

**TMR Bayhead Secs. LLC v Aegis Texas Venture
Fund II, LP**

2009 NY Slip Op 33332(U)

September 2, 2009

Supreme Court, New York County

Docket Number: 115387/08

Judge: Eileen Bransten

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

PRESENT: **HON. EILEEN BRANSTEN**

PART 3

Justice

Index Number : 115387/2008
TMR BAYHEAD SECURITIES, LLC
VS.
AEGIS TEXAS VENTURE FUND II, LP,
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 115387-08
MOTION DATE 4/23/09
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

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

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

**IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM**

FILED
Sep 11 2009
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
SEP 09 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Handwritten signature/initials

Dated: 9-2-09

Handwritten signature of Eileen Bransten

HON. EILEEN BRANSTEN J.S.C.

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Check if appropriate: DO NOT POST

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

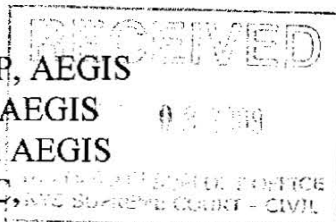
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TMR BAYHEAD SECURITIES, LLC and TODD
ROBERTS,

Plaintiffs,

-against-

Index No.: 115387/08
Motion Date: 4/23/09
Motion Seq. No.: 001

AEGIS TEXAS VENTURE FUND II, LP, AEGIS
TEXAS VENTURE FUND II GP, LLC, AEGIS
ALABAMA VENTURE FUND, LP, and AEGIS
ALABAMA VENTURE FUND GP, LLC,



Defendants.

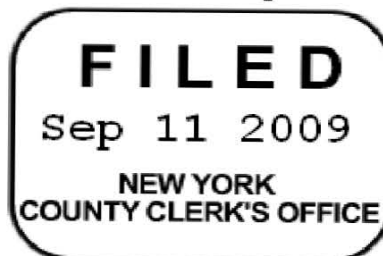
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PRESENT: EILEEN BRANSTEN, J.:

In this action, plaintiffs TMR Bayhead Securities, LLC (“Bayhead”) and Todd Roberts seek specific performance compelling defendants Aegis Texas Venture Fund II, LP (“Texas II Fund), Aegis Texas Venture Fund II GP, LLC (“Texas II GP”), Aegis Alabama Venture Fund, LP (“Alabama Fund”), and Aegis Alabama Venture Fund GP, LLC (“Alabama GP”) (collectively “Defendants”) to reimburse and advance legal fees and costs incurred in defending litigation. Defendants move to dismiss the complaint and plaintiffs oppose the motion.

BACKGROUND

Bayhead is a broker-dealer (Compl at ¶ 2). Todd Roberts is the sole stockholder of Bayhead (*id.* at ¶ 3). Additionally, Roberts was a member or limited partner of each of the Defendants (*id.* at ¶¶ 18, 28).

PCT



Defendants Texas II Fund and Texas II GP

Texas II Fund was formed on October 10, 2007, for the purpose of qualifying as a certified capital company (“CAPCO”) and operating as a venture capital partnership focused on small-business investing within the State of Texas (*id.* at ¶ 9). It operates pursuant to a January 2, 2008 Amended and Restated Agreement of Limited Partnership (“Texas II Fund Operating Agreement”) (*id.* at ¶ 10).

Defendant Texas II GP was formed on October 10, 2007, to serve as the general partner of the Texas II Fund (*id.* at ¶ 12). It operates pursuant to an October 10, 2007 Limited Liability Company Operating Agreement (“Texas II GP Operating Agreement”) (*id.* at ¶ 13).

The Texas II Fund closed in January 2008 with a capitalization of about \$27 million in bonds purchased by outside investors (*id.* at ¶ 17).

Until September 17, 2008, when Texas II GP and Texas II Fund purported to terminate his membership and “repurchase” his interests in those entities, Roberts was a principal and member of the Texas II GP and a limited partner of the Texas II Fund (*id.* at ¶ 18).

Defendants Alabama Fund and Alabama GP

Alabama Fund was organized as a limited partnership as of December 27, 2007 for the purpose of qualifying as a CAPCO and operating as a venture capital partnership focused

on small-business investing within the State of Alabama (*id.* at ¶ 19). It operates pursuant to a December 27, 2007 Agreement of Limited Partnership for Alabama Fund (“Alabama Fund Operating Agreement”) (*id.* at ¶ 20).

Alabama GP was formed on December 26, 2007, to serve as the general partner of the Alabama Fund (*id.* at ¶ 22). It operates pursuant to an April 18, 2008 Amended and Restated Limited Liability Company Operating Agreement (“Alabama GP Operating Agreement”) (*id.* at ¶ 23).

The Alabama Fund closed in April 2008 with a capitalization of about \$5 million (*id.* at ¶ 27). Until September 17, 2008, when Alabama GP and Alabama Fund purported to terminate his membership and “repurchase” his interests in those entities, Roberts was a principal and member of the Alabama GP and a limited partner of the Alabama Fund (*id.* at ¶ 28).

The Bayhead Engagements

On November 8, 2007, Texas II Fund and Bayhead entered into a written agreement (the “Texas Engagement Letter”) (*id.* at ¶ 15).

On March 7, 2008, Alabama Fund and Bayhead executed a written agreement dated February 12, 2008 (the “Alabama Engagement Letter”) (*id.* at ¶ 25).

By complaint filed on or about September 17, 2008, Defendants, among others, commenced an action against Bayhead and Roberts, *Schepisi v Roberts*, Index No.

