SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

----------X

LEVINE LEICHTMAN CAPITAL PARTNERS II, L.P.,

Plaintiff,

- v -

INDERDENT, INC.,PROSPECT CAPITAL CORPORATION, PROSPECT CAPITAL MANAGEMENT L.P., JASON WILSON, ROBERT NABHOLZ, ROBERT MELMAN, DOES 1 THROUGH 20

Defendant.

----------X

INDEX NO. 657099/2019

MOTION DATE 01/30/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 59

were read on this motion to/for DISMISS.

Upon the foregoing documents and following oral argument on the record (July 9, 2020), the defendants' motion to dismiss, pursuant to CPLR §§ 3211(a)(1) and (a)(7), is granted.

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to (i) a certain Merger Agreement (the **Merger Agreement**) dated June 22, 2012, between Levine Leichtman Capital Partners II, L.P. (**Levine Leichtman**), as the representative, InterDent ID Acquisition Sub, Inc. (**ID Acquisition Sub**) and InterDent Holdings, Inc. (**Holdings**) as buyer (NYSCEF Doc. No. 30), pursuant to which Levine Leichtman agreed to sell its shares in InterDent, Inc. **(InterDent**) for $110 million and approximately $37 million in earnout payments (the **Earnout Payments**), (ii) a Commitment Letter (the **Commitment Letter**) also dated June 22, 2012, pursuant to which Prospect Capital

Corporation (**Prospect**) agreed to lend ID Acquisition Sub $110 million to finance the merger with InterDent and to provide certain other credit facilities (NYSCEF Doc. No. 32), (iii) a Senior Secured Loan Agreement (the **Loan Agreement**) dated August 3, 2012, by and between ID Acquisition Sub as borrower, InterDent Service Corporation and Holdings as guarantors, Prospect as agent and the purchasers identified on Annex A thereto (NYSCEF Doc. No. 31), pursuant to which Prospect agreed to lend ID Acquisition Sub $110 million as partial financing for the Merger Agreement, and (iv) a Pledge Agreement (the **Pledge Agreement**) dated August 3, 2012, by Holdings, ID Acquisition Sub and InterDent Service Corporation (**InterDent Service**) as pledgors in favor of Prospect in its capacity as agent for the benefit of the purchasers as that term is defined in the Loan Agreement (NYSCEF Doc. No. 33), pursuant to which the pledgors "agreed to pledge to [Prospect] … the Equity Interests of the Pledged Companies [including InterDent]," which included the stock that Holdings held in InterDent and the proceeds of the stock (*id.* at Recital C; §§ 2[a], 3[a]).

The Merger Agreement incorporated the Commitment Letter and other ancillary documents:

> 13.1 Entire Agreement; Waivers. This Agreement, the Limited Guarantee, the Commitment Letters, the Escrow Agreement, the Warrant Purchase Agreement and each of the other Ancillary Agreements constitute the entire agreement among the parties hereto pertaining to the subject matter hereof ….

(NYSCEF Doc. No. 30, § 13.1). In addition, although obtaining financing was not a condition to closing (NYSCEF Doc. No. 30, § 5.16[e]), pursuant to Section 5.16 of the Merger Agreement, Holdings and ID Acquisition Sub were obligated to use commercially reasonable efforts to obtain financing on the terms set forth in the Commitment Letters:

> 5.16 Financing. Between the date of the Agreement and the Closing:

> (a) The Buyer and Merger Sub shall use their respective commercially reasonable efforts to obtain the Financing on the terms and conditions set forth in the Commitment Letters …

The Merger Agreement, the Commitment Letter, the Loan Agreement, and together with the Pledge Agreement, shall hereinafter, collectively, be referred to as the **Transaction Documents**.

