SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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INTREPID INVESTMENTS, LLC, AS ADMINISTRATIVE AGENT,

Plaintiff,

- v -

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

Defendants.

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INDEX NO. 654291/2013

MOTION DATE N/A, N/A

MOTION SEQ. NO. 014 016

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 014) 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 398, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452

were read on this motion for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 016) 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 554

were read on this motion for SUMMARY JUDGMENT.

In this action, Intrepid Investments, LLC ("Intrepid") is suing to recover on a defaulted $27.8 million Junior Secured Promissory Note dated August 31, 2010 (the "Intrepid Note" [NYSCEF Doc. No. 351]), executed by defendant Selling Source, LLC ("Selling Source").

Intrepid brings this suit as administrative agent on behalf of the Intrepid Note Holders (the "Holders"). Intrepid also sues Defendant White Oak Global Advisors, LLC ("White Oak"), a senior Selling Source note holder that allegedly has frustrated Intrepid's ability to obtain repayment of the Intrepid Note.

Defendants collectively seek summary judgment dismissing Intrepid's claims, principally on the ground that the relevant agreements among the parties prohibit Intrepid from enforcing its "third priority" Junior Secured Promissory Note until more senior lenders (including White Oak) are repaid in full, which has not occurred. Intrepid, for its part, argues that Defendants breached one or more agreements that may have originally prohibited Intrepid from enforcing the Intrepid Note. Intrepid seeks partial summary judgment against Defendants for the $28,700,000 principal amount of the Intrepid Note and foreclosure against Defendants' collateral.

For the reasons set forth below, Defendants' motion is granted, and the Complaint is dismissed. Intrepid's motion is denied.

BACKGROUND

a. Selling Source's First Priority and Second Priority Obligations

In 2007 and 2008, Selling Source, one of the largest Internet marketing companies in the United States, obtained secured loans ("First Priority Obligations" and "Second Priority Obligations") from lenders represented by the Bank of New York Mellon ("BNY Mellon"). Selling Source and its parent company, London Bay-TSS Acquisition Company, LLC ("LBTSS") and various subsidiaries (collectively, the "Grantors"[1]) guaranteed repayment of the

[1] The Grantors are DataX, Ltd.; Partner Weekly, LLC; LeadRev Holding, LLC; 19 Communications, LLC; iDeskTopMedia.com, LLC; Email React, LLC; FPG, LLC; Impeerian Insurance Agency of Nevada, LLC; Lead Silo, LLC; Mark Holdings, LLC; Speedwell Marketing

First Priority Obligations and Second Priority Obligations, pledging their assets as security (the "Common Collateral") (*see* NYSCEF Doc. No. 403 [Affidavit of S. Humphreys] at ¶¶ 7 – 10).

Defendant White Oak is an SEC-registered investment advisor, focused on direct lending and specialty financing to mid-size companies (*id.* at ¶ 13). White Oak is a First Priority Lender (*i.e.*, it holds Selling Source's First Priority Notes) (*id.*).

b. The Intrepid Note

In August 2010, Selling Source agreed to acquire a number of Internet businesses from Intrepid (the "Selling Source Transaction"). In partial consideration for the Selling Source Transaction, Selling Source executed the Intrepid Note in favor of the Holders for $28,700,000, with a 14% interest rate and a maturity date of June 30, 2013 (*see* Intrepid Note at Annex B[q]). Intrepid holds the majority of the Intrepid Note (*id.*). Intrepid also received, as a second form of consideration, a potential "earn-out" equity share in Selling Source (*see* Affidavit of S. Humphreys at ¶ 15). The principal terms of the loans were set out in a Security Agreement, dated August 31, 2010 (*see* NYSCEF Doc. No. 352 ["Security Agreement"]).

c. The ICA

In connection with the Selling Source Transaction, the parties executed the Intercreditor and Subordination Agreement on August 31, 2010 (*see* NYSCEF Doc. No. 348 [the "ICA"]), delineating the priority of each party's security interest in the Common Collateral. Plaintiff as the "Third Party Representative" of the "Third Priority Lenders," received third priority liens on

