IT IS ORDERED as set forth below:

Date: September 29, 2009

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	BANKRUPTCY CASE NUMBERS
	:	
MAXXIS GROUP, INC.	:	03-77243 through 03-77245 and
MAXXIS 2000, INC., MAXXIS	:	03-77247 through 03-77248
NUTRITIONALS, INC., MAXXIS	:	
RESOURCE & DEVELOPMENT, INC.,	:	**Jointly Administered Under**
MAXXIS COMMUNICATIONS, INC.,	:	**03-77243-MGD**
	:	
Debtors,	:	CHAPTER 7
	:	
S. GREGORY HAYS,	:	
as Chapter 7 Trustee for the Estate of	:	
MAXXIS GROUP, INC. et al.,	:	
	:	
Plaintiff,	:	ADVERSARY CASE NUMBER
v.	:	**06-06554-MGD**
	:	
ALVIN CURRY, LARRY GATES,	:	
ROBERT GLOVER, SANDRA	:	
JORDAN, TERRY HARRIS, STEVE	:	
JOHNSON, GEORGE STEINBERGER,	:	
IVEY STOKES and PAM WARD,	:	
	:	
Defendants.	:	
	:	

ORDER

A trial was held in the above-styled adversary proceeding on March 31, 2009. The Chapter 7 Trustee ("Trustee") initially filed this action on November 15, 2006 against ten named defendants who were alleged to be "directors, officers, and/or controlling shareholders" of Maxxis Group, Inc. ("Debtor" or "Maxxis"). Trustee amended his complaint on January 2, 2008. (Docket No. 58). The claims in the amended complaint were for breach of fiduciary duty, deepening insolvency, and equitable subordination.

At trial, Trustee prosecuted only the claim for breach of fiduciary duty against four defendants, Larry Gates, Robert Glover, Steve Johnson, and Pam Ward (collectively, "Defendants"). These Defendants have no attorneys of record and did not appear at trial. Three of these four Defendants, Larry Gates, Steve Johnson, and Pam Ward, filed answers. (Docket Nos. 6, 21 & 23). Trustee elected not to strike the answers of these Defendants at trial. Robert Glover did not file an answer or any other pleading in this action.

Settlements between Trustee and defendants Alvin Curry, Sandra Jordan, George Steinberger, and Ivey Stokes have been approved by the Court. (Case No. 03-77243, Docket Nos. 687, 675, 648 & 689). No order approving compromise and settlement for defendant Terry Harris has been entered by the Court, and no motion for such approval appears on the docket. Because Trustee affirmatively forfeited his right to prosecute Mr. Harris at trial, any claims against Mr. Harris are abandoned. *See generally, e.g.*, *Manton Cork Corp. v. Reilyy-Moustak Dev.*, No. 84-3723, 1987 WL 5286 at *12 (E.D. Pa. Jan. 8, 1987) (explaining that count II of the complaint was abandoned because it was not pursued at trial).

Trustee seeks recovery of damages based on the following five alleged acts of breach of

fiduciary duty by Defendants: (1) entering into a consulting agreement with Partners with Power operated by Rachel Stokes, (2) sponsoring a cruise promotion in November of 2002, (3) the issuance of asset purchase agreements, (4) a board approved stock repurchase plan beginning in August 2002, and (5) fees paid to the Maxxis' auditors. For the reasons set forth below, Defendants have no personal liability under O.C.G.A. § 14-2-830 because the evidence did not establish any breach of Defendants' duties of good faith and due care. Judgment will be entered in favor of Defendants.

The Court has jurisdiction pursuant to 28 U.S.C. § 1334, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This memorandum opinion constitutes findings of fact and conclusions of law pursuant to FED. R. CIV. P. 52(a), applicable to this proceeding pursuant to FED. R. BANKR. P. 7052.

FINDINGS OF FACT

Maxxis Group, Inc., Maxxis 2000, Inc., Maxxis Nutritionals, Inc., Maxxis Resource and Development, Inc., and Maxxis Communications, Inc. (collectively, "Debtors") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code on December 13, 2003. An Order authorizing joint administration of the Debtors' estates was entered on that same date. (Case No. 03-77243, Docket No. 3). S. Gregory Hays was appointed Chapter 11 Trustee, and, after the case was converted to Chapter 7 on February 21, 2006, Mr. Hays was also appointed Chapter 7 Trustee. An Order authorizing substantive consolidation of the Debtors' estates was entered on February 9, 2007. (Case No. 03-77243, Docket No. 545).

