SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS 49EFM

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BORDEN LP,

Plaintiff,

-against-

TPG SIXTH STREET PARTNERS,
PPB INVESTMENTS II, LLC and JOHN DOES 1-10,

Defendants.

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TPG SIXTH STREET PARTNERS, LLC and
PPB INVESTMENTS II, LLC,

Third-Party Plaintiffs,

-against-

MICHAEL BORDEN, PRS 1000, LLC and
SMUDGE MONSTER, LLC[1],

Third-Party Defendants,

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DECISION AND ORDER
Index No.: 657398/2017

Motion Seq. Nos.: 006, 007, 008, and 009

THIRD-PARTY ACTION
Index No.: 595050/2018

O. PETER SHERWOOD, J.S.C.:

Recitation pursuant to CPLR 2219 (a) of the papers considered in these motions for summary judgment: documents numbered 1-6, 9-11, 47, 54, 88, 90, 125-221, 224, 225, and 229-239[2] listed in the New York State Courts Electronic Filing System (NYSCEF).

In this action seeking a declaration of the parties' rights and obligations pursuant to a Term Loan Credit Agreement dated July 19, 2013 (the Credit Agreement) (Doc No. 2),[3] plaintiff

[1] Smudge Monster, LCC is no longer a party to this action pursuant to the court's January 2, 2019 orders (Doc No. 88 and 90) granting its pre-answer motion (Motion Seq. 004) (Doc No. 37) to dismiss the Third-Party Action for lack of personal jurisdiction, which orders were not appealed.

[2] Oral argument was held on December 9, 2019 (see Court transcript, Doc No. 277).

[3] References to "Doc No." followed by a number refers to documents filed in NYSCEF.

Borden LP moves in Motion Seq. No. 006 (Doc No. 125) for summary judgment (CPLR 3212) on its sole cause of action for a declaration that it fully complied with the terms of the Credit Agreement and for dismissal of the counterclaims asserted by defendants TPG Sixth Street Partners and PPB Investments II, LLC (collectively, the Lenders). In Motion Seq. No. 007 (Doc No. 165), the Lenders move for partial summary judgment (CPLR 3212) dismissing the Complaint and finding Borden LP liable on the counterclaims for breach of contract, fraudulent conveyance, indemnification and a declaration that plaintiff defaulted under the terms of the Credit Agreement. As third-party plaintiffs, the Lenders also move in Motion Seq. No. 008 (Doc No. 229) for summary judgment on their third-party complaint (Doc No. 10) against third-party defendants Michael Borden, individually, and PRS 1000, LLC (PRS1000) for tortious interference with contract and actual fraudulent conveyance. In Motion Seq. No. 009 (Doc No. 231) third-party defendants Michael Borden and PRS1000 move for summary judgment dismissing the third-party action.

Motion Seq. Nos. 006, 007, 008, and 009 are consolidated for disposition.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012 Borden LP[4] acquired 1,866,666 common membership units in Switch Ltd. (Switch) - "a technology infrastructure company that designs, constructs, and operates some of the world's most reliable, secure, resilient, and sustainable data centers" (Complaint at ¶¶ 11, 14, 17; Borden affidavit at ¶ 7). On or about July 19, 2013 Borden LP secured a $14 million loan (the loan) for general corporate purposes (Borden affidavit at ¶¶ 9, 14; Credit Agreement, at 1)

[4] MDB Living Trust, the Borden Children's Trust 2012, and Borden General Partner, LLC own Borden LP (see ¶ 6 of Michael Borden's 5/30/19 affidavit [Borden affidavit]) (Doc No. 126). Michael Borden is the operating manager and sole member of Borden General Partner, LLC.

pursuant to a Credit Agreement executed with Credit Suisse Loan Funding LLC (Credit Suisse). The collateral for the loan was the previously acquired membership units in Switch (the Switch Units) (Borden affidavit at 17). Borden LP's goal was to convert Switch to a public company and eventually use the proceeds from its publicly traded stocks to repay the loan (Borden affidavit at 9).

Section 2.10 of the Credit Agreement provides that Borden LP was to repay "the aggregate principal amount of the [loan], together ... with all accrued and unpaid interest thereon, the Switch Sharing Percentage, if any, and any other Fees or amounts due pursuant to [the Credit Agreement]" by the "Maturity Date" defined in Article 1 of the Credit Agreement as July 18, 2016 (the initial maturity date). The Switch Sharing Percentage to be paid in the event Switch Units were sold is governed by § 5.06 (d) (i) of the Credit Agreement which states, in pertinent part, as follows:

> "... (d) ... thirty percent (30%) of the increase in value of the Switch Units from the Initial Switch Unit Value (such amount, the 'Switch Sharing Percentage') upon
>
> (i) any sale of Switch Units pursuant to this Section 5.06 ...
>
> For purposes of the foregoing clause ... payments of the Switch Sharing Percentage shall be made promptly, and in no event later than two (2) Business Days after the occurrence of the event triggering [Borden LP's] duty to pay its Switch Sharing Percentage."

The Initial Switch Unit Value was $15.00 per unit as of July 19, 2013 (see § 5.06 [a] of the Credit Agreement).

On February 26, 2016, in accordance with a "First Amendment to Term Loan Credit Agreement" (the Amended Credit Agreement) (Doc No. 135), Credit Suisse and Borden LP extended the initial maturity date to December 31, 2017 (the extended maturity date) and agreed

that upon written approval, if needed, Borden LP could request an additional one year extension thereafter (Amended Credit Agreement, section 2[A]). Plaintiff avers that the Amended Credit Agreement also adjusted the Initial Switch Unit Value from $15 to $5 per unit (Borden affidavit, ¶ 19). In this connection, in their Answer to the Complaint (Doc No. 9, ¶ 52) and in its Rule 19-a Statement of Undisputed Facts (the Lenders' Rule 19-a Statement) (Doc No. 167), the Lenders acknowledge that "[t]o account for a three-for-one split in the equity of Switch, the number of Switch Units pledged by [Borden LP] as collateral under the Credit Agreement increased to 5,599,998 Switch Units; as a result of the stock split, the measure of the Switch Sharing Percentage became based upon an initial share price of $5 per unit" (the Lenders' Rule 19-a Statement, ¶ 22).

