Golden Tech. Mgt., LLC v NextGen Acquisition, Inc.
2014 NY Slip Op 33368(U)
December 22, 2014
Supreme Court, New York County
Docket Number: 653514/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GOLDEN TECHNOLOGY MANAGEMENT, LLC, PHILIP LEVINSON, JEFF DEWEESE, GOSHEN CAPITAL, and RON ROBBINS,

Plaintiffs,

-against-

NEXTGEN ACQUISITION, INC., GS AGRIFUELS CORPORATION, GS CLEANTECH CORPORATION, GREENSHIFT CORPORATION, and VIRIDIS CAPITAL, LLC,

Defendants.

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Index No.: 653514/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Plaintiffs, Golden Technology Management, LLC (Golden), Philip Levinson, Jeff DeWeese, Goshen Capital Corporation (Goshen),[1] and Ron Robbins, move for summary judgment on their complaint and for dismissal of defendants' counterclaims. Defendants, NextGen Acquisition, Inc. (NextGen Acquisition), GS Agrifuels Corporation (Agrifuels), GS Cleantech Corporation (Cleantech), Greenshift Corporation (Greenshift), and Viridis Capital, LLC (Viridis), oppose and cross-move for summary judgment. The motion and cross-motion are granted in part and denied in part for the reasons that follow.

I. Procedural History & Factual Background

The following facts are undisputed.[2]

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[1] Plaintiffs are directed to amend the caption to read "Goshen Capital Corporation", not "Goshen Capital."

[2] Technically, this is both a motion to dismiss under CPLR 3211 and a motion for summary judgment under CPLR 3212. No discovery has taken place. However, and unless otherwise indicated, the facts recited, which are taken from the pleadings and the documentary evidence, are undisputed. As discussed herein, the instant motions are decided purely on the law, and hence the disputed facts (i.e. whether the subject technology works) are immaterial.

Plaintiffs are former executives, directors, and shareholders of NextGen Fuels, Inc. (NextGen), a company that produces biodiesel technology. Pursuant to a Stock Purchase Agreement dated October 12, 2006 (the SPA), plaintiffs sold NextGen to NextGen Acquisition for an aggregate purchase price of approximately $20 million. *See* Dkt. 24. $17 million was due at closing and approximately $3.2 million (the Holdback) was to be placed in a "Holdback Account".[3] The Holdback was to be used as indemnity to pay for any third-party claims related to the sale, made within one year of the October 2006 closing. Whatever Holdback amount remained was payable to the sellers (plaintiffs) one year after closing, that is, by the end of October 2007.[4]

By letters dated December 19, 2007 and April 29, 2009, plaintiffs demanded payment. The letters went unanswered, and plaintiffs were not paid the Holdback. On October 10, 2013, plaintiffs filed this lawsuit to collect the Holdback, alleging breach of contract, breach of fiduciary duty, and unjust enrichment. Defendants answered on January 10, 2014, and asserted counterclaims that allege – for the first time and more than 7 years after closing – that the biodiesel technology owned by NextGen does not work. Thus, they argue that they were wrongly induced into executing the SPA and should not have to pay the Holdback. Additionally, they counterclaim for breach[5] of 2-year Consulting Services Agreements (the CSAs) with

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[3] It is undisputed that the amounts set forth in the SPA (e.g., $18 million due at closing) were altered by the parties' ancillary agreements.

[4] The parties are unsure of the exact closing date, but they agree it occurred no later than October 31, 2006.

[5] The counterclaims are asserted as causes of action for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and indemnification.

plaintiffs Levinson and DeWesse, executed in conjunction with SPA.[6] In the CSAs, Levinson and DeWesse agreed to assist NextGen's continued development of the company's technology. The CSAs set certain goals, such as production and sales thresholds, which, if met, would entitle Levinson and DeWesse to total compensation, including bonus, in excess of $1 million. It is undisputed that these goals were not met and that Levinson and DeWesse were terminated early and never paid for their consulting services.[7]

In opposition, plaintiffs dispute defendants' claim that NextGen's technology does not work. The court will not opine on the technology's functionality because, even if the technology does not work, defendants still cannot maintain a claim for fraudulent inducement of the SPA as a means to avoid paying the Holdback.

