

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 SEA TRADE MARITIME CORP. et. al., :
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 Plaintiffs, :
 :
 -against- :
 :
 STELIOS COUTSODONTIS, et. al., :
 :
 Defendants. :
 :
 -----X

9 Civ. 488 (LGS)

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS, on December 7, 2018, Judge Pitman filed a Report and Recommendation (the “Report”) recommending (1) that Defendant Stelios Coutsodontis is entitled to \$1,170.645.87, or one-half the proceeds from the sale of M/V ATHENA, plus any accrued interest, currently residing in escrow, and (2) that the balance of the escrow account be distributed to Plaintiff George Peters;

WHEREAS, the Report stated that the parties “have fourteen (14) days from the receipt of this Report to file written objections”;

WHEREAS, on December 18, 2019, the parties filed a letter requesting that the deadline to file objections be extended to January 21, 2019. The Order dated December 19, 2019, granted the extension;

WHEREAS, on February 23, 2019, the parties filed objections to the Report (the “Objections”) (Dkt. 371-72). The parties filed responses to the Objections on February 25, 2019 (Dkt. 375-76);

WHEREAS, no Objections were timely filed;

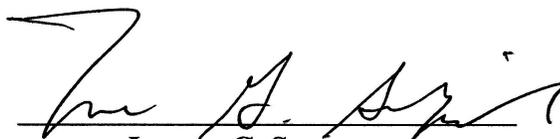
WHEREAS, in reviewing a Report and Recommendation of a magistrate judge, a district

judge “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). “In a case such as this one, where no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.” *Poulos, v. City of New York*, No. 14 Civ. 3023, 2018 WL 3745661, at *1 (S.D.N.Y. Aug. 6, 2018) (internal quotation marks omitted);

WHEREAS, the Court finds no clear error on the face of the record. It is hereby

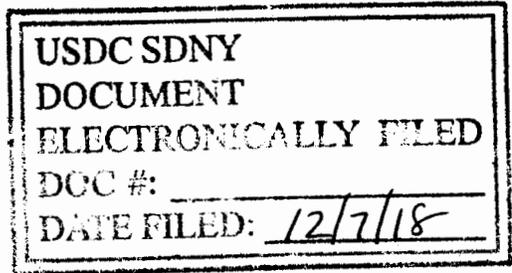
ORDERED that the Objections are overruled and the Report is adopted. For the reasons stated in the Report, the Clerk of Court is directed to enter judgment (1) for Defendant Coutsodontis in the amount of \$ 1,170.645.87, plus any accrued interest, currently residing in escrow; and (2) for Plaintiff Peters as to the remaining balance in the escrow account.

Dated: February 27, 2019
New York, New York



LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
SEA TRADE MARITIME CORPORATION, :
et al., :
Plaintiffs, :
-against- :
STELIOS COUTSODONTIS, :
Defendant. :
-----X

09 Civ. 488 (LGS) (HBP)
REPORT AND
RECOMMENDATION

PITMAN, United States Magistrate Judge:

TO THE HONORABLE LORNA G. SCHOFIELD, United States
District Judge,

I. Introduction

This action arises from an intra-family dispute over ownership and control of plaintiff Sea Trade Maritime Corporation ("Sea Trade"). The dispute has been the subject of numerous other actions that the parties have litigated across the globe since approximately 2005. Plaintiffs -- Sea Trade and its "attorney-in-fact" and shareholder George Peters -- commenced this action on January 16, 2009, claiming, among other things, that defendant Stelios Coutsodontis had breached his fiduciary duty to Sea Trade (Amended Complaint, dated Apr. 3, 2009 (Docket Item ("D.I.") 4) ("Am. Compl.") ¶¶ 149-55). Sea Trade and Peters sought equitable relief in the form of a court order directing

Coutsodontis to forfeit his 50% ownership interest in Sea Trade (Am. Compl. ¶ 141). In his Answer, Coutsodontis raised the affirmative defense of Peters' own inequitable conduct, or "unclean hands", alleging that Peters had breached his fiduciary duty to Coutsodontis as a fellow shareholder (Answer, dated Aug. 19, 2010 (D.I. 19) ("Ans.") ¶ 166). Coutsodontis did not assert any counterclaims.

The Honorable Lorna G. Schofield, United States District Judge, held a bench trial from January 11 through January 13, 2016; she issued her "Findings of Fact and Conclusions of Law" on August 23, 2016 ("August 23, 2016 Opinion") (Findings of Fact and Conclusions of Law of Judge Schofield, dated Aug. 23, 2016 (D.I. 309) ("Aug. 23, 2016 Op.") at 28-29). Judge Schofield held that Coutsodontis had breached his fiduciary duty to Sea Trade and that, as a result, Coutsodontis must forfeit his shares to Peters and Sea Trade's other shareholder, Anna Peters (Peters' mother) (Aug. 23, 2016 Op. at 28-29). However, in light of the fact Coutsodontis had also sufficiently established that Peters had unclean hands, Judge Schofield also held that Coutsodontis must forfeit his shares of Sea Trade as of August 23, 2016, rather than on the date that Coutsodontis had first breached his fiduciary duty (Aug. 23, 2016 Op. at 28-29)

Citing the district court's equitable power to grant and define the scope of a remedy, Judge Schofield then referred

this matter to the undersigned to conduct an inquest to determine the amount of compensation, if any, Coutsodontis is due based on his interest in Sea Trade from January 13, 2003 through August 23, 2016 (Aug. 23, 2016 Op. at 29; see Amended Order of Reference, dated Aug. 23, 2016 (D.I. 311) ("Order of Reference")).

In September 2016, plaintiffs filed a motion for reconsideration pursuant to Fed.R.Civ.P. 59 (Plaintiffs' Memorandum of Law in Support of Fed.R.Civ.P. 59 Motion, dated Sept. 21, 2016 (D.I. 317) ("Pl.'s Fed.R.Civ.P. 59 Motion Mem.")). Judge Schofield denied that motion on April 14, 2017 ("April 14, 2017 Opinion"). Sea Trade Maritime Corp. v. Coutsodontis, 09 Civ. 488 (LGS), 2017 WL 1378276 at *1 (S.D.N.Y. Apr. 14, 2017) (Schofield, D.J.). Plaintiffs next appealed Judge Schofield's August 23, 2016 Opinion, challenging, among other things, the district court's grant of equitable relief to Coutsodontis. The Court of Appeals for the Second Circuit affirmed Judge Schofield's directive that Coutsodontis be awarded the amount he is retroactively entitled to as a fifty percent shareholder, but reversed the district court's conclusion that Coutsodontis had breached his fiduciary duty to Sea Trade and, therefore, vacated the district court's directive that Coutsodontis' be required to forfeit his Sea Trade shares ("August 7, 2018 Summary Order"). Sea Trade Maritime Corp. v. Coutsodontis, Docket Nos. 16-3291 (L), 17-1573 (CON), 17-1572 (XAP), 2018 WL 3752229 at *3 (2d Cir. Aug. 7,

2018) (summary order). Accordingly, the Court of Appeals affirmed the referral for an inquest concerning the amount of equitable relief to which Coutsodontis is entitled. Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 375229 at *4.

Based on the parties' submissions, I respectfully recommend that Coutsodontis be awarded \$1,170,645.87 based on his fifty percent ownership of Sea Trade.

