

**Platinum Asset Funding, LLC v Platinum Rapid  
Funding Group Ltd.**

2022 NY Slip Op 31171(U)

April 8, 2022

Supreme Court, New York County

Docket Number: Index No. 652167/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

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PLATINUM ASSET FUNDING, LLC,  
  
Plaintiff,

- v -

PLATINUM RAPID FUNDING GROUP LTD., ALI MAYAR,  
VINCENT BARDONG,

JBMLL, LLC, FRIEDLAND CAPITAL 2, INC.,<sup>1</sup>

CFG MERCHANT SOLUTIONS, LLC, CETERIS  
PORTFOLIO SERVICES, LLC, PRIME MERIDIAN  
SPECIAL OPPORTUNITIES FUND, L.P, ARENA PRFG,  
LLC, and ARENA INVESTOR, LP.,<sup>2</sup>

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 69, 70, 71, 72, 73, 81, 82, 83, 84, 85, 97, 98

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 93, 94, 95, 96, 118

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 99, 100, 101, 102, 103, 104, 105, 106, 107, 120, 145

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 126, 127, 128, 129, 130, 131, 132, 133, 142

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

<sup>1</sup> The intervenors are not defendants. The caption must be corrected. (See CPLR 3019.)

<sup>2</sup> CFG Merchant Solutions, LLC, Ceteris Portfolio Services, LLC, Prime Meridian Special Opportunities Fund, LP, Arena PRFG, LLC and Arena Investor, LP are not defendants. The caption must be corrected. (See CPLR 3019.)

In motion sequence number 003, counterclaim defendants Platinum Asset Funding LLC (PAF), Arena Investors, LP (AILP), Arena PRFG, LLC (Arena PRFG), Prime Meridian Special Opportunities Fund, L.P. (Prime), and Ceteris Portfolio Services, LLC (Ceteris) (collectively CC Defendants) move pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the eight counterclaims of counterclaim plaintiffs Platinum Rapid Funding Group Ltd. (PRFG), Ali Mayar, Vincent Bardong, JBMML, LLC (JBMML), and Friedland Capital 2, Inc. (Friedland) (collectively CC Plaintiffs).

In motion sequence number 004, Friedland moves pursuant to CPLR 1012(a)(2) and (3), and CPLR 1013 to intervene in this action as intervenor-CC plaintiff.

In motion sequence number 005, Nextwave Enterprises, LLC (Nextwave) moves pursuant to CPLR 1012 and CPLR 1013 to intervene in this action as intervenor-CC plaintiff.

In motion sequence number 008, JBMML moves pursuant to CPLR 1012(a)(2) and (3), and CPLR 1013 to intervene in this action as intervenor-CC plaintiff.

This is an action by plaintiff PAF, the lender and agent under a credit agreement, against the guarantors for breach of contract and tortious interference. (NYSCEF Doc. No. [NYSCEF] 1, Complaint.) However, these motions concern the counterclaims against PAF for (1) declaratory judgment “concerning (i) whether PAF's May 15, 2020 foreclosure sale of the Collateral was commercially reasonable under Article 9 of New York's Uniform Commercial Code; (ii) whether the Collateral foreclosed upon included the syndicate participants' interest in the Receivables; (iii) whether PAF is obligated to pay the syndicate participants their share of the merchant Receivables collected by PAF; and (iv) whether there were any Trigger Events under the Parent or Principal

Guarantees;" (2) injunctive relief enjoining and restraining CC Defendants from (a) seeking a deficiency judgment against PRFG, Mayar, and Bardong on the outstanding balance of the Credit Facilities and (b) from withholding the Receivables Participation Payments from the syndicate participants; and (ii) compelling CC Defendants to distribute to the syndicate participants' their share of the Receivables Participation Payments; (3) breach of the NDA Letter Agreement; (4) breach of the covenant of good faith and fair dealing; (5) tortious interference with PRFG's relationships with merchants; (6) conversion of the receivable participation payments of JBMML and Friedland PRFG's syndicate participants; (7) unjust enrichment; and (8) enrichment. (NYSCEF 38, Verified Answer with Counterclaims [VAC].) Unless indicated otherwise, the following facts are taken from defendants' VAC and for the purposes of this motion to dismiss, are accepted as true. (See *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993].)

