SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

SALVATORE BONAVITA, MARIO BONAVITA, RALPH BONAVITA, GLEN SANSONE, DANIELA SANSONE, VINCENT BONAVITA, FRANCESCA DIPUPPO, and SALVATORE M. BONAVITA, individually, and derivatively on behalf of SAVENERGY INC., as successor-in-interest of World Wide Savenergy Inc.,

Plaintiffs,

- against -

SAVENERGY HOLDINGS, INC., SAVENERGY INC., as successor-in-interest of World Wide Savenergy Inc., JOHN HYUNG CHOI, in his individual capacity and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy Inc., CHRISTINE CHUNG CHOI, in her individual capacity and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy Inc., MICHAEL COREY, in his individual capacity and as an officer, director and stockholder of Savenergy, Inc. and Savenergy Holdings Inc., ALICE KATHERINE COREY, in her individual capacity and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy, Inc., IRA FISCHER GROSS, in his individual capacity and as an officer, director and stockholder of Savenergy Holdings, Inc. and Savenergy, Inc., DONALD GROSS, "JOHN DOE 1-10," and "JANE DOE 1-10", said names being fictitious, it being the intention of plaintiffs to designate as defendants any and all officers, stockholders or board members of SAVENERGY HOLDINGS, INC. and SAVENERGY, INC. whose identities at present are unknown,

Defendants.

Index No.: 603891/2013

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE SAVENERGY DEFENDANTS' MOTION TO DISMISS

Assigned to:
Hon. Timothy S. Driscoll

LAW OFFICES OF TIMOTHY KEBBE
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Preliminary Statement

Plaintiffs submit this Memorandum of Law in opposition to the Savenergy Defendants' motion to dismiss the Complaint. Plaintiffs have served and filed a Verified Amended Complaint (the "Amended Complaint") in this action. To the extent that the Savenergy Defendants believe there were deficiencies in the original Verified Complaint (the "Complaint"), those deficiencies have been addressed in the Amended Complaint, which contains detailed factual allegations underpinning fourteen well pleaded causes of action against the Savenergy Defendants. As set forth in detail below – and in the Amended Complaint, affirmation in opposition to the Savenergy Defendants' motion to dismiss and the exhibits submitted with those materials – this Court should deny the Savenergy Defendants' motion to dismiss in all respects.

Facts

(a) Background

The facts are set forth in the Verified Amended Complaint, affirmation in opposition and the exhibits annexed thereto. They are summarized as follows. Defined and Capitalized terms have the meanings ascribed to them in the Verified Amended Complaint.

In or about January 2008 and October 2010, plaintiff S. Bonavita issued checks in the total sum of $763,000 for investment in Savenergy on behalf of himself and members of his family. S. Bonavita's checks in January 2008, in the amount of $263,000, were payable to Mr. Choi. Mr. Bonavita's checks in or about October 2010, totaling $500,000, were payable to Savenergy. Mr. Sansone, a son-in-law of S. Bonavita, also issued a check to Savenergy in or about October 2010. Savenergy issued a total of 136,500 shares of unauthorized restricted stock to plaintiffs in the fall of 2010. (Amend. Cplt. ¶¶ 9-16, 36-40, 58-62.)

Defendant SHI is a Delaware corporation with its only place of business located in Garden City, New York. SHI is not authorized to do business in New York. It has no nexus in Delaware other than its certificate of incorporation. SHI is a privately held corporation and the parent company of defendant Savenergy. SHI owes $187,734.03 in unpaid taxes as of May 29, 2014. (Id. ¶ 17.) Defendant Savenergy is a Delaware corporation with its only place of business located in Garden City, New York. Savenergy is the successor-in-interest to WSEI. Savenergy installs, maintains and repairs Products, and provides energy saving Services to institutional users of such Products. Savenergy is a privately held corporation authorized to do business in New York. Savenergy's only nexus with Delaware is its certificate of incorporation. The Corporate Defendants' bank accounts are maintained in New York. (Id. ¶¶ 21, 22.)

Mr. Choi is an individual residing in Nassau County, New York and is the majority stockholder, president, and chief executive officer of the Corporate Defendants. Mrs. Choi resides in Nassau County, New York and is a stockholder, officer and director of the Corporate Defendants. (Id. ¶¶ 21, 23, 24.) Mr. Corey is an individual residing in New York County, New York and is married to Mr. and Mrs. Choi's daughter, defendant Alice Corey. Mrs. Corey resides in New York County, New York. Mr. and Mrs. Corey are officers, directors and stockholders of the Corporate Defendants. (Id. ¶¶ 25, 26.)

Defendant Ira Gross is a resident of Nassau County and a stockholder of the Corporate Defendants. Until 2014, the Corporate Defendants publically listed Mr. Gross as an officer and director of the Corporate Defendants. Ira Gross has been an Executive Vice President of the Corporate Defendants since at least 2010. Ira Gross's father, Donald Gross, purchased stock in the Corporate Defendants. Ira Gross and the other Individual Defendants caused the Corporate Defendants to make at least one $50,000 payment to Ira and Donald Gross to the detriment of

other investors in and creditors of the Corporate Defendants, including plaintiffs. Donald Gross is a resident of Nassau County and a stockholder in the Corporate Defendants. (Id. ¶¶ 27-29.)

(b) The 2008 Stock Purchase

In January 2008, Mr. Choi solicited S. Bonavita and M. Bonavita to invest in WSEI. Mr. Choi told the Bonavita brothers that the Corporate Defendants owned valuable patents for the Products and that third parties had made offers to purchase some or all patents for more than $70 million. Mr. Choi represented that the Products were cost effective, state of the art technology and that he had decided not to sell the patents in order to build WSEI's business. Mr. Choi further represented that the Corporate Defendants had a rapidly growing customer base, were operating at a profit and were looking for additional investors to expand their operations, Product development and Services. Mr. Choi also represented that, among other things, the Corporate Defendants' stock would be listed for trading on the Bulletin Board and that if the Bonavitas bought the Corporate Defendants' stock, they would be able to sell that stock at a substantial profit after it began publically trading. (Id. ¶¶ 36-40, 42-48.)