Credit Suisse, on or about December 30, 2016 and for an agreed upon consideration, assigned all of its rights and obligations under the Credit Agreement to the Lenders (Doc No. 202). Thereafter, Borden LP requested from the Lenders another maturity date extension to December 31, 2018 but understood that the Lenders were unwilling to grant the request (see Borden affidavit, at ¶ 3). In order to timely pay the loan, plus interest, by the extended maturity date of December 31, 2017, plaintiff endeavored to refinance the loan and proceed with registering Switch as a public company.

On September 8, 2017 Switch filed a Registration Statement with the United States Securities and Exchange Commission (SEC) to register an initial public offering for the sale of its common stock (Borden affidavit, ¶ 25). A non-party to this litigation, Goldman Sachs & Co., LLC, entered into an Underwriting Agreement[5] with Switch "providing for a public offering of"

[5] A copy of the Underwriting Agreement was not provided to the court for review, but its terms are alluded to in the Lock-Up Agreement discussed *infra*.

Switch's Class A Common Stock pursuant to the Registration Statement with the SEC. In consideration for the Underwriting Agreement, Borden LP agreed that between September 25, 2017 up to and including "the date 180 days after the date set forth on the final prospectus used to sell the Class A Common Stock" (the Lock-Up Period) Borden LP would not:

> "offer, sell, pledge, grant any option to purchase, make any short sale or otherwise dispose of any share of [Switch's] Class A Common Stock, Class B Common Stock or Class C Common Stock, or any securities convertible into, exchangeable for or that represent the right to receive shares of [Switch's] Common Stock, whether now owned or hereafter acquired, owned directly by [Borden LP] (including holding as custodian) or with respect to which the undersigned has beneficial ownership within the rules and regulations of the SEC (collectively the '[Borden LP] Shares'), or publicly announce its intention to do any of the forgoing."

(the Lock-Up Agreement) (Doc No. 137). The following language was also incorporated:

> "Notwithstanding any other provision in this agreement, the restrictions described in this Lock-Up Agreement shall not apply to any pledge, security interest, lien or other encumbrance with respect to the [Switch Units] (the 'Pledged Securities') in existence as of the date hereof (or subsequently, in the case of a refinancing) as collateral for a loan or series of loans (or any refinancing of such loan or series of loans) provided to [Borden LP], and any transfer of such Pledged Securities during the Lock-Up Period resulting from any default relating to such loan (or series of loans) or refinancing thereof."

(The Lock-Up Period Exception). Accordingly, Borden LP was permitted to transfer/pledge/sell the Switch Units to refinance the loan. To that end, plaintiff sought to find a "financing source" (Borden affidavit, at ¶ 32) that would be in compliance with any Switch share sales restrictions outlined in the Credit Agreement, the Lock-Up Agreement and the Fifth Amended and Restated Operating Agreement of Switch Ltd. (the Switch Operating Agreement)[6] (Doc No. 136). In the

[6] Section 11.01 of the Switch Operating Agreement provided that Borden LP could only convert their Switch Units to Class A Commons stock on "quarterly redemption dates."

meantime, Borden LP notified the Lenders by letter dated September 29, 2017 (the Notice) (Doc No. 138) that it intended to sell the Switch Units. The Notice complied with § 5.06 of the Credit Agreement which states, in pertinent part:

> "SECTION 5.06. Switch Units. . . .
>
> (b) Subject to the requirements of this Section 5.06 and Article VII, [Borden LP] shall have the right, but not the obligation, to sell all or any portion of the Switch Units at any time or times; *provided, however,* that
>
> (i) (A) [Borden LP] shall provide [the Lenders] with written notice at least 10 Business Days in advance of [Borden LP's] intent to sell any Switch Units,
>
> (B) the [Lenders] shall have the right, but not the obligation, to offer to purchase all or any portion of the Switch Units [Borden LP] intends to sell (any such offer to be made by [the Lenders] in writing and no later than 10 Business Days after the notice referred to in the preceding clause (A),
>
> (C) to the extent that [Borden LP] elects to consummate the sale of any or all of the offered Switch Units, [Borden LP] shall sell such Switch Units to the Person (or Persons, if applicable) who offers the highest price per Switch Unit within sixty (60) days of the notice provided pursuant to the preceding clause (A), and
>
> (D) [Borden LP] shall permit [the Lenders] (and any Evaluator) to review the records of any sale of Switch Units to confirm [Borden LP's] compliance with the foregoing;
>
> (ii) upon consummation of such sale, [Borden LP] shall promptly (and in no event later than two Business Days) following receipt of the net proceeds arising from such sale, pay the Switch Sharing Percentage, if any, to the Administrative Agent (for and on behalf of the Lenders) pursuant to Section 5.06 (d); . . . ."

