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

PRESENT: O. PETER SHERWOOD Justice PART 49

RUBIN SCHRON, *et al.*

Plaintiffs,

-against-

LEONARD GRUNSTEIN, *et al.*,

Defendants.

INDEX NO. 650702/2010

MOTION DATE Aug. 9, 2012

MOTION SEQ. NO. 014

MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read on this motion 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 for summary judgment is decided in accordance with the accompanying decision and order.

Dated: September 6, 2012

O. PETER SHERWOOD, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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RUBIN SCHRON, CAM-ELM COMPANY, LLC,
SMV PROPERTY HOLDINGS LLC,
SWC PROPERTY HOLDINGS LLC,
SWC SPECIAL HOLDINGS, LLC,
SMV SPECIAL HOLDINGS, LLC,
CAMMEBY'S EQUITY HOLDINGS LLC,
CAMMEBY'S FUNDING LLC,
CAMMEBY'S FUNDING II LLC,
CAMMEBY'S FUNDING III LLC,
CAMFIVE HOLDINGS, LLC,
CAMMEBY'S MANAGEMENT CO. LLC, and
CAMMEBY'S INTERNATIONAL, LTD.,

Plaintiffs,

-against-

LEONARD GRUNSTEIN, MURRAY FORMAN,
TROUTMAN SANDERS LLP,
CANYON SUDAR PARTNERS LLC,
SVCARE HOLDINGS, LLC,
SAVASENIORCARE LLC,
FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC,
THI OF BALTIMORE, INC.,
NATIONAL SENIOR CARE, INC.,
MARINER HEALTH CARE, INC.,
METCAP SECURITIES, LLC,
METCAP HOLDING, LLC,
METCAP ADVISORY SERVICES, LLC,
HARRY GRUNSTEIN, and
LAWRENCE LEVINSON,

Defendants.

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DECISION AND ORDER
AFTER TRIAL

Index No.: 650702/2010

O. PETER SHERWOOD, J.:

I. BACKGROUND

The genesis of this case lies in the execution of a successful leveraged buyout plan devised by defendants, Leonard Grunstein ("Grunstein") and Murray Forman ("Forman"), to acquire a publicly held company that was engaged in the nursing home business. Grunstein approached

plaintiff, Rubin Schron ("Schron"), a sophisticated real estate investor and client of many years, to participate and to serve as the principal source of the financial resources required to consummate the deal. Schron, who had no experience operating nursing homes, was interested in acquiring the real estate only. Grunstein and Forman devised a "PropCo/OpCo" structure, pursuant to which entities affiliated with Schron would acquire and mortgage the real estate (the PropCo), which would then be leased to an operator of the nursing homes (the OpCo) under long term leases. Rents from the properties would supply revenue to pay principal and interest on the mortgages assumed in connection with the acquisition.

The $1.3 billion transaction, referred to as the Mariner Transaction, closed on December 10, 2004. Schron and his associates provided the financing. Schron affiliates acquired the PropCo, options to acquire control of the OpCo, and certain other assets. Grunstein's brother, Harry Grunstein, was hired to run the OpCo and was installed as the nominal owner of the company. Harry Grunstein had experience operating nursing homes (Tr. 838:7-22; Tr. 839:10-12)[1]. Shortly after the closing, the OpCo came to be controlled by Grunstein and Forman through Canyon Sudar Partners LLC ("Canyon Sudar"), a company formed by them to hold the OpCo.

The Fifteenth Cause of Action of the complaint alleges that defendants, Canyon Sudar and SVCARE Holdings, LLC ("SVCARE"), who are parties to an Amended and Restated Unit Purchase Option Agreement ("Option") and an Amended and Restated Term Loan and Credit Facility Agreement ("2006 Term Loan"), both dated as of June 9, 2006, breached the Option when they refused to honor exercise of the Option by its holder, CamEquity Holdings, LLC ("CamEquity"). Under the terms of the Option, CamEquity was granted the right to purchase up to 99.999% of all membership units of SVCARE for $100 million. In rejecting the notice of exercise, SVCARE claimed, *inter alia*, that the Option was unenforceable because CamEquity or its affiliates failed to fund a loan to SVCARE in the amount of $100 million, which loan is alleged to have been a condition of granting the Option.

In a Decision and Order, dated January 20, 2011, the court (Yates, J.) granted a motion of plaintiffs to preclude defendants from offering extrinsic evidence in connection with a determination

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[1]As used in this Decision and Order, "Tr.___" refers to the trial transcript and "PX___" and "SVX ___" refer to admitted trial exhibits.

of whether the alleged loan was a condition precedent to exercise of the Option and whether the loan was actually funded (*see* 32 Misc3d 231). That decision and the Decision and Order on defendants' motion to renew and reargue, dated September 9, 2011 (*see* 2011 NY Misc LEXIS 6612) reaffirming Justice Yates' decision, were affirmed by the Appellate Division First Department (*see Schron v Troutman Sanders LLP*, 97 AD3d 87 [1st Dept 2012]).

On December 2, 2011, plaintiffs moved for summary judgment as to the Fifteenth Cause of Action. In a Decision and Order, dated March 5, 2012, this court granted the motion but determined that there was a question of fact as to what portion of the $100 million purchase price could be defrayed by assumption/release of the SVCARE indebtedness to CamEquity. The court then scheduled an immediate trial pursuant to CPLR 3212(c) "on the limited issue of the amount, if any, of indebtedness available to be paid at the closing toward the purchase price."

A 10-day non-jury trial was held. Despite the limited nature of the inquiry, the parties offered and the court heard live testimony of nine (9) witnesses, including plaintiff, Schron; defendants, Grunstein and Forman; plaintiffs' expert Harvey A. Kelly, CPA ("Kelly"); and defendants' expert David S. Williams ("Williams"). In addition, the court reviewed excerpts of video deposition testimony of nineteen (19) witnesses and considered more than a hundred exhibits. Following closing arguments, the parties submitted proposed findings of fact and conclusions of law. The case is now ready for decision.

II. FINDINGS OF FACT

A. The Parties

Plaintiff Schron is a New York real estate investor. He is the manager of SMV, Cam III and CamEquity, companies majority-owned by Schron and members of his family.

Plaintiff SMV Property Holdings LLC ("SMV") owns and controls real estate properties acquired in the Mariner Transaction (Tr. 840:16-25). SMV is majority-owned by Schron and members of his family. Grunstein and Forman hold minority interests in SMV.

