related Expenses were not subject to advancement. This was error for several reasons, including particularly that it ignored the rule of inclusion.

37. Just as the work by SSD for Donovan was properly advanceable even if it also benefitted other defendants who were not entitled to receive advances, so too the discovery work advanceable because it was relevant to Donovan's affirmative defenses of setoff and recoupment should have been allowed even if it also was relevant to Donovan's counterclaims because the same work would have been performed in all events.

38. The Referee's adoption of a *per se* rule excluding 55% of all Donovan's discovery related Expenses also violates well established Delaware law. For example, in *Kreinberg*, the Chancery Court held that the corporation had to advance Expenses for activities undertaken in connection with its former officer's defense even though those activities also related to his counterclaims. Whether the officer obtained incidental benefit was irrelevant if the same matter also related to the officer's defense. Thus, the Court rejected the corporation's arbitrary decision to advance only 50 percent of all advances demands made upon it. 2008 WL 868108, at *5. And in *Weaver,* the corporation argued that it was required to advance only 25 percent of its former officer's Expenses because it assumed that one-half of all fees would be incurred in defending a counterclaim and that those fees would be split between two separately alleged claims. But the Chancery Court rejected this formulaic approach, stating that, "despite the administrative appeal of a formulaic analysis, the better approach [was] to rely, at least in the absence of a showing of abuse, upon the good faith allocation . . .by [the former officer's] attorneys." 2004 WL 243163, at * 5.

39. Indeed, Hopkins admitted that his *per se* allocation was arbitrary and not based on any informed analysis of whether a particular Expense related to discovery was also related to Donovan's defense of this action:

> Now, there is no magic about 45, 55. Maybe the percentages should be higher, lower, whatever, but it's clear that some portions of the discovery, some portion of going through the documents and finding the ones that you can use to defend against their claim, finding the ones you can use to make this claim, finding the ones that you could use to defend against E-Mail Hacking, some portion of that relates to claims that are not compensable, either claims Mr. Donavan is making or claims that aren't compensable because they don't involve his actions as the CEO.

(Apr. 15, 2009 Hr'g Tr. at 382-83.) Further, Hopkins' explanation for his across-the-board 55/45 allocation is also fatally flawed because he incorrectly assumed that there was discovery relating to the Cline e-mail hearing and the books and records contempt hearing, even though the Referee had precluded discovery in those two proceedings. (*See* Apr. 16, 2009 Hr'g Tr. at 504 (Hopkins conceding that, contrary to his earlier claims, no discovery was permitted in these proceedings).)

40. The Referee ignored that Donovan's affirmative defenses are the mirror image of his counterclaims, and thus discovery related to the counterclaims is equally relevant to the affirmative defenses as a matter of law. (*See* Donovan's Verified Answer to Fourth Amend. Compl., admitted at the hearing as Defendant's Ex. M, ¶¶ 173-90.) Indeed, the Referee ignored Mr. Lundin' testimony—unrebutted by any witness with personal knowledge—that that "all of the discovery work SSD did for which it sought advances related to Donovan's defenses to Plaintiffs' claims" and that "this discovery would have been conducted if SSD had only been defending Donovan against Plaintiffs' claims. (*See* Lundin Aff. ¶ 162; Mar. 23, 2009 Hr'g Tr. at 87 ("I can't think of any discovery we've sought that wouldn't relate to the . . . defense of the main action, even though it might also relate to other things as well.").)

41. Here, Donovan's affirmative defense of set off was particularly critical. In his counterclaims and third-party claims, on one hand, and in the affirmative defense of setoff, on the

other, Donovan argues that the claims against him should be dismissed because Plaintiffs owe him much more money than he would owe them if they prevail on their claims, because they have misappropriated his properties worth tens of millions of dollars. Indeed, Plaintiffs recently moved for partial summary judgment seeking an order that Donovan is liable to them for at least $11 million, and one of Donovan's principal arguments in opposition to that motion was setoff and recoupment.

