SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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GSO COASTLINE CREDIT PARTNERSHIP LP, et al.

Plaintiffs,

-against-

Index No. 650447/2014
Motion Seq. Nos. 002, 003, 004
Motion Date: 2/6/2015

GLOBAL A&T ELECTRONICS LTD., et al.,

Defendants.

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BRANSTEN, J.:

Plaintiffs, who are holders of 10% Senior Secured Notes issued by defendant Global A&T Electronics Ltd. ("GATE") in February 2013, assert claims arising from a September 2013 transaction, whereby GATE issued additional notes to holders of then-outstanding second lien debt in exchange for the cancellation and termination of this debt. Plaintiffs contend that this issuance of additional notes, which rank *pari passu* to plaintiffs' holdings, violates the contracts governing the notes. According to plaintiffs, the debt exchange (the "Exchange") altered the lien priority scheme in GATE's capital structure, eliminated GATE's second lien debt as a "credit cushion," and "diluted" the collateral securing plaintiffs' notes.

In their Amended Complaint, plaintiffs assert claims for (1) breach of the February 7, 2013 Indenture, as amended (the "Indenture"), which governs the notes; (2) breach of the October 30, 2007 Intercreditor Agreement, as amended (the "ICA"), which governs

the priority structure between GATE's first and second lien debt; (3) fraudulent inducement and fraud arising in connection with plaintiffs' purchases of the notes; (4) breach of the implied covenant of good faith and fair dealing; and, (5) tortious interference with contract.

Motion sequence nos. 002, 003 and 004 are consolidated herein for disposition. In motion sequence no. 002, defendants Affinity Fund III General Partner Limited ("Affinity") and Costa Esmeralda Investments Limited ("Costa") seek dismissal of the seventh, eighth, ninth and tenth causes of action of the Amended Complaint, as asserted against them, pursuant to CPLR 3211(a)(1) and (a)(7) .

In motion sequence no. 003, defendants Newbridge Asia GenPar IV Advisors, Inc. and TPG Asia GenPar V Advisors, Inc. (collectively "TPG") move, pursuant to CPLR 3211(a)(7), for an order dismissing the Amended Complaint as against them.

In motion sequence no. 004, defendants GATE, and its subsidiaries, Global A&T Finco Ltd., United Test and Assembly Center Ltd. ("UTAC"), UTAC Cayman Ltd., UTAC Hong Kong Limited, UTAC (Taiwan) Corporation, UTAC Thai Limited, and UTAC Thai Holdings Limited (collectively, the "GATE defendants") likewise seek dismissal of all claims asserted against them in the Amended Complaint, pursuant to CPLR 3211(a)(1) and (a)(7).

For the reasons set forth below, defendants' motions to dismiss are granted.

I. BACKGROUND

A. *The Parties*

The GATE defendants are a leading provider of semiconductor test and assembly services for integrated circuits used in mixed signal and logic products, and analog and memory products. (Am. Compl. ¶¶ 1, 91.) Defendants Affinity and TPG own a majority share in the GATE defendants, having acquired their interest in October 2007. *Id.* ¶¶ 1, 96. Defendant Affinity is the general partner of a fund – Affinity Asia Pacific Fund II – which is a shareholder of defendant GATE. Defendant Costa, an affiliate of Affinity, was one of the holders of the second-lien loans.

Plaintiffs allege that the two named TPG defendants control GATE, because they control the entities that hold approximately 47% of the outstanding equity of Global A&T Holdings ("GATH"), of which GATE is a wholly-owned subsidiary. (Am. Compl. ¶ 96.) Plaintiffs further allege that TPG and Affinity are GATE's "controlling shareholders," *id.* ¶¶ 3, 5, 15, 89, 23, 164, 179, 321-22, 324, and that "each have two representatives on GATE's four-member board of directors." *Id.* ¶ 96.

Plaintiffs are purchasers of more than $323 million of GATE's Senior Secured Note (the "Notes"), pursuant to the Indenture. *Id.* ¶ 2. Plaintiffs represent four Noteholder groups: Group I plaintiffs represent $84 million; Group II plaintiffs represents $12 million; and, Group III plaintiffs represent $225 million. The Indenture plaintiffs

comprise some, but not all, of the Group I and Group II plaintiffs. *Id.* ¶¶ 2, 70-74. Only the Group I and Group II plaintiffs assert fraud claims, and all of the plaintiffs assert breach of the ICA.

B. *GATE's Pre-2013 Credit Facilities*

In 2007, GATE entered into two senior and two junior credit facilities. *Id.* ¶ 97. The senior facilities comprised a $625 million senior term loan due to mature on October 30, 2014 and a $150 million revolving credit facility due to mature on October 20, 2013 (the "2007 First Priority Obligations"). The junior facilities comprised a fixed rate loan and a floating rate loan, each for $237.5 million, and both due to the mature on October 30, 2015 (the "Second Priority Obligations"). *Id.* All four credit facilities were equal in payment priority, but the 2007 First Priority Obligations had a first lien on GATE's assets and the Second Priority Obligations had a second lien. *See* Affirmation of Joshua Greenblatt ("Greenblatt Affirm.") Ex. H at 9, 11 (1/31/13 offering circular).

C. *GATE Issues the Notes Purchased by Plaintiffs*

In February 2013, GATE issued $625 million of Notes pursuant to the Indenture, and used the proceeds to prepay the 2007 First Priority Obligations. (Am. Compl. ¶¶ 118, 124.) The Notes, due to mature on February 1, 2019, are equal in payment priority to

GATE's Second Priority Obligations, if any, but are secured by a first lien on GATE's assets under the terms of the Indenture. *Id.* ¶ 117.