650344/2008 (the “Litigation”), challenging payments Alabama Fund and Texas II Fund made to Bayhead and accusing Roberts and Bayhead of wrongful conduct.

Both the Texas II Fund and the Alabama Fund Operating Agreements require that “expenses incurred by an Exculpated Party in defending any claim, demand, action, suit or proceeding shall, from time to time, be advanced by the Partnership prior to the final disposition of such claim, demand, action, suit or proceeding” (*id.* at ¶¶ 11, 21).

Both the Texas II GP and the Alabama GP Operating Agreements contain provisions requiring them to “advance the expenses incurred by the Covered Persons in defending any claim, demand, action suit or proceeding” (*id.* at ¶¶ 14, 24).

Both the Texas and Alabama Engagement Letters require the funds to “reimburse Bayhead for its reasonable legal and other expenses incurred in connection” with “any action, proceeding or investigation brought by or against any person, including stockholders of the Company, in connection with or as a result of either the Engagement or any matter referred to in the letter Agreement” (*id.* at ¶¶ 16, 26).

Roberts contends he is a “Covered Person” within the meaning of the Texas II GP and Alabama GP Operating Agreements and is an “Exculpated Party” within the meaning of the Texas II Fund and Alabama Fund Operating Agreements (*id.* at ¶ 31). He also maintains that the Litigation is an “action, proceeding or investigation” brought in connection with or as a

result of either the Engagement or any matter referred to in the letter Agreement” within the meaning of the Texas and Alabama Engagement Letters (*id.* at ¶ 32).

On November 4, 2008, plaintiffs requested that Defendants, within a week, advance and reimburse legal fees and costs they already incurred and would incur in connection with the litigation (*id.* at ¶ 34). Defendants have not made any payments to Plaintiffs (*id.* at ¶ 36).

Plaintiffs commenced this action asserting causes of action for breach of contract and seeking specific performance. Defendants now move, pursuant to CPLR 3211 (a) (3) and (a) (7), to dismiss the complaint. Plaintiffs oppose the motion.

ANALYSIS

Defendants argue that as a former member of the Funds and a former partner of the General Partners, Roberts is no longer entitled to advancement of indemnification payments. Relying only on a strict construction of the indemnification provisions, they assert that because the provisions do not expressly and specifically authorize advancement for former members or partners, Roberts is not entitled to it.

Defendants cite *Hooper Associates, Ltd. v AGS Computers, Inc.* for the rule that courts should not infer an intention to indemnify a party’s legal costs “unless the intention to do so is unmistakably clear from the language of the promise” (74 NY2d 487, 492 [1989]). There, applying the doctrine of *expressio unius est exclusio alterius* (“The express mention of one

thing excludes all others”), the Court of Appeals reasoned that because the indemnification clause expressly allowed indemnification for third-party claims but not inter-party claims, the parties did not intend to indemnify claims between the parties themselves (*id.* at 492).

Here, however, the indemnification provisions do not contain language that expressly permits indemnification for those currently holding a qualifying position, while effectively excluding those who formerly held a qualifying position. There is absolutely no reason, based on the contract, to treat current members or partners different from former ones; *Hooper Associates, Ltd.* is therefore inapposite. Defendants offer no authority that bars advancement of indemnification payments to former members or partners if sued in their capacity as principals of the entity. Although Defendants may ultimately prevail in demonstrating that Roberts is not entitled to advancement of indemnification payments, the argument presented in its motion to dismiss is unavailing, and therefore dismissal is unwarranted.

Defendants further argue that Bayhead is not entitled to advancement of legal fees and costs because the alleged engagement letters are invalid. The Texas II Fund and Alabama Fund operating agreements both contain provisions stating that when a member has a conflict of interest, any action requiring a vote or written consent must be determined by a supermajority, as defined in the provision. Defendants maintain that the engagement letters were not duly authorized by a super majority of the members of the entities, as required by the

respective operating agreements. Further, with respect to the Alabama Engagement Letter, Defendants dispute the existence of the letter altogether.

Bayhead responds that the provision requiring a super-majority vote for interested transactions is irrelevant because both the Texas II GP and Alabama GP operating agreements authorize Brett Hickey, a principal of the Defendants, and Roberts to “execute and deliver, the Indenture, the Note Purchase Agreement and all documents, agreements, certificates, or financing statements contemplated thereby or related thereto, all without any further act, vote or approval of any other person notwithstanding any other provision of this Agreement” (Roberts Aff, Ex B to Ex 1, at § 5.1; Ex E to Ex 1, at § 5.1).

Defendants rejoin that the provision cited by Bayhead only relates to management powers and is narrowly circumscribed to the execution and delivery of the Indenture, the Note Purchase Agreement and related documents—a class of documents that does not include the engagement letters. The management authority of Hickey and Roberts is not connected to whether the engagement letters were properly executed, Defendants argue.

Questions of fact that the documentary evidence does not resolve—such as whether a super-majority vote was indeed required or whether the Alabama Engagement Letter exists at all—precludes dismissal of this case at the pleading stage (*Standard Chartered Bank v D. Chabbott, Inc.*, 178 AD2d 112, 112 [1st Dept 1991]).

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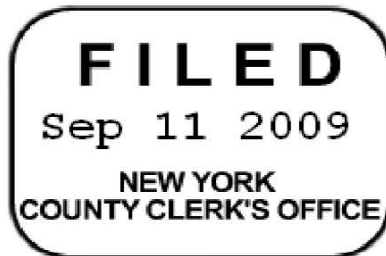
Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is DENIED; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
September 2, 2009



ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten".

Hon. Eileen Bransten