The Notice triggered § 5.06 (b) (i) (B) of the Credit Agreement which allowed the Lenders to, within 10 days of the Notice, make an offer to purchase the Switch Units. The Lenders

apparently objected to the validity of the Notice by letters dated October 2, and October 10, 2017 (the Objection letters)[7]. The parties did not provide the court with copies of the Objection letters, but they are referenced in another letter from the Lenders to Borden LP dated October 13, 2017 (the First Offer) (Doc No. 139), which states in pertinent part:

> "As you know from our October 2 and October 10 letters, we believe your September 29, 2017 letter is not a good faith notice of an intent to sell pursuant to Section 5.06 of the Credit Agreement. However, in order to preserve our rights, we propose to purchase the Switch Units from you on the following terms and conditions . . . a per Switch Unit value equal to a 20% discount to the arithmetic average of the daily volume weighted average price per share of Class A Common Stock of Switch, Inc. (the "Class A Common Stock") on the principal U.S. securities exchange on which the Class A Common Stock is traded and quoted, as reported by Bloomberg, L.P., or its successor for each of the four (4) consecutive full trading days (other than any trading day during which a Market Disruption Event (as defined below) has occurred), ending on and including the last full trading day immediately prior to the date constituting the end of the bidding period set forth in Section 5.06(b) of the Credit Agreement."

By letter dated October 17, 2017 (Doc No. 206) Borden LP rejected the First Offer on grounds that, amongst other reasons, the Lenders failed to specify a purchase price and the form of consideration being proposed (e.g. cash at closing, by promissory note, or other deferred/structured payment) (see Plaintiff's Rule 19-a Statement, ¶¶ 31 and 32) (Doc No. 164).

As the parties continued their discussions respecting the First Offer, Michael Borden prepared to refinance the loan and created PRS1000 as an affiliate of Borden LP to act as the borrower with US Bank National Association (US Bank) which had agreed to accept Switch Units as collateral. Borden LP hired the accountants, Hagen, Streiff, Newton & Oshiro,

[7] The parties' prior dispute respecting the validity of the Notice is not before the court as it was not raised in the pleadings, nor in the motion papers. Moreover, the Lenders' conduct in subsequently making bids to purchase the Switch Units waived any objections it may have had to the substance of the Notice.

Accountants, P.C. (the independent valuation firm) to assist with calculating the Switch Units' sales price to PRS1000 (Borden affidavit, ¶¶ 45 and 46). It is noted that Michael Borden was the president and sole member of PRS1000. The Switch Unit sales price was "calculated by starting with $18.36, the closing price for the publicly-traded Class A Switch stock on November 20, 2017, applying a 31% lack of marketability discount determined by [the independent valuation firm] and multiplying that discounted per share figure by 5,599,998" (Borden affidavit, ¶ 47). Accordingly, on or about November 20, 2017, pursuant to a Unit Purchase Agreement (the Sales Agreement) (Doc No. 142), the Switch Units were transferred to PRS1000 which delivered to Borden LP a ten-year term promissory note (the Promissory Note) (Doc No. 143) in the amount of $70,973,321.85, with a 2.64% annual interest rate. Michael Borden personally guaranteed the Promissory Note.[8] Initially, he did not disclose the PRS1000 transaction with Borden LP's partial owners, the Trustee of the Board and Children's Trust (the Trustee) (see Lenders' Rule 19-a Statement, ¶¶ 10, 94).

On November 24, 2017 the Lenders sent Borden LP another letter (the Second Offer) (Doc No. 140) proposing to pay "$15.71 per Switch Unit" which represented "a 15% discount on the four-day volume weighted average price of Switch, Inc. Class A stock." Borden LP did not respond to the Second Offer. Instead, days later, on November 27, 2017, PRS1000 entered into Term Loan Agreement with US Bank (Doc No. 238) for $30 million (the US Bank Loan). On that same date and in advance of the extended maturity date, Borden LP paid the Lenders $16,613,145.39, representing the principal balance of the loan due, plus interest (Borden affidavit, ¶ 49; Plaintiff's Rule 19-a Statement, ¶ 48).

[8] A copy of the guarantee was not submitted, but Borden admitted in footnote 2 of his 7/22/19 affidavit (Doc No. 234) that he personally guaranteed the Promissory Note.

By letter dated December 15, 2017 (the Sale Notice) (Doc No. 146), Borden LP notified the Lenders that it sold the Switch Units to PRS1000 as part of a loan refinancing transaction and that pursuant to § 5.06 (b) of the Credit Agreement, it would pay the Switch Sharing Percentage "within two business days following each receipt of net proceeds" and that "[s]ince no proceeds yet have been received by [Borden LP], no [Switch Sharing Percentage] payment has become due under the Credit Agreement." Although Borden LP asserts that it was not yet required to make any Switch Sharing Percentage payments, it offered to pay $12,891,999.56 (see Plaintiff Rule 19-a Statement, ¶ 50) to the Lenders nonetheless (Borden affidavit, ¶ 3). The Lenders rejected plaintiff's offer because the amount differed significantly to Lenders' claimed amount due of about $23 million (Court tr at 38: 20-23 [Doc No. 277], and the Lenders Response to Plaintiff's 19-a Statement, ¶ 50 [Doc No. 253]). On the same date as the Sale Notice, Borden LP commenced the instant action for a declaration that it fully complied with the terms of the Credit Agreement and properly transferred its interest in the Switch Units.

In their Answer (Doc No. 9) to the Complaint, the Lenders generally denied the allegations therein and interposed the following counterclaims against plaintiff: (a) breach of contract for failing pay the Switch Sharing Percentage and refusing to consider the Lenders' offers to purchase; (b) actual fraudulent conveyance/transfer in violation of New York Debtor & Creditor Law (DCL) § 276[9]; (c) constructive fraudulent conveyance/transfer in Violation of DCL § 273; (d) a declaration of plaintiff's default under the Credit Agreement; and (e) indemnification

[9] Section 9.07 of the Credit Agreement states that the subject contract "shall be construed in accordance with and governed by the laws of the State of New York." Accordingly, the court will not address the relief sought pursuant to Nev. Rev. Stat. § 112.180 and/or Nev. Rev. Stat. § 112.190 (See also, CPLR 301, 501, and 503).

pursuant to § 9.05 (a) of the Credit Agreement and § 7.5 of the Collateral Agreement.[10] In response, plaintiff generally denied the counterclaims and asserted affirmative defenses (see Reply to Counterclaims, Doc No. 11).

