SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CAVALRY LLC d/b/a CAVALRY ASSOCIATES a/k/a CAVALRY a/k/a CNC, YOEL BOCHNER, and CHANY ROSEN,

Plaintiffs,

-against-

FUNDING METRICS, LLC d/b/a LENDINI, and BANKS 1-5,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF003093-2021
Motion Date: July 23, 2021

The following papers numbered 1 to 7 were read on Defendants' motion for an order dismissing Plaintiffs' action and compelling arbitration of Plaintiffs' claims:

Notice of Motion - Affirmation / Exhibits - Affidavit - Memorandum 1-4

Affirmation in Opposition / Exhibits - Memorandum 5-6

Reply Memorandum 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This action concerns a merchant funding agreement (the "Agreement") dated April 26, 2021, whereby defendant Funding Metrics, LLC ("Lendini") purported to purchase certain future receivables of plaintiff Cavalry LLC ("Cavalry"). On May 11, 2021, two weeks after entering into the Agreement, Cavalry commenced this action, asserting that the transaction, though ostensibly a purchase and sale of future receivables, was in fact a criminally usurious loan.

A. Plaintiffs' Complaint

Plaintiffs' claim that the Agreement at issue here constitutes a criminally usurious loan rests on the following allegations of their Complaint:

> 45. Lendini's cash advances are payday loans because Lendini structures them so that they are subject to repayment absolutely, not on a contingent basis. They do this in a number of ways.
>
> 46. First, Lendini requires merchants to repay the cash advances through daily payments at fixed amounts that are not reconciled. These amounts are stated in Lendini agreements and called a "Daily Increment."
>
> 47. These fixed daily payment amounts do not vary from day to day. Lendini states in its agreement that they will "reconcile" merchants' payment amounts based on a "Purchase Percentage" of their receivables," but this contract language is a sham, as set forth below.
>
> 48. Second, Lendini's loan agreement indicates a finite repayment term. The repayment term is the total repayment amount of the cash advance, called a "Purchased Amount," divided by its daily payment amount. For example, an agreement with a total repayment amount of $87,000 and a daily amount of $659.10 indicates a finite repayment term of 132 business days ($87,000 ÷ $659.10 = 132).
>
> 49. Third, Lendini drafted their loan agreement to provide it with security in the event of default. The agreement states that (a) the cash advances are personally guaranteed by guarantors, who are in most cases merchants' principals; (b) Lendini holds security interests under the Uniform Commercial Code over "all accounts" and other assets of merchants; and (c) bankruptcy or the termination of merchant's business is an event of default triggering immediate payment of the entire amount due.

(Complaint ¶¶ 45-49)

On that foundation, Plaintiffs allege eleven (11) causes of action under New York state law, all predicated on their claim that the Agreement constitutes not a sale of future receivables, but rather a usurious loan:

(1) civil usury, in violation of GOL §5-501(1)
(2) criminal usury, in violation of Penal Law §190.40
(3) engaging in unlicensed lending, in violation of Banking Law §340
(4) violation of GBL §349, based on alleged usurious lending
(5) declaratory judgment that Agreement is usurious and unenforceable
(6) unjust enrichment, based on receipt of proceeds of illegal loan
(7) fraudulent inducement of criminally usurious Agreement
(8) engaging in deceptive usurious practices, in violation of GOL §5-515
(9) collecting unlawful usurious debt, in violation of Penal Law §§190.42, 109.45.
(10) permanent injunctive relief against unlawful usurious practices
(11) intentional infliction of emotional distress

B. Defendant's Motion

Lendini moves for an order dismissing the complaint on the grounds that (1) the Agreement is governed by Pennsylvania law, not New York law, (2) in any event, Calvary's claims are subject to dismissal under New York law, and (3) those claims are subject to mandatory arbitration pursuant to the terms of the Agreement.

C. Legal Standards Governing Motions For Dismissal

1. Documentary Evidence

Dismissal pursuant to CPLR §3211(a)(1) on the basis of documentary evidence may be warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez,* 84 NY2d 83, 88...)." *LG Funding, LLC v. United Senior Properties of Olathe, LLC,* 181 AD3d 664, 122 NYS3d 309, 312 (2d Dept. 2020). *See, Goshen v. Mutual Life Ins. Co. of New York,* 98 NY2d 314, 326 (2002); *Gad v. Sherman,* 160 AD3d 622 (2d Dept. 2018).

2. Failure to State a Claim

In *Tilford v. Greenburgh Housing Authority,* 170 AD3d 1233 (2 Dept. 2019), the Second Department articulated the well established legal principles governing motions pursuant to CPLR

§3211(a)(7) for failure to state a claim:

> "On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Shah v. Exxis, Inc.*, 138 AD3d 970, 971... *see Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326...[cit.om.]. "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v. R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852...; *see Guggenheimer v. Ginzburg*, 43 NY2d 268, 274-275...[cit.om.].

