CS Leveraged Loan Funding 2021, LLC v Bank of Am., N.A.

2024 NY Slip Op 32013(U)

June 11, 2024

Supreme Court, New York County

Docket Number: Index No. 652151/2023

Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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CS LEVERAGED LOAN FUNDING 2021, LLC,BLACK DIAMOND CAPITAL MANAGEMENT LLC,

Plaintiff,

- v -

BANK OF AMERICA, N.A.,

Defendant.

INDEX NO. 652151/2023

MOTION DATE 04/17/2024, 05/29/2024

MOTION SEQ. NO. 009 011

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 113, 114, 115, 116, 117, 118, 119, 120, 124, 137, 138, 139, 140, 141, 142

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 132, 133, 134, 135, 136

were read on this motion to/for PRECLUDE.

Upon the foregoing documents and for the reasons set forth on the record (*tr*. 6.11.24), the motions to quash (Mtn. Seq. Nos. 009, 011) brought by non-party Goldberg Lindsay & Co. LLC (**Lindsay Goldberg**) are denied solely to the extent that Steven Klinger must sit for a deposition for the time indicated in the plaintiffs' Memorandum of Law – *i.e.*, three hours (NYSCEF Doc. No. 137, at 3) but are otherwise granted.

This case arises out of the attempted purchase by CS Leveraged Loan Funding 2021 LLC (**CS Leveraged**) via its alleged agent, Black Diamond Capital Management LLC (**Black Diamond**, and collectively with CS Leveraged, **Plaintiffs**), of a participation interest in certain debt securities (the **Crown Loans**) from the defendant Bank of America (**Bank of America** or

Defendant). The Crown Loans were originally issued by Port Townshend Holdings Company, Inc. (**Port Townshend**), and governed by a certain Credit Agreement, dated April 3, 2018 (the **Credit Agreement**; NYSCEF Doc. No. 141). Lindsay Goldberg was the equity owner of Port Townshend.

The initial lender, arranger, and "Administrative Agent" (as defined in the Credit Agreement) of the Crown Loans was Citizens Bank, N.A. (**Citizens Bank**). As alleged, Bank of America refused to close on the trade because Black Diamond was placed on a list of disqualified lending institutions (the **DQ List**). The Credit Agreement defines a "Disqualified Institution" as:

> (a) (i) any bank, financial institution or other entities separately identified in writing by the Company, Holdings or the Sponsor to the Arranger prior to the Closing Date,
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> [(ii) any bank, financial institution or other entity as mutually agreed between the Company and the Administrative Agent after the date hereof, or
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> [(iii) any Affiliate of any Person described in clauses (a)(i) or (a)(ii) above that is reasonably identifiable as an Affiliate of such Person on the basis of such Affiliate's name (each such person described in clauses (a)(i) through (a)(iii) above, a "Disqualified Lending Institution")

(NYSCEF Doc. No. 141, at 23).

Pursuant to paragraph (a)(i) of the definition, *prior to the closing date* (*i.e.*, April 3, 2018), the "Company" (Port Townshend) or the "Sponsor" (Lindsay Goldberg) could each place any entity on the DQ List unilaterally by identifying said entity to Citizens Bank. Pursuant to paragraph (a)(ii), however, *after the closing date*, such designations could be made as "mutually agreed" to between Port Townshend and Citizens Bank.

The Plaintiffs previously moved to extend the time for the completion of fact discovery (Mtn. Seq. No. 003) based in part on an October 29, 2018 email (the **Winnie Liu Email**) sent by Winnie Liu to an employee of Citizens Bank containing a list of "our NQLs" (*i.e.*, entities to be put on the DQ List) which included Black Diamond (NYSCEF Doc. No. 139, at 1-2) and copying Vincent Ley, a Port Townshend board member and employee of Lindsay Goldberg.

