PDL Biopharma, Inc. v Wohlstadter
2019 NY Slip Op 32693(U)
September 11, 2019
Supreme Court, New York County
Docket Number: 653028/2015
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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PDL BIOPHARMA, INC.,

Plaintiff,

- v -

SAMUEL WOHLSTADTER, NADINE WOHLSTADTER, HYPERION CATALYSIS INTERNATIONAL, INC., WELLSTAT MANAGEMENT LLC, WELLSTAT BIOLOGICS LLC, WELLSTAT THERAPEUTICS LLC, WELLSTAT OPHTHALMICS LLC, WELLSTAT VACCINES LLC, WELLSTAT IMMUNOTHERAPEUTICS LLC, WELLSTAT BIOCATALYSIS, LLC, WELLSTAT AVT INVESTMENTS LLC

Defendants.

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INDEX NO. 653028/2015

MOTION DATE N/A, N/A

MOTION SEQ. NO. 014 015

DECISION AND ORDER

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF[1] document number (Motion 014) 504, 505, 506, 507, 508, 516, 518, 523, 527, 528, 529, 530, 531, 532, 535, 576, 577
were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 510, 511, 512, 513, 514, 515, 517, 524, 525, 526, 533, 534
were read on this motion for SUMMARY JUDGMENT.

This is a breach of contract case asserted against Defendants that guaranteed repayment of a loan made by the Plaintiff[2] to an entity owned by two of the Defendants. The principal

[1] All references and citations to NYSCEF filings are to filings in Index No. 653028/2015.

[2] For convenience, all references herein to "Plaintiff" are to PDL, which is the Plaintiff in Index No. 653028/2015 and Defendant in Index No. 653512/2015. All references to "Defendants"

questions presented are whether the guarantees are with or without recourse to the Defendants' personal assets and, with respect to a related agreement, whether Plaintiff's alleged failure to satisfy procedural conditions precedent for payment should give rise to forfeiture of Plaintiff's right to that payment under the agreement.

Plaintiff PDL Biopharma, Inc. ("PDL") loaned $40 million to Wellstat Diagnostics ("Diagnostics"). The Defendants, including Samuel and Nadine Wohlstadter ("the Wohlstadters"), who at the time were the 100% owners of Diagnostics, agreed to guarantee repayment of the loan. Through various twists and turns in the parties' arrangements, the Wohlstadters' guarantee obligations evolved from "non-recourse" (that is, secured only by the Wohlstadters' equity position in Diagnostics) to "full recourse" (that is, secured broadly by the Wohlstadters' assets) and then – potentially – back to "non-recourse." In addition, a number of affiliated companies (the "Wellstat Affiliates") also provided certain guarantees of repayment. The crux of the dispute is whether the conditions triggering the final toggle back to non-recourse guarantees and releasing the liens on the Wellstat Affiliates' assets were satisfied. If so, the Wohlstadters and Wellstat Affiliates have no additional liability because the non-recourse guarantees are limited to the Wohlstadters' equity stake in Diagnostics (which ultimately was acquired by PDL). If not, the guarantees are full-recourse, and the Wohlstadters and Wellstat Affiliates are obligated to repay the loan.

Separately, certain Defendants seek a declaration that a related agreement between the parties (referred to herein as the "September 9 Agreement"), under which PDL was to receive a

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herein are to the Wohlstadters and/or Wellstat Defendants, which are Defendants in Index No. 653028/2015 action and Plaintiffs in Index No. 653512/2015.

substantial payment in exchange for releasing a lien, never became effective and that they have no obligations to PDL under that agreement.

Both sides seek summary judgment, taking the position that the language of the relevant agreements is clear and that the undisputed facts support their respective positions. The Court agrees that this case can be decided as a matter of law.

For the reasons set forth below, the Court grants PDL's motion for summary judgment. Under the plain language of the relevant agreements, and based on the undisputed facts, the Court finds that the Wohlstadters' and Wellstat Affiliates' guarantee obligations are with full-recourse, and thus Defendants are liable to PDL for repayment of the loan. Plaintiff is also entitled to a declaratory judgment that the applicable Defendants are required to fulfill their obligations to PDL under the September 9 Agreement. Defendants' motion for summary judgment is denied.

Background

PDL invests in and acquires pharmaceutical assets. Diagnostics develops, manufactures, sells and distributes small point-of-care diagnostic systems that perform a variety of tests targeting the clinical diagnostics market, utilizing electrochemiluminescence technology.

