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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

LINDA SHENWICK, derivatively

- v -

HM RUBY FUND, L.P. et al

INDEX NO. 652082/2011

MOTION DATE

MOTION SEQ. NO. 001

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 by defendants for dismissal of the complaint is GRANTED per the attached Decision and Order

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

Dated: June 5, 2012

MELVIN L. SCHWEITZER, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

LINDA SHENWICK, derivatively on behalf of HIMELSEIN MANDEL OFFSHORE LIMITED, Plaintiff, v. HM RUBY FUND, L.P., WAYNE HIMELSEIN, JASON G. MANDEL, HIMELSEIN MANDEL ADVISORS LLC, HIMELSEIN MANDEL FUND MANAGEMENT LLC, VIJAYABALAN MURUGESU, and EVAN BURTTON, Defendants, - and - HIMELSEIN MANDEL OFFSHORE LIMITED, Nominal Defendant.	Index No. 652082/2011 DECISION AND ORDER Motion Sequence Nos. 001, 002 and 003

MELVIN L. SCHWEITZER, J.:

Motion sequence numbers 001, 002, and 003 are consolidated for disposition.

In motion sequence number 001, defendants HM Ruby Fund, L.P. (HM Ruby), Wayne Himelsein (Himelsein), Jason G. Mandel (Mandel), Himelsein Mandel Advisors, LLC (HM Advisors), and Himelsein Mandel Fund Management LLC (HMFM) move: (1) pursuant to CPLR 3211 (a) (1), (a) (3), (7), for dismissal of the complaint on the grounds of (a) a defense founded on documentary evidence, (b) lack of standing, and (c) failure to state a cause of action; and (2) pursuant to CPLR 3214 (b), for an order staying discovery until determination of the motion.

In motion sequence number 002, defendants Evan Burtton (Burtton) and Vijayabalan Murugesu (Murugesu) (together, Defendant Directors) move, pursuant to CPLR 3211 (a) (7) and (a) (8), for dismissal of the complaint on grounds of (a) failure to state a cause of action and

(b) no jurisdiction of the person of the defendant, and, pursuant to CPLR 3214 (b), for an order staying discovery.

In motion sequence number 003, plaintiff Linda Shenwick moves, pursuant to Commercial Division Rule 18 (22 NYCRR 202.70), for permission to file a "Sur-Reply Declaration."

Factual Background and Allegations

The complaint alleges as follows: plaintiff is a shareholder of nominal defendant Himelsein Mandel Offshore Limited (Fund), a mutual fund organized under Cayman Islands law, which maintains a nominal office (i.e., a mail drop) in the Cayman Islands. The Fund served as an investment vehicle through which non-U.S. investors and U.S. tax-exempt organizations participated in the financing of life insurance policies (Complaint, ¶¶ 4-5).

Defendant HM Ruby is a Delaware limited partnership that provides financing in the life insurance industry (HM Ruby and the Fund together, HM). Its general partner is HMFM, an entity that defendants Himelsein and Mandel founded. Defendant HM Advisors is the Fund's investment adviser, with Himelsein and Mandel as its principals, responsible for investing the Fund's portfolio.

HMFM, a corporate affiliate of HM Advisors, manages HM Ruby, through which the Fund conducted its investments. Mandel is the managing partner of HMFM, Himelsein is a director of the Fund and a principal of HM Advisors. The Director Defendants are directors of the Fund, and affiliated with Ogier Fiduciary Services (Cayman) Limited (Ogier), which provided services to the Fund (*id.*, ¶¶ 6-11).

The Fund makes all of its investments jointly or through defendant HM Ruby, which also employs HM Advisors as its investment advisor. HM Ruby "causes" an elderly person to purchase a life insurance policy with financing that HM Ruby or the Fund arranges. After two years, HM acquires ownership of the policy, and continues making payments on the policy until the insured dies, at which time HM collects on the underlying insurance policy. The investment thesis of the Fund is that it can profit by taking advantage of inefficiencies in the pricing of life insurance policies, known as "insurance arbitrage" (*id.*, ¶¶ 16-17).

