Aktiv Assets LLC v Centerbridge Partners, L.P.
2019 NY Slip Op 33736(U)
December 24, 2019
Supreme Court, New York County
Docket Number: 653259/2019
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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AKTIV ASSETS LLC, PARTNERSHIPS & INVESTMENTS, LLC, AMERICAS LENDING FINANCE LLC, NICOLAS KOGAN, CAROLA ACUM, JOSE CORREA, RICARDO CRUZ, JOSE PENCHI, CARLOS PEREZ, IVAN RIVERA, ALEJANDRO RODRIGUEZ, KATIA RODRIGUEZ, CARLO RODRIGUEZ, DORIS RODRIGUEZ, LUIS ROIG, MONICA ROMERO

Plaintiffs,

- v -

CENTERBRIDGE PARTNERS, L.P., CP CARCO GP, LTD., CP CARCO INTERMEDIATE, LTD., RESORT CAYMAN HOLDINGS, LTD., CP CARDO, LP,

Defendants.

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INDEX NO. 653259/2019

MOTION DATE ______

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 100, 101, 102, 103, 104, 105
were read on this motion for PARTIAL SUMMARY JUDGMENT.

In this case, warring business partners dispute, among other things, whether the five contracts that define their business relationship should be read together as a single agreement. In its Fifth Claim for Relief, Plaintiffs[1] seek a declaratory judgment that Defendants[2] may not exercise a call option (to purchase LLC membership units) contained in one of those contracts

[1] "Plaintiffs" refers to, collectively, Aktiv Assets LLC, Partnerships & Investments, LLC, Americas Leading Finance, LLC, Nicolás A. Kogan, Carola Acum, José Correa, Ricardo Cruz, José Penchi, Carlos Perez, Iván Rivera, Alejandro Rodríguez, Katia Rodríguez, Carlo Rodríguez, Doris Rodríguez, Luis Roig, and Mónica Romero.

[2] "Defendants" refers to, collectively, Centerbridge Partners, L.P. ("Centerbridge"), CP Carco GP, Ltd., CP Carco Intermediate, Ltd., Resort Cayman Holdings, Ltd., and CP Carco, L.P.

because of Defendants' alleged breaches of a different one. Defendants move for partial summary judgment dismissing that claim.

For the reasons set forth below, Defendants' motion is granted. In a nutshell, even assuming the various agreements are linked, the two minor breaches asserted by Plaintiffs are not material. The record shows that one of the alleged breaches was promptly cured and that the other has had no practical effect. Although in many cases the question of the relative materiality of a breach of contract raises questions of fact, in this case the result is clear based on undisputed facts. In the absence of a material breach of contract, Defendants are free to exercise their unambiguous right to purchase LLC membership units in exchange for specified consideration.

FACTUAL BACKGROUND

Nicolás A. Kogan is the founder and CEO of Americas Leading Finance LLC ("ALF"), a Puerto Rican company engaged in the acquisition, sale, and servicing of consumer auto loans. Amended Complaint ("Am. Compl."), ¶¶8-9 (NYSCEF Doc. No. 73). Centerbridge, a multibillion-dollar hedge fund, is a limited partnership organized under the laws of Delaware with its principal place of business in New York. *Id.*, ¶23. The assorted other individuals and entities in this action are affiliated with Kogan, Centerbridge, or both.[3]

A. Kogan and Centerbridge Enter Business Relationship

Around 2014, Kogan and his management team were exploring a potential new venture involving consumer car loans to the residents of Puerto Rico (the "Puerto Rico Auto Loan Business"). *Id.*, ¶31. Centerbridge became interested in investing in the Puerto Rico Auto Loan Business. By early 2015, Kogan and Centerbridge were actively negotiating the structure for

[3] Capitalized terms not defined herein are defined in Defendants' Rule 19-a Statement of Material of Facts (NYSCEF Doc. No. 76) or the Amended Complaint.

Centerbridge's investment in the Business. They agreed on a plan to initially invest $100 million in equity capital to develop an auto loan platform in Puerto Rico, then grow the portfolio through various means, including equity capital and third-party financing, and sell the business at a profit once the total loan portfolio reached approximately $700 million to $1 billion. *Id.*, ¶¶31-33.

In June 2015, certain Centerbridge affiliates went into business with Kogan and certain of his affiliated businesses to build both an automobile-lending platform and an automobile-servicing platform in Puerto Rico. Defs.' Rule 19-a Statement of Material Facts ("Defs.' SMF"), ¶1 (NYSCEF Doc. No. 76). This business relationship was effectuated through five agreements, all dated July 31, 2015 (the "Agreements"). *Id.* Three of the Agreements, in particular, weigh on the instant motion.