The Lenders also interposed a third-party summons and complaint (Third-Party Complaint) (Doc No. 10) against Michael Borden and PRS1000 for: (a) tortious interference with a contract; (b) actual fraudulent conveyance/transfer in violation of DCL § 276; and (c) constructive fraudulent conveyance/transfer in violation of DCL § 273. In their Answers (Doc Nos. 224 and 225), third-party defendants Michael Borden and PRS1000 generally denied the allegations in the Third-Party Complaint and interposed affirmative defenses.

ARGUMENTS

Motion Sequence Numbers 006 and 009:

Borden LP contends that a declaratory judgment must be granted in its favor and the Lenders' counterclaims dismissed because: (1) Borden LP complied with its obligations under the Credit Agreement by timely repaying the loan amount due, plus accrued interest; (2) § 5.06 (b) of the Credit Agreement expressly permitted the sale of the Switch Units and did not prohibit its sale to an affiliate entity such as PRS1000; (3) the Switch Units' sale did not render Borden LP insolvent but rather facilitated a loan refinancing in order to timely repay the original loan to the Lenders; (4) the sale price for the Switch Units was based on a third-party independent analysis; (5) the Lenders rejected plaintiff's offer to advance the payment of the Switch Sharing Percentage; (6) the First Offer was not a proper bid because it failed to include a purchase price and/or the form of consideration; (7) the Second Offer was untimely as it was not made by

[10] The Credit Agreement refers to "Exhibit D" as the Collateral Agreement but it was not annexed thereto, and a copy was not uploaded to NYSCEF.

October 13, 2017 (ten business days from the Notice); (8) the Lenders did not have 60 days to make an offer; and (9) Borden LP admits owing a Switch Sharing Percentage and will pay it according to the Credit Agreement once "net proceeds" from the Switch Unit sale to PRS1000 are received in accordance with the terms of the Promissory Note and Sale Agreement.

Additionally, Michael Borden and PRS1000 contend the Third-Party Complaint must be dismissed because the Switch Units sales transaction did not interfere with Borden LP's obligations under the Credit Agreement, nor was there an actual fraudulent conveyance of the Switch Units because: (i) the principal loan amount due, plus interest, was paid prior to the extended maturity date; (ii) Borden LP admits owing the Switch Sharing Percentage; and (iii) Michael Borden acted in his corporate capacity and the personal guarantee of the Promissory Note was for the benefit of ensuring that Borden LP could repay the loan to the Lenders.

Motion Sequence Number 007 and 008:

The Lenders contend that plaintiff's declaratory judgment action must be dismissed and the counterclaims granted because Borden LP breached §§ 5.06 (b) (i) (C) and 5.06 (d) (i) of the Credit Agreement by, respectively, rejecting the Lenders' timely offers as the highest bidder[11] and failing to pay the Switch Sharing Percentage promptly after the PRS1000 Switch Units sales transaction.

Moreover, as third-party plaintiffs, the Lenders argue that their Third-Party Cause of Action for tortious interference with contract and actual fraudulent conveyance against Michael Borden and PRS1000 must be granted because: (1) the "sham sale" of the Switch Units to the "straw purchaser" PRS1000 hindered and delayed the payment of the Switch Sharing Percentage

[11] The Lenders aver (Lenders' Rule 19-a Statement at ¶ 57) that they offered $81 million (the First Offer) and then for $87.98 million (the Second Offer) to purchase the Switch Units which offers it claims were about $10 million more than SPR1000's sales price.

by forbearing from payment of the Promissory Note; and (2) Michael Borden was not acting in the interest of Borden LP as its corporate officer, but rather for his own benefit because: (i) he directed Borden LP to reject the Lenders' offers which would have been more economically profitable to Borden LP than PRS1000's offer; (ii) he personally guaranteed PRS1000's obligations under the Promissory Note; and (iii) he owns 100% of PRS1000, effectively retaining full control of the Switch Units as its sole title holder.

For the reasons discussed below, Motion Seq. Nos. 006 and 009, are granted and Motion Seq. Nos. 007 and 008, are denied.

DISCUSSION

"On a motion for summary judgment, the moving party 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" (*Xiang Fu He v. Troon Mgmt., Inc.*, 34 N.Y.3d 167, 175 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The burden then shifts to the opponent of the motion to "to establish the existence of material issues of fact which require a trial of the action" (*Xiang Fu He*, 34 NY3d at 175, quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits

of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]).

Moreover, a declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001; *see also Long Is. Light. Co v Allianz Underwriters Ins. Co*., 35 AD3d 253 [1st Dept 2006]).

Credit Agreement § 5.06 (b) (i) (C)

The Lenders contend that plaintiff breached § 5.06 (b) (i) (C) of the Credit Agreement when Borden LP refused to accept the Lenders' higher bid to purchase the Switch Units. Under New York law, the elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Belle Lighting LLC v. Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019], *quoting Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept. 2010]) (see New York Pattern Jury Instr 4:1 [2019]). Where the plain language of the contract establishes obligations on the other party that have not been met, summary judgment is warranted (*Bartfield v RMTS Assoc.*, LLC, 283 AD2d 240, 241 [1st Dept 2001]). Here, the parties had a valid contract (the Credit Agreement). However, the Lenders cannot succeed on their counterclaim for breach of contract because they failed to establish their own performance under the contract and failed to establish that plaintiff breached the terms of the Credit Agreement (see *Dorfman v American Student Assistance*, 104 AD3d 474 [1st Dept 2013]).

