Cause no. 10-05639
In the District Court, 192nd Judicial District Court, Dallas County Texas

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Hillwood Investment Properties III, Ltd.,
individually and on behalf of
Dallas Basketball Limited d/b/a Dallas Mavericks,
Plaintiff,

v.

Radical Mavericks Management, LLC and
Dallas Basketball Limited d/b/a Dallas Mavericks,
Defendant.

Defendants' Amended Motion for Summary Judgment

Come now Defendants Dallas Basketball Limited d/b/a Dallas Mavericks ("Dallas Mavericks") and Radical Mavericks Management, LLC ("Radical Mavericks") (collectively, "Defendants") and hereby move for summary judgment and would show the Court as follows:

I. Summary of Argument

Plaintiff Hillwood Investment Properties III, Ltd. ("Hillwood" or "Plaintiff ") voluntarily dismissed over half of its claims including all claims for damages. Remaining in this case are fatally-flawed claims for breach of fiduciary duty, receivership, an accounting, and attorney's fees. Defendants are entitled to summary judgment on each of Plaintiff's remaining claims for the reasons set forth below:

Claim 1: Breach of Fiduciary Duty

- There is no evidence of any injury suffered by Hillwood—only a speculative "belief' that the value of its investment in the Dallas Mavericks has diminished. Rather, Radical Mavericks and Mark Cuban have successfully revived the franchise, which just won its first NBA World Championship.
- There has been no breach—Radical Mavericks has used it best business judgment in running the Dallas Mavericks, which recently resulted in the team winning its first NBA World Championship. In any event, Hillwood admits Radical Mavericks complied with the Partnership Agreement, which defines the scope of its duties as general partner.

Claim 2: Receivership

- Hillwood cannot establish that the Dallas Mavericks are insolvent or in imminent danger of insolvency—it is undisputed that the Dallas Mavericks have paid all debts as they come due and there is sufficient cash available to do so for several years. Moreover, Cuban is an integral part of the ongoing NBA labor negotiations. If a receiver is appointed over the Dallas Mavericks, the company and its owners could suffer substantial harm by losing Cuban's insight and influence in the negotiations. Therefore there is no basis for the Court to appoint a receiver under Texas Business Organizations Code

§11.404 or Texas Civil Practice and Remedies Code §64.001.

- Further, Hillwood is not entitled to a receiver because of the claimed "irreconcilable conflict between the limited partners on the one hand, and [Radical Mavericks] and Cuban, on the other, regarding the courses of action [the Dallas Mavericks] might take to ameliorate its financial condition."[1] The limited partners, by agreement, cannot participate in the operations of the partnership. Moreover, Hillwood cannot identify any other limited partners that agree with its allegation. It stands alone.

Claim 3: Accounting

- Hillwood is afforded a contractual right to conduct an audit of the books of DBL and has done so, with the help of a forensic accountant, fairly routinely over the course of the past two years. There is no evidence that an accounting is necessary.

Claim 4: Attorney's Fees

- There is no basis in statute, common law, or equity for Hillwood to recover its attorney's fees.

This is the second action brought by the Hillwood family of entities against the Dallas Mavericks relating to the Mavericks' financial condition. Hillwood's subsidiary, the plaintiff in the first action (an arbitration proceeding), claimed that Cuban breached his duties to his partners in a related entity by making a loan to the Dallas Mavericks because the Dallas Mavericks were alleged to be insolvent. The Arbitrator found that Cuban complied with his duties, entered an award in the Dallas Mavericks' favor, and awarded the Mavericks' recovery of the attorney's fees expended on the arbitration.[2] This suit should fare no better. For the reasons listed above, and discussed in more detail below, Defendants are entitled to summary judgment on all of Plaintiff's claims and requests for relief and a final judgment should be rendered in favor of Defendants.

II. Summary Judgment Evidence

A. Radical Mavericks and Cuban turned the Dallas Mavericks from the worst franchise in all of sports to world champions.

Since 1980, Dallas has been the home to the Dallas Mavericks, a National Basketball Association ("NBA") franchise. From 1979 to 1997, the Dallas Mavericks were owned by Don Carter and several minority partners. In 1997, Don Carter and his partners sold his majority stake in the partnership to Hillwood, which is ultimately owned by Ross Perot, Jr. and certain other entities. Mr. Carter and his co-investors retained a minority ownership interest, in the form of limited partnership interests, in the Dallas Mavericks.

Under Hillwood's ownership the Dallas Mavericks struggled on the court and lost money. During this period, the Dallas Mavericks were labeled the worst franchise in all four of the major U.S. professional sports leagues.[3] It is well-known that Mr. Perot and Hillwood invested in the Dallas Mavericks as part of a strategy to launch a new real estate development called Victory (the "Victory Development"). In 2000, Hillwood sold the Dallas Mavericks to Mark Cuban for a healthy profit despite the poor performance on the court and losses every year during Hillwood's ownership.[4] At present, Cuban, through his entities owns approximately seventy-

[1] Amended Petition ¶18.

[2] See Arbitration Award dated October 12, 2010, attached hereto as Exhibit "A".