1. The Partnership Agreement

The Exempted Limited Partnership Agreement (the "Partnership Agreement"), governed by Cayman Islands law, created CP Carco, LP (the "Partnership"). The Partnership Agreement memorializes the rights and obligations of the General Partner and Limited Partners in the Partnership, which was formed to purchase auto loans acquired by ALF from Puerto Rican car dealerships. Defs.' SMF, ¶1(a). The Partnership's Limited Partners include Carco Owner and Aktiv Assets LLC ("Aktiv Assets"), who hold Class A Units, and Kogan and his management team at ALF, who hold Common Units and Profit Units. The Class A Unit holders agreed to make Capital Contributions to the Partnership of up to $100 million (the "Initial Capital Commitment"), with Carco Owner contributing $96 million and Aktiv Assets contributing the remainder. *Id.*, ¶24.

Two provisions in the Partnership Agreement are particularly relevant here. *First*, Section 16.4(a) provides that when the General Partner looks to sell additional Class A Units after the Initial Capital Commitment is exhausted, the Partnership must provide written notice to the Class A Unit holders. That way, the Unit holders have the opportunity to purchase a portion of the new shares, at a certain price and on certain conditions, to avoid dilution of their shares. *Id.*, ¶¶26-27. *Second*, Section 15.13 provides that if the Capital Contributions from the Limited Partners (*i.e.*, Carco Owner and Aktiv Assets) exceed the Initial Capital Commitment, then "the Limited Partners shall discuss in good faith the treatment of distributions with respect to Capital Contributions in excess of such [Initial Capital Commitment] threshold." *Id.*, ¶29. As described *infra*, Plaintiffs allege that both of these provisions were violated.

2. The Call Option Agreement

The Call Option Agreement among Partnerships & Investments LLC ("PI" or "ALF Owner"), ALF, Resort Cayman Holdings, Ltd. ("Cayman Holdings"), and the Guarantor Named Therein (the "Call Option Agreement"), governed by New York law, grants Centerbridge-affiliate Cayman Holdings the option to purchase 100% of ALF's membership units from ALF Owner in exchange for specified consideration. *Id.*, ¶1(d). That "Consideration" is defined to mean "the Fixed Option Amount, plus any Proportionate Incremental Profit." Call Option Agreement, at 2 (NYSCEF Doc. No. 79).

The Fixed Option Amount is $2 million. The Proportionate Incremental Profit is derived from two other figures, termed "Incremental Profit" and "Proportionate Portion." The Incremental Profit references "the consideration, if any, received by [Cayman Holdings] for the assignment of" the Call Option Agreement, minus the Fixed Option Amount. *Id.*, at 3-4. And the Proportionate Portion represents the fraction of Incremental Profit that PI (or its assignee) "would have received had the Incremental Profit been distributed" under the Partnership Agreement. The upshot of this is that if the Proportionate Incremental Profit is zero – if, for example, there is no assignment – then Cayman Holdings may exercise the option for the fixed price of $2 million.

To exercise this option, Cayman Holdings must deliver an "Exercise Notice" to ALF Owner specifying a "Tentative Closing Date." Defs.' SMF, ¶3. Following the Exercise Notice, the Call Option Agreement lists five preconditions to Cayman Holdings' purchase of the ALF membership units, each of which is an obligation of ALF or ALF Owner and which Cayman Holdings can waive at its sole discretion. *Id.*, ¶¶6-7. The "Closing" then occurs on the Tentative Closing Date, or within three business days after all Closing conditions are satisfied or waived. *Id.*, ¶4. At the Closing, ALF Owner must deliver the membership units and Cayman Holdings must deliver the Consideration. *Id.*, ¶5.

If "the Closing does not occur on or prior to the Tentative Closing Date due to any action or inaction of [ALF Owner]," an Event of Default is triggered under the Call Option Agreement. *Id.*, ¶11; Call Option Agreement, at 2. Upon an Event of Default, Cayman Holdings may exercise the remedies of a secured party under the UCC, and may act as ALF Owner's attorney-in-fact to realize upon the ALF membership units. Defs.' SMF, ¶10; Call Option Agreement, §6.8(b)-(c). The Event of Default also activates certain provisions in the Escrow Agreement.

The Call Option Agreement contains an integration clause, stating that it "constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings among the parties with respect to the subject matter hereof." Defs.' SMF, ¶13; Call Option Agreement, §8.2.

3. The Escrow Agreement

Under the Escrow Agreement by and among ALF Owner, Cayman Holdings, and The Title Security Group, Inc., as Escrow Agent (the "Escrow Agreement"), governed by New York law, ALF Owner deposited its ALF membership units with the Escrow Agent when the Call Option Agreement was executed. *Id.*, ¶¶1(e), 15. The Escrow Agent must release those membership units to Cayman Holdings upon written notice from Cayman Holdings that an Event of Default has occurred. *Id.*, ¶16. In effect, the Escrow Agreement reinforces Cayman Holdings' rights under the Call Option Agreement by ensuring that ALF Owner cannot unilaterally thwart the transfer of ALF membership units.