Pursuant to the Transaction Documents, ID Acquisition Sub, the borrower under the Loan Agreement, paid $110 million to Levine Leichtman for its shares in InterDent, merged into InterDent, and became a wholly owned subsidiary of Holdings. The deal was structured such that Holdings (and not ID Acquisition Sub/InterDent), which guaranteed the loan and pledged its interest in InterDent (Guarantee, NYSCEF Doc. No. 31, Ex. C, § 4.1[c][xi]), was obligated to pay the Earnout Payments as an unsecured obligation if InterDent met specified milestones or if there was a sale of InterDent or a sale of the OHP Business (as such term is defined in the Merger Agreement). To wit, Section 2.15(e)(iii) of the Merger Agreement provided that:

> Any Earnout Payment … will be payable on the earlier of (A) the date that is five years and six months following the Closing Date … or (D) the date that the Earnout Payment becomes final and binding in accordance with Section 2.15(d) if the payment is permitted by the terms of Buyer's third party credit facilities or, if required by the terms of such facilities, or the date of the Buyer's third party lenders consent in writing to Buyer's payment of such Earnout Payment

(NYSCEF Doc. No. 30, § 2.15[e][iii]).

However, the Transaction Documents make clear that no Earnout Payments could be made without Prospect's consent and that such Earnout Payments were the sole obligation of Holdings and that such obligation was required to be unsecured. This understanding was first reflected in the Commitment Letter, which provided that the obligation to pay the Earnout Payments was

solely the obligation of Holdings and that the Loan Agreement would contain a negative covenant prohibiting Earnout Payments from being made:

> c. The negative covenant with respect to Earnout Payments and Buyer Preferred Stock (as each such term is defined in the Merger Agreement) shall prohibit the payment of Earnout Payments and payments on the Buyer Preferred Stock, prohibit any amendment to the terms of the Earnout Payments and the Buyer Preferred Stock, and require that Earnout Payments; and the Buyer Preferred Stock are unsecured. ***The Earnout Payments shall solely be obligations of Holdings.***

(*id.* at 23 [emphasis added]).

It was later reflected in the Loan Agreement, which prohibited distributions to Holdings so that Holdings could not make the Earnout Payments until the loan was paid in full:

> Section 7.2 Negative Covenants
>
> Each Loan Party covenant that on behalf of itself, and acknowledges with respect to the other Restricted Parties (as applicable), ***until all of the principal amount of the Notes and any interest, fees or expenses thereon*** (other than contingent indemnification obligations for which claims have not been actually asserted) ***have been paid in full in cash***:
>
> . . . (h) Dividends and Stock Purchases. ***None of the Loan Parties shall*** directly or indirectly declare or pay any dividends or ***make any distribution*** of any kind on its outstanding Equity Interests (including any redemption, payment of liquidation preference, purchase or acquisition of, whether in cash or in property, securities or a combination thereof, of any Equity Interests or capital accounts or warrants, options or any of their other securities), or set aside any sum for any such purpose; ***provided, that . . . (vii) to the extent that [Prospect] in its sole discretion has provided its prior written consent, [InterDent] may make distributions to Holdings and other equity holders to make Earnout Payments*** . . . .

(NYSCEF Doc. No. 31, § 7.2[h][vii] [emphasis added]).

The agreed upon understanding between Levine Leichtman and ID Acquisition Sub and Holdings that Holdings would not be paid without Prospect's consent was also reflected in

Section 2.15(h) of the Merger Agreement which provided that there would be no liability if Prospect did not consent to the payment of the Earnout Payments:

> The Buyer shall request that lenders under its third party credit facilities (i) include terms that permit it to pay any Earnout Payment under such facilities or (ii) consent to the payment of each Earnout Payment due hereunder, provided, however, that (x) it is agreed that Buyer shall not be required to pay any fee or incur any other cost or expense (including, but not limited to, higher interest rates) or modify any other material terms of its credit facilities in connection with such good faith efforts and (y) if such lenders refuse to include such terms or grant such consent then Buyer shall have no liability to the Sellers under this Section 2.15(h); provided, that the Representative, on behalf of the Company Equityholders, may in its discretion, pay any fee, cost or expense to obtain such lender consent, so long as the amount of all such fees, costs and/or expenses are less than $100,000 in the aggregate

(NYSCEF Doc. No. 30, § 2.15[h]).

