

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION**

In re:)
) Chapter 11
) OGGUSA, Inc., *et al.*,¹)
) Case No. 20-50133-grs
) Debtors.)
) (Jointly Administered)
) Honorable Gregory R. Schaaf
))
))

))
) OGGUSA, Inc., *et al.*,)
) Adversary Case No. 20-_____)
) Plaintiffs,)
))
) v.)
))
) Southern Tier Hemp LLC,)
))
) Defendant.)

)

ADVERSARY COMPLAINT

Plaintiffs OGGUSA, Inc. f/k/a GenCanna Global USA, Inc. (“OGGUSA”) and OGG, Inc. f/k/a GenCanna Global, Inc. (“OGG,” and together with OGGUSA “Old GenCanna”), and GenCanna Acquisition Corp. (“GAC,” and together with Old GenCanna, the “Plaintiffs”), state the following for their Adversary Complaint against Defendant Southern Tier Hemp LLC (“Southern Tier”):

¹ The Debtors in these chapter 11 bankruptcy cases are (with the last four digits of their federal tax identification numbers in parentheses): OGGUSA, Inc. (0251); OGG, Inc. (N/A); and Hemp Kentucky, LLC (0816).

NATURE OF PROCEEDING

1. This is an action to recover funds owing to the Plaintiffs. For several years, the chair of Old GenCanna’s board of directors, Michael Falcone (“Falcone”), used Old GenCanna’s money to operate his side-business, Southern Tier. Through a series of promissory notes, guarantees, and a hemp grower agreement, Southern Tier received the benefit of over \$4,100,000 from Old GenCanna.

2. At the same time, Southern Tier also procured hundreds-of-thousands-of-dollars’ worth of goods from Old GenCanna on credit, including (i) hemp cuttings, genetics, mother plants, and seeds, and (ii) hemp and CBD products, including topical skin care products, hemp-based extracts and gel capsules, among other things (collectively, the “Products”).

3. Southern Tier agreed, both orally and in writing, that it would repay Old GenCanna. But when the time came to do so, Southern Tier refused.

4. Plaintiffs now seek to recover the monies owed by Southern Tier, as well as compensation for the Products delivered by Old GenCanna, under section 542(a) of the Bankruptcy Code and applicable state law.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action under 28 U.S.C. §§ 157 and 1334, and pursuant to L.R. 83.12 of the Joint Local Rules of Civil Practice for the United States District Courts for the Eastern and Western Districts of Kentucky.

6. This action is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E), and (O). This action is a proceeding arising under title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”) and arising in and/or related to Old GenCanna’s bankruptcy cases. Old GenCanna’s bankruptcy cases are jointly administered with the bankruptcy cases of the other debtor entity Hemp Kentucky, LLC (collectively with Old GenCanna, the “Debtors”) as cases

under chapter 11 of the Bankruptcy Code, and are pending in the United States Bankruptcy Court for the Eastern District of Kentucky (the “Court”).

7. Venue in this Court is proper under 28 U.S.C. § 1409(a).

PARTIES

8. Plaintiff OGGUSA, Inc. is a Delaware corporation with a place of business at 4274 Colby Road, Winchester, Kentucky 40391.

9. Plaintiff OGG, Inc. is a Delaware corporation with a principal place of business at 321 Venable Road, Suite 2, Winchester, Kentucky 40391.

10. Plaintiff GenCanna Acquisition Corp. is a Delaware corporation with a place of business at 4274 Colby Road, Winchester, Kentucky 40391.

11. Southern Tier is a Delaware limited liability company that can be served through its registered agent located at 3500 S. DuPont Highway, Dover, Delaware 19901.

RELEVANT FACTUAL BACKGROUND

12. Falcone, the founder of Southern Tier, is the chair of the board of directors of OGGUSA and OGG.

13. On September 17, 2018, Southern Tier and OGGUSA entered into a Promissory Grid Note (the “September 2018 Note”), pursuant to which OGGUSA agreed to loan \$750,000 to Southern Tier. A copy of the September 2018 Note is attached as **Exhibit A**.

14. Under the September 2018 Note, OGGUSA disbursed the principal amount of the loan to both Southern Tier and directly to various vendors of Southern Tier that were identified on Schedule A of the September 2018 Note. Pursuant to the September 2018 Note, interest on the on the unpaid principal accrued daily at a rate of 4% annually.

15. Additionally, on around April 1, 2019, OGG and Lake Breeze Farms, LLC (“Lake Breeze”) entered into a Hemp Field Grower Agreement (the “Hemp Field Grower Agreement”). A copy of the Hemp Field Grower Agreement is attached as **Exhibit B**.