The Original Guarantee

On November 2, 2012, Diagnostics and PDL entered into a credit agreement whereby PDL agreed to loan Diagnostics $40 million (the "Original Credit Agreement"). Diagnostics executed a term note that contained an acceleration clause providing that upon default the entire balance became immediately due. On the same day, the Wohlstadters executed a non-recourse guarantee of the loan (the "Original Guarantee"), which was limited to pledging the Wohlstadters' equity interests in Diagnostics.

The Amended Guarantees

Diagnostics defaulted on the loan by allegedly transferring over $10 million to the Wohlstadters and other companies wholly owned by the Wohlstadters. On January 23, 2013, PDL declared a default, accelerated the loan, and demanded payment in full.

On February 28, 2013, PDL and Diagnostics entered into a Forbearance Agreement, which gave the Wohlstadters 120 days to make a "Cash Contribution" to Diagnostics in the amount of $15 million. Contemporaneous with the Forbearance Agreement, the Wohlstadters agreed to a *full recourse* guarantee of Diagnostics' repayment of the loan, broadly pledging repayment from their own assets (the "Amended Wohlstadter Guarantee"). The Wellstat Affiliates (or "Affiliate Guarantors") also entered into a guarantee pledging certain collateral as security for the loan (the "Affiliate Guarantee").

The Amended Wohlstadter Guarantee and the Affiliate Guarantee (together, the "Amended Guarantees") provided that upon execution of new "Loan Documents," the Amended Wohlstadter Guarantee would revert to the Original (*i.e.*, non-recourse) Guarantee, and the Affiliate Guarantee would be extinguished. "Loan Documents" are defined as arrangements under which "(i) the Borrower receives aggregate Cash Contributions equal at least [sic] $15,000,000… (iii) no Forbearance Termination Event has occurred, and (iv) the parties mutually agree on a final form of the new Loan Documents." In turn, Cash Contributions are defined as "an aggregate minimum amount of $15,000,000 in cash." The purpose of the provisions, in combination, is clear. In order to revert to the Original Guarantee (*i.e.*, without recourse) and extinguish the Affiliate Guarantee, the Wohlstadters had to, among other things, contribute cash into the company to rectify (and then some) the unapproved diversion of $10 million that led to the default in the first place.

Rather than injecting their own funds into Diagnostics, on August 15, 2013, the Wohlstadters contributed the proceeds of a loan they had obtained from White Oak Capital Advisors ("White Oak"). That transaction obligated Diagnostics to repay White Oak and gave White Oak a lien on Diagnostics' assets. That same day PDL and Diagnostics entered into an Amended and Restated Credit Agreement (the "Amended Credit Agreement"), and PDL and White Oak entered into an Intercreditor Agreement. Under Section 10.18.4 of the Amended Credit Agreement, the Amended Wohlstadter Guarantee would revert to a non-recourse guarantee, and the liens on the Wellstat Affiliates' collateral would be released, if Diagnostics paid off the White Oak loan and the White Oak liens were released.

On August 20, 2013, the parties also entered into several security agreements pledging as collateral various intellectual property owned by the Wellstat Affiliates. NYSCEF 791 – 800. The individual security agreements each reference, and are incorporated into, a Subsidiary Security Agreement[3] entered into between PDL and the Wellstat Affiliates, which placed liens on the intellectual property.

Diagnostics subsequently defaulted under both the Amended Credit Agreement and the White Oak loan. White Oak agreed to provide Diagnostics with an additional 60 days of funding during which Diagnostics would liquidate its assets in order to repay White Oak and PDL. After the 60-day period, White Oak terminated funding. Diagnostics still had not repaid the loans. PDL sent two notices of default on August 7 and 20, 2014.

[3] No version of the Subsidiary Security Agreement was ever finalized or executed. For the purpose of their summary judgment motion, Defendants assume "arguendo that the Subsidiary Security Agreement and any liens created thereby are enforceable." NYSCEF 654 at 41, n.12.

Following the default, on September 24, 2014, PDL applied to appoint a receiver for Diagnostics' assets. The application was granted the same day and a receiver was appointed by the Montgomery County, Maryland court to preserve Diagnostics' assets. On May 24, 2017, PDL acquired Diagnostics' assets for $5 million.

September 9 Agreement

While the above was going on, the lenders' respective hopes for repayment were raised when, in September 2014, Therapeutics (a Diagnostics affiliate) sought to sell to a third party (AstraZeneca) the rights to a valuable "Voucher" that it was seeking from the FDA with respect to a drug called Xuriden.®, a medication being developed to treat a rare pediatric disease.