Defendant Grunstein is an attorney who represented Schron companies for more than two decades. Grunstein represented Schron in "dozens of matters," serving as his primary legal counsel in business matters, including acquisition of Mariner Health Care Inc. ("Old Mariner", the acquisition referred to as the "Mariner Transaction")(Tr. 122:11-13, 128:9-11).

Defendant Forman is the principal of MetCap Securities LLC ("MetCap"). He acted as Schron's investment banker in the Mariner Transaction (Tr. 821:13-18, 1165:14-25;Tr.393:26-394:16).

Defendant SVCARE Holdings, LLC is a holding company formed in connection with the Mariner Transaction. SVCARE directly owns Sava Senior Care LLC ("Sava") and through Sava owns approximately 170 nursing home operating entities.

Defendant, Canyon Sudar Partners, LLC is the owner and sole member of SVCARE. Canyon Sudar is jointly owned by Grunstein and Forman.

B. The 2004 Mariner Transaction

In 2004, Grunstein and Forman approached Schron and others with a proposal to acquire Old Mariner in a leveraged buyout. At the time, Old Mariner was a public company which operated more than 250 nursing homes and owned the real estate associated with approximately 170 of them (Tr. 830:4-831:12).

Schron was interested in owning the real estate, not operating nursing homes (Tr. 127:23-25, 825:3-12). Grunstein and Forman proposed a complex transaction employing a "PropCo/OpCo" structure whereby Old Mariner's real estate would be separated from the nursing home operations (Tr. 127:15-16, 831:13-18). Through subsidiaries, SMV would acquire Mariner's real estate assets ("PropCo"). Sava, a newly formed company, would lease the SMV properties pursuant to the terms of a master lease and operate nursing homes on those sites (the "OpCo")(Tr. 126:12-25, 130:6-21, 831:13-18). SVCARE is the sole owner of Sava (PX 61.0030).

As structured by the parties, a newly formed company, National Senior Care, Inc. ("New Mariner", "NSC" or "NSC/Mariner"), purchased all of the shares of stock of Old Mariner and then sold the real estate to Schron's company, SMV (PX 2, PX 41). SMV then leased the properties to Sava (Tr. 130:16-25, 830:16-831:18). NSC retained the residual operations consisting of the roughly 100 nursing homes located on properties that were leased from third parties. All options to purchase leased property were transferred to Schron entities (Tr. 830:19-831:12, 837:10-25).

As of December 10, 2004, the day of the closing, Grunstein's brother, Harry Grunstein, nominally owned both NSC and SVCARE (Tr. 142:13-16). Thereafter, effective as of February 1,

2005, Grunstein and Forman acquired SVCARE, through Canyon Sudar, a company created for that purpose (Tr. 102:2-11; PX 182.0006; Tr. 480:13-20, PX 314.0001, PX 278.0001).

As discussed at length below, documents signed at the closing provide that Cam III made a loan of $100 million to SVCARE. Defendants claim that the loan was never funded and that there is no indebtedness to be released and contributed toward a purchase of SVCARE.

Grunstein and Forman negotiated and structured the Mariner Transaction (Tr. 127:12-14). A team of attorneys acting under the leadership of Grunstein worked on the transaction and drafted the deal documents (Tr. 98:21-99:10). The legal team, all members of which were associated with the law firm of Jenkens & Gilchrist Parker Chapin ("Jenkens"), included Larry Levinson ("Levinson"), who acted as the chief draftsman, and Mitchel Hill ("Hill"). Hill worked closely with Vincent Barra ("Barra"), a partner in Marks, Paneth & Shron ("MPS"), the accounting firm engaged by the acquiring parties to compile the sources and uses schedules for the deal and to ensure there was adequate funding to close (Tr. 1121:13-18, 1118:23-1119:9).

Defendants' accounting expert, David Williams, testified that parties to complex transactions such as this typically prepare a "deal book" to document the agreement of the parties (Tr 1516,1568). In this case, no deal book was prepared following the closing, but schedules of sources and uses of the funds transferred at the closing were prepared by MPS. Much of the defense in this case involves the alleged unreliability of the documents generated in connection with the closing (*see* the SVCARE Parties' Proposed Findings of Fact and Conclusions of Law, pp. 9-16).

None of the lawyers on the team except Grunstein heard prior to the closing in December 2004 or for the next five years that the $100 million loan was not funded at the closing. Hill, who directed the flow of funds on the closing date, testified that he understood that "the conditions to closing occurred" (Tr. 280:10-11). Levinson, who was in charge of drafting the documents, testified that he was "surprised" when Grunstein told him in the Spring of 2009 that the loan had not been funded, given the structure of the deal, the work that they had done for years to document the loan and Grunstein's prior statements (Tr. 169:3-183:23).

C. Financing of the Mariner Transaction

Schron raised about $1.1 billion in financing for the Mariner Transaction (Tr. 845:21-851:2, 1224:3-7).

The real estate was acquired by SMV for approximately $834 million. SVCARE and NSC/Mariner borrowed approximately $250 million from CapitalSource Finance LLC ("CapSource") to fund their operations (Tr. 849:19-25). The borrowings were partially secured by Schron.

Schron's contribution took multiple forms. Column Financial, an affiliate of Credit Suisse First Boston ("Credit Suisse"), provided $918 million in mortgage and mezzanine loans (PX 24, PX 55, PX 56). Those loans included $70 million from refinancing properties owned by a separate Schron company, SWC Property Holdings LLC ("SWC"). PX 51.0107-0108. Schron also raised an additional $25 million from Credit Suisse (PX 51.007; PX 241.0030).

Additionally, Schron borrowed $50 million from Arbor Realty ("Arbor")(PX 303.0001; Tr. 405:26-406:4). He also obtained a $75 million letter of credit from HSBC as a credit enhancement to the Credit Suisse mortgage (PX 53; Tr. 205:13-21). As discussed below, Schron contributed $40 million obtained pursuant to the terms of a contract to sell a former Mariner asset that Schron acquired and resold on the closing date to Omnicare, Inc. ("Omnicare")(SVX 1075-0010). Along with certain partners, Schron contributed $56 million in cash (PX 51.0108; PX 241, PX 303)*(see also* Tr. 214:25-215:22, 413:17-414:8, 857:2-11, 1235:3-1236:8).

Separate from these direct advances, Schron provided a $75 million guarantee to NSC/Mariner, (PX 313.0001), and signed a $50 million Put Agreement with Sava's lender, CapSource (PX 58.0002). The Put Agreement was an essential term of the CapSource loans to Sava. Schron maintains that the various resources he provided enabled Sava to obtain the CapSource loans.

