Intrepid Invs., LLC v Selling Source, LLC
2015 NY Slip Op 31129(U)
June 26, 2015
Supreme Court, New York County
Docket Number: 654291/2013
Judge: Eileen Bransten
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 3

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INTREPID INVESTMENTS, LLC, as Administrative Agent,

Plaintiff,

-against-

SELLING SOURCE, LLC, LONDON BAY – TSS ACQUISITION COMPANY, LLC, DATAX, LTD., PARTNERWEEKLY, L.L.C., LEADREV HOLDING, LLC, 19 COMMUNICATIONS, LLC, IDESKTOPMEDIA.COM, LLC, EMAIL REACT, LLC, FPG, LLC, IMPEERIAN INSURANCE AGENCY OF NEVADA, LLC, LEAD SILO, LLC, MARK HOLDINGS, LLC, Q INTERACTIVE, LLC, KITARA MEDIA, LLC, CLICKGEN, LLC, OG LOGISTICS, LLC, DUCK PLAY, LLC, PLAY NOMY, LLC, PLAY TURTLE, LLC, JOHN DOES 1-20, AND WHITE OAK GLOBAL ADVISORS, LLC,

Defendants.

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Index No. 654291/2013
Motion Date: 12/10/2014
Seq. No.: 008 & 009

BRANSTEN, J.

In this action, plaintiff Intrepid Investments, LLC sues for breach of a $27.8 million "Junior Secured Promissory Note" note, dated August 31, 2010, (the "Intrepid Note") executed by defendant Selling Source, LLC ("Selling Source"). The note is alleged to have been in default since June 30, 2013.

Motion sequence numbers 008 and 009 are hereby consolidated for disposition. In motion sequence number 008, defendant White Oak Global Advisors, LLC ("White Oak") seeks to dismiss the supplemental complaint, pursuant to CPLR 3211(a)(1) and (a)(7). In

motion sequence number 009, plaintiff moves to further amend the supplemental complaint to assert additional causes of action for breach of an "Intercreditor and Subordination Agreement," dated August 31, 2010 (the "ICA"), and tortious interference with the Intrepid Note and the ICA.

I. Background

In 2007 and 2008, defendant Selling Source obtained secured loans from lenders, represented by Bank of New York Mellon ("BNY Mellon") as agent. These loans are referred to in the loan documents and these motion papers as the "First Priority Obligations" and "Second Priority Obligations." Selling Source, as well as its parent company, defendant London Bay-TSS Acquisition Company, LLC ("LBTSS") and various subsidiaries (collectively, the "Grantors"), guaranteed the loans and pledged all of their assets as security (the "Common Collateral"). Defendant White Oak is an investment firm that lends money to medium-sized companies. White Oak participated in the original loans and has been a "First Priority Lender" to Selling Source since February 2008.

A. *The Intrepid Note*

In 2010, Selling Source and plaintiff entered into an agreement whereby Selling Source acquired certain businesses owned by plaintiff. As part of the transaction, Selling

Source executed the Intrepid Note in the principal amount of $28.7 million with a 14% interest rate and maturity date of June 30, 2013. *See* Affirmation of Clement J. Farley ("Farley Affirm.") Ex. E. The holders of the Intrepid Note are plaintiff (98.60628%) and non-party Dale Baker (1.39372%). *Id.* Ex. E at Annex A & B.

B. *The ICA*

In connection with this transaction, plaintiff, Selling Source/LBTSS, and BNY Mellon executed the ICA, which delineated the priority of each party's security interest in the "Common Collateral," i.e., Selling Source's assets. *See* Affirmation of Edward Griffith ("Griffith Affirm.") Ex. B. Plaintiff is denominated the "Third Party Representative." In that role, as the representative of, and for the benefit of, the "Third Priority Lenders,"[1] plaintiff was given third priority liens on the Common Collateral as security for the payment of the Intrepid Note. *Id.* Ex. B at 2. Plaintiff expressly acknowledged in the ICA that its third priority liens were "junior and subordinate in all respects to any and all Liens securing the First . . . and the Second Priority Obligations." *Id.* Ex. B at 6.

Several other provisions of the ICA are relevant to the determination of these motions. Most important is Section 5(a), entitled "Remedies Standstill," which provides:

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[1] The term "Third Priority Lenders" is defined in the ICA as "Intrepid Investments, LLC, Dale Baker and any other holder party thereto." *Id.* at 2. Thus, the term is synonymous with the Holders of the Intrepid Note.