The directors of the Fund, along with HM Advisors, invested virtually all of the Fund's assets in loans that HM Ruby originated in connection with HM Ruby's acquisitions of the policies. Neither the Fund's directors, nor HM Advisors, took adequate steps to ensure that HM had sufficient funds to pay the policies' premiums, or that HM Ruby was not overpaying for the insurance policies (*id.*, ¶ 18).

In the aftermath of the 2008 financial crisis, and the highly publicized implosion of hedge funds, investors in the Fund began to request that their shares be redeemed for their stated net asset value. Plaintiff made such request on June 30, 2010. The Fund refused to redeem the plaintiff's "Class R" shares for cash, and, instead, offered the equivalent value in life insurance investments or new "Class L" shares, which purportedly would be paid off as soon as the Fund's liquidity was restored. Notwithstanding the redemption requests, the Fund continued to invest its assets in life settlement policies and related assets of questionable value (*id.*, ¶¶ 23-26).

In February 12, 2010, HM Ruby entered into a credit facility and security agreement with the distressed asset division of Fortress Credit Corp. (Fortress) (*id.*, ¶ 27). This was disclosed in October 2010, in the Fund's financial statements for the 2009 fiscal year. The 2009 statements

also disclosed for the first time: that from January 1, 2010 through October 4, 2010, the Fund had only attracted $650,000 of new subscriptions for Class R shares; that Fortress took a senior position regarding HM Ruby's future cash flows; that as of December 31, 2009, 70% of the total assets of the Fund were being held in Class L shares awaiting redemption; and that the Fund's assets were not based on quoted prices in active or inactive markets for similar assets (*id.*, ¶ 29).

In December 2010, Fortress issued a formal notice of event of default to HM Ruby, and reserved its acceleration rights. HM Advisors informed plaintiff and other investors in the Fund of serious financial difficulties. In January 2011, HM Advisors informed them of the suspension of the determination of net asset value, and that the liquidation of assets to meet redemption requests would not be reasonably practicable, and might seriously prejudice shareholders (*id.*, ¶¶ 32-34).

The complaint describes other problems such as the sale of HM Ruby's $1.2 billion life settlement portfolio for $105 million to Gerova Financial Group Ltd., which, in March 2011, defaulted on the terms of its agreement with HM Ruby (*id.*, ¶ 35). A special purpose vehicle that HM Ruby established to pay a $65 million loan to Fortress on the credit facility failed, and HM Ruby was reported to owe Fortress $80 million in principal and interest, as well as premium payments that Fortress has paid since HM Ruby breached its loan agreement. In April 2011, HM Offshore and HM Advisors stated that the United States Securities and Exchange Commission had been conducting a formal investigation titled *In the Matter of Himelsein Mandel Fund Management* (*id.*, ¶¶ 39-40).

Plaintiff commenced this action derivatively in the right and for the benefit of the Fund, which is named as a nominal defendant solely in a derivative capacity. Plaintiff did not make a

demand on the Fund's directors to institute this action, because, allegedly, such demand is either unnecessary or would be a useless and futile act.

The complaint contains four causes of action. The first cause of action is against Himelsein, HM Advisors, and the Director Defendants for breach of fiduciary duties or aiding and abetting the breach of fiduciary duties by, among other things, causing the Fund's investment in life settlement policies at artificially inflated prices to a point where HM Ruby's financial position had become so perilous that it threatened the value of the investments in the life settlement policies and the life settlement portfolio.

The second cause of action is against Mandel, HM Ruby, and HMFM for aiding and abetting the Fund's directors and HM Advisors' breaches of fiduciary duties, by assisting HM Ruby in purchasing life settlement policies and increasing the amount of premiums that HM Ruby had to pay, while knowing that the policies were overvalued.

The third cause of action is against Himelsein and the Director Defendants for breach of their duty of candor, and against HM Advisors, Mandel, HM Ruby, and HMFM for aiding and abetting such breaches. Allegedly, defendants breached their fiduciary duty, or aided and abetted such breach, by offering Class L shares to investors without disclosing adverse information about the Fund.

