SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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WHITE OAK COMMERCIAL FINANCE, LLC,

Plaintiff,

- v -

EIA INC., ELECTRONIC INTERFACE ASSOCIATES, INC., EIA DATACOM, INC., EIA ELECTRIC, INC., GEORGE ENGEL LIC, LLC, YOLANDA DELPRADO, ALEXANDRA ENGEL, DAVID ENGEL, GEORGE ENGEL, MATTHEW ORENT, ANDREEA ORENT, CHARLES SCHWAB & CO., INC. (A NOMINAL DEFENDANT), ADP TOTALSOURCE, INC. (A NOMINAL DEFENDANT), 1861 ACQUISITION LLC (A NOMINAL DEFENDANT), GREAT MIDWEST INSURANCE COMPANY (A NOMINAL DEFENDANT), and SOFIA ENGEL,

Defendants.

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INDEX NO. 650346/2023

MOTION DATE 06/05/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 141, 142, 160, 161 were read on this motion to/for DISMISS.

Plaintiff White Oak Commercial Finance, LLC (White Oak) brings this action, as amended on May 15, 2023, against defendants EIA Inc., Electronic Interface Associates, Inc., EIA Datacom, Inc., EIA Electric, Inc. (together, Borrowers), Yolanda DelPrado, Alexandra Engel, George Engel, Matthew Orent (Matthew, and together with DelPrado, Alexandra Engel, and George Engel, the Individual Guarantors),[1] George Engel LIC, LLC (Engel LIC, and together with the Individual Guarantors, Guarantors), AnDreea Orent (AnDreea, and together with Borrowers and Guarantors, the EIA defendants), and Sofia Engel (Sofia, and together with the EIA defendants, defendants),[2] alleging causes of action for, *inter alia*, breach of contract, fraudulent misrepresentation, fraudulent conveyance, and tortious interference with contract (NYSCEF # 102 – AC). Presently before the court is defendants' motion pursuant to CPLR 3211(a)(7) seeking dismissal of the Seventh and Tenth through Sixteenth Causes of Action set forth in White Oak's Verified

[1] David Engel is also named as a defendant. However, because of a Chapter 7 Petition filed by David Engel in the United States Bankruptcy Court for the Southern District of Florida, Case No. 23-11822, this action has been automatically stayed against David Engel.
[2] White Oak also names Charles Schwab, ADP TotalSource, Inc., and Great Midwest Insurance Company as nominal defendants. By Notice of Discontinuance filed January 30, 2023, White Oak discontinued claims against nominal defendant 1861 Acquisition LLC (NYSCEF # 68).

Amended Complaint (NYSCEF # 141). White Oak opposes the motion. For the following reasons, defendants' motion is granted in part and denied in part.

Background

Below the court details those facts pertinent to the present motion. These facts are derived from the allegations in the Amended Complaint and are accepted as true solely for purposes of this motion. The court otherwise assumes the parties' familiarity with the factual background of this matter, which was detailed in its Decision and Order, dated June 23, 2023 (NYSCEF # 163).

The Credit Agreement

On November 12, 2020, White Oak, through its predecessor-in-interest, White Oak Business Capital, Inc., entered into a Revolving Credit and Security Agreement (the Credit Agreement) with Borrowers to extend a $10 million revolving secure line of credit (AC ¶¶ 29-30; NYSCEF # 103). As part of the Credit Agreement, Borrowers granted to White Oak a first lien on and security interest in all of Borrowers' assets (as defined and identified in the Credit Agreement, Collateral), which Borrowers represented was "subject to no other Liens, claims or encumbrances" (AC ¶¶ 31-33, 39-41; NYSCEF # 103 §§ 4.1, 5.10). Borrowers also executed a promissory note under which they covenanted and agreed to repay the principal amount outlined in the Credit Agreement (*id.* ¶¶ 34-35; NYSCEF # 106). And to further induce White Oak to extend a line of credit, the Individual Guarantors and Engel LIC executed unconditional and absolute personal and/or corporate guarantees of Borrowers' obligations (AC ¶¶ 36-38; NYSCEF #'s 104-105).

The Alleged ARC Misrepresentations and White Oak's Resulting Payment Demand

Pursuant to the Credit Agreement, White Oak agreed to advance up to 85% of Borrowers' eligible accounts receivables based on an agreed-upon formula (the Credit Limit), and Borrowers, in turn, agreed to use these advances to pay fees and expenses only related to the Credit Agreement and for working capital (AC ¶¶ 34, 42; NYSCEF # 103 §§ 2.3, 2.5). As a condition to any advance requested, Borrowers agreed to submit to White Oak Accounts Reporting Certificates (ARCs) to certify the total calculation of the Credit Limit (*see* AC ¶ 43; NYSCEF # 103 § 2.2). White Oak alleges, upon information and belief, that the Individual Guarantors and AnDreea, as directors and/or officers of Borrowers, prepared ARCs and assembled the data used in the ARCs (AC ¶ 44). At the time of their initial submission, the EIA defendants allegedly represented in the ARCs that Borrowers' accounts receivables totaled approximately $11.4 million (*id.* ¶ 47).

White Oak alleges, again upon information and belief, that the Individual Guarantors and AnDreea failed to appropriately analyze the legitimacy of Borrowers' accounts receivable and submitted ARCs that inflated Borrowers'

borrowing base (AC ¶¶ 45-46). Specifically, White Oak contends that, after collection issues began surfacing on Borrowers' accounts receivables in August 2022, Borrowers submitted, on September 13, 2022, an ARC that removed approximately $1.72 million from Borrowers' borrowing base and did so without adequate explanation (*see id.* ¶¶ 46, 48). This write-off caused Borrowers' outstanding obligations under the Credit Agreement to exceed the Credit Limit (*id.* ¶ 49; NYSCEF # 103 § 2.9). After Borrowers failed to provide certain financial information required under the Credit Agreement, White Oak issued a Reservation of Rights letter on September 16, 2022 that notified Borrowers of their defaults under the Credit Agreement (AC ¶¶ 50-52).

