SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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CRG FINANCIAL LLC,

Plaintiff,

- v -

AMLOID CORPORATION,

Defendant.

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INDEX NO. 652552/2018

MOTION DATE 01/11/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 38

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is ORDERED that defendant's motion to dismiss the complaint herein is granted, and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of defendant; and it is further

ORDERED that plaintiff's cross motion for summary judgment is denied.

DECISION

This case arises out of a Claim Purchase Agreement (the Agreement), pursuant to which plaintiff CRG Financial LLC

purchased a bankruptcy claim from defendant Amloid Corporation, a creditor of Toys R Us, Inc. (Toys R Us).

Defendant now moves, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of the complaint.

Plaintiff cross-moves for summary judgment on first and fourth causes of action asserted in the complaint, or, alternatively, on the third and fourth causes of action.

Facts

On September 18, 2017, Toys R Us and 24 other Toys R Us affiliated entities filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the Code) in the United States Bankruptcy Court for the Eastern District of Virginia (complaint, ¶ 6). These 25 bankruptcy cases are currently pending and are jointly administered under Case No. 17-3466 (the Bankruptcy Case).

Defendant was a supplier of Toys R US. Prior to filing for bankruptcy, Toys R Us purchased various goods from defendant, and as a result, defendant is a named creditor in the Bankruptcy Case (complaint, ¶¶ 7, 19, 23; Claim Purchase Agreement, ¶ 3).

As of September 18, 2017, the date of the bankruptcy petitions, Toys R Us was indebted to defendant in the total amount of $223,961.58 as a result of goods that defendant had sold and delivered to Toys R Us.

Plaintiff is a bankruptcy claim purchaser (complaint, ¶¶ 7-8; Agreement, ¶ 1). Plaintiff is in the business of purchasing debt from bankruptcy creditors at a lower price than the face value of the debt. After purchasing a bankruptcy claim, plaintiff then stands in the shoes of the bankruptcy creditor who sold the claim, and thus collects the proceeds of the purchased bankruptcy claim (Agreement, ¶ 1).

Pursuant to 11 USC § 503 (b) (9), goods that are delivered by a trade creditor to the debtor in the normal course of business within 20 days of a bankruptcy petition filing are considered "administrative expenses for purposes of a bankruptcy proceeds" (11 USC § 503 [b] [9]). Of the total $223,961.58 Toys R U debt, $194,530.00 stemmed from goods that were delivered by defendant to Toys R Us within 20 days of the September 18, 2017 petition date (the Administrative Claim), and therefore, that amount qualified as an administrative expense claim pursuant to 11 USC § 503 (b) (9) (complaint, ¶ 7). An administrative expense claim sits higher on the bankruptcy priority ladder than pre-bankruptcy, general unsecured claims that are not entitled to any priority (11 USC § 507).

The remaining $29,431.58 that Toys R Us owed to defendant represented goods that were delivered by defendant to Toys R Us more than 20 days before the September 18, 2017 petition date (the General Unsecured Claim). The General Unsecured Claim does

not qualify as an administrative claim, and therefore, is not entitled to the same payment priority as the Administrative Claim.

On November 17, 2017, plaintiff and defendant entered into the Agreement (complaint, ¶ 3). Pursuant to the terms of the Agreement, plaintiff agreed to purchase the Administrative Claim in the amount of $194,530.00 from defendant for the sum of $137,731.00 (the Purchase Price), meaning that plaintiff paid 70 cents on the dollar for all of defendant's rights to and under the Administrative Claim (complaint, ¶ 8; Agreement, ¶ 1).

Pursuant to the terms of paragraph 6 of the Agreement, the parties agreed that if certain contingent events occurred that impaired the Administrative Claim, such as the claim being reclassified as a non-administrative claim, then plaintiff would be entitled to a refund of the Purchase Price, plus interest at 1% per month (complaint, ¶ 9; Agreement, ¶ 6). The parties also agreed, however, that plaintiff took on the risk of collecting any recovery in connection with the Administrative Claim (Agreement, ¶ 6). Thus, if the Administrative Claim is valid, but the collected recovery is less than the Purchase Price, plaintiff is not entitled to a refund of the Purchase Price. Specifically, paragraph 6 of the Agreement provides:

> "Claim or Recovery Impaired or Allowed for an Amount less than Claim Amount. **Purchaser assumes all risks with respect to the amount of Recovery, even if the**

