

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

SALVATORE BONAVIDA, *et al.*,

Plaintiffs,

-against-

SAVENERGY HOLDINGS, INC., *et al.*,

Defendants.

-----X

**REPLY
MEMORANDUM OF LAW**

Index No. 603891/13

Preliminary Statement

This Reply Memorandum of Law is submitted in further support of motion to dismiss by defendants Savenergy Holdings, Inc., Savenergy, Inc., John Young Choi, Christine Chung Choi, Michael Corey and Alice Katherine Corey (the "Moving Defendants"). For the reasons set forth herein and in the moving papers the Court should grant the motion and dismiss all claims pleaded against the Moving Defendants.

The Amended Complaint

Following service of the instant motion to dismiss, plaintiffs, implicitly acknowledging the merits of the motion, filed an Amended Complaint. Plaintiffs' service of an amended complaint does not render motion to dismiss academic; the Moving Defendants elect to apply the motion to the new pleading. Livadictakis v. Tzitzikalakis, 302 A.D. 2d 369, 370 (2d Dept 2003). Sage Realty Corp v. Proskauer Rose Goetz & Mendelsohn, 251 A.D. 2d 35, 38 (1st Dept 1998). The Amended Complaint does not correct the obvious and admitted deficiencies in the initial pleading.

The Amended Complaint pleads fourteen causes of action. Plaintiffs claim to bring seven of these causes derivatively on behalf of Savenergy, Inc. In six of the derivative claims plaintiffs demand judgment on behalf of Savenergy, Inc., and on behalf of the individual defendants.

In the Amended Complaint plaintiffs' also assert four direct claims for damages against Savenergy, Inc., the corporation they purport to represent derivatively. The eleventh cause of action demands judgment in favor of plaintiffs against Savenergy, Inc. for \$263,000. The twelfth cause of action demands judgment in favor of plaintiffs against Savenergy, Inc. for \$505,000. The thirteen cause of action demands judgment in favor of plaintiffs against Savenergy, Inc. for \$768,000. The fourteenth cause of action demands judgment in favor of plaintiffs against Savenergy, Inc. for \$768,000.

Plaintiffs' Lack Standing to Bring the Derivative Claims

Plaintiffs' standing to sue on the derivative causes of action is governed by Delaware law since it is the state under which the limited partnership was created. O'Donnell v. Ferro, 303 A.D. 2d 567 (2d Dept 2003). Plaintiffs acknowledge that the law of Delaware applies to plaintiffs' derivative claims. See Plaintiffs' Memorandum of Law page 12 ("New York courts apply New York law to the internal affairs of a foreign corporation *with the exception of derivative claims*" [emphasis supplied], and page 13 ("These facts also establish that this Court should apply New York law to all cause of action in the Amended Complaint with *the exception of plaintiffs' derivative claims*" [emphasis supplied]).

Under Delaware law, a plaintiff in a shareholder derivative action, to have standing, must show both shareholder status at the time of the complained of transaction and be qualified to serve in a fiduciary capacity as a representative of the shareholder class. Matter of CPF

Acquisition Co. v. CPF Acquisition Co., 255 A.D.2d 200 (1st Dept 1998), citing Youngman v. Tahmoush, 457 A.2d 376, 379 (Del Ch Ct 1983). The qualification aspect is dependent upon the plaintiff's ability "to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution." Youngman v. Tahmoush, 457 A.2d 376, at 379).

Under Delaware law, as well as New York law, Plaintiffs' direct claims against Savenergy, Inc. create a conflict of interest that renders plaintiffs inadequate derivative representatives. Plaintiff cannot represent a corporation that they are simultaneously bringing direct claims against, e.g., JFK Family Ltd. Partnership v. Millbrae Natural Gas Development Fund 2005, L.P., 2008 WL 4308289 815 (West. Sup. Ct., 2008) (applying Delaware law); Jones v. Citigroup Inc., 2010 WL 2944224 (App Term, 1st Dept, July 27, 2010). *See also*, Barmash v. Perlman, 2013 WL 4467807, 8 (Sup Ct N.Y Co. Schweitzer 2013). As District Judge Rakoff stated in Wall St. Systems, Inc. v. Lemence, 2005 WL 292744, 3 (SDNY 2005), "[A]n individual shareholder has a conflict of interest, and therefore cannot adequately represent other shareholders, when he simultaneously brings a direct and derivative action."