Nothing in the Merger Agreement provided that if the lender was to exercise its rights under the loan documents and foreclose upon its lien, that the lender under those circumstances would become liable for the Earnout Payments. Indeed, the obligation of Holdings to make the Earnout Payments was Holdings' unsecured obligation and, therefore, necessarily subordinate to the rights of the secured lender of InterDent/Id Acquisition Sub, the borrower under the loan documents.

Pursuant to Sections 4 and 6 of the Pledge Agreement, Holdings granted Prospect an irrevocable proxy to exercise all voting and corporate rights to the Pledged Interests and upon an event of default under the loan documents, Prospect had the "sole and exclusive" authority to exercise such rights and powers (including the right to become a shareholder of any Pledged Company, which includes InterDent), and/or to assign or dispose of the pledged collateral (NYSCEF Doc. No. 33, § 4[c]).

Accordingly, because the obligation to pay the Earnout Payments was Holdings' unsecured obligation as required by the Transaction Documents, and Holdings pledged its interest in InterDent (as the merger survivor) to Prospect as collateral for its guarantee under the loan, and the loan documents prohibited distributions to Holdings prior to the loan's repayment without the lender's consent, Holdings' obligation to pay the Earnout Payments was structurally subordinate to Prospect's secured loan for two independent reasons: (i) because the obligation was Holdings', the parent company to InterDent, and not InterDent's, and (ii) because Prospect's secured loan was against InterDent, guaranteed by Holdings and secured by a pledge of Holdings' interest in InterDent.

In September and December 2017, several defaults occurred under the Loan Agreement and Prospect declared Holdings and InterDent in default under the Loan Agreement for breaches of financial and non-financial covenants (Compl., NYSCEF Doc. No. 1, ¶ 52). In addition, in October of 2017, InterDent and Holdings informed Levine Leichtman that the Earnout Payments would not be paid because Holdings did not have sufficient funds.

In response, Levine Leichtman sued to enforce and collect the Earnout Payments. This is not that lawsuit. That lawsuit (**Levine Leichtman 1.0**) was brought on February 8, 2018, against InterDent and Holdings in Los Angeles Superior Court, alleging a single cause of action for breach of contract (*Levine Leichtman Capital Partners II, L.P. v Holdings, Inc.*, Los Angeles Superior Court Case No. BC693404; Compl., NYSCEF Doc. No. 1, ¶ 52). Nor is this the second or third lawsuit brought by Levine Leichtman. This lawsuit is the fourth.

Following the filing of Levine Leichtman 1.0, on February 23, 2018, Prospect delivered a letter to Holdings and InterDent advising that pursuant to Section 4 of the Pledge Agreement: (i) Holdings' right to vote its shares in InterDent was terminated, and (ii) Prospect was taking legal title to any of the Pledged Interests, exercising its voting and proxy right as well as other corporate rights (including dividend and distribution rights) together with other powers relating to the Pledged Interests. The Complaint alleges that Prospect took these actions, at least in part, because of Levine Leichtman's then-pending lawsuit against Holdings and InterDent (Compl., NYSCEF Doc. No. 1, ¶ 54).

Pursuant to a Unanimous Written Consent of Directors in Lieu of a Special Meeting, dated March 22, 2018, InterDent's Board of Directors allegedly determined that InterDent needed $3 million in capital to stabilize the company (NYSCEF Doc. No. 34 at 2). When InterDent's controlling shareholder – Holdings' parent company, H.I.G. Capital – declined to provide the money to InterDent, InterDent's Board of Directors negotiated a $3 million loan from Prospect and InterDent issued to Prospect a warrant to purchase 4,900 shares of InterDent's stock for an exercise price of $0.01 per share (the **First Stock Warrant**) (Compl., NYSCEF Doc. No. 1, ¶ 60; NYSCEF Doc. 34 at 2).