On or about January 30, 2008, in reasonable and justifiable reliance upon the representations and omissions made by Mr. Choi, S. Bonavita purchased six shares of WSEI stock for himself, and three shares of WSEI stock for his brother. S. Bonavita paid $113,000 for his stock and $150,000 for his brother's stock. S. Bonavita bought these shares with checks payable to Mr. Choi, individually. Mr. Choi's bank accounts are located in New York. Mr. Choi did not remit S. Bonavita's funds to the Corporate Defendants for use in connection with their business. Instead, he used the checks for personal purposes unrelated to the Corporate Defendants' business. (Id. ¶¶ 40-41.)

Mr. Choi's misrepresentations and omissions of material facts to S. Bonavita and M. Bonavita were false at the time they were made by Mr. Choi. Mr. Choi knew these misrepresentations and omissions were false and untrue when he made them. The Corporate Defendants were not profitable and their patents were for Products that were outdated and had been surpassed in quality and efficiency by newer LED lights, machinery, temperature control devices and related technology. Neither Mr. Choi nor the Corporate Defendants had received offers from others to buy their patents for an excess of $70 million or any other sum. The patents, Products and Services were outdated and had been surpassed by superior technology and services. (Id. ¶¶ 42-46.)

Contrary to Mr. Choi's representations, the Corporate Defendants did not have a rapidly growing client base and were not operating at a profit. Nor were defendants able to provide routine maintenance and repairs for Products installed at customer locations. Mr. Choi also knew that the Corporate Defendants' stock would be delisted from trading in the event that it began trading on any exchange or market (which is exactly what happened). The Corporate Defendants' stock could not be listed for trading because the Corporate Defendants did not have the required financial statements, corporate organization or structure, or tax filings required for listing on a securities exchange or market. Mr. Choi did not disclose this information to plaintiffs. (Id. ¶¶ 45-47.)

(c) **Additional Misrepresentations**

During 2009 and 2010, Mr. Choi repeated the lies previously made to S. Bonavita and M. Bonavita. Mr. Choi enhanced these lies by: (a) providing new stock certificates, in the name of Savenergy (as opposed to WSEI), to S. Bonavita and M. Bonavita; (b) increasing the number of shares in Savenergy issued to each of them; (c) telling them that the name change and issuance

of new stock were in preparation for listing Savenergy stock on the Bulletin Board; (d) providing the Bonavitas with a list of purported clients of Savenergy; and (e) representing that Savenergy was making substantial profits. (Id. ¶ 55.)

S. Bonavita and M. Bonavita asked Mr. Choi if Savenergy was going to distribute dividends to them based on their stockholdings. Mr. Choi replied that Savenergy had reinvested the $2 million in dividends attributable to their stock ownership in order to expand Savenergy's ability to purchase and develop Products, and to supply Products and Services to its customers. But there were no dividends attributable to plaintiffs' initial investment in the Corporate Defendants. Mr. Choi knew that there were no dividends attributable to plaintiffs' initial investment at the time he made this misrepresentation to S. Bonavita and M. Bonavita. (Id. ¶ 56.) Throughout 2009 and until December 2010, Mr. Choi, on behalf of himself and the Corporate Defendants, made the additional material misrepresentations and omissions of material fact, and promises and guarantees, to S. Bonavita and M. Bonavita regarding the Corporate Defendants businesses and their stock as detailed in the Amended Complaint. (Id. ¶¶ 55, 57(a)-57(d).)

In or about September and October 2010, Mr. Choi represented to S. Bonavita that "[Savenergy's] stock is going to go up...You should buy as much as you can...This thing is going to fly..." Based on Mr. Choi's repeated misrepresentations and omissions S. Bonavita invested $500,000 in additional funds in the Corporate Defendants during October 2010. Upon receipt of the $500,000 in checks payable to Savenergy, the Corporate Defendants issued restricted stock certificates to members of the Bonavita family. (Id. ¶ 58.)

Savenergy has 1,500 authorized shares of stock under its certificate of incorporation. Nevertheless, Mr. Choi and Savenergy issued restricted stock certificates reflecting that Mr. Bonavita and members of the Bonavita family owned 135,000 shares of Savenergy stock, 90

times more than the entire authorized shares for Savenergy. Mr. Choi and Savenergy knew that Savenergy could not legally issue this number of shares to the Bonavita family or anyone else. Defendants issued 90 times more stock than authorized by Savenergy's certificate of incorporation to fraudulently induce S. Bonavita to provide $500,000 to Savenergy – ostensibly for use in its business – which the Individual Defendants took out of the Corporate Defendants for personal purposes unrelated to their purported business. (Id. ¶¶ 59-60.)

In September and October 2010, Mr. Choi made the same misrepresentations and omissions to Glen Sansone, who works with S. Bonavita at SME. Based on Mr. Choi's fraudulent statements and omissions Savenergy issued 1,500 shares of restricted stock to Mr. Sansone in exchange for $5,000. Defendants issued 1,500 shares of Savenergy restricted stock to fraudulently induce Mr. Sansone to provide $5,000 to Savenergy in or about October 2010. The Individual Defendants used Mr. Sansone's funds for their personal affairs, but not Savenergy's business. (Id. ¶ 61.)

Defendants' issuance of 136,500 of restricted shares of unauthorized Savenergy stock to the Bonavita family was fraudulent and known to be fraudulent at the time defendants issued that stock. Mr. Choi's misrepresentations and omissions of material facts to S. Bonavita, M. Bonavita and Mr. Sansone were false at the time they were made by Mr. Choi. Mr. Choi knew these misrepresentations and omissions were false and untrue when he made them. (Id. ¶¶ 62-77.) S. Bonavita, M. Bonavita and Mr. Sansone reasonably and justifiably relied on Mr. Choi's misrepresentations and omissions of material facts in making their decisions to invest a total of $505,000 in Savenergy during October 2010. (Id. ¶ 78.)