The individual claims raised by the plaintiffs present "an impermissible conflict of interest." Tuscano v. Tusano, 403 F. Supp 2d 214, 223 (EDNY 2005); In Tusano, District Judge Spatt held:

"Forchelli Curto also argues that, as a matter of law, the plaintiff will not be able to adequately represent the interests of the corporation with respect to those causes of action brought derivatively, because the plaintiff is, at the same time, alleging direct claims. The Court agrees. Any individual claims raised by a shareholder in a derivative action present an impermissible conflict of interest. *See Wall Street Sys., Inc. v. Lemence*, No. 04 Civ. 5299, 2005 WL 292744, at *3 (S.D.N.Y.2005) (stating that an individual shareholder cannot simultaneously bring direct and derivative claims in the same action); *Ryan v. Aetna*, 765 F.Supp. 133, 136–37 (S.D.N.Y.1991) (explaining that a plaintiff

would be “subject to a conflict of interest in pursuing both direct and derivative claims” in the same action); *Petersen v. Fed. Devel. Co.*, 416 F.Supp. 466, 475 n. 6 (S.D.N.Y.1976) (noting that a plaintiff must choose between the pursuit of his personal interest and that of the corporation).” *supra* at 223.

In the Amended Complaint plaintiffs plead direct claims for damages against Savenergy, Inc. Plaintiffs, who simultaneously assert direct and derivative claims cannot adequately represent the interests of the corporation for purposes of the derivative action. Scopas Technology Co. v. Lord, 1984 WL 8266 (Del Ch Ct 1984). The court should dismiss the derivative claims pleaded in the Second, Third, Fourth, Fifth, Eighth, Ninth and Tenth causes of action in the Amended Complaint because plaintiffs have a conflict of interest by simultaneously bringing direct and derivative claims.

Plaintiffs’ Continue to Individually Assert Corporate Claims

Defendants moved the court to dismiss claims in the Initial Complaint belonging to Savenergy, Inc. but brought by plaintiffs’ directly. In their Amended Complaint plaintiffs attempt remedy this obvious defect by claiming to bring the Second, Third, Fourth, Eighth, Ninth and Tenth causes of action derivatively on behalf of Savenergy, Inc. and individually. In the Amended Complaint, Plaintiffs persist in claiming direct damage by reason of purported claims belonging to Savenergy Inc. In each of the derivative causes of action, plaintiffs claim individual damage and demand judgment individually.

The second cause of action for breach of fiduciary duty claims the “Corporate defendants and plaintiffs have sustained substantial financial damage (Amended Complaint ¶134) and demands damages be paid “to the Corporate Defendants and Plaintiffs” (Amended Complaint page 43). The other derivative causes of action make similar demands for individual relief. The third cause of action for “failure to pay dividends” alleges damage to plaintiffs (Amended

Complaint ¶142) and demands damages be paid “to the Corporate Defendants and Plaintiffs” (Amended Complaint page 43). The fourth cause of action for “waste and neglect” alleges damage to plaintiffs (Amended Complaint ¶ 146) and demands damages be paid “to the Corporate Defendants and Plaintiffs” (Amended Complaint page 43). The eight cause of action to set aside allegedly unlawful and fraudulent conveyances seek judgment individually. (Amended Complaint, pages 43-44). Plaintiffs’ ninth cause of action for unjust enrichment seeks the return of funds to plaintiffs and Savenergy, Inc. (Amended Complaint ¶170) and demands judgment in favor of Savenergy, Inc. and plaintiffs (Amended Complaint page 44). The tenth cause of action for “money had and received” demands damages be paid “to the Corporate Defendants and Plaintiffs” (Amended Complaint page 44).