According to Plaintiffs, these Agreements involved different entities and different governing jurisdictions because that was precisely the structure directed by Centerbridge, at the recommendation of Centerbridge's advisors, to minimize tax obligations. Am Compl., ¶42. Once all five agreements were executed, the operation of the business promptly commenced. From July 2015 through the end of 2016, the Puerto Rico Loan Auto Business grew steadily. *Id.*, ¶44.

B. The Relationship Deteriorates and Plaintiffs File the Instant Action

As the initial $100 million capital outlay was nearing exhaustion, the Kogan-affiliated parties clashed with the Centerbridge-affiliated parties over a number of issues. *See id.*, ¶¶44-45. For example, Plaintiffs allege that Centerbridge repeatedly made and received additional capital contributions to the Partnership without abiding by the express provisions of the Partnership Agreement – specifically, by not providing advance written notice to Aktiv Assets and by not engaging in any good faith discussions concerning the impact of those additional capital contributions on the distribution arrangements of the Partnership. *Id.*, ¶¶49-50.

At the same time that Centerbridge was allegedly contributing additional capital to the Partnership in violation of the Partnership Agreement, Centerbridge was also spurning offers for third-party financing, a source that Plaintiffs considered crucial to the original business plan. *Id.*,

¶54. In Plaintiffs' view, Centerbridge's strategy put its own economic interests ahead of the Partnership, including Kogan and his management team. *Id.* As these and other disagreements boiled over, Plaintiffs also allege that Centerbridge harassed, bullied, and verbally abused the management team. *See id.*, ¶¶62-72.

Plaintiffs initiated this action by filing a Summons with Notice on June 4, 2019. Defs.' SMF, ¶38; *see* NYSCEF Doc. No. 1. The Notice stated that Centerbridge and its affiliate entities were "unlawfully squeez[ing] out" the Kogan-affiliated individuals and entities, and that Plaintiffs would seek, among other things, "a declaratory judgment that Centerbridge may not exercise the call option while its affiliates are in breach of the Partnership Agreement." NYSCEF Doc. No. 1. Two weeks later, Plaintiffs filed a Complaint which alleged eight causes of action. NYSCEF Doc. No. 4. In the fifth cause of action, Plaintiffs sought a declaratory judgment to determine its rights under the Call Option Agreement because it believed that "Centerbridge may still direct the [Centerbridge entity] to exercise the right to acquire the ownership of PI from ALF." Compl., ¶94. The next month, Centerbridge did just that.

C. Centerbridge Elects to Exercise the Call Option

On July 22, 2019, Centerbridge sent a letter to PI in which Centerbridge claimed that it had elected to exercise the call option, intended to pay $2 million for ALF, and set a "Tentative Closing Date" for three days later. Am. Compl. ¶76; Affirmation of Michael B. Carlinsky ("Carlinsky Aff."), Ex. I (the "Exercise Notice") (NYSCEF Doc. No. 57). A flurry of tense correspondence ensued. On July 24, Kogan wrote a letter on behalf of PI to Cayman Holdings, alleging that Cayman Holdings was "arrogantly ignor[ing] the existence of" this action. Carlinsky Aff., Ex. J (NYSCEF Doc. No. 58). Kogan advised Cayman Holdings that PI would not follow the instructions in the Exercise Notice, and that "[t]here will be no closing of any transaction involving the Call Option Agreement." *Id.*

On July 25, the scheduled Tentative Closing Date, Cayman Holdings advised ALF Owner that "all conditions to Closing under §3.2 of the Call Option Agreement have been satisfied or waived, and Cayman Holdings is ready, willing and able to consummate the Closing." Defs.' SMF, ¶41. However, ALF Owner refused to deliver the ALF membership units to Centerbridge. *Id.*, ¶42. Cayman Holdings then notified the Escrow Agent of ALF's default and demanded delivery of the ALF membership units. *Id.*, ¶43. At that point, ALF Owner wrote to the Escrow Agent, warning that if the Escrow Agent "took any such action . . . [it] would certainly expose Escrow Agent to a claim for damages by PI in a material and significant amount." *Id.*, ¶44; *see* Carlinsky Aff., Ex. N (NYSCEF Doc. No. 95). In response to these "conflicting positions," the Escrow Agent refused to release the escrowed assets. Carlinsky Aff., Ex. O (NYSCEF Doc. No. 95).[4]

D. The Instant Motion

On September 9, 2019, Plaintiffs filed an Amended Complaint. Defs.' SMF, ¶48; *see* NYSCEF Doc. No. 73. In their Fifth Claim for Relief, Plaintiffs seek a declaratory judgment "stating that Centerbridge . . . may not exercise any rights under the Call Option Agreement." Am. Compl., ¶111. This relief is not predicated on any breach of the Call Option Agreement itself. Rather, Plaintiffs urge that the various Agreements comprise, "in substance, a single agreement negotiated between Centerbridge, on the one hand, and Kogan and his colleagues, on

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[4] The Escrow Agent then initiated an interpleader action in this Court on July 31, explaining that it "faces competing claims to the assets by the [Cayman Holdings and PI entities] and cannot determine, without hazard to itself, how to proceed." Interpleader Complaint, ¶1 (NYSCEF Doc. No. 118).

the other." *Id.*, ¶105. As a result, Plaintiffs say, Centerbridge's alleged breach of the Partnership Agreement means that the entity Centerbridge controls "is estopped from exercising any rights under the Call Option Agreement." *Id.*, ¶107.