Plaintiff's business decision to refinance the loan using the Switch Units as collateral (as it had previously done with Credit Suisse to obtain the loan), is not being challenged. The parties' dispute began when plaintiff provided Notice of its intent to sell the Switch Units that

would ultimately secure the refinancing and pay the Lenders the loan amount and interest due by the extended maturity date.

The Lenders' First Offer was timely made within 10 days from the date of the Notice in accordance with § 5.06 (b) (i) (B) of the Credit Agreement. All parties agree that the First Offer did not include a purchase price (Court tr at 19). Indeed, the Lenders contend that an "offer" does not require a purchase price (Court tr at 43: 4-9) and that in any event, it could not provide a specific price offer until the Switch shares were publicly traded after which they would be able to calculate the 20% discount offer made in its first bid. The Credit Agreement, however, did not require that the Lenders' offer to be contingent on the public trading price of Switch's Class A stocks since a private sale of Switch Units was not expressly excluded in the Credit Agreement. Nevertheless, the Lenders' decision to wait until the public sale of the Switch shares before providing a purchase price rendered its first bid incapable of being considered, let alone accepted, as an "offer" by plaintiff.

As noted by the Lenders' attorneys during oral argument "[a]n offer is -- an offer is a set of terms that are capable of acceptance as a contract. That's what an offer is." (Court tr at 42: 12-14). Indeed, an offer "must be plain and clear enough to establish the intended terms of the proposed contract" (*Amalfitano v NBTY, Inc.*, 128 AD3d 743, 744 [2nd Dept 2015], quoting *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 104 [1st Dept 2009]). Whether an omission in an offer prevents it from being sufficiently definite to preclude an unequivocal acceptance requires the court to determine if the omission, the purchase price in this case, renders the offer "vague and uncertain" and whether the omitted term is "material" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 590 [1999]).

Here, the First Offer merely provided a formula, or a calculation, upon which a purchase price would be made at some point in the future. Since the Switch shares had not yet been publicly traded when the First Offer was made, a purchase price calculation based on an unknown weighted average price of the publicly traded Switch shares could not yield a price offer that plaintiff could possibly entertain in contemplation of a Switch Units sales contract with the Lender, ultimately rendering the First Offer "vague and uncertain." Additionally, the parties did not agree to "conclude a contract of sale" absent a settled purchase price (UCC 2–305[1]; and *Matter of Express Indus. & Terminal Corp.*, 93 NY2d at 860). To the contrary, plaintiff's rejection letter to the First Offer makes clear that a purchase price was required and was being requested before Borden LP could consider the bid a viable offer. Such demand makes the purchase price a "material term" – the omission of which led Borden LP to properly reject the Lenders' first bid as an improper offer.

Even if the court concluded that plaintiff's rejection of the First Offer was improper, which it was not, and irrespective of the validity of Lenders' first bid as a viable offer, which it was not, the Lenders' very insistence that they had a right to make multiple offers between the date of the Notice but no later than 60 days after the Notice, rendered the First Offer presumptively revoked when the Second Offer was made on November 24, 2017 (see *e.g. Rubin v Baumann*, 148 AD3d 556, 557 [1st Dept 2017], *citing Norca Corp. v Tokheim Corp.*, 227 AD2d 458 [1st Dept 1996]). When the Second Offer was made, which included a specific purchase price with newly proposed discount terms, it was also properly rejected by plaintiff as untimely because this second bid fell outside the 10-day bidding period prescribed by § 5.06 (b) (i) (B) of the Credit Agreement and most notably because the subject Switch Units had already been effectively transferred to PRS1000 on November 20, 2017.

The Lenders' contention that they had both 10 days (until October 13, 2017) and 60 days (until November 27, 2017) from the date of the Notice to make an offer to purchase the Switch Units, is misplaced. In support of its belief that it could make multiple offers after the initial bid and up to 60 days from the Notice date (see Court tr at 46:1-3), the Lenders presented evidence that during the Credit Agreement negotiations between plaintiff and Credit Suisse the parties deleted the phrase, "*after which time [the Lender] shall have no further right to present an offer pursuant to this clause...*" at the end of § 5.06 (b) (i) (B) and argue that by deleting these words it was the parties' intention that the Lenders were permitted to present further offers beyond the 10-day period prescribed therein (see Defendants' Memorandum of Law, Doc No. 166 at 5). The Lenders were admittedly not parties to the negotiated terms of the Credit Agreement and defendants' conclusion as to what was intended by the parties when they deleted the aforementioned phrase is no more convincing than the court's supposition that the phrase was redundant as the provision itself makes clear that the Lenders were to make an offer to purchase, if any, "no later than 10 Business Days after the [N]otice" (§ 5.06 [b] [i] [B] of the Credit Agreement). Even so, the Lenders' extrinsic evidence cannot be considered because "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing [internal quotation marks and citation omitted]" (*Golden Gate Yacht Club v Societe Nautique de Geneve*, 12 NY3d 248, 256 [2009]). Extrinsic evidence may not be submitted to interpret the contract unless it is ambiguous (*Consedine v Portville Cent.l School District*, 12 NY3d 286, 293 [2009]). Here, the terms of the subject provisions in the Credit Agreement, namely § 5.06 (b) (i) (B) and (C), are clear and unambiguous.

Under the Lenders' theory that § 5.06 (b) (i) (C) allowed them to make multiple bids for up to 60 days of the Notice, § 5.06 (b) (i) (B) of the Credit Agreement would be rendered meaningless since the 60 days would overlap with the 10-day period. In fact, it could even be argued that these two provisions are seemingly conflicting were the court to give them credence as the Lenders insist. It is the court's obligation to "avoid an interpretation that would leave contractual clauses meaningless," and "conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect" (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings*, LLC, 149 AD3d 127, 133-34 [1st Dept 2017]; *Isaacs v Westchester Wood Works*, 278 AD2d 184,185 [1st Dept 2000]). In this case, the Lenders were specifically referenced in § 5.06 (b) (i) (B), but not in § 5.06 (b) (i) (C) of the Credit Agreement because the latter did not apply to it. With the obvious intent explicitly expressed in the contract, the only reasonable interpretation is that the Lenders had 10 days from the Notice to make an offer, and not 60 days as they insist. In fact, the 60-days noted in §5.06 (b) (i) (C) of the Credit Agreement referred to the lookback period within which plaintiff was required to accept the highest offer made for the purchase of the Switch Units.

The semantic dispute over whether the words "shall sell" or "consummate the sale" meant that the sale had to "close within 60 days" (see Court tr at 49: 19-24, 52 and 58: 2-7) is inconsequential here where the contract for sale of the Switch Units to PRS1000 occurred on or about November 20, 2020, within that prescribed 60 day period and where the Lenders were precluded by §5.06 (b) (i) (B) of the Credit Agreement from making another offer past 10 days from the Notice. Similarly, whether or not the deal was "less profitable" than if Borden LP accepted the Lenders' offers is of no import here because Borden LP was not obligated to accept a late offer (the Second Offer), nor accept a bid missing material terms (the First Offer), leaving

plaintiff with one viable offer to consider and accept as the "highest" bid - that of PRS1000. Additionally, Borden LP's failure to wait out the 60 days and see if another offer came in after the PRS1000 offer, is of no import to this litigation since the Lenders' time to make a viable offer had by then long expired.

Burden LP's contentions that the Lock-Up Period Exception only permitted Switch Units sales in connection to a loan refinance transaction and that a sale to the Lenders could only be made in April of 2018, after the extended loan maturity date, is without merit. Although these assertions were raised for the first time during oral argument (Court tr at 27: 15-21 and 28:19-20), defendants addressed them at the hearing and so the issues will be addressed here. If plaintiff's argument were to have any credulity, the Notice would have been nothing more than a pro forma letter of compliance with § 5.06 (b) (i) (A) of the Credit Agreement. The court agrees with defendants' rebuttal argument (Court tr at 61: 13-22) that the Lock-Up Agreement did not restrict sale of the Switch Units to the Lenders because the Switch Units in question were the "pledge, security interest ... in existence as of the date" of the Lock-Up Agreement and therefore fell within its exception and could be sold. It just so happens that if Borden LP sold the Switch Units to defendants, the collateral (i.e., the Switch Units) needed to obtain the US Bank loan would not have been available. Although it could be argued that plaintiff rejected the First and Second Offers because it never intended to sell the Switch Units to defendants, the fact remains that the Lenders failed to make a proper offer to purchase them *ab initio*, having omitted material terms therein and subsequently having made an untimely Second Offer.

Credit Agreement § 5.06 (d) and § 7 (c)

The Lenders contend that Borden LP breached § 5.06 (d) (i) of the Credit Agreement when it refused to pay the Switch Sharing Percentage promptly after the sale of the Switch Units.

Section 5.06 (d) (i) of the Credit Agreement states that "... payments of the Switch Sharing Percentage shall be made promptly, and in no event later than two (2) Business Days after the occurrence of the event triggering [Borden LP's] duty to pay its Switch Sharing Percentage." Accordingly, the Lenders argue that the "triggering event" occurred on November 20, 2017 when the Switch Units were transferred to PRS1000 and that the failure to pay the subject percentage amounts due was an "Event of Default" pursuant to § 7 (c) of the Credit Agreement.

Borden LP contends that although the "triggering event" under § 5.06 (d) (i) of the Credit Agreement gives rise an obligation, or duty, to pay the Switch Sharing Percentage, § 5.06 (b) (i) (D) (i) dictates when those payments are due and that is "promptly (and in no event later than two Business Days) following receipt of the net proceeds arising from" the Switch Units sale. The Credit Agreement does not define the term "net proceeds" though this term is cited approximately three times in reference to the Switch Sharing Percentage payments. Nevertheless, the Sale Notice provided to the Lenders defines the term "net proceeds" as the "payments of principal and interest on the [Promissory] Note" and defendants did not dispute this construction of the term. It is plaintiff's argument that it was not in default pursuant to § 7 (c) of the Credit Agreement because PRS1000 did not pay cash for the purchase of the Switch Units but rather issued Borden LP the Promissory Note wherein payments on the note (the net proceeds) was due on November 20, 2019 (see Borden affidavit, ¶ 56) pursuant to a Deferral Agreement[12] (Doc No. 148) executed between the parties.

Indeed, because the plain and unambiguous language in the contract makes clear that the Switch Sharing Percentage amount was due upon "receipt of the net proceeds" from the Switch Units sale and since Borden LP had not received any "net proceeds," or payments under the

[12] Originally the first payment on the Promissory Note was due November 20, 2018.

Promissory Note at the time the Switch Units were transferred to PRS1000, plaintiff was not required to make the subject payments two days after the subject sale, or by the loan's extended maturity date of December 31, 2017. It is a well settled contract principle that "when parties set down their agreement in a clear complete document, their writing should be enforced according to its terms" (*Kennedy Assoc. v JPMorgan Chase Bank N.A.*, 134 AD3d 412, 413 [1st Dept 2015]). Here the Credit Agreement plainly requires that once payment on the Promissory Note is received, Borden LP shall "promptly" and no later than two business days after its receipt, pay the Lenders the Switch Sharing Percentage due (§ 5.06 (b) (i) (D) (i) of the Credit Agreement). Accordingly, the Lenders' counterclaim for a declaration of contractual default pursuant to § 7 (c) of the Credit Agreement, is dismissed as without merit.