Despite this apparent default, White Oak agreed, at Borrowers' request, to advance additional funds pursuant to the Credit Agreement (AC ¶¶ 50-53). Specifically, between September 5, 2022 and December 1, 2022, White Oak advanced more than $6.8 million to Borrowers (*id.* ¶ 63). To obtain these funds, Borrowers submitted cash flow projections that were, upon information and belief, prepared and assembled by the Individual Guarantors and AnDreea (*see id.* ¶¶ 54-55). However, on December 5, 2022, Borrowers submitted an ARC that reflected an additional reduction of $1.63 million of accounts receivable, again without adequate explanation (*id.* ¶ 64; NYSCEF # 114). White Oak avers that these cash flow projections falsely represented Borrowers' cash flow at the time White Oak advanced funds and that, upon information and belief, the Individual Guarantors and AnDreea failed to appropriately analyze the legitimacy of Borrowers' accounts receivables (*see id.* ¶ 57).

White Oak stopped making any further funding available to Borrowers because Borrowers were willing to provide any requested financial information or pledge of sufficient collateral to satisfy White Oak of their ability to repay their outstanding indebtedness (*id.* ¶¶ 65-66). Borrowers then suspended all business operations and notified employees that they were not funding payroll (*id.* ¶ 67). Soon after, given Borrowers' various defaults under the Credit Agreement, White Oak issued a letter demanding that Borrowers (1) immediately pay all obligations due and owing under the Credit Agreement and corresponding guarantees, and (2) assemble, make available, and surrender to White Oak the Collateral and Brokerage Account (the Demand Letter) (*id.* ¶¶ 68-75; NSYCEF # 115). To date, Borrowers and Guarantors remain in default, and the outstanding indebtedness owed as of May 1, 2023, is $9,720,546.09 (*see* AC ¶¶ 76-77).

The Alleged Transfers from the Brokerage Account

Separate from requesting Borrowers' cash flow projections, White Oak had also conditioned any advance of additional funds on the Guarantors pledging additional security as collateral (AC ¶¶ 58-62). For his part, Matthew agreed to pledge a cash brokerage account maintained by Charles Schwab (the Brokerage Account), and he executed a pledge agreement that granted White Oak a security

interest in all of Matthew's rights, title and interest in the Brokerage Account, including "all investment property, financial assets . . . and all other investments contained in or added or credited to" the Brokerage Account and "all proceeds" therein (*see id.* ¶¶ 58-59; NYSCEF # 111). As reflected in the Brokerage Account statement for the period of September 19-30, Matthew initially funded the account with $200,000, and, as of September 30, 2022, the total account value was $186,422.65 (AC ¶ 58).

On November 22, 2022, despite having pledged the Brokerage Account to White Oak, Matthew transferred $10,500 from the Brokerage Account (the First Brokerage Account Transfer) to a Charles Schwab brokerage account jointly owned by Matthew and AnDreea (*see* AC ¶¶ 90, 98; NYSCEF # 99[3] ¶ 26). At the time, the Brokerage Account had accrued an additional value of approximately $11,000 (NYSCEF # 99 ¶ 23). Later, on December 12, 2022 (the same day Borrowers and Guarantors received the Demand Letter), Matthew directed his financial advisor to journal mutual funds worth approximately $196,000 from the Brokerage Account to a joint account owned by Matthew and AnDreea, and to transfer $500 in cash to that same account (the Second Brokerage Account Transfer, and together with the First Brokerage Account Transfer, the Brokerage Account Transfers) (*see* AC ¶ 91; NYSCEF # 99 ¶ 33).[4] The Brokerage Account Transfers left the Brokerage Account without any funds (*see* AC ¶ 93).

Other Alleged Transfers by the EIA Defendants

In addition to Matthew's transfers from the Brokerage Account, White Oak alleges that, between November 2020 and December 2022, Borrowers paid for the Individual Guarantors' and AnDreea's personal expenses, including a payment of approximately $124,000 towards an American Express credit card in Matthew's name that was purportedly used for Matthew's and AnDreea's personal expenses (the Credit Card Payments) (AC ¶ 86). During this same period, Borrowers also allegedly paid for multiple luxury vehicles for the EIA defendants, including a 2017 Aston Martin Rapide, a 2018 Porsche 211 Turbo, a 2021 Porsche Macan Turbo, a 2021 Porsche Cayenne, a 2020 Mercedes-Benz GLS, and a 2022 Acura MDX (the Car Payments, and together with the Credit Card Payments, the EIA Payments) (*id.* ¶ 87). White Oak avers that the EIA Payments relied on funds advanced by White Oak for the personal benefit the Individual Guarantors and AnDreea, rather than legitimate business purposes (*id.* ¶ 88).

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[3] On a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider both the facts alleged in the complaint, as well as documents attached to the complaint as exhibits or incorporated by reference (*see e.g. Shuman v New York Magazine*, 72 Misc.3d 1211[A], at *2 [Sup Ct, NY County, June 15, 2021]; *Dragonetti Brothers Landscaping Nursery & Florist, Inc. v Verizon New York, Inc.*, 71 Misc. 3d 1214[A], at *2 [Sup Ct, NY County, Apr. 28, 2021]).

