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OF THE
STATE OF DELAWARE

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Re: PT China LLC v. PT Korea LLC, et al.
C.A. No. 4456-VCN
Date Submitted: October 27, 2009

Dear Counsel:

This case involves a limited liability company, its members, managers, and the mutual contractual and/or fiduciary obligations owed among and between them. Although almost all of the parties have appeared before the Court, there remains one holdout. The third-party defendant claims that the Court lacks personal jurisdiction over him, and he seeks a protective order shielding him from

the third-party plaintiffs' efforts to conduct jurisdictional discovery. Although the parties' briefs were filed in support of and in response to the motion for a protective order, they also fully discussed the merits of whether the Court has personal jurisdiction over the third-party defendant as a manager of the limited liability company pursuant to 6 *Del. C.* § 18-109, and the parties agreed to resolution of the jurisdictional issue at this stage. The Court concludes that it has personal jurisdiction over the third-party defendant under § 18-109. This moots the need for jurisdictional discovery.

I. BACKGROUND

A. *The Parties*

The Plaintiff is PT China LLC ("PT China"), a Delaware limited liability company, suing on its own half and derivatively on behalf of Nominal Defendant Pine Tree Holdings I LLC ("PT Holdings"), also a Delaware limited liability company. The Defendants are PT Korea LLC ("PT Korea"), a Delaware limited liability company, and Myung Hun "Michael" Kim ("Kim"), PT Korea's sole member and manager.

PT Holdings, PT Korea, and Kim, have asserted counterclaims against PT China, and third-party claims against Harrison Wang ("Wang"), PT China's sole member and manager. Wang currently resides and conducts his daily work in Singapore. The third-party claims, and more specifically, Wang's amenability to suit in Delaware, are the subject of this letter opinion. For this reason, PT Holdings, PT Korea, and Kim will collectively be referred to as the "Third-Party Plaintiffs," and Wang will sometimes be referred to as the "Third-Party Defendant."

B. *PT Equity's Formation*

PT Korea and PT China are the sole members of PT Holdings, owning 70% and 30% respectively.[1] PT Holdings, in turn, is the managing member and minority interest holder of Pine Tree Equity LLC ("PT Equity"), a Delaware limited liability company. Specifically, and as of December 31, 2007, PT Holdings owned 1.77% of PT Equity, while the remaining 98.23% was owned

[1] The facts are drawn from PT China's Verified Complaint (the "Original Compl."), filed on March 27, 2009, as well as PT Holdings, PT Korea, and Kim's Verified Amended Counterclaims and Third-Party Claims, filed August 14, 2009 (the "Third-Party Cls.").

by the American Life Insurance Company (Japan Branch) ("ALICO"), a Delaware corporation and subsidiary of the American International Group, Inc. ("AIG").

PT Equity was formed in 2003, originally with Kim as the sole member, for the purpose of managing a joint venture investment fund created by Kim and a General Electric subsidiary. The fund's investment strategy was focused on the acquisition, and value appreciation, of distressed or underperforming Asian asset-backed securities or unsecured assets, known in the industry as "special situation" assets. Seeking to expand the geographical reach of his investment activities, Kim asked Wang in or around November 2003 to participate in PT Equity "by taking responsibility for developing investment opportunities for Pine Tree Equity in China."[2] Kim's prior success with the General Electric fund and other predecessor funds attracted ALICO's attention, and it agreed to fund PT Equity in its current form.[3]

The parties reformatted PT Equity as an investment vehicle on August 17, 2004. Kim transferred his membership interests in PT Equity to PT Holdings;

[2] Third-Party Cls. ¶ 7.
[3] ALICO has committed $250 million to PT Equity.

PT Holdings and ALICO were then substituted as the two members of PT Equity. PT Holdings and ALICO entered into the First Amended Limited Liability Operating Agreement (the "PTE Agreement"), which was again amended on March 31, 2007. PT Holdings, PT Korea, PT China, Kim, Wang, ALICO and American Insurance Assurance Company (Singapore) Ltd. also entered into a Master Joint Venture Agreement (the "JV Agreement"). Together, the JV Agreement and the PTE Agreement (collectively, the "Agreements") govern Pine Tree Equity.

C. *The Agreements*

The Agreements name Wang and Kim as PT Equity's sole "Principals," as well as two of the three members of the PT Equity Management Committee. The Third-Party Plaintiffs allege that Wang and Kim "served in these roles by virtue of their positions at PT Holdings," which is, once again, PT Equity's managing member.[4] Under the Agreements, a unanimous vote of the Management Committee is needed to effectuate certain defined "major decisions," while a

[4] Third-Party Cls. ¶ 14.

majority vote is required on any other issue presented to the committee. The Management Committee has sole authority to approve a number of investments; these investments include the "special situation" assets described above.