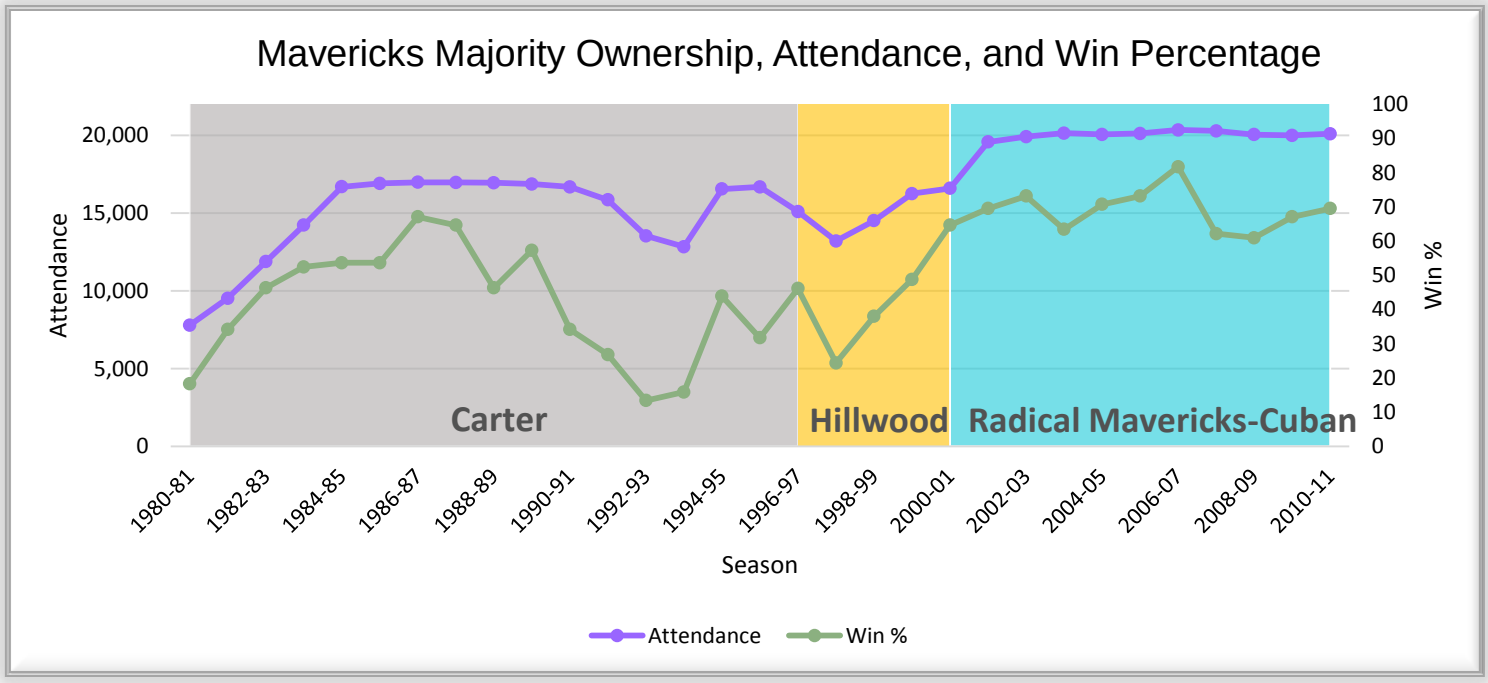
[3] Affidavit of Mark Cuban ("Cuban Affidavit") at ¶ 4, attached hereto as Exhibit "B".

[4] Excerpts of Transcript of Hillwood Center Partners, et al v. Radical Cuban, LLC, et al, at Vol. 2, 352:10–12, attached hereto as Exhibit "C".

four percent (74%) of the Dallas Mavericks.[5] Hillwood retained a five percent (5%) limited partner interest in the Dallas Mavericks and in the Mavericks' share of the operations of their new home, the American Airlines Center ("AAC"); which Hillwood valued at $15.1 million at the time.[6] The only purpose of Hillwood is to hold these two interests.[7]

At the time of the sale by Hillwood to Cuban in 2000 no new partnership agreement was entered into. Rather, the existing partnership agreement that had been negotiated and entered into between Mr. Carter and Hillwood was amended to change the Dallas Mavericks' general partner from a Hillwood entity to Radical Mavericks, an entity ultimately owned by Cuban.[8] The Partnership Agreement governs the relationship between the general partner and the limited partners.[9]

As stated above, when Cuban purchased the Dallas Mavericks the team was the laughing stock of the NBA. The premier free agents had no interest in coming to play in Dallas, as the team was considered a perennial loser.[10] Moreover, many seats in Reunion Arena (still the home of the Mavericks when Cuban bought the team mid-season) were empty.[11] In Cuban's view, the best way to bring fans, and thus revenue, back to the Dallas Mavericks was to win.[12]



[5] *See generally* Third Amended and Restated Agreement of Limited Partnership of Dallas Basketball Limited, as amended, (the "Partnership Agreement"), attached hereto as Exhibit "D".

[6] *Id.;* Deposition of Hillwood Corporate Representative Scott Meyer ("Meyer Depo") at 14:25–15:13, attached hereto as Exhibit "E".

[7] Deposition of Hillwood Corporate Representative David Newsom ("Newsom Depo") at 51:10–15, attached hereto as Exhibit "F".

[8] A few terms of the agreement were also amended, however none of those terms are relevant here. See generally Partnership Agreement.

[9] *Id.*

[10] See Exhibit B, Cuban Affidavit at ¶ 8.

[11] *Id.* at ¶ 5.

[12] *Id.* at ¶ 6.

Cuban and Radical Mavericks set out on a long-term plan to build the long-term franchise value by putting a championship-caliber team on the court.[13] This could not be done overnight, and given the economics of the NBA, getting championship-caliber players and staff would not be inexpensive.[14] It is undisputed that over the course of the past decade the Dallas Mavericks borrowed money to fund cash flow losses.[15] As general partner, Radical Mavericks approved the borrowings because Cuban believed that it was in the best interests of the Dallas Mavericks.[16] Specifically, Cuban believed it was in all of the partners' best interests to put a winning team on the court.[17] Moreover, the Partnership Agreement: (1) expressly contemplates that the partnership will need to borrow money to operate the team; (2) vests sole decision-making authority in Radical Mavericks as general partner; and (3) expressly states that Radical Mavericks may borrow money as it "considers necessary or appropriate" and "deems necessary and advisable for the conduct of the activities of the Partnership."[18] Hillwood agrees that Radical Mavericks and Cuban have not violated any terms of the Partnership Agreement.[19]

Cuban's approach and strategy are sound. The best ways to increase the value of an NBA franchise are, unsurprisingly, to win an NBA championship and create a sustained period of winning.[20]

Since 2000, Cuban's and Radical Mavericks' strategy has succeeded and the Dallas Mavericks have turned the franchise around. The Mavericks have won 50 or more regular season games (out of 82) for eleven straight years.[21] As a result, the Dallas Mavericks' have the NBA's longest sell-out streak at over 400 games.[22]

Most importantly, this past June, Cuban's strategy of winning a championship paid off the Dallas Mavericks defeated the Miami Heat on June 12, 2011 to win the franchise's first World Championship.[23]