[4] Matthew later conceded in a filing with this court that he "should not have removed funds out of the Broker Account" (*see* NYSCEF # 99 ¶ 51).

White Oak also alleges a separate set of purportedly improper transfers. Namely, from April 2022 through August 2022, approximately $374,217.17 was transferred from Electronic Interface Associates, Inc.'s (EIA Interface) bank account to a Charles Schwab account in George and Sofia's name (the EIA Interface Transfers) (AC ¶ 89). White Oak identifies eleven total transfers, with the largest single-day transfer occurring on August 24, 2022, when George and Sofia allegedly transferred $210,000.00, $23,632.67, and $20,025.00 (a total of $253,657.67) to their joint account (*see id.*).

Finally, White Oak claims, upon information and belief, that the Individual Guarantors and AnDreea caused Borrowers to use trust funds meant to pay the claims of laborers and materialmen to pay for other projects in violation of Article 3-A of the New York Lien Law (*see* AC ¶ 180). White Oak also alleges that the Individual Guarantors and AnDreea diverted these trust funds to pay for luxury vehicles and personal expenses (*id.* ¶ 183). By doing so, the Individual Guarantors and AnDreea caused third parties (such as laborers and materialmen who have not been paid) to have claims to and interest in the Collateral that are—notwithstanding Borrowers' representations under the Credit Agreement—superior to White Oak's interest (*id.* ¶¶ 181-182; NYSCEF # 103 § 5.10).

The Employee Retention Credits

At some point, Borrowers submitted a claim with the United States Internal Revenue Service (IRS) to obtain an Employee Retention Credit (ERC) of $3.17 million, minus applicable fees, for employee wages paid by Borrowers between 2020 and 2021 (the ERC Claim) (AC ¶ 78). To access these funds, Borrowers allegedly contemplated a transaction with 1861 Acquisition LLC (1861 Acquisition) wherein Borrowers would transfer or assign the ERC Claim to 1861 Acquisition in consideration of and/or as collateral security for loans and/or advances from 1861 Acquisition (*id.* ¶ 79). ADP TotalSource, Inc. (ADP), as Borrowers' Professional Employer Organization, had agreed to undertake "commercially reasonable efforts" to cause amounts payable in connection with the ERC Claim to be paid to 1861 Acquisition (*id.*) The transaction was never consummated (*id.*).

To date, no funds from the ERC Claim have been turned over to White Oak (AC ¶ 85). 1861 Acquisition, however, has acknowledged that it has no rights or interest in the ERC Claim or proceeds thereof, and that it shall not assert any such right, title or interest (*id.* ¶ 83). Meanwhile, both ADP and the EIA defendants have agreed not to transfer, sell, pledge, assign, or dispose of the ERC Claim or its proceeds, and they will transfer any proceeds collected in connection with the ERC Claim to White Oak as soon as reasonably practicable (*id.* ¶ 84).

Legal Standard

CPLR 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action when a pleading "fails to state a cause of action" (CPLR 3211 [a] [7]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the non-movant] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arb. Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation omitted]; *accord Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]). "[W]hether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" (*Wilson v Tully*, 243 AD2d 229, 234 [1st Dept 1998]).

Discussion

White Oak advances seventeen causes of action, including, as is relevant here, (1) a claim for a permanent injunction against the EIA defendants and ADP regarding the ERC Claim; (2) a claim against the EIA defendants for fraudulent misrepresentation; (3) a claim against the Individual Guarantors and AnDreea for aiding and abetting fraud; (4) four claims against defendants for fraudulent conveyance pursuant to Debtor and Creditor Law (DCL) §§ 237(a)(1), 273(a)(2)(i), 273(a)(2)(ii), 274(a); and (5) a claim against the Individual Guarantors and AnDreea for tortious interference with contract (*see* AC ¶¶ 130-32, 145-85). Defendants now move to dismiss each of these claims (NYSCEF # 141). The court addresses each of defendants' bases for dismissal below.

I. White Oak's Claim for a Permanent Injunction Concerning the ERC Claim (Seventh Cause of Action)

Defendants argue that White Oak's Seventh Cause of Action fails because the Amended Complaint does not allege that White Oak will suffer any harm related to the ERC Claim (NYSCEF # 142 – MOL at 4-5). Specifically, defendants aver, the Seventh Cause of Action is premised on a transaction that never occurred, and therefore any purported injury to White Oak is, at most, tenuous or speculative (*id.* at 5). In response, White Oak contends that because it has not received any proceeds from the ERC Claim, it has an actual legal stake in an adjudication of the Seventh Cause of Action (NYSCEF # 160 – Opp at 10-11).

Under New York law, a party seeking relief must have "a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution" (*Sec. Pacific Nat. Bank v Evans*, 31 AD3d 278, 279

[1st Dept 2006]). This requires a plaintiff to establish an "injury in fact—an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus., Inc. v Cty. of Suffolk*, 77 NY2d 761, 772-773 [1991]). In other words, plaintiff must "establish that [it] will actually be harmed by the challenged action, and that the injury is more than conjectural" (*Carper v Nussbaum*, 36 AD3d 176, 183 [2d Dept 2006], citing *New York State Ass'n of Nurse Anesthetist v Novello*, 2 NY3d 207, 211 [2004]). If a complaint fails to plead an injury in fact related to a particular cause of action, dismissal of that claim is appropriate (*see Saratoga Cty. Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003] [explaining that "[s]tanding to sue" is a "threshold issue" for courts]; *Raske v Next Mgmt., LLC*, 40 Misc 3d 1240[A], at *6 [Sup Ct, NY County, 2013] [concluding that plaintiff lacked standing to sue on claims for breach of fiduciary duty, fraud, fraudulent concealment, conversion where plaintiff did not suffer any injury arising from defendants' alleged actions]).