II. Facts¹

Sea Trade was formed by Elias and Athena Eliades -- Greek nationals living in Athens -- under the laws of the Republic of Liberia for the purpose of engaging in the dry-bulk shipping industry (Aug. 23, 2016 Op. at 3). Sea Trade's Articles of Incorporation initially authorized 500 shares, without par value, of which Elias Eliades received 475 and his nephew, Peters, received 25 (Sea Trade's Articles of Incorporation, dated July 8, 1992 ("Sea Trade's Art. of Inc."), annexed as Ex. 3 to the Declaration of Jason H. Berland, Esq., dated Feb. 18, 2015 (D.I. 211)). At the time of formation, Athena Eliades was also designated as the company's nominal president, and Peters was designated as its attorney-in-fact (Reply Declaration of Scott R.

¹The facts giving rise to this action are set forth in the August 23, 2016 Opinion, the April 14, 2017 Opinion and the August 7, 2018 Summary Order. Familiarity with those decisions is assumed. I recite the facts here only to the extent necessary for an understanding of the issues before me.

Johnston, Esq., dated Jan. 17, 2017 (D.I. 350) ("Reply Johnston Decl.") ¶ 13; Declaration of George C. Peters, dated Nov. 28, 2016 (D.I. 338) ("Peters Decl.") ¶¶ 11-12, 21)). Athena Eliades, as Sea Trade's president, executed a Power of Attorney ("POA") on August 18, 1992 that granted Peters broad powers and effectively made him Sea Trade's de facto manager (Power of Attorney, dated Aug. 18, 1992 ("POA"), annexed as Ex. 19 to Peters Decl.; see Reply Johnston Decl. ¶ 13; Peters Decl. ¶¶ 11-12).² The POA was signed and authorized by Athena Eliades (Aug. 23, 2016 Op. at 11).³

In addition, Sea Trade, through Peters as attorney-in-fact, entered into two employment agreements with Peters, dated May 15, 1995 and August 4, 2004 (collectively, the "Employment Agreements") (see Peters' Employment Agreement, dated May 15, 1995 ("Employment Agreement"), annexed as Ex. 9 to Peters Decl. at 1-7; Peters' Employment Agreement Addendum, dated Aug. 4, 2004

²The POA grants Peters the power "[t]o conduct generally the business for and on behalf of the corporation," "to administer and operate for the Corporation any and all vessels[,] . . . to compromise any present or future dispute relating to said vessels or other disputes as said attorney may deem advisable," "to retain legal counsel, solicitors, attorneys at law and agents" and "generally to act in relation with respect to the Corporation's business as fully and effectually in all respects as the Corporation could do if personally present" (POA at 7-9).

³At trial, Coutsodontis argued that the POA was invalid because Peters had forged Athena Eliades' signature. Judge Schofield concluded that the signature was valid, and, thus, that the POA itself was valid (Aug. 23, 2016 Op. at 10-11).

("Addendum"), annexed as Ex. 19 to Peters Decl. at 10-11). Under the Employment Agreements, Peters was to be paid \$72,000.00 per annum beginning May 15, 1995, with a yearly increase in compensation of 20% through May 15, 2005; however, Peters' salary arrangement was modified on August 4, 2004, such that Peters was to be paid \$371,504.00 per annum through May 15, 2010, at which time Peters' would continue to be employed by Sea Trade on a year-to-year basis (Employment Agreement at 1-7; Addendum at 10-11). As noted above, the Employment Agreements were signed by Peters only. The Employment Agreements also provided that:

indemnify and hold [Peters] harmless for all suits for damages in connection with the management of the affairs of the corporation. Said indemnification shall not extend to damages or injuries caused by the willful or wrongful acts o[r] omissions of [Peters]. [Sea Trade] shall pay all reasonable costs, including attorney fees in connection with any claims or suits made against [Peters] arising out of his management of the affairs of [Sea Trade].

(Peters' Employment Agreement ¶ 11).

In pursuit of Sea Trade's corporate purpose, the company purchased a "Panamax"-type, bulk maritime vessel (the "M/V ATHENA") in approximately 1992 (Aug. 23, 2016 Op. at 3). Sea Trade began chartering the M/V ATHENA for ocean carriage of dry bulk commodities in approximately 1993 (Reply Johnston Decl. ¶ 8). As de facto manager, Peters claims that he was deeply involved in the management and operation of Sea Trade and its vessel, including creating and managing Sea Trade's only bank

account at M&T Bank ("Sea Trade's Bank Account"), into which all income earned from M/V ATHENA's charters was deposited (Peters Decl. ¶ 20; see Sea Trade's Bank Account Statements from January 1, 2004 through July 31, 2007 ("Sea Trade's Bank Account Statements Pt. 1"), annexed as Ex. 2 to Peters Decl.; Sea Trade's Bank Account Statements from July 31, 2007 through October 31, 2011 ("Sea Trade's Bank Account Statements Pt. 2"), annexed as Ex. 33 to Peters Decl.). Peters also retained several third-party ship management companies, including Byzantine Maritime Corporation ("Byzantine"), which oversaw and managed the M/V ATHENA's repairs, crew hiring, fueling and port operations, as well as, certain aspects of Sea Trade's accounting (Peters Decl. ¶ 15). Byzantine subcontracted some of its obligations to Colonial Navigation Company, Inc. ("Colonial"), which set up a bank account for Sea Trade for the purpose of paying "operational expenses" ("OPEX")⁴ and other expenses incurred through the operation of the M/V ATHENA (Peters Decl. ¶ 18). Peters also worked with "charter brokers", including Ekko Chartering LLP

⁴OPEX consist of "[g]eneral day-to-day expenses involved in the running and technical management of the vessel These typically include engine maintenance, paints, lubricants and provisioning, crew costs and all insurance requirements" (Revised Expert Report of Gray Page, dated Jan. 12, 2017 ("Revised Gray Page Report"), annexed as Ex. A to Reply Johnston Decl., ¶ 18 n. 7). This expense does not include fuel consumed during normal operations (Revised Gray Page Report ¶ 18 n. 7).

("Ekko"), to obtain the "best or most profitable" charters (Peters Decl. ¶ 22).

In July 1994, Elias Eliades redistributed his Sea Trade shares. He gave an additional 25 shares to Peters (leaving Peters with a total of 50 shares) and gave 150 shares to Peters' mother, Anna Peters. As a result of this redistribution, Elias Eliades was left with a total of 300 shares (Aug. 23, 2016 Op. at 3). Shortly thereafter, Elias Eliades passed away, and Athena Eliades inherited his shares (Aug. 23, 2016 Op. at 3-4). On January 13, 2003, Athena Eliades died and bequeathed 250 of her Sea Trade shares to her brother, Coutsodontis, and 50 shares to Anna Peters, bringing Anna's total ownership interest to 200 shares (Aug. 23, 2016 Op. at 4). Prior to that time, Coutsodontis had no involvement with Sea Trade.

Peters and his mother refused to acknowledge Coutsodontis as a shareholder, claiming that his acquisition of Sea Trade shares was improper (Aug. 23, 2016 Op. at 4; Am. Compl. ¶¶ 36-54). According to Peters, Athena Eliades' holographic will was invalid because Sea Trade's Articles of Incorporation forbade the conveyance of shares to a non-shareholder without prior written approval from other shareholders (Am. Compl. ¶¶ 43-47; Sea Trade's Art. of Inc. at 2). In approximately 2006, Anna Peters sought a declaration from the Multi-Member Court of First Instance of Athens (the "Lower Greek Court") that Athena Eliades'

will was null and void (the "Greek Action") (Aug. 23, 2016 Op. at 4). In response, Coutsodontis filed a competing action in the Supreme Court of the State of New York (the "2006 State Action"), requesting a declaratory judgment that he was the rightful holder of the 250 Sea Trade Shares because they were an inter vivos gift from Athena Eliades (Aug. 23, 2016 Op. at 4). Coutsodontis v. Peters, 11 Misc. 3d 1066(A), 816 N.Y.S.2d 694 (Sup. Ct. N.Y. Co. 2006), aff'd, 39 A.D.3d 274, 831 N.Y.S.2d 902 (Mem.) (1st Dep't 2007). Coutsodontis' complaint was dismissed in 2006, with former New York State Supreme Court Justice Herman Cahn noting that the validity of Athena Eliades' gift of 250 Sea Trade shares to Coutsodontis through a holographic will was a matter "better left to the Greek Courts." Coutsodontis v. Peters, supra, 11 Misc. 3d at 1066(A), 816 N.Y.S.2d at 694.