As discussed at oral argument on that motion (*tr*. 4.19.24; NYSCEF Doc. No. 145), this email, which appears to reflect an agreement as to the DQ List, did not occur prior to the closing of the transaction in accordance with paragraph (a)(i) and only occurred after the closing pursuant to paragraph (a)(ii). The Plaintiffs indicated that they had the right to explore whether there was an agreement between Port Townshend and Citizens and not merely Lindsay Goldberg (Port Townshend's equity sponsor) and Citizens Bank given the timing of when the email occurred and notwithstanding the fact that Vincent Ley (the Port Townshend director) was copied on the Winnie Liu Email. The court agreed to the extent of permitting certain interrogatories of Citizens Bank and otherwise indicating that the depositions of Winnie Liu and Vincent Ley appeared appropriate "[s]ubject to the motions to quash" brought by Lindsay Goldberg (NYSCEF Doc. No. 145, at 52:5-6).[1]

In support of the instant motions to quash, Lindsay Goldberg has adduced, among other things, the affidavit of Steven Klinger (the **Klinger Affidavit**), the former Executive Chairman and board member of Port Townshend and a resolution of the Board of Port Townshend (the **Port Townshend Board Resolution**) approving the Credit Agreement, appointing Steven Klinger as

[1] The Klinger Affidavit and Port Townshend Board Resolution had been filed in support of this motion but not in opposition to the motion to extend such that those two documents were not then in front of the court.

an Authorized Person and giving him broad authority to "**take or cause to be taken any and all such further actions … as the Authorized Persons or any one Authorized Person shall in his or her judgment determine to be necessary" and make all "other agreements" pursuant to the Credit Agreement** (*i.e.*, which authority necessarily includes the right to appoint anyone he chooses to facilitate any such agreement on behalf of Port Townshend to make an agreement with Citizens Bank as to any DQ List):

> WHEREAS, the Board has considered a proposal for the Company to enter into a Credit Agreement (the "Credit Agreement"), among the Company, Crown Corrugated Company, a Nova Scotia unlimited company (the "Canadian Borrower"), Crown Paper Group Inc., a Delaware corporation and the sole stockholder of the Company ("Holdings"), the Lenders party thereto and Citizens Bank, N.A., as administrative agent (the "Administrative Agent"), pursuant to which, among other things, the Company and the Canadian Borrower will obtain a senior secured revolving credit facility in an initial aggregate principal amount of up to USD $25,000,000, and the Company will obtain a senior secured term loan credit facility in an initial aggregate principal amount of up to USD $155,000,000, in each case subject to increase as set forth therein. Capitalized terms used herein but not otherwise defined have the meanings ascribed thereto in the Credit Agreement.
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> WHEREAS, the Company will use the borrowings under the Credit Agreement to, among other things, (a) finance working capital needs and other general corporate purposes of the Company and its subsidiaries, (b) pay the Dividend (as defined below), (c) refinance the indebtedness outstanding under the Revolving Credit, Term Loan and Security Agreement, dated as of February 12, 2015, as amended, among the Company, the subsidiaries of the Company party thereto, the financial institutions party thereto from time to time as lenders and PNC Bank, National Association, as administrative and collateral agent (such refinancing, the "Refinancing"), and (d) pay fees, premiums, expenses and other transaction costs payable or otherwise borne in connection with the foregoing transactions and the transactions contemplated thereby.
>
> WHEREAS, in connection with the Credit Agreement, Holdings, the Company and certain subsidiaries of the Company (such subsidiaries, collectively, the "Subsidiary Loan Parties" and, together with Holdings and the Company, the "Loan Parties") will be required (a) to enter into the Pledge and Security Agreement (the "Security Agreement"), by and among the Company, Holdings, the Subsidiary Loan Parties and the Administrative Agent, whereby

Holdings, the Company and the Subsidiary Loan Parties will grant a security interest in substantially all of their respective assets (other than certain excluded assets) to secure the Secured Obligations, (b) to enter into the Loan Guaranty (the "Loan Guaranty"), by and among Holdings, the Company, the Subsidiary Loan Parties and the Administrative Agent, whereby Holdings, the Company and such Subsidiary Loan Parties will guarantee the Guaranteed Obligations (as defined in the Loan Guaranty) and (c) to execute and deliver the Promissory Notes.