16. OGG entered into the Hemp Field Grower Agreement for the exclusive benefit of Southern Tier. Falcone negotiated the deal as the chairman of the board of OGGUSA and OGG, on the one hand, and the Chief Executive Officer of Southern Tier, on the other.

17. Under the Hemp Field Grower Agreement, OGG paid Lake Breeze to plant, grow, and cultivate industrial hemp, and provide all necessary equipment to do so, for the exclusive benefit of Southern Tier.

18. Old GenCanna and Southern Tier structured the Hemp Field Grower Agreement this way because Southern Tier did not have the financial resources to fulfil the commitments to Lake Breeze for the necessary services it provided.

19. Southern Tier agreed to reimburse OGG for all monies paid under the Hemp Field Grower Agreement, but has refused to do so.

20. As of January 24, 2020 (the “Petition Date”), under the September 2018 Note and Hemp Field Grower Agreement, OGGUSA has paid Southern Tier and Southern Tier’s vendors no less than \$2,340,902.

21. Additionally, on July 2 and 3, 2019, Southern Tier entered into two separate agreements with NG Growers, Inc. d/b/a Nanticoke Gardens (“Nanticoke Gardens”).

22. First, Southern Tier and Nanticoke Gardens executed a Note (“Note I”) under which Southern Tier agreed to pay Nanticoke Gardens \$756,604.80 for “products/goods (280,000 plants) shipped on and between July 1 and July 15, 2019.” A copy of Note I is attached as **Exhibit C**.

23. Falcone caused OGGUSA to guaranty Southern Tier’s obligations under Note I.

24. Second, Southern Tier and Nanticoke Gardens executed a Note (“Note II”) under which Southern Tier agreed to pay Nanticoke Gardens \$705,889.60 for “product/goods previously shipped and invoiced to Borrower.” A copy of Note II is attached as **Exhibit D**.

25. Falcone caused OGGUSA to guaranty Southern Tier’s obligations under Note II.

26. On August 12, 2019, Southern Tier and Nanticoke Gardens entered into an Amended & Restated Note (the “Amended Note,” and, collectively with Note I and Note II, the “Nanticoke Notes”), which amended and superseded Note I. The Amended Note obligated Southern Tier to pay Nanticoke Gardens \$790,041.60 for the 280,000 hemp plants shipped in July 2019. A copy of the August 2019 Note is attached as **Exhibit E**.

27. Falcone caused OGGUSA to guaranty Southern Tier’s obligations under the Amended Note.

28. Although Southern Tier was the borrower, and therefore primarily responsible for the indebtedness, Falcone caused Old GenCanna, as guarantors, to repay Nanticoke under the Notes.

29. Old GenCanna also produced the Products for delivery to Southern Tier and its customers.

30. Old GenCanna’s books and records show that, as of March 2, 2020, Southern Tier owed Old GenCanna the following: (i) \$2,340,902 under the September 2018 Note and for amounts paid by OGGUSA for Southern Tier’s benefit under the Hemp Field Grower Agreement; (ii) \$1,805,931 for payments made by OGG on behalf of and at the behest of Southern Tier as guarantor under the Nanticoke Notes; and (iii) at least \$228,192 for the Products.

31. On February 18, 2020, the Debtors filed a motion in their Chapter 11 Cases to establish procedures for the sale of substantially all of their assets [Docket No. 136].

32. On March 6, 2020, the Bankruptcy Court entered an order establishing procedures for the sale of substantially all of the Debtors' assets [Docket No. 304].

33. On April 27, 2020, the Debtors filed a notice [Docket No. 682] identifying GAC, an entity wholly owned by funds and accounts managed by the Debtors' senior secured creditor MGG Investment Group, LP ("MGG"), as having submitted the highest and best bid for the Debtors' assets.

34. On May 19, 2020, the Bankruptcy Court entered the *Order (I) Approving the Sale of Certain of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests Other than Permitted Liens, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and (III) Granting Related Relief* [Docket No. 850] (the "Sale Order"). Under the terms of the Sale Order and the Asset Purchase Agreement (the "APA") which it approved, GAC acquired the right to proceeds from certain causes of action, including, but not limited to the claims against Southern Tier. A copy of the Sale Order and APA is attached hereto as **Exhibit F**.

35. On March 2, 2020, the Plaintiffs sent Southern Tier a Demand for Payment of Amounts Owed (the "Demand"). A copy of the Demand is attached hereto as **Exhibit G**.

36. On September 29, 2020, the Plaintiffs sent Southern Tier a further Demand for Payments of Amounts Owed (the "Second Demand"). A copy of the Second Demand is attached hereto as **Exhibit H**.

