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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

LHR, INC.,
Plaintiff,

vs.

MEMORANDUM DECISION

T-MOBILE USA, INC. and SUNCOM WIRELSS OPERATING CO. LLC,
Defendants.

Index No. 5839/10

BEFORE: **HON. JOHN A. MICHALEK**

APPEARANCES:

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MICHALEK, J.

Before the court is the motion of Defendants T-Mobile USA, Inc. (T-Mobile) and SunCom Wireless Operating Company, LLC (SunCom) for partial summary judgment. The motion was argued on February 28, 2013 and decision was then reserved.

The background of the case, undisputed unless otherwise stated, is

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as follows.

LHR is in the business of collecting delinquent consumer debts (Burke Affid. Ex A, Second Amended Compliant [hereafter Complaint] ¶ 2). LHR both purchases debt portfolios from creditors such as SunCom and collects debts on a contingency basis (Lewis Affid. ¶ 3). Between 2005 and 2008, LHR purchased by its own calculations delinquent consumer debt from SunCom with a face value of over $150,000,000, paying in total approximately $11.7 million to SunCom (Joseph Affid., Ex. A at 3). In 2008, SunCom became a wholly-owned subsidiary of T-Mobile.

The complaint in this action alleges that LHR and SunCom entered into twenty-eight (28) different agreements to purchase delinquent customer accounts at various intervals; the early agreements were for immediate sale of accounts, while later agreements provided for periodic delivery of accounts, under what the parties call a "forward flow agreement".

In June 2012, the parties stipulated, "in order to narrow the issues in this action, for purposes of this action only" that T-Mobile "is the successor in interest to [SunCom] solely for the following matters (i) on the contracts between Plaintiff.... and SunCom that are at issue in this lawsuit; and (ii) for LHR's conversion claim against SunCom." (Joseph Affid. Ex. P; *see also* PSA Agreements, section 7.1 [Orig. Complaint Exs.

A-D, E, S] [contract provisions insure to benefit of successors and assigns upon written consent of contracting party]).

THE CONTRACTS

The parties disagree whether there were twenty eight (28) contracts or only six. The first Purchase and Sale Agreement (PSA) between the parties was dated November 2005, covering debts sold on November 29, 2005; the second PSA was dated February 10, 2006; the third PSA was dated March 15, 2006 (Burke Affid. Ex. E, [Original Complaint] Exs. A-C).

The fourth PSA between the parties was what the parties term a "forward flow agreement", dated March 2006 (First FFA).[1] The First FFA had a term of approximately 12 months and expired on May 15, 2007, with an option to renew for twelve additional months (Orig. Complaint Exhibits F through R [definitions]). It contemplated multiple purchases on a monthly basis by plaintiff of SunCom's delinquent accounts (Orig. Complaint Ex. F through R at p. 1). The First FFA contains an Article 5 that is identical to the one in the prior three PSAs (compare Orig. Complaint Exs. A-C and F). At section 2.1, the First FFA provides that "**[s]ubject to the terms of this agreement**, on each Closing Date, Seller agrees to sell and assign to Purchaser, and Purchaser agrees to

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[1] The fourth PSA between the parties was dated "March __ 2006" with a blank instead of an actual date.

buy from Seller....all of Seller's right title and interest in and to the accounts... .The Accounts shall be transferred and assigned pursuant to a Bill of Sale in the form attached hereto as Exhibit A" (Orig. Complaint, Exs. F through R, section 2.1 [emph. supplied]). The form Bill of Sale at Exhibit A provides in part:

> This Bill of Sale and Assignment of Accounts is delivered pursuant to the terms and conditions of that certain Purchase and Sale Agreement dated as of March __ 2006...

(*Id.*) Thirteen separate sales occurred under the First FFA (Orig. Complaint Exs. F through R).

Thereafter, the parties entered into the fifth PSA – the Second FFA – on May 16, 2007 (Orig. Complaint Ex. S).[2] Bills of sale for sale of accounts were executed in June 2007, July 2007, August 2007, September 2007, and October 2007 (Orig. Complaint Exs. T through W). Then in November 2007, LHR sent SunCom a notice of termination of the Second FFA (Burke Affid., Ex. F). The letter from LHR states that "LHR hereby terminates the Purchase and Sale Agreement dated March 1, 2006 [sic] on its current terms." (*Id.*) The letter went on to state that LHR would consider entering into a new agreement upon a reduced purchase price (*id*).