The fourth cause of action is against Himelsein, HM Advisors, and the Director Defendants for breach of their duty of loyalty, and against Mandel, HM Ruby, and HMFM for aiding and abetting such breaches by, among other things, agreeing to divide with HM Ruby proceeds available for distribution.

Determination

Motions 001 and 002 are granted, and motion 003 is denied.

Discussion

Motion 001

In support of their motion for dismissal of the complaint, movants HM Ruby, Himelsein, Mandel, HM Advisors, and HMFM argue that (1) under Cayman Islands law, plaintiff lacks standing to bring this action; (2) even if plaintiff had standing, the claims alleged here must be brought in courts in the Cayman Islands; and (3) the complaint fails to state a cause of action.

Under New York law, "claims related to corporate affairs – i.e., issues involving the rights and liabilities of a corporation – are governed by the internal affairs doctrine" (*In re BP p.l.c. Derivative Litig.*, 507 F Supp 2d 302, 307 [SD NY 2007]; *see also Galef v Alexander*, 615 F2d 51, 58 [2d Cir 1980]). Accordingly, the "rights of a shareholder in a foreign company (including the right to sue derivatively) are determined by the law of the place where the company is incorporated" (*In re BP p.l.c. Derivative Litig.*, 507 F Supp 2d at 307-8), which, here, is the Cayman Islands (*see also Howe v Bank of New York Mellon,* 783 F Supp 2d 466, 475 [SDNY 2011] [court must apply the law of the jurisdiction of incorporation to determine whether plaintiff has standing to bring this action, because the claims relate to the rights and liabilities of the company]). Moreover, the parties do not dispute that Cayman Islands law is applicable, at least in regards to the issue of standing.

In the context of derivative actions, the courts of the Cayman Islands adopt English common law principles (*CMIA Partners Equity Ltd. v O'Neill*, 29 Misc 3d 1228 (A), 2010 NY Slip Op 52068 [U] [Sup Ct, NY County 2010]; *see Winn v Schafer*, 499 F Supp 2d 390, 396

[SDNY 2007]). Controlling precedent as to standing and derivative actions under Cayman Islands law is the English common law rule set forth in *Foss v Harbottle* [1843] 2 Hare 461 [*Foss*], which prevents shareholders from bringing derivative actions except in limited instances (Declaration of Hector George Robinson, sworn to September 30, 2011, ¶¶ 8-11; *City of Harper Woods Empls.' Retirement Sys. v Olver*, 577 F Supp 2d 124, 131 [Dist DC 2008], *affd* 589 F3d 1292 [DC Cir 2009]; *CMIA Partners Equity Ltd. v O'Neill*, 29 Misc 3d 1228 (A), 2010 NY Slip Op 52068 [U], *supra*).

"There are four recognized exceptions to the rule in *Foss* that would permit a shareholder to bring a derivative action: (1) if the conduct infringed on the shareholder's personal rights; (2) if the conduct would require a special majority to ratify; (3) if the conduct qualifies as a 'fraud on the minority'; or (4) if the conduct consists of ultra vires acts" (*Winn v Schafer*, 499 F Supp 2d at 396).

Plaintiff is relying on the fraud on the minority exception, which requires her to show that the alleged wrongdoers (1) control the Fund, and (2) committed "fraud"; i.e., "self-dealing at the company's expense," which differs from the American understanding of the concept of fraud (*Feiner Family Trust v VBI Corp.*, 2007 WL 2615448, *5, 2007 US Dist LEXIS 66916, *18 [SDNY 2007]). The essence of the claims is "an abuse or misuse of power" (2007 WL 2615448, at *5, 2007 US Dist LEXIS 66916, at * 19). The rationale for this exception is that "if they were denied that right, their grievance could never reach the court, because the wrongdoers themselves, being in control, would not allow the company to sue" (*City of Harper Woods Empls.' Retirement Sys. v Olver*, 577 F Supp 2d at 132)

Plaintiff contends that the allegations in the complaint satisfy this standard because (1) she has established a prima facie fraud on the minority claim, and (2) the alleged wrongdoing was perpetrated by persons who are in a position to block the company from proceeding with the underlying claim by their control of the voting on corporate matters. Although plaintiff has satisfied the "control" component of the fraud on the minority exception, the complaint fails to adequately allege fraud.