The Notes were offered to plaintiff pursuant to a detailed offering circular, dated January 31, 2013 (the "Offering Circular"). The Offering Circular expressly disclosed that:

- the Notes being offered to plaintiffs and other investors were equal to the Second Priority Obligations in payment priority, *see* Offering Circular at 9, 133;
- GATE had the express right to issue additional Notes *pari passu* to the Notes being offered to plaintiffs and other investors, *id.* at 132-133;
- GATE had the express right to secure the additional Notes with a lien on the same collateral securing the Notes held by plaintiffs and other investors, *id.* at 136-138;
- the Second Priority Obligations were due to be repaid in 2015, four years before the Notes matured in 2019, at the latest, *id.* at 159, 200-201.

D. *The Governing Agreements*

The Indenture governs GATE's rights and obligations regarding its Priority Obligations – including $625 million of Notes issued February 7, 2013 and $502 million in additional Notes issued on September 30, 2013. (Am. Compl. ¶ 9.) GATE entered into a second supplemental indenture on September 30, 2013 to specify that the additional Notes be treated as a single class with the Notes. *See* Greenblatt Affirm. Ex. G.

The ICA governs the priority structure between GATE's First Priority Obligations and Second Priority Obligations. (Am. Compl. ¶ 7.) The ICA was amended twice, most notably for the second time on September 30, 2013, *inter alia*, to amend the definition of "Second Priority Agreement" in the ICA and to designate the additional Notes issued by GATE on that date as "First Priority Agreements" under the ICA. *See id.* Ex. E.

E. *The Exchange*

Following the issuance of the Notes in February 2013, GATE's business took a downturn and its sales decreased by a year-over-year drop of 18%. (Am. Compl. ¶¶ 157-158.) According to plaintiffs, GATE's "deteriorating financial condition" made taking the company public difficult, and "forc[ed] GATE to revert to its contingency plan: the Exchange." *Id.* ¶ 198.

On September 30, 2013, pursuant to the Exchange, GATE issued approximately $502 million of additional Notes pursuant to the Indenture. (Am. Compl. ¶ 167.) As expressly permitted under the Indenture, the additional Notes were designated First Priority Obligations and rank *pari passu* to the Notes issued in February 2013 with respect to GATE's collateral. *See* Greenblatt Affirm. Ex. F (Indenture) at A-3, A-4. GATE issued the additional Notes to holders of GATE's Second Priority Obligations,

who agreed to cancel and terminate their Second Priority Obligations as of September 30, 2013 in exchange for the additional Notes. (Am. Compl. ¶¶ 166-169.)

Specifically, GATE provided holders of the Second Priority Obligations with (1) $925 in principal value of the Notes for every $1,000 of outstanding Second Priority Obligations that the holders agreed to cancel and terminate; and (2) consent and issuance fees payable upon successful completion of the Exchange. (Am. Compl. ¶¶ 169-173.) All of GATE's then-existing Second Priority Obligations were extinguished as of September 30, 2013. *Id.* ¶¶ 16, 174.

GATE contends that it had clear contractual rights to effect each aspect of the Exchange under the Indenture and the ICA.

G. *The Amended Complaint*

The Amended Complaint alleges thirteen causes of action. The first through sixth and eleventh causes of action assert breaches of the Indenture and seek injunctive relief unwinding the Exchange, damages, and a declaration accelerating the Notes. The seventh and ninth causes of action assert a breach of the ICA, while the twelfth and thirteenth causes of action assert fraudulent inducement and fraud and seek rescission of plaintiffs' Note purchases, and damages.

II. DISCUSSION

A. *Motion to Dismiss Standard*

Although on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction," and "the facts as alleged in the complaint [are presumed] as true," *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994), "factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Mark Hampton, Inc. v. Bergreen*, 173 A.D.2d 220, 220 (1st Dep't 1991) (citation omitted); *see also Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 A.D.2d 233 (1st Dep't 1994).

In order to prevail on a motion to dismiss based upon documentary evidence, the movant must demonstrate that the documentary evidence conclusively refutes the plaintiff's claims. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 590-591 (2005). Thus, dismissal is warranted where documentary evidence establishes that "the allegations of the complaint fail to state a cause of action." *L.K. Station Grp., LLC v. Quantek Media, LLC*, 62 A.D.3d 487, 491 (1st Dep't 2009). Moreover, where, as here, a written agreement "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting dismissal of the complaint pursuant to CPLR 3211(a)(1)" *150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't

2004). The court is "not required to accept factual allegations that are contradicted by documentary evidence" in connection with plaintiffs' fraud claims. *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006).

B. *Plaintiffs' Contract Claims (First Through Fifth, Seventh Through Eighth and Eleventh Causes of Action)*

Plaintiffs assert a number of breaches of both the Indenture and the ICA that allegedly arise from the Exchange. Each of these claims, however, must be dismissed under the plain language of the Indenture and the ICA. *See Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002) ("a written agreement . . . must be enforced according to the plain meaning of its terms").

Plaintiffs premise their entire complaint on the assertion that holders of GATE's second lien debt "must always be subordinated to the holders" of GATE's first lien debt. However, they cite to nothing in either the Indenture or the ICA that prohibits GATE from retiring its junior debt, or prohibits former second lien holders from becoming holders of first lien debt. To the contrary, as more specifically set forth below, each aspect of the Exchange was authorized under the plain language of the governing agreements. Thus, GATE was expressly entitled to issue additional Notes under the Indenture; designate those additional Notes as first lien debt pursuant to the Indenture and the ICA; secure those additional Notes with a lien on GATE collateral; amend the ICA to

clarify that the additional Notes are first lien debt; and, provide those additional Notes to then-holders of its second lien debt in exchange for the cancellation and termination of that debt.

