ICG Global Loan Fund 1 DAC v Boardriders, Inc.
2022 NY Slip Op 33492(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 655175/2020
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ICG GLOBAL LOAN FUND 1 DAC, ICG GLOBAL TOTAL CREDIT FUND 1 DAC, ICG US SENIOR LOAN FUND (CAYMAN) MASTER LP, ICG SENIOR DEBT PARTNERS SV 1 - ICG SECURED FINANCE COMPARTMENT, ICG US CLO 2014-1, ICG US CLO 2014-2, ICG US CLO 2015-1, ICG US CLO 2015-2R, ICG US CLO 2016-1, ICG US CLO 2017-1, ICG US CLO 2017-2, ICG US CLO 2018-1, ICG US CLO 2018-2, ICG US CLO 2018- 3, ICG US CLO 2019-1, YORK CLO-1 LTD., YORK CLO-2 LTD., YORK CLO-3 LTD., YORK CLO-4 LTD., YORK CLO-5 LTD., YORK CLO-6 LTD., YORK CLO-7 LTD., BLUEMOUNTAIN CLO 2013-2 LTD., BLUEMOUNTAIN FUJI US CLO I LTD., BLUEMOUNTAIN FUJI US CLO II LTD., BLUEMOUNTAIN CLO 2012-2 LTD., BLUEMOUNTAIN CLO 2013-1 LTD., BLUEMOUNTAIN CLO 2014-2 LTD., BLUEMOUNTAIN CLO 2015- 2 LTD., BLUEMOUNTAIN CLO 2015-3 LTD., BLUEMOUNTAIN CLO 2015-4 LTD., BLUEMOUNTAIN CLO 2016-1 LTD., BLUEMOUNTAIN CLO 2016-2 LTD., BLUEMOUNTAIN CLO 2016- 3 LTD., BLUEMOUNTAIN CLO 2018-1 LTD., BLUEMOUNTAIN CLO 2018-2 LTD., BLUEMOUNTAIN CLO 2018-3 LTD., BLUEMOUNTAIN CLO XXII LTD., BLUEMOUNTAIN CLO XXIII LTD., BLUEMOUNTAIN CLO XXIV LTD., BLUEMOUNTAIN CLO XXV LTD., GREAT ELM CAPITAL CORP., OFSI BSL VIII, LTD., OFSI BSL IX, LTD., Z CAPITAL PARTNERS CLO 2018-1 LTD., and Z CAPITAL PARTNERS CLO 2019-1 LTD.,

Plaintiffs,

- v -

BOARDRIDERS, INC., OAKTREE CAPITAL MANAGEMENT, L.P., OAKTREE FUND GP, LLC,OAKTREE FUND GP I, L.P., CANYON CAPITAL ADVISORS, LLC,CANYON PARTNERS REAL ESTATE LLC, RIVER CANYON FUND MANAGEMENT LLC, MARATHON BLUE GRASS CREDIT FUND, LP, MARATHON CENTRE STREET PARTNERSHIP, L.P., MARATHON SPECIAL OPPORTUNITY MASTER FUND, LTD., AUSTRALIANSUPER, TRS CREDIT FUND LP, BRIGADE CAPITAL MANAGEMENT, LP, MIDOCEAN CREDIT FUND MANAGEMENT L.P., CORBIN CAPITAL PARTNERS, L.P., and PONTUS HOLDINGS LTD., REDWOOD CAPITAL MANAGEMENT, LLC,

Defendants.[1]

INDEX NO. 655175/2020

MOTION DATE N/A

MOTION SEQ. NO. 004 005 006

DECISION + ORDER ON MOTION

[1] On consent, Oaktree Principal Fund V (Delaware), L.P., Oaktree Principal V Continuation Fund (Delaware) Holdco, L.P., and Oaktree Principal Fund VI (Delaware)

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 102, 126, 127, 128, 129, 130, 131, 132, 133, 147, 150, 151, 154, 155, 157

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 56, 57, 58, 59, 60, 61, 104, 134

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 62, 63, 103, 105, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 149, 152

were read on this motion to/for DISMISSAL.

Holdings, L.P. (Oaktree Lenders) substituted defendants Oaktree Fund GP, LLC and Oaktree Fund GP I, L.P. (Prior Oaktree Funds). (NYSCEF Doc. No. [NYSCEF] 153, so ordered stipulation at 1.) All claims against the Prior Oaktree Funds have been dismissed with prejudice. (*Id.*)

In simple terms, this case concerns an uptier transaction[2] that left plaintiffs' first-lien term loans subordinated without their consent to a group of select lenders, here, defendants, who once held first-lien term loans but now hold super-priority term loans.

Background

The following facts are taken from the complaint (*see* NYSCEF Doc. No. [NYSCEF] 1, compl.) and presumed as true on these motions to dismiss. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted].)

