reasonable investigation if it simply accepts defendants' version of disputed facts without consulting independent sources to verify defendants' assertions.[78]

To demonstrate that its recommendations are supported by reasonable bases, the SLC must show that it correctly understood the law relevant to the case. If the SLC's recommendation is based on an error of law then the basis for that recommendation is not reasonable.[79] Moreover, if the SLC gets the undisputed facts wrong in its report, and then relies on its erroneous recitation of the undisputed facts in making its dismissal recommendation, it also goes without saying that the basis for the recommendation is not reasonable.[80]

Having articulated the relevant standards I turn to the SLC Report to determine if it demonstrates a reasonable investigation conducted in good faith and reasonable bases for the SLC's recommendation that this case be dismissed. The SLC Report identifies the SLC's recommendations for each of the three counts in plaintiffs' complaint. As we have seen, Count I alleges that defendants breached their fiduciary duties of care and loyalty by adopting the 2007 Plan. The duty of care claims are based on the allegation that defendants approved the 2007 Plan knowing that Chessiecap's Final Valuation was based on stale and incomplete information in the Revised Chessiecap Forecast. The duty of loyalty claims are based on the allegation that defendants intentionally provided misleading and incomplete information to Chessiecap in order to artificially depress iGov's value so that defendants would receive underpriced options and shares when the 2007 Plan was implemented. Count II seeks rescission of the 2007 Plan and is essentially dependent on the success of Count I. Count III is styled as an individual claim, the personal harm being that defendants improperly diluted plaintiffs' ownership interests, thereby expropriating economic value and voting power from them. I analyze the SLC's recommendation on each count in turn.

1. The Duty of Care Claims in Count I

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[78] *Id.* at *5.

[79] *Lewis v. Fuqua*, 502 A.2d 962, 968-70 (Del. Ch. 1985) (holding that an SLC did not have a reasonable basis for its dismissal recommendation because it had incorrectly concluded that the business judgment rule applied to the challenged transactions).

[80] *Id.* at 968 (holding that an SLC did not have a reasonable basis for its dismissal recommendation because it had incorrectly assumed in its report that the board had rejected a corporate opportunity when, in fact, it was undisputed that the board had never formally rejected the opportunity).

The SLC first addressed Count I, ultimately concluding that it should be dismissed. As to the duty of care claims in Count I, the SLC found that the 8 *Del. C.* § 102(b)(7) provision in iGov's corporate charter exculpates directors from personal liability for monetary damages so long as the director did not engage in intentional misconduct or knowing violations of the law.[81] The SLC concluded that a duty of care claim should not be pursued because defendants breach of care conduct, if it occurred, would be covered by the § 102(b)(7) provision.

I take this opportunity to note the first of many concerns I have with the conclusions in the SLC Report. In finding that the action should not be pursued on the basis of duty of care claims, the SLC noted that § 102(b)(7) provisions such as iGov's are routinely upheld by Delaware courts and that such a provision protects defendants from personal liability, in the form of money damages, for gross negligence. *On that basis alone*, the SLC concluded that duty of care claims against defendants should not be pursued. I find this to be an unreasonable conclusion because the SLC failed to consider that the requested relief in plaintiffs' complaint is not limited to money damages; it specifically requests that the 2007 Plan be rescinded. Under Delaware law, exculpatory provisions do not bar duty of care claims "in remedial contexts . . ., such as in injunction or rescission cases."[82] Thus, if I became convinced at the summary judgment stage or after a trial on the merits that defendants breached their duty of care the exculpatory provision in the iGov charter would not preclude me from ordering rescission of the 2007 Plan, even though it might preclude me from entering a judgment for monetary damages against defendants.[83] It was unreasonable, therefore, for

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[81]The full § 102(b)(7) provision reads:

> A director of the corporation shall not be personally liable to the corporation or its stockholders *for monetary damages* for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under Section 174 of the Delaware General Corporation Law; or (iv) *for any transaction from which the director derived an improper personal benefit.* If the Delaware General Corporation Law is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended (emphasis added).

[82]BALOTTI & FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.15[C] (3d. ed. 2009); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A.2d 533, 542 (Del. 1996).

[83]I also note that iGov's § 102(b)(7) provision might not even protect defendants against liability for monetary damages because the provision makes an exception for "any transaction from

the SLC to conclude that the duty of care claims in Count I should not go forward solely on the basis of iGov's § 102(b)(7) provision. The SLC simply fails to understand that Delaware law permits a suit seeking rescission to go forward despite a § 102(b)(7) provision protecting directors against monetary judgments.

2. The Duty of Loyalty Claims in Count I

The SLC's investigation of plaintiffs' duty of loyalty claims, as well as its conclusion that those claims should be dismissed, merits the most discussion in my analysis of the *Zapata* requirements. The SLC concluded that plaintiffs' duty of loyalty claims should be dismissed because it believes the 2007 Plan was entirely fair to iGov. Underlying this conclusion are the SLC's findings that (1) the process defendants' employed to secure approval of the 2007 Plan, particularly the process employed to develop the exercise price, was entirely fair, and (2) $4.92 was a fair exercise price.

a. Fair Process

I begin by analyzing whether the SLC's investigation of defendants' process was reasonable in scope. I also analyze whether the SLC's conclusion that the process was fair is supported by reasonable bases. In conducting this analysis I avoid considering the merits of plaintiffs' claims.[84] My findings here relate only to the SLC's investigation.

In concluding that defendants would be able to show fair dealing, the SLC first determined that plaintiffs' claims can be:

> distilled . . . to *one key issue.* Can a CFO have one forecasting model for the purpose of seeking an increase in the Company's credit availability and for [internal] goal-setting while, at the same time, have a *substantially lower* forecast for the purpose of valuing the Company's equity?[85]

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which the director derived an improper personal benefit." *See* n.79 above. Plaintiffs' complaint alleges that defendants were able to obtain iGov stock for themselves at an artificially low price as a result of breaching their duty of care. Thus, the exculpatory clause might not apply to adoption of the 2007 Plan. The SLC failed to address this issue in the SLC Report. For the moment, I make no finding on whether the exculpatory clause would or would not apply to adoption of the 2007 Plan. I simply mention this to highlight that it was not considered by the SLC.

[84] *Kaplan v. Wyatt*, 484 A.2d 501, 508 (Del. Ch. 1984).

[85] SLC Report 40-41 (emphasis added); *see also id.* 25 ("The [SLC] determined that the crux of the Derivative Complaint goes to the allegation that Tyrrell manipulated the information he was providing to Chessiecap so as to depress the value of the Company"); *id.* 60 ("Plaintiffs' only

A natural place for me to begin my inquiry is with the SLC's own characterization of the key issue underlying plaintiffs' complaint. Namely, was it acceptable for Tyrrell to provide Chessiecap with the Revised Chessiecap Forecast showing an EBITDA of $1.8 million while simultaneously providing Textron with multiple iterations of EBITDA forecasts, all of which showed an EBITDA of at least $3 million, and using internal EBITDA forecasts that also projected an EBITDA of at least $3 million? The SLC concluded that this was an acceptable thing for Tyrrell to do. The SLC Report explains this conclusion as follows:

> The existence of multiple forecasts circulated internally and externally during the same time frame, in and of itself, is not indicative of anything nefarious or ill-motivated. It is not unusual for CFOs to analyze and estimate a company's future performance and test their predictions and assumptions. It is also not unusual for CFOs to provide an *optimistic* outlook to its lender when the goal is to instill confidence in the company's ability to comply with its covenant requirements and seek an increase in the availability of the credit line. A forecast that is optimistic is not misleading, it merely reflects the guessing of what the Company *may* accomplish if certain favorable events occur as the management hopes they will. We see no value for a CFO to present a pessimistic case when seeking financing. By the same token, an optimistic forecast is often used by management as a goal setting tool to inspire and incentivize the company's employees who may have incentive based compensation rooted in hitting certain set benchmarks. Setting a high goal is a necessary tool to motivate performance. Such practice is widespread and not misleading, ill-motivated or self-dealing. On the other hand, a CFO can also have a forecast that he believes the company will actually achieve, rather than a wishful "may" achieve. It is that forecast that the Committee believes should be utilized for estimating the value of the Company's equity.[86]

Elsewhere in the SLC Report this conclusion is reemphasized:

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meaningful attack on the procedural process through which the 2007 Plan was adopted is focused on their belief that Mike Tyrrell deliberately supplied Chessicap (sic) with overly pessimistic financial data for iGov").

[86]SLC Report 41 (emphasis added).

> With regard to the forecasts identified by Plaintiff but not provided to Chessiecap, [] Tyrrell stated to the SLC that it was his usual practice regularly to create such varying forecasts for purpose of motivating employees and testing "what if" scenarios. He also created optimistic forecasts showing "*the art of the possible*" to instill confidence in the Company's lender by showing what the Company hoped to achieve, and to illustrate to management how best to position the Company for future growth. The Committee finds that it is not uncommon for CEOs of companies to run varies (sic) scenarios and forecasts particularly for a company like iGov that remained in transition mode through 2006 and 2007. Moreover, the record compiled by the SLC for the period 2006-2007 and the SLC's experience serving on the Board of iGov, corroborate [] Tyrrell's statements and confirm his business practices.[87]

As is evident from the SLC Report, the SLC concluded that the process of adopting the 2007 Plan was fair primarily because the SLC believes it was perfectly normal for Tyrrell to provide "optimistic" and "art of the possible" forecasts to Textron and use those forecasts internally, while at the same time providing a forecast to its valuation expert that was "substantially lower" but something the Company could "actually achieve," rather than being "wishful." To put it mildly, this is an interesting conclusion, especially in light of the current credit environment. One would suspect that lenders would prefer a forecast projecting what management believes is actually achievable as opposed to wishful. In and of itself, this conclusion does not inspire confidence that the SLC conducted a good faith investigation. But I need not rest my decision solely on the merits of this crucial conclusion, because, broadly speaking, I do not believe that the SLC's investigation was sufficient in scope to adequately address plaintiffs' duty of loyalty claims. Nor do I believe the SLC developed reasonable bases for concluding plaintiffs' duty of loyalty claims should be dismissed.