I. Breach of the Indenture (First Through Fifth and Eleventh Causes of Action)

a. Breach of Section 4.09 (First Cause of Action)

Plaintiffs allege that section 4.09 of the Indenture limited the circumstances under which GATE and its subsidiaries could incur additional indebtedness. (Am. Compl. ¶ 239.) Plaintiffs further allege that the GATE defendants breached section 4.09(b) by incurring the additional Notes in the Exchange, as the Exchange was not a Permitted Refinancing Indebtedness, and therefore not a Permitted Debt. According to Plaintiffs, the Exchange was not a Permitted Debt, since the Additional Senior Secured Notes did not retain the same relative priority position to the Senior Secured Notes as the Junior Debt. *Id.* ¶ 240. Plaintiffs also allege that section 4.09(a) "does not permit the issuance of debt that otherwise contravenes the provisions of the Indenture and the [ICA]." *Id.* ¶ 241. The Amended Complaint fails to plead a breach of either provision.

By its terms, section 4.09(a) permits the issuance of additional debt – including the additional Notes used in the Exchange – provided that GATE has met the required debt coverage ratio during the four quarters preceding the issuance:

> [GATE] may incur Indebtedness . . . if the Consolidated Interest Expense Coverage Ratio for the Issuer's most recently ended four full fiscal quarters for which internal financial statements are available immediately preceding the date on which such additional Indebtedness is Incurred or such Disqualified Stock is issued would have been at least 2.0 to 1.0 determined on a pro forma basis.

(Indenture § 4.09(a).) Nothing further is required to permit the issuance of additional Notes, and there is no restriction on what GATE can do with the proceeds – including using the proceeds to retire its second lien debt.

Section 4.09(b), in turn, permits the issuance of additional Notes even where the required debt coverage ratio in section 4.09(a) has not been met, provided GATE meets one of the enumerated exceptions to section 4.09(a): "Clause (a) of this section 4.09 shall not prohibit the Incurrence of any of the following items of Indebtedness or Disqualified Stock, as applicable [collectively, 'Permitted Debt']."

In any event, regardless of whether GATE meets the coverage ratio under section 4.09 (although GATE alleges that it does), the Indenture permits GATE to incur additional debt under one of the exceptions in section 4.09(b), including as a "Permitted Refinancing Indebtedness" under subsection 6. Plaintiffs claim that the Exchange did not meet the Permitted Refinancing Indebtedness definition's requirement that, if the debt being replaced is "subordinated in right of payment to the Notes," the new debt must also be subordinated. (Am. Compl. ¶¶ 134-136, 240.) However, this argument ignores the

plain language of the Indenture and confuses the distinct concepts of payment subordination and lien subordination.

The definition of Permitted Refinancing Indebtedness requires continuity as to *payment* subordination only:

> if the Indebtedness being extended, refinanced, renewed, replaced, defeased or refunded is by its terms ***subordinated in right of payment to the Notes***, such Permitted Refinancing Indebtedness is by its terms ***subordinated in right of payment to the Notes.***

(Indenture, § 1.01) (emphasis added).

The Exchange plainly satisfied this requirement. Contrary to plaintiffs' allegations, the Exchange need not have "retain[ed] the same relative priority position" in other respects – including with respect to liens on the company's collateral – to meet the definition. (Am. Compl. ¶ 240.) Plaintiffs' effort to stretch the definition to require total "subordination," *id.* ¶ 136, would render meaningless the explicit limiting reference to "payment" subordination in the definition. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007) (courts should "construe the agreements so as to. . . . not render any portion meaningless").

Here, the Second Priority Obligations extinguished in the Exchange were not subordinated – but rather were equal – to the Notes in right of payment. The Second Priority Obligations expressly constitute Senior Indebtedness under the Indenture and are "not subordinated to the Notes of the Note Guarantee of such Subsidiary Guarantor."

(Indenture, § 1.01) (definition of "Senior Indebtedness"). Indeed, the reverse side of every Note held by plaintiffs confirms that GATE's Senior Indebtedness is not subordinated to the Notes in right of payment. *See* Indenture Ex. A at A-3 (the Notes "rank *pari passu* in right of payment with all existing and future Senior Indebtedness of [GATE]").

Accordingly, because the Second Priority Obligations were *not* "subordinated in right of payment" to the Notes under the plain language of the Indenture, the additional Notes which replaced the Second Priority Obligations need not have been subordinated to the Notes in order to meet the definition of a Permitted Refinancing Indebtedness. Thus, plaintiffs' section 4.09 claim must be dismissed. *See R/S Assoc. v. N.Y. Job Dev. Auth.*, 98 N.Y.2d 29, 32 (2002) (clear and unambiguous contract language should be enforced according to its plain terms); *N.Y. City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (1st Dep't 2006) (same).

2. Breach of Section 4.11 (Second Cause of Action)

Plaintiffs allege that section 4.11 of the Indenture limited the circumstances under which GATE and its subsidiaries could enter into an Affiliate Transaction, and that the GATE defendants breached section 4.11 by entering into an improper Affiliate Transaction in connection with the Exchange. (Am. Compl. ¶¶ 250, 251.) Plaintiffs

further allege that the Exchange was an Affiliate Transaction because Costa participated in and benefitted from the Exchange as a holder of approximately 35% of the Junior Debt. Accordingly, plaintiffs maintain that the Exchange breached section 4.11(a)(1) of the Indenture because the terms of the Exchange were less favorable to GATE than the terms it would have obtained in a comparable arms-length transaction with an unrelated person to refinance the Junior Debt. *Id.* ¶¶ 252, 253.

Plaintiffs' entire claim for a breach of section 4.11 is based on the fact that defendant Costa is a GATE affiliate and participated in the Exchange. However, the Indenture expressly permits transactions with affiliates like Costa, subject to certain enumerated requirements. Specifically, given the involvement of Costa, section 4.11 required GATE to effect the Exchange "on terms that are, when taken as a whole, no less favorable to the Issuer [GATE] . . . than those that would have been obtained in a comparable arm's-length transaction by the Issuer" and to deliver an Officer's Certificate and fairness opinion to the Trustee confirming compliance with the covenant. (Indenture, §§ 4.11(a)(1) & (a)(2)(i)-(ii).)