The Syndicated Credit Agreement

Defendant Boardriders, Inc. (Company), a California-based surfing and skateboarding apparel maker, borrowed $450 million in term loans pursuant to an April 6, 2018 syndicated credit agreement (Credit Agreement) (NYSCEF 1, compl. ¶¶ 49, 51) to finance the acquisition of nonparty Billabong International Limited (Billabong) and to refinance its and Billabong's debt. (*id*. ¶ 2). Nonparty Deutsche Bank AG New York Branch served as Administrative Agent and Collateral Agent under the Credit Agreement. (*Id.* ¶ 51.) Plaintiffs are a group of lenders collectively holding

[2] "There has been a flurry of litigation in recent years over transactions that seem to take advantage of technical constructions of loan documents in ways that some view as breaking with commercial norms. One example of such a transaction is sometimes described as an 'uptier' transaction. . . . [S]uch a transaction is one in which the debtor and a majority (but not all) holders of a syndicated debt issuance agree to enter into a new loan that is supported by a superior lien in the same collateral that secured the original debt. Thereafter, the debtor repurchases the participating lenders' share in the prior (now junior) loan – effectively leaving behind the minority holders in a tranche of debt that is now junior to that held by the majority lenders. While such a transaction would typically require an amendment to the original credit agreement or indenture, those documents are typically drafted to permit a majority (or, in some cases, a supermajority) of the holders to amend the agreement without the consent of the minority." (*In re TPC Group Inc.*, 2022 WL 2498751, US Bankr LEXIS 1856 [Bankr D Del July 6, 2022] [Goldblatt, J.].)

approximately $85 million of first-lien term loans under the Credit Agreement. (*Id.* ¶ 53; *see also id.* ¶¶ 14-19 [enumerating the amount of first-lien term loans held by individual plaintiffs or groups of plaintiffs].) Defendant Oaktree Capital Management LLC (Oaktree Capital) serves as the "Sponsor"[3] under the Credit Agreement, is the equity holder of the Company, and, through its affiliated funds, the Oaktree Lenders, held approximately $35 million in first-lien term loans. (*See* NYSCEF 1, compl. ¶¶ 52, 74.) Defendants Canyon Capital Advisors, LLC, Canyon Partners Real Estate LLC, River Canyon Fund Management LLC, Marathon Blue Grass Credit Fund, LP, Marathon Centre Street Partnership, L.P., Marathon Special Opportunity Master Fund, Ltd., Australiansuper, TRS Credit Fund LP, Brigade Capital Management, LP, MidOcean Credit Fund Management L.P., Corbin Capital Partners, L.P., Pontus Holdings Ltd., and Redwood Capital Management, LLC are a group of lenders holding approximately $286 million in first-lien term loan debt (Participating Lenders, and together with the Oaktree Lenders and the Company, defendants). (*See id.* ¶¶ 37, 76.) The Participating Lenders and the Oaktree Lenders collectively held $321 million in first-lien term loan debt under the Credit Agreement.

Plaintiffs' Allegations and the Terms of the Credit Agreement

The "hallmark" of the Credit Agreement, in plaintiffs' view, is equal treatment of all lenders with respect to payment of loan interest and principal amounts. (NYSCEF 1, compl. ¶ 3.) In other words, the Company must pay down its term loans through the administrative agent to each lender pro rata and may not selectively pay down the loans

[3] This term is defined in the Credit Agreement. (See NYSCEF 28, redline of Second Amended Credit Agreement at 74.)

of any one particular lender. (*Id.*) Plaintiffs explain that the Credit Agreement is a typical syndicated credit facility where the borrower

> "arranges to borrow the amount it needs from a 'syndicate' of lenders, all under a single loan agreement. The loan agreement in a syndicated credit facility contains various provisions to ensure that the borrower treats the loans from each lender equally and as part of a 'single' loan. Examples of such provisions include pro rata payment requirements mandating that the borrower make payments on the loans equally among all lenders and the requirement that amendments to the pro rata payment provisions can only be effectuated with the consent of all lenders. Without these pro rata protections, the borrower could elect to pay certain favored lenders a greater proportion (or even all) of their loans ahead of the other lenders."

(*Id.* ¶ 55.) To that end, section 4.01(a)(iii) of the Credit Agreement, which governs voluntary prepayment of the loans, provides that "each prepayment pursuant to this section . . . in respect of any Loans made pursuant to a Borrowing shall be applied pro rata among such loans[.]" (*Id.* ¶ 58.) Section 4.02, titled "Mandatory Repayments," sets forth in sub-section (h) that "except for repayments made pursuant to Section 2.15, each repayment of any Loans made pursuant to a Borrowing shall be applied pro rata among the Lenders holding such Loans." (*Id*. at 101.) Another pro rata provision appears in section 12.06 of the Credit Agreement:

> "Payments Pro Rata. (a) Except as otherwise provided in this Agreement, the Administrative Agent agrees that promptly after its receipt of each payment from or on behalf of the Borrower in respect of any Obligations hereunder, the Administrative Agent shall distribute such payment to the Lenders entitled thereto (other than any Lender that has consented in writing to waive its pro rata share of any such payment) pro rata based upon their respective shares, if any, of the Obligations with respect to which such payment was received."

