

**Vox Funding LLC v Champion Family Auto Sales
LLC**

2024 NY Slip Op 30390(U)

February 2, 2024

Supreme Court, Nassau County

Docket Number: Index No. 610308/2023

Judge: Erica L. Prager

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: ERICA L. PRAGER, J.S.C.

-----X
VOX FUNDING LLC,

Plaintiff,

-against-

**CHAMPION FAMILY AUTO SALES LLC D/B/A
CHAMPION FAMILY AUTO SALES AND GRADY
DARNELL CHAMPION,**

Defendants.
-----X

IAS/TRIAL PART 17

**Motion Seq.: 002
Submission Date: 11/14/23**

Index No.: 610308/23

DECISION AND ORDER

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Upon the foregoing papers, the plaintiff moves for an Order: (i) pursuant to CPLR § 3212 granting to plaintiff summary judgment on the causes set forth in its Verified Complaint; (ii) dismissing defendant’s affirmative defenses; and (iii) awarding plaintiff costs, expenses and disbursements.

BACKGROUND

In this action, plaintiff seeks to recover damages for breach of a commercial agreement for the sale of future receivables. The following facts are taken from the parties’ submissions, and are undisputed, unless otherwise noted.

On or about January 5, 2022, defendant CHAMPION FAMILY AUTO SALES LLC (the “Merchant”) entered into an agreement with plaintiff entitled the Future Receipts Sale Agreement

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(the "Agreement"), wherein the Merchant agreed to sell to plaintiff Future Receipts¹ in the amount of \$190,223.67 (the "Amount Sold") for a discounted Purchase Price of \$161,206.50, to be paid up front by plaintiff. The Agreement required the Merchant, upon receiving the Purchase Price, to deposit all of its Future Receipts into a designated bank account (the "Account"), out of which plaintiff was authorized to receive, through daily Authorized Clearing House debits, the Estimated Remittance Amount in the sum of \$905.83 until the Amount Sold was paid in full. The Estimated Remittance Amount represented an approximation of the Specified Percentage (6%) of the Merchant's Future Receipts calculated on a daily basis. The Estimated Remittance Amount was subject to mandatory reconciliation and adjustment provisions, which, upon written notice from either party and upon the terms set forth therein, provided for modification of the amounts debited by plaintiff to accurately reflect the Specified Percentage of the Future Receipts, based upon the Receipts for the one month period prior to notice being given.

The Merchant's obligations under the Agreement, as specified therein, were guaranteed by its principal, defendant GRADY DARNELL CHAMPION (the "Guarantor"), pursuant to the "Personal Guaranty of Performance" contained in the Agreement (the "Guaranty").

A prior action was commenced by plaintiff against defendants on November 14, 2022, based upon an alleged breach of the Agreement in or about September of 2022, when defendants closed the Account from which plaintiff withdrew its daily remittance. That action, entitled *Vox Funding LLC v Champion Family Auto Sales LLC*, Nassau County Index No. 615887/22 (the "Prior Action") was dismissed pursuant to CPLR §3211(a)(5) by Decision and Order of the Court dated June 6, 2023 (Kapoor, J.) (the "Kapoor Decision"). Judge Kapoor dismissed the action on the basis of evidence showing that, prior to the commencement of that action, the parties had entered into an agreement whereby the Merchant authorized a non-party entity to debit \$1,000 weekly from the Merchant on behalf of plaintiff, starting on October 7, 2022, with possible increases until the balance was paid in full, and that plaintiff had received four such payments as of the filing of the motion to dismiss. Thus, the Court held, defendant had established the defense of payment, and plaintiff had failed to establish a continuous default. The Court opined that "[w]hile this Court cannot speculate as to the merits of the case, it is clear that Defendants was [sic] adhering to the terms of the Authorization Agreement for Clearing House Transaction form as evidence [sic] by the four \$1,000.00 payments that were required."

¹ Except where otherwise noted, all defined terms used herein shall have the meaning ascribed to them in the Agreement.

