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

PRESENT: HON. MARCY S. FRIEDMAN, J.S.C.

CASITA, L.P., derivatively on behalf of MAPLEWOOD EQUITY PARTNERS (OFFSHORE) LTD.,

Plaintiff,

- against -

ROBERT V. GLASER, MAPLEWOOD HOLDINGS LLC, MAPLEWOOD MANAGEMENT LP and MAPLEWOOD PARTNERS LP,

Defendants,

- and -

MAPLEWOOD EQUITY PARTNERS (OFFSHORE) LTD.,

Nominal Defendant.

Index No.: 600782/2007

DECISION/ORDER

Motion Sequence 018

In this derivative action, plaintiff Casita, L.P. (Casita), a shareholder of nominal defendant MapleWood Equity Partners (Offshore) Ltd. (the Fund), alleges that defendants breached their fiduciary duties to the Fund by failing to make investments in the Fund's best interest and by misusing their control over the Fund to generate fees and other compensation for themselves. Defendants Robert V. Glaser (Glaser), MapleWood Management LP (MapleWood Management), MapleWood Partners LP (MapleWood Partners), and MapleWood Holdings LLC (MapleWood Holdings) move, pursuant to CPLR 3212, for summary judgment dismissing the second amended complaint (SAC) with prejudice.

Background

Defendants manage the Fund, which is organized under the laws of the Cayman Islands. (Joint Statement of Material Facts ["Joint Statement"], ¶ 17.) MapleWood Management entered into a management agreement with the Fund. (Id., ¶ 24.) MapleWood Partners entered into an advisory services agreement with the Fund. (Id., ¶ 25.) MapleWood Holdings is the general partner of MapleWood Partners and MapleWood Management. (Id., ¶¶ 4, 7.) Glaser was and is on the board of directors of the Fund, and is the managing member of Maplewood Holdings, a limited partner of MapleWood Management, and a limited partner of MapleWood Partners. (Id., ¶¶ 2, 5, 8, 18.) The Fund and its domestic counterpart, MapleWood Equity Partners, L.P. (Domestic Fund), which is not a party to this litigation, "were created to invest primarily in middle-market companies based in the United States with annual revenues between $25 million and $250 million." (Id., ¶ 19.) From 1998-2000, defendants circulated a private placement memorandum to Casita and other potential investors "that provided information about investing" in the Fund. (Id., ¶ 20.) On April 30, 1999, Casita agreed to invest $25 million in the Fund and entered into a subscription agreement. (Id., ¶ 21.)

The Fund invested in two portfolio companies, AMC Computer Corp. (AMC) and Parts Depot. Inc. (Parts Depot).[1] (Joint Statement, ¶ 26.) On August 24, 2000, the Fund, together with the Domestic Fund, acquired a controlling interest in AMC, a New York City-based computer business, and Casita co-invested $2.5 million in AMC.[2] (Id., ¶¶ 27, 31-32.) On August 31, 2000,

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[1] The Fund also invested in two other companies, but Casita is not pursuing damages based on those investments. (SAC, ¶ 29.)

[2] Casita's co-investment is not the subject of this action and is not part of the damages sought. (OA Tr. at 27.)

the Fund, together with the Domestic Fund, acquired a controlling interest in Parts Depot, a distributor of automotive parts. (Id., ¶¶ 39, 41.)

In the second amended complaint, Casita alleges that defendants breached their fiduciary duties to the Fund by investing the Fund's money in portfolio companies that were poor investments or by failing to liquidate the investments, in order to collect management and consulting fees. (SAC, ¶ 32.) More specifically, the second amended complaint alleges that defendants breached their fiduciary duties by:

> "(i) improvidently investing in AMC and refusing to take appropriate action to remedy or reveal to the Company [i.e., Fund] or its shareholders a massive fraud at AMC, in order to protect defendants' collection of management and consulting fees; (ii) refusing to sell Parts Depot at a time when it could return a reasonable value to the Company, in order to continue collecting management and consulting fees; and (iii) refusing to write down investments in AMC and Tia's, in order to continue collecting management and consulting fees from those investments."

(Id.)

In its brief in opposition to this motion, Casita withdraws its theories of liability based on defendants' alleged post-closing accounting fraud at AMC and on failure to write down or write off the Fund's investments in AMC and Tia's Restaurant. (P.'s Memo. Of Law In Opp. at 22, 22 n 34.)