On or about September 19, 2018, Prospect provided InterDent with an additional $5 million loan and InterDent issued to Prospect a second warrant to purchase an additional 95,000 shares of InterDent's stock for an exercise price of $0.01 per share (the **Second Stock Warrant;** the First Stock Warrant and the Second Stock Warrant, together, the **Warrants**) as partial consideration for the loan (Compl., NYSCEF Doc. No. 1, ¶ 61). Both the First Stock Warrant and the Second

Stock Warrant were exercised on May 6, 2019 (*id.*, ¶ 64). Thus, as of that date, Prospect became the owner of 99.9% of InterDent's stock by making an additional payment of an aggregate exercise price of $49 in connection with the First Stock Warrant and $950 in connection with the Second Stock Warrant, i.e., less than a $1000 in total of additional consideration. The Complaint alleges that this caused Holdings' ownership in InterDent to become effectively worthless and that:

> Holdings received nothing in exchange for the transfer of its ownership interest in InterDent from 100% to 0.1%, notwithstanding the fact that, at the time that Prospect exercised the penny stock warrants, Prospect was aware of [Levine Leichtman's] outstanding RTAO against Holdings for $32,971,527.79.

(*id.*, ¶ 65).

Levine Leichtman alleges that at the time that the Warrants were issued InterDent was "likely solvent" and had sufficient value to pay Prospect Capital its indebtedness in full (*id.*, ¶ 66).

At some point the parties were engaged in settlement negotiations, and Levine Leichtman voluntarily discontinued Levine Leichtman 1.0 without prejudice on April of 2018 (NYSCEF Doc. No. 37, ¶ 20).

When a settlement did not materialize, Levine Leichtman refilled its suit (**Levine Leichtman 2.0)** in June of 2018 in Los Angeles Superior Court, again alleging a breach of contract by InterDent and Holdings (*id.*, ¶ 21). Pursuant to a decision, dated August 19, 2019 (the **California Decision**), the California court granted InterDent's motion for summary judgment and dismissed Levine Leichtman 2.0 as against InterDent (NYSCEF Doc. 38). In granting summary judgment, the California court found that no triable issue of fact existed as to whether InterDent was liable for the Earnout Payments because under the Merger Agreement, the

Commitment Letter and the Loan Agreement, the Earnout Payments were to be made solely by Holdings. In so doing, the California court rejected Levine Leichtman's argument that it was not bound by the Commitment Letter and Loan Agreement and concluded that the Commitment Letter and the Loan Agreement were all part of the agreement between the parties:

> the agreements [including the Commitment Letter and Loan Agreement] do not just reflect the parties understanding of a larger transaction, but are stated to constitute part of the agreement itself

(*id.* at 11-12).

Holdings, the party obligated to pay the Earnout Payments under the Transaction Documents, ultimately entered into a stipulated judgment dated October 31, 2019 with Levine Leichtman for the $37,454,000 in Earnout Payments, plus interest for which Levine Leichtman is now suing in the instant action (NYSCEF Doc. No. 39).

On or about August 23, 2019, Levine Leichtman filed another action (**Levine Leichtman 3.0**) in Los Angeles Superior Court. This time Levine Leichtman alleged that InterDent, Prospect and Prospect's investment advisor, Prospect Capital Management L.P. (**PCM**), as well as Prospect's employees, Jason Wilson, Robert Melman and Robert Nabholz, were responsible for Levine Leichtman not receiving the Earnout Payments (NYSCEF Doc. No. 40). On or about November 22, 2019, the Los Angeles Superior Court stayed Levine Leichtman 3.0 on the basis of *forum non conveniens* (NYSCEF Doc. No. 41).