On July 16, 2008, prior to the decision of the Lower Greek Court, Coutsodontis caused the maritime arrest of the M/V ATHENA in Tarragona, Spain; Sea Trade sought counsel to vacate the arrest and obtain damages in the Spanish courts (the "Spanish Action") (Aug. 23, 2016 Op. at 5 n.2; Peters Decl. ¶ 84). The arrest remained in force for approximately one month, until a Spanish court dismissed Coutsodontis' claim and found Coutsodontis liable to Sea Trade for over \$1,000,000.00 as a result of the Spanish Arrest (Peters Decl. ¶ 85). Sea Trade and Peters sought recognition of that judgment in the New York

Supreme Court (the "2008 State Action") (Peters Decl. ¶¶ 86-89).⁵ On August 27, 2008, Coutsodontis again caused the maritime arrest of the M/V ATHENA in New Orleans, Louisiana in order to protect his interests as a fifty percent shareholder in Sea Trade; the United States District Court for the Eastern District of Louisiana vacated that arrest on September 12, 2008 (Aug. 23, 2016 Op. at 5).

On January 16, 2009, the Lower Greek Court held that Athena Eliades' will was valid and, thus, Coutsodontis was a fifty percent shareholder in Sea Trade (Aug. 23, 2016 Op. at 6, citing Multi-Member Court of First Instance of Athens [Pol. Pr.] [district court] 1391/2009, p.3 (Greece)).⁶ That same day, Peters and Sea Trade commenced this action, alleging that, in the event this Court recognized Coutsodontis as a Sea Trade shareholder, this Court must also find that Coutsodontis had breached his fiduciary duty to Sea Trade by twice causing the arrest of the M/V ATHENA (Am. Compl. ¶¶ 149-55).

⁵Ultimately, the New York Supreme Court recognized the judgment for \$1,092,445.15 against Coutsodontis; that judgment was upheld by the Appellate Division in 2016 (Peters Decl. ¶¶ 88-89). The record does not disclose whether this judgment has been satisfied.

⁶The Lower Greek Court's decision was upheld by the Supreme Court of Greece -- the nation's highest court -- on May 27, 2014 (Aug. 23, 2016 Op. at 6, citing Aerios Pagos [A.P.] [Supreme Court] 1421/2014, p. 4, 15 (Greece)).

While this action was pending, Peters and his mother continued to ignore Coutsodontis' claimed ownership of Sea Trade shares and the Lower Greek Court's decision that recognized him as such. Peters and his mother did not "organiz[e] a shareholders' meeting [or] arrang[e] for an election of directors" as is required under Liberian law (Aug. 23, 2016 Op. at 29, citing 5 Associations Law of Liberia §§ 7.1, 7.8, 8.1-8.2 (1976)).

On January 27, 2009, a buyer paid Sea Trade \$2,341,291.73 for the M/V ATHENA. The proceeds from the sale were placed in escrow pursuant to an agreement between Sea Trade and Coutsodontis (the "Escrow Agreement") (Peters Decl. ¶ 136; Reply Johnston Decl. ¶ 9). The Escrow Agreement provides, in pertinent part, that the sale proceeds "shall . . . be disbursed only as follows":

(i) pursuant to jointly signed written instructions from Sea Trade and Coutsodontis; or

(ii) upon the final non-appealable judicial determination of Coutsodontis' ownership interest in Sea Trade and Coutsodontis' entitlement to the [sale proceeds].

(Escrow Agreement, dated Jan. 27, 2009, annexed as Ex. A to Letter of Kelly A. Zampino, Esq., dated July 9, 2016 (D.I. 307)). Peters is not a party to the Escrow Agreement (Escrow Agreement at 1).

Because the M/V ATHENA was Sea Trade's sole asset, Sea Trade has been dormant and has had no income since January 27,

2009 (Aug. 23, 2016 Op. at 27). The corporation still exists, however, on June 2, 2016, unbeknownst to this Court, Coutsodontis filed a Second Amended Complaint in a state court action he had commenced in 2012, asserting, among other things, a claim for dissolution pursuant to New York Business Corporation Law Section 1104-a (the "2016 State Action") (Pl.'s Fed.R.Civ.P. 59 Motion Mem. at 4, 16-17, citing Coutsodontis v. Sea Trade et al., Index No. 653956/12, Second Amended Complaint)).

Following a three-day bench trial, Judge Schofield concluded in her August 23, 2016 Opinion that: (1) the Greek Court's decision that Coutsodontis was the rightful holder of fifty percent interest in Sea Trade should be recognized as a matter of comity; (2) Coutsodontis breached his fiduciary duty to Sea Trade by twice causing the maritime arrest of the M/V ATHENA; (3) given his breach, Coutsodontis must forfeit his interest in Sea Trade to Peters and his mother; (4) Peters, by failing to comply with the Lower Greek Court's order, was also guilty of inequitable conduct and had breached his fiduciary duty to Coutsodontis; (5) Peters' unclean hands bore on his own entitlement to equitable relief and, thus, Coutsodontis' forfeiture would be effective as of August 23, 2016, rather than as of the date of his breach in 2008 (Aug. 23, 2016 Op. at 13, 26-29). Accordingly, Judge Schofield concluded:

[i]n light of Peters' unclean hands -- i.e., his failure to respect the decision of the [Lower Greek Court]

that Coutsodontis had become the rightful owner of 250 shares of Sea Trade upon Athena's death on January 13, 2003 -- the forfeiture of Coutsodontis' shares is effective as of the date of this Opinion, rather than the date Coutsodontis breached his fiduciary duty Coutsodontis is entitled to any and all of the benefits of ownership from having held a 50% interest in Sea Trade from January 13, 2003, until the date of this Opinion, including the 50% of the proceeds from the sale of the M/V ATHENA.

(Aug. 23, 2016 Op. at 29). In Judge Schofield's April 14, 2017 Opinion, she further explained that:

[t]he time constraint on Coutsodontis' forfeiture avoids [the] windfall [to Peters that he be enriched despite his breach of fiduciary duty] and provides an equitable outcome by effectively splitting Sea Trade's net profits during the time Peters and Coutsodontis were both owners.

Sea Trade Maritime Corp. v. Coutsodontis, supra, 2017 WL 1378276 at *3. Judge Schofield then referred this matter to me to conduct an inquest to determine the amount, if any, to which Coutsodontis is retroactively entitled based on his former fifty percent interest in Sea Trade (Aug. 23, 2016 Op. at 29; see Order of Reference).