Tilford, 170 AD3d at 1234-35. *See, LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra.*

D. Lendini Has Failed To Demonstrate That Plaintiffs' Claims Are Governed By Pennsylvania Law

There is no general "choice of law" provision in the Agreement. Lendini points to three discrete provisions thereof:

(1) Agreement ¶4 authorizes Lendini to recover court costs and attorney's fees as permitted by Pennsylvania law in the event a payment by Cavalry is returned for insufficient funds.

(2) Agreement ¶5.6 provides that in the event of a breach by Cavalry, Lendini is entitled to recover certain "'Indemnified Amounts'...including, without limitation, the payment of all costs and expenses...as permitted by the law of the Commonwealth of Pennsylvania."

(3) Agreement ¶11 affords the parties the "right" in certain defined circumstances to "go to the Pennsylvania Court of Common Pleas."

Paragraphs 4 and 5.6 are inapplicable on their face to Plaintiffs' claims. Paragraph 11 merely affords the parties the "right" in certain circumstances, not demonstrated to be applicable here, to

litigate in a Pennsylvania court. Neither individually or collectively do these provisions manifest the parties' intent that the Agreement as a whole or the specific claims advanced by Plaintiffs in this action be governed by Pennsylvania law.

Accordingly, the Court will address Plaintiffs' claims under New York law.

E. Are Merchant Funding Agreements Sales or Loans ?

1. General Principles

In *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra,* 181 AD3d 664, 122 NYS3d 309 (2d Dept. 2020), the Second Department was confronted with the very issue presented here, i.e., whether a merchant funding agreement which ostensibly involved a sale of receivables was in actuality a usurious loan. The Court wrote:

> The rudimentary element of usury is the existence of a loan or forbearance of money, and where there is no loan, there can be no usury, however unconscionable the contract may be (*see, Seidel v. 18 E. 17th St. Owners,* 79 NY2d 735...; *Abir v. Malky, Inc.,* 59 AD3d 646, 649...). To determine whether a transaction constitutes a usurious loan, it "must be 'considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it'" (*Abir v. Malky, Inc.,* 59 AD3d at 649 ...[cit.om.]). The court must examine whether the plaintiff "is absolutely entitled to repayment under all circumstances" (*K9 Bytes, Inc. v. Arch Capital Funding, LLC,* 56 Misc.3d 807, 816...[Sup. Ct. Westchester Co.]). Unless a principal sum advanced is repayable absolutely, the transaction is not a loan (*see Rubenstein v. Small,* 273 App.Div. 102...).

LG Funding, LLC, supra, 122 NYS3d at 312.

Thus, an essential element of usury is the existence of a loan, and a transaction however characterized by the parties may be deemed a loan where the principal sum advanced is "repayable absolutely." *See, id.* What does that mean ? The *LG Funding, LLC* Court cited *Rubenstein v. Small, supra,* wherein the First Department wrote:

> For a true loan it is essential to provide for repayment absolutely and at all events or that the principal in some way be secured as distinguished from being put in hazard. Bank of United States v. Owens, [27 U.S.] 527...; Hall v. Eagle Insurance Co. of London, England, 151 App.Div. 815, 827..., affirmed 211 NY 507...

Rubenstein v. Small, *supra*, 273 App.Div. 102, 104 (1st Dept. 1947). *Rubenstein* in turn cited *Bank of U.S. v. Owens* and *Hall v. Eagle Ins. Co., supra*. In *Bank of U.S. v. Owens, supra,* 27 US 527 (1829), the U.S. Supreme Court wrote:

> A profit made, or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume where the treaty is for a loan, and the capital is to be returned at all events; has always been adjudged to be so much profit taken upon a loan; and to be a violation of those laws which limit the lender to a specified rate of interest.

Id., 27 US at 537. *Hall v. Eagle Ins. Co., supra,* 151 AD 815, 136 NYS 774 (1st Dept. 1912), *aff'd* 211 NY 507 (1914), quoted *Bank of U.S. v. Owens, supra,* and went on to quote *Tyson v. Rickard,* 3 Har. & J. (Md.) 109 as follows:

> A stipulation to repay the principal in money is not necessary to constitute a loan. It is enough if the principal is secured, and not bona fide put in hazard, and it matters not what the nature of the security is; it is sufficient. *** The true ground is, not that there must be a stipulation to repay the principal at all events in money, but that it must in some way be secured, as distinguished from being put in hazard; but whether it is secured by pawn or pledge, or a conveyance of land, or is by agreement to be returned in lands, goods or money, is not material. If the principal is secured and the interest reserved is more than the law allows, it is usury.

See, Hall v. Eagle Ins. Co., supra, 136 NYS at 783.

In principle, then, a loan may be found to exist where the payor is entitled to repayment of principal under all circumstances, or when the principal is secured such that it is not *bona fide* at hazard of loss.