Trustee hired J. Wesley Pennington III, a certified public accountant, accredited in business valuation, a certified fraud examiner, a certified turnaround professional, and a certified insolvency and restructuring advisor, to perform a retrospective solvency and damages analysis. Mark King, a

certified turnaround manager and certified computer examiner, was also hired by Trustee in November of 2005 to help determine whether a turnaround was viable. Mr. King met with the Chief Executive Officer, Alvin Curry, and other executives to make his assessment. Mr. King also met with Cherry Bekeart & Holland, LLP ("CBH"), Maxxis' former auditors, Tauber & Balser, P.C., the auditing firm retained by Maxxis in February 2003, and the Securities and Exchange Commission's evaluator. Mr. King used forensic accounting and data recovery on Debtors' computers and servers to access all recoverable financial information. Mr. King and Mr. Pennington testified at trial for Trustee.

Debtor Maxxis was incorporated in Georgia in 1997.[1] The business operations of Debtors included sales for marketing communications, internet services, nutritional and health enhancement products. Maxxis was a publicly traded company. Its most valuable asset was a telephone switch purchased for five million dollars by Debtor Maxxis Communications in 1998. Mr. King testified that Debtors' financial records were in disarray and incomplete. The five debtor companies operated out of one office without a conventional accounting system.

Debtors were insolvent on or about March 31, 2001. Mr. Pennington testified at the trial and was certified as an expert witness in the areas of solvency and damages analysis for publically traded companies. Mr. Pennington relied upon Debtors' financial statements, including 10-Ks, 10-Qs, and 8-Ks, Debtors' bankruptcy schedules and statements, Debtors' internal correspondence, memoranda, and board meeting minutes, interviews with non-parties, Alvin Curry deposition, and non-party

[1] Plaintiff's Exhibit 8, compiled minutes of Maxxis board of directors meetings, repeatedly states that Maxxis Group, Inc. is a Delaware corporation. The Georgia Secretary of State website lists Maxxis as domestic corporation.

correspondence with the Securities and Exchange Commission to formulate his report, which was admitted into evidence as Plaintiff's Exhibit 1. Mr. Pennington's analysis uses definitions of "insolvent" found in the Bankruptcy Code and Uniform Fraudulent Transfer Act.

At trial, Mr. King answered affirmatively to the following question: "Were all defendants, Alvin Curry, Larry Gates, Robert Glover, Sandra Jordan, Terry Harris, Steve Johnson, George Steinberger, Ivey Stokes, and Pam Ward, officers and directors during all or during a significant portion of the period after Maxxis became insolvent?" The Court's independent review of the Maxxis board meeting minutes, admitted into evidence as Plaintiff's Exhibit 8, provided more detail of each defendant's role and participation as a director of Maxxis. Larry Gates served as a Maxxis director, holding the position of Secretary, from, at least, July 20, 2001 through April 17, 2003 and attended all regular and special board meetings held during this period, except for the April 15, 2002 meeting. (Plaintiff's Exhibit 1, p.18 & Plaintiff's Exhibit 8). Mr. Gates was a salaried founder. (Plaintiff's Exhibit 8, p.15). Robert Glover was a founder of Maxxis and served as a director for, at least, the period from July 20, 2001 until his resignation reported at the April 17, 2003 special meeting of Maxxis Board of Directors. (Plaintiff's Exhibit 8, p.35). Mr. Glover attended all regular and specially held board meetings during this period, except for the April 15, 2002 regular meeting and the April 17, 2003 special meeting. Steve Johnson served as a Maxxis director from, at least, July 21, 2001 through April 17, 2003 and attended all regular and special meetings during this period. (Plaintiff's Exhibit 8). Pam Ward was appointed a director of the Maxxis Board of Directors effective September 16, 2002. (Plaintiff's Exhibit 8, p.16, 18-19). Ms. Ward attended the October

30, 2002 regular meeting and February 25, 2003 special meeting.[2] (Plaintiff's Exhibit 8, p.15 & 31).

(1) Partners with Power Consulting Contract. Maxxis entered into a consulting agreement with Partners with Power in December of 2000. Rachel Stokes, wife of Chairman Ivey Stokes, was hired and paid $100,000.00 in start-up costs and expenses and $10,000.00 per month, for a total cost to Debtors of $220,000.00. Mr. King saw no improvement in sales during or after her services were provided to Maxxis.