(d) Looting, Mismanagement and Waste of the Corporate Defendants' Assets

The Individual Defendants have diverted funds from the Corporate Defendants for their personal purposes unrelated to the Corporate Defendants' business. The Individual Defendants, particularly the members of the Choi family, operate the Corporate Defendants as a sole proprietorship for their own benefit without regard to: (a) their fiduciary duties to stockholders; (b) Savenergy's contractual obligations, and (c) representations made to existing and potential customers. (Id. ¶¶ 79-80.) The Corporate Defendants have hired executives and consultants with educational backgrounds and extensive professional experience in connection with the Products and Services. Defendants have failed and refused to pay these executives and consultants the salaries and consulting fees due and owing them and have terminated their services. (Id. ¶¶ 81-82.)

Defendants' patents are worthless and have been surpassed by superior and more efficient technology. Defendants have not undertaken any steps to update and modernize the technology underlying the Products. The Individual Defendants have caused the Corporate Defendants to engage unqualified, untrained and unlicensed independent contractors to install, repair and maintain the Products. These independent contractors have incorrectly installed, maintained and repaired the Products and are unable to provide Services. These contractors also caused physical damage to the premises of a number of customers while attempting to install and repair Products. This has resulted in a loss of business for the Corporate Defendants. (Id. ¶¶ 82-90.)

In a number of instances, customers have executed contracts with Savenergy for the provision of Products and Services, only to find that Savenergy was unable to deliver or furnish any Products or Services set forth in the contracts. (Defendants have no quality control concerning their Products, or the installation, maintenance and repair of their Products). This

resulted in the termination of the relationship between customers and Savenergy. The Corporate Defendants and Mr. Choi have underbid numerous projects and, as a result, entered into contracts and made promises that they are unable to fulfill. This too has resulted in lost customers, business and revenue. (Id.)

Mrs. Choi keeps the Corporate Defendants' day-to-day financial records. Mrs. Choi's recordkeeping is inaccurate and intentionally misleading. The Corporate Defendants' outside accountants have thus refused to certify or verify that the Corporate Defendants' books and records are accurate, complete or kept in accordance with GAAP. (Id. ¶¶ 91-92.) The Corporate Defendants are now severely undercapitalized and insolvent. They do not have sufficient assets to pay their debts as they become due. (Id. ¶ 93.)

The Individual Defendants authorized the Corporate Defendants to make $50,000 monthly payments to Donald and Ira Gross to repay the Gross family's investment in Corporate Defendants. The Choi family succumbed to pressure from Ira Gross, who has, threatened legal action against the Choi family and the Corporate Defendants. To date, the Corporate Defendants have made a $50,000 payment to the Gross family. The Choi family made Ira Gross an officer and director, giving him the ability, if he chose to exercise it, to review and block their conduct and the Corporate Defendants' business dealings. In 2014, the Choi family removed Ira Gross' name from a publicly available list of the Corporate Defendants' officers and directors. (Id. ¶¶ 94-96.)

(e) **Piercing the Corporate Veil**

The Individual Defendants made all decisions regarding the Corporate Defendants' business and the Corporate Defendants' relationship with their stockholders. The Corporate Defendants did not hold stockholders' meetings. The Corporate Defendants did not hold

meetings of their boards of directors. The Corporate Defendants did not have, or did not abide by, the terms of any by-laws, stockholders agreements and articles of incorporation, none of which have been provided to plaintiffs despite plaintiffs' repeated requests for these materials. The Corporate Defendants do not have by-laws or a stockholders' agreement. (Id. ¶¶ 49-54, 98-105.)

The Corporate Defendants have not abided by corporate formalities, among them: (a) holding stockholders' meetings and meetings of their boards of directors; (b) maintaining by-laws; (c) having a stockholders' agreement; (d) keeping minutes of the Corporate Defendants' (nonexistent) stockholders' meetings and meetings of their boards of directors; (e) maintaining separate bank accounts for SHI and Savenergy; and (f) permitting the Corporate Defendants' stockholders to inspect and copy their books and records, to the extent that they exist. The Corporate Defendants share the same office space, telephone numbers, officers, directors and employees. The Corporate Defendants are treated as a single entity by the Individual Defendants. The Corporate Defendants do not deal with each other at arms' length and are not treated as independent profit centers. Each Corporate Defendant uses the others' real and personal property as if such property belonged to such Corporate Defendant. (Id. ¶¶ 100, 104-105.)

The Individual Defendants repeatedly take money out of the Corporate Defendants' bank accounts – including plaintiffs' $768,000 investment – for their personal purposes not related to the Corporate Defendants' business. The Individual Defendants have co-mingled large sums of monies and other assets among the Corporate Defendants, and withdrawn funds from the Corporate Defendants, leaving them insolvent and without the ability to pay the Corporate Defendants' debts as they become due. (Id.) The Individual Defendants have exercised complete dominion and control over Savenergy, which they treat as a single entity with SHI. The

Individual Defendants treat the Corporate Defendants as a sole proprietorship and do not maintain any distinction between the Corporate Defendants and themselves. (Id. ¶¶ 102-103.)

ARGUMENT

"On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference. . . The role of the Court is to 'determine only whether the facts as alleged fit within any cognizable legal theory'. . . Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated. . . 'Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus'. . ." Dee v. Rackower, 112 A.D.3d 204, 208 (2d Dep't 2013) (citations omitted). Affidavits and documents may be considered in opposition to a motion to dismiss brought under CPLR 3211(a) (7). See Ural v. Encompass Ins. Co., 97 A.D.3d 562, 564-65 (2d Dep't 2012). A motion to dismiss for lack of subject matter jurisdiction must take into account that the "Supreme Court is a court of general jurisdiction, and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed (N.Y. Const., art. VI)." Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 166 (1967). And, under CPLR 3211(a)(3), a motion to dismiss will be granted only where a plaintiff lacks "the power to appear and a bring its grievance before the court." Comm. Bd. 7 of the Borough of Manhattan v. Schaffer, 84 N.Y.2d 148, 155 (1994).

