Max v GS Agrifuels Corp.
2013 NY Slip Op 33110(U)
March 19, 2013
Sup Ct, NY County
Docket Number: 652233/2011
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 652233/2011
MAX, DAVID W.
vs.
GS AGRIFUELS CORPORATION
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 2/20/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 2-6
Answering Affidavits — Exhibits _____ | No(s). 9-11
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/19/13

SHIRLEY WERNER KORNREICH J.S.C.
_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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DAVID W. MAX, MICHAEL AMSPAUGH, KENT PERELMAN, SUSAN RUSSELL, CLAY FRANKLIN SCROGHAM, GARY SCROGHAM, LINDA SCROGHAM, HOWARD "NICK" CHANDLER, EDWARD T. HOLZHEIMER, as Trustee of the Edward T. Holzheimer Trust dated 2/15/99, DALLAS NEIL, CONWAY PRIVATE EQUITY GROUP LLC, MICHAEL SKINNER, LIFELINE PRODUCE, IAN O. MAUSNER, ERIC SCOTT and JENNY SCOTT, STEPHEN CHARTER and AMAZING MILLING, LLC,

Plaintiffs,

-against-

GS AGRIFUELS CORPORATION, GREENSHIFT CORPORATION, KEVIN KREISLER, VIRIDIS CAPITAL, LLC, SUSTAINABLE SYSTEMS, LLC, SUSTAINABLE SYSTEMS, INC., PAUL MILLER, THOMAS SCOZZAFAVA, MARK ANGELO, TROY RILLO, CARBONICS CAPITAL CORPORATION, YA GLOBAL INVESTMENTS, LP, YA GLOBAL INVESTMENTS (U.S.), LP, YA GLOBAL INVESTMENTS II (U.S.), LP, YA GLOBAL INVESTMENTS SPV, LLC, YORKVILLE ADVISORS LLC and JOHN DOES 1 through 100, representing unknown entities controlled and being used by one or more defendants to remove and hide assets belonging to defendants, and to manipulate the securities market for securities issued by public companies being financed by defendants, through naked short-selling, death-spiral financing and otherwise,

Defendants.

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Index No.: 652233/2011

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendants GS Agrifuels Corporation (Agrifuels), Greenshift Corporation (Greenshift), Kevin Kreisler, Viridis Capital, LLC (Viridis), Sustainable Systems, LLC (SSL), Sustainable Systems, Inc. (SSI), Paul Miller, and Carbonics Capital Corporation (Carbonics) (collectively, the Agrifuels Defendants) move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1) & (7).[1] Defendants' motion is granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

As this decision involves a motion to dismiss, the facts recited are taken from the Amended Complaint (the AC).

This case arises from the sale of plaintiffs' shares of stock in SSI to Agrifuels. The individual plaintiffs reside in various states, including Montana, California, Virginia, Florida, and Ohio. AC ¶¶ 1-10, 12, 14-16. Plaintiff Conway Private Equity Group, LLC is an Ohio company, and plaintiffs Lifeline Produce (f/k/a Lifeline Organics) and Amazing Milling LLC are Montana companies. ¶¶ 11, 13, 17.

Moving defendants are Delaware corporations, a New York limited liability company and Montana companies. ¶¶ 18-20, 23, 24-25. Individual defendant Kreisler, a New York resident, is the founder and CEO of Carbonics and Chairman and CEO of Greenshift, Agrifuels, and Viridis. ¶ 21. Individual defendant Miller is a resident of Virginia and the President of

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[1] The non-moving defendants have not appeared and may not have been served.

Carbonics, SSL, and SSI. ¶ 26. The non-moving defendants are residents of New York and New Jersey, a Cayman Islands company and Delaware companies. ¶¶ 27, 28-29, 30-34. [2]

In 2006, Agrifuels entered into negotiations with plaintiffs to purchase all of the outstanding shares of SSI's stock. ¶ 40. At that time, SSL was a wholly owned subsidiary of SSI and operated a renewable energy company in Montana. *Id.* Miller, a shareholder of SSI, acted as plaintiffs' agent in the negotiations with Agrifuels. ¶ 41.