(*Id.* ¶ 56 [emphasis added].) Accordingly, section 12.06(b) requires any lender that receives any amount applicable to the payment of interest or principal of the loan to "purchase for cash without recourse or warranty from the other Lenders an interest in the Obligations of the respective Credit Party so such Lenders in such amount as shall result in a proportional participation by all the Lenders in such amount." (*Id.* at 58.) There is one exception under the Credit Agreement with regard to pro rata treatment among lenders at issue here. (*Id.* ¶ 4.) Section 2.15 of the Credit Agreement, titled "Loan Repurchases," authorizes the Company to repurchase loans on a non-pro rata basis through an "open market" purchase. (*Id.* ¶ 60.)

Generally, pursuant to section 12.12, the Credit Amendment and "Credit Documents"[4] may be amended or modified by approval of the "Required Lenders" which is defined as "Non-Defaulting Lenders (other than Affiliated Non-Debt Fund Lenders) the sum of whose outstanding Loans at such time represents at least a majority of the sum of all outstanding Loans of Non-Defaulting Lenders that are not Affiliated Non-Debt Fund Lenders at such time." (NYSCEF 28, redline of Second Amended Credit Agreement at 70, 172). Section 12.12 contains exceptions to amending the Credit Agreement and Credit Documents, commonly known as a "sacred rights" provision (NYSCEF 1, compl. ¶ 59), and provides in relevant part:

> "(a) Neither this Agreement nor any other Credit Document nor any terms hereof or thereof may be amended, waived or modified (other than upon payment in full of the Obligations) unless such amendment, waiver or modification is in writing

[4] Under the Credit Agreement, "Credit Documents" defined as "this Agreement, the Guaranty, each Security Document, the Intercreditor Agreement, the Intercompany Subordination Agreement and, after the execution and delivery thereof pursuant to the terms of this Agreement, each Other Intercreditor Agreement, each Note and each Mortgage." (NYSCEF 28, redline of second amended credit agreement at 41.)

> signed by the respective Credit Parties party hereto or thereto and signed or consented to in writing by the Required Lenders or the Administrative Agent with the consent of the Required Lenders . . . , provided that no such amendment, waiver or modification shall, without the consent of each Lender (with Commitments or Obligations being directly affected in the case of following clauses (i), (iv), (v), (vi) and (vii)), (i) increase the amount of any Commitment, extend the final scheduled maturity of any Loan or Note, or reduce the rate or extend the time of payment of scheduled amortization, interest or Fees thereon . . . , or reduce (or forgive) the principal amount thereof . . . [;] (ii) release all or substantially all of the Collateral under the Security Documents or release all or substantially all of the value of the Guaranty provided by the Guarantors . . . [;] (iii) amend, modify or waive any provision of this Section 12.12(a) . . . [;] (iv) amend, modify or waive any provision of Section 12.04 to the extent such amendment, modification or waiver would further restrict the ability of Lenders to assign or grant participations in their rights hereunder [;] (v) reduce the "majority" voting threshold specified in the definition of Required Lenders . . . [;] (vi) amend, modify or waive any of the order of application provisions contained in Section 10.02[;] or (vii) amend, modify or waive any of the pro rata sharing provisions contained in Section 4.01(a), Section 4.02(h) or Section 12.06[.]"

(NYSCEF 28, redline of Second Amended Credit Agreement at 172-73 [emphasis added].) And, in plaintiffs' view, the amendment provision underscores the importance of the pro rata sharing provisions as amendments cannot be made without consent of all lenders if any modifications modify or implicate any of the sacred rights enumerated above. (*See* NYSCEF 1, compl. ¶ 59.)

The Disputed Transaction

Between March 2020 and May 2020, after the onset of the COVID-19 pandemic, plaintiffs, recognizing the financial challenges presented by the pandemic, repeatedly attempted to speak with high-level executives at the Company concerning any financial challenges the Company may be facing in light of the pandemic. (*See* NYSCEF 1,

compl. ¶¶ 105, 122, 134, 137-38, 146.) They either received conflicting responses or could not reach anyone. (*See id*.)

Sometime in June 2020, the Company, Participating Lenders (who were allegedly hand-selected by the Oaktree Lenders), and the Oaktree Lenders "commenced secret discussions," amended the Credit Agreement, and entered into a suite of interrelated agreements to effectuate a transaction to "provide[] the Company with up to $110 million of new money commitments, which were given super-priority lien treatment over the existing term loans" (Transaction) over an excluded group of holders of first-lien term loans of which plaintiffs are a part of (Non-Participating Lenders). (NYSCEF 1, compl. ¶¶ 67-68.) Deutsche Bank resigned as the Administrative and Collateral Agent before the Transaction was publicly announced; thereafter, nonparty Alter Domus (US) LLC (Alter Domus) stepped in as Administrative and Collateral Agent without plaintiffs' knowledge or consent. (*Id.* 8.) The Transaction went into effect on August 31, 2020, and plaintiffs were informed of the Transaction after it was publicly announced on August 31, 2020. (*See, e.g., id.* ¶¶ 120, 149.)