According to the Third-Party Plaintiffs, "PT Equity is not limited to investing in Korean assets, and to the contrary was specifically mandated to invest in Chinese assets, with gradual expansion into other Asian countries."[5] Article III of the Master Agreement details a "China Investment Program"; in fact, PT China's name supposedly reflects "the purpose of pursuing Chinese investments."[6]

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[5] *Id.* at ¶ 13.

[6] Wang filed a motion to dismiss the Third-Party Claims along with his motion for a protective order. In his opening brief in support of his motion to dismiss, he contests the purpose and structure of the Agreements as described by Kim and PT Korea. Wang's Opening Br. in Supp. of his Mot. to Dismiss the Am. Countercls. & Third-Party Cls. ("Wang's Mot. to Dismiss Br.") at 6 & n.4. He argues that the joint venture was intended to focus on investment in Korea, and that any Chinese investments were more or less prospective. He attached the PTE and JV Agreements to his motion to dismiss as exhibits A and B, respectively. The provisions governing investment in Chinese assets are complex. Stated briefly, the JV Agreement provided for the eventual creation of a separate joint venture to invest entirely in Chinese assets; until then, Wang, Kim, PT China, PT Korea, and PT Holdings were required to develop a Chinese asset investment plan, and PT Holdings, PT China and PT Korea were obligated to submit potential Chinese investment opportunities to ALICO for its consideration on a deal-by-deal basis, under a right of first refusal. JV Agmt. §§ 3.1-3.5. Wang and Kim were prohibited from acquiring an interest in a proposed Chinese investment until it had been rejected. The Court cannot now discern the parties' intent and the role they assigned Chinese investment in their overall relationship. The Court is satisfied, however, that the Third-Party Plaintiffs have adequately alleged that investment in Chinese assets was an objective of the joint venture.

According to the Third-Party Claims, Wang was specifically sought out, due to his "skills, language ability, experience, and cultural connections," to develop and pursue Chinese investment opportunities.[7]

The Agreements further placed restrictions on Wang and Kim's ability to engage in related business endeavors outside of PT Equity. They prohibited Wang and Kim from serving in a number of defined management and employee roles with "other Entities with investment objectives substantially similar" to those of PT Equity.[8] The PTE Agreement further contained a "Key Man Trigger," which gave ALICO the right either to dissolve PT Equity or replace PT Holdings as PT Equity's managing member if either Kim or Wang, as the Principals and "key men," were not engaged primarily in PT Equity's business or that of its

[7] Third-Party Cls. ¶ 7.

[8] Wang points out that, at least within the JV Agreement, these particular restrictions applied only to Wang and Kim's engagement with Korean assets, and that similar prohibitions with respect to investments in Chinese assets would be drafted in connection with forming a separate entity to pursue such investments. JV Agmt. §4.2. This provision, however, also cross-references the broad prohibitions contained in § 3, which details ALICO's right of first refusal over Chinese investments discovered and offered by PT Holdings, PT Korea, and PT China. The JV Agreement thus contained, in some form or another, prohibitions on PT Holdings and Wang's ability to discover and cultivate investment in Chinese assets without first presenting these opportunities to ALICO.

subsidiaries.[9] These two provisions remained in effect during a defined "Exclusivity Period," which expired on August 17, 2009. Additionally, the Agreements each contained confidentially provisions, which prohibited Kim, Wang, and PT Holdings from disclosing any information relating to either PT Equity or any of its investments; the provisions further barred them from disclosing the Agreements' terms or those of any related document.

II. CONTENTIONS

A. *The Initial Complaint*

In its complaint, PT China alleges that Kim and PT Korea misappropriated PT Holdings' funds and revenues to the detriment of both PT Holdings and PT China.[10] In particular, PT China claims that Kim misappropriated almost $900,000 to pay off personal creditors and to pay for personal expenditures, including Kim's home mortgage, school tuition, country club membership fees, and a leased car and driver. It also alleges that PT Korea failed to pay its pro rata share of a capital contribution from PT Holdings to PT Equity. Further, Kim has allegedly used PT

[9] Third-Party Cls. ¶ 17.
[10] The allegations made in the Amended Complaint do not factor into the Court's decision; they have been stated in summary form merely as background.

Holdings' capital to fund a new investment vehicle for his own personal benefit both at PT Holdings' expense and to PT China's exclusion.

B. *The Amended Third-Party Claims*

In their Amended Third-Party Claims, Kim and PT Korea allege that Wang committed several wrongful acts. They claim that Wang never presented a suitable opportunity in China, or elsewhere, for PT Equity's investment; instead, Wang "used [PT Holdings] resources to conduct business on behalf of [both] himself" and a fund with which he had a prior relationship, and all "out of [PT Equity's] Shanghai and Singapore offices."[11] They further contend that Wang served as the "director of at least seven entities unrelated" to PT Equity, but never disclosed his involvement to that entity, Kim, or PT Holdings.