Plaintiffs do not allege that: (1) GATE failed to deliver requisite documentation to the Trustee; (2) Costa, a 35% holder, was treated any differently than the remaining 65% of the unaffiliated Second Priority Lenders who also participated in the Exchange; (3) Costa participated in the negotiations with GATE; or, (4) GATE could have extinguished

the Second Priority Obligations on terms more favorable than the Exchange. Rather, plaintiffs' only specific allegation in support of their section 4.11 claim is that "GATE issued the [Notes] plus millions of dollars in "consent" and "issuance" fees to Costa without requiring it to contribute any new capital to GATE, causing the market value of Plaintiffs' Senior Secured Notes to plummet drastically immediately following the Exchange." (Am. Compl. ¶ 189.)

However, even if taken as true, this allegation fails to state a claim. Consent and Issuance fees paid to Second Priority Lenders were not prohibited under either the Indenture or the ICA. Plaintiffs also contend that GATE should have required Costa to contribute "new capital to GATE" in connection with the Exchange (Am. Compl. § 188). Plaintiffs fail, however to point to any section of the Indenture that required Costa to do so.

Finally, plaintiffs fail to allege that Costa received any special treatment relative to the other 65% of unaffiliated Second Priority Lenders. To the contrary, as plaintiffs acknowledge, GATE paid identical Exchange fees to all Second Priority Lenders. *See* Am. Compl. ¶¶ 15, 170-173, 234, 252. The foregoing facts do not plead any failure by GATE to effect the Exchange on terms comparable to those available in an arm's-length transaction. *See Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516,

523 (1976) (defining arm's- length transactions as those where the parties enjoy "relative equality of bargaining power").

Accordingly, plaintiffs' claim for breach of section 4.11 of the Indenture must be dismissed.

3. Breach of Sections 4.12 and 4.18 (Third and Fifth Cause of Action)

Plaintiffs assert two claims – the third and fifth causes of action – alleging that the Liens on the Collateral established in the Exchange were not permitted.

In the third cause of action, plaintiffs allege that section 4.12 of the Indenture limited the ability of GATE and its subsidiaries to place new liens on the Collateral. (Am. Compl. ¶ 261.) Plaintiffs further allege that the Gate defendants breached section 4.12 because the first-priority lien they issued on the Collateral to secure the additional Notes did not constitute a Permitted Lien, and the Exchange did not satisfy the definition of a Permitted Refinancing Indebtedness because it did not subordinate the additional Notes to the Senior Secured Notes. *Id.* ¶ 262.

Section 4.12 of the Indenture provides that GATE will not "directly or indirectly create, incur, assume or suffer to exist any Lien securing Indebtedness or Attributable Debt (other than Permitted Liens) ... on the Collateral." Thus, to state a claim for breach of section 4.12, plaintiffs must establish that the Liens securing the additional Notes

issued by GATE in the Exchange did not fall within one or more of the 29 categories of "Permitted Liens" defined in the Indenture. *See* Indenture, § 1.01 ("definition of Permitted Liens"). Plaintiffs cannot do so.

To the contrary, under the plain language of the Indenture, "Liens securing the Notes and the Note Guarantees" qualify as Permitted Liens. *Id.* § 1.01 (clause 17). Accordingly, any Lien securing the additional Notes is, by definition, a Permitted Lien under the Indenture.

Plaintiffs ignore this clear contractual language and pick a different clause from the Permitted Liens definition and claim that the additional Notes did not meet that definition. *See* Am. Compl. ¶ 143. However, despite plaintiffs' arguments, nothing in the Indenture requires that Liens securing the additional Notes qualify as Permitted Liens under each of the 29 enumerated categories. Because the Liens securing the additional Notes qualify under clause 17, plaintiffs cannot claim a breach of the Indenture even if the Liens do not fall within clause 11, or any other category. *See Consedine v. Portville Cent. Sch. Dist.*, 12 N.Y.3d 286, 293 (2009) ("[c]ourts may not by construction add or excise terms . . . under the guise of interpreting the writing") (citation omitted).

Plaintiffs contend that, even though GATE expressly meets the definition of Permitted Liens under clause 17, it must also meets the definition under clause 11 to avoid rendering that provisions "superfluous." (Pls.' Br. in Opp. to the GATE

Defendants' Motion at 13.) The Court rejects this argument. Clause 17 does not reference any of the other 28 clauses of the Permitted Lien definition. Nor does the Indenture require that the Liens securing the additional Notes meet the definition of "Permitted Liens" under any more than one of the 29 available, and often conflicting, categories. Indeed, compliance with all of these provisions appears to be impossible, as some categories concern Liens existing as of the date of the Indentures (i.e., clause 8), while other others include Liens incurred subsequent to that date in the regular course of business (i.e., clauses 6 and 7).

Plaintiffs' fifth claim for breach of Indenture section 4.18 also fails because the Liens securing the additional Notes qualify as Permitted Liens. While plaintiffs claim that the "Exchange violated section 4.18 of the Indenture because it materially impaired the Senior Secured Notes' security interest in the collateral," *see* Am. Compl. ¶ 184, section 4.18(b) explicitly provides that "the Incurrence of Permitted Liens relating to the Collateral securing the Notes shall under no circumstances be deemed to materially impair the security interest with respect to the Collateral." Thus, contrary to plaintiffs' claim, the plain language of section 4.18 unambiguously excludes Permitted Liens – such as the Liens securing the additional Notes.

Accordingly, the third and fifth causes of action must be dismissed.

4. **Breach of Section 4.16 (Fourth Cause of Action)**

Plaintiffs next assert a breach of section 4.16 of the Indenture based on GATE's failure to seek their consent prior to amending the ICA in connection with the Exchange. (Am. Compl. ¶¶ 148, 267-276.) Specifically, plaintiffs allege that section 4.16 precluded GATE from amending the ICA in a way that disturbed the priority scheme established by the terms of the Indenture and the ICA without the consent of a majority of the holders of Senior Secured Notes. *Id.* ¶ 270.