> No Third Priority Lender shall commence or exercise any Remedies in respect of any default or event of default under any Third Priority Document until such time as the Payment-in-Full of the First Priority Obligations and Second Priority Obligations.

(Griffith Affirm. Ex. B at 7.)

In addition, in Section 5(b)(ii), the Third Priority Lenders, or Holders of the Intrepid Note, are barred from taking any action adverse to the priority status of the liens securing the First and Second Priority Obligations.

Likewise, Section 8(g) of the ICA provides that, "[i]n no event shall any Third Party Lender or the Third Party Representative" institute or join in any legal action seeking a determination that any lien or claim of any First Priority Lender or Second Priority Lender against the Common Collateral is invalid, unperfected, or avoidable. However, Section 7 of the ICA confirms that the "Third Priority Obligations," defined as the Intrepid Note and its associated obligations, are absolute and unconditional, and shall not be impaired. Consistent with this intent, Section 2(b) provides that payment of the Third Priority Obligations is expressly permitted.

C. *Refinancing of the First and Second Priority Obligations*

In January 2013, the First and Second Priority Obligations had reached their maturity dates and allegedly were refinanced pursuant to a "Loan and Security Agreement" dated January 31, 2013 (the "White Oak Agreement"). The new lenders to Selling Source were

allegedly White Oak Strategic Master Fund, L.P., Full Circle Capital Corp. and certain unnamed lenders. As part of the alleged refinancing, White Oak contends that it succeeded to the positions of BNY Mellon as the "First Priority Representative."

D. *Selling Source's Alleged Default and the Kitara Lien*

By letter dated August 14, 2013, plaintiff claimed that Selling Source was in default of its obligations both prior to and after the June 30, 2013 maturity date of the Intrepid Note. *See* Griffith Affirm. Ex. F. Selling Source responded by its letter dated August 19, 2013, contending that it was not in default and that it was not "obligated (or permitted) to make any payment whatsoever" on the Intrepid Note prior to June 30, 2013, pursuant to Section 2.2 of the note. In addition, Selling Source advised that Section 5 of the ICA prohibited plaintiff from taking any legal action in respect of any default, since the First and Second Priority Obligations remained outstanding. *Id.*

On September 3, 2010 – several years before the alleged default – plaintiff perfected its security interest and lien on all of the personal property of defendant Kitara Media, LLC ("Kitara"), one of the Grantors, by filing a UCC-1 financing statement against Kitara with the Delaware Secretary of State (the "Kitara Lien"). (Supp. Compl. ¶¶ 2-3.) By email dated October 23, 2010, Kitara asked plaintiff for permission to remove Kitara Lien. The reason given was that Kitara was "trying to close on a line of credit with Wells Fargo bank." (Farley

Affirm. Ex. F; *see also* Supp. Compl. ¶ 4.) By letter dated October 24, 2013, plaintiff refused Kitara's request since the Intrepid Note remained unpaid. *See* Supp. Compl. ¶ 5.

In an October 30, 2013 email, counsel to White Oak advised Selling Source and LBTSS that, in connection with "the disposition" of Kitara and pursuant to section 8(d) of the ICA, White Oak was providing its authorization to file the requested UCC termination statement for the Kitara Lien. (Farley Affirm. Ex. G.) On or about November 8, 2013, plaintiff claims that it learned that a UCC-3 termination statement, purporting to terminate the Kitara Lien, had been filed on October 30, 2013 with the Delaware Secretary of State without plaintiff's authorization or knowledge. (Supp. Compl. ¶ 6.)

E. *The Instant Action*

Plaintiff filed the original complaint on December 12, 2013, asserting ten causes of action against Selling Source under the Intrepid Note. In July 2014, plaintiff sought to amend the complaint to assert claims against White Oak. White Oak then sought leave to intervene in this action. The Court granted plaintiff's motion and denied White Oak's motion to intervene. On August 5, 2014, plaintiff filed a supplemental complaint, adding White Oak as a defendant and asserting a single claim against it for a declaratory judgment that the ICA bars neither this action nor the relief sought herein against the other defendants.