Defendants' motion seeks summary judgment dismissing Plaintiffs' Fifth Claim for Relief and, accordingly, a declaration that Centerbridge *may* exercise its rights under the Call Option Agreement. To reach that conclusion, Defendants must establish either of two things: (1) that the Agreements are wholly independent of one another, so the breach of one cannot interfere with the obligations of another; or (2) that even if the Agreements were said to be interdependent, the breaches alleged here do not excuse performance because they are not material.

While the Court declines to hold that the Agreements are incapable of being read together as a matter of law, Defendants are nonetheless entitled to summary judgment on the narrower ground. Under any view of how these agreements tie together, Defendants' alleged violations of Sections 16.4 and 15.13 of the Partnership Agreement are not material to – and thus do not excuse – Plaintiffs' obligations under the Call Option Agreement.

LEGAL ANALYSIS

Summary judgment is appropriate when the movant has made "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." *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015). If such a showing has been 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). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

A. Defendants Have Not Established Conclusively That The Agreements are Independent of One Another

Defendants have not established that the five agreements are independent of one another as a matter of law. "The extent to which contracts may be deemed interdependent, of course, depends upon the intent of the parties." *Nat'l Union Fire Ins. Co. of Pittsburgh v. Clairmont*, 231 A.D.2d 239, 241 (1st Dep't 1997). "Whether the parties intended to treat both agreements as mutually dependent contracts, the breach of one undoing the obligations under the other, is a question of fact." *Rudman v. Cowles Commc'ns, Inc.*, 30 N.Y.2d 1, 13 (1972); *see Capital Bus. Credit LLC v. Tailgate Clothing Co., Corp.*, 172 A.D.3d 655, 656 (1st Dep't May 30, 2019) ("Whether the parties intended to treat the licensing agreement, the manufacturing agreement and the distribution agreement as mutually dependent contracts . . . is a question of fact.") (denying summary judgment). "In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances." *Rudman*, 30 N.Y.2d at 13.

At a minimum, Plaintiffs have raised a genuine issue of fact as to whether the parties intended the Agreements to function as interlocking parts of a single, cohesive business arrangement. The Agreements were all executed at or around the same time, for the purpose of structuring "[t]he business relationship" between the Centerbridge affiliates and the Kogan affiliates. *See* Defs.' SMF, ¶1. "Where several instruments constitute part of the same transaction, they must be interpreted together." *BWA Corp. v. Alltrans Exp. U.S.A., Inc.*, 112 A.D.2d 850, 852 (1st Dep't 1985); *see Perlbinder v. Bd. of Managers of 411 E. 53rd St. Condo.*, 65 A.D.3d 985, 987 (1st Dep't 2009) ("[A]greements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one."); *Fernandez v. Cohen*, 110 A.D.3d 557, 558 (1st Dep't 2013) (agreements "executed at the same time, by the same parties, and for the same purpose, and therefore are, in the eye of the law, one instrument").[5]

The Agreements also reference provisions in one another, suggesting some measure of interdependence. *See Perlbinder*, 65 A.D.3d at 987–88 (noting two interrelated agreements "were executed as part of the same transaction and cross-reference one another"); *cf. Schron v. Troutman Saunders LLP*, 97 A.D.3d 87, 92 (1st Dep't 2012) (two agreements "were not interdependent and should not be read as a unitary obligation" where, *inter alia*, "the agreements contained no cross references to each other"). Most prominently, determining the exercise price under the Call Option Agreement requires reference to the Partnership Agreement. The definition of "Consideration" consists, in part, of the "Proportionate Portion," an amount derived from an assignment of the option and linked to the Partnership Agreement. Call Option Agreement, §1.1. In addition, Section 6.5 of the Option Agreement also references the Partnership Agreement, while Section 15 of the Partnership Agreement refers to the terms "Consideration" and "Fixed Option Amount" as defined in the Option Agreement.

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[5] Defendants appear to suggest that *BWA*, and other First Department cases holding that multiple instruments executed contemporaneously must be construed together, are no longer good law in light of *Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC*, 20 N.Y.3d 438, 443 (2013). *See* Defs.' Mem. of Law in Support of S.J., at 6 n.5. But *Fundamental* did not abrogate prior case law reading such instruments, in certain circumstances, as one. Instead, the Court of Appeals distinguished the facts in *Fundamental* from "cases in which courts have considered multiple agreements together, even though they were executed on different dates and/or by different parties." 20 N.Y.3d at 445. The Court reasoned that, in those cases, "the agreements are inextricably intertwined, unlike the option agreement and the operating agreement in this case." *Id.* Here, questions of fact exist as to whether the Agreements at issue are indeed "inextricably intertwined," and the proximity in time among the Agreements is a factor to be considered in that analysis.

