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

PRESENT: BERNARD J. FRIED Justice **FBEM** PART 60

Casita, LP

-v-

- Maplewood Equity Partners

INDEX NO. #603525-2005

MOTION DATE

MOTION SEQ. NO 007

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 motion and cross-motion are decided in accordance with the accompanying memorandum decision.

SO ORDERED

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

Dated: 12/7/07

J.S.C. HON. BERNARD J. FRIED

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST [ ] REFERENCE

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

----------X

CASITA, LP,

Plaintiff,

- against - Index No. 603525/2005

MAPLEWOOD EQUITY PARTNERS (OFFSHORE) LTD.,

Defendant.

----------X

CASITA, LP,

Plaintiff,

- against - Index No. 600966/2006

MAPLEWOOD EQUITY PARTNERS (OFFSHORE) LTD.,

Defendant.

----------X

APPEARANCES:

For Plaintiff:

Katten Muchin Rosenman LLP
575 Madison Avenue
New York, New York 10022
(Martin E. Karlinsky, Jay W. Freiberg, Keir N. Dougall, Catherine G. Patsos)

For Defendant:

Stevens & Lee, P.C.
485 Madison Avenue
20th Floor
New York, New York 10022-5803
(Chester B. Salomon, Constantine D. Pourakis)

Akerman Senterfitt
One Southeast Third Avenue
28th Floor
Miami, Florida 33131-1714
(Brian P. Miller, pro hac vice)

FRIED, J.:

In this action alleging breaches of contract and fiduciary duty, defendant moves for an order vacating a temporary restraining order, issued on October 3, 2005 (the TRO), which enjoined defendant from taking adverse action against plaintiff on account of any default by

plaintiff in failing to fund a "capital call" issued by defendant. Plaintiff cross-moves, pursuant to CPLR 6301 *et seq.*, for a preliminary injunction enjoining defendant from declaring or holding plaintiff in default, or acting upon any default by plaintiff, as a consequence of plaintiff's refusal to fund seven capital calls, including the capital call which was the subject of the TRO.[1]

Plaintiff Casita, LP (Casita) executed a subscription agreement (the Subscription Agreement), on April 30, 1999, pursuant to which Casita agreed to purchase "class A" common shares (Class A Shares) in, and made a commitment to invest $25 million in, defendant MapleWood Equity Partners (Offshore) Ltd. (the Fund), a Cayman Islands investment fund which invests in middle-market companies. Pursuant to the Subscription Agreement, Casita also agreed to make payments on calls for capital contributions issued by the Fund -- in accordance with the terms of the Subscription Agreement and the Fund's articles of association (the Articles) -- until Casita had invested the full amount of its $25 million commitment. Casita's investment commitment allegedly accounts for 61.9% of the Fund's total investment commitment.

Casita allegedly invested more than $20 million in the Fund pursuant to capital calls made through January 2005, and the Fund made investments in various companies, including a company named AMC Computer Corp. (AMC). A company which is affiliated with Casita, Eugenia VI Venture Holdings, Ltd. (Eugenia), also allegedly loaned more than $15 million directly to AMC. According to Casita, AMC's employees engaged in a fraudulent scheme whereby they used various means, including falsified financial reports, to mislead

---

1

Plaintiff also cross-moves for an order: (1) pursuant to CPLR 3025 (b), granting plaintiff leave to file a second amended consolidated complaint; and (2) pursuant to CPLR 3211 (a) (1), dismissing defendant's counterclaims insofar as they are predicated upon defendant's purported contractual right to recover monies owed on two capital calls relating to so-called "Follow-on Investments." However, those branches of plaintiff's cross motion will be addressed in a separate decision.

AMC's lenders and investors into believing that AMC's financial condition was better than it actually was. Allegedly as a result of that fraudulent scheme, AMC encountered financial difficulties, and its assets were eventually liquidated in a voluntary assignment for the benefit of its creditors. The Fund allegedly lost the entire value of its investment in AMC, and Eugenia also allegedly lost a substantial amount of money. According to Casita, certain individuals associated with the Fund -- including Robert Glaser, who is the sole director of the Fund and the managing member of the general partner of two limited partnership which are the manager and the advisor of the Fund -- either originated, or participated in, or were negligent in failing to prevent the fraudulent scheme involving AMC. Beginning in 2005, Eugenia initiated legal actions against various entities and individuals, including Glaser and certain other persons associated with the Fund, relating to the purported fraud involving AMC.