2. Specific Criteria

In *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra*, the Second

Department summarized the specific criteria by which New York courts determine whether merchant funding agreements which ostensibly involve a sale of receivables are in actuality usurious loans:

> Usually, courts weigh three factors when determining whether repayment is absolute or contingent:
>
> (1) whether there is a **reconciliation provision** in the agreement;
> (2) whether the agreement has a **finite term**; and
> (3) whether there is any **recourse** should the merchant declare bankruptcy....

LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra, 122 NYS3d at 312.

Elucidating these three criteria, the court in *Pirs Capital, LLC v. C&M Truck, Tire & Trailer Repair Inc.*, 69 Misc.3d 457 (Sup. Ct. N.Y. Co. 2020) wrote:

> The first prong of the test is whether the contract contains a reconciliation provision that allows the merchant (here, defendant D&M) to seek adjustments of the amount remitted to the purchaser (here, plaintiff). If a transaction does not have a reconciliation agreement, then it is more likely to be a loan than a purchase of future receivables....
>
> The next prong of the test is whether the transaction is for a fixed (or "finite") term or for a non-finite term. Ordinarily, a loan consists of a face value, repayable (with interest) over a finite period DEFINED in the transaction documents. If a transaction instead has a non-finite term, that suggests that the transaction is instead a purchase of future receivables. In that scenario, the length of time required to complete the transaction will be contingent "upon the outside factor of customers actually shopping at [the merchant] and paying for products and services," thereby generating receivables for the purchaser to collect....
>
> The third and final prong of the test is whether the purchaser has any recourse in the event of the merchant's bankruptcy. If the purchaser does have recourse, especially through a personal guaranty, that is a consideration pointing toward the agreement being treated as a loan rather than a receivables purchase....

Pirs Capital, LLC, supra, 69 Misc.3d at 462-463. *See also, K9 Bytes, Inc. v. Arch Capital Funding, LLC,* 56 Misc.3d 807, 816-818 (Sup. Ct. Westchester Co. 2017).

F. The April 26, 2021 Merchant Funding Agreement Is Not A Loan

1. The Agreement Purports To Be A Sale of Receivables, Not a Loan

The Agreement is captioned "Purchase and Sale of Future Receivables", and states in large boldface print, "THIS IS NOT A LOAN." (Agreement, p. 2) It further states:

> Merchant hereby sells, assigns and transfers to Lendini (making Lendini the absolute owner), without recourse, in consideration of the "Purchase Price" specified below, the "Purchase Percentage" of the proceeds of each future sale made by Merchant (collectively "Future Receipts") until Lendini has received the Purchased Amount.

(*Id.*) "Lendini's Acknowledgment" follows:

> Merchant is selling a portion of a future revenue stream to Lendini at a discount, not borrowing money from Lendini. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Lendini. Merchant going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Lendini is entering into this Agreement knowing the risks that Merchant's business may slow down or fail, and Lendini assumes these risks based on Merchant's representations, warranties and covenants in this Agreement, which are designed to give Lendini a reasonable and fair opportunity to receive the benefit of its bargain.

(*Id.*) Section 3.1 of the Agreement further provides:

> The Merchant and Lender acknowledge and agree that the Purchase Price paid by Lendini in exchange for the Purchased Amount of future receipts is a purchase of the Purchased Amount and is not intended to be, nor shall it be construed as, a loan from Lendini to the Merchant. Merchant agrees that the Purchase Price and the Purchased Amount equals the fair market value of such Receipts. Lendini has purchased and shall own all the Receipts described in this Agreement up to the full Purchased Amount as the Receipts are created. Payments made to Lendini in respect to the full amount of the Receipts shall be conditioned upon Merchant's sale of products and services and the payment therefore by Merchant's customers. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Lendini. In no event shall the aggregate of all amounts be deemed as interest hereunder and charged or collected hereunder exceed the highest rate permissible at law. In the event that a court determines that Lendini charged or received interest hereunder and interest is in excess of the highest applicable rate, the rate in effect hereunder shall automatically be reduced to the maximum rate permitted by applicable law and Lendini shall promptly refund to Merchant any interest received by Lendini in excess of the maximum lawful rate, it being intended that

> Merchant not pay or contract to pay, and that Lendini not receive or contract to receive, directly or indirectly in any manner whatsoever, interest in excess of that which may be paid by Merchant under applicable law. As a result thereof, Merchant knowingly and willingly waives the defense of Usury in an action or proceeding.

(*Id.*, p. 6)

It is plain from the language of the Agreement that the parties intended the transaction to be sale of future receivables and not a loan.

2. The Agreement Provides for Reconciliation

The Agreement provides that "Lendini will debit the specific daily increment [$659.10] each business day from only one depositing bank account, which account must be acceptable to and pre-approved by Lendini (the "Account") into which Merchant and Merchant's customers shall remit the Receipts from each Transaction, until such time as Lendini receives payment in full of the Purchased Amount." (Agreement, p. 2)

However, contrary to Plaintiffs' allegation, the Agreement explicitly provides for reconciliation:

> Merchant's Right to Request a Reconciliation. The Daily Payment amount is intended to represent the Purchase Percentage [1.04%] of Merchant's future receipts. Merchant may request that Lendini reconcile Merchant's actual receipts by either crediting or debiting the difference back to or from the Account so that the amount Lendini debited in the most recent calendar month equaled the Purchase Percentage of Future Receipts that Merchant collected in that calendar month....Failure to send a written reconciliation request within 30 days after the last day of the calendar month at issue forfeits that month's reconciliation.