In September 2014, White Oak filed this motion to dismiss the supplemental complaint. In October 2014, plaintiff moved[2] for leave to amend its supplemental complaint to assert two additional claims against White Oak for breach of the ICA (proposed new twelfth count) and tortious interference with the Intrepid Note and the ICA by White Oak (proposed new thirteenth count). Plaintiff also seeks to add Full Circle Capital Corp., White Oak Strategic Master Funds, L.P. and "John Doe Lenders 1-20" as defendants to the tortious interference claim.

II. White Oak's Motion to Dismiss

White Oak brings the instant motion to dismiss, seeking dismissal of the declaratory judgment claim asserted against it in the supplemental complaint. In addition, White Oak argues that plaintiff cannot maintain its claims against Selling Source, on the ground that sections 5 and 8 of the ICA bar plaintiff from exercising any remedies, including demanding payment under the Intrepid Note and seeking to enforce any third priority liens.

In opposition to White Oak's motion to dismiss, plaintiff argues that Section 5(a) of the ICA does not bar this litigation, since it only prohibits suit by a Third Priority Lender, not the Third Priority Representative. Plaintiff asserts that it is acting solely as a representative

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[2] The parties denote motion seq. no. 009 as a cross-motion in their motion papers.

in this action. Plaintiff also contends that Section 16 of the ICA expressly permits it, as the Third Party Representative, to bring this action against the Grantors.

A. *Section 5(a) of the ICA*

Plaintiff is correct that the remedies standstill provision in Section 5(a) of the ICA makes no reference to the Third Party Representative, and restricts only the Third Priority Lenders, which are the two Holders – plaintiff and Dale Baker. *See* Griffith Affirm. Ex. B at 7 ("No Third Priority Lender shall commence or exercise any Remedies in respect of any default or event of default under any Third Priority Document until such time as the Payment-in-Full of the First Priority Obligations and Second Priority Obligations.") Notably, other sections of the ICA restrict both the Third Priority Representative and the Third Priority Lenders from taking certain actions. *See* ICA §§ 8(e), 8(g), 9(c). However, plaintiff's authority to bring legal action to enforce the Intrepid Note flows directly from the Holders' rights and remedies as limited by the terms of the ICA.

Sections 5, 7.2 and 12 (c) of the Intrepid Note make this very clear. Sections 5 and 7.2 of the Intrepid Note provide that the note, and any remedies for its enforcement, are subject to the terms and conditions of the ICA, while section 12(c) provides:

> Each Holder hereby appoints and constitutes Agent as its agent with full power and authority to exercise on behalf of such Holder *any and all rights and remedies which such Holder may have with respect to the enforcement of the Note*, including the right to exercise, or to refrain from exercising, any and all

> remedies afforded to such Holder by the Note or which such Holder may have as a matter of law.

(Farley Affirm. Ex. E at 6) (emphasis added). In other words, plaintiff, as the Administrative Agent or Third Priority Representative, only can pursue the rights and remedies that belong to the Third Priority Lenders, and is subject to any restrictions on those rights and remedies as was agreed to in the ICA.

It is well-settled that an assignee "stands in the shoes of an assignor and thus acquires no greater rights than its assignor." *Am. States Ins. Co. v .Huff*, 119 A.D.3d 478, 479 (1st Dep't 2014); *see also Madison Liquidity Invs. 119, LLC v. Griffith*, 57 A.D.3d 438, 440 (1st Dep't 2008). Any other interpretation of Section 5(a) of the ICA would render a key provision of that agreement meaningless, which is an interpretation that courts must always avoid. *See Two Guys from Harrison–N.Y. v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403 (1984). Such an interpretation also would be inconsistent with the restrictions placed on both the Third Priority Representative and the Third Priority Lenders not to challenge the liens or claims of the First and Second Priority Lenders, as set forth in Section 8(g) of the ICA.

Further, plaintiff's reliance on the fourth sentence of Section 16 of the ICA is misplaced. That section, entitled "Governing Law; Forum," provides:

> Each of the parties hereto irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of the courts of the State of New York sitting in New York County and of the United States District Court

> for the Southern District of New York ... in any action or proceeding arising out of or relating to this agreement... ***Nothing in this agreement or in any other first priority document, second priority document or third priority document shall affect any right that the first priority representative, the second priority representative or the third priority representative may otherwise have to bring any action or proceeding relating to this agreement against any grantor or its properties in the courts of any jurisdiction.***

(Griffith Affirm. Ex. B at 15 (emphasis added).) Section 16 is merely an agreement by the parties to the nonexclusive jurisdiction of New York federal and state courts in Manhattan to hear disputes by either the First, Second or Third Priority Representatives against the Grantors. The parties agreed that an action may be brought in New York but that none of Selling Source's lenders were bound to do so and could file an action in the courts of any jurisdiction if it is a right they "otherwise have." Nothing in this section can be construed to obliterate the remedies, including the standstill provision that plaintiff agreed to in Section 5(a) of the ICA.