Moreover, the Third Party Plaintiffs claim that, "in the first half of 2008," Wang and several of his affiliates began forming separate investment companies, Gryphus Capital Limited and its wholly-owned subsidiary, Gryphus Capital Partners Pte. Ltd. (together, "Gryphus").[12] Kim and PT Korea claim that Gryphus

[11] Third-Party Cls. ¶ 21.
[12] *Id.* at ¶ 25.

"has investment objectives substantially similar to those of PT Equity," namely "special situation" investing. The Third-Party Plaintiffs allege that Wang serves, in some form or another, as the Gryhpus entities' chief executive.[13] They further claim that Wang spent more time on Gryphus business than that of PT Equity, pursued investment opportunities for Gryphus within PT Equity and PT Holdings' line of business without first disclosing these opportunities to PT Equity, PT Holdings, or Kim, and disclosed confidential information regarding PT Equity and PT Holdings to Gryphus.

The Third-Party Plaintiffs assert claims for breach of fiduciary duty, contract, and the implied covenant of good faith and fair dealing against Wang and PT China. They contend that Wang and PT China usurped corporate opportunities to PT Holdings' detriment, disclosed confidential information and utilized proprietary information for their own benefit, misappropriated PT Holdings' resources, and did so willfully and in bad faith. If true, Wang's alleged conduct

[13] *Id.* at ¶ 27.

would constitute several breaches of the fiduciary duty of loyalty. Kim and PT Korea also claim that Wang breached the exclusivity and confidentiality provisions contained in the Agreements, while his conduct gave ALICO the right to implement the "Key Man Trigger."

C. *Jurisdictional Discovery and Personal Jurisdiction*

On July 24, 2009, the Third-Party Plaintiffs sent to Wang and PT China their First Set of Jurisdictional Discovery Requests.[14] Many of the requests are directed toward Wang's relationship with and authority over PT China, PT Holdings, and PT Equity. The Third-Party Plaintiffs claim that discovery into the nature and extent of these relationships could help them establish personal jurisdiction over Wang under either an agency or alter ego theory, or under a theory set forth by this Court in *In re USACafes, L.P. Litigation*.[15] The Third-Party Plaintiffs contend that

[14] As a matter of procedural history, these requests were sent on July 24, 2009, after the Third-Party Plaintiffs filed their original verified counterclaims and third-party claims on May 13, 2009, but before those claims were amended on August 14, 2009. Wang and PT China filed both their motion for a protective order and motion to dismiss the amended counterclaims and third-party claims on August 28, 2009.

[15] 600 A.2d 43 (Del. Ch. 1991). *USACafes* involved suit by a class of limited partners against the individual directors of the limited partnership's corporate general partner. The Court held that the directors of the general partner owed fiduciary duties to the limited partnership in their directorial capacities, thereby rendering them amenable to personal jurisdiction under 10 *Del. C.* § 3114. *Id.* at 53.

jurisdictional discovery could also help demonstrate Wang's direct contacts with Delaware, thereby rendering him amenable to service under Delaware's long-arm statute, 10 *Del. C.* § 3104. Lastly, they argue that the Court already has "ample basis to find that Mr. Wang is subject to personal jurisdiction under [6 *Del. C.*] § 18-109." Sustaining personal jurisdiction under that provision would of course moot the need for jurisdictional discovery, and the Third-Party Plaintiffs have invited the Court to rule accordingly.

Wang has moved for a protective order. He argues that the jurisdictional discovery requests "represent nothing more than an unnecessary fishing expedition" by the Third-Party Plaintiffs "in a desperate attempt to secure personal jurisdiction over Mr. Wang, who . . . resides in Singapore and has no contacts in Delaware."[16] Because the personal jurisdiction grounds for which the Third-Party Plaintiffs seek discovery are, according to Wang, essentially frivolous, he asks the Court to issue a protective order prohibiting jurisdictional discovery. As for personal jurisdiction under § 18-109, Wang does not contest his status as a manager of PT Holdings under that provision, but instead maintains that the Third-

[16] Wang's Mot. for a Prot. Order ¶ 5.

Party Plaintiffs' fiduciary duty claims are both factually unsupported and precluded by their contract claims, and therefore fail as a matter of law. Moreover, Wang claims that he has insufficient contact with Delaware to merit personal jurisdiction under the breach of contract claims.[17]

III. ANALYSIS

The parties have framed two issues for the Court's consideration: (1) whether there is cause for the Third-Party Plaintiffs to conduct jurisdictional discovery to assess the viability of their alter ego, agency, *USACafes*, and long-arm theories of personal jurisdiction; and (2) whether the Third-Party Claims adequately state a claim for breach of fiduciary duty, which would give the Court personal jurisdiction over Wang under 6 *Del. C.* § 18-109, and, alternatively, whether personal jurisdiction over the contract claims comports with due process.