This claim has no basis under the Indenture. To the contrary, section 4.16(b) expressly permits GATE to amend the ICA without Noteholder consent in the circumstances that are presented here. Section 4.16(b) provides that "[a]t the written direction of the Issuer [GATE] and without the consent of the Holders of the Notes, the Trustee shall from time to time . . . enter into one or more amendments to any intercreditor agreement to:

> (i) cure any ambiguity, omission, defect or inconsistency in any intercreditor agreement;
>
> (ii) increase the amount of Indebtedness or the types of Indebtedness covered by any of the intercreditor agreements that may be Incurred by the Issuer . . . [and] . . .
>
> (v) make provisions for the security securing additional Notes to rank *pari passu* with the security the Notes on the Collateral

(Indenture, § 4.16(b).) The ICA amendments fall within each of these provisions.

a. Section 4.16(b)(i)

First, as specifically set forth in the amended ICA, the amendments cured an "ambiguity" and "inconsistency" with respect to the ICA's definition of "Second Priority Agreement." *See* Greenblatt Affirm. Ex. E at 2 (Second Intercreditor Amendment Agreement) ("The definition of 'Second Priority Agreement' in the [ICA] is hereby replaced in its entirety" and "The First Priority Indenture and any notes issued thereunder (including, ***for the avoidance of doubt***, the Additional Notes) are hereby designated as 'First Priority Agreement' and not 'Second Priority Obligations' for the purposes of the [ICA]"). The additional Notes meet the definition of, and were issued as, first lien debt (encompassed within the definition of the Notes) under the Indenture, and are thus "First Priority Obligations" as expressly defined in the ICA. *See* ICA § 1.1. However, because the definition of Second Priority Obligations set forth in the ICA originally provided that any debt used to retire the Second Priority Obligation would be deemed a Second Priority Obligation, *see* ICA, § 1.1, the additional Notes could have been simultaneously both First and Second Priority Obligations under the ICA – a confusing result.

In a situation like this, section 9.3(b) of the ICA explicitly permits the First Priority Representative to amend the ICA "without the consent" of the Noteholders to "facilitate having additional indebtedness" of GATE "become First Priority Obligations or Second Priority Obligations" under the ICA. Accordingly, under section 9.3(b), the ICA

amendments designated the Indenture as a First Priority Agreement and amended the definition of "Second Priority Agreement" to exclude any agreement that was "not intended to be and [was] not a Second Priority Agreement' under the ICA. Since these agreements eliminated the "ambiguity" and "inconsistency" in the ICA, they fall within section 4.16(b)(i) of the Indenture, and plaintiffs' claim for breach of section 4.16 fails.

b. Section 4.16(b)(ii) and (v)

The ICA amendments also were permitted without Noteholder consent under section 4.16(b)(ii) and (v). Clause (ii) specifically contemplates the very transaction effectuated by the Exchange: a permissible increase in an amount and type of indebtedness covered by the ICA – the Notes. The ICA amendments facilitated this increase. Similarly, consistent with clause (v), the ICA amendments helped "make provision for the security securing additional Notes to rank *pari passu* with the security securing the Notes on the Collateral" by clarifying that the additional Notes are First Priority Obligations.

In their opposition to the motion, plaintiffs contend that none of the provisions of section 4.16 of the Indenture authorizes the amendment, because such amendment would "render superfluous" the ICA's "carefully-structured limitations" on restructuring lien

priority. (Pls.' Br. in Opp. to the GATE Defendants' Motion at 23.) The Court rejects this argument.

In an analogous case, *Matter of Musicland Holding Corp.*, 374 B.R. 113 (Bankr. S.D.N.Y. 2007), *aff'd* 386 B.R. 428 (S.D.N.Y. 2008), *aff'd* 318 Fed. App'x 36 (2d Cir. 2009), the defendant-debtor, Musicland, amended the applicable credit and intercreditor agreements to secure a new term loan by a first lien – on par with its revolving credit facility and above the second lien held by the plaintiff-trade creditors. Plaintiffs sued, alleging that "they [had] bargained for a lien that was subordinate only to obligations under Musicland's existing revolving credit facility." *Id.* at 121. The bankruptcy court granted Musicland's motion to dismiss, holding that "the unambiguous provisions of the Intercreditor Agreement allowed the parties to . . . amend the Revolving Credit Agreement to incorporate the [new loan term], and thereby extend the lien priority granted under the Intercreditor Agreement to that loan." *Id.* The District Court affirmed, rejecting the arguments by the trade creditors who, like plaintiffs here, "urge[d] a construction of the Intercreditor Agreement based upon their alleged expectation that the Revolving Credit Agreement would not be amended except for 'routine' matters, since the 'fundamental purpose' of the Intercreditor Agreement was 'the protection of [the trade creditors'] lien priority' and preservation of an 'equity cushion in the collateral.'" (386 B.R. at 437).

Accordingly, plaintiffs' claim for breach of section 4.16 of the Indenture fails, and it must be dismissed.

5. Declaration of Event of Default (Eleventh Cause of Action)

Plaintiffs seek a declaration that an "Event of Default has occurred and is occurring under Section 6.01(4) of the Indenture, and that pursuant to Section 6.02 of the Indenture, the [Notes] are due and payable immediately." (Am. Compl. ¶¶ 325-331.) However, as previously demonstrated, neither the issuance of additional Notes, nor GATE's exchange of the Notes for the Second Priority Obligations, nor the related amendments of the ICA violated any provision of the Indenture. Accordingly, the Amended Complaint fails to plead facts establishing an Event of Default under the Indenture, and the eleventh cause of action is dismissed.

6. Breach of the ICA (Seventh and Eighth Causes of Action)

a. Breach of Section 2.2 (Seventh Cause of Action)

ICA section 2.2 prohibits a change to the "lien priorities provided in section 2.1" of the ICA. Section 2.1(a) provides that Liens "securing the Second Priority Obligations" are junior to Liens "securing the First Priority Obligations." In their seventh cause of action, asserted against both GATE and Costa, plaintiffs allege that the Exchange

"refinanced the [Second Priority Obligations] in a way that altered the priority scheme set forth in Section 2.1 of the [ICA] between the First Priority Obligations, i.e., the [Notes], and Second Priority Obligations." (Am. Compl. ¶¶ 189, 299.)