Grunstein and Forman did not personally contribute any cash or provide any personal guarantees in connection with the Mariner Transaction (Tr. 126:2-3, 395:11-13). Their respective firms were paid substantial sums for professional services each firm provided (PX 318.0001, PX 114.0001, SVX 1086.0197).

Schron claims that he provided more than $1 billion to an escrow account at Fidelity National Title Insurance Company ("Fidelity", the account "Escrow Account"). He states that he provided all of the money Grunstein advised was needed for the closing and that in fact he was refunded over $23 million upon Grunsteins' determination that the funds were not needed (Tr.860, 994). Grunstein and Forman directed the distribution of over $1.2 billion (including funds loaned to SVCARE and

Mariner by CapSource) from the Escrow Account at closing as well as, apparently, $200 million more outside the escrow (Tr. 416:7-12, 1076:11-21, 1223:14-1224:7).

Following the closing, Fidelity returned $26.5 million to Schron, representing funds that were not needed (PX 54.0001, PX 325; Tr. 860:4-18).

D. The $100 Million Cam III-SVCARE Note

Much of the evidence offered at the trial was devoted to the hotly contested issue of whether or not sufficient Schron funds were available at the closing to fund a $100 million loan to SVCARE. Aided by testimony of a forensic accountant, Harvey Kelly, plaintiffs argue that at least $118 million of excess Schron funds are shown on the sources and uses schedules prepared by MPS in December 2004.[2] Defendants' forensic expert, David Williams, opined that insufficient funds remained in the Escrow Account to fund a $100 million SVCARE Loan after paying for real estate and associated expenses. Williams testified that after paying these costs and deducting $26,732,500 in "over-funded" resources returned to Schron after the closing (PX 1254.0005), only $8,271,063 remained to fund the SVCARE loan (SVX 1254.0007).

As discussed below, this argument is a red herring and is not dispositive because the dispute must be resolved on the basis of the 2006 Term Loan and the 2006 Note. In any event, the evidence of what the parties did at the closing is at odds with the *post hoc* accounting arguments offered at trial.

Schron testified and it is undisputed that he provided all of the funds for the Mariner Transaction in the form of cash, letters of credit, loan proceeds and various guarantees. SVCARE had no resources and NSC/Mariner also lacked sufficient funds to close. Schron also testified that he raised more funds than was needed to pay his costs and help defray expenses of SVCARE and NSC and that he signed a Put Agreement that enabled SVCARE to obtain a loan from CapSource (Tr. 858-59; 848-49).

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[2] Defendants have attacked the schedules as unreliable (*see, e.g.*, Defendants' Proposed Finding of Fact 24 and 39). Defendants' forensic expert, David Williams, concurred and complained that no "deal book" was ever prepared following the closing (SVX 1254.0004; Tr. 1633, 1568). Preparation of a deal book would have been a responsibility of the legal team supervised by Grunstein (Tr. 1748-49). The MPS sources and uses compilation was directed by Mitch Hill, a partner on the legal team assembled and lead by Grunstein to negotiate and document the Mariner Transaction. Williams testified that the compilation is "[t]he only thing that comes as close [as] possible to [describing what happened in the transaction]." (Tr. 1551). On these facts, any doubts resulting from a lack of clarity of what occurred at the closing will be resolved against defendants.

Schron states broadly that in exchange for providing $1.1 billion in financing and additional guarantees to fund the entire transaction, he received a number of things, including the Mariner real estate and two promissory notes -- a $100 million note payable by SVCARE to Cam III and a $75 million note payable by NSC to Cammeby's Funding II LLC ("Cam II")[3] (Tr. 747:10-26, 858:20-859:20; 994; 977-78). The structure of the transaction as reflected in the legal documents prepared by Grunstein in and around December 2004, supports Schron's testimony.

Credit Suisse and CapSource required that Sava be capitalized with $100 million in equity so as to provide a cushion for the newly formed operating company (Tr. 692:9-13; PX 36, PX 37.0004 [CapSource], PX 47.0018-19, PX 55.0107 [Credit Suisse]).

According to a memorandum, dated November 11, 2004 (prior to the closing), from Grunstein to an HSBC banker regarding the $100 million "OpCo Note", the parties contemplated that $100 million of the funds raised by Schron and sent to the Escrow Account would be funded to SVCARE at the closing out of the sources and uses and recorded as a loan from "a Cammeby's entity" (PX 18.0004; *see also* PX 37.0010). The parties implemented this plan. In a memorandum, dated April 12, 2005 (after the closing), Grunstein advised Barra that SVCARE borrowed $100 million from Cam III (PX-88.0001). SVCARE in turn contributed that $100 million to Sava. Sava advanced the sum to a subsidiary, SVCARE Intermediate Holdings LLC ("SVCARE Intermediate"), which used the funds as collateral for a separate loan from CapSource (PX 88.0001, PX 51.0167; Tr. 146:19-147:11, 1228:3-6). These transactions all happened simultaneously at the closing, resulting in a $100 million wire transfer from the Escrow Account to a bank account maintained by SVCARE Intermediate (PX 51.0167).

Contemporaneous accounting documents reveal that an equity contribution was made to Sava. Specifically, a compilation of the sources and uses for the closing identifies a $100 million wire as "Sava Equity Capital" (PX 304.0004). The compilation was prepared by Barra at the direction of Forman and Hill. Subsequently, Barra prepared two sources and uses schedules for Sava

[3] Although the original Cam II Note fixed that amount of the debt at $75 million, Cam II's books reflected from the outset $25 million as the outstanding net balance of inter-company obligations (PX 245.0002; Tr. 723:10-22). The Cam II Note was amended to reflect the lower amount at the time the mortgages were refinanced in June 2006 (SVX 1156.0001; Tr. 884-885).

under the supervision of Forman (Tr. 1148:26-1149:25), both of which identify the $100 million equity contribution (PX124, PX85).

Plaintiffs argue that, in sum, Sava and its affiliates received about $209 million at the closing: $100 million in equity from SVCARE; $98.5 million, representing the net proceeds of a $100 million term loan from CapSource and $11 million drawn down on a line of credit from CapSource (PX 124.0004, PX 68.0007-0011; Tr. 1242:14-24).