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Solutions, LLC; Q Interactive, LLC; Kitara Media, LLC; Clickgen, LLC; OG Logistics, LLC; Duck Play, LLC; Play Nomy, LLC; and Play Turtle, LLC (also referred to collectively as the "Selling Source Defendants"). Intrepid also asserts causes of action against John Does 1 – 20, unknown persons or entities who allegedly received or possess Intrepid's Collateral ("John Doe Defendants').

the Common Collateral as security for the payment of the Intrepid Note (*see* ICA at § 8.03). Intrepid expressly acknowledged in the ICA that its third priority liens were "junior and subordinate in all respects to any and all Liens securing the First … and Second Priority Obligations" (*id.* at § 2[a]; *see also id.* at p. 18).

Section 2(b) of the ICA provides that "[e]ach Grantor … and the Third Priority Representative … by its acceptance of the Third Priority Obligations whether upon original issuance, transfer, assignment or exchange, agrees that on the terms and conditions herein, the payment of the Third Priority Obligations shall be subordinated to the prior Payment-in-Full of all First Priority Obligations and Second Priority Obligations …"

Section 7, in turn, provides that "[n]othing contained in [the ICA] or the other Third Priority Documents is intended to or shall impair, as between the Grantors and the Third Priority Lenders, the obligations of the Grantors, which are absolute and unconditional, to pay to the Third Priority Lenders the principal of, premium, if any, and interest on the Third Priority Obligations as and when the same shall become due and payable in accordance with their terms…"

Notwithstanding those provisions, the ICA also contains a "Remedies Standstill" provision that limits Intrepid's ability to exercise remedies in the event of a default by Selling Source. Specifically, Section 5(a) provides that:

> "No Third Priority Lender shall commence or exercise any Remedies in respect of any default or event of default under any Third Priority Document until such time as the Payment-in-Full of the First Priority Obligations and Second Priority Obligations" (ICA at § 5[a])

"Remedies," in turn, is defined in Section 1 of the ICA as: "[W]ith respect to any Third Priority Default, the acceleration of any of the Intrepid Note, the Exercise of Secured Creditor

Remedies, the exercise of any other remedies in respect of such Third Priority Default including, without limitation, suing any Grantor or filing or participating in any involuntary bankruptcy petition against any Granter, but excluding in any event the imposition of the default rate interest under the Intrepid Note."

In addition, in Section 5(b)(ii), the Third Priority Lenders and Holders are barred from taking any action "adverse to the priority status of the Liens securing the First Priority Obligations and Second Priority Obligations, or the rights of the First Priority Representative, Second Priority Representative or Collateral Agent to exercise remedies in respect thereof…" Likewise, Section 8(g) of the ICA provides that, "[i]n no event shall any Third Party Lender of the Third Party Representative" institute or join in any legal action "seeking a determination that any lien or claim of any First Priority Lender or Second Priority Lender against the Common Collateral is invalid, unperfected, or avoidable."

d. Refinancing of The First and Second Priority Obligations

In January 2013, the First and Second Priority Obligations had reached their maturity dates (without repayment) and were refinanced pursuant to a Loan and Security Agreement dated January 31, 2013 (*see* NYSCEF Doc. No. 355 [the "White Oak Agreement"]). The lenders in the refinancing included White Oak and Full Circle Capital Corp. As part of the refinancing, White Oak succeeded to the position of BNY Mellon as the "First Priority Representative."

e. Selling Source's Default on the Intrepid Note

By letter dated August 14, 2013, Intrepid provided notice that Selling Source was in default of its obligations under the Intrepid Note and the ICA (namely 2[b] [requiring payment of the Third Priority Obligations on the Junior Maturity Date]) both prior to and after the June 30, 2013 maturity date of the Intrepid Note (*see* NYSCEF Doc. No. 130 ["August 19, 2013 Letter"]

[referencing August 14, 2013 Letter]). Selling Source responded in a letter dated August 19, 2013, contending that it was not in default and that it was not "obligated (or permitted) to make any payment whatsoever" on the Intrepid Note prior to June 30, 2013, per Section 2.2 of the Intrepid Note (*id.*). In addition, Selling Source stated that Section 5 of the ICA prohibited Intrepid from taking any legal action in respect of any default, since the First and Second Priority Obligations remained outstanding (*id.*).