[17] Although this letter opinion responds to a motion for a protective order, the parties fully briefed the issue of whether the Court has personal jurisdiction over Wang pursuant to § 18-109. Moreover, and as set forth above, the Third-Party Plaintiffs invited the Court to avoid the protective order issues and instead find personal jurisdiction under § 18-109. Wang expressed no objection to this proposed route. Counsel for Wang also confirms that this issue is ripe for a decision as a matter of law and informed the Court at oral argument held on October 27, 2009, that he was prepared to rest on his brief as to its resolution. Oral Arg. Tr. at 9-10.

The Court will address the second issue first because an affirmative finding of personal jurisdiction moots the need for jurisdictional discovery.

A. *Personal Jurisdiction under § 18-109*

When personal jurisdiction is challenged by a motion to dismiss pursuant to Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of demonstrating a basis for the Court's exercise of jurisdiction over the nonresident defendant.[18] The Court will often engage in a two-step analysis: (1) determining whether service of process on the nonresident is authorized by statute; and (2) considering whether jurisdiction is, "in the circumstances presented, consistent with due process."[19]

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[18] *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003).

[19] *Id.* at 326. As a predicate to a full resolution of the personal jurisdiction issue, the Court first determines whether the fiduciary duty claims fail as a matter of law under Court of Chancery Rule 12(b)(6). Wang moved for dismissal of the fiduciary duty claims on Rule 12(b)(6) grounds in his motion to dismiss, but dismissal of these claims is also a key link in his argument that the Court lacks personal jurisdiction over him. If, as Wang says, the Court lacks personal jurisdiction over the contract claims, and if the fiduciary duty claims fail as a matter of law, there, at least arguably, would remain no basis for compelling Wang's appearance before this Court under § 18-109.

Wang argues that the Third-Party Plaintiffs' fiduciary duty claims are unsupported by the factual allegations as well as precluded by the breach of contract claims. On a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court must accept all well-pled factual allegations stated in the Third-Party Claims as true, and draw all reasonable inferences from those facts in favor of the Third-Party Plaintiffs. The Court, however, will not accept the Third-Party Plaintiffs' legal and factual conclusions as true unless they are supported by factual allegations. *See Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 880 (Del. Ch. 2009).

Turning to the first prong of the analysis, the Third-Party Plaintiffs claim that "Wang is subject to this Court's personal jurisdiction as a result of his participation in the management of Pine Tree Holdings, a Delaware limited liability company." The Delaware Limited Liability Company Act (the "LLC Act") authorizes service of process on the managers of limited liability companies formed under the laws of this state. The so-called "implied consent" statute, 6 D*el. C.* § 18-109(a), reads in part:

> A manager . . . of a limited liability company may be served with process in the manner prescribed in this section in all civil actions . . . brought in the State of Delaware involving or relating to the business of the limited liability company or a violation by the manager . . . of a duty to the limited liability, or any member of the limited liability company . . . .

Critically, a "manager," as used in § 18-109(a), refers to any person who is a manager as defined in the LLC Act's definitional section, § 18-101(10), as well as a person who "participates materially in the management of the limited liability company."

Even if one is served pursuant to § 18-109, personal jurisdiction must still be consistent with due process. Thus, the state's exercise of jurisdiction over the

person must meet the constitutional standards of "fairness and substantial justice."[20] This is often a question of minimum contacts.[21] That said, service under § 18-109 will be consistent with due process when the action relates to a violation by the manager of a fiduciary duty owed to the limited liability company.[22]

As stated in *Rosheim*, the more difficult question is whether and when § 18-109 "permits the exercise of jurisdiction in the other disputes involving or relating to the business or affairs" of the limited liability company.[23] In *Rosheim*, which

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[20] *USACafes,* 600 A.2d at 50 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 US. 286, 292 (1980); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

[21] *Assist Stock Mgmt. L.L.C. v. Rosheim*, 753 A.2d 974, 978 (Del. Ch. 2000).

[22] *See id.* at 978 n.18 ("[I]f the complaint is read as validly alleging a breach of fiduciary duty against Rosheim in his capacity as a manager of AIT, there is little question that § 18-109 will subject him to the jurisdiction of this court for purpose of litigating that claim."). The Supreme Court, in *Armstrong v. Pomerance*, addressed this issue in the corporate context. In a corporate derivative suit against directors for breach of fiduciary duty, the Court held that, while the defendant directors' contacts with the state were limited to their acceptance of the directorships, they tendered such acceptance with notice of Delaware's corporate implied consent statute, 10 *Del. C.* § 3114, and thus understood that "they could be haled into the Delaware Courts to answer for alleged breaches of the duties imposed on them by the very laws which empowered them to act in their corporate capacities." 423 A.2d 174, 176 (Del. 1980). The Court in *Armstrong* concluded that Delaware has a significant and substantial interest in overseeing the conduct of those owing fiduciary duties to shareholders of Delaware corporations, and that this interest far outweighs any burden to directors who submit to the jurisdiction of the Delaware courts. *Id.* at 177.