As a preliminary matter, movants' argument – that plaintiff may not litigate her claims in this court because of a forum selection clause – is unpersuasive. According to movants, the "Advisory Agreement" between the Fund and HM Advisors contains a mandatory forum selection clause providing that "[e]ach party irrevocably agrees to submit to the exclusive jurisdiction of the court of the Cayman Islands over any claim or matter arising under or in connection with this agreement."

Plaintiff is not bound by the forum selection clause, because she is not a party to the agreement containing the clause, and she does not come within one of the three circumstances in which a nonparty may invoke a forum selection clause (*Freeford Ltd. v Pendleton,* 53 AD3d 32 [1st Dept 2008], *lv denied* 12 NY3d 702 [2009]). These include the following: (1) an entity or individual that is a third-party beneficiary of the agreement may enforce a forum selection clause found within the agreement; (2) parties to a "global transaction" who are not signatories to a specific agreement within that transaction may nonetheless benefit from a forum selection clause contained in such agreement if the agreements are executed at the same time, by the same parties or for the same purpose; and (3) a nonparty that is "closely related" to one of the signatories can enforce a forum selection clause. "The relationship between the nonparty and the signatory in

such cases must be sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them" (*id.* at 38-9). Movants do not assert the existence of any of these grounds (*see* Memorandum of Law in Support of the Motion, at 1-20). Furthermore, movants seek to invoke the forum selection clause against plaintiff, rather than plaintiff seeking to utilize it for her benefit, and this distinguishes the situation presented here from that in *Freeford Ltd. v Pendleton,* or from the majority of cases that movants cite in their legal memoranda. The others are inapplicable.

Turning to the issue of control, defendants have control by virtue of the voting proxy that they granted to themselves. The subscription agreement pursuant to which the investors acquired their interests in the Fund provides:

> "The Subscriber hereby designates and appoints Himelsein Mandel Advisors, LLC with full power of substitution, as its true and lawful Proxy and Attorney-in-Fact for the purpose of voting the shares herein subscribed for or otherwise acquired as said Proxy may determine on any and all matters which may arise at any annual or special meeting of shareholders and upon which such shares could be voted by shareholders present in person at such meeting."

(*see* Exhibit E to Affirmation of Jeffrey S. Abraham, Esq., at 95). Hence, for purposes of Cayman Islands law, in the very least they have de facto control (*see In Re Tyco Intl. Ltd.*, 340 F Supp 2d 94, 99 [D NH 2004]; *CMIA v O'Neill*, Sup Ct, NY County, March 18, 2011, Kornreich, J., Index No. 603622/2009). To be sure, the subscription agreement affords the shareholders the right to revoke the voting proxy, but that requires an affirmative act. The subscription agreement was designed so that the defendants would acquire control by default, and there is no indication that such control has been relinquished. If, instead, the subscribers

affirmatively conferred control via proxy on the defendants, the results may be different, but that is not alleged to be the case here.

The complaint is dismissed as against movants, however, because it fails to adequately allege self-dealing for purposes of satisfying the pleading requirements under Cayman Islands law. The essence of the claim is that the individual defendants, and the defendant companies through which they operated, failed to perform their jobs properly, and were overpaid in compensation, which is not self-dealing under Cayman Islands law (*City of Harper Woods Empls.' Retirement Sys. v Olver*, 577 F Supp 2d at 135). Allegedly, defendants were overcompensated, because the Fund was mismanaged by the purchase of insurance polices that were not properly valuated.

Specifically, the complaint alleges that: (1) defendants caused the purchase of "policies at artificially inflated prices to a point where HM Ruby's financial position had become so perilous that it threatened the value of the investments in the life settlement policies and the life settlement portfolio" (first cause of action); (2) the amount of premiums that HM Ruby had to pay was increased, even though the policies were overvalued (second cause of action); (3) defendants offered Class L shares to investors without disclosing adverse information about the Fund (third cause of action); and (4) defendants wrongfully intend to divide with HM Ruby proceeds available for distribution (fourth cause of action). These are the sort of allegations that "do not constitute the necessary self-dealing by a director sufficient to underpin the exception" (*id.* at 135 [defendants allegedly made illegal payments that jeopardized the company's financial health, but this does not constitute the requisite fraudulent conduct]).

