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

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

Plaintiffs,

-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.

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

AFFIRMATION OF CRAIG CARPENITO

I, **CRAIG CARPENITO,** do hereby affirm under penalty of perjury the following to be true:

1. I am an attorney admitted to practice before the courts of New York State and counsel with the law firm of Alston & Bird LLP, attorneys for Plaintiffs Ficus Investments, Inc. ("Ficus") and Private Capital Group, LLC (the "Company") in the above-captioned action.

2. I submit this affirmation in further support of the Company's cross-motion for an order pursuant to CPLR § 4403 confirming the July 7, 2009 Amended Report (the "Report") of Special Referee Marilyn Dershowitz (the "Referee"), which determined that defendant Thomas Donovan was entitled to be advanced $1,852,594.62 of the demanded $3,828,708.49 in legal fees and expenses ("Expenses") he purportedly incurred between January 1, 2008 to January 31, 2009 and later submitted to the Company for advancement.

PRELIMINARY STATEMENT

3. At its core, Donovan's reply to the Company's motion to confirm the Referee's Report is nothing more than a stubborn refusal to acknowledge this Court's prior clear interpretation of the advancement provisions of the Operating Agreement. Donovan insists on his position – that, even though he is entitled to advancement based solely on his status as a former Officer of the Company, the Company must advance him all Expenses he incurs in this action without regard for whether those Expenses actually stem from the defense of claims brought against him because of his role as an Officer of the Company – despite the fact that it finds no basis in the Operating Agreement, the orders of this Court or the First Department, or any principals of law. Indeed, as evidenced below and as set forth in the Company's August 14, 2009 submission, Donovan's position is directly contradicted by the language of the Operating Agreement, the April 24 and February 19 Orders of this Court, and Delaware case law.

4. Moreover, Donovan's position should be a familiar one to this Court. It is virtually the same argument he made in January and February of this year before both Your Honor and the Referee in trying to avoid any factual hearing whatsoever before the

Referee as to his Expenses. Both this Court and the Referee made short work of these arguments then and, respectfully, the Court should do the same now. Indeed, to indulge Donovan's position at this stage would be to render pointless the Your Honor's prior decisions, the copious work of the Referee, and the time and money spent by the parties and the Company's expert.

5. It is clear that Donovan and his counsel cling to this untenable stance because they realize that only a portion of the millions of dollars of Expenses Donovan has racked up in this litigation actually stem from his defense of the claims on the merits and are thus legitimately subject to advancement. The balance of his legal bills, of course, are the result of his own attempts at a counter-attack and delay strategy based on distortion and violation of clear orders of this Court, abuse of the CPLR and acceptable discovery practices, and other attempts to distract from the true merits of the claims against him. Accepting Donovan's strained "interpretation" of the Operating Agreement would force the Company to pay for work that bears no connection to Donovan's Officer status or the defense of claims against him in that status, would not only award Donovan for his chicanery but would turn the very purpose of advancement on its head.

ARGUMENT

6. Donovan seems to believe that if he refers enough times to the First Department's holding that as an Officer of the Company he is entitled to advancement in this action, this Court will ignore any inquiry into the actual expenses for which he demands advancement and will award him any and all of the fees billed by his attorneys in this action – subject only to a reasonable-hours objection – regardless of the nature of the work that resulted in those fees. Donovan stubbornly ignores the fact that this Court,

at the time it ruled Donovan was entitled to advancement, could have decided just that, but specifically chose not to do so. Rather, Your Honor determined that, under the clear terms of the Operating Agreement, the Expenses demanded by Donovan must be subject to a factual determination as to "which of Donovan's claimed 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)," (April 24, 2008 Order) and thus "whether or not the hours billed are reasonable or reasonably related to work necessitated by virtue of Donovan being an Officer of [the Company]" (February 19, 2009 Order).

7. This Court has correctly recognized that under the terms and purpose of the Operating Agreement – and indeed, under principles of common sense – that the Company can only be obligated to advance Donovan those Expenses which were incurred as a result of the defense of claims arising from his status vis-à-vis the Company.