Defendants disagree. Forman testified that Sava did not receive $100 million in equity from Schron and, thus, Sava had only $109 million to use at the closing (Tr. 530:12-14). Defendants claim that the $100 million wire shown on the Barra sources and uses compilation actually reflects the proceeds of the CapSource term loan. Although the MPS sources and uses show that $100 million was wired to Sava, there is no credible evidence that the loan from CapSource was the source of the wired funds. Plaintiffs note that net proceeds of the CapSource was only $98.5 million (Tr. 164:19-22, 467:15-18; PX 68.0010-11).

Plaintiffs maintain that without the $100 million from Cam III, SVCARE and its subsidiaries would not have had sufficient funds to meet their obligations. At closing, Sava wired $100 million to Wachovia Bank to serve as collateral for the CapSource loan (Tr. 133:21-134:2, 427:18-428:7; PX 51.0167; PX 88.0001). Sava also had over $28 million in closing expenses and fees (Tr. 419:23-421:11, 440:22-441:21; PX 114, PX 124.0004) and an indirect obligation to reimburse SMV for the $37.5 million in cash collateral for the HSBC letter of credit (Tr. 406:21-410:8; PX 38.0042, PX 53.0025-0030, PX 241.0032-0033). Thus, Sava required more than $109 million to meet its obligations at the closing.

In addition, Sava advanced $65,153,266.87 to New Mariner as a loan (PX 45.0001). A MPS sources and uses compilation prepared for Sava shows that the same amount had been used by New Mariner from sources attributed to Sava (PX 124.0004). Those funds were necessary for New Mariner to meet its more than $1 billion in obligations on December 10, 2004 (PX 59). Defendants contend that the loan was never made, but, as noted, the $65 million loan is documented by a promissory note that was executed after Sava's accountants completed the allocation of funds from the closing (PX 45). The loan is also confirmed in Sava's audited financial statements (PX 300.0002-0003; PX 174.0028).

Absent the Cam III loan, Sava would not have had funds sufficient to make the loan.[4]

E. Confirmation of Funding of $100 Million and $20 Million Loans

Plaintiffs emphasize that documents executed by the parties as part of the 2004 Mariner Transaction, as well as confirmations made thereafter, conclusively demonstrate that the $100 million loan was funded and remains outstanding and that an additional $20 million loan was made in 2006.

1. 2004 Loan Documents

On December 10, 2004, SVCARE executed and delivered a promissory note evidencing a $100 million debt to Cam III (the "2004 Note")(PX 43; Tr. 97:20-98:14, 394:20-24). In the 2004 Note, SVCARE "promise[d] to pay to the order of CAMMEBY'S FUNDING III LLC . . . the principal sum of ONE HUNDRED MILLION AND NONE/100 Dollars ($100,000,000) or such other amount of the Term Loan (as defined in the Loan Agreement) as may then be outstanding, as applicable, together with interest thereon . . . " (PX 43.0001).

The parties also agreed that "[a]ll advances and payments . . . made pursuant to [the] Note, the Loan Agreement, and other Loan Documents may be recorded by the Lender on its books and records, and such books and records shall be conclusive as to the existence and amounts thereof absent manifest error" *id.* Cam III recorded the $100 million note on its books and records starting with its first set of books, dated December 2004 (PX 245.0003). The 2004 Note was accompanied by a Term Loan and Credit Facility Agreement ("2004 Term Loan Agreement")(PX 42.0001). Other contemporaneous deal documents confirm the $100 million loan (PX 48.0003; *see also* PX 55, 46).

Grunstein and Forman testified that these records do not reflect the facts. According to Grunstein, at some point prior to the 2004 closing, Schron told him that he wasn't going to fund the

[4] Defendants also asserted that allocation to Sava of $8 million of the legal fees payable to the Jenkens firm at the closing was not a Sava expense (PX 304, PX 124). In 2005, the Jenkens partner in charge of billing relating to the Mariner Transaction, Sava's senior accountant, and Sava's outside accountant all confirmed the correctness of this allocation (Tr. 1209.7-26; PX 114).

In another *post hoc* argument, defendants assert that they are entitled to a $17.8 million offset due to Sava in connection with Sava's security deposit under the terms of the Master Lease. Suffice it to say that any such payment from SMV to Sava need not be repaid until the Master Lease ends (SVX 1137).

loan at the closing and that Schron did not fund the loan[5] (Tr. 118, 154, 161). Both testified that, despite full knowledge that Schron was not going to fund the loan, the parties proceeded to the closing without amending the loan documents to reflect the version of the facts they now assert. If true, they are guilty of perpetuating a fraud. The evidence of what occurred at the closing and thereafter reveals that this testimony is not credible (*see* fn. 6).

2. The 2006 Refinancing

In June 2006, Schron refinanced the Credit Suisse loans and at that time restated the 2004 loan agreement and promissory note.

On behalf of SVCARE and Canyon Sudar, Forman signed a number of documents confirming the $100 million loan. In the Amended and Restated Subordinated Term Promissory Note dated as of June 9, 2006 (the "2006 Amended Note"), SVCARE reiterated its promise to "pay" the $100 million in "outstanding" indebtedness "together with unpaid and accrued interest" (PX 153.0001) ("Term Note A"). Term Note A, like the 2004 Note, provides that the loan amounts recorded on Cam III's books and records would be conclusive, absent "manifest error" (PX 153.0001; Tr. 558:21-24, 560:22-25). As part of the 2006 refinancing, the parties successfully requested that Credit Suisse remove an existing restriction on repaying the $100 million Cam III loan (PX 145.0001-0002).

Forman also signed an Amended and Restated Term Loan and Credit Facility Agreement in which the parties reaffirmed that the 2004 loan had been "made" and was "still outstanding" (PX 151.0006)(the "2006 Loan Agreement"). The 2006 Loan Agreement further confirms that the "proceeds of the Term Loan A [were used] for the purpose of making an equity contribution" to Sava (PX 151.0029). SVCARE agreed that the $100 million Cam III loan "continue[s] in full force and effect" and that its repayment obligations "are not subject . . . to any defense, counterclaim, setoff, right of recoupment, abatement, reduction or other claim or determination . . . " (PX 151.0027; *see also* Tr. 106:12-107:8, 556:3-9). SVCARE and Canyon Sudar also agreed that "pursuant to the Existing Term Note, interest has accrued on the Existing Term Loan but has not been paid" (PX 151.0027).

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[5] In an affidavit submitted to this court and at his deposition, Grunstein stated that the conversation took place within "a few days" of the December 10, 2004 closing (Tr. 116-117, 162). At a subsequent deposition session and at trial, Grunstein testified that the conversation took place a month earlier, in early November (Tr. 170). The timing of the conversation is significant because other evidence reveals that CapSource, which purportedly supplied a $100 million to replace the hole created by Schron's alleged refusal to provide funding, had tentatively agreed to make the loan in early November, much more than "a few days" before the closing (PX-16.0002; Tr. 165-170).

