

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH
Shirley Kornreich
Justice

PART _____

RNK Capital LLC, Grey K Environmental

INDEX NO.

603483/06

MOTION DATE

11/24/08

MOTION SEQ. NO.

004

MOTION CAL. NO.

- v -

NatSource LLC, et al

The following papers, numbered 76 to 95 were read on this motion to/for

Summary

Judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

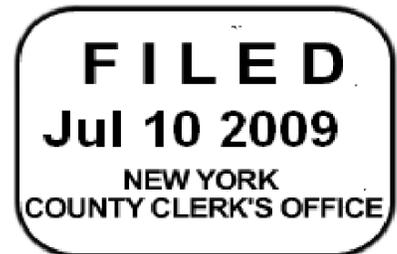
Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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



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

Dated: _____

7/9/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

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

-----X
RNK CAPITAL LLC, GREY K ENVIRONMENTAL
FUND, LP, and GREY K ENVIRONMENTAL
OFFSHORE FUND, LTD.,

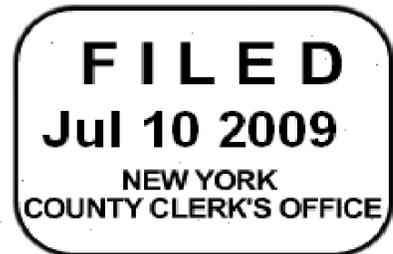
Plaintiffs,

Index No. 603483/06

- against -

NATSOURCE LLC, NATSOURCE ASSET
MANAGEMENT LLC, NATSOURCE
TRANSACTION SERVICES LLC,
NATSOURCE EUROPE LTD., NATSOURCE
JAPAN CO., LTD., HARVEY ABRAHAMS,
BEN RICHARDSON, MICHAEL INTRATOR,
DAVID OPPENHEIMER, JACK COGEN, and
JOHN DOE COMPANIES NOS. 1 THROUGH
10, the true name of said defendants being
unknown to plaintiff, the party intended to be
any NATSOURCE ENTITY that obtained or
stands to obtain an interest in the property
described in the complaint,

Defendants.



-----X
KORNREICH, J.:

In this action based on loss of a potentially lucrative investment opportunity to invest in certified emissions reductions credits (CERs)¹, all defendants (with the exception of Ben Richardson, Harvey Abrahams, and the John Doe Companies) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The claims against Harvey Abrahams were dismissed pursuant to a settlement agreement. The gravamen of the action is the allegation that defendants agreed to broker a deal that would result in plaintiffs' acquisition of CERs from the

¹CERs are measured in tons.

Shangdong Dongyue HFC23 Decomposition Project in China (Dongyue). In substance, plaintiffs allege that instead of faithfully executing their brokerage obligations, defendants sought to purchase the Dongyue CERs for their own benefit and the benefit of their other clients, failed to honestly report the progress of the negotiations to plaintiffs and agreed that Mitsubishi Corporation (Mitsubishi), with whom one of the defendants had a financial relationship,² would be the only party to conduct negotiations for the Dongyue deal. Ultimately, the Dongyue CERs were sold to Mitsubishi and Nippon Steel, and neither defendants nor plaintiffs invested in the Dongyue CERs.

Plaintiffs withdrew several causes of action prior to submission of the motion.³ The remaining causes of action asserted in the complaint are breach of fiduciary duty asserted against the Natsource entity defendants (first); aiding and abetting breach of fiduciary duty asserted against the individual defendants (second); negligent misrepresentation against all defendants (third); and breach of the agency agreement asserted against the Natsource entity defendants (fifth). As damages, plaintiffs seek the value of the profits that they allegedly would have realized from selling the CERs and from other investments plaintiffs would have made if they had not put aside money to invest in the CERs, plus attorneys' fees, costs and punitive damages. The prayer for disgorgement of profits defendants earned in the Dongyue transaction is moot as it is undisputed that defendants did not invest in it. *See*, Plaintiffs' Counterstatement of Material

²A subsidiary of Mitsubishi is a member of Natsource Japan Co, Ltd. and Mitsubishi had a representative on Natsource's board at all relevant times.

³The withdrawn causes of action were tortious interference with prospective economic relations (fourth); unjust enrichment (sixth); constructive trust (seventh); and declaratory judgment and injunction (eighth).

Facts, ¶¶ 63-66.

Factual Background

Plaintiffs Grey K Environmental Fund, LP and Grey K Environmental Offshore Fund (collectively Grey K) invest in environmental securities, including CERs, that are generated by projects authorized by the Kyoto Protocol of the United Nations Framework Convention on Climate Change (Kyoto Protocol). CERs are based on emissions of carbon, sulfur, or nitrogen and are traded on a worldwide basis. Ownership of a CER provides the holder with the right to emit a specific substance during a specific time period. CERs are purchased pursuant to an Emission Reduction Purchase Agreement [ERPA]. After purchase, Grey K sells the CERs or CER options for profit. Plaintiff RNK Capital, LLC (RNK) is an investment manager for Grey K.

Defendants Natsource LLC (Natsource), Natsource Europe, Ltd. (Natsource Europe), and Natsource Japan Co., Ltd. (Natsource Japan), help clients reduce their greenhouse gas emissions (GHG) in compliance with the Kyoto Protocol. Natsource Japan is a joint venture between Natsource and a subsidiary of Mitsubishi, among others. Natsource develops and brokers investment transactions in environmental commodities or other market instruments that enable firms to comply with emission reduction requirements. Defendants Natsource Transaction Services LLC (NTS) and Natsource Asset Management LLC (NAM) are Natsources' wholly owned subsidiaries. Defendant John Doe Companies 1 through 10 are other Natsource entities whose names are unknown.