The Court rejects this argument. The facts as pleaded by the Amended Complaint demonstrate that nothing about the Exchange "altered" GATE's lien priority scheme between the First and Second Priority Obligations. Rather, there was simply an issuance of the Additional Notes in repayment of the Second Priority Obligations. The "priority scheme" was not affected in any way. Indeed, to the contrary, following the Exchange, any existing (or future) Second Priority Obligations at GATE remain "expressly junior in priority" to GATE's First Priority Obligations – including the Notes purchased by plaintiffs.

Plaintiffs are really complaining about the fact that certain former "holders" of GATE's Second Priority Obligations now hold additional Notes which rank *pari passu* to the Notes held by plaintiffs. However, this fact has nothing to do with the overall priority structure alleged in the Amended Complaint. The structure remains intact. As plaintiffs' own illustrations demonstrate, *see* Am. Compl. ¶¶ 10, 16, plaintiffs' holdings – $625 million in Notes – remain in precisely the same lien position following the Exchange. All that has changed is (1) the issuance of the additional Notes and (2) extinguishment of the particular Second Priority Obligations below the Notes that existed prior to the Exchange.

Moreover, both the issuance of the Additional Notes and the repayment of the Second Priority Obligations were expressly permitted by the unambiguous language of both the ICA and the Indenture. First, the issuance of additional Notes used in the Exchange – and their designation as First Priority Obligations under section 9.3(b) – was expressly permitted. *See* ICA § 2.2 ("the aggregate amount of the First Priority Obligations [the Notes] may be increased . . . without affecting the provisions" of the ICA). Second, nothing in the ICA or the Indenture prohibited the second element of the Exchange – the repayment of the Second Priority Obligations prior to the maturity of the Notes with the Additional Notes. Where, as here, there is a written agreement that "unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract [so that] the contract itself constitutes documentary evidence . . . dismissal of the complaint [is warranted] pursuant to CPLR 3211(a)(1)." *150 Broadway N.Y. Assoc, L.P. v. Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004).

Finally, plaintiffs have no grounds for their claim that GATE is somehow required to maintain Second Priority Obligations at all times as a "credit cushion" and indeed they cite nothing in the Indenture or ICA obliging GATE to do so. Plaintiffs do not identify a single provision in the Indenture or the ICA that require GATE to maintain a "credit cushion" for the Notes. Indeed, the Second Priority Obligations were due to mature in 2015, four years before the Note, and could be repaid at any time.

While plaintiffs may dislike the consequences of the Exchange, the Amended Complaint fails to allege any actual impermissible change in the "lien priorities" under the Exchange. Thus, plaintiffs' claim under ICA section 2.2 must be dismissed.

b. Breach of Section 3.2 (Eighth Cause of Action)

In their eighth cause of action, plaintiffs allege that Costa breached section 3.2 of the ICA, which provides that the Second Priority Representative, on behalf of itself and the holders of Second Priority Obligations (including Costa):

> will not take or cause to be taken any action, the purpose or effect of which to make any Lien in respect of any Second Priority Obligation *pari passu* with or senior to, or to give any Second Priority Secured Party any preference or priority relative to, the Liens with respect to the First Priority Obligations or the First Priority Secured Parties with respect to any of the Common Collateral

(ICA § 3.2.)

The plain language of section 3.2 prohibits holders of the Second Priority Obligations from taking any action to make any lien with respect to the Second Priority Obligations *pari passu* with, or senior to, any lien securing the Notes. Plaintiffs allege that Costa violated "Section 3.2 of the [ICA] because the Junior Creditor Class Defendants acted to make the lien securing the Second Priority Obligations *pari passu* with the lien securing the First Priority Obligations." (Am. Compl. ¶ 190.) However, the facts of the Exchange – as pleaded by the plaintiffs themselves in their Amended

Complaint – do not allege any fact showing that any lien securing any Second Priority Obligation was made *pari passu* with, or senior to, any lien securing the Notes. Indeed, the Exchange did not alter those lien priorities at all. Rather, as is also alleged in the Amended Complaint, the Second Priority Obligations were paid in full by the issuance of the Additional Notes, as expressly authorized by the Indenture and the ICA.

Accordingly, the eighth cause of action is dismissed.

C. *Breach of the Implied Covenant of Good Faith (Sixth and Ninth Causes of Action)*

In the sixth and ninth causes of action, plaintiffs allege that both the Indenture and the ICA contain "an implied covenant by the GATE defendants that they would not take any action to disturb or alter the priority structure between the [Notes] and the [Second Priority Obligations]." (Am. Compl. ¶¶ 289, 314.) The sixth cause of action is asserted against GATE defendants, and the ninth cause of action is asserted against the GATE defendants and Costa.

These claims, however, are improperly duplicative of plaintiffs' contract claims. Indeed, plaintiffs' allegation that GATE and Costa breached an implied covenant "not [to] take any action to disturb or alter the priority structure between the [Notes] and the Second Priority Obligations" is a mere restatement of plaintiffs' claims for breach of the Indenture and the ICA. *Compare* Am. Compl. ¶¶ 240, 262, 270, 272, 281, 299, 307 *with*

Am. Compl. ¶¶ 289-290, 314-315. In addition, the instant claim seeks identical relief as the breach of contract claims. *Compare* Am. Compl. ¶¶ 245-246, 265-266, 275-276, 284-285, 301-302 *with* Am. Compl. ¶¶ 292-293, 317-318.

