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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 650371/2009
PRUDENTIAL INSURANCE
vs.
WESTLB AG, NEW YORK BRANCH
SEQUENCE NUMBER : 008
PARTIAL SUMMARY JUDGMENT

PRES

PART 63

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______
Answering Affidavits — Exhibits ______ | No(s). ______
Replying Affidavits ______ | No(s). ______

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

Motion is decided in accordance with accompanying Memorandum Decision.

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

Dated: 10/12/12

______, J.S.C.
HON. CHARLES E. RAMOS

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and NATIXIS, NEW YORK BRANCH, and METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiffs,

Index No. 650371/09

- against -

WESTLB AG, NEW YORK BRANCH, ASA ETHANOL HOLDINGS, LLC, ASA ETHANOL LINDEN, LLC, and ASA ETHANOL BLOOMINGBURG, LLC,

Defendants.

--X

Hon. Charles Edward Ramos, J.S.C.:

This inter-creditor dispute arises out of allegations that defendants wrongly deprived plaintiffs of their rights in two ethanol production plants, as collateral for a loan.

Plaintiffs Prudential Insurance Company of America (Prudential), Natixis, New York Branch (Natixis), and Metropolitan Life Insurance Company (MetLife) move for partial summary judgment on their causes of action for breach of contract, conversion, and declaratory judgment.

Defendants ASA Ethanol Holdings, LLC, ASA Ethanol Linden, LLC, and ASA Ethanol Bloomingburg, LLC (collectively, the Asa defendants) and WestLB AG, New York Branch (WestLB) cross-move for summary judgment seeking dismissal of the complaint.

At oral argument, the Court denied the cross motions in their entirety, for the reasons set forth on the record (Tr

4/26/12 Tr:35-37).

Background

In February 2006, plaintiffs and sixteen other entities (altogether, lenders) extended credit to companies (the borrowers) that owned three ethanol plants, through several financing documents (Financing Documents), including a credit agreement (Credit Agreement).[1] The borrowers were indebted in the total amount of $262.6 million under the loan. Of the plaintiffs, Metlife extended $23.9 million (9.1%), Prudential extended $19.1 million (7.3%), and Natixis extended $7.6 million (2.9%).

The lenders obtained a security interest in all of the borrowers' assets, including the plants (collateral). The Credit Agreement provides for pro rata distribution of all payments and repayments under the loan (Credit Agreement, §§ 3.13-3.14).

Defendant WestLB executed the Credit Agreement in a number of capacities, including as administrative agent for the lenders. It was subsequently appointed as the sub-collateral agent for the lenders, with all the rights and powers as the collateral agent.

[1] The three ethanol plants are Linden, Bloomingburg and Albion. The Asa defendants, defendants herein, were not the original borrowers.

Bankruptcy Filing

In October 2008, the borrowers filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Delaware, which constituted an event of default under the Credit Agreement. The borrowers sought a sale of their assets, namely the plants, under section 363 of the Bankruptcy Code.

After the filing of the bankruptcy petition, several lenders, including WestLB, formed a steering committee to develop strategy. Of the plaintiffs, only MetLife served as a member of the steering committee. Although the lenders preferred to sell the collateral (the plants) for cash to a third-party buyer, in light of the credit crisis and the severe state of distress effecting the ethanol markets in 2008, certain lenders were concerned that the plants would either not be sold or would be sold for pennies on the dollar (Defendants' Rule 19-A Statement, ¶¶ 16, 20). The steering committee discussed the possibility that the lenders themselves would have to acquire the plants pursuant to a credit bid (Credit Bid) under section 363 (k) of the Bankruptcy Code, and own and manage the plants for sale at a later time.[2]

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[2] Under 11 USC § 363 (k) of the Bankruptcy Code, secured creditors can credit bid, that is, "take an ownership interest in the [debtor] company by bidding a reduction in the debt the company owes" (*Indiana State Police Pension Trust v Chrysler LLC [In re Chrysler LLC]*, 576 F3d 108, 116 [2d Cir 2009], *vacated and*