The Dallas Mavericks celebrate the franchise's first World Championship in 2011

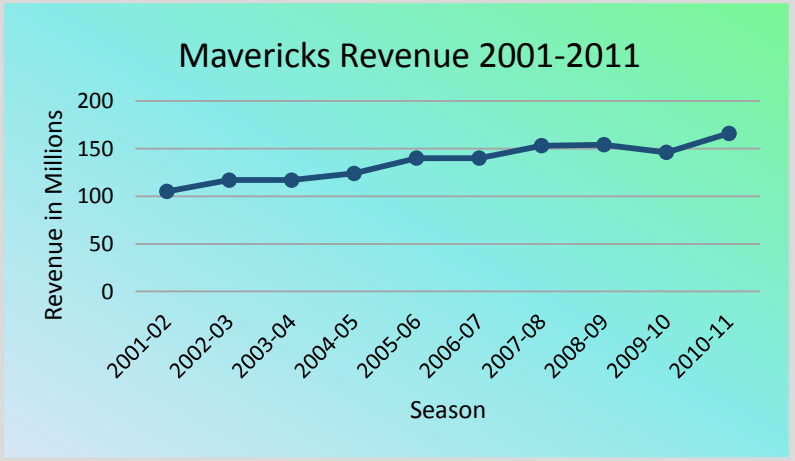
[13] *Id.* at ¶ 8.
[14] *Id.* at ¶ 8.
[15] *Id.* at ¶ 9.
[16] *Id.* at ¶ 12.
[17] *Id.* at ¶ 16.
[18] Partnership Agreement §§ 2.3, 5.4, 7.1(a).
[19] *See* Exhibit F, Newsom Depo. at 30:25–31:7.
[20] Cuban Affidavit at ¶ 7.
[21] *Id.* at ¶ 13.
[22] *Id.* at ¶ 14.
[23] *Id.* at ¶ 15.

B. Hillwood's investment has not diminished: one year after filing this suit, Hillwood agreed to sell a portion of its interest in the Dallas Mavericks at a break-even price.

Despite claiming that it "believes" that its investment in the Dallas Mavericks has been diminished, in May of this year Hillwood executed an agreement to sell 49 percent of the company (i.e., 49 percent of Hillwood's limited partnership interests in the Dallas Mavericks and the entity that holds its interest in the operations of the AAC), for $7,404,028.[24] The transaction price was based upon 49 percent of the value of Hillwood's minority interest as of 2000, when it "acquired" that interest as part of the sale to Cuban, or approximately $15.1 million.[25] Thus, a year after filing suit, Hillwood entered into a binding agreement with the potential purchaser for what is, at least, a break-even price.

C. The Dallas Mavericks have paid and are projected to pay all debts as they come due.

The Dallas Mavericks have never been in default of any obligation.[26] To date, the Dallas Mavericks have paid all of their bills as they have come due.[27] Ernst & Young and KPMG, the respective current and former independent auditors of the Dallas Mavericks, have never issued a qualified audit opinion, questioning the Dallas Mavericks ability to continue as a going concern or questioning their ability to pay the partnership's obligations in the following twelve months.[28] Moreover, KPMG, the Dallas Mavericks' current auditor prepared a cash-flow analysis in 2010 that determined that the company "should be able to easily sustain its operations for the next year [i.e., through June 2011]" and determined that the company had $47 million in available funds beyond what was projected to be spent for the 2011 fiscal year.[29] Based on an analysis by John D. Finnerty, Hillwood's purported insolvency expert,[30] the Dallas Mavericks have sufficient cash available through their existing lines of credit to fund operations through 2014.[31] Furthermore, the projections that Mr. Finnerty relied on do not take into account (1) the impact of the NBA championship on long-term projections, and (2) the impact a new NBA collective bargaining agreement[32] may have on future revenues or costs of the Dallas Mavericks.[33]



[24] May 25, 2011 Executed Contribution Agreement ("Skokus Contribution Agreement") attached hereto as Exhibit "G".

[25] *See* Exhibit E, Meyer Depo. at 16:18–17:7.

[26] Affidavit of Floyd Jahner ("Jahner Affidavit") at ¶ 3, attached hereto as Exhibit "H"; *See* Exhibit E, Meyer Depo. at 20:17–23; Exhibit F, Newsom Depo. at 111:17–-22.

[27] *See* Exhibit H, Jahner Affidavit at ¶ 4; Exhibit E, Meyer Depo. at 20:17–23; Exhibit F, Newsom Depo. at 111:17–22; Deposition of KPMG Corporate Representative Jeffrey Francis ("KPMG Depo") at 153:6–12, attached hereto as Exhibit "I".

[28] *See* Exhibit H, Jahner Affidavit at ¶7; Deposition of Ernst & Young Corporate Representative David Heseleton ("Ernst & Young Depo.") at 69:5–12, attached hereto as Exhibit "J"; Exhibit I, KPMG Depo at 138:15–139:4.

[29] *See* Exhibit I, KPMG Depo at 142:22–144:11.

[30] Defendants reserve the right, and intend to move to strike the opinions of John D. Finnerty.

[31] Deposition of Hillwood Expert John D. Finnerty ("Finnerty Depo.") at 141:04–142:10, attached hereto as Exhibit "K".

[32] The NBA and the owners of the 30 NBA franchises are currently in negotiations with the NBA Players Association regarding the negotiation of a new collective bargaining agreement. Cuban Affidavit at ¶ 17. The previous collective bargaining agreement expired on June 30, 2011. *Id.*

[33] *Id.* at 143:13–19.

Furthermore, the Dallas Mavericks' lenders have never indicated they had any issues with the partnership's capital structure.[34] In fact, the lenders have recently indicated their willingness to extend the partnership's lines of credit until Fall 2012.[35] Under these circumstances, there can be no insolvency or immediate threat thereof as a matter of law.

D. Radical Mavericks and the Dallas Mavericks have kept Hillwood regularly informed and complied with Hillwood's recent requests to conduct a forensic audit.

