SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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INTREPID INVESTMENTS, LLC AS ADMINISTRATIVE AGENT,

Plaintiff,

- v -

SELLING SOURCE, LLC, LONDON BAY - TSS ACQUISITION COMPANY, LLC,DATAX, LTD., PARTNERWEEKLY, L.L.C., LEADREV HOLDING, LLC,19 COMMUNICATIONS, LLC,IDESKTOPMEDIACOM, LLC,EMAIL REACT, LLC,FPG, LLC, IMPEERIAN INSURANCE AGENCY OF NEVADA, LLC, LEAD SILO, LLC, MARK HOLDINGS, LLC, SPEEDWELL MARKETING SOLUTIONS, LLC,Q INTERACTIVE, LLC, KITARA MEDIA, LLC, CLICKGEN, LLC, OG LOGISTICS, LLC,DUCK PLAY, LLC,PLAY NOMY, LLC,PLAY TURTLE, LLC, WHITE OAK GLOBAL ADVISORS, LLC

Defendants.

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INDEX NO. 650641/2019

MOTION DATE 08/02/2023, 08/02/2023

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 63, 64, 65, 66, 67, 68, 69, 70, 96, 98, 100, 104, 105

were read on this motion to DISMISS AMENDED COMPLAINT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 97, 99, 101, 102, 103, 104, 105

were read on this motion to DISMISS AMENDED COMPLAINT.

Defendants Selling Source LLC ("Selling Source"), London Bay – TSS Acquisition Co. LLC, DataX Ltd., Partner Weekly LLC, 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, Speedwell Marketing Solutions LLC, Q Interactive LLC, Kitara Media LLC, Clickgen LLC, OG Logistics LLC, Duck Play LLC, Play Nomy LLC and Play Turtle LLC (collectively, the "Selling Source Defendants"), and Defendant White Oak

Global Advisors LLC ("White Oak") (together with the Selling Source Defendants, "Defendants") each move to dismiss Plaintiff Intrepid Investments LLC's ("Intrepid") Amended Complaint (Mot. Seq. 05 & 06).

The Selling Source Defendants primarily argue that the Amended Complaint is barred by res judicata based on the Court's dismissal of Intrepid's prior action bearing the caption *Intrepid Investments, LLC, v. Selling Source, LLC, et al.*, Index No. 654291/2013 (the "2013 Action") (*see* NYSCEF 94). White Oak, for its part, primarily contests the sufficiency of the pleadings (*see* NYSCEF 70). Both the Selling Source Defendants and White Oak join in each other's motion (NYSCEF 94 at 1; NYSCEF 70 at 2).

In the 2013 Action, Intrepid sued Selling Source seeking to recover on a defaulted $27.8 million promissory note (*see* NYSCEF 624 at 1 in the 2013 Action). Intrepid also sued White Oak, as a senior note holder, alleging White Oak frustrated Intrepid's ability to obtain repayment on its junior note (*id.* at 2). Intrepid's complaint in the 2013 Action was dismissed at summary judgment on the ground that the senior debt had not been paid in full and therefore Intrepid's claims were barred by the remedies standstill provision in the Intercreditor Agreement ("ICA") (*id.* at 11-12).

Prior to the summary judgment decision in the 2013 Action, Intrepid had commenced the instant action in alleging, among other things, that subsequent transactions between Defendants occurring after the filing of the 2013 Action rendered White Oak's senior debt paid in full and breached the ICA (NYSCEF 61).

For the following reasons, the Selling Source Defendants' motion (in which White Oak joins) is **denied**, and White Oak's motion (in which the Selling Source Defendants join) is **granted in part**. Under the particular circumstances of this case, Intrepid's claims based on

facts post-dating the filing of the 2013 Action are not barred by res judicata. Intrepid's claims asserting conversion (Fourth Cause of Action) and aiding and abetting conversion (Fifth Cause of Action) are dismissed as duplicative of its claim for breach of contract.

Discussion

On a motion to dismiss, the Court must "accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within a cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2014] [internal quotation marks and citation omitted]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). This standard applies to motions to dismiss brought pursuant to CPLR § 3211(a)(5) on res judicata grounds (s*ee Gingold v Beekman*, 183 AD2d 870, 870 [2d Dept 1992]; *People ex rel. Schneiderman v College Network, Inc.*, 53 Misc.3d 1210(A), at *4 [NY Sup Ct Alb Cnty 2016].