As part of the refinancing, Cam III also agreed to provide a discretionary line of credit of up to an additional $100 million to SVCARE, which SVCARE would contribute to Sava as additional equity (PX 151.0027, 0029). SVCARE delivered a second note, Term Note B, evidencing advances under this line of credit (PX 154.0001). At the closing, Cam III wired a $20 million advance under Term Note B to SSC Disbursement Company, an affiliate of Sava and SVCARE[6] (Tr. 312:13-17; 562:11-15; 1605:2-12; PX 158, PX 162.0002).

Defendants insist that this amount cannot be contributed to the purchase because the funds were paid to SSC Disbursement Company, not SVCARE. That the funds were wired to a SVCARE affiliate and not to SVCARE is of no moment. In 2006, Forman and SVCARE acknowledged the $20 million as an equity contribution to SVCARE (PX 157, PX 164).

The 2006 Loan Agreement and the 2006 Amended Note, together with undisputed proof at trial that no payment of either principal or accrued interest has been paid on either the $100 million loan or the $20 million loan, establishes that the outstanding indebtedness is substantially in excess of the option price of $100 million. The sums outstanding are sufficient to pay the entire purchase price under the terms of the Option by assumption or release of debt evidenced by the 2006 note (Tr. 892:8-20; 1254:20-1255:9; Tr. 1071:12-1071:23).

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[6] The record contains extensive additional documentary evidence of admissions by Grunstein and Forman that the SVCARE loans were made, funded and remain outstanding. In an attempt to explain away the admissions, Grunstein and Forman testified that they repeatedly misrepresented in writings that the loans were made and funded in order to induce third parties, including lenders and the United States Department of Housing and Urban Development, to advance money to SMV, SVCARE and NSC. They assert that together with Schron, they conspired to defraud third parties by falsely stating that the loans were funded by Cam III. They make the implausible claim that although loan documents and various other documents they signed reflect that the loans were funded, the lenders closed the deal without any amendments to reflect the purported fact that the Cam III loans were not funded (Tr. 636-37, 639, 693). According to Forman the lenders simply "looked the other way" and "allowed the deal to close." *Id.*

Other than the testimony of Grunstein and Forman, the trial record contains no evidence of any such conspiracy. To the contrary, virtually every witness involved in the 2004 Mariner Transaction testified that they had no knowledge that the Cam III loan was not funded and when asked, testified that they believed the loan was funded. Details of this extensive testimony, conflicting statements of Grunstein and Forman and other evidence are set forth at plaintiffs' proposed findings of fact numbers 48-64 and 72-88 and will not be recounted here.

In face of the evidence referenced here and elsewhere in this Decision and Order, the court rejects as a prevarication, the testimony of Forman and Grusntein regarding the circumstances of the alleged non-funding of the loan. Apart from the fact that all of the documentary and non-party witness evidence contradict their testimony, their evasive answers and manner on the witness stand left the court with a firm belief that both gave testimony that was less than candid.

3. Financial Books and Records

Plaintiffs insist that the accounting records prepared by the parties, Credit Suisse, and CapSource to reflect the flow of funds at the closing, as well as the books and records of Cam III and Sava, record that Cam III funded a $100 million loan.

Following the closing, MPS prepared a final compilation of the sources and uses for SMV, SVCARE and NSC, dated December 15, 2004. The compilation shows that at the closing, a Sava company received a $100 million wire, which was identified as "Sava Equity Capital" (PX 73.0002, PX 304.0004). The compilation, which was prepared by Barra under the direction of Forman, Grunstein and Hill (PX 272.0001, PX 273.0001; Tr. 196:3-10, 680:12-17, 1119:3-1122:10), does not reveal the source of these funds.

The CapSource and Credit Suisse sources and uses charts similarly record Sava's receipt of the $100 million (PX 75.0003, PX 78.0002; Tr. 140:16-25). Additionally, following the closing, Sava retained MPS to prepare a Sava-specific schedule to help the company set up its initial balance sheet (*see* PX 85, PX 124; Tr. 1143:4-18). These schedules all show the $100 million loan.

Cam III's books and records also record a $100 million loan as well as accrual of interest for each year starting with December 2004 (PX 245.0003, PX 246.0003, PX 247.0003, PX 248.0003, PX 244). Cam III filed tax returns showing the principal and accrued interest on the $100 million and $20 million loans (PX 122.0003, 0006, PX 175.0016, 0022). Grunstein and Forman, who have a minority interest in Cam III, received K-1's from Cam III each year since 2005 reflecting the same information (Tr. 582:8-585:26, 720:18-721:16). Although no taxes were required to be paid, there was no evidence presented at trial of either ever having questioned the information recorded on the K-1's received.

F. Funding of the $100 Million Loan

Schron purports to have received two promissory notes at the closing of the Mariner Transaction in return for funding the entire Mariner Transaction, including the financing and guarantees he provided for the benefit of SVCARE and NSC, an assertion defendants have not challenged directly (Tr. 994, 977-78, 982-84, 987, 1021). Instead, defendants assume the notes were given simply for loans in the amounts stated thereon. Following this premise, the parties sought to prove that sufficient Schron funds were available (or not available) at the closing in 2004

to fully fund a $100 million Cam III loan. This hotly disputed issue is immaterial (*see* Conclusions of Law, *infra*).

Cam III did not transfer cash directly to SVCARE. Schron contends however, that the Cam III Loan was fully funded on December 10, 2004 from the funds he made available at the closing, including sums deposited into the Escrow Account and $100 million wired to a SVCARE affiliate from the Escrow Account.

Williams, on behalf of the defendants, testified that he conducted a forensic analysis of the funds associated with the 2004 closing, as well as all of the relevant bank accounts (SVX 1254; Tr. 1513:25-1515:15; 1517:24-1521:5). He opined that the Schron related entities did not deposit enough money into the Escrow Account to fund both the necessary expenses to close the Mariner Transaction and a $100 million loan to SVCARE (SVX 1254). Plaintiffs, through Kelly, testified that $118.4 million in excess funds was available at the closing to fund a $100 million Cam III loan.