Here, the injury alleged by White Oak in connection with its request to enjoin any transfer of ERC Claim is, at best, tenuous and grounded in nothing more than mere speculation. The crux of White Oak's claim is that, to date, no part of the ERC Claim has been turned over to it (Opp at 11; AC ¶¶ 85, 131-132). But as the Amended Complaint makes abundantly clear, the contemplated transaction involving transfer of the ERC Claim to 1861 Acquisition was never consummated, and 1861 Acquisition has already acknowledged and agreed that it has no right, title, or interest in the ERC Claim (*see* AC ¶¶ 80, 83). Moreover, both the EIA defendants and ADP stipulated that the ERC Claim will be turned over as soon as received (*id.* ¶ 84). To date, those proceeds have not yet even been received by Borrowers (*see* MOL at 5; Opp at11). Accordingly, White Oak fails to plausibly allege an injury in fact supporting its claim for a permanent injunction in connection with the ERC Claim (*see Urban Justice Ctr. v Pataki*, 38 AD3d 20, 24 [1st Dept 2006] [dismissing claims where injury alleged was "too speculative" to confer standing]).

White Oak's Seventh Cause of Action is dismissed without prejudice.

II. White Oak's Fraudulent Misrepresentation and Aiding and Abetting Fraud Claims (Tenth and Eleventh Causes of Action)

The Amended Complaint's fraudulent misrepresentation and aiding and abetting fraud claims are premised on two distinct sets of purportedly fraudulent misconduct by defendants. *First*, White Oak contends that, Borrowers misrepresented to White Oak that all receivables assigned to White Oak, as provided in the ARCs and cash flow projections, were bona fide eligible and collectible receivables, when, in fact, $3.3 million of the receivables were not eligible and uncollectible (AC ¶¶ 146-150). *Second*, White Oak alleges that, in executing the Pledge Agreement, Matthew mispresented to White Oak that the Brokerage Account was funded with $200,000 and that all of the proceeds therein were pledged to White Oak because Matthew and AnDreea subsequently caused the Brokerage

Account Transfers to occur, thereby emptying the Brokerage Account (*see id.* ¶¶ 151-154). White Oak avers that the Individual Guarantors and AnDreea aided and abetted these alleged fraudulent misrepresentations (*id.* ¶¶ 156-159).

Defendants argue that White Oak's fraudulent misrepresentation claim fails to satisfy the heightened pleading requirements of CPLR 3016(b) (MOL at 9-13). Specifically, defendants contend that the Amended Complaint fails to establish how any of the alleged amounts in the ARCs and cash flow projections were supposedly ineligible and uncollectable at the time submitted, or how any of the defendants learned, or otherwise knew, that the information contained therein was false (*see id.* at 10-11; NYSCEF # 161 – Reply at 5-6). Meanwhile, as to Matthew's representations in the Pledge Agreement, defendants aver that the Amended Complaint fails to allege how Matthew made a false statement at time he represented that the Brokerage Account was funded with $200,000 (MOL at 11-12; Reply at 6). White Oak counters that the Amended Complaint pleads all elements of a fraudulent misrepresentation claim and does so with sufficient detail by setting forth the exact amounts written-off, without explanation, from the ARCs (Opp at 16). Regarding Mathew's purported misrepresentations, White Oak claims that Amended Complaint sufficiently alleges that, despite pledging the Brokerage Account to White Oak, Matthew had no intention of keeping the Brokerage Account funded (*id.* at 16, citing AC ¶¶ 151-153).

To state a claim for fraudulent misrepresentation, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Gomez-Jimenez v New York Law School*, 103 AD3d 13, 18 [1st Dept 2012], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). To this end, while a complaint need not set forth "unassailable proof at the pleading stage" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]), it will not suffice to merely offer conclusory allegations that defendants made knowingly false representations (*see Pace v Raisman & Assocs., Esqs., LLP*, 95 AD3d 1185, 1189 [2d Dept 2012] [affirming dismissal of fraud-based cause of action where allegations of fraud in complaint were conclusory]). Rather, there must sufficient facts alleged supporting a reasonable inference that the alleged misrepresentation was knowingly made (*Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 98 [1st Dept 2003]; *see also Eurycleia Partners*, 12 NY3d at 559 [explaining that CPLR 3016(b) "is satisfied when the facts suffice to permit a 'reasonable inference' of the alleged misconduct]).

Here, even if White Oak's allegations are accepted as true, the Amended Complaint fails to plausibly allege a fraudulent misrepresentation claim in connection with the ARCs and cash flow projections. As alleged, Borrowers

purportedly represented to White Oak through ARCs and cash flow projections that they had approximately $11.4 million of eligible billed and unbilled accounts receivable. Yet approximately $3.3 million were later written off as ineligible, without explanation, upon submission of updated ARCs in September and December 2022, respectively (*see* AC ¶¶ 43, 47-48, 54, 63-64). This resulted in White Oak advancing far more funds to Borrowers than they would have otherwise been entitled under the Credit Agreement (*see id.* ¶¶ 42-43, 63).