8. Despite the Company's clear reliance on the language of Your Honor's April 24 and February 19 Orders as the bases for its objections to portions of Donovan's demanded Expenses, Donovan insists that the Company is trying to "re-interpret" the Operating Agreement and enforce a "new condition." Notably, Donovan tries to downplay the import of the February 19 Order by claiming the Company's position is that Your Honor was "rewriting" the Operating Agreement through its issuance. As even a brief reading of my moving affirmation on this motion makes clear, the Company has never taken that position. The February 19 Order, by making clear the format that Donovan's demanded Expenses must be in to facilitate a proper review by the Company, simply followed and further emphasized the April 24 Order's holding that advanceable

Expenses must be both reasonable and related to Donovan's defense as an Officer of the Company. Donovan obstinately refuses to acknowledge the fact that this Court never would have ordered that Donovan rewrite his demands so as to allow the Company to determine if his Expenses were "reasonably related to work necessitated by virtue of Donovan being an officer" if Your Honor had not already determined that Donovan was only entitled to Expenses arising from his defense of clams against him as an Officer. Indeed, Donovan does not even attempt to dream up another reason for why Your Honor would have ordered his Expenses to be submitted in this manner.

9. Ironically, it is Donovan who is trying to force his own unsupported "interpretation" of the Operating Agreement upon this Court – in direct contrast to the decisions already made by Your Honor – by making the nonsensical argument that although the Operating Agreement undeniably entitles him to advancement based solely on the existence of claims against him as an officer of the Company, the Company must pay for his tactics and maneuverings in this litigation that have no feasible connection to his defense of those claims.

10. Mr. Dolan's reply affirmation claims that "there is no dispute between [Donovan] and the Company that the issue before the Court is purely one of contract interpretation." (September 4, 2009 Affirmation of Richard Dolan ("Dolan Aff.") at ¶ 2). Again, Donovan seeks to mischaracterize the Company's position for his own purposes; it is only Donovan who is attempting to force this Court to re-examine its prior interpretation of the Operating Agreement. It is abundantly clear that Your Honor already interpreted the Operating Agreement's advancement provisions in making the April 24 reference and that interpretation governs. The only matter now before Your

Honor is whether the Referee's factual determinations under that interpretation and reference are supported by the record of the hearings before her and it is well-established that these factual determinations should be given great deference. Nager v. Panadis, 238 A.D.2d 135, 136, 259 N.Y.S.2d 118, 119 (1st Dep't 1997)("the Referee is considered to be in the best position to determine the issues presented")(internal citations omitted).

11. Indeed, even Donovan admits that the Referee was charged with determining whether Expenses were "incurred in defending the claims brought against him by Plaintiffs." (Dolan Aff. ¶ 3). The Company does not disagree. The Referee found, based on ample testimony and exhibits presented, that the millions of dollars of Expenses racked up by Donovan in connection with work done on – for example – the Email Hacking Hearing or the Books and Records Contempt Hearing, were not incurred in defending claims brought against Donovan, let alone claims brought by virtue of Donovan having been an Officer of the Company. Donovan's position that he is entitled to all Expenses incurred by him in this action ignores the plain fact that not every motion, issue, or event in this case bears a connection to the claims against him in the Complaint. The Email Hacking Hearing and the Books & Records Contempt Hearing are powerful examples of this point. These hearings were simply not the result of Donovan's defense of any claims against him in the Complaint, but were necessitated solely by Donovan's own outright thieving behavior and his repeated violations of this Court's orders and the CPLR. Indeed, the fact that Donovan seeks his Expenses on the Books & Records Contempt Hearing despite the fact that he has now been found in contempt and will thus be required to reimburse the Company's legal expenses from that hearing demonstrates the ridiculousness of his position. The concept of Company advancement to Donovan for

his theft of thousands of pages of private e-mails, including attorney-client privileged and otherwise confidential materials, from Lawrence Cline and the Company is equally offensive and preposterous. These hearings in no way relate to the defense of claims in this action, but rather to contemptuous conduct and discovery abuses committed by Donovan well outside his status as an Officer of the Company and, at times, after he was clearly no longer an Officer of the Company. This position cannot be reconciled with the Operating Agreement, this Court's Orders, case law, or even common sense.

12. Donovan also tries to support his assertion that the Company is imposing a "new" condition on his advancement right by claiming that the Company has not previously argued that Donovan is only entitled to Expenses connected to his defense of claims against him as an officer. This is nonsense. Donovan seems to have conveniently forgotten that prior to the initial hearing on Expenses before the Referee in 2008 – the first proceeding in this action in which the actual amount of Expenses to be awarded, rather than merely Donovan's entitlement to them, was at issue -- the Company objected not only to work done on behalf of other individuals or in other actions (such as the Copperfield bankruptcy) but to a significant amount of Expenses indisputably incurred by Donovan in this action. These Expenses encompassed Donovan's initial motion for a temporary receiver, his motion for a preliminary injunction granting access to Company books and records, a contemplated motion to disqualify Alston & Bird as counsel, and transition costs caused by his multiple changes in counsel. Donovan also conveniently ignores the fact that he willingly stipulated to the Company's objections to the initial set of Expenses – resulting in a reduction of approximately 50% of the demanded Expenses – and, as a result, the Company was not forced to raise the present issue before the Referee