The parties dispute, however, is not limited to when payments are due, but also includes a difference of opinion on the amount due once the Switch Sharing Percentage payment is initiated. As previously noted, plaintiff contends that it owes the Lenders a Switch Sharing Percentage in the amount of $12,891,999.56, whereas the Lenders claim the amount due is actually closer to $23 million. There is no dispute that the language in the parties' contract is clear and unambiguous that in the event of a Switch Units sale, the Switch Sharing Percentage amount due is calculated as "thirty percent (30%) of the increase in value of the Switch Units from the Initial Switch Unit Value" (§ 5.06 [d] [i] of the Credit Agreement). The parties also agree that the Initial Switch Unit Value was $5 per share.

Plaintiff maintains, however, that the "value" of the Switch Units is measured by the "sales price" and since it sold the Switch Units at $12.67 per share, the increase in value of the Switch Units was $7.67 ($12.67 [sales price] – $5.00 [Initial Switch Unit Value] = $7.67). Plaintiff calculates that "30% of the [$7.67] increase in value" is $2.03 per share multiplied by

the 5,599,998 Switch Units sold to PRS1000, yielding a Switch Sharing Percentage amount due of $12,891.999.56. The Lenders, on the other hand, maintain that the "value" of the Switch Units is not measured by Borden-PRS1000 transaction, and the court agrees.

The Switch Units were transferred to PRS1000 at a discounted price. The Credit Agreement, however, makes no provision that the "value" of the Switch Units be based on the sales price, but rather "the increase in value of the Switch Units from the Initial Switch Unit Value" (§ 5.06 [d] [i] of the Credit Agreement). Here, the court must look at the actual "value" of the Switch Units on the date of the sale to PRS1000. Contrary to plaintiff's contention, § 5.06 (d) does not define the term "value" to be the "sales price" (see Plaintiff's Memorandum of Law at 2) (Doc No. 268). In fact, § 5.06 (a) permits the Lenders the right "to demand an independent valuation of the fair market value of the Switch Units" and goes on to note that the "value" on the date of the Credit Agreement was $15, which was later reduced to $5 (the initial Switch Unit Value). Based on this provision alone, the parties' understanding of "value" was indeed the undiscounted "fair market value" of the Switch Units. Since the actual market value upon which the Switch shares traded is known, there is no need for a "valuation" in order to determine what the fair market value would be.

Bloomberg LP's recorded stock price (Doc Nos. 214 and 215) shows that on the date of the Sales Agreement with PRS1000, November 20, 2017, the Switch shares traded at $18.30 per share. Incidentally, this figure was the base amount per share used to calculate the price discount to be negotiated with PRS1000 for the Switch Sales. Were the court to entertain defendants' contention that the subject Switch Units sale was a "sham sale" transaction (discussed below) because, according to meta-data documents obtained during discovery, the final version of the Sales Agreement did not occur until December 15, 2017 (Defendant's Memorandum of Law at 9,

Doc No. 166), the traded Switch shares on that date according to Bloomberg LP's recorded stock price was, $17.10 per shares. Nevertheless, the court must apply the actual "value" of the Switch shares recorded on the date of the parties' agreement to sell, which was $18.30. Here, the increase in value was, $13.30 ($18.30 [market Switch Unit value] - $5.00 [Initial Switch Unit Value] = $13.30 [increase in value]). Pursuant to § 5.06 (d) (i) of the Credit Agreement the Switch Sharing Percentage due to the Lenders is 30% of $13.30 per share, or $3.99 per share, calculated to yield a Switch Sharing Percentage amount of $22,343,992 (5,599,998 [Switch Units sold] x $3.99 = $22,343,992). This amount, however, was not due until Borden LP received the "net proceeds" from the sale, as previously discussed.

Counterclaim for Fraudulent Conveyance

The Lenders contend that the Switch Units sale to PRS1000 was a fraudulent conveyance in violation of DCL § 276, entitled "Remedies of creditor." To establish a fraudulent conveyance, the Lenders must demonstrate that: (1) there was a conveyance; (2) the transfer of the Switch Units to PRS1000 would render Border LP insolvent; and (3) there was no fair consideration for the conveyance (see DCL § 273; *Matter of CIT Group/Commercial Servs., Inc. v. 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 (1st Dept 2006]). Moreover, the Lender must allege fraudulent intent with particularity as required by CPLR 3016 (b) which states, in part, that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (*RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015], *lv dismissed in part, denied in part* 26 NY3d 1059, [2015]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Here, the actual fraudulent conveyance counterclaim must be dismissed because the Lenders failed to allege fraudulent intent with the factual particularity required and relied on conclusory statements based on "information and belief" which has been held to be insufficient to sustain this claim (see *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018] [internal quotation marks and citation omitted]). Absent sufficient facts to conclude a "reasonable inference of the alleged misconduct," the claim for actual fraudulent conveyance must fail (see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). Additionally, the difference between the discounted price attempted to be offered by the Lenders and the discounted price made with PRS1000, alone, fails to support a fraudulent conveyance claim where the Lenders supplied no proof of fraudulent intent behind the higher discounted price (see e.g. *U.S. Bank N.A. v Martinez*, 162 AD3d 528, 528 [1st Dept 2018] where the court held that there can be no fraud based upon "the mere inadequacy of price"). Furthermore, the different sale "discounts" is of no moment here where the plaintiff was under no obligation to accept the Lenders' invalid offers and where there is no dispute that the agreement between Credit Suisse and Borden LP provided that any offer for the purchase of the Switch Units would be made on a "blind basis" (Court tr at 13: 14-18), or "without knowing the specifics of any offers which Borden LP already may have had or even if Borden LP had any offers" (Borden affidavit at ¶ 34).