f. The Kitara Lien

On September 3, 2010 – several years before the alleged default – Intrepid perfected its security interest and lien on all of the personal property of defendant Kitara Media, LLC ("Kitara"), one of the Grantors, by filing a UCC-1 financing statement with the Delaware Secretary of State (the "Kitara Lien") (*see* NYSCEF Doc. No. 116 ["Supplemental Complaint"] at p. 7, ¶ p). By email dated October 23, 2010, Kitara asked Intrepid for permission to remove the Kitara Lien, because Kitara was "trying to close on a line of credit with Wells Fargo Bank" (NYSCEF Doc. No. 371 ["Lien Termination Request"]). By letter dated October 24, 2013, Intrepid refused the Lien Termination Request because the Intrepid Note remained unpaid (*see* NYSCEF Doc. No. 341 ["Affidavit of Niuniu Ji"] at ¶ 60).

In an October 30, 2013 email, counsel to White Oak advised Selling Source that, in connection with "the disposition" of Kitara, and pursuant to section 8(d) of the ICA, White Oak was providing its authorization to file the requested UCC termination statement for the Kitara Lien (*see* NYSCEF Doc. No. 373 ["White Oak Authorization"]). Subsequently, a UCC-3 termination statement was filed with the Delaware Secretary of State, terminating the Kitara Lien (*see* NYSCEF Doc. No. 344 ["Kitara Answer"] at p. 7, ¶ 6).

g. The Instant Action

Intrepid filed the original complaint on December 13, 2013, asserting causes of action against Selling Source under the Intrepid Note (NYSCEF Doc. No. 1). In June 2014, Intrepid sought to amend the complaint to assert claims against White Oak (NYSCEF Doc. No. 96). White Oak then sought leave to intervene in this case (NYSCEF Doc. No. 106). The Court granted Intrepid's motion and denied White Oak's motion to intervene as moot (NYSCEF Doc. Nos. 119, 120). On August 5, 2014, Intrepid filed a supplemental complaint, adding White Oak as a defendant and asserting a single claim against it for a declaratory judgment that the ICA bars neither this action nor the relief sought herein against the other defendants (*see* Supplemental Complaint]).

In September 2014, White Oak filed a motion to dismiss the supplemental complaint (NYSCEF Doc. No. 132). In October 2014, Intrepid moved for leave to amend its supplemental complaint to assert two additional causes of action against White Oak for breach of the ICA and tortious interference with the Intrepid Note and the ICA by White Oak (NYSCEF Doc. No. 151). By Decision dated June 26, 2015, Justice Bransten denied White Oak's motion to dismiss and permitted Intrepid to file a second supplemental complaint (*see* NYSCEF Doc. No. 257). This Decision was appealed, and, on October 18, 2018, the Appellate Division affirmed Justice Bransten in relevant part, finding that Intrepid adequately alleged that White Oak breached the ICA by "restricting payments from borrowers on plaintiff's note" and by "removing plaintiff's lien on the assets of guarantor defendant Kitara Media, LLC" (*Intrepid Investments, LLC v Selling Source, LLC*, 165 AD3d 523, 524 – 25 [1st Dept 2018]). Ultimately however, Intrepid never filed an operative second supplemental complaint, having withdrawn its earlier submission

without further attempts to re-file (*see* NYSCEF Doc. Nos. 294, 306). As it stands, the following counts are asserted by Intrepid:

1. Count One – Intrepid alleges that Selling Source failed to repay all the sums due under the Intrepid Note by the Maturity Date, and that Intrepid is due a judgment on the Intrepid Note against Selling Source.
2. Count Two – Intrepid alleges that the alleged failure to make payments by Selling Source and the Grantors constitutes a breach of the Intrepid Note.
3. Count Three – Intrepid alleges that an Event of Default exists under the Intrepid Note, permitting it to foreclose on the Grantors' Security Interests.
4. Count Four – Intrepid alleges that the conduct of Selling Source and the Grantors constitutes a breach of the implied covenant of good faith and fair dealing.
5. Count Five – Intrepid alleges that LBTSS fraudulently transferred the Holders' Collateral to the John Doe Defendants, constituting a violation of NY CLS Debtor and Creditor § 273.
6. Count Six – Intrepid alleges that LBTSS' alleged fraudulent transfers are voidable under NY CLS Debtor and Creditor § 274.
7. Count Seven – Intrepid alleges that LBTSS' alleged fraudulent transfers are voidable under NY CLS Debtor and Creditor § 275.
8. Count Eight – Intrepid alleges that LBTSS' alleged fraudulent transfers are voidable under NY CLS Debtor and Creditor § 276 against LBTSS and the John Doe Defendants
9. Count Nine – Intrepid seeks a judgment directing the John Doe Defendants to surrender and transfer the allegedly wrongfully-obtained Collateral.