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On or about June 13, 2023, plaintiff requested a reconciliation pursuant to Section 2(a) of the Agreement, but defendants did not comply. Plaintiff commenced the instant action on June 29, 2023, alleging a breach of the Agreement occurring on or about June 20, 2023. As in the Prior Action, the Complaint alleges that plaintiff performed its obligations under the Agreement by paying the up front Purchase Price, less the agreed upon fees. The Complaint alleges further that on or about June 20, 2023, the Merchant materially breached the Agreement by intentionally stopping to remit the purchased receivables to plaintiff from the Account without proper notice, and without providing proper financial disclosures or a written request for reconciliation, and by otherwise intentionally impeding and preventing plaintiff from receiving the proceeds of the receivables purchased by them while conducting regular business operations. According to plaintiff, the Merchant made payments totaling \$95,353.63, leaving a balance due of \$94,870.04, plus an additional \$5,000.00 default fee (which plaintiff has since waived). Based upon the foregoing, plaintiff asserts three causes of action: the FIRST, against the Merchant for breach of contract; the SECOND, against the Guarantor for breach of the Guaranty; and the THIRD, against both defendants for unjust enrichment.

Issue was joined on July 6, 2023, with the filing of defendants' Answer. The Answer consists of general admissions and denials, and six affirmative defenses, namely: First – Illegal Contract; Second – Illusory Contract; Third – Lack of Subject Matter Jurisdiction; Fourth – Criminal Usury; Fifth – Waiver and Infirmity; Sixth – Unconscionability/Adhesion Contract.

Plaintiff now moves for summary judgment on the causes of action set forth in the Complaint, and to dismiss the affirmative defenses set forth in the Answer. In support of its motion, plaintiff submits (among other things): (i) the Agreement; (ii) the Affidavit of plaintiff's President, Louis Calderone, sworn to on September 11, 2023, attesting to the facts alleged in the Complaint and the amount due (the "Plaintiff Affidavit"); (iii) the account transaction records indicating the payments made by defendants pursuant to the Agreement (the "Account Transaction Records"); and (iv) the Affidavit of plaintiff's President, Louis Calderone, sworn to on September 11, 2023, attesting to the authenticity of the Agreement and establishing a foundation for the entry of the Account Transaction Records into evidence as business records (the "Business Records Affidavit"). As stated in the Plaintiff Affidavit, plaintiff waives the \$5,000 default fee based upon the \$4,000.00 payments made over the course of the Prior Action, leaving a balance due of \$94,870.04.

In opposition, defendants argue that: (1) plaintiff has failed to make a *prima facie* case with respect to the Second Affirmative Defense, insofar as plaintiff did not specifically address this defense in its motion papers; (2) the Court lacks subject matter jurisdiction pursuant to Business Corporation Law ("BCL") §1314; (3) the Agreement is not a true sale of future receivables, but is,

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in its essential nature and effect, an illegal predatory loan; and (4) the motion should not be granted where there is any doubt as to the existence of issues of fact.

DISCUSSION

“On a motion for summary judgment, the moving party has the initial burden of coming forward with sufficient proof in admissible form to enable the court to determine that it is entitled to judgment as a matter of law. ... If the moving party makes a *prima facie* showing of its entitlement to judgment as a matter of law, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Gesuale v. Campanelli & Associates, P.C.*, 126 A.D.3d 936 (2d Dept. 2015) (internal citations and quotation marks omitted). See *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986).

Breach of Contract: Breach of Guaranty

At bar, the Court finds that plaintiff has met its initial burden to present *prima facie* proof with respect to its breach of contract cause of action. The Plaintiff Affidavit, together with the Agreement and the Account Transaction Records, adequately demonstrate the existence of a valid contract, that plaintiff performed under the contract, that the Merchant breached the contract, and that plaintiff was damaged as a result. See *34-06 73, LLC v. Seneca Ins. Co.*, 39 N.Y.3d 44, 52 (2022); *Ben Ciccone, Inc. v. Naber Elec. Corp.*, 214 A.D.3d 936, 937 (2d Dept. 2023). Moreover, plaintiff's submissions are sufficient to identify the nature of the breach and the terms of the agreement upon which liability is predicated. See *Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751 (2d Dept. 2011); *Chrysler Cap. Corp. v. Hilltop Egg Farms, Inc.*, 129 A.D.2d 927, 928 (3d Dept. 1987).