An obvious first question that was not adequately explored by the SLC is this: why did Tyrrell provide Chessiecap with the Original Chessiecap Forecast (showing an EBITDA of roughly $3 million) if he did not believe that the projections in that forecast were actually achievable? Why put Chessiecap to the time, expense, and effort of developing a valuation based on an overly optimistic projection? The SLC addresses this

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[87]SLC Report 61 (emphasis added).

question, but provides an answer that contradicts the key conclusion of its investigation. Specifically, the SLC Report states that the Original Chessiecap Forecast was the "only operating forecast available" to give to Chessiecap in August 2006.[88] Of course, that is inconsistent with the SLC's finding that it was Tyrrell's "usual practice regularly to create [] varying forecasts . . . ."[89] By August 2006, Tyrrell had worked at iGov for nearly a year, plenty of time to have developed more than one forecast if he actually did that on a regular basis. Moreover, iGov was nearing the end of its fiscal year at that time and so, if it was Tyrrell's usual practice to create varying forecasts, one would assume he would have developed more than one forecast for the next year by then. The SLC does not explain this inconsistency, and it is the only basis on which it attempts to explain away Tyrrell first providing Chessiecap with the Original Chessiecap Forecast, a projection that was identical to the Second Textron Forecast that iGov had sent to its lender the same month. The SLC's finding that the Original Chessiecap Forecast was the only one available actually provides evidentiary support for plaintiffs' assertion that Tyrrell began manipulating forecasts to depress iGov's valuation. This cannot be a reasonable basis upon which to conclude that plaintiffs' complaint should be dismissed.

A second question that was not adequately investigated by the SLC is why did Tyrrell provide Textron with the Third Textron Forecast (showing an EBITDA of 3.1 million) *after* he provided Chessiecap with the Revised Chessiecap Forecast (showing an EBITDA of $1.8 million)? The SLC Report explains that the SLC interviewed Tyrrell multiple times and that in those interviews Tyrrell testified that he provided Chessiecap with the Revised Chessiecap Forecast on October 18, 2006 because he believed it was a more realistic projection for FY07. The SLC accepted Tyrrell's testimony on this point as true without adequately exploring contrary evidence. For example, why would Tyrrell have been comfortable continuing to provide Textron with forecasts that were higher than what he believed was realistic?[90] The SLC found that Tyrrell provided Textron with the Third Textron Forecast because he wanted to ensure that financing would be obtained.[91] But the SLC never tested whether Tyrrell genuinely

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[88]SLC Report 42-43.

[89]SLC Report 61. This inconsistency is problematic for the SLC because its finding that Tyrrell regularly prepared multiple forecasts for different purposes was critical to its conclusion that it was acceptable for him to provide different forecasts to Chessiecap and Textron. The SLC's ultimate conclusion is undermined by this inconsistency.

[90]The Third Textron Forecast showed an EBITDA that was 60% higher than the Revised Chessiecap Forecast.

[91]Presumably Textron would have been less willing to lend iGov money if Tyrrell sent them

believed he was sending Textron overly optimistic forecasts by asking him why he was comfortable providing a potential creditor with data he did not believe was realistic. It was not reasonable for the SLC to accept Tyrrell's assertion that the Revised Chessiecap Forecast was the most realistic without exploring Tyrrell's conduct that suggests otherwise.

The SLC also did not adequately address the ample evidence that internal forecasts continued to project EBITDA of roughly $3-4 million, a figure much higher than the Revised Chessiecap Forecast.[92] As we have seen, Tyrrell's own emails suggest that he believed these higher internal forecasts where achievable, in direct contradiction to the testimony he provided the SLC, but the SLC does not appear to have questioned him thoroughly about these emails. Instead, the SLC explains away these internal forecasts with its finding that they were used to motivate and inspire management by demonstrating what *might* be achievable, rather than what Tyrrell actually believed was achievable. The SLC's finding on this point appears to be completely based on Tyrrell's assertions about the purpose of the internal forecasts. Nothing in the SLC Report suggests that management was questioned to see if they understood that the internal projections being circulated were not what the CFO believed was actually achievable. In fact, there was evidence that iGov management generally believed that an EBITDA of $3 million or more *was* realistic for FY07.[93]

Based on the SLC's own investigation, it appears that the only character in this story to rely on the relatively lower, but "actually achievable" numbers reflected in the Revised Chessiecap Forecast was Chessiecap—the firm that, according to plaintiffs' complaint, was manipulated to provide a low valuation that directly benefitted defendants. Per the SLC's own findings, then, all other characters were relying on projections that were "art of the possible" but probably not achievable. From the point of view of an objective SLC conducting a good faith investigation, this discovery is clearly problematic. Absent some further explanation, it inferentially supports plaintiffs' allegations that manipulation had occurred. An objective SLC would have been *duty bound* at this point to thoroughly explore why management pervasively used forecasts it did not believe were realistic, but the SLC failed to do this. Rather, it appears to have accepted Tyrrell's representations that the Revised Chessiecap Forecast was the most accurate without pressing him on why he felt the *only* appropriate use of the

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the Revised Chessiecap Forecast.

[92]This evidence is outlined in Part I-J of this Opinion.

[93]*See* part I-J of this Opinion describing communications from management other than Tyrrell indicating a belief that an EBITDA of $3 million or more was realistic.

most accurate forecast was valuing iGov's equity in connection with the 2007 Plan.

A third question the SLC Report did not adequately address was the assertion in plaintiffs' complaint that Tyrrell only considered negative developments that had occurred after the July 31, 2006 valuation date when preparing the Revised Chessiecap Forecast. Plaintiffs' complaint provides examples of positive developments that had occurred but were purportedly ignored by Tyrrell; specifically, the $7 million PTO contract that was awarded in September 2006 and the increased profitability in the TACLAN contract that was becoming apparent. Moreover, plaintiffs' complaint alleges that when the 2007 Plan was finally approved on January 31, 2007, defendants were even more aware of the TACLAN contract's better-than-expected performance, as well as the increasing likelihood that the DHS contract would be awarded, but made no efforts to have Chessiecap update its Final Valuation to reflect this.

Nothing in the SLC Report indicates that the SLC seriously investigated plaintiffs' allegations that the Revised Chessiecap Forecast ignored positive developments while incorporating negative developments. Nor does the SLC Report provide me with any comfort that the SLC adequately investigated whether defendants adopted the 2007 Plan despite knowing that the Final Valuation upon which it was based failed to reflect the positive developments that had occurred since July 31, 2006. Tyrrell had specifically stated his belief on January 7, 2007 that the Final Valuation was old and would likely be higher when it was updated and then just a few days later represented to Chessiecap that no material changes had occurred since July 31, 2006. Likewise, Neven and Hupalo implicitly represented that no material changes had occurred by adopting the 2007 Plan based on the Final Valuation. There is no evidence that the SLC questioned any of defendants as to why they felt the PTO contract, the increased TACLAN profitability, or the increasing likelihood of a DHS contract award were not material developments. Perhaps there would have been defensible reasons for defendants to come to these conclusions, but we are left wondering because the SLC did not investigate it. This was a failure to investigate a fundamental theory of recovery in plaintiffs' complaint that precludes me from granting the SLC's motion to dismiss.[94]

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[94]*Lewis v. Fuqua*, 502 A.2d 962, 967 (Del. Ch. 1985). In their depositions, Salvatori and Vinter testified that they did not recall whether they investigated the allegation that the Revised Chessiecap Forecast failed to reflect the increased profitability in the TACLAN contract. Salvatori Dep. 207:19-20, Oct. 6, 2009; Vinter Dep. 95:14, Oct. 7, 2009. Salvatori admitted that knowing whether TACLAN had a large backorder would have been relevant, but he could not say what the SLC did to investigate this allegation. Salvatori Dep. 208:15-16.

While I am on the subject of the absence of "material changes" I should discuss a fourth question that the SLC did not investigate; namely, the award of 25,000 options to Marksberry in May 2007. These options were awarded at $4.92 per share, the same price as the options under the 2007 Plan. The SLC reasoned that it would not have been useful to explore this grant because Marksberry was no longer employed by iGov at the time of the investigation and could not exercise any of the 25,000 shares he had been granted. The SLC believed that iGov was in no danger of being harmed by this grant and therefore it would not be cost-beneficial to investigate it.

The SLC is undoubtedly correct that the 25,000 option grant to Marksberry does not threaten iGov economically. But that does not mean investigating the option grant would not have shed light on the merits of plaintiffs' complaint. The grant occurred ten months after the Final Valuation upon which the $4.92 per share price was based. Plaintiffs allege that by that time it was abundantly clear that positive, material developments had occurred that made the Final Valuation upon which the $4.92 strike price was based unreliable. Among other things, plaintiffs point out that the DHS contract had been formally awarded in March 2007. Tyrrell's rationale for excluding the DHS contract from the Revised Chessiecap Forecast was that it had not been formally awarded. Thus, it at least seems reasonable that once the DHS contract was formally awarded the Revised Chessiecap Forecast should have been revised again to account for profits from the DHS contract. Nevertheless, defendants did not provide Chessiecap with any revised forecast or ask them to update their Final Valuation. Rather, defendants adopted a formal resolution that specifically stated no material changes had occurred since July 31, 2006 and awarded Marksberry options on that basis.