10. Count Ten – Intrepid seeks a declaratory judgment that the Kitara Lien Termination was improper and is null and void.

11. Count Eleven – Intrepid seeks a declaratory judgment that the ICA does not bar its action.

ANALYSIS

"[W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see also* CPLR § 3212 [b] [summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party"]). To be entitled to summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When deciding a summary judgment motion, the Court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). But "it is incumbent upon the [party opposing summary judgment] … to produce 'evidentiary proof, in admissible form, sufficient to require a trial … mere conclusions, expressions of hope, unsubstantiated allegations or assertions are insufficient'" (*State Bank of Albany v Fioravanti*, 51 NY2d 638, 647 [1980] [quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

I. Defendants' Motion for Summary Judgment is Granted

a. The "John Doe" Claims Are Dismissed

As a threshold matter, Intrepid's claims against the John Doe Defendants (Counts 5 - 9) are dismissed. Once an "action [i]s commenced by designating defendants as 'John Doe,' the

plaintiff is still required to name and serve the actual defendants within the 120-day time frame" as required by CPLR § 306-b (*see Cabrera v Port Auth. of New York*, 2016 WL 7313683 at *2 [Sup Ct, Queens County, 2015]; *Redmond v Jamaica Hosp. Med. Ctr.*, 29 AD3d 768, 769 [2d Dept 2016]). Intrepid has failed to identify, name, or serve such additional parties. It is no longer necessary or appropriate for the Court to exercise discretion to give Intrepid more time to identify the John Doe Defendants.

b. The ICA Section 5(a) Remedies Standstill Provision Bars This Action

The Intrepid Note is expressly "subject to the terms and conditions set forth in … [the] Intercreditor and Subordination Agreement" (Intrepid Note at § 5). Section 5(a) of the ICA, in turn, expressly bars Intrepid from suing any Grantor until the First and Second Priority Obligations have been repaid in full. Selling Source's "Payment-in-Full" of senior debt is thus a condition precedent to the enforcement of the Intrepid Note.

1. No Payment-In-Full Has Occurred

The summary judgment record demonstrates conclusively that the "Payment-in Full" condition has not been satisfied.[2] Intrepid's argument that the refinancing of the senior debt under the White Oak Loan Agreement constituted Payment-in-Full is meritless. The possibility of refinancing the senior debt is expressly contemplated in the ICA. Section 15 of that agreement provides that: "The Third Priority Representative [*i.e.*, Intrepid] on behalf of the Third Priority Lenders, further agrees that … if any Grantor desires to refinance or replace any or all of the First Priority Obligations or Second Priority Obligations with a new lender or lenders,

[2] Intrepid attempts to argue that the relevant burden in this case rests on Defendants to prove the absence of a Payment-in-Full. However, Defendants do not have this burden – Intrepid must prove the occurrence of the condition permitting enforcement of the Intrepid Note (*see, e.g.*, *Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 943-44 [2d Dept 2017]).

this Agreement shall apply mutatis mutandis [applying required changes] to any such refinanced or replaced obligations …"]).

Further, the Intrepid Note itself states: "This Note shall rank senior to all existing and future indebtedness of Maker … except for Senior Indebtedness," which is defined as "any debt incurred to redeem, repay, *or refinance*" the senior debt (Intrepid Note at § 6.1; Annex B. at § T [emphasis added]). This definition was acknowledged by Intrepid's corporate representative, who agreed that the ICA "contemplates the possibility of a refinancing" and that there is a possibility that a new lender could potentially have rights in connection with the ICA" (NYSCEF Doc. No. 413 ["Deposition of Niuniu Ji"] at 103:3-4; 104:25 – 105:4).