The evidence shows that the named entity defendants (collectively, Natsource entities) are affiliated entities that share common membership, ownership, and management. The individual

defendants are or were principals in the Natsource entities, who were involved with the GHG business opportunities that plaintiffs were seeking. Much of plaintiffs' contact was with defendant Harvey Abrahams, a former managing director of Natsource, who is no longer a party in this action. Defendants Michael Intrator and David Oppenheimer are managing directors of Natsource. Defendant Jack Cogen is its President and Chief Executive Officer. Defendant Ben Richardson worked as a consultant to Natsource Europe beginning in 2002 and became a managing director in 2006, as well as a member of NAM and a member of Natsource.

According to the testimony of Robert Koltun, he is and was RNK's managing member. Prior to that he worked for Natsource for six or seven years, where he was a senior manager broker on a trading desk with Abrahams. Koltun left Natsource in March 2002 and formed RNK in February 2004. Grey K Environmental Fund was formed on November 2, 2004, and Grey K Environmental Offshore Fund on January 28, 2005.

Abrahams and Koltun agree that they were friends from the time that Koltun was at Natsource. Abrahams testified that he worked at Natsource beginning in September 2006. Koltun testified that the principals of Natsource were his former partners and his best friends in the world. Koltun further testified that after he left Natsource, plaintiffs and Natsource had an ongoing broker relationship, in which Natsource would bring business opportunities to plaintiffs and negotiate transactions on plaintiffs' behalf. Koltun testified that prior to October 2004, Natsource acted as plaintiffs' broker and brought many business opportunities to Koltun, some of which closed, some of which did not. Defendants do not dispute that. Koltun testified that Natsource did not have authority to bind RNK entities without explicit permission.

Also undisputed is that starting in 2004, Natsource contemplated entering into three

different GHG business opportunities, the Dongyue, Cobee and Taishan transactions.⁴ The causes of action asserted in the complaint arise solely out of the Dongyue investment opportunity, which was negotiated at the same time as the Cobee and Taishan transactions. However, what is disputed is the nature of Natsources' obligation to plaintiffs in connection with Dongyue.

Abrahams and Koltun testified that in the Fall of 2004, they reached an agreement that Natsource would serve as plaintiffs' primary agent on environmental commodities deals. According to Koltun and Abrahams, in October 2004, they agreed that plaintiffs would be one of three CER purchasers in the Dongyue transaction.

Defendants dispute this. Intrator testified that, with the exception of their managed accounts, with whom they had an asset allocation agreement, Natsource had absolute discretion to determine which investors would participate in a particular transaction and that they had no obligation to include plaintiffs, who had no obligation to invest until they signed an ERPA. It is defendants' position that this is how CER sales are usually transacted. Cogen testified at his deposition that Natsource agreed that Koltun's entity would be a member of a consortium of which Natsource was the principal, if it were able to put the consortium together, which never happened. According to Cogen, the principal negotiates the form of the transaction, acts as buyer, controls the transaction, approaches other firms that have the needed capital and defines

⁴In March 2005, Abrahams reported to plaintiffs that the putative seller had backed out of the Cobee transaction. In June 2005, the parties agreed that, in return for repaying plaintiffs \$45,000 advanced for negotiation expenses, NAM would acquire plaintiffs' right to participate as a principal in the Taishan transaction.

the terms on which they can participate. He further testified that usually there is no consortium until the ERPA documents are signed, before which there is an ever-changing group with no commitment on either side.

However, Cogen admitted that in 2004, Natsource had no syndicated deals because they were just then beginning to enter into the asset management business. Nevertheless, he stated that Natsource was in the syndication business in 2004 because it had employees who were developing an asset management business. Cogen testified that the other businesses operated by Natsource in 2004 were an advisory and research business and a transaction services business (NTS), which had a broker's component. Cogen admitted that it was not until 2005 that NAM was formed and began managing an investment fund called GG-CAP. There is no dispute NAM was formed to operate a business that would compete with plaintiffs.

Cogen testified that in 2004, he, Abrahams and a representative of Mitsubishi Corporation, which has been on Natsource's Board since 2003, had a meeting in New York to discuss the Dongyue transaction. At that initial meeting, one of the buyers contemplated was Koltun or plaintiffs. Defendant Intrator testified that initially defendant Oppenheimer and Abrahams were the Natsource representatives responsible for interfacing with plaintiffs, but Intrator took over after a time due to strained relations between Abrahams and Koltun. Cogen testified that after Abrahams went to NAM, Natsource made a decision that Oppenheimer should take over interfacing with plaintiffs because Abrahams was no longer acting as a broker. Oppenheimer testified that at some point in time, he took over from Abrahams as the Natsource representative dealing with Koltun and RNK about Dongyue. Defendant Richardson testified that one reason he stepped aside from being involved with RNK's investment in Dongyue was

that NAM had a competing relationship with RNK.

In December 2004, defendants transmitted a draft term sheet to plaintiffs relating to the Dongyue transaction. The term sheet identified Natsource as a buyer representing a consortium of buyers. In contrast to the Taishan and Cobee term sheets, this one did not identify Natsource as a participant in the transaction. Later, Natsource decided to become a participant in Dongyue.

Koltun and Abrahams testified that initially Abrahams advised Koltun that plaintiffs would receive the right to purchase up to 20 million CERs from the Dongyue deal in the event that it came to fruition. According to the December 2004 draft term sheet, it was proposed that plaintiffs would pay 50 cents for call options to purchase CERs for \$5 each. Plaintiffs would make an upfront payment of 50 cents for each CER that it would have a future right to buy for an additional \$4.50. The CERs would be generated from 2007 through 2012.