The SLC declined altogether to investigate this transaction. They did not question defendants about their resolution that no material change had occurred as of May 2007, despite the DHS contract having been formally awarded. If the SLC had investigated this transaction, it likely would have shed light on the broader allegations in plaintiffs' complaint.[95] Specifically, the SLC could have gained insight into defendants' motivations with respect to the 2007 Plan. By simply asking defendants why they believed no "material change" had occurred for equity valuation purposes since the Final Valuation, the SLC could have determined what sort of change defendants needed to see before they would feel it necessary to update the Final Valuation and could have evaluated whether defendants' assessments were being made in good faith or whether they were ill-motivated. Defendants

[95] *Electra Inv. Trust PLC v. Crews*, 1999 WL 135239, at *4 (Del. Ch. Feb. 24, 1999).

were willing to award Marksberry options at the $4.92 strike price despite the formal award of the DHS contract. This behavior calls into question the sincerity of Tyrrell's earlier assertion that the DHS contract should not be included in a forecast until it was formally awarded. The SLC should have challenged defendants on this point. It may have taken nothing more than a few questions. But the SLC declined to do so. Seeing this omission, I must conclude that the SLC's investigation into plaintiffs' duty of loyalty claims was not reasonable in scope.

A fifth problem is that the SLC Report fails to investigate the timing of plaintiffs' removal from the board. As we've seen, plaintiffs were removed from the board just days after they protested the use of the Final Valuation, alleging that it was based on stale and inaccurate information in the Revised Chessiecap Forecast. Plaintiffs' complaint contends that defendants' plan was to procure iGov shares for themselves at artificially low prices and to entrench themselves in management and directorship positions through the increased ownership percentages they would realize under the 2007 Plan. To that end, plaintiffs allege that they did not receive any shares under the 2007 Plan, which was adopted just days after their removal from the board, and that their ownership percentages were decreased by the 2007 Plan while defendants' ownership increased.

The SLC Report characterizes plaintiffs' removal from the board as the product of a disagreement between plaintiffs and defendants over the direction that iGov should take. The SLC Report characterizes plaintiffs, specifically Hunt, as wanting iGov to drop all other pursuits so that it could "milk" the TACLAN contract. In contrast, the SLC Report describes defendants, specifically Neven and Hupalo, as wanting to grow iGov and use the TACLAN contract as a stepping stone to reinvent the Company from a low-margin information technology reseller into a higher-margin service provider. The SLC Report states:

> During their interviews, Neven and Hupalo displayed a sense of personal responsibility for the employment of almost one hundred people and felt that the Company had become the home to hardworking individuals who were committed to serving the government and building a great product. It was that sense of long-term commitment to iGov by Neven and

> Hupalo, in contrast to Hunt's short-term objectives, that divided . . . and ultimately shattered the Board.[96]

Conspicuously absent from the SLC Report are any citations to interview notes or other evidence supporting the SLC's finding that this disagreement was the cause of plaintiffs' removal from the board. In fact, there is evidence in the record that shows defendants may have been just as interested in maximizing short-term profits from iGov as plaintiffs' purportedly were, but the SLC Report fails to investigate or explain this.[97] The biggest problem, though, is that the SLC Report wholly fails to analyze or explain why plaintiffs were removed from the board only three days after objecting to the Final Valuation and a little less then two weeks before the 2007 Plan was adopted. There is no indication that the SLC probed defendants on why they felt it was necessary or advisable to remove plaintiffs from the board almost immediately after they objected to the Final Valuation and then shortly thereafter approve the 2007 Plan, which plaintiffs were certain to vote against. In fact, the SLC Report gets the date of plaintiffs' removal from the board wrong. It states: "*By the end of December 2006*, the relationship among the Founders had deteriorated and Neven and Hupalo, acting as majority shareholders removed London and Hunt from the Board of Directors."[98] Thus, the SLC Report gets a fundamental, undisputed fact from plaintiffs' complaint wrong and then fails to conduct the investigation that would have been necessary if the SLC had the facts right. This does not demonstrate that the SLC conducted an investigation of reasonable scope.[99]

A sixth area of inadequate investigation deserves mention. The SLC Report assumes that defendants Neven and Hupalo gave up options with a $1.25 strike price from the 2000 Plan for options with a strike price of $4.92 in adopting the 2007 Plan. Presumably this finding is included in the SLC Report to demonstrate the good faith of defendants in adopting the 2007 Plan. The SLC concludes that all parties agreed that the 2007 Plan was adopted to replace the 2000 Plan to correct the defects in the 2000 Plan. The SLC fails to acknowledge, however, evidence suggesting that defendants' knew the options under the 2000 Plan were never granted to them.

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[96]SLC Report 23.

[97]For example, the SLC's interview notes indicate that Neven and Hupalo both made statements to the SLC that it was their goal to sell or merge the Company. Pls.' Answer Ex. 5 at 38, 47. Similarly, Mr. Tyrrell told Chessiecap in an email dated September 19, 2006 that "[t]here are very few people here with knowledge of our plan to sell in 2 or 3 years . . . ." *Id.* Ex. 55.

[98]SLC Report 24.

[99]*See Lewis v. Fuqua*, 502 A.2d 962, 968 (Del. Ch. 1985).

Specifically, in September 2006, Tyrrell told Neven that the options under the 2000 plan were never issued.[100] In addition, on October 26, 2006, iGov's corporate counsel gave the opinion that the options were never granted.[101]

Since the SLC believed that the 2007 Plan was designed to replace the problematic $1.25 options that had been granted under the 2000 Plan, it should have investigated why London did not receive options under the 2007 Plan to replace the options he had purportedly been granted under the 2000 Plan. According to the SLC, London, Neven, and Hupalo had all been given defective options under the 2000 Plan. Yet only Neven and Hupalo had those defective options replaced when they voted to adopt the 2007 Plan. London was not permitted to vote on the 2007 Plan (because he had been removed from the board) and was not given replacement options under the 2007 Plan. Surely this should have suggested something about the fairness of the 2007 Plan adoption process from the SLC's perspective. And yet the SLC did nothing to investigate this.

I could go on, but I decline to.[102] What I have written is sufficient to demonstrate that there is a material question of fact as to whether the SLC conducted a good faith investigation of reasonable scope into the fairness of the 2007 Plan's adoption process.

b. Fair Price

Having determined that the SLC did not conduct a reasonably thorough investigation into defendants' process for adopting the 2007 Plan and did not have reasonable bases for concluding that the process was fair, I could dispense with the remainder of the entire fairness inquiry. Nevertheless, to be thorough, I will briefly explore the SLC's investigation of price and whether it had reasonable bases to conclude that $4.92 per share was a fair price.

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[100]Pls.' Answer Ex. 56.

[101]*Id.* Exs. 57, 58.

[102]For example, at one point in the SLC Report the SLC speculates that the adoption of the 2007 Plan might actually be subject to business judgment review, rather than entire fairness review. The SLC bases this conclusion on the theory that the option grants and direct share purchases under the 2007 Plan might not have been "material" to defendants. Of course, this speculation is irrelevant because defendants stood on both sides of the transaction in adopting the 2007 Plan and entire fairness review would thus apply regardless of whether the options and direct share purchases were "material" to defendants. *London v. Tyrrell*, 2008 WL 2505435, at *5 (Del. Ch. June 24, 2008) (citing *Orman v. Cullman*, 794 A.2d 2, 25 n.50 (Del. Ch. 2002)). But in speculating as to materiality the SLC failed to conduct any investigation into the net worth or income of defendants so it had no basis in any event upon which to conclude that the options and direct share purchases might not have been "material."

The SLC ultimately determined that both the Chessiecap Final Valuation and McLean Valuations were "tainted" and did not rely on either valuation in concluding that $4.92 was a fair price.[103] The SLC partially relied on the SRR Valuations in concluding that $4.92 was a fair price. I say "partially" because the SLC Report summarily marginalizes the SRR Valuations, which concluded that iGov equity was worth $3.90 - $4.15 as of October 31, 2006 and $5.24 - $ 5.30 as of January 30, 2007. The SLC Report concludes that $4.92 was in the range of fair market value based on the SRR Valuations, but then states that "$4.92 . . . was likely too high, from a practical, real world perspective . . . ."[104] The SLC Report takes the position that the SRR Valuations $5.24 - $5.30 per share estimate for January 30, 2007 was largely a function of iGov's cash position on that date, and was not an indication of the real value of the Company. This disagreement about the effect of iGov's cash position on value, combined with the SLC's hunches about the Company's value, led the SLC to conclude that even the SRR Valuations missed the mark. Thus, the SLC is left with no professional valuation upon which to hang its hat entirely. That is certainly enough to create a material question of fact about whether the SLC had a reasonable basis to conclude that $4.92 was a fair price.

Compounding this problem though is the fact that SRR utilized the Tyrrell Baseline Forecast (showing an EBITDA of $2.1 million) in preparing its valuation. The SLC Report indicates that SRR was given the Tyrrell Baseline Forecast because:

> . . . Tyrrell testified that he viewed the [Tyrrell Baseline Forecast] as a more realistic projection for FY2007. Tyrrell testified that this forecast was a revision of the [Revised Chessiecap Forecast] previously provided to Chessiecap and did not contain the operational or motivational assumptions found in the [Third Textron Forecast]. The SLC concluded, therefore, that as of December 2006, the [Tyrrell Baseline Forecast] was the most accurate prediction of the Company's likely performance . . . .[105]

There are at least two problems with the SLC's decision to provide SRR with the Tyrrell Baseline Forecast for its analysis. First, as is evident from the language cited, the SLC determined that the Tyrrell Baseline

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[103]SLC Report 47.
[104]SLC Report 50.
[105]SLC Report 21.

Forecast was the most appropriate forecast for SRR to use solely based on Tyrrell's testimony. This was not a reasonable basis for such a determination. Serious doubts are raised about an SLC's investigation where it does not consult sources of information other than one of the defendants to make conclusions.[106]

The second problem is related to the first. The SLC does not appear to have actually understood the Tyrrell Baseline Forecast. Tyrrell described the Tyrrell Baseline Forecast as being a revision of the Revised Chessiecap Forecast, but this was inaccurate. The SLC appears to have accepted this characterization, and included it in the SLC Report, without actually testing it. A close comparison reveals that the Tyrrell Baseline Forecast was identical to the Third Textron Forecast with the exception that two line items differed. The principal difference between the Tyrrell Baseline Forecast and the Third Textron Forecast was the revenues and expenses from the DHS contract. As we have seen, the DHS contract was one of the major line items, if not *the* major line item, that plaintiffs accuse Tyrrell of adjusting to manipulate the valuations. If the SLC had compared the Tyrrell Baseline Forecast to the Third Textron Forecast it would have noticed that the two were substantially identical with the exception that DHS contract revenue and expenses were omitted from the Tyrrell Baseline Forecast. This omission largely caused the Tyrrell Baseline Forecast to project an EBITDA of $2.1 million, 32% lower than the Third Textron Forecast's EBITDA projection of $3.1 million. This difference should have been addressed by the SLC because it provides evidentiary support for plaintiffs' assertion that Tyrrell was manipulating the DHS contract in his projections. But the SLC did not do this because it accepted Tyrrell's inaccurate description of the Tyrrell Baseline Forecast at face value. SRR's consequent reliance on the Tyrrell Baseline Forecast leaves me with a material doubt as to the bases upon which the SLC grounded its conclusion that $4.92 was a fair price. I cannot grant the SLC's motion under the *Zapata* standard where such doubts exist.

Before moving on to Counts II and III I wish to make something clear. I have no opinion at this stage of the proceedings as to the fair market value of iGov shares on January 30, 2007. I have not attempted to determine which valuation is the most accurate. I have simply evaluated the scope of the SLC's investigation into the $4.92 price and the bases of its conclusions regarding the $4.92 price and have found that it leads me to conclude that the SLC's investigation did not meet the *Zapata* requirements.

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[106] *Electra Inv. Trust PLC v. Crews*, 1999 WL 135239, at *5 (Del. Ch. Feb. 24, 1999).

3. Counts II and III

I briefly address Counts II and III before concluding my *Zapata* step-one analysis. The SLC recommended that Count II be dismissed because it believed adoption of the 2007 Plan was entirely fair to iGov and, therefore, plaintiffs would not prevail on Count I. Because the SLC failed to meet the *Zapata* standard its recommendation to dismiss Count I is denied. Accordingly, Count II, which seeks rescission of the 2007 Plan, will not be dismissed for the obvious reason that rescission may be the appropriate remedy if plaintiffs ultimately prevail on the merits of Count I.

With respect to Count III, the SLC concluded it was a derivative claim and should be dismissed along with Count I (and for the same reasons). Plaintiffs assert that this is an individual claim over which the SLC has no power. Because I am permitting plaintiffs to continue piloting derivative claims through this litigation, I will not spend time at this juncture attempting to resolve whether Count III alleges individual or derivative claims. Either way the claims survive. We can leave determination of the exact nature of Count III for another day. In fact, a more accurate determination may be made at a later time when the benefits of full discovery have enlarged the record.

C. The Court's Independent Business Judgment

Having determined that I will not grant the SLC's motion to dismiss after fully applying the first step of the *Zapata* standard to the motion, I find it unnecessary to apply the second step of *Zapata*. In my view, this is not a case where application of the second step will add anything of value, and so I exercise my discretion not to apply this step.

IV. CONCLUSION

Because there are material questions of fact as to the SLC's independence, the reasonableness of its investigation, and whether it had reasonable bases for its conclusions, the SLC's motion to dismiss plaintiffs' complaint is DENIED.

IT IS SO ORDERED.

KURODA V. SPJS HOLDINGS, L.L.C.

No. 4030-CC

Court of Chancery of the State of Delaware, New Castle

March 16, 2010

Collins J. Seitz, Jr., Esquire, David E. Ross, Esquire, and Ryan P. Newell, Esquire, of Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware; of counsel: Reid M. Figel, Esquire, David L. Schwarz, Esquire, and Kelly P. Dunbar, Esquire, of Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C., Attorneys for Plaintiff.

Edward McNally, Esquire, Lewis H. Lazarus, Esquire, and Jason C. Jowers, Esquire, of Morris James LLP, Wilmington, Delaware; of counsel: Howard J. Kaplan, Esquire, Lisa C. Solbakken, Esquire, and Sara Welch, Esquire, of Arkin Kaplan Rice LLP, New York, New York, Attorneys for Defendants.

CHANDLER, *Chancellor*

This is round two of a bout between sophisticated, experienced parties who have woven a complex web of overlapping contracts, agreements, and duties that the Court must now untangle and interpret in order to make sense of who among these sophisticated parties owes whom what. Plaintiff seeks money he alleges defendants owe to him pursuant to a limited liability company agreement. In an April 15, 2009 Memorandum Opinion,[1] I dismissed the bulk of plaintiff's claims against defendants.[2] On April 29, 2009, defendants filed their counterclaims against plaintiff. The counterclaims include misappropriation of trade secrets, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and breach of contract.[3]

On June 16, 2009, plaintiff moved to dismiss some, not all, of defendants' counterclaims under Court of Chancery Rule 12(b)(6) for failure

[1]*Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872 (Del. Ch. 2009).

[2]The dismissed claims include: 1) breach of contract for improper tax allocation; 2) tortious interference with contract; 3) tortious interference with prospective economic advantage; 4) breach of the implied covenant of good faith and fair dealing; 5) conversion; 6) unjust enrichment; and 7) civil conspiracy. I dismissed these claims under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, though I declined to dismiss plaintiff's breach of contract claims.

[3]Defendants also ask me, on the grounds of a drafting error, to reform one section of the limited liability company agreement. That request is not related to the motion presently before the Court.

to state a claim upon which relief can be granted. Specifically, plaintiff moved to dismiss in their entirety the breach of the implied covenant counterclaim and the breach of contract counterclaim, and to dismiss in part or in full the breach of fiduciary duty counterclaim. For the reasons set forth below, I grant plaintiff's motion to dismiss in full.

I. BACKGROUND[4]

In 2001, defendants Thomas J. Niedermeyer, Jr. and Warren G. Lichtenstein formed non-party Steel Partners Japan Strategic Fund, L.P. ("Feeder Fund")[5] and non-party Steel Partners Japan Strategic Fund (Offshore), L.P. ("Master Fund")[6] in an effort to bring their investment experience and activist investor strategy to Japan. The Funds[7] applied an investment strategy of accumulating equity in strategically targeted Japanese companies (specifically, small- to mid-size, publicly traded corporations), and applying an activist investor approach to managing those investments. The Master Fund was to serve as the principal investment vehicle for making investments in Japanese companies, and the Feeder Fund was structured to serve as a vehicle for United States investors to invest in the Master Fund. At the time of forming the Funds, Lichtenstein had already established a successful track record as an activist shareholder in the United States, and Niedermeyer had successfully invested in Japanese companies for many years.

Soon after establishing the Funds, Niedermeyer and Lichtenstein formalized a relationship with two Japanese investment bankers: non-party Yusuke Nishi and plaintiff Kenzo Kuroda. Nishi had approached Niedermeyer and Lichtenstein to inquire about the possibility of working with them on the new Funds. Nishi also recommended to Niedermeyer and Lichtenstein that they bring in as a consultant Kuroda, with whom Nishi had previously worked. At that time, Kuroda was an investment banker with no experience managing investments or operating an investment fund, though

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[4]The facts herein are drawn from defendants' Answer and Verified Counterclaims and Third-Party Complaint, including those facts initially asserted in plaintiff's Complaint and admitted to in defendants' Answer, and are assumed true for the purposes of plaintiff's motion to dismiss counterclaims.

[5]The Feeder Fund is a Delaware limited partnership, and its principal place of business is Boston, Massachusetts, at the offices of defendant Liberty Square Asset Management, LLC. I refer to the operative legal document for the Feeder Fund as the "Feeder Fund Agreement."

[6]The Master Fund is a partnership formed under the laws of the Cayman Islands. As is the Feeder Fund, the Master Fund is based principally in Boston, Massachusetts, at the offices of defendant Liberty Square Asset Management, LLC. I refer to the operative legal document for the Master Fund as the "Master Fund Agreement."

[7]I refer to the Feeder Fund and the Master Fund collectively as the "Funds," and to the agreements governing them as the "Fund Agreements."

he had spent the majority of his career evaluating Japanese companies and developing acquisition strategies for senior Japanese executives.

The relationship between Niedermeyer, Lichtenstein, Nishi, and Kuroda was governed by a series of agreements and contracts that formed a complex web of interrelated companies and partnerships. The purposes of this web were to establish a regulatory- and tax-efficient structure and to manage and provide investment advice to the Funds.

First, defendant SPJS Holdings, LLC ("SPJS Holdings")[8] was created to serve as the Funds' General Partner. At the time of its creation, there were four members of SPJS Holdings: defendant Liberty Square Asset Management, LLC ("Liberty Square");[9] defendant WGL Capital Corp. ("WGL");[10] Nishi; and Kuroda. Liberty Square and WGL were designated as Class A Managing Members of SPJS Holdings and, thus, were directly responsible for the operation and management of the Master Fund.[11] Nishi and Kuroda were designated as Class A Non-Managing Members. Kuroda did not contribute any capital to SPJS Holdings or the Funds at the time of their inception, nor did he bring any investors to the Funds at the time of the Funds' inception or at any point thereafter. Given his designation as a Non-Managing Member of SPJS Holdings, Kuroda had no decision-making authority in connection with the Funds or SPJS Holdings. It is worth noting here, that pursuant to their understanding of the terms of various agreements involved with the establishment of SPJS Holdings and the Funds, between 2002 and 2006 some of the Steel Partners Entities—that is, Managing Members of SPJS Holdings—pursued other investment activities and managed other investment funds outside the Steel Partners web.[12]

Next, non-party Steel Partners Japan Asset Management ("SPJAM") was created to be the investment manager of the Funds. Under a Management Agreement, SPJAM assumed the primary duty of providing investment advice to SPJS Holdings, the General Partner of the Master Fund. In return for these management services, SPJAM was paid a per annum fee based on the total amount of assets under management in the Master Fund.

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[8]SPJS Holdings is a Delaware limited liability company, and its principal place of business is Boston, Massachusetts, at the offices of defendant Liberty Square Asset Management, LLC. I refer to the operative legal document for SPJS Holdings as the "LLC Agreement."

[9]Liberty Square is a Delaware limited liability company founded in 1998 by Niedermeyer and three other individuals, including Claire Walton. Walton is a named defendant in this case.

[10]WGL is a Colorado corporation formed by Lichtenstein, who currently is the Chairman of WGL.

[11]SPJS Holdings, Liberty Square, and WGL are referred to herein collectively as the "Steel Partner Entities."

[12]It is not clear to what extent, if any, these external activities occurred in Japan, or if they were investment endeavors in other countries. At this point in the narrative, however, that distinction seems to lack import.

In meeting its management and advisory obligations to the Master Fund, SPJAM utilized the consulting services of non-party Steel Partners Japan, K.K. ("SPJ-KK"), a Japanese corporation in which Kuroda and Nishi each were 50% shareholders. At the beginning of 2002, SPJ-KK entered into a Consulting Agreement with SPJAM. Under this Consulting Agreement, SPJ-KK agreed to act as a consultant to SPJAM in connection with SPJAM's role as investment manager to the Funds, in exchange for a consulting fee. It was through SPJ-KK that Kuroda provided consulting and investment analyst services to SPJAM. As part of these services, Kuroda identified and analyzed potential investment opportunities, performed due diligence on potential investment opportunities, provided updates on portfolio companies from an analyst's perspective, analyzed the proposed terms and structure of investment transactions, and assisted in communications with the Japanese companies in which the Funds invested or considered investing.

In the course of performing these services, Kuroda worked as a trusted consultant to the Funds' investment manager. Kuroda's role and responsibilities exposed him to high-level proprietary and confidential information relating to the Steel Partners Entities, including but not limited to: (i) investor lists; (ii) information about Fund investors (including key contact people, decision-makers, preferences, and risk history); (iii) prospective investment opportunities; and (iv) information about the unique investment and market strategies applied by the Steel Partners Entities on behalf of the Funds.

This high-level proprietary and confidential information was unknown to Kuroda prior to his relationship with the Steel Partners Entities, and was acquired by him solely in his role as a trusted consultant to SPJAM. In recognition of the critical nature of the confidential information to which Kuroda would be exposed, the parties had crafted the Consulting Agreement between SPJAM and SPJ-KK such that it contained a confidentiality provision. That confidentiality provision required SPJ-KK to maintain the confidentiality of any information obtained in connection with its consulting services. Additional confidentiality was required by other documents, including the Funds' partnership documents, the subscription documents executed by investors in the Funds, and the Management Agreement between SPJAM and the Master Fund.

There were two channels through which Kuroda was to receive compensation for his business role in this web of corporate entities and contractual agreements. First, as a Class A Non-Managing Member of SPJS Holdings, Kuroda was entitled to receive personally 16-2/3% of the Incentive Allocation[13] allocated annually to SPJS Holdings' account with the

[13]This allocation is a common tool used by hedge funds and other investment vehicles to create incentives for a general partner and its affiliates to generate significant returns for an investment fund. Kuroda's share of the Incentive Allocation would be deposited in his personal

Master Fund, subject to the agreements governing the Funds and their general partner, SPJS Holdings. Second, as a shareholder of SPJ-KK, Kuroda received his pro rata portion of the fees paid by SPJAM to SPJ-KK, pursuant to the Consulting Agreement.

In 2003 and 2004, the Funds achieved net profits of approximately 22.3% and 30.0%, respectively. During this time period, Kuroda's Incentive Capital Account was credited with the full amount of his share of the Incentive Allocation credited to SPJS Holdings by the Funds. Also during this time period, Kuroda requested and received distributions from SPJS Holdings of approximately $26.3 million.

In 2005, conflict and tension arose. Kuroda stated to Lichtenstein and Niedermeyer that the Funds should abandon their activist investment strategy in Japan, a strategy that Kuroda alleged had become more aggressive over time but that in fact had been known to Kuroda at the time he came to the Funds and that had remained consistent since the time of the Funds' formation. Kuroda also took issue with a decision to waive the management and incentive fees for Steel Partners II, an investment fund controlled by WGL. Steel Partners II had made an early investment in the Funds—an investment that was instrumental in getting the Funds off the ground—and the fees on Steel Partner II's investment were waived so as to avoid double charging the investors in that fund.

Tension continued into 2006, as did Kuroda's stated disagreement with defendants' approach to activist investing in Japan. On or about May 13, 2006, Kuroda abruptly informed representatives of SPJAM, who were also representatives of the Steel Partners Entities, that he was resigning as a consultant to SPJAM and leaving to pursue other business opportunities. He advised defendants that he intended to establish his own fund. Kuroda also informed the SPJAM representatives that he had hired an employee of SPJAM, Gordon Ho ("Ho"), and an employee of SPJ-KK, Tomomi Sukagawa ("Sukagawa"), to assist him in his new endeavors.

For a brief period after Kuroda made these announcements, his departure was treated as amicable, although defendants did express concern about the impact that Kuroda's departure and the circumstances of his departure would have on the Funds' investors. Specifically, Walton expressed concern that Kuroda's departure and the circumstances surrounding it could trigger a loss of investor capital. On or about May 16, 2006, Walton sent Kuroda an email that included a draft communication to investors, which was to serve the purpose of explaining Kuroda's departure to the Funds' investors. On or about May 22, 2006, Walton and Kuroda met to discuss the terms of Kuroda's withdrawal. A few weeks thereafter, in early June 2006, non-party Yoshiaki Murakami, the founder of M&A Consulting, another activist investment fund in Japan, was arrested for insider trading. Murakami's fund was shut down. Lichtenstein, Niedermeyer, and Walton

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Incentive Capital Account at SPJS Holdings.

approached Kuroda and asked that Kuroda take steps to mitigate any adverse impact resulting from Kuroda's departure.[14] Several weeks later, on or about June 26, 2006, Kuroda received a written proposal relating to his withdrawal. Kuroda formally ceased performing any consulting services as of June 30, 2006.

During the May discussions with Walton, Kuroda had requested payment of all amounts held in his Incentive Capital Account at SPJS Holdings. Pursuant to Kuroda's request, 90% of that amount was paid to Kuroda within 45 days, and the total payment—that is, the 90% within 45 days and the remaining 10%—was to be approximately $6.3 million.[15] Yet that is where any amicability seems to have ended.

Although Kuroda had told defendants he intended to establish his own fund, it was not clear to defendants that Kuroda intended to launch a fund that would compete directly with the Funds. That is in fact what happened, however. In or about May 2006, Kuroda formed Fugen Capital Management LLC ("Fugen"), an investment fund that applies an investment strategy substantially similar to the strategy applied by the Steel Partners Entities on behalf of the Funds. It is solely as a result of information and strategies shared with Kuroda in his position as a consultant to SPJAM that Kuroda allegedly was able to learn this investment strategy. Furthermore, Kuroda surreptitiously used the office infrastructure and resources (for example, fax machines, Internet access, and telephones) of the Steel Partners Entities to establish Fugen before he departed the Steel Partners Entities. And, at the time of Ho's departure from SPJAM and before Ho began working with Kuroda at Fugen, Ho downloaded his contacts list from his SPJAM work computer, a list that contained information regarding the Funds' investors.

In July 2006, approximately two months after Kuroda last performed any real service as a consultant to SPJAM, SPJS Holdings was advised by various Fund investors that Kuroda had solicited those investors both before and after the time of his departure from the Steel Partners Entities. As part of

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[14]After a reading of defendants' Answer, it is not entirely clear to me what impact, if any, Murakami's arrest had on defendants' interactions with Kuroda. I simply have included it here because plaintiff included it in his narrative and indicates it had some influence on interactions between the parties, and defendants' Answer does not clearly deny any such influence.

[15]The language of plaintiff's Complaint seems to indicate that the total value of Kuroda's Incentive Capital Account was $6.3 million, rather than $6.3 million being the 90% payout from the account. Defendants' Answer does not seem to dispute the former interpretation, though the sentence structure in the Answer could be read to mean either of the two. *See* Defs.' Answer and Verified Counterclaims and Third-Party Complaint, 9 ("Admit that during these discussions, Kuroda requested payment of all amounts held in his Incentive Capital Account at SPJS Holdings, and that 90% of this amount was paid to him within 45 days of the request, for a total payment of approximately $6.3 million.") This question of fact is not material to the motion before the Court; rather, I have selected one possible interpretation from defendants' Answer and simply note it here as a point for future clarification.

those solicitations, Kuroda informed the Fund investors that as of July 1 he had withdrawn as Co-Founding Partner of Steel Partners Japan Strategic Fund.[16] In reality, Kuroda had nothing to do with structuring the Funds, formulating the strategy to be applied by the Funds, or recruiting the Funds' initial investors. Yet by describing his role as that of a Co-Founding Partner, Kuroda had exaggerated his own contributions to the Funds, and thereby had created a misleading impression as to the significance of his departure from SPJS Holdings. In an attempt to convince Fund investors and various third parties to join Fugen, Kuroda also falsely disparaged the Steel Partners Entities' investment strategy and management. As a result of this disparagement, marketplace rumors began to surface that Kuroda had withdrawn from SPJS Holdings because the activist investment strategy it employed had become unduly aggressive. Subsequently and consequently, certain of the Funds' investors became concerned about the future of the Funds. This concern first created a significant distraction for SPJS Holdings and required its Managing Members to devote substantial time and effort responding to investor inquiries. The concern ultimately resulted in several investors leaving the Funds at the close of 2006.

Upon learning that Kuroda had misappropriated their confidential investor list and had begun contacting the Funds' investors, the Steel Partners Entities sent a cease-and-desist letter to Kuroda. The letter advised Kuroda that he and his agents were in unlawful possession of, and had unlawfully used, confidential trade secret information belonging to the Steel Partners Entities, including the confidential investor list. The letter further demanded that Kuroda: (i) immediately return the misappropriated investor list and all copies or extracts thereof, and any other confidential, proprietary, or trade secret information relating to the Steel Partners Entities, whether maintained electronically or otherwise; (ii) cease and desist using information derived from the confidential investor list; and (iii) cease and desist any further solicitation of business from the Funds' investors. Kuroda refused that request and to this date has not returned any confidential information.

As part of this souring of relations, no additional payments have been made to Kuroda. The remaining 10% of Kuroda's Incentive Capital Account at SPJS Holdings was to be paid to Kuroda after a 2006 audit of the Master Fund. That audit was completed no later than May 2007. The Master Fund reported net profits in 2006, and, in accordance with the Master Fund Agreement, Incentive Allocations were credited to SPJS Holdings based upon those profits. Although a 2006 audit has been completed and Incentive

[16]The description Kuroda offered the Funds' investors is false. He was not permitted to withdraw from SPJS Holdings except with the consent of, and on such terms as were approved by, all of the other Class A Members of SPJS Holdings. Such approval had not been secured as of the date of Kuroda's communications to investors.

Allocations have been credited to SPJS Holdings, SPJS Holdings has yet to pay Kuroda that amount withheld from the payment he received within 45 days of his May 2006 request. Defendants deny that Kuroda is entitled to receive any additional amounts under the SPJS Holdings LLC Agreement. Any previous payments to Kuroda notwithstanding, defendants also deny Kuroda has the right to withdraw from SPJS Holdings without the consent of all of the remaining Class A Members.

Defendants filed counterclaims against Kuroda on April 29, 2009. Relevant now are the counterclaims of: 1) misappropriation of trade secrets; 2) breach of fiduciary duty, via the use of the Steel Partners Entities' infrastructure, solicitation of employees of the Steel Partners Entities' affiliates, and the use of confidential information regarding the Funds' investors to solicit those investors on behalf of Fugen; 3) breach of the implied covenant of good faith and fair dealing, via use of SPJS Holdings' and the Funds' confidential information to solicit the Funds' investors on behalf of Fugen and via disparagement of SPJS Holdings and its management; and 4) breach of contract, via the appropriation and use—for Kuroda's own benefit—of confidential information belonging to or relating to SPJS Holdings and the Funds, all in violation of the confidentiality provisions in the Master Fund and Feeder Fund Agreements. Defendants seek compensatory and punitive damages for Kuroda's willful wrongdoing, a declaration that the Steel Partners Entities owe no further amounts to Kuroda under the SPJS Holdings LLC Agreement, and injunctive relief compelling Kuroda to return all confidential information belonging to the Steel Partners Entities and prohibiting any further use or disclosure of that information.

On June 16, 2009, plaintiff moved to dismiss some, not all, of defendants' counterclaims under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Specifically, plaintiff moved to dismiss in their entirety the breach of the implied covenant of good faith and fair dealing counterclaim (Count III) and the breach of contract counterclaim (Count IV), and to dismiss in part the breach of fiduciary duty counterclaim (Count II).

At oral argument, both sides modified their respective arguments relating to the breach of fiduciary duty counterclaim. First, in light of an October 28, 2009 Court decision[17] issued by Vice Chancellor Parsons in an unrelated case, Kuroda withdrew his argument that defendants' trade secret counterclaim—via the Delaware Uniform Trade Secrets Act[18]—preempts their fiduciary duty counterclaim. Rather than continue to argue preemption,

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[17] *Petroplast Petrofisa Plasticos S.A. v. Ameron Intern. Corp.*, 2009 WL 3465984 (Del. Ch. Oct. 28, 2009) (holding that, under California law, a common law misappropriation claim is not preempted by California's Uniform Trade Secrets Act when litigation is in its early stages and it remains uncertain whether the information in question was in fact a trade secret).

[18] 6 *Del. C.* §§ 2001-2009 (2008).

Kuroda conceded to postpone the preemption issue until later in these proceedings when it is clearer whether, assuming information had been taken, the information taken was in fact a trade secret.

At oral argument, Kuroda next asserted that because defendants' own fiduciary duty counterclaim was based upon the consulting relationship between Kuroda (via SPJ-KK) and SPJAM,[19] the operative agreement should be the Consulting Agreement, which contains a provision that mandates arbitration in Tokyo.[20] Plaintiff had not made this argument in the briefs supporting his motion to dismiss counterclaims. Faced with this new argument, defendants responded that the basis for their fiduciary duty counterclaim is much broader than the terms of the Consulting Agreement between SPJAM and SPJ-KK. Specifically, as reflected in other sections of defendants' counterclaims, Kuroda had a "central role in the LLC Agreement,"[21] and, thus, owed fiduciary duties beyond duties found in the Consulting Agreement, including the obligation not to contact Fund investors, not to solicit those investors to leave the Funds and join Fugen, and not to use the Steel Partners Entities' infrastructure to benefit himself. After describing this broader-than-briefed base for their fiduciary duty counterclaim, defendants withdrew their argument that Kuroda breached his fiduciary duty by soliciting Sukagawa to join him at Fugen.[22] Defendants did maintain, however, that Kuroda breached fiduciary duties by soliciting Ho.[23] No additional modifications occurred at oral argument.

On January 7, 2010, I requested additional briefing from the parties on the issue of whether defendants could bring a suit against Kuroda for any violation of the terms of the Master Fund Agreement and Onshore Fund Agreement, given that defendants and Kuroda appear to stand on the same side of those agreements—"the General Partner and its affiliates side," so to speak—with the Funds' Limited Partners, or investors, on the other side. Defendants and plaintiff filed their briefs on January 13, 2010.

This is my decision on plaintiff's motion to dismiss defendants' counterclaims.

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[19]Defs.' Compl. ¶ 239 ("Kuroda assumed a special relationship of trust and confidence with the Steel Partners Entities due to the nature of the consulting services he provided to them.... This relationship gave rise to fiduciary duties on the part of Kuroda toward the Steel Partner Entities.").

[20]Consulting Agreement ¶ 16 ("Any disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules as modified by this Section 16. Any such arbitration shall be conducted in English in Tokyo, Japan.").

[21]Tr. 19.

[22]Defendants conceded that because Sukagawa was an employee of SPJ-KK, a corporation of which Kuroda and Nishi each owned 50%, Kuroda did not breach any fiduciary duties in seeking to have Sukagawa join him at Fugen. In essence, Sukagawa already was one of Kuroda's employees.

[23]Ho was an employee of SPJAM and, thus, not one of Kuroda's own employees.

II. ANALYSIS

On a motion to dismiss under Court of Chancery Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Court must accept the factual allegations in the complaint as true and make all reasonable inferences from those facts in the non-moving party's favor.[24] Conclusory allegations, however, without supporting factual allegations, will not be accepted as true.[25] Furthermore, when evaluating defendants' counterclaims, the Court may also consider the unambiguous terms of documents that are integral to or are incorporated by reference into the complaint.[26] Under this standard, if defendants' counterclaims assert any set of facts that would entitle defendants to relief, then plaintiff's motion to dismiss must fail.

A. Breach of Fiduciary Duty Counterclaim Against Kuroda

I have described above the development of the parties' arguments relating to the fiduciary duty counterclaim. As I understand defendants' fully revised arguments, defendants assert that Kuroda violated fiduciary duties that arose both from the terms of the Consulting Agreement between SPJAM and SPJ-KK, *and* from Kuroda's role at SPJS Holdings and in the overall structure of this corporate endeavor. Plaintiff responded with the same oral assertion that first inspired defendants' revision in their argument: any dispute arising in connection with the Consulting Agreement should be arbitrated in Tokyo. Plaintiff did not, during rebuttal at oral argument, directly address defendants' oral assertion that plaintiff owed fiduciary duties to the Steel Partners Entities as a result of plaintiff's "central role in the LLC Agreement."[27]

Plaintiff need not have done so, however, as I am baffled by defendants' argument that Kuroda had assumed the role of a fiduciary by virtue of his "central role" in the LLC agreement. Defendants did not make this argument in their briefing, and for good reason: it is entirely baseless. Kuroda was not a fiduciary to anyone who has alleged any harm—or to anyone on whose behalf parties have alleged harm—and there is no factual or legal basis to which defendants point me that suggests otherwise. Pursuant

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[24] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009) (citing *Great Lakes Chem. Corp. v. Pharmacia Corp.*, 788 A.2d 544, 548 (Del. Ch. 2001)).

[25] *Kuroda*, 971 A.2d at 880 (Del. Ch. 2009) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995)).

[26] *Xu Hong Bin v. Heckmann Corp.*, 2009 WL 3440004, at *5 (Del. Ch. Oct. 26, 2009) (citing *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999)).

[27] Tr. 19.

to the LLC Agreement, Kuroda was a Non-Managing Member of SPJS Holdings who had no control, power, or authority over a single investor's assets or the actions that SPJS Holdings took. He was neither a manager of SPJS Holdings nor a controlling member, and he thus has no fiduciary duties.[28]

No matter how "central" Kuroda was to the entire business endeavor, his centrality was governed by contractual duties, not fiduciary ones. I concur with plaintiff's assertion at oral argument that defendants are seeking to impose any additional duties they can tack on beyond those found in the Consulting Agreement, and that defendants are doing so because the Consulting Agreement contains a provision mandating arbitration in Japan. Among those additional duties defendants seek me to impose are fiduciary ones on an individual who clearly is not a fiduciary. This I cannot do. A rose by any other name may smell as sweet,[29] but calling Kuroda a fiduciary here would smell of inaccuracy—and imposing upon him ex post some kind of fiduciary duties would reek of injustice. Had defendants wanted everyone to enjoy a red rose of fiduciary duty, they should not have planted white roses of contractual obligations and now ask me to paint over them.[30]

I grant in full plaintiff's motion to dismiss defendants' counterclaim for breach of fiduciary duty.[31]

B. Breach of Contract Counterclaim[32]

Defendants allege that "[t]he Master Fund Agreement and the

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[28]*See Kelly v. Blum*, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010) ("[U]nless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional fiduciary duties, *managers* owe those duties to the LLC and its members and *controlling members* owe those duties to minority members.") (emphasis added). Tellingly, defendants have not provided a single citation or reference to a Delaware statute or case that imposes fiduciary duties on non-managing or non-controlling members of an LLC.

[29] WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 ("What's in a name? That which we call a rose By any other name would smell as sweet.").

[30]*See* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 69 (Hugh Haughton ed., Penguin Books 2010) (1865). To believe that the parties in this complex web of contractual arrangements intended to superimpose fiduciary duties upon a non-managing, non-controlling LLC member would require me to surpass even the White Queen's ability to believe six impossible things before breakfast. *Id.* at 174. *See also* ALICE IN WONDERLAND (Walt Disney Pictures 2010).

[31]Defendants *may* have some kind of valid common law counterclaim relating to Kuroda's alleged use of SPJAM's infrastructure, but they do not have a valid counterclaim grounded in any kind of fiduciary duty. Defendants are free to amend their counterclaims accordingly.

[32]Defendants assert their breach of contract counterclaim (Count IV) after their breach of the implied covenant of good faith and fair dealing counterclaim (Count III). I will first evaluate the Count IV counterclaim, however, as I believe it best to determine first the specific and express terms and meanings of the agreements, and then only if necessary move on to an analysis of any relevant implied terms of the agreements.

Onshore Fund Agreement prohibit the disclosure of trade secrets and other proprietary information relating to the partnership by partners and their affiliates, which includes Kuroda."[33] Defendants further allege that "Kuroda breached the confidentiality provisions in the Master Fund and Onshore Fund Agreements by appropriating and using for his own benefit confidential information belonging or relating to SPJS Holdings and the Funds,"[34] as well as by "appropriat[ing] the Steel Partners Entities' confidential market and trading strategies and us[ing] them on behalf of Fugen, thereby unjustly enriching Kuroda and Fugen in the process."[35]

Kuroda seeks dismissal of the breach of contract counterclaim on the grounds that he is neither a party to the Master Fund Agreement nor a party to the Onshore Fund Agreement, and accordingly that he cannot be bound by any of the provisions in those contracts, including the confidentiality provisions.[36] Defendants argue that although "it is ordinarily the case that a non-signatory to an agreement will not be bound by it, courts have recognized various exceptions to this rule,"[37] such as implicit adoption of a contract that occurs when a non-signatory accepts the benefits of a contract made for the non-signatory's benefit.[38] Defendants ask me to apply that very logic here and, thus, to bind Kuroda to the terms of the Master Fund Agreement and the Onshore Fund Agreement. Defendants also argue that Kuroda "is bound by the confidentiality provisions of the [Fund Agreements] because he authorized the Managing Members of SPJS Holding to make the promises contained therein on his behalf."[39] Defendants assert that Kuroda issued this authorization by signing the LLC agreement, which provides that: 1) "[t]he Managing Members shall have the authority on behalf and in the name of the Company ... to perform all acts and enter into and perform all contacts and other undertakings which it may deem necessary, advisable or incidental"[40] to carry out the purposes of SPJS Holdings; and 2) "[e]ach of the Members hereby appoints each Managing Member ... with power of substitution as his or her true and lawful representative and attorney-in-fact,

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[33]Defs.' Compl. ¶ 258.

[34]Defs.' Compl. ¶ 259.

[35]Defs.' Compl. ¶ 261.175. I have utilized this unusual notation, given that defendants' complaint proceeds in the following sequence: Paragraph 261, Paragraph 175, Paragraph 262. There is another Paragraph 175, which can be found earlier in the complaint and in the appropriate sequence, though the first Paragraph 175 contains content unrelated to the content included in Paragraph 261 and those paragraphs that follow Paragraph 261.

[36]Pl.'s Opening Br. 15.

[37]Defs.' Answer 20.

[38]*See, e.g.*, *American Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 349 (Del. Ch. 2003) (citing *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369, at *4 (Del. Ch. Mar. 16, 2000), *aff'd*, 763 A.2d 92 (Del. 2000)).

[39]Defs.' Answer 22.

[40]LLC Agreement § 2.01(a).

in his or her name, place and stead to make, execute, [and] sign,"[41] among other items, "any ... instrument or document of any kind necessary or desirable to accomplish the business, purpose and objectives of [SPJS Holdings] ...."[42] As outlined elsewhere in the LLC Agreement, the purpose of SPJS Holdings is to serve as General Partner to both the Master Fund and the Onshore Fund.[43] Kuroda responds with the argument that defendants' interpretation of the LLC Agreement would eviscerate the LLC Agreement's "Liability of Members" section,[44] and that even if Section 9.02 of the LLC Agreement did *not* eviscerate that section and *did* permit the Managing Members to bind Kuroda, the Managing Members had not ultimately included Kuroda's name on the Fund Agreements and he therefore is not bound to those agreements.

I agree entirely with Kuroda's assertion that *American Legacy* in no way supports defendants' position. I also believe Kuroda's interpretation of the LLC Agreement to be the only reasonable one. Consequently, I conclude that Kuroda is not bound by the terms of the Master Fund Agreement and Onshore Fund Agreement.

In *American Legacy*, the non-signatory to the relevant agreement was a tobacco education foundation *that was formed by the agreement itself.* Thus, the education foundation was a non-signatory very different in nature from a non-signatory that arrives on the scene long after the agreement takes effect and had been contemplated by the agreement only in the abstract.[45] Even as I shift to focus less on the specific facts in *American Legacy* and more on the legal standards employed by *American Legacy* and its predecessors, I do not believe the mechanics of the implied-adoption standard support defendants' position here. It is not enough that the Fund Agreements contemplated that non-signatories may adopt it—that is, that Limited Partners could sign on at a later time—or that some trickle of the financial benefits of activities governed by the Fund Agreements ultimately

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[41]LLC Agreement § 9.02.

[42]LLC Agreement § 9.02(b).

[43]LLC Agreement § 1.04.

[44]LLC Agreement § 1.06 (stating, inter alia, that "the debts, obligations and liabilities of the Company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the Company, and no Member shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Member.").

[45]*See American Legacy Found. v. Lorillard Tobacco Co.*, 831 A.2d 335, 345 (Del. Ch. 2003) ("In contrast to non-signatory tobacco companies, the nature of [the foundation] and its relationship to the [agreement] is discussed in significant detail throughout that contract. Indeed, to a large extent, the legal conclusion that [the foundation] has 'adopted' the [agreement] flows directly from the parties' performance of their obligations under that contract. One could almost conclude that the [agreement] *expressly* contemplates [the foundation's] adoption because it provides for [the foundation's] creation and funding, it requires [the foundation's] board to be comprised of a predetermined group of people, and it places significant restrictions on [the foundation's] activities.") (emphasis in original).

flowed to Kuroda, who was a non-signatory in that his name was not found on the dotted line. Moreover, it is clear that: 1) the Fund Agreements were forged not on Kuroda's behalf but on behalf of SPJS Holdings; and 2) that Kuroda was not a Limited Partner to the Fund Agreements, which was the type of non-signatory that the Fund Agreements had contemplated joining later, but a Non-Managing Member of SPJS Holdings, which was itself a signatory to the Fund Agreements. Kuroda cannot be roped in to the terms of the Fund Agreements as if he were an independent party arriving after the festivities had begun and submitting himself to the benefits of the sort contemplated for Limited Partners. SPJS Holdings is a signatory to the Fund Agreements; Kuroda enjoyed the benefits of the Fund Agreements only to the extent permitted by the LLC Agreement; and any contractual duties Kuroda had vis-à-vis the Fund Agreements are duties that arose through his role within the SPJS Holdings structure itself, as determined by the LLC Agreement.