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[2] The Bill of Sale for the first sale of accounts under the second FFA refers to the latter as a PSA dated June 2007 (Ex. S). Later bills of sale are similarly inconsistent (*see e.g.* Ex. T)

Thereafter, in December 2007, the parties executed Amendment No. 1 to Purchase and Sale Agreement, which deleted certain provisions and altered others, and further permitted plaintiff to sell some of the accounts it purchased under certain conditions, defined as "Approved Transactions" (Orig. Complaint Ex. S Amendment No. 1 ¶ 5). Further, at section 5:

> Purchaser shall indemnify, defend and hold each of the Seller Indemnitees harmless from and against all Losses directly or indirectly arising from or in any way relating to any Approved Transaction. Purchaser understands, acknowledges and agrees that none of the limitations set forth in Section 5.4 of the Agreement will apply to or otherwise limit in any way any of Purchaser's obligations under this *Section 5*.

(Orig. Complaint Ex. S Amendment No. 1 § 5).

Further Assignments and Bills of Sale concerning account sales were entered into in December 2007, January 2008, two in February and one in March 2008, pursuant to the Second FFA and its Amendment (Orig. Complaint Exs. X to BB). By letter dated April 9, 2008, LHR again gave notice of termination under the Second FFA, and purchased no more accounts from Sun Com.

Section 5 of the PSAs – which the parties incorrectly agree is identical in each of the PSAs[3] -- provides for indemnification. Section 5.4

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[3] In the 2007 PSA/General Terms and Conditions, the paragraphs in section 5.4 have been rewritten, from 5.4 (a) (i), (ii), (iii) (iv); b (i) (ii) and (c) (i) and (ii), to 5.4 (a) through (h). The court perceives no change in substance, and will refer to the 2006

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is entitled "Certain Limitations on Indemnification Obligations" and provides at subsection b (i):

> Except with respect to [irrelevant exception], **the sole and exclusive remedy available to Purchaser Indemnitees** for any breach by Seller of its representations, warranties, covenants, obligations and agreements hereunder or under any of the documents or instruments delivered pursuant hereto by Seller **shall be a claim for indemnification pursuant to the terms of this Article 5.**

(emphasis supplied).[4] Subsection 5.4(c) (i) provides that:

> Notwithstanding anything in this Agreement or applicable law to the contrary, other than claims pursuant to this *Article 5* and subject to the limitations set forth herein, after each Closing Date, none of Seller, its affiliates or any of their respective officers, directors, members, managers, shareholders, partners, employees or agents shall have any obligation or liability to any Purchaser Indemnitee under this Agreement or otherwise, and Purchaser Indemnitees shall not have any claim or recourse against Seller its affiliates or any of their respective officers, directors, members, managers [etc] as a result of the breach of any representation, warranty, covenant or agreement of Seller contained herein or otherwise arising out of or in connection with the transactions contemplated by this Agreement or the documents executed in connection herewith, and the provisions of this *Article 5* shall be the sole and exclusive remedy for any such claim by Purchaser Indemnities for any such matters, whether such claims are framed in contract, tort, or otherwise

(Section 5.4 [c] [i] [italics in original]). Subsection 5.4 (c) (ii) is an

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numbering system which defendants have referenced in their papers.

[4] The term "Purchaser indemnitees" is defined as "Purchaser, and its agents, affiliates, managers and representatives" (Orig. Complaint Ex. X Agreement § 5.1).

identical limitation of liability of Purchaser to Seller Indemnitees.

Most telling, however, is the Procedure for Indemnification, section 5.5, which stated that "the procedure for indemnification shall be as follows: ...(b) **With respect to claims solely between the parties**, following receipt of notice from the Claimant of a claim, the indemnifying Party shall....." (section 5.5 [b]).

The indemnification provisions also contain limitations on liability. Section 5.4 (a)(i) provided:

> Notwithstanding anything in the agreement to the contrary... (a) (i) Seller will not be required to indemnify and will not otherwise be liable to Purchaser Indemnitees for any matter described in Section 5.1 hereof unless and until the aggregate amount of all Losses of Purchaser arising therefrom for which Seller would have liability to Purchaser Indemnitees but for this Section 5.4(a) (i) exceeds, and then only to the extent of the excess above, Twenty Five Thousand Dollars ($25,000).