These claims must be dismissed as "duplicative of the [underlying] cause[s] of action for breach of contract." *N.Y. Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320 (1995); *see, e.g., Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010), *lv denied* 15 N.Y.3d 704 (2010) (dismissing implied covenant claims as duplicative where they "arise from the same facts" and "seek the identical damages for each alleged breach" as plaintiffs' breach of contract claims).

Although plaintiffs contend, in opposition, that their implied covenant claims are "intended to be pled in the alternative," this argument fails. *See* Pls.' Br. in Opp. to the GATE Defendants' Motion at 23. Under New York law, implied covenant claims may only be pled in the alternative where, unlike here, the implied covenant claims are based on allegations collateral to those underlying separate claims for breach of contract. *See MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d 419, 419-420 (2011).

D. *Fraud (Twelfth and Thirteenth Causes of Action)*

While the majority of plaintiffs in this action purchased their Notes after the Exchange, those who allege that they acquired their Notes beforehand (the Group I and

Group II plaintiffs) also assert claims for fraud against GATE in the twelfth and thirteenth causes of action. (Am. Compl. ¶¶ 2, 70-74 & Exs. A & B). Plaintiffs' primary allegation is that they purchased their Notes because GATE represented that it "intended" to refinance its second debt lien through an IPO.

To properly plead a common-law fraud claim, a plaintiff must allege a representation of a material fact, falsity of the representation, scienter, plaintiff's reasonable reliance on the alleged misrepresentation, and injury resulting from the reliance. *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 57 (1999); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273 (1st Dep't 2005); *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003). The absence of any of these elements is fatal to a recovery on a claim for fraud. *Shea v. Hambros PLC*, 244 A.D.2d 39, 46-47 (1st Dep't 1998).

Here, plaintiffs allege only non-actionable representations and omissions. Specifically, plaintiffs allege that: (1) prior to the Exchange, GATE represented that it intended to refinance the Second Priority Obligations with an IPO (*see* Am. Compl. ¶¶ 129-131); (2) in marketing the Notes in February 2013, GATE represented that the Notes would rank above then-existing Second Priority Obligations with respect to GATE Collateral (*see id.* ¶¶ 126-128); and, (3) GATE failed to disclose that it had the ability to "implement the Exchange" prior to doing so. *See id.* ¶¶ 193-197.

First, with respect to GATE's alleged misrepresentations concerning an intended IPO, such statements are nothing more than "representations of future intent" and therefore "nonactionable since there is no allegations that would support an inference that the representations were made with a present intention that they would not be carried out." *Papp v. Debbane*, 16 A.D.3d 128, 128 (1st Dep't 2005). Although plaintiffs cite statements by GATE concerning its "present intent" and "current plan" to pursue an IPO, nevertheless, the law is clear that such allegations regarding an IPO are insufficient to state a fraud claim. *See id.* In fact, given the highly uncertain nature of IPOs – both as to timing and ultimate success – statements of intent to pursue an IPO are routinely rejected as grounds for fraud. *See Weinstein v. Appelbaum*, 193 F. Supp. 2d 774, 781-782 (S.D.N.Y. 2002) (dismissing fraud claim because "no one can promise in advance that it will be possible to take a company public successfully"); *Dooner v. Keefe, Bruyette & Woods, Inc.*, 157 F. Supp. 2d 265, 278 (S.D.N.Y. 2001) ("By stating that the IPO was a 'sure thing,' the defendants only expressed their optimism about an event out of their control. They did not commit fraud though such statements").

Second, with respect to GATE's representations concerning the priority of the Notes, plaintiffs' allegations are based on disclosures concerning the terms of the Indenture and the ICA contained in the Offering Circular, complete with explicit references to the applicable contract language. *See* Am. Compl. ¶¶ 126-128. However, a

fraud claim cannot be based on disclosed contract provisions that were allegedly subsequently breached. Rather, to the extent that these provisions were breached, any harm to plaintiffs is properly addressed through their breach of contract claims, and such a claim must be dismissed as improperly duplicative of the breach of contract claims. *See Caniglia v. Chicago Tribune-N.Y. News Syndicate, Inc.*, 204 A.D.2d 233, 234 (1st Dep't 1994) ("It is well settled that a cause of action for fraud does not arise, where, as here, the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligations"); *Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993) (fraud claims dismissed where the "damage is recoverable under the other causes of action alleged").

Third, while plaintiffs claim that GATE had "an affirmative duty" to disclose "its belief that it could" and "its intent" to conduct the Exchange, *see* Am. Compl. ¶¶ 198, 335-337, 345-347, plaintiffs do not allege that GATE was even considering the Exchange in February 2013 when the original Notes were issued. Moreover, even if such allegations could be made, under New York law, an issuer such as GATE owes no duty to noteholders outside the terms of the governing indenture. *Alexandra Global Master Fund, Ltd. v. Ikon Office Solutions*, 2007 WL 2077153, at *9 (S.D.N.Y. 2007) ("Courts have commonly held that the indenture under which bonds are issued circumscribes the rights owed to the noteholders"). Where, as here, a complaint does not allege any basis for a

duty to disclose, a claim based upon nondisclosure of material information cannot be sustained. *Rivietz v. Wolohojian*, 38 A.D.3d 301, 301 (1st Dep't 2007) ("A claim predicated on nondisclosure requires a showing that a party is duty-bound to disclose pertinent information").

Accordingly, plaintiffs' twelfth and thirteenth causes of action for fraud must be dismissed.

9. *Tortious Interference with Contract (Tenth Cause of Action)*

Plaintiffs claim that TPG and Affinity tortiously interfered with plaintiffs' rights under two contracts they had with GATE – the Indenture and the ICA, by causing GATE to issue the Exchange. (Am. Compl. ¶ 322.)

To state a claim for tortious interference with contract, a plaintiff must allege: (1) the existence of [a] valid contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional and improper procuring of a breach, and (4) damages. *White Plains Coat & Apron Co., Inc. v.Cintas Corp.*, 8 N.Y.3d 422, 426 (2007); *see also Foster v. Churchill*, 87 N.Y.2d 744, 749-750 (1996).