(*Id.*, p. 3) In a subsequent paragraph, the Agreement provides in addition for the "Merchant's Right to Request a Reduction for affordability, not based on a Loss of Revenue" and states therein that "Lendini retains the discretion to determine whether or not a reduction is warranted." No such discretion, however, is afforded Lendini with respect to the Merchant's right to a monthly reconciliation. (*See, id.*)

The Agreement's provision for a monthly reconciliation to assure that the Daily Payments remitted to Lendini do not exceed the contractually specified Purchase Percentage of Cavalry's receipts – the first prong of the Second Department's test in *LG Funding, LLC v. United Senior Properties of Olathe, LLC, supra* – supports a finding that the transaction was in actuality a sale of future receivables, not a loan. *Cf., LG Funding, LLC, supra,* 122 NYS3d at 312 (reconciliation available only at funder's "sole discretion").

3. The Agreement Does Not Have a Finite Term

Contrary to Plaintiffs' allegation, the Agreement has no fixed or finite term as a loan would normally have. It provides, rather, for payment of "the 'Purchase Percentage' of the proceeds of each future sale made by Merchant...until Lendini has received the Purchased Amount." (Agreement, p. 2) Although payment of the daily increment of $659.10 would *absent reconciliation* result in payment of the Purchase Price in a finite term, the Agreement, as shown above, does provide for reconciliation to assure that the Daily Payments remitted to Lendini do not exceed the contractually specified Purchase Percentage of Cavalry's receipts. (*Id.,* p. 3) Thus, as the parties specifically acknowledge in their Agreement, "[t]here is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by Lendini." (*Id.,* p. 2 [Lender's Acknowledgment], p. 6 [Par. 3.1]). Here then, as in *Pirs Capital, LLC v. C&M Truck, Tire & Trailer Repair Inc., supra,* "the length of time required to complete the transaction will be contingent 'upon the outside factor of customers actually shopping at [the merchant] and paying for products and services,' thereby generating receivables for the purchaser to collect." *Id.,* 69 Misc.3d at 463.

Thus, the absence of a fixed or finite term for payment – the second prong of the Second Department's test in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, *supra* – also supports a finding that the transaction was in actuality a sale of future receivables, not a loan.

4. Lendini Has Only Limited Recourse In The Event of Cavalry's Bankruptcy or Termination of Business

Lendini acknowledges in the Agreement:

> Merchant going bankrupt or going out of business, in and of itself, does not constitute a breach of this Agreement. Lendini is entering into this Agreement knowing the risks that Merchant's business may slow down or fail, and Lendini assumes these risks based on Merchant's representations, warranties and covenants in this Agreement, which are designed to give Lendini a reasonable and fair opportunity to receive the benefit of its bargain.

(Agreement, p. 2) As per Lendini's acknowledgment, and contrary to Plaintiffs' allegation, neither the termination of Cavalry's business nor its bankruptcy are included among the "Events of Default" specified in the Agreement. (*Id.*, p. 8, ¶ 3.13) In this regard, a default occurs only if "Merchant *intentionally and not in the ordinary course* transports, moves, interrupts, suspends, dissolves or terminates its business." (*Id.*, ¶3.13[e]). This provision quite clearly does not insulate Lendini from the assumed risk of Cavalry's slow down or failure due to adverse financial conditions, but only from bad faith efforts to defeat Lendini's rights under the Agreement.

The Agreement provided for (1) personal guarantees by Cavalry's principles, and (2) the conveyance to Lendini of a security interest in assets of Cavalry. Contrary to Plaintiffs' allegation, however, the effect of those guarantees and security is neither to assure repayment absolutely of Lendini's cash advance or to prevent Lendini's principal from being genuinely at hazard in the transaction.

Specifically, the Agreement contained a "Limited Performance Guarantee of Merchant" as follows:

> In consideration of Lendini entering into this Agreement, and to induce Lendini to enter into this Agreement, the undersigned principals of Merchant ("Guarantors") hereby guarantee to Lendini that: (I) all information provided by Merchant to Lendini in connection with the transaction contemplated by this Agreement is true, correct and complete; (II) the principals shall not undertake any action to divert business from the merchant to any other entity or otherwise take any action to deprive Lendini of the value of the assets purchased; and (III) shall not direct, or through omission, permit, Merchant to breach this Agreement, or do any of the acts prohibited by this Agreement.