DIP Financing and Credit Bid

In order to provide for the working capital needs of the borrowers during the pendency of the bankruptcy proceedings, WestLB requested that the lenders extend additional funding to the borrowers, termed debtor-in-possession financing (DIP financing) (Defendants' Rule 19-A Statement, ¶ 9). Some, but not all, of the lenders agreed to commit funds to the DIP financing.[3]

Exit Facility

Prior to the auction, the steering committee also discussed the necessity to extend exit financing (exit facility) to the borrowers. The purpose of the exit facility was to repay the DIP financing, and to provide additional funding for the plants' maintenance.[4]

WestLB afforded all lenders the opportunity to commit funds to the exit facility, and it managed to secure $20 million out of the $60 million that it solicited. Plaintiffs elected not to

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dismissed as moot 592 F3d 370 [2d Cir 2010]). Secured lenders thus purchase their own collateral by using the debt owed to them (*see RadLAX Gateway Hotel, LLC v Amalgamated Bank*, __ US __, 132 S Ct 2065, 2070 n 2 [2012]).

[3] Of plaintiffs, only Metlife contributed to DIP financing.

[4] An "exit facility" is financing provided to Chapter 11 debtors to allow them to emerge from bankruptcy. Debtors use exit financing to pay creditors' claims under the reorganization plan and to fund their operations after bankruptcy (*see In re Journal Register Co.*, 407 BR 520, 539 [Bankr SD NY 2009]).

commit funds to the exit facility.

The auction was held on March 16-17, 2009. Non-party Valero made the winning bid, $55 million, for the Albion plant. A portion of the sale proceeds was used to repay the DIP financing, and the balance of the proceeds was distributed pro rata to the lenders, including plaintiffs, as provided for in the Credit Agreement. Plaintiffs do not complain of this distribution or the repayment of the DIP financing.

No acceptable bids were received for the Linden and Bloomingburg plants, and thus, WestLB made a successful Credit Bid for them.

After the auction, WestLB reduced the amount it sought for the exit facility. Although they had initially declined, plaintiffs offered to contribute funds to the exit facility. Nonetheless, those lenders who had committed funds to the exit facility prior to the auction (the exit lenders), declined plaintiffs' request (Defendants' Response to Plaintiffs' Rule 19-A Statement, ¶ 47). The exit facility was secured by liens on the plants, the same collateral as the (pre-petition) loan.

Post-Auction

In April 2009, the Bankruptcy Court approved the lenders' Credit Bid and successful purchase of the Linden and Bloomingburg plants, and the asset purchase agreement (APA), which memorialized the transaction. Under the APA, the plants would be transferred to limited liability companies, which would be owned by the lenders (the Asa defendants), free and clear of all liens and encumbrances.[5]

WestLB drafted the Asa Operating Agreement, and sought to create a management and ownership structure that rewarded the exit lenders through "participation enhancements" over those lenders who initially refused to commit funding, namely the plaintiffs. Thirteen of the 19 Lenders, not including plaintiffs, signed the Asa operating agreement (Asa Operating Agreement).

The Asa Operating Agreement divides membership interests into Class A, Class B, and non-member unit holders.

Class A members are the exit lenders. Under the Asa Operating Agreement, class A members have priority in distribution, enjoy superior voting rights, and are entitled to a portion of a $40 million "liquidation preference" corresponding to their pro rata participation in the exit facility. Each class A member is also entitled to a liquidation preference priority

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[5] With respect to each creditor asserting a lien, claim, encumbrance, or interest, including those who objected to the sale, the standards set forth in 11 USC § 363 (f) and (k) were satisfied. Section 363 (f) of the Bankruptcy Code deals with the sale of the debtor's property and section 363 (k), as stated above, permits a secured creditor to credit bid and purchase its own collateral.

return, calculated at a rate of 15% annually, compounded daily. As of February 2010, these combined liquidation preferenes amounted to approximately $45 million.