Citing the exception in Section 5(b)(iv) of the ICA, plaintiff argues that this lawsuit is justified, because the Third Priority Lenders may "take any action to the extent necessary to prevent the running of any applicable statute of limitation." (Griffith Affirm. Ex. B at 7.). According to plaintiff, the applicable statute of limitations is set forth in CPLR § 213, which requires actions to be commenced within six years of accrual. The supplemental complaint alleges that Selling Source "failed to repay all sums due under the Intrepid Note by the Maturity Date (i.e., June 30, 2013)." (Supp. Compl. ¶¶ 4, 5.) Since a six-year statute of

limitations would not expire until June 2019, a lawsuit commenced on December 12, 2013 can hardly be deemed a necessary action to prevent the running of the statute of limitations.

For these reasons, the court determines that Section 5(a) bars this lawsuit to the extent that the First and Second Priority Obligations have not been paid in full or that defendants are not otherwise in breach of the ICA, as plaintiff maintains. As addressed below, the payment of the Obligations and the material breach allegations are not established as a matter of law on this motion and therefore must be explored during discovery.

1. Payment of the First and Second Priority Obligations

Plaintiff contends that the First and Second Priority Obligations have been paid off, and that BNY Mellon terminated the liens that secured these debts. (Supp. Compl. ¶ 4.) White Oak, on the other hand, asserts that the First and Second Priority Obligations remain outstanding. In support, White Oak submits Selling Source's August 19, 2013 letter to plaintiff, as well as a September 9, 2013 letter from its counsel to plaintiff's counsel. *See* Griffith Affirm. Exs. F & G. Both letters note their respective author's belief that the First and Second Priority Obligations "have not been paid in full." *Id.*

A motion to dismiss based on documentary evidence must be supported by documents that are "'essentially undeniable' and support the motion on its own'" *Amsterdam Hospitality Group, LLC v. Marshall-Alan Assoc., Inc.*, 120 A.D.3d 431, 432 (1st Dep't 2014) (quoting

David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22).) In this case, neither letter can be considered documentary evidence within the meaning of CPLR 3211(a)(1). Defendants' own statements to plaintiff do not "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Whether there has been a "Payment-in-Full" of the First and Second Priority Obligations within the meaning of that term is a question of fact that cannot be resolved on this motion to dismiss.

2. Material Breach

Plaintiff next contends that White Oak is precluded from asserting Sections 5 and 8 of the ICA as a bar to this action, since White Oak has breached the ICA in the following six ways: (1) by agreeing with Selling Source to restrict Third Priority Obligations payments to plaintiff until White Oak was paid first; (2) by improperly agreeing with Selling Source to extend the maturity date of the Intrepid Note by four years; (3) by improperly terminating the Kitara Lien in violation of Section 8(d) of the ICA; (4) by concealing the White Oak Agreement from plaintiff in violation of Section 10 of the ICA; (5) by amending the ICA without plaintiff's consent in violation of section 14 of the ICA; and, (6) by interfering with plaintiff's right to enforce the Third Priority Obligations through its conduct in this litigation, in violation of Section 16 of the ICA.

"Under New York law, when one party has committed a material breach of a contract, the non-breaching party is discharged from performing any further obligations under the contract, and the non-breaching party may elect to terminate the contract and sue for damages." *NAS Elec., Inc. v. Transtech Elec. PTE Ltd.*, 262 F. Supp. 2d 134, 145 (S.D.N.Y. 2003); *see also Awards.com, LLC v. Kinko's, Inc.*, 42 A.D.3d 178, 188 (1st Dep't 2007) ("When a party materially breaches a contract, the non-breaching party must choose between two remedies: it can elect to terminate the contract or continue it. If it chooses the latter course, it loses its right to terminate the contract because of the default."). As explained more fully below, plaintiff has articulated at least three material breaches of the ICA.

a. **Failure to Make Payments Under the Intrepid Note**

Section 2(b) of the ICA provides that Selling Source is permitted to pay plaintiff regularly scheduled interest payments due under the Intrepid Note and the maturity date principal payment. However, Plaintiff argues that Section 7.06 of the White Oak Agreement[3] conflicts, preventing Selling Source from paying any so-called "Restricted Payments," and that the definition of a restricted payment includes payments to plaintiff on the Intrepid Note.