A. Selling Source Defendants' Motion (Motion Sequence 06)

"A party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*In re Hunter*, 4 NY3d 260, 269 [2005]). Res judicata "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*id.*). "The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*id.*). By contrast, "where a claim could not have been raised in the prior

litigation because it had not yet matured, res judicata does not apply" (*UBS Sec. LLC v Highland Capital Mgmt., LP*, 159 AD3d 512, 513 [1st Dept 2018]).

The Selling Source Defendants argue that all claims asserted in the instant case were or could have been raised in the 2013 Action (NYSCEF 101 at 1).[1] In support of this argument, the Selling Source Defendants rely on this Court's decision (per Bransten, J.) permitting the Selling Source Defendants to file an amended answer in late 2018 alleging that senior debt had not been paid in full. (NYSCEF 593 in the 2013 Action). They also point to Intrepid's failure to perfect an appeal of this Court's denial of Intrepid's motion to vacate the note of issue and reopen discovery on that issue in the 2013 Action (*see* NYSCEF 594 in the 2013 Action). However, as set forth below, the Court finds that Intrepid did not have a full and fair opportunity to litigate the post-2013 conduct alleged in the Amended Complaint (NYSCEF 61 ¶¶ 71-89).

Due to a delay in filing the notice of entry of this Court's (Bransten, J.) 2015 decision and order denying White Oak's motion to dismiss in the 2013 Action, the First Department's decision on appeal was not rendered until 2018 (*see* NYSCEF 598 in the 2013 Action at 67:9-11; *see also Intrepid Investments LLC v Selling Source, LLC et al.*, 165 AD3d 523 [1st Dept 2018]). In that decision, the First Department "dismiss[ed] any claim or defense based on allegations that the First Priority or Second Priority Obligations have been paid in full or paid off" (*Intrepid Investments LLC*, 165 AD3d at 523). This ruling came after this Court's decision permitting the Selling Source Defendants to amend their answer, but before this Court's denial of Intrepid's motion to vacate the note of issue and reopen discovery.

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[1] The Court notes Intrepid's concession in its opposition "that it is limited in this action to pursuing claims based on the post-2013 events alleged in the Amended Complaint (NYSCEF 99 at 7). Accordingly, for purposes of this action, only the allegations contained in the Post-2013 Transactions are considered operative (NYSCEF 61 ¶¶ 71-89).

Thus, the denial of Intrepid's motion to vacate the note of issue and reopen discovery as moot based on the First Department's decision left it unclear whether the Selling Source Defendants' recently amended affirmative defense that no payment in full had occurred as of 2018 was properly at issue in the 2013 Action (NYSCEF 593 in the 2013 Action). In fact, Intrepid's Counsel inquired about this issue at the hearing denying its motion to vacate the note of issue (*id*. at 13:25-14:2). While the Court (Bransten, J.) declined to rule on the discrepancy (*id*. at 14:16-17; 15:10-18), it acknowledged that the First Department's ruling appeared to reset the factually relevant period to before the 2013 Action was commenced (*see id*. at 14:3-5). This notion was also reiterated by counsel for White Oak at the January 28, 2019 hearing on summary judgment (*see* NYSCEF 598 in the 2013 Action, at 69:13-16; 70:3-6).

Further, this Court's decision on summary judgment in the 2013 Action did not address the post-2013 allegations that are now the subject of the Amended Complaint (*see* NYSCEF 624 in the 2013 Action). And as noted above, Intrepid initiated the instant action in 2019 prior to this Court's dismissal of the 2013 Action on summary judgment in an effort to preserve claims based on the alleged post-2013 transactions entered into by Defendants (*see* NYSCEF 596 in the 2013 Action).

As a result, based on the facts and circumstances, the Court finds that Intrepid did not have the opportunity to pursue or present a claim based on post-2013 conduct. Therefore, the Court finds that the claims asserted in the Amended Complaint in this action "could not have been raised in the prior litigation because it had not yet matured, [therefore] res judicata does not apply" (*UBS*, 159 AD3d at 513-14 [finding claim not barred "[b]ecause the conduct at issue here took place after the commencement of the prior action"] [internal citations omitted]).

The Selling Source Defendants' remaining contentions with respect to the sufficiency of Intrepid's response to the bill of particulars are similarly unavailing. Despite the arguments in their papers on this motion (*see e.g.*, NYSCEF 94 at 12-13), counsel for the Selling Source Defendants highlighted that the conduct forming the basis for Intrepid's post-2013 allegations was "clear from the Bill of Particular responses" and the Amended Complaint (NYSCEF 105 at 12:9-15). The Court declines to dismiss the Amended Complaint or otherwise sanction Intrepid based on its responses to the Bill of Particulars.