Subsequently, Levine Leichtman filed this fourth lawsuit on November 27, 2019, asserting the following eight causes of action: (1) intentional interference with contract (against Prospect, PCM, the "Prospect Controlled Directors" and Does 1-20); (2) breach of contract (against

Prospect and Does 1-20); (3) aiding and abetting breach of fiduciary duty (against Prospect, PCM and Does 1-20); (4) conversion (against Prospect and Does 1-20); (5) unjust enrichment (against Prospect and Does 1-20); (6) breach of the implied covenant of good faith and fair dealing against InterDent and Does 1-20; (7) constructive fraudulent transfer (against Prospect and Does 1-20); and (8) aiding and abetting common law fraudulent transfer (against InterDent, the "Prospect Controlled Defendants" and Does 1-20). In total, Levine Leichtman seeks damages of $37,454,000, plus interest, on its first through sixth and the eighth causes of action and an order setting aside the allegedly fraudulent transfer on its seventh cause of action, restitution, punitive damages, costs and attorneys' fees.

DISCUSSION

Under CPLR 3211(a)(1), dismissal of a complaint is warranted where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [internal quotations and citations omitted). Where a written agreement unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself will constitute documentary evidence on which dismissal must be based (*150 Broadway NY Assocs., LP v Bodner,* 14 AD3d 1, 5 [1st Dept 2004]).

Under CPLR 3211(a)(7), dismissal of a complaint is warranted where accepting all allegations as true and drawing all reasonable inferences in the plaintiff's favor, the complaint still fails to state a cause of action for which relief may be granted (*Sanders v Winship*, 57 NY2d 391 [1982]).

As an initial matter, the defendants argue that each of Levine Leichtman's causes of action is based on its claim that the defendants improperly prevented it from receiving the $37 million in Earnout Payments, but that the relevant agreements between the parties – i.e., the Loan Agreement and the Commitment Letter – provide that the Earnout Payments cannot be paid until Prospect is paid back in full. The defendants further maintain that as it is not disputed that Prospect has not been paid back in full and has not consented to InterDent making a distribution to Holdings for the Earnout Payments (which consent it was free to withhold), and that Levine Leichtman simply does not have a claim to the Earnout Payments against anyone other than Holdings, from whom it has already secured a judgment, and was not damaged by the issuance of the Warrants (*see* Compl., NYSCEF Doc. No. 1, ¶¶ 41-43). The defendants further argue that even if Levine Leichtman was damaged, it cannot allege that the defendants caused the damages because, as Levine Leichtman admits, Holdings had already breached the Merger Agreement by not making the Earnout Payments before any of the alleged actions by the defendants took place, the earliest of which was on February 23, 2018 (*see id.*, ¶ 54).

In its opposition papers, Levine Leichtman argues that the Merger Agreement is the only relevant document in this action and that the defendants have breached it. Levine Leichtman argues that the court should disregard the Loan Agreement, the Commitment Letter, and the other ancillary agreements between the parties, as Levine Leichtman is not a party to those agreements. In fact, Levine Leichtman argues that there is only one single reference to the Commitment Letter in the Merger Agreement and that there is no basis to integrate with the Merger Agreement:

> Defendants argue that the Merger Agreement makes reference to the Commitment Letter. However, that reference is for the limited purpose of confirming debt financing for the merger. Defendants' Exhibit B, Section 4.4 (Pursuant to the Commitment Letter, "[Holdings] and [ID Acquisition Sub] will have at Closing sufficient funds to fund its obligations."). This is the only reference to the Commitment Letter, and it does not modify [Levine Leichtman's] right to the Earnout Payments. Moreover, given that each contract serves entirely separate purposes and parties, there is no basis to argue the Commitment Letter integrates with the Merger Agreement

(*Ptf. Memo. of Law in Opp. to Def. Mtn. to Dismiss,* NYSCEF Doc. No. 47 at 10)

Putting aside that this is false (i.e., it is not the only place the Commitment Letter is referred to and in fact the integration clause in Section 13.1 explicitly refers to the Commitment Letter, and Holdings, pursuant to Section 5.16, was obligated to use commercially reasonable efforts to obtain financing on the terms set forth in the Commitment Letters) as discussed above, this issue was already litigated and the California court's decision in Levine Leichtman 1.0 is *res judicata.* Levine Leichtman is precluded from again arguing that the Merger Agreement is the only controlling agreement and that the Commitment Letter, the Loan Agreement and other Transaction Documents should all be ignored (NYSCEF Doc. No. 38; *see Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). However, even without the preclusive effect of the California Decision, the Commitment Letter, the Loan Agreement and other Transaction Documents must be read together with the Merger Agreement pursuant to the Merger Agreement's integration clause described above (NYSCEF Doc. No. 30, § 13.1).

