

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
Justice

**E-FILE** PART 60

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

INDEX NO. 600926/2007

- v -

PRIVATE CAPITAL MANAGEMENT, LLC, et al.,  
Defendants.

MOTION DATE \_\_\_\_\_  
NYS SUPREME COURT  
RECEIVED  
FEB 23 2009  
MOTION SEQ. NO. 046  
MOTION CAL. NO. \_\_\_\_\_  
MOTION SUPPORT OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

**FILED**  
**Feb 24 2009**  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

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

Defendant, Private Capital Management, LLC ("PCM"), moves for the advancement of litigation expenses in accordance with the Private Capital Group LLC Operating Agreement. Plaintiffs cross-move for an order, pursuant to New York Limited Liability Company Law § 702, dissolving PCM.

By Order dated April 24, 2008, I granted a motion by Defendant, Thomas B. Donovan, for advancement of litigation expenses, but denied the same motion as to Defendants Christopher Chalavoutis and Peter Kamran. On January 20, 2009, the Appellate Division, First Department, affirmed the April 24 Order, but modified it to provide for advancement of litigation expenses to Chalavoutis and Kamran. *See Ficus Investments, Inc. v. Private Capital Management, LLC*, 2009 N.Y. Slip Op. 00263 (1st Dep't Jan. 20, 2009.) Now, Defendant PCM moves for the same relief on the basis of its status as a member of Private Capital Group LLC ("PCG").

The PCG Operating Agreement provides for the advancement of litigation expenses:

incurred by a Person who is a Party to a Proceeding because he or she is a Member, Manager or Officer if such person delivers to [PCG] a written affirmation of his or her good faith belief that his or her conduct does not constitute behavior that would result in Liability for (i) intentional misconduct or a knowing violation of the law, or (ii) any transaction for which such Member, Manager or Officer received a personal benefit in violation or breach of any provision of this

Agreement; and such Member, Manager or Officer furnishes [PCG] a written undertaking, executed personally or on his or her behalf, to repay any advances if it is ultimately determined that he or she is not entitled to indemnification under this Section 3.4 or the Florida [Limited Liability Company] Act. (Operating Agreement § 3.4.3(a).<sup>1</sup>)

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In my April 24 Order I concluded that Donovan was entitled to such advancement because he was an Officer of PCG. There is no dispute that PCM is a Member of PCG. By letter dated September 18, 2008, counsel for PCM, Edward J. Nitkewicz, made a formal demand for reimbursement of PCM's litigation expenses. (See Nitkewicz Affirm. Ex. C at 1-2.) Attached to that letter was an Affidavit and Undertaking, made on behalf of PCM by its manager, Defendant Thomas B. Donovan. (*Id.* at 3-4.) The Affidavit and Undertaking were made in accordance with the requirements of § 3.4.3(a) of the Operating Agreement. As a Member of PCG, which has satisfied the requirements of § 3.4.3(a), and for all the same reasons elucidated in my April 24 Order as affirmed by the Appellate Division, PCM is also entitled to advancement of Expenses, as that term is defined in § 3.4.1(d) of the Operating Agreement.

Plaintiffs' opposition to PCM's motion is based on their contention that PCM is merely an alter ego of Donovan, and that any recovery by PCM of Expenses would be duplicative of the advances Donovan is receiving under the April 24 Order.<sup>2</sup> Moreover, Plaintiffs argue that PCM's demanded fees are patently unreasonable, and that any amount PCM is determined to be due must be reduced to account for Mr. Nitkewicz's representation of other Defendants who are not entitled to advancement.<sup>3</sup>

These factual questions are very similar to the factual questions that the April 24 Order referred to Special Referee Dershowitz. I can therefore see no principled reason that this experienced and talented Special Referee cannot hear and report on the issues of: (1) the reasonableness of the Expenses billed to PCM by Nitkewicz & McMahon, LLP; (2) which of the Expenses apply to PCM; and (3) which of the Expenses were incurred as a result of PCM's being "a Party to a Proceeding because [it] is a Member" of PCG. (Operating Agreement § 3.4.3(a).) If Plaintiffs are correct in their belief that PCM has not generated any independent legal fees, or that the invoiced bills reflect services performed for other Defendants, or that the fees billed

1

A copy of the PCG Operating Agreement is annexed to the September 27, 2008 Affirmation of Edward J. Nitkewicz at Exhibit B.

2

Plaintiffs also opposed this motion on the same grounds it opposed Donovan's motion for advancement - that the plain language of the Operating Agreement prohibits it. This argument, which I rejected in the April 24 Order, was likewise rejected by the First Department. I therefore see no reason to discuss it further here.

3

Plaintiffs also argue that Mr. Nitkewicz's representation of PCM is unauthorized, as Cline has filed a motion seeking his disqualification on the grounds that the representation constitutes a conflict of interest. This motion is currently *sub judice*.

are patently unreasonable, the Special Referee's report and recommendations will reflect her similar findings on those issues.

The April 24 Order also put into place a protocol to govern the advancement of litigation expenses going forward (the "Protocol"). By Stipulation dated February 17, 2009, Plaintiffs and Defendant Donovan agreed to refine the Protocol to provide for, *inter alia*, the submission by Donovan to Plaintiffs of more detailed invoices with their demands for advancement. (*See* Stipulation, February 17, 2009 at 2-3; *see also* Order dated February 19, 2009, deciding Motion Sequence No. 059, at 2.) The Protocol, along with the modifications set forth in the Stipulation of February 17, 2009, shall also govern the procedure by which PCM's demands shall be submitted and reviewed, after the initial hearing before Special Referee Dershowitz: the invoices submitted by PCM in connection with its demand for advances shall be subject to the requirements outlined in the Stipulation, and Plaintiffs shall make an interim payment of any undisputed amounts, directly to Nitkewicz & McMahon, LLP.