As noted above, on August 7, 2018, the Court of Appeals reversed the district court's finding that Coutsodontis had breached his fiduciary duty by twice causing the M/V ATHENA's arrest because plaintiffs had failed to establish what, if any, damages Sea Trade ultimately suffered as a result. Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 3752229 at *3. Because Coutsodontis could not be found liable, the Court of

Appeals reversed the district court's order that Coutsodontis forfeit his interest in Sea Trade. Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 3752229 at *3. However, the Court of Appeals affirmed district court's holding that Peters had unclean hands, and held that an inquest was appropriate despite the fact that Coutsodontis had not asserted an affirmative claim for relief. Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 3752229 at *3.⁷ Moreover, the Court of Appeals noted that its reversal likely had "no practical effect [on the inquest] in that it affords Coutsodontis no larger share of the

⁷Specifically, the Court of Appeals held that:

[t]he district court did not exceed its equitable powers in ordering an inquest, despite the fact that Coutsodontis did not assert an affirmative claim for relief. Once parties invoke a court's equity jurisdiction, the court "has the power to decide all relevant matters in dispute and to award complete relief," F.T.C. v. Bronson Partners, LLC, 654 F.3d 359, 366 (2d Cir. 2011) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 399 (1946)), and "to assure that equity is done to all parties," In re Galewitz, 3 A.D.2d 280, 286, 160 N.Y.S.2d 564, 572 (1st Dep't 1957). Indeed, a court sitting in equity "may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just." State of New York v. Barone, 74 N.Y.2d 332, 336, 547 N.Y.S.2d 269, 271 (1989) (quoting N.Y. C.P.L.R. § 3017(a)); see Soviero v. United States, 967 F.2d 791, 793 (2d Cir. 1992) ("When a court possessing equitable powers has jurisdiction over a complaint that seeks equitable relief, it has authority to award whatever damages are incident to the complaint.").

Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 3752229 at *4.

sale assets in escrow, and Sea Trade has no other assets or ongoing business operations." Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 3752229 at *3 n.1.

Although discovery had previously been conducted with respect to damages, namely the fair market value of the M/V ATHENA in 2008, minimal discovery has been conducted concerning Sea Trade's profits. As noted above, it is undisputed that the M/V ATHENA was sold for \$2,341,291.83, and that this amount now resides in escrow pursuant to the Escrow Agreement. However, the parties sharply dispute the amount of profit earned from Sea Trade's other source of revenue -- the proceeds from the charter of the M/V ATHENA. Unfortunately, the documents provided by Peters and Sea Trade do not allow for a precise calculation of that amount. Thus, Coutsodontis and Peters have both submitted expert reports regarding Sea Trade's profits.

Coutsodontis claims that, he is entitled to \$18,708,188.50 -- fifty percent of Sea Trade's total profit from approximately 1993 through the present -- based on the report of his expert, Gray Page Intelligence Services ("Gray Page") (Revised Expert Report of Gray Page, dated Jan. 12, 2017 ("Revised Gray Page Report"), annexed as Ex. A to Reply Johnston Decl.; Chart of M/V ATHENA's Earnings from 2003 through 2009 ("Earnings Chart"), annexed as Ex. 1 to Revised Gray Page Report at 32; see Reply Johnston Decl. ¶¶ 10, 96; see also Supplemental Expert

Report of Gray Page, dated July 21, 2008, annexed as Ex. C to Johnston Decl.; Original Expert Report of Gray Page, dated June 13, 2005 ("Initial Gray Page Report"), annexed as Ex. B to Johnston Decl.)).

Specifically, relying on "Sea Trade's Statement of Income" Gray Page that Sea Trade earned and retained \$11,678,000.00 of profit from approximately 1993 through approximately December 31, 2002 (Statement of Income, dated Aug. 4, 2004, annexed as Ex. 4 to Peters Decl. at 4).⁸ Gray Page estimates that Sea Trade's revenue from approximately January 1, 2003 through January 27, 2009 was \$45,489,025.00 (Earnings Chart).⁹ This amount is inclusive of (1) \$43,148,025.00 in revenue from the charter of the M/V ATHENA during that period and (2) \$2,341,000.00 for the sale of the M/V ATHENA (Earnings Chart).¹⁰ With respect to the revenue from the charter of the M/V ATHENA from January 1, 2003 through January 27, 2009, it appears that Gray Page reached its estimate by relying on data obtained from the "Baltic Exchange" and/or the "Clarkson's Research" firm that tracked the "industry standard" charter rates for a Panamax-type

⁸Coutsodontis claims that he inherited an interest in these retained profits when he became a shareholder on January 13, 2003 (Reply Johnston Decl. ¶ 8).

⁹Coutsodontis does not dispute that Sea Trade has not earned any revenue since the sale of the M/V ATHENA on January 27, 2009.

¹⁰Gray Page appears to have rounded down the amount of proceeds from the sale of the M/V ATHENA for simplicity's sake.

vessel similar to the M/V ATHENA throughout the relevant time period (Revised Gray Page Report ¶¶ 2, 12 ("We . . . sought the best available data for comparable vessels, and based on years of experience[,] assessed the earnings of the vessel on the basis that it was operating in the spot market[,] i.e.[,] in short single trip charter employment."); Compilation of M/V ATHENA Charter Earnings Compared Against Market Data from Clarkson's Research for a Comparable Panamax Vessel, dated Dec. 22, 2016, annexed as Ex. 6 to Revised Gray Page Report).¹¹

Gray Page next estimates that Sea Trade's total expenses from January 1, 2003 through the present were \$19,750,648.00 (Earnings Chart). This amount includes (1) \$12,886,500.00 in OPEX, (2) \$671,900 for "drydocking" the M/V ATHENA in 2004 (the "2004 Drydocking"), (3) \$3,111,018.00 for the drydocking the M/V ATHENA in 2007 (the "2007 Drydocking"), (4) \$743,872.00 in fuel costs and (5) \$2,337,358.00 in commissions to charter brokers (Earnings Chart). With respect to Sea Trade's OPEX, fuel costs and commissions, Gray Page appears to have relied on data provided to it by the Balkan Exchange that indicates the average amount that a vessel similar to the M/V ATHENA would have incurred with respect to each of these expenses during the relevant time period (see Charter of Bunker Prices from 1993

¹¹According to Gray Page, the M/V ATHENA "operated through one of the greatest, and longest running shipping booms in history" (Revised Gray Page Report ¶ 13).

through 2009, dated Dec. 22, 2016, annexed as Ex. 2 to Revised Gray Page Report at 34-36; Moore Stephens' Estimates of Annual OPEX for Panamax Bulker from 2000 through 2005, annexed as Ex. 6 to Revised Gray Page Report at 64; Revised Gray Page Report ¶ 97). Coutsodontis claims that no other type of cost should be considered for the purpose of calculating Sea Trade's total profit.

Accordingly, Gray Page estimates that Sea Trade's total profit from 1993 until present was \$37,416,377.00. Coutsodontis claims he is entitled to one half of that amount, or \$18,708,188.50 (Earnings Chart).

Peters disputes Coutsodontis' claim that Coutsodontis' equitable relief should be measured by dividing Sea Trade's total profit evenly between them (Peters Decl. ¶ 8). Rather, according to Peters, the "benefits of ownership" constitute only the shareholder dividends, if any, that a corporation issues during a shareholder's period of ownership. (Peters Decl. ¶ 8). Peters claims that Sea Trade has not issued a single shareholder dividend since January 13, 2003 (Peters Decl. ¶ 8). Accordingly, Peters claims that Coutsodontis is entitled to nothing (Peters Decl. ¶ 8).

In addition, Peters argues that even if Coutsodontis were entitled to a portion of Sea Trade's profit proportional to his ownership of Sea Trade, he would still receive nothing

because Sea Trade has no assets except for the proceeds of the M/V ATHENA that are being held in escrow (Peters Decl. ¶¶ 135-37). Relying on his expert, Jean Richards of Quantum Shipping Services, Ltd., Peters claims that Sea Trade has made not made a profit from the charter of the M/V ATHENA, and has, in fact, amassed liability to Peters amounting to \$13,634,015.49 (Peters Decl. ¶¶ 135-37). Peters requests that the funds currently in escrow from the sale of the M/V ATHENA be distributed to him in their entirety to satisfy this liability, relying on "Sea Trade's Statement of Income" prepared by Byzantine, dated August 4, 2004, Sea Trade's total liability to him (Peters Decl. ¶¶ 135-37).

