

**Trump v Cheng**

2006 NY Slip Op 30606(U)

July 24, 2006

Supreme Court, New York County

Docket Number: 602877/05

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. RICHARD B. LOWE, III PART 56  
*Justice*

DONALD J. TRUMP,  
  
Plaintiff,  
  
-against-  
  
HENRY CHENG ,  
  
Defendants.

INDEX NO. 602877/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 011  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

J.S.C. Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

**FILED**  
JUL 27 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

*[Signature]*  
JUSTICE RICHARD B. LOWE, III  
J.S.C.

Dated: 7/24/06

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

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DONALD J. TRUMP, individually and  
derivatively on behalf of  
HUDSON WATERFRONT ASSOC., L.P.,  
HUDSON WATERFRONT ASSOC., I, L.P.,  
HUDSON WATERFRONT ASSOC. II, L.P.,  
HUDSON WATERFRONT ASSOC. III, L.P.,  
HUDSON WATERFRONT ASSOC. IV, L.P.,  
HUDSON WATERFRONT ASSOC. V, L.P.,

Plaintiff,

Index No. 602877/05

-against-

HENRY CHENG, VINCENT LO, CHARLES YEUNG,  
EDWARD WONG, DAVID CHIU HUDSON  
WATERFRONT CORP., HUDSON WATERFRONT I  
CORP., HUDSON WATERFRONT II CORP.,  
HUDSON WATERFRONT III CORP., HUDSON  
WATERFRONT IV CORP., HUDSON WATERFRONT  
V CORP., HUDSON WATERFRONT ASSOC., L.P.,  
HUDSON WATERFRONT ASSOC. I, L.P.,  
HUDSON WATERFRONT ASSOC. II, L.P.,  
HUDSON WATERFRONT ASSOC. III, L.P.,  
HUDSON WATERFRONT ASSOC. IV, L.P.,  
HUDSON WATERFRONT ASSOC. V, L.P.,  
HUDSON WESTSIDE ASSOC., L.P.,  
HUDSON WESTSIDE ASSOC. I, L.P.,  
HUDSON WESTSIDE ASSOC. II, L.P.,  
HUDSON WESTSIDE ASSOC. III, L.P.,  
HUDSON WESTSIDE ASSOC. IV, L.P.,  
HUDSON WESTSIDE ASSOC V, L.P.,  
JOHN DOE I and JOHN DOE II,

Defendants.

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**RICHARD B. LOWE, III, J:**

Motion sequence numbers 011, 012 and 013 are consolidated for disposition.

This action involves a dispute over the sale price of, and the use of sale proceeds from,

parcels of land that were developed by the parties in this action. The complaint, filed on August 10, 2005, asserted direct and derivative causes of action, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy to breach fiduciary duty, tortious interference with fiduciary relationships, breach of contract, constructive trust, an accounting, dissolution of limited partnerships, access to books and records, and injunctive relief.

Trump served an amended complaint, dated January 13, 2006. The twenty-count amended complaint asserts causes of action under the same theories set forth in the original complaint. Defendants now move to dismiss the amended complaint for lack of jurisdiction, failure to state a cause of action, and based upon documentary evidence.

The facts of this case are stated in detail in this court's decision and order, *Trump v Cheng et. al.*, 9 Misc 3d 1120 (A) (Sup Ct, NY County 2005) (Order). Therefore, the facts will not be restated herein. To the extent that new facts are alleged in the amended complaint that are relevant to this decision, those allegations are stated in the discussion below. Unless otherwise indicated in this decision, defined terms in the Order shall have the same meaning herein.

For the reasons stated in this decision, the motions are granted, and the amended complaint is dismissed in its entirety as to the individual defendants, the Westside LPs and the Hudson Waterfront LPs. All but the eighteenth cause of action, for access to books and records, are dismissed as to the Hudson Waterfront Corps.

## DISCUSSION

### General Partners' Motion To Dismiss

#### Direct Claims

The Hudson Waterfront Corps move to dismiss the second, fourth, sixth, eighth,

thirteenth, fifteen, and nineteenth causes of action, all of which are asserted as direct claims, arguing that these claims must be brought derivatively.<sup>1</sup> In opposition, Trump argues that his claims are direct.

These causes of action assert claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conspiracy to breach fiduciary duties, tortious interference with fiduciary relationships, constructive trust, an accounting, and injunctive relief. Each of these claims is based upon the same alleged breaches of fiduciary duties. At the heart of these claims is Trump's assertion that the Properties were sold for approximately \$1 billion less than their market value.

"[T]he laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." Partnership Law § 121-901. The same rule applies to corporations, requiring the application of the laws of the state where the corporation was formed. *Hart v General Motors Corp.*, 129 AD2d 179 (1<sup>st</sup> Dept 1987). As it is undisputed that the Hudson Waterfront LPs are Delaware limited partnerships, and that the Hudson Waterfront Corps are Delaware corporations, Delaware law therefore applies to Trump's claims for breaches of fiduciary duties.

Under Delaware law, in order to determine whether plaintiffs' claims are derivative or individual, the

court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be

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<sup>1</sup> In motion sequence numbers 012 and 013, the Hudson Waterfront LPs, the individual Cheng Group defendants and the Westside LPs adopt and incorporate the general partners' arguments. Hudson Waterfront LPs' Mem. of Law, at 1; Individual Defendants' and Westside LPs' Mem. of Law, at 19-20.

independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.

*Tooley v Donaldson, Lufkin, & Jenrette, Inc.*, 845 A2d 1031, 1039 (Del Supr 2004). Under *Tooley*, “[t]he analysis must be based solely on ... : Who suffered the alleged harm – the corporation or the suing stockholder individually – and who would receive the benefit of the recovery or other remedy[.]” *Id.* at 1035. Thus, under Delaware law, plaintiffs’ individual claims must allege harm independent from the alleged injury suffered by the corporation.

Here, Trump’s claims are based upon an alleged diminution of the value of the Hudson Waterfront LPs, due to the general partners selling the Properties for less than they were worth. Trump also avers that the Hudson Waterfront LPs’ used the sale proceeds from the Properties to purchase commercial office buildings at excessive prices. However, these facts would result in injury to the Hudson Waterfront LPs, not Trump. Similarly, any constructive trust, accounting or injunction would be imposed on behalf of the Hudson Waterfront LPs, not Trump.

Citing *In re Cencom Cable Income Partners, L.P.* (2000 WL 130629 [Del Ch, Jan. 27, 2000]), and *Anglo Am. Sec. Fund, L.P. v S.R. Global Intl. Fund, L.P.* (829 A2d 143 [Del Ch 2003]), Trump argues that his direct claims are valid. In *In re Cencom Cable Income Partners, L.P.*, the court’s decision was based on the fact that:

the partnership’s business is complete, the liquidation sale is over, and the only two parties to the partnership are now clearly adversaries. Further, the remaining claims only challenge the conduct of the general partner in the final sale transaction, not any ongoing conduct, and the claims have already survived one summary judgment motion. For those reasons, the purposes for classifying claims as derivative and, in particular, the reasons for its attendant demand rule, are not present here.

*In re Cencom Cable Income Partners, L.P.*, 2000 WL 130629, at \*4. The court stated that “[w]ith the partnership in dissolution the ‘partnership’ entity is simply an artifice representing the relationship between two legally juxtaposed parties and is no longer relevant as a distinct legal creature for the purpose of resolving the final claims between these parties.” *Id.*, at \*6. In other words, the court permitted plaintiffs to proceed on their direct claims, because the “partnership [was] in liquidation,” and, therefore, there was “no need to push plaintiffs into pursuing intra-partnership remedies.” *Id.*, at \*5.

Here, conversely, the Hudson Waterfront LPs are not in liquidation. The term of these limited partnerships does not expire until December 2044. Accordingly, *In re Cencom Cable Income Partners, L.P.* is distinguishable on its facts.

*In Anglo Am. Sec. Fund, L.P.*, the court permitted direct claims, because the allegedly injured partners had withdrawn from the partnership, and, therefore, had no standing to sue derivatively. 829 A2d at 152-53. The court also determined that the current, newly admitted limited partners, who did have derivative standing, had suffered no injury. Rather, the injury was suffered by the former limited partners. Therefore, the new limited partners would have received a windfall if the injured plaintiffs were required to share their recovery.

Here, Trump remains a limited partner of the Hudson Waterfront LPs. Nothing contained in the amended complaint indicates that he would not share in any recovery to the Hudson Waterfront LPs in the event that he prevails in a derivative suit. Moreover, permitting Trump to sue directly would deprive the Westside LPs of any possible relief. Accordingly, *Anglo Am. Sec. Fund, L.P.* is distinguishable on its facts.

None of the other cases cited by Trump support a different result. For the foregoing

reasons, the second, fourth, sixth, eighth, thirteenth, fifteenth and nineteenth causes of action of the amended complaint are derivative. Accordingly, the Hudson Waterfront Corps' motion to dismiss these claims is granted.

### Derivative Claims

The Hudson Waterfront Corps next move to dismiss all of Trump's derivative causes of action, because Trump failed to make a demand on the general partners, and he failed to show that demand should be excused. Trump admits that he made no pre-suit demand. Amended Complaint, ¶ 72. In opposition, Trump argues that no demand was required, because the amended complaint alleges a reason to doubt the independence of the general partners, and the applicability of protection under the business judgment rule.

Under the Delaware Code, a limited partner may bring an action in the right of a limited partnership to recover a judgment "if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." 6 Del C § 17-1001. "This requires that a plaintiff plead 'with particularity' those facts which warrant a suit. Those particular facts can be determined only through the analysis of business judgment, as in corporation law." *Litman v Prudential-Bache Prop., Inc.*, 1993 WL 5922, \*3 (Del Ch, Jan. 4, 1993); *see also* 6 Del C § 17-1003 ("[i]n a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.").

"Plaintiffs must allege, with particularity, facts showing a conflict affecting the general partners' conduct which raises a reasonable question as to their disinterestedness, independence or business judgment." *Levine v Prudential Bache Prop., Inc.*, 855 F Supp 924, 940 (ND Ill

1994) (applying Delaware law); *Aronson v Lewis*, 473 A2d 805, 814 (Del 1984).

The key principle upon which this area of our jurisprudence is based is that the directors are entitled to a presumption that they were faithful to their fiduciary duties. In the context of presuit demand, the burden is upon the plaintiff in a derivative action to overcome that presumption. The Court must determine whether a plaintiff has alleged particularized facts creating a reasonable doubt of a director's independence to rebut the presumption at the pleading stage. If the Court determines that the pleaded facts create a reasonable doubt that a majority of the board could have acted independently in responding to the demand, the presumption is rebutted for pleading purposes and demand will be excused as futile.

*Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 845 A2d 1040, 1048-49 (Del 2004).

A director is considered interested where he or she will receive a personal financial benefit from a transaction that is not equally shared by the stockholders. Directorial interest also exists where a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders. In such circumstances, a director cannot be expected to exercise his or her independent business judgment without being influenced by the adverse personal consequences resulting from the decision.

*Simon v Becherer*, 7 AD3d 66, 72 (1<sup>st</sup> Dept 2004) (applying Delaware law) (citation and quotation marks omitted).

Here, the amended complaint alleges that the Hudson Waterfront Corps abandoned their fiduciary obligations as general partners, and exercised no business judgment over the sale of the Properties. The pleading avers that these general partners acted at the behest of the Cheng Group, structuring the sale of the Properties to maximize the benefit to the Cheng Group at the expense of Trump and the Hudson Waterfront LPs.

The pleading claims that the directors and officers of the Hudson Waterfront Corps were

“dominated, controlled, and beholden to the Cheng Group, which is the 100% owner of the general partners, and by Cheng, who appointed and controls the continued employment and compensation of the directors and officers.” Amended Complaint, ¶ 69. According to the amended complaint, Cheng provided continued employment, and higher compensation, to Hudson Waterfront Corps’ officers and directors in exchange for their willingness to follow the Cheng Group’s directives.

The amended complaint avers that the Cheng Group owned 70% of the equity in the Hudson Waterfront LPs (69% as owners of the Westside LPs, and 1% as shareholders of the Hudson Waterfront Corps), whereas Trump owned only 30%. The pleading also claims that defendants pursued a divestiture plan in connection with the sale of the Properties, involving an offshore transaction as part of the Cheng Group’s elaborate scheme of tax-avoidance and currency exchange.

The Cheng Group allegedly sought to receive undisclosed distributions, kickbacks and commissions, all to the exclusion of Trump. The Hudson Waterfront Corps allegedly reinvested the sale proceeds in overpriced rental properties without analyzing appropriate market appraisals, alternative replacement properties, and whether the partnership should have distributed sale proceeds or developed the Properties. Trump also claims that the general partners used their fiduciary positions to pressure him to provide the Cheng Group with a liability release.

As a preliminary matter, it is not clear to the court that Trump has identified all of the directors and officers of the general partners. The amended complaint claims that non-parties Paul Davis, Barry Gross and Chris Lam, directors and officers of the Hudson Waterfront Corps, were dominated and controlled by the Cheng Group and Cheng. However, it is not clear from

the pleading whether these three individuals comprise a majority of the board of directors of the Hudson Waterfront Corps, and, therefore, the extent to which the alleged domination affected actions taken by the general partners.

In any event, allegations “that certain individual wrongdoers dominate and control the board, and that the director defendants receive director fees,” are “conclusory boilerplate allegations of director interest,” and, therefore, “do not provide a basis to excuse demand.” *Spear v Conway*, 2003 WL 24012118, \*5 (Sup Ct, NY County Oct. 17, 2003) (applying Delaware law), citing *Aronson v Lewis*, 473 A2d 805 (Del 1984) and *Brehm v Eisner*, 746 A2d 244 (Del 2000); see also *In re Baxter Intern., Inc. Shareholders Litig.*, 654 A2d 1268, 1269 (Del Ch 1995) (officers’ alleged receipt of compensation as a result of the wrongful conduct was insufficient to excuse a demand); and *In re E.F. Hutton Banking Practices Litigation*, 634 F Supp 265, 271 (SD NY 1986) (construing Delaware law) (the receipt of directors’ fees is not sufficient to show self-interest by a board member).

Furthermore, “[e]ven where the potential for domination or control by a controlling shareholder exists, the complaint must allege particularized allegations that would support an inference of domination or control.” *In re Paxson Communication Corp. Shareholders Litig.*, 2001 WL 812028, \*9 (Del Ch, July 12, 2001). “A stockholder’s control of a corporation does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder.” *Beam*, 845 A2d at 1054.

In *Brehm* (746 A2d 244, *supra*), the Delaware Supreme Court rejected, as conclusory, the plaintiff’s attempt to excuse demand based upon allegations that the defendant endorsed

corporate action in order to gain increased compensation. The Court stated that the plaintiff's allegations were counterintuitive and illogical, because the defendant's financial gain was tied to the success of the company. *Id.*, at 257.

Here, Trump fails to plead particularized allegations in support of his claim that the general partners were beholden to the owners of the Hudson Waterfront Corps. The amended complaint fails to plead, in any detail, the nature of the allegedly improper employment arrangement of the Hudson Waterfront Corps' officers and directors. Other than conclusory allegations of increased compensation, the pleading also fails to explain why these individuals are obligated to follow the directions of the Cheng Group. If anything, the pleading shows that Cheng concurred with the decision to sell the Properties, not that he, or the Cheng Group, dominated the board of the Hudson Waterfront Corps.

Trump's claim that the general partners lacked independence is based heavily upon his counterintuitive argument that the individual defendants, as 70% owners, who, therefore, had the largest interest in making the Hudson Waterfront LPs successful, sought to sabotage their multi-billion dollar investment by selling the Properties at an artificially low price, to the detriment of the Hudson Waterfront LPs. This claim is contradicted by the documentary evidence, submitted with the affidavit of Barry Gross (Gross), the vice president of the Hudson Waterfront Corps. Gross submits 22 appraisal reports, from two prominent appraisal firms, that were completed prior to the sale of the Properties. The evidence submitted by Gross shows that the Properties were sold for approximately \$188 million *more* than the most recent appraisals of the Properties.

Trump fails to rebut this showing.<sup>2</sup>

Trump argues that no pre-suit demand is required where the demanded suit includes claims against the Cheng Group, which is the 100% owner of the general partner, to whom the demand would be made. However, “the conclusory allegation that the general partners cannot be expected to sue themselves, as alleged in the Amended Complaint, ... is insufficient as a matter of law.” *Litman*, 1993 WL 5922, at \*4; see also *Dean v Dick*, 1999 WL 413400, \*3 (Del Ch, June 10, 1999) (“[i]t is not sufficient to excuse demand ... to simply allege a director would be required to bring suit against himself”).

In *Dean*, upon which Trump relies, the court found “persuasive that where the general partner is 100% owned by one person, and the general partner would be required to bring suit against that person, there is at least some doubt as to the disinterest of that person.” *Id.* The amended complaint identifies Cheng himself as the individual who controlled the general partners’ actions, because Cheng allegedly controlled the general partners’ employment and compensation. However, the Hudson Waterfront Corps are owned by various individuals, not solely Cheng, thereby undermining Trump’s argument that the Cheng Group (styled by Trump as the sole owner of the general partners), controlled the general partners. Trump fails to allege any factual basis for treating the individual defendants that comprise the Cheng Group as the sole stockholder of the general partners. Nor does Trump explain how Cheng controlled the Cheng Group, or how the individual defendants acted through Cheng. Therefore, *Dean* is distinguishable on its facts.

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<sup>2</sup> Trump fails to submit any appraisals, or any other evidence, to refute defendants’ showing that the Properties were sold for \$188 million more than their appraised value.

Moreover, Trump admits that the purported divestment plan never materialized.

Additionally, Trump concedes that the Hudson Waterfront LPs have continued the business of the partnerships by reinvesting the proceeds from the sale of the Properties in properties in the United States (Amended Complaint, ¶ 4), thereby negating any purported offshore divestment plan. As discussed in the Order, the 1031 Exchange reinvestment plan was expressly permitted under the partnership Agreements. The 1031 Exchange does not entitle defendants to *avoid* taxes, but rather, to defer them.

Furthermore, while Trump maintains that the alleged kickbacks were “far in excess” of Cheng Group’s remaining financial interest in the Properties (Trump’s Opp. Mem. of Law, at 21), these allegations are vague and conclusory. In addition, these claims are counterintuitive. If the Properties were sold for \$1 billion below their market value, as Trump claims, defendants’ share of the loss, as 70% owners, would be \$700 million. Trump fails to explain what the alleged kickbacks were, how they were obtained, how they could have exceeded \$700 million, and why defendants would forego \$700 million in value.

In addition, also discussed in the Order, the Agreements did not obligate the general partners to distribute partnership assets or sale proceeds to Trump prior to the expiration of the term of the partnerships, in 2044. Thus, the general partners’ alleged request for a release from Trump in exchange for distributing his portion of funds from the sale proceeds of the Properties was merely an accommodation to Trump, not something that Trump was entitled to under the Agreements. *In re Coleman Co. Inc. Shareholders Litig.*, 750 A2d 1202, 1211 (Del Ch 1999) (shareholders’ relinquishment of right to seek appraisal, in exchange for monetary benefit, did not constitute coercion).

The amended complaint avers that the general partners distributed nearly \$20 million to the Cheng Group, through the Hudson Waterfront LPs, but failed to make any distributions to Trump, as required under the parties' Agreements. The general partners also allegedly released false financial statements to Trump, concealing these distributions in order to inflate the amount of sale proceeds due to the Cheng Group at Trump's expense.

However, Trump fails to plead with particularity any details concerning this allegedly fraudulent conduct, pursuant to CPLR 3016, which requires circumstances constituting a fraud to be stated in detail. Nor does Trump claim that he relied on any allegedly false financial statements. *WSFS v Chillibilly's, Inc.*, 2005 WL 730060, \*12 (Del Super, March 30, 2005) (fraud claim requires showing that "action was taken in justifiable reliance upon a fraudulent representation"); *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 390 (1<sup>st</sup> Dept 2005) (same).

Trump also claims that, at the closing of the sale of the Properties, Cheng received \$35 million that was paid to an offshore entity, non-party Fineview Resources, Ltd. (Fineview), an entity allegedly owned by Cheng. However, while the amended complaint makes conclusory allegations that the Cheng Group received kickbacks, none of the allegations concerning the \$35 million state that this was a kickback payment received by Cheng. In fact, the amended complaint does not claim that this alleged payment was improper.

Thus, Trump fails to explain the "the circumstances constituting the wrong" in detail to "sufficiently illuminate the transactions involved." *Block v Landegger*, 44 AD2d 671, 671 (1<sup>st</sup> Dept 1974), citing CPLR 3016 (b). Additionally, Trump fails to show how Cheng allegedly controlled Fineview. *Longo v Butler Equities II, L.P.*, 278 AD2d 97, 98 (1<sup>st</sup> Dept 2000) (fraud claim dismissed under CPLR 3016 [b] where plaintiff limited partner failed to identify investors

who made allegedly worthless contributions, or to show how defendants controlled those investors); *In re JP Morgan Chase Sec. Litig.*, 363 F Supp 2d 595, 624 (SD NY 2005) (plaintiffs failed to “plead with requisite particularity that any of the defendants engaged in illegal behavior”; allegation that investment constituted a “kickback” for bank officers was conclusory where plaintiff offered no specific allegations that defendants acted corruptly).

In short, Trump fails to show that Cheng or the Cheng Group controlled the directors of the Hudson Waterfront Corps, or that the directors themselves were interested or lacked independence. Nor does Trump show that any of the defendants sought to destroy the value of their investment, or that they had an interest in obtaining anything other than an optimal price for the Properties. None of Trump’s claims support the conclusion that defendants intentionally sought to sell the Properties for a price that was below their market value, or to reinvest the sale proceeds in overpriced rental properties.

For the foregoing reasons, the amended complaint fails to allege that the directors of the Hudson Waterfront Corps would receive a personal benefit not shared equally by the partners with respect to the sale of the Properties and the 1031 Exchange reinvestment plan. Nor does the pleading allege that the challenged actions would impact the general partners and their boards in a materially different way than the other partners. Accordingly, Trump’s claim that the general partners were interested, and lacked independence, is unpersuasive.

Trump also argues that defendants’ conduct falls outside the protections of the business judgment rule. Trump claims that the general partners abdicated control over the sale of the Properties, that the sale was not the product of minimal due care, and that the sale was made in bad faith or constitutes corporate waste.

“It is a presumption that in making a business decision the directors ... acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation.” *Aronson v Lewis*, 473 A2d 805, 812 (Del 1984). However, the business judgment rule “has no role where directors have ... abdicated their functions.” *Aronson*, 473 A2d at 813.

Under Delaware law, analyzed in the context of the application of the business judgment rule, fiduciaries selling a substantial partnership asset have a duty to maximize the value of that property. *Cede & Co. v Technicolor, Inc.*, 634 A2d 345, 367-70 (Del 1993). The exercise of the duty of care is not satisfied where, for example, the fiduciary fails to make a “prudent search for alternatives,” fails to put the asset up for auction, causes a lock-up that impedes the emergence of information, and fails to “reach an informed decision in approving” the transaction. *Id.* at 369.

To prevail on a bad faith claim, Trump “must overcome the general presumption of good faith by showing that the board’s decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation’s best interests” (*White v Panic*, 783 A2d 543, 554 n 36 [Del 2001]), and that the “decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith” (*In re J.P. Stevens & Co., Inc. Shareholders Litig.*, 542 A2d 770, 780-781 [Del Ch 1988]).

[Corporate] waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude ex post that the transaction

was unreasonably risky.

*Brehm*, 746 A2d at 263. “The burden is on the party challenging the decision to establish facts rebutting the presumption.” *Aronson*, 473 A2d at 812.

As discussed above, Trump fails to show how the general partners were controlled by any of the defendants. The amended complaint fails to show that the general partners abdicated control over the sale of the Properties to Cheng or the Cheng Group. Moreover, the alleged divestment plan never occurred. Thus, for the same reasons stated above, the allegations supporting Trump’s abdication claim are conclusory, vague and counterintuitive. Therefore, Trump’s abdication argument is without merit.

Central to Trump’s challenge to the business judgment exercised by the general partners, for lack of minimal due care, is his allegation that “[t]he general partners, like the Cheng Group, had no appraisals, valuations, analyses, or any other relevant market information to justify the sale or the \$1.76 billion price.” Amended Complaint, ¶ 37. Trump claims that the general partners failed to take “the most basic steps necessary to determine or secure the [Properties’] market value,” that they were uninformed about the market value of the Properties, and that they ignored information that the Properties’ value exceeded the sale price. Amended Complaint, ¶¶ 3, 34, 37, 65-70.

However, as discussed in the Order, Gross’s affidavit was persuasive that the amount received for the Properties was a realistic and fair figure reached after investigation by the purchaser. According to Gross, and the documentary evidence, at the same time as the general partners were negotiating with Extell, they were also engaged in detailed negotiations with several other highly qualified real estate entities, including non-parties Vornado Realty Trust,

The Related Companies and the Durst Organization. Gross stated that these negotiations culminated in real offers that were based on knowledge of the Properties, offers which were below the \$1.76 billion sale price.

Gross stated that the expressions of interest of non-parties Colony Capital and Richard LeFrak were not based upon any knowledge of the complex realities of the Properties, information which formed the basis of the offers of Extell, Vornado Realty Trust, The Related Companies, and other potential buyers. According to Gross, the general partners sought to obtain the highest price for the Properties, and decided not to pursue Colony Capital and Richard LeFrak's expressions of interest due to the unlikelihood that either would become a real offer that exceeded the Extell offer of \$1.76 billion, and because the general partners were concerned that the real estate market could collapse.

Moreover, as discussed above, the allegations of the amended complaint that challenge the general partners' business judgment are contradicted by the documentary evidence submitted by Gross with the general partners' current motion to dismiss. These documents show that the general partners conducted several appraisals, using two prominent appraisers. The sale of the Properties was discussed with at least four prominent real estate companies in New York City. Gross Aff., Ex. B. Having appraised and marketed the Properties, Trump fails to explain why the general partners were obligated to pursue any mere expressions of interest from purported purchasers.

Trump also fails to allege any facts showing that the general partners "were uninformed about the market value of the [Properties], and ignored information that the property value was far greater than the sales price." Trump Opp. Mem. of Law, at 14. To the contrary, the

documentary evidence shows that the Properties were sold for approximately \$188 million *more* than the most recent appraisals of the Properties. Trump fails to rebut this showing.<sup>3</sup>

Moreover, while Trump continues to argue that the Properties were sold for \$1 billion below their value, as discussed above, he fails to rebut the appraisals submitted by the general partners. Other than conclusory allegations that other purchasers would have purchased the Properties for \$1 billion more than the price at which the Properties were sold, and allegations of expressions of interest from purported purchasers, Trump fails to plead any facts showing that the Properties could have been sold for \$2.7 billion.

Trump also argues that defendants failed to analyze whether the sale of the Properties was justified for the purpose of reinvesting in rental properties. However, other than conclusory allegations, Trump fails to show that the reinvestment plan was uninformed or prohibited under the Agreements, or that the Hudson Waterfront LPs overpaid for these properties.

Trump claims that the sale of the Properties was beyond the bounds of reasonable judgment, and must have been the product of bad faith or corporate waste, because three of the ten parcels being sold were appraised at \$543 million, but after the sale these parcels were “flipped” for \$816 million. 4/4/06 Tr., at 22. According to Trump, applying this differential to the entire \$1.76 billion sale price demonstrates that the flipped Properties were re-sold at a 40% mark-up, a mark-up that presumably could have been enjoyed by the Hudson Waterfront LPs,

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<sup>3</sup> Tellingly, while Trump continuously asserts that the Properties were being sold for far less than their value, he never sought an order preventing the sale. Rather, Trump moved, by order to show cause, for an order of attachment of the proceeds from the sale. The only benefit to Trump from attaching the proceeds would have been the proceeds themselves, as opposed to the benefit of finding a buyer willing to pay a significantly higher price for the Properties, a claim that is at the heart of Trump’s lawsuit.

and by Trump. *Id.*, at 23.

However, Trump's selective arithmetic fails to explain how the value of the other seven parcels affected the three parcels identified by Trump. As discussed in the Order, Gross's un rebutted affidavit explained that the Properties are subject to many legal restrictions, encumbrances, zoning regulations, affordable housing requirements, infrastructure requirements, park contribution requirements and other restrictions that restrict the nature of the development that can be done on different parts of the Properties. Trump fails to explain the extent to which the three parcels he identified were burdened by the other seven parcels sold. In other words, Trump fails to explain what value the seven remaining parcels retained once the three parcels were flipped for \$816 million, essentially failing to consider the value of the Properties as a whole.

The amended complaint fails to show bad faith, or that the sale of the Properties and the reinvestment plan cannot be attributed to a rational business purpose. Nor does the amended complaint allege any facts, other than conclusory allegations, showing that defendants were grossly negligent or failed to consider all material facts reasonably available.

Moreover, each of the Agreements expressly exculpates the general partners, and any entity or person controlling the general or limited partners, "for any loss arising out of or in connection with the management, operation or conduct of the Partnership's business and affairs, except by reason of willful misconduct, fraud, gross negligence or disregard of duties and obligations under this Agreement." Agreement, Gruenglas Aff., Ex. 2, § 7.6 (a), at 40. In any event, the amended complaint fails to show any such conduct by defendants.

For the foregoing reasons, Trump fails to show a reason to doubt the independence of the

general partners, and the applicability of protection under the business judgment rule. Therefore, Trump fails to plead facts showing demand futility with respect to his derivative claims. Accordingly, the third, fifth, seventh, ninth, fourteenth, sixteenth and twentieth causes of action, all of which are asserted derivatively by Trump on behalf of the Hudson Waterfront LPs, are dismissed.

#### Breach of Contract

The Hudson Waterfront Corps next move to dismiss the eleventh cause of action for breach of contract, and breach of the implied covenant of good faith and fair dealing. Generally, this cause of action alleges that the Hudson Waterfront Corps breached the purpose of the Agreements by failing to operate and develop the Properties in the best interest of the partnerships, as required under the Agreements.<sup>4</sup>

Specifically, Trump claims that the Cheng Group breached the following sections of the Agreements: 2.1, 2.2., 4.1 and 7.1 - 7.6. Trump argues that the general partners' reinvestment of Trump's share of the proceeds from the sale of the Properties violates the parties' Agreements, and breaches the implied covenant of good faith and fair dealing. Trump also argues that the general partners failed to seek the best price for the Properties.

To state a cause of action for breach of contract, Trump must establish the existence of a contract, performance by plaintiff, breach by defendants, and damages sustained by plaintiff as a

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<sup>4</sup> According to Trump's opposition papers, paragraph 64 of the amended complaint alleges that the defendants "were, by contract, partners of Trump in the partnership and under various partnership instruments, and were required, among other things, to operate and develop Trump Place in the best interest of the partnership." Trump Opp. Mem. of Law, at 22. However, this allegation is not contained in paragraph 64 of the amended complaint. The court was unable to identify this allegation anywhere in the 40-page, 146-paragraph pleading.

result of the breach. *Furia v Furia*, 116 AD2d 694 (2d Dept 1986).

In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included.

*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002) (internal quotation marks and citations omitted).

Trump fails to identify any provision of the Agreements that prevents the type of reinvestment allegedly sought, and undertaken, by the general partners. To the contrary, the express “Purposes” of the partnerships, as defined in the Agreements, contemplated the sale, transfer, exchange, disposition and encumbrance of the Properties, and any other partnership assets (Agreements, § 2.2 [d]), and “such other lawful activities consistent with this Agreement as may be necessary or appropriate in connection with the foregoing” (*id.*, § 2.2 [g]). Thus, the Agreements expressly permit the general partners to consummate a 1031 Exchange, thereby reinvesting the proceeds from the sale of the Properties. Therefore, section 2.2 of the Agreements undermines Trump’s argument.

Section 2.1 of the Agreements states the name, principal office and registered agent of the limited partnerships. Sections 4.1 and 4.2 identify the general and limited partners, respectively. Article 7 describes the management of the partnership, granting the general partners full control over the management of the limited partnerships. Section 7.1 again expressly permits the general partners to “sell ... , mortgage, encumber, dispose of, exchange ... and otherwise deal in and with

the Partnership and the Partnership Assets ... ." Agreements, § 7.1, at 33. Trump fails to allege a breach of any of these provisions.

Trump argues that his "allegation that the Cheng Group did not seek the best price in the sale of Trump Place plainly states a claim for breach of their express and implied obligations under the partnership agreement." Trump Opp. Mem. of Law, at 22-23. However, Trump fails to identify this allegation in the amended complaint. Nor does Trump identify any provision of the Agreements to this effect, and the court is unable to locate this allegation in the pleading or the Agreements.

Thus, Trump's claim is not that the general partners failed to obtain the "best" price for the Properties. Rather, the essence of his argument is that the general partners failed to sell the Properties "at a price even remotely close to [their] market value," and that they failed to examine whether "the plan to sell the property for the purpose of reinvesting in rental properties served the partnerships' financial interests." Amended Complaint, ¶ 68.

However, as discussed above, the documentary evidence shows that the Properties were sold for approximately \$188 million *more* than the most recent appraisals of the Properties. Also discussed above, other than conclusory allegations, Trump fails to show that the reinvestment plan was uninformed or prohibited under the Agreements, or that the Hudson Waterfront LPs overpaid for these properties. Therefore, Trump's argument is unpersuasive.

Trump argues that the implied covenant of good faith and fair dealing prevents the general partners from acting contrary to Trump's interests, or contrary to the interests of the partnerships. However, Trump's argument is counterintuitive, because the general partners themselves stood only to lose by foregoing the best price for the Properties, or by reinvesting in

rental properties that do not serve the partnerships' interests. Other than conclusory allegations, nothing contained in the amended complaint shows that the general partners acted in a manner that would deprive Trump of receiving the benefits of their agreement. In short, Trump's brief fails to analyze how the implied covenant of good faith and fair dealing might salvage this claim. For the foregoing reasons, the Hudson Waterfront Corps' motion to dismiss the eleventh cause of action, for breach of contract, is granted.

### Books & Records

The general partners move to dismiss the eighteenth cause of action, arguing that Trump fails to explain how the general partners falsified book and records, and that the documentary evidence contradicts Trump's claims that Trump was refused access to, and inspection of, the Hudson Waterfront LPs' books and records. Trump does not respond to this argument.

The eighteenth cause of action claims that "the defendants have repeatedly refused to permit Trump to conduct any inspection or copying, refused to provide access to documents on request, and falsified other books and records to conceal their wrongdoing." Amended Complaint ¶ 139.

Section 12.2 (a) of the Agreements provides that "[t]he General Partner shall maintain, or cause to be maintained, complete and accurate records of all transactions of the Partnership." Schaeffer Aff., Ex. I, at 66. Section 12.2 (b) requires that the books and records be kept at the office of the Hudson Waterfront LPs, and that they "and shall be open for the inspection and examination (and making copies) by the Partners or their authorized representatives during regular business hours." *Id.*

As discussed above, Trump fails to show how the general partners falsified the Hudson

Waterfront LPs' books and records. However, under the Agreements, the general partners were responsible for the books and records, and they were required to permit Trump to inspect and examine the books and records. The general partners submit documentary evidence of correspondence exchanged between Trump's lawyers, and the lawyers for the general partners and the limited partnerships. The general partners argue that this correspondence establishes that they remained "ready and willing to work out a protocol for the inspection of the Limited Partnerships' business records ... ." Gruenglas Aff., Exs. 13, 15, 17, 21-23. However, this correspondence, if anything, shows that the general partners disputed whether Trump was permitted to access the books and records, and sought to establish a "protocol" for inspection that was not contemplated in the Agreements. Moreover, to date, it appears that Trump has been denied access to the limited partnerships' books and records. Therefore, this documentary evidence fails to refute Trump's claim against the general partners for access to books and records. Despite this court's dismissal of all other causes of action, Trump is entitled to inspection of the books of records immediately. Furthermore, he is entitled to access to the books and records throughout the continued course of the partnership. Accordingly, the general partners' motion to dismiss the eighteenth cause of action is denied.

#### Motion of Individual Defendants and Westside LPs

##### Jurisdiction

The individual defendants Vincent Lo (Lo), Charles Yeung (Yeung), Edward Wong (Wong) and David Chiu (Chiu) move to dismiss the complaint for lack of personal jurisdiction, under CPLR 302 (a).<sup>5</sup> In opposition, Trump argues that jurisdiction exists as a result of these

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<sup>5</sup> Defendant Henry Cheng does not contest jurisdiction.

defendants' membership in a New York partnership, independent from the partnership memorialized in the Agreements, whose purpose was the ownership and development of real estate in New York City.

"It is axiomatic that the essential elements of a partnership must include an agreement between the principals to share losses as well as profits." *Chanler v Roberts*, 200 AD2d 489, 491 (1<sup>st</sup> Dept 1994).

The amended complaint avers that, in 1994, the Cheng Group entered into an agreement with Trump, whereby they agreed to buy, develop and manage the Properties. According to the amended complaint, the agreement allocated responsibility for these undertakings to the Hudson Waterfront Corps, as general partners, and to Trump to oversee development, management and operations. The pleading alleges that this agreement is "confirmed by Lo's public acknowledgment that Trump and the Cheng Group agreed, among other things, 'to share profits from a sale' of the property." Amended Complaint, ¶ 25.

Conspicuously missing from Trump's pleading is any explanation of how this partnership was formed, or of any discussions among the principals that resulted in the partnership. Trump also fails to allege any facts showing that these principals agreed to share losses. The purported agreement, if anything, is merely an agreement to agree, which is unenforceable as a matter of law. *Lazard Freres & Co. v First Nat. Bank of Maryland*, 268 AD2d 294 (1<sup>st</sup> Dept 2000).

Citing *Penato v George* (52 AD2d 939, 942 [2d Dept 1976]), Trump argues that the "law will imply an agreement to share losses." However, *Penato* excused the failure to allege the sharing of losses only where "other elements of a joint venture are present" (*id.*), which Trump has not alleged in the amended complaint. Therefore, Trump's reliance upon *Penato* is misplaced.

That the alleged agreement was merely an agreement to agree is further evidenced by the written Agreements subsequently entered into, each of which contains a merger clause. The merger clauses state that each Agreement “supersedes all prior agreements among the parties with respect to the subject matter hereof ... and contains the entire Agreement among the parties with respect to such subject matter.” Schaeffer Aff., Ex. I, at 96-97, § 20.16.

Trump cites *Louis Dreyfus Corp. v ACLI Intern., Inc.* (52 NY2d 736 [1980]), arguing that the merger clauses in the written Agreements are irrelevant, because the individual defendants claim that they are not parties to those Agreements, and none of them is a partner in the limited partnerships. In *Louis Dreyfus Corp.*, the Court of Appeals recognized an “overarching oral partnership agreement” between two parent corporations to share profits under a partnership contract between their subsidiaries. *Id.*, at 739. The Court held that a merger clause in the written contract between the subsidiaries did not bar enforcement of the separate oral agreement between the parent companies, which contained material terms *not* encompassed by the written contract. *Id.*

Here, the amended complaint avers that the purpose of the oral partnership agreement “was and remains exclusively to buy, develop, and manage the property” (Amended Complaint, ¶ 26), which is exactly the same purpose as explicitly provided in the “Purpose” section of the written Agreements. Schaeffer Aff., Ex. I, at 19-21, § 2.2. Thus, “[p]laintiffs do not allege that an oral agreement differing in its terms from the [written] agreement existed between plaintiffs and defendants. Rather, they argue that the oral agreement was exactly the same as the [written] agreement and encompassed the same terms,” but that different parties were involved. *Bross Util. Serv. Corp. v Aboubshait*, 618 F Supp 1442, 1446 (SD NY 1985). Under these circumstances,

*Louis Dreyfus Corp.* is inapposite. *Id.* For the foregoing reasons, the alleged oral partnership agreement is not a sufficient basis to confer jurisdiction over the individual defendants.

Trump next argues that the individual defendants are subject to jurisdiction pursuant to CPLR 302 (a) (1), (a) (2) and (a) (3). The court may exercise personal jurisdiction under CPLR 302 (a) (1) where the defendant, in person or through an agent, transacts any business within the state or contracts anywhere to supply goods or services in the state. CPLR 302 (a) (1) “is a ‘single act statute’ and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant’s activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988).

Trump’s first argument under CPLR 302 (a) is that the individual defendants are subject to jurisdiction under an agency theory. Establishing jurisdiction based upon an “agency” theory requires a showing that the alleged principal “exercised some control” over the agent’s activities (*id.*), and that “the defendant was a ‘primary actor’ in the specific matter in question; control cannot be shown based merely upon ... conclusory allegations” (*Karabu Corp. v Gitner*, 16 F Supp 2d 319, 324 [SD NY 1998]).

Here, the amended complaint alleges that Cheng “represented and acted on behalf of the Cheng Group,” that the Cheng Group “has acted and is acting (through Cheng) on behalf of itself and on behalf of a separate group of Chinese investors,” and that Cheng acted “with the knowledge and consent of the Cheng Group.” Amended Complaint, ¶¶ 10, 15, 30. The pleading avers that the Cheng Group instructed the general partners by communicating through Cheng. *Id.*, ¶¶ 37, 52. However, all of these allegations are conclusory, because they conclude that Cheng

was the agent of the Cheng Group without explaining how the Cheng Group controlled Cheng.

Trump submits two letters from Cheng to Trump, which he claims establish that Cheng acted as the Cheng Group's agent for purposes of jurisdiction. The first letter, dated May 4, 2005, states that, "[a]fter careful consideration, our Hong Kong partners have agreed to accept the current offer and sell all the properties ... for \$1.75 billion" (May 4<sup>th</sup> Letter). *Bowe Aff.*, Ex. B. The second letter, dated May 25, 2005, states that "[w]e are in negotiations ... for the sale of significant portions of Riverside South" (May 5<sup>th</sup> Letter). *Id.*, Ex. A.

Both letter's copied defendant Lo. However, neither letter specifies who the "Hong Kong partners" are. More significantly, neither letter makes any showing that Cheng was controlled to any extent by the other individual defendants who comprise the Cheng Group, or that any of these individuals were primary actors with respect to the circumstances surrounding the sale of the Properties. Therefore, Trump fails to establish personal jurisdiction over the individual defendants under an agency theory.

Trump claims that "representatives of the Cheng Group traveled to New York from Hong Kong" to inform Trump of the sale of the Properties. Amended Complaint, ¶ 39. Trump also argues that Lo, in his affirmation, called Trump to discuss the sale of the Properties, and called non-party Richard LeFrak in New York to inquire about his interest in buying the Properties for \$3 billion. However, Trump fails to identify which "representative" of the Cheng Group traveled to New York. Moreover, Lo's affirmation merely states that he returned Trump's telephone call, and that he attempted to call Richard LeFrak but was unsuccessful. These alleged calls are insufficient to confer jurisdiction. *Granat v Bochner*, 268 AD2d 365, 365(1<sup>st</sup> Dept 2000) ("making phone calls to this State are not, without more, activities tantamount to 'transacting

business' within the meaning of the aforecited long-arm statute"). For the foregoing reasons, Lo, Yeung, Wong and Chiu are not subject to personal jurisdiction under CPLR 302 (a) (1).

CPLR 302 (a) (2) permits the court to exercise personal jurisdiction over a non-domiciliary who "commits a tortious act within the state ... ." The traditional view is that this provision requires "a showing that the nondomiciliary committed a tortious act *in this State*." *Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 464 (1965) (emphasis added); *Bensusan Rest. Corp. v King*, 126 F3d 25, 28 (2d Cir 1997) ("CPLR § 302 (a) (2) reaches only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act"); Practice Commentary C302:10 ("CPLR 302 (a) (2) ... has been narrowly construed to apply only when the defendant's wrongful acts are performed in New York").

However, some courts have resisted the traditional view in cases involving fraud, conspiracy, and other illegal activities. See e.g. *Banco Nacional Ultramarino, S.A. v Chan*, 169 Misc 2d 182 (Sup Ct, NY County 1996), *aff'd* 240 AD2d 253 (1<sup>st</sup> Dept 1997) (held that a defendant who converted funds on deposit in a New York bank did not have to be present in New York in order to fall within the reach of CPLR 302 [a] [2]).

Here, the amended complaint fails to show that Lo, Yeung, Wong and Chiu were present in New York at any relevant time. Moreover, other than conclusory allegations that lack any detail or particularity, and for the reasons stated in this decision, the amended complaint fails to plead any claim of fraud, conspiracy, or any other illegal or tortious activity against these individual defendants that would subject them to jurisdiction under CPLR 302 (a) (2).

CPLR 302 (a) (3) subjects a non-domiciliary to jurisdiction who:

commits a tortious act without the state causing injury to person or property within the state ..., if he

(I) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce ... .

Trump argues that the amended complaint, and the May 4<sup>th</sup> and 5<sup>th</sup> Letters, show that Lo, Wong, Yeung and Chiu committed a tortious act by: participating in discussions and meetings with interested parties concerning the sale of the Properties; agreeing to accept the offer to sell the Properties for \$1.76 billion; engaging in negotiations to sell portions of the Properties; and agreeing to give the buyer an exclusivity period in connection with the sale of the Properties. Trump Opp. Mem. of Law, at 19; Bowe Aff., Exs. A and B.

The amended complaint asserts tort claims for breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. Each of these claims relies upon the alleged oral partnership agreement between Trump and the individual defendants. However, as discussed above, there was no oral partnership agreement. Thus, no fiduciary duty arose. To the extent that Trump's tort claims do not rely upon the alleged oral partnership agreement, for the reasons stated in this decision, those claims fail to state a cause of action. Therefore, there was no tortious act. Accordingly, these defendants are not subject to jurisdiction under CPLR 302 (a) (3).

Trump argues that he has made a "sufficient start" to showing that jurisdiction may exist over Lo, Yeung, Wong and Chiu by piercing the corporate veil, because Cheng allegedly dominated the general partners and the Westside LPs for the benefit of the individual defendants, and with their knowledge and consent.

“The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.” *Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 142 (1993).

Here, all of Trump’s claims of domination involve actions undertaken by Cheng, not Lo, Yeung, Wong or Chiu. Other than conclusory allegations, Trump fails to show *any* facts of domination warranting piercing the corporate veil. *DaSilva v American Tobacco Co.*, 175 Misc 2d 424, 428 (Sup Ct, NY County 1997) (conclusory statements insufficient to pierce corporate veil).

Moreover, Lo, Yeung, Wong and Chiu’s ownership interests in the New York entities are insufficient to establish jurisdiction. *Ferrante Equip. Co. v Lasker-Goldman Corp.*, 26 NY2d 280, 283 (1970); *see also Generale Bank, New York Branch v Choudury*, 776 F Supp 123, 124 (SD NY 1991) (investment in New York business venture insufficient to establish jurisdiction). Therefore, the court has no jurisdiction over Lo, Yeung, Wong and Chiu under a theory of piercing the corporation veil.

For the foregoing reasons, the court lacks personal jurisdiction over defendants Lo, Yeung, Wong and Chiu. Accordingly, the amended complaint is dismissed in its entirety as to these defendants.

#### Failure to State a Cause of Action

Cheng and the Westside LPs argue that Trump’s tenth cause of action for breach of the alleged oral partnership agreement between Trump and the Cheng Group. As discussed above, there was no oral partnership agreement. Therefore, the Cheng Group’s motion to dismiss the

tenth cause of action is granted.

The Westside LPs move to dismiss the twelfth cause of action for breach of contract. This claim alleges that the Westside LPs breached section 6.1 of the Hudson Waterfront LPs' partnership Agreements, and the implied covenants of good faith and fair dealing. In opposition, Trump argues that the Westside LPs participated in the sale of Trump place as the alter egos of the individual defendants.

Section 6.1 provides that "the Limited Partners shall not take part in the management of the business or affairs of the Partnership or control the Partnership business." Schaeffer Aff., Ex. K, § 6.1, at 14. However, under the Agreements, the limited partners have no managerial powers. Moreover, Trump fails to identify any act taken by the Westside LPs in connection with the management or control of the Hudson Waterfront LPs. In addition, as discussed above, Trump's alter ego argument is without merit. Therefore, Trump has not alleged a breach of these Agreements.

Trump also has not alleged anything done by the Westside LPs which will have had the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Therefore, Trump's claim that the Westside LPs breach the implied covenant of good faith and fair dealing is without merit. Accordingly, the Westside LPs' motion to dismiss the twelfth cause of action is granted.

Cheng and the Westside LPs argue that the eighteenth cause of action, for access to the Hudson Waterfront LPs' books and records, should be dismissed, based upon the partnership Agreements. Trump does not respond to this argument.

As discussed above, under the Agreements, the general partner was responsible for the

books and records, not Cheng or the Westside LPs. Accordingly, the eighteenth cause of action for access to books and records is dismissed as to Cheng and Westside LPs.

Cheng and the Westside LPs next argue that Trump fails to state any claims against them for breach of fiduciary duty, because, as limited partners, they had no control over the limited partnerships, and they owed no fiduciary duties to Trump. In opposition, Trump argues that the individual defendants and the Westside LPs owed fiduciary duties as affiliates of the general partners who have exercised control over the Hudson Waterfront LPs' property.

The amended complaint asserts breach of fiduciary duty claims against Cheng and the Westside LPs in the first, second and third causes of action.<sup>6</sup>

Under Delaware law, "a fiduciary is typically one who is entrusted with the power to manage and control the property of another." *Bond Purchase, L.L.C. v Patriot Tax Credit Properties, L.P.*, 746 A2d 842, 864 (Del Ch 1999). However, "in the absence of any provision in the Partnership Agreement engrafting fiduciary duties onto [a limited partner]," that limited partner "owes no fiduciary duties to the other limited partners ... ." *Id.*

"While mere ownership - either direct or indirect - of the general partner does not result in the establishment of a fiduciary relationship, those affiliates of a general partner who exercise control over the partnership's property may find themselves owing fiduciary duties to both the partnership and its limited partners." *Bigelow/Diversified Secondary Partnership Fund 1990 v Damson/Birtcher Partners*, 2001 WL 1641239, \*8 (Del Ch, Dec. 4, 2001).

In *Bigelow*, the pleading sufficiently alleged fiduciary liability against the general partners'

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<sup>6</sup> The court notes that, for the reasons stated above, the second and third causes of action are already dismissed. In any event, for the reasons stated herein, these claim fail to state a cause of action.

affiliates, where the affiliates allegedly “controlled the day-to-day operations and affairs of the Partnership.” *Id.* The pleading also alleged specific examples of transactions involving “a long-term course of conduct by the [defendants] with the purpose of deterring a sale of the Partnerships’ properties in order that [certain defendants] continue to receive fees.” *Id.* Similarly, in *Wallace v Wood* (752 A2d 1175, 1180-82 [Del Ch 1999]), the court denied a motion to dismiss where the plaintiffs alleged that the defendants “personally caused the Limited Partnership to enter into self-interested transactions adverse to the interests of the Limited Partners.”

Section 7.1 (a) of the Agreements grants the general partner “full control over the management, operation and activities of, and dealings with, the Partnership Assets and the Partnership’s properties, business and affairs,” and “all rights and powers generally conferred by law and necessary, advisable or consistent in connection with the purposes of the Partnership ... .” Agreements, Schaeffer Aff., Ex. I, § 7.1 (a), at 31. The Agreements expressly limit the powers of the limited partners, stating that “the Limited Partners shall not take part in the management of the business or affairs of the Partnership or control the Partnership business.”<sup>7</sup> *Id.*

Thus, the Agreements vest exclusive control over the management of the Hudson Waterfront LPs in the general partners. Trump fails to identify any provision contained in the Agreements that imposes fiduciary duties upon the limited partners, or that provides the limited partners with any ability to manage or control the property of the Hudson Waterfront LPs. *Compare Cantor Fitzgerald, L.P. v Cantor*, 2000 WL 307370, \*10 (Del Ch, March 13, 2000) (fiduciary duty imposed upon limited partner where partnership agreement expressly provided that

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<sup>7</sup> The Agreements expressly permit the general and limited partners to compete directly with the Hudson Waterfront LPs. *Id.*, § 4.4, at 23.

“[e]ach Partner acknowledges its duty of loyalty to the Partnership and agrees to take no action to harm [or that would reasonably be expected to harm] the Partnership or any Affiliated Entity”).

The amended complaint alleges that “[t]he Cheng Group owns and controls 100% of the defendant general partners directly or, alternatively, indirectly through their 100% ownership and control of the Westside Limited Partnerships and of the general partners of the Westside Limited Partnerships.” Amended Complaint, ¶ 19. However, the amended complaint fails to show that either Cheng or the Westside LPs controlled the day-to-day operations of the Hudson Waterfront LPs.

Moreover, Trump admits in the amended complaint that the Westside LPs are owned by an “Investor Group,” which the pleading defines as “a separate group of Chinese investors.” *Id.*, ¶ 15. This separate group of Chinese investors, together with the Cheng Group, allegedly own their interests in the Properties through various offshore British Virgin Islands entities. *Id.* Therefore, based on the allegations of the amended complaint, the Cheng Group does not own 100% of the Westside LPs, but rather, the Westside LPs are owned, at least in part, by the Investor Group.

Nor does Trump show that Cheng, any of the individual defendants, or the Westside LPs personally caused the Hudson Waterfront LPs to enter into self-interested transactions adverse to the interests of Trump. As discussed above, the documentary evidence establishes that the sale of the Properties was not adverse to Trump. To the contrary, the Gross affidavit shows that the Properties were sold for approximately \$188 million *more* than the most recent appraisals of the Properties. All of the parties stood to gain equally in proportion to their respective ownership interests.

Moreover, contrary to Trump’s assertion, Delaware “[c]ourts have not found limited

partners subject to default fiduciary duties in the absence of a fiduciary relationship.” *Cantor Fitzgerald, L.P.*, 2000 WL 307370, at \*20. Furthermore, as discussed above, Trump fails to plead alter ego liability. Therefore, Trump fails to show that the corporate veil could be pierced to reach Cheng or the Westside LPs. Trump fails to show that Cheng or the Westside LPs exercised control over the Hudson Waterfront LPs or the general partners. For the foregoing reasons, Trump’s claims for breaches of fiduciary duties fail to state causes of action, and the first, second and third causes of action of the amended complaint are dismissed as to defendants Westside LPs and Cheng.

Defendants next move to dismiss Trump’s fourth and eighth causes of action for aiding and abetting breach of fiduciary duty and tortious interference with fiduciary duty.<sup>8</sup>

To state a claim for aiding and abetting a breach of fiduciary duty, Trump must show: “(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.”

*Kaufman v Cohen*, 307 AD2d 113, 125 (1<sup>st</sup> Dept 2003); *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A2d 59, 72 (Del 1995) (same). A claim for tortious interference with fiduciary duty consists of the same elements. *Hannex Corp. v GMI, Inc.*, 140 F3d 194, 203 (2d Cir 1998).

As discussed above, Trump fails to show that a fiduciary duty existed and was breached. To the extent that Trump’s claim relies upon the alleged oral partnership agreement, the claim fails, because, as discussed above, Trump has not alleged the existence of such an agreement. Accordingly, the fourth and eighth causes of action are dismissed.

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<sup>8</sup> The court notes that these claims were already dismissed because they are derivative, rather than direct, claims. In any event, for the reasons stated herein, these claim fail to state a cause of action.

Defendants next move to dismiss the sixth cause of action for conspiracy to breach fiduciary duties, arguing that neither New York nor Delaware recognize a separate cause of action for conspiracy. Trump concedes that conspiracy is not a separate tort.<sup>9</sup> In opposition, citing *Alexander & Alexander of N.Y., Inc.* (68 NY2d 968, *supra*), Trump argues that his allegations of conspiracy should be permitted “to connect the actions of separate defendants with an otherwise actionable tort.” In this context, Trump claims that his conspiracy claim is based upon his allegation that the general partners committed a wrongful act by selling the Properties at a grossly deficient price, with the agreement of the remaining defendants.

In order for a conspiracy to be actionable, Trump must plead an agreement to do something that independently would constitute a tort. *Smukler v 12 Lofts Realty*, 156 AD2d 161, 163 (1<sup>st</sup> Dept 1989). Trump must allege, among other things, facts sufficient to constitute an agreement or common understanding, and a joint intent to tortiously injure. *Conspiracy-Civil Aspects*, 20 NY Jur 2d, § 19.

However, “a mere conspiracy to commit a [tort] is never of itself a cause of action.” *Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 989 (1986); *Nutt v A.C. & S. Co., Inc.*, 517 A2d 690, 694 (Del Super 1986) (“[c]ivil conspiracy is not an independent cause of action in Delaware, but requires an underlying wrong which would be actionable absent the conspiracy”).

Moreover, as discussed above, the documentary evidence submitted with Gross’s affidavit establishes that the Properties were not sold at a grossly deficient price. In any event, the

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<sup>9</sup> The court notes that this claim was already dismissed because it is a derivative, rather than a direct, claim. In any event, for the reasons stated herein, these claim fail to state a cause of action.

amended complaint fails to show an agreement among the defendants for an unlawful purpose, or a joint intent to tortiously injure Trump. The court considered Trump's allegations of conspiracy in connection with his tort claims, and, for the reasons stated in this decision, Trump's conspiracy allegations do not substantiate those claims. Therefore, Trump's argument is unpersuasive, and the sixth cause of action is dismissed.

#### Hudson Waterfront LPs Motion

The Hudson Waterfront LPs move to dismiss the seventeenth cause of action for dissolution, arguing that none of the Agreements trigger dissolution, and that Trump fails to show that it is not reasonably practicable for the partnerships to continue. In opposition, Trump argues that the partnership Agreements mandate dissolution, that defendants' breach of their fiduciary duties warrants dissolution, and that the purpose of the limited partnerships no longer exists.

Delaware's Limited Partnership Law requires a limited partnership to be dissolved and its affairs wound up upon the first to occur of the following circumstances:

(1) At the time specified in a partnership agreement, but if no such time is set forth in the partnership agreement, then the limited partnership shall have a perpetual existence;

...

(5) Upon the happening of events specified in a partnership agreement; or

(6) Entry of a decree of judicial dissolution under § 17-802 of this title.

6 Del C § 17-801.

Section 17-802 provides that, "[o]n application by or for a partner the Court of Chancery may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry

on the business in conformity with the partnership agreement.” Under section 17-802, the test is “whether it is ‘reasonably practicable’ to carry on the business of a limited partnership, and not whether it is impossible.” *In re Silver Leaf, L.L.C.*, 2005 WL 2045641, \*10 (Del Ch 2005).

The amended complaint alleges that the Agreements do not permit the reinvestment of sale proceeds in rental properties. Amended Complaint, ¶¶ 56, 133-35. It also avers that, under the Agreements, the Hudson Waterfront LPs are required to distribute sale proceeds from a sale of substantially all of the partnerships’ assets. *Id.*

Section 17.1 (b) of the Agreements provide that the partnership shall be dissolved upon “a sale or other disposition of all or substantially all of the assets of the Partnership, *unless within 10 business days thereafter the General Partner determines to continue the Partnership ...*”

(Emphasis added.) As stated in the Order, the express “Purposes” of the partnerships, as defined in the Agreements, contemplated the sale, transfer, exchange, disposition and encumbrance of the Properties, and any other partnership assets. *Id.*, § 2.2 (d).

Article 9 of the Agreements provides that “Cash Available for Distribution shall be distributed by the Partnership from time to time as determined by the General Partner (but no less frequently than annually) ...” *Id.*, article 9, at 50. “Cash Available for Distribution” is defined as net cash after providing for cash reserved for debts, costs, obligations, liabilities and expenses,

related to or incurred in the operation and/or development of the Partnership ... whether for operating expenses or capital expenditures, previously incurred or anticipated to be incurred in the foreseeable future (including, without limitation ... future anticipated development costs) ... or other requirements of the Partnership, in each case as determined by the General Partner in its sole discretion.

*Id.* at 6-7. The remainder of article 9 describes the priority of distribution, once Cash Available

for Distribution is determined. It does not create any obligation to distribute sale proceeds, or any right in Trump to redeem his interest in the limited partnerships.

Thus, dissolution is not required upon a sale if the general partners determine to continue the partnership, which here they have done by virtue of the 1031 Exchange reinvestment plan. Trump fails to identify any provision in the Agreements to the contrary that would require dissolution upon the sale of the Properties, or a 1031 Exchange.

As this court already determined in the Order, the term of the Agreements expires on December 31, 2044, requiring dissolution of the partnerships. Agreements, art. 3, at 21, and art. 17 at 82. The Agreements do not obligate the general partners to distribute partnership assets or sale proceeds to the limited partners prior to this date, unless dissolution occurs under one of the events listed in section 17.1 of the Agreements, none of which are alleged here.

Moreover, nothing contained in the amended complaint shows that it would not be reasonably practicable to carry on the business of the Hudson Waterfront LPs in conformity with the partnership agreement. Trump admits in the amended complaint that the sale of the Properties “provided a very high return to Trump personally ... .” Amended Complaint, ¶ 40. Moreover, nothing contained in the amended complaint shows that there was a deadlock that prevented the Hudson Waterfront LPs from functioning pursuant to their Agreements.

In short, Trump fails to “point to specific facts on which this Court may determine that the business is no longer reasonably practicable to continue.” *Cincinnati Bell Cellular Systems Co. v Ameritech Mobile Phone Service of Cincinnati, Inc.*, 1996 WL 506906, \*9 (Del Ch 1996); compare *PC Tower Ctr., Inc. v Tower Ctr. Dev. Assoc. Ltd. Partnership*, 1989 WL 63901, \*6 (Del Ch 1989) (dissolution ordered where business operated at substantial loss, and outstanding

debt was without recourse and was far in excess of its value); and *Haley v Talcott*, 864 A2d 86, 89 (Del Ch 2004) (dissolution ordered where deadlock prevented business from functioning as provided in its LLC agreement). Therefore, the amended complaint fails to state a cause of action for dissolution pursuant to section 17-802 of Delaware's Limited Partnership Law.

Trump argues that dissolution is warranted because defendants breach their fiduciary duties. However, as discussed above, Trump fails to state any claim for breach of fiduciary duty. Nor does Trump show any "fiduciary misconduct" by any of the defendants (Trump Opp. Mem. of Law, at 8), or any violation of the partnership Agreements. Therefore, the Hudson Waterfront LPs' motion to dismiss the seventeenth cause of action is granted.

### CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence numbers 011, 012 and 013 are granted to the extent that the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteen, fourteenth, fifteenth, sixteenth, seventeenth, nineteenth and twentieth causes of action are severed and dismissed, and the complaint is dismissed in its entirety as to defendants Henry Cheng, Vincent Lo, Charles Yeung, Edward Wong, David Chiu, Hudson Waterfront Assoc., L.P., Hudson Waterfront Assoc., I, L.P., Hudson Waterfront Assoc., II, L.P., Hudson Waterfront Assoc., III, L.P., Hudson Waterfront Assoc., IV, L.P., Hudson Waterfront Assoc., V, L.P., Hudson Westside Assoc., L.P., Hudson Westside Assoc., I, L.P., Hudson Westside Assoc., II, L.P., Hudson Westside Assoc., III, L.P., Hudson Westside Assoc., IV, L.P., Hudson Westside Assoc., V, L.P., with costs and disbursements to these named defendants as taxed by the Clerk of the Court; and it

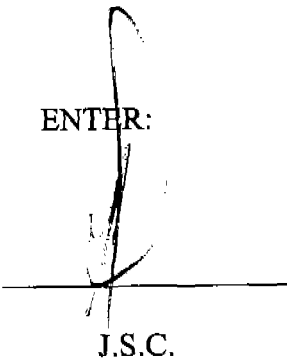
is further

ORDERED that defendants Hudson Waterfront Corp., Hudson Waterfront I Corp., Hudson Waterfront II Corp., Hudson Waterfront III Corp., Hudson Waterfront IV Corp., Hudson Waterfront V Corp. are directed to serve an answer to the eighteenth cause of action of the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 24, 2006

ENTER:



J.S.C.

**FILED**  
JUL 27 2006  
COUNTY CLERK'S OFFICE  
NEW YORK