These facts, as alleged, indicate that the ARCs and cash flow projections originally offered to White Oak overstated Borrowers' financial condition. But White Oak fails to set forth any non-conclusory facts allowing for a reasonable inference that the EIA defendants knew that the ARCs and cash flow projections were false at the time submitted. To the contrary, White Oak merely alleges—upon information and belief—that the Individual Guarantors and AnDreea failed to approximately analyze the "legitimacy of Borrowers' accounts receivables," and either "negligently or intentionally submitted" these purportedly false ARCs and cash flow projections to White Oak (*id.* ¶¶ 46, 56-57). Nothing in the Amended Complaint sheds light on the factual basis or source of White Oak's claims, including how and when *any* of the EIA defendants learned of the purportedly false information (*see Dau v 16 Sutton Place Apartment Corp.*, 205 AD3d 533, 535 [1st Dept 2022]). Nor does any of the documentary evidence offered by White Oak rectify these clear pleading deficiency. Simply put, White Oak's allegations, without more, fail to establish the "necessary quantum of proof to sustain allegations of fraud" (*Weinberg v Kaminsky*, 166 AD3d 428, 429 [1st Dept 2018]).

White Oak's fraudulent misrepresentation claim premised on Matthew's representations concerning the Brokerage Account similarly fails. White Oak avers that, in executing the Pledge Agreement, Matthew represented to White Oak that the Brokerage Account was funded with $200,000 and that all of the proceeds were pledged to White Oak (AC ¶¶ 58-59, 151). White Oak claims that this representation was apparently false in light of the Brokerage Account Transfers (*id.* ¶¶ 151-153). But nothing in the Amended Complaint indicates that Matthew made a knowingly false representation at the time he executed the Pledge Agreement. In fact, the documents upon which White Oak relies in support of its claim confirm that, at the time the Pledge Agreement was executed, it was funded with the $200,000 and contained the "investments made on behalf of [Matthew]" (*see* NYSCEF # 111). The Amended Complaint therefore fails to allege any facts supporting a reasonable inference that Matthew made a fraudulent misrepresentation upon execution of the Pledge Agreement.

In its opposition, White Oak contends that Matthew's misrepresentation extends to the fact that he never intended to keep the Brokerage Account funded when he executed the Pledge Agreement (Opp at 16, citing AC ¶¶ 151-153). That allegation, however, appears nowhere in the complaint. To be sure, as explained below, White Oak's allegations of Matthew's role in effectuating the Brokerage

Account Transfers do ultimately support its various fraudulent transfer claims. And as White Oak acknowledges, Matthew's alleged conduct, if ultimately proven, would constitute a breach of the Pledge Agreement (*see* NYSCEF # 111 ¶ 3). Nevertheless, as presently alleged, the Amended Complaint does not offer any facts to support even a reasonable inference that Matthew knowingly made false representations when executing the Pledge Agreement or that he never intended to keep the Brokerage Account funded at the time that agreement was executed.

In sum, even accepting the non-conclusory allegations in the Amended Complaint as true and drawing all reasonable inference in White Oak's favor, the court dismisses White Oak's fraudulent misrepresentation claims without prejudice. And because White Oak fails to plausibly allege an underlying fraud, its aiding and abetting claims must also be dismissed without prejudice (*Vilar v Rutledge*, 106 AD3d 489, 490 [1st Dept 2013] [explaining that, in the "absence of a predicate claim for fraud, plaintiffs' claims of aiding and abetting fraud must also fail"]).

III. White Oak's Tortious Interference with Contract Claim (Sixteenth Cause of Action)

Defendants argue that White Oak's tortious interference claim must fail because the Amended Complaint fails to allege, beyond bald, conclusory allegations, that the Individual Guarantors and AnDreea acted outside of the scope of their employment by using funds from one project to pay for another project (MOL at 7-8). Defendants further argue that the Amended Complaint fails to establish that the Individual Guarantors and AnDreea gained any personal benefit in purportedly inducing Borrowers to breach the Credit Agreement (Reply at 3-4). In response, White Oak contends that the Amended Complaint sufficiently alleges that the Individual Guarantors and AnDreea acted beyond the scope of their employment because they violated Lien Law § 79-a and thus committed an independent tort that resulted in the alleged contractual breach by Borrowers (Opp at 11-13). White Oak further avers that the Amended Complaint also sufficiently states a tortious interference claim against the Individual Guarantors and AnDreea because they allegedly caused Borrowers to use White Oak's funds to pay for personal expenses and their personal enrichment, rather than fees and expenses related to the Credit Agreement (*id.* at 13).

To state a cause of action for tortious interference with contract, a plaintiff must allege "a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 293 AD2d 314, 315 [1st Dept 2002]). When a plaintiff seeks to hold a corporate officer liable for inducing a breach, such claims are subject to an enhanced pleading standard (*Petkanas v Kooyman*, 303 AD2d 303, 305 [1st Dept 2003]). This requires a particularized pleading of allegations "that the officers' acts were taken

outside the scope of their employment," including by committing an independent tort (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [1st Dept 2002]; *see also Murtha v Yonkers Child Care Assoc.*, 45 NY2d 913, 915 [1978] ["A corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer (and did not commit) independent torts or predatory acts directed at another"] [alterations omitted]), or that they personally profited from their acts" (*Shear Enters., LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020]). Courts construe "personal gain" to require a showing that the "challenged acts were undertaken 'with malice and were calculated to impair . . . business for the personal profit of the [individual] defendant'" (*Petkanas*, 303 AD2d at 305).