(2) Promotional Cruise. The "Maxxis ED Cruise" was offered to qualifying sales executive directors as a promotion in February of 2002. (Plaintiff's Exhibit 6). Mark King, director of Hays Financial, testified that the estimated cost of the cruise was between $600,000.00 and $700,000.00. Mr. King also testified that "a couple of directors went on the cruise." Mr. King explained that Maxxis made many off the books transactions. He used forensic accounting to provide a summary analysis of off the books transactions as Plaintiff's Exhibit 5. This summary shows that Debtor Maxxis 2000, Inc. made payments to Debtors' affiliate, Maxxis Millionaire Society ("MMS"). MMS is not a debtor but was controlled by Mr. Stokes and Mr. Curry. Total payments from Maxxis 2000, Inc. to MMS from 2000 to 2002 equal $3,025,061.51. (Plaintiff's Exhibit 5). Disbursements from MMS total $1,821,789.05, including $572,149.00 to Oconee travel tagged "cruise for company assoc's" by Mr. King. (Plaintiff's Exhibit 5). Mr. King explained that the summary demonstrates disbursements made from MMS are a result of funding provided to MMS by Debtor Maxxis 2000, Inc. The summary created by Mr. King has no dates. Mr. King testified that his notes on this Exhibit were based off of his analysis and recovery of all accessible documents.

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[2] Board meeting minutes in Plaintiff's Exhibit 8 do not list Ms. Ward as present or absent except for the October 30, 2002 meeting. The Court reviewed the minutes and determined that there is sufficient evidence that she participated in the February 25, 2003 meeting.

At the April 15, 2002 Maxxis Board Meeting, minutes from the October 29, 2001 meeting were approved without correction, indicating that no board meeting had been held in the interim period. (Plaintiff's Exhibit 8, p.3). Mr. Stokes reported that the "Maxxis ED Cruise" had been contracted and that most of the qualifiers had been notified. The options presented to the qualifiers included: (1) a free Western Caribbean cruise departing from New Orleans on November 17, 2002, (2) purchase additional 300 shares of stock, or (3) receive an additional 150 shares of stock.

In addition to the cruise promotion, Mr. Stokes made several other noteworthy comments at the April 15, 2002 board meeting. In fact, Mr. Stokes resigned as Chief Executive Officer at the meeting after providing the chairman's and financial report to the board. (Plaintiff's Exhibit 8, p.3-5). He stated "that the company has had an excellent six months and that the auditors had completed both the end of the year and second quarter audits and filed the appropriate filings with the Security and Exchange Commission." Mr. Stokes reported that the management staff had "done an excellent job over the last six months." He focused on increased revenue goals for the nutrition group. Mr. Stokes noted that he would focus his efforts in recruiting. To accomplish this goal, Mr. Stokes resigned as CEO and Alvin Curry was promoted to the CEO position in a motion unanimously approved by the board. Also at this meeting, Mr. Stokes suggested that Defendant Pam Ward be added to the Maxxis board of directors. Upon motion and unanimous approval, Pamela Ward, a Maxxis associate from Shorterville, Alabama was appointed to the board.

(3) Issuance of Asset Purchase Agreements. The August 21, 2002 board meeting was called to discuss issuing a new asset purchase agreement. (Plaintiff's Exhibit 8, p.9). Mr. Stokes presented that Maxxis could offer a 14% return to investors. Mr. King testified that under this program, Maxxis provided monthly payments to customers that equated to a 14% return on

investment for a period of three years. The program provided that Maxxis would repurchase the asset purchase agreement at the end of the three year period for $1300. The board unanimously approved a motion authorizing Maxxis to issue the asset purchase agreements. By December 2003, Maxxis' obligations with respect to these asset purchase agreements exceeded four million dollars. (Plaintiff's Exhibit 1, p.12). Mr. Pennington testified that the prime interest rate between August of 2002 and December of 2003 was approximately 5%.