(Agreement, p. 3) In addition, the "Merchant Security Agreement and Guaranty" affords Lendini a security interest in assets of Cavalry solely "[t]o secure Merchant's performance obligations", and includes the individual Plaintiffs' "Personal Guarantee of Performance", which provides:

> The undersigned Guarantors hereby guarantee to Lendini, Merchant's performance of all of the representations, warranties, obligations and covenants made by Merchant in this Agreement and the Merchant Agreement, as each agreement may be renewed, extended or otherwise modified (the "Guaranteed Obligations"). Lendini is buying the Purchased Amount knowing the risks that Merchant's business may slow down or fail, and Lendini assumes these risks based on Merchant's representations, warranties and covenants in the Merchant Agreement and Security Agreement (the "Agreement"), which are designed to give Lendini a reasonable and fair opportunity to receive the benefit of its bargain. The undersigned Guarantors hereby unconditionally guarantee to Lendini, Merchant's good faith, truthfulness and performance of all the representations, warranties, covenants made by Merchant in the Agreement as each may be renewed, amended, extended or otherwise modified (the "Guaranteed Obligations"). Guarantor's obligations are due at the time of any event of Default under the Agreement....

The effect of those provisions is to secure Lendini against a breach by Cavalry of its *contingent* obligations under the Agreement. Since neither the slow down or termination of Cavalry's business in the event of adverse financial conditions nor its bankruptcy would constitute events of default or a breach of Cavalry's obligations, the personal guarantees and security interest would not in those circumstances afford Lendini recourse for recovery of its

cash advance. They simply do not contradict Lendini's repeated acknowledgment that it was knowingly assuming the risk that Cavalry's business may slow down or fail, or prevent the conclusion that Lendini's principal was genuinely at hazard in this transaction.

Thus, the absence of recourse in the event of Cavalry's failure or bankruptcy – the third and final prong of the Second Department's test in *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, *supra* – likewise supports a finding that the transaction was in actuality a sale of future receivables, not a loan. *Cf., LG Funding, LLC, supra,* 122 NYS3d at 313 (bankruptcy was event of default entitling funder to immediate repayment in full by guarantors).

5. Conclusion

Cavalry commenced this action on May 11, 2021, just two (2) weeks after entering into the Agreement on April 26, 2021, and prior to the time when Cavalry's right to its first monthly reconciliation would have accrued. Consequently, there is no foundation in the Complaint for Cavalry's conclusory allegation that the reconciliation provision of the Agreement was a "sham." Indeed, the Complaint is wholly bereft of allegations of specific conduct undertaken by Lendini pursuant to the Agreement. Accordingly, the determination of Cavalry's claim of usury must be made based on the substance of the Agreement itself.

For the reasons set forth hereinbove, the Court concludes as a matter of law that the transaction between Lendini and Cavalry constitutes a purchase and sale of future receivables, not a loan. As the Court of Appeals observed in *Seidel v. 18 East 17th Street Owners, Inc.*,

> Usury laws apply only to loans or forebearances, not investments (General Obligations Law §5-501[1], [2]). If the transaction is not a loan, "there can be no usury, however unconscionable the contract may be." (*Orvis v. Curtiss,* 157 NY 657, 661...).

Seidel, supra, 79 NY2d at 744. Therefore, Cavalry's claim of usury is without merit, and all of Cavalry's causes of action herein, predicated as they are on a baseless claim of usury, are subject to dismissal.

6. Postscript

The present action is one of four essentially identical lawsuits commenced by Cavalry on May 11, 2021 based on merchant funding agreements dated, respectively, March 18, 2021, April 15, 2021, April 26, 2021, and April 28, 2021, pursuant to which Cavalry received substantial sums of money from different merchant funding companies in return for a promise of payment of a percentage of its future receivables. The complaints in all four actions contain the same blunderbuss allegations of usury and fraud, with (1) no citation to the specific provisions of any of the agreements in question, and (2) no specific allegations of any wrongful conduct undertaken by those funding companies pursuant to the agreements in question. (Cavalry had previously brought similar lawsuits based on merchant funding agreements against other funding companies in 2019 and 2020.)

It appears from the face of the record that Cavalry – breezily assuming victim status with no concrete factual allegations or supporting evidence of any kind – has fraudulently induced the defendant funding companies to part with considerable sums of money in return for promises it had no intention of keeping. Cavalry's scheme to defraud is evidenced by the pattern of its obtaining large sums of money from a number of different parties in return for a promise of future payment of a portion of its receivables, and then promptly filing frivolous lawsuits to forestall collection of the promised payments. *See, e.g., People v. Fenner,* 155 AD2d 946 (4th Dept.), *appeal denied* 75 NY2d 770 (1989); *People v. DeMuirier,* 106 AD2d 266, 267

(1st Dept. 1984); *People v. Coloney,* 98 AD2d 969, 970 (4th Dept. 1983). Thus, Cavalry and its principals, plaintiffs Yoel Bochner and Chany Rosen, are potentially liable to criminal prosecution for larceny by false promise under Penal Law §155.05(2)(d), which provides:

> A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he or a third person will in the future engage in particular conduct, and when he does not intend to engage in such conduct or, as the case may be, does not believe that the third person intends to engage in such conduct.