Koltun testified that from late 2004 into October 2005, Koltun often communicated with defendants regarding the status of the Dongyue deal and Natsource repeatedly represented to plaintiffs that they would participate in it. This is confirmed by e-mail correspondence in the record.

However, Natsource subsequently attempted to have NAM and/or GG-CAP invest in the Dongyue deal. Abrahams testified that, up until 2005, he was a principal for NTS, which brokered deals as part of its business. In 2005, he moved to NAM. Abrahams testified that Natsource then sought to have investors with established managed accounts in NAM invest in Dongyue. Abrahams testified that in March 2005, disagreements arose about the number of CERs that should be allocated to plaintiffs. Abrahams further testified that his partners wanted to reduce plaintiffs' CERs to between \$1 and \$5 million, which translated to the right to buy

between 2 and 10 million CERs, instead of the promised 20 million. Defendant Intrator testified that at some point, he, Abrahams and Cogen had approximately ten meetings to discuss eliminating plaintiffs' participation in Dongyue and ultimately decided that plaintiffs would not be investors in the transaction.

The record contains e-mail correspondence, sent during March 2005, between Abrahams and Koltun concerning the Dongyue transaction. According to plaintiffs, this correspondence constitutes a sufficient memorandum to satisfy the statute of frauds.

On March 3, 2005, Abrahams e-mailed Koltun stating that "we will conclude our agreement on how Natsource will get paid on your participation on the Cobee, Taishan and Dongyue deals" (Carnavale Aff., Ex. 25). "We have agreed" that Natsource's fee "for working to structure these deals for RNK" will consist of repayment of its expenses and "participation in the upside of the deals" (*id.*). "I suggest that ... the upside be paid to Natsource in the form of some fixed percentage of the tons ... I hope this meets with your approval" (*id.*). "Whatever arrangement we reach verbally or through email or IM will be followed by a standard brokerage contract issued by" a Natsource entity (*id.*).

On March 4, 2005, for the first time, defendants told plaintiffs that Natsource was going to participate in the Dongyue transaction as a principal alongside plaintiffs and the Japanese companies. On March 4, Koltun e-mailed Abrahams. "I don't understand how will u know the upside to figure out how many tons u receive. Also then I will have someone else controlling when they decide to sell the tons creating a competitor in the mkt. Third what name and who controls - is partners in [the Natsource entity referenced in Abraham's email]" (*id.*). "[I] have no trust in Ratsources ethics so my lawyers have to review document so I can't give your thief

partners any wiggle room" (*id.*).

On March 4, Abrahams responded. "If we got say 1-2% of the tons we [would be] riding the same price risk as you. Also it would make us independent of what you do on anything else in your fund" (*id.*). Subsequently, on March 4, Abrahams e-mailed Koltun that he was "glad that we have agreed that Natsource would be paid by RNK in tons plus reimbursement of expenses on the Taishan, Cobee, and Dongyue deals. We will come back to you with a proposal shortly" (*id.*, Ex. 26). On the same day, Cogen e-mailed Abrahams that no deal for Koltun should be finalized without a discussion among Intrator, Cogen and Abrahams (Plaintiffs' Ex. 42).

On March 9, 2005, Koltun e-mailed Abrahams stating that here was his answer to Abrahams' question as to why Koltun was "upset" (Carnavale Aff., Ex. 27). "U rushed me and sent that weird email implying we have a brokerage agreement when we don't. There was clearly some agenda to that email that I am not a party to. Nor im sure is in my best interest" (*id.*). Koltun adds that Abrahams is working on other issues "that don't involve these deals. I understand that but PRICES ARE RALLYING [several exclamation points]. ... And IM NOT LONG. I DO NOT HAVE ANY CLOSED DEALS [several exclamation points]. Its march 9" (*id.*). The e-mail continues. "U continually tell me that a deal is imminent" (*id.*). "If I was being paranoid I would assume that u guys have an ulterior motive for your failures!! But im trying not to go there" (*id.*). "I want a document before I release this 30k today that says that natsource acting as a broker for RNK in these transactions and that I am entitled to the first 5 million dollars worth of credits (before you give credits to anyone else) that u broker from Dongyue and [Taishan]" (*id.*). "I would like to agree to a exact percentage of credits for your brokerage or cash and credits" (*id.*).

On March 9, Abrahams e-mailed Koltun stating that the agreement that he “rushed [Koltun] to sign was a brokerage agreement. Which I believe is what you want” (*id.*). The “30k” was for the Taishan deal, and “I thought before you sent it we should have a brokerage agreement” (*id.*). “I can’t give you a doc that says you get 5 mill worth of CERs before natsource get any bec. in dongyue we are all sharing ‘our’ tons prorata and I promised you between \$1 and 5 mill worth” (*id.*). Natsource is “almost certainly going to be acting as a principal in that deal so I can’t send you a letter stating that I am the broker of the dongyue deal. another thing. I am not sure what the final volume is and I never promised you the first ones so I can’t give you that. What I can say is you will be getting tons along with us and we will not have all of ours before you get yours” (*id.*). Regarding the Taishan deal, “I didn’t promise you the whole project just the first 300k. If you want the balance, we can talk about that” (*id.*). Abraham further states that “we normally get 5% to ‘broker’ these. ... Ben wrote the [ERPA], the basis of which you will be using... I think 3% of tons plus my expenses is not unreasonable” (*id.*). “In view of your concerns about natsource’s level of honesty, I thought a % of the tons upfront would work best for you. You and I have always dealt on a handshake. I am the one who put my side of the deal in writing. I have not asked you to do so ...” (*id.*).