> **Recovery is less than the Purchase Price.** Notwithstanding the foregoing, to the extent that (i) the Claim is impaired for any reason, including, without limitation, disallowance, subordination, objection, offset, demand for repayment as a preference, or due to a breach of this Agreement, (ii) the Claim is reclassified as something other than an administrative claim pursuant to 11 USC § 403 (b) (9), and/or (iii) the claim is not listed on the Schedules, or is listed on the Schedules as unliquidated, contingent or disputed, or is listed on the Schedules in a lesser amount than the Claim Amount, Seller agrees to make Purchaser immediate proportional Restitution and repayment of the Purchase Price (the "Restitution Payment"), together with interest at the rate of one percent (1%) per month on the amount repaid for the period from the date of this Agreement through the date such repayment is made. Seller further agrees to reimburse Purchaser for all costs and expenses, including reasonable legal fees and costs, incurred by Purchaser as a result of such disallowance or impairment. **The Seller is not liable to Purchaser for the Restitution Payment if the Claim is valid, but Recovery is less than the amount of the Purchase Price**"

(id. [emphasis in original]).

While the Agreement governs the sale of defendant's Administrative Claim, defendant did not sell to plaintiff its separate General Unsecured Claim, and therefore, defendant retains all of its rights with respect to the General Unsecured Claim (id., ¶ 1[defining the scope of the agreement as a sale of only defendant's "administrative expense claim pursuant to 11 USC § 503 [b] [9] for goods delivered within 20 days of the bankruptcy filing"]).

After a bankruptcy petition is filed, the debtor then files certain schedules, which, among other things, provides a list of

known creditors and the amounts of those known creditors' claims (11 USC § 521 [a] [1]). The debtors file the schedules - creditors have no control over which claims the debtor lists on its bankruptcy schedules. Whether a claim is listed on the debtor's schedules, however, is not determinative of the creditor's claim (Fed R Bankr P 3003). For example, if a claim is not listed on the schedules, then a creditor may still assert its claim by filing a "proof of claim" (Fed R Bankr P 3003 [c] [2]). Once a proof of claim is filed, it supersedes the listing on the debtor's schedules (Fed R Bankr P 3003 [b] [4] ["Effect of Filing Claim or Interest. A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 451 [a] [1] of the Code"]). On the other hand, if a creditor's claim is listed on the debtor's schedules, then the claim is prima facie valid, absent any objection to the claim (11 USC § 1111 [a] ["a proof of claim or interest is deemed filed" if it "appears in the schedules"]; see also Fed R Bankr P 3003 [b] [1] ["the schedule of liabilities . . . shall constitute prima facie evidence of the validity and amount of the claims . . . . It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest"]).

Thus, the only distinction between a creditor whose claim is listed on the debtor's schedules and a creditor whose claim

is not listed on the schedules is that the listed claim creditor need not file a proof of claim, while the non-listed claim creditor must file a proof of claim (Fed R Bankr P 3003 [b] [1] and [b] [4]). Once the non-listed claim creditor files a proof of claim, however, there is no distinction at all, since the filed proof of claim is the equivalent of having the claim listed on the schedules in the first place (Fed R Bankr P 3003 [b] [4]).

On November 16, 2017, the day before defendant sold its Administrative Claim to plaintiff, Toys R Us filed its schedules in the Bankruptcy Case and affiliated bankruptcy proceedings (complaint, ¶ 10; *see* abbreviated copy of Schedule E/F: Creditors Who Have Unsecured Claims). Defendant's Administrative Claim was omitted from the Toys R Us schedules, but defendant's General Unsecured Claim was listed on Schedule E/F (complaint, ¶¶ 11-12). On April 6, 2018, plaintiff (not defendant) - as the owner and holder of the Administrative Claim - timely filed its proof of claim in the amount of $194,530.00, or the full amount of the Administrative Claim (the Proof of Claim). To date, there has been no objection to the Proof of Claim, its classification or status as a § 503 (b) (9) claim has not been challenged; nor has the Proof of Claim been subject to any other defense or setoff, nor has it been otherwise impaired.

From the outset of the Bankruptcy, Toys R Us intended to reorganize and remain an operating going concern, rather than to liquidate its assets and cease operations. For example, on September 19, 2017, the day after Toys R Us filed its petition, Toys R Us filed a motion seeking authority to enter into a debtor-in-possession credit facility, pursuant to which Toys R Us would borrow $2.75 billion to support its reorganization efforts (the DIP Financing Motion. The DIP Financing Motion described Toys R Us's efforts to refinance its debts, implement new strategies to help pay its creditors, and to generally remain an operating business.