Over the course of the past two years, the Dallas Mavericks, Radical Mavericks and their staff have complied with Hillwood's requests under the Partnership Agreement to conduct an audit of the Dallas Mavericks. Dallas Mavericks' and Radical Mavericks' legal and accounting staff have devoted approximately 800 hours and turned over approximately 30,000 pages of documents at the request of a forensic accountant hired by Hillwood.[36] Moreover, as recently as this year, Dallas Mavericks' and Radical Mavericks' staff collected and were prepared to make available additional documents at Hillwood's request.[37] Hillwood, however, cancelled the meeting and never attempted to reschedule.[38] In addition to complying with Hillwood's contractual rights to an audit, Radical Mavericks' and Dallas Mavericks' staff consistently provided Hillwood with audited financial statements on a timely basis and had frequent discussions with Hillwood staff regarding the finances and operations of the Dallas Mavericks.[39]

[34] *See* Exhibit H, Jahner Affidavit at ¶ 5.

[35] Deposition of Dallas Mavericks' Corporate Representative Floyd Jahner ("Jahner Depo.") at 97:2–23, attached hereto as Exhibit "L".

[36] *See* Exhibit H, Jahner Affidavit at ¶¶ 10–12; December 3, 2010 email from Robert Hart to Steven Parker (HLWD03445), attached hereto as Exhibit "M".

[37] January 26, 2011 e-mail from Steven Parker to Robert Hart (Newsom Depo. Ex. 18), attached hereto as Exhibit "N".

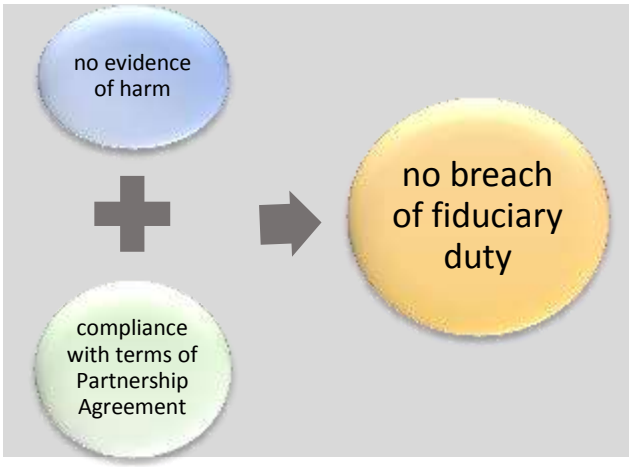
[38] *Id.;* Jahner Affidavit at ¶ 16.

[39] *See* Exhibit F, Newsom Depo. at 43:23–44:2; 45:17–24.

III. Argument and Authorities

A. Hillwood's breach of fiduciary duty claim fails as a matter of law.

Hillwood's breach of fiduciary duty claim fails as a matter of law for two independent reasons: (1) there is no evidence that Hillwood has suffered any harm from any alleged breach, merely a speculative "belief' that the value of its investment in the Dallas Mavericks has decreased; and (2) Hillwood admits that Cuban and Radical Mavericks Management have complied with the terms of the Partnership Agreement, which defines the scope of the duties it owes to Hillwood as the general partner. Accordingly, Defendants are entitled to summary judgment on Hillwood's breach of fiduciary duty claim.



1. Hillwood cannot establish the essential element of injury.

Hillwood's admitted speculation that it "believes" the value of its investment in the Dallas Mavericks has decreased is insufficient to establish injury. Accordingly, there is no evidence of the essential element of injury suffered as a result of any alleged breach and Defendants are entitled to summary judgment on the fiduciary duty claim.

It is well established that to prevail on a breach of fiduciary duty claim, a plaintiff must show an injury to the plaintiff or benefit to the defendant as a result of the defendant's breach.[40] Hillwood has not alleged that Radical Mavericks have gained any benefit as a result of an alleged breach.[41] Thus, Hillwood must show that it has suffered some injury at the hands of Radical Mavericks. By its own admission, Hillwood cannot do so.

When asked what harm Hillwood has suffered as a result of the alleged conduct at issue in this case, Hillwood's corporate representative, General Counsel David Newsom, testified "[w]e believe that the value of our investment has been eroded as a result of the management of [the Dallas Mavericks]."[42] Newsom did not identify any other alleged harm suffered by Hillwood.[43] When asked whether Hillwood could quantify its "believe[d]" diminution in value, Hillwood's corporate representative stated that Hillwood "[has] not gotten any valuation of [its] interest" in the Dallas Mavericks.[44] Hillwood's other corporate representative, its Chief Financial Officer, also stated that he had "no idea" what the current fair market value of Hillwood's investment in the Dallas Mavericks is.[45] In fact, Hillwood itself acknowledged that it is possible that the value of the Dallas Mavericks' assets may have increased at a higher rate than the team's liabilities, i.e., Hillwood acknowledges that the value of its investment might have actually increased.[46] Finally, Hillwood's purported expert witness, John D. Finnerty, confirmed that he is not opining on the value of the Dallas Mavericks, the value of Hillwood, or the value of Hillwood's investment in the Dallas Mavericks.[47] Despite its "belief' that its investment has somehow diminished since 2000, Hillwood signed an agreement in May 2011 under which it agreed to sell a portion of its investment in the Dallas Mavericks and the American Airlines Center for what would be, at worst, a break-even price.[48]

Simply put, there is no evidence supporting the essential element of injury caused by any alleged breach. Hillwood's "belief' that its investment in the Dallas Mavericks has somehow diminished is mere conclusion and speculation and is not competent evidence.[49] As such, there is no evidence that Hillwood has suffered any injury based on the allegations in its Amended Petition and Defendants are entitled to summary judgment on Hillwood's fiduciary duty claims.[50]

2. Radical Mavericks has not breached any of its duties to Hillwood.

Radical Mavericks has not breached any duty owed to Hillwood. The only fiduciary duties that Radical Mavericks owe Hillwood are the duties of loyalty and care, as modified by the Partnership

[40] *Jones v. Blume,* 196 S.W.3d 440, 447 (Tex. App.Dallas 2006, pet. denied).

[41] *See generally* Amended Petition

[42] *See* Exhibit F, Newsom Depo at 4:13–5:1.