Specifically, Richards estimates that Sea Trade's revenue from January 1, 2003 through January 27, 2009 was \$35,236,904.24 (Expert Report of Jean Richards of Quantum Shipping Services, Ltd., dated Nov. 28, 2016 ("Richards Report") ¶ 5.28, annexed as Ex. 1 to Peters Decl.). This amount is inclusive of (1) \$32,895,612.51 in "net revenue"¹² from the charter of the M/V ATHENA between January 1, 2003 and January 27, 2009 and (2) \$2,341,291.73 in proceeds from the sale of the M/V ATHENA (Richards Report ¶ 5.28). With respect to the revenue from the charter of the M/V ATHENA, Richards principally relies on Sea

¹²Richards claims that the net revenue is less than the amount in Sea Trade's Bank Account, in part, because Sea Trade's charterers would frequently deduct the cost of fuel and the charter broker's commission (Richards Report ¶ 5.26).

Trade's Bank Account Statements, which reflect 108 deposits into Sea Trade's Bank Account between January 1, 2004 and approximately 2009, when the M/V ATHENA ceased operating, totaling \$35,552,976.00 (Sea Trade's Bank Account Statements Pt. 1; Sea Trade's Bank Account Statements Pt. 2; see Richards Report ¶ 5.26).¹³

Richards next estimates that Sea Trade incurred \$43,533,015.00 in total expenses between January 1, 2003 through the present. Peters separates Sea Trade's expenses into two categories. First, Peters, through Richards, claims that Sea Trade incurred \$25,128,711.00 in expenses from the operation and maintenance of the M/V ATHENA, including (1) \$19,647,725.00 in OPEX, (2) \$671,000.00 for the 2004 Drydocking, (3) \$3,356,121.00 for the 2007 Drydocking, (4) \$953,119.00 in fuel costs and (5) \$490,746.00 in brokers' commissions that were not already deducted from charterer's deposits (Richards Report ¶ 8.3-8.7; Peters Decl. ¶ 135). Second, Peters identifies \$18,404,304.00 in

¹³Peters declares under penalty of perjury that Sea Trade deposited the proceeds from charters, or hire income, into only one bank account, and that the bank account has been empty since approximately 2012 (Peters Decl. ¶ 20). According to Peters, he currently pays for Sea Trade's expenses out of his own pockets. Coutsodontis disputes this assertion and claims that Sea Trade has two bank accounts that Peter has not disclosed to this Court (Reply Johnston Decl. ¶ 35). In support of this claim, Coutsodontis relies on statements by Gray Page that Sea Trade "knowingly hold[s]" bank accounts with APSIS bank, as shown in the [Statement of Income] and potentially also with UBS Bank (Revised Gray Page Report ¶ 100).

additional expenses that Coutsodontis has refused to consider, i.e., (1) Peters' compensation, (2) interest paid on loans that Peters and his mother had extended to the company in 1997, 2004 and 2007 and (3) legal fees and expenses (collectively, the "Disputed Expenses").

With respect to his salary, Peters claims that Sea Trade paid him \$1,320,000.00, or approximately \$146,666.67 per annum, from 2003 through 2012 (Peters Decl. ¶ 135-37). However pursuant to the Employment Agreements, Peters is owed a total of \$5,555,073.00 for that period and, therefore, he claims that he is entitled to the difference between the salary specified in the Employment Agreements and what he was actually paid, namely \$4,235,073.00 (Peters Decl. ¶ 135-37).

With respect to the loans, Peters asserts that between 1997 and 2011, he and his mother made numerous loans to Sea Trade for various, legitimate business purposes (Peters Decl. ¶¶ 58, 135-37). Some documented by promissory notes while others are documented only by infusions of cash reflected in Sea Trade's Bank Account Statements. Specifically, in 1997, Peters loaned Sea Trade \$350,000.00 at an interest rate of 24% per annum (the "1997 Loan"), as evidenced by a promissory note, dated December 6, 1997, after the M/V ATHENA sustained serious damages from a

terrorist bombing while it was docked in Sri Lanka¹⁴ (Peters Decl. ¶ 57; Promissory Note, dated Dec. 6, 1997, annexed as Ex. 10 to Peters Decl.). To date, Sea Trade has paid \$383,200.00 in interest and owes Peters \$1,568,553.00 in accrued interest and principal on the 1997 Loan (Peters Decl. ¶ 137).¹⁵ Throughout 2002, Peters extended nine loans, each for 100,000.00, at an interest rate of 18% per annum (the "2002 Loans"), as evidenced by nine promissory notes dated March 20 through July 15, 2002 (Peters Decl. ¶ 64; 2002 Promissory Notes, dated Mar. 20 through July 15, 2002, annexed as Ex. 14 to Peters Decl.). Sea Trade satisfied its obligation to repay Peters the principal amount in approximately 2009, but has not paid any of the \$1,372,776.00 it owes in interest on the 2002 Loans (Peters Decl. ¶¶ 66-67). Between January 13, 2003 and August 23, 2016, Peters personally loaned Sea Trade: (1) \$500,000.00 at 13% interest per annum on

¹⁴In 1997, the M/V ATHENA was seriously damaged by a bomb explosion set off by the Tamil Tigers while the vessel was docked in Sri Lanka (Peters Decl. ¶ 57). Sea Trade's insurer, Hellenic Mutual War Risk Association ("Hellenic") refused to cover the entire claim because Sea Trade did not alert the insurance company prior to the M/V ATHENA's entering a "war-zone" (Reply Johnston Decl. ¶¶ 79-81). The result was a lengthy litigation and arbitration spanning more than a decade (the "Hellenic Matter").

¹⁵The Peters Declaration provides a chart listing the amount of principal and interest paid and owed for each of the loans (Peters Decl. ¶ 135-37). This chart mistakenly omits as an expense the \$383,200.00 in interest Sea Trade paid Peters with respect to the 1997 Loan and, thus, Peters' calculation of Sea Trade's expenses set forth in the Peters Declaration is short that amount (Peters Decl. ¶ 58).

August 3, 2007, which Sea Trade fully satisfied by paying Peters \$500,000.00 plus \$95,000.00 in interest on February 2, 2009 (the "2007 Loan"); (2) \$415,000.00 at 3.5% per annum in approximately 2009, which remains entirely unpaid; (3) \$720,000.00 at 3.5% per annum in approximately 2010, which remains entirely unpaid and (4) \$750,000.00 at 3.5% per annum in approximately 2011, which also remains entirely unpaid (Peters Decl. ¶¶ 69-72). In addition, Anna Peters personally loaned Sea Trade \$1,500,000.00 at 11% per annum (the "Anna Peters Loan") in July 2007 to help cover some of the costs of the 2007 Drydocking; this loan was repaid in July 8, 2009, with interest at the agreed rate (Peters Decl. ¶ 71).

To date, Sea Trade has paid \$643,200.00 in interest to Peters and his mother pursuant to the 1997, 2007 and Anna Peters Loans, and the company owes Peters \$5,210,456.06 in total interest and principal (Peters Decl. ¶ 137). The 1997 and 2002 Loans -- the only loans documented by promissory notes -- appear to be unsecured investments. The remainder of the loans, for which no documentation exists except for Sea Trade's Bank Statements, are, by definition, unsecured.