PRFG is a merchant cash advance (MCA) funder. (NYSCEF 38, VAC ¶19.) PRFG purchases a merchant's future receivables at a discount in exchange for an upfront cash advance. (*Id.* ¶¶20-21.) PRFG collect the receivables PRFG purchased from daily or weekly debits from the merchant's bank account, known as Automated Clearing House (ACH) pulls from the merchant's credit and debit card sales. (*Id.* ¶21.) PRFG's cash to make the advances comes from two sources: (1) through credit facilities and (2) syndicate partners. (*Id.* ¶¶30-32.) In September 2017, PRFG negotiated a \$25 million credit facility from AILP. (*Id.* at ¶35.) AILP formed Arena PRFG as the "Lender." (*Id.* ¶38.) AILP required PRFG to form a bankruptcy remote special purpose vehicle, the SPV, to be the "Borrower," to protect and insulate the collateral. (*Id.* ¶¶39- 40.) On February 1, 2018, SPV, as "Borrower", PRFG as

“Servicer”, and Arena PRFG as “Lender” entered into a Credit and Security Agreement (2018 Credit Agreement). (*Id.* ¶¶41; NYSCEF 2, 2018 Credit Agreement.) On August 29, 2019, the SPV, as “Borrower”, PRFG, as “Servicer”, and Arena PRFG as initial “Lender”, together with CC Defendant Prime, entered into a Credit and Security Agreement (the 2019 Credit Agreement and together with the 2018 Credit Agreement, the Credit Agreements). (NYSCEF 38, VAC ¶¶54; NYSCEF 40, 2019 Credit Agreement.)

PRFG purchased the receivables from Merchants via the “Merchant Agreements.” (See e.g. NYSCEF 51, Sample Merchant Agreement.) Only PRFG and the Merchant are parties to those Agreements. (*Id.* 3/9 NYSCEF pages. )

PRFG entered into Master Participation Agreements (“MPA”) with Participants such as JBMML or Friedland. (See e.g., NYSCEF 52, Friedland MPA; NYSCEF 38, VAC ¶¶ 32.) The MPAs granted participants a “Right to Receive” revenue based on performance of unidentified receivables. (NYSCEF 52, MPA ¶¶1.31)

PRFG serviced its portfolio of MCA receivables with its proprietary CRM system, the PRFG Platform. (*Id.* ¶¶25-29; 57-58.) PRFG generated a monthly report and provided it to First Associates, a back-up servicer, along with access to the data necessary to service. (*Id.* ¶¶59, 60, 61, 66.) AILP allegedly terminated the backup servicer and hired CC Defendant Ceteris, instead. (*Id.* ¶¶55, 69, 108.)

“In January 2020, Arena served a 30-day Notice to Cure an alleged Tangible Net Worth violation.” (*Id.* ¶89.)

AILP terminated PRFG on March 31, 2020 as servicer. (*Id.* ¶117.)

“On April 5, 2020, Arena PRFG and PRFG entered into a non-disclosure letter agreement” which limited PRFG’s cooperation period to six weeks. (*Id.* ¶¶141-142.)

On May 1, 2020, PAF served a foreclosure notice setting a public foreclosure sale of PRFG SPV's interest in the collateral for May 15, 2020. (*Id.* ¶¶158-160.) The outstanding debt was \$19 million. (*Id.* ¶166.) On May 15, 2020, PAF credit bid \$1 million. (*Id.* ¶¶15, 169.) CC Defendants assert a deficiency claim of \$18 million against the guarantors. (*Id.* ¶15.)

CC Plaintiffs claim that AILP wrongfully short funded the SPV between the First and Second Credit facilities in the summer of 2019 triggering PRFG's eventual default. (*Id.* ¶ 85.)