In addition, the Court finds that plaintiff has established, *prima facie*, its right to relief on the breach of guaranty cause of action. The plaintiff's submissions are sufficient to demonstrate the Merchant's primary obligation under the Agreement, the guarantee of such obligations by the Guarantor, and a default on the part of the Merchant and the Guarantor. See *Valley Natl. Bank v. INI Holding, LLC*, 95 A.D. 3d 1108 (2nd Dept. 2012).

Accordingly, the burden shifts to defendants to raise an issue of fact warranting a trial. Defendants submit no evidence refuting plaintiff's proof or raising an issue of fact regarding the defendants' failure to satisfy their obligations under the Agreement and Guaranty. Rather, defendants rely upon their affirmative defenses and arguments challenging the Court's jurisdiction to hear the

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dispute in the first instance, and challenging the legality and enforceability of the Agreement as a whole.

Jurisdiction (Third Affirmative Defense).

Defendants assert that the New York courts lack jurisdiction over the instant action pursuant to BCL §1314(b), insofar as plaintiff is a foreign limited liability company suing another foreign limited liability company, and none of the enumerated circumstances in which such actions are permitted is applicable in this case. Defendants argue that BCL §1314(b) was enacted to deter litigation in New York pursuant to a contractual forum selection clause of cases in which New York has no significant connection with the parties or subject matter of the dispute.

Plaintiff seeks to dismiss this affirmative defense, on the basis that subsection (c) of BCL §1314 renders the limitation set forth in BCL §1314(b) inapplicable to the case at bar.

The Court agrees. Subject matter jurisdiction concerns the Court's competence to entertain a particular cause of action. *Lacks v. Lacks*, 41 N.Y.2d 71, 75 (1976). The New York State Supreme Court, as a court of general original jurisdiction, is competent to entertain all causes of action unless specifically prohibited. *Id.* See *NY Const., Art. VI, §7*. BCL §1314(b) is not a limitation upon the subject matter jurisdiction of the Court, but merely addresses the right of a non-resident or foreign corporation to maintain an action in New York against another foreign corporation. The provision states:

- (b) Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in the following cases only:
- (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.
 - (2) Where the subject matter of the litigation is situated within this state.
 - (3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.
 - (4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.
 - (5) Where the defendant is a foreign corporation doing business or authorized to do business in this state.

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BCL §1314(c), however, expressly provides:

(c) Paragraph (b) does not apply to a corporation which was formed under the laws of the United States and which maintains an office in this state.

Defendants' own evidence reveals that plaintiff was formed in Delaware and maintains an office in New York (see *NYSCEF Doc. 53*). The New York State Department of State, Division of Corporations website confirms that plaintiff was formed in Delaware on May 9, 2018, was registered as a foreign limited liability company in New York on August 26, 2020, and maintains an office in New York. The Court thus finds that BCL §1314(b) does not operate to bar plaintiff from maintaining an action in New York.²

The Court finds no merit to defendants' argument that BCL §1314(c) pertains only to corporations formed under United States law, such as National Banks. Defendants cite no authority for such proposition, and the holdings in recent cases applying BCL §1314(c) reflect a broader interpretation of the phrase "formed under the laws of the United States." These cases upheld the right of entities formed under the laws of another state of the United States (and with an office in New York), to maintain an action against a foreign corporation in New York. See, e.g., *Vox Funding LLC v Aldevo Enterprises*, Index No. 602333/2023 [Kapoor, J.]; *Fox Capital Group, Inc. v JW Trucking LLC et al.*, Index No. 603494/2022 [Pineda-Kirwin, J.]; *Fox Capital Group, Inc. v Superior Caregivers LLC et al.*, Index No. 613133/2021 [McCormack, J.].

Accordingly, the Court finds that plaintiff has established a *prima facie* right to dismissal of this affirmative defense. Defendants offer no admissible proof sufficient to raise an issue of fact warranting a trial.

Waiver and Infirmary (Fifth Affirmative Defense).

In their Answer, defendants assert that the instant action is "infirm" for all the reasons stated in the Kapoor Decision, and that defendants have failed to remediate any infirmity found by Justice Kapoor in the Prior Action. Answer, ¶49, 50. Defendants' opposition papers do not clarify the nature of the infirmity purportedly found by Justice Kapoor, or elaborate upon defendants' waiver defense. Accordingly, the Court finds that this defense may properly be dismissed, solely on the basis that it

² This particular plaintiff's right to maintain an action in New York has been upheld previously by the New York State Supreme Court in *Vox Funding LLC v Aldevo Enterprises*, Index No. 602333/2023 [Kapoor, J.].