With respect to AMC, Casita bases its claim of fiduciary duty claim on the assertion that defendants' own due diligence revealed prior to the acquisition that AMC's financial condition was "disastrous," and that defendants concealed this information from the Fund's investors in order to collect fees from the acquisition. (Id. at 3.) For example, Casita asserts that defendants knew, prior to the closing, that AMC's value was deteriorating due to its failure to transition from a computer hardware provider to a services provider; that AMC's services revenues would

not be as high as projected (id. at 3-5); and that without sufficient service revenue, the "enterprise value" of AMC was far less than projected. (Id. at 8-9.) Casita also contends that AMC's seller put defendants on notice before the closing that AMC's projected earnings before interest, taxes, depreciation, and amortization (EBITDA) were too high and "might come in massively below MapleWood's projection." (Id. at 7.)

With respect to Parts Depot, Casita alleges that defendants breached their fiduciary duties to the Fund by "extracting" excessive management fees from that company (id. at 11), and by refusing to sell Parts Depot even as its value was deteriorating in order to continue to collect additional fees. (Id. at 11-12.) Casita contends that Glaser was "repeatedly" advised to sell Parts Depot and had received serious inquiries and acceptable offers. (Id. at 12-16.) However, defendants retained Parts Depot for the purpose of generating fees and were ultimately forced, in September 2007, to relinquish majority interest and control to the junior secured lender, TD Capital. (SAC, ¶¶ 55-57.) As a result of defendants' concealment of Parts Depot's financial condition from shareholders, they were allegedly unable to take action to benefit the Fund, such as demanding "prompt liquidation" of the investment. (Id., ¶ 58.)

Based on these allegations, Casita asserts a sole cause of action for breach of fiduciary duty and seeks an injunction enjoining defendants from further breaches of their fiduciary duties, compensatory and punitive damages, and an award of attorney's fees.[3] (SAC, Demand For Relief.)

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[3] In the second amended complaint, Casita also seeks an order removing defendants from control of the Fund, appointing a receiver for the Fund, and directing the receiver to liquidate the Fund. (SAC, Demand For Relief.) By prior order of this Court (Fried, J., now retired), that request for relief was dismissed "as Casita itself concedes . . . a New York court lacks jurisdiction to appoint a general receiver for a foreign corporation." (Casita, L.P. v Glaser, 2010 WL 1049291, *8 [Sup Ct, NY County, March 16, 2010, No. 600782/2007].)

Defendants seek summary judgment dismissing the complaint. Defendants contend that Casita's claims as to AMC are time-barred because AMC was acquired on August 24, 2000, and this action was not commenced until more than six years later on March 13, 2007. Casita counters that its claim with respect to AMC is not time-barred because defendants deliberately concealed facts needed to assert the cause of action.[4] With respect to Parts Depot, defendants contend that the business judgment rule bars Casita from pursuing a claim for breach of fiduciary duty. Casita contends that its claim turns on Glaser's motive, a fact-specific issue that cannot be resolved on this motion for summary judgment.

DISCUSSION

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact.' (CPLR 3212, subd. [b]." (Zuckerman, 49 NY2d at 562.)

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[4] In initially moving for summary judgment, defendants also argued that Casita could not prove damages or that Casita's claim for damages was barred by collateral estoppel. This argument was made, however, in connection with Casita's claim for damages as a result of alleged "accounting fraud" at AMC, after the closing of the Fund's investment in AMC. As noted above (supra at 3-4), Casita has withdrawn its theory of liability based on defendants' post-closing accounting fraud at AMC. However, Casita offers evidence of these allegations regarding "accounting fraud . . . [as] supportive of [Casita's] argument that Mr. Glaser knew as soon as he did the AMC deal that the company was worthless. . . ." (OA Tr. at 43.)