Second Amended Credit Agreement

To effectuate the Transaction, defendants and Alter Domus entered into the Second Amendment to Term Loan Credit Agreement, Consent and Waiver, dated August 31, 2020 (Second ACA). (NYSCEF 1, compl. ¶¶ 70-71.) The Second ACA permitted the Company to issue "new, super-priority first-lien debt with the rights among the lenders of the new super-priority debt and the existing term loan debt . . . [to be] governed by the . . . Intercreditor Agreement." (*Id.* ¶ 71.) To incur this new super-priority debt, section 9 of the Credit Agreement was eliminated as these negative

covenants "prohibited the Company from granting liens upon its property or assets, paying dividends and making other restricted payments, and incurring new debt, among other things." (*See id.* ¶ 64.) Section 9, titled "Negative Covenants" contained "negative covenants beginning on the closing date of the Credit Agreement until the term loans were paid in full. (*Id.* ¶¶ 64, 87; *see* also NYSCEF 28, redline of Second ACA at 126.) Section 8 of the Credit Agreement was also eliminated. (*Id.* at 116.) Section 8 of the Credit Agreement, titled "Affirmative Covenants" contained provisions requiring the Company to deliver quarterly and annual financial information, maintain its corporate ratings, comply with all applicable laws and regulations, and pay all material taxes imposed upon it. (NYSCEF 1, compl. ¶ 63.) Section 12.23 of the Credit Agreement, originally titled "Lender Action" was amended to provide that "Lenders can only enforce their rights if they have the status of Required Lenders and direct the Administrative Agent . . . to take such action on their behalf." (*See id.* ¶ 92.) A new provision, 12.01(c) was added, which required a cash indemnity bond equal to commence any action. (*See id.* ¶ 91.) Alter Domus, the new Administrative and Collateral Agent, entered into a new Intercreditor Agreement with the Company. (*See id.* ¶ 93.)

Under section 11.10(a) of the Credit Agreement, all initial term loan lenders authorized and directed the Deutsche Bank, as the Collateral Agent, to enter into certain agreements, including 'any Other Intercreditor Agreement for the benefit of the Lenders . . . .'" (*Id.* ¶ 94.) Under the Credit Agreement, "Other Intercreditor Agreements" is defined as "any Second Lien Intercreditor Agreement, Pari Passu Intercreditor Agreement or other intercreditor in form and substance reasonably satisfactory to the

Borrower and the Administrative Agent and the Collateral Agent." (NYSCEF 28, redline of Second ACA at 61.) The amended section 11.10(a) "struck the *pari passu* limitation on any Other Intercreditor Agreement from Section 1.02(b) of the Credit Agreement when they executed the Second Amended Credit Agreement." (NYSCEF 1, compl. ¶ 95.)

Super-Priority Credit Agreement & the Open Market Purchase Agreements

On the same day as the Second ACA, the Company, Participating Lenders, Oaktree Lenders, and nonparty Wilmington Savings Fund Society, FSB, as Administrative and Collateral Agent (Wilmington), entered into the Super-Priority Term Loan Credit Agreement dated August 31, 2020 (SPCA). (NYSCEF 1, compl. ¶ 72.) The SPCA "provides for three new tranches of first-lien term loans . . . with priority status over the loans of the [p]laintiffs and other excluded [non-participating lenders]." (*Id.* ¶¶ 73-74.) First, "$45 million of super-priority 'Tranche A' Priority Loans made by [Participating Lenders and Oaktree Lenders] consisting of new money commitments"; second, "[a]pproximately $80 million of 'Tranche B-1' Priority Loans held by certain affiliates of Oaktree Capital, consisting of $45 million of new money commitments and a roll-up of $35 million of Loans held by certain affiliates of Oaktree Capital"; and third, "[a]pproximately $286 million of 'Tranche B-2' Priority Loans held by the [Participating Lenders and Oaktree Lenders], entirely on account of a roll-up of $286 million in loans held by the [Participating Lenders and Oaktree Lenders] and no new money commitment." (*Id.* ¶ 74.) The SPCA also provided a $20 million super-priority delayed draw term loan facility funded by Oaktree Lenders. (*Id.* ¶ 75.)

In order to "effectuate the roll-up of existing *pari passu* term loans into Tranche B-1 and B-2 priority loans on a non-pro rata basis . . . the Company entered into private agreements with Oaktree Capital and/or certain of its affiliates, as well as the Participating Lenders [and Oaktree Lenders], in which the Company agreed to satisfy its obligations on $321 million of term loans . . . at par in exchange for an equal amount of Tranche B-1 and B-2 Priority Loans" by entering into open market purchases. (NYSCEF 1, compl. ¶ 76.) These private agreements were labeled as "Open Market Purchase Agreements," but in plaintiffs' view, did not constitute as true open market purchases under section 2.15 because (i) the Company did not retire the debt, but instead exchanged existing *pari passu* debt for new senior secured debt; (ii) purchases were not at market value; (iii) the Participating Lenders' and Oaktree Lenders' term loans were exchanged at par even though the trading value of such debt was at 50-60% of par, and (iv) the purchase were not stand alone transactions but part of the larger scheme to divert value from the plaintiffs and other non-participating lenders. (*Id.* ¶ 77.)