Id. See, People v. Kramer, 92 AD2d 529, 542 (1998); *People v. Norman,* 85 NY2d 609, 619 (1995).

G. Mandatory Arbitration

The Agreement contains a broad arbitration provision which states:

> All claims and disputes, including without limitation, the terms, construction, interpretation, performance, termination, breach, or enforceability, arising under or relating to this Agreement shall be settled by binding Arbitration....

(Agreement, p. 12, ¶8) The Agreement further provides:

> "Dispute" and "Disputes" are given the broadest possible meaning and include, without limitation, (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration Provision, the validity and scope of this Arbitration Provision and any claim or attempt to set aside this Arbitration Provision; (b) all federal or state law claims, disputes or controversies, arising from or relating directly to this Agreement, including this Arbitration Provision;....(d) all common law claims, based upon contract, tort, fraud, or other intentional torts; (e) all claims based upon a violation of any state or federal constitution, statute or regulation; (f) all claims asserted by Lendini against Merchant...; (g) all claims asserted by Merchant against Lendini....

(*Id.*, ¶8.2) Thus, the Agreement provides for mandatory arbitration of all claims and disputes arising under or relating thereto, and specifically delegates questions of "arbitrability", including the validity and scope of the arbitration provision, to the arbitrator.

Lendini asserts that questions concerning the enforceability of the arbitration provision, and specifically of the provision delegating matters of arbitrability to the arbitrator, must be determined under the Federal Arbitration Act. Cavalry asserts to the contrary that New York law applies, and that it requires a prior determination by the court whether the Agreement is void *ab initio* for usury. *See, Durst v. Abrash,* 22 AD2d 39 (1st Dept. 1964), *aff'd* 17 NY2d 445 (1965).

1. The Federal Arbitration Act Applies

The Federal Arbitration Act ("FAA") provides that "[a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or inequity for the revocation of any contract." 9 U.S.C. §2.

As the Court of Appeals explained in *Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA,* 26 NY3d 659 (2016):

> The FAA was enacted by Congress "in response to widespread judicial hostility to arbitration" [cit.om.], and it aims to "ensure judicial enforcement of privately made agreements to arbitrate" [cit.om.]. "[9 U.S.C. §2] reflects the overarching principle that arbitration is a matter of contract" and, "consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms" [cit.om.]. Typically, "the FAA preempts state laws [that] 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration'" [cit.om.].

Id., 26 NY3d at 665.

The FAA applies to arbitration provisions in contracts "evidencing a transaction involving commerce." The United States Supreme Court has interpreted the words "involving commerce" as the functional equivalent of the phrase "affecting commerce," which ordinarily

signals Congress' intent to exercise its Commerce Clause powers to the fullest extent. *See, Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 273-274, 281 (1995). *See also, Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp.,* 4 NY3d 247, 252 (2005). An agreement between corporations from different states is one "involving commerce" and hence subject to the FAA. *See, Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp., supra; Bergassi Group LLC v. Allied World Insurance Co.,* 193 AD3d 524 (1st Dept. 2021); *Highland HC, LLC v. Scott,* 113 AD3d 590, 592-593 (2d Dept. 2014). Conversely, where the parties are local commercial entities who lack a multi-state or national presence, the agreement may not trigger the FAA. *See, Smith v. Nobiletti Builders, Inc.,* 177 AD3d 807, 810 (2d Dept. 2019); *Siegel v. Landy,* 95 AD3d 989, 991 (2d Dept. 2012).

In an apparent effort to escape the reach of the FAA, Cavalry pleads in its Complaint that it is a New York limited liability company (Complaint ¶24), that Lendini, though a Delaware corporation, effects its lending business "from an office located at 1330 Avenue of the Americas, Suite 23A, New York, NY" (*id.,* ¶27), and that "[t]he transactions and events that are the subject matter of the Complaint all occurred within the State of New York." (*Id.,* ¶29)

However, the Agreement states:

(1) that Lendini's address as 3220 Tillman Drive, Suite 200, Bensalem, PA 19020 (Agreement, p. 1);

(2) that all requests for reconciliation or reduction of Daily Payments due under the Agreement must be sent to Lendini at its Bensalem, PA address (*id.,* p.3);

(3) indeed, that all notices, requests, demands and other communications must be sent to Lendini's Pennsylvania address (*id.,* p. 10);

(4) that, as set forth in Point "D" above, the parties are afforded certain remedies under Pennsylvania law or in Pennsylvania courts (*id.,* pp. 9-10, 14); and

(5) that arbitration under the Agreement is to be held in Bucks County, Pennsylvania (*id.*, p. 13).

