

**Quartix Fin. Inc. v KSH Brands LLC**

2023 NY Slip Op 32453(U)

July 10, 2023

Supreme Court, New York County

Docket Number: Index No. 654957/2022

Judge: Margaret A. Chan

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

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QUARTIX FINANCE INC.,	INDEX NO. <u>654957/2022</u>
Plaintiff,	MOTION DATE <u>02/01/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>
KSH BRANDS LLC, ISRAEL FRIEDMAN, and PINCHUS FRIEDMAN	<b>DECISION + ORDER ON MOTION</b>
Defendants.	
-----X	

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25  
 were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT

In this action, plaintiff Quartix Finance Inc. (Quartix) moves for summary judgment in lieu of complaint pursuant to CPLR 3213, seeking to recover sums allegedly owed by defendant KSH Brands LLC (KSH) under a customer services agreement and personally guaranteed by defendants Israel Friedman (Israel) and Pinchus Friedman (Pinchus; together with Israel, the individual defendants) under two separate guarantees. Defendants oppose the motion and make a cross-motion to dismiss. For the reasons below, Quartix’s motion for summary judgment and defendants’ cross-motion to dismiss are both denied.

**BACKGROUND**

In seeking summary judgment in lieu of complaint, Quartix relies on a customer services agreement between itself and KSH, dated August 23, 2021 (NYSCEF # 4 – the Customer Services Agreement), and two personal guarantees, both dated October 4, 2021, signed by Israel and Pinchus, respectively (NYSCEF #'s 5, 6 – together, the Guarantees).

According to the Customer Services Agreement and an affidavit of Dror Polak— Manager, Customer Success of Quartix (NYSCEF # 3 – Polak Aff), Quartix maintains a cloud-based supply chain finance platform that facilitates timely payments from merchants to their vendors or suppliers (*id.*, ¶ 4). The platform can function like a credit card, allowing users to pay vendor invoices on credit extended by Quartix, then repay Quartix later (*id.*). KSH is a one such user of Quartix’s platform (*id.*, ¶ 8). Quartix helps KSH pay its vendors in time in exchange for KSH’s

repayment and an interest charge (*id.*, ¶’s 8-12; NYSCEF # 4, §§ 7, 8). The parties executed the Customer Services Agreement to memorialize this arrangement (NYSCEF # 4). In connection with the Customer Services Agreement, the parties also entered the Guarantees, under which Israel and Pinchus each “irrevocably and unconditionally guarantees to [Quartix] payment . . . of any and all Obligations of [KSH] to [Quartix]” (NYSCEF #’s 5, 6). The term “Obligations” is defined as “all obligations, liabilities and indebtedness of [KSH] to [Quartix] . . . now existing or thereafter arising, however evidenced, including without limitation those now existing or hereafter arising under the Customer Services Agreement” (*id.*).

The Customer Services Agreement governs how KSH may use Quartix’s platform to acquire financing from Quartix. Specifically, KSH can post invoices issued by KSH’s vendors to KSH on Quartix’s platform, then approve such posted invoices for Quartix’s financing. Following this, Quartix may provide financing to KSH in two ways: Quartix may advance a payment to KSH or directly to KSH’s vendors (Advance) upon KSH’s request (Borrowing Request). But even without KSH’s asking, Quartix may purchase a posted invoice from a vendor of KSH at Quartix’s proposed price (Purchase), so long as it notifies KSH of the Purchase (NYSCEF # 4, §§ 7(a), 8(a)).

The CSA provides for different arrangements respecting Advance and Purchase. For Advance, the procedure starts with KSH making a Borrowing Request, identifying the invoices at issue, specifying the amounts of payments requested, selecting available maturity dates from Quartix’s platform, and accepting the interest rates quoted on Quartix’s platform (*id.*, § 8(b)). Quartix may, but is not obliged to, make an Advance accordingly (*id.*, § 8(a)). Each Advance made is due on demand, and if no demand is made, on the maturity date KSH selects. If KSH defaults on such payment, the past due amount will be subject to a “post-default rate” specified on Quartix’s platform (*id.*, § 8(f)).