In the September 9 Agreement, the parties[4] agreed that in exchange for PDL and White Oak releasing their liens on Diagnostics' assets, Diagnostics would use the expected payment from AstraZeneca to satisfy the debt to White Oak, and PDL would receive 65% of the remaining closing payment.

That is not what happened. On September 9, 2014, Therapeutics received the expected sum from AstraZeneca in exchange for the rights to the Voucher. With those funds, Therapeutics paid off the White Oak loan, and White Oak released all liens thereunder. Therapeutics did not, however, pay PDL 65% of the remaining proceeds as provided in the September 9 Agreement, claiming that PDL failed to satisfy conditions precedent to trigger the payment obligation.

Specifically, the September 9 Agreement required that Therapeutics make a $2 million payment to White Oak by 5 p.m. PST on September 10, 2014, and deposit the remaining

[4] The parties to the September 9 Agreement include PDL, White Oak, the Wohlstadters (in their individual capacities), the Wellstat Affiliates, and other Wellstat entities.

proceeds into a collateral account that was subject to PDL and White Oak deposit control agreements. PDL and White Oak failed to provide control agreements for a collateral account and instead created an "escrow account." Therapeutics made the $2 million payment before 5 p.m. on September 10, 2014, in accordance with instructions given by White Oak, but the funds did not reach White Oak until September 16th. The parties disagree as to whether these actions constitute failures to fulfill the conditions precedent contained in the September 9 Agreement and whether any such failures would be sufficient to extinguish the obligation to make payment to PDL under the agreement.

Procedural History

On September 4, 2015, PDL filed this action with a motion for summary judgment in lieu of complaint. On July 26, 2016, the Court (Bransten J.) granted PDL's motion for summary judgment in lieu of complaint to recover the amounts due under the credit agreements. On appeal, the Appellate Division, First Department, reversed and remanded, finding that summary judgment under CPLR § 3213 was not appropriate because PDL's entitlement to the debt could not be determined on the face of the documents, and required the Court to look to extrinsic evidence to make its determination. *PDL Biopharma, Inc., v. Wohlstadter et al.*, 147 A.D.3d 494 (1st Dep't 2017).

PDL thereafter filed a Complaint with a single claim for breach of contract seeking repayment of the loan, plus interest. Defendants filed an Answer with Counterclaims on August 9, 2017, seeking damages under four causes of action: (1) breach of contract under the Forbearance Agreement (2) breach of contract under the Amended Credit Agreement, (3) breach of fiduciary duty, and (4) tortious interference with prospective economic advantage under the September 9 Agreement. PDL filed an Answer to the counterclaims.

The Wohlstadters, the Wellstat Affiliates, and additional Defendants filed a separate action against PDL on October 22, 2015, with two causes of action for: (1) declaratory relief on the September 9 Agreement (the "Wellstat Action") and (2) declaratory relief that they have no obligations to PDL. PDL denied most of the factual allegations and asserted several affirmative defenses, including that granting the proposed relief would result in unjust enrichment.

On March 2, 2017, PDL served a notice to foreclose on the Wohlstadters' home (the "Property"). On March 6, 2017, PDL sought information from Wellstat Affiliates in preparation for the sale of some or all of the IP collateral held by the Wellstat Affiliates (the "Wellstat IP"). Defendants moved for a preliminary injunction to enjoin PDL from foreclosing on, selling, or otherwise interfering with the Property and Wellstat IP collateral during the pendency of these actions. On February 20, 2018, the Court granted Defendant's motion enjoining PDL from foreclosing on the Property and the Wellstat IP. NYSCEF 456.

Defendants filed a motion for summary judgment on October 2, 2018, seeking dismissal of PDL's Complaint and granting summary judgment on their second counterclaim for breach of the Amended Credit Agreement. Defendants also moved for summary judgment on the declaratory relief sought in the Wellstat action, *i.e.*, that the September 9 Agreement never became effective and that Defendants have no obligations to PDL under the September 9 Agreement. Finally, Defendants move to convert the preliminary injunction issued by this Court on February 20, 2018, into a permanent injunction enjoining PDL from selling any of the intellectual or real property that was the subject of the February 20, 2018, order.

PDL filed its own motion for summary judgment on October 22, 2018, seeking judgment in its favor on its claim for breach of the Amended Guarantees, and to dismiss each of Defendants' counterclaims.