Mr. Pennington's retrospective solvency analysis includes a reference to his review of the July 20, 2001 Maxxis board meeting minutes, which were not included in Plaintiff's Exhibit 8. At the July 20, 2001 meeting, Mr. Stokes initiated a discussion regarding the prospect of issuing APAs. Alvin Curry, Ivey Stokes, Larry Gates, Robert Glover, Steve Johnson, George Steinberger, and Terry Harris attended this meeting. (Plaintiff's Exhibit 1, p.18). No action was taken by the Maxxis Board, but the possible uses for cash generated by the issuance were described in the minutes as follows:

> "Mr. Stokes then discussed the Asset Purchase Agreements. He explained how investors would get paid, and stated that the Company had two options for the profits made with this deal -- the first would be to pay off the switch . . . the second would be . . . to go into the local telephone business. There was no discussion on which of the methods the board preferred . . . ."

(Plaintiff's Exhibit 1, p.18).

(4) Stock Repurchase Plan. At the August 21, 2002 board meeting, the board unanimously approved a motion to authorize Maxxis "to issue new Asset Purchase Agreement to raise a maximum of $2 million to buy back repurchase shares of Maxxis stock from shareholders wanting to sell stock." (Plaintiff's Exhibit 8, p.9-10). Mr. King testified that he did not recall the total amount of stock repurchased by Maxxis. The retrospective solvency and damage analysis prepared by Mr. Pennington explains that poor financial records do not permit him to determine the amount

of stock repurchased. (Plaintiff's Exhibit 1, p.18). Mr. Pennington's report states that "March 2002 was the last known financial statement filed, so I am not currently able to resolve the amount of stock ultimately retired, although the amount is believed to be nearly $1 million." (Plaintiff's Exhibit 1, p.18). No testimony was provided as to the beginning and end dates of stock repurchases by Maxxis.

Mr. King's prepared summary of transactions between Debtor Maxxis 2000, Inc. and MMS, includes a line item tagged by Mr. King as "repurchase of 4500 shares stk" under the category of disbursements from MMS. (Plaintiff's Exhibit 5). Mr. King testified that the stock referred to in that line item was Maxxis Group, Inc. stock. The repurchase from Anthony Malone was in the amount of $24,750.00. Mr. King's summary included analysis from 2000 to 2002, and no dates were associated with the MMS disbursements.

Mr. Stokes reported at the October 30, 2002 board meeting that Georgia law prevented the company from repurchasing shares from shareholders. A board meeting agenda from CEO Alvin Curry dated October 31, 2002 reviews items discussed at the October 30, 2002 board meeting. (Plaintiff's Exhibit 8, p.18-19). Paragraph 4 reads of the agenda reads: "Prohibition on stock buybacks per Georgia law. Based on the company's current financial position, the state of Georgia says that the company cannot buy stock from any of its current shareholders. The company can only re-purchase stock when it has a positive equity position."

(5) Auditor's Fees. Mr. Stokes announced at the December 11, 2002 board meeting that Cherry Bekaert & Holland, LLP ("CBH") resigned based on (1) the material weakness in Maxxis' internal controls with respect to documentation and disbursement approval, (2) significant adjustments from financial statements, and (3) a series of related party transactions since the last

audit. CBH withdrew its opinion attached to the June 30, 2001 year end 10-K. Additionally, CBH would not issue an opinion for fiscal year 2002. As a result, a 10-K for 2002 was not filed. Fees payable to CBH associated with the preparation of the 2001 opinion and the 2002 10-K, which was not filed, totaled "a little over $100,000", according to Mr. King's testimony.

Directors' Knowledge of Insolvency. The October 30, 2002 board meeting minutes indicate that Mr. Stokes referenced the telecommunications switch, Maxxis' largest asset, at this meeting. Mr. Pennington testified that the switch was repossessed by the lessor in August of 2002 based on Maxxis' payment default. The board meeting minutes admitted into evidence do not reference the repossession of the switch.

Mr. Curry held a special meeting December 20, 2002 in response to the auditor's resignation, which was announced at the December 11, 2002 board meeting. Mr. Curry stated that the resignation was unexpected. Although he was aware that the auditors had raised issues in late October, it was understood and expected that they would complete the audit. (Plaintiff's Exhibit 8, p. 22). The board approved hiring new legal counsel and hiring a new auditor.

Mr. Curry reported at the January 17, 2003 board meeting that an internal controls expert had been hired and he had begun his review of corporate practices and records. The board formed an audit committee, interviewed accounting firms, and extended an offer to Tauber & Balser based, in part, on the firm's experience with SEC litigation. Mr. Curry represented at the February 25, 2003 special board meeting that Tauber & Balser raised concerns about the competency of Chief Financial Officer, Dechane Cameron. A March 20, 2003 Maxxis board resolution included retention of Tauber & Balser and the resignation of Mr. Cameron. (Plaintiff's Exhibit 8, p.34). Mr. King testified that Mr. Cameron submitted a letter to the SEC upon his resignation and an investigation pursued.