On the other hand, a Purchase begins with Quartix striking a deal with a supplier of KSH: Quartix offers a purchase price for a posted invoice and if the price is accepted, Quartix carries out the Purchase and receives the right, title, or interest in the purchased invoice. In that event, Quartix shall notify KSH of the Purchase, provide KSH with a summary report indicating the amount due under the Purchase, the maturity date, and applicable payment instructions (*id.*, § 7(a)). Quartix’s notice to KSH regarding a Purchase constitutes “a notice of assignment pursuant to Section 9-406 of the [Uniform Commercial Code],” which allows an account debtor to discharge its obligation by paying the assignor upon a notice of assignment (*id.*). If Quartix fails to notify KSH as such, the failure does not affect “the right, title or interest of Quartix in such [purchased] [i]nvoice [and] the related account and the proceeds thereof” (*id.*). KSH may request that Quartix extend the maturity date of a purchased invoice past the original maturity date provided in the invoice (Extension Request), and if Quartix agrees to an extension, KSH should pay Quartix interest on the amount owed for the period of extension—the period

between the original maturity date and the extended maturity date (*id.*, § 7(b)). The applicable interest rates are specified on Quartix's platform; Quartix may change such interest rates from time to time, with prior electronic notice to KSH (*id.*). If KSH fails to pay Quartix in full on the extended maturity date, the outstanding amounts due will be subject to a post-due interest rate equal to "the WSJ Prime Rate plus 4% (which rate shall apply after as well as before judgment)" (*id.*, § 7(d)).

In sum, by its own terms, the Customer Services Agreement does not specify many key terms respecting each financing transaction, including payment amount, interest rate, and repayment due date. It instead refers to KSH's vendor invoices, future communication between the parties, and information on Quartix's platform to determine the specific terms applicable. For both Advances and Purchases, Quartix's financing to KSH is fully discretionary (NYSCEF # 4, §§ 7(a), 8(a) ["Quartix shall have no obligation to purchase any Invoice"; "Quartix may, at [KSH]'s request but in Quartix's sole discretion, (i) pay Approved Invoices . . . or (ii) make advances to [KSH] to pay such Approved Invoices"]). Once Advances or Purchases take place, KSH "shall have an absolute, irrevocable, legal, valid and binding obligation to repay each Purchased Invoice" and "each Advance" (*id.*, §§ 7(c), 8(c)).

Quartix asserts that defendants have defaulted on the Customer Services Agreement and the Guarantees, owing Quartix a total balance of \$723,171.28, constituting of \$719,869.57 of principal and \$3,301.71 of interest (NYSCEF # 3, ¶ 20). In support of its claim, Quartix submits a copy of an internal report "from Plaintiff's computer system showing Advances made by Plaintiff and the repayment terms pertaining thereto" (*id.*, ¶ 21; NYSCEF # 7 – Internal Report). This Internal Report is undated; it contains six requests made by KSH, among which ksh-20221108-ext-81, ksh-20221108-ext-55, and ksh-20221108-ext-20 have a due date of November 8, 2022; and ksh-20221110-ext-31, ksh-20221110-ext-68, and ksh-20221110-ext-5 have a due date of November 10, 2022 (NYSCEF # 7). For each item, the Internal Report also lists an "Initial Due Date" as well as a corresponding amount and "fee" (*id.*).<sup>1</sup> All six items have an 19% interest rate<sup>2</sup> and their status remains "uncollected" (*id.*).

Additionally, Quartix presents a screenshot of a dashboard on its platform (NYSCEF # 9 – Dashboard Screenshot). Quartix avers that "[i]t is the regular practice of Plaintiff to make the [Dashboard Screenshot], record and maintain the [Dashboard Screenshot], and to rely upon the [Dashboard Screenshot] during the ordinary course of its business" (NYSCEF # 3, ¶ 25). The Dashboard Screenshot is

<sup>1</sup> Elsewhere in Quartix's moving papers, this "fee" is characterized as interest due (NYSCEF # 3, ¶'s 20, 21; NYSCEF # 10 at 8).