or this Court. Donovan declares that this stipulation excluded Expenses incurred in other actions and in connection with his third-party claims and counterclaims, but conspicuously and disingenuously fails to acknowledge that he also agreed to the large reduction of Expenses of costs incurred in this action and solely by him – the exact same types of Expenses to which he now argues he is entitled under the Operating Agreement. Notably, this 50% reduction of Donovan's initial Expenses bears a striking resemblance to the reduction the Referee has found is now appropriate as to the current Expenses.

13. Donovan's claim that Delaware law is not relevant to supporting this Court's interpretation of the Operating Agreement, and the Referee's findings thereunder, is laughable in light of his past use of Delaware case law ad nauseum in arguing for interpretations of the Operating Agreement that suit his own purposes. As an initial matter, in claiming that the Company "does not even attempt" to show that the Operating Agreement allows for advancement/indemnification of only those Expenses incurred in connection with conduct or status as an Officer, it appears that Donovan failed to read Section C of Plaintiffs' moving affirmation. As discussed extensively in that Section, the Operating Agreement makes clear that the purpose of indemnification/advancement is to protect officers from liability and expenses arising "in connection with the Company," and not those costs bearing no connection to Donovan's term as an Officer of the Company or his defense of conduct taken in that role.

14. The Company cited Delaware law, which as this Court knows has been repeatedly trumpeted by Donovan as the last word on the purposes of advancement, simply in order to show that Your Honor's interpretation of the Operating Agreement is in accord with Delaware's advancement jurisprudence. As those cited cases demonstrate,

Delaware courts have repeatedly held that a party entitled to advancement by virtue of his role as an officer, director, or agent of a corporation is entitled to advancement only in respect to work done in connection with claims and issues arising from the defense of conduct in that role. The words of the Fasciana v. Electronic Data Systems Corporation court – notably the very same case which Donovan has cited repeatedly for the proposition that the Operating Agreement's advancement procedures require the Company to rely on his attorneys' "good faith allocations" – bear repeating:

> "What [the corporation] contracted for was to bear the risk of later non-payment on expenses for which advancement is owed in the event that the underlying conduct of [the agent] and/or the outcome of the matter ultimately disentitles [the agent] to indemnification. I do not believe that [the corporation] contracted to provide [the agent] with a loan so that he could fund defense costs that do not arise out of his conduct as an agent and therefore could never be subject to advancement." Fasciana v. Electronic Data Systems Corporation, 829 A.2d 160, 175 (Del. Ch. 2003)(emphasis added).

Similarly, the court in Underbrink v. Warrior Energy Servs. Corp., faced with corporate bylaws which, much like the Operating Agreement, stated that a party was entitled to indemnification/advancement if "made…a Party to any Proceeding by reason of his Corporate Status," stated that '[i]n seeking advancement for expenses related to the defense of claims not brought by reason of the fact they were directors of [the corporation], Plaintiffs are asking for advancement of expenses for which indemnification is not possible." Civ. A. No. 2982-VCP, 2008 WL 2262316 at *13 (Del. Ch. May 30, 2008)(emphasis added). These cases, as well as the others cited in Plaintiffs' moving affirmation, make clear that the overarching purpose of advancement and indemnification – regardless of the particular language used to convey those rights – is to fund the legal costs of an officer or director in defending claims brought against him

as an officer and specifically not to fund defense costs which bear no connection to that officer status.

15. Donovan's attempt to "distinguish" the cases cited by the Company by drawing a line between advanceable and non-advanceable "claims" and advanceable and non-advanceable "motions or discovery devices" is nonsensical. First, Donovan apparently neglected to finish reading the Underbrink case, which recognized that expenses stemming from work on issues not arising out of the party's official status are not subject to advancement, even if those expenses were incurred in support of advanceable claims. Id. at *17. Moreover, the point of the Delaware cases is plainly that advancement as an officer/director is allowed only for the defense of conduct as an officer/director. Donovan fails to recognize that by holding that the only advanceable expenses are those stemming from work done in defense of claims against a party in his official status, the Delaware courts have necessarily held that any work not done in defense of claims against a party in his official status is not subject to advancement.

16. Donovan has never made any effort to argue that the categories of Expenses excluded by the Referee stem from work done in defense of claims against him as an officer, likely recognizing that attempting to do so with respect to the largest categories of Expenses – the Email Hacking Hearing and the Books & Records Hearing – would be futile. Indeed, as the Referee recognized, none of the excluded motions and discovery devices – including motions made to interfere with the business of the Company long after Donovan was no longer an Officer, a motion on behalf of Schlam Stone to claim advancement funds owed to Curtis Mallet by Donovan, and subpoenas in support of his third-party claims and counterclaims – bear any relationship to the

allegations against Donovan as an Officer or conduct taken by him in that status. Donovan cannot deny that this is a highly unusual case in that much of the motion practice has stemmed from incidents – largely, if not entirely, his own delay tactics and abuses of the litigation system – taken after the events that make up the substance of the Complaint. Thus, faced with the reality that large portions of his Expenses have no feasible connection to his defense on the merits, Donovan is forced to make the unsupported argument that because he is entitled to advancement in this action as an initial matter, he is thus entitled to any and all Expenses he may choose to incur within it.

17. The Company has been, and continues to be, willing to pay Donovan's reasonable Expenses in defending the allegations against him as a result of his conduct as an Officer, as required by the Operating Agreement and in line with the purpose of advancement and indemnification. It is Donovan and his lawyers who have not been able to submit remotely reasonable Expenses, as evidenced by their own July 2008 stipulation and Referee Dershowitz' July 7, 2009 Amended Report. This Court should not now allow Donovan to denigrate the purpose of advancement so far as to require the Company to pay Expenses that have no relation to Donovan's actual defense but rather serve to fund his counter-attack strategy of delay, disobedience, and distraction.

18. It is undisputed that a trial court should accept a referee's recommendation and report if the findings are supported by the record. See, e.g., RBC Capital Markets Corp. v. Bittner, 24 Misc. 3d 728, 728, 877 N.Y.S.2d 877, 881 (Sup. Ct. N.Y. County 2009); Barrett v. Toroyan, 45 A.D.3d 301, 301 (1st Dep't 2007), (citing Baker v. Kohler, 28 A.D.3d 375, 375-376, 814 N.Y.S.2d 121, 122 (1st Dep't 2006)); DiIorio v. Gibson & Cushman of New York, Inc., 204 A.D.2d 167, 614 N.Y.S.2d 114 (1st Dep't 1994). This

is the only issue before Your Honor. Yet Donovan again makes no attempt to argue that the findings of the Referee are not amply supported by the record, resorting instead to the claim that the Company's expert, Mr. Hopkins, gave "legal opinions" and that the Referee made "legal conclusions." Given that Mr. Hopkins simply expressed his factual opinions as to the recommended categorization of Expenses under the language of the April 24 Order, and that the Referee simply made the exact determinations charged to her, Donovan's argument bears no fruit. As discussed in detail in my moving affirmation, there is ample factual support in the record for each of the Referee's categories of excluded Expenses. Donovan's only attempt to assert otherwise is a half-hearted argument that the Referee's discount to Donovan's discovery expenses (made to account for the multitude of non-advanceable issues involved in this case) cannot be squared with her granting of Expenses for Donovan's counterclaims and third-party claims. However, Donovan's reasoning completely ignores the fact that the counterclaims and third-party claims only made up a small fraction of the Expenses to which the Company objected to as non-advanceable. The Referee thus had sufficient other bases on which to base her recommended discount. The decision as to the precise allocation of discovery expenses between advanceable and non-advanceable work was explicitly left up to the Referee; the fact that she chose to go with the Company's recommendation rather than Donovan's "all or nothing" approach does not provide a basis to fault her finding. Indeed, despite ample opportunity to do so, Donovan simply refused to present evidence on the reasonableness of his discovery Expenses or their relationship to advanceable subjects at the hearing. The time to do so has now passed.

19. Finally, it is striking that Donovan now claims that the Referee making a determination as to whether certain categories Expenses must be paid under the April 24 Order is a "legal" conclusion, yet happily accepted her ability to make a determination under the same reference as to whether the terms of the Operating Agreement required allocation to Donovan's co-defendants. The plain fact is that Donovan and his counsel are simply unhappy with the Referee's current determination and have realized they have no possible factual basis on which to attack it; as a result, their only hope is to insist that this Court ignore its own past rulings and the fully informed factual determination of the Special Referee in favor of Donovan's own self-serving interpretation of the Operating Agreement and re-imagining of the purposes of advancement.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' motion to confirm the Report in its entirety should be granted.

Dated: New York, New York
September 18, 2009

CRAIG CARPENITO