Here, the outcome of defendants' motion turns on whether White Oak has sufficiently alleged that Borrowers' corporate officer can be held liable for tortious interference. With this framing in mind, the court concludes that White Oak had alleged sufficient facts, accepted as true, to allow its tortious interference against the Individual Guarantors and AnDreea to survival dismissal. To start, the Amended Complaint alleges that the Individual Guarantors and AnDreea caused Borrowers to take funds earmarked to pay for laborers and materialmen and use them for other projects, as well as to fund personal expenditures (*see* AC ¶¶ 4, 86-88, 180-184). This conduct purportedly resulted in a violation of Article 3-A of the New York Lien Law and caused other third parties to obtain superior claims to the Collateral as a result, notwithstanding Borrowers' representations in the Credit Agreement (*id.* ¶ 182; NYSCEF # 103 § 5.10). White Oak has therefore sufficiently stated a cognizable tortious interference claim (albeit just barely) against the Individual Guarantors and AnDreea, as Borrowers' corporate officers, on the basis of their alleged violation of the New York Lien Law at (*cf. Ginarte Gallardo Gonzalez & Winograd v Schwitzer*, 193 AD3d 614, 615 [1st Dept 2021] [concluding that complaint sufficiently stated tortious interference claim premised on violation of statute, namely Judiciary Law §§ 479 and 482).

A similar conclusion is warranted based on White Oak's claims related to the Individual Guarantors' and AnDreea's alleged role in causing Borrowers to purportedly breach Section 2.5 of the Credit Agreement. According to the Amended Complaint, whose allegations the Court must accept as true at this juncture, the Individual Guarantors and AnDreea used White Oak's funds to pay for personal expenses and gifts and fund a lavish lifestyle (*see* AC ¶¶ 86-88). By doing so, the Individual Guarantors and AnDreea thereby caused Borrowers to use White Oak's funds for personal purposes other than paying White Oak's fees and expenses and Borrowers' working capital (*id.* ¶¶ 34, 186-188). These allegations support a reasonable inference at this juncture that the Individual Guarantors and AnDreea acted with the requisite mental state to impair Borrowers' business in order to promote their own personal gain (*see C.H.A. Design Export (H.K.) Ltd. v Miller*, 191 AD3d 459, 460 [1st Dept 2021] (holding that complaint sufficiently stated claim for

tortious interference with contract where defendant used company to pay himself and for personal benefits).

In avoiding this outcome, defendants contend that it was against the interests of the Individual Guarantors and AnDreea to induce a breach given that the Guarantors were liable for and unconditionally obligated to pay White Oak the full amount of indebtedness (*see* MOL at 8; Reply at 3-4). They further contend that, in deciding to pay the laborers they were acting within the scope of their employment (MOL at 8; Reply at 4). Although these points may certainly bear on the ultimate question of the Individual Guarantors' and AnDreea's liability for tortious interference as corporate officers, they at most raise questions of fact that are not properly resolved on a motion to dismiss (*see generally Sand Canyon Corp. v Homeward Residential, Inc.*, 105 AD3d 587, 587 [1st Dept 2013] [observing that questions of fact are not appropriate for resolution on a motion to dismiss]).

Defendants' motion to dismiss White Oak's tortious interference with contract claim is denied.

IV. White Oak's Fraudulent Conveyance Claims (Twelfth through Fifteenth Causes of Action)

White Oak advances four fraudulent conveyance causes of action against the defendants related to the EIA Payments, the EIA Interface Transfers, and the Brokerage Account Transfers (AC ¶¶ 160-177). *First*, White Oak alleges that these alleged transfers were made with actual intent to hinder, delay, or defraud White Oak under DCL § 273(a)(1) (*id.* ¶¶160-165). *Second*, White Oak avers that these alleged transfers were done without receiving a reasonably equivalent value in exchange for the transfer and rendered the remaining assets "unreasonably small" under DCL § 273(a)(2)(i) (*id.* ¶¶ 166-169). *Third*, White Oak claims that these alleged transfers were done without receiving a reasonably equivalent value in exchange for the transfer and caused Borrowers to incur debts beyond their ability to pay under DCL § 273(a)(2)(ii) (*id.* ¶¶ 170-173). *Finally*, White Oak contends that these transfers were made without receiving a reasonably equivalent value in exchange for the transfer or obligation and Borrowers were either insolvent or about to become insolvent under DCL § 274(a) (*id.* ¶¶ 174-77).

Defendants advance several basis in support of their motion to dismiss White Oak's fraudulent conveyance claims. As for White Oak's fraudulent conveyance claims under DCL § 273(a)(1), defendant primarily focus on the EIA Payments and argue that the Amended Complaint fails to adduce any facts to conclude that EIA's practice of paying for company cars or business expenses were made with actual intent to hinder or defraud White Oak (MOL at 14-15).[5] Regarding White Oak's

[5] Defendants briefly contend (without any meaningful explanation) that White Oak fails to establish how "the other transfers," presumably the EIA Interface Transfers and the Brokerage Account Transfers," were made with actual intent to hinder and defraud White Oak (MOL at 15).

fraudulent conveyance claims under DCL §§ 273(a)(2), defendants primarily argue that the Amended Complaint sets forth no facts indicating that any of the EIA Payments and EIA Interface Transfers were made (1) at a time when the property left would be unreasonably small or (2) without receiving equivalent value in exchange for the transfer or otherwise causing Borrowers to incur debts beyond their ability to pay (*id.* at 15-16). Turning to White Oak's claims under DCL 274(a), defendants make a similar argument, averring that White Oak does not allege any facts that would allow the court to conclude that EIA Payments, the EIA Interface Transfers, and Brokerage Account Transfers were done at a time when Borrowers or Matthew were insolvent (*id.* at 16).

The court first addresses White Oak's fraudulent conveyance claims under DCL § 273(a)(1). It then turns to White Oak's fraudulent conveyance claims under DCL §§ 273(a)(2) and 274(a).