On March, 9, 2005, Koltun e-mailed that Abrahams promised him that if the deal was for 10 million tons, plaintiffs would get their tons before Natsource “or new managed accts” got any (Plaintiffs’ Ex. 43). Plaintiffs will share prorata with Natsource only if the deal is for 25 million tons (*id.*). “The reason natsource is [the name] on docs was to make my life easier not because it gave u rights to do the deal” (*id.*). “Out of friendship I have bent over backwards ... I gave u leads for money when this was a dream ...” (*id.*). “What I want is that last Friday u told me u

would have a proposal to fees/brokerage I have been asking for a proposal since" (*id.*). "And I think 3 percent plus some # for expenses is fine assuming all 3 close but I am not paying for things that u did to further your bid to bring that [expletive] cogen and intrator to become my competition" (*id.*). In another e-mail, on March 9, 2005, Koltun stated that he had done things against his lawyer's advice in order to help his friend Abrahams. "Lets do these 3 deals and then be done" (Carnevale Affirmation, Ex. 27).

It is undisputed that at some point in 2005, in or about July, the seller in the Dongyue deal was no longer interested in an option transaction and wanted a fixed price transaction that required full payment of the CERs on delivery. Also undisputed is that prior to October 2005, Natsource learned that the Chinese government would not approve the sale of CERs for \$5 per ton. In September 2005, Natsource executed a letter of intent to buy 30% of the CERs in the Dongyue project from 2008 to 2012 at a fixed price of \$7 per CER.

It is undisputed that plaintiffs never had direct contact with the sellers in the Dongyue transaction and defendants and/or Mitsubishi controlled all information from the seller. In fact, defendants admit that Mitsubishi became the seller's agent in July 2005. Koltun testified that defendants never told him that the Dongyue seller changed the terms of the transaction and that in 2004 through October 2005, he was repeatedly told that plaintiffs' Dongyue deal was going to close. Defendants have presented no evidence that Koltun or RNK was advised that the terms of the potential deal had changed or that plaintiffs were given an opportunity to bid once that happened. Intrator testified that he could not recall any representative of Natsource telling any representative of plaintiffs about these changes. Further, he admitted that in July 2005, Natsource Japan was facilitating discussions concerning an investment by NAM and Mitsubishi

in Dongyue. Intrator said that in August 2005, Natsource considered having Natsource Europe, GG-CAP or an SPV (special purpose venture) created by Natsource, invest in the Dongyue CERs.

As time passed and the Dongyue transaction did not appear to proceed, the relationship between Koltun and Abrahams deteriorated. Defendant Michael Intrator replaced Abrahams as Natsource's liaison with plaintiffs. On October 19, 2005, Intrator told Koltun that there was nothing new to report on the Dongyue deal. On October 20, 2005, a news report issued, announcing that Natsource and the Japanese companies were to buy 60.66 million CERs that were expected to be generated from the Dongyue decomposition project from 2007 through 2012, at a rate of 10.11 million CERs each year. The article stated that Natsource had announced the closure of the deal. According to plaintiffs, Natsource's share was 20 million CERs, the amount that Natsource previously agreed to obtain for plaintiffs. However, as previously noted, plaintiffs now admit that Natsource did not participate in the Dongyue transaction.

The parties have different explanations as to why Natsource was unable to finalize the Dongyue deal for itself or plaintiffs. Defendants claim that the Chinese government would not permit the sale of CERs at the price in the December 2004 term sheet after the United Nations ratified the Kyoto Protocol in February 2005 and that the sellers wanted a fixed price transaction.

Plaintiffs allege that defendants mismanaged the negotiations. Plaintiffs also allege that Natsource chose to forego the Dongyue opportunity in favor of pursuing another deal, the PetroChina deal. In addition, plaintiffs allege that defendants could not secure the Dongyue deal because Natsource lacked sufficient credit. Plaintiffs contend that if Natsource had asked them to provide more credit support, they would have done so to save the deal. At the time, plaintiffs

claim they had \$800 million under management and could have bought CERs for \$7 to \$11, the price Mitsubishi paid. Plaintiffs have presented evidence that in April and May 2006, CERs were selling for \$41.82 and \$21.38, respectively.

Plaintiffs have submitted an affidavit by Abrahams, which he executed in connection with his settlement agreement, as well as the deposition testimony of Abrahams. Abrahams' affidavit and testimony support plaintiffs' version of the facts and contradict his answer.

Stripped of its legal conclusions, the Abrahams affidavit states: 1) that Koltun was his long time friend and partner; 2) that before the end of 2004, Natsource began representing RNK and its affiliated hedge funds by brokering environmental commodities transactions for them domestically and abroad; 3) that by March 2005, Natsource changed its business model from being primarily an environmental commodities broker to being primarily a money manager and had formed its own environmental fund, activities that competed with RNK; 4) that in late 2004, Natsource needed capital to establish itself in the GHG market and that without RNK's financial backing that would not have been possible; 5) that Abrahams agreed that Natsource would be the primary broker for Koltun and RNK in GHG transactions and, in late 2004 to early 2005, he repeatedly assured Koltun that Natsource would serve plaintiffs' interests; 6) that Abrahams promised that Natsource would, through its connections, special expertise, knowledge and judgment in emerging GHG markets such as China, which was far superior to Koltun's, secure GHG investment opportunities for RNK; 7) that plaintiffs placed full trust and confidence in Abrahams; 8) that as RNK's trusted representative, Abrahams handled all key business issues (specifically, he negotiated prices, solicited bids, facilitated term sheets and other transactional documents, and met with potential sellers and government officials); 9) that individual

defendants Intrator, Cogen and Richardson knew of and never objected to the relationship Natsource established with RNK; 10) that in December 2004, Koltun and Abrahams agreed that Natsource would try to secure an investment for RNK in the Dongyue, Taishan and Cobee transactions in return for which RNK would pay Natsources' expenses plus 3% of CERs purchased on each deal that closed; 11) that Abrahams first learned of the Dongyue transaction from Itsuho Haruta of defendant Natsource Japan, a joint venture between Natsource, Mitsubishi and others; 12) that in September 2004, Abrahams told Haruta, as well as individual defendants Cogen and Richardson, that he had a group of investors, the largest of whom was Koltun of RNK; 13) that in late December 2004, RNK and Koltun expressed an interest in investing in call options in Dongyue and Abrahams promised Koltun the bulk of the CERs: \$10 to \$15 million; 14) that in March 2005, Abrahams' partners at Natsource were soliciting private investor clients to open managed accounts at NAM and were promising them participation in Dongyue and, therefore, his partners began to disagree about RNK's percentage; 15) that after conversations with Cogen and Intrator, Abrahams told Koltun that he would get many fewer CERs from Dongyue if the deal closed and that Natsource managed accounts would be participating in it; 16) that subsequently Abrahams lost control of the allocations of the Dongyue CERs and no longer acted as RNK's broker; 17) that Dongyue closed with Mitsubishi, but without Natsources' participation. Defendants object to consideration of Abrahams' affidavit and deposition on the ground that they contradict Abrahams' answer, which they claim is a binding.

Discussion

A court may grant summary judgment if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law

in directing judgment in favor of any party” (*Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 560-562 [1980]). Once movant makes this showing, the burden shifts to the opposing party to show that there are material issues of fact warranting a trial (*Id.*; *Garrett v Unanimity Constr., Inc.*, 160 A.D.2d 546, 547 [1st Dept 1990]). The evidence must be examined in the light most favorable to the non-moving party (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 N.Y.3d 96, 105-106 [2006]).

Defendants are incorrect that the court may not consider Abrahams’ affidavit and deposition because they contradict his answer. A judicial admission binds the party making it (9 Wigmore, *Evidence* §2590 (Chadbourn rev. 1981), *Paige v. Willet*, 38 N.Y. 28, 31 [1868]). It relieves the party opposing it from the obligation to prove the fact admitted and binds the party making the admission from disputing it. Wigmore, *supra*, §2589. However, a fact admitted by a defendant during settlement negotiations may be used to support the plaintiff’s position (*Central Petroleum v. Kyriakoudes*, 121 A.D.2d 165 [1st Dept 1986]). It is error for a court to exclude an admission offered by the opposing party (*Bellino v. Bellino Construction Co.*, 75 A.D.2d 630 [2nd Dept 1980]). Here, Abrahams’ answer binds him, not plaintiffs, who may use Abrahams’ factual statements in his settlement affidavit and deposition to defeat summary judgment.

A. Breach of Contract

Defendants move for summary judgment dismissing the fifth cause of action for breach of an agency agreement. They urge dismissal based upon the statute of frauds, which provides that every agreement “to pay compensation for services rendered in negotiating ... a business opportunity” must be in writing (General Obligations Law [GOL] § 5-701 [a] [10]; *Parma Tile Mosaic & Marble Co., Inc. v Estate of Short*, 87 NY2d 524, 527 [1996]). The court will not

enforce agency and brokerage agreements that provide that one party will negotiate business opportunities on behalf of the other that are not in writing (*Stephen Pevner, Inc. v Ensler*, 309 AD2d 722, 722 [1st Dept 2003]; *Davis & Mamber v Adrienne Vittadini, Inc.*, 212 AD2d 424, 424 [1st Dept 1995]). It is the nature of the alleged agreement that governs whether [GOL] 5-701 (a) (10) applies (*Herkert v. Temco Services Industries, Inc.*, 272 A.D.2d 161 [1st Dept 2000]). Defendants also assert that the alleged agreement violates GOL 7-501(a)(1) because it was a service contract of indefinite duration with termination dependent on the will of a third party, in this case the party selling the CERs (*see, North Shore Bottling Co. v. C. Schmidt & Sons, Inc.*, 22 N.Y.2d 171, 178 [1968]).

Defendants correctly maintain that any understanding that they would act as plaintiffs' agent and negotiate the Dongyue deal for them must conform to the statute of frauds to be enforceable. The parties disagree over whether they made such a writing. Plaintiffs maintain that the e-mails exchanged between Koltun and Abrahams on March 3, 4, and 9, 2005, taken together, constitute a written contract that satisfies the statute of frauds. Defendants argue that the e-mails show negotiation and discussion, but not an agreement on terms. Specifically, they contend that there was no meeting of the minds on the entities that were parties to the agreement, the volume of CERs or CER options to be acquired, whether plaintiffs would get their CERs before others, whether Natsource would be a broker or a principal, and how Natsource was to be compensated if the call options were sold and plaintiffs never received CERs. Further, Natsource urges that the e-mail exchange is evidence that the parties did not intend to be bound until a formal written brokerage agreement was prepared.

To meet the requirements of the statute of frauds, a writing must contain all of the

essential terms of the purported agreement (*Nemelka v Questor Mgt. Co.*, 40 AD3d 505, 506 [1st Dept 2007]; *DeRosis v Kaufman*, 219 AD2d 376, 379 [1st Dept 1996]). Common law likewise requires that an agreement be reasonably certain in its material terms; otherwise, it cannot be enforced (*Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989]). The writing must show that the contracting parties arrived at a “mutual assent or a meeting of the minds” (*Langer v Dadabhoy*, 44 AD3d 425, 426 [1st Dept 2007]). An agreement is enforceable if all essential material terms are in writings cobbled together (*Adiel v Lincoln Plaza Assoc.*, 254 AD2d 5, 5 [1st Dept 1998]) and the writings do not demonstrate conclusively that the parties intended to finalize their agreement in a formal document that never materialized (*Jericho Group, Ltd. v Midtown Dev. L.P.*, 32 AD3d 294, 299 [1st Dept 2006]; *Sabetfard v Smith*, 306 AD2d 265, 266 [2d Dept 2003]). This holds true even where there is an intent to “hammer out” details subsequently (*Foster v Kovner*, 44 A.D.3d 23, 28 [1st Dept 2007]). Where the writings are ambiguous, they may be explained by parole evidence and present a question of fact that must be determined by a jury (*Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 171-172 [1973]).

Here, there are questions of fact as to whether there is a sufficient memorandum to satisfy the statute of frauds. The e-mails sent by the parties demonstrate that Natsource was to obtain some CERs for plaintiffs and that Natsource’s fee would be 3% of the CERs plus expenses. At oral argument, the parties contended that when negotiating the sale of CERs, the amount to be sold and their allocation are not known until the deal closes. Although the writings do not establish how many CERs plaintiffs would receive, the order in which CERs would be distributed, including whether plaintiffs would receive theirs ahead of other buyers, and what

percentage of CERs Natsource would get for its own account, the writings are sufficient to present an issue of fact as to whether Natsource agreed to obtain the CERs for plaintiff in exchange for a specific fee. Given the parties' description of the normal course of negotiating a CER transaction, the number of CERs to be sold and their allocation may not have been an essential term. This view of the evidence is consistent with defendants' testimony that the final ERPA determined the allocation of CERs, absent an allocation agreement for a client with a managed account.

The writings are susceptible of the interpretation that Koltun acquiesced to the diminution of the CERs and his priority in obtaining them, as he agreed ultimately to the fee. Koltun testified that he assented to the allocation and timing of the CER distribution because it would have been better than nothing. Whether the agreement was subject to conditions is also a question of fact. Koltun's March 9, 2005 e-mail agreed to defendants' email offer of 3% plus expenses, but added "assuming all 3 close but I am not paying for things that u did to further your bid ... to become my competition." It is unclear whether that meant that all three transactions had to close or that the fee would be earned on each one only after it closed, as Koltun testified. Also ambiguous is the meaning of paying for things that furthered defendants' bid to become plaintiffs' competition. This could mean that Koltun would not agree to have Natsource be a participant, or it could mean, as Koltun testified, that he would only pay for expenses that were attributable to Natsources' attempts to secure CERs for plaintiffs. With respect to the failure to identify the parties in privity, there is evidence that Koltun and Abrahams were principals with the authority to bind all of the named entities. Although Abrahams refused to state that he was the broker of the Dongyue deal, the relationship of the parties governs the nature of the

agreement, not the nomenclature adopted by the parties (*Herkert v. Temco Services Industries, Inc.*, *supra*). Finally, it is a question of fact whether the parties did not agree to be bound absent a formal writing, given Abrahams statements that they had always done business on a handshake and that he had put his side of the deal in writing.⁵

However, although summary judgment dismissing the contract claim must be denied, at most plaintiffs are entitled to nominal damages for breach of contract because the lost profits sought are speculative (*O'Neill v. Warburg, Pincus & Co.*, 61 A.D.3d 570 [1st Dep't 2007])[lost profits may not be merely speculative, possible or imaginary]). Where an anticipated profit requires the approval of a party over which the defendant has no control, they are too speculative to permit recovery (*Hoeffner v. Orrick, Herington & Sutcliffe*, 20 Misc.3d 1139(A)[Sup. Ct. N.Y. Co. 2008], *modified on other grnds.* 61 A.D.3d 614 [1st Dep't 2009])[earnings plaintiff would have received if retained by law firm other than defendant not recoverable]; *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205, 209 [1886])[damages must be directly traceable to breach and not from other intervening causes]).

Here, plaintiffs' alleged lost profits would have required the approval of a third party, the

⁵Plaintiffs argue that the parties had an oral agreement which is enforceable due to the part performance exception to the statute of frauds. However, the doctrine of part performance does not apply to GOL 5-701 (a) (1) and (10) (*Nemelka*, 40 AD3d at 506; *Stephen Pevner, Inc.*, 309 AD2d at 722; *Walker v Knowles*, 15 Misc 3d 1124[A]; 2007 NY Slip Op 50825[U], *3-4 [Sup Ct, NY County 2007]. *See also United*, 584 F Supp 2d at 654; *Messner Vetere Berger McNamee Schmetterer Euro RSCG, Inc. v Aegis Group PLC*, 93 NY2d 229, 234 n 1 [1999]). To the extent that plaintiffs claim promissory estoppel should overcome the statute of frauds, they would have to demonstrate unconscionable injury, "injury beyond that which flows naturally (expectation damages) from the non-performance of the unenforceable agreement" (*United*, 584 F Supp 2d at 658) [quotation omitted]). Injury that results from "non-performance of a void agreement" is not the sort of "irremediable change in position normally associated with the doctrine of promissory estoppel" (*Philo Smith & Co. v USLIFE Corp.*, 554 F2d 34, 36 [2d Cir 1977]). Here, there is no evidence of the required injury.

seller of the CERs. This was not in defendants' control. While there is evidence of an objective basis to determine the value of the CERs, there is no way of knowing whether the seller would have agreed to a transaction with plaintiffs or for how many CERs. For this reason, plaintiffs' damages are at most nominal.