Much of the testimony of the experts, who are accountants, involved their respective interpretations of contracts signed by the parties to the Mariner Transaction, matters as to which neither possesses any technical or professional expertise. Such matters are more likely in the ken of professionals in the field of law (*see People v Taylor*, 75 NY2d 277, 288 [1990]["expert opinion is admissible if it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror"][internal quotations omitted]). Nevertheless, both provided helpful analyses concerning the allocation of fees and expenses paid at the closing.

According to Williams, the funds from Schron entities deposited into the Escrow Account are: (1) mortgage and mezzanine financing from Credit Suisse, totaling $871,497,069; (2) individual mortgage financing from Credit Suisse on three other nursing homes; (3) a $10,831,684 mortgage loan from First Mariner Bank; (4) a $49,232,500 loan from Arbor Financial, a lender to Schron; and (5) $3.5 million in cash from Schron. The total is $947,725,079 (SVX 1254.0007). From this amount, Williams deducted $834,380,500, representing the cost of the Mariner real estate plus $78,341,016 of Schron related fees and expenses.[7]

[7] According to Kelly, Schron related fees and expenses inside the Escrow Account aggregate to $62,728,736. The difference is a result of Kelly having allocated certain of the fees and expenses to SVCARE and NSC. Compare SVX 1254.0007 with PX 241.0027.

Williams also analyzed the sources and uses of funds transferred outside the Escrow Account. The MPS compilation records Schron sources as contributing $93,964,410 "additional cash and letter of credit equity" (SVX 1086.0007) from which Williams deducted $37,500,000 representing "the unfunded amount of a $75 million letter of credit required of Mr. Schron by the [Credit Suisse] mortgage for which he posted only $37.5 million of cash collateral." SVX 1254.0008. Williams then deducted all of the remaining balance of $56,464,410 as funds spent on specifically identifiable closing related costs charged to Schron (SVX 1254.0008). Of this amount, $37.5 million consists of the cash collateral for the letter of credit.

Williams did not take into account any of the funds withheld by Credit Suisse to cover the cost of lender fees, taxes and other expenses, some of which were non-Schron related expenses. Pursuant to section 10.4 of the Master Lease between SMV affiliates and SVCARE affiliate, SSC Equity Holdings LLC (the "Tenant"), the Tenant is obligated to provide "escrows, cash collateral accounts, letters of credit, insurance deposits, bonds and other financial requirements imposed by any mortgage" (SVX 1047.0042). Defendants argue that obligations governed by section 10.4 should be excluded because they are obligations of the Tenant and not obligations of either SVCARE or Sava (*see* Defendant's Proposed Findings of Fact and Conclusions of Law, p. 22).

For purposes of determining whether sufficient Schron resources were available at the closing, the separate corporate existence of the various SVCARE affiliated entities is irrelevant. These costs were incurred at the closing and were paid from Schron funds, but they were not Schron obligations. Kelly properly allocated them as SVCARE related costs.

According to Kelly, the funds withheld by Credit Suisse to cover costs consisted of (1) $20.1 million held in "Servicer Escrows and Sub-accounts" of which $16.8 million were "Engineering Reserve" and "Environmental Reserve" amounts attributable to non-Schron entities[8] and (2) $26.98 million in "Lender Fees and Expenses" of which $10.1 million were related to redemption of

[8] As discussed above, Defendants contend that these are costs of the Tenant and should not be counted toward the $100 million loan. The court finds that these and any other proper expense of a SVCARE or NSC/Mariner affiliate may be counted for purposes of this analysis. It appears that SVCARE assumed some NSC/Mariner costs at the closing and took back a note from NSC/Mariner in connection with those assumed costs (PX 124.0004; PX 45.0001). The court need not analyse the details of this arrangement as the court has found that the defendants have failed to show that there was not sufficient funds available to fully fund the Cam III equity loan to SVCARE.

Mariner bonds and, therefore, were attributable to NSC/Mariner. Similar fees and expenses arising from mortgaging of four SMV and SWC properties resulted in additional non-Schron expenses of $0.6 million (PX 241.0031). The total of these non-Schron expenses is $37.5 million.

Williams did not credit Schron for $37.5 million deposited in an HSBC bank as cash collateral for a $75 million line of credit, the cost of which was an obligation of SSC Equity Holdings pursuant to section 10.4 of the Master Lease. In Williams' opinion, the cash collateral could not be counted as a contribution to the $100 million loan because the funds were deposited in a Schron account and were eventually returned with interest. Williams failed to recognize that as of December 10, 2004, which is the relevant date for purposes of this analysis, Schron was deprived of use of these funds. The $37.5 million deposit should be classified as a Schron source.

Williams also excluded as Schron sources $1,800,835 that was wired into the title company by Mariner, as well as a deposit of $40 million relating to the sale of Mariner Medical Supply, Inc. ("MMS") to Omnicare for $50 million. These amounts are also classified on the MPS schedule as "cash equity." Williams classified this $40 million as Mariner money (Tr. 1528:26-1529:7, 1531:7-1534:3).

On December 10, 2004, Harry Grunstein certified that SMV will be acquiring "all of the outstanding stock of [MMS]" and that "immediately following the acquisition of MMS by SMV, SMV and MMS will enter into an Asset Purchase Agreement with Omnicare pursuant to which Omnicare will purchase from MMS ... the assets of the MMS Business" (SVX 1075.0004). This is precisely what the MMS Asset Purchase Agreement, dated December 10, 2004, provides.

The Asset Purchase Agreement also contains an agreement by SMV to provide a guaranty to Omnicare in connection with the $40 million that was deposited in the Escrow Account. An agreement by Schron to assure return of the money Omnicare deposited is consistent with ownership of MMS by Schron.

On these facts Williams' classification of the $40 million must be rejected. The deposit of the Omnicare supplied funds is properly classified as a Schron source (Tr. 1795-1801).
These amounts - - 37.5 million withheld by Credit Suisse, $37.5 million security deposit and $40 million from the MMS asset sale - - aggregate to more than $100 million and illustrate that

defendants claim that Schron lacked the resources at the closing to fund a $100 million Cam III loan has not been established.

III. CONCLUSIONS OF LAW

It is well settled that a *prima facie* case is established by introducing the operative, signed promissory notes and loan documents (*see, e.g., Citibank, N.A. v. Silverman ["Citibank II"]*, 84 AD3d 425, 425 (1st Dept 2011); *UrbanAmerica, L.P. II v. Carl Williams Grp., L.L.C.*, 95 AD3d 642, 643 [1st Dept 2012]). The court has found that the loan agreements and promissory notes were properly signed and delivered and that no portion of the outstanding balance has been repaid (Tr. 373:26-374:5; Tr. 560:3-561:2).