On March 6, 2007, all of the shareholders of SSI, including plaintiffs and Miller, entered into Share Purchase Agreements (the SPAs) with Agrifuels, whereby Agrifuels became the owner of 100% of SSI's stock in exchange for cash and securities. ¶¶ 43-44. The SPAs were identical except for the following, which varied by shareholder: (1) the specific amount of cash and Agrifuels stock to be paid at closing (the Closing Payment); (2) the specific amount of money in the form of a secured convertible debenture payable within thirty days of the completion and commissioning of SSL's crush plant expansion (the Expansion Debenture); (3) the specified number of shares of Agrifuels common stock purchased at the rate of $4.50 per share (the Purchaser Shares); and (4) the specific amount of money paid on the first and second anniversaries of the closing date in the form of secured convertible debentures convertible into

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[2] Specifically, non-moving defendant Thomas Scozzafava (who is not one of the Agrifuels Defendants) is a New York resident and the former VP of Acquisitions and Investments of Greenshift and former President and CEO of Agrifuels. Non-moving defendants YA Global Investments, LP is a Cayman Islands company and YA Global Investments (U.S.), LP, YA Global Investments II (U.S.), LP, YA Global Investments SPV, LLC, and Yorkville Advisors, LLC are Delaware companies (collectively, the YA Companies). The other individual, non-moving defendants, Troy Rillo and Mark Angelo, are New Jersey residents and high level employees of the YA Companies.

Agrifuels common stock (the Term Debentures). ¶ 45. Viridis pledged 25 million shares of Greenshift common stock as security for performance under the SPAs, and Agrifuels pledged 11,270,515 shares of SSI as security for performance under the SPAs. ¶ 46. The SPAs are governed by New York law and provide for venue in this court. ¶ 44A.

The SPAs specified that Agrifuels would "provide any necessary capital and other resources to Sustainable that may be required to complete and fully commission the Expansion" and "[t]he timeline, budget and funding for the Expansion shall be as agreed upon between Purchaser and the former executive management of Sustainable within [30] days of the execution hereof." ¶ 49. The timing of this expansion determined when the Expansion Debenture would be paid. ¶ 44. Plaintiffs claim that defendants' representations that they intended to fund the expansion and had financing in place to do so was essential to their decision to enter into the SPAs. ¶ 50. However, Agrifuels never funded the expansion. ¶ 51. Plaintiffs eventually learned that defendants did not have the funding in place. ¶ 52.

On February 15, 2008, Greenshift announced that it intended to take Agrifuels private and that all of Agrifuels' shareholders would receive a cash payment of $0.50 per share in consideration for the cancellation of their shares. ¶ 54. Plaintiffs contend that they were the only Agrifuels shareholders that did not receive payment for their shares. *Id.* Plaintiffs further contend that, other than the Closing Payment, they have not received some or all of the payments due under the SPAs. ¶ 48.[3]

[3] The court will not discuss these payments in more detail because such detail is not pertinent to this motion.

Plaintiffs seek to impute liability for their claims onto all of the defendants by virtue of their operation of an undisclosed de facto partnership (the Partnership). *See* ¶ 37. Plaintiffs allege that defendants (a) control and use the corporate defendants and the John Doe defendants as alter egos; (b) move and shift assets to various defendants without adequate compensation for the purpose of hiding assets and profits; and © divide up the income and profits derived by the corporate defendants for various accounting and tax purposes. *Id.* Essentially, plaintiffs argue that "defendants are a single business entity" -- the Partnership. ¶ 37F.

Plaintiffs commenced this action in this court on August 10, 2011. On November 17, 2011, the action was removed to the United States District Court for the Southern District of New York. On January 17, 2012, the Agrifuels Defendants filed a motion to dismiss the complaint pursuant to FRCP 12(b)(6). On March 14, 2012, plaintiffs filed the AC, asserting four causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) negligent misrepresentation; and (4) fraud, and sought punitive damages. On March 30, 2012, the Agrifuels Defendants filed another 12(b)(6) motion to dismiss all of plaintiffs' claims except the breach of contract claim against Agrifuels. That motion was fully briefed in federal court. In an Order dated August 30, 2012, without deciding the motion, the federal court remanded the case to this court for lack of subject matter jurisdiction. On September 24, 2012, plaintiffs and the Agrifuels Defendants executed a stipulation whereby they agreed that their 12(b)(6) motion papers would be filed in the instant motion. The court notes that while the substantive law cited by the parties applies equally in federal and state court, as discussed below,

the court applies the CPLR's standards on this motion to dismiss and disregards the parties' citations and arguments relating to the federal rules set forth in their briefs.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty* Corp., 60 NY3d 491 (2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.* (citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Breach of Contract