Further:

> (a) (iii) Seller will not be required to indemnify, and will not otherwise be liable to, Purchaser Indemnitees for Seller's indemnification obligations under this Article 5 for any amounts in excess of a maximum aggregate amount of $200,000

(section 5.4 [a] [iii]).[5]

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[5] The limitation of liability against plaintiff under section 5.4 decreased between the first PSA in 2005 and the 2007 PSA, but that is not directly at issue on this motion (Compare Orig. Complaint Ex. A at 5.4 (a) (iv) and Ex. BB at section 5.4 (d)). Note also that exhibit AA is missing page 8 of the 2007 PSA, containing section 5.4.

All of the PSAs allegedly had the same language at section 2.5, which provided that for a period of five years, the purchaser could request underlying documentation concerning debtors' accounts or an "affidavit of debt" from SunCom, either free or, after a period of time, for a fee. During 2008, after T-Mobile bought SunCom, defendants stopped complying with plaintiff's requests under section 2.5 (Joseph Affid. Exs. I through L). By email dated January 19, 2010, T-Mobile's employee Virginia Kelm informed plaintiff's counsel:

> I have been working with our team here at T-Mobile to see if we could provide affidavits for the SunCom portfolio. We would be happy to help you, but unfortunately, due to the merger, we are unable to provide bill statements or affidavits as we no longer have access to the SunCom Data.

(Joseph Affid. Ex. M).

Finally, section 7.3 contains an integration clause and provided that no modifications would be valid unless in writing.

PROCEDURAL HISTORY

Plaintiff sued defendants for breach of twenty-eight (28) contracts and also stated claims based upon negligence against both defendants. Defendants moved to dismiss, in part on the basis of lack of jurisdiction over SunCom, and also sought to dismiss the negligence claim. Plaintiff cross-moved for leave to serve an amended complaint alleging in addition conversion and tortious interference with contract against T-Mobile. On appeal, the Appellate Division, Fourth Department affirmed a

determination by this court that it had jurisdiction over Sun Com; dismissed the negligence cause of action and any cause of action under the Fair Debt Collections Act (15 USC § 1692 et seq.), but permitted plaintiff to assert a conversion cause of action against T-Mobile (88 AD3d 1301, 1304 [4th Dept 2011]).

Plaintiff served a Second Amended Complaint (the complaint) asserting the following causes of action: causes of action 1-28) breach of contract based upon failure to provide documents or affidavits of debt and failure to submit to plaintiff money that defendants collected on the purchased accounts;[6] the 29th cause of action for conversion against both defendants; and the 30th cause of action against T-Mobile for tortious interference with contract.

Defendants assert that: 1) there is a limitation on damages for each of the six PSAs to $200,000 per PSA, which means that plaintiffs may recover no more than $1.2 million on all of their claims; 2) there is no conversion claim as a matter of law, because T-Mobile was authorized to take the SunCom data; and 3) T-Mobile cannot be held to have interfered with its own contract or with that of its subsidiary.

SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the moving party bears the

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[6] The first through twenty-eighth causes of action do not state which defendant(s) are sued.

initial burden of making a prima facie showing of entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The movant must demonstrate the merits of its claims or defenses and cannot meet its burden merely by identifying gaps in the other party's proof (*Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]). Unless the movant establishes its entitlement to judgment as matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*Loveless v Am. Ref-fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]). The court must on summary judgment view the evidence in the light most favorable to the non-moving party (*Evans v Mendola*, 32 AD3d 1231, 1233 [4th Dept 2006]). Nonetheless, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*Gern v Basta*, 26 AD3d 807, 808 [4th Dept], *lv denied* 6 NY3d 715 [2006]).

BREACH OF CONTRACT CLAIMS

With respect to the contract claims, there are two main questions before the court: one, does article 5 apply to claims between the contracting parties, or only to claims by third parties against Purchaser (plaintiff) or Seller (defendants); and if the answer is that article 5

applies to both types of claims, with respect to the Forward Flow Agreements (FFAs), did the parties intend Seller to be liable for no more than $200,000 for all claims concerning all delinquent accounts sold under one FFA, or for each set of debts sold under a separate Bill of Sale and Assignment?[7]

Defendants point to a choice of law provision in the PSAs at paragraph 7.6, which provides that "[t]his Agreement shall be governed by, and construed and enforced in accordance with the laws of the Commonwealth of Pennsylvania" (Complaint Exs. A-BB at §7.6). Plaintiff appears to agree that Pennsylvania law, from the state in which SunCom had its principal place of business (*LHR, Inc. v T-Mobile USA, Inc.*, 88 AD3d 1301, 1302 [4th Dept 2011]), should apply as provided.