The continued acknowledgment that a Switch Sharing Percentage was due to the Lenders was demonstrably a good faith attempt on the part of Borden LP to proceed with the Switch Units sales transaction in order to timely pay the loan amount, plus interest, by the extended maturity date which for whatever reason the Lender refused to extend for another year. Moreover, the claim for fraudulent conveyance is undermined insofar the Switch Sharing

Percentage amount was not due at the time the counterclaims were interposed and therefore could not have impaired the collection of a debt not yet owed (see *3 E. 54th St. N.Y., LLC v Patriarch Partners, LLC*, 90 AD3d 418 [1st Dept 2011]). Nor is there any evidence that Borden LP was rendered insolvent as a result of the Switch Unit Sale to PRS1000 (see Borden LP Financial Statements, Doc Nos. 144 and 145).

Counterclaim for Indemnification

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82 [1st Dept 2018]; *Torres v Morse Diesel Intl., Inc*., 14 AD3d 401, 403 [1st Dept 2005]). "'The right to contractual indemnification depends upon the specific language of the contract'" (*Trawally v City of New York*, 137 AD3d 492, 492-493 [1st Dept 2011], quoting *Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255, 1255 [2d Dept 2010]). Additionally, indemnity contracts "must be strictly construed so as to avoid reading unintended duties into them" which the parties did not intend to assume (*905 5th Assoc., Inc. v Weintraub*, 85 AD3d 667, 668 [1st Dept 2011]).

In the matter before the court there can be no dispute that the indemnification provision, § 9.05 (a) of the Credit Agreement specifies that Borden LP would be liable for "all out-of-pocket expenses incurred by [the Lenders] ... in connection with the enforcement or protection of its rights in connection with" the subject contract and, relevant here, "[t]o the extent that [Borden LP] fails to pay any amount required to be paid." Here, the Switch Sharing Percentage required to be paid was not due on the date claimed by the Lenders and therefore, once again, Borden LP

was not in default of the terms of the Credit Agreement, rendering any application of the indemnification provision § 9.05 (a), premature and inapplicable under the facts of this case. The Lenders also seek to enforce the purported indemnification provision of §7.5 of the Collateral Agreement, but a copy was not submitted to the court and thereunder the relief sought thereunder cannot be considered.

Third-Party Action

The Lender's Third-Party Complaint for tortious interference with contract must fail and is hereby dismissed. In order to establish a cause of action for tortious interference with the performance of a contract, it is necessary to demonstrate that: "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]; *AREP Fifty-Seventh, LLC v PMGP Assoc., LP*, 115 AD3d 402 [1st Dept 2014]).

PRS1000 was created to act as the borrower with US Bank to refinance the loan. There is no documentary evidence, or deposition testimony, supporting the Lenders' claim that PRS1000 was created or procured to interfere with obligations under the Credit Agreement and more specifically to delay payment of the Switch Sharing Percentage amounts due. Contrary to the Lenders' conclusory allegations, PRS1000 was created to avoid a breach of the Credit Agreement and facilitate the loan refinancing to ensure that the principal amount of the loan, plus interest, would be paid by the extended maturity date, otherwise -- and it is uncontroverted -- Borden LP would have had no liquidity to timely pay off the loan (Court tr at 6: 3-10).

The court is unpersuaded by the Lenders' further unsupported assertion that the failure of Michael Borden to disclose the PRS1000 Switch Units transaction to the Trustee somehow proves that the Sales Agreement was a "sham sale" created to fraudulently convey Switch Units and avoid paying the Switch Sharing Percentage. There is no genuine justiciable dispute between Borden LP and the Trustee. There is no claim that the Trustee would have refused and objected to the subject sales transaction as it materialized, and Borden LP's Sale Notice dated December 15, 2017 admits to an obligation to pay the Switch Sharing Percentage and admits it still (court tr at 36: 20-25). Nor does Michael Borden's role as the sole shareholder of PRS1000 and his control of PRS1000 alone amount to proof that the Lenders were wronged by, or support, an alleged intentional interference with the Credit Agreement and/or fraudulent conveyance (see also *D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451 [1st Dept 2013]). Lastly, defendants failed to demonstrate how personally guaranteeing a PRS1000's $71 million Promissory Note benefited Michael Borden rather than Borden LP's interest in paying the loan, plus accrued interest, to the Lenders in a timely manner and by the extended maturity date.

CONCLUSION

In as much as there are no factual disputes to be determined at trial, summary disposition of this matter is warranted. The court has considered all remaining arguments raised by the parties and find them to be without merit and/or moot as a result of the determinations herein.

Accordingly, it is hereby

ORDERED that the applications by plaintiff Borden LP and third-party defendants, Michael Borden and PRS 1000 LLC, for summary judgment (respectively, Motion Seq. Nos. 006 and 009), are granted; and it is further

ADUJUDGED and DECLARED that Borden LP fully complied with its obligations under the parties' Term Loan Credit Agreement dated July 19, 2013 by timely paying the principal amount due, plus interest and permissibly transferring its interest in the Switch Units pursuant to said agreement; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor plaintiff, Borden LP and against defendants, TPG Sixth Street Partners and PBB Investments II, LLC, dismissing all counterclaims against plaintiff; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of third-party defendants, Michael Borden and PRS 1000 LLC against third-party plaintiffs, TPG Sixth Street Partners and PBB Investments II, LLC, dismissing the third-party action against them; and it is further

ORDERED that the applications by defendant/third-party plaintiffs, TPG Sixth Street Partners and PBB Investments II, LLC, for summary judgment (respectively, Motion Seq. Nos. 007 and 008), are denied.

DATED: April 28, 2020

ENTER:

O. P. Sherwood

J.S.C.

O. PETER SHERWOOD