Casita has refused to fund seven capital calls by the Fund dated September 14, 2005 through December 19, 2006 -- those numbered 28 through 34 (each, individually, a Capital Call) -- which are the subject of these two consolidated actions. In the first action (Index Number 603525/2005), commenced on October 3, 2005, Casita alleged that the Fund's issuance of Capital Call 28 was a breach of the Subscription Agreement. In that action, I granted Casita's motion for the TRO, which enjoined the Fund from acting adversely against Casita upon any default by Casita under the Subscription Agreement and/or the Articles. On March 21, 2006, after the Fund had issued Capital Calls 29, 30 and 31, Casita commenced the second action (Index Number 600966/2006), which alleged that the issuance of those Capital Calls was also a breach of the Subscription Agreement. The Fund subsequently issued Capital Calls 32, 33 and 34, which Casita has also refused to pay. Although the Fund disputes whether the TRO prevents it from declaring Casita to be in default on account of its failure to fund Capital Calls 29 through 34, the Fund has apparently not formally declared Casita to be in default with respect to those Capital Calls.

On or about March 5, 2007, after I granted a motion to consolidate the two actions, Casita filed a "first amended verified consolidated complaint" (the Complaint). The Complaint asserts two causes of action which allege that the Fund's issuance of the Capital Calls was: (1) a breach of contract, because the Capital Calls were not authorized under the Subscription Agreement; and (2) a breach of fiduciary duty, because the Capital Calls were (a) tainted by, and issued partially to cover costs that the Fund incurred as a result of, the fraudulent scheme relating to AMC, which involved conduct by persons associated with the Fund that was "in breach of [the Fund's] ... fiduciary duties to its investors, including Casita" (Complaint, ¶ 39) and (b) not authorized under the Subscription Agreement. The Complaint seeks monetary damages, a declaratory judgment and preliminary and permanent injunctions.

"In order to obtain a preliminary injunction, the moving party must demonstrate (1) likelihood of success on the merits; (2) irreparable injury absent the injunction; and (3) a balancing of the equities in its favor" (*Matter of 35 N.Y. City Police Officers v City of New York*, 34 AD3d 392, 394 [1st Dept 2006]).

Casita has failed to establish, for purposes of the instant motions, that it is likely to succeed on the merits of its second cause of action for breach of fiduciary duty. The breaches of fiduciary duty alleged in that claim are predicated upon the involvement of certain individuals who are associated with the Fund in the fraudulent scheme involving AMC, and also upon the Fund's issuance of capital calls which are purportedly not authorized by the Subscription Agreement and/or the Articles. However, insofar as the claim relates to the purported fraudulent scheme involving AMC, the claim is supported only by inadequately substantiated allegations of fraud and wrongful conduct, which are insufficient to demonstrate a clear likelihood that Casita will succeed on the merits of the claim (*cf. Lugosch v Congel*, 2001 WL 1217213, *6 [ND NY, Aug. 30, 2001]). Insofar as the breach of fiduciary duty claim is predicated upon the Fund's allegedly wrongful issuance of capital calls which are not authorized under the Subscription Agreement and/or the Articles, the

claim would appear to be redundant or duplicative of Casita's breach of contract claim, and subject to dismissal, inasmuch as the breach of fiduciary duty claim "fails to allege conduct by defendant[] in breach of a duty other than, and independent of, that contractually established between the parties" (*Kaminsky v FSP Inc.*, 5 AD3d 251, 252 [1st Dept 2004]; *see also William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]).

However, Casita has demonstrated that it is likely to succeed on the merits of its breach of contract claim, although only to the extent of establishing that the Fund's issuance of Capital Calls 30, 31 and 32, and the portion of Capital Call 28 which was allocated to the payment of litigation expenses, was a breach of the terms of the Subscription Agreement and the Articles. The Fund issued Capital Calls 30 and 31 on March 3, 2006 to fund two investments -- in entities known as "Parts Depot" and "Uncle Julio's" -- which both parties agree should be characterized as "Follow-on Investments."