CC Plaintiffs argue that the SPV's receivables – AILP's Collateral – are only a percentage of the total receivables originated and serviced by PRFG. The remaining percentage of the receivables are owned by PRFG's syndicate partners, such as Friedland. The Credit Agreements expressly refer to a "Receivables Participant," which are the syndicate partners. (NYSCEF 3, 2018 Credit Agreement at p 15, 18, 19, 21, 31, 32, 33, 36.) CC Plaintiffs argue the CC Defendants used a sham foreclosure sale to steal PRFG's syndicate partners' share of the receivables, as the receivables participation payments were not part of AILP's collateral.

CC Defendants argue that PRFG expressly authorized PAF to perfect its interest in certain collateral, namely, all of PRFG's right, title and interest in receivables PRFG held under the Merchant Agreements, by filing UCC-1s on all receivables at issue. CC Defendants assert a senior secured position against the receivables which were seized following a default under the secured Credit Agreements of 2018 and 2019.

The proposed intervenors JBMML and Friedland were allegedly promised a participation interest under the MPAs.

### Motion Sequence Number 003

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the “burden of showing that the relied upon documentary evidence ‘resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [citation omitted].) “A cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [citation omitted].) “The documents submitted must be explicit and unambiguous.” (*Dixon v 105 West 75th St. LLC*, 148 AD3d 623, 626 [1st Dept 2017] [citation omitted].) Their content must be “‘essentially undeniable.’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [citation omitted].) The authenticity of documentary evidence must not be subject to genuine dispute, and it must be enough to “‘support the ground on which the motion is based.’” (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [citation omitted].) In addition to contracts and other legal instruments, “emails can qualify as documentary evidence if they meet the ‘essentially undeniable’ test.” (*Id.* at 433 [citations omitted].)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “[B]are legal conclusions, as well as factual claims which are either inherently incredible or flatly

contradicted by documentary evidence” cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

### **Declaratory Relief (Claim I)**

In their first cause of action, CC Plaintiffs seek a declaratory judgment that (1) PAF’s May 15, 2020 UCC-9 foreclosure sale was commercially unreasonable, (2) the collateral that was foreclosed upon at the sale did not include the participation interests of the syndicate participants, (3) that PAF is required to pay the syndicate participants their share of receivables, and (4) there were no Trigger Events under the either the principal or parent guarantees. (NYSCEF 38, VAC ¶¶ 197-200).

“Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy. The general purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.” (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009] [internal quotation marks and citations omitted], *lv denied* 15 NY3d 703 [2010].) The necessary question for evaluating declaratory judgments on a motion to dismiss is solely “whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him.” (*Fillman v Axel*, 63 AD2d 876, 876 [1st Dept 1978] [internal quotation marks and citation omitted]). However, a motion to dismiss a claim for a declaratory judgment may be granted pursuant to CPLR 3211(a)(1) if the defendant asserts “a defense founded upon . . . documentary evidence.” (CPLR 3211 [a] [1].) Yet, a court may not dismiss a declaratory judgment

claim under CPLR 3211(a)(1) unless “the factual allegations are definitively contradicted by the evidence.” (*VXI Lux Holdco*, 171 AD3d at 193.)

PRFG challenges whether a UCC sale was necessary since there was an SPV and Arena serviced the portfolio. Rather, PRFG asserts that the sale was done to “steal the \$17 million in RTR that belonged to the syndicates.” (NYSCEF 148, tr 39:5-6.)

UCC § 9-610(b) requires that “[e]very aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable.” (UCC. § 9-610 [b]). Here, CC Plaintiffs allege that the sale is unreasonable for two reasons: (1) the parties received only 15 days’ notice amid a global pandemic that left New York State on lockdown, and (2) Arena did not create a market for the Collateral, resulting in a sale price of \$1,000,000, which was “far below the current value of the Collateral.” (NYSCEF 38, VAC ¶ 169).