Second Lien Intercreditor Agreement

Alter Domus and the Company entered into a new intercreditor agreement, "Second Lien Intercreditor Agreement," dated August 31, 2020 (Second ICA) at the direction of defendants. The Second ICA subordinated the first-lien debt of the non-participating lenders in lien priority to the new super-priority debt of the Participating Lenders and pre-authorized the Company to subordinate the lien of the Non-Participating Lenders to any of the Company's future debts. (*See* NYSCEF 1, compl. ¶¶ 11, 98.)

Against the Company, Participating Lenders, and Oaktree Lenders, plaintiffs assert causes of action for (i) breach of Sections 4.01 and 12.06 under the Credit Agreement and seek specific performance of Section 12.06 which requires the defendants to purchase for cash without recourse or warranty from the plaintiffs an interest in the obligations of the respective credit party to plaintiffs in an amount that will result in proportional participation by all lenders in the amounts received from The Company as a result of the Transaction (first cause of action), or alternatively, damages; (ii) breach of the implied duty of good faith and fair dealing (second cause of action); and (iii) declaratory judgment that Sections 12.01(c) and 12.23 of the Second Amended Credit Agreement are unenforceable, Section 12.06(b) shall be enforced, that the Transaction Agreement and its associated agreements and amendments be invalidated and unwound, and that votes of the Oaktree entities permitting the Transaction be invalided (fourth and fifth causes of action).

Against Oaktree Capital, plaintiffs assert a claim of tortious interference with the Credit Agreement (third cause of action). Plaintiffs initially claimed, against all defendants, violations of Sections 273, 276, and 276(a) of the New York Uniform Voidable Transactions Act (NYUVTA), and against the Company and Oaktree Capital, violations of Sections 274, 276, and 276(a) of the NYUVTA (sixth and seventh causes of actions, respectively). However, plaintiffs have voluntarily withdrawn their claims arising from the NYUVTA (sixth and seventh causes of action). (NYSCEF 77, mem of law in opp at 11 n 1.)

In motion sequence number 004, the Company moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), and (7). In motion sequence number 005, the

Participating Lenders move to dismiss the complaint pursuant to CPLR 3211 (a)(7). In motion sequence number 006, Oaktree Capital and the Oaktree Lenders move to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), and (7).

Legal Standard

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) 'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to "'support the ground on which the motion is based.'" (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.,* 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].)

Under CPLR 3211(a)(3) motion to dismiss, the moving party has the burden to establish a prima facie case that plaintiff lacks standing. (*Brunner v Estate of Lax*, 137 AD3d 553, 553 [1st Dept 2016] [citation omitted].) "[T]he plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing." (*Luong v Ha The Luong*, 67 Misc 3d 1210(A), *4 [Sup Ct, NY County 2020] [citation omitted].)

On a motion to dismiss brought under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," the motion will be denied. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) But "allegations consisting of bare legal conclusions … are not entitled to any such consideration." (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted].) In addition, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003].)

Discussion

In essence, plaintiffs allege that the amendments to the Credit Agreement implicated the sacred rights provision requiring consent of all lenders prior to any amendment or modification and thus the Second ACA, Second ICA, SPCA, and Open Market Purchase Agreements are in violation of the Credit Agreement. Specifically: (i) the pro rata sharing provisions were breached when the Company exchanged the Participating Lenders and Oaktree Lenders' initial first-lien term loans at par on a non-pro rata basis without complying with the open market exception; (ii) the amendments to the Credit Agreement reduced the principal amount of the Participating Lenders and Oaktree Lenders' term loans which negatively affected the obligations owed to plaintiff; and (iii) the amendment to the Credit Agreement authorizing Alter Domus to enter into the Second ICA implicated various sacred right protections under the Credit Agreement.

The Company argues that plaintiffs' complaint should be dismissed in its entirety because plaintiffs failed to comply with the Credit Agreement's amended no-action provision and thus lack standing. The Company argues that, in the alternative, plaintiffs' breach of contract, breach of good faith and fair dealing, and declaratory judgment claims must be dismissed as they are contradicted and defeated by the plain terms of the Credit Agreement which did not prevent defendants from amending the Credit Agreement to enter into the Transaction. As to plaintiffs' claim against Oaktree Capital for tortious interference with the Credit Agreement, Oaktree Capital moves to dismiss under the economic interest defense.

The Participating Lenders and the Oaktree Lenders raise similar arguments in support of dismissal, and, to the extent that the Participating Lenders and/or the Oaktree Lenders pose different arguments from the Company, they will be discussed separately below.

Standing

The Company argues that plaintiffs lack standing as they failed to (i) act through the Administrative Agent with respect to any of plaintiffs' claims pursuant to Section 12.23 of the Amended Credit Agreement, and (ii) post a cash indemnity pursuant to Section 12.01(c) of the Amended Credit Agreement.