For the reasons stated in Moving Defendants’ Initial Memorandum of Law the court must dismiss the individual claims pleaded in the Second, Third, Fourth, Eighth, Ninth and Tenth causes of action because these claims belong to Savenergy, Inc.

A New York Court May Not Dissolve a Foreign Corporation

The overwhelming weight of authority establishes that New York Courts are without subject matter jurisdiction to dissolve a foreign corporation. Plaintiffs’ first cause of action seeks common law dissolution of the corporate defendants.

A New York court does not have subject matter jurisdiction to dissolve a foreign corporation. The corporate defendants are organized under the laws of Delaware. In MHS Venture Corp. v. Utilisave, LLC 63 A.D.3d 840, 841 (2d Dept 2009), the Appellate Division, Second Department stated held; “A claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction (*see* Rimawi v. Atkins, 42

A.D.3d 799 (3d Dept 2007); Matter of Porciello v. Sound Moves, 253 A.D.2d 467 (2d Dept 1998); Matter of Warde–McCann v. Commex, Ltd., 135 A.D.2d 541 (2d Dept 1987).” See also, Hilton Head Holdings b.v. v. Peck, 2012 WL 613729, 6 (SDNY 2012), citing Matter of Warde–McCann v. Commex, Ltd., 135 A.D.2d 541 (2d Dept 1987).

Plaintiffs’ first cause of action seeks common law dissolution of the two Delaware corporate defendants. The first cause of action should also be dismissed because there is no common law dissolution under Delaware law. Marcus v. Lincolnshire Management, Inc., 409 F. Supp.2d 474, 481 (SDNY 2006); Hilton Head Holdings b.v. v. Peck, *supra*.

The cases cited by plaintiffs in support of their position that this NY courts have subject matter jurisdiction to dissolve a Delaware corporation are all distinguishable from and inapposite to the instant matter. In Matter of Hospital Diagnostic Equipment Corp., 205 A.D. 2d 459 (1st Dept 1994) the First Department affirmed the dismissal of a dissolution petition on the ground of *forum non conveniens*. Any reference to dissolution is *obiter dicta*. In Broida v. Bancroft, 103 A.D. 2d 88 (2d Dept 1984), the court held that the New York courts have subject matter jurisdiction over a stockholders derivative action seeking review of corporate board action concerning the capitalization and a stock split plan. No claim of dissolution was involved in Broida v. Bancroft. In Matter of The Dissolution of 1545 Ocean Avenue, LLC, 72 A.D. 3d 121 (2d Dept 2010) involved the dissolution of a New York limited liability company. The Appellate Division Second Department Suffolk County, holding that dissolution of the New York limited liability company was not warranted reversed the judgment of Supreme Court.

The first cause of action should be dismissed as not stating cause of action and because the court does not have subject matter jurisdiction.

**The Complaint Fails to Allege Specific Misconduct
Against the Individual Moving Defendants:
Breach of Fiduciary Duty and Fraud Claims Lack Required Particularity**

The Amended Complaint pleads multiple causes of action against individual defendants, including the moving defendants, for fraud and breach of fiduciary duty. The causes are not pleaded with the required particularity and must be dismissed as failing to state claims upon which relief may be granted.

CPLR Section 3016(b) states that “[w]here a cause of action or defense is based upon fraud, misrepresentation, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” Because the underlying facts of the complaint here are based on fraud and breach of fiduciary duty CPLR 3016(b) applies to each of the asserted causes of action. Mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact” will not suffice. Heffez v. L & G General Const., Inc., 56 AD3d 526, 527 (2d Dept 2008). Further, sweeping references to acts by all or some of the defendants are unacceptable. Aetna Casualty & Surety Co. v. Merchants Mutual Insurance Co., 84 A.D. 2d 736 (1st Dept 1981), Daly v. Kochanowicz, 67 A.D. 78, 90 (2d Dept 2009; Excel Realty Advisors, L.P. v. SCP Capital, Inc., 2010 WL 5172417 (S Ct Nassau Co 2010 Warshawsky J.)