“Whether a sale was commercially reasonable is, like other questions about ‘reasonableness’, a fact-intensive inquiry; no magic set of procedures will immunize a sale from scrutiny.” (*D2 Mark LLC v OREI VI Invs.*, No. 652259/2020, 2020 NY Misc. LEXIS 2978, at \*12 [Sup Ct, New York County 2020]). Thus, CC Defendants’ compliance with the notice requirements under the Credit Agreements as well as with UCC’s 10-day safe harbor provision may render the timeliness of the sale reasonable, but that does not render the sale itself commercially reasonable. Moreover, while a low sale price is not outcome determinative on the matter of commercial reasonableness, as both sides acknowledge, there is a “need for closer scrutiny” where “the possibilities for self-dealing are substantial,” as CC Plaintiffs assert. (*Central Budget Corp. v Garrett*, 48 AD2d 825, 825 [2d Dept 1975]). Thus, despite CC Defendants’ adherence to certain

applicable notice timing provisions, it cannot be said at this stage of the proceedings that the UCC-9 Sale was commercially reasonable.

CC Plaintiffs allege sufficient facts to support their assertion that the collateral did not include the participation interests of the syndicate participants to survive this motion to dismiss. Specifically, CC Plaintiffs allege that the syndicate participants' "share of any merchant cash advance was never sold to PRFG SPV" and that "PRFG SPV did not have any right, title or interest in the syndicate participant's portion of any merchant cash advance." (NYSCEF 38, VAC ¶¶ 76-77).

CC Defendants contend that the documentary evidence – their UCC-1 filing – is conclusive proof that they have a senior secured position against the receivables. (NYSCEF 54, UCC filings.) PAF's February 2018 UCC-a filing describes the covered collateral as: "All of the Debtor's [PRFG's] right, title and interest in and to, whether now existing or hereafter created, the Receivables and Related Security (collectively, the "Transferred Property") sold pursuant to that certain Receivables Purchase Agreement." (*Id.* Exhibit A at 9/45 NYSCEF pages.) Further, Exhibit A defines the "Receivables" as: [E]ach merchant cash advance made or acquired by the Borrower at any time on or after the date hereof, whether by way of purchase of accounts receivable or otherwise, and all instruments, agreements, or other documents evidencing or relating to such merchant cash advance, including all rights under the applicable Contracts." (*Id.* at 9/45 NYSCEF pages.)

CC Plaintiffs counter that their syndicate participants acquired an ownership interest, not a security interest, in the receivables which would not require them to perfect their interest through a UCC-1 filing of their own. CC Plaintiffs' contention has

support in the record. Indeed, § 1.21 the MPA defines “Participant’s Right to Receive” as the “total amount of [receivables] which the Participant has invested in and owns outright as a co-investor.” (NYSCEF 52, Friedland’s MPA, § 1.21). This language, as well as that of §2.6(a) of the Credit Agreements, which acknowledges the participation payments to be paid to syndicate participants, demonstrate that there is an ambiguity as to whether the syndicate participants’ participation interests were included in the Collateral. Therefore, the UCC-1 filing is not conclusive.

Therefore, CC Defendants’ motion to dismiss CC Plaintiffs’ claim for declaratory relief is denied.

#### Injunctive Relief (Claim 2)

In their second cause of action, CC Plaintiffs seek: (1) an injunction to enjoin and restrain CC Defendants from (a) pursuing a deficiency judgment against PRFG, Mayar, and Bardong under the Credit Facilities and (b) withholding the syndicate participants’ interests in the syndication receivables; and (2) a judgment “compelling [CC Defendants] to distribute to the syndicate participants’ their share” of the syndication receivables. (NYSCEF 38, VAC ¶ 204). To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a “violation of a right presently occurring, or threatened and imminent,” that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor. (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014] [internal quotation marks and citations omitted].) CC Plaintiffs fail to allege any of the elements in the complaint and fail to address this claim in their papers. In any case, CC Plaintiffs have a remedy at law.