The complaint alleges that defendants improperly refused to redeem shares, but acknowledges that the redemption requests occurred in the midst of the financial market turmoil of 2008, and, as defendants point out, the governing documents afford the managers the right to withhold redemptions under circumstances such as "market disruptions."

According to the declaration of Graeme Alexander Halkerston, an attorney in the Cayman Islands office of Appleby, HM Advisors received fees based on a net asset value which was overly inflated due to defendants' misconduct (Declaration of Graeme Alexander Halkerston, sworn to November 20, 2011, ¶ 11). The allegation about fees, and their tie-in with net asset value, is incidental to the primary claim of mismanagement. That a greater net asset value would lead to higher fees is not the type of self-dealing required, because it does not show that defendants "stood to gain in some special way . . . at the expense of other shareholders" (*In Re Tyco Intl. Ltd.*, 340 F Supp 2d at 100).

Plaintiff's allegations about the receipt of fees do not establish that defendants benefitted "'beyond the normal emoluments of office'" (*Winn v Schaefer*, 499 F Supp 2d at 398, quoting *In Re Tyco Intl. Ltd.*, 340 F Supp 2d at 100, n 7). As persuasively opined by Hector George Robinson, defendants' Caymans Island law expert, the types of fraud claims where the courts permit derivative actions to proceed include instances where "wrongdoers made a concealed profit from the sale of property to the company, or where they diverted business from the company to another in which they are interested, as well as in cases of fraudulent misappropriation of corporate assets" (Reply Declaration of Hector George Robinson, sworn to January 3, 2012, ¶¶ 16-17, citing Palmer's Company Law).

Plaintiff cites *Renova Resources Private Equity Ltd. v Gilbertson* (2009 CILR 268 [Cayman Islands Grand Ct. 2009]) for the proposition that, if a director acts in a way in which he does not honestly believe is in the best interests of the company, then he is liable for breach of fiduciary duty, regardless of whether he stands or thinks he stands to gain personally from his actions. Reliance on *Renova* is unconvincing, because in that case, plaintiff alleged that the defendant director breached his fiduciary duty by "diverting away from the company a valuable opportunity to acquire from Unilever Plc. the benefit of exploiting the rights to the Faberge brand" (*id.* at 285). This is a far different type of allegation than the ones presented here.

The same analysis applies to plaintiff's citation to *Weavering Macro Fixed Income Fund Ltd. v Peterson*, Cause No. FSD 113 of 2010 [Cayman Islands Grand Ct. 2011]). In *Weavering*, the director defendants are alleged to have run the company without any regard for corporate formalities and completely disregarded their responsibilities: "In 2007 they signed sham investment management and advisory agreements without reading them, or, if they did, knowing that the agreements would never be acted upon"; in six years they never asked the persons whom they were supposedly supervising to provide any reports; no business was ever conducted at board "meetings"; the directors "consistently signed financial statements, management representation letters, side letters and other documents without making any enquiry whatsoever" (*see id.*, ¶ 51). Moreover, *Weaving* was not a derivative action; it was brought by the corporation's liquidator.

The fourth cause of action is based on a contingency that may not occur – the proposed plan of distribution (*see* Complaint, ¶¶ 41-43; 53 [f]). According to the complaint, this alleged breach of loyalty is based on a "contemplated sale to the Firm," and it is "anticipated that certain

proceeds will be available for distribution to HM Ruby and the Fund," and defendants' "contemplated actions" violate their duty (Complaint, ¶ 71). Because of the uncertainty of the terms of any contemplated sale and possible distribution, the claim is not ripe for adjudication (*see Parametric Capital Mgt., LLC v Lacher*, 15 AD3d 301, 302 [1st Dept 2005]).