In Mr. Pennington's opinion, directors and officers knew or should have known the company was insolvent as of March 31, 2001 because of three consecutive quarters of negative EBITDA. Mr. King also testified that he believed Defendants were aware of the financial condition of the company based on his review of the board minutes and other documents reviewed as part of his investigation. His review of the board meeting minutes served as one bases for his opinion regarding Defendants' knowledge of insolvency.

Defendants' failure to execute a formal or informal turnaround plan is inconsistent with conventional board behavior, according to Mr. Pennington's expert opinion. Mr. Pennington also opined that Defendants authorized Debtors to continue to incur debt through the asset purchase agreements with no hope of repayment amounted to gross negligence and a reckless disregard for Maxxis' financial situation.

Mr. Pennington testified that damages caused by Defendants' breach of fiduciary duty totaled $4,100,000.00. His calculation of damages was based on the assumption that a breach of fiduciary duty occurred. (Plaintiff's Exhibit 1, p.22). Mr. Pennington compared Maxxis' obligations on its March 31, 2001 insolvency date, 4.7 million dollars, with its December 15, 2003 petition date liabilities of 8.9 million dollars. (Plaintiff's Exhibit 1, p.22). He explained that the difference in debt obligations was primarily a result of the 4.7 million dollars in obligations generated by issuing asset purchase agreements. Mr. Pennington's expert opinion is that the method used by the board to raise capital through these asset purchase agreements was outside the realm of a suitable financial program when considering Maxxis' level of insolvency. Mr. Pennington explained that the board approved financing debt at 15% when prime was 5% and expended the new cash on normal operations without acquiring any asset or value to correspond to the growing asset purchase

agreement obligations.

CONCLUSIONS OF LAW

Under Georgia law, corporate directors must serve in good faith and with due care. O.C.G.A. § 14-2-830. "A director shall discharge his duties as a director . . . (1) [i]n a manner he believes in good faith to be in the best interests of the corporation; and (2) [w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances." O.C.G.A. § 14-2-830(a).

Acting in good faith and with due care permits reliance on information, opinions, reports, or statements presented by an officer or employee that the director "reasonably believes to be reliable and competent in the matters presented." O.C.G.A. § 14-2-830(b). Similarly, reliance on information, opinions, reports, or statements presented by legal counsel, public accountants and other professionals that the director "reasonably believes are within the person's professional or expert competence."[3] *Id.* Reliance based on reasonable belief of competent reports of statements only satisfies service of good faith and due care to the corporation when a director lacks other knowledge concerning such a matter. O.C.G.A. § 14-2-830(c).

Determining whether a director breached his or her duty to the corporation requires a finding that acts or omissions taken as a director fail to comply with the statutory requirements. O.C.G.A. § 14-2-830(d). The official comment to section 14-2-830 further explains the limits of director liability under the statute:

Although some decisions turn out to be unwise or the result of a mistake of

[3] Although inapplicable to this case, a director may also rely on information, opinions, reports, or statements presented by "[a] committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence." O.C.G.A. § 14-2-830(b).

> judgment, it is unreasonable to reexamine these decisions with the benefit of hindsight. Therefore, a director is not liable for injury or damage caused by his or her decision, no matter how unwise or mistaken it may turn out to be, if in performing his or her duties he or she met the requirements of *Section 14-2-830*.

O.C.G.A. § 14-2-830, cmt.

A director must be present at the meeting, under Georgia law, to be deemed compliant with actions taken by the board of directors. O.C.G.A. § 14-2-824(d) ("A director who is present at a meeting of the board of directors or a committee of the board of directors when corporate action is taken is deemed to have assented to the action taken unless . . . .") Therefore, any finding of personal liability based on the collective action of the board of directors would have to be limited to those directors present at the meeting where the actions amounting to breach were approved.