Defendants assertion that they are entitled to summary judgment dismissing any claim for damages in excess of $200,000 per PSA is a proper subject for summary judgment under Pennsylvania law (*see e.g. STS Holdings Inc v CDI Corp.*, 2004 WL 739869 [ED PA] [applying Pennsylvania law]; *New York State Electric & Gas Corp v Westinghouse Electric Corp.*, 564 A2d 919 [Pa Super 1989]).

The law of Pennsylvania is substantially similar to that of New York

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[7] Plaintiff points out that the Appellate Division decision in this matter refers to "28 separate purchase contracts" but the Fourth Department did not rule on what the terms of those contracts were relative to article 5.

on the issues of contractual interpretation relevant here. "'[U]nless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence" (*United Refining Co. v Jenkins*, 410 Pa 126, 134 [1963] [int. cits & quot. marks om.). "Whether a contract is clear and unambiguous is a question of law for the court.... If the terms are ambiguous, the fact finder must interpret the terms" (*Matter of Nelson Co.*, 959 F.2d 1260, 1263 [3rd Cir 1992] [applying Pennsylvania Law]). Further, "reviewing courts will not 'distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity'" (*Trizechahn Gateway LLC v. Titus*, 601 Pa 637, 653 [Pa 2009], quoting *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 557 Pa 595, 606, 735 A.2d 100, 106 [1999]; *see also* Penn. Jur. Commercial § 1:101).

> In *Consolidated Tile and Slate Co. v. Fox*, 410 Pa. 336, 339, 189 A.2d 228, 229 (1963), we stated that where an agreement is ambiguous and reasonably susceptible of two interpretations, 'it must be construed most strongly against those who drew it.' We further stated, 'if the language of the contract is ambiguous and susceptible of two interpretations, one of which makes it fair, customary and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not likely enter into, the construction which makes it rational and probable must be preferred.

(*RKO-Stanley Warner Theatres, Inc. v. Graziano*, 467 Pa. 220, 226, 355 A.2d 830, 833-834 (Pa. 1976]).

The court finds no ambiguity in section 5.4 with respect to any matter at issue on this motion. Initially, the section clearly provides that it will govern any claim or suit between the contracting parties as well as any claims or suits by third parties (see e.g. section 5.5 [b] ["(w)ith respect to claims solely between the parties..."]). LHR argues that the majority of Federal courts applying Pennsylvania law have construed so-called indemnification clauses containing the language "defend and hold harmless" not to apply to first party claims between the contracting parties (Plaintiff's memo of law at pp. 16-18). However, the court must construe the clauses at issue, which in sections 5.4 (b) (i) and 5.5 (b) provide that the parties' only basis for recovery against each other will be under article 5 of the PSA (*see e.g.* section 5.4 [b] [i] ["the sole and exclusive remedy available to Purchaser Indemnitees for any breach by Seller of its ... obligations and agreements hereunder or under any of the documents or instruments delivered pursuant hereto by Seller shall be a claim for indemnification pursuant to the terms of this Article 5"]; *see also* [c] [i] ["the provisions of this Article 5 shall be the sole and exclusive remedy for any such claim by Purchaser Indemnitees for any such matters, whether such claims are framed in contract, tort, or otherwise"]).

Further, section 5.4 contains clear limitations of liability as to

claims by the contracting parties against each other.[8] Whether the limitation of liability clause in section 5.4 (a) (iii) applies to each separate bill of sale under a PSA is a closer question, but still not a matter of interpreting ambiguous provisions (*see e.g.* Orig. Complaint Ex. U, section 1.1 [Bill of Sale defined as "the document **evidencing** the sale of the Accounts" [emph. supplied]). Construing the writings themselves, the Bills of Sale and Assignments of Accounts were not intended to be separate agreements from the PSAs under which they were issued. For that reason, the expert affidavit submitted by LHR, in addition to the affidavits of its principals, being extrinsic evidence, are not admissible to *create* an ambiguity. "The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties.... The intention of the parties must be ascertained from the document itself, if its terms are clear and unambiguous" (*Sun Co., Inc. (R&M) v. Pennsylvania Turnpike Com'n*, 708 A2d 875, 878 [Pa.Cmwlth 1998], citing *Hutchison v. Sunbeam Coal Corp.*, 513 Pa 192, 519 A.2d 385 [1986]).[9]

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[8] If T-Mobile could be liable on the contracts – essentially as stipulated between the parties --, it can also claim any limitation of liability the contracts provide – in contrast to LHR's argument a page 31 of its memo of law. By the stipulation T-Mobile has essentially taken over the liability and the defenses of Sun Com.