Plaintiffs served an Amended Complaint and annexed new exhibits in addition to those submitted with the original Complaint. The Amended Complaint, which was verified by plaintiff Salvatore Bonavita, "may be used as an affidavit of the facts constituting the claim. . ." Triangle Props. #2, LLC v. Narang, 73 A.D.3d 1030, 1032 (2d Dep't 2010) (citations omitted).

The Amended Complaint and affirmation in opposition to defendants' motion to dismiss establish that plaintiffs have alleged legally sufficient causes of action for: (a) common law dissolution (first cause of action); (b) breach of fiduciary duty (sixth cause of action); (c) an accounting (seventh cause of action); (d) fraud (eleventh and twelfth causes of action); and (e) piercing the corporate veil (thirteenth and fourteenth causes of action). The Amended Complaint also properly alleges derivative causes of action, on behalf of the Corporate Defendants, for (f) breach of fiduciary duty (second cause of action); (g) failure to pay dividends (third cause of action); (h) waste and neglect (fourth cause of action); (i) an accounting (fifth cause of action); (j) setting aside fraudulent conveyances (eighth cause of action); (k) unjust enrichment (ninth cause of action); and (l) money had and received (tenth cause of action). Plaintiffs have standing and the capacity to maintain this action and the Court has subject matter jurisdiction over the causes of action alleged in the Amended Complaint.

POINT I

THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION

The Court of Appeals has "reject[ed] any automatic application of the so-called 'internal affairs' choice of law rule, under which the relationship between shareholders . . . and directors of a business corporation would be governed by the law of the State in which the business entity was formed." Greenspun v. Lindley, 36 N.Y.2d 473, 478 (1975). A corporation may have contacts with New York to be sufficiently "present" in New York "to call for the application of New York law." Id. at 477-78. "[A] suit which concerns the internal affairs of a foreign corporation should be entertained unless the same factors that would lead to dismissal under *forum non conveniens* principles suggest that New York is an inconvenient forum and that litigation in another forum would better accord with the litigation interests and the public. . ."

Brodia v. Bancroft, 103 A.D.2d 88, 91 (2d Dep't 1984) (citations omitted). "New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation, though having a foreign charter, has substantial contacts with this State. . ." Id. at 92 (citations omitted).

New York courts apply New York law to the internal affairs of a foreign corporation – with the exception of derivative claims – where (a) the corporation has minimal contacts with the jurisdiction in which it was formed; (b) the corporation is located in New York and conducts business in New York; (c) the acts of which plaintiffs' complaint occurred in New York; (d) the corporation's books and records are kept in New York; and (e) the officers and directors participated in the alleged misconduct from New York. See UBS Sec. LLC v. Highland Capital Management, L.P., 93 A.D.3d 489, 490 (1st Dep't 2012); Brodia, 103 A.D.2d at 91-93; Serio v. Ardra Ins. Co., 304 A.D.2d 362 (1st Dep't 2003), appeal dismissed, 100 N.Y.2d 576 (2003); Lyman Commerce Solutions, Inc. v. Lung, 2013 U.S. Dist. Lexis 124689 at * 10 - * 12 (S.D.N.Y. Aug. 30, 2013), reconsid. denied, 2014 U.S. Dist. Lexis 15282 (S.D.N.Y. Feb. 6, 2014); UBS Sec. LLC v. Highland Corp. Mgm't, L.P., 2011 N.Y. Misc. Lexis 798 at *8 - *9 (Sup. Ct. N.Y. Co. Mar. 1, 2011), aff'd in relevant part, 93 A.D.3d 489 (1st Dep't 2012); Greenspun, 36 N.Y.2d at 478.

The Amended Complaint establishes that this Court has subject matter jurisdiction over this action. The Corporate Defendants' principal and only place of business is located in Garden City, New York. While the Corporate Defendants are incorporated in Delaware, that is their only connection with that state. The Corporate Defendants' officers and directors reside in New York and directed and controlled the wrongdoing at issue in this action. The Corporate Defendants' bank accounts, books and records, to the extent that they exist, are located in Nassau County. All

of the material witnesses in the action – the Individual Defendants, Donald Gross and plaintiffs – reside in New York. The misconduct alleged in the Amended Complaint occurred in New York. Savenergy has initiated another litigation presently pending in the Supreme Court, Nassau County. (Amend. Cplt. ¶ ¶ 17-18, 36-105; Kebbe Aff. ¶ 6.) The Court has subject matter jurisdiction over this action. See, e.g., Greenspun, 36 N.Y.2d at 478; Brodia, 103 A.D.2d at 90-93; Hart v. Gen'l Motors Corp., 129 A.D.2d, 179, 186 (1st Dep't), appeal denied, 70 N.Y.2d 608 (1987); Barocas v. Gorenstein, 189 A.D.2d 847, 848 (2d Dep't 1993).

These facts also establish that this Court should apply New York law to all of the causes of action alleged in the Amended Complaint with the exception of plaintiffs' derivative claims. See, e.g., Greenspun, 36 N.Y.2d at 478; UBS Sec., 93 A.D.3d at 490; Brodia, 103 A.D.2d at 90-92; Serio, 304 A.D.2d at 362; Lyman, 2013 U.S. Dist. Lexis 124689 at *10-*12.

POINT II

THE COURT SHOULD DISSOLVE THE CORPORATE DEFENDANTS

The First Department held that New York courts have subject matter jurisdiction to dissolve a foreign corporation. See Application for a Dissolution of Hospital Diagnostic Equip. Corp., 205 A.D.2d 459 (1st Dep't 1994) ("We have considered the litigants' remaining arguments, including the Attorney General's that the courts of New York lack subject matter jurisdiction to dissolve a foreign corporation, and find them to be without merit"), citing, Brodia, 103 A.D.2d at 90-92; Holdrum Inv. N.V. v. Edelman, 2013 N.Y. Misc. Lexis 710 at *7 - *8 (Sup. Ct. N.Y. Co. Jan. 31, 2013) (denying motion to dismiss action to dissolve a Delaware corporation on the ground that New York courts had subject matter to dissolve a foreign corporation). The Second Department recently signaled that it is receptive to dissolving foreign corporation under New York law. See Matter of the Dissolution of 1545 Ocean Ave., LLC, 72

A.D.3d 121, 127 (2d Dep't 2010). In Ocean Ave., the Second Department stated "The Business Corporation Law applies to 'every domestic corporation and to every foreign corporation which is authorized to do business in this state. . .' (Business Corporation Law § 103[a]. . .). The grounds for a judicial dissolution of a corporation are set forth in article 11 of the Business Corporation Law." Id. at 127. While Ocean Ave. did not apply the BCL to dissolve a foreign corporation, the decision indicates that the Second Department is prepared to consider such an application on the merits. But see Matter of Porciello v. Sound Moves, Inc., 253 A.D.2d 467 (2d Dep't 1998)(a foreign corporation should be dissolved under the law of the state wherein it is incorporated).

Although the decisions of the First Department in Hospital Diagnostic, 205 A.D.2d at 459, and the Second Department in Ocean Ave., 72 A.D.3d at 127, pertained to dissolution under Article 11 of the BCL, an action for common law dissolution also may be brought by minority shareholders where "'it appears that the directors and majority shareholders 'have so palpably breached the fiduciary duty they owed to the minority shareholders that they are disqualified from exercising the exclusive discretion and the dissolution power given to them by statute.'"" Matter of the Judicial Dissolution of Kemp & Beatley, Inc., 64 N.Y.2d 63, 69-70 (1984), quoting, Leibert v. Clapp, 13 N.Y.2d 313, 317 (1963).

Like the original Complaint, the Amended Complaint contains detailed factual allegations establishing that the Individual Defendants have palpably breached their fiduciary duties to plaintiffs so as to disqualify them "from exercising the exclusive discretion and the dissolution power given to them by statute." Kemp & Beatley, 64 N.Y.2d at 69-70 (citation and internal quotation omitted.) (Amend. Cplt. ¶¶ 121-22.) This Court should dissolve Savenergy and its alter ego, SHI, under New York common law. See also Greenspun, 36 N.Y.2d at 478.

Even if plaintiffs' allegations do not require this Court to dissolve the Corporate Defendants, "the allegations nonetheless furnish the basis for other relief properly awarded by the court. . ." Tosi v. Pastene & Co., 34 A.D.2d 520 (1st Dep't 1970); see id. ("where the court has acquired jurisdiction of the parties and there is an appropriate basis for the granting of some relief to plaintiffs in New York, the court should not reject jurisdiction of the action"); Matter of Dohring [Dissolution of CVC Prod., Inc.], 142 Misc. 2d 429, 433 (Sup. Ct. Monroe Co. 1989) ("Whether petitioner's cause of action is considered statutory or common law, there is ample authority for this court to fashion a remedy, short of dissolution, which will attain substantial justice between the parties")(citations omitted). This Court should deny defendants' motion to dismiss plaintiffs' cause of action for common law dissolution.

POINT III

THE AMENDED COMPLAINT ALLEGES DERIVATIVE CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS

In their Amended Complaint, plaintiffs allege derivative claims on behalf of the Corporate Defendants against the Individual Defendants for (a) breach of fiduciary duty, (Amend. Cplt. ¶¶ 127-134); (b) failure to remit dividends and related distributions (id. ¶¶ 135-42); (c) waste, mismanagement and willful dissipation of corporate assets (id. ¶¶ 143-46); (d) accounting (id. ¶¶ 147-151); (e) setting aside unlawful and fraudulent conveyances (id. ¶¶ 161-66); (f) unjust enrichment (id. at ¶¶ 167-71); and (g) money had and received (id. ¶¶ 172-76.) As plaintiffs have substantially altered these causes of action from the original Complaint, defendants' motion to dismiss for failure to assert these claims derivatively should be denied as moot. See EDP Hosp. Computer Sys., Inc. v. Bronx-Lebanon Hosp. Center, 212 A.D.2d 570, 571 (2d Dep't 1995).

BCL § 626(a) provides that a derivative action "may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor, by the holder of shares...of the corporation..." N.Y. Bus. Corp Law § 626(b) (McKinney's 2014); see N.Y. Bus. Corp. Law § 1319(a)(2) (McKinney's 2014). Plaintiffs have properly asserted derivative claims, on behalf of the Corporate Defendants, against the Individual Defendants for breach of fiduciary duty, waste and mismanagement, an accounting, setting aside fraudulent conveyances, money had and received, and unjust enrichment under Delaware and New York law. See Tooley v. Donaldson, Lufkin & Jennette, 845 A.2d 1031, 1038-39 (Del. 2004); In re J.P. Morgan Chase & Co. Shareholders Lit., 906 A.2d 808, 817-19 (Del. Ch. New Castle Co. 2005), aff'd, 906 A.2d 766 (Del. 2006); Abrams v. Donati, 66 N.Y.2d 951, 953-54 (1985); Mizrahi v. Cohen, 104 A.D.3d 917, 919 (2d Dep't), appeal dismissed, 21 N.Y.3d 968 (2013); Kramer v. Western Pacific Indus., Inc., 546 A.2d 348, 353 (Del. 1988).

(a) Breach of Fiduciary Duty

The Amended Complaint alleges the Individual Defendants' actions, misrepresentations and omissions constituting breach of fiduciary duty in detail and with particularity. (Amend. Cplt. ¶¶ 49, 52-98.) See Armentano v. Paraco Gas Corp., 90 A.D.3d 683, 684-85 (2d Dep't 2011). Defendants' argument that this claim has not been pled with the required particularity is incorrect.

(b) Accounting

"Under Delaware law, '[a]n accounting is an equitable remedy that consists of the adjustment of accounts between parties and a rendering of a judgment for the amount ascertained to be due to either as a result.'" Khandalavala v. ArtsIndia.com, LLC, 2014 N.Y. Misc. Lexis 1675 at *50 (Sup. Ct. N.Y. Co. April 8, 2014), quoting, Jacobson v. Dryson Acceptance Corp.,

2002 Del. Ch. Lexis 4 at *12-*13 (Del. Ch. New Castle Co. Jan. 9, 2002). "Also, under Delaware law, [an accounting] is not so much a cause of action as it is a form of relief...Where one or more causes of action survive a motion to dismiss, plaintiffs may proceed with their secondary claims, such a claim for as an accounting...As [an accounting] is a remedy, should the plaintiffs ultimately be successful on one or more of their claims, the court will address their arguments for granting an accounting..." Id. at *50-*51 (citations and internal quotations omitted); see Jacobson, 2002 Del. Ch. Lexis 4 at *12-*13; Albert v. Alex. Brown Mgm't Serv. 2005 Del. Ch. Lexis 133 at *40-*41 (Del. Ch. New Castle Co. Aug. 26, 2005). There is no requirement that plaintiffs demand an inspection of a corporation's books and records before pleading a claim for an accounting. See Jacobson, 2002 Del. Ch. Lexis 4 at *12-*14.[1]

(c) Setting Aside Fraudulent Conveyances, Unjust Enrichment and Money Had And Received

In their Amended Complaint, plaintiffs assert derivative claims for setting aside fraudulent conveyances and unjust enrichment. Defendants' motion to dismiss those claims is now moot and should be denied. See, e.g., Tooley, 845 A.2d at 1039; Rosenbluth v. Ornstein, 2008 N.Y. Misc. Lexis 6063 at *11-*12 (Sup. Ct. Nassau Co. Oct. 10, 2008) (court denied motion to dismiss derivative cause of actions to set aside fraudulent conveyances and unlawful transactions); Zutty v. Rye Select Broad Market Prime Fund, L.P., 2011 N.Y. Misc. Lexis 5621 at *13-*14 (Sup. Ct. N.Y. Co. April 15, 2011); Shillinger & Albert v. Myral Hats, Inc., 55 Misc 2d 178, 179 (Civ. Ct. N.Y. Co 1967). We note that Donald and Ira Gross, the recipients of at

[1] In Yusufzai v. Owners Transp. Comm., Inc., 2008 N.Y. Misc. Lexis 356 at *10 (Sup. Ct. Queens Co. Feb. 4, 2008), plaintiffs sought an order permitting them to inspect a corporation's books and records without first making a demand to do so. As plaintiffs failed to make a demand under Delaware or New York law, their application to inspect the corporation's books and records was denied. See id. at *10-*11. Plaintiffs in this action seek an accounting and do not assert a cause of action to inspect plaintiffs' books and records. Yusufzai is not relevant to the cause of action asserted by plaintiffs.

least one fraudulent conveyance from the Corporate Defendants, are necessary parties to this claim. See Alvaro v. Faracco, 85 A.D.3d 1072, 1073 (2d Dep't 2011).

(d) Demand Futility

The Amended Complaint sets forth particularized, detailed factual allegations establishing that making a demand on the Individual Defendants to maintain the derivative causes of action on behalf of the Corporate Defendants in the Amended Complaint was futile. (Amend. Cplt. ¶¶ 106-109). These factual allegations create "reasonable doubt" that: (a) the Individual Defendants were " disinterested and independent"; or (b) "the challenged transaction was otherwise the product of a valid exercise of business judgment"... O'Donell v. Foley, 303 A.D.2d 567, 568 (2d Dep't 2008)(citations and internal quotations omitted)(applying Delaware law); see Malkinzon v. Kordonsky, 56 A.D.3d 734, 735 (2d Dep't 2008) (under BCL § 626(c), a demand on the board of directors is excused "when the directors are incapable of making an impartial decision as to whether to bring suit") (citation omitted). Defendants' motion to dismiss on the ground that plaintiffs failed to allege derivative claims on behalf of the Corporate Defendants should be denied.

POINT IV

PLAINTIFFS' CLAIM FOR MONEY HAD AND RECEIVED IS WELL PLED

"A cause of action for money had and received is one of ... contact implied in -law. . . Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise. . ." Goel v. Ramachadran, 111 A.D.3d 783, 789-90 (2d Dep't 2013) (citations and internal quotations omitted). The elements of a claim for money had and received are: "(1) the defendant received money belonging to plaintiff, (2) the defendant benefited from the receipt of the money, and (3) under principles of

equity and good conscience, the defendant should not be able to keep the money. . . The action depends upon equitable principles in the sense that broad considerations or right, justice and morality apply to it. . ." Id. at 790 (citations and internal quotations omitted).

The Amended Complaint alleges that plaintiffs were fraudulently induced to transfer $768,000 to Mr. Choi and Savenergy for an unlawful purpose, to wit: To enable the Individual Defendants to fraudulently transfer plaintiffs' funds to themselves for personal purposes. (Amend. Cplt. ¶ 169.) See id. at 790, 792. Unlike Goel, plaintiffs' unjust enrichment claim is not founded upon a breach of a stockholders' agreement because there was no such agreement between plaintiffs, the Corporate Defendants and the other stockholders of SHI and Savenergy. (Amend. Cplt. ¶¶ 51, 168-71.) See id. at 790-91.