To determine whether the agreements are "separable or entire, the primary standard is ***the intent manifested***, viewed in the surrounding circumstances" (*see Rudman v Cowles Comms.*, 30 NY2d 1, 12 [1972] [emphasis added]). Simply put, Levine Leichtman's position that the Commitment

Letter and Loan Agreement are not part of an integrated transaction with the Merger Agreement is, at best, disingenuous. This is what the court in Levine Leichtman 2.0 decided and it is the necessary result here. In addition, the Complaint fails to state a claim upon which relief may be granted.

Intentional Interference with Contract (against Prospect, PCM, the "Prospect Controlled Directors")

To state a claim for intentional interference with contract, a complaint must allege (1) the existence of a valid, enforceable contract, (2) defendants' knowledge thereof, (3) and intentional procurement of a breach, and (4) resulting damages (*Israel v Wood Dolson Co.*, 1 NY2d 116 [1956]). A breach of the underlying contract is an essential element of this claim (*id.*).

Economic interest may be a defense to an action for tortious interference with contract unless there is a showing of malice or illegality (*Foster v Churchill*, 87 NY2d 744, 750 [1996]). Notably, "[p]rocuring the breach of a contract in the exercise of equal or superior right is acting with just cause or excuse and is justification for what would otherwise be an actionable wrong" (*Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682, 687 [1969]).

Here, the Complaint alleges that Prospect and PCM knew of the Merger Agreement and the Earnout Payments and intentionally interfered with the same by engaging in a "scheme" to dilute InterDent stock, which caused Levine Leichtman to suffer damages by way of the unpaid Earnout Payments, and that this was malicious, intentional and done for the purpose of depriving Levine of its property or legal rights (Compl., NYSCEF Doc. No. 1, ¶¶ 75-79). More specifically, Levine Leichtman claims that, as a result of the foregoing, the defendants breached

Section 2.15(e) of the Merger Agreement, which required payment of Earnout Payments within 5 years and 6 months following the Closing Date, i.e., by February 3, 2018, regardless of whether Prospect had been paid in full (NYSCEF Doc. No. 30, § 2.15[e][iii]). The argument fails. As the California Decision in Levine Leichtman 2.0 makes clear, the obligation to make the Earnout Payments was that of Holdings and Holdings alone (and, in fact, Levine Leichtman obtained a confession of judgment from Holdings in Levine Leichtman 2.0). As concerns Prospect, Prospect had no obligation to make the Earnout Payments, the obligation to make the Earnout Payments was the unsecured obligation of Holdings and necessarily subordinate to the secured interest of Prospect. The exercise of the rights under the Pledge Agreement (i.e., on February 23, 2018), the issuance of the Warrants (i.e., the First Stock Warrant's issuance as of March, 2018) and the alleged dilution occurred *after* the breach of the Merger Agreement is alleged to have occurred (i.e., February, 2018). Put another way, nothing that Levine Leichtman alleges that Prospect did was a breach of the Merger Agreement or the Transaction Documents. In addition, and fatally, in exercising its rights as lender under the Transaction Documents, nothing as alleged, ***caused*** the failure to make the Earnout Payments, let alone the intentional and deliberate procurement of any breach by Prospect or PCM as required to allege a claim for tortious interference with contract (*see Oddo Asset Mgmt. v Barclays Bank PLC*, 19 NY3d 584 [2012]); (*Burrowes v Combs*, 25 AD3d 370, 371 [1st Dept 2006] [affirming dismissal of claim]); (*see* Compl., NYSCEF Doc. No. 1, ¶¶ 59-60, 61-65 and 71-79).