Finally, with respect to Sea Trade's legal fees and expenses, Peters asserts that Sea Trade paid approximately \$16,441,104.00 to litigate and arbitrate actions across the globe (Peters Decl. ¶ 135). In addition, after Sea Trade's assets were

drained in 2012, Peters claims that he has personally had to pay an additional \$4,188,486.32 in legal fees and costs (Peters Decl. ¶ 137). The first of these actions -- the Hellenic Matter -- required nearly a decade to resolve, and involved a litigation against Hellenic in New York and an arbitration in London (see Peters Decl. ¶¶ 57, 81). Sea Trade was ultimately unsuccessful and was required to pay a judgment to Hellenic to cover its legal fees and expenses (Peters Decl. ¶ 101). Sea Trade subsequently pursued litigation against one of its other insurance brokers in New York State court (the "Marsh Action") (Peters Decl. ¶ 122). Thereafter, Sea Trade and Peters were embroiled in numerous other litigations, including: (1) the Greek Action; (2) the 2006 State Action; (3) the Spanish Action; (4) the 2008 State Action; (5) a defamation action commenced by Peters against Coutsodontis (the "Defamation Action");¹⁶ (6) this action; (7)

¹⁶As explained by Judge Schofield in her August 23, 2016 Opinion:

. On February 15, 2007, Peters sued Coutsodontis and others in Supreme Court for the State of New York, claiming libel per se based on two allegedly defamatory statements made in the [2006 State Action]. The libel action was dismissed on July 11, 2016, with the granting of defendants' summary judgment motion. The court held that the absolute privilege for statements made in the course of judicial proceedings shields the alleged defamatory statements, that malice does not defeat the privilege, and that Peters had failed to raise an issue of fact showing abuse of the privilege. See George Peters v. Stelios Coutsodontis, et al., No. 600492/2007, 2016 WL 3902274, at *5 (N.Y. Sup. Ct. July (continued...))

the 2016 State Action and (8) an action between Peters and his mother brought by Peters' sister regarding her shareholder status (the "Family Action"). Peters has provided numerous sworn affidavits from his counsel in all of these matters, as well as the accompanying invoices, to support his claim that he and Sea Trade have paid \$20,629,590.32 in legal fees and expenses to date.

Accordingly, Peters claims that Coutsodontis would receive nothing even if he were entitled to half of Sea Trade's total profit.

III. Analysis

"'When a breach of fiduciary duty occurs, that action will be considered unlawful and the aggrieved shareholder may be entitled to equitable relief'" Samuel M. Feinberg Testamentary Trust v. Carter, 652 F. Supp. 1066, 1081 (S.D.N.Y. Jan. 15, 1987) (Walker, then D.J., now Cir. J.), quoting Alpert v. 28 William Street Corp., 63 N.Y.2d 557, 568, 473 N.E.2d 19, 25, 438 N.Y.S.2d 667, 673-74 (1984). A court sitting in equity "may award damages in lieu of the desired equitable remedy." HSBC Bank USA, N.A. v. DB Structured Products, Inc., 5 F. Supp.

¹⁶ (...continued)
11, 2016).

(Aug. 23, 2016 Op. at 4 n.1).

3d 543, 554 (S.D.N.Y. 2014) (Nathan, D.J.), citing Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 443, 136 N.E.2d 484, 487, 154 N.Y.S.2d 10, 12 (1956) ("A court of equity . . . will adapt itself to the exigencies of the case. It may order a sum of money to be paid to the plaintiff and give him a personal judgment therefor, when that form of relief becomes necessary in order to prevent a failure of justice . . ." (internal quotations and internal citations omitted)).

As the Court of Appeals explained in Sea Trade Maritime Corp. v. Coutsodontis, supra, 2018 WL 3752229 at *3, a court sitting in equity is not precluded from granting equitable relief simply because no affirmative claim for relief has been asserted. See Soviero v. United States, supra, 967 F.2d at 793. Rather, that court "'may order a sum of money to be paid . . . when that form of relief becomes necessary in order to prevent a failure of justice.'" Deutsche Bank Nat'l Trust Co. v. Morgan Stanley Mortgage Capital Holdings LLC, 14 Civ. 3020 (KBF), 289 F. Supp. 3d 484, 501-02 (S.D.N.Y. 2018) (Forrest, D.J.), quoting Doyle v. Allstate Ins. Co., supra, 1 N.Y.2d at 443, 136 N.E.2d at 484, N.Y.S.2d at 10.

The party seeking damages "'bear[s] the burden of proving damages with reasonable certainty[.]'" New York v. United Parcel Serv., Inc., 253 F. Supp. 3d 583, 687 (S.D.N.Y. 2017) (Forrest, D.J.), appeal filed, Docket No. 17-1993 (2d Cir.

June 23, 2017), quoting Raishevich v. Foster, 9 F. Supp. 2d 415, 417 (S.D.N.Y. 1998) (Conner, D.J.). "A court may determine the appropriate damages on the basis of affidavits and other documentary evidence, 'as long as [the court has] ensured that there [is] a basis for damages'" GAKM Res. LLC v. Jaylyn Sales Inc., 08 Civ. 6030 (GEL), 2009 WL 2150891 at *2 (S.D.N.Y. July 20, 2009) (Lynch, then D.J., now Cir. J.), quoting Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 108 (2d Cir. 1997). Although "some uncertainty may be tolerated" in approximating a party's damages, see Whitney v. Citibank, N.A., 782 F.2d 1106, 1118 (2d Cir. 1986) (uncertainty may be tolerated when the "difficulty in calculating damages is attributed to defendant's misconduct"), courts "will not permit recovery when the connection between the claimed loss and [a] tortious act is speculative or uncertain.'" New York v. United Parcel Serv., Inc., supra, 253 F. Supp. 3d at 697, quoting Anderson Grp., LLC v. City of Saratoga Springs, supra, 805 F.3d at 52.

As an initial matter, Coutsodontis claims that he is entitled to one-half of Sea Trade's total profit, including profit that the company earned between 1993 and December 31, 2012, and that it retained as of approximately January 13, 2003 (Coutsodontis' Proposed Findings of Fact and Conclusions of Law, dated Oct. 10, 2016 (D.I. 328) ("Def.'s Mem.") ¶¶ 28, 31). This assertion is inconsistent with the scope of the equitable relief

ordered by Judge Schofield and affirmed by the Court of Appeals (see Aug. 23, 2016 Op. at 28-29). To permit Coutsodontis to recover amounts earned by Sea Trade when he was not a Sea Trade shareholder would result in an inequitable windfall in his favor. Judge Schofield's April 14, 2017 Opinion limited Coutsodontis' recovery to the period from January 13, 2003 through August 24, 2016. The start date of that time period avoided a windfall to Coutsodontis by ensuring that Coutsodontis would not recover profits for the period in which he had no association with Sea Trade. Accordingly, Coutsodontis' maximum potential recovery is a share of Sea Trade's profits for the period beginning on January 13, 2003.

Although Coutsodontis claims that Sea Trade's profits "could [have] b[een] expected to be distributed between the shareholders[,] " he does not dispute that Sea Trade did not distribute any shareholder dividends during the time that both he and Peters were both shareholders (Revised Gray Page Report ¶ 113; see Peters Decl. ¶ 8). Coutsodontis' conclusory assertion concerning what Sea Trade could have been expected to do is wholly speculative. As a fifty percent shareholder, Coutsodontis could not have unilaterally authorized the issuance of shareholder dividends under Liberian law; such an action would have required the approval of two-thirds of Sea Trade shareholders. 5 Association Laws of Liberia § 5.09. Thus, whether Sea Trade

would have issued shareholder dividends and, the possible amount of each such dividend, is uncertain and speculative based on the record before me.