A. Claims under DCL § 273(a)(1)

Under Section 273(a)(1) of the DCL, a transfer made or obligation incurred by a debtor is voidable as to a creditor if the debtor made the transfer or incurred the obligation "with actual intent to hinder, delay or defraud any creditor of the debtor." Fraudulent intent under DCL § 273(a)(1) must be pleaded with particularity (*see* CPLR 3016[b]; *see also RTN Networks, LLC v Telco Grp., Inc.*, 126 AD3d 477, 478 [1st Dept 2015] [addressing analogous provision of DCL prior to the 2020 amendment]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 199] [same]). That said, "[t]here is no requirement that a transaction involve common law deceit or fraudulent misrepresentation to be voidable for 'actual intent.' Actual intent to hinder or delay creditors suffices" (*245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 80 Misc 3d 1206[A], at * [Sup Ct, NY County, Aug. 31, 2023], quoting James Gadsen and Alan Kolod, Supplementary Practices Commentaries, McKinney's Debtor and Creditor Law § 273). To assist with this analysis, the DCL sets forth several non-exhaustive factors that courts may consider as indicia of fraud in a transaction, including whether "the transfer or obligation was to an insider," "the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred," and "the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred" (*see* DCL § 273[b][1]-[11]).

Here, White Oak has sufficiently alleged a claim under DCL § 273(a)(1) in connection with the EIA Interface Transfers and the Brokerage Account Transfers. In each case, White Oak has alleged that money from a debtor—to wit EIA Interface and Matthew—was transferred away and seemingly done so with an intent to defraud White Oak given certain badges of fraud alleged in the Amended Complaint. In the case of the EIA Interface Transfers, Borrowers had granted to White Oak a first lien and security interest in their assets (NYSCEF # 103 § 4.1). Despite this, George and Sofia purportedly triggered numerous transfers of

money—totaling $374,217.17—from EIA Interface's bank account to their joint bank account at a time when Borrowers were beginning to suffer financial hardships (*see* AC ¶¶ 48, 89). This included transfers of $210,000, $23,632.67, and $20,025 in August 2022 (a total of $253,657.67), which is the same time that Borrowers' collections issues began surfacing (*see id.*). Based on the destination of these transfers, the Amended Complaint supports a reasonable inference that George and Sofia remained in full control of these assets and obtained these funds without obtaining a reasonably equivalent value (*see id.* ¶ 89; *see also Matter of CIT Grp./Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 Ad3d 301, 303 [1st Dept 2006] [explaining, in the context of a constructive fraudulent transfer claim under the former DCL § 273, that "[t]ransfers to a controlling shareholder, officer or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent"]).

As for the Brokerage Account Transfers, Matthew had pledged to White Oak his "rights, title and interest in and to" the Brokerage Account (NYSCEF # 111). Despite this clear pledge, Matthew directed his financial advisor to transfer away all funds from the Brokerage Account to a joint account held by both Matthew and AnDreea, as well as an account controlled by AnDreea, and he did so on the *same day* Borrowers and Guarantors received the Demand Letter (AC ¶¶ 90-91; NYSCEF # 99 ¶¶ 26, 28, 33, 51). And these transfers rendered the Brokerage Account empty upon completion (AC ¶ 93). After these transfers, Matthew remained in full control of the funds, and, as alleged, he never disclosed the transfers to White Oak until he filed a motion to unfreeze his account with Charles Schwab (*see id.* ¶¶ 95-97).

At bottom, considering these badges of fraud set forth in the Amended Complaint, White Oak has plausibly alleged a fraudulent transfer claim under DCL § 273(a)(1) with regard to the EIA Interface Transfers and Brokerage Account Transfers. Therefore defendants' motion to dismiss these claims is denied insofar as they are brought against EIA Interface, George, and Sophia as to the EIA Transfers, and Matthew and AnDreea as to the Brokerage Account Transfers. The complaint, however, does not state how, if at all, any of the other defendants participated in the aforementioned transactions. As a result, because liability for a fraudulent conveyance is only imposed on the "parties who participate in the fraudulent transfer of a debtor's property and are transferees of the assets and beneficiaries of the conveyance" (*see Constitution Realty, LLC v Oltarsh*, 309 AD2d 714, 716 [1st Dept 2003]), defendants' motion is granted as to the other defendants, without prejudice.

The above analysis notwithstanding, the court reaches a different conclusion regarding the sufficiency of White Oak's DCL § 273(a)(1) claim covering the EIA Payments. According to the Amended Complaint, "[b]etween November 2020 and December 2022," Borrowers paid for Individual Guarantors' and AnDreea's personal expenses, as well as multiple luxury vehicles (AC ¶¶ 86-88). Notably absent is an approximately timeline of when these payments occurred. For example, these

payments could have been made in 2020, 2021, or early 2022, or they could have occurred when Borrowers began experiencing collection issues. Without more, the court cannot reasonably infer the requisite "actual intent" hinder White Oak. Accordingly, defendants' motion to dismiss the fraudulent conveyance claim under DCL § 273(a)(1) related to the EIA Payments is granted, without prejudice.

B. Claims under DCL §§ 273(a)(2) and 274(a)

Under DCL § 273(a)(2), a transfer made or obligation incurred by a debtor is voidable as to a creditor if the transfer was made "without receiving a reasonably equivalent value in exchange for the transfer or obligation" and the debtor (i) was engaged or about to be engaged "in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (ii) intended to incur, or believing or reasonably should have believed it would incur, "debts beyond debtor's ability to pay as they became due" (DCL § 273[a][2][i]-[ii]). Meanwhile, DCL § 274 provides that a transfer made or obligation incurred by a debtor will be voidable if the transfer was made "without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at the time . . . or became insolvent as a result of the transfer" (*id.* § 274[a]).