B. Breach of Fiduciary Duty

Defendants argue that the breach of fiduciary duty claim should be dismissed as it entirely derives from and duplicates the breach of contract claim. They contend that plaintiffs failed to present evidence of a fiduciary relationship and that the facts show nothing more than a conventional, arms-length business relationship. If the breach of fiduciary duty claim cannot be maintained, defendants argue that the aiding and abetting breach of fiduciary duty also must fall.

Plaintiffs counter that there is evidence to prove that: defendants were plaintiffs' agents; plaintiffs reposed trust and confidence in them; the genesis of this trust was the relationship between Koltun and Abrahams that began in 1995, when they became partners and friends, and continued after Koltun left Natsource; Koltun and Abrahams relied on a handshake to seal agreements; and there was an ongoing relationship between plaintiffs and defendants that arose before the CER transactions and resulted in finalized deals. Defendants do not dispute that they brokered deals for plaintiffs prior to the three CER transactions contemplated in 2004 to 2005.

Plaintiffs urge that the evidence further shows that developing a relationship of trust with plaintiffs was a top priority for defendants, Natsource promised to act as an agent for RNK, RNK was one of the first institutional investors in the GHG market, and defendants needed RNK's money to launch their GHG business. Moreover, plaintiffs contend that defendants agreed to broker the Dongyue deal for plaintiffs, that plaintiffs obtained information about the deal only

through defendants and that defendants represented to plaintiffs that they were brokering the deal for plaintiffs, while they were, in fact, acting for themselves and their own investors.

Unless there are special circumstances giving rise to a confidential relationship of trust, an arm's length business relationship does not create a fiduciary duty (*V. Ponte & Sons v American Fibers Intl.*, 222 A.D.2d 271, 272 [1st Dept 1995]). However, a fiduciary relationship may arise "between contracting commercial parties, such as, for example, when one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party" (*Calvin Klein Trademark Trust v Wachner*, 123 F. Supp.2d 731, 734 [S.D.N.Y. 2000]). "A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (Restatement [Second] of Torts § 874, Comment a). The fiduciary relationship is grounded on a higher level of trust than usually found in the marketplace (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). Whether such a relationship exists is fact specific (*id.*) and requires an examination of the ongoing relationship between the parties (*see Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 A.D.3d 107, 110 [1st Dept 2005]). It may arise from close friendships or prior business dealings between the parties (*Apple Records, Inc. v Capitol Records, Inc.*, 137 A.D.2d 50, 57 [1st Dep't 1988]).

While defendants contend that plaintiffs had a non-discretionary trading account that could not give rise to a fiduciary duty (*see e.g. Fesseha v TD Waterhouse Investor Services, Inc.*, 305 A.D.2d 268 [1st Dep't 2003]), the authority to conduct negotiations coupled with an ongoing relationship creates a fiduciary duty (*Frydman & Co. v Credit Suisse First Boston Corp.*, 272

A.D.2d 236 [1st Dep't 2000]; *Lazard Freres & Co.*, 241 A.D.2d 114 [1st Dep't 1998]). Here, there is evidence that the parties had an ongoing business relationship and friendship, plaintiffs left all negotiations to defendants and defendants had sole access to the information.

Defendants argue that a cause of action for breach of fiduciary duty based entirely on allegations supporting a breach of contract claim will fail, even if the putative contract is unenforceable (*Steinberg v. DiGeronimo*, 255 A.D.2d 204 [1st Dep't 1998]; see *Foster v Kovner*, 44 A.D.3d 23, 30 [1st Dept 2007][*dicta*]). Here there is more.

A fiduciary claim must allege that defendants breached a duty other than and independent of the duty to perform under the putative contract (*Kaminsky v FSP, Inc.*, 5 AD3d 251, 252 [1st Dept 2004]; *William Kaufman Org., Ltd. v Graham & James L.L.P.*, 269 AD2d 171, 173 [1st Dept 2000]). “Where a party is merely seeking to enforce its bargain, a tort claim will not lie” (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; *Saint Patrick's Home for the Aged & Infirm v Laticrete Intl., Inc.*, 267 AD2d 166, 167-168 [1st Dept 1999]). In this case, there are questions of fact as to whether the breach of fiduciary duty claim duplicates the cause of action for breach of contract. While defendants dispute that the parties had more than a series of arms-length transactions, there is evidence that there existed a long-standing friendship and trust, as well as an ongoing course of defendants' negotiation of transactions on behalf of plaintiffs that predated Dongyue. Moreover, it is undisputed that plaintiffs relied exclusively on defendants to negotiate and impart information about the transaction and there is evidence that defendants had superior knowledge of the GHG market in China. Whether Koltun actually had trust and confidence and relied upon defendants presents a question of fact, as there also is evidence that Koltun did not trust Natsource.

The second cause of action for aiding and abetting the breach of fiduciary duty presents the same question of fact. There is e-mail correspondence and testimony to evidence that the individual moving defendants were, at various stages, in charge of pursuing the Dongyue transaction for plaintiffs, but changed course when defendants' competing funds came into existence.