As set forth above, plaintiffs have failed to sufficiently plead an actual breach of the Indenture and the ICA. Because plaintiffs have failed to state a claim for breach of contract against the GATE defendants, a necessary element of a claim for tortious

interference with that contract, their claim against TPG and Affinity for tortious interference with contract also fails as a matter of law. *See NBT Bancorp v. Fleet/Norstar Fin. Grp.*, 87 N.Y.2d 614, 620 (1996) ("In order to succeed on a cause of action for inducement of breach of contract a plaintiff obviously must show a breach of contract").

However, even if plaintiffs were able to demonstrate that a breach of the Indenture and the ICA occurred, plaintiffs also fail to state a claim for tortious interference for the independent reason that they have not adequately alleged that the alleged interference by TPG and Affinity was "improper." A party with an economic or legal interest in the breaching party's business may assert the so-called "economic interest" defense against claims for tortious interference with an existing contract. An economic justification defeats a tortious interference claim unless the plaintiff shows that the defendant acted maliciously or used illegal means to bring about the breach. *Foster v. Churchill*, 87 N.Y.2d 744, 750 (1996).

New York courts regularly dismiss claims for tortious interference with contract at the pleading stage when the defendant has an economic or legal interest in the breaching party and the plaintiff fails to allege malice or illegal means. *See, e.g., Hirsch v. Food Resources, Inc.*, 24 A.D.3d 293, 297 (1st Dep't 2005); *Torrenzano Group, LLC v. Burnham*, 26 A.D.3d 242, 242-243 (1st Dep't 2006) (affirming 3211(a)(1) dismissal of tortious interference claim because "it is clear, by virtue of documentary evidence

submitted by [defendant] in support of this pre-answer motion to dismiss . . . that the alleged interference had an economic justification . . . requiring [plaintiff] to adduce evidence in opposition sufficient to raise an issue of fact in that regard . . . [which plaintiff] failed to do").

Plaintiffs have specifically pleaded that both Affinity and TPG had an economic interest in GATE as "controlling shareholders" through their control of the voting stock of GATE. (Am. Compl. ¶¶ 95, 96, 187, 252.) Plaintiffs allege that "TPG and Affinity together control," that they are the "two controlling shareholders," and that each has two representatives on GATE's four-member board of directors. (Am. Compl. ¶¶ 3, 96.) Plaintiffs allege that, "[t]hrough their control of the GATE Defendants, [TPG and Affinity] intentionally caused the GATE Defendants to breach" the relevant agreements. *Id.* § 322. Moreover, plaintiffs have not made any allegation that TPG and Affinity were motivated by malice or employed illegal means to effect the Exchange. Rather, plaintiffs merely conclusorily assert that TPG and Affinity interfered in GATE's contracts "without justification." (Am. Compl. ¶ 322.) This allegation is plainly insufficient to state claim for tortious interference. *See 57th Street Arts, LLC v. Calvary Baptist Church*, 52 A.D.3d 425, 426 (1st Dep't 2008) ("Conclusory assertions of wrongful, intentional, malicious or improper actions, for personal profit or constituting independent torts, are inadequate to spell out a claim here for tortious interference with contract."); *127 W. 25th LLC v. Artek*

Sewing Supplies, Inc., 2010 WL 10076320, at *6 (Sup. Ct. N.Y. Cnty. 2010) ("conclusory allegations, such as those under review, that a defendant wrongfully, knowingly, intentionally, maliciously interfered with the consummation of a contract are clearly insufficient to withstand a motion to dismiss a cause of action based on tortious interference with contract").

Indeed, plaintiffs concede that the Exchange was implemented, not maliciously or illegally, but by GATE in order to protect its economic interests. For example, plaintiffs claim that "GATE experienced a downturn in business" after February 2013, and that GATE's "hand was forced by its deteriorating financial condition" to implement the Exchange (Am. Compl. ¶¶ 157-158, 198). These facts, as described by plaintiffs, lead to the conclusion that GATE had little option other than issuing the Exchange in order to remain economically viable.

***

For the foregoing reasons, all of the moving defendants' motions are granted, and the entirety of the Amended Complaint is dismissed. The Court has considered the parties' remaining arguments and deems them to be without merit.

III. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendants Affinity Fund III General Partner Limited and Costa Esmeralda Investments Limited for dismissal of the seventh, eighth, ninth and tenth causes of action of the Amended Complaint (motion sequence no. 002) is granted and the seventh, eighth, ninth and tenth causes of action of the Amended Complaint are dismissed as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendants Newbridge Asia GenPar IV Advisors, Inc. and TPG Asia GenPar V Advisors, Inc. for dismissal of the tenth cause of action of the Amended Complaint (motion sequence no. 003) is granted, and the tenth cause of action of the Amended Complaint is dismissed as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendants Global A&T Electronics Ltd., Global A&T Finco Ltd., United Test and Assembly Center Ltd., UTAC Cayman Ltd., UTAC Hong Kong Limited, UTAC (Taiwan) Corporation, UTAC Thai Limited, UTAC Thai Holdings Limited for dismissal of the first through seventh, ninth, and eleventh through

thirteenth causes of action of the Amended Complaint (motion sequence no. 004) is granted, and the first through seventh, ninth, and eleventh through thirteenth causes of action of the Amended Complaint are dismissed as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
July 14, 2015

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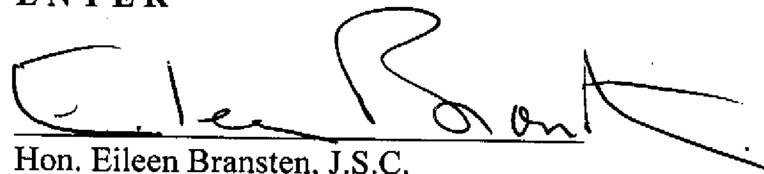

Hon. Eileen Bransten, J.S.C.