To support its contention, the Company principally cites to *Eaton Vance Mgmt. v Wilmington Sav. Fund Soc'y*, a case in which the court dismissed plaintiffs' claim as barred by the no-action clause. (2018 WL 1947405, at *6 [Sup Ct, NY County, Apr. 25, 2018], aff'd 171 AD3d 626 [1st Dept 2019].) In *Eaton Vance*, the defendants argued that plaintiffs' causes of actions were barred by the no-action clauses in their 2014 and 2017

agreements. The similarities end there. The circumstances of *Eaton Vance* and the no-action clause there are quite different in comparison to this action, and therefore inapposite. Critically, no party in *Eaton Vance* challenged the enforceability of the no-action clause which prohibited a lender from taking any legal action "without the prior written consent of the Administrative Agent." (*Id.* at *1-3.) Moreover, the plaintiffs in *Eaton Vance* sued under their 2014 agreement. (*Id*. at *4.) The dispute in *Eaton Vance* did not require the court to consider whether the no-action clause was unenforceable, rather, the court was presented with the question of whether the plaintiffs' claims fell into the no-action clause. (*Id*.) Here, the enforceability of the amendments to the no-action clause, which, amended without plaintiffs' consent, prohibited plaintiffs from taking legal action without the prior authorization of the Administration Agent, is heavily disputed. As the Company primarily relies on *Eaton Vance*, and other authorities that concerned valid no-action clauses, the Company has failed to establish prima facie that plaintiffs lack standing to bring this action.

On the other hand, plaintiffs argue that the pre-amended version of section 12.23 does not prohibit them from bringing claims against these defendants as the pre-amended version only prohibits actions against the Company or any other obligor concerning "any Collateral or any other property of the Borrower." Plaintiffs contend, and the court agrees, that they are not seeking to enforce any liens against the collateral or any other Company property. Moreover, the court finds an analogous situation in *Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp.*, where "Defendants assert that Plaintiffs do not have standing to assert their claims because they failed to comply with the amended no-action provisions requiring Plaintiffs to pre-fund a cash indemnity

and request the Administrative Agent to initiate litigation on their behalf." (72 Misc 3d 1218[A], *5 [Sup Ct, NY County, Aug. 16, 2021].) After the court in *Audax* considered the purpose of no-action clauses, enforceability of such clauses, and the atypical situation leading to the amendment of the challenged no-action clauses, the court found that "amended no-action provisions are unenforceable and inapplicable to the claims asserted in this action. They were never agreed to by the parties to the Original Agreement, and do not serve the 'salutary purpose' that generally supports enforceability of such restrictions on access to the courts and are alleged to be an integral part of Defendants' breach of contract." (*Id.* at *7.) Here, plaintiffs have sufficiently alleged that Section 12.23 was amended in bad faith to prevent plaintiffs from suing to enforce their rights under the Credit Agreement (*see, e.g.,* compl. ¶ 92) and their right to bring this action is not barred by the pre-amended version of Section 12.23.

Declaratory Judgment and Breach of Contract[5]

Dismissal under CPLR 3211(a)(1) and (7) is inappropriate if a court finds that a contract is ambiguous and thus cannot be construed as a matter of law. (*See Telerep, LLC v U.S. Intern. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010].) "Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources." (*Duane Reade, Inc. v Cardtronics, LP*, 54 AD3d 137, 141 [1st Dept 2008] [citation omitted].) "In deciding

[5] Plaintiffs' claims for declaratory judgment against defendants and breach of contract are tethered to the threshold question of whether the amendments to the Credit Agreement and resulting agreements to facilitate the Transaction violated plaintiffs' sacred rights set forth under section 12.12 of the Credit Agreement.

whether an agreement is ambiguous courts 'should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought.'" (*Kass v Kass*, 91 NY2d 554, 566-67 [1998], citing *Atwater & Co. v Panama R.R. Co*., 246 NY 519, 524 [1927].) A contract is ambiguous if it is "susceptible of two reasonable interpretations." (*Lend Lease U.S. Const. LMB Inc. v Zurich Am. Ins. Co*., 136 AD3d 52, 56 [1st Dept 2015] [internal quotation marks and citation omitted], affd on other grounds, 28 NY3d 675 [2017].)

"[I]nstruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument." (*BWA Corp. v Alltrans Express U.S.A., Inc*., 112 AD2d 850, 852 [1st Dept 1985].) As the Second ACA, Second ICA, SPCA, and Open Market Purchase Agreements were executed on the same day and entered into to effectuate the Transaction (*see* NYSCEF 1, compl. ¶¶ 6, 70), the court will read the August 31, 2020, agreements as one instrument.

The Company argues that the Credit Agreement did not prohibit the amendments at issue—i.e., amendments having the effect of subordinating liens, removing affirmative and negative covenants, or modifying the no-action clause—because none of the amendments implicated a sacred right. Therefore, the consent of all lenders was not necessary. The Company posits two arguments as to why there was no breach of the Credit Agreement in opposition to plaintiffs' allegations. First, as to the Second ICA,

the Company argues that there was no breach because the Second ICA, on its face, does not amend the plaintiffs' pro rata distribution provisions under the Credit Agreement. The Company concedes that the Second ICA does, however, subordinate the liens securing plaintiffs' term loans. Plaintiffs argue that by allowing Alter Domus to enter into the Second ICA and subordinating plaintiffs' original first-lien behind the new super-priority debt and future debt, the defendants improperly altered the pro rata rights under the Credit Agreement.