The Agrifuels Defendants argue that plaintiffs can only maintain a claim for breach of contract against Agrifuels because the other defendants are not parties to the contracts at issue. This is true, except as to Greenshift and Viridis, who pledged common stock as collateral on Agrifuels' performance under the SPAs. Thus, plaintiffs may maintain a breach of contract claim against Agrifuels, Viridis, Greenshift, and Carbonics (as successor in interest to Greenshift) based on privity of contract. Plaintiffs concede this point, but argue that the rest of the Agrifuels Defendants are liable under either a veil piercing or de facto partnership theory of liability.

1. Piercing the Corporate Veil

"In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff." *Fantazia Int'l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009), citing *Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135 (1993). "Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive." *Id.*, citing *Freeman v Complex Computing Co.*, 119 F3d 1044 (2d Cir 1997).

Though the heightened pleading standards of the Federal Rules of Civil Procedure do not apply in this court, a plaintiff may not merely assert that veil piercing is warranted and parrot the relevant factors in the complaint. Rather, the plaintiff must allege *facts* that form the basis for the contention that these factors are present. *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 (2011) (in order to state viable claim to pierce corporate veil, plaintiff must allege facts); *accord Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d 541, 542 (2d Dept 2012); *see Brown v Noble, Inc.*, 29 Misc3d 1230(A), at *3 (Sup Ct, NY County, 2010) ("plaintiffs are required to plead *facts* sufficient to warrant piercing of the corporate veil.") (emphasis added). Moreover, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012), quoting *TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 (1998).

Plaintiffs make serious allegations regarding the existence and operation of the alleged Partnership, including that "one of the purposes of the Partnership and its defendant entities is to prevent U.S. taxing authorities from obtaining payment of taxes." AC ¶ 37G. Additionally, plaintiffs contend that the YA Companies exercise complete control and domination over the Partnership. Assuming this is true, plaintiffs, nevertheless, have failed to establish that veil piercing is warranted.

First, the breaches at issue relate to money that Agrifuels allegedly failed to pay the plaintiffs pursuant to the SPAs. The fact that the other defendants may have assets of Agrifuels

that might be subject to a fraudulent transfer claim is an issue more properly asserted in a post-judgment enforcement proceeding, not as a pre-judgment veil piercing claim.

Second, plaintiffs merely assert the existence of the Partnership without pleading *facts* demonstrating the presence of the relevant veil piercing factors. While the AC contains ample rhetoric about the veil piercing factors, there are scant facts to support such rhetoric. For instance, plaintiffs contend that the corporate defendants failed to adhere to corporate formalities, but do not identify which formalities were not adhered to. While plaintiffs assert that the YA Companies exercised domination and control over the Agrifuels Defendants and hid their assets, the AC does not detail how the Agrifuels Defendants were dominated or what assets were improperly transferred. Moreover, even if plaintiffs had adequately pled the YA Companies' domination over the Agrifuels Defendants, this domination, on its own, is insufficient to warrant veil piercing on the breach of contract claim because, as discussed *infra*, part II.D, plaintiffs failed to establish that defendants committed fraud. *See TNS Holdings*, 92 NY2d at 339-40. Therefore, plaintiffs cannot maintain their breach of contract claim against the alleged Partnership based on a veil piercing theory.

2. De Facto Partnership

Likewise, plaintiffs cannot maintain their breach of contract claim against the alleged Partnership on the ground that defendants operated as a de facto partnership. Where, as here, there is no written partnership agreement between the parties, a court may find that a partnership exists based on the "conduct, intention, and relationship between the parties." *Brodsky v Stadlen*, 138 AD2d 662, 663 (2d Dept 1988). But, "when parties adopt the corporate form, with

the corporate shield extended over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of stockholders. They cannot be partners inter sese and a corporation as to the rest of the world." *Weisman v Awnair Corp. of Am.*, 3 NY2d 444, 449 (1957) (internal quotation marks omitted).