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is conclusory and unsubstantiated by factual allegations. See *Katz v. Miller*, 120 A.D.3d 768, 769-770 (2d Dept. 2014). The Court finds further, however, that any purported “infirmity” found by Justice Kapoor is no longer applicable. The Kapoor Decision held only that insofar as regular payments were being made pursuant to the parties’ post-default agreement, the plaintiff did not establish a continuing default. The Kapoor Decision did not hold that plaintiff had waived its right to the remaining balance of the Purchased Amount. In fact, the Kapoor Decision appeared to contemplate continued payments by the defendants pursuant to their post-default agreement until the Purchased Amount was paid in full. It is undisputed that, subsequent to the Kapoor Decision, defendants did not respond to plaintiff’s request for reconciliation, and that no further payments were made (beyond the original four noted in the Kapoor Decision). Accordingly, to the extent that the Kapoor Decision was based upon the circumstances existing at the time, the Kapoor Decision does not bar the commencement of a new action based upon events occurring thereafter.

Essential Nature of the Transaction (Second and Fourth Affirmative Defenses).

Defendants’ Second and Fourth Affirmative Defenses go to the essential nature of the transaction – whether it is, as denominated in the Agreement and characterized by plaintiff, a sale of future receivables, or, as characterized by defendants, a predatory and usurious loan.³

³ Defendants’ contend that their Second Affirmative Defense, entitled “Illusory Contract,” was conceded by plaintiff, in view of plaintiff’s failure to specifically address the defense in its motion papers. The Court finds otherwise. The plaintiff does specifically refer to the Second Affirmative Defense in its supporting Memorandum of Law. Plaintiff argues that the defense is duplicative of defendants’ usury defense. The Court agrees. Read closely, the allegations of the Second Affirmative Defense do not amount to a claim that the Agreement was “illusory.” An illusory contract is “[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation.” *Lend Lease (US) Const. LMB Inc. v. Zurich Am. Ins. Co.*, 28 N.Y.3d 675, 684 (2017). Defendants do not, and indeed cannot, assert that plaintiff’s promise under the Agreement was so insubstantial as to constitute a lack of consideration. Plaintiff provided consideration in the sum of \$161,206.50 – the Purchase Price delivered to the Merchant at the commencement of the transaction. The allegations of the Second Affirmative Defense are more aptly described as a challenge to certain terms of the Agreement. The particular terms challenged by defendants are those which purport to distinguish the subject transaction from a loan (e.g., no interest; no fixed payment period; no recourse in bankruptcy; plaintiff to bear the risk of a downfall in the Merchant’s business). Defendants assert that these provisions are illusory insofar as they do not, in reality, afford the purported benefit or right, when read in the factual context or in conjunction with other terms in the Agreement. Based upon the foregoing, this Court is of the opinion that the allegations of the Second Affirmative Defense are essentially part and parcel of the defendants’ larger argument – that the Agreement is, in its true nature, a predatory loan. Plaintiff addresses this argument, and its specific components, throughout its motion papers and reply papers.

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Defendants assert that, regardless of the language in which the Agreement was cast, and the representations made therein, the true nature of the transaction underlying the Agreement was a loan. They calculate interest thereunder at an annual rate of 27% (see Answer, ¶45), rendering the transaction criminally usurious pursuant to Penal Law §190.40, and thus void and unenforceable as a matter of law. In defendants' view, the terms and conditions of the Agreement purporting to reflect the purchase and sale of Future Receipts were illusory. Defendants rely primarily upon the following arguments:

(i) The Agreement had the essential features of a loan. There was interest, measured by the difference between the amount funded and the amount debited back to plaintiff. There was a fixed payment schedule, in the form of the required debits of \$905.83 per day, and there was a fixed repayment term of approximately 210 days – the number of days it would take to pay the full remittance amount of \$190,223.76, at \$905.83 per day.