[9] LHR quotes a Pennsylvania Superior Court decision from 1988, *Walton v Philadelphia Nat. Bank* (376 Pa Super 329, 545 A2d 1383, 1388 [Pa Super 1988]), which quotes a Third Circuit decision in stating: "In making the ambiguity determination, a

Here, each bill of sale under the FFAs refers explicitly to the "terms and conditions set forth in the Agreement." In section 2.1 of each FFA, entitled "Agreement to Purchase", the parties agreed that "[s]ubject to the terms of this Agreement, on each Closing Date, Seller agrees to sell and assign to Purchaser and Purchaser agrees to buy from Seller,...all of Seller's right, title and interest in and to the Accounts...The Accounts shall be transferred and assigned pursuant to a Bill of Sale in the form attached hereto..." The duration of each PSA was defined in the definition section; as to the March 2007 Agreement, the term was to commence June 2007 and expire June 15, 2008 (definitions). Further, "the closing date" is defined in the FFAs as "the sixth Business Day of each month during the term" (see Complaint Exs, G through R and S through Z, BB and CC). The FFAs unambiguously apply the same terms to each of the Bills of Sale issued and sales consummated under that FFA. In the court's

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court must consider the words of the agreement, alternative meanings suggested by counsel, and extrinsic evidence offered in support of those meanings" (*Kroblin Refrigerated Xpress Inc v Pitterich*, 805 F2d 96, 101 [3rd Cir 1986] [after a bench trial], citing *Mellon Bank v Aetna Business Credit Inc.*, 619 F2d 1001, 1011 [3rd Cir 1980]). In *Mellon*, the judge made determinations of fact and reached conclusions of law (*id.* n.10). The circumstances surrounding the making of the contract may be considered by the court in determining whether a provision is ambiguous, but extrinsic evidence cannot be used to create an ambiguity where none exists (*see Delaware River Port Auth v Thorburgh*, 137 Pa Cmwlth 7, 13. 585 A2d 1123 [PaCommwlth 1989] [distinguishing *Mellon Bank*]).

view, the $200,000 limitation applies to each FFA, regardless of the amount of debt sold thereunder.

LHR argues strenuously that such an interpretation would be grossly unreasonable, as the same damage limitation would then apply to a sale of accounts for a purchase price of $222,656.34 and accounts under a FFA totaling $4 million. However, these are not purchases of objects or widgets, but rather of delinquent accounts which, as the agreements recited in the whereas clauses, **had already been charged off** by Sun Com. It appears reasonable that SunCom would want to limit any liability it might have on the sale of those bad debts, i.e. not wanting to throw good money after bad. The court notes further, that the last three sales of debt by SunCom to LHR were "flipped" (Joseph Affid. Ex. A at pp. 2-3 [chart of sales, including Feb. and March 2008]); in other words, LHR sold them to a third person, rendering it even more reasonable that the parties agreed to a limitation of liability in claims against each other (see Amendment No. 1, Complaint Exs. S to BB).

Finally, although LHR contends that it cannot be considered a "sophisticated" party, because its principals had little secondary education and its in-house counsel, who reviewed the PSAs before they were executed, was inexperienced, LHR has been operating since 1996 years, the principals have over a decade of experience in the business, and they paid nearly $12 million for the accounts. Under the

circumstances, the court declines to construe the contract against the drafter, simply because LHR may have failed to negotiate the indemnification provisions at issue.

As to that portion of LHR's contract cause of action that seeks recovery for defendants' failure to deliver any remittances since August 2008 from debtors whose debt LHR had purchased, defendants' former agent admitted in writing that SunCom "typically" failed to notify LHR when debtors whose debts had been sold to LHR sent payments to SunCom rather that to LHR, raising issues of fact whether LHR is entitled to recover damages on this theory, and the extent of those damages (Schifferlli Affid. & Ex. E). That portion of defendants' motion is denied.

Plaintiff's remaining contentions on this issue are without merit.

Therefore, the court grants the motion for partial summary judgment but only insofar as it limits the amount of damages available under each of six PSAs to a total of no more $200,000 for each, or of no more than $1.2 million in total.