The burden then shifts to the defendants to demonstrate a *bona fide* defense (*see Quest Commercial, LLC v. Rovner*, 35 AD3d 576, 576 [2d Dept 2006]). The borrower must prove that a loan was ***not*** funded (*see Carlin v. Jemal*, 68 AD3d 655, 656 [1st Dept 2009][borrower could not establish a defense through "conclusory allegations that the loan was not fully funded"]; *UrbanAmerica*, 95 AD3d at 643 [plaintiff was not required to prove funds "were actually disbursed" to make out a *prima facie* case]).

In this case, the parties restated the $100 million note in 2006, and at that time SVCARE waived all defenses relating to the 2004 note (PX 151.0027)("the obligations of the Term Borrower to repay th[e] Existing Loans . . . (B) are not subject as of the date of this Agreement to any defense, counterclaim, setoff, right of recoupment, abatement, reduction or other claim or determination . . . ."). Further and as described above, Cam III provided $20 million in additional consideration.

New York courts recognize that parties to an agreement may waive their defenses and will enforce validly executed waiver clauses (see Bank of Suffolk Cnty. v. Kite, 49 NY2d 827, 828 [1980] [defendants' claims were "clearly inconsistent" with the agreement's "explicit waiver of 'the right to interpose any defense, set-off, or counterclaim whatsoever'"]; Banque Nationale de Paris v. 1567 Broadway Ownership Assocs., 214 AD2d 359, 361 [1st Dept 1995]; Quest, 35 AD3d at 576). The Appellate Division, First Department has specifically recognized that when parties sue on a restated note, the funding of the original note is irrelevant (see Urban America, 95 AD3d 643 ["Plaintiff did not have to prove that the funds that it lent [the defendant] under the original note were actually disbursed to [the defendant]; plaintiff was suing on the amended and restated note, not

the original note."]). Nothing more is required to resolve the issue before the court. The Schron Parties are entitled to judgment based on the 2006 Loan Agreement and the related Note.

Defendants cast aside the express waiver as well as the multiple written statements of Grunstein and Forman as mere extrajudicial admissions which must be weighed like any other evidence and may be explained by other evidence, especially objective evidence (*see e.g. Bondy & Schloss v Strategic Dev. Ptnrs. LLC*, 82 AD3d 615 [1st Dept 2011] and *Mason v Allstate Ins.*, 12 AD 2d 138, 142 [2d Dept 1960]). Defendants would also have the court ignore its prior ruling that where there is a general merger provision, extrinsic evidence to vary or contradict the terms of the writing is barred (*see* 32 Misc3d at 236). Defendants maintain that "[a] failure of consideration for the $100 million promissory note voids any waiver of defenses in the promissory note." Defendants' Proposed Findings of Fact Conclusions of Law, p. 4.

Although the courts have considered objective proof to contradict admissions that are contrary to the actual fact (*see, e.g. Mason v Allstate Ins. Co.*, 12 AD2d 138, 142 [2d Dept 1960]), this is not such a case. Here, it is the documentary evidence that shows that the loans were made and funded. Defendants would have the court ignore such evidence and substitute the self-serving testimony of Grunstein and Forman and unpersuasive evidence as to where funds were directed at the closing. Such evidence cannot rebut documentary evidence of the indebtedness in the form of loan agreements and promissory notes or avoid the effects of a waiver provision that was executed after defendants had knowledge of the defense (*see Lumber Indus., Inc. v Woodlawn Furniture Corp.*, 26 AD2d 924, 925 [1st Dept 1966]).

The court has found that the 2004 and 2006 loans were funded. Assuming, as defendants contend, that the loans were not fully funded, the loan agreements and notes would not be voided for lack of consideration. The general rule is that where a party has received 'some benefit," "the adequacy of consideration is not a proper subject of judicial scrutiny" *Laham v Chambi*, 299 AD2d 151, 152 [1st Dept 2002]). By defendants' calculations, between $8 and $18 million of excess uses were available for SVCARE at the closing in 2004 and $20 million more was loaned in 2006 (*see* SVX 1254.0006; Defendants' Proposed Findings of Fact Conclusions of Law, p. 26).

The evidence defendants presented in an attempt to avoid the legal effect of the acknowledgments and waiver of defenses is unpersuasive. As mounted at trial, defendants' defense has two branches: the credibility of Grunstein's and Forman's denial of funding and defendants' arguments as to the flow of funds (Tr. 1004:24-1006:10).

The mendacity of Grunstein and Forman entitles their testimony to be given no weight. Their shifting explanations and the difficult to imagine contention that a $100 million loan that was documented and relied upon for years by numerous sophisticated parties went unfunded is not credible[9] (*see, e.g. Anderson v. Weinroth*, 48 A.D.3d 121, 136 [1st Dept 2007]). Further, defendants did not explain why the parties would prepare and execute the 2006 loan documents in perpetuation of the charade alleged when, by that time, Credit Suisse no longer required the Cam III loan (PX 145.0001-0002). Moreover, if the loan had not been funded as of the time of refinancing, one would expect that it would have been noted and addressed at that time as was the amount of a $75 million loan to Mariner which was reduced to $25 million. It is difficult to imagine sophisticated businessman such as Grunstein and Forman reaffirming the 2004 loan and waiving all defenses knowing that by doing so they would be left without legal redress.

New York courts are skeptical of self-serving arguments from borrowers claiming that they should be absolved from repaying a promissory note. This is especially true, where, as here, the arguments are expressly contradicted by the contracts the parties signed (*see, e.g.*, *LaMar v. Vasile*, 49 AD3d 1218, 1219 [4th Dept 2008][rejecting defense of lack of consideration where "notes recited that consideration had 'already' been received by defendant at the time of the execution."]).

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[9] To the extent defendants are making a fraudulent inducement argument, the claim is barred, the court having already denied defendants' motion to amend their answer. Additionally, the argument fails because fraudulent inducement is barred by the specific language and merger clause set forth in the Amended and Restated Loan Agreement.