Dominic Frascella, a Senior Underwriter for Lendini, avers that Lendini is a Delaware corporation maintaining its principal place of business, as set forth in the Agreement, in Bensalem, Pennsylvania. (Frascella Aff. ¶2) His affidavit further states:

> Funding Metrics, LLC is based in Bucks County, Pennsylvania, it performed by paying the purchase price in Bucks County, Pennsylvania, and was intended to receive its share of receivables in Bucks County, Pennsylvania. Funding Metrics, LLC, accepted and executed the Agreement in Bucks County, Pennsylvania. When the Plaintiffs breached the contract, Funding Metrics, LLC was injured in Bucks County, Pennsylvania. Furthermore, when Plaintiffs applied for funding, they solicited Funding Metrics, LLC, electronically at its office in Bucks County, Pennsylvania. Pennsylvania was substantially related to every step of the Agreement from solicitation, negotiation, and execution, through Funding Metrics, LLC's performance, and the Plaintiffs' ultimate breach of the Agreement.

(Frascella Aff. ¶4) Mr. Frascella's averments stand unrebutted by Cavalry.

The Court need not accept the conclusory allegation of Cavalry's Complaint that "[t]he transactions and events that are the subject matter of the Complaint all occurred within the State of New York" as true where, as here, it has been shown that this is not a fact at all. *See, Tilford v. Greenburgh Housing Authority, supra,* 170 AD3d at 1234-35 (citing *Guggenheimer v. Ginzburg, supra,* 43 NY2d 268, 274-275). It is clear from the face of the Agreement and from Mr. Frascella's unrebutted affidavit that this was an agreement between corporations from different states "involving commerce" within the meaning of §2 of the FAA. Accordingly, the FAA applies. *See, Allied-Bruce Terminix Companies, Inc. v. Dobson, supra*; *Diamond Waterproofing Systems, Inc. v. 55 Liberty Owners Corp., supra; Bergassi Group LLC v. Allied World Insurance Co., supra*; *Highland HC, LLC v. Scott, supra.*

2. Under the FAA, Calvary's Claim of Usury is a Matter for the Arbitrator

In *Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, supra,* the Court of Appeals laid out the analytical framework under the FAA for determining whether the threshold question of arbitrability should be resolved by the arbitrator or by the court:

> "'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit'" (*AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648 ... [1986], quoting *Steelworkers v. Warrior & Gulf Nav. Co.,* 3363 U.S. 574, 582 ... [1960]; *see First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943 ... [1995]). As the United States Supreme Court has stated, "[c]hallenges to the validity of arbitration agreements ... can be divided into two types," namely, "challenges specifically [to] the validity of the agreement to arbitrate" and "challenges [to] the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.,* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid" (*Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 ... [2006]). "[A]ttacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause[,] itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court'" (*Nitro-Lift Technologies, LLC v. Howard,* 568 U.S. –, 133 S.Ct. 500, 503 ... [2012], quoting *Preston,* 552 U.S. at 349 ...; *see Buckeye Check Cashing, Inc.,* 546 U.S. at 444 ...; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S.; 395, 403-404 ... [1967]).
>
> The Supreme Court has also held that arbitration agreements must be enforced according to their terms, and that "parties can agree to arbitrate 'gateway' questions of 'arbitrability'" (*Rent-A-Center, West, Inc.,* 561 U.S. at 68-69 ...; *see Nitro-Lift Technologies, LLC,* ... 133 S.Ct. at 503; *Buckeye Check Cashing, Inc.,* 546 U.S. at 445...). Such "delegation clauses" are enforceable where "there is 'clear and unmistakeable' evidence" that the parties intended to arbitrate arbitrability issues (*First Options of Chicago, Inc.,* 514 U.S. at 944 ..., quoting *AT & T Technologies, Inc.,* 475 U.S. at 649 ...).....
>
> Further, "courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself" (*Granite Rock Co. v. Teamsters,* 561 U.S. 287, 301 ... [2010]; *see Nitro-Lift Technologies, LLC,* ..., 133 S.Ct. at 503; *Rent-A-Center, West, Inc.,* 561 U.S. at 71 ...; *Buckeye Check Cashing, Inc.,* 546 U.S. at 445 ...). The rule of severability extends to delegation clauses, which are severable from larger arbitration provisions (*see Rent-A-Center, West, Inc.,* 561 U.S. at 71-72 ...; *Parnell v. CashCall, Inc.,* 804 F.3d 1142, 1146 [11th Cir. 2015];

> *Brennan v. Opus Bank,* 796 F.3d 1125, 1133 [9th Cir. 2015]). Thus, where a contract contains a valid delegation to the arbitrator of the power to determine arbitrability, such a clause will be enforced absent a specific challenge to the delegation clause by the party resisting arbitrability (*see Rent-A-Center, West, Inc.*, 561 U.S. at 71-72 ...).

Monarch Consulting, Inc., 26 NY3d at 674-676.

In *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), the United States Supreme Court ruled in circumstances akin to those of the case at bar that a claim of usury is effectively a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, and must therefore be decided by the arbitrator, not the court. *Id.,* at 445-449.