[43] *Id.*

[44] *Id.* at 33:22–34:1.

[45] *See* Exhibit E, Meyer Depo. at 11:10–12.

[46] *See* Exhibit F, Newsom Depo. at 43:6–10.

[47] *See* Exhibit K, Finnerty Depo. at 28:18–29:1.

[48] The only potentially admissible or reliable evidence in this case relating to the value of Hillwood and its investment in the Dallas Mavericks is the executed agreement between Hillwood and Mr. Skokos regarding his potential purchase of 49 percent of Hillwood. Hillwood has acknowledged that the price Mr. Skokos was going to pay for 49 percent of Hillwood was based on the amount Hillwood valued its interest in the Dallas Mavericks at the time it acquired the interest in 2000. Exhibit E, Meyer Depo. at 16:17–17:7.

[49] *See e.g., Coastal Transp. Co. v. Crown Cent. Petroleum Corp.,* 136 S.W.3d 227, 232 (Tex.2004); *Selz v. Friendly Chevrolet, Ltd.,* 152 S.W.3d 833, 837 (Tex. App.Dallas 2005, no pet.) ("When summary judgment evidence raises only a mere suspicion or surmise of a fact in issue, no genuine issue of material fact exists to defeat summary judgment.").

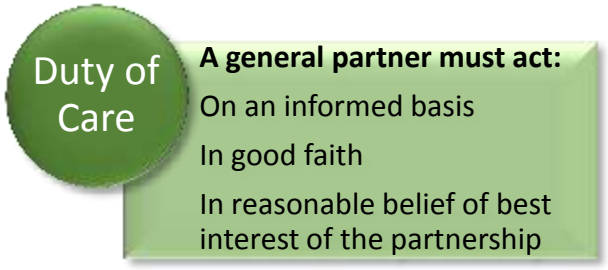
[50] Per its pleading, and according to its corporate representative, Hillwood asserts an additional basis for breach of fiduciary duty founded on an allegation that it was not properly kept informed of Dallas Mavericks' business. Amended Petition ¶16. This version of its fiduciary duty claim suffers the same infirmity as the first—no harm or injury. When pressed about what harm was suffered as a result of this alleged brief, Hillwood testified "Pretty hard to quantify the harm . . . I can't quantify it." Exhibit F, Newsom Depo. at 116:19–117:11. Moreover, Hillwood agreed that any harm would be speculative. *Id.* at 121:16–122:14. Thus, Hillwood fails to meet an essential element of its claim (e.g. injury) no matter what theory of breach it pursues.

Agreement. There is no allegation that Radical Mavericks has breached the duty of loyalty. Furthermore, Radical Mavericks has fully complied with its duty of care, as defined and limited by the Partnership Agreement.

Pursuant to the Texas Business Organizations Code (the "TBOC"), a general partner in a limited partnership has the liabilities of a partner in a general partnership to the other partners and the partnership unless the limited partnership statutes or the partnership agreement provide otherwise.[51] The limited partnership statutes do not apply special fiduciary duties to general partners in a limited partnership. Thus, a general partner in a limited partnership has the duties of care and loyalty set forth in Chapter 152 of the TBOC unless limited by a partnership agreement.[52]

The duty of loyalty prohibits the general partner from engaging in self-dealing, usurping partnership opportunities and competing with the partnership.[53] None of the allegations in Hillwood's First Amended Original Petition ("Hillwood's Petition") implicate the duty of loyalty. Hillwood's claims for breaches of fiduciary duty stem from its allegations that Radical Mavericks burdened "DBL with operating and debt obligations far beyond the capabilities of DBL to satisfy" and that DBL failed "to keep Hillwood and the other partners properly and regularly informed regarding the business of DBL."[54] Neither of these allegations implicate self-dealing or competition with the partnership. Accordingly, there can be no claim for breach of the duty of loyalty.

As for the duty of care, the TBOC defines the duty as an obligation "to act in the conduct and winding up of the partnership business with the care an ordinarily prudent person would exercise in similar circumstances."[55] The TBOC further provides that an "error in judgment does not by itself constitute a breach of the duty of care."[56] A partner who acts on an informed basis, in good faith, and in a manner the partner reasonably believes to be in the best interest of the partnership is presumed to satisfy the duty of care.[57]



The TBOC provides that the partners may not eliminate the duty of care through the partnership agreement, but may determine the standard by which the performance of the duty of care is to be measured so long as the standard is

[51] Tex. Bus. Org. Code. § 153.152(a)(2); *see also* Tex. Bus. Org. Code § 153.003(a).

[52] "Though courts have been inclined to refer to a general partner of a limited partnership as a 'trustee,' it is no longer appropriate to speak in terms of 'trustee' standards for a general partner [because the] general partnership statutes negate the trustee standard." Elizabeth S. Miller, Fiduciary Duties, Exculpation, and Indemnification in Texas Business Organizations, State Bar of Texas Essentials of Business Law, April 29, 2010, Chapter 13, at 14.

[53] *See* Tex. Bus. Org. Code § 152.205.

[54] Hillwood's Petition at ¶ 16.

[55] Tex. Bus. Org. Code § 152.206(a).

[56] *Id.* at § 152.206(b).