### Breach of Contract (Claim 3)

In their third cause of action, CC Plaintiffs allege that CC Defendants breached the April 5, 2020 NDA Letter Agreement by “improperly disclosing PRFG’s entire static pool to CFG.” (NYSCEF 38, VAC ¶¶ 209-211). Following the default, and in advance of the UCC sale, CC Plaintiffs offered to share data and its account used to manage the receivables for four weeks. (*Id.* ¶138.) In exchange CC Plaintiffs demanded an NDA whereby PAF agreed not to use that information for anything other than managing the accounts. (*Id.* ¶¶138-141.) The NDA is executed by Arena PRFG on behalf of AILP, the “Arena Parties,” its affiliates, officers, directors, consultants, agents, service providers, and employees. (NYSCEF 41, NDA.) AILP allegedly shared the information with CFG which contacted PRFG’s merchants which would be a violation of the NDA. (NYSCEF 38, VAC ¶¶147-149.)

CC Defendants challenge whether there was consideration for the NDA because CC Plaintiffs had an obligation to provide access under the credit agreement.

Specifically, Section 4.1. provides:

Duties of Servicer. (g) The Servicer shall retain all files and data (including computerized records) relating directly to or maintained in connection with the servicing of the Receivables . . . , and shall give the Borrower and the Collateral Agent access to all data at all reasonable times and upon reasonable notice. While an Event of Default shall be continuing, the Servicer shall, on demand of the Administrative Agent or the Collateral Agent provide all data (including computerized records and, to the extent transferable, related operating software) necessary for the servicing of the Contracts and all monies collected by it and required to be deposited in or credited to the Collection Account. (NYSCEF 3, 2019 Credit Agreement.)

CC Plaintiffs allege that at the time that the parties entered into the NDA, PRFG had been terminated as servicer rendering 4.1(g) inapplicable. Section 4.11(b) provides that if the Servicer is terminated, its rights and obligations are terminated (NYSCEF 38,

VAC ¶¶127.) Therefore, there was consideration: PRFG gave access to its system and AILP promised not to disclose information, withdrew its threat of litigation and reduced cooperation time to six weeks. (*Id.* ¶¶138-141.)

CC Plaintiffs have alleged damages. Breach of the NDA harmed PRFG's competitive advantage in the marketplace and tarnished its goodwill by harassing its merchants for payment. (*Id.* ¶¶151, 210.)

Finally, AILP argues that Ceteris and CFG are constrained by the NDA as an express party or as an affiliate of AILP. While the NDA did permit AILP to disclose the proprietary information to CFG, it did not permit CFG to contact PFRG's merchants. Accordingly, this claim would be dismissed against AILP which did not contact PFRG's merchants if AILP were the only party to the NDA. However, the claim is stated against all CC Defendants, including Ceteris and CFG. (NYSCEF 38, ¶¶238(d).) Moreover, the NDA obligates AILP to limit use of the proprietary information to manage the accounts. Therefore, the motion to dismiss the third claim is denied.

#### Breach of Covenant of Good Faith and Fair Dealing (Claim 4)

In their fourth cause of action, CC Plaintiffs allege that CC Defendants breached the implied covenant of good faith and fair dealing under the Credit Agreements by "exercising the[ir] discretion . . . under the Credit Agreements in an irrational manner for an illegitimate purpose, and by exercising its contractual rights and obligations malevolently or its own personal gain and at PRFG's expense." (NYSCEF 38, VAC ¶¶ 215-216). The Credit Agreement is between PRFG and Arena PRFG. (NYSCEF 3, 2019 Credit Agreement.)

Every contract contains an implied covenant of good faith and fair dealing that neither party will injure nor destroy the other party's right to the benefit of the contract. (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995] [citations omitted].) The breaching party's action need not be expressly forbidden by a contract provision to inhibit the other party's benefit of the contract. (*Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008] [citations omitted].)