<sup>2</sup> But Quartix seeks pre-judgment interest against total amounts outstanding of \$723,171.28 at a rate of 19.5%, equaling \$386.35 per day (NYSCEF # 10 at 8). It is unclear if this 19.5% interest rate is derived from or related to the 19% interest rate reflected in the report (NYSCEF # 7). Plaintiff does not explain whether the 19.5% rate is a "post-default rate" that the Customer Services Agreement refers to in sections 8(f) or 7(d).

also not dated; Quartix maintains that it “was made at or near the time of the act, transaction, occurrence or event recorded therein” (*id.*). In the Dashboard Screenshot, the same six items are listed, with the same due dates and outstanding amounts as shown in the Internal Report (NYSCEF #s 7, 9).

Quartix claims that the undated Internal Report and the Dashboard Screenshot suffice as “payment records evidencing the Defendants’ payment default” (NYSCEF # 10 – Pltf’s MOL at 9). Nevertheless, neither the Internal Report nor the Dashboard Screenshot is signed or otherwise expressly acknowledged by defendants. Quartix has not submitted any other evidence as to the payments it allegedly made. Neither the Internal Report nor the Dashboard Screenshot identify the underlying invoices paid, the suppliers of the invoices, or the specific payment process respecting each item. Oddly, Quartix asserts that the six payment items at issue are Advances to KSH (NYSCEF # 3, ¶’s 20, 21); but the names of these items—for example, “ksh-20221108-ext-81”—and the fact that each item’s “Initial Due Date” is extended to the current “Due Date,” suggest that these items represent KSH’s Extension Requests made in connection with Quartix’s Purchases, not KSH’s Borrowing Requests for Quartix’s Advances. This distinction matters because, as addressed above, an Advance and a Purchase are subject to different payment procedures, interest rates, and post-due interest rates.

On November 14, 2022, Quartix’s counsel sent a demand letter to KSH for a past due payment of \$723,171.28, stating that Quartix would commence legal action against defendants if they fail to pay the balance by November 21, 2022 (NYSCEF # 8 – Demand Letter). Quartix states that this letter was sent by email and registered mail with return receipt requested (NYSCEF # 3, ¶ 24). The individual defendants appear to be carbon-copied in the Demand Letter (NYSCEF # 8 at 2).

On December 21, 2022, Quartix filed a motion for summary judgment in lieu of complaint (NYSCEF #s 1-12). In connection with this action, Quartix effectuated service of process on all defendants on December 27, 2022 (NYSCEF #s 13, 14, 15). Quartix e-filed an affidavit of service respecting each defendant on December 30, 2022 (*id.*). Plaintiff’s notice of motion set a return date of February 6, 2023, which is later extended to March 14, 2023, per the parties’ stipulations (NYSCEF # 2 – Notice of Motion, NYSCEF #s 16, 21 – Stipulations of Extension). Quartix seeks judgment against defendants in the amount of \$723,171.28, plus pre-judgment interest at a rate of 19.5% on this amount, and reasonable attorneys’ fees and other collection costs in an amount to be determined at inquest (NYSCEF # 10 at 8).

In opposition, defendants KSH and Israel contend that the Customer Services Agreement and the Guarantees are not instruments for the payment of money only within the meaning of CPLR 3213 because, among other reasons, “any proof of an obligation to pay requires extrinsic evidence” (NYSCEF # 20 – MOL in Opp at 1-7, 8-9). Israel submits an affirmation, stating that based on the limited evidence Quartix submitted, he cannot confirm that KSH owes \$723,171.28 to

Quartix (NYSCEF # 19 – Israel Aff, ¶ 8 [“[i]t is impossible for me to verify this amount without more documentation and evidence”). Israel further claims that the court lacks personal jurisdiction over him because the return date of Quartix’s motion is improper with respect to the individual defendants, rendering Quartix’s service on the individual defendants defective (NYSCEF # 20 at 7-8). Accordingly, Israel files a cross-motion to dismiss Quartix’s action under CPLR 3211(a)(8) for lack of personal jurisdiction (*id.* at 8; NYSCEF # 18 – Notice of Cross-Motion). Likewise, Pinchus submits an affidavit of his attorney, Israel Goldberg (NYSCEF # 23 – Goldberg Aff). In addition to raising the same arguments made by Israel and KSH, Pinchus also contends that Quartix’s motion should be dismissed pursuant to CPLR § 3211(a)(1) because “it fails for lack of documentary evidence” (*id.*, ¶ 2).