42. It is well established that setoff and recoupment are complete defenses in an action. *See Citizens Bank of Md. v. Strumpf,* 516 U.S. 16, 18 (1995) ("The right of setoff . . . allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'") (quoting *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)); *Kemper Reinsurance Co. v. Corcoran (In re Midland Ins. Co.),* 79 N.Y.2d 253, 260 n.2, 582 N.Y.S.2d 58, 62 n.2 (1992) (under New York law, "mutual debts and credits may be set off even though they arise from different transactions."); *Bendat v. Premier Broadcast Group, Inc.,* 175 A.D.2d 536, 539, 572 N.Y.S.2d 796, 799 (3d Dep't 1991) (recoupment allowed because "plaintiff has a subsisting breach of contract cause of action, which has its provenance in the same contract as Premier's right to the withheld accounts receivable"); *Nat'l Cash Register Co. v. Joseph*, 299 N.Y. 200, 203, 86 N.E.2d 561, 562 (1949) ("Recoupment means a deduction from a money claim through a process whereby cross demands arising out of the same transaction are allowed to compensate one another and the balance only to be recovered. . . [Recoupment] permits a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole.").

43. Finally, another conspicuous example of Hopkins' allocating discovery Expenses to Donovan's third-party claims that plainly related to Donovan's affirmative defenses is Hopkins' treatment of the time spent by SSD relating to the depositions of Third-Party Defendants Voss and

Piercy based on the erroneous assumption that these depositions related solely to Donovan's Third-Party claims against them. But what Hopkins failed to understand was that these depositions actually related to Donovan's defenses against Plaintiff's claims. Indeed, Voss and Piercy were produced by Plaintiffs as their designated witnesses for deposition notices served on the Company and Ficus pursuant to Donovan's priority under the CPLR **as a defendant** to take the depositions of Plaintiffs before his deposition could be taken. (*See* Mar. 23, 2009 Hr'g Tr. at 89.) Accordingly, these Expenses were subject to advancement as a matter of law.

B. <u>The Books and Record Contempt Hearing.</u>

44. The Referee excluded as a matter of law $504,014.75 of Expenses related to the books and records hearing, even though these Expenses plainly related to Donovan's defense in this action. In doing so, she relied on Hopkins' opinion that these Expenses were "not within the terms of the advancement provision of the . . . Operating Agreement." (Hopkins Report ¶ 77; *see also* Apr. 15, 2009 Hr'g Tr. at 276 ("My opinion is that the work on the Books and Records Contempt matter was not necessitated by reason of Donovan being an officer of [the Company].").

45. But the books and records hearing stems from a motion made by Plaintiffs in this action to hold Donovan in contempt by allegedly removing the Company's books and records from the Company's premises. At bottom, the books and records motion is a motion in this action that Donovan has to defend because he is a defendant in this action. (*See* Lundin Aff. ¶¶ 117-21; Mar. 23, 2009 Hr'g Tr. at 78.) Indeed, a finding that Donovan is in contempt could adversely affect Donovan's ability to defend the merits of this action and could result in adverse inferences being drawn against him. (*See* Mar. 23, 2009 Hr'g Tr. at 78-79; Apr. 16, Hr'g Tr. at 514.) Thus, these Expenses are advanceable as a matter of law.

C. **Cline E-Mail Hearing.**

46. The Referee excluded as a matter of law that $419,698 of Expenses incurred by Donovan in connection with the Cline e-mail hearing on the ground that these Expenses were not necessitated by Donovan's status as a former officer, even though they were plainly necessary as part of his defense in this action. In doing so, she relied on Hopkins' opinion that these Expenses were "not within the terms of the advancement provision of the . . . Operating Agreement." (Hopkins Report ¶ 95; *see also* Apr. 15, 2009 Hr'g Tr. at 266 (the Expenses relating to the Cline e-mail hearing were "not . . . necessitated by Donovan being an officer of [the Company].").)

47. But the Cline e-mail hearing is just another motion by Plaintiffs in this action seeking relief against Donovan, in this instance for a discovery sanction against Donovan based on his allegedly unauthorized access of Mr. Cline's e-mails while this case was pending. The sanction sought is to preclude Donovan from using these allegedly privileged e-mails in defending himself in this action. This hearing also relates to a cross-motion brought by Donovan for: (a) an order permitting him to use the Cline emails in this Proceeding because Cline has waived any privilege to them, and (b) a discovery sanction precluding Cline from using privileged and confidential information against Donovan in this proceeding because Cline accessed this information without Donovan's consent. (*See* Lundin Aff. ¶¶ 122-27; Mar. 23, 2009 Hr'g Tr. at 80-82.) Thus, these Expenses stem from a motion and a cross-motion during the course of discovery in this action that relates to Donovan's ability to use information to defend himself and Donovan's ability to prevent Cline and Plaintiffs' from using information in their prosecution of their claims against him in this action. Therefore, these Expenses are advanceable as a matter of law because they plainly relate to Donovan's defense of this action.