The motions decided herein were filed in Index No. 653028/2015 (the PDL Action) but cover the claims asserted in the Wellstat Action (653512/2015). The two actions – 653028/2015 and 653512/2015 – have been joined for trial and discovery, and this decision resolves all claims in both actions. NYSCEF 871.

The Parties' Arguments

The Wohlstadters and Wellstat Affiliates argue that the Amended Wohlstadter (full recourse) Guarantee reverted to the Original (non-recourse) Guarantee and the Affiliate Guarantee was terminated under both the Forbearance Agreement and the Amended Credit Agreement.

Specifically, the Wohlstadters and Wellstat Affiliates claim that the August 15, 2013, loan from White Oak was a Cash Contribution, and thus the Amended Credit Agreement constituted new "Loan Documents" under Section 21 of the Forbearance Agreement. Accordingly, the Wohlstadters assert that their guarantee reverted to the terms of the Original Guarantee, and that the Affiliate Guarantee was extinguished. In the alternative, the Wohlstadters argue that their guarantee became without-recourse and that the Affiliate Guarantee was extinguished under Section 10.18.4 of the Amended Credit Agreement when Diagnostics paid off the White Oak Loan and the White Oak liens were released in September 2014.

In response, PDL argues that the funds "contributed" to Diagnostics via the loan from White Oak did not constitute a "Cash Contribution," and therefore the Amended Credit Agreement was not a new Loan Document that would obviate the Wohlstadters' and Wellstat Affiliates' full-recourse guarantees. Further, PDL maintains that the Wohlstadters and Wellstat Affiliates cannot invoke the provisions of Section 10.18.4 of the Amended Credit Agreement

because Diagnostics was in breach of the core terms of that agreement – that is, repayment of the PDL loan – at the time it paid off the White Oak loan.

Finally, Defendants argue that the September 9 Agreement – and thus their obligation to make payments to PDL from proceeds of the AstraZeneca transaction – was not binding because Therapeutics failed to make a $2 million deposit to White Oak by 5 p.m. on September 10, 2014, and PDL and White Oak failed to create a "collateral account" for Therapeutics to deposit the remaining proceeds, as required under the agreement. Essentially, Defendants take the position that Therapeutics could keep the remainder of the AstraZeneca payment for itself notwithstanding the fact that PDL's release of its liens was what permitted the AstraZeneca transaction (and the resulting payment) to occur.

Not surprisingly, PDL disagrees. PDL contends that the conditions were met, and that even if they were not met, they were immaterial to the contract and should not permit Defendants to escape their obligations under the agreement. PDL asserts that permitting Therapeutics to retain the entirety of the AstraZeneca payment would be inequitable and would result in a disproportionate forfeiture and unjust enrichment, given that Therapeutics could not have sold the Voucher to AstraZeneca in the first place if PDL had not released its lien on Diagnostics' assets.

Analysis

A party seeking summary judgment must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). If such a showing is made, the burden shifts to the opposing party to "produce evidentiary proof in admissible form"

sufficient to establish the existence of material issues of fact which require a trial in the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

A. Scope of Defendants' Liability as Guarantors

The elements of a claim for breach of contract are straightforward. The movant must establish: (1) the existence of a valid contract, (2) plaintiff's performance of the contract, (3) defendant's breach of the contract, and (4) damages resulting from defendant's breach. *See, e.g.*, *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010); *Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007). "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations." *Franklin Apt. Assoc., Inc. v. Westbrook Tenants Corp.*, 43 A.D.3d 860, 861 (1st Dep't 2007). A contract should be "'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose.'" *Ins. Co. of New York v. Central Mut. Ins. Co.*, 47 A.D.3d 469, 471 (1st Dep't 2008) (quoting *Empire Properties Corp. v. Mfrs. Trust Co.*, 288 N.Y. 242 (1942)).

Here, there is no dispute that there was a valid contract and that PDL performed its obligation under the contract by extending credit to Diagnostics in the amount of $40 million. The only question is whether the Wohlstadters and Wellstat Affiliates breached that contract by failing to honor their guarantees. Embedded within that question, of course, is whether the guarantees were with or without recourse to the Wohlstadters' and Wellstat Affiliates' assets independent of their equity stake in Diagnostics.