On September 20, 2017, Toys R Us received interim approval for the requested $2.75 billion credit facility in the Bankruptcy Case (the Interim Approval Order). On October 24, 2017, the reorganization strategy was confirmed on a more permanent basis when the Bankruptcy Court gave its final approval of Toys R Us' requested debtor-in-possession credit facility (the Final Approval Order), which allowed Toys R Us to continue its operations and implement its reorganization strategy.

With its debtor-in-possession credit facility secured, Toys R Us continued to operate through the holiday season and in the months that followed, until on March 15, 2018, Toys R Us

filed a motion in the Bankruptcy Case seeking authority from the Bankruptcy Court to transition from a reorganization process to a wind-down process in which Toys R Us would liquidate all of its assets (the Wind-Down Motion). The Wind-Down Motion also confirms that it was originally Toys R Us' intent to reorganize and remain an ongoing concern:

> "At the first day hearing in these chapter 11 cases, the Debtors announced they had secured over $3.1 billion in three separate debtor-in-possession financing facilities collectively, the "DIP Facilities") after a highly competitive process. This financing allowed the Debtors to reopen their global supply chain and best position the company for a successful holiday season . . . . the DIP Facilities and related budget afforded the Debtors flexibility to get through the holiday season. Consistent with that budget, and with relief provided by this Court on a fully-consensual basis, the Debtors made substantial payments to many of their key vendors-including more than $300 million in critical vendor and early 503(b)(9) payments"

(WindDown Motion, ¶ 2).

Despite those efforts, the Wind-Down Motion effectively signaled a significant change in the Toys R Us bankruptcy strategy because it indicated that Toys R Us now intended to liquidate its assets and eventually cease its operations (*see* Wind-Down Motion, ¶ 8 ["by this Motion, the Debtors are seeking authority to begin an immediate and orderly liquidation of their U.S. business"]). The impact of Toys R Us' shift from an attempted reorganization to a liquidation is the devaluation and lower collectability of the Administrative Claim.

On April 24, 2018, a month after the Toys R Us Bankruptcy had changed from a reorganization to a liquidation proceeding and over five months after Toys R Us publicly filed the schedules in the Bankruptcy Case, plaintiff sent defendant a letter demanding that defendant reimburse plaintiff for the Administrative Claim. According to plaintiff, defendant is required to reimburse the purchase price to plaintiff pursuant to Paragraph 6 of the Agreement. Specifically, plaintiff asserted two reasons for the claimed right to reimbursement: "(i) Amloid's 503 (b) (9) Administrative Claim is not listed on the Debtor's Schedules; and (ii) the Debtor has classified the 503 (b) (9) Administrative Claim as a general unsecured claim in the sum of $29,431.58 rather than as a 503 (b) (9) Administrative Claim in the sum of $194,530".

DISCUSSION

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 NY2d 83, 87 [1994]; see also Rovello v Orofino Realty Co., 40 NY2d 633 [1976]), "'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 AD2d 220, 220 [1st Dept 1991] [citation omitted]; see also Caniglia v

Chicago Tribune-N.Y. News Syndicate, 204 AD2d 233 [1st Dept 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 NY3d 582, 590-591 [2005]). In addition, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and documentary evidence" (Wilhelmina Models, Inc. v Fleisher, 19 AD3d 267, 269 [1st Dept 2005]). Thus, dismissal is warranted where documentary evidence establishes that "the allegations of the complaint fail to state a cause of action" (L.K. Sta. Group, LLC v Quantek Media, LLC, 62 AD3d 487, 491 [1st Dept 2009]).

Appropriate "documentary evidence" for purposes of a motion brought pursuant to CPLR 3211 (a) (1) includes publicly available records, such as judicial records and filings in separate judicial proceedings (see e.g. Flushing Expo, Inc. v New World Mall, LLC, 116 AD3d 826, 827 [2d Dept 2014] [relying on a court order from a separate judicial proceeding in a 3211 (a) (1) motion]; Fontanetta v John Doe 1, 73 AD3d 78, 85 [2d Dept 2010] [judicial records are "essentially undeniable" and qualify as documentary evidence). Moreover, courts routinely take judicial notice of applicable public records, statutes,

rules and regulations (see e.g. Albano v Kirby, 36 NY2d 526, 532-522 [1975] [courts may take judicial notice of applicable statutes, rules and regulations; Matter of Sunhill Water Corp. v Water Res. Comm., 32 AD2d 1006, 2007 [3d Dept 1969] [courts may take judicial notice of public records]).