D. The Receivership Motion and Appeal.

48. The Referee excluded as a matter of law the $107,389 of Expenses related to a motion made by Donovan in this action seeking the appointment of a temporary receiver over the Company and to his appeal of this Court's denial of that motion. In doing so, she relied on Hopkins' opinion that these Expenses were not advanceable because they were not "necessitated by reason of Mr. Donovan being an officer of [the Company]." (Apr. 15, 2009 Hr'g Tr. at 298.) But Donovan's motion was directed towards ensuring that the Company's was managed by an officer of the Court who had the Company's best interests at heart, including preserving the Company's value—a critical element of Donovan's set-off defense. Because Donovan's motion for the appointment of a temporary receiver related to his affirmative defenses to claims brought against him in this action they are subject to advancement as a matter of law.

E. Emergency Motions to Compel the Company to Make an Interim Advances Payment to Donovan.

49. The Referee excluded as a matter of law the $69,462.75 of Expenses related to motions made by Donovan to compel the Company to make an interim advances payment to Donovan. In doing so, she relied on Hopkins' opinion that these Expenses were "not subject to advancement under the . . . Operating Agreement." (Hopkins Report ¶ 120.) But, the relief sought by Donovan was completely consistent with the First Department's *Ficus I* decision that Donovan had a right to the "immediate" advancement of his Expenses.

50. These motions ultimately achieved results. As the Court will recall, during the proceedings in February 2009, the Court threatened to stay all proceedings except the advances proceedings in response to Donovan's motions unless the Company reconsidered its refusal to make reasonable voluntary payments of advances. Donovan's motions seeking that relief, moreover, were the direct cause of the Company's interim payment on Donovan's demand for advances and on its agreement going forward to pay any amounts not objected to within 10 days of receiving

Donovan's advances demands. The Referee also ignored the language in Section 3.4.5(b) of the Operating Agreement, which requires the Company to pay Donovan's "reasonable Expenses to obtain court-ordered . . . advance for Expenses" once the Court has determined that he is entitled to advancement of his Expenses. Thus, these Expenses are subject to advancement as a matter of law.

F. The Company's Motion to Repay Ficus' Loans to the Company.

51. The Referee excluded as a matter of law the $59,138.75 of Expenses related to Donovan's partial opposition to a belated motion by the Company to repay tens of millions of dollars of loans from Ficus that Ficus and the Company has collusively defaulted in order to reap the benefits of accelerating all the debts due to Ficus and to take advantage of exorbitant default interest rates. In doing so, she relied on Hopkins' opinion that the " opposition to the repayment motion] was not work that was incurred as a result of Mr. Donovan being the chief executive officer of [the Company]." (Apr. 15, 2009 Hr'g Tr. at 342.)

52. But Donovan incurred those Expenses in response to a motion made by the Company in this action to which he is a party-defendant because he was an officer of the Company. Thus, under the standard in Section 3.4.3(a), the only issue was whether Donovan reasonably incurred those expenses in opposing the Company's motion, an issue which the Referee did not address and the Company did not dispute. Indeed, one of the reasons proffered by Donovan for making this motion was to ensure that there were sufficient funds reserved by the Company to pay his future advances demands. (Lundin Aff. ¶¶ 130-32.) Thus, these Expenses are advanceable as a matter of law because they plainly relate to Donovan's defense of this action.

G. Financial Analyses.

53. The Referee excluded as a matter of law $37,206 of Expenses related to financial analyses performed by Donovan's attorneys in conjunction with their forensic accountants, Stroz Friedberg. In doing so, she relied on Hopkins' opinion that these Expenses were not adequately

explained in SSD's invoices. (Hopkins Report ¶ 135.) However, all of those Expenses related to defending Donovan against Plaintiffs' claims that funds he allegedly "stole" were directly traceable to him. (Lundin Aff. ¶¶ 174-75; Mar. 23, 2009 Hr'g Tr. at 60.) Thus, these activities were covered by the Operating Agreement's advances provisions because they relate to his liability to the Company for actions he took when he was an officer and to his affirmative defenses in this action.