In reply, Quartix reiterates that it has established *prima facie* entitlement to CPLR 3213 treatment through its submission of the Customer Services Agreement, the Guarantees, the Internal Report, and the Dashboard Screenshot (NYSCEF # 24 – MOL in Reply at 3-12). Regarding the individual defendants’ contentions of improper service, Quartix maintains that the court does not lose personal jurisdiction over Israel and Pinchus because they are not substantially prejudiced by the alleged service defect. Indeed, all defendants have appeared to oppose Quartix’s motion; moreover, the parties have stipulated to extend the return date of this motion from February 6, 2023 to March 14, 2023, affording defendants ample time to respond (*id.* at 12-13; NYSCEF #s 16, 21 – Stipulations).

## DISCUSSION

CPLR 3213 permits “actions based upon an instrument for the payment of money only to be commenced with a motion for summary judgment rather than a complaint” (*Banco Popular N. Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381, 383 [2004]). This is to provide “a speedy and effective means of securing a judgment on claims presumptively meritorious” (*Interman Indus. Prods., Ltd. v R.S.M. Electron Power, Inc.*, 37 NY2d 151, 154 [1975]).

To establish *prima facie* entitlement to summary judgment in lieu of complaint on a promissory note, a plaintiff must show that the instrument sued upon is “for the payment of money only,” meaning that it contains “an unconditional promise to pay a sum certain . . . due on demand or at a definite time” (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]). Specifically, “a document comes within CPLR 3213 if a *prima facie* case would be made out by the instrument and a failure to make the payments called for *by its terms*” (*id.* [emphasis added] [internal quotation marks omitted]). “The payment terms must therefore be apparent on the face of the instrument itself” (*Emperor Indus., Inc. v Rothbaum*, 17 Misc 3d 1125(A) [Sup Ct 2007]; *cf. Vali Indus., Inc. v Mega Builders, Inc.*, 104 AD3d 843, 844 [2d Dept 2013] [holding that plaintiff failed to establish a *prima facie* case for CPLR 3213 procedure because “the note does not contain a maturity date . . . nor does it contain an acceleration clause”]).

On the other hand, “[w]here proof outside the instrument is necessary to establish the underlying obligation, the CPLR 3213 procedure does not apply” (*Maglich v Saxe, Bacon & Bolan, P.C.*, 97 AD2d 19, 21 [1st Dept 1983]; *see also Weissman*, 88 NY2d at 444 [“[t]he instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document”]).

### ***Defendants’ Cross-Motion to Dismiss Under CPLR 3211***

As a threshold matter, the individual defendants contend that Quartix’s action should be dismissed under CPLR 3211(a)(8) for lack of personal jurisdiction. The court disagrees.<sup>3</sup>

The court notes at the outset that Quartix’s service on the individual defendants has a procedural defect because the initial return date of Quartix’s motion is improper as to the individual defendants. By CPLR 3213’s plain text, a motion under this statute may not be made returnable before defendants’ time to appear under CPLR 320 expires (CPLR 3213). And pursuant to CPLR 320, “the [defendants’] appearance shall be made within thirty days after service is complete” if defendants were served pursuant to CPLR 308(2), as in the case here. For this purpose, service is complete ten days after plaintiff files proof of service (CPLR 308(2)). Here, Quartix e-filed the proof of service on December 30, 2022; ten days later, on January 9, 2023, Quartix’s service on the individual defendants was completed. The individual defendants’ deadline to appear is February 8, 2023—thirty days after January 9, 2023. However, Quartix’s motion set an initial return date of February 6, 2023, two days before the earliest permissible date.