[3] As addressed earlier, the refinancing of the First and Second Priority Obligations was effectuated through the White Oak Agreement, and the parties thereto included Selling Source and White Oak – but not plaintiff.

Relevant to this dispute, Section 7.06 of the White Oak Agreement, entitled "Negative Covenants/Restricted Payments," provides, in pertinent part, that "[s]o long as any Obligations . . . have not been repaid in full, Borrower shall not . . . Declare or make, directly or indirectly, any Restricted Payment." (Griffith Affirm. Ex. D at 68-69.) The term "Restricted Payment" is defined in Section 1.01(c) of the White Oak Agreement to include:

> any payment of principal or interest or any purchase, redemption, retirement, acquisition or defeasance with respect to any Debt of such Person which is subordinated to the payment of the Obligations.

Id. at 22.

The term "Obligations" is defined as: "all advances, debts, liabilities, obligations, covenants and duties of each Loan Party to any Lending Party, in each of the foregoing cases, under or in respect of any Loan Document." *Id.* at 18. This definition appears to exclude the Intrepid Note. Notably, to qualify as an Obligation, the debt or duty owed must be owed to a "Lending Party, " meaning, collectively the "Administrative Agent," i.e., White Oak (*id.* at 2, 16) and the "Lenders" listed in Schedule 2.01 – the sixteen lenders that appear to be affiliated with White Oak and Full Circle Capital Corp. *Id.* at 16; Glass Affirm. Ex. H. Plaintiff is not listed as a "Lending Party" and therefore the Intrepid Note, for which plaintiff is the holder, appears to fall outside the scope of the term "Obligation." A reasonable interpretation of Section 7.06 therefore would be that payment of the Intrepid Note would

be subordinate to the Obligations and would qualify as a "Restricted Payment," which is barred by the "Negative Covenants" in the White Oak Agreement.

White Oak's counsel argues that its client has never taken the position that Selling Source was barred from making payments to plaintiff based on Section 7.06 of the White Oak Agreement, which he argues is a "tortured interpretation." (White Oak's Reply Br. at 11; 12/8/14 Oral Arg. Tr. at 28.) It may be the case that the definition of the term "Obligations" in that agreement was poorly drafted. At the very least, an ambiguity as to its meaning exists. Further, how, why and if, as of June 30, 2013, Selling Source was in default of its payment obligations under the Intrepid Note is a question of fact that cannot be resolved on this motion to dismiss.

b. **Event of Default**

White Oak also argues that no material breach of the ICA occurred, since Section 8.01(n) of the White Oak Agreement provides that an event of default will occur under the White Oak Agreement if Selling Source fails to pay off plaintiff. This provision specifically provides, in pertinent part, that the following shall constitute an event of default of the White Oak Agreement:

> **(n) Second Priority Obligations and Third Priority Obligations**. On or before May 15, 2013, the Third Priority Obligations are not repaid in full (with no Default existing either before or immediately following the payment in full of such Third Party Obligations) or the Junior Maturity Date shall not have

> been extended (on terms and pursuant to documentation in form and substance satisfactory to Required Lenders) to a date that is on or after the date that is six months following the Maturity Date [i.e., January 31, 2017].

(Griffith Affirm. Ex. D at 73.) Plaintiff argues that this provision unilaterally modifies the maturity date of the Intrepid Note, even though such modifications are expressly prohibited by Section 14 of the ICA.

By its terms, Section 8.01(n) of the White Oak Agreement provides that a default does not occur if the maturity date of the Intrepid Note is extended six months past January 31, 2017 "on terms and pursuant to documentation in form and substance satisfactory to Required Lenders." Since the phrase "Required Lender" is defined as the White Oak Lenders, and does not appear to include the "Third Priority Lenders" (*see* Griffith Affirm. Ex. D at 16, 22, 24 & Sch. 2.01), plaintiff offers a reasonable interpretation of the White Oak Agreement.