Article 1 of the Articles defines a "Follow-on Investment" as "an Investment in a Portfolio Company subsequent to the initial investment in such Portfolio Company." Subsection 1.3 (a) (iii) of the Subscription Agreement states, in relevant part, that:

> Subscriber shall not be required to make any Capital Contribution ... (B) after the expiration of the Investment Period ...; provided, however, that notwithstanding clause (B) of this sentence, ... Capital Contributions may be required after the expiration of the Investment Period ... (y) in connection with an Investment in a Portfolio Company subsequent to the initial Investment in such Portfolio Company, which subsequent Investment is consummated within six months after the expiration of the Investment Period ... .

Thus, pursuant to subsection 1.3 (a) (iii) (y), Casita would presumably not be required to fund a capital call for a Follow-on Investment "after the expiration of the Investment Period" unless such investment was "consummated within six months after the expiration of the Investment Period."

The parties evidently agree that the "Investment Period" expired no later than May 5, 2005 (*see* Complaint, ¶ 15; Answer, ¶ 15; Pl. Mem. of Law, at 7; Def. Reply Mem. of Law, at 10 n 5). Therefore, Casita was presumably not required to fund a capital call for a

Follow-on Investment after May 5, 2005 unless the Follow-on Investment was consummated by November 5, 2005, that being the date six months after May 5, 2005. Inasmuch as Capital Calls 30 and 31 were both issued on March 3, 2006, to cover Follow-on Investments that were apparently consummated after November 5, 2005, it would seem that Casita was not required to fund those Capital Calls.

The Fund contends that Casita was obligated to fund capital calls for Follow-on Investments which were consummated within 12 months after the expiration of the Investment Period, rather than six months, because: (1) article (33) (d) (i) (y) of the Articles states that "a Subscription Agreement may provide that Capital Contributions may be required after the Investment Period Termination Date ... in connection with a Follow-on Investment consummated within twelve months after the Investment Period Termination Date," and section 3.7 of the Subscription Agreement provides that, if a conflict exists between the Subscription Agreement and the Articles, the Articles will govern; and (2) the Fund, a Cayman Islands investment fund, was organized contemporaneously with, and intended to be operated in a parallel manner with, a United States fund (the U.S. Fund), and the limited partnership agreement for the U.S. Fund provides that investors in that fund are required to pay capital calls for Follow-on Investments consummated within 12 months after the "Investment Period Termination Date" (*see* Glaser Supp. Affirm., ¶¶ 11-12).

However, the Fund's contentions are not persuasive. The language of article 33 (d) (i) (y) of the Articles is merely permissive, stating that the Subscription Agreement "***may*** provide that Capital Contributions ***may*** be required" (emphasis added) to fund Follow-on Investments consummated within 12 months after the "Investment Period Termination Date." That the Subscription Agreement authorizes capital calls for Follow-on Investments consummated only within six months after the expiration of the Investment Period does not present a conflict with article 33 (d) (i) (y), but merely indicates that the Subscription Agreement does not extend the time during which the Fund can issue capital calls for

Follow-on Investments to the full extent permitted in the Articles. The Fund's interpretation of the contractual language would deprive the six-month time limitation set forth in subsection 1.3 (a) (iii) (y) of the Subscription Agreement of any meaning or effect, violating the basic tenet of contract construction that "[a] reading of [a] contract should not render any portion [of the contract] meaningless" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]).