The individual defendants assert that such a service defect deprives the court personal jurisdiction over them. They rely on *Segway of New York, Inc. v Udit Group, Inc.* (120 AD3d 789 [2d Dept 2014]), which is followed by *Bhanti v Jha* (140 AD3d 685, 686 [2d Dept 2016]),<sup>4</sup> to argue that the improper return date in this case constitutes “a fatal jurisdictional defect.” Their reliance is misplaced. In *Segway*, following the defective service, defendant defaulted in the action and a default judgment was entered against him. The court vacated such default judgment

<sup>3</sup> Additionally, Pinchus claims that Quartix’s motion “should be dismissed as pursuant to CPLR § 3211(a)(1) as it fails for lack of documentary evidence.” This is a misconstruction of CPLR 3211(a)(1)—the ground for CPLR 3211(a)(1) dismissal is not that plaintiff fails to substantiate its claims with documentary evidence, but that there is “a defense . . . founded upon documentary evidence.” Therefore, Pinchus’ argument under CPLR 3211(a)(1) is rejected.

<sup>4</sup> The *Bhanti* court relied solely on *Segway* to determine this issue. The *Bhanti* decision does not include much facts of the case. To the extent that *Bhanti* can be interpreted as finding an improper return date to be a fatal jurisdictional defect in all circumstances, it is superseded by a more recent Second Department decision, *Blue Lagoon, LLC v Reisman* (214 AD3d 938, 941-42 [2d Dept 2023]), where the court finds that “plaintiff’s failure to provide an adequate return date on its original notice of motion was not a fatal defect that deprived the Supreme Court of jurisdiction over the action” because the parties have adjourned the motion to afford defendant enough time to respond.

because the service defects were “substantial”— plaintiff’s notice of motion was not only made returnable on an earlier than permissible date, but contained an incorrect address, directing defendant to oppose the motion at a location nowhere close to where the Supreme Court was located (*Segway of New York, Inc.*, 120 AD3d at 791-792). It was “under the particular circumstances of this case” that the *Segway* court concluded that plaintiff’s service defects “created a greater possibility of frustrating the core principles of notice to the defendant” (*id.* at 792).

The facts before us are different from “the particular circumstances” in *Segway*. The individual defendants here do not dispute that they received service of process on December 27, 2023. Nor have they defaulted in this action. Instead, they have appeared to oppose Quartix’s motion, for which they were afforded ample time to prepare: the parties stipulated twice to adjourn the motion, extending the motion’s return date first to February 28, 2023 and then to March 14, 2023.

Given that the individual defendants are on notice of Quartix’s action and have had sufficient time to respond, they are not substantially prejudiced by Quartix’s misstep; therefore, the court has acquired personal jurisdiction over the individual defendants (*see* CPLR 2001 [“if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded”]; *see also Blue Lagoon, LLC v Reisman*, 214 AD3d 938, 941-42 [2d Dept 2023] [given that defendants were on notice of plaintiff’s action, which were adjourned multiple times, “plaintiff’s failure to provide an adequate return date on its original notice of motion was not a fatal defect that deprived the Supreme Court of jurisdiction over the action”]; *Capolino v Goren*, 155 AD3d 1414, 1415-16 [3d Dept 2017] [finding personal jurisdiction over defendants as plaintiff’s initial defective service did not frustrate notice to the defendants]).

### ***Plaintiff’s Motion for Summary Judgment Under CPLR 3213***

#### **Condition Precedent**

Contrary to Quartix’s contention, summary judgment under CPLR 3213 is not appropriate for the Customer Services Agreement and the Guarantees, because both are not “*unconditional* promise[s] to pay a sum certain” (*Weissman*, 88 NY2d at 444) (emphasis added). “Resort to this expedited procedure [under CPLR 3213] has been denied, where the action was founded upon documents which, although calling for the payment of a sum of money, also required some other condition or performance” (*Maglich*, 97 AD2d at 22). In particular, the availability of CPLR 3213 cannot be contingent on the occurrence or non-occurrence of certain future events if “immediately upon execution [of the instrument] . . . terms and conditions precedent . . . remain unresolved within the instrument itself” (*Kerin v Kaufman*, 296 AD2d 336, 338 [1st Dept 2002]).