Plaintiffs' allege that the Individual Defendants – by misappropriating plaintiffs' investment for themselves – personally benefitted from their funds; and that principles of equity and good conscience require the $768,000 taken by the Individual Defendants be returned to plaintiffs. (Amend. Cplt. ¶¶ 168-71.) See id. at 790-91; Byxbie v. Wood, 24 N.Y. 607, 610 (1862) ("by false representations and the alteration of bills and vouchers, the defendant himself received from Marvine large sums of money to which he was not entitled. . . Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise"); Rodolico v. Rubin & Licatesi, P.C., 112 A.D.3d 608, 610 (2d Dep't 2013).

For the same reasons, plaintiffs have alleged facts establishing a derivative claim on behalf of the Corporate Defendants for unjust enrichment against the Individual Defendants. See Morini v. Lombardo, 79 A.D.3d 932, 934 (2d Dep't 2010), appeal denied, 17 N.Y.3d 705 (2011).

Plaintiffs have stated a derivative claim on behalf of the Corporate Defendants for money had and received and unjust enrichment against the Individual Defendants.

POINT V

PLAINTIFFS' FRAUD CLAIMS AGAINST MR. CHOI AND THE CORPORATE DEFENDANTS ARE WELL PLED

"[I]n a claim for fraudulent misrepresentation, a plaintiff must allege a misrepresentation or omission of material fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury. . ." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 179 (2011) (citations and internal quotations omitted). Plaintiffs allege that Mr. Choi and the Corporate Defendants fraudulently induced them to invest in the Corporate Defendants; these claims are not derivative and may be asserted directly against defendants. See Continental Cas. Co. v. PricewaterhouseCoopers, LLC, 15 N.Y.3d 264, 269, 270-71 (2010). The Court of Appeals "[has] never required talismanic, unbending allegations [with respect to] specific details of each defendant's conduct. . ." Pludeman v. Northern Leasing Syst., Inc., 10 N.Y.3d 486, 493 (2008). "Simply put, sometimes such facts are unavailable prior to discovery. . . [The Court of Appeals] [has] always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud. . ." Id. at 493 (citations omitted).

A party expressing an opinion "ha[s] an obligation to render such opinion truthfully." Christallina S.A. v. Christie, Manson & Woods Int'l, Inc., 117 A.D.2d 284, 294 (1st Dep't 1986). "An expression or prediction as to some future event, known by the [party] to be false or made despite the anticipation on that the event will not occur, "'is deemed a statement of material existing fact, sufficient to support a fraud action. . .'" Id. at 294-95, quoting, Channel Master

Corp. v. Aluminium Ltd. Sales, 4 N.Y.2d 403, 407 (1958); see Chase Manhattan Bank, N.A. v. Perla, 65 A.D.2d 207, 210-11 (4th Dep't 1978). Projections of future events and "expected financial performance" made with knowledge of their falsity, and not based on the actual financial condition of a corporation, "are misrepresentations of material existing [facts], sufficient to support a fraud action" . . . CPC Int'l Inc. v. McKesson Corp., 70 N.Y.2d 268, 286 (1987); see e.g., Kittywalk Syst. Inc. v. Mighty Pet Prods., Inc., 2009 N.Y. Misc. Lexis 5185 at * 11 (Sup. Ct. Nassau Co. Nov. 10, 2009) ("a jury could find that the [projected amount] was inflated and deliberately made to entice defendants into the joint venture. [T]hus, there is an issue of fact as to whether. . . plaintiffs engaged in fraudulent representations by making the $3 million projection").

The Amended Complaint alleges facts demonstrating (a) that Mr. Choi and the Corporate Defendants made numerous material misrepresentations and omissions of material existing facts, (b) as well as facts establishing the other elements of common law fraud. (Amend. Cplt. ¶¶ 36-37, 42-48, 55, 57(a), 57(c), 59-71, 75, 78, 177-188.) This is sufficient to allege causes of action for common fraud. See, e.g., Scott v. Fields, 92 A.D.3d 666, 668-69 (2d Dep't 2012).

To the extent that defendants attempt to mischaracterize plaintiffs' allegations as non-actionable opinions, puffery or predictions of future events (Mandarin Trading, 16 N.Y.3d at 178-79 (opinion as to value of a painting, amounting to no more than puffery, was not fraudulent)), plaintiffs have pled facts establishing that Mr. Choi's opinions and predictions were not rendered truthfully and made with knowledge of their falsity. (Amend. Cplt. ¶¶ 38, 57(b), 57(d), 36-37, 39-48, 55-56, 58-78, 177-88.) see CPC Int'l, 70 N.Y.2d at 286; Channel Master, 4 N.Y.2d at 407-08; SEC v. Zubkis, 2000 U.S. Dist. Lexis 1865 at *19-*20 (S.D.N.Y. Feb. 23, 2000) (defendant made material misrepresentations and omissions of fact to induce investors to

purchase stock by furnishing baseless predictions of a corporation's stock price, contractual relations, projected revenues and proposed listing on a significant stock exchange); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC, 19 A.D.3d 273, 275 (1st Dep't 2005); Alio v. Saponaro, 133 A.D.2d 887, 888-89 (3d Dep't 1987).

Defendants' argument that plaintiffs have not pled their fraud claims with particularity is incorrect. Not only have plaintiffs alleged the date and location of defendants' fraudulent misrepresentations and omissions, plaintiffs have set forth detailed, particularized factual allegations of defendants' fraud. (Amend. Cplt. ¶¶ 36-48, 55-78, 177-88.) "[S]ection 3016(b) should not be strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud. . ." Pludeman, 10 N.Y.3d at 491 (citations and internal quotations omitted). "Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud." Id. The particularized allegations in the Amended Complaint more than satisfy the requirements of CPLR 3016(b) See id.; Sargiss v. Magarelli, 12 N.Y.3d 527, 531-32, (2009). This Court should deny defendants' motion to dismiss plaintiffs' causes of action for fraud.