WHEREAS, the Board has determined that it is advisable and in the best interests of the Company for the Company to enter into the Credit Agreement and to obtain loans and other extensions of credit thereunder, to enter into the Security Agreement and to grant a security interest in its assets to secure the Secured Obligations, to enter into the Loan Guaranty and to guarantee, jointly and severally, irrevocably and unconditionally, together with the other Loan Parties, the Guaranteed Obligations, and to execute and deliver the Promissory Notes.

WHEREAS, the Board has reviewed and received advice from the financial officers of the Company with respect to the Company's financial condition (including the fair value of the assets and liabilities of the Company and the amount of its "capital" (as defined and computed in accordance with Sections 154 and 244 of the DGCL)) and a proposal to declare aone-time cash dividend in an aggregate amount equal to USD $60,000,000 (the "Dividend Cap"), payable in cash (a) first, to the holders of shares of the Company's issued and outstanding preferred stock, par value $0.01 per share, designated Series A Preferred Stock (the "Series A Preferred Stock"), in an aggregate amount that shall equal the cumulative dividends that have (i) accrued on each share of Series A Preferred Stock pursuant to Section 4.2(b) of the Company's Amended and Restated Certificate of Incorporation, as amended (the "Certificate") and (ii) not been paid as of the Record Date (as defined below) (such accrued but unpaid dividends, the "Accrued Dividends"), to be distributed on a pro rata basis to holders of record of shares of Series A Preferred Stock as of immediately following the close of business on April 3, 2018, the ("Record Date") and (b) second, to the holders of shares of the Company's issued and outstanding common stock, par value $0.01 per share (the "Common Stock"), in an aggregate amount that shall equal the amount, if any, by which the Dividend Cap exceeds the aggregate amount of the Accrued Dividends, to be distributed on a pro rata basis among the holders of record of shares of Common Stock as of immediately following the close of business on the Record Date (such payments described in clauses (a) and (b), collectively, the "Dividend"); provided, however, that in no event shall the aggregate amount of the Dividend exceed the Dividend Cap.

NOW, THEREFORE, BE IT:

New Senior Secured Credit Facilities

RESOLVED, that (a) the form, terms and provisions of the Credit Agreement, in substantially the form attached hereto as Annex A, (b) each of the transactions contemplated thereby to be undertaken by the Company, including, among other things, (i) the borrowing by the Company of Term Loans, Revolving Loans, Incremental Loans and Swingline Loans thereunder, and the obtainment by the Company of Letters of Credit thereunder, in each case, up to the full amount permitted thereunder (in each case, as in effect from time to time) and (ii) the Refinancing, and (c) the performance by the Company of all of its obligations pursuant thereto, be, and they hereby are, in all respects approved by the Board; and be it further

RESOLVED, that (a) the form, terms and provisions of the Security Agreement, in substantially the form attached hereto as Annex B, (b) each of the transactions contemplated thereby to be undertaken by the Company, including, among other things, the grant by the Company of a security interest in and a Lien on all or substantially all of its assets, and (c) the performance by the Company of all of its obligations pursuant thereto, be, and they hereby are, in all respects approved by the Board; and be it further

RESOLVED, that (a) the form, terms and provisions of the Loan Guaranty in substantially the form attached hereto as Annex C, (b) each of the transactions contemplated thereby to be undertaken by the Company, including, among other things, the guarantee by the Company of the Guaranteed Obligations, and (c) the performance by the Company of all of its obligations pursuant thereto, be, and they hereby are, in all respects approved by the Board; and be it further

RESOLVED, that (a) the form, terms and provisions of the Promissory Notes, each in substantially the form attached as Exhibit K of the Credit Agreement, in substantially the form attached hereto as Annex A, (b) each of the transactions contemplated thereby to be undertaken by the Company, and (c) the performance by the Company of all of its obligations pursuant thereto, be, and they hereby are, in all respects approved by the Board; and be it further

RESOLVED, that the Chairman of the Board, the Chief Executive Officer, the President, any Vice President, the Treasurer, the Secretary and any other officer of the Company (each, an "Authorized Person") be, and each of them individually hereby is, authorized, empowered and directed to take all or any part of the following actions on behalf of the Company:

(a) to execute and deliver, in the name and on behalf of the Company (i) the Credit Agreement, (ii) the Security Agreement, (iii) the Loan Guaranty, (iv) the Promissory Notes, (v) any and all other Loan Documents to which the Company is contemplated to be a party and (vi) any and all other agreements (including one or more mortgages, intellectual property security agreements and other security, pledge or other collateral agreements), assignments, documents, conveyances, certificates, notes and instruments to be executed and/or delivered

by or on behalf of the Company pursuant to or in connection with the Credit Agreement, the Security Agreement, the Loan Guaranty, the Promissory Notes or the other Loan Documents or required in connection therewith (collectively, the "Related Documents"), in each case of clauses (i) through (vi), in such form and containing such terms and provisions and with such changes, revisions, amendments, modifications and additions as such Authorized Persons or any one Authorized Person may approve (which approval, and the approval of the Board referred to above, shall be conclusively evidenced by such Authorized Persons' or any one Authorized Person's execution and delivery thereof);

(b) to incur indebtedness under the Credit Agreement from time to time (including the borrowing of Term Loans, Revolving Loans, Incremental Loans and Swingline Loans and the obtaining of Letters of Credit) up to the full amount permitted thereunder (in each case, as in effect from time to time) and to determine the terms of such indebtedness in effect from time to time (which determination shall be conclusively evidenced by the incurrence of such indebtedness on such terms at the direction of such Authorized Persons or any one Authorized Person);

(c) to negotiate the forms, terms and provisions of, and to execute and deliver, in the name and on behalf of the Company, any amendments, modifications, waivers or consents to the Credit Agreement, the Security Agreement, the Loan Guaranty, the Promissory Notes, any of the other Loan Documents or any of the Related Documents, in each case, as may be approved by such Authorized Persons or any one Authorized Person executing the same (which approval, and the approval of the Board, shall be conclusively evidenced by such Authorized Persons' or any one Authorized Person's execution and delivery thereof), which amendments, modifications, waivers or consents may provide for fees, premiums, expenses and other transaction costs or other amounts payable or other modifications of or relief under such agreements, documents or instruments, the purpose of such amendments, modifications, waivers or consents being to facilitate consummation of the transactions contemplated by the foregoing resolutions or any other purpose; and

(d) to carry out, amend, restate, supplement or otherwise modify, or to terminate, the Credit Agreement, the Security Agreement, the Loan Guaranty, the Promissory Notes, any of the other Loan Documents or any of the Related Documents or any other arrangements or agreements at any time existing between the Company and any of the parties to any of the foregoing agreements, documents or instruments; and be it further

Dividend

RESOLVED, that the Board, in reliance on, among other things, the advice of management (including the financial officers of the Company), whom the Board believes to be reliable and competent in the matter, and based upon information provided to it by

its officers and advisors, hereby determines (a) that (taking into account the borrowings under the Credit Agreement) the Company has sufficient surplus and funds otherwise lawfully available to pay the Dividend to the holders of Series A Preferred Stock and Common Stock in accordance with the provisions of the DGCL with respect to the payment of dividends, (b) that the Company is not currently insolvent, (c) that, after giving effect to the Dividend, the Company (i) will be in compliance with the provisions of the DGCL with respect to the payment of dividends and (ii) will not (x) be insolvent as a result of the payment of the Dividend, (y) be left with unreasonably small capital with which to engage in its business or (z) incur debts beyond its ability to pay such debts as they mature, such that the Dividend could be deemed a fraudulent conveyance or impermissible dividend or distribution under applicable law and (d) the payment of the Dividend will not impair the Company's ability to continue as a going concern; and be it further

RESOLVED, that the Dividend be, and the same hereby is, declared payable on April 3, 2018, out of the surplus of the Company lawfully available therefor (taking into account the borrowings under the Credit Agreement), to the holders of Series A Preferred Stock and the holders of Common Stock, in each case of record as of immediately following the close of business on the Record Date; and be it further

General Approvals

RESOLVED, ***that the Authorized Persons be, and each of them individually is, authorized, empowered and directed (a) to take or cause to be taken any and all such further actions*** and to prepare, execute and deliver, or cause to be prepared, executed and delivered, and where necessary or appropriate file or cause to be filed with the appropriate governmental authorities, all such other agreements, documents or instruments, (b) to incur and pay, or cause to be paid, all fees, premiums, expenses, transaction costs and other amounts payable, and (c) to engage such financial advisors, legal counsel and other advisors, consultants or experts, in each case ***as the Authorized Persons or any one Authorized Person shall in his or her judgment determine to be necessary, desirable, advisable or appropriate to consummate, effectuate, carry out or further the transactions contemplated by, and the intent and purposes of, the foregoing resolutions, the doing of such acts or things to be conclusive evidence of such determination***; and be it further

RESOLVED, that the omission from these resolutions of any agreement, document, instrument or other arrangement contemplated by any of the agreements, documents or instruments described in the foregoing resolutions or any action to be taken in accordance with any requirement of any of the agreements, documents or instruments described in the foregoing resolutions shall in no manner derogate from the authority of the Authorized Persons or any one Authorized Person to take all actions necessary, desirable, advisable or appropriate to consummate, effectuate, carry out or further the transactions contemplated by, and the intent and purposes of, the foregoing resolutions; and be it further

> RESOLVED, that each Authorized Person may authorize any employee or agent of, or counsel to, the Company to take any and all actions and to execute and deliver any and all agreements, certificates, documents and instruments referred to in these resolutions in place of or on behalf of such Authorized Person, with full power as if such Authorized Person were taking such action himself or herself; and be it further
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> RESOLVED, that all agreements, documents or instruments, including any engagement letter or fee letter, heretofore executed and/or delivered, and any and all lawful actions heretofore taken, by any Authorized Person in connection with the transactions contemplated by the foregoing resolutions be, and hereby are approved, ratified and confirmed in all respects as the act and deed of the Company, as applicable.

(NYSCEF Doc. No. 134, exhibit A [emphasis added]).

In Steven Klinger's affidavit, among other things, he indicates:

5. In my capacity as Executive Chairman of the Company-and as an Authorized Person of the Company—I determined, in my judgment, that it was desirable, advisable and appropriate to authorize Vincent Ley and Winnie Liu at Goldberg Lindsay & Co. LLC ("Lindsay Goldberg") to prepare and deliver a list of Disqualified Institutions on the Company's behalf, which list was contemplated by the terms of the Credit Agreement and furthered the Company's interests with respect to the financing thereunder.

6. Lindsay Goldberg is an investment firm that owns equity in a variety of portfolio companies. Lindsay Goldberg's employees often work with those portfolio companies and may, from time to time, serve as officers or directors of such companies***. Mr. Ley served alongside me as a member of the Board at this time, and had far more experience with identifying disqualified institutions for purposes of credit agreements.***

7. Based on my review of Exhibit B, ***I believe the list of Disqualified Institutions was prepared by Mr. Ley and Ms. Liu at Lindsay Goldberg and delivered to the Administrative Agent (as defined in the Credit Agreement) on October 29, 2018, on the Company's behalf, and Mr. Ley and Ms. Liu were authorized by me, in my capacity as an Authorized Person, to do so.***

(NYSCEF Doc. No. 134, ¶¶ 5-7 [emphasis added]). This facially resolves the issue previously identified by the Plaintiffs in the prior motion seeking to extend discovery. It is unequivocal that the Port Townshend Board Resolution makes clear that Steven Klinger was authorized to enter into the Credit Agreement and to do what was necessary to effectuate it. As such, and as

indicated above, Steven Klinger could designate **any person**, including an employee of Port Townshend's parent company (Winnie Liu of Lindsay Goldberg) and another member of the Board of Port Townshend itself (Vincent Ley), to make an agreement with between Port Townshend and Citizens Bank as to the DQ List, and/or he could ratify any such deal once it was made. In the Klinger Affidavit he not only indicates that this is what was done, but he explains why he did it – *i.e.*, because they had more experience with these issues and were better equipped to identify disqualified institutions. A limited deposition of Steven Klinger however on this issue is appropriate.