[23] *Rosheim*, 753 A.2d at 978. The Court found that the "involving or related to" language in § 18-109 is susceptible to overly broad, and therefore potentially unconstitutional application,

involved a dispute between limited liability company co-managers over their respective authority within the company and its subsidiary, the Court found personal jurisdiction in that instance to be appropriate because: (1) the allegations focused on the defendant's rights, duties, and obligations as the manager of a limited liability company; (2) the matter was "inextricably bound up in Delaware law"; and (3) Delaware has a strong interest in providing a forum for disputes relating to the actions of managers of a limited liability company formed under its law in discharging their managerial functions.[24] These factors guide this Court's analysis as well.

B. *The Fiduciary Duty Claims*

As stated above, the Third-Party Plaintiffs claim that the Court already has "ample basis" to exercise personal jurisdiction over Wang under § 18-109 because

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and thus called for minimum contacts analysis when applying that portion of the statute. *Id.* at 980.

[24] *Id.* at 981 (citing *Hana Ranch, Inc. v. Lent*, 424 A.2d at 28, 30 (Del. Ch. 1980); *Armstrong*, 423 A.2d at 176 n.5).

they have stated claims for breach of fiduciary duty against him in his capacity as a manager of PT Holdings. Wang does not refute that he is a "manager," as defined under § 18-109, but instead argues that these allegations are not sufficiently supported by the alleged facts and are otherwise duplicative of the Third-Party Plaintiffs' breach of contract claims.[25]

1. The Factual Allegations

Wang contends that none of the Third-Party Plaintiffs' allegations that he breached fiduciary duties owed to PT Korea and PT Holdings is supported by any facts. The Court disagrees. It will address each of the Third-Party Plaintiffs' allegations in turn along with their supporting facts as pled.

First, the Third-Party Plaintiffs claim that Wang solicited and usurped business and investment opportunities that should have first been "presented to [PT] Holdings for investment by [PT] Equity," and further pursued such business

[25] Wang concedes that "it is not in dispute" that he "participated materially" in the management of PT China and PT Holdings. Wang's Reply Br. in Supp. of the Mot. for Prot. Order at 5. Indeed, the facts, at least as alleged, demonstrate that Wang participated materially in PT Holdings' management. Kim asked Wang to join the entity because of his potential for developing investment opportunities in China. Moreover, the JV Agreement named Wang as a Principal and "key man," and contained a specific China Investment Program, which ostensibly Wang would at least help cultivate.

opportunities through Gryphus. On a related point, they also argue that Wang failed to give the Pine Tree entities his "utmost loyalty," and instead engaged in Gryphus and other businesses. In support, the Third-Party Plaintiffs allege that Wang and his affiliates began forming Gryphus "in the first half of 2008." Gryphus purportedly has investment objectives "substantially similar" to those of PT Equity, especially its focus on "special situation" investment in distressed assets, which is PT Equity's focus as well.[26] They also claim that Wang "spent more of his time on Gryphus business than Pine Tree business." The Court may reasonably infer from these allegations, under a motion to dismiss standard, that Wang usurped corporate opportunities belonging to PT Holdings, and thus breached his duty of loyalty to both PT Holdings and PT Korea.[27]

Second, the Third-Party Plaintiffs argue that Wang disclosed confidential information and utilized proprietary information belonging to PT Holdings and PT

[26] Third-Party Cls. ¶¶ 25-26, 50-51.

[27] This is especially so given PT Holdings' supposed obligations to PT Equity and ALICO, which may inform the nature and extent of Wang's fiduciary duties to PT Holdings. For example, if ALICO had a right of first refusal over potential investments in Chinese assets discovered by PT Holdings, does Wang's misappropriation of these opportunities for his own use breach a duty he owes to PT Holdings? In other words, do PT Holdings' obligations to PT Equity and ALICO, because they help define PT Holdings' purpose and line of business, further help define Wang's duties toward PT Holdings?

Equity for his own personal gain. Indeed, in the Third-Party Claims, Kim and PT Korea assert that Wang disclosed confidential information belonging to the Pine Tree entities to Gryphus, "potential investors, and other third parties."[28] Kim and PT Korea further argue that, despite a breakdown in their relationship, PT China still sought to obtain from PT Holdings information regarding its business as late as July 7, 2009.[29] They believe that Wang intended to use this information for Gryphus's benefit.[30] Once again, it is certainly reasonable to infer, from the facts as alleged, that Wang has used PT Holdings' confidential and proprietary information for his own benefit. If the Court accepts that he inappropriately created a competing entity, Gryphus, it is only a small step to infer, at least at this

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[28] *Id.* at ¶ 29.