The Forbearance Agreement

Based on the undisputed facts and the plain language of the Forbearance Agreement, the Court concludes that the full-recourse Amended Wohlstadter Guarantee did not revert to the Original Guarantee and the Affiliate Guarantee was not terminated. First, the Wohlstadters failed to make a Cash Contribution to Diagnostics, as that term is used in the Forbearance Agreement to trigger abolition of the Amended Guarantees. Instead of contributing "$15,000,000 in cash," the Wohlstadters saddled Diagnostics with additional debt. The notion that loading more debt onto Diagnostics was sufficient to satisfy the conditions of the Forbearance Agreement cannot be squared with the plain language of that Agreement or with its obvious purpose – that is, to condition relaxation of Defendants' full recourse guarantee on an infusion of cash that would *improve* Diagnostics' financial position in the wake of the improper use of the original loan proceeds, not to add a new liability to Diagnostics' balance sheet and add another creditor with a claim on Diagnostics assets. [5]

Defendants' argument that "cash is cash," and thus that there is no distinction between a contribution of unencumbered funds and "contribution" of the proceeds of a loan is not persuasive. The clear purpose of the Forbearance Agreement was to condition relaxation of the full-recourse guarantee upon a remediation of the harm done by the diversion of funds from Diagnostics to the Wohlstadters. In that context, the only sensible reading of "Cash Contribution" is that it required Defendants to inject unencumbered cash into Diagnostics (just as the Wohlstadters siphoned cash away from the company), not to saddle the company with more

[5] Justice Bransten reached a similar conclusion that the debt obligation did not constitute cash under the Forbearance. *PDL Biopharma v. Wohlstadter*, 2016 WL 4063063, at 5 (N.Y. Sup. Ct. N.Y. Cty. July 27, 2016). In view of the First Department's reversal of that decision, albeit on other grounds, the Court does not rely on that prior determination.

debt. Defendants' position cannot be squared with the language or clear purpose of the Forbearance Agreement.

The language of the subsequent Amended Credit Agreement and related agreements in connection with the White Oak loan transaction (which Defendants assert are new "Loan Documents") further supports PDL's argument that the White Oak loan did not terminate the Amended Guarantees contained in the Forbearance Agreement. The Amended Credit Agreement defines the guarantee as the "Amended and Guarantee Pledge Agreement, dated February 28, 2013." NYSCEF 602 at 7. This is the full recourse guarantee. More to the point, the Amended Credit Agreement lists the full-recourse Amended Guarantees as Collateral Documents to be delivered to the Agent with the other Loan Documents. NYSCEF 602 at 20. There would be no need to list the Amended Guarantees as Collateral Documents if the parties intended that the Amended Guarantees were terminated by the Amended Credit Agreement.

Finally, the Amended Credit Agreement contains a clause which, if fulfilled, *would* terminate the Amended Guarantees (*i.e.* section 10.18.4). If the White Oak loan was considered by the parties to be a Cash Contribution, which would on its own terminate the Amended Guarantees, there would have been no need for section 10.18.4.[6] It is well established that contracts should, where possible, be construed to give effect to all of their terms. *Ins. Co. of New York*, 47 A.D.3d at 471. Accordingly, the Court concludes that the White Oak loan did not

[6] The related agreements entered into at that time such as the Joinder Agreement with the Additional Defendants similarly reference the Amended Guarantees, which would similarly be irrelevant if the guarantees were terminated.

constitute a Cash Contribution as that term is used in the Forbearance Agreement to trigger termination of the Amended Guarantees.[7]

As such, the branch of PDL's motion for summary judgment dismissing Defendants' first counterclaim for breach of the Forbearance Agreement is Granted.

Section 10.18.4 of the Amended Credit Agreement

Nor does Section 10.18.4 of the Amended Credit Agreement support the Wohlstadters' claim that their full-recourse guarantee reverted to a non-recourse guarantee or the Wellstat Affiliates' claim that their guarantee was extinguished.

Section 10.18.4 provides that "if and when [White Oak] releases the Liens securing the [White Oak] Debt pursuant to the Second Lien Loan Documents and the Intercreditor Agreement, Lender and Agent shall (i) terminate the Subsidiary Security Agreement and release the Liens created thereby and (ii) amend the Guarantee and Pledge Agreement to, among other things, provide that recourse to the Holders shall be limited to all of the Holders' interest in, and right and title to, the equity of the Borrower." NYSCEF 602 at 49.