The Complaint also fails because to the extent that Prospect took certain actions in its own economic interest, which it was permitted to do under the terms of the Commitment Letter and the Loan Agreement, such actions are, in any event, protected by the economic interest defense

and Levine Leichtman fails to establish either malice or fraudulent/illegal means as required to overcome the defense (*see Wilmington Trust Co. v Burger King Corp.*, 34 AD3d 401 [1st Dept 2006]; *E.F. Hutton Intl. Assocs. Ltd. v Shearson Lehman Bros. Holdings, Inc.*, 281 AD2d 362 [1st Dept 2001]; *Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, 179 AD2d 592 [1st Dept 1992]). For the avoidance of doubt, the Complaint fails to allege any facts in support of this claim *vis a vis* the individual defendants. Accordingly, the cause of action for tortious interference with contract must be dismissed.

Breach of Contract (against Prospect)

The well-settled elements of a breach of contract claim are a contract, breach by a party thereto, and damages (*see, e.g., Markov v Katt*, 176 AD3d 401 [1st Dept 2019]). Prospect cannot have breached the Merger Agreement as it is not a party to that agreement (*see* NYSCEF Doc. No. 30). Inasmuch as the Merger Agreement provided that if Holdings transferred its assets there needed to be a provision in the transfer agreement requiring the transferee to assume the obligation for the Earnout Payments, Holdings did not transfer anything here:

> "In the event Buyer [Holdings]…(ii) transfer or conveys all or substantially all of its properties and assets to any other Person, in each case which does not result in a Sale of the Company or a Sale of the OHP Business, then, in each such case, proper provision shall be made so that such other Persons assume the obligations of [Holdings] set for in this Agreement" [Empahsis Added].

(Compl., NYSCEF Doc. No. 1, ¶ 48, citing the Merger Agreement, NYSCEF Doc. No. 30, § 2.15[f]).

It was InterDent, not Holdings, that issued the new stock. Putting aside that this is not the same as a transfer, there is no language in the Merger Agreement that prevented downstream subsidiary transfers (i.e, transfers by ID Acquisition Sub/InterDent), which there could have

been. Holding otherwise would amount to impermissibly rewriting this otherwise unambiguous provision to provide for protection that was not bargained for. In any event, as discussed above, the obligation to make the Earnout Payment was that of Holdings and the allegations as to the failure to make Earnout Payments predate the issuance of the Warrants so this cause of action also fails for lack of causation.

Aiding and Abetting Breach of Fiduciary Duty (against Prospect, PCM and Does 1-20)

Levine Leichtman alleges that Prospect and PCM owed fiduciary duties to Holdings and that they breached their fiduciary duties to Holdings (NYSCEF Doc. No. 1, ¶¶ 93, 97-98). However, Levine Leichtman lacks standing to allege this claim on behalf of Holdings. Nor is there any dispute that there is no fiduciary relationship between Levine Leichtman and Prospect and/or PCM (nor does Levine Leichtman allege as much) (*see Oddo Asset Mgmt.,* 19 NY3d at 593-594). Accordingly, this claim must also be dismissed.

Conversion (against Prospect)

To state a claim for conversion, a plaintiff must allege that it had an immediate superior right of possession to the funds and that the defendants exercised unauthorized dominion over the funds to the exclusion of the plaintiff's rights (*Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 AD2d 384, 385 [1st Dept 1992]). This claim fails because as discussed above Levine Leichtman did not have a superior right of possession over InterDent's stock, or to distributions therefrom (*Lucker v Bayside Cemetery*, 114 AD3d 162, 174 [1st Dept 2013]); *Soviero v Carroll Group Intl., Inc.,* 27 AD3d 276, 277 [1st Dept 2006]).

Unjust Enrichment (against Prospect)

To assert a claim for unjust enrichment, a plaintiff must allege that (1) a defendant was enriched at (2) plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Georgia Malone & Co. v Rieder,* 19 NY3d 511, 516 [2012]). Generally, a claim for unjust enrichment does not lie where "the matter is controlled by contract" (*Goldman v Metro Life Ins. Co.*, 5 NY3d 561, 572 [2005]; *see also, Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403, 405 [1st Dept 2008]). Here, Levine Leichtman's claim for unjust enrichment is not viable as the right to Earnout Payments is controlled by the Transaction Documents.