CC Plaintiffs argue that AILP breached its duty of good faith and fair dealing by withholding from PRFG the benefits that it was entitled to under the Credit Agreements, by exercising the discretion afforded to it under the Credit Agreements in an irrational manner for an illegitimate purpose, and by exercising its contractual rights and obligations malevolently for its own personal gain and at PRFG's expense. For example, when the parties switched from the 2018 Credit Agreement to the 2019 Credit Agreement, Arena allegedly withheld funding to the SPV. (NYSCEF 38 ¶¶83-102.) The CC Defendants slow and or reduced funding to the SPV from the First Credit Facility in the summer of 2019, allegedly caused PRFG's SPV merchant portfolio to have a lower Borrowing Base, reduced Tangible Net Worth, and ultimately Loss Adjusted Asset Deficits – factors Arena used to extend credit or declare a default. (*Id.* ¶¶73-76, 85.)

Another example offered by CC Plaintiffs is that CC Defendants terminated the backup servicer. (*Id.* ¶¶ 55, 112.) As a result, when PRFG was terminated, there was no back-up servicer and *Ceteris*, the proposed replacement servicer was not able to perform such duties. (*Id.* ¶¶129, 132-37.) "Without a qualified and experienced servicer in place, Arena put the entire portfolio at risk, including the syndicate participant's share of the Receivables." (*Id.* ¶130.) The Credit Agreements include multiple references to

the backup servicer which implies that such a servicer is constantly in place. While there was no provision barring CC Defendants from terminating the backup servicer, doing so threatened the entire portfolio.

Finally, CC Plaintiffs allege that CC defendants failed to cooperate during the pandemic instead taking advantage of it. (*Id.* ¶157.) As discussed above, the Credit Agreement references cooperation.

As to the above examples, the court finds that CC Plaintiffs have stated a claim for breach of the covenant of good faith and fair dealing. These are not newly created contractual rights, as CC Defendants object, but obligations while not specifically stated in the Credit Agreements, they could be integral to those Agreements. “In order that an unexpressed term may be implied and inserted in a contract, the implication must arise from the language employed in the expressed terms of the contract, or be indispensable to effectuate the intention of the parties.” (*Park Ave. Assoc. in Radiology, P.C. v Nicholson*, 200 AD3d 1436 [3d Dept 2021] [internal quotation marks and citations omitted].)

However, the court agrees CC Defendants as to the balance of the examples of good faith and fair dealing offered by CC Plaintiffs. In particular, the alleged breaches of the NDA and Credit Agreements are breaches of those agreements and cannot be repeated as breaches of the covenant of good faith and fair dealing. Likewise, CC Plaintiff’s objections to the UCC sale cannot be repeated as a breach of the implied covenant.

### Tortious Interference with Prospective Economic Advantage (Claim 5)

In their fifth cause of action, CC Plaintiffs allege that “Counterclaim Defendants knowingly interfered with PRFG’s relationships with its merchant customers by contacting them for collections and to solicit new advances after their information was shared by Arena in breach of the NDA Letter Agreement.” (NYSCEF 38, VAC ¶ 221.) CC Plaintiffs allege that this “bad faith conduct” was committed with “the intent to injure PRFG by interfering with PRFG’s relationships with its merchant customers” and thus “constitutes tortious interference with PRFG’s prospective economic advantage,” which has caused PRFG damages, including punitive damages. (*Id.* ¶¶ 221-224.)

To establish a claim for tortious interference with prospective economic advantage, “a plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by ‘wrongful means’ or that the defendant acted for the sole purpose of harming the plaintiff.” (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999] [citations omitted].)

CC Plaintiffs have failed to make out a claim for tortious interference with prospective economic advantage. While CC Plaintiffs that CC Defendants conduct in sharing their proprietary information with CFG may be “wrongful,” and allegedly caused “loss of income and loss of future income,” they have failed to allege that CC Defendants did so with the *sole* purpose of harming PRFG. (NYSCEF 38, VAC ¶ 222.)

CC Defendants’ motion to dismiss CC Plaintiffs’ claim for tortious interference with prospective economic advantage is granted.