The plaintiff borrowers therein claimed that the defendant lender made illegal usurious loans disguised as check cashing transactions in violation of Florida statutes which rendered the parties' agreement criminal on its face. The Florida Supreme Court denied the lender's motion to compel arbitration, reasoning that the enforcement of an arbitration agreement in a contract challenged as usurious would violate state public policy and contract law. *Id.,* at 442. The U.S. Supreme Court reversed. Relying on its prior decisions in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967) and *Southland Corp. v. Keating,* 465 U.S. 1 (1984), the Supreme Court ruled:

> *Prima Paint* and *Southland* answer the question presented here by establishing three propositions.
>
> First, as a matter of substantive federal arbitration law, an **arbitration provision is severable** from the remainder of the contract.
>
> Second, **unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator** in the first instance.
>
> Third, **this arbitration law applies in state as well as in federal courts.**

> ....Applying them to them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.

Buckeye Check Cashing, Inc. v. Cardegna, supra, 546 U.S. at 445-446. *See, Granite Rock Company v. International Brotherhood of Teamsters,* 561 U.S. 287, 301 (2010). *See also, In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litigation,* 835 F.3d 1195, 1210-11 (10th Cir. 2016); *Moran v. Svete,* 366 Fed.App'x. 624, 631 (6th Cir. 2010); *Madura v. Country-wide Home Loans, Inc.,* 344 Fed.App'x. 509, 515 (11th Cir. 2009); *Koch v. Compucredit Corp.,* 543 F.3d 460, 464 (8th Cir. 2008); *Sleeper Farms v. Agway, Inc.,* 506 F.3d 98, 103 (1st Cir. 2007).

Buckeye Check Cashing, Inc. v. Cardegna notwithstanding, Cavalry asserts that *Durst v. Abrash, supra,* 22 AD2d 39 (1st Dept. 1964), *aff'd* 17 NY2d 445 (1965) requires that its claim of usury be determined by the court, not by the arbitrator. In *Durst,* the plaintiff alleged that a purported stock sale transaction was in fact a disguised usurious loan agreement. The defendant moved to compel arbitration of the issues of usury and invalidity. The *Durst* Court, with no discussion of the FAA or whether the agreement was one "involving commerce" within the meaning of FAA §2, framed the issue as one arising wholly under New York law as follows:

> The issue is whether the agreement to arbitrate has independent viability apart from the alleged usurious transactions so that all the issues, including the claim of usury, are for the arbitrators to determine rather than the court.

Id., 22 AD2d at 40. The Court ruled:

> ...[I]t is undisputed law that a usurious agreement is invalid regardless of the form it takes and regardless of the rules governing integrated agreements. It is always possible to show that any transaction and the documents which are a part of it are illegal and unenforcible as a usurious transaction.. [cit.om.]....
> ....

> The separate execution of the one-sentence agreement to arbitrate any disputes which might arise under the principal agreements does not, of course present a separable question. The papers being executed simultaneously and as part of the same transaction are to be construed together [cit.om.]. If the main purpose of the transaction was illegal then the subsidiary agreements, if they are truly subsidiary, are rendered invalid by the invalidity of the principal agreement. [cit.om.].

Id., 22 AD2d at 42, 43.

It is immediately apparent that *Durst v. Abrash* runs afoul of the fundamental FAA principles that (1) "an arbitration provision is severable from the remainder of the contract" *(see, Buckeye Check Cashing, Inc. v. Cardegna, supra,* 546 U.S. at 445; *Prima Paint Corp. v. Flood & Conklin Mfg. Co., supra,* 388 U.S. at 402-404); and (2) "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator" (*see, Buckeye, supra,* 546 U.S. at 445-446; *Prima Paint, supra,* 388 U.S. at 403-404). Answering the question posed by the Court in *Durst* as it must be answered under the FAA, the agreement to arbitrate is severable from the main contract and does indeed have "independent viability apart from the alleged usurious transactions, so that all the issues, including the claim of usury, are for the arbitrators to determine rather than the court." *See, id. See also, AF Trucking Inc. v. Business Financial Services, Inc.*, 2020 WL 2765678 at *5 (S.D.N.Y., May 28, 2020) (recognizing that *Durst v. Abrash* is inconsistent with *Buckeye Check Cashing, Inc. v. Cardegna, supra*).

Since the Agreement in this case "involves commerce" and is therefore subject to the FAA, the Court finds that all issues herein, including the enforceability of the Agreement and its arbitration provision in the face of Cavalry's claim of usury, are subject in the first instance to mandatory arbitration pursuant to Article 8 of the Agreement.

However, assuming *arguendo* it were necessary that a prior determination be made by the Court whether the Agreement and /or its arbitration provision is void on account of usury, the Court has determined in Point "F" above that the transaction between Lendini and Cavalry constitutes a purchase and sale of future receivables, not a loan, and hence there can be no usury.

It is therefore

ORDERED, that Defendants' motion for an order dismissing Plaintiffs' action and compelling arbitration of Plaintiffs' claims is granted in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: August 17, 2021 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE