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Re: *Intrepid Investments, LLC v. Selling Source, LLC*
C.A. No. 8261-VCN
Date Submitted: February 4, 2013

Dear Counsel:

This is a dispute over payment by a limited liability company to one of its members. The plaintiff seeks both a temporary restraining order and a preliminary injunction in support of its claims. Before the Court is the plaintiff's motion to expedite these proceedings. Because the plaintiff has waited too long and because its claim boils down to one for the payment of money, its motion to expedite will be denied.

* * *

In August 2010, pursuant to the Transaction and Purchase Agreement (the “Purchase Agreement”),¹ Plaintiff Intrepid Investments, LLC (“Intrepid”) (and affiliates) sold to Defendant Selling Source, LLC (“Selling Source”) (and affiliates) “certain . . . equity and assets” (the “Acquired Business”).² Intrepid received a junior secured promissory note (the “Note”)³ and, in accordance with the Second Amended and Restated Limited Liability Company Operating Agreement of Selling Source (the “LLC Agreement”),⁴ a fifteen percent equity interest in Selling Source, contingent upon its financial success. As a result of Contingent Value Calculations, a formula reflecting the Acquired Business’s and Selling Source’s legacy business’s Adjusted EBITDA and other factors, Intrepid’s equity ownership rights may increase or decrease (the “Earn-out Adjustment”). There is an ongoing dispute now pending before an arbitrator (the “Independent Accounting Firm”) that is scheduled to resolve disputes regarding Intrepid’s

¹ Compl. Ex. A.

² Compl. ¶ 12. The documents governing the relationship between Intrepid and Selling Source are relatively complex. The Court has not attempted to describe the terms governing the flow of funds in comprehensive detail.

³ No payments are due under the Note.

⁴ Compl. Ex. B.

remaining equity interest by August 2013. The outcome of that arbitration will likely narrow substantially or focus the scope of the debate in this forum.

* * *

Intrepid argues that Selling Source has acted prematurely, interfered with the arbitration process, and unjustifiably and untimely reduced its equity interest. Thus, Selling Source allegedly did not allocate Profits and Losses to Intrepid under the LLC Agreement and did not make Tax Distributions to which Intrepid was entitled. During the second and third quarters of 2012, Selling Source made no distributions to Intrepid. Intrepid contends that Selling Source's reduction of its share of Profits and Losses to nothing (from the thirty percent that was to be used until the Earn-out Adjustment)⁵ also caused the Tax Distribution, which is also based on Intrepid's equity share, to be reduced to nothing. Selling Source, in contrast, contends that the lack of payment was not the result of an adjustment in Intrepid's equity interest (resulting in a zero share of the Profits and Losses), but,

⁵ Compl. ¶ 28; LLC Agreement § 5.3.1(f).

instead, it reflected earlier excess Tax Distribution payments that justify no current distributions until the overage is netted out.⁶

Intrepid's motion for interim injunctive relief identified several elements of relief: (1) enjoining Selling Source from depriving Intrepid of its rights to proceed with the dispute resolution proceeding before the Independent Accounting Firm;⁷ (2) enjoining Selling Source from making any further Tax Distributions or Cash Distributions; (3) restoring Intrepid's rights with respect to the allocations and distributions of Selling Source and to require Selling Source to make the required distributions to Intrepid; and (4) enjoining Selling Source from making any other changes to the rights of Intrepid with respect to allocations and distributions under the LLC Agreement.

* * *

Intrepid learned on August 14, 2012, that it would not receive a Tax Distribution for the second quarter of 2012.⁸ On September 20, 2012, it learned

⁶ See Tr. of Oral Arg. ("Tr.") (Feb. 4, 2013) 12-14, 17-18.

⁷ Except distributions of cash during the pendency of the arbitration proceeding, Intrepid has not identified any conduct by Selling Source that is depriving Intrepid of its right to engage in the dispute resolution process.

⁸ Compl. ¶¶ 36-37.

that others had received Tax Distributions.⁹ It waited until January 29, 2013, to file this action—more than five months. Yet, it now wants interim relief, despite its dilatory conduct, on a very hasty basis.

If parties fail to act promptly, they may find that they have lost their expectation for expedited treatment.¹⁰ Delay imposes unnecessary burdens on the Court and opposing parties and may impair the ability of the Court “to adjudicate the matter fairly.”¹¹

Here, Intrepid had knowledge of its claim five months ago; without any good reason,¹² it delayed in asserting its claims; and it wants to address complex tax and accounting issues in an unnecessarily and unreasonably short period.¹³ The delay is of Intrepid’s own making, and, for that reason, its motion to expedite, at this late date, should be denied.