37. Southern Tier refused to repay its outstanding obligations to the Plaintiffs.

CLAIMS FOR RELIEF

COUNT I

**For Turnover of Debt—11 U.S.C. § 542(b)
Plaintiffs v. Southern Tier**

38. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

39. Old GenCanna loaned monies to Southern Tier under the September 2018 Note.

40. Old GenCanna paid Southern Tier's debt under the Hemp Field Grower Agreement.

41. Old GenCanna paid Southern Tier's debt under the Nanticoke Notes.

42. Old GenCanna also provided the Products to Southern Tier pursuant to an agreement between the parties.

43. Old GenCanna satisfied all of its obligations to Southern Tier related to the monies loaned and the Products provided to Southern Tier.

44. The Plaintiffs made two demands for repayment and payments are now overdue.

45. Southern Tier owes approximately \$4,375,025 to the Plaintiffs pursuant to the foregoing agreements, excluding interest and fees.

46. These receivables are property of the Debtors' bankruptcy estates, the proceeds of which have been sold to GAC.

47. Southern Tier cannot reasonably dispute the sums are due and owing.

48. No part of the receivables may be offset under section 553 of the Bankruptcy Code against a claim against the Plaintiffs.

49. All or part of the sums due and owing from Southern Tier to the Plaintiffs are sums which Southern Tier must turnover to GenCanna under section 542(b) of the Bankruptcy Code.

COUNT II
Breach of Contract (September 2018 Note)
OGG v. Southern Tier

50. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

51. OGG and Southern Tier are parties to the September 2018 Note (*see* **Exhibit A**).

52. OGG timely performed its obligations and discharged its covenants under the September 2018 Note.

53. All conditions precedent to Southern Tier's performance of its obligations under the September 2018 Note are satisfied.

54. Southern Tier has breached the September 2018 Note by failing to pay the amounts owed to OGG.

55. Southern Tier owes \$2,340,902 to OGG for amounts borrowed under the September 2018 Note, but has refused to remit payment to OGG.

56. Under the express terms of the September 2018 Note, OGG has a right to recover attorneys' fees and related costs incurred by the Plaintiffs in bringing this action.

57. Southern Tier thus breached the September 2018 Note and directly and proximately caused OGG approximately \$2,340,902 in damages, which remains unpaid and due, along with interest as well as all fees, costs, and expenses incurred by the Plaintiffs before and during this adversary proceeding, including reasonable attorneys' fees and costs.

COUNT III
Unjust Enrichment
Plaintiffs v. Southern Tier

58. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

59. Under the Hemp Field Grower Agreement (**Exhibit B**), Old GenCanna paid Lake Breeze to plant, grow, and cultivate industrial hemp, and provide all necessary equipment to do so, for the exclusive benefit of Southern Hemp.

60. Southern Tier has not repaid the Plaintiffs for covering its expenses under the Hemp Field Grower Agreement.

61. Under the Notes (**Exhibits C, D, and E**), Old GenCanna paid amounts owed by Southern Tier to its lender, Nanticoke Gardens.

62. Southern Tier has not reimbursed the Plaintiffs for these payments.

63. Old GenCanna also provided Southern Tier the Products, but Southern Tier has not paid the Plaintiffs for the Products.

64. Southern Tier's retention of these benefits, to the Plaintiffs' detriment, violates fundamental principles of justice, equity, and good conscience.

65. Southern Tier benefitted from the monies paid and goods and services provided by Old GenCanna to, or on behalf of, Southern Tier.

66. Southern Tier has been unjustly enriched at the Plaintiffs' expense by using the monies and goods without compensating or reimbursing the Plaintiffs.

COUNT IV
Indemnification (Amended Note)
OGGUSA v. Southern Tier

67. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

68. Southern Tier and Nanticoke Gardens entered into Note I (**Exhibit C**), which was amended and superseded by the Amended Note (**Exhibit E**).

69. Southern Tier, as the borrower, was the primary obligor under the Amended Note and was primarily responsible for repayment of the Amended Note.

70. OGGUSA repaid the amounts owed by Southern Tier under the Amended Note and, in doing so, discharged Southern Tier from its obligation under the Amended Note.

71. Southern Tier must indemnify OGGUSA for the amounts paid by GenCanna under the Amended Note, but has refused to do so.

72. As a direct and proximate result of Southern Tier's breaches of the Amended Note, and refusal to satisfy its obligations under it, OGGUSA has suffered and will continue to suffer damages and financial losses.