Plaintiff's reliance on *ABN AMRO Bank, N.V. v MBIA Inc.* (17 NY3d 208 [2011]) is unavailing. There, the Court of Appeals found that the breach of contract claims were validly stated, not in spite of a contingency, but because, "by fraudulently transferring billions of dollars of its assets to MBIA Inc. for no consideration," MBIA Insurance Corporation "violated the covenant by substantially reducing the likelihood that [it] will be able to meet its obligations under the terms of the insurance policies" (*id.* at 228 [internal quotation marks and citation omitted]). The Court found that the complaint alleged an actual breach of the implied covenant of good faith and fair dealing.

For the foregoing reasons, the complaint does not satisfy the pleading requirements under Cayman Islands law to bring a derivative action.

Motion 002

The Director Defendants adopt the arguments by movants in motion 001, and they are entitled to dismissal of the complaint for the reasons discussed above. They also seek dismissal on the additional ground of lack of personal jurisdiction.

In support of their argument that the court lacks personal jurisdiction over them, the Director Defendants assert that they are foreign citizens who have not transacted business in New York in their individual capacities, or as non-executive directors of the Fund. They are both residents of the Cayman Islands, while Burrton is a citizen of New Zealand, and Murugesu is a

citizen of Malaysia. Both state that they have never resided in New York, nor do they own, lease, possess, or maintain a residence or other real property in New York, nor maintain a bank, investment, or deposit account in New York, and have never paid income taxes in New York.

They both also state that, in their individual capacities, they have not worked or transacted business in New York on a regular or consistent basis, have never owned, leased, or maintained an office or place of business in New York, and in their capacities as non-executive directors of the Fund, they have not traveled to New York or transacted any business in New York on behalf of or for the benefit of the Fund.

Burtton is employed by Ogier, and serves as an independent, non-executive director of the Fund. Murugesu was employed by Ogier from 2005 to 2011. Ogier is a Cayman Islands trust and administration services company that provides, among other things, services to Cayman Islands registered companies (such as the Fund) that include, primarily, independent directorships, registered office space and proxy services. In the capacities of non-executive directors, they participated in telephonic board meetings at Ogier's offices in the Cayman Islands. During these meetings, they discussed the Fund's business and related matters and adopted and recorded board resolutions. Both directors state that, during the course of their employment with Ogier, they have served as independent, non-executive directors for a variety of international and U.S. entities, other than the Fund, and have on occasion traveled to New York in their capacity as representatives of some of those entities.

Plaintiff contends that the court has personal jurisdiction over both defendants based on CPLR 302 (a) (1), (2), and (3), New York's long arm statute. CPLR 302 (a) (1) provides:

> "(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> "1. transacts any business within the state or contracts anywhere to supply goods or services within the state;"

CPLR 302 (a) (1) has two requirements: defendant must have "some purposeful activities within the State" and a substantial relationship must exist "between those activities and the transaction out of which the cause of action arose" (*O'Brien v Miller*, 60 AD3d 555, 555 [1st Dept 2009] [internal quotation marks and citation omitted]). A nondomiciliary defendant will have transacted business in New York if he has purposefully availed himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws (*Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002]).

To demonstrate compliance with the statute's requirements, plaintiff relies on the following: (1) Burrton and Murugesu served as directors of the Fund, which conducted its business activities through its investment advisor located in New York; (2) they admit in their affidavits traveling to New York regarding their directorial duties (but not as directors of the Fund); and (3) their employer, Ogier, established an ongoing banking relationship with JPMorgan Chase, N.A. in New York to facilitate its fund clients' subscription and redemptions. These allegations fail to show the "existence of some articulable nexus between the business transacted and the cause of action sued upon," and that the business actually transacted here was sufficiently related to the subject matter of the lawsuit (*McGowan v Smith*, 52 NY2d 268, 272 [1981]; *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 95 [1st Dept 2010]). Burrton and

Murugesu state in their affidavits that they have not traveled to New York or transacted any business in New York on behalf of, or for the benefit of, the Fund, and plaintiff offers no controverting evidence.