As the authorities cited at pages 26-27 teach, "it is well-settled under New York law that '[t]he rule that proscribes the recovery of uncertain and speculative damages applies where the fact of damages is uncertain.'" Toporoff Engineers, P.C. v. Fireman's Fund Ins. Co., 371 F.3d 105, 109 (2d Cir. 2004), quoting Matarese v. Moore-McCormack Lines, 158 F.2d 631, 637 (2d Cir. 1946). Coutsodontis and Gray Page do not provide a firm foundation for an estimate of the amount of benefits, *i.e.*, shareholder dividends and income from the sale of shares, that Coutsodontis would have realized had his shareholder status been properly recognized. Rather, Coutsodontis relies principally on Venizelos v. Oceana Mar. Agency, Inc., 268 A.D.2d 291, 702 N.Y.S.2d 17 (1st Dep't 2000) ("Venizelo"), for the proposition that he is entitled to one-half of Sea Trade's assets (Coutsodontis' Reply Memorandum of Law in Support of the Proposed Findings of Fact and Conclusions of Law, dated Jan. 17, 2017 (D.I. 349) ("Def.'s Reply Mem."). In Venizelos, plaintiffs, family members who were shareholders in a family-owned shipping business, sued the family member entrusted with managing the business for breach of fiduciary duty. They alleged that the defendant had managed the business with an intent to steal from

it in order to enrich himself and to divest plaintiffs of their interest in the company. The Appellate Division affirmed the trial court's decision to award plaintiffs "damages in proportion to plaintiffs' individual share holdings."

Coutsodontis appears to argue that Peters similarly managed Sea Trade "in a manner intended to steal from the company and/or "to divest . . . Coutodontis of his interest therein" by self-dealing and wasting corporate assets (Def.'s Reply Mem. at 16). In particular, Coutodontis claims that the Disputed Expenses should not be considered in calculating Sea Trade's total profits because each underlying transaction was the result of self-dealing or was otherwise so improper that none should be shielded by the business judgment rule (Def.'s Reply Mem. at 16, citing Wolf v. Rand, supra, 258 A.D.2d at 403, 685 N.Y.S.2d at 711 (Because "the business judgment rule does not protect corporate officials who engage in fraud or self-dealing, or corporate fiduciaries when they make decisions affected by inherent conflict of interest, the burden shifts to [that party] to prove the fairness of the challenged acts." (internal citations omitted))). See Patrick v. Allen, 355 F. Supp. 2d 704, 711 (S.D.N.Y. 2005) (Pauley, D.J.) ("[I]n an action seeking to hold a director liable, a court must first determine whether the business judgment rule applies [to the board's decision].").

This is the first time Coutsodontis has raised an issue concerning Peters' alleged mismanagement of Sea Trade's business operations; he has not asserted any counterclaim alleging breach of fiduciary duty on such a theory. In addition, although Coutsodontis raised Peters' unclean hands as an affirmative defense, that defense was premised on Peters' breach of fiduciary duty to Coutsodontis, not to Sea Trade, and was based solely on Peters' failure to recognize Coutsodontis as a shareholder following the Lower Greek Court's decision. Neither Judge Schofield nor the Court of Appeals concluded that Peters had breached his fiduciary duty to Coutsodontis by mismanaging Sea Trade's affairs.

Even if I were to consider Coutsodontis' argument, his contention is unavailing because there is no evidence in the record that demonstrates Peters mismanaged Sea Trade in a manner similar to the conduct involved in Venizelos. Nevertheless, Coutsodontis argues that each of the transactions underlying the Disputed Expenses was fraught with illicit self-dealing and, thus, should be excluded from consideration in determining Sea Trade's profit.

First, Coutsodontis argues that the Employment Agreements are not "bona fide obligations" of Sea Trade because they were not reached following an arm's-length negotiation (Def.'s Reply Mem. at 16). Rather, Coutsodontis claims, the excessive

compensation paid, and owed, to Peters pursuant to the Employment Agreement constitutes self-dealing and an "abuse of [Peters'] power [as attorney-in-fact] to benefit himself at [Sea Trade's] expense" (Def.'s Mem. at 16, citing Everett v. Phillips, 288 N.Y. 227, 232, 43 N.E.2d 18, 19 (1942) ("[D]irectors who control corporate action [are] responsible for dereliction of duty where they have used the property of the corporation or managed its affairs to promote their own interests, disregarding the interests of the corporation. Power of control carries with it a trust or duty to exercise that power faithfully to promote the corporate interests . . ."). Coutsodontis' assertion that Peters' salary was excessive is wholly conclusory. He speculates that Peters' responsibilities as de facto manager were minimal given the fact that Sea Trade had retained Byzantine and Colonial to manage and oversee the operations of the M/V ATHENA (see Reply Johnston Decl. ¶ 63). However, he offers no evidence to support a finding that Peters was overcompensated for his position as the de facto manager of a small, family owned maritime shipping operation with one Panamax-type vessel. Coutsodontis also ignores the fact that Sea Trade only actually paid Peters \$1,320,000.00 of the \$5,555,073.00 in salary to which he was entitled for the period between 2003 and 2012 (Peters Decl. ¶ 135-37). The compensation actually paid averaged \$146,666.67 per year which does not appear excessive on its face for Peters'

position. Accordingly, Coutsodontis has no basis for excluding Peters' compensation as an expense in calculating Sea Trade's profits.

Second, Coutsodontis claims that the \$643,000.00 in interest that Sea Trade paid Peters and his mother pursuant to the 1997, 2007 and Anna Peters Loans should be excluded for purposes of this inquest because the loans (1) involved excessive interest rates and (2) were not made for a legitimate business purpose (Def.'s Reply Mem. at 17-18). Gray Page offers data, which indicates that the "Libor interest rates on \$10,000,000.00 eight-year ship mortgages" for each month between 1993 and 2009 never exceeded 7% (Libor Interest Rate Chart, dated Dec. 23, 2016, annexed as Ex. 3 to Revised Gray Page Report). Although the 1997, 2007 and Anna Peters Loans each carried interest at a rate above 7%, these investments are not comparable to \$10,000,000.00 eight-year ship mortgages. Unlike a mortgage, the loans at issue were unsecured, and I can take judicial notice of the fact that unsecured loans generally carry a higher interest rate than secured loans. In re Oszejca, 199 B.R. 103, 109 (D. Vt. 1996) (Court takes judicial notice of the fact that, as a general matter "unsecured loans are riskier investments that justify the imposition of higher interest rates."). Moreover, Coutsodontis' claim that these Loans were self-serving is further undercut by the fact that Peters has sustained substantial losses

due to Sea Trade's inability to pay its liabilities pursuant to the 1997 and 2007 Loans, as well as several other unpaid loans that Peters extended between 2002 and 2011. Coutsodontis' suggestion that a loan that goes unpaid somehow benefits the creditor is absurd on its face.

On the other hand, Sea Trade, which has incurred substantial litigation, insurance and drydocking costs, has benefitted from infusions of cash on a consistent basis without any penalty for failing to repay its creditor. By lending money to Sea Trade to pay for the repair of the M/V ATHENA in 1997, the 2007 Drydocking and Sea Trade's legal fees and expenses, Peters' conduct is more consistent with prudent management than self-enrichment at Coutsodontis' expense. Coutsodontis' theory that the purpose of the Loans was to divert money away from him is particularly unavailing, given the fact that the 1997, 2007 and Anna Peters Loan were each entered into before the Lower Greek Court's decision recognizing Coutsodontis as a shareholder, and the 1997 Loan was made even before Coutsodontis had any claim to any Sea Trade shares.¹⁷ Thus, Peters and his mother could not have made these loans with the intent of avoiding payments to Coutsodontis to which he was entitled because ; there was no legal obligation of any kind to Coutsodontis at the time these

¹⁷As noted above, Coutsodontis received his shares under the will of Athena Eliades who died on January 13, 2003.

loans were made. Accordingly, the \$643,200.00 in interest Sea Trade has paid on the Loans to date must be considered as a valid expense for purposes of this inquest.