Class B members are lenders that only signed the Asa Operating Agreement, and have inferior voting rights. Unitholders are comprised of lenders who neither participated in the exit facility or signed the Asa Operating Agreement, and include all of plaintiffs. Unitholders have no voting rights, are excluded from participation in management, and do not receive financial statements and other information about the plants.

In the event of a sale of the plants, an amount equal to the liquidation preference premium would be deducted from the proceeds and distributed on a priority basis to the Class A members, followed by a distribution to the Class B members and to the unitholders ratably, in accordance with their interests under the Credit Agreement.

Class A members also possessed an option to convert their interests into Class B interests. The conversion of Class A interests would result in a dilution of distributions otherwise payable to the Class B members and unitholders, and also would provide for the payment of an increased distribution to the exit lenders beyond what they would have received under the Credit

Agreement (Plaintiffs' Rule 19-A Statement, ¶¶ 70-79).[6]

Litigation

Plaintiffs commenced this action in June 2009 asserting causes of action for breach of contract, conversion and declaratory judgment. Plaintiffs allege that WestLB abused its position as agent for the lenders to derive a benefit for itself and defendants to the detriment of plaintiffs, and sought to dilute its interests in breach of the Credit Agreement

In November 2009, Valero, the purchaser of the Albion plant, offered to purchase the Linden and Bloomingburg plants for $200 million (the Valero transaction).

Following the closing of the Valero transaction, plaintiffs made an application for a TRO and a preliminary injunction in order to enjoin defendants from distributing any liquidation preference derived from the sale, and moved to amend their complaint. On January 15, 2010, Justice Lowe granted the TRO.

While the motion for a preliminary injunction was pending, defendants, the Class A members, elected to convert their interests into Class B interests in the Asa defendants, which plaintiffs complain would result in a windfall to defendants

[6] Under the Asa Operating Agreement, so long as no Class A member converted their interests to Class B interests, each Class B member's and unitholder's portion of the remainder of the proceeds corresponds to their pro rata interest under the Credit Agreement (Asa Operating Agreement, § 6.1 [a] [iii]).

while diluting what they otherwise would have received from the sale of the plants. Plaintiffs allege that, prior to the conversion, the unitholders would have received a 51% return on their original Credit Agreement participation, which would be reduced to a 41% return after the conversion. At the same time, defendants' return on their original Credit Agreement participation increases in range from approximately 68-105% pre-conversion to a range of approximately 70-137% recovery post-conversion (Plaintiffs' Rule 19-A Statement, ¶¶ 80-81).

In May 2010, Justice Lowe granted plaintiffs' motion for a preliminary injunction and enjoined any distribution from the proceeds of the Valero transaction.

Discussion

Plaintiffs move for summary judgment as to liability on their claims for breach of contract against WestLB, and for conversion and declaratory judgment asserted against all the defendants.

I. Breach of Contract

In support of their motion, plaintiffs argue that the Credit Agreement and Financing Documents mandate pro rata distribution of the proceeds of the sale of the collateral, and that any release of collateral requires the unanimous consent of each lender. Thus, the distribution of ownership interests in the

Linden and Bloomingburg plants and distribution of the proceeds of the sale of the plants following the Valero transaction on a non-ratable basis constitute a breach of the Credit Agreement.

WestLB does not deny that the Asa Operating Agreement will significantly reduce the amount that the unitholders will receive from the distribution of the proceeds of the Valero transaction, while the exit lenders will receive significantly more. Instead, WestLB argues that, but for the participation enhancements that incentivised lenders to fund the exit facility, the plants would have sold for much less and all the lenders would ultimately receive less return on their pre-petition investment.

WestLB argues that, in any event, the Credit Agreement and Financing Documents authorized it to pursue its strategy because, as administrative and collateral agent, it properly deemed the exit facility and participation enhancements "necessary and desirable" to "protect or realize upon" its interest in the collateral.

The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in writing (*W.W.W. Assoc. V Giancontieri,* 77 NY2d 157, 162 [1990]). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous.

With these principles in mind, it is evident that the Credit Agreement, which principally governs the lenders' inter-creditor relationship, mandates, in no uncertain terms, that any payments or repayments of the loan be distributed on a pro rata basis amongst the lenders (*see* Credit Agreement §§ 3.13, 3.14).[7]

Section 9.04 of the Credit Agreement, which details the

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[7] Section 3.13 states:

"Each Borrowing and ... each reduction of commitments of any type ... **shall be allocated by the Administrative Agent ... pro rata among the Lenders in accordance with their respective applicable Commitment Percentages** ... Each payment "of principal of the Loans **shall be allocated by the Administrative Agent pro rata among the Lenders** in accordance with the respective principal amounts of their outstanding Loans ..." and interest shall be allocated in the same manner (emphasis added) (Credit Agreement ¶ 3.13 [a], [b]).

Section 3.14 states:

"If any Lender shall obtain any payment or any recovery (whether voluntary, involuntary, by application of setoff or otherwise) on account of any Loan ... in excess of its pro rata share of payments then or therewith obtained by all Lenders holding Loans of such type, such Lender shall purchase from the other Lenders such participations in Loans made by them as shall be necessary to cause such purchasing Lender to share the excess payment or other recovery ratably with each of them ..." (*id.*, ¶ 3.14 [a]).

manner in which WestLB, as sub-collateral agent, treats any moneys "received after the occurrence and during the contiuance of an Event of Default," such as the borrowers' bankruptcy, also contains mandatory language as to ratable distribution amongst the lenders (Credit Agreement ¶ 9.04 [c], [d]).[8]

Other Financing Documents, entered into by WestLB as sub-collateral agent and the borrowers, contain largely identical mandatory language that, upon the occurrence of and during a default, "the proceeds of any sale of or any realization upon all or any part of the Collateral **shall be applied** in accordance with Section 9.04" of the Credit Agreement (emphasis added) (Pledge and Security Agreement ¶ 7.08, Assignment and Security Agreement ¶ 7.12).

WestLB contends that it was permitted to pursue the conveyance of the collateral to the Asa defendants along with the participation enhancements which followed the exit facility and modified the lenders' interests in the collateral, because this

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[8] Any moneys received by WestLB "after the occurrence and during the continuance of an Event of Default may be held by the Collateral Agent as Collateral and/or ... may be applied in full or in part by the Collateral Agent against the Obligations in the following order of priority ... **to payment of the portion of the Obligations constituting accrued and unpaid interest ... ratably among the Lenders ... and to the principal amount of the Loans ... payable by the Borrower to the Lenders ... ratably among the Lenders ... in proportion to the respective amounts ... held by them**" (emphasis added) (Credit Agreement ¶ 9.04 [c], [d]).

strategy was approved by the "Required Lenders," although it did not even need such approval because it was authorized to act within its discretion.[9]

Although the Credit Agreement and Financing Documents granted WestLB discretion to act on behalf of the lenders, its ability to exercise this discretion was not unfettered. Rather, this discretion was limited to the extent "specifically delegated or required of it" in the governing documents (*see* Credit Agreement §§ 10.01 [a], [b], [c], 10.02).

In the instance of releasing "all or substantially all of the collateral," WestLB could not act on the direction of the Required Lenders alone, but was required to obtain the unanimous consent of the lenders.

Section 11.01 of the Credit Agreement states that WestLB can act by direction of the Required Lenders, except in the instance of an amendment or waiver of any provision of the Credit Agreement, modification of any contractual rights, or "release

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[9] The Credit Agreement defines Required Lenders as those holding in excess of fifty percent of the aggregate outstanding principal amount of the loans. Section 9.03 of the Credit Agreement provides that during the continuance of an event of default, the administrative agent "**upon the direction of the Required Lenders** shall, instruct the Collateral Agent to exercise any or all remedies provided for under this Agreement or the other Financing Documents" (emphasis added). WestLB points out that 77% of the lenders directed it to make a Credit Bid, and 69% of the lenders approved the exit facility.

... all or substantially all of the Collateral in any transaction or series of related transactions," in which case, prior written consent of each lender must be obtained, rather then just the approval of the Required Lenders (Credit Agreement §§ 11.01 [f], [g] [ii]).

WestLB can point to no language in the Credit Agreement or Financing Documents which grants it authority to reduce a lender's interests, or permit the differential treatment of lenders vis-a-vis their rights in the collateral without their consent. Accordingly, there is no legal justification for its contention that the exit lenders deserve more than other lenders in the proceeds from the Valero transaction.[10] Thus, the Court rejects WestLB's argument that its actions cohered with section 10.01 (a) of the Credit Agreement, because they were "reasonably incidental" to powers expressly delegated to the agent. Such an interpretation would render meaningless those portions of the Credit Agreement that limit WestLB's authority to act in the

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[10] Plaintiffs also argue that the sale of the Linden and Bloomingburg plants free and clear of liens and encumbrances amounts to a breach of the Credit Agreement because WestLB did not obtain the unanimous consent of all lenders, although the bankruptcy court approved the sale. This Court lacks the authority to review a decision of the bankruptcy court who approved the conveyance of the plants free and clear of liens. Nonetheless, the bankruptcy court did not direct the manner in which the lenders would divide ownership of the plants and any monies resulting from their sale.

instances of a "release of all or substantially all of the collateral" or "modify any rights" as to the release of collateral set forth in section 11.01 of the Credit Agreement, discussed above.

WestLB's reliance on *Beal Sav. Bank v Sommer* (8 NY3d 318 [2007]), in which one lender in a syndicated loan arrangement objected to the other lenders' settlement with the borrower in the borrower's bankruptcy proceeding, is misplaced. There, the Court of Appeals addressed whether one lender had standing to sue the borrower directly for breach of contract, against the will of the other 36 lenders in the syndicate, where the credit agreement and financial documents made no reference to individual action and established a collective enforcement scheme.

In contrast to *Beal Sav. Bank* (*Id.*), the issue before the Court is not plaintiffs' individual standing to sue the borrowers as a result of default. Rather, it is whether the Credit Agreement and Financing Documents permit WestLB, as both collateral and administrative agent, to effectuate a series of transactions following the borrower's bankruptcy filing involving the sale of the collateral and the reordering of the original lenders' ratable interests therein, including the marked diminishment of certain lenders' interests without their consent. The Credit Agreement and Financing Documents unequivocally mandate the pro rata distribution of ownership of the plants and payments received from the sale of the plants, and lenders' rights may not be so fundamentally modified with respect to the collateral without their consent, which WestLB did not obtain.

Nonetheless, the Credit Agreement contains an exculpation clause, which provides that WestLB is not liable for actions taken "with the prior written consent or at the request of the Required Lenders (or such other number ... of the Lenders as may be necessary, or as such Agent may believe in good faith to be necessary ...) or in the absence of its own gross negligence or willful misconduct (Credit Agreement, § Section 10.03 [b]).

Exculpatory clauses that express in unequivocal terms the intentions of the parties to relieve a defendant of liability for negligence are generally enforceable (*Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 [1998]), and can bar breach of contract claims (*see Retty Fin., Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [1st Dept 2002]).

WestLB represents that it acted with the consent of the Required Lenders, in pursuit of a strategy that it deemed was reasonable. Further, WestLB states that the participation enhancements were necessary in order to entice the lenders to fund the exit facility, in the midst of severe economic distress in the credit and ethanol markets. According to WestLB, its strategy provided plaintiffs with a recovery that exceeds the amount that each of them was willing to accept before the auction of the plants, to the extent that they were ultimately sold to Valero for $200 million.