[29] Wang allegedly informed Kim in September 2008 that he wanted to reduce his involvement in PT Holdings and PT Equity. In mid-December of that year, Kim told Wang that he should resign his position due to Wang's lack of commitment to their joint venture, as well as Wang's possible conflict with a vague "new path" that Wang told Kim he would be exploring. Kim immediately thereafter informed Pine Tree personnel of Wang's departure effective December 31, 2008. Wang contested this announcement and refused to resign until he received a written severance agreement and compensation. Kim discovered Wang's alleged involvement with Gryphus in January 2009; he soon after informed Wang of his removal from any role in PT Holdings' management and demanded that Wang cease all Gryphus operations; Wang, however, continued to resist and claimed that Gryphus was not yet operational. Wang then caused PT China to initiate this action. *Id.* at ¶¶ 31-50.

[30] *Id.* at ¶ 51.

stage in the proceeding, that he would use information acquired from PT Holdings for that entity's benefit.

Lastly, the Third-Party Plaintiffs allege that Wang misappropriated PT Holding's resources and incurred substantial expenses for his own personal benefit or that of his affiliates, and again breached his duty of loyalty to PT Holdings. They claim that Wang never presented a suitable investment opportunity to the Pine Tree entities, and "used [PT] Holding's resources" to conduct his own business out of the Pine Tree Shanghai and Singapore offices. More importantly, Kim and PT Korea allege that "between September 2005 and July 2007, Mr. Wang expended more than $240,000 of [PT] Holding's capital" through a PT China subsidiary, PTCM Shanghai.[31] PT Holdings allegedly received no benefits from these expenditures, which PT Korea and Kim argue were used for Wang's personal gain or that of his affiliates. The Third-Party Plaintiffs' misappropriation claims are thus also sufficiently supported by the factual allegations.

[31] *Id.* at ¶ 22.

In sum, the Court concludes that the Third-Party Plaintiffs have pleaded sufficient facts to support their allegations that Wang breached his fiduciary duties to PT Holdings and PT Korea.

2. The Legal Sufficiency of the Fiduciary Duty Claims

Wang argues that, even if the fiduciary duty claims have substantive merit, they are merely duplicative of the Third-Party Plaintiffs' breach of contract claims and should therefore be dismissed. They contend that the fiduciary duty claims are based on the same conduct by which Kim and PT Korea allege that Wang breached the Agreements. They conclude that the parties chose to govern their relationship by contract, thereby rendering the fiduciary duty claims superfluous.

As this Court stated in *Solow v. Aspect Resources, LLC*, a contractual claim will preclude a fiduciary claim, so long "as the duty sought to be enforced arises from the parties' contractual relationship."[32] This is due to the primacy of contract law over fiduciary law in matters involving essentially what amounts to contractual rights and obligations.[33] Wang advances an expansive view of this approach and

[32] 2004 WL 2694916, at *4 (Del. Ch. Oct. 19, 2004) (citations omitted).
[33] *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. Mar. 4, 1998) (finding that a preferred shareholder's contractual claims against a corporation and its board of directors precluded its

argues that the "key issue" is whether the fiduciary and contractual claims are based on the same facts. The case law, however, does not support this reading—the appropriate question instead is whether there exists an independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct.[34] If so, the fiduciary duty claims will survive.

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fiduciary duty claims because the contested rights and obligations of the preferred shareholders were "essentially contractual").

[34] *BAE Sys. N. Am. Inc. v. Lockheed Martin Corp.*, 2004 WL 1739522, at *7 (Del. Ch. Aug. 3, 2004) (finding that the counterclaim plaintiffs fiduciary duty claims could not be brought independently of its breach of contract claims as they were "rooted in" the contract). Indeed *BAE Systems* involved an asset purchase agreement that contained a provision requiring the buyer to undertake the seller's litigation defense in an ongoing lawsuit. The Court found no suggestion that a "special relationship" had developed between the parties before the asset purchase agreement was negotiated, and thus found no basis for any duties owed by the buyer to the seller outside of those agreed upon pursuant to the purchase agreement. *Id.* at *7 n.45.

In *Madison Realty Partners 7, LLC v. AG ISA, LLC*, also cited by Wang, the Court again held that the issue presented is whether the fiduciary duty claims can be maintained independently of the breach of contract claims. The Court found that they could not. 2001 WL 406268, at *6 (Del. Ch. Apr. 17, 2001). *Madison Realty* involved a general partnership dispute between the two general partners; the case turned on interpretation of the partnership agreement, and whether the funding partner needed to provide 120 days notice before terminating its funding, or whether such notice, as required under the agreement, was excused once the funding reached a certain level. *Id.* at *2.