H. Superiority of SSD's Charging Lien.

54. The Referee excluded as a matter of law $25,588.50 of Expenses related to a motion made by SSD to establish the superiority of its charging lien over claims made by SSD's predecessor counsel, Curtis Mallet, with respect to any advances the Court ordered the Company to pay Donovan. In doing so, she relied on Hopkins' opinion that advancement of these Expenses was "not available under the . . . Operating Agreement." (Hopkins Report ¶ 123; *see also* Apr. 15, 2009 Hr'g Tr. at 387-88.) But this motion was made in furtherance of SSD's ability to defend Donovan in this action. (Lundin Aff. ¶¶ 170-72.) Moreover, the Referee also ignored the language in Section 3.4.5(b) of the Operating Agreement, which as discussed above, requires the Company to pay Donovan's "reasonable Expenses to obtain court-ordered . . . advance for Expenses" once the Court has determined that he is entitled to advancement of his Expenses. Thus, these Expenses are subject to advancement as a matter of law.

I. Ravage, Greenberg Traurig, and Schancupp Subpoenas.

55. Finally, the Referee excluded as a matter of law $29,747.50 of Expenses related to the subpoenas directed at Marc Ravage, Greenberg Traurig, and Peter Schancupp. In doing so, she relied on Hopkins' opinion that these Expenses were "not within the terms of the advancement provision of the . . . Operating Agreement." (Hopkins Report ¶ 112 (Schancupp subpoena); *id.* ¶ 80 (Expenses relating to Ravage subpoena did "not fall within the advancement clause of the Operating Agreement"); *id.* ¶ 98 (same quote regarding Greenberg Traurig subpoena); *see also* Apr. 15, 2009

Hr'g Tr. at 309-10 (Schancupp subpoena), 320 (Ravage subpoena not "necessitated by Mr. Donovan being an officer of [the Company]"), 324 (Greenberg Traurig subpoena related to "an affirmative claim that in no way was necessitated by Mr. Donovan's position as" CEO).)

56. But all of these subpoenas were related to Donovan's defense of this action. For example, Mr. Ravage was an officer at the bank from which Donovan allegedly looted the Company's funds, and the Company used excerpts of his deposition transcript in its motion for partial summary judgment against Donovan. (*See* Lundin Aff. ¶¶ 128-29; Apr. 16, 2009 Hr'g Tr. at 558.) Thus, motion practice with respect to Ravage's deposition clearly related to Donovan's defense of this action. Furthermore, the document subpoena directed at the Greenberg Traurig law firm related to documents exchanged between that law firm, on the one hand, and Plaintiffs and Cline, on the other hand, relating to Donovan's efforts to rebut the claims alleged against him in this action. (Lundin Aff. ¶¶ 139-40.) And the Schancupp subpoena was directed at another crucial player in this litigation who once worked for Donovan and Cline at Private Capital Management Group of NY, LLC before settling with the Plaintiffs in 2007. Schancupp had submitted several affidavits staking out positions against Donovan since his settlement with the Plaintiffs. The Schancupp subpoena sought documents related to Plaintiffs' claims against Donovan, including a request for "[a]ll communications between Plaintiffs and [Schancupp] concerning Thomas Donovan or Private Capital Management Group of NY, LLC." (Lundin Aff. ¶¶ 145-46.) Thus, these subpoenas were discovery devices used by Donovan to defend himself against Plaintiffs' claims in this action and the Expenses relating to them are advanceable as a matter of law.

III. THE REFREE IMPROPERLY ADMITTED AND CREDITED HOPKINS' LEGAL OPINIONS

57. The Referee's error in applying the wrong legal standard arose, in part, from her error in allowing Hopkins to offer "expert" legal opinions. Donovan objected repeatedly to the Company's proffer of Hopkins' opinions on matters of law. (*See, e.g.*, Mar. 23, 2009 Hr'g Tr. at

184, 201.) As stated above, the substance of Hopkins' testimony was that in order to be reimbursable by an Advance any task (*i.e.* motion, research *etc.*) must have related directly to Donovan's performance of his duties as Chief Executive Officer of the Company or been 'necessitated" by such performance or duties. By definition, Hopkins' testimony was an impermissible opinion on the legal interpretation of the contract.