It is proper for Trustee to bring this action because as the trustee in bankruptcy, he succeeds to any right the corporation may have had to sue directors or officers for loss from a breach of duty. *Greenwood v. Greenblatt*, 173 Ga. 551, 558, 161 S.E. 135 (1931) (citing *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777 (1913)). Further, upon insolvency, duties running from directors and officers to the corporation and its shareholders are altered. Officers and directors of an insolvent corporation "stand as trustees of corporate properties for the benefit of creditors first and stockholders second." *Bank Leumi-Le-Israel, B.M., Philadelphia Branch v. Sunbelt Indus., Inc.*, 485 F. Supp. 556, 559 (S.D. Ga. 1980); *see also* Andrew D. Shaffer, *Corporate Fiduciary -Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About*, 8 AM. BANKR. INST. L. REV. 479, 536 n.264 (2000) ("There is near unanimity among courts and commentators that upon insolvency, some kind of fiduciary relationship exists between an insolvent corporation's management and its creditors.").

To support a breach of fiduciary duty claim, Trustee must prove three elements: (1) the

existence of such duty, (2) breach of the duty, and (3) damages proximately caused by the breach. *Douglas v. Bigley*, 278 Ga. App. 117, 120, 628 S.E.2d 199 (Ga. Ct. App. 2006) (citing *Bienert v. Dickerson*, 276 Ga. App. 621, 623, 624 S.E.2d 245 (Ga. App. Ct. 2005)).

Here, the fiduciary duty owed by Defendants is created by law. "It is settled law that corporate officers and directors occupy a fiduciary relationship to the corporation and its shareholders, and are held to the standard of utmost good faith and loyalty." *Quinn v. Cardiovascular Physicians, P.C.*, 254 Ga. 216, 217, 326 S.E.2d 460, 463 (1985); *Rome Indus. v. Jonsson*, 202 Ga. App. 682, 683, 415 S.E.2d 651 (Ga. Ct. App. 1992). Duties owed by Defendants to the corporation expanded to include creditors when Debtor became insolvent. *Bank Leumi-Le-Israel, B.M., Philadelphia Branch v. Sunbelt Indus., Inc.*, 485 F. Supp. at 559.

Trustee alleges that Defendants breached their fiduciary duties to creditors by the following five acts, which were outlined above in the facts section and will be assessed below in turn.

First, Trustee asserts that the one-year consulting agreement entered into with Partners for Power in December of 2000 violates the Defendants duty of good faith and due care. No evidence established that the board, and, more specifically, the Defendants, approved or gave authority to enter into this consulting arrangement. Rachel Stokes, the wife of Ivey Stokes, Maxxis CEO at the time Partners for Power was engaged, was hired as the consultant under the agreement to promote sales. Mr. King testified that there was no improvement in sales during or after the year Maxxis engaged in this consulting arrangement. There is no evidence to allow the Court to deduce that by entering into this arrangement, Defendants failed to meet their statutory obligations under O.C.G.A. § 14-2-830. In December of 2000, Maxxis was not insolvent. The concept of seeking outside assistance to boost sales is certainly consistent with maximizing profits for shareholders.

During the course of the consulting agreement, Defendants' duty expanded to include creditors. *Bank Leumi-Le-Israel, B.M., Philadelphia Branch v. Sunbelt Indus., Inc.*, 485 F. Supp. at 559. While the expense incurred with the consulting agreement perhaps seems unwise given the unsuccessful outcome, that perspective is only available because of the benefit of hindsight. Hindsight is not relevant to determining whether Defendants acted in good faith and with due care. The absence of evidence regarding the Defendants role in authorizing the consulting agreement and the lack of evidence that Defendants acted outside the scope of good faith and with due care are insufficient to establish personal liability for breach of fiduciary duty.

Second, Trustee argues that the Maxxis ED Cruise, offered to qualifying employees in February 2002, constitutes a breach of fiduciary duty by Defendants. Similar evidence problems exist with this allegation. There is no evidence establishing that Defendants authorized or approved the promotional cruise.

CEO Ivey Stokes discussed the promotional cruise at the April 15, 2002 board meeting. The last board meeting prior to the April 15, 2002 meeting was August 21, 2001. The letters offering the cruise and the other stock options were sent to qualifying employees in February 2002. Mr. Stokes also reports at the April meeting that the company had an "excellent six months." Although Mr. Pennington and Mr. King testified that the Defendants knew or should have known of the company's insolvency, Georgia law allows directors to properly exercise their duties by relying on information, opinions, reports, or statements presented by an officer or employee that the director "reasonably believes to be reliable and competent in the matters presented." O.C.G.A. § 14-2-830(b)(1). No evidence was introduced at trial to suggest that Defendants had reason to believe Mr. Stokes was not reliable or competent at this time.