Moreover, the Fund's contention that the time limitation on capital calls for Follow-on Investments, which is set forth in the limited partnership agreement for the U.S. Fund, should be applied to capital calls for Follow-on Investments by the Fund, despite the six-month period specifically provided for in the Subscription Agreement, is untenable because: (1) such a construction would deprive a provision of the parties' agreed upon contract (i.e., the six-month time limitation set forth in subsection 1.3 [a] [iii] [y] of the Subscription Agreement) of meaning and effect, and substitute therefor a provision contained in a contract which Casita did not even enter into (i.e., the 12-month time limitation set forth in the U.S. Fund's limited partnership agreement); (2) the Subscription Agreement expressly provides that there need not be a complete correspondence between investments in the Fund and in the U.S. Fund, stating that "[i]t is the intent, ***but not the obligation***, of the Manager that Investments of the Fund and the U.S. Fund ... will be ***substantially*** parallel and in proportion to the aggregate commitments of the Fund and the U.S. Fund" (Subscription Agreement, § 3.3 [emphasis added]); and (3) Casita invested in the Fund, not the U.S. Fund.

Therefore, Casita has demonstrated that it is likely to succeed on the merits of its claim that it was not required to fund Capital Calls 30 and 31, and that it would be a breach of the parties' contract for the Fund to declare or enforce a default against Casita, under the Subscription Agreement and/or the Articles, on account of Casita's refusal to fund those Capital Calls.

Casita has also demonstrated a likelihood of success on the merits of its claim that it was not required to fund the litigation expenses which were the stated basis for the Fund's

issuance of Capital Call 32 and a portion of Capital Call 28. The Fund is correct in asserting that article 33 (f) of the Articles is the provision which generally authorizes capital calls for litigation expenses. Article 33 (f) provides that "[t]he Management Agreement [2] may provide that the Manager, on behalf of the Board, shall ..., from time to time in its discretion, send Drawdown Notices ... for Capital Contributions in amounts not exceeding such amounts as the Board estimates to be necessary to pay Expenses," and, that, "[i]n furtherance of the foregoing, the [Fund] may require ... Class A Members to make Capital Contributions on the Initial Closing Date and on dates subsequent thereto in such amounts as the [Fund] estimates to be necessary to pay Expenses." "Expenses" are defined in article 1 of the Articles to include the "the expenses of the [Fund] described in ... Article[] 69," and the expenses described in article 69 include "without limitation, expenses of ... outside counsel and ... any ... litigation expenses."

However, Casita correctly asserts that capital calls for litigation expenses, albeit authorized by article 33 (f), are nonetheless subject to the time limitations set forth in article 33 (c) and (d). Article 33 (a) is a general introductory provision which provides that "[c]ommitments shall be drawn upon by the [Fund] at the times and in the manner provided in this Article 33." Thus, article 33 (a) encompasses capital calls issued pursuant to all of the subparts of article 33, including article 33 (f). Article 33 (c) (ii) provides that, "[s]ubject to clause (d) of this Article 33, no Class A Member shall be required in any Subscription Agreement to make any Capital Contribution pursuant to Article 33 (a) ... after the Investment Period Termination Date." Since the phrase "Capital Contribution pursuant to Article 33 (a)," in article 33 (c) (ii), encompasses a capital contribution made pursuant to article 33 (f), a member cannot be required to make a capital contribution for litigation

---

2

Neither party has submitted a copy of a management agreement for the Fund, or asserted that such an agreement is relevant to the issue of whether there is a final date beyond which a member cannot be required to pay a capital call for "Expenses."

expenses after the "Investment Period Termination Date" except as permitted in article 33 (d).

Article 33 (d) (i) (x) -- the only provision of article 33 (d) which seems applicable to a capital call for litigation expenses -- provides that, "[n]otwithstanding Article 33 (c) (ii), ... a Subscription Agreement may provide that Capital Contributions may be required after the Investment Period Termination Date ... to fund the expenses and liabilities of the [Fund] ... incurred on or prior to the expiration of the Investment Period and thereafter only to the extent required by Cayman Islands law." Subsection 1.3 (a) (iii) (x) of the Subscription Agreement, a parallel provision, provides that "Capital Contributions may be required after the expiration of the Investment Period ... to fund the expenses and liabilities of the Fund ... incurred on or prior to the expiration of the Investment Period and thereafter only to the extent required by applicable Cayman Islands law."