These references distinguish this case from the facts of *Schron*, 97 A.D.3d at 92, *aff'd* 20 N.Y.3d 430 (2013), on which Defendants chiefly rely. There, the alleged connection between an option agreement and a loan agreement consisted entirely of extrinsic evidence – the "agreements contained no cross references to each other." 97 A.D.3d at 92. The court cited to that lack of internal referencing in holding that the loan and option agreements "were not interdependent and should not be read as a unitary obligation." *Id.*, citing *Unclaimed Prop. Recovery Serv., Inc. v. UBS PaineWebber Inc.*, 58 A.D.3d 526 (1st Dep't 2009) (no cross references "identify[ing] the referenced document beyond all reasonable doubt").[6]

That the Proportionate Portion here is zero – because there was no assignment – does not mean this reference to the Partnership Agreement is a "minor contingent" one, as Defendants urge. *See* Defs.' Reply Mem. of Law, at 5 (NYSCEF Doc. No. 105). The value of an option depends on the exercise price. *See generally, e.g.*, *Hall v. The Children's Place Retail Stores, Inc.*, 580 F. Supp. 2d 212, 222 (S.D.N.Y. 2008) ("The value of the options is spring-loaded because after they are granted there is a high likelihood that the options will be 'in the money,' *i.e.*, the market price will be above the strike price."). The fact that no assignment occurred here changes only the direction that value travels. The greater the Proportionate Portion, the more valuable the exercise price becomes to Plaintiffs. The lower the Proportionate Portion, the more valuable the exercise price becomes to Defendants. Either way, the Proportionate Portion, and thus the Partnership Agreement, is intertwined with the exercise of the option. By contrast, in *Fundamental*, 20 N.Y.3d at 443, another case on which Defendants rely, the option's strike price

[6] By the time *Schron* reached the Court of Appeals, the appellant "no longer presse[d] its argument raised below that the option and loan agreement – involving separate subject matters, different parties and without any cross-references – are inextricably intertwined and must be read together." 20 N.Y.3d at 435.

was untethered to any other agreement – it "unambiguously granted [one entity] the right to acquire a one-third interest in [another entity] upon payment of the strike price of $1,000." *Id.* Here the Partnership Agreement, by way of the Proportionate Portion, is sewn into the exercise price.

Defendants are correct that other aspects of the agreements weigh against the notion of contractual interdependence. "[T]he form of the agreements, though not conclusive, is significant." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Robert Christopher Assocs.*, 257 A.D.2d 1, 6 (1st Dep't 1999). "[I]n the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable." *Nat'l Union Fire Ins. Co. of Pittsburgh*, 231 A.D.2d at 241 (noting also that although several agreements were "executed almost contemporaneously" and for the same purposes, those "circumstances alone do not justify the inference of contractual interdependence"). These Agreements involve different parties, are subject to the laws of different jurisdictions, and contain integration clauses. *Applehead Pictures LLC v. Perelman*, 2009 WL 5225213 (Sup. Ct. N.Y. Cty. Nov. 13, 2009) (ruling that two agreements that "are governed by the laws of two different states, serve different purposes, and do not have identical parties" are "two distinct and unrelated agreements, imposing separate obligations"), *aff'd*, 80 A.D.3d 181 (1st Dep't 2010).

As the First Department has observed, however, these formal factors are "not conclusive." *Nat'l Union Fire Ins. Co.*, 257 A.D.2d at 6. For example, Plaintiffs allege that the patchwork quilt of entities and jurisdictions in the Agreements can be explained as a "tax minimization" strategy employed at the direction of Centerbridge and its tax advisors. *See* Am. Compl., ¶¶34-36; *see* Affirmation of Nicolás A. Kogan, ¶3 (NYSCEF Doc. No. 102). That is, the structure set up by the parties here allegedly did not reflect an intent to read the Agreements as standalone documents for purposes of running the business. There is evidence, too, that the parties saw through these formal differences in dealing with each other. Centerbridge argues that Aktiv Assets had actual notice of additional capital contributions "because its *affiliate* ALF's funding demands under the Loan Purchase Agreement made the Additional Unit Sales necessary." *See* Defs.' Mem. of Law in Support of S.J., at 9 (emphasis added) (NYSCEF Doc. No. 75). Put differently, Centerbridge contends that one party had actual notice of a transaction through a related party in a separate agreement. Connecting the dots this way raises questions, at least, about Centerbridge's theory that each of the Agreements are sealed off from the others.