Further, "[w]hether partnership status is enjoyed turns on various factors including sharing in profits and losses, exercising joint control over the business and making investments and possessing ownership interest in the partnership...the fact that an individual receives a share of the profits is not dispositive." *Blaustein v Lazar Borck & Mensch*, 161 AD2d 507, 508 (1st Dept 1990). The requisite factors are absent here. The documentary evidence establishes that the corporate defendants have parent-subsidiary and debtor-creditor relationships. However, **plaintiffs have not pleaded any facts to support their contention that, as a matter of law, the** defendant corporations are partnerships, instead of the stand alone corporate entities structured pursuant to their publicly filed incorporation documents. The breach of contract claim is dismissed against SSL, SSI, Kreisler, and Miller.

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

Every contract implies a promise that neither party will do anything that has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Dalton v Educational Testing Service,* 87 NY2d 384, 389 (1995). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" *Id.,* citing *Murphy v American Home Products Corp.*, 58 NY2d 293, 304 (1983). "A claim of implied duty of good faith and

fair dealing cannot create new duties under a contract or substitute for an insufficient contract claim." *Duration Mun. Fund, L.P. v J.P. Morgan Securities Inc.*, 2009 WL 2999201, at *7 (Sup Ct, NY County 2009), citing *Murphy*, 58 NY2d at 304 (breach of covenant of good faith and fair dealing claim dismissed since it was merely substitute for nonviable breach of contract claim).

The AC does not plead facts supporting a cause of action for breach of the covenant of good faith and fair dealing, but merely restates the allegations of plaintiffs' breach of contract claim. Indeed, plaintiffs do not set forth any arguments to support this independent cause of action. Instead, they argue that this claim should be "treated as part of Count 1." *See* Plaint. Mem., p. 3. Hence, plaintiffs' cause of action for breach of the covenant of good faith and fair dealing is dismissed as improperly duplicative of the breach of contract claim.

D. Negligent Misrepresentation

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v Stavitsky,* 8 NY3d 144, 148 (2007).

Plaintiffs cannot maintain a claim for negligent misrepresentation because the SPAs were the product of arm's length negotiations businesses and businessmen. The parties had no special or privity-like relationship. Ergo, this cause of action is dismissed.

E. Fraud

To properly plead a cause of action for fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance, and injury. *Small v Lorillard Tobacco*

Co., 94 NY2d 43, 57 (1999). Moreover, pursuant to CPLR 3016(b), the circumstances constituting the fraud must be stated in detail. *Id.*

Plaintiffs' fraud claim is based on a list of representations and omissions set forth in ¶¶ 74A-74K of the AC. At the outset, the court dismisses plaintiffs' claim based on fraudulent omissions because, as discussed *supra*, part II.C, no fiduciary relationship existed between the parties. *See SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 356 (1st Dept 2004).

As to the claimed misrepresentations, plaintiffs assert that defendants stated that: (i) funding was in place to complete the expansion of the plant; (ii) Agrifuels was prepared to commence the expansion of the plant immediately after the SPAs were executed; (iii) Agrifuels was prepared to pay the Expansion Debenture to plaintiffs; (iv) Agrifuels' common stock was worth $4.50 per share; (v) plaintiffs would receive $0.50 per share in the transactions where Greenshift eventually took Agrifuels private; (vi) Agrifuels would pay plaintiffs the payments (set forth in the SPAs) on the first and second anniversaries of the closing; and (vii) in the event of default, Agrifuels would pay plaintiffs the stock it pledged as collateral.

Plaintiffs cannot claim they reasonably relied upon the representation that funding was in place to complete the expansion of the plant, since this was a fact they could have verified before executing the SPAs. Due diligence here was commenced in May 2006, and the SPAs were executed in March 2007. AC ¶¶ 42, 44. Plaintiffs' failure to conduct due diligence concerning this fact during the year that due diligence was performed, precludes them from claiming reasonable reliance. Nor can plaintiffs maintain a fraud claim based on Agrifuels purported misrepresentation that it was prepared to commence the expansion of the plant immediately after

the SPAs were executed. If the existence of funding was material to plaintiffs' executing the SPAs, they could have insisted that Agrifuels substantiate that such funding was in place. If plaintiffs had conducted due diligence on the funding and discovered, as they contend, that the funding was not in place, it would have been obvious to plaintiffs that Agrifuels was not prepared to commence the expansion of the plaint immediately after the SPAs were executed.

Likewise, the alleged misrepresentations that Agrifuels was prepared to pay the Expansion Debenture to plaintiffs, that its common stock was worth $4.50 per share and that plaintiffs would receive $0.50 per share in the transactions where Greenshift eventually took Agrifuels private cannot form the basis of a fraud claim. These statements were merely representations that Agrifuels would perform its obligations under the SPAs. As such, they are duplicative of the contract claim. *See Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 (1st Dept 2009).

Finally, Agrifuels alleged statements that it would pay plaintiffs the payments (set forth in the SPAs) on the first and second anniversaries of the closing and that in the event of default, it would pay plaintiffs the SSI stock it pledged as collateral are not sufficient to establish fraud. The $4.50 price of the Purchaser Shares was negotiated. If plaintiffs did not share Agrifuels' opinion as to the value of the stock, they could have chosen not to execute the SPAs or negotiated different terms. Moreover, as noted above, plaintiffs' failure to conduct due diligence on Agrifuels' finances precludes their claim of reasonable reliance. And, the sufficiency of the price of $0.50 per share in the going private transaction, which occurred approximately one year after the SPAs were executed, could not have induced the execution of the SPAs. The failure to

disclose that the Partnership would take Agrifuels private is an omission, which, as discussed above, cannot give rise to a fraud claim absent a fiduciary duty.

The court notes that the parties spent a substantial portion of their briefs on the complex issue of what statutes of limitation apply to the fraud claims. The court declines to address this issue since the fraud claims are dismissed.

F. Punitive Damages

"Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but 'evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" *Ross v Louise Wise Services, Inc.*, 8 NY3d 478, 489 (2007) (quoting *Walker v Sheldon*, 10 NY2d 401 (1961)).

Plaintiffs demand for punitive damages is stricken because their only viable claim is for money allegedly owed under the SPAs. As discussed *supra*, parts II.C-D, the causes of action relating to possible moral turpitude and wanton dishonesty (negligent misrepresentation and fraud) are dismissed. Plaintiffs cannot recover punitive damages on a mere breach of contract arising out of a commercial transaction. Accordingly, it is

ORDERED that the motion to dismiss by defendants GS Agrifuels Corporation, Greenshift Corporation, Kevin Kreisler, Viridis Capital, LLC, Sustainable Systems, LLC, Sustainable Systems, Inc., Paul Miller, and Carbonics Capital Corporation against plaintiffs David W. Max, Kent Perelman, Susan Russell, Dallas Neil, Stephen Charter, Michael Amspaugh, Michael Skinner, Ian O. Mausner, Clay Franklin Scrogham, Gary Scrogham, Linda Scrogham, Howard "Nick" Chandler, Eric Scott, Jenny Scott, Edward T. Holzheimer, Conway

Private Equity Group, LLC, Lifeline Produce, and Amazing Milling LLC is granted in part as follows: (1) the Amended Complaint is dismissed with prejudice against defendants Sustainable Systems, LLC, Sustainable Systems, Inc., Kevin Kreisler, and Paul Miller; (2) the causes of action for breach of the covenant of good faith and fair dealing, negligent misrepresentation, and fraud are dismissed with prejudice against defendants GS Agrifuels Corporation, Greenshift Corporation, Viridis Capital, LLC, and Carbonics Capital Corporation; and (3) plaintiffs demand for punitive damages is stricken; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre St., rm. 228, New York, N.Y., for a preliminary conference on April 4, 2013 at 10:00 in the forenoon.

Dated: March 19, 2013

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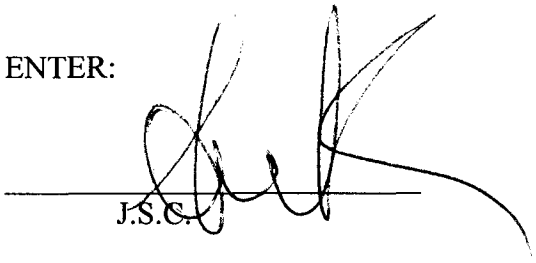

J.S.C.