The above provisions can be distilled into the following legal principal: to state claim under either DCL § 273(a)(2) or § 274(a), a plaintiff must essentially allege that the transfer was without fair consideration and rendered the debtor insolvent or without the ability to pay its debts (*see L&M 353 Franklyn Ave. LLC v Steinman*, 202 AD3d 440, 440 [1st Dept 2022]; *245 E. 19th Realty LLC*, 80 Misc. 3d 1206[A] at *4-5 ["[T]he voidability of these transactions . . . turns on objective facts concerning the debtor's distressed financial condition and the inadequate consideration received"]). In the context of constructive fraud provisions under former DCL §§ 273, 274, and 275, the First Department has explained that transfers from an insolvent entity to a company member or insider "are not made in good faith" and therefore are "made without fair consideration" (*Brennan v 3250 Rawlins Ave. Partners, LLC*, 171 AD3d 603, 604 [1st Dept 2019]; *Great Atlantic & Pacific Tea Co., Inc. v 380 Yorktown Food Corp.*, 2020 WL 4432065, at *20 [SD NY July 31, 2020, No. 16-cv-5250 (NSR)] [observing, under New York law, that "[g]ood faith is an 'indispensable condition in the definition of fair consideration'"]). And a lack of consideration creates "a [rebuttable] presumption of insolvency" (*Pensmore Invs., LLC v Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020] [analyzing constructive fraudulent transfers under an analogous provision of DCL prior to the 2020 amendment]). Notably, claims under DCL §§ 273(a)(2) and 274(a) are not subject to the particularity requirements of CPLR 3016(b) because they are "based on constructive fraud" (*see Bd. of Managers of the 165 E. 62nd St. Condominium v Churchill E 62nd LLC*, 2023 NY Slip Op 31828[U], at *7-8 [Sup Ct, NY County, May 25, 2023], citing *Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]).

Here, White Oak sufficiently alleges claims under DCL §§ 273(a)(2) and 274(a) in connection with the EIA Interface Transfers. As explained above, the Amended Complaint alleges that the EIA Interface Transfers were made by EIA Interface to one of its officers (George) and its employee (Sofia), thereby undermining any contention that these transfers were for fair consideration (*see* AC ¶¶ 14, 17, 89). Moreover, the majority of the EIA Interface Transfers took place near or at a time when Borrowers' collection issues were surfacing and only a few months before Borrowers (including EIA Interface) were forced to shut down operations (*see id.* ¶¶ 48, 66, 89). And since that time, Borrowers have failed to repay any of the indebtedness owed to White Oak under the Credit Agreement (*id.* 77). These allegations, accepted as true, support a reasonable inference that EIA Interface Transfers left EIA Interface close to, if not actually, insolvent. All told, then, the EIA Interface Transfers, as alleged, satisfy the statutory elements of DCL §§ 273(a)(2) and 274(a).

The same conclusion is warranted for White Oak's DCL §§ 273(a)(2) and 274(a) claims related to the Brokerage Account. To start, as alleged, the transfers by Matthew from the Brokerage Account were seemingly made for less than reasonably equivalent value given that the bulk of the Brokerage Account Transfers occurred at time when Matthew was aware of the Demand Letter and the Brokerage Account's assets were transferred to accounts controlled by Matthew and/or AnDreea (*see* AC ¶¶ 90-91; NYSCEF # 99 ¶¶ 26, 28, 33, 51). Moreover, the transfers effectively rendered the Brokerage Account—which was pledged to White Oak in order to induce further advances to Borrowers—insolvent because there were zero assets remaining in the account (AC ¶ 93). Accordingly, the Brokerage Account Transfers readily satisfy the elements of DCL §§ 273(a)(2) and 274(a).

In sum, defendants' motion to dismiss White Oak's DCL §§ 273(a)(2) and 274(a) claims is denied insofar as they are brought against George and Sophia relating to the EIA Interface Transfers, and Matthew and AnDreea relating to the Brokerage Account Transfers. That said, as previously noted, liability can only be imposed on parties who participate in the fraudulent transfer of a debtor's property (*see Oltarsh*, 309 AD2d at 716). Therefore, defendants' motion is granted, without prejudice, as to the other EIA defendants, whose participation in the EIA Interface Transfers and the Brokerage Account Transfers is not alleged.

Furthermore, for the same reasons warranting dismissal of the DCL § 273(a)(1) claim, defendants' motion to dismiss White Oak's DCL §§ 273(a)(2) and 274(a) claims related to the EIA Purchases is also granted without prejudice.

Conclusion

In light of the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's Verified Amended Complaint is granted with respect to Seventh, Tenth, and Eleventh Causes of Action; and it is further

ORDERED that defendants' motion to dismiss is denied with respect to the Sixteenth Cause of Action; and it is further

ORDERED that defendants' motion to dismiss is denied with respect to the Twelfth through Fifteenth Causes of Action as to (1) defendants Electronic Interface Associates, Inc., George Engel, and Sofia Engel with respect to the EIA Interface Transfers (as defined above) and (2) defendants Matthew Orent and AnDreea Orent with respect to the Brokerage Account Transfers; and it is further

ORDERED that Defendants' motion to dismiss the Twelfth through Fifteenth Causes of Action is granted in all other respects; and it is further

ORDERED that within 30 days of the e-filing of this order, defendants shall file an answer to the Verified Amended Complaint; and it is further

ORDERED that a preliminary conference to schedule discovery shall take place on November 1, 2023 at 11:30 a.m. or at such time as the parties may schedule with the court's law clerk, provided, however, that the parties shall first meet and confer to determine if there is agreement to stipulate to a preliminary conference order, available at https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/part49-PC-Order-fillable.pdf.

This constitutes the Decision and Order of the court.

09/27/2023
DATE

MARGARET A. CHAN, J.S.C.

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