Exhibit 1

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

PRESENT: Marilyn B. Dershowitz
Special Referee

E-FILE

PART 80R

Jicius

INDEX NO. 600926/07

MOTION DATE

- v -

PCM, LLC, et al

MOTION SEQ. NO. 059

MOTION CAL. NO.

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	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that ~~this motion~~ the referee report of June 29, 2009 is withdrawn and this report is substituted.

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

FILED
Jul 07 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 7, 2009

Marilyn B. Dershowitz, Sp Ref

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
---X
FICUS INVESTMENTS, INC. and PRIVATE CAPITAL GROUP, LLC,

Plaintiffs,
-against-

Index No.600926/07E
Referee Report (Amended July 7, 2009)

PRIVATE CAPITAL MANAGEMENT, LLC, THOMAS B. DONOVAN, et al.,

Defendants.
---X
MARILYN B. DERSHOWITZ, Spec Ref:

FILED
Jul 07 2009
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the annexed stipulation of the parties of July 6, 2009, and the inadvertent errata of the undersigned the report of June 29, 2009 is withdrawn and this Amended Report is substituted:

Pursuant to the Orders of Honorable Bernard J. Fried, JSC, dated April 24, 2008 and February 19, 2009, the issue of the advancement of fees for Thomas B. Donovan was referred for hearing and report by the undersigned. The hearing proceeded on March 23, April 15, and April 16, 2009 to completion. Witnesses included John M. Lundin and John Silas Hopkins III. The documents marked in evidence accompany this report.

Although on a previous application for fees the plaintiffs had agreed not to contest the hourly rates requested by the defendant or the time spent, in this hearing they dispute a number of aspects of the billings including the rates and hours. Presently the defendant, Donovan, seeks in his revised demands through March 2, 2009 the balance of $3,828,708.49 or $2,133,304.21, having already received an advancement of $1,695,404.28 for fees, from the plaintiff.

Mr. Donovan had been the Chief Executive Officer of Private Capital Group, LLC ("PCG"). Donovan and Cline had formed PCG, Florida and were the senior executives of that entity. PCG and Donovan and Cline were sued on a claim of breach of fiduciary duties. Initially Troutman, Sanders (the successor to Parker, Chapin) represented Cline and Donovan. Cline eventually settled with the plaintiffs and secured other counsel. Curtis, Mallet was then counsel to Donovan. In a separate action, Donovan's assets were frozen, rendering him unable to pay counsel. At that time Curtis, Mallet was relieved; Schlam, Stone & Dolan replaced the Curtis, Mallet firm as counsel to Donovan.

The basis for the claim for fees is the agreement by PCG to "indemnify and hold harmless its Members, Manager and Officers, or any individual who is a Party to a Proceeding because he or she is or was a Member, Manager or Officer, from and against any and all Liability whatsoever arising in connection with the Company,..." as detailed in the Private Capital Group LLC Operating Agreement at page 12, ¶3.4.2 (a).

At the commencement of the hearing, counsel for the law firm seeking advancement of fees on behalf of Donovan argued as a first matter that no expert was required for the hearing since advancement of fees is only a loan, and no more than a good faith estimate of the fees, subject to a later tally. In opposition counsel for the plaintiff argued that there had been problems with the Schlam Stone firm's billing and that $1.5 had already been paid on behalf of Donovan with half of the funds having gone to the Schlam, Stone firm. Moreover, he noted that a party seeking fees bears the burden of demonstrating its entitlement.

John Silas Hopkins, III testified as an expert on behalf of the plaintiff; he had served as the expert on the fees in the Enron matter. In the instant proceeding he has reviewed the billing records, filings and rulings in an effort to evaluate the reasonableness of the time spent, the fees charged and the issues addressed by counsel. 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.

The first witness was John M. Lundin, the Schlam Stone & Dolan LLP member who represented that he was responsible for the Donovan matter. He highlighted that a far greater number of law persons had worked on the matter on behalf of the plaintiffs than on behalf of the defendants. He emphasized that a tremendous amount of documentation was required in discovery. He also discussed the deposition process and his personal involvement with it. It became apparent that much of the activity of his firm, Schlam, Stone benefitted the Copperfield bankruptcy which is not the subject of this proceeding as well as other related matters in litigation. While there may be a denomination of separate client matters for each action, it cannot be disputed that information gleaned in this action enures to the benefit of the defendant in the Copperfield and other actions.