Capital Calls 28 and 32 were issued on September 14, 2005 and April 28, 2006, that is, after the expiration of the Investment Period, which occurred no later than May 5, 2005. It does not appear that either of those Capital Calls was issued to fund litigation expenses that were incurred on or prior to the expiration of the Investment Period or required by applicable Cayman Islands law. The Fund asserts that "the events giving rise to the litigation expenses occurred before May 5, 2005" (Def. Reply Mem. of Law., at 12-13). However, even assuming the accuracy of that assertion, it would not be probative as to whether the litigation expenses were incurred on or prior to that date. Nor does anything contained in the record demonstrate that applicable Cayman Islands law required Casita to fund the litigation expenses. Thus, Casita has established that it is likely to succeed on the merits of its claim that it was not required to fund either Capital Call 32 or the portion of Capital Call 28 which was attributable to litigation expenses.

However, Casita has failed to establish that it is likely to prevail on in its claim that it was not required to pay the remaining portion of Capital Call 28, which was attributable

to the Fund's payment on a guaranty that the Fund had provided on behalf of AMC. The Fund argues that its payment on the AMC guaranty should be treated as a so-called "Facilitating Investment," and that Capital Call 28 was timely, as a capital call for a Facilitating Investment, under article 33 (e) of the Articles. The Fund argues, alternatively, that the Capital Call to cover payment on the AMC guaranty was timely even if it is deemed to be a capital call for a Follow-on Investment, governed by article 33 (d) (i) (y) of the Articles and subsection 1.3 (a) (iii) (y) of the Subscription Agreement, or a capital call to cover an expense or liability, governed by article 33 (d) (i) (x) of the Articles and subsection 1.3 (a) (iii) (x) of the Subscription Agreement. Casita argues that the guaranty payment can only be deemed an expense or liability, and that Capital Call 28, as a capital call issued to cover an expense or liability, was untimely under article 33 (d) (i) (x) of the Articles and subsection 1.3 (a) (iii) (x) of the Subscription Agreement.

However, accepting Casita's premise -- i.e., that the Fund's payment on the guaranty must be deemed an expense or liability -- Casita has failed to demonstrate that Capital Call 28, as a capital call issued to cover such an expense or liability, was untimely under article 33 (d) (i) (x) of the Articles and subsection 1.3 (a) (iii) (x) of the Subscription Agreement. Pursuant to those provisions, as previously set forth, a member or subscriber may be required to make capital contributions after the expiration of the Investment Period "to fund the expenses and liabilities" of the Fund that were "incurred on or prior to the expiration of the Investment Period." The Fund apparently entered into the AMC guaranty on or about March 24, 2004 (*see* Glaser Supp. Affirm., ¶ 4 and Ex. A), and Casita has not established that the Investment Period expired before May 5, 2005. Inasmuch as Casita has failed to demonstrate that the Fund's obligation to pay on the AMC guaranty was not a liability that the Fund incurred before the expiration of the Investment Period, Casita has not established a clear likelihood that it will succeed on the merits of its claim that it was not required to fund the portion of Capital Call 28 that was attributable to the Fund's payment on the AMC guaranty.

Casita has also failed to establish that it is likely to succeed on the merits of its claim that it is not required to fund Capital Calls 29, 33 and 34, which were issued to cover management and advisory fees for the Fund. Casita does not argue that any of those Capital Calls was untimely. Rather, Casita contends that the Fund's issuance of other capital calls that were unauthorized constituted a material breach of the Subscription Agreement and of the Articles, and that the Fund's material breach relieved or excused Casita from performing its further obligations under those agreements, including its obligation to pay management and advisory fees.

Certainly "[w]hen a party has breached a contract, that breach may excuse the non-breaching party from further performance if the breach is 'material'" (*New Windsor Volunteer Ambulance Corps v Meyers*, 442 F3d 101, 117 [2d Cir 2006]). In such a case, "the non-breaching party is discharged from performing any further obligations under the contract, and ... may elect to terminate the contract and sue for damages" (*NAS Elec. v Transtech Elec. PTE*, 262 F Supp 2d 134, 145 [SD NY 2003]). However, while the non-breaching party may elect either to cease to perform under the contract or to continue to perform:

> conduct indicating an intention to continue the contract in effect will constitute a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform. In other words, the general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply where the latter party, with knowledge of the facts, either performs ... despite the breach, or insists that the defaulting party continue to render future performance.