And, as stated in note 33 *supra*, *Gale* involved a claim by preferred shareholders, whose preferences and limitations relative to the common shareholders are recognized as contractual in nature. *See Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 594 (Del. Ch. 1986); *see also Blue Chip Capital Fund II Ltd. P'ship v. Tubergen*, 906 A.2d 827, 834 (Del. Ch. 2006) (holding that claims of the preferred shareholder to a larger distribution of proceeds arose from their contractual rights under the certificate of incorporation, which thereby precluded fiduciary duty claims that the directors acted upon their self-interest in favoring one group of preferred shareholders over another).

The Court is satisfied that there is a basis for the breach of fiduciary duty claims asserted against Wang, independent of those claims for breach of contract.[35] The Third-Party Plaintiffs' claims that Wang usurped business opportunities belonging to PT Holdings inherently arise under his duty of loyalty to the company,[36] as does the claim that Wang used PT Holdings' confidential and

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Perhaps most helpful to the analysis is *Solow*. There the Court found that the breach of fiduciary duty claims were merely duplicative of the contract claims, *and* arose from the disputed partnership agreement, not general fiduciary duty principles. 2004 WL 2694916, at *4-5. The Court went through each fiduciary duty claim and found none of the alleged conduct was an "inherent" breach of fiduciary duty. Whether the alleged conduct was lawful or appropriate instead turned on the interpretation and application of the partnership agreement. *Id.*

[35] The Court, however, is not suggesting that legally sufficient allegations that a limited liability company manager breached his or her fiduciary duties are necessary to confer personal jurisdiction over the person under § 18-109 of the LLC Act. As explained in greater detail in the following section, when a manager's fiduciary duties are limited and/or defined contractually, the Court may still exercise personal jurisdiction over the manager under the implied consent statute so long the action involves the manager's rights, duties, and obligation to the company. Jurisdiction in such circumstances comports with due process because when a manager agrees, contractually or otherwise, to accept certain managerial duties or obligations to a company, he or she may reasonably expect to appear before a court of the state of that company's formation when questions arise concerning the execution, interpretation, or scope of these responsibilities.

[36] The Court in *Solow* rejected a breach of fiduciary duty claim against the defendant general partner for beginning a new venture without the limited partner's involvement. The Court reasoned that the defendant's alleged conduct was not "inherently a breach of fiduciary duty," and was also covered by the partnership agreement, under which the general partner was required to offer the limited partner "the opportunity to participate in future projects." *Solow*, 2004 WL 2694916, at *5. The Court noted, however, that the plaintiff did not plead that the defendant's alleged failure to offer participation in the business venture "constituted usurpation of a partnership opportunity." *Id.* Here, the Third-Party Plaintiffs allege that Wang solicited and usurped business and investment opportunities that should have been presented to PT Holdings for investment by PT Equity. Third-Party Cls. ¶ 56. Moreover, the Court will allow this claim

proprietary information for his personal self-interest. And of course, the allegation that Wang misappropriated PT Holdings' resources for his own benefit and that of his affiliates would be a classic example of self-dealing, and another breach of the duty of loyalty.

Moreover, Wang does not argue that he and Kim (or perhaps more appropriately, PT China and PT Korea) contractually limited the fiduciary duties they owed to each other and PT Holdings under that entity's operating agreement.[37] Nor does Wang argue that the JV Agreement and PTE Agreement governing PT Equity limit the duties Wang owes Kim, PT Korea, and PT Holdings. Moreover, the fiduciary duties owed by Wang to PT Holdings arise under a different agreement (PT Holdings' limited liability company agreement)

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to stand in light of the other fiduciary duty claims, especially the misappropriation claim, which was most certainly not covered by the Agreement.

[37] 6 *Del. C.* § 18-1101(b) ("To the extent that, at law or in equity, a member of manager or other person has duties (including fiduciary duties) to a limited liability company . . . [such] duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement . . . ."). S*ee also Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *9 (Del. Ch. Apr. 20, 2009) ("[T]he interpretive scales . . . tip in favor of preserving fiduciary duties under the rule that the drafters of chartering documents must make their intent to eliminate fiduciary duties plain and unambiguous."). PT Holdings' limited liability company operating agreement, attached as Exhibit C to Wang's Motion to Dismiss, is bare-boned and does nothing to modify or limit the parties' respective fiduciary duties. In fact, it makes no mention of these duties at all.

from those which govern the breach of contract claims, and may therefore fairly be considered distinct in scope.[38] Because the fiduciary duty claims arise independently of the duties imposed contractually by the Agreements and because no argument has been made that these duties are limited in any way by either the Agreements or PT Holdings' governing documents, the Court will allow them to stand for now. Accordingly, the Court has personal jurisdiction over the fiduciary duty claims pursuant to § 18-109.