CONVERSION

As to the cause of action for conversion, the court is bound by the decision of the Fourth Department that granted plaintiff's cross-appeal insofar as to permit plaintiff to assert a cause of action for conversion against T-Mobile, regardless of the presence of a contract claim. In that decision, the Fourth Department dismissed the negligence cause of action

against T-Mobile, in part on the basis of allegations that T-mobile "**as a successor to the purchase agreements, breached** those agreements by failing to provide plaintiff with documents necessary to verify its debt," and the alleged negligence was not shown to spring from tortious conduct separate from the contracts (*id*. at 1303 [emphasis supplied]). At the same time, the Fourth Department further ruled that, "[h]ere, although plaintiff does not own the account records maintained by Sun Com **or T-Mobile**" (emphasis supplied) the parties' agreements required SunCom to provide copies of the records or an affidavit of debt to plaintiff upon request; and that in a conversion action, plaintiff must show legal ownership "**or an immediate superior right of possession** to a specific identifiable thing" [emphasis in original], which the court plainly found had been alleged here (*see LHR Inc v T-Mobile USA Inc.*, 88 AD3d at 1304 [int. quot. marks and cits. om.]).

Therefore, defendants' motion is denied insofar as it seeks summary judgment dismissing the conversion cause of action. In any event, that cause of action is also subject to the damages limitation (*see* PSA agreements, section 5.4 [c] [i]).

INTENTIONAL INTERFERENCE WITH CONTRACT

As to the cause of action for tortious or intentional interference with contract, again, as noted, the parties have stipulated that for the purposes of this action T-Mobile is the successor in interest to SunCom

on the Agreements. The law is clear that a party to a contract cannot be liable for tortiously interfering with its own contract (*see Tri-Delta Aggregates, Inc v Goodell*, 188 AD2d 1051 [4th Dept 1992]). Otherwise stated, "only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract" (*Koret Inc. v Christian Dior, S. A.*, 161 AD2d 156, 157 [1st Dept 1990], *lv denied* 76 NY2d 714 [1980]; *see Mallory Factor Inc v Schwartz*, 146 AD2d 465 [1st Dept 1989] ["if one has an action for breach of contract, he should not also have a cause of action for inducement to breach against the same defendant"]).

Defendants also contend, as a second basis for summary judgment on this cause of action, that a parent corporation cannot be held liable for tortiously interfering with a contract between its subsidiary and the plaintiff, if the parent has an economic interest in the subsidiary's affairs (*see e.g. Koret Inc. v Christian Dior, S.A., supra*, at 157). In *Koret,* the jury had found Dior-Paris, the parent entity, liable for tortiously interfering with a joint venture Agreement between the plaintiff and a co-defendant, subsidiary corporation Dior-New York (*id.*) The First Department reversed that verdict, stating that:

> the weight of the evidence clearly indicates that Dior-Paris, as the corporate parent, had a right to interfere with the contact of its subsidiary in order to protect its economic interests (*Felsen v Sol Café Mfg. Corp*, 24 NY2d 382, 387 [1969]) Dior-Paris was no stranger to the joint venture Agreement, in view of the fact that Mr. Rouet, who was both managing director of Dior-Paris and chairman of Dior-New

> York, played a role in negotiation of the joint venture Agreement and executed same

(*Koret*, 161 AD2d at 147). The law also provides that "economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality" (*Foster v Churchill*, 87 NY2d 744, 750 [1996]). However, as noted, this is a defense, and T-Mobile has failed to establish by proof in admissible form that it is entitled to this defense, or that no malice or illegality exists as a matter of law.

LHR, in its response, argues that a defendant can be liable both for a tort and on a contractual claim at the same time, a statement that in and or itself is true, at least under the federal district court case that it cites, despite the Pennsylvania "gist of the case doctrine" (*Ramesh Turuvekere v Continuserve, LLC*, 2012 US Dist Lexis 169129, at *7-8 [E.D. Pa 2012]). However, it fails to defend against the fact that T-Mobile cannot be held to have interfered with its own contracts, upon which LHR sues and seeks to recover from T-Mobile.

For the reasons stated, defendants have establish entitlement to summary judgment as a matter of law on the cause of action for tortious interference with contract and plaintiff has failed to raise an issue of fact for trial.

In conclusion, the motion for partial summary judgment is granted in part, insofar as it limits the amount of damages available under each

of six PSAs to a total of no more $200,000 for each, or of no more than $1.2 million in total; and dismisses the cause of action for tortious interference with contract, but is otherwise denied.

Defendants are to submit an order on notice to plaintiff.

Dated: March 14 2013
Buffalo, NY

HON. JOHN A. MICHALEK, J.S.C.