Although hindsight suggests that such an expenditure was unwise and detrimental to Maxxis,

company efforts to reward and incentivize high performing sales associates when the business needed increases in revenues cannot be characterized as a breach of duties owed to its creditors without more exacting evidence of Defendants' failings to act in good faith and with due care. A discussion regarding the deficiencies of evidence establishing the cost of the promotional cruise is unnecessary since no breach occurred.

The third and fourth alleged breaches of duties owed by Defendants are intertwined. Issuing asset purchased agreements were discussed as early as July 2001 but initially did not include any connection to a stock repurchase plan. Then, at the August 21, 2002 board meeting, Ivey Stokes presented the board with an asset purchase agreement ("APA") sales program. The sales program would allow Maxxis to issue new APAs and provide a 14% return on investment to customers over a three-year period. The issuance of APAs was introduced to fund the repurchase of stock. The board unanimously approved a motion to issue new APAs to raise a maximum of two million dollars to buyback share of Maxxis.

Distributions made when a corporation is insolvent are prohibited. O.C.G.A. § 14-2-640. Georgia law restricts distributions when the corporation (1) would not be able to pays its debts as they come due in the usual course or (2) when the corporation's total assets would be less than the sum of its total liabilities. *Id.* The definition of "distribution" includes purchase, and is applicable to the stock repurchase plan authorized by the Maxxis board at the August 21, 2002 board meeting. O.C.G.A. § 14-2-140(6).[4] The measure of damages for a director who votes for or assents to a distribution made in violation of § 14-2-640 is prescribed by § 14-2-832. A violation creates

[4] "Distribution" means a direct or indirect transfer of money or other property except its own shares or rights to acquire its own shares or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect of any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise. O.C.G.A. § 14-2-140.

personal liability for the director "for the amount of the distribution that exceeds what could have been distributed without violating Code Section 14-2-640." O.C.G.A. § 14-2-832(a). However, liability under this section only follows when it is established that the director "did not perform his duties in compliance with Code Section 14-2-830." *Id.*

The evidence shows that as of October 30, 2002, Defendants definitively knew of the company's insolvency.[5] At the October 30, 2002 board meeting, Ivey Stokes discussed that Georgia law prevents the company from repurchasing stock from shareholders based on the company's financial position, specifically its negative equity. All Defendants in this action were present at the October 30, 2002 board meeting. Therefore, any repurchase of stock after October 30, 2002 would constitute a breach of good faith and due care under O.C.G.A. § 14-2-830 and expose Defendants to liability for "the amount of the distribution that exceeds what could have been distributed without violating Code Section 14-2-640."

There is sufficient evidence to establish that Maxxis repurchased stock, but the evidence fails to support a finding that stocks were specifically repurchased after October 30, 2002. Mr. King and Mr. Pennington testified generally as to stock repurchases approved by the Maxxis board.[6] Mr. King testified that he did not recall the total amount of stocks repurchased, but that the board approved a maximum of two million dollars. Mr. Pennington's retrospective solvency report includes a statement that, although he is not able to resolve the amount of stock repurchased, "the amount is believed to be nearly $1 million." The Trustee did not elicit any testimony from Mr. Pennington

[5] The Court is not holding that liability for directors under O.C.G.A. § 14-2-830 is predicated on actual knowledge of the company's insolvency. However, given the lack of evidence in support of the Trustee's allegations of breach of good faith and due care, the Court is left to deduce by its own efforts when, if ever, Defendants breached their duties.

[6] There is no evidence that Defendant Pam Ward authorized any repurchase of Maxxis stock since she was appointed to the board effective September 16, 2002.

regarding a specific dollar amount expended to repurchase stock, nor was there any evidence regarding the period of time in which stocks were repurchased by Maxxis. Mr. King provided testimony that a line item on Plaintiff's Exhibit 5 was for the repurchase of Anthony Malone's stock, in the amount of $24,750.00 paid from a nondebtor entity, MMS. Mr. King testified as to the unauthorized transfers and off the books transactions between Debtors and with MMS, but this is insufficient evidence for the Court to make a finding of liability for this transaction. No date is associated with the repurchase from Mr. Malone, and no testimony supplemented the summary. The Court will not impose personal liability on the Defendants without adequate evidence to support allegations.