Construing the claims in the generous matter to which they are entitled, this court nevertheless concludes that defendant's motion to dismiss must be granted, as each claim is legally deficient on its face, and/or is contradicted by clear documentary evidence.

Breach of Contract (First Cause of Action)

Plaintiff alleges in the first cause of action that the "restitution" provision in paragraph 6 of the Agreement applies because the Administrative Claim was not listed in the Toys R Us Bankruptcy (*see* complaint, ¶¶ 15-17 [because the Administrative Claim was not listed on the debtor's schedules, under the terms of the Agreement, defendant is required to make to plaintiff "immediate proportional Restitution and repayment of the Purchase Price to [plaintiff] with interest at the rate of one percent (1%) per month through the date repayment is made"]). According to plaintiff, that fact alone entitles it to reimbursement of the Purchase Price, plus interest.

However, the argument that the "not listed on the schedules" contingency was triggered is squarely defeated as a

matter of law by the Proof of Claim that plaintiff filed because a filed proof of claim supersedes the bankruptcy schedules (see Fed R Bankr P 3003 [b] [4] ["Effect of Filing Claim or Interest. A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521 [a] [1] of the Code"]). The only difference between a claim holder whose claim is listed on the bankruptcy schedules and one whose claim is not listed is that the former's claim is deemed filed while the latter must take an additional step of filing a proof of claim (11 USC § 1111[a] ["a proof of claim or interest is deemed filed" if it "appears in the schedules"]; Fed R Bankr P 3003[b] [1] ("the schedule of liabilities . . . shall constitute prima facie evidence of the validity and amount of the claims . . . . It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest"]). Thus, when plaintiff filed its Proof of Claim on April 6, 2018, the filed Proof of Claim superseded and rendered moot the earlier-filed Toys R Us schedules, and had the same effect, by operation of law, as if the Administrative Claim had been on the schedules all along (Fed R Bankr P 3003 [b] [4]).

Thus, the Proof of Claim filed by plaintiff conclusively defeats its assertion that it is entitled to "restitution" because the purchased claim was not listed on the schedules.

Additionally, the Proof of Claim itself highlights the Administrative Claim's validity. The Proof of Claim, which plaintiff filed, specifies that the claim is "entitled to 503 (b) (9) administrative priority" because the goods were "delivered w/i the 20 days prior to the filing" (*see* Proof of Claim, handwritten notations at ¶¶ 7 and 8). Moreover, the Proof of Claim included the invoice and packing list which demonstrates that goods in the amount of $194,530.00 were sold to Toys R Us on September 1, 2017 and delivered to Toys R Us on September 16, 2017, both within 20 days of the September 18, 2017 bankruptcy petition filing (id. at 4-5). Thus, there is no dispute that the Administrative Claim was a valid Section 503 (b) (9) claim when it was sold to plaintiff, and by virtue of the Proof of Claim, it remains a valid Section 503 (b) (9) claim.

Accordingly, the complaint must be dismissed since the Proof of Claim and applicable bankruptcy law conclusively establish a defense to plaintiff's "not listed on the schedule" claims as a matter of law.

Plaintiff makes several arguments in opposition to the motion, and in support of its motion for summary judgment. However, none are sufficient to defeat the motion to dismiss.

First, plaintiff argues that "the language of the Purchase Agreement clearly and unequivocally states that if the Claim is

not purchased on the Debtor's Schedules, the Plaintiff is entitled to a refund of the Purchase Price plus interest," and "[a]ccordingly, the Plaintiff is entitled to summary judgment on the First Cause of Action".

However, in making this argument, plaintiff focuses on one portion of a single sentence in the Agreement, in complete isolation and without context, to claim that because the purchased claim was not listed on the Toys R Us Bankruptcy schedule, plaintiff is entitled to a restitution payment. As discussed above, this argument fails because the Proof of Claim that it filed supersedes any schedules that were filed, and legally renders them moot.