The problem with defendants' fraud claim, aside from the commercial unfeasibility of a $20 million merger going forward without the buyer definitively confirming that the sole asset of the company being purchased actually worked – an issue about which defendants did not complain to plaintiffs (either informally or in a lawsuit) for **7 years after the sale**[8] – is that such claim is incompatible with the SPA. As explained below, where, as here, a contract has a merger

[6] Another non-party individual, John Gaus (Golden's managing member), also signed a consulting agreement. Defendants have not asserted a claim against Gaus for breach of that agreement. However, defendants allege that breach of Gaus' consulting agreement is a breach of the SPA. Additionally, and confusingly, in their briefs, plaintiffs' counsel repeatedly refers to Gaus as a plaintiff. He is not.

[7] Contrary to defendants' position, the CSAs *do not* obligate Levinson and DeWesse to ensure completion of the project's development. Rather, they are entitled to a substantial bonus upon completion. Nothing in the CSAs imposes any penalty onto Levinson and DeWesse if the project is not completed other than their inability to collect their contingent compensation. Levinson and DeWesse are not and have never asserted a claim for the company's failure to pay them for the consulting services actually rendered.

[8] It is simply implausible that such a fraud claim, if it was meritorious, would not previously have been the subject of a lawsuit. As discussed below, defendants' counterclaims are time-barred and can only be used for recoupment.

clause and language expressly disclaiming reliance on representations and warranties not contained in the contract and where due diligence was capable of revealing the alleged fraud, a fraud claim does not lie.

II. Legal Standard

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

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. Discussion

It is undisputed that plaintiffs were not paid the Holdback when it was due in October 2007. Defendants assert two defenses to non-payment: the statute of limitations and their counterclaims.

A. Statute of Limitations

Pursuant to CPLR 213(2), breach of contract claims are subject to a 6-year statute of limitations. The claim accrues when the contract is breached, regardless if plaintiff suffered an injury or knows about the breach. *Elie Int'l, Inc. v Macy's West Inc.*, 106 AD3d 442, 443 (1st Dept 2013), accord *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 (1993). When the claim is failure to pay money due under a contract, the claim accrues "when the plaintiff had the right to demand payment." *Elie Int'l*, 106 AD3d at 443, accord *Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 770-71 (2012).

Defendants argue that plaintiffs' claim accrued at closing, in October 2006 and, hence, would be time barred since the instant action was not commenced until October 2013, 7 years thereafter. In opposition, plaintiffs argue that, pursuant to section 7.7 of the SPA, plaintiffs are not entitled to demand payment of the Holdback until one year *after* closing, in October 2007, unless NextGen collected $7.5 million in gross revenue before that time. In other words, the *only* situation where plaintiffs had the right to demand payment of the Holdback before October 2007 was if NextGen achieved this $7.5 million benchmark. Defendants do not claim that NextGen did so. Consequently, as the SPA expressly provides, plaintiffs had no right to demand payment of the Holdback until October 2007. Their breach of contract claim, therefore, is timely.[9]

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[9] In reply, defendants argue the real breach was their failure to place the Holdback in a separate bank account – which they admit they failed to do – and thus their breach of this obligation, which occurred at closing, is the only breach of contract claim here and makes the claim for non-payment time barred. This is incorrect. To be sure, defendants may well have breached their obligation to segregate the Holdback funds. And, of course, a claim for such a breach is time barred. But failure to segregate the funds and failure to pay them when they were due, one year later, are different wrongs with different remedies. Plaintiffs, for instance, might have sought injunctive relief in November 2006 to compel defendants to place the Holdback in a separate bank account. But the failure to pay, as *Hahn*, 18 NY3d at 770-71, makes clear, is a claim that does not accrue until plaintiff has the *right* to demand payment. Here, no matter where the Holdback was kept, plaintiffs could not demand payment until October 2007.

Plaintiffs' quasi-contract, breach of fiduciary duty and unjust enrichment causes of action are dismissed as duplicative of the breach of contract claim. *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 (1st Dept 2014); *see Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987). Additionally, these claims are not viable. Plaintiffs have not pled an independent breach of fiduciary duty. That the Holdback was to be placed in an "escrow" account does not automatically give rise to an independent breach of fiduciary duty claim. The claim here is simply for non-payment, not for mismanagement or theft of escrowed funds. Mere non-payment under a contract does not implicate an independent fiduciary violation. Nor is the circumstance that the non-contracting defendants ended up with the Holdback proceeds a viable claim. Unjust enrichment claims are permitted when contractual proceeds are paid out to the wrong party. *See See Trade Expo Inc. v Bancorp*, 2014 WL 4634989, at *2 (Sup Ct, NY County, 2014). Here, however, no improper transfers are alleged (though whether there were any transfers between defendants that might give rise to post-judgment Article 52 claims was not argued and is not before the court).

B. Defendants' Counterclaims

Defendants assert three categories of defenses and counterclaims they contend excuse their failure to pay the Holdback. First, defendants claim they were fraudulently induced to buy NextGen because they were fooled into believing that NextGen's technology, its primary asset, was workable. Second, defendants claim that plaintiffs' breach of the SPA's representations and warranties (lies about the technology and beach of certain contracts, discussed below) excuse defendants' breach. Third, defendants assert quasi-contract and good faith counterclaims.

1. Fraud

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Defendants' fraud claim is based on extra-contractual representations plaintiffs allegedly made in connection with the SPA. Specifically, plaintiffs allegedly made certain representations about how NextGen's technology worked. These representations are not among the SPA's representations and warranties. In fact, in the SPA, plaintiffs warrant *nothing* about how NextGen's technology works or if it meets the specifications desired by defendants.

It is well settled that a sophisticated party cannot maintain a claim for fraudulent inducement of an SPA based on extra-contractual representations where, as here, the SPA contains comprehensive representations and warranties, specific disclaimers of reliance, and a merger clause. "Although a general merger clause will not preclude parol evidence regarding fraud in the inducement or fraud in the execution, where the parties expressly disclaim reliance on the particular misrepresentations, contrary parole evidence is barred." *Rosenblum v Glogoff*, 96 AD3d 514, 514-15 (1st Dept 2012) (citations omitted), accord *Citibank, N.A. v Plapinger*, 66 NY2d 90, 94-95 (1985); *see Benjamin Goldstein Prods., Ltd. v Fish*, 198 AD2d 137 (1st Dept 1993) ("parol evidence [] barred by the merger clause, negotiated at arm's length and inserted by the sophisticated parties in their Settlement Agreement, in which plaintiffs specifically acknowledged that they were not relying upon any oral representations").

As the First Department recently explained:

> The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made **sufficiently specific to the particular type of fact misrepresented** or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the

> seller's knowledge. Accordingly, only where a written contract contains a specific disclaimer of responsibility for extraneous representations, that is, a provision that the parties are not bound by or relying upon **representations or omissions as to the specific matter**, is a plaintiff precluded from later claiming fraud on the ground of a prior misrepresentation as to the specific matter.

Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 137 (1st Dept 2014) (citations omitted; emphasis added); *see also Barnaba Realty Group, LLC v Solomon*, 121 AD3d 730 (2d Dept 2014) ("While a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, a specific disclaimer defeats any allegation that the contract was executed in reliance upon contrary oral representations").

Here, however, the SPA is replete with provisions specifically disclaiming reliance on the alleged extra-contractual representations. For instance, sections 2.1(bb), 2.2(c), and 2.3(d) repeatedly affirm that, with respect to all but a few (inapposite) matters, the parties conducted robust due diligence and expressly disclaim reliance on anything not warranted in the SPA. These are effective disclaimers, not a one-line boilerplate waiver. To wit, section 2.2(c) states: neither "the Company, the Sellers [n]or any other person makes any express *or implied representation with respect to the Business, the Company* or the Sellers or otherwise with respect to the subject matter of this Agreement, including, but not limited to, any implied warranty or representation" (emphasis added). Such a disclaimer cannot possibly exclude express or implied representations with respect to NextGen's technology – the acquisition of which was the very reason defendants purchased NextGen. *See Barnaba Realty*, 121 AD3d 730 ("the lease specifically provided that the plaintiff made no representations, warranties, or promises with respect to the leased property (other than those expressly set forth in the lease), and that [counterclaim-defendant] had thoroughly reviewed 'the facts, circumstances, and the physical

condition of the Building.' Those clauses are sufficiently specific to bar [defendant's] allegations that [it] was induced to enter into the lease based upon certain oral misrepresentations").[10]

