

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

MOTION DATE _____

- v -

MOTION SEQ. NO. 084

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

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

RECEIVED

APR 27 2010

Cross-Motion: Yes No

MOTION OFFICE
NYS SUPREME COURT - CIVIL

By this motion (Motion Sequence No. 084), Plaintiffs, Ficus Investments, Inc. ("Ficus") and Private Capital Group, LLC ("PCG"), along with Lawrence and Susan Cline, jointly move to confirm the November 15, 2009 Report of Special Referee Marilyn Dershowitz (the "November 15 Report").

Plaintiffs and Lawrence and Susan Cline (collectively, the "Movants"), seek an order that would implement the recommendations contained in the November 15 Report by dismissing Donovan's counterclaims in this action, and dismissing Donovan's claims against Plaintiffs, Lawrence Cline, Susan Cline, Jerome Cline, and Pirrip Advisors, LLC in each of the related actions pending before me.¹ Movants further seek an order, as against Donovan, awarding their attorneys' fees in this and all the related actions, directing Donovan and his counsel to return the stolen emails to Lawrence Cline ("Cline"), and awarding sanctions against Schlam Stone & Dolan, LLP in an amount equal to costs and attorneys' fees on this motion, cross-motion and hearing.²

¹
The related actions are: *Banque Portfolio Corp. v. Torchio*, Index No. 650339/2007; *New York Holding v. PCG REA LLC*, Index No. 602795/2007; *422 East 84th Street v. PCG REA LLC*, Index No. 602839/2007; *Private Capital Group LLC v. Donovan*, Index No. 650338/2007; *Winchester Global Trust Co. Ltd. v. Private Capital Group*, Index No. 602752/2009; and *Cline v. Donovan*, 650117/2009.

²
Rather than cross-moving to reject the November 15 Report, Donovan has moved for this relief by Motion Sequence No. 086.

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

2/11/10
m

I have read, with great interest, the November 15 Report, and I have carefully reviewed the evidence submitted here and to Special Referee Dershowitz. There is no doubt in my mind that the Referee's findings are amply supported by the record, and I therefore confirm her report. *Baker v. Kohler*, 28 A.D.3d 375, 375-76 (1st Dep't 2006).

Moreover, the egregious nature of the conduct that is at issue here, to wit, the continuous hacking, by Donovan, into Cline's email account from November 15, 2007 through January 10, 2008, is further compounded by the systematic printing, reading, analyzing and categorizing of the email communications he accessed -- email communications, which, Donovan admits, included messages from Cline to his attorney and the attorneys for Plaintiffs. There can be no doubt that this outrageous conduct has so tainted this litigation as to render Donovan's continued prosecution of his claims and counterclaims against Movants unfathomable -- an affront against fairness and against the due administration of justice. There can thus further be no doubt that the only appropriate remedy is the dismissal, in accordance with the recommendations of Special Referee Dershowitz, of all of Donovan's claims and counterclaims against Plaintiffs, Lawrence Cline, Susan Cline, Jerome Cline, and Pirrip Advisors, LLC, in this and the related actions.

Special Referee Dershowitz also recommended the imposition of additional sanctions against Donovan, in the form of attorneys' fees incurred by Plaintiffs and Cline in this and each of the related actions. However, I do not believe that this further sanction is necessary, and I therefore reject this element of the November 15 Report.

As for that portion of the Motion that seeks sanctions against Schlam Stone & Dolan, LLP, I note that Special Referee Dershowitz stopped short of recommending this penalty, and I am not satisfied that there is a basis, on this record, to impose the sanctions Movants request. That part of this Motion is therefore denied.

Accordingly, it is

ORDERED that the Motion to Confirm the November 15 Report of Special Referee Marilyn Dershowitz is GRANTED in part and DENIED in part; and it is further

ORDERED that the November 15 Report is rejected to the extent that it recommends an award of attorneys fees and costs as against Donovan, and it is confirmed in all other respects; and it is further

ORDERED that the claims and counterclaims of Defendant, Thomas B. Donovan, asserted against Plaintiffs and Lawrence Cline shall be dismissed; and it is further

ORDERED that Movants are directed to submit an order in accordance with this decision.

Dated: 4/26/2014



J.S.C.

HON. BERNARD J. FRIED

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