58. Expert testimony is permitted only if it will "help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical [fact finder]." *De Long v. County of Erie*, 60 N.Y.2d 296, 307, 469 N.Y.S.2d 611, 617 (1983); *Sanders v. Otis Elevator Co.*, 232 A.D.2d 327, 328, 649 N.Y.S.2d 19, 20 (1st Dep't 1996). Hopkins' testimony about whether, as a matter of contract law and interpretation, Donovan's Expenses were within the scope of the advancement provisions of the Operating Agreement, was not the proper subject of expert testimony. As the First Department explained in *Colon v. Rent-A-Center., Inc.*, 276 A.D.2d 58, 61-62, 716 N.Y.S.2d 7, 10 (1st Dep't 2000), experts are not permitted to opine on questions of law at all:

> [E]xpert witnesses should not be called to offer opinion as to the legal obligations of parties . . . ; that is an issue to be determined by the trial court. Expert opinion as to a legal conclusion is impermissible. Likewise, the interpretation of a statute is purely a question of law, and is the responsibility of the court, not the trier of facts.

See also Franco v. Jay Cee of N.Y. Corp., 36 A.D.3d 445, 448, 827 N.Y.S.2d 143, 146 (1st Dep't 2007) (experts cannot testify about "the meaning and applicability of the law, which is the province of the court"); *Russo v. Feder, Kaszovitz, Isaacson, Weber, Salad & Bass, LLP,* 301 A.D.2d 63, 69, 750 N.Y.S.2d 277, 282 (1st Dep't 2002) ("An expert may not be utilized to offer opinion as to the legal standards which he believes should have governed a party's conduct."); *Measom v. Greenwich & Perry St. Housing Corp.,* 268 A.D.2d 156, 159, 712 N.Y.S.2d 1, 3 (1st Dep't 2000) ("Expert testimony as to a legal conclusion is impermissible."). Thus, "[w]here the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a

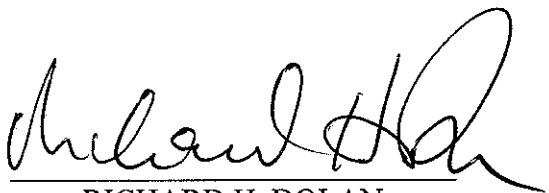
plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected." *Singh v. Kolcaj Realty Corp.*, 283 A.D.2d 350, 351, 725 N.Y.S.2d 37, 39 (1st Dep't 2001).

59. The Company has never claimed that the controlling provisions of the Operating Agreement are ambiguous, and has never proffered any parol evidence that might be relevant to the meaning of those provisions. In all events, Hopkins had no knowledge whatever about the negotiation or drafting of the Operating Agreement, and was merely offering his opinions about the proper interpretation of its unambiguous text. The Referee's ruling, over Donovan's objections, allowing Hopkins to offer "expert" legal opinions was clearly error. *See Fruin-Colnon Corp. v. Niagara Frontier Transp. Auth.*, 180 A.D.2d 222, 227, 585 N.Y.S.2d 248, 252 (4th Dep't 1992) ("The contract is controlling and the expert witnesses were not 'experts' in contract interpretation."); *Hess v. Zoological Soc'y of Buffalo, Inc.*, 134 A.D.2d 824, 521 N.Y.S.2d 903 (4th Dep't 1987) (expert testimony not admissible to aid in interpretation of contract term "negotiated proposal"). Indeed, in rejecting the portion of the Referee's November 2008 Report that required Donovan to post a bond, this Court emphasized that it had referred only factual matters, and not questions of law, to the Special Referee. If interpreting the Operating Agreement was beyond the scope of the reference to the Referee, it was beyond the scope of any testimony (expert or otherwise) submitted to her.

CONCLUSION

60. For the reasons set forth above, Donovan's motion to confirm in part, reject in part, and modify in part the Report should be granted.

Dated: New York, New York
July 24, 2009



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