Conflict of Laws and the Statute of Limitations

As a threshold matter, the court must determine what law – both substantive and procedural – applies to the parties' dispute. The parties agree that Cayman Islands law applies to Casita's claims for breach of fiduciary duty and to the defenses to those claims – namely, the statute of limitations defense regarding AMC, and the business judgment rule regarding Parts Depot. (Ds.' Memo. Of Law In Supp. at 3; P.'s Memo. Of Law In Opp. at 19.) In support of the application of Cayman Islands law to these issues, the parties cite the prior decision of this Court (Fried, J.), dated March 16, 2010, denying defendants' motion to dismiss the second amended complaint on the ground, among others, that it is time-barred as to the AMC claim. (Casita, L.P. v Glaser, 2010 WL 1049291, supra.) The Court held that Cayman Islands law is the substantive law applicable to the breach of fiduciary duty claim. In this regard, the Court noted, and accepted, the parties' agreement that Cayman Islands law is applicable because it is the law of the Fund's place of incorporation. (Id. at *3.) The Court also applied the Cayman Islands statute of limitations to the claim, noting that "[d]efendants assert, and Casita does not dispute, that the limitations law of the Cayman Islands governs the question of whether Casita's claim is time-barred." (Id. at *4.) In determining the motion to dismiss, the Court further found that "[d]efendants' expert has better substantiated his argument that a six-year limitations period applies to Casita's claim than Casita's expert has substantiated his argument that no limitations period applies to the claim. However, assuming, arguendo, that Casita's claim is subject to a six-year limitations period, defendants have, nevertheless, failed to establish that Casita's claim should be dismissed as time-barred insofar as it is based upon defendants having caused the Fund to invest in AMC in 2000." (Id. at *5.) The Court also held that, under Cayman Islands law, the

issue of whether defendants' alleged deliberate concealment of facts concerning AMC's financial condition prevented Casita from bringing this action earlier involved questions of fact that could not be determined on a motion to dismiss. (Id. at *6.)

The parties' position that Cayman Islands law governs the substantive aspects of the breach of fiduciary cause of action is supported by extensive legal authority. It is well established that causes of action directed to the internal affairs of a corporation are determined pursuant to the laws of the state (or country) of incorporation. (Lerner v Prince, 119 AD3d 122, 128 [1st Dept 2014] ["New York choice-of-law rules provide that substantive issues such as issues of corporate governance . . . are governed by the law of the state in which the corporation is chartered. . . ."]; Sturman v Singer, 213 AD2d 324, 325 [1st Dept 1995] [holding the state of incorporation, Delaware, "has a paramount interest in this claim that corporate decisions to make investments and hire a consulting firm amounted to a breach of fiduciary duty. . . ."]; Hart v General Motors Corp., 129 AD2d 179, 185-186 [1st Dep't 1987], lv denied, 70 NY2d 608 [1987] [reversing lower court's dismissal of complaint on forum non conveniens grounds, the court citing, among other factors, "Delaware's paramount interest in determining whether a Delaware corporation properly purchased securities from a group of its shareholders, including one of its directors"]; see also Diamond v Oreamuno, 24 NY2d 494, 503-504 [1969] [holding that "the primary source" of law on "the duties and obligations of directors and officers and their relation to the corporation and its shareholders" is the law "of the State which created the corporation"].) The law of the Cayman Islands accordingly governs the substantive issues raised by the breach of fiduciary duty cause of action.

However, under also well established choice-of-law principles, the law of the forum

controls procedural matters, and the applicable statute of limitations is traditionally a procedural matter.

> "In New York, Statutes of Limitation are generally considered procedural because they are viewed as pertaining to the remedy rather than the right. The expiration of the time period prescribed in a Statute of Limitations does not extinguish the underlying right, but merely bars the remedy. Nicely summarized elsewhere, the theory of the statute of limitations generally followed in New York is that the passing of the applicable period does not wipe out the substantive right; it merely suspends the remedy."

(Tanges v Heidelberg N. Am., Inc., 93 NY2d 48, 54-55 [1999] [internal quotation marks, citations, and brackets omitted]. See also Martin v Julius Dierck Equip. Co., 43 NY2d 583, 588 [1978] ["Since under common-law rules matters of procedure are governed by the law of the forum, it has generally been held that the Statute of Limitations of the forum rather than that of the jurisdiction where the cause of action accrued governs the timeliness of a cause of action"]; Lerner, 119 AD3d at 127-128 ["Under New York choice-of-law rules, matters of procedure are governed by the law of the forum"].)

Here, the parties have not explained why the statute of limitations defense is not a procedural defense that should be governed by the law of the forum. A serious question thus exists as to whether their agreement to apply Cayman Islands law not only to the substantive issues raised by plaintiff's breach of fiduciary duty claim, but also to the statute of limitations defense, offends established choice-of-law principles. The court will accordingly undertake a de novo analysis of the applicable law.