It seems that APAs continued to be issued beyond its initial purpose of providing Maxxis with the cash to repurchase stock. Mr. Pennington explained that, in his opinion, the issuance of APAs was a breach by Defendants. He testified that Defendants breached their duties when they failed to implement a formal or informal turnaround plan. He also explained that the APA program created company obligations at a 14% interest rate when the prime rate at this time was approximately 5%. Because Defendants were taking on an obligation without securing a corresponding asset to balance the liability, Mr. Pennington opined that the approval and continuation of the APA sales constituted a breach by Defendants.

The Court refuses to find breach of a corporate director's duty based solely on the absence of a turnaround plan. Such a standard is not supported by Georgia statute or common law. Instead, courts defer to the strategies and judgment of corporate management. *See*, *e.g.*, *Tallant v. Executive Equities, Inc.*, 232 Ga. 807, 810 (Ga. 1974) (citing *Regenstein v. J. Regenstein Co.*, 213 Ga. 157 (97 S.E.2d 693) ("No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority

in exercising control over corporate affairs.").

Trustee argues that the absence of a plan, the return promised far exceeding the prime interest rate, and the continued and mounting debt obligation created by the APAs taken together provide ample basis for a determination that Defendants breached their duty of good faith and due care owed to creditors. However, "a director is not liable for injury or damage caused by his or her decision, no matter how unwise or mistaken it may turn out to be, if in performing his or her duties he or she met the requirements of *Section 14-2-830*." O.C.G.A. § 14-2-830, cmt.

Mr. King and Mr. Pennington did testify that, in their opinions, the Defendants knew or should have known of the financial position of the company. Mr. King stated that his opinion was based on his review of the books and records, including the board meeting minutes. The Court's review of the contents of the board meeting minutes admitted into evidence reveals many efforts to grow sales with a variety of products after the March 31, 2001 insolvency date and beyond. Mr. Pennington stated that the financial performance of Debtors should have provided notice to Defendants of the insolvency. If any financial records were presented to the board of directors, they were not included in the exhibits admitted into evidence. Instead, statements from Mr. Stokes indicating positive growth with the company were included in the exhibits admitted into evidence. Moreover, knowledge of the financial condition of the company does not trigger liability for subsequent actions. Breaches of good faith and due care are required. There is simply insufficient evidence to impose liability with respect to the issuance of the APAs.

Mr. Pennington provided expert testimony that Maxxis' debt obligation associated with the APA sales program exceeded four million dollars by December 2003 when Maxxis filed its Chapter 11 petition. The debt obligation from issuing APAs serves as the basis for Mr. Pennington's opinion as to the amount of damages. He further explains that the difference in debt obligation of Maxxis

on the insolvency date, $4.7 million, and the debt obligation on the petition date, $8.9 million, establishes that Defendants are liable in the amount of $4.1 million. Since all of the $4.1 million dollars can be attributable to the APA obligations, Mr. Pennington testified that this is the proper measure of damages. Mr. Pennington's damage analysis is more akin to deepening insolvency damages than establishing that damages were proximately caused by the breach, as Georgia law provides. *See*, *e.g.*, *Douglas v. Bigley*, 278 Ga. App. 117, 120, 628 S.E.2d 199 (Ga. Ct. App. 2006). Because there is no breach by Defendants, a determination regarding the appropriate damages is unwarranted.

Lastly, Trustee also asserts that he is entitled to recover fees paid to CBH for the opinion filed, and later withdrawn, in support of the Form 10-K filed for the fiscal year ending June 30, 2001 and the fees paid for their work in preparation of 2002 filings. CBH resigned as independent auditors on or about December 11, 2002, and refused to issue a fiscal year 2002 opinion. Trustee seeks to recover the professional fees paid during this period. There is no law to support this theory of recovery, and Defendants have no liability for payment to the accounting and auditing firm for services provided during this period.

CONCLUSION

The Court is sensitive to Trustee's efforts to piece together the chain of events when Debtors' books and records were in disarray. However, the state of Debtors' records cannot lower the standard of proof required to create personal liability for corporate directors. Trustee failed to establish any breach of Defendants' duties under O.C.G.A. § 14-2-830.

Judgment will be entered in favor of Defendants and against the Plaintiff. A separate judgment will be entered contemporaneously herein in accord with this memorandum opinion.

The Clerk's office is directed to serve a copy of this opinion to the parties on the attached

distribution list.

END OF DOCUMENT

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