Based on the plain language of the agreements, and the summary judgment record, the Court concludes that the refinancing of the senior debt (which cannot reasonably be interpreted as "repaying" the first and second-priority Notes) did not constitute Payments-in-Full, and therefore did not satisfy the contractual condition precedent to Intrepid being able to enforce the Intrepid Note.

Intrepid's reliance on Section 2(b) of the ICA, which generally provides for enforcement of the Intrepid Notes, to avoid this conclusion is unavailing. Section 2(b) is a general provision stating that the Note can be enforced. The Remedies Standstill provision in Section 5, however, is a specific limitation on that enforcement (*see Muzak Corp. v Hotel Taft*, 150 NYS2d 171, 174 [1956] ["Even if there was an inconsistency between a specific provision and a general provision of a contract …, the specific provision controls"]). This interpretation of the ICA is bolstered by Section 10 of the ICA, which authorizes Senior Lenders and Selling Source to amend their agreements without Intrepid's consent.

Intrepid's reliance on Section 5(b)(iv) is similarly unavailing. That section permits Intrepid to "take action to the extent necessary to prevent the running of any applicable statute of limitation." However, until the condition precedent to the enforcement of the Intrepid Note occurs – that is, Payment-in-Full of senior debt – the six-year limitations period will not start to run (*see, e.g.*, *John J. Kassner & Co. v City of N.Y.*, 46 NY2d 544, 550 [1979]; *see also Fabozzi v Lexington Ins. Co.*, 601 F3d 88, 93 [2010] [under New York law, "[f]or limitations purposes, a claim generally accrues only once the conditions precedent to filing suit have been satisfied"]). Intrepid's creative effort to interpose Section 5(b)(iv) to undermine the plain language of the Remedies Standstill provision in Section 5(a) cannot be sustained (*see Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] ["A written contract will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose"]).

2. Defendants Did Not Breach the ICA

Intrepid's argument that the Remedies Standstill is inapplicable because the Senior Lenders breached the ICA is not supported by the record.

First, the White Oak Agreement did not constitute a breach of the ICA. As noted above, Section 10 of the ICA permitted Senior Lenders and Selling Source to amend their agreements without Intrepid's consent, even in instances that materially affect the rights of Third Priority Lenders like Intrepid. Section 7 of the ICA, upon which Intrepid relies, simply restates Selling Source's payment obligation under the Intrepid Note and clarifies that the Intercreditor Agreement does not displace those terms. Section 7 of the ICA does not by its terms prohibit or limit the Senior Lenders' discretion to discuss and determine their own default terms.

Second, there is no evidence to support Intrepid's argument that the White Oak Agreement wrongfully restricted Intrepid's Third Priority Obligations or did anything to negatively affect Intrepid's priority standing. The White Oak Agreement defines "Restricted Payments" to mean "any payment of principal or interest or any purchase, redemption, retirement, acquisition or defeasance with respect to any Debt of such Person which is subordinated to the payment of the Obligations" (White Oak Agreement at § 1.01, "Restricted Payment"). The White Oak Agreement does not state that interest and principal payments to Intrepid were subordinated to White Oak's Obligations, and Intrepid has failed to submit any evidence to support its interpretation of the White Oak Agreement. Moreover, the White Oak Agreement does not change Intrepid's status or level of priority. White Oak was and is still a senior lender, with priority over Intrepid, with or without the White Oak Agreement.

Third, White Oak's termination of the Kitara Lien did not constitute a breach of the ICA that would extinguish the Remedies Standstill provision. Per Section 8(d) of the ICA, Senior Lenders like White Oak can terminate any liens in connection with the sale of a Grantor or a disposition of Common Collateral (*see also Intrepid Investments, LLC*, 165 AD3d at 524 - 25; *see also* NYSCEF Doc. No. 340 ["Plaintiff Rule 19-A Statement" at ¶ 12). White Oak, as the First Priority Representative, could act with "with full power of substitution, as [Intrepid's] true and lawful attorney-in-fact with full irrevocable power of attorney" to take actions "to accomplish the purposes of this Section 8(d), including, without limitation … [filing] releases or other documents or instruments of transfer" (ICA § 8[d]).