In so holding, the court recognizes that the March 26, 2010 decision of the parties' motion to dismiss accepted their agreement to apply Cayman Islands law to the defense. The

court is mindful that, under the law of the case doctrine, a court should not ordinarily reconsider or overrule the determination of another court of coordinate jurisdiction once an issue has been fully litigated and judicially determined. (See Martin v City of Cohoes, 37 NY2d 162, 165 [1975]; Matter of Dondi v Jones, 40 NY2d 8, 15 [1976].) However, the law of the case doctrine "expresses the practice of the courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court's discretion, but does not restrict its authority." (People v Evans, 94 NY2d 499, 503 [2000] [internal quotation marks and citations omitted].)

Moreover, a court retains the power to revisit its own orders. "The law of the case rule prohibits a judge or court from modifying a ruling on the merits made by a judge or court of coordinate jurisdiction. Yet, it has been said that '[e]very court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made.'"[5] (Wells Fargo Bank, N.A. v Zurich Am. Ins. Co., 59 AD3d 333, 335 [1st Dept 2009], lv denied 12 NY3d 713 [2009], quoting Aridas v Caserta, 41 NY2d 1059, 1061 [1977] [other internal citations omitted].)

In undertaking de novo review of the law that governs the statute of limitations defense, the court also recognizes that under settled authority, "parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied." (Martin v City of Cohoes, 37 NY2d at 165.) Significantly, however, the parties have not cited, and the court's own research has not located, any case which has applied a foreign jurisdiction's statute of limitations without undertaking an analysis under the borrowing statute, where, as here, the plaintiff makes no claim that it is a resident and the cause of action may have

[5] Although the prior order was made by Justice Fried, this court assumed his docket upon his retirement.

accrued outside New York State.

As explained by the Court of Appeals, in order to "temper the rigid application" of the choice-of-law rule that matters of procedure are governed by the law of the forum, New York and most other states have enacted borrowing statutes that "'borrow' the foreign Statute of Limitations of the jurisdiction in which the defendant or both parties resided or the jurisdiction in which the cause of action accrued, if to do so would bar the plaintiff's cause of action." (Martin v Dierck Equip. Co., 43 NY2d at 588.) New York's borrowing statute, CPLR 202, provides: "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued [with an exception not here relevant]."[6] As the Court of Appeals has observed, "one of the key policies underlying CPLR 202" is "to prevent forum shopping by nonresidents attempting to take advantage of a more favorable statute of limitations in this state." (Portfolio Recovery Assocs., LLC v King, 14 NY3d 410, 418 [2010].) "[T]he legislature enacted section 202 primarily to prevent forum shopping; i.e., to make sure that nonresidents do not select a New York forum and burden New York's state and federal courts when, and perhaps precisely because, their lawsuits are time-barred by the applicable laws of the foreign states where the causes of action accrued." (Norex Petroleum Ltd., 23 NY3d at 676.) Thus, "[w]hen a cause of action accrues outside New York and the plaintiff is a nonresident, section 202 'borrows' the statute of limitations of the jurisdiction where the claim arose, if

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[6] When New York borrows another state's statute of limitations, it also imports that state's law with respect to defenses such as tolling and discovery of facts necessary to state a claim. (See Norex Petroleum Ltd. v Blavatrik, 23 NY3d 665, 675-676 [2014]; Fraser v Eli Lilly & Co., 221 AD2d 200, 201 [1st Dept 1995].)

shorter than New York's, to measure the lawsuit's timeliness." (Id. at 668.) However, "[w]hen a nonresident sues on a cause of action accruing outside New York," the borrowing statute also "requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 [1999].)

On the instant motion, the parties assume the applicability of the Cayman Islands statute of limitations, but make no showing as to whether the borrowing statute is implicated. As noted above, the Fund on behalf of which Casita brings this action is a nonresident, as it is incorporated in the Cayman Islands. It is also undisputed that Casita is a limited partnership organized under the laws of Delaware. (Joint Statement, ¶ 9.) Moreover, it is settled that "a cause of action accrues at the time and in the place of the injury" and, in cases involving purely economic loss, "the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss." (Global Fin. Corp., 93 NY2d at 529; accord Portfolio Recovery Assocs., 14 NY3d at 416.) These facts raise issues – albeit, issues that the court does not finally determine because they have not been addressed by the parties – as to whether the action was brought by a nonresident whose cause of action accrued outside New York and, therefore, as to whether the borrowing statute should be applied.

Even under Cayman Islands law, questions of law and fact exist as to whether Casita's claims regarding the AMC investment are time-barred. The parties offer conflicting expert testimony on the Cayman Islands statute of limitations. Casita's expert previously opined that Cayman Islands law would impose no limitations period on its claims as they are claims asserted

by a beneficiary of a trust against a trustee.[7] (Affidavit of Hector Robinson, dated April 9, 2009, ¶¶ 10-24.) Alternatively, Casita's expert previously opined that even if a limitations period were applicable under Cayman Islands law, that period would be tolled by proof of defendants' deliberate concealment of facts under section 37 of the Cayman Islands Limitation Law.[8] (Id., ¶¶ 32-36.) On the instant motion, Casita's expert makes the assumption, with which this court disagrees (see supra at 6), that the March 16, 2010 decision of the motion to dismiss finally determined that the Cayman Islands six-year statute of limitations applies. (Affidavit of Hector Robinson, dated August 9, 2013, ¶ 14.) He adheres to his previous opinion that the period would be tolled by defendants' deliberate concealment of facts. (Id., ¶¶ 19-27.) Casita's expert notes that "[w]hether a defendant has engaged in deliberate concealment is a question of fact." (Id., ¶

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[7] It is undisputed that section 27 (1) (a) and (b) of the Limitation Law provides as follows:

> "No period of limitation prescribed by this Law applies to an action by a beneficiary under a trust, being an action—
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
> (b) to recover from the trustee trust property, or the proceeds of trust property in the possession of the trustee or previously received by him and converted to his use."

[8] Subsections (1) and (2) of section 37 of the Cayman Islands Limitation Law provide as follows:

> "37 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Law, either -
> (a) the action is based upon the fraud of the defendant;
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> (c) the action is for relief from the consequences of a mistake,
> the period of limitation does not begin to run until the plaintiff has discovered, or could with reasonable diligence have discovered, the fraud, concealment or mistake. References in this subsection to the defendant include references to the defendant's agent, and to any person through whom the defendant claims, and his agent."
>
> "37 (2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

27.) Defendants' expert opines that the six-year statute of limitation under Cayman law would apply and that it would not be tolled pursuant to section 37 of the Limitation Law because Casita does not plead a fraud perpetrated by the defendants against it. Defendants' expert further posits that Casita would have the burden of proving that a fraud was not discoverable by reasonable diligence. (Affidavit of Mac Webster Imrie, dated June 3, 2013 [Fifth Imrie Aff.], ¶¶ 25-37; Imrie Aff., dated September 6, 2013 [Sixth Imrie Aff.], ¶ 13.)

The experts provide scant legal authority on the standards for determining what conduct constitutes deliberate concealment of facts within the meaning of the Cayman Islands Limitation Law tolling provision. The experts' affidavits therefore do not "furnish[] the court sufficient information" to enable it to take judicial notice of the foreign law. (See CPLR 4511 [b].) In any event, the parties present sharply conflicting evidence on this motion as to defendants' alleged concealment from the investors, prior to AMC's acquisition, of information about AMC's poor financial condition.

If the borrowing statute were to be applied, a serious question would also exist as to whether Casita's claim against AMC is time-barred under the New York statute of limitations. Under New York law, the statute of limitations for a breach of fiduciary claim "depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214 (4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213 (1) applies." (IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132, 139 [2009] [internal citations omitted].) In addition, a six-year limitations period applies to a breach of fiduciary duty claim "where an allegation of

fraud is essential" to the claim. (Id.; Kaufman v Cohen, 307 AD2d 113, 119 [1st Dept 2003].)

Here, Casita does not plead fraud on defendants' part. It thus appears questionable – although again, the court does not determine an issue which the parties have not briefed – that Casita would have the benefit of a discovery accrual rule which applies to fraud claims or fraud-based breach of fiduciary duty claims. (See generally CPLR 213 [8]; Kaufman v Cohen, 307 AD2d 113, supra.)

In summary, issues of law and fact exist as to whether Casita's claim against AMC would be barred under Cayman Islands law, New York law, or both. Unless Casita can submit evidence that it is not a nonresident or that its cause of action did not accrue outside New York, the borrowing statute would apply, absent the parties' agreement that Cayman Islands law governs the limitations period. The parties should therefore address the validity of their agreement in light of the public policy concerns that underlie the borrowing statute. The branch of defendant's motion seeking dismissal of Casita's claim against AMC will be denied without prejudice to defendants' right to raise the bar of the statute of limitations on this claim at trial.