COUNT V
Indemnification (Note II)
OGGUSA v. Southern Tier

73. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

74. Southern Tier and Nanticoke Gardens entered into Note II (**Exhibit D**).

75. Southern Tier, as the borrower, was the primary obligor under Note II and was primarily responsible for repayment of Note II.

76. OGGUSA repaid the amounts owed by Southern Tier under Note II and, in doing so, discharged Southern Tier from its obligation under Note II.

77. Southern Tier must indemnify OGGUSA for the amounts paid by Old GenCanna under Note II, but has refused to do so.

78. As a direct and proximate result of Southern Tier's breaches of the Amended Note, and refusal to satisfy its obligations under it, OGGUSA has suffered and will continue to suffer damages and financial losses.

COUNT VI
Subrogation (Amended Note)
OGGUSA v. Defendant

79. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

80. The obligations of Southern Tier under the Amended Note (**Exhibit E**) represent a debt owed by Southern Tier to Nanticoke Gardens.

81. OGGUSA made payments to Nanticoke Gardens in satisfaction of the debt obligations of Southern Tier under the Amended Note.

82. OGGUSA made the payments in its own interest.

83. OGGUSA did not make the payments as a volunteer but as a party contractually bound to make them.

84. OGGUSA was not primarily liable to Nanticoke Gardens on the obligation to pay the amounts owed under the Amended Note.

85. OGGUSA has or will pay the entire debt owed by Southern Tier under the Amended Note.

86. OGGUSA is equitably subrogated to the rights of Nanticoke Gardens under the Amended Note.

87. OGGUSA's equitable subrogation will not work any injustice to the rights of third parties.

88. As a result of OGGUSA's equitable subrogation to Nanticoke Gardens' rights under the Amended Note, OGGUSA may assert all rights of Nanticoke Garden as against Southern Tier.

89. Nanticoke Gardens and therefore OGGUSA as subrogee, has a right as against Southern Tier to all payments it made, and will make, in connection with the Amended Note.

90. As a direct and proximate result of Southern Tier's breaches of the Amended Note, and refusal to satisfy its obligations under it, OGGUSA has suffered and will continue to suffer damages and financial losses.

COUNT VII
Subrogation (Note II)
OGGUSA v. Defendant

91. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

92. The obligations of Southern Tier under the Note II (**Exhibit D**) represent a debt owed by Southern Tier to Nanticoke Gardens.

93. OGGUSA made payments to Nanticoke Gardens in satisfaction of the debt obligations of Southern Tier under Note II.

94. OGGUSA made the payments in its own interest.

95. OGGUSA did not make the payments as a volunteer but as a party contractually bound to make them.

96. OGGUSA was not primarily liable to Nanticoke Gardens on the obligation to pay the amounts owed under Note II.

97. OGGUSA has or will pay the entire debt owed by Southern Tier under Note II.

98. OGGUSA is equitably subrogated to the rights of Nanticoke Gardens under Note II.

99. OGGUSA's equitable subrogation will not work any injustice to the rights of third parties.

100. As a result of OGGUSA's equitable subrogation to Nanticoke Gardens' rights under Note II, OGGUSA may assert all rights of Nanticoke Garden as against Southern Tier.

101. Nanticoke Gardens and therefore OGGUSA as subrogee, has a right as against Southern Tier to all payments it made, and will make, in connection with Note II.

102. As a direct and proximate result of Southern Tier's breaches of Note II, and refusal to satisfy its obligations under it, OGGUSA has suffered and will continue to suffer damages and financial losses.

COUNT VIII
Breach of Express or Implied Contract (Hemp Field Grower Agreement)
Plaintiffs v. Southern Tier

103. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

104. Old GenCanna and Southern Tier, through Falcone, agreed orally and through their actions that Southern Tier would reimburse Old GenCanna for all payments made on Southern Tier's behalf related to the Hemp Field Grower Agreement (**Exhibit B**).

105. Southern Tier, through Falcone, induced Old GenCanna to make payments on behalf of and for the benefit for Southern Tier.

106. Relying on Southern Tier's representations, Old GenCanna entered into and made payments for the benefit of Southern Tier.

107. Southern Tier has breached the express or implied agreement with Old GenCanna because Southern Tier has failed to reimburse Old GenCanna for any payments made to, or on behalf of, Southern Tier under the Hemp Field Grower Agreement.

108. Old GenCanna and their bankruptcy estates have been damaged because of Southern Tier's breach of the express or implied agreement.

109. Southern Tier breached the express or implied agreement with Old GenCanna related to the Hemp Field Grower Agreement and directly and proximately caused the Plaintiffs approximately \$2,340,902 in damages, which remains unpaid and due, along with interest as well as all fees, costs, and expenses incurred by the Plaintiffs in advance of and during this adversary proceeding, including reasonable attorneys' fees and costs.