Here, defendants' obligations to repay Quartix are conditioned on Quartix's performance, which was a mere possibility when the parties executed the Customer Services Agreement. Quartix mistakenly relies on sections 7(c) and 8(c) of the Customer Services Agreement to characterize KSH's obligations as unconditional. In contrast, these sections provide that KSH has "an absolute, irrevocable, legal, valid, and binding obligation to repay *each Purchased Invoice*" and "*each Advance*" made by Quartix (NYSCEF # 4, emphasis added). Therefore, Quartix's Purchases or Advances must occur for KSH's liabilities to arise. As a condition precedent, Quartix's provision of financing to KSH remains unresolved within the Customer Services Agreement, which provides that "Quartix shall have no obligation to purchase any Invoice" and that "Quartix may, at [KSH]'s request but in Quartix's sole discretion" make advance payments to KSH or its suppliers (NYSCEF # 4, §§ 7(a), 8(a)). At the time of its execution, the Customer Services Agreement only contemplated Quartix's financing of KSH as a possible future event that may or may not occur. Given that defendants' liabilities are contingent on the occurrence of a future event not resolved within the Customer Services Agreement, CPLR 3213 summary judgment is not available (*see Kerin*, 296 AD2d at 338 ["the availability of CPLR 3213 can never depend upon the occurrence (or nonoccurrence) of any unrelated future event"]).

### Extrinsic Evidence

Another reason Quartix is not entitled to summary judgment under CPLR 3213 is because without extrinsic evidence, many vital terms of the alleged obligations—such as amounts due, applicable interest rates, and maturity dates—are not ascertainable on the face of the Customer Services Agreement and the Guarantee. If resort to extrinsic evidence is necessary, plaintiff fails to establish a prima facie entitlement to summary judgment in lieu of complaint (*Metal Mgt., Inc. v Esmark Inc.*, 49 AD3d 333 [1st Dept 2008]). Courts have denied summary judgment under CPLR 3213 when "the writing relied upon by plaintiff fails to recite to any agreement by the parties on several vital terms" (*Mesaba Serv. & Supply Co. v R. Freedman & Son, Inc.*, 111 AD2d 985, 986 [3d Dept 1985] [because vital terms such as the manner of payment and the due date were missing from the writing plaintiff sued upon, "proof beyond the written instrument is necessary to substantiate the underlying obligation, resort to CPLR 3213 was inappropriate"]), when the notes and guaranty plaintiff sues upon refer to external documents with regard to events of default (*see Matter of Estate of Peck*, 191 AD3d 537 [1st Dept 2021]), and when "an excursion outside the four corners of the agreement" is required to determine defendants' liabilities (*Kerin*, 296 AD2d at 337). In short, an "instrument does not qualify [for CPLR 3213 treatment] if outside proof is needed [to make out a prima facie case], other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman*, 88 NY2d at 444).

In the present case, Quartix cannot make out its prima facie case without resorting to evidence outside the four corners of the Customer Services Agreement.

By its own terms, the Customer Services Agreement does not specify the applicable interest rates, amounts due, and maturity dates, leaving these terms to be determined by information on Quartix's platform, KSH's Borrowing Requests or Extension Requests, and KSH's vendor invoices at issue—all of which are impermissible extrinsic evidence under CPLR 3213. Specifically, the Customer Services Agreement provides that if KSH makes an Extension Request related to a Purchase, the amount due is “the face amount of such [i]nvoice” at issue, the interest rate applicable is “specified on [Quartix's] [p]latform” and is “subject to change from time to time at the discretion of Quartix” (NYSCEF # 4, § 7(b)). In the event that KSH makes a Borrowing Request for an Advance, KSH shall “state the amount of the requested Advance . . . , specify the desired Maturity Date . . . , accept the interest rate quoted on the [Quartix] Platform” in the Borrowing Request, which is no part of the Customer Services Agreement (NYSCEF # 4, § 8(b)). As such, the Customer Services Agreement and the Guarantees leave the amount, interest rate, and maturity date blank, and resort to outside proof to determine them; therefore, the Customer Services Agreement and the Guarantees do not qualify for summary judgment in lieu of complaint.