### Conversion (Claim 6)

In their sixth cause of action, CC Plaintiffs allege that “Counterclaim Defendants . . . misappropriated JBMML’s and Friedland Capital’s Receivable Participation Payments and . . . converted those payments for their own use, dominion and control, when Counterclaim Defendants knew or should have known that JBMML and Friedland Capital are and remain the rightful owners thereof.” (NYSCEF 38, VAC ¶ 228). As a result, CC Plaintiffs claim that JBMML and Friedland are entitled to compensatory and punitive damages and that PRFG is entitled to a judgment in an amount to be proven at trial as well as punitive damages. (*Id.* ¶¶ 229-230.)

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights.” (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [citations omitted].)

Here, CC Plaintiffs have successfully alleged the elements of conversion.

JBMML and Friedland Capital, as PRFG’s syndicate participants, allege that they have an ownership interest in Receivable Participation Payments under the terms of their respective MPAs. (NYSCEF 38, VAC ¶¶ 174, 227-228.) As described above, there is an ambiguity regarding what type of interest was acquired by the syndicate participants and discovery is required on that question. The CC Plaintiffs have successfully pleaded the first element of conversion to survive this motion to dismiss. As stated on the record in the related Chatham Action, “conversion . . . comes down to whether Plaintiff has an ownership interest in something or not. They are asserting it, and I think that can move forward and do the discovery.” (NYSCEF 52, tr at 41:7-11 in *Chatham Capital*

*Management IV LLC et al v Platinum Asset Funding LLC et al*, Sup Ct, New York County, Index No. 157977/2020.)

The second element of conversion is likewise satisfied. The CC Plaintiffs allege that CC Defendants exercised “dominion and control” over the syndicate participants’ Receivable Participation Payments in view of their admitted sale of these contested portions of the Collateral at the May 15, 2020, UCC-9 Sale. (NYSCEF 38, VAC ¶228.) As such, CC Plaintiffs have sufficiently pled a claim for conversion and CC Defendants’ motion to dismiss that claim is denied.

#### Unjust Enrichment (Claim 7)

In their seventh cause of action, CC Plaintiffs allege that CC Defendants “retain . . . Receivable Participation Payments” that “are the exclusive property belonging to JBMML and Friedland Capital, such that “Counterclaim Defendants have been unjustly enriched and have benefitted at the direct expense of JBMML and Friedland Capital. (NYSCEF 38, VAC ¶¶ 232-233). As a result, CC Plaintiffs claim that they are entitled to restitution. (*Id.* ¶ 234).

To sustain a claim for unjust enrichment, plaintiff must show that (1) the other party was enriched, (2) at plaintiff’s expense, and that (3) it is in equity and good conscience to permit [the other party] to retain what is sought to be recovered. (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affg order* 19 NY3d 511 [2012] [internal quotation marks and citations omitted].)

CC Plaintiffs have successfully made out a claim of unjust enrichment. While CC Defendants argue that their relationship between the syndicate participants is too attenuated under *Georgia Malone* as they were merely parties to tangential agreement

(the MPAs), that argument fails here. Indeed, CC Plaintiffs have alleged that the Arena parties were aware of the existence of the MPAs and of the syndicate participants' Right to Receive thereunder due to section 2.6 of the Credit Agreements. Therefore, as in the related Chatham Action, CC Plaintiffs' claim for unjust enrichment may go forward and CC Defendants' motion to dismiss that claim is denied.

#### Constructive Trust (Claim 8)

In their eighth cause of action, CC Plaintiffs seek an order "declaring and adjudicating that the wrongful withholding of JBMML's and Friedland's Receivables Participation Payments in violation of their rights are to be held in a constructive trust for the benefit of JBMML and Friedland Capital." (NYSCEF 38, ¶ 237.) The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment. (*Castellotti v Free*, 165 AD3d 535, 537 [1st Dept 2018], citing *Panetta v Kelly*, 17 AD3d 163, 165, [1st Dept 2005].) Plaintiff asserts a fiduciary or confidential relationship between Friedland and Arena as the Receivables Participation Payments were held exclusively for the syndicate participants in the Collection Account under the Credit Agreements. (NYSCEF 38, VAC ¶¶2, 3, 236; Credit Agreements, Exhibits A and B, §2.6). Arena expressly provided that the Receivables Participation Payments were kept separate and that syndicate participants were entitled to those payments. (NYSCEF 38, VAC ¶¶2, 3; NYSCEF 2 and 3 Credit Agreements §2.6.) Friedland's reliance is evidence by the various purchases it made from PRFG over the course of many months. Moreover, CC Defendants' one sentence objection to the eighth cause of action is woefully inadequate.