Additionally, defendants cannot plead reasonable reliance. If NextGen's technology did not work as advertised, defendants could have and should have discovered this before executing the SPA. Indeed, in section 2.3(d) of the SPA, defendants represent that they have "substantial experience in evaluating and purchasing companies engaged in the Business similar to [NextGen] and ... can protect [their] own interests."[11]

Nonetheless, defendants protest plaintiffs' extra-contractual alleged lies about how the technology worked, specifically with respect to the "washing" of the biodiesel. To be sure, questions regarding how the technology worked require expert testimony and cannot be resolved on a motion to dismiss. However, even if defendants' allegations regarding the technology are true, defendants do not allege they could not have independently discovered the truth about how the technology worked. This bars an assertion of reasonable reliance. *Mountain Creek Acquisition LLC v Intrawest U.S. Holdings, Inc.*, 96 AD3d 633, 634 (1st Dept 2012), citing *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001) ("a

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[10] It should also be noted that, though not argued by the parties, defendants' fraud claim is also barred by the prophylactic provision rule. The rule, simply put, is that sophisticated parties cannot sue for fraud when they could have included a warranty in the contract to protect against the alleged fraudulent misrepresentation (here, i.e., a warranty about the functionality of NextGen's technology). *See ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 106 AD3d 494, 495 (1st Dept 2013) ("a fraud claim is barred where a sophisticated and well-counseled entity fails to include an appropriate prophylactic provision in the agreement governing the transaction from which the legal dispute arises to ensure against the possibility of misrepresentation").

[11] Defendants' initial involvement with plaintiffs was through a subsidiary of defendant Greenshift, Warnekce Design, Inc., which, prior to the SPA, had discussions with NextGen about manufacturing its equipment. These discussion ultimately led to negotiations that culminated in the SPA. Defendants, thus, clearly are sophisticated participants in the same industry and had the wherewithal to understand the subject technology.

sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it"); *see also HSH Nordbank AG v UBS AG*, 95 AD3d 185, 197-98 (1st Dept 2012) (collecting cases dismissing fraud claim where plaintiff simply relied on information provided by defendant without independently verifying the truth of the matter that forms the basis of the fraud claim).[12]

Furthermore, the fact that the technology may not have worked is not fraud. When a buyer purchases a company, it places a valuation on the company's assets. If the buyer's valuation is premised on a key assumption about the assets (here, the technology working as allegedly represented), there are two ways for the buyer to protect himself: conduct due diligence (as provided for here) or procure a warranty. *See MAFG ART Fund, LLC v Gagosian*, 2014 NY Slip Op 08499 (1st Dept Dec. 4, 2014); *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 76 AD3d 310, 320 (1st Dept 2010); *Graham Packaging Co., v Owens-Illinois, Inc.*, 67 AD3d 465 (1st Dept 2009). Where, as here, the product's utility allegedly was not definitively confirmed and no warranty was bargained for, the risk of loss falls exclusively on the buyer.

2. *The Remaining Counterclaims*

Next, defendants claim that plaintiffs' own breaches of the SPA precludes them from seeking payment of the Holdback. As an initial matter, plaintiffs argue that defendants'

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[12] Defendants' reliance on an exception to this rule, where "the matters misrepresented were … fact[s] peculiarly within the knowledge of the defendants" [*see HSH Nordbank*, 95 AD3d at 198 n.9, distinguishing *DDJ Mgmt., LLC v Rhone Group L.L.C.*, 15 NY3d 147 (2010)] is misplaced. Though defendants complain about the accuracy of testing reports provided by plaintiffs, defendants do not allege they lacked the ability to independently verify that the technology was as warranted. That is the hallmark of insufficient due diligence – mere reliance on the seller's representations in lieu of independent inquiry.

counterclaims are time barred either under CPLR 213(2) (because the alleged breaches occurred at closing or more than 6 years before this action was commenced) or section 7.1 of the SPA, which sets a 1-year limitations period to assert claims for breach of the SPA's representations and warranties. Defendants concede they are barred from asserting their counterclaims for the purpose of obtaining a net recovery from plaintiffs. Nonetheless, defendants aver that their counterclaims, pursuant to CPLR 203(d), can be asserted for recoupment purposes. *See Bloomfield v Bloomfield*, 97 NY2d 188, 193 (2001) ("It is axiomatic that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced"); *Enrico & Sons Contracting, Inc. v Bridgemarket Assocs.*, 252 AD2d 429, 430 (1st Dept 1998). Defendants are correct, and plaintiffs do not meaningfully refute this argument.

Turning to the merits, the first alleged breach is the warranty in section 2.1(x) of the SPA, which provides that, to plaintiffs' knowledge, a Material Contract is not in default. "Material Contract" is defined as a contract to which NextGen is a party that involves more than $25,000. Defendants allege that, when the SPA closed, NextGen was in breach of a contract to sell its product to a client, NextDiesel (the NextDiesel Contract).[13] The NextDiesel Contract obligated NextGen to deliver a product capable of producing biodiesel at certain ASTM specifications. NextGen's technology being capable of meeting these specifications is the very alleged misrepresentation at issue in defendants' (dismissed) fraud claim.

NextGen executed the NextDiesel Contract on September 19, 2006, the month before the SPA. After the SPA was executed, defendants, as the new owners of NextGen, assumed

[13] The parties do not dispute that the NextDiesel Contract was worth more than $25,000.

responsibility for the NextDiesel Contract. Defendants claim the technology was not working as supposedly advertised and prevented NextGen from delivering a product that met ASTM specifications.

Again, whether NextGen's technology worked is irrelevant to the viability of defendants' claim. All plaintiffs warrant in section 2.1(x) is that, at closing, the NextDiesel Contract was not "in material default or breach" and that no current condition existed at closing that would give rise to a breach. Defendants do not and cannot argue that the NextDiesel Contract was in breach at closing because that contract's deliverables were not yet due. However, defendants argue that, since the technology the NextDiesel Contract required was lacking at the time of the SPA's closing, plaintiffs' knowledge of this fact[14] constituted a breach of section 2.1(x).

As noted earlier, the question of the actual utility of NextGen's technology and, of course, plaintiffs' knowledge of it, are not matters that can be resolved on a motion to dismiss. Nonetheless, even assuming *arguendo* that the technology did not yet work at closing and plaintiffs knew it, defendants have not stated a claim for breach of section 2.1(x). To explain, defendants allege that the parties' post-SPA arrangement was to have the people who worked on NextGen's technology execute CSAs to help defendants further develop the technology so NextGen would be capable of meeting its clients' deliverables, such as those set forth in the

[14] Defendants' invocation of plaintiffs' involvement with a company called O'Brien & Gere Engineers, Inc. (OBG) is misguided. Before plaintiffs were involved with defendants, plaintiffs had a dispute with another manufacturer, OBG. Plaintiffs settled their dispute, which concerned NextGen's technology, and that settlement was disclosed to defendants and is attached as a schedule to the SPA. *After* the SPA was executed, OBG sued the parties. Though the parties reference this litigation, no citations to the lawsuits are provided. The court's records indicate that the litigation was originally commenced in this court on January 31, 2007 under Index No. 604178/2006 and appears to have been transferred to Onondaga County under Index Nos. 4610/2007 and 9164/2008. OBG's prior involvement with plaintiffs is an utter red herring. Defendants clearly knew about the OBG controversy before they entered into the SPA. Defendants were aware of NextGen's prior technology issues and still did not bargain for a warranty regarding the technology.