Similarly, the presence of an integration clause, while significant, does not preclude a finding that the Agreements should be read together. *See Williams v. Mobil Oil Corp.*, 83 A.D.2d 434, 439 (2d Dep't 1981); ("[T]he rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement . . . [and] is applied even though in one of the contracts it is stated that there are not other contracts between the parties."); *Wells Fargo Bank Minnesota v. CD Video, Inc.*, 6 Misc. 3d 1003(A), at *6 (Sup. Ct. N.Y. Cty. 2004), *aff'd sub nom. Wells Fargo Bank Minnesota, Nat. Ass'n v. CD Video, Inc.*, 22 A.D.3d 351 (1st Dep't 2005) (reading two agreements together "even where in one of the contracts it is stated that there are no other contracts between the parties").

B. The Alleged Breaches are Not Material

Even if the agreements were viewed as a single intertwined agreement, however, the claimed breaches of the Partnership Agreement are not material. Under New York law, a non-breaching party's obligation to perform is excused only when there is a material breach by the other party – *i.e.,* where the breach is "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *Smolev v. Carole Hochman Design Grp., Inc.*, 79 A.D.3d 540, 541 (1st Dep't 2010); *see Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347 (1st Dep't 2005) ("The alleged breach by defendant . . . does not defeat the purpose of the contract so substantially as to support a claim for rescission."); *see In re Lavigne*, 114 F.3d 379, 387 (2d Cir. 1997) ("The non-breaching party will be discharged from the further performance of its obligations under the contract when the breach goes to the root of the contract."). Conversely, technical non-compliance with a contractual condition does not excuse performance. *See Danco Elec. Contractors, Inc. v. Dormitory Auth. of State*, 162 A.D.3d 412, 413 (1st Dep't 2018) ("[W]e conclude 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.").

The materiality of a breach is a "matter of law for the court to decide" where, as here, "the evidence concerning the materiality is clear and substantially uncontradicted." *Cont'l Ins. Co. v. RLI Ins. Co.*, 161 A.D.2d 385, 387 (1st Dep't 1990) (summary judgment motion); *Alberts v. CSTV Networks, Inc.*, No. 1130812009, 2011 WL 11069936, at *4 (Sup. Ct. N.Y. Cty. Feb. 25, 2011) ("Whether a given set of facts constitutes a material breach of a contract is a question of law to be decided by the Court.") (granting summary judgment); *Jacobs Private Equity*, 22 A.D.3d at 347 (affirming dismissal of complaint where "[t]he alleged breach . . . does not defeat the purpose of the contract so substantially as to support a claim" that material breach excuses performance); *see also Frank Felix Assocs., Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) ("Whether [the defendant] materially breached the executory accord is a question of law.") (decision following bench trial); *Jafari v. Wally Findlay Galleries*, 741 F. Supp. 64, 67 (S.D.N.Y. 1990) (deciding materiality of breach on summary judgment motion).

"In determining if [Centerbridge's] breach defeated the object of the [parties' agreements, considered together], we must consider the special purpose of the contract." *Frank Felix Assocs.*, 111 F.3d at 289. At issue are two provisions in the Partnership Agreement – the written notice requirement under §16.4(a), and the good-faith discussion provision under §15.13 – designed to preserve Plaintiffs' financial interest in the business venture with Centerbridge and its affiliates. Section 16.4, an anti-dilution device, ensures that Plaintiffs have an opportunity to co-invest when "the Partnership proposes to issue additional Units or other equity securities." Partnership Agreement, §16.4(a). And Section 15.13 instructs that, when the Limited Partners' Capital Contributions exceed $100 million, "each Limited Partner agrees that at such time the Limited Partners shall discuss in good faith the treatment of distributions with respect to Capital Contributions in excess of such $100,000,000 threshold." Based on the undisputed facts in the record, the Court finds that Centerbridge's alleged breaches of these two provisions are not material and thus they do not excuse Plaintiffs from performing its obligations under the Call Option Agreement.

First, the form of notice set out in §16.4(a) is not "substantial and fundamental" to the "object of the parties in making the contract." *Smolev*, 79 A.D.3d at 541. Plaintiffs do not dispute that they "had actual notice of the Additional Unit Sales." Defs.' SMF, ¶31; *see* Pls.' Resp. to Defs.' SMF, ¶31 (disputing fact only "to the extent that this paragraph . . . contends that 'actual notice' is relevant to Defendants' breach"). Because Plaintiffs had actual notice, they still could have exercised their right to co-invest in order to avoid dilution. That right was not contingent on Plaintiffs' receiving written notice. And in fact, Plaintiffs did receive a belated written notice which included an offer to retroactively co-invest, effectively placing Plaintiffs in the same, if not better, position as under §16.4(a). As a result, the original failure to provide written notice had little or no practical impact upon Plaintiffs.[7]