Moreover these activities are insufficient, because to avail herself of CPLR 302 (a) (1), plaintiff must show that defendants conducted business in New York on an individual basis, and not on behalf of a corporation (*Laufer v Ostrow*, 55 NY2d 305, 313 [1982]; *Brinkmann v Adrian Carriers, Inc.*, 29 AD3d 615, 617 [2d Dept 2006]). "[C]laims against a corporate defendant, if jurisdictionally viable do not provide a basis for personal jurisdiction over a corporate official or employee who acts on behalf of a corporation" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD23d at 95-96).

Plaintiff states that the directors authorized the Fund to send solicitations and communications to her in New York. She also states that, as board members, they probably attended meetings in New York on behalf of the Fund, and, presumably, engaged in e-mail and telephone contact with persons in New York, but she does not claim to have had any contact with the Defendant Directors. Although e-mails and telephone contact could be sufficient (*see e.g. Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65), *cert denied* 549 US 1095 [2006], plaintiff's support is based on speculative assertions by counsel which are insufficient to demonstrate that the court has jurisdiction over these defendants (*Andrew Greenberg, Inc. v Sir-Tech Software,* 297 AD2d 834 [3rd Dept 2002]). Plaintiff states that, as an investor in the Fund, she regularly receives communications from the Fund by mail, e-mail, and telephone, but the only specific contact that she describes pertains to Mandel, who contacted her on her cellular

telephone regarding a potential investment in the Fund (*see* Affidavit of Linda Shenwick, sworn to January 21, 2012, ¶ 4).

To the extent that plaintiff is relying on a theory of agency, that assertion is unpersuasive. CPLR 302 (a) (1) permits the New York courts to exercise personal jurisdiction over a non-domiciliary who in person *or through an agent* "transacts any business within the state." Although plaintiff argues that HM Advisors, which the directors appointed as the Fund's investment manager, was a New York limited liability company with its offices in Manhattan, HM Advisors did not act as agent of the Director Defendants, but, rather, as the agent of the Fund.

For similar reasons, plaintiff fails to establish jurisdiction through CPLR 302 (a) (2) ("commits a tortious act within the state, except as to a cause for action for defamation of character arising from the act"), because, again, the assertion is based on agency, i.e., the directors transacted business in New York through their agent HM Advisors, and the tortious act occurred by their agent in New York.

Lastly, plaintiff relies upon CPLR 302 (a) (3), which provides for jurisdiction over a defendant who:

> "3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> "(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> "(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

"The situs of the injury, for long-arm purposes under CPLR 302 (a) (3), is where the event giving rise to the injury occurred" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d at 97-98). Assuming, without deciding, that the alleged wrongful acts caused injury within the state, because, allegedly, the Fund's assets are located here, there are issues of fact as to whether the Director Defendants expected or should reasonably have expected that their acts would have consequences in the state, and whether they derived substantial revenue from interstate or international commerce. Both directors state that, during the course of their employment with Ogier, they have served as independent, non-executive directors for a variety of international and U.S. entities, other than the Fund, and have on occasion traveled to New York in their capacity as representatives of some of those entities. The provision about deriving substantial revenue from interstate or international commerce requires no direct contact with New York State (*Ingraham v Carroll*, 90 NY2d 592, 598 [1997]). Thus, there is an issue as to the extent to which they derive revenue from interstate or international commerce. However, because of the dismissal on the other ground of lack of standing, the issue is moot.

Motion 003

Plaintiff seeks permission to file a "Sur-Reply Declaration" of her Cayman Islands law expert Graeme Alexander Halkerston to clarify issues of Cayman Islands law. The motion is denied, because the Court does not require further clarification of Cayman Islands law to render its determination.

Accordingly, it is

ORDERED that the motion (001) by defendants HM Ruby Fund, L.P., Wayne Himelsein, Jason G. Mandel, Himelsein Mandel Advisors, LLC, and Himelsein Mandel Fund Management

LLC for dismissal of the complaint is granted, and the complaint is dismissed as against these defendants with costs and disbursements to them as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion (002) by defendants Evan Burtton and Vijayabalan Murugesu for dismissal of the complaint is granted, and the complaint is dismissed as against these defendants with costs and disbursements to them as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion (003) by plaintiff Linda Shenwick for permission to file a "Sur-Reply Declaration" is denied.

Dated: June 5, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.