c. **Termination of the Kitara Lien**

Plaintiff contends that White Oak's authorization of the termination of the Kitara Lien in 2013 constituted a third material breach of the ICA, specifically Section 8(d). White Oak, in turn, claims that Section 8(d) granted it the power to act unilaterally and even without notice to plaintiff. Section 8(d) provides as follows:

> (d) The Third Priority Representative, by and on behalf of the Third Priority Lenders, confirms and agrees that within three (3) business days of the request

> by the First Priority Representative or the Second Priority Representative, such Third Priority Lender shall execute and deliver such lien or guaranty releases as the First Priority Representative or the Second Priority Representative shall request to release (i) the Lien of such Third Priority Lender in the Common Collateral or (ii) the obligations of any Grantor under its guaranty of the Third Priority Obligations, and such Liens and guaranty shall be automatically, unconditionally and simultaneously released, *in connection with a disposition of such Common Collateral or sale of any Grantor by any First Priority Lender or Second Priority Lender* (or by any Grantor with the consent of the First Priority Lenders or Second Priority Lenders, as applicable).

(Griffith Affirm. Ex. B at 9 (emphasis added).)

White Oak contends that its unilateral termination of the Kitara Lien was entirely within its rights, as the First Priority Representative, in connection with the disposition of Common Collateral or sale of a Grantor. White Oak contends that this disposition was properly made in connection with a June 2013 transaction involving Selling Source, Kitara, and non-party Ascend Acquisition Corp. ("Ascend"). Plaintiff attacks the Ascend Transaction was a sham. The Court need not delve too deeply into the parties' arguments on this point, since whether the Ascend Transaction was a bona fide disposition of the Common Collateral or bona fide sale of a Grantor is a question of fact that cannot be resolved on this motion to dismiss.

Accordingly, plaintiff's allegations regarding breaches of Section 7.06 and Section 8.0(n) of the White Oak Agreement, in addition to the unilateral termination of the Kitara Lien, may constitute a material breach or material breaches of the ICA that would prevent Selling Source and White Oak from enforcing the remedies standstill provision in Section

5 (a) of the ICA. However, such a determination at this juncture would be premature for the reasons set forth above.

d. **Other Alleged Material Breaches**

The Court is less persuaded by the other alleged breaches.

The fourth alleged breach of the ICA is premised on White Oak's concealment of the White Oak Agreement from plaintiff, allegedly in violation of Section 10 of the ICA. That section provides, in pertinent part, that the "Third Priority Representative shall be given prior written notice of any changes to the First Priority Documents or Second Priority Documents that materially affect the rights that the Third Priority Lenders have in the Common Collateral." (Griffith Affirm. Ex. B at 13.) Plaintiff alleges that White Oak concealed the terms of the White Oak Agreement and that plaintiff only obtained a copy of the agreement after this Court directed White Oak to comply with discovery at the April 2014 hearing. However, even if the White Oak Agreement does materially affect plaintiff's rights, Section 10 continues on to say that any failure to provide such notice "shall not . . . release the obligations of the Third Priority Representative or any Third Party Lender under this Agreement." *Id.*

Plaintiff asserts that a separate fifth breach of the ICA based on White Oak's amendment of the ICA's terms without plaintiff's consent in violation of section 14 of the

ICA, which provides that none of its terms may be amended unless such amendment is in writing signed by the Third Priority Representative. *See* Griffith Affirm. Ex. B at 14. However, since the actions of Selling Source and White Oak that allegedly created unilateral amendments to the ICA are the same actions that form the basis of the first three alleged breaches of that agreement, there is no separate breach of Section 16 of the ICA.

Finally, plaintiff asserts that Section 16 of the ICA bars White Oak from making the instant motion to dismiss the supplemental complaint. As stated above, Section 16 is merely an agreement by the parties to the nonexclusive jurisdiction of New York federal and state courts in Manhattan to hear disputes by either the First, Second or Third Priority Representatives against the Grantors. This provision does not prevent White Oak from filing a motion to dismiss before this Court.

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To conclude, White Oak's motion to dismiss the supplemental complaint in its entirety based on Sections 5 and 8 of the ICA is denied. White Oak has not demonstrated that the documentary evidence it attaches to its motion papers resolves all factual issues as a matter of law and conclusively disposes of all of the plaintiff's claims. *See, e.g., Fortis Fin. Servs. v. Fimat Futures USA*, 290 A.D.2d 383, 383 (1st Dep't 2002). Plaintiff has articulated as least three material breaches of the ICA, and discovery is necessary to explore possible

ambiguities in the White Oak Agreement. In addition, since plaintiff was a stranger to the January 2013 transaction between BNY Mellon, Selling Source and White Oak and its lenders, discovery is needed to test the validity of White Oak's allegations regarding the refinancing of the First and Second Priority Obligations. Discovery regarding the termination of the Kitara Lien is also necessary given the discrepancy regarding the timing and justification for White Oak's actions with respect to that lien.