Parts Depot and The Business Judgment Rule

With respect to Parts Depot, the following facts are undisputed. In August 2000, the Domestic Fund and the Fund acquired a controlling interest in Parts Depot. (Joint Statement, ¶ 41.) Parts Depot's revenue grew from approximately $108 million in 2000 to approximately $374 million in 2006. (Id., ¶¶ 44-50.) In or about 2006, Glaser met with several prospective purchasers and investors "regarding the possibility of a transaction with Parts Depot." (Id., ¶¶ 55-56, 61.) Parts Depot hired Capstone Financial Group, an investment bank, to facilitate such a transaction in July 2006. (Id., ¶ 59.) In October 2006, Parts Depot entered into an agreement

with another investment bank, CIBC World Markets Corp. (Id., ¶ 62.) From November through December 2006, Parts Depot received an offer and a series of revised offers from Code Hennessy & Simmons LLC ("Code Hennessy"). (Id., ¶¶ 63-66.) Parts Depot rejected the offers. (Id., ¶ 67.) In May 2007, Parts Depot accepted an offer from The Jordan Company, L.P. ("Jordan"). (Id., ¶ 70.) However, after conducting due diligence, Jordan lowered the value of its proposal in July 2007, and Parts Depot rejected the revised proposal. (Id., ¶ 71.) It is further undisputed that the intent of the Domestic Fund and the Fund was to "maintain ownership of and grow Parts Depot for a period of approximately three to five years and then to sell Parts Depot for a profit." (Affidavit of Robert Glaser, dated June 7, 2013 [Glaser Aff.], ¶ 10. See also Private Placement Memorandum at 33-34 [Ds.' Ex. 6].)

Casita alleges that defendants could, and should, have sold Parts Depot in March 2006 for an offer of "a 9 times multiple of demonstrated EBITDA" by Uni-Select Inc. ("Uni-Select"), but that defendants refused because Uni-Select proposed an outright sale, which would have deprived defendants of ongoing fees. (P.'s Memo. Of Law In Opp. at 15-16 [internal quotation marks and citation omitted].) Casita's expert characterizes this rejection as "a highly irresponsible act." (Geisser Sept. 7, 2012 Report at 49 [Casita Ex. 117].) By letter dated October 4, 2006, Uni-Select's CEO wrote to Glaser and again proposed an outright purchase for cash of Parts Depot for 9 times its last 12 months' EBITDA. (Casita Ex. 145.) It is undisputed that neither Parts Depot nor defendants responded in writing to Uni-Select. (Joint Statement, ¶ 58.) According to Parts Depot's board minutes, Uni-Select's offer was not presented at Parts Depot's regular board meeting held two weeks later on October 19, 2006. (Casita Ex. 146.)

In sum, Casita alleges that defendants refused to sell Parts Depot in order to continue earning management fees, at a time when the value of Parts Depot declined to the detriment of investors. (P.'s Memo. Of Law In Opp. at 12-13.) According to Casita's expert, had defendants sold Parts Depot, they would no longer have been entitled to monitoring fees or management fees from the Fund "as a percentage of the capital that the Fund had invested in Parts Depot," and "Glaser would no longer have been entitled to the $150,000 a year that he began taking in board fees when he installed himself on the board of directors at the end of 2005." (Affidavit of Andrea Geisser, dated August 7, 2013 [Geisser Aff.], ¶ 52.)[9] In addition, Casita contends that Parts Depot was the only major asset left in the Fund, and its sale and the attendant loss of fees would have caused the defendants financial distress. (Id., ¶ 54.)

Defendants counter that they acted for the benefit of investors and that their actions are protected by the business judgment rule. Defendants point to the increase in Parts Depot's revenue and EBITDA as evidence that Parts Depot was increasing in value. (Glaser Aff., ¶¶ 12-13, 32, 37, 45, 96.) Glaser avers that he began entertaining expressions of interest from potential purchasers of Parts Depot as early as 2001, and continued to do so throughout 2002. (Id., ¶¶ 11, 14-21.) Glaser had numerous communications and meetings with potential purchasers and investment banks from 2002 through 2006 and explored other strategies such as mergers and a public offering. (Id., ¶¶ 14-96.) In furtherance of defendants' effort to sell, Parts Depot entered

[9] According to Casita's expert, "it is not accepted practice . . . for a fund manager to keep board fees from a portfolio company, even in good times." (Geisser Aff., ¶ 52.) The general partner typically is not paid board fees, because it is already compensated by the management fee paid by the limited partners, as well as monitoring fees paid by the portfolio company. (Id.)

into agreements with two investment banks, Capstone and CIBC, and allowed itself to be shopped to potential buyers. (Id., ¶¶ 73, 84, 87, 91, 95, 98.)