Moreover, even if the schedules were not superseded by the Proof of Claim, plaintiff's argument fails for the additional reason that its reading of paragraph 6 is out of context and unreasonable. Paragraph 6 of the Agreement makes clear that plaintiff assumes "all risks with respect to the amount of Recovery, even if the Recovery is less than the Purchase Price." Plaintiff's reading is at odds with the provisions that specify that plaintiff assumes all risk that the purchased claim may not result in a desirable recovery, and that defendant is not liable for any "restitution payment" if the claim was valid. That concept is highlighted in bolded and underlined font.

Indeed, this reading is in complete contradiction to the principles of contract interpretation. "'It is well settled that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (Sullivan v Harnisch, 96 AD3d 667, 667 [1st Dept 2012] [citation omitted]; see also Greenfield v Philles Records, 98 NY2d 562, 569 [2002] ["a written agreement . . . must be enforced according to the plain meaning of its terms"]). "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (Beal Sav. Bank v Sommer, 8 NY3d 318, 324 [2007]). In interpreting a contract, courts "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed" (Kass v Kass, 91 NY2d 554, 566 [1997]). Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought" (id.; see also W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157, 163 [1990] [when the parties dispute the meaning of a particular contract clause, the task of the court is to determine whether such clauses are ambiguous "when read in the context of the entire agreement"]).

To read paragraph 6 as allowing plaintiff to retroactively unwind the parties' deal at its option simply because the debtor did not list the purchased claim on its schedules - a harmless omission given that plaintiff filed a Proof of Claim - is to ignore the context of the paragraph, especially the bolded and underlined language that plaintiff drafted.

Moreover, paragraph 6 includes language that would allow plaintiff to seek a "restitution payment" in the event that the claim is "impaired." However, plaintiff does not allege that the Administrative Claim is invalid, impaired, or has been disallowed. Instead, the only basis for plaintiff's claimed "restitution" payment in the first cause of action is the fact that the Administrative Claim was not listed on the schedules in the Toys R Us Bankruptcy. It is clear from a full reading of paragraph 6, however, that the parties intended the remedy to apply only if the purchased claim was actually impaired or allowed in an amount less than the face value of the claim.

For example, Paragraph 6 is labeled "Claim or Recovery Impaired or Allowed for an Amount Less than Claim Amount." In addition, all of the contingent situations listed in paragraph 6 involve actual impairment of a claim, such as if the claim was subject to an offset, or disallowed. For instance, if the purchased-claim is "impaired for any reason," such as "disallowance, subordination, objection, offset, demand for

repayment as a preference," or "reclassified as something other than an administrative expense claim."

Additionally, the attorneys' fee provision that plaintiff drafted, and which follows the enumerated contingencies that trigger "restitution," confirms that actual impairment is required in order to trigger a right to reimbursement. It provides that plaintiff is entitled to recover "all costs, and expenses, including reasonable legal fees and costs, incurred by Purchaser as a result of such disallowance or impairment." Although a claim that is not listed on the schedules may become impaired if no proof of claim is filed, plaintiff did file a Proof of Claim, so the fact that it was not initially scheduled is wholly inconsequential.

Thus, reading paragraph 6 in its entirety, since defendant is not liable to plaintiff for the "restitution payment" if the claim is valid, simply being omitted from the bankruptcy schedules alone, without any resulting harm to the validity of the claim, is not enough to invoke the "restitution provision."

Plaintiff further contends that defendant's arguments must be disregarded because they are merely a "recitation of esoteric bankruptcy law." This argument makes no sense as bankruptcy law is relevant to a determination of the parties' rights involving a scheduled versus filed bankruptcy claim. Federal Rule of Bankruptcy Procedure 3003 clearly applies here for the

proposition that, by filing a proof of claim, plaintiff rendered moot any schedules that the debtor filed as to that claim.

Plaintiff also asserts, without any supporting authority, that a proof of claim is meaningless because "anyone can assert they are a creditor of a debtor and file a proof of claim in a bankruptcy proceeding for any amount". This is completely untrue, as knowingly filing a false proof of claim is punishable by a fine of up to $500,000.00, imprisonment for up to five years, or both (18 USC §§ 152, 157 and 3571).

Plaintiff also submits the affidavit of Robert Axenrod, its CEO, in which Axenrod offers his unsupported lay opinion regarding the effect of a claim being omitted from a bankruptcy schedule:

> "if a claim is not listed and acknowledged by the debtor on its Schedules or is listed by the debtor in a lesser amount than the claim amount purchased, the risk of a claim dispute and non-payment by the debtor on account of the claim is far greater than if the claim was listed by the debtor on its schedules from the outset".