The most highly contentious aspect of the fees sought involves the hearings on whether the access of Mr. Cline's email by Mr. Donovan included a deliberate violation of the attorney/client privilege and whether the actions of Mr. Donovan in the removal and concealment of books and records, after the Ficus takeover of the offices of PCG,FL at 2 Jericho Place represented a contempt in violation of the court's order with regard to discovery access ordered by the court. Before the undersigned hearings on these issues consumed numerous days, and were very time-consuming, separate and apart from the hearing on advancement of fees. These hearings are obviously highly significant to Mr. Donovan. And, they grew out of this case wherein he was sued. However that they arose out of this action is not necessarily sufficient to mandate that the fees engendered by these hearings are advanceable.

Donovan also seeks fees for having sought a receiver claiming that Ficus had mismanaged the company, mandating the appointment of a receiver. However he has made no showing whatsoever that the motion was grounded in any reality other than he did not like the way the Ficus group was managing the company that he had previously owned and managed however he wished. In any event his application was denied as was the appeal of the Order. Clearly, the results obtained were not positive.

On cross examination of Mr. Lundin, the plaintiffs pointed out that the bills were initially defective and lacked sufficient detail requiring that they be resubmitted at additional cost. Counsel, Mr. Lundin, defended the actions of Mr. Donovan, with respect to he contempt issue, by asserting that Mr. Donovan took corporate books and records because they were his and not the property of the plaintiff/corporation. Still Mr. Lundin seeks fees for defense of these actions which are, by Mr. Donovan's own admissions for his personal benefit, and not in his role as CEO of the corporation. If we credit that the books and records which Mr. Donovan took are his personal property then plainly his actions are outside the scope of his employment; alternatively if he did indeed remove the books and records which rightfully were the property of the corporation he engaged in a deliberate defalcation of his duties. Thus, under either scenario he has shown no legitimate entitlement to advancement of fees for this aspect of the hearings.

The testimony of Mr. Lundin made clear that Mr. 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. Plaintiffs in these hearings claim that the access of the email account by Mr. Donovan was for personal gain, it violated the attorney/client privilege and was outside of Mr. Donovan's corporate duties. These "email hacking" hearings were also time-consuming and required many additional days of hearing. Indeed if the allegations are proven that Mr. Donovan hacked into the email without authorization of Cline and without his knowledge 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.

A further disputed issue involves the issue of where fees which were already paid were to be allocated. Judge Fried ruled on this issue that the fees had to be forwarded to Curtis Mallet, not a matter within the suit against Mr. Donovan and not properly advanceable. Donovan also seeks fees for work on a motion for a stay. The plaintiff contests advancement for these fees.

John Silas Hopkins III testified after the defendant's counsel, John Lundin. Mr. Hopkins was qualified as an expert, having developed an expertise in the area of fees through his long practice in the area of bankruptcy. He described his methodology in his review of the Schlam, Stone bills. He complained at times about the lack of specificity in the billing entries. He conceded that the resubmitted bills were improved and did assist him somewhat in his analysis.

That there is an operating agreement that provides that officers of the company are entitled to fees, when sued in the course of employment is undisputed. However, the expert pointed out that inquiry was still warranted whether the suit was brought against the individual as an officer of the corporation and the reasonableness of the expenses engendered. The question of the "misconduct" of Mr. Donovan was repeatedly addressed as something for which fees should not be permitted. Mr. Donovan stated that he hacked email to ensure that Cline did not steal anything in which he, Donovan, had an interest. Thus, that which he did was plainly not as an officer of the company. That an examination of this activity within this action was generated by his admitted activity on his own behalf and not on behalf of the company would warrant that fees for hearing on this matter are outside the scope of advanceable fees.

Donovan resigned from the plaintiff corporate entity, Private Capital group on April 10, 2007. The 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 Thomas B. Donovan as he admitted. In hearings before the undersigned, separate from this fees hearing, he has testified that the books and records which he took belonged to other companies, not those of PCG,FL. He 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. Moreover, he had testified that he hacked into Mr. Cline's email to ensure the preservation of his personal assets, having <u>nothing</u> to do with the plaintiff corporation.

Based on the charges for fees for these specific activities, the expert witness opined that $504,014.75 charged for the hearing on the books and records issue plus $419,698 for the hearings on the email issue are not advanceable. Further deductions were urged for the motion wherein Donovan sought to have a receiver appointed which was denied, then appealed, and again denied for a sum of $244,576. Random other charges which were general entries were also challenged. There were time charges for the prosecution of third party claims, all of which were dismissed. These charges total $198,632. Additionally Copperfield fee charges were interspersed with the charges for this action in the amount of $23,500. There were charges for a motion for repayment which bore no relationship to Mr. Donovan in the amount of $59,138.75. The expert also challenged certain work done as not relevant to Mr. Donovan or time charges which he found to be excessive for the work done, including some for the corporate plaintiff at a time when Schlam, Stone & Dolan was not even counsel to the entity.

Indeed what is crystal clear is that the defendants had spun a complicated web of interconnected corporations which for certain purposes were touted as independent entities but for others not. At this juncture they seek to charge the plaintiff for legal work done for any and all of the entities as though Mr. Donovan and the entities were somehow synonymous.

The expert recommends deductions from the demands of Schlam, Stone as billed for matters "outside the scope of the operating agreement" including motion practice for contempt, for repayment, for a receivership, to quash subpoenas, and an appeal of the receivership denial. Additionally he recommends that time spent on a charging lien, financial analysis and reductions of certain demands by 55%, plus the removal of the charges assessed for hearings on the books and records contempt and the email hearings. In all he recommends that charges of $2,005,042.12 be deducted as claims for work for matters not within the scope of the operating agreement. I credit these recommendations.

Hopkins urges that $464,904.75 should be deducted for "non-advanceable" work including matters which are outside this action before the court, training, work for other clients, a billing error, overhead, counterclaims and third party claims. I credit these as non-advanceable items, except for the counterclaims and third party claims for which the charge assessed is $198,632. Thus I conclude that **$264,669.25** is properly deductible from the advances sought in this category.

The third basis for which the expert urges deductions is for "reasonableness". To be deducted he includes a charge for a letter of $7,647.50, opposition to a motion, the advances motion and trial, deposition preparation, Beseda charges and a Marcus rate adjustment. I credit that the advances motion and trial should be reduced as recommended, by $119,073 but I do not believe that it is appropriate to deduct the remaining charges.

"An award of attorneys' fees pursuant to ...a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered." (***Kamco Supply Corp v Annex Contr***. 261 AD2d 363, 365 [2d Dept 1999]) Pursuant to the inherent and statutory power of the court to regulate the practice of law, it bears responsibility for the supervision of the charging of fees for legal services. (***Matter of First Natl Bank of E Islip v Brower***, 42 NY2d 471) In accordance therewith it is essential that a review of fees examine whether amounts are reasonable and warranted.

Accordingly I find and report that deductions in the amount of **$2,388,779.37** are warranted from the **$4,241,373.99** demanded as advancements the Schlam, Stone firm. Thus the firm is entitled to recover as "reasonable" and warranted as advancement of fees the sum of **$1,852,594.62**.

Thus I recommend that upon a motion pursuant to CPLR §4403 that this report be confirmed and that the plaintiff firm fee advancement for the period covered by the hearing be set in accordance with this report.

July 7, 2009

SP REF

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

FICUS INVESTMENTS, INC. and PRIVATE CAPITAL GROUP, LLC, *Plaintiffs*, *-against-* PRIVATE CAPITAL MANAGEMENT, LLC, *et al.*, *Defendants*. THOMAS B. DONOVAN individually and derivatively on behalf of PRIVATE CAPITAL GROUP, LLC, *et al.*, *Counterclaim Plaintiffs*, *-against-* FICUS INVESTMENTS, INC. and PRIVATE CAPITAL GROUP, LLC, *Counterclaim Defendants*. *-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,	Index No.: 600926/07 **STIPULATION**

ROUNDPOINT MORTGAGE CO. and PETER SCHANCUPP, *Third-Party Defendants.* *-and-* PRIVATE CAPITAL MANAGEMENT, LLC and PRIVATE CAPITAL MANAGEMENT CORP., *Nominal Defendants.*	

IT IS HEREBY STIPULATED AND AGREED, by and among counsel for the undersigned parties, with regard to the Report of Special Referee Marilyn Dershowitz dated June 29, 2009 (the "Report") (a copy of which is attached hereto as Exhibit 1) regarding certain demands made by Defendant Thomas B. Donovan for the advancement of legal fees and expenses by Plaintiff Private Capital Group LLC (the "Company") as follows:

1. The last sentence beginning on the bottom of Page 7 and carrying over to the top of Page 8 of the Report shall be amended to read as follows: "Thus, I conclude that $264,669.25 is properly deductible from the advances sought in this category."

2. The second-to-last paragraph on Page 8 of the Report shall be amended to read: "Accordingly, I find and report that deductions in the amount of $2,388,779.37 are warranted from the $4,241,373.99 invoiced by the Schlam, Stone firm. Thus, the firm is entitled to recover as 'reasonable' and warranted as advancement of fees the sum of $1,852,594.62."

3. Nothing in this Stipulation shall be construed as a waiver by either party of any arguments they may make challenging the factual findings or legal conclusions reached by the Referee in the Report, all of which are expressly reserved.

4. This stipulation may be signed in counterparts. Signatures transmitted by

facsimile or e-mail attachment shall be deemed to be originals.

Dated: New York, New York
July 6, 2009

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