(14 Lord, Williston on Contracts § 43:15, at 626 [4th ed] [footnotes omitted]; *see e.g. Liebowitz v Elsevier Science*, 927 F Supp 688, 702 [SD NY 1996]).

Casita's conduct appears to constitute an election by it to enforce the Fund's performance under the Subscription Agreement and the Articles, and to continue those contracts in effect, rather than to terminate those contracts on account of the Fund's purported breach. Casita asserts: that it "does not seek to 'opt out' of *any* provision of the

parties' agreement"; and that, "to the contrary, it seeks to enforce those provisions against [the Fund]," and "to maintain its contract rights in all respects" (Pl. Reply Mem. of Law, at 12 [emphasis in original]). Casita evidently seeks to retain its investment in the Fund, and to enforce its contractual rights, inter alia, to continue to receive the profits and distributions attributable to its Class A Shares, under articles 28, 46 and 47 of the Articles, and to continue to exercise the voting and approval rights appurtenant to its Class A Shares, under article 59 of the Articles. Insofar as Casita's conduct might be deemed to constitute an election by it to continue the parties' contractual relationship in effect, Casita has waived any right it might have to assert that the Fund's purported breach of contract, by reason of its issuance of unauthorized capital calls, discharged Casita's contractual obligation to pay management and advisory fees. Consequently, Casita has not shown that it is likely to succeed on the merits of its claim that it was not required to fund Capital Calls 29, 33 and 34.

In addition to demonstrating that it is likely to succeed on the merits of its breach of contract claim -- with respect to Capital Calls 30, 31 and 32, and the portion of Capital Call 28 which was attributable to the payment of litigation expenses -- Casita has also demonstrated the potential for irreparable injury in the event that the requested preliminary injunction is not issued with respect to those Capital Calls.

When Casita refused to pay Capital Call 28, the Fund notified Casita that, if it did not pay the Capital Call within five business days from the date of that notification, Casita would be deemed to be in default under the Articles. Article 42 of the Articles provides: that a member who fails to fulfill its commitment to pay a capital call in accordance with its Subscription Agreement shall be deemed to be in default of its obligations under that agreement; that such defaulting member shall lose the right to receive any distributions attributable to the member's Class A Shares; that such member shall lose the right to exercise the voting, consent and decision-making rights appurtenant to its Class A Shares; and that such member's Class A Shares are subject to "forced sale" (Articles, art 42 [b], [c] and [d]).

Casita asserts that it will sufferable potentially irreparable harm if the Fund is permitted to declare and enforce a default against Casita under the Articles, in that Casita will potentially lose: its right to receive distributions on its Class A Shares; its right to exercise or withhold its vote, consent or decision with respect to matters affecting the Fund; and some or all of its investment in the Fund.

Casita's loss of the right to receive distributions on its Class A Shares does not constitute irreparable injury, inasmuch as Casita's damages resulting from such a loss are "compensable in money and capable of calculation" (*Credit Index, L.L.C. v Riskwise Intl. L.L.C.*, 282 AD2d 246, 247 [1st Dept 2001]). However, Casita's loss of some or all of its investment in the Fund, by reason of a forced sale of its Class A Shares, and/or its loss of the voting and decision-making rights appurtenant to those shares, would constitute irreparable injury (*see e.g. Suchodolski Assoc. v Cardell Fin. Corp.*, 2003 WL 22909149, *4 [SD NY, Dec. 10, 2003] [finding that the plaintiffs' loss of shares of stock in a company, and of the ability to participate in the company's business, would constitute irreparable harm]; *Street v Vitti*, 685 F Supp 379, 384 [SD NY 1988] [finding that the forced sale of the plaintiffs' shares of stock would constitute irreparable harm, where the value of the shares could not be adequately determined]).[3] Casita asserts that, as the investor responsible for 61.9% of the investment committed to the Fund, it has a commensurate degree of control over matters submitted to the holders of Class A Shares for vote, consent or approval. Thus, Casita's loss of the voting and decision-making rights appurtenant to its Class A Shares would be irreparable, inter alia, because Casita would thereby lose majority voting control with respect to such matters (*see e.g. Danaher Corp. v Chicago Pneumatic Tool Co.*, 1986 WL 7001, *14 [SD NY, June 19, 1986] [granting preliminary injunction where plaintiffs were controlling