In claiming the protection of the business judgment rule, defendants rely heavily on Glaser's affidavits discussing the proposals for sale of Parts Depot that defendants rejected. For example, with respect to the offers from Code Hennessy that Capstone produced in 2006 (see supra at 15), Glaser asserts that the offers were too low and that the Fund's investors would be better off holding Parts Depot. (Glaser Aff., ¶¶ 85-89, 92-93, 97.)

Defendants further point to their implementation of an auction process during which CIBC contacted 96 prospective purchasers. (Glaser Aff., ¶ 102.) As of January 2007, defendants had received 16 bid letters from interested buyers and scheduled management meetings with eight of them. (Id., ¶¶ 104, 107.) Four bidders then submitted revised bids, two conducted due diligence, and one (Jordan) submitted a final written proposal for acceptance. (Id., ¶¶ 114, 122, 124.) After further negotiations, Jordan submitted revised offers. (Id., ¶ 128.) On May 11, 2007, a deal with Jordan was finalized. (Id.) On July 6, 2007, after conducting due diligence, Jordan made a new offer. (Id., ¶ 137.) According to Glaser, defendants rejected Jordan's new offer because it lowered its valuation of Parts Depot from $200,000,000 to $150,000,000 and changed the proposed equity stake from minority to majority. (Id., ¶¶ 129, 137.)

Defendants also contend that they could not have been motivated by fees to retain Parts Depot as they stood to profit more from the sale of Parts Depot than from retaining Parts Depot. (Ds.' Memo. Of Law In Supp. at 23; Glaser Aff., ¶ 141.) According to defendants, under an Advisory Agreement between Parts Depot and MapleWood Partners, a sale would have entitled them "to immediately collect five years' worth of management fees [the so-called 'tail fees'], as

well as accrued and unpaid fees, as part of the closing, plus the additional fees and potential investment return from that sale." (Ds.' Memo. Of Law In Supp. at 23 [citing Ds.' Ex. 31 [Advisory Agreement, § 3 (a), (b)].)

As held above and as the parties agree, Cayman Islands law is applicable both to the breach of fiduciary duty claim and the business judgment rule defense. The parties' experts are in general agreement as to the standards applicable to the business judgment rule under Cayman Islands law. (Fifth Imrie Aff., ¶¶ 38- 43; Affidavit Of Richard Lester Millett [Millet Aff.], ¶ 15 ["As to the matters covered by Mr Imrie at paragraphs 38-43 of Imrie 5 ('business judgment rule'), I do not disagree with much, if anything, that he says."].) Defendants' expert opines that a director bears the "fiduciary duty to act in good faith in the interests of the company." (Fifth Imrie Aff., ¶ 39.) Plaintiff's expert offers a more extensive discussion of fiduciary duties imposed by Cayman Islands law and the application of the business judgment rule to them. For example, plaintiff's expert discusses the rejection by English law, and by extension Cayman Islands law, of "mixed motives." According to plaintiff's expert, a fiduciary must "act (i) in the principal's best interests, (ii) in good faith, and (iii) for proper purposes" (Millet Aff., ¶ 36), and "mixed motives are not good enough." (Id., ¶ 37.) Plaintiff's expert opines that it will therefore "be a breach of fiduciary duty for a fiduciary to act (or to omit to do an act) where the act or failure to act is influenced by any interest or consideration that is not wholly in the best interests of its principal, or in any way in the pursuance of any goal or consideration that is in its personal interests, even if the fiduciary considers that its principal's own interests are also thereby served, even predominantly so." (Id.) On the reply, defendants' expert does not address the distinction

which the plaintiff's expert makes between acting in the "interests," as opposed to the "best interests," of the Fund.