While Plaintiffs allege that "Centerbridge intentionally and permanently diluted [their] ownership interests," Pls.' Mem. of Law in Opp. to S.J., at 18 (NYSCEF Doc. No. 100), that purported dilution cannot be ascribed to the manner of notice. *See Restoration Realty Corp. v. Robero*, 58 N.Y.2d 1089, 1091 (1983) (holding that "the plaintiff has failed to show any prejudice resulting from the tenant's alleged breach of the terms of the lease" and affirming lower court's finding "that none of the alleged breaches were material"); *Clayton B. Obersheimer, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 96 A.D.3d 1284, 1287 (3d Dep't 2012) ("[D]efendant has nevertheless failed to allege how Massa has been prejudiced by the violation sufficient to constitute a material breach of the subcontract."); *Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 103 F. Supp. 2d 711, 731 (S.D.N.Y. 2000) (notice failure immaterial as a matter of law because "[a]t worst" it "resulted in a delay of [plaintiff]'s awareness that it had [a] right"), *aff'd*, 294 F.3d 383 (2d Cir. 2002).

The absence of any identified harm to Plaintiffs resulting from the alleged failure to provide written notice distinguishes this case from *Special Situations Fund III, L.P. v. Versus Tech., Inc.*, 227 A.D.2d 321 (1st Dep't 1996). There, the defendant "materially breached, *inter alia*, the anti-dilution provision of the parties' warrant agreement by reason of defendant's

[7] On June 13, 2019, the General Partner wrote to Aktiv Assets: "It is the Partnership's understanding that, considering your role in instigating the capital calls, in all instances you have been aware of, and afforded the opportunity to participate in, all such issuance of Units, and that you have consistently elected not to exercise your rights to purchase such Units. . . . The Partnership . . . is hereby offering you the ability to exercise 100% of your theoretical preemptive rights with respect to all Units that have been issued and subject to Section 16.4, including the ability to require the Partnership to finance up to $2,000,000 worth of Units in the aggregate pursuant to Section 16.4(b)." Carlinsky Aff., Ex. G (NYSCEF Doc. No. 84).

admitted failure to adjust the purchase price of the warrant before privately selling shares of the common stock for less than the current fair market value." *Id.* at 321. Critically, "uncontroverted evidence" in that case showed "lost profits sustained by plaintiff as a result of defendant's material breach," establishing "that the alleged loss was directly related to the breach." *Id.* No such evidence is presented here, nor is there any genuine issue of fact to be tried.

Second, the alleged breach of the good-faith discussion provision in the Partnership Agreement does not justify excusing Plaintiffs' obligations under the Call Option Agreement. The object of this provision is to grant Plaintiffs a right to *negotiate*, in "good faith," favorable "treatment of distributions" if and when the Limited Partners' Capital Contributions exceed $100 million. The provision provides no definite timeframe in which these good-faith discussions should occur – "at such time" could mean at any time after the Capital Contributions exceed $100 million, before a distribution occurs. And *when* that distribution occurs is also beyond Plaintiffs' control. Plaintiffs do not have the right under §15.13 – or any other provision – to influence the timing or amount of a future distribution. That right is entrusted to the sole discretion of the General Partner under §15.1. And of course, §15.13 could be followed to the letter and still not lead to any change in the treatment of distributions, as long as good-faith negotiations took place. All told, the sole benefit offered to Plaintiffs by §15.13 – an advantageous treatment of a distribution – materializes only if a distribution occurs, *which indisputably it has not*. Without a distribution, Plaintiffs cannot claim a material breach stemming from its right to negotiate favorable treatment of that distribution.

Plaintiffs' contention that, "[h]ad the Defendants complied with their contractual obligation to negotiate the appropriate treatment of distributions . . . those discussions *may well* *have resulted in an agreement to make distributions* to Aktiv and the Management Team from the proceeds of third-party financing," Pls.' Mem. of Law in Opp. to S.J., at 20 (emphasis in original), is thus completely speculative. Plaintiffs' argument appears to use the alleged breach of §15.13 as a vehicle for advancing a broader grievance – the source of money infusions into the Partnership. As laid out in their separate claim for breach of fiduciary duty, which is not subject to the present motion, Plaintiffs object to Centerbridge's rejection of third-party financing agreements to acquire additional auto loans after the initial investment of $100 million. Am. Compl., ¶97. Whatever the merits of that argument, it is apparent that the harm Plaintiffs claim to have suffered results from the Partnership's decisions about capital contributions and third-party financing, not from a failure to negotiate the treatment of distributions (which, again, have not occurred) in good faith.