It is undisputed that Defendants breached the Amended Credit Agreement well before they paid off the White Oak Loan, *i.e.*, by failing to pay off the PDL loan, Defendants nevertheless argue that they are entitled to rely upon Section 10.18.4. In a nutshell, Defendants argue that because PDL "elected" not to terminate the Amended Credit Agreement based on Diagnostics' default, they cannot now prevent Defendants from enforcing the remainder of the

[7] Plaintiff also argues that Diagnostics failed to secure the additional funds within the Forbearance Period. We need not address this issue, as the Wohlstadters failed to meet the cash requirement, and therefore did not meet all the requirements to consider the Amended Credit Agreement a new Loan Document, and thereby terminate the Amended Guarantees.

agreement, including section 10.18.4. The Court does not find that argument – which essentially would permit Defendants to benefit from their own malfeasance – to be persuasive.

Under New York law "when a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default." *Awards.com v. Kinko's, Inc.*, 42 A.D.3d 178, 187 (1st Dep't 2007). "The election of remedies doctrine requires knowledge of the alleged breach and an affirmative action that constitutes an election to continue performance." *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 842 F.Supp.2d 682, 710 (S.D.N.Y. 2012). "Typically, where courts find that a breach claim is barred by the doctrine of 'election of remedies,' the claimant has not only continued to perform under the contract, but received benefits under the contract." *Hallinan v. Republic & Trust Co.*, 519 F.Supp.2d 340, 352 (S.D.N.Y. 2007) (citing *ARP Films, Inc. v. Marvel Entertainment Group*, Inc., 952 F.2d 643, 649 (2d Cir. 1991).

The flaw in Defendants' argument is that PDL did not take any affirmative steps to continue the contract. Instead, PDL sent two letters of default to Diagnostics. Exs. 45, 46, to Myatt Aff., NYSCEF 805, 806. The default letters stated that due to Diagnostics' failure to make the required loan payments, all obligations have been accelerated and are immediately due and payable. *Id.* These letters of default are evidence that PDL did not continue the contract. *See Kamco Supply Corp. v. On the Right Track LLC*, 149 A.D.3d 275, 284 (2d Dep't 2017) (finding that Defendant continued the contract by failing to send a notice of default regarding plaintiff's continued failure to meet monthly requirements).

After sending letters of Default to Diagnostics, PDL applied to the Maryland court to appoint a receiver for Diagnostics' assets. On September 24, 2014, just over a month after the

letters of default were issued, the application was granted, and a receiver was appointed to preserve Diagnostics' assets. And later, on September 4, 2015, PDL filed this action to enforce the Amended Guarantees. PDL took clear and affirmative steps to declare a breach and terminate the contract. The record does not support the notion that PDL "elected" to permit Defendants to retain the benefits of the Amended Credit Agreement while at the same time defaulting upon its central obligation. PDL did not receive any benefit from allegedly continuing the contract, *Hallinan*, 519 F.Supp.2d at 352, nor did it accept any further performance by Diagnostics on the contract. *Kamco*, 149 A.D.3d at 283.

The Wohlstadters and Wellstat Affiliates point to the Third Amendment to the Credit Agreement as evidence that PDL continued the contract. However, the Third Amendment simply kept Diagnostics afloat in order to protect PDL's collateral while in receivership. Section 10.03 of the Amendment begins "Borrower is in default and Lender has no duty to fund any new advances... Nothing contained herein will obligate Lender to make any advances." NYSCEF 819. Diagnostics admits it is in default, and that PDL has *no duty* to make any payments to Diagnostics. PDL was acting to make sure that the collateral it would collect retained its value.

In sum, the record does not support Defendants' contention that PDL elected to continue complying with the already-breached Amended Credit Agreement. Accordingly, the breaching parties (the Wohlstadters and Wellstat Affiliates) cannot enforce section 10.18.4 for their own benefit. "Under New York law, when a party to a contract materially breaches that contract, it cannot then enforce that contract against a non-breaching party." *Nadeau v. Equity Residential Props. Mgmt. Corp.*, 251 F.Supp.3d 637, 641 (S.D.N.Y. 2017). *See also Gaviria v. El Tawil*, 2019 WL 103724 at *5 (N.Y. Sup. Ct. N.Y. Cty., January 4, 2019) (finding that Defendant could

not make a breach of contract claim against Plaintiff because Defendant was in breach of the agreement).