White Oak's only asserted ground for dismissal of plaintiff's declaratory judgment claim is that it "falls with Intrepid's inability to maintain its remaining claims." *see* White Oak Moving Br. at 16. Since White Oak has failed to offer meritorious dismissal arguments as to plaintiff's other claims, this argument for dismissal of the declaratory judgment claim likewise fails. Accordingly, White Oak's motion to dismiss plaintiff's declaratory judgment claim is denied.

III. Plaintiff's Motion to Amend the Supplemental Complaint

Finally, Plaintiff seeks to amend its supplemental complaint to assert two new causes of action: (1) a claim against White Oak for breach of the ICA; (2) a claim for tortious interference with the Intrepid Note and ICA against White Oak, Full Circle Capital Corp., White Oak Strategic Master Fund, L.P., and "John Doe Lenders 1-20." *See* Farley Affirm. Ex. A.

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. *See* CPLR 3025(b); *see also Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008) (granting motion to amend absent showing of surprise or prejudice). A showing of "[p]rejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007) (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)).

Further, in considering a proposed amendment, "the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face." *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366 (1st Dep't 2007); *see also Perotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dep't 2011) ("[O]n a motion for leave to amend a pleading, the movant 'need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'").

Selling Source took no position on plaintiff's motion to amend (*see* 12/8/14 Oral Arg. Tr. at 3-4), and White Oak has not demonstrated any basis for denial of the amendment. White Oak again argues that the ICA authorized the actions taken by White Oak and precludes Intrepid from maintaining this action. As already addressed in this decision, these

arguments fail to provide a basis for dismissal of plaintiff's complaint and fail to demonstrate that the proposed pleading is palpably insufficient. Accordingly, Defendants have not made the requisite threshold demonstrations of prejudice and patent insufficiency, and plaintiff's motion for leave to amend is granted.

IV. Conclusion and Order

For the foregoing reasons, it is hereby

ORDERED that the motion of defendant White Oak Global Advisors, LLC to dismiss the supplemental complaint pursuant to CPLR 3211 (a) (1) and (7) is denied; and it is further

ORDERED that plaintiff's motion for leave to serve and file a second supplemental complaint, in the form annexed to its motion papers, is granted; and it is further

ORDERED that the second supplemental complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in this action; and it is further

ORDERED that a summons and the second supplemental complaint, the latter in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after

service of a copy of this order with notice of entry unless counsel for the plaintiff and the new parties stipulate otherwise in writing; and it is further

ORDERED that the action shall bear the following caption:

"SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COM. DIV. PART 3
----------X
INTREPID INVESTMENTS, LLC, as Administrative Agent,

Plaintiff,

-against- Index No. 654291/13

SELLING SOURCE, LLC, LONDON BAY – TSS ACQUISITION COMPANY, LLC, DATAX, LTD., PARTNERWEEKLY, L.L.C., LEADREV HOLDING, LLC, 19 COMMUNICATIONS, LLC, IDESKTOPMEDIA.COM, LLC, EMAIL REACT, LLC, FPG, LLC, IMPEERIAN INSURANCE AGENCY OF NEVADA, LLC, LEAD SILO, LLC, MARK HOLDINGS, LLC, Q INTERACTIVE, LLC, KITARA MEDIA, LLC, CLICKGEN, LLC, OG LOGISTICS, LLC, DUCK PLAY, LLC, PLAY NOMY, LLC, PLAY TURTLE, LLC, JOHN DOES 1-20, WHITE OAK GLOBAL ADVISORS, LLC, FULL CIRCLE CAPITAL CORP., WHITE OAK STRATEGIC MASTER FUND, L.P., AND JOHN DOE LENDERS 1-20,

Defendants.
----------X"

; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158), and the Clerk of the E-Filing Support Office (Room 119) who are directed to mark the court's records to reflect the additional parties.

Dated: New York, New York
June 26, 2015

Hon. Eileen Bransten, J.S.C.