Defendants acknowledge that they bear the burden of demonstrating the protection of the business judgment rule. (Fifth Imrie Aff., ¶ 43. See also Millet Aff., ¶ 50 [same].) As stated by Casita's expert and unrebutted by defendants' expert: "In order to decide whether the Defendants are liable for breach of fiduciary duty as a matter of Cayman law, the fact-finder is required to undertake an intensive factual inquiry into (i) what exactly the Defendants did, (ii) with what motives they did it, (iii) what they knew at the relevant times and (iv) whether their actions were taken honestly or dishonestly." (Millet Aff., ¶ 21.)

Notwithstanding their agreement as to general precepts of the applicable law, defendants fail to demonstrate as a matter of law that their failure to sell Parts Depot was not a breach of fiduciary duty. In support of their motion, defendants submit a totally conclusory expert affidavit with a discussion of fiduciary duties and the business judgment rule limited to one-and-one-half pages. Defendants also offer insufficient evidence as to why negotiations with prospective purchasers or investors, such as Uni-Select, Code Hennessy, and Jordan, did not result in a deal. This evidence amounts merely to a chronology of inquiries and negotiations by purchasers or investors, along with Glaser's conclusory assessment that the deals were not good enough. Defendants also fail to address Casita's expert's opinion that they were required to act in the "best interests" of the Fund in rejecting the various offers for the sale of Parts Depot, and do not submit evidence that conclusively eliminates issues of fact as to their motives in not agreeing to an earlier sale of the company.

As noted above, defendants claim that they could not have been motivated to retain Parts Depot in order to collect fees, because they would have been entitled to large tail fees upon a sale, pursuant to section 3 of the Advisory Agreement between MapleWood Partners and Parts Depot. This court's review of section 3 reveals that it provides for such payments upon "a transfer . . . of greater than 50.1% of the aggregate of the issued and outstanding common stock" of Parts Depot. However, defendants rejected the Code Hennessy offers that provided for the acquisition of a majority ownership stake in Parts Depot. (Glaser Aff., ¶¶ 85-97.) The only offer for sale of a majority interest that was accepted by defendants – that made by Jordan – in fact provided for defendants to "give up approximately $10M in management/tail fees." (Glaser Aff., ¶¶ 128, 130.) Moreover, Casita offers the evidence of its expert that tail fees represent the present value of a projected future income stream and are payable, if at all, in a lump sum "upon a change in control of a private equity asset." (Geisser Aff., ¶ 10.) Further, Casita's expert opines that the five-year tail fees in the Advisory Agreement would not have been paid in any event as they would have increased the purchase price and so would not have been acceptable to a buyer. (Id., ¶¶ 13-15.) In addition, she opines that the five-year tail fee provision was not the result of an "arms-length transaction" and was "not a standard practice in the industry." (Id., ¶¶ 17-18; Geisser Sept. 7, 2012 Report at 39-40.)

The court also rejects defendants' contention that "Casita's entire theory regarding Parts Depot is undermined" by the fact that defendants signed a contract with Jordan in May 2007. (Ds.' Memo. Of Law In Reply at 10.) It is undisputed that Jordan subsequently presented a revised offer that was rejected by defendants, and no transaction closed. The fact that defendants agreed to a transaction that ultimately fell through because terms could not be agreed upon can

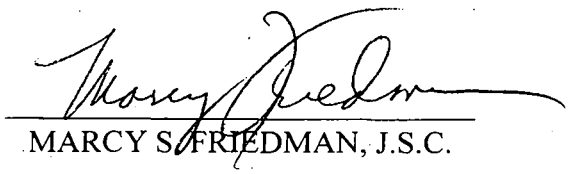
hardly be dispositive of Casita's claim. On this record, defendants fail to demonstrate eliminate factual issues as to their motives in retaining Parts Depot.[10]

It is accordingly hereby ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 60, Room 248, 60 Centre Street, New York, New York on April 14, 2015 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
February 20, 2015



MARCY S. FRIEDMAN, J.S.C.

[10]In reaching this result, the court need not and does not rely on evidence offered by Casita challenging defendants' motives to the extent that such evidence consists of inadmissible emails from various sources. That evidence includes emails from Parts Depot's minority owner (Rollie Olson) and a potential purchaser (Jordan), suggesting that Glaser's interest in earning fees affected his willingness to consider a sale, as well as emails from or about lenders discussing the amount of defendants' fees. (See P.s' Memo. Of Law In Opp. At 24, citing e.g. Casita Exs. 92 [Olson]; 167 [Jordan]; 85, 86, 89 [lenders].)