Moreover, even if PDL *had* continued the contract, and Section 10.18.4 was enforced with respect to the Amended Wohlstadter Guarantee, the *Wellstat Affiliate Guarantee* would still be in effect. Section 10.18.4 part (i) terminates the "Subsidiary Security Agreement" and releases the liens created by that Agreement. What it does not do is terminate the Affiliate Guarantee. The Subsidiary Security Agreement is defined in the Amended Credit Agreement as "the Security Agreement, dated as of February 28, 2013" made by the Affiliate Guarantors "in favor of [PDL]." NYSCEF 602. The plain language, assuming it is applicable at all, provides that the Subsidiary Security Agreement is terminated, and the liens created by that agreement are released. That does not mean that the Affiliate Guarantors are off the hook to guarantee repayment of the underlying loan to PDL with the collateral pledged in the Affiliate Guarantee. It simply means that the liens on said collateral are released.

This interpretation of the contract is bolstered by a comparison to the similar language in the Forbearance Agreement. Under the Forbearance Agreement, if the conditions as set out above were met it would result in "the termination of the Wellstat Companies' Guarantee and related Security Agreement." NYSCEF 599 at 10. Section 10.18.4 leaves out the Wellstat Companies' Guarantee (the Affiliate Guarantee) and only states that the Subsidiary Agreement will be terminated. As such, even if section 10.18.4 was enforceable, the Affiliate Guarantee would remain in effect.

Accordingly, the branch of PDL's motion for summary judgment on its claim for breach of the Amended Guarantees and dismissal of Defendants' second counterclaim for breach of the

Amended Credit Agreement is Granted. And for the same reasons, Defendants' motion for summary judgment dismissing PDL's Complaint is Denied.

B. Scope of Defendants' Liability under The September 9 Agreement

Defendants also move for summary judgment granting a declaratory judgment that the September 9 Agreement did not take effect, and that they have no obligations to PDL under that agreement, because PDL failed to satisfy material conditions precedent.

The September 9 Agreement contains the following language:

> "This letter agreement shall become effective upon: (a) the execution and delivery of a counterpart hereof by each of the parties hereto; (b) the receipt by Therapeutics of the Initial Payment; and (c) the fulfillment of its obligations with respect to the payment and/or deposit of the proceeds of the Initial Payment in accordance with Section B(a) of this letter; provided that, if all of such conditions are not satisfied by 5:00 p.m., California time, on September 10, 2014, then this letter agreement shall be of no further force and effect." Ex. 49 to Myatt Aff., NYSCEF 810 at 5

Defendants argue that because PDL and White Oak failed to create a "collateral account" into which Therapeutics could transfer the balance of the AstraZeneca Initial Payment, and Therapeutics failed to make the $2 million payment to White Oak by 5 p.m. on September 10, 2014, the agreement never took effect and is not enforceable.

In response, PDL maintains that it and White Oak made an *escrow* account available to receive the payment, which satisfied the requirement in the agreement, and that the payment to White Oak *was* made before 5 p.m. on September 10. Alternatively, PDL argues that even if these two obligations were not properly fulfilled, it would not be appropriate or equitable to impose a disproportionate forfeiture upon PDL for such technical breaches. PDL also asserts that the requirements were waived by Defendants and that permitting Defendants to retain the AstraZeneca payment would constitute unjust enrichment.

Both parties cite to *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685 (1995) to support their arguments. *Oppenheimer* explains that "[a] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.'" *Id.* at 690 (citations omitted). Yet "the nonoccurrence of the condition may yet be excused by waiver, breach or forfeiture. The Restatement posits that '[t]o the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.'" *Id.* at 691 (citation omitted). In *Oppenheimer*, the court found that the plaintiff had not suffered a forfeiture or conferred a benefit upon defendant, and, therefore, the condition precedent remained as a requirement under the contract.

That is not the case here. Here, PDL conferred a benefit upon Defendants (and a potential harm to itself) by lifting the lien on the Voucher, allowing Therapeutics to sell the Voucher for a substantial sum. To nullify the agreement on these facts, and permit Defendants to retain funds clearly meant to be paid to PDL in compensation for its lifting of the lien, would create a substantially inequitable result. *See, e.g., Danco Electrical Contractors v. Dormitory Authority of the State of New* York, 162 A.D.3d 412 (1st Dep't 2018) (finding that "plaintiff should be excused from the non-occurrence of that condition because otherwise it would suffer a disproportionate forfeiture, and the occurrence of the condition was not a material part of the agreed exchange.").

As in *Danco*, the purported "failure" of the condition precedent in this case was a matter of form, not substance. Although there may be some differences between a collateral account and an escrow account, that logistical issue could have been easily remedied and it was not a

"material part of the agreed exchange," and therefore is insufficient to nullify the contract. *See Oppenheimer*, 86 N.Y.2d at 691. It is also immaterial that the $2 million payment from Therapeutics to White Oak ultimately finalized on September 16 instead of September 10. Therapeutics wired the funds on September 10, and the funds ultimately arrived at White Oak, through a number of bank transfers, on September 16. Such minor variations from the process set forth in the September 9 Agreement are not sufficient to impose the disproportionate forfeiture of PDL's entitlement to the agreed upon compensation for lifting the lien on Therapeutics' assets.