Moreover, Intrepid fails to support with evidence the allegation that the sale of Kitara was a sham. Here, publicly-available SEC filings illustrate that, on June 12, 2013, Kitara merged with a wholly-owned subsidiary of Ascend Acquisition Corp. ("Ascend") (*see* NYSCEF Doc.

No. 497 ["Ascend Form-8K"]). Membership units in Kitara were cancelled, extinguished, and the new entity's units were issued to Ascend (*id.*). Further, contrary to Intrepid's unsubstantiated arguments, there is no evidence that Selling Source is maintaining anything but a minority interest in the newly formed entity (*see* Affidavit of S. Humphreys at ¶ 36). Therefore, the Court finds that White Oak's termination of the Kitara Lien was appropriate. Accordingly, summary judgment is granted on Intrepid's tenth cause of action in Defendants' favor.

The Court finds Intrepid's remaining arguments to be without merit.

* * * *

In sum, based on the plain language of the relevant agreements and the summary judgment record, Intrepid is (currently) contractually barred from seeking to enforce the Intrepid Note. Accordingly, Intrepid's causes of action seeking to enforce the $28.7 million Intrepid Note (Counts One, Two, Three, Four, and Eleven) are dismissed.

c. ***Intrepid's Fraudulent Transfer Claims Are Dismissed***

The summary judgment record also fatally undermines Intrepid's claims of fraudulent transfer. Count Five is brought under DCL § 273, which requires proof of transfer(s) without fair consideration "made . . . by a person who is or will be thereby rendered insolvent." To prevail on Count Five, Intrepid must therefore prove that LBTSS was insolvent prior to a challenged transfer, or rendered insolvent by the challenged transfer. At the time of the alleged fraudulent transfer, LBTSS owned the majority interest in Selling Source, another clearly solvent entity (*see* NYSCEF Doc. No. 425 ["Excerpts from S. Humphreys' Deposition"] at 60:12 – 19, 159:3 – 160:16). Intrepid has not raised any material facts to demonstrate that LBTSS was insolvent at the time of the challenged transfers. Accordingly, Intrepid's Count Five is dismissed.

Second, for similar reasons, Intrepid's Count Six is dismissed. Count Six, per DCL § 274, requires proof that LBTSS had "unreasonably small capital" at the time of the alleged transfer. Intrepid has failed to submit facts demonstrating LBTSS' lack of capital.

Third, Count Seven (brought under DLC § 275) requires a showing that the challenged "conveyance" was "incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Intrepid has failed to submit any evidence suggesting that LBTSS believed the alleged transfer would prevent it from covering its potential liabilities to Intrepid.

Finally, DCL § 276 (Count Eight) requires that Intrepid show that LBTSS made the alleged conveyance with fraudulent intent. Fraudulent intent must be shown with clear and convincing evidence (*see Matter of U.S. Bancorp Equipment Finance, Inc. v Rubashkin*, 98 AD3d 1057, 1057 [2d Dept 2012]). Intrepid has failed to submit any evidence to demonstrate how the alleged conveyance – LBTSS' loan to its affiliate, Lone Star SPV I LLC – was intended to defraud Intrepid as a creditor.

II. Intrepid's Motion for Partial Summary Judgment is Denied

For the reasons set forth above in granting Defendants' motion for summary judgment, Intrepid's motion for partial summary judgment is denied.

CONCLUSION

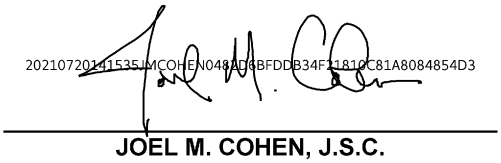
For the foregoing reasons, it is hereby

ORDERED that Intrepid's Motion for Partial Summary Judgment (Motion Sequence Number 014) is **denied**; it is further

ORDERED that Defendants' Motion for Summary Judgment (Motion Sequence Number 016) is **granted** and Plaintiff's Complaint is **dismissed**; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of Defendants, dismissing the Complaint.

This constitutes the decision and order of the Court.



7/20/2021
DATE

JOEL M. COHEN, J.S.C.

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