Thus, the question is whether the Credit Agreement utterly refutes plaintiffs' claims that the amendments to the Credit Agreement implicated a sacred right requiring the consent of all lenders prior to effectuating any amendment and resulting agreements. The answer is in the negative. Plaintiffs allege that they cannot be repaid until the lenders holding the super-senior loans, and any future Company debt, are repaid. (NYSCEF 1, compl. ¶ 179.) While there is nothing in the sacred rights provision that expressly prohibits the subordination of any lenders' liens, the court rejects the Company's narrow reading of the sacred rights provision. Accepting the Company's argument would essentially vitiate the equal repayment provisions set forth in sections 4.01, 4.02, and 12.12 and be contrary to the court's obligation to consider the context of the entire contract and not in insolation of particular words—or in this case, the absence of particular words. (*Kass*, 91 NY2d at 566, citing *Atwater*, 264 NY at 524.) Therefore, plaintiffs have adequately alleged a breach of their rights under the sacred rights provision in the Credit Agreement.

The Participating Defendants similarly argue that the amendment to section 11.10 under the Credit Agreement does not fall within the ambit of the sacred rights

provision and thus plaintiffs fail to allege an amendment to the Credit Agreement that would require the consent of all lenders. It is clear that amended section 11.10, titled "Collateral Matters" now provides and refers to the second ICA, in that "Each Lender authorizes and directs the Collateral Agent to enter into the Security Documents and the Intercreditor Agreement, the First Lien/Second Lien Intercreditor Agreement and any Other Intercreditor Agreement for the benefit of the Lenders and the Secured Creditors . . . ." (NYSCEF 28, redline of Second ACA at 158.) The Second ICA purports to dictate relative rights between the term lenders and the now priority term lenders under the Second ACA. However, for the same reasons as above, the court rejects the Participating Lenders' arguments and denies dismissal on this ground.

Reduction of Principal Loan Amounts

Second, the Company contends that the Second ACA did not reduce or forgive the principal amount of any term loans and thus does not implicate any sacred right. According to the Company, the new loans acquired through the open market purchases were expressly permitted by the Credit Agreement and did not affect any of the Company's obligations to plaintiffs, especially so since plaintiff retains the same principal amount of term loans at the same interest rate with the same maturity date they held prior to the Second ACA.

Here, the Company has failed to meet its burden to show that the Second ACA clearly forecloses plaintiffs' claim that the Transaction impermissibly reduced the principal amount of loans. Section 12.12(a)(i) does not specify whose term loans may not be reduced or forgiven. The Company's view is that plaintiffs' term loans were not affected but plaintiffs have posited a reasonable interpretation and alleged that the

Open Market Purchase Agreements, construed together with the Second ACA, extinguished the Participating Lenders and Oaktree Lenders' initial $321 million worth of *pari passu* debt, reducing the principal amount of their debt to zero. As two reasonable interpretations exist, the court declines to dismiss plaintiffs' claim.

Open Market Exception

Plaintiffs also allege that the "roll-up" of defendants' initial *pari passu* term loans into Tranche B-1 and B-2 loans did not comport with section 2.15 and thus breaches the pro rata sharing provisions of the Credit Agreement. The Company contends that there was no breach of the pro rata sharing provisions because the "open market" exception contained within the Credit Agreement does not impose the requirements plaintiffs claim. Specifically, the Company argues that the open market exception does not require, as plaintiffs argue, that term loans must be retired and not exchanged, the purchases to be at market value or for cash, the purchases be standalone transactions, and that the transaction be offered to all initial term lenders.

Plaintiffs argue that they have adequately alleged claims for breach of sections 4.01 and 12.06, the pro-rata sharing provisions, when the Company exchanged the Participating Lenders' and Oaktree Lenders' initial first-lien term loans at par on a non-pro rata basis without satisfying the Open Market exception in section 2.15. Specifically, plaintiffs argue that the court should accord the open market exception the plain and ordinary meaning of "open market," which, according to Black's Law Dictionary, means a market in which any buyer or seller may trade in and which prices and product availability are determined by free competition. Plaintiffs argue that they have met their pleading burden because they allege that the Transaction was not

available to all buyers and sellers in the marketplace, and that in fact, the Transaction was made available to select first-lien lenders; free competition did not determine the market price, no third-party advisor or broker was hired to canvass the market for first-lien debt to purchase at a discount, and, the Company did not purchase the loans at market value but rather it exchanged the Participating Lenders and Oaktree Lenders' loans at par value despite the trading value at 40-50% discount to par. And in opposition to defendants' interpretation of the "Dutch Auction Purchase Offer" which is also used in section 2.15 of the Credit Agreement, plaintiffs argue that there was no need to specify that an open market purchase must be open to all lenders because it is obvious in name. Alternatively, plaintiffs argue that the open market exception is ambiguous and thus the claim should not be dismissed at this stage.