Separately, the Defendants waived insistence on PDL's compliance with the conditions precedent by issuing the Voucher free and clear of all liens and accepting the payment from AstraZeneca. PDL released the liens on Diagnostics assets to allow Therapeutics to go through with the sale of the Voucher under the terms of the September 9 Agreement. By transferring the Voucher free and clear of those liens and accepting payment from AstraZeneca, Therapeutics waived compliance with the conditions precedent. In addition, Therapeutics deposited the $2 million to White Oak in accordance with White Oaks' instructions and made no objection to the account into which White Oak instructed it to deposit the funds. As such, Defendants are not entitled to declaratory relief because they waived – for their own benefit – strict compliance with the mechanics of creating accounts for depositing the various payments.

Finally, the declaratory relief sought by Defendants would result in their unjust enrichment. Here, Defendants were (1) enriched by receiving and retaining the AstraZeneca payment, (2) at PDL's expense, and (3) it would be inequitable to allow Defendants to retain the money owed to PDL. PDL released the liens and allowed Therapeutics to sell the Voucher in order for PDL to get repaid from the proceeds. To allow Defendants to keep the payment

without compensating PDL for releasing the liens would be "against equity and good conscience." *See Mandarin Trading Ltd v. Wildenstein*, 16 N.Y.3d 173, 182 (2011).

For those reasons, Defendants are not entitled to a declaratory judgment that the September 9 Agreement was not effective or that they have no obligations to PDL under that agreement. Accordingly, the Court will issue a declaration in PDL's favor. *N.Y. City Sch. Constr. Auth. v. New S. Ins. Co.*, 173 A.D.3d 539 (1st Dep't 2019) (citing *Hirsch v. Lindor Realty Group*, 63 N.Y.2d 878 (1984)).

C. Defendants' Third and Fourth Counterclaims for Breach of Fiduciary Duty and Tortious Interference with Prospective Economic Advantage

Defendants' third and fourth counterclaims for breach of fiduciary duty and tortious interference with prospective economic advantage, respectively, are also without merit.

Defendants have failed to show that PDL owed a fiduciary duty to Defendants. "To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." "[A]n arm's length borrower-lender relationship is not of a confidential or fiduciary nature." *River Glen Assoc. v. Merrill Lynch Credit Corp.*, 295 A.D.2d 274, 275 (1st Dep't 2002). Defendants have not submitted evidence sufficient to state a viable claim that PDL was their fiduciary.

Defendants' fourth counterclaim for tortious interference with prospective economic advantage is also dismissed. "[C]onduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182 (2004) (citing *Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 957 F. Supp. 477, 482 (S.D.N.Y. 1997) ("(U)nder New York law, in order for a party to make out a claim for tortious interference with

prospective economic advantage, the defendant must ... direct some activities towards the third party...")). As discussed above, PDL took specific actions to protect collateral after Defendants' defaulted under the Amended Credit Agreement. These actions included appointing a receiver for Diagnostics' assets and placing a lien on the Therapeutics Voucher. These actions were not directed towards a third party but were directed at Therapeutics in order to protect PDL's collateral. As such, Defendants' counterclaim for tortious interference with prospective economic advantage is dismissed.

Therefore, it is:

ORDERED that Plaintiff PDL's motion for summary judgment is Granted; it is further

ORDERED that Defendants' motion for summary judgment is Denied; it is further

ORDERED and **DECLARED** that the September 9 Agreement did take effect and Defendants are obligated to perform under that agreement; it is further

ORDERED that the preliminary injunction issued by this Court on February 6, 2018, is terminated; it is further

ORDERED that the parties are directed to an inquest before a Judicial Hearing Officer ("JHO") or Special Referee to determine the amount of damages owed under the Amended Guarantees and the September 9 Agreement; it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the

"Local Rules" link), shall assign this matter to an available Special Referee to determine as specified above; it is further

ORDERED that Plaintiff PDL's counsel shall serve a copy of this order with notice of entry on the Defendants and that counsel for Plaintiff PDL shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212–401–9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR § 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the decision and order of the Court.

9/11/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[X]	REFERENCE