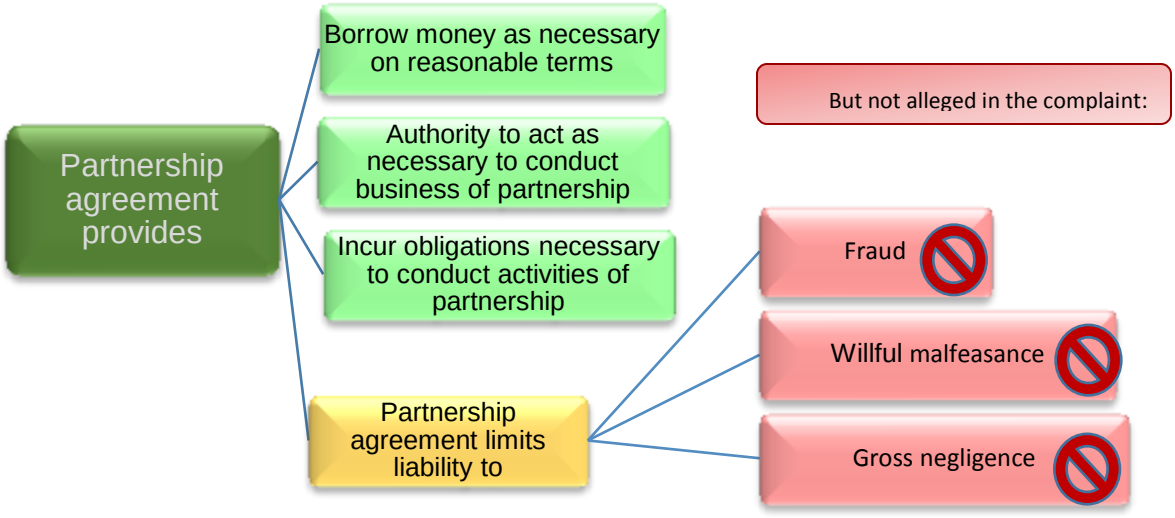
[57] *Id.* at §§ 152.204(b), 152.206(c).

"not manifestly unreasonable."[58] In other words, a partnership agreement may modify the duty of care and raise the standard by which a breach of the duty is established so long as the standard is not manifestly unreasonable. This is extremely important in the instant case because the Partnership Agreement specifically addresses the acts which Hillwood claims amount to a breach of fiduciary duty here.

The Partnership Agreement provides:

- "[T]he General Partner is hereby empowered to borrow such sums on behalf of the Partnership as it considers necessary or appropriate. Such loans shall be obtained by it in accordance with such terms and conditions as it considers reasonable and appropriate."[59]
- "[T]he General Partner shall have full power and authority to do all things deemed necessary or desirable by it to conduct the business of the Partnership, including without limitation: ... the making of any expenditures, the borrowing of money, the guaranteeing of indebtedness and other liabilities, the issuance of evidences of indebtedness, and the incurrence of any obligations it deems necessary or advisable for the conduct of the activities of the Partnership."[60]
- "The General Partner shall not be liable to the Partnership or the Limited Partners for any act or omission performed or omitted by it pursuant to the authority granted to it by this Agreement, other than for fraud, willful malfeasance, or gross negligence."[61]

Reading these provisions together, the Partnership Agreement plainly authorizes Radical Mavericks to borrow money in an amount and on terms that Radical Mavericks "considers necessary or appropriate." Hillwood's Petition lacks any allegation that Radical Mavericks did not believe that the loans undertaken were not necessary or appropriate. Accordingly, the acts underlying Hillwood's claims were clearly authorized by the Partnership Agreement. And there is also simply no evidence that Radical Mavericks engaged in authorized acts in a manner that violated the duty of care.



[58] *Id.* at § 152.002(b)(3).

[59] Partnership Agreement at § 5.4(a).

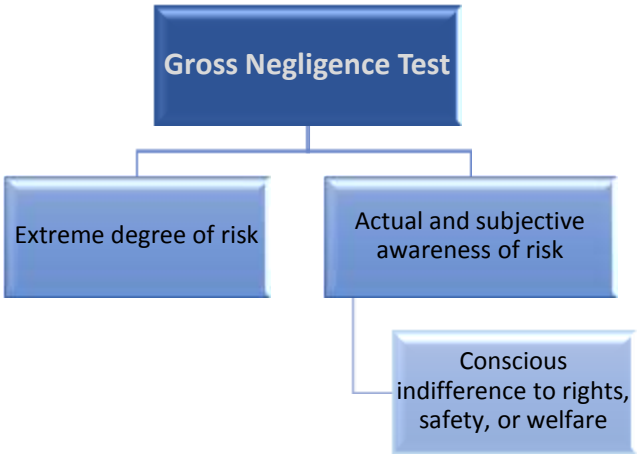
[60] *Id.* at § 7.1(a).

[61] *Id.* at § 7.3(a).

Furthermore, the Partnership Agreement plainly provides that Radical Mavericks shall not be liable for engaging in any act authorized by the Partnership Agreement unless undertaken "for fraud, willful malfeasance, or gross negligence." At the outset, there is no allegation of fraud. Next, as set forth below, undertaking loans as authorized by the Partnership Agreement does not amount to willful malfeasance or gross negligence as a matter of law.

To establish willful malfeasance, Hillwood must provide evidence of "willful misconduct for example, the assessment of false charges or the deliberate allocation, to Plaintiffs' partnership interests, expenditures not related to the operation of [the] partnership."[62] There are no allegations of willful misconduct. Nothing in Hillwood's Petition indicates a claim that Radical Mavericks undertook acts for the deliberate and willful purpose of harming Hillwood. Every act alleged to be a breach of fiduciary duty by Hillwood has the same effect upon Radical Mavericks and Cuban's other entities that have an ownership interest in the Dallas Mavericks as it does Hillwood. So it would be odd indeed to find that Radical Mavericks acted with a willful purpose to harm itself.

As for gross negligence, the Texas Supreme Court has established a two-step test: "(1) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others."[63] As explained below, there is no evidence of gross negligence here.



There is no objective evidence of an "extreme degree of risk" of harm to Hillwood. Given that Cuban has sufficient assets to back up the guaranty, there is simply no risk to Hillwood, let alone an "extreme degree of risk."[64] Hillwood argues that Radical Mavericks and Cuban have been engaging in this alleged mismanagement since at least May 2010, when it first filed the suit.[65] However, as discussed above, Hillwood cannot identify any quantifiable harm it has suffered,[66] and Hillwood executed an agreement one year after filing this claim to sell 49% of its stake in the Dallas Mavericks for at least a break-even price.[67] There is simply no evidence that Hillwood has suffered any harm or that there is an extreme degree of risk that it will suffer potential harm. Moreover, there is certainly no evidence of a subjective awareness by Radical Mavericks of a supposed "extreme degree of risk." The record is simply devoid of any evidence that Radical Mavericks had a

[62] *See Grider v. Boston Co., Inc.,* 773 S.W.2d 338, 341 (Tex. App. Dallas 1989, writ denied) *disapproved on other grounds by Tex. Commerce Bank, N.A. v. Grizzle,* 96 S.W.3d 240 (Tex. 2002) (holding that duty of care, as modified by partnership agreement to fraud or willful malfeasance, had not been breached by the general partner, and holding that terms 'fraud" and "willful malfeasance" were "synonymous").