In its attempt to prove these contractual terms and establish a prima facie case, Quartix points to the Internal Report, the Dashboard Screenshot, and the Demand Letter. These documents are of no help. Even assuming that they are “de minimis deviation from the face of the document” as described in *Weissman*, rather than impermissible extrinsic evidence, they fail to support Quartix's claim. As a preliminary matter, the Internal Report and the Dashboard Screenshot are not dated, leaving a question as to the currentness of the outstanding balance therein. More importantly, they conflict with Quartix's pleadings. For one thing, Quartix's pleadings describe the alleged balance owed by KSH as unpaid Advances, but the Internal Report and the Dashboard Screenshot connect the balance to KSH's Extension Requests, in relation to Quartix's Purchases, not Advances. For another, the Internal Report assigns a 19% interest rate to the alleged debt (NYSCEF # 7), but in this action, Quartix seeks, inter alia, prejudgment interest at a rate of 19.5% (NYSCEF # 10 at 8).

Even if we were to disregard these discrepancies, these documents still do not warrant summary judgment in lieu of complaint. Quartix's Demand Letter is nothing more than a “conclusory allegation[]” (*HSBC Bank USA v IPO, LLC*, 290 AD2d 246 [1st Dept 2002] [“the prima facie case for such relief [under CPLR 3213] requires documentary evidence or an explanation of how the indebtedness is calculated, other than in the form of mere conclusory allegations”]). The letter only contains an aggregate past-due sum alleged by Quartix, \$723,171.28, without any explanation as to how the amount is derived. Therefore, the Demand Letter alone does not satisfy Quartix's initial burden to establish a prima facie entitlement to summary judgment under CPLR 3213 (*see First Am. Bank of New York v L.V. Lowden, Inc.*, 197 AD2d 774, 775 [3d Dept 1993] [finding that “absent supporting documentary evidence or an explanation as to how the total amount of debt was

calculated,” conclusory allegations are insufficient “to satisfy plaintiff’s initial burden of coming forward with prima facie evidence of the outstanding balance of the indebtedness”).

As to the Internal Report and Dashboard Screenshot, although they provide an item-by-item break down of the total balance of alleged debt, they are not founded on underlying documentary evidence that the Customer Services Agreement called for. Specifically, according to the Customer Services Agreement, each item listed in the Internal Report and Dashboard Screenshot should have a corresponding Extension Request or Borrowing Request, confirming the amounts, interest rates, and due dates as reflected in the Internal Report and the Dashboard Screenshot. Quartix, nonetheless, submits no such requests or any other underlying documents to substantiate the enumerated charges listed in the Internal Report and Dashboard Screenshot. The Customer Services Agreement also provides that the post-due interest rates of Advances and Purchases should be either specified on Quartix’s platform or determined by “the WSJ Prime Rate” (NYSCEF # 4, §§ 7(d), 8(e)). But Quartix simply points to an unexplained 19% interest rate in the Internal Report, without showing documentary evidence that this 19% rate is the post-due interest rate quoted on Quartix’s platform or “the WSJ Prime Rate plus 4%” (*id.*). Unsupported by underlying evidence, the alleged charges in the Internal Report and Dashboard Screenshot cannot justify summary judgment (*see Chrysler E. Bldg., L.L.C. v Keenwawa, Inc.*, 2023 NY Slip Op 03193 [1st Dept June 13, 2023] [denying summary judgment because although the movant “submitted a spreadsheet purporting to calculate the amount owed by the [non-movant], it failed to submit the underlying documents and invoices supporting the enumerated charges”]).