Accordingly, the Selling Source Defendants' motion to dismiss the Amended Complaint is **denied**.

B. White Oak's Motion to Dismiss (Motion Sequence 05)

In addition to joining the Selling Source Defendants' motion, White Oak separately moves to dismiss the Amended Complaint on the ground that Intrepid has failed to plead payment-in-full under the terms of the ICA, and therefore the action is still barred by the remedies standstill provision in the ICA (*see* NYSCEF 100 at 1). White Oak also seeks dismissal of Intrepid's Fourth and Fifth Causes of Action for Conversion and Aiding and Abetting Conversion, respectively, arguing that they are duplicative of the contract claims asserted in the Amended Complaint (NYSCEF 70 at 6-7). For the reasons set forth below, White Oak's motion is **granted** to the extent it seeks dismissal of the Fourth and Fifth Causes of Action, and is otherwise **denied**.

White Oak argues that Intrepid has failed to adequately plead payment-in-full of the senior debt. Specifically, White Oak asserts that Intrepid's allegations fail to account for the fact that the ICA did not limit senior debt to $40 million; that subsequent re-financings were permitted under the ICA; and that senior debt includes principal as well as accrued interest, fees,

and other expenses (*id*. at 4). The Amended Complaint, however, sufficiently alleges that even after accounting for adjustments, White Oak received more than $100 million in payments and therefore was fully paid off and received at least $54 million worth of payments were made in violation of Intrepid's rights (NYSCEF 61 ¶¶ 77-78). Accepting the Amended Complaint's allegations as true, and giving Intrepid the benefit of every reasonable inference (*Weil, Gotshal & Manges, LLP*, 10 AD3d at 270), White Oak's arguments at most create issues of fact that cannot be resolved on a motion to dismiss.

By contrast, Intrepid's Fourth and Fifth Causes of Actions must be dismissed. "A cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]). Rather, for a conversion claim to stand alongside a breach of contract claim, Intrepid must allege "facts independent of the facts supporting their breach of contract claims" (*Jeffers v American Univ. of Antigua*, 125 AD3d 440, 443 [1st Dept 2015]). "Conversion occurs when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Family Health Mgt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 139 [1st Dept 2022] [internal quotation omitted]).

Intrepid's claim for conversion is predicated upon White Oak's status under the ICA. Specifically, Intrepid alleges that the $100 million White Oak received in payments was paid out of the Collateral (NYSCEF 61 ¶ 77). This same $100 million forms the basis for Intrepid's breach of the ICA claim (*see id*. ¶¶109-110; 117-120). Therefore, Intrepid only has a present possessory right to the Collateral if the alleged $100 million in payments constitutes payment-in-full and a breach of the ICA. Stated differently, Intrepid's conversion claims rise and fall with the breach of contract claim and must be dismissed (*Fesseha*, 305 AD2d at 269).

Based on the foregoing, White Oak's motion is **granted** to the extent it seeks dismissal of the Fourth and Fifth Causes of Action and is otherwise **denied**.

Accordingly, it is

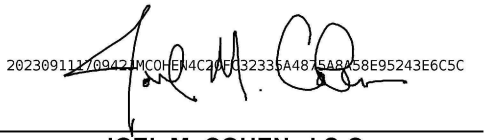
ORDERED that the Selling Source Defendants' Motion to Dismiss the Amended Complaint (Mot. Seq. 06) (in which White Oak joins) is **denied**; it is further

ORDERED that White Oak's Motion to Dismiss the Amended Complaint (Mot. Seq. 05) (in which the Selling Source Defendants join) is **granted** to the extent it seeks dismissal of the Fourth and Fifth Causes of Action and is otherwise **denied**; it is further

ORDERED that Defendants file answers to the remaining claims in the Amended Complaint within 21 days of this Decision and Order; and it is further

ORDERED that the parties appear telephonically for a preliminary conference on Tuesday, October 17, 2023, at 10:00 a.m., with the parties circulating dial-in information to chambers at SFC-Part3@nycourts.gov in advance of the conference.[2]

This constitutes the Decision and Order of the Court.



9/11/2023
DATE

JOEL M. COHEN, 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

[2] If the parties agree on a proposed preliminary conference order in advance of the conference date (consistent with the guidelines in the Part 3 model preliminary conference order, available online at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/PC-Order-Part-3.pdf), they may file the proposed order and email a courtesy copy to chambers with a request to so-order in lieu of holding the conference.