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Turning now to Plaintiffs' cross-motion, I note that Plaintiffs have not asserted a cause of action seeking the judicial dissolution of PCM; rather, their application for this relief takes the form of a cross-motion. Unlike §§ 1104 and 1104-a of the Business Corporation Law, which provide that shareholders may "present a petition" of dissolution to the court in certain situations and upon certain grounds, § 702 of New York's Limited Liability Company Law merely states that, "On application by or for a member," the court may decree dissolution. While the statute thus appears not to deny Plaintiffs the right to seek this relief by way of cross-motion, it seems to me that the better practice is to apply for judicial dissolution by way of a plenary action. This would provide Plaintiffs the opportunity to plead a cause of action for judicial dissolution, and it would enable PCM to answer this claim, rather than merely oppose the cross-motion.

Although the case law applying LLCL § 702 is not exactly robust, it is clear that "[t]he appropriateness of an order of dissolution of a limited liability company is vested in the sound discretion of the court hearing the petition." *Matter of Extreme Wireless, LLC*, 299 A.D.2d 549, 550 (2d Dep't 2002). Moreover, the vast majority of the cases applying § 702 involve an application for dissolution that is made by way of cause of action contained in the complaint (*see, e.g., Klein v. 599 Eleventh Avenue Co., LLC*, 14 Misc.3d 1211A (Sup. Ct. N.Y. Co., 2006) (Cahn, J.); *Schindler v. Niche Media Holdings, LLC*, 1 Misc.3d 713 (Sup. Ct. N.Y. Co. 2003) (Kornreich, J.), *abrogated by Tzolis v. Wolff*, 10 N.Y.3d 100 (2008)), counterclaim (*see, e.g., Widewaters Herkimer Co., LLC v. Aiello*, 28 A.D.3d 1107 (4th Dep't 2006)), or plenary petition (*see, e.g., Artigas v. Renewal Arts Realty Corp.*, 22 A.D.3d 327 (1st Dep't 2005); *Horning v. Horning Const., LLC*, 12 Misc.3d 402 (Sup. Ct. Monroe Co. 2006) (Fisher, J.); *Spires v. Casterline*, 4 Misc.3d 428 (Sup. Ct. Monroe Co. 2004) (Stander, J.)).

Even the case cited by Plaintiffs to support their contention that they need not bring a plenary petition, *Caplash v. Rochester Oral & Maxillofacial Surgery Associates, LLC*, 20 Misc.3d 1004(A) (Sup. Ct. Monroe Co. 2008) (Fisher, J.), included an application for dissolution by way of a counterclaim. Both defendants

and plaintiff in *Caplash* sought judicial dissolution of the defendant LLC, and the issue before the court was whether the plaintiff had standing to seek such relief.

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Although plaintiff did not plead a cause of action for dissolution, Justice Fisher pointed out that summary judgment on an unpleaded cause of action may nevertheless be appropriate "if the proof supports such cause and if the opposing party has not been misled to its prejudice." *Id.* at \*5 (quoting *Weinstock v. Handler*, 254 A.D.2d 165, 166 (1st Dep't 1998)). Moreover, the question of whether the cross-motion for summary judgment was supported by the law had already been answered in the affirmative by the Appellate Division, Fourth Department, and thus Justice Fisher was obligated by the law of the case to conclude that the cross-motion should be granted if plaintiff was found to have standing.

Here, Plaintiffs have not sought summary judgment on a claim or counterclaim for judicial dissolution, but rather, have merely cross-moved for the relief sought. Defendant PCM has neither interposed a counterclaim for dissolution nor indicated in any way that it would favor such relief. As stated above, I believe the preferable way to proceed with this application for judicial dissolution is by way of petition, and, exercising my discretion, I therefore deny Plaintiffs' cross-motion without prejudice.<sup>4</sup>

Accordingly, it is

ORDERED that PCM's motion for the advancement of Expenses is GRANTED as set forth above; and it is further

ORDERED that the issues of (1) the reasonableness of the Expenses billed to PCM by Nitkewicz & McMahon, LLP; (2) which of the Expenses apply to PCM; and (3) which of the Expenses were incurred as a result of PCM's being "a Party to a Proceeding because [it] is a Member" of PCG are hereby referred to Special Referee Marilyn Dershowitz to hear and report with recommendations, except that, in the event of, and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to the Special Referee; and it is further

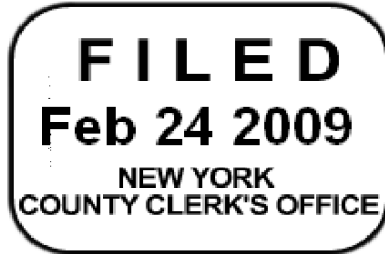
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<sup>4</sup> PCM opposed the cross-motion for dissolution on several grounds. My denial of the cross-motion for the reasons stated above is not intended to bear in any way on the merits of the application for dissolution.

ORDERED that, going forward, the parties shall comply with the Protocol set forth in the Order of April 24, 2008, as modified and refined by the Stipulation of February 17, 2009, and as set forth above, in connection with the determination of future questions of reasonableness; and it is further

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ORDERED that Plaintiffs' cross-motion for judicial dissolution of PCM is DENIED without prejudice.



Dated: 2/23/09

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

cc: Special Referee Marilyn Dershowitz