### Lack of Acknowledgement

Quartix’s motion for summary judgment also fails for defendants have not acknowledged the alleged indebtedness. “[C]ases permitting the use of the CPLR 3213 procedural device have dealt primarily with some variety of commercial paper in which the party to be charged has formally and explicitly acknowledged an indebtedness” (*Interman Indus. Products, Ltd.*, 37 NY2d at 154-55; *see also Maglich*, 97 AD2d at 21). Where “the instruments upon which plaintiff bases its action have not been subscribed by the defendant,” CPLR 3213 relief is not available (*Interman Indus. Products, Ltd.*, 37 NY2d at 155).

In the present action, “there is no written instrument by which the defendant has expressly obligated itself to make the payments *required by the accounts stated*” (*id.* at 156 [emphasis added]). Here, defendants signed the Customer Services Agreement and the Guarantees, acknowledging the obligations thereunder. But based on the evidence Quartix has submitted, the terms of the Customer Services Agreement and the Guarantees remain disconnected from the items shown in the Internal Report and the Dashboard Screenshot. Quartix has not demonstrated that by signing the Customer Services Agreement and the

Guarantees, defendants have “expressly obligated [themselves] to make the payments required by” the Internal Report and the Dashboard Screenshot (*id.*). Put differently, Quartix still needs to prove that defendants’ conditional obligations under the Customer Services Agreement and the Guarantees have materialized and are accurate as alleged in the Internal Report and Dashboard Screenshot.

Regarding the Internal Report and Dashboard Screenshot, defendants have not signed either of them, and do not agree on their accuracy or correctness. Claims based on accounts stated fail, when there is no “agreement between parties . . . with respect to the correctness of the account items and balance due” (*Dragonetti Bros. Landscaping Nursery & Florist, Inc. v Verizon New York, Inc.*, 208 AD3d 1125, 1126 [1st Dept 2022]). Here, Israel Friedman states that “[i]t is impossible for me to verify this amount without more documentation and evidence . . . . From the submitted pleadings and evidence, I cannot tell whether [KSH] were advanced funds or whether any vendors were paid, which vendors were paid, whether KSH Brands agreed to the interest rate and/or whether the maturity dates are correct and agreed upon” (NYSCEF 19, ¶ 8). Therefore, to the extent that Quartix bases its claim on the Internal Report and the Dashboard Screenshot, which are not agreed to by defendants, Quartix’s claim cannot stand (*Toobian v Toobian*, 209 AD3d 907, 910 [2d Dept 2022] “[a]n essential element of an account stated is that the parties came to an agreement with respect to the amount due”).


**CONCLUSION**

Based on the foregoing, it is

ORDERED that plaintiff Quartix Finance Inc.’s motion for summary judgment in lieu of complaint against defendants KSH Brands LLC, Israel Friedman, and Pinchus Friedman is denied; and it is further

ORDERED that defendants Israel Friedman and Pinchus Friedman’s cross-motion to dismiss is denied; and it is further

ORDERED that this proceeding is converted into a plenary action and parties’ moving and answering papers shall be deemed the complaint and answer, respectively.

<p>7/10/2023 DATE</p>																					
<p>CHECK ONE:</p>	<p>MARGARET A. CHAN, J.S.C.</p>																				
<p>APPLICATION:</p>	<table border="0"> <tr> <td><input type="checkbox"/></td> <td>CASE DISPOSED</td> <td><input checked="" type="checkbox"/></td> <td>NON-FINAL DISPOSITION</td> </tr> <tr> <td><input type="checkbox"/></td> <td>GRANTED</td> <td><input checked="" type="checkbox"/></td> <td>GRANTED IN PART</td> </tr> <tr> <td><input type="checkbox"/></td> <td>SETTLE ORDER</td> <td><input type="checkbox"/></td> <td>OTHER</td> </tr> <tr> <td><input type="checkbox"/></td> <td>INCLUDES TRANSFER/REASSIGN</td> <td><input type="checkbox"/></td> <td>FIDUCIARY APPOINTMENT</td> </tr> <tr> <td><input type="checkbox"/></td> <td></td> <td><input type="checkbox"/></td> <td>REFERENCE</td> </tr> </table>	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
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