[63] *La.-Pac. Corp. v. Andrade,* 19 S.W.3d 245, 246 (Tex. 1999).

[64] *See* Exhibit B, Cuban Affidavit at ¶ 10-11.

[65] *See generally* Amended Petition.

[66] *See* Exhibit F, Newsom Depo. at 116:19-117:11.

[67] *See* Exhibit G, Skokos Contribution Agreement; Exhibit E, Meyer Depo. at 16:18–17:7.

subjective belief that Hillwood faced an extreme degree of risk of harm because Radical Mavericks undertook loans guaranteed by Cuban.[68]

There is no evidence of a breach of duty owed to Hillwood. Indeed, Hillwood authorized Radical Mavericks to undertake every act allegedly undertaken through the Partnership Agreement. Accordingly, the Defendants are entitled to summary judgment on Hillwood's breach of fiduciary duty claim.

B. Hillwood is not entitled to the appointment of a receiver because there is no evidence the Dallas Mavericks are insolvent or in imminent danger of insolvency.

There is no evidence that the Dallas Mavericks are insolvent or in imminent danger of insolvency, thus Hillwood is not entitled to the extraordinary appointment of a receiver over the reigning NBA World Champions as a matter of law. Although the determination of whether a receiver should be appointed rests with the Court's discretion, receivership is an extraordinarily harsh remedy and one that courts are particularly loathe to utilize.[69] Hillwood has not met the requirements of either statute on which it bases its claim for a receiver—Texas Business and Organizations Code §11.404 or Texas Civil Practice and Remedies Code §64.001–and the Court should not impose the harsh remedy of appointing a receiver.

The relevant portions of the Business and Organizations Code are:

Tex. Bus. & Org. Code §11.404 Appointment of Receiver to Rehabilitate Domestic Entity

(a) Subject to Subsection (b), a court that has jurisdiction over the property and business of a domestic entity under Section 11.402(b) may appoint a receiver for the entity's property and business if:
  (1) in an action by an owner or member of the domestic entity, it is established that:
    (A) the entity is insolvent or in imminent danger of insolvency;
    (B) the governing persons of the entity are deadlocked in the management of the entity's affairs, the owners or members of the entity are unable to break the deadlock, and irreparable injury to the entity is being suffered or is threatened because of the deadlock;
    (C) the actions of the governing persons of the entity are illegal, oppressive, or fraudulent;
    (D) the property of the entity is being misapplied or wasted; or
    (E) with respect to a for-profit corporation, the shareholders of the entity are deadlocked in voting power and have failed, for a period of at least two years, to elect successors to the governing persons of the entity whose terms have expired or would have expired on the election and qualification of their successors;

(b) A court may appoint a receiver under Subsection (a) only if:
  (1) circumstances exist that are considered by the court to necessitate the appointment of a receiver to conserve the property and business of the domestic entity and avoid damage to interested parties;
  (2) all other requirements of law are complied with; and
  (3) the court determines that all other available legal and equitable remedies, including the appointment of a receiver for specific property of the domestic entity under Section 11.402, are inadequate.

The relevant portions of the Civil Practice and Remedies Code are:

Tex. Civ. Prac. & Rem. Code §64.001 Availability of Remedy

(a) A court of competent jurisdiction may appoint a receiver:
  * * *
  (3) in an action between partners or others jointly owning or interested in any property or fund;
  * * *
  (5) for a corporation that is insolvent, is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights; or
  (6) in any other case in which a receiver may be appointed under the rules of equity.

[68] To the extent that Hillwood argues that it was not kept properly and regularly apprised of the partnership's business, there is no evidence that failing to keep Hillwood regularly apprised (Radical Mavericks did keep Hillwood apprised) exposed Hillwood to an extreme degree of risk. Exhibit F, Newsom Depo. at 116:19–117:11 (admitting Hillwood could not identify harm suffered as a result of the alleged failure to keep it informed).

[69] *Independent Am. Sav. & Loan Ass'n v. Preston 117 Joint Venture,* 753 S.W.2d 749, 750 (Tex. App. Dallas 1988, no writ).

Hillwood claims it is entitled to the appointment of a receiver for the Dallas Mavericks because the entity is "insolvent or in imminent danger of insolvency."[70] "Insolvency" is defined in the Business and Organizations Code as "inability of a person to pay the person's debts as they become due in the usual course of business or affairs."[71] "Insolvent" is likewise defined as "a person who is unable to pay the person's debts as they become due in the usual course of business or affairs."[72]

The undisputed evidence in this case establishes that the Dallas Mavericks have paid their debts as they become due in the usual course of business. Even Hillwood's corporate representatives and expert witness have acknowledged that the Dallas Mavericks have, to date, paid their debts as they come due and have not been in default of any obligation.[73] Moreover, the Dallas Mavericks have never received a going concern opinion from their independent auditors.[74]

Because Hillwood cannot meet the test prescribed by the statute, Hillwood and its expert have modified the definition of insolvency.[75] Hillwood claims that the Dallas Mavericks are insolvent on a "stand-alone" basis. This is not the test in Texas. Rather, the test is whether a person is able to pay his debts as they become "due in the usual course of business."[76] Hillwood asks this Court to ignore an important source of outside financing for the Dallas Mavericks. Like many other professional sports teams, the Dallas Mavericks utilize debt as a form of capital to pay for operations. Borrowing is not merely in the Dallas Mavericks' usual course of business; *it is expressly contemplated as one of the company's business purposes*.[77] Moreover, as Plaintiff's expert admitted, the ability to obtain cash through borrowing is something that is routinely considered in an insolvency analysis.[78]

Even Hillwood's own expert admitted that when the borrowings that are guaranteed or provided by Cuban are considered at the current levels, the Dallas Mavericks can pay all obligations as they come due at least until 2014.[79] There is no evidence that the Dallas Mavericks are insolvent or in imminent danger of insolvency. In fact, the summary judgment evidence establishes just the opposite as a matter of law. Accordingly, Hillwood is not entitled to the appointment of a receiver.[80]

C. Hillwood is not entitled to an accounting.

There is no basis in equity or statute that entitles Hillwood to an accounting. The Partnership Agreement provides Hillwood with the right to

[70] Amended Petition ¶ 18.