Such conclusion is merely self-serving testimony that lacks foundation and is not based on any legal authority, and, as such, is insufficient to defeat the motion to dismiss (see Grullon v City of New York, 297 AD2d 261, 264-265 [1st Dept 2002]).

Second and Third Causes of Action

The schedules that Toys R Us filed in the Bankruptcy Case do not include the $194,530.00 Administrative Claim, but they do list the $29,431.58 General Unsecured Claim that was not sold to plaintiff. In the second and third causes of action, plaintiff alleges that, in the event the General Unsecured Claim listed on Schedule E/F is a reclassified or reduced version of the Administrative Claim, defendant must made immediate restitution of the purchase price (*see* complaint, ¶¶ 19-21, 23-25).

However, these causes of action must be dismissed because they are premised mistakenly on confusing the claim that plaintiff purchased - the Administrative Claim - with an unrelated claim that defendant did not sell to plaintiff - the General Unsecured Claim.

Contrary to plaintiff's allegations, the General Unsecured Claim is not a reclassified or reduced version of the Administrative claim. The General Unsecured Claim is completely distinct from the Administrative Claim that defendant sold to plaintiff and that is listed on Schedule E/F, as evidenced by, among other things, the invoices attached to the Proof of Claim (*see* Proof of Claim at 4 [invoice for $194,530.00]).

For instance, in its second cause of action, plaintiff alleges that the Administrative Claim was reclassified by Toys R Us "as a non-priority, general unsecured claim and not a priority

administrative claim pursuant to 11 USC. 503 (b) (9)" (complaint, ¶ 19). Plaintiff, however, is mistaken, as it is clear that nothing has been reclassified. The $29,431.58 claim listed in defendant's name on Schedule E/F is the General Unsecured Claim that defendant still owns. Merely listing a claim on a schedule does not "reclassify" the claim as something other than a § 503 (b) (9) claim. Similarly, in the third cause of action, plaintiff alleges in the alternative that, since the amount listed on Schedule E/F was only $29,431.58 and not the $194,530.00 amount, then defendant is obligated by virtue of paragraph 6 to reimburse plaintiff for the difference between the two figures, plus interest (complaint, ¶¶ 23-25). This alternative theory suffers from the same flaw: plaintiff is simply mischaracterizing the General Unsecured Claim that was listed on Schedule E/F as the Administrative Clam that was not listed on the schedules.

In addition to incorrectly conflating the General Unsecured Claim with the Administrative Claim, both theories are also defeated as a matter of law because plaintiff filed a Proof of Claim for the $194,530.00 Administrative Claim. As the Proof of Claim supersedes the filed schedules, it renders them moot (Fed R Bankr P 3003 [b] [4]). Plaintiff's Proof of Claim asserts the Administrative Claim in the full amount of $194,530.00. The Proof of Claim also contains documentation which supports its

classification as a Section 503 (b) (9) claim by demonstrating that defendant sold and delivered goods to Toys R Us within 20 days of the bankruptcy petition filing. Importantly, there have been no objections to plaintiff's Proof of Claim, which means that the $194,530.00 Proof of Claim pursuant to Section 503 (b) (9) is presumptively valid.

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

Attorney's Fees (Fourth Cause of Action)

In the fourth cause of action, plaintiff seeks to recover its attorneys' fees and costs for bringing this action because, "[u]nder the terms of the Agreement, Amloid agreed to indemnify CRG from all losses, damages and liabilities including attorneys' fees and expenses which result from, inter alia, CRG's breach of any representation, warranty or covenant in the agreement or litigation arising out of or in connection with the enforcement of the agreement" (complaint, ¶ 39). The fourth cause of action relies entirely on plaintiff's success on the first, second and third causes of action to recover its attorneys' fees and costs. Since the first, second and third causes of action are being dismissed, the fourth cause of action likewise fails, and must be dismissed. In addition, the fourth cause of action should also be dismissed for the independent reason that the attorney's fee provisions apply only if the

Administrative Claim has been disallowed or impaired, and the complaint does not allege that the Administrative Claim has been disallowed or impaired.

The court has considered the remaining arguments and finds them to be without merit.

10/3/2019
DATE

DEBRA A. JAMES, J.S.C.

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