Damages for breach of fiduciary duty comprise a special breed of cases that often loosen normally stringent requirements of causation and damages because they are intended to compensate the plaintiff and to deter fiduciaries from breaching their responsibilities (*Gibbs v. Breed, Abbott & Morgan*, 271 A.D.2d 180, 189 [1st Dep't 2000]). However, the plaintiff must establish that the offending parties' actions were a substantial factor in causing an identifiable loss (*id.*). A reasonable assessment of lost profits may be made where the disloyalty is a significant cause of an identifiable loss (*id.*). Compensatory damages also may include lost opportunities for profit caused by the faithless conduct (*105 E. Second St. Assoc. v. Bobrow*, 175 A.D.2d 746, 747 [1st Dep't 1991]). "A principal may recover damages based on the harm caused by an agent's breach of fiduciary duty although it is not possible to show that the agent profited through the breach" (Restatement [Third] of Agency § 8.01 [d] [1]). An attempted acquisition of a benefit from a third party also may subject the agent to liability, even if the attempt does not succeed (*id.*, § 8.02 [b], [c]). Moreover, a party liable for breaching a fiduciary duty may have to disgorge any gains realized therefrom, even where the injured party has sustained no direct economic loss (*Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 [1st Dept 1990]). Punitive damages are recoverable where the alleged wrongdoing has been intentional and deliberate (*Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 230 [1st Dep't 2001]). However, there

at least must be a viable cause of action for nominal damages to recover punitive damages (*id.*).

Here, were the jury to resolve the claim in plaintiffs' favor, even nominal damages would serve a deterrent function. There is evidence that defendants' deliberately tried to obtain CERs for themselves and investors in their managed funds to the exclusion of plaintiffs, which could be a basis for both nominal and punitive damages. However, as with the breach of contract claim, lost profits would require a demonstration that the Chinese seller would have sold to plaintiffs, which is speculative. And evidence of specific lost investment opportunities is lacking.

C. Negligent Misrepresentation

Turning to the negligent misrepresentation cause of action, defendants argue that it merely parallels the contract claim and that the complaint does not state such a cause of action. A claim for negligent misrepresentation requires: proof that defendants owed plaintiffs a duty of reasonable care in supplying information to them; that the representations made were false; and that the plaintiffs reasonably relied on the information to their detriment. (*Heard v City of New York*, 82 NY2d 66, 74 [1993]; *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 [2007] [elements of negligent misrepresentation claim are: (1) the existence of a special or privity-like relationship imposing a duty on defendant to impart correct information to plaintiff; (2) provision of incorrect information; and (3) reasonable reliance]). For a negligent omission, there must be a confidential or fiduciary relationship giving rise to a duty to speak with care (*Korea First Bank of N.Y. v Noah Enters.*, 12 AD3d 321, 323 [1st Dept 2004]).

However, the negligent misrepresentation claim must be dismissed because the damages sought by the third cause of action are not recoverable in an action for misrepresentation.

Compensatory damages for misrepresentation are limited to provable out-of-pocket losses (*Lama*

Holding Co. v Smith Barney, Inc., 88 NY2d 413, 421 [1996]). Profits that would have been realized in the absence of the fraud, or recovery based on the loss of an alternative bargain overlooked in favor of the fraudulent one or because of the fraud, are barred (*id.*; *Geary v Hunton & Williams*, 257 AD2d 482, 482 [1st Dept 1999]; *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 72 [1st Dept 1990]). A plaintiff may not recover contract damages for negligent misrepresentation (Restatement [Second] of Torts § 552B [2]). Here, the damages for negligent misrepresentation claimed are alternative bargains that plaintiff overlooked in hopes that the Dongyue deal would materialize. Plaintiffs allegedly put aside \$10 million so that they would be able to purchase the CERs in the Dongyue deal, as a result of which plaintiffs claim they made more conservative bids on other investments and did not have the funds to invest in several transactions that became available between late 2004 and October 2005. These damages are not recoverable in an action for misrepresentation. Accordingly, it is

ORDERED that the motion by defendants Natsource, LLC, Natsource Asset Management, LLC, Natsource Transaction Services, LLC, Natsource Europe, Ltd., Natsource Japan Co., Ltd., Michael Intrator, David Oppenheimer, and Jack Cogen for summary judgment dismissing the complaint is granted solely to the extent that the third cause of action in the complaint is dismissed with prejudice and in all other respects the motion is denied; and it is further

ORDERED that the parties are directed to appear for a status conference in Part 54, Room 418, of the courthouse located at 60 Centre Street, New York, N.Y., on August 6, 2009 at 9:30 a.m.; and it is further

ORDERED that the caption of the action is amended as follows:

-----X
RNK CAPITAL LLC, GREY K ENVIRONMENTAL
FUND, LP, and GREY K ENVIRONMENTAL
OFFSHORE FUND, LTD.,

Plaintiffs,

Index No. 603483/06

- against -

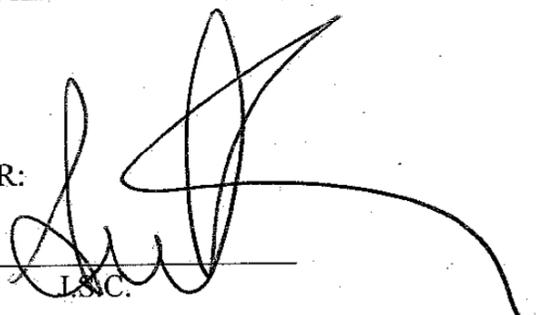
NATSOURCE LLC, NATSOURCE ASSET
MANAGEMENT LLC, NATSOURCE
TRANSACTION SERVICES LLC,
NATSOURCE EUROPE LTD., NATSOURCE
JAPAN CO., LTD., BEN RICHARDSON,
MICHAEL INTRATOR, DAVID OPPENHEIMER,
and JACK COGEN,

Defendants.
-----X

and that, upon service upon them of a copy of this order with notice of entry, the Clerks of the Court and of the Trial Support Office, Room 158M, shall amend their records to reflect the amended caption.

Dated: July , 2009

ENTER:


L.S.C.