⁹ Compl. ¶ 41.

¹⁰ *Brookstone P’rs Acq. XVI, LLC v. Tanus*, 2012 WL 3711410, at *2 (Del. Ch. Aug. 22, 2012).

¹¹ *Oliver Press P’rs, LLC v. Decker*, 2005 WL 3441364, at *1 (Del. Ch. Dec. 6, 2005).

¹² See Tr. 10 (attributing delay to waiting for Selling Source to provide information).

¹³ Cf. *CNL-AB LLC v. E. Property Fund I SPE LLC*, 2011 WL 353529, at *5 (Del. Ch. Jan. 28, 2011).

* * *

The various transaction documents acknowledge that specific performance may be an appropriate final remedy for any dispute that the parties may have, but they do not expressly contemplate injunctive relief or irreparable harm.¹⁴ Thus, in order to obtain interim injunctive relief, Intrepid must show that it is likely to suffer irreparable harm in the absence of such relief.

That task is made difficult because Selling Source's conduct, if improper, may be remedied through an award of money damages. The Tax Distributions and the Profits are measured in dollars. An award in dollars satisfies any shortcoming that Intrepid may have endured.¹⁵ If the Verified Complaint identifies a right, it is a right to be paid. Irreparable harm does not loom "if the injury can be fully compensated after a full trial on the merits . . . by an award of damages."¹⁶

Trial, a process likely to be aided by the decision of the Independent Accounting Firm in the not too distant future, will, after analyzing various accounting records, tax status, and the text of the governing documents, yield, if

¹⁴ See LLC Agreement § 14.9.

¹⁵ Selling Source says that it has not reduced, and does not intend to reduce, Intrepid's equity interest without a decision of the Independent Accounting Firm.

¹⁶ *Cantor Fitzgerald L.P. v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998).

Intrepid should prevail, an entitlement to damages (*i.e.*, measured in dollars). Unless something else is at work in this case, the lack of immediate, irreparable harm brings the interim injunctive process to a halt.

* * *

Intrepid contends that the loss of rights and status under the LLC Agreement constitutes irreparable harm. Intrepid is not directly involved in managing the Acquired Business;¹⁷ there is no ongoing enterprise operational aspect to this dispute. Merely violating an operating agreement does not necessarily give the aggrieved member a claim of irreparable harm. Every breach of an operating agreement does not constitute a *de facto* amendment accomplished without regard to the voting or agreement modification provisions.

Intrepid relies upon *AM General Holdings, LLC v. The Renco Group, Inc.*,¹⁸ but the facts of that case are markedly different from the circumstances in which the Intrepid-Selling Source dispute has evolved and is of no assistance to Intrepid. In *AM General*, the parties' agreement recognized that "a non-breaching party is

¹⁷ At least, its pleadings do not suggest any such role.

¹⁸ 2012 WL 6681994 (Del. Ch. Dec. 21, 2012).

entitled to injunctive relief.”¹⁹ Moreover, unlike here, there was more than the mere receipt of money at issue in *AM General* because the plaintiff there was obligated to perform two specific tasks, arguably in the nature of corporate governance, relating to the funds at issue. Those tasks were dependent upon the orderly operation of a complex contractual nesting arrangement between two principal entities and another entity within that same arrangement. Not only was that arrangement far different from the agreement here, but also the need for the transfer of funds was clear and not subject to serious debate.

In sum, Intrepid’s efforts to build on corporate governance notions overlook the simple fact that its dispute with Selling Source is about a calculation of amounts due to Intrepid and the payment of those amounts. No ongoing issue of corporate governance or the effectiveness of that governance has been placed in issue.²⁰

¹⁹ *Id.* at *5.

²⁰ Intrepid has not argued that Selling Source’s potential insolvency or inability to pay any amounts due to it might somehow justify expedited treatment.

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Thus, Intrepid has not met its burden of showing that it is likely to suffer irreparable harm in the absence of interim injunctive relief.²¹

* * *

Because of Intrepid's delay in bringing this action and its inability to demonstrate that it will likely suffer irreparable harm in the absence of interim injunctive relief, its motion to expedite is denied.²²

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

²¹ With the conclusion that Intrepid has failed to demonstrate irreparable harm, there is no need to address whether or not it has presented a colorable claim.

²² Although Intrepid's motion hints that expediting the final resolution of this matter would be appropriate, Mot. for Expedited Proceedings at ¶ 2, the relief sought (as framed in the proposed form of order referenced in the Motion's WHEREFORE clause) involved only interim injunctive relief. It may be that a prompt final hearing following the August 2013 Independent Accounting Firm's decision would be in order, but Intrepid did not include that in the relief which it now seeks.