POINT VI

PLAINTIFFS' PIERCING THE CORPORATE VEIL ALLEGATIONS ARE WELL PLED

In Goel v. Ramachandran, the Second Department found that plaintiffs failed to allege facts sufficient to pierce the corporate veil of a Swiss corporation (Bunge S.A.), which was a subsidiary of a Bermuda corporation (Bunge, Ltd.) having its principal office in New York. (Kebbe Aff. ¶ 7); see Goel, 111 A.D.3d at 785, 793. The Second Department applied New York common law in deciding whether to dismiss the piercing the corporate veil claim against the

Swiss corporation. See id. at 793, quoting, Matter of Morris v. New York Dep't of Taxation & Fin., 82 N.Y.2d 135, 141 (1993).

The facts alleged in the Amended Complaint, and set forth in the accompanying affirmation and exhibits, establish that New York law should be applied to plaintiffs' causes of action for piercing the corporate veil. See, e.g., Greenspun, 36 N.Y.2d at 477-78; Goel, 111 A.D.3d at 793; UBS Sec., 93 A.D.3d at 490; Serio, 304 A.D.2d at 362; UBS Sec., 2011 N.Y. Misc. 798 at *8 - *10.[2] The Amended Complaint alleges facts establishing that the Individual Defendants exercised complete domination and control of the Corporate Defendants and failed to adhere to corporate formalities. (Amend. Cplt. ¶¶ 49-54, 79-105) This pleading further alleges that the Corporate Defendants are inadequately capitalized, insolvent and that the assets of SHI and Savenergy are commingled. (Id.) The Individual Defendants used the corporations' funds, including plaintiffs' $768,000 investment, for personal purposes unrelated to Corporate Defendants' business. See Grammas v. Lockwood Assoc., LLC, 95 A.D.3d 1073, 1074-75 (2d Dep't 2012); East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 66 A.D.3d 122, 127 (2d Dep't 2009), aff'd, 16 N.Y.3d 775 (2011). Plaintiffs' factual allegations establish that the Individual Defendants exercised complete domination and control over the Corporate Defendants and abused the corporate form to perpetrate a wrong against plaintiffs by misappropriating plaintiffs' $768,000 investment. See Morris, 82 N.Y.2d at 141-42.

The Amended Complaint also alleges facts reflecting that SHI was the alter ego of Savenergy and should be held liable for Savenergy's debt to plaintiffs. The Corporate Defendants (a) have overlapping ownership, officers and directors; (b) share the same office

[2] While the law of the state of incorporation is ordinarily applied to pierce the veil of corporation (Sweeney, Cohn, Stahl & Vaccaro v. Kane, 6 A.D.3d 72, 75 (2d Dep't), appeal dismissed, 3 N.Y.3d 751 (2004), this action falls within the well-recognized exception to that rebuttable presumption. See Greenspun, 36 N.Y.2d at 477-78; Goel, 111 A.D.3d at 793; UBS Sec., 93 A.D.3d at 490.

space; (c) fail to observe corporate formalities; (d) commingle assets; and (e) are inadequately capitalized. (Amend. Cplt. ¶¶ 49-54, 74-109.) See Last Time Beverage Corp. v. F & V Distrib. Co., 98 A.D.3d 947, 950-51 (2d Dep't 2012). The Corporate Defendants are not treated as separate entities or independent profit centers by the Individual Defendants and do not have separate or distinguishable property. (Id.) SHI is the alter ego of Savenergy and should be held liable for Savenergy's debt to plaintiffs. See Last Time, 98 A.D.3d at 950-51. Defendants' motion to dismiss plaintiffs' claims for piercing the corporate veil should be denied.

POINT VII

PLAINTIFFS MAY ASSERT DIRECT CLAIMS FOR BREACH OF FIDUCIARY DUTY AND AN ACCOUNTING AGAINST THE INDIVIDUAL DEFENDANTS

Directors, officers and controlling stockholders of a closely held corporation, including the Individual Defendants, owe a duty to the corporation's stockholder "to adhere to fiduciary standards of conduct. . ." Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 568 (1984), reh'g denied, 64 N.Y.2d 1041(1985); see Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93, 98 (1st Dep't 2006), appeal denied, 8 N.Y.3d 804 (2007). A minority shareholder may maintain a direct action against corporate fiduciaries where those fiduciaries for breach of fiduciary duty and related claims where the fiduciaries have "acted malevolently and in bad faith, [and] solely for their own gain. . ." O'Neill v. Warburgh, Pincus & Co., 39 A.D.3d 281, 282 (1st Dep't 2007) (citation omitted); see Abrams, 66 N.Y.2d at 953. "Under New York law, a shareholder may sue individually when the wrongdoer has breached a duty owed to the shareholder independent of any duty owed to the corporation wronged." Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 372, 400-01 (S.D.N.Y. 2010)(citations and internal quotations omitted).

The Individual Defendants and in particular, Mr. Choi, breached their fiduciary duties of good faith and loyalty – and acted malevolently, in bad faith and for their personal gain – by

making false representations and omissions of fact; and issuing stock certificates for unauthorized Savenergy stock to induce plaintiffs' investment in Savenergy. The Individual Defendants also breached their fiduciary duties to plaintiffs in bad faith by misappropriating plaintiffs' investment for personal use not related to the corporations' supposed business. (Amend. Cplt. ¶¶ 153-57.) See O'Neill, 39 A.D.3d at 282; Anwar, 728 F. Supp. 2d at 400-01. This Court should deny defendants' motion to dismiss plaintiffs' direct claims for breach of fiduciary duty and to require the Individual Defendants to account for the monies which they pilfered from plaintiffs.

Conclusion

For the foregoing reasons, this Court should deny the Savenergy Defendants' motion to dismiss.

Dated: June 6, 2014

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