Such claim preclusion considerations aside, to prevail on a fraudulent inducement claim, the proponent must prove (*see Boxberger v New York N.H. &H. Railroad Co.*, 237 NY 75, 78 [1923]) by clear and convincing evidence (*see M. Entertainment, Inc. v Leydier*, 71 AD3d 517, 519 [1st Dept 2010]; *Chopp v Welbourne & Purdy Agcy, Inc.*, 135 AD2d 958, 959 [3d Dept 1987]) that (1) the signer knows the terms of the contract, (2) assents to these terms and intends to execute the contract but (3) the assent itself has been induced by fraudulent representations (*see Maji Communications, Inc. v Jac-Lu Assoc.*, 65 AD2d 727[1st Dept 1978]; *Dalessio v Kresster*, 6 AD3d 57, 61 [2d Dept 2004]). Defendants' evidence falls far short of "the high standards of clear and convincing evidence required for proof of fraud" (*see 10-162 Corp. v Tompkins Green Assoc.*, 179 AD2d 450 [1st Dept 1992]).

Generally, even a single document acknowledging a loan suffices for judgment in the lender's favor (*see, e.g. Abko Music & Records, Inc. v. Montague*, 90 AD3d 402, 402 [1st Dept 2011]).

Defendants treated the debt as valid and owing from the 2004 transaction until 2009, when the relationship between the Schron and the Grunstein parties broke down. "[T]he parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties." *Fed. Ins. Co. v. Ams. Ins. Co.*, 258 AD2d 39, 44 (1st Dept 1999). Here, the consistent "practical interpretation of (the) contract by the parties to it" for five years before it became "the subject of controversy" has "great, if not controlling, influence" *id.* (internal citations omitted).

Plaintiffs' books and records show the loans and Sava's audited financial statements reflect a capital contribution from SVCARE in December 2004 in the amount of $100 million and a second capital contribution from SVCARE in June 2006 in the amount of $20 million. There is no proof of a "manifest error" in Cam III's books and records, and they are thus entitled to controlling weight under the terms of the promissory notes and loan agreements executed by the parties (*see Domansky v. Berkovitch*, 243 AD2d 374, 374-75 [1st Dept 1997]; *In re Moak*, 92 AD3d 1040, 1044 [3d Dept 2012]).

Moreover, promissory notes, like other contracts, are, in the first instance, interpreted and enforced based on their plain language (*see Embraer Fin. Ltd. v. Servicios Aereos Profesionales, S.A.*, 42 AD3d 380, 381 [1st Dept 2007]). Here, the 2006 Note contains an unequivocal promise by SVCARE to repay $100 million (PX 153.0001) and Term Note B contains a similar unequivocal promise to repay all amounts advanced thereunder, namely the additional $20 million (PX 154.0001). Both notes also include merger and integration clauses (PX 153.0003, PX 154.0003; Tr. 560:11-18).

Even if the court were inclined to give some weight to defendants' assertion that the $100 million was not funded, that testimony is inadmissible. The loan documents are fully integrated contracts, which may not be modified by parol evidence (*see Citibank, N.A. v. Plapinger ["Citibank I"]*, 66 NY2d 90, 95-96 [1985]; *see also Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC*, 92 AD3d 449, 450 [1st Dept 2012]).

The second branch of the defense is also meritless. Contemporaneous financial records demonstrate that the $100 million loan was funded on December 10, 2004. To the extent that defendants challenge that finding on various technical and *post hoc* grounds, the court rejects them based on the findings of fact set forth above.

The court specifically rejects defendants' hyper-technical arguments as to compliance with Section 2.1(b) of the 2004 Agreement and Section 2.1(d) of the 2006 Agreement. Parties to a contract may not avoid their obligations under an unambiguous promissory note by pleading technical defects in loan-related documentation. *Citibank II,* 84 A.D.3d at 426. That is especially true here where the documents were prepared (and the closing processes were managed) by Grunstein and the lawyers he directed. Moreover, as noted above, defendants broadly waived their defenses in 2006 and that waiver encompasses the current challenges to repayment.

The court therefore holds that Cam III's $100 million loan to SVCARE, as evidenced by Term Note A, and Cam III's $20 million loan to SVCARE, as evidenced by Term Note B, both remain outstanding and are not subject "to any defense, counterclaim, setoff, right of recoupment, abatement, reduction or other claim or determination" (PX 151.0027; *see also* PX 153.0001, PX 154.0001). Based on recent records of Cam III, the total debt owed by SVCARE to Cam III as of July 2012 is $157,376,399, consisting of the $100 million Term Loan, the $20 million advance under Term Note B, and accrued interest (PX 323).

IV. CONCLUSION AND ORDER

In an action filed on March 23, 2010, SVCARE, Grunstein, Forman and others sought, *inter alia*, a declaration that the Option was not enforceable because the $100 million loan was not made. That claim was dismissed (*see* 32 Misc3d 231). On June 22, 2010, CamEquity served written notice of exercise of the Option. This court and the Appellate Division have upheld the validity of the Option. This court has found that plaintiffs have a right to take control of SVCARE. Further, the parties were allowed to explore fully the question of whether or not there is in fact outstanding indebtedness in amounts sufficient to satisfy the exercise price of the Option.

In its Decision and Order, dated March 15, 2012 granting plaintiffs' motion for summary judgment, the court ordered that "SVCARE and Canyon Sudar shall comply immediately and in

good faith with their obligations pursuant to Sections 6 and 7 of the Option". The court has seen little evidence of progress in this regard.

CamEquity is entitled to reap the benefit of its bargain now. Pursuant to the terms of the Amended and Restated Unit Purchase Option Agreement (PX 155), Cam Equity may complete exercise of the Option and without further delay acquire 99.999% of the outstanding shares of SVCARE by forgiving $100 million of the debt evidenced by Term Note A and Term Note B.

Plaintiffs' request for imposition of sanctions against Grunstein and Forman is denied.

Accordingly, it is hereby

ORDERED that defendants, Canyon Sudar and SVCARE are hereby directed to proceed without further delay to a closing pursuant to the terms of the Amended and Restated Option Agreement, dated as of June 9, 2006, and shall deliver 99.999% of all membership units of SVCARE to CamEquity or its designee, together with all voting rights attendant thereto including the rights of election and removal of directors and managers of SVCARE; and it is further

ORDERED that SVCARE, its existing officers, directors and managers are hereby enjoined from taking any action that (1) would violate this order or any prior order of this court; (2) would conflict with or interfere with the rights of CamEquity or its designee as owner of SVCARE or (3) would otherwise be inconsistent with the rights of CamEquity pursuant to sections 6 and 7 of the Option; and it is further

ORDERED that counsel for the parties shall appear at a status conference at Part 49, Courtroom 252, 60 Centre Street, on Monday, November 5, 2012 at 10:00 AM to discuss the remaining issues in this case.

This constitutes the decision and order of the Court.

DATED: September 6, 2012

ENTER,

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.