NextDiesel Contract. To wit, Gaus' CSA provides that he will assist NextGen complete the design of a biodiesel system capable of delivering 10 million gallons per year – the very system specification NextGen agreed to provide to NextDiesel. Hence, the parties recognized that NextGen was not yet in a position to deliver on the NextDiesel Contract. That is likely why Levinson and DeWesse were promised incentive compensation if they helped NextGen reach its production goals, even after they ceased being employees when the company was sold. Defendants, therefore, understood at closing that NextGen did not yet have the capacity to fulfill the NextDiesel Contract. Defendants' contention that this reality is a breach of the SPA is not viable.

Simply put, defendants have no legitimate claim based on the allegation that plaintiffs gave them the impression that NextGen's technology was, at the time of sale, capable of meeting certain specifications that would allow defendants to utilize the technology in certain ways. The SPA, which contains robust and detailed contractual provisions explicitly setting forth exactly what plaintiffs were warranting about NextGen and its assets, *warrants nothing about NextGen's technology*. Defendants take this to mean the SPA's disclaimers are not specific enough so defendants can sue regarding the technology. But defendants have it backwards. That the parties carefully drafted the SPA, paying very close attention to every word and making sure each side understood its own risk allocation, militates demonstrably against defendants' claim that it may sue plaintiffs for anything relating to the utility of NextGen's technology. If the parties actually intended for any aspect of the technology's utility to be a matter plaintiffs were warranting, as opposed to intending that defendants would accept the technology as is for the purpose of developing it to fruition, the SPA would have said so.

For these reasons, defendants' counterclaims are dismissed.[15] To hold otherwise would be tantamount to rewriting the contract. It is well settled that New York courts will not *ex post facto* rewrite contracts in a manner that contravenes the parties' intentions. *Flag Wharf, Inc. v Merrill Lynch Capital Corp.*, 40 AD3d 506, 507 (1st Dept 2007) ("Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities"); *see Breed v Ins. Co. of N. Am.*, 46 NY2d 351, 355 (1978) ("It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed"). Here, when defendants made a contractual representation that they did not rely on anything not expressly warranted in the contract, the court must take them at their word. Defendants cannot, more than seven years later, claim otherwise.

C. Defendants' Liability

Finally, the parties' dispute which defendants are liable to pay plaintiffs the Holdback. The SPA obligates the Buyer (NextGen Acquisition) to pay plaintiffs the purchase price, but section 7.7 states that the Company (NextGen) shall distribute the Holdback to plaintiffs. Plaintiffs, however, argue that defendants Greenshift, Agrifuels, and Viridis are also liable as successors in interest to NextGen Acquisition, which plaintiffs allege was simply an SPV that effectuated the sale of NextGen from plaintiffs to defendants. On this record, defendants' actual corporate structure is unclear. As ordered below, the parties, therefore, shall appear for a conference. Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted on their entitlement to the full amount of the Holdback, plaintiffs' motion to dismiss the affirmative defenses and

[15] The court will not address the parties' arguments regarding defendants' non-contractual causes of action. The parties' rights are governed exclusively by written contracts, negating all alleged quasi contract and duplicative good faith claims. *See Mosaic Caribe*, 117 AD3d at 423.

counterclaims in defendants' answer is granted, and defendants' cross-motion for summary judgment is granted on all of plaintiffs' claims except the breach of contract claim for failure to pay the Holdback; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a status conference on January 13, 2015 at 10:30 in the forenoon.

Dated: December 22, 2014

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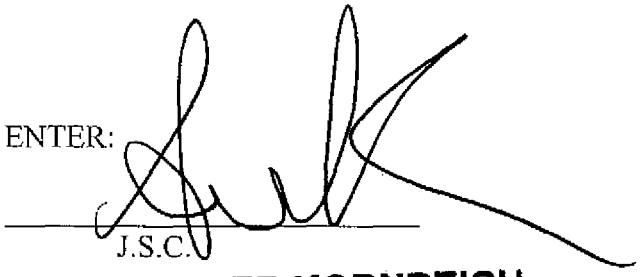

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.