Plaintiffs second, third, fifth, sixth, seventh, and ninth causes of action claim the individual defendant breached their fiduciary duties. The claims are pleaded generally against the individual defendants without any specification of the claimed acts. All defendants are lumped together without any particularization. The second and third causes of action claim breached of fiduciary duty against the individual defendant without any attempt to sort out the particular

claims against each (Amended Complaint ¶¶134, 141). The fifth cause of action seeks an accounting “by reason of individual defendants’ numerous breaches of fiduciary duty” (Amended Complaint ¶148). The sixth cause of action claims that “defendants breached their fiduciary duty to plaintiffs by obtaining plaintiffs’ funds under false pretenses for the individual defendants’ personal gain and benefits” (Amended Complaint ¶156). The seventh cause of action seeks an accounting “by reason of the individual defendants’ breaches of fiduciary duty” (Amended Complaint ¶159). The ninth cause of action is for unjust enrichment and claims that the individual defendants obtained funds from plaintiffs “under false pretenses” (Amended Complaint ¶170).

Plaintiffs’ breach of fiduciary claims do not set forth the discrete breaches supposedly committed by the separately named parties. As such, third, fifth, sixth, seventh, and ninth causes of action are not pleaded with sufficient particularity pursuant to CPLR 3016(b) and must be dismissed. Aetna Casualty & Surety Co. v. Merchants Mutual Insurance Co., 84 A.D. 2d 736 (1st Dept 1981), Daly v. Kochanowicz, 67 A.D. 78, 90 (2d Dept 2009; Excel Realty Advisors, L.P. v. SCP Capital, Inc., 2010 WL 5172417 (S Ct Nassau Co 2010 Warshawsky J.)

Conclusion

For all of the foregoing reasons the motion should be granted and the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action of plaintiffs' amended complaint dismissed and the action dismissed.

Dated: New York, New York
July 28, 2014


STEPHEN LATZMAN, P.C.

By: Stephen Latzman, Esq.
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Savenergy Holdings, Inc.,
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AFFIDAVIT OF SERVICE

Index No. 603891/13

State of New York)
)ss.:
County of New York)

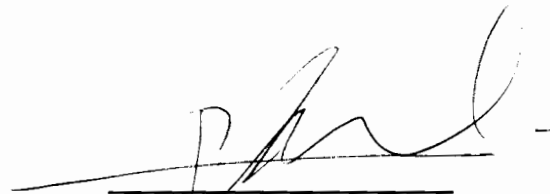
Chong W. Woo, being duly sworn, deposes and says:

1. I am over the age of eighteen years not a party to this action, reside at Brooklyn, New York and am employed by Stephen Latzman, an attorney with offices at 276 Fifth Avenue, Suite 402, New York, New York 10001.

2. On July 28, 2014, I served the within Reply Memorandum of Law upon the following, by first class mail by depositing a true copy of the same in a postpaid properly addressed wrapper in the official depository under the exclusive care and control of the United States Postal Service within the State of New York.

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Attorneys for Plaintiffs
445 Hamilton Avenue, Suite 1102
White Plains, NY 10601

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
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Ira Fischer Gross and Donald Gross
150 East 42nd Street
New York, NY 10017



Chong W. Woo

Sworn to before me
On July 28, 2014



Notary Public

STEPHEN LATZMAN
Notary Public, State of New York
No. 02LA4618508
Qualified in Nassau County
Commission Expires Oct. 31, 2015

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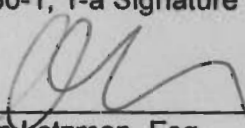
-against-

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REPLY MEMORANDUM OF LAW

Rule 130-1, 1-a Signature



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