---

3

Insofar as Casita, as a consequence of its purported default, were to be deprived of access to the books, records and accounts of the Fund (*see* Articles, art 111 [a]), that loss may also constitute irreparable harm (*see e.g. Matter of Brenner v Goldsmith*, 114 AD2d 363, 366 [2d Dept 1985]; *Street v Vitti*, 685 F Supp at 384).

shareholders] ; *cf. Parrott v Pasadena Capital Corp.*, 1997 WL 13205, *3 [SD NY, Jan. 15, 1997] [denying preliminary injunction where plaintiff owned only approximately 4% of company's stock]).

Finally, neither Casita's loss of its investment in Class A Shares of the Fund, nor its loss of the voting and decision-making rights appurtenant to those shares, is compensable by money damages that would be capable of calculation to a reasonable degree of certainty (*see e.g. Penstraw, Inc. v Metropolitan Transp. Auth.*, 200 AD2d 442, 442 [1st Dept 1994]). Any calculation of the value of Casita's investment in Class A Shares of the Fund would be merely speculative, since it is not clear, among other things, what the future rate of return will be on an investment in the Class A Shares, or when the investment will be subject to liquidation.[4] Nor could Casita use an award of money damages to "cover" its loss of the Class A Shares, since, presumably, neither they nor an equivalent security would be available for purchase on the open market. Thus, Casita has adequately demonstrated the potential for irreparable injury in the event that the Fund is permitted to declare and enforce a default against Casita, under the Subscription Agreement and the Articles, on account of Casita's failure to fund Capital Calls 30, 31 and 32, and/or the portion of Capital Call 28 which was attributable to the payment of litigation expenses.

Casita has also demonstrated that the equities balance in favor of the granting of a preliminary injunction enjoining the Fund from declaring or enforcing such a default against Casita. If such an injunction is not granted, Casita may lose its entire investment in the Fund as a result of its failure to pay capital calls which, it appears, it should not be obligated to pay under the Articles and the Subscription Agreement. Conversely, if such an injunction is granted, the Fund -- pending the final determination of the causes of action alleged in the

---

4

The "Term" of the Fund is defined in article 108 of the Articles and, according to the Fund, will expire on "May 7, 2010, unless extended by the Board in accordance with Article 108" (Def. Mem. of Law, at 20).

complaint -- will merely have to do without, or find other sources to supplant, the amount of the Capital Calls which, it appears, have been improperly assessed upon Casita.

Accordingly, Casita has demonstrated its entitlement to a preliminary injunction enjoining the Fund from declaring or holding Casita to be in default under the Subscription Agreement and the Articles -- or taking adverse action against Casita as a consequence of any such purported default -- but only insofar as such purported default would arise in connection with Casita's refusal to fund Capital Calls 30, 31 and/or 32, and/or that portion of Capital Call 28 which is attributable to litigation costs and expenses.

For the foregoing reasons, the Fund's motion for an order vacating the TRO is granted, in part, but only to the extent that the TRO, insofar as it is not continued in the preliminary injunction granted herein, is vacated.

Casita's cross motion is also granted, in part, but only to the extent that -- conditioned upon Casita's provision or continuation in effect of an undertaking in the amount of $3.1 million, that being the approximate aggregate total of the amounts of Capital Calls 30, 31, and 32, and the portion of Capital Call 28 which was attributable to the payment of litigation expenses[5] -- Casita is granted a preliminary injunction enjoining the Fund from declaring or enforcing a default against Casita, under the Subscription Agreement and/or the Articles, on account of Casita's nonpayment of Capital Calls 30, 31 and 32, and the portion of Capital Call 28 which was attributable to the payment of litigation expenses.

---

[5] Although Casita established certain letters of credit in favor of the Fund, as a condition of the TRO, the current status of those letters of credit is unclear.

Settle an order in Room 148 within 20 days from the date of this order providing for the relief granted herein.

Dated: 12/7/07

ENTER:

J.S.C.