Finally, Coutsodontis claims that Sea Trade's legal fees and expenses should not be considered because Peters has failed to provide documentation establishing that those fees were fair and reasonable. This argument attempts to flip Coutsodontis' burden on its head; it is Coutsodontis' burden to prove damages with reasonable certainty. See Raishevich v. Foster, supra, 9 F. Supp. 2d at 417. Peters documented these expenses by submitting affidavits from each of the various law firms that worked on each of Sea Trade's litigations, as well as invoices for the services that they performed. Coutsodontis does not offer any evidence indicating that the rates charged by these firms were unreasonable or otherwise above market rate.

Coutsodontis also challenges the propriety of the legal fees and expenses Sea Trade paid in specific actions. Coutsodontis argues the legal fees and expenses from the Hellenic Matter should not be considered expenses for the purpose of this inquest because the dispute was "ill-advised and ultimately unsuccessful" (Reply Johnston Decl. ¶ 85). The fact that Sea Trade was ultimately unsuccessful in the Hellenic Matter does not, without more, deprive subject Sea Trade's decision to litigate of the protection of the business judgment rule. In re

Perry H. Koplik & Sons, Inc., 476 B.R. 746, 796 (S.D.N.Y. Br. 2012) ("When the decision making process has been satisfactory, officers and directors will be protected under the business judgment rule, even though their decision turned out to be unwise."). Because Coutsodontis has neither claimed nor demonstrated that the process through which Sea Trade decided to pursue the Hellenic Matter was infected by fraud, bad faith or self-interest, I conclude that the legal fees relating to the Hellenic Matter are protected by the business judgment rule and, therefore, must be considered in calculating Sea Trade's profit.

Coutsodontis next challenges the legal fees and expenses that Sea Trade paid in actions involving Peters in his personal capacity, which Coutsodontis deems "personal proxy fights on the part of [Peters]", including (1) the Defamation Action, (2) the instant action, (3) the Cahn Action and (4) the Family Action. Coutsodontis and Peters' sister commenced the Cahn Action and named Peters as a defendant. Both of these actions involved Peters' management of Sea Trade's affairs and, thus, Sea Trade was contractually obligated to pay his reasonable attorneys fees (Employment Agreement ¶ 11). Although I am somewhat troubled by Peters' use of Sea Trade's funds to pay legal fees and expenses in the Defamation Action, in which Peters, in his personal capacity, was the plaintiff, Coutsodontis

does not dispute that Peters was permitted to do so pursuant to the POA and the Employment Agreements.¹⁸

Accordingly, the Disputed Expenses should be included in the calculation of Sea Trade's profit. Thus, using Gray Page's income figures, Sea Trade's total profits were \$4,993,073.00, excluding the proceeds from the sale of the M/V ATHENA.

However, Coutsodontis has failed to prove with reasonable certainty that Sea Trade actually earned net profits or that Sea Trade has any assets beyond the proceeds from the sale of the M/V ATHENA. One of Coutsodontis' principal bases for arguing that Gray Page's figures are more accurate than Richards' is that the Richards Report relies on Sea Trade's Bank Account Statements (Def.'s Reply Mem. at 11). Coutsodontis claims that Sea Trade's Bank Account Statements provide an incomplete picture of Sea Trade's financial condition because Peters maintained other bank accounts on behalf of Sea Trade, which he has not disclosed to Coutsodontis or the Court (Def.'s Reply Mem. at 11). Accordingly, Coutsodontis argues that a reasonable basis exists to believe that Sea Trade's earnings amount to a greater sum than

¹⁸It is worth noting that the litigation fees and expenses incurred as a result of the Defamation Action were \$38,887.50 -- a small portion of the total legal costs incurred by Sea Trade (Peters Decl. ¶ 116). Given Sea Trade's poor financial state, they have no impact on the outcome of this inquest.

that reflected by the 108 deposits made to Sea Trade's Bank Account.

As a maritime expert, Gray Page may be familiar with certain aspects of finance and accounting that are typical to the maritime industry, but it does not follow, as a matter of logic, that Gray Page is an expert in the realm of forensic accounting and unearthing hidden bank accounts. It does not profess any special knowledge, skill or training that would allow it to deduce whether a shipping company has hidden bank accounts. In addition, Gray Page provides no factual basis for its conclusory assertion that Sea Trade maintains an account at UBS Bank. Quizzically, in support of its assertion that secret bank accounts exist, Gray Page writes only that "Peters claims within his affidavit that his sister Francis Peters was also suing the shareholders of Sea Trade" (Revised Gray Page Report at 27 n.57). As a matter of logic, litigation initiated by Peters' sister does not imply the existence of "secret" bank accounts. Coutsodontis also claims that Sea Trade maintained a bank account at APSIS Bank ("ASPIS") (Def.'s Reply Mem. at 11; Revised Gray Page Report at 27). Again, Coutsodontis relies on the Revised Gray Page Report to support this assertion, but that assertion also lacks a factual basis.

Accordingly, because Coutsodontis (1) claimed to be entitled to profit that he is not retroactively owed, (2) failed

to consider the Disputed Expenses in evaluating Sea Trade's profits and (3) failed to explain adequately the discrepancy between Gray Page's estimate and the amount of profit reflected by Sea Trade's Bank Account Statements, I find that Coutsodontis has failed to prove to a reasonable certainty that Sea Trade made any net profit from the charter of the M/V ATHENA during the time that both he and Peters were shareholders.

Coutosdontis has, however, proven to a reasonable certainty that Sea Trade's remaining assets are the proceeds from the January 27, 2009 sale of the M/V ATHENA, amounting to \$2,341,291.73. Citing the district court's equitable authority, Judge Schofield directed that Coutsodontis be awarded half of that amount, or \$1,170,645.87 in order to advance "the interest of bringing this dispute to a final resolution" (Aug. 23, 2016 Op. at 29). The Court of Appeals affirmed this aspect of Judge Schofield's August 23, 2016 Opinion. Nevertheless, Peters argues, citing no law, that the balance of the escrow account should be remitted to him to resolve a portion of Sea Trade's liabilities. Peters was not a party to the Escrow Agreement, and he does not claim to have been a third-party beneficiary of the agreement. Therefore, he lacks standing to challenge the contract to the extent he attempts to do so here. See Debary v. Harrah's Operating Co., Inc., 465 F. Supp. 2d 250, 262 (S.D.N.Y. 2006) (McMahon, D.J.), quoting Wells Fargo Bank N.W., N.A. v.

Energy Ammonia Transp. Corp., 01 Civ. 5861, 2002 WL 1343757 at *1 (S.D.N.Y. June 18, 2002) ("Since . . . defendants are neither parties to, nor third-party beneficiaries of [the contract] they lack standing to bring a claim for tortious interference with that contract.").

Accordingly, for the reasons stated above, I respectfully recommend that Coutsodontis is entitled to \$1,170,645.87, or one-half of the proceeds from the sale of the M/V ATHENA, plus any accrued interest thereon, currently residing in escrow, as the benefit of his 50% ownership in Sea Trade. The balance of the escrow account should be distributed to Peters.

IV. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C), the parties shall have fourteen (14) days from the receipt of this Report to file written objections. Such objections (and responses thereto) shall be filed with the Clerk of Court, with courtesy copies delivered to the Chambers of the Honorable Lorna G. Schofield, 40 Foley Square, Room 201, New York, New York 10007 and to the Chambers of the undersigned, 500 Pearl Street, Room 1670, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Schofield. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn,

474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrman, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714, F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
December 7, 2018

Respectfully submitted,


HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

All Counsel