Plaintiffs argue that WestLB cannot dodge liability under the exculpation clause because it acted willfully in its breach of the Credit Agreement, which is demonstrated by its election to convey the Linden and Bloomingburg plants to the Asa defendants over plaintiffs' objections. Nonetheless, plaintiffs fail to demonstrate as a matter of law that WestLB is not entitled to exculpation for its actions, and thus, a triable issue remains with respect to the cause of action for breach of contract.

II. Conversion

Plaintiffs' conversion cause of action is premised on the conveyance of the plants to the Asa defendants and their attempt to distribute the proceeds of the Valero transaction non-ratably. "The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier,* 211 AD2d 379, 384 [1st Dept 1995]). A defendant could have converted disputed property even without a "manual taking" by "assuming to sell and dispose of it as their own" (*State of*

New York v Seventh Regiment Fund, 98 NY2d 249, 260 [2002]; *see also Weisman, Celler, Spett & Modlin v Chadbourne Parke*, 253 AD2d 721 [1st Dept 1998]).

As against WestLB, the cause of action for conversion is dismissed, as it is duplicative of the breach of contract cause of action (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]).

Otherwise, plaintiffs have demonstrated entitlement to judgment as a matter of law as against the Asa defendants. Plaintiffs are entitled to own a portion of the plants, and the proceeds of the sale therefrom, pursuant to their ratable interest in the loans. The Asa defendants, comprised of a different iteration of the exit lenders, accepted the plants, the distribution of membership interests therein, and the cash proceeds from its sale in complete disregard to plaintiffs' ownership interests. The Asa defendants largely do not dispute that the conversion of Class A interests to Class B interests immediately following the Valero transaction dilutes plaintiffs' pro rata interests, but argue that this outcome was contractually authorized. However, as discussed above, WestLB lacked the authority under the Credit Agreement to fundamentally modify plaintiffs' rights in the collateral without their consent, and the Credit Agreement and Financing Documents mandate the pro rata distribution of ownership in the plants.

Therefore, plaintiffs are entitled to summary judgment as to liability on the cause of action for conversion as against the Asa defendants.

III. Declaratory Judgment

As against all defendants, plaintiffs seek a declaration that they should receive their aggregate 19.3% pro rata portion of the Valero transaction net proceeds (the balance remaining after repayment of the exit facility).

Pursuant to CPLR 3001, the Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether further relief is or could be claimed. The main purpose of a declaratory judgement is to "establish the respective legal rights of the parties to a justiciable controversy," where the "plaintiff is unable to find among the traditional kinds of action one that will enable her to bring it to court" (*Thome v Alexander & Louisa Calder Foundation,* 70 AD3d 88, 100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). Thus, a cause of action for a declaratory judgment is "unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records,* 137 AD2d

50, 54 [1st Dept 1988]). Thus, the cause of action for declaratory judgment is properly dismissed, in light of an adequate alternative remedy in the form of breach of contract (*Id.; Wells Fargo Bank, Natl. Assoc. v GRSE II, Ltd.*, 92 AD3d 535, 535 [1st Dept 2012]; *Singer Asset Fin. Co., LLC v Melvin,* 33 AD3d 355, 358 [1st Dept 2012]).

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment is denied, in part, as to the first cause of action, which shall be determined at the trial herein; and it is further

ORDERED that the fourth cause of action for declaratory judgment is severed and dismissed; and it is further

ORDERED that plaintiffs' motion is otherwise granted as to liability on the second cause of action for conversion as against defendants Asa Ethanol Holdings, LLC, Asa Ethanol Linden, LLC, and ASA Ethanol Bloomingburg, LLC, and is denied as to defendant WestLB AG, New York Branch.

Settle judgment.

Dated: October 12, 2012

ENTER:

J.S.C.

HON. CHARLES E. RAMOS