Section 2.15, titled Loan Repurchases, states that either the sponsor, the borrower, or their affiliates "may from time to time, at its discretion, conduct modified Dutch auctions in order to purchase Loans (Each, a "Dutch Auction Purchase Offer"), each such Dutch Auction Purchase Offer to be managed by DBNY or another financial institution or advisor selected by the Borrower" and "may from time to time purchase Loans on the open market (each, an "Open Market Purchase Offer" and together with a Dutch Auction Purchase Offer, the "Purchase Offers"), so long as in each case the following conditions [stated in (i)—(vii)] (to the extent applicable) are satisfied[.]" The condition stated in (iii) provides that "each Dutch Auction Purchase Offer shall be open and offered to all Lenders (or all Lenders of a particular Class) on a pro rata basis[.]" The provision provides for purchases of loans on the open market but critically fails to define what constitutes an open market. The Company's interpretation of the open

market transaction is supported by the omission of the express condition that loan repurchase transaction be "open and offered to all Lenders," a condition that is clearly ascribed to Dutch Auction Purchase Offers. (*See* NYSCEF 28, Second Amended CA at 91-92 [section 2.15 (iii)].) However, just as reasonable is plaintiffs' proffered interpretation that the ordinary and plain meaning of "open market" implies "open and offered to all Lenders." Therefore, as the term is undefined and the contractual language is reasonably susceptible of more than one interpretation, an ambiguity exists. Thus, the Credit Agreement does not unequivocally foreclose the allegations in the complaint, and the motion to dismiss plaintiffs' breach of contract claim is denied.

Breach of the Implied Covenant of Good Faith and Fair Dealing

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [citations omitted].) "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" (*Id.* [citations omitted].) A claim for breach of the implied covenant of good faith and fair dealing will be dismissed as duplicative of its contract if both claims arise from the same facts and seek the identical damages for each alleged breach. (*See Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423 [1st Dept 2010] [citations omitted], *lv to appeal denied*, 1 NY3d 704 [2010].) However, an explicitly discretionary contract right cannot be exercised in such bad faith as to deprive the other party of the benefit of the bargain. (*Shatz v Chertok*, 180 AD3d 609, 609-10 [1st Dept 2020], citing *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003].)

The Company contends that plaintiffs' claims are duplicative of their breach of contract claims, however, the court disagrees and denies defendants' motion to dismiss the implied covenant claim. Here, plaintiffs allege that the Transaction was carried out in secret and while plaintiffs made multiple attempts to gauge whether the Company needed additional capital, which plaintiffs allege they were willing to provide. (*See, e.g.,* NYSCEf 1, compl. ¶¶ 105-120.) Plaintiffs further allege that defendants, who constitute "majority lenders" under the Credit Agreement, abused their ability to amend the Credit Agreement to effectuate the Transaction (*see id.* ¶ 10), going so far as to amend the no-action provisions to hinder plaintiffs' ability to sue and eliminating every affirmative and negative covenants set out in sections 8 and 9 (*see id.* ¶ 9). These allegations are sufficient to show that defendants worked in concert and in secret to deprive plaintiffs of the benefit of their bargain, i.e., pro rata distribution of loan repayments, in bad faith. (*See Shatz*, 180 AD3d at 609-10.)

Tortious Interference against Oaktree Capital

Oaktree Capital raises the economic interest defense in support of their motion to dismiss plaintiffs' tortious interference claim. "[D]efendant may raise the economic interest defense—that it acted to protect its own legal or financial stake in the breaching party's business." (*White Plains Coat & Apron Co., Inc. v Cintas Corp*., 8 NY3d 422, 426 [2007].) For example, the defense applies where "defendants were significant stockholders in the breaching party's business; where defendant and the breaching party had a parent-subsidiary relationship; where defendant was the breaching party's creditor; and where the defendant had a managerial contract with the breaching party at the time defendant induced the breach of contract with plaintiff." (*Id.*)

Here, plaintiffs concede throughout their complaint that Oaktree Capital was the ultimate equity holder of the Company and uses its relationships in the retail sector and its expertise to help the Company grow. (*See, eg.,* NYSCEF 1, compl. ¶ 52.) The defense applies. Thus, unless plaintiffs can make a showing of malice, fraud, or illegality to defeat Oaktree Capital's invocation of the economic interest defense, plaintiffs' tortious interference claim will be dismissed. (*Foster v Churchill*, 87 NY2d 744, 750-51 [1996] ["The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other."].) However, plaintiffs have failed to make such a showing of malice, fraud, or illegality to preclude the application of the economic interest defense. Although Oaktree Capital may not have acted in good faith in their actions, specifically with regard to shutting down avenues of communication (*see* NYSCEF 1, compl. ¶¶ 105, 122, 134, 137-38, 146), plaintiff fails to allege that the actions were fraudulent or illegal.

All other arguments have been considered and the court finds them unavailing.

Accordingly, it is

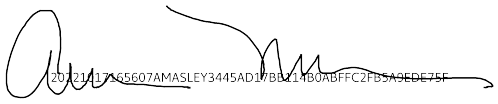
ORDERED that motion sequence number 004 is denied; and it is further

ORDERED that motion sequence number 005 is denied; and it is further

ORDERED that motion sequence number 006 is denied in part and granted in part with respect to plaintiffs' claim for tortious interference (count III) which is dismissed; and it is further

ORDERED that defendants are directed to serve their answers within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall file in NYSCEF and email to the court a proposed PC order to which all parties agree or competing PC orders if the parties cannot agree to a discovery schedule by November 4, 2022 at 4 pm.



10/17/2022
DATE

ANDREA MASLEY, J.S.C.

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