### Motion Sequence Numbers 004, 005, 008

In motion sequence numbers 004, 005, and 008 Intervenor CC Plaintiffs Friedland, Nextwave, and JBMML each move pursuant to CPLR 1012 and 1013 to intervene in the present action based upon a similar set of facts. In each instance, the Intervenor Counterclaim Plaintiff invested with Counterclaim Plaintiff Platinum Rapid Funding Group as “Participants” or “Syndicate Partners” under Merchant Cash Advance (MCA) agreements governed by a Master Participation Agreement (MPA). Under the terms of those MPAs, the Participants purchased a “*pro rata* share” of receivables “outright as a co-investor.” (See, e.g., NYSCEF 76, Friedland Master Participation Agreement at 5.) Intervenor CC Plaintiffs seek to intervene to protest their purported ownership interests in the receivables which were sold by CC Defendant Arena PRFG at the May 15, 2020 UCC-9 Sale and purchased by CC Defendant Platinum Asset Funding.

CPLR 1012 reads in relevant part:

“(a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

...  
 (2) when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or

(3) when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.”

CPLR 1013 provides: “Upon timely motion, any person may be permitted to intervene in any action when . . . the person’s claim or defense and the main action have a common question of law or fact.”

As CC Defendants acknowledge, “[d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied.” (*Yuppie Puppy Pet Prods.*,

*Inc., v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]). Here, whether under either CPLR 1012 or CPLR 1013, Intervenor CC Plaintiffs meet the standard. Indeed, the present action clearly involves the disposition of property, namely the syndicate receivables under the MPA. Thus, Intervenor CC Plaintiffs “may be affected adversely by the judgment.” (CPLR 1012[a][3]). Moreover, their claims share common questions of law and fact with the present action, namely the proper ownership of the syndication receivables under the MPAs.

While CC Defendants assert that the Intervenor CC Plaintiffs lack standing to intervene in the action because they “lack[] the written documentation necessary to grant or perfect the alleged security interest at issue,” Intervenor CC Plaintiffs do not assert a *security* interest in the receivables, but rather outright ownership interests under the MPAs. The nature of the ownership interest in the syndicate participants’ *pro rata* share of the receivables is precisely what is in dispute and there remains ambiguity as to the ownership interest of those receivables under the MPAs. Thus, Intervenor CC Plaintiffs have standing in the present action.

Accordingly, it is

ORDERED that within 10 days Counterclaim plaintiffs” shall correct the caption; and it is further

ORDERED that Counterclaim Defendants’ motion to dismiss is granted in part to the extent that the second and fifth cause of action are dismissed. The fourth cause of action is dismissed to the extent that it is duplicative of the other cause of action for breach of contract and declaratory judgment.

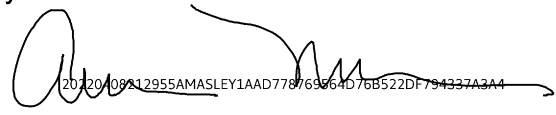
ORDERED that Intervenor Counterclaim Plaintiff Friedland Capital 2, Inc.'s motion to intervene is granted; and it is further

ORDERED that Intervenor Counterclaim Plaintiff Nextwave Enterprises, LLC's motion to intervene is granted; and it is further

ORDERED that Intervenor Counterclaim Plaintiff JBMML, LLC's motion to intervene is granted; and it is further

ORDERED that Counterclaim Defendants shall file an answer within 20 days of the date of this order; and it is further

ORDERED that the parties shall submit a stipulated PC order or if they cannot agree, individual proposed PC orders within 30 days of the date of this order.

  
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4/8/2022  
DATE

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ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE