

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

KENZO KURODA,)
)
Plaintiff,)
)
v.) Civil Action No. 4030-CC
)
SPJS HOLDINGS, L.L.C., LIBERTY)
SQUARE ASSET MANAGEMENT,)
L.L.C., WGL CAPITAL CORP.,)
WARREN G. LICHTENSTEIN,)
THOMAS J. NIEDERMEYER, JR.,)
and CLAIRE A. WALTON,)
)
Defendants.)

OPINION

Date Submitted: January 13, 2010

Date Decided: March 16, 2010

Collins J. Seitz, Jr., David E. Ross, and Ryan P. Newell, of CONNOLLY BOVE LODGE & HUTZ LLP, Wilmington, Delaware; OF COUNSEL: Reid M. Figel, David L. Schwarz, and Kelly P. Dunbar, of KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C., Washington, D.C., Attorneys for Plaintiff.

Edward McNally, Lewis H. Lazarus, and Jason C. Jowers, of MORRIS JAMES LLP, Wilmington, Delaware; OF COUNSEL: Howard J. Kaplan, Lisa C. Solbakken, and Sara Welch, 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 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

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.

counterclaim. For the reasons set forth below, I grant plaintiff's motion to dismiss in full.

I. BACKGROUND⁴

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 Funds⁷ 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

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."

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 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

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.”

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.

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

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.

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 Allocation¹³ allocated annually to SPJS Holdings' account with the 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

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 Incentive Capital Account at SPJS Holdings.

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 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

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.

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

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.

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 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

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.

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 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 decision¹⁷ issued by Vice Chancellor Parsons in an unrelated case, Kuroda withdrew his argument that defendants' trade secret counterclaim—via the

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).

Delaware Uniform Trade Secrets Act¹⁸—preempts their fiduciary duty counterclaim. Rather than continue to argue preemption, 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

¹⁸ 6 *Del. C.* §§ 2001-2009 (2008).

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.”).

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.

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.

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

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

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)).

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 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

²⁷ Tr. 19.

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

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.”).

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 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

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.

³³ Defs.’ Compl. ¶ 258.

³⁴ Defs.’ Compl. ¶ 259.

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

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)).

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, 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

³⁹ Defs.’ Answer 22.

⁴⁰ LLC Agreement § 2.01(a).

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.”).

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

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).

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 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

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

interpret ambiguous provisions in the light most favorable to the nonmoving party.”⁴⁷ I do not believe there 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

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 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.

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 duties⁵¹ 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 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

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.

⁵³ Defs.’ Answer 27.

⁵⁴ Pl.’s Reply 13.

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],

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.

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 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

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.”).

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

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.

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 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.