[71] Tex. Bus. & Org. Code §1.002(39).

[72] *Id.* §1.002(40).

[73] *See* Exhibit E, Meyer Depo. at 20:13–23; Exhibit F, Newsom Depo. at 111:17–22.

[74] *See* Exhibit I, KPMG Depo. at 138:15–139:4; Exhibit J, Ernst & Young Depo. at 69:5–12.

[75] Additionally, the Court should not appoint a receiver because of the current circumstances of the NBA labor negotiations. See Tex. Bus. Org. Code § 11.404(b)(1). The NBA and the owners of the thirty NBA franchises are currently in negotiations with the NBA Players' Association over the terms of a new collective bargaining agreement. Exhibit B, Cuban Affidavit at ¶ 17. Having been an NBA owner for more than a decade and serving on the NBA Labor Board, Cuban is a key party to the negotiations. *Id.* at ¶ 19. It is in the best interests of the Dallas Mavericks and all of its partners that Cuban continues to play a key role in the negotiations. *Id.* at ¶ 18. Moreover, it would result in substantial risk of harm to the owners if a receiver were placed over the Dallas Mavericks at such a critical point in time. *Id.* at ¶ 20. For these reasons, the circumstances dictate that Cuban should be left in place and no receiver should be appointed.

[76] Tex. Bus. & Org. Code §1.002(39)-(40).

[77] *See* Exhibit D, Partnership Agreement § 2.3.

[78] *See* Exhibit K, Finnerty Depo. at 142:6–10.

[79] *Id.* at 141:6--142:10.

[80] Hillwood also asks for the appointment of a receiver based on an alleged "irreconcilable conflict" between the limited partners and Radical Mavericks on the best way to ameliorate the supposed financial condition of the Dallas Mavericks. Amended Petition ¶ 18. Hillwood and the other limited partners, however, are not permitted to participate in the management or control of the business," under the Partnership Agreement. Exhibit D, Partnership Agreement § 6.1. Moreover, none of the other six unrelated limited partners has come forward to back up Hillwood's claims of an "irreconcilable conflict." Because the Dallas Mavericks are not insolvent and because there is no conceivable irreconcilable conflict between the limited partners and Radical Mavericks, Hillwood is not entitled to the appointment of a receiver.

conduct an audit of the partnership.[81] Hillwood has done just that in the past two years, employing a forensic accountant to review the company's detailed books and records.[82] If there were any discrepancies in the books and records, Hillwood would have raised them in this case. It has not done so, and cannot identify any information that an accounting would provide that was not already provided in the forensic audit.[83]

Radical Mavericks and Dallas Mavericks' staff have spent nearly 800 hours and thousands of dollars complying with Hillwood's request to review over 30,000 pages of documents relating to the company's books.[84] Moreover, as recently as this year, Dallas Mavericks' staff expended substantial time and expense in collecting documents and materials for a review by Hillwood.[85] Hillwood, however, cancelled the planned meeting and never attempted to reschedule.[86] Hillwood has already been afforded the relief it has requested by the Partnership Agreement and should not be afforded further opportunities to do what it has either done already or refused to do.

D. There is no basis to award Hillwood its attorney's fees.

Notwithstanding Hillwood's inability to prevail on any of its substantive claims, as discussed above, there is no statutory or contractual basis to award Hillwood its attorney's fees. "It has long been the rule in Texas that attorney's fees paid to prosecute or defend a lawsuit cannot be recovered in that suit absent a statute or contract that allows for their recovery."[87] It is also well established that "[a]ttorney's fees are not available for a breach of fiduciary duty claim."[88] Moreover, neither statute upon which Hillwood bases its claims for the appointment of a receiver authorizes the award of attorney's fees.[89] Finally, the Partnership Agreement does not provide for the award of attorney's fees.[90] Accordingly, even if Hillwood were to prevail on one of its substantive claims, it is not entitled to an award of its attorney's fees.

To the extent Hillwood is seeking an equitable award of attorney's fees, it is the Defendants that should have their fees awarded. Perot and another of his Hillwood entities has already brought a claim over similar subject matter against the Dallas Mavericks and another Cuban entity and lost.[91] Moreover, Hillwood's forensic audit caused Radical Mavericks and Dallas Mavericks staff to expend substantial time and effort in complying with Hillwood's numerous requests—and Hillwood found nothing.[92] Accordingly, if equity demands an award of fees it is certainly not to Hillwood, but rather to the Defendants for having to spend valuable resources as a result of Hillwood's harassment.

IV. Conclusion

For the reasons stated above, Defendants respectfully request that the Court grant summary judgment in their favor on all of Plaintiff's claims, and grant Defendants such further relief to which the Court deems they are entitled.

[81] See Exhibit D, Partnership Agreement §14.2(b).

[82] See Exhibit F, Newsom Depo. at 129:2-8.

[83] *Id.*

[84] See Exhibit H, Jahner Affidavit at ¶¶11–12; Exhibit M, December 3, 2010 email from Robert Hart to Steven Parker.

[85] See Exhibit N, January 26, 2011 email from Steven Parker to Robert Hart.

[86] *Id.*; Jahner Affidavit at ¶ 16.

[87] *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.,* 299 S.W.3d 106, 120 (Tex. 2009).

[88] *Western Reserve Life Assur. Co. of Ohio v. Graben,* 233 S.W.3d 360, 378 (Tex. App.Fort Worth 2007, no pet.).

[89] See *generally* Tex. Bus. & Org. Code §11, et seq.; Tex. Civ. Prac. & Rem. Code § 64, et seq.

[90] See *generally* Exhibit D, Partnership Agreement.

[91] See Exhibit A, Arbitration Award.

[92] See Exhibit H, Jahner Affidavit at ¶¶ 11–15; Exhibit F, Newsom Deposition at 129:2–8.