C. *The Breach of Contract Claims*

The Court also has personal jurisdiction over Wang for the Third-Party Plaintiffs' breach of contract claims.[39] Personal jurisdiction for these claims is authorized by statute: Section 18-109 permits service to be made on Wang in his capacity as manager of PT Holdings because the claims "involve or relate" to

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[38] *See Schuss v. Penfield Partners, L.P.*, 2008 WL 2433842, at *10 (Del. Ch. June 13, 2008) (declining to dismiss fiduciary duty claims even though they shared "a common nucleus of operative facts" with the breach of contract claims, they depended on additional facts, were broader in scope, and involved "different considerations in terms of a potential remedy"). Indeed, as Wang himself argues, the Agreements were intended to govern PT Equity's business, not that of PT Holdings. Wang's Reply Br. in Supp. of his Mot. for Prot. Order at 17. Wang's alleged obligations under the Agreements, like Kim's, seem to run to PT Equity or ALICO, not PT Holdings, Kim, or PT Korea.

[39] Whether the Third-Party Plaintiffs sufficiently pleaded a cause of action for breach of contract is not yet at issue, but must be resolved at some point in the proceeding.

PT Holdings' business. Wang contests, however, whether service under this provision, and for these claims, comports with due process. He argues that the breach of contract claims do not implicate his rights, duties, and obligations as manager of PT Holdings and are not inextricably bound up in Delaware law, citing the fact that the JV Agreement is expressly governed by New York law.

Although the Agreements govern the management of PT Equity, they still implicate Wang's rights, duties, and obligations as manager of PT Holdings. Wang's managerial functions within PT Holdings relate directly to the operations of PT Equity; PT Holdings exists, in large part, to manage the PT Equity investment fund.[40] PT Holdings can essentially be viewed as a conduit through which Kim and Wang were to apply and grow ALICO's investment. The Agreements describe the contours of this relationship, and thus suit under their confidentiality and noncompetition provisions would of course implicate Wang's

[40] *See USACafes,* 600 A.2d at 52 (noting that "[i]t is quite keeping with traditional notions of fair play and substantial justice" to exercise personal jurisdiction over directors of a corporate general partner of a limited partnership in a suit by the limited partners when "[t]he Delaware corporation which the individual defendants serve as directors was created for the sole purpose of conducting the affairs of another Delaware entity, the Partnership.").

management of both PT Equity and PT Holdings, each of which is a Delaware limited liability company.[41]

Wang attempts to distinguish this case from *Rosheim*. He points out that the JV Agreement is to be interpreted under New York law. The claims arising under the JV Agreement are therefore obviously not "inextricably bound up" in Delaware law, as the Court found the disputed agreement to be in *Rosheim*. That said, the fact that the Pine Tree entities are Delaware limited liability companies still raises this State's interest in resolving disputes regarding the management of limited liability companies formed under its laws; and perhaps more importantly, the *Rosheim* court did not indicate that the "inextricably bound" factor was dispositive.[42] Instead, the Court suggested that the critical determination is whether the dispute is intertwined with the defendant's managerial position.[43] Viewing the totality of the circumstances here, the fact that the breach of contract claims are intertwined with Wang's management of both PT Holdings and

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[41] *See Rosheim*, 753 A.2d at 980 (finding that the questions posed by the plaintiff's complaint "run to the core of the governing structure for AIT, a Delaware LLC").
[42] *Id.* at 981.
[43] *Id.* ("When he became a manager of a Delaware limited liability company, Rosheim impliedly consented to being sued in a Delaware court to adjudicate disputes so inherently intertwined with that fiduciary position.").

PT Equity, the potential usefulness of his involvement in this suit, and Delaware's interest in adjudicating disputes involving the management of its limited liability companies, the Court has personal jurisdiction over Wang to hear the contract claims.[44]

IV. CONCLUSION

For the reasons stated above, there is no need for jurisdictional discovery, but a protective order is not necessary, because the Court has personal jurisdiction over Wang pursuant to 6 *Del. C.* § 18-109. Counsel are requested to confer and to submit an implementing order and a briefing schedule to resolve those issues remaining in Wang's motion to dismiss.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[44] In sum, personal jurisdiction over Wang regarding the contract claims comports with due process and the constitutional standards of fairness and substantial justice. *See supra* note 20. By accepting a key management position over two Delaware limited liability companies, Wang submitted himself to the jurisdiction of the Delaware courts in suits pertaining to his rights, duties, and obligations as a manager. The contractual breaches of which Wang has been accused relate directly to his obligations as a manager of PT Equity, and indirectly as a manager of PT Holdings.