Breach of the Implied Covenant of Good Faith and Fair Dealing (against InterDent)

This cause of action must be dismissed because the issue as to whether InterDent is responsible for the Earnout Payments is *res judicata* based on the California Decision, and even if this were not the case, the Transaction Documents make clear that this obligation was solely an unsecured obligation of Holdings (*B&B Hardware, Inc. v Hargis Indus., Inc.*, 575 US 138, 147 [2015] ["the determination of a question directly involved in one action is conclusive as to that question in a second suit"]; *Robert B. Jetter, M.D., PLLC v 737 Park Ave. Acquisition LLC*, 2017 NY Slip Op 30797 at *12, 2017 WL 1398814 at * 6 [Sup Ct NY Cnty April 19, 2017] [Scarpulla, J.] [dismissing plaintiffs' cause of action for breach of covenant of good faith and fair dealing based on preclusive effect of breach of contract claim litigated in prior action]).

Constructive Fraudulent Transfer (against Prospect)

Here, Levine Leichtman alleges that Prospect violated the Delaware Uniform Fraudulent Transfer Act (**DUFTA**) through its exercise of the First Stock Warrant and the Second Stock Warrant for less than fair consideration, which it claim eliminated Holdings' ability to make the Earnout Payments (Compl., NYSCEF Doc. No. 1, ¶¶ 137-39, 143). A cause of action for fraudulent transfer under DUFTA requires that (1) the debtor made a transfer, (2) for less than reasonably equivalent value, and (3) that the debtor was rendered insolvent as a result (*In re Delta Petroleum Corp.*, 2015 WL 1577990 at *18 [Bankr D Del April 2, 2015]).

Levine Leichtman alleges that InterDent made the transfer, not Holdings (Del Code Ann, Tit 6, § 1304 ["A transfer made or obligation incurred by a debtor is fraudulent as to a creditor … if the debtor made the transfer or incurred the obligation…."]; *see also,* Cal Civ Code § 3439.04[a] [similar provision under California law]. This claim fails as DUFTA only applies to transfers made by a debtor. Stated differently, InterDent was not an obligor of Levine Leichtman, only Holdings was, therefore, any transfer by InterDent is not actionable under DUFTA by Levine Leichtman.

Aiding and Abetting Common Law Fraudulent Transfer (against InterDent and the "Prospect Controlled Defendants")

Finally, with respect to the claim for aiding and abetting common law fraudulent transfer against InterDent and the individual defendants, such a claim is not cognizable under Delaware or California law. Inasmuch as the claim is based on DUFTA, Delaware law does not recognize such a claim (*Crystallex Intl. Corp. v Petroleos de Venezuela, S.A.*, 879 F3d 79, 89 [3d Cir 2018]; *Edgewater Growth Capital Partners, L.P. v H.I.G. Capital, Inc.*, 2010 WL 720150 at *1

[Del Ch March 3, 2010]). Inasmuch as the claim is based on California law, California requires that an alleged aider and abettor "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the others to so act" (*Casey v U.S. Bank Natl. Assn.,* 127 Cal App 4th 1138, 1144 [2005]). The Complaint does not allege any specific facts to support a claim that either InterDent or the individual defendants actually gave substantive assistance or encouragement to Prospect to engage in a fraudulent transfer (*see* Compl., NYSCEF Doc. No. 1, ¶ 147) or had knowledge that Prospect's conduct may have constituted a breach of duty. In any event, there was no fraudulent transfer under California law because InterDent is not a debtor of Levine Leichtman, as confirmed by the California court (*see* Cal Civ Code § 3439.04[a]).

Accordingly, it is

ORDERED that the defendants' motion to dismiss the complaint is granted and the complaint dismissed.

20200727110456ABORROK62AF7BCDA67B441A8CC2588AAB44C8E9

7/27/2020
DATE

ANDREW BORROK, J.S.C.

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