Defendants also base their breach of contract counterclaim on this latter point, arguing that the LLC Agreement permitted them to bind Kuroda to the Fund Agreements. I disagree. In my earlier opinion in this case, I noted that "[l]imited liability companies are creatures of contract, and the parties have broad discretion to use an LLC agreement to define the character of the company and the rights and obligations of its members."[46] I do not agree with defendants' assertion that the LLC Agreement gave them the right to bind Kuroda to ancillary agreements forged in furtherance of the SPJS Holdings' business purpose of being General Partner to the Funds. The sections of the LLC Agreement to which defendants cite do not provide Managing Members with the authority to bind individual Members of SPJS Holdings to any kind of contract or agreement. Section 2.01(a) empowers defendants to bind *SPJS Holdings* to any agreement or contract defendants believe is in furtherance of SPJS Holdings' business purpose. Section 9.02, meanwhile, is nothing more than boilerplate language authorizing defendants to sign Kuroda's name to whatever documents or agreements are required by the day-to-day operations of the business. Such documents or agreements could include, I believe, ones that require *pro forma* the signature of all Members of SPJS Holdings. They could not, however, include a major agreement that would impose upon Kuroda new rights and obligations as an individual. Whether read together or separately, Sections 2.01(a) and 9.02 do not empower defendants in the way defendants now argue. As I also noted in my earlier opinion in this case, "[i]n analyzing a contract on a motion to dismiss under Rule 12(b)(6), the Court must interpret ambiguous provisions in the light most favorable to the nonmoving party."[47] I do not believe there

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[46] *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009).

[47] *Kuroda*, 971 A.2d at 881 (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003) ("Because the provisions at issue in the Agreement are susceptible to more

to be any ambiguity in the LLC Agreement in terms of defendants' authority to bind Kuroda to agreements: defendants had no such authority. Because I am convinced that this is the only reasonable interpretation of the LLC Agreement, and because the implied-adoption standard is inapplicable to Kuroda, the breach of contract counterclaim against Kuroda must be dismissed.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendants contend that the LLC Agreement included several implied promises on the part of Kuroda, including the promises: 1) not to misappropriate trade secrets; 2) not to cause SPJ-KK to commit a material breach of the Consulting Agreement's confidentiality provision; 3) not to commit a material breach of the Fund Agreements' confidentiality provisions; 4) not to cause SPJS Holdings to commit a material breach of the Fund Agreements' confidentiality provision; and 5) not to engage in conduct destructive to the business of SPJS Holdings and the Funds.[48]

Kuroda argues that defendants included confidentiality provisions in several agreements within this corporate web (including the Fund Agreements and the Confidentiality Agreement) but not in the LLC Agreement, and, thus, that the implied covenant of good faith and fair dealing should not be used as a tool to insert language into an agreement that specifically excluded a confidentiality provision defendants obviously knew how to employ.[49] Defendants respond with a discussion of common-law duties relating to confidentiality,[50] as well as references to fiduciary duties[51] and contractual intentions.[52] Defendants also note an outcome they believe to defy logic and common sense: that Kuroda would be entitled to millions of dollars under the LLC Agreement without having to undertake any obligations under the agreement; or that Kuroda would be entitled to millions of dollars under the LLC Agreement for services rendered under the Consulting Agreement but that the two agreements are wholly separate from

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than one reasonable interpretation, for purposes of deciding a motion to dismiss, their meaning must be construed in the light most favorable to the non-moving party.")).

[48]Defs.' Compl. ¶ 251.

[49]Pl.'s Opening Br. 18-19.

[50]Defs.' Answer 24-25.

[51]*Id.* at 25-26 (citing *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451 (Del. Ch. Apr. 20, 2009) as support for the argument that any restriction or elimination of fiduciary duties must be plain and unambiguous).

[52]*Id.* at 26 ("At a minimum, whether the LLC Agreement is *intentionally* silent on confidentiality is a disputed question of fact that should not be decided on a motion to dismiss") (emphasis in original). To support this position, defendants cite *Cypress Assocs. LLC v. Sunnyside Cogeneration Assocs. Project*, 2007 WL 148754 (Del. Ch. Jan. 17, 2007), which holds that a motion to dismiss should be denied when a fact issue remains that would determine the correct interpretation of ambiguous contract language.

one another.[53] Kuroda responds that common law duties of confidentiality are unrelated to the implied covenant of good faith and fair dealing, which pertains to *contractual* obligations,[54] and that he did in fact both furnish consideration—his consulting services—in exchange for benefits under the LLC Agreement and undertake certain duties with respect to the LLC Agreement.[55]

I largely, though not entirely, agree with the arguments Kuroda has made, and I will not apply the implied covenant of good faith and fair dealing to impose upon Kuroda a duty of confidentiality under the LLC Agreement.

As I discussed previously in the course of this litigation,[56] the implied covenant of good faith and fair dealing inheres in every contract and "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain."[57] The implied covenant cannot be invoked to override the express terms of the contract.[58] Moreover, rather than constituting a free floating duty imposed on a contracting party, the implied covenant can only be used conservatively "to ensure the parties' 'reasonable expectations' are fulfilled."[59] Thus, to state a claim for breach of the implied covenant, defendants "must allege a specific implied contractual obligation, a breach of that obligation by [Kuroda], and resulting damage to [defendants]."[60] General allegations of bad faith conduct are not sufficient. Rather, defendants must allege a specific implied contractual obligation and allege how the violation of that obligation denied them the fruits of the contract. Consistent with its narrow purpose, the implied covenant is only rarely invoked successfully.[61]

I believe that any use of the implied covenant to insert a contractual duty of confidentiality into the LLC Agreement would be an override of the express terms of that agreement. Defendants included confidentiality provisions in other documents, including the Fund Agreements and the

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[53]Defs.' Answer 27.

[54]Pl.'s Reply 13.

[55]*Id.* 14-15.

[56]*Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

[57]*Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (quoting *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

[58]*Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ('[W]here the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the implied duty to perform in good faith does not come into play.").

[59]*Dunlap*, 878 A.2d at 442.

[60]*Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998).

[61]*Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426, at *6 (Del. Ch. Aug. 25, 2006) ("[I]mposing an obligation on a contracting party through the covenant of good faith and fair dealing is a cautious enterprise and instances should be rare.").

Consulting Agreement. Defendants' somewhat muddled discussion of other wellsprings for the duty of confidentiality—including the common law, fiduciary duties, and contractual intentions—cannot cloud the fact that the LLC Agreement specifically excluded any duties relating to confidentiality, while at the same time intimately related agreements—in particular, the Consulting Agreement—included such duties. *Bay Center* is irrelevant here, given that Kuroda was not a fiduciary, and therefore that any waiver of fiduciary duties is entirely unrelated to Kuroda's position. Likewise, *Cypress Associates* does not help defendants' position, as there is no contractual ambiguity for which a factual inquiry and motion for summary judgment would be applicable. Furthermore, I am not persuaded by defendants' argument relating to the connection between the LLC Agreement and the Consulting Agreement. If Kuroda has argued that his consulting services entitled him to millions of dollars under the LLC Agreement but that he is not bound by the terms of the Consulting Agreement, defendants can choose whether to tackle that argument head on. Defendants should not, however, elect *not* to argue that the Consulting Agreement binds Kuroda,[62] and then point out to me some absurdity in a finding that Kuroda is not bound by a single agreement within this intricate web. To my knowledge, no court has reached that conclusion, and to my certainty I have not reached it today. If defendants believe Kuroda is bound by a duty of confidentiality deriving from some other valid source, they must point me to that source. Given the facts of this case, the implied covenant of good faith and fair dealing simply is not one.

III. CONCLUSION

Defendants' counterclaims seek to impose on Kuroda some kind of duty or obligation beyond any duty or obligation found in the Consulting Agreement. Their motivations for doing so are clear: if defendants are limited to proceeding solely on the basis of duties, obligations, and rights contained in the Consulting Agreement, they likely will find themselves forced to arbitrate in Japan. What is equally clear is that defendants have failed to present me with any set of facts that entitle them to the relief they seek for an alleged breach of fiduciary duty, contract, or implied covenant of good faith and fair dealing. Defendants are sophisticated investors, and I suspect their transactional counsel were, too. Together, these players crafted a web of entities, only after careful planning and preparation, so as to minimize tax and regulatory burdens. I cannot now rewrite their carefully woven web by inserting into it new language or superimposing fiduciary

[62] I emphasize here that defendants' position in this regard appears to support Kuroda's argument that defendants are, at all costs, seeking to avoid pursuing claims under the Consulting Agreement, which includes a provision that mandates arbitration in Tokyo.

duties, and I cannot accept as valid and reasonable their asserted interpretation of the contractual language and contractual interactions. I view Kuroda's interpretation of this language and these interactions as the only reasonable one. Accordingly, defendants' complaint has failed to state a counterclaim upon which relief can be granted. Therefore, I dismiss all counterclaims for which and to the extent Kuroda currently seeks dismissal. The parties will confer and submit a form of order consistent with this Opinion.