COUNT IX
Breach of Express or Implied Contract (The Nanticoke Notes)
Plaintiffs v. Southern Tier

110. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

111. Old GenCanna and Southern Tier, through Falcone, agreed orally and through its actions that Southern Tier would reimburse Old GenCanna for all payments made on Southern Tier's behalf related to the Nanticoke Notes (**Exhibits C, D, and E**).

112. Southern Tier, through Falcone, induced Old GenCanna to make payments on behalf of and for the benefit for Southern Tier.

113. Relying on Southern Tier's representations, Old GenCanna entered into and made payments for the benefit of Southern Tier.

114. Southern Tier has breached the express or implied agreement with Old GenCanna because Southern Tier has failed to reimburse Old GenCanna for any payments made to, or on behalf of, Southern Tier under the Nanticoke Notes.

115. Old GenCanna and their bankruptcy estates have been damaged because of Southern Tier's breach of the express or implied agreement.

116. Southern Tier breached the express or implied agreement with Old GenCanna related to the Nanticoke Notes and directly and proximately caused the Plaintiffs approximately

\$1,805,931 in damages, which remains unpaid and due, along with interest as well as all fees, costs, and expenses incurred by the Plaintiffs in advance of and during this adversary proceeding, including reasonable attorneys' fees and costs

COUNT X
Breach of Express or Implied Agreement (Products)
Plaintiffs v. Southern Tier

117. The Plaintiffs re-allege and incorporate by reference the foregoing paragraphs as if fully set forth herein.

118. Old GenCanna and Southern Tier, through Falcone, agreed orally and through its actions that Southern Tier would pay Old GenCanna for the Products.

119. Southern Tier, through Falcone, induced Old GenCanna to produce and ship the Products to, or on behalf of, Southern Tier.

120. Relying upon Southern Tier's representations, Old GenCanna produced and shipped the Products.

121. Southern Tier has breached the express or implied agreement by refusing to pay Old GenCanna for the Products.

122. The Plaintiffs have been damaged because of Southern Tier's breach of the express or implied agreement.

123. Southern Tier thus breached the express or implied agreement with Old GenCanna related to the Products and directly and proximately caused the Plaintiffs at least \$228,192 in damages, which remains unpaid and due, along with interest as well as all fees, costs, and expenses incurred by the Plaintiffs in advance of and during this adversary proceeding, including reasonable attorneys' fees and costs.

COUNT XI
Promissory Estoppel
Plaintiffs v. Southern Tier

124. The Plaintiffs re-alleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

125. Falcone promised that Southern Tier would repay Old GenCanna the amounts Old GenCanna paid to, or on the behalf of, Southern Tier relating to the Field Hemp Grower Agreement and the Notes.

126. Falcone also promised that Southern Tier would pay Old GenCanna for the Products it provided to, or on behalf of, Southern Tier.

127. As a result of Southern Tier's promise, Old GenCanna made the above-identified payments and transfers of the Products. These actions were detrimental to the Plaintiffs.

128. Falcone's promise, on behalf of Southern Hemp, to repay the \$4,375,025 in monies and Products transferred to, or on behalf of, Southern Tier—(i) \$2,340,902 under the September 2018 Note and the Hemp Field Grower Agreement; (ii) \$1,805,931 for payments made by OGG as guarantor under the Nanticoke Notes; and (iii) at least \$228,192 for the Products—was a definite and certain promise, and induced reliance from the Plaintiffs.

129. Southern Tier refused to pay the Plaintiffs the amounts paid to, or on behalf of, Southern Tier, nor has Southern Tier paid for the Products.

RESERVATION OF RIGHTS

130. The Plaintiffs explicitly reserve the right to amend the Complaint.

CONSENT TO JURISDICTION

131. Regardless of whether this proceeding is core, non-core, or otherwise, the Plaintiffs consent to the entry of a final order and judgment by the United States Bankruptcy Court for the

Eastern District of Kentucky in this adversary proceeding. This statement is made to comply with Rules 7008 and 9027(a) of the Federal Rules of Bankruptcy Procedure.

WHEREFORE, the Plaintiffs respectfully request that the Court enter a judgment in its favor and against Southern Tier Hemp LLC in the amount of \$4,375,025 plus prejudgment and post-judgment interest at the applicable rate. The Plaintiffs also seeks an award of their fees, costs, and expenses, including their reasonable attorneys' fees and court costs, as well as such other relief as may be just and appropriate

Dated: October 14, 2020

Respectfully submitted,

/s/ James R. Irving

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