Finally, Plaintiffs' conclusory suggestion of a need for discovery "regarding . . . the material breaches of the Partnership Agreement," Pls.' Mem. of Law in Opp. to S.J., at 22, is unavailing. Although Plaintiffs reference CPLR 3212(f) in support of their supposed need for discovery, they do not submit an affidavit showing "that facts essential to justify opposition may exist but cannot then be stated." Plaintiffs' "mere conclusory statement" of a need for discovery "provides no basis, pursuant to CPLR 3212(f), for postponing a decision on the summary judgment motion." *CVC Capital Corp. v. Weil, Gotshal, Manges*, 192 A.D.2d 324, 324–25 (1st Dep't 1993) (granting summary judgment). Without more, invoking CPLR 3212(f) is ineffectual. *First City Nat. Bank & Tr. Co. v. Heaton*, 165 A.D.2d 665, 712 (1st Dep't 1990) ("To speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on the summary judgment motion."); *cf. Cont'l Ins. Co.*, 161 A.D.2d at 387–88 (denying summary judgment as to materiality of breach due to questions of fact about whether failure to report certain losses under insurance contract "so materially increased the risk for the reinsurer as to justify its refusal to make payment under the reinsurance contract").[8]

Even assuming there is a fact issue warranting discovery as to *whether* Defendants breached the Partnership Agreement, there is no factual issue as to whether such a breach – if it occurred – was *material* to the overall purpose of the parties' commercial arrangements. As described above, the underlying facts concerning materiality are undisputed and conclusive. Plaintiffs had actual notice of Additional Unit Sales despite Centerbridge's failure to provide written notice, *see* Defs.' SMF, ¶31, Pls.' Resp. to Defs.' SMF, ¶31; Plaintiffs did not attempt to participate in these Additional Unit Sales even *after* receiving written notice, *see* Defs.' SMF, ¶32, Pls.' Resp. to Defs.' SMF, ¶32; and no distributions have occurred since Defendants allegedly failed to engage in good-faith discussions related to the distribution waterfall, *see* Defs.' SMF, ¶37, Pls.' Resp. to Defs.' SMF, ¶37. What remains is a purely legal determination: Whether these purported breaches of the Partnership Agreement excuse Plaintiffs' performance under the Call Option Agreement. As explained above, they do not.[9]

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[8] Plaintiffs' belated submissions to the Court, well after oral argument, requesting leave to supplement the record with two additional exhibits, do not change this result. *See* NYSCEF Doc. Nos. 124-26. To begin with, the submissions were improper. Plaintiffs' letter, which advances legal arguments, amounts to an unauthorized sur-reply. *See Musey v. 425 E. 86 Apartments Corp.*, 2019 WL 2602125, at *11 n.1 (Sup. Ct. N.Y. Cty. June 25, 2019). At any rate, the submissions do not raise fact questions about the materiality of Defendants' alleged breaches. Plaintiffs' submissions – like Plaintiffs' motion papers – focus on Defendants' failure to obtain third-party financing. But again, to the extent Defendants used equity investments to dilute Plaintiffs' stake in the business, that is the subject of claims not before the Court on this motion. *See* Am. Compl., ¶97 (breach of fiduciary duty claim).

[9] Plaintiffs' suggestion that the conditions for exercise of the option were not satisfied or waived is meritless. Centerbridge had the unilateral right to waive the conditions, and it did so expressly in a letter to ALF Owner on July 25, 2019. Defs.' SMF, ¶41. Plaintiffs' observation

In sum, the Court finds that Plaintiffs are not entitled to the declaration sought in the Fifth Claim for Relief in the Amended Complaint – *i.e.*, that "Centerbridge, through the Centerbridge Call Option Holder or otherwise, may not exercise any rights under the Call Option Agreement." "[W]hen a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendants." *Maurizzio v. Lumbermens Mut. Cas. Co.*, 73 N.Y.2d 951, 954 (1989). Therefore, the Court declares instead that Centerbridge *may* exercise its Call Option rights.

Accordingly, it is

ORDERED that Defendants' motion for partial summary judgment dismissing the Fifth Claim for Relief in the Amended Complaint (Declaratory Judgment) is Granted; and it is further

DECLARED that Centerbridge, through the Centerbridge Call Option Holder or otherwise, may exercise its rights under the Call Option Agreement.

This constitutes the Decision and Order of the Court.

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12/24/2019
DATE

JOEL M. COHEN, J.S.C.

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

Centerbridge used the past tense "have been . . . waived" and did not "specify[ ] when or in what manner" the waiver was made is irrelevant. The Call Option Agreement does not require any specific form of written waiver and Centerbridge plainly waived "all conditions to Closing under §3.2 of the Call Option Agreement." In any event, the Closing Conditions – and the concomitant waiver provision – were conditions attached to "[t]he obligation of Purchaser to purchase" the membership units, *not* the obligation of PI to deliver those units (which is what is at issue here). Call Option Agreement, §3.2(b). Finally, Plaintiffs repudiated their own obligations under the Call Option Agreement even before Cayman Holdings waived the Closing Conditions. Carlinsky Aff., Ex. J (NYSCEF Doc. No. 58). Plaintiffs' repudiation discharged Defendants from performing "futile acts or conditions precedent . . . upon the . . . refusal by a party to honor its obligations under their contract." *Special Situations*, 227 A.D.2d at 321.