As set forth in the papers, however, this is not all the Plaintiffs seek to explore. In fact, the Plaintiffs now seek four additional depositions: the deposition of Steven Klinger, which they indicate they intend to limit to three hours (*see* NYSCEF Doc. No. 137, at 3) and which as discussed above appears appropriate, the deposition of Winnie Liu, the deposition of Vincent Ley, and the deposition of a corporate representative of Lindsay Goldberg (unless Winnie Liu or Vincent Ley were named as the corporate representative).

Lindsay Goldberg has moved (Mtn. Seq. Nos. 9 and 11) to quash these subpoenas on the grounds that the discovery sought is irrelevant and cumulative. In their opposition papers, the Plaintiffs contend this additional discovery is relevant to determine (i) whether Winnie Liu's email concerned the Credit Agreement or some other transaction, (ii) whether Winnie Liu and Vincent Ley believed themselves to be making an agreement on behalf of Port Townshend, and (iii) whether Winnie Liu and Vincent Ley were validly delegated the authority to make such agreements on Port Townshend's behalf. These arguments fail.

Steven Klinger as the Chairman of Port Townshend and as an Authorized Person pursuant to the Port Townshend Board Resolution is the appropriate person to field those questions. The subpoenas to Winnie Liu and Vincent Ley however are quashed as cumulative or irrelevant. As discussed above, what matters is whether Steven Klinger as the Authorized Person employed Winnie Liu (an employee of his company's equity sponsor) and Vincent Ley or either of them in making an agreement with Citizens Bank, or if he in fact ratified any agreement on behalf of Port Townshend. Given the Port Townshend Board Resolution and the Klinger Affidavit, these questions are for Steven Klinger. Asking the same questions of Vincent Ley or Winnie Liu is cumulative.

The other information sought is irrelevant. Simply put, Lindsay Goldberg's general policies and procedures are not relevant to this dispute. What is relevant solely is whether there was a mutual agreement between Port Townshend and Citizens Bank as to the DQ List.

Finally, the DQ List is not agreement-specific but purchaser-specific. What is agreement specific however is whether Port Townshend made an agreement with Citizens Bank if the agreement occurred post-closing. As discussed above, this could be done post-closing, and Steven Klinger had the authority to do this through whomever he chose to employ and he could ratify any such agreement that his equity sponsor made with Citizens Bank pursuant to the broad authority granted to him in the Port Townshend Board Resolution. The Klinger Affidavit makes clear that he employed Winnie Liu, an employee of his company's equity sponsor, and Vincent Ley, a

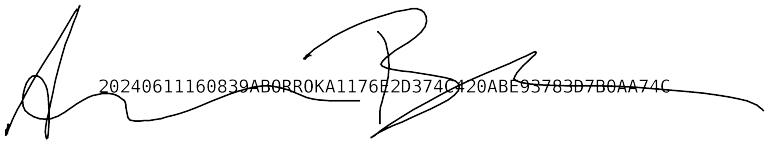
fellow board member at Port Townshend because they were better equipped to identify disqualified institutions. But this too is properly addressed to Steven Klinger, not them.

The Court has considered the parties' remaining arguments and found them unavailing.

Accordingly, it is hereby

ORDERED that non-party Lindsay Goldberg's motion to quash the subpoenas issued to Vincent Ley and Winnie Liu (Mtn. Seq. No. 009) is granted; and it is further

ORDERED that non-party Lindsay Goldberg's motion to quash the subpoena issued to Steven Klinger (Mtn. Seq. No. 011) is denied solely to the extent set forth above.



6/11/2024
DATE

ANDREW BORROK, J.S.C.

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