(ii) The reconciliation provision was illusory. Paragraph 2(b) of the Agreement provides for reconciliation “[u]pon reasonable verification of Merchant’s actual Future Receipts for the month under review.” Defendants read this provision as permitting plaintiff “to forever put off any adjustment in the fixed daily payment by requesting any verification it wanted.” Answer, ¶29; Affidavit of GRADY DARNELL CHAMPION, sworn to on October 31, 2023 (“CHAMPION Affidavit”), ¶14.

(iii) The plaintiff’s right to payment was absolute.

First, defendants argue, although the Agreement did not expressly make the Merchant’s bankruptcy an event of default, a bankruptcy would inevitably trigger a default under the Merchant’s Representations, Warranties and Covenants enumerated in the Agreement. Specifically, in bankruptcy, the Merchant would be required under Federal law to open a debtor-in-possession account and deposit all future receipts into such account. To do so would violate the Merchant’s covenant not to change the Account or to cause Future Receipts to be delivered to any other account. See Agreement, ¶16(v) (xvi). This would constitute an Event of Default under the Agreement, making available to plaintiff all of the contractual remedies associated with same. Thus, according to defendants, even if a Merchant’s bankruptcy does not expressly trigger an Event of Default, it may do so indirectly.

Second, the Security Interest and Security Agreement contained in the Agreement allows the plaintiff to reach the secured assets, with or without an Event of Default. According to defendants,

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this would enable plaintiff to “grab all assets at any time for any reason or no reason at all.” Answer, ¶35, CHAMPION Affidavit, ¶20.

Finally, defendants assert that the Agreement placed the Merchant in default immediately upon its execution. Paragraph 6 of the Agreement defines “Events of Default” to include the violation of any term, representation, warranty or covenant in the Agreement. Paragraph 16 enumerates the merchant’s representations, warranties and covenants to include a representation that the Future Receipts were not subject to any claims, charges, liens, restrictions, encumbrances or security interests of any nature, unless disclosed to the plaintiff in writing. Defendants claim that there were UCC filings by “other funders similar to the plaintiff” demonstrating encumbrances that pre-dated the Agreement, of which plaintiff knew or should have known, based upon its right to investigate the Merchant’s financial responsibility and history. See CHAMPION Affidavit, ¶17, Exhibit B. Thus, defendants’ argue, plaintiff knew, or should have known, that defendants were in default the moment they entered the Agreement, and that this was part of plaintiff’s predatory lending scheme. Defendants seem to imply that, contrary to the notion that the underlying transaction was a purchase and sale of receivables, plaintiff actually assumed none of the risks associated with same, because so long as defendants were in default at the outset of the transaction, the plaintiff could avail itself of any and all of the contractual remedies at any time.

Plaintiff submits a reply memorandum of law, addressing defendants’ arguments in opposition. In plaintiff’s view, defendants’ fail to raise a triable issue of fact as to whether or not the Agreement was an unenforceable loan. Plaintiff highlights the undisputed fact that defendants stopped all payments without informing plaintiff, never sought a reconciliation, and never submitted any financial information documenting the Merchant’s purported reduction in revenue. Moreover, plaintiff demonstrates that when plaintiff sought a reconciliation after months of non-payment, the Merchant failed to comply with plaintiff’s request for bank statements. Plaintiff argues further that under New York law, there is a presumption that a transaction is not usurious, and thus, usury must be proved by clear and convincing evidence. As discussed in detail in plaintiff’s reply, plaintiff maintains that the Agreement (a) contained a mandatory reconciliation Agreement, (b) did not have a finite term, and (c) provided no recourse to the plaintiff should the Merchant declare bankruptcy.

The determination as to whether a transaction constitutes a usurious loan is guided by principles which, although variously articulated, appear to be well established. “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. ... To determine whether a transaction constitutes a usurious loan ... the court must examine whether the plaintiff is absolutely entitled to

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repayment under all circumstances. Unless a principal sum advanced is repayable absolutely, the transaction is not a loan. 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.” *Principis Cap., LLC v. I Do, Inc.*, 201 A.D.3d 752, 754 (2d Dept. 2022) (internal citations and quotation marks omitted). See also *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 665 (2d Dept. 2020). The three factors provide a guide to the analysis, but do not dictate the Court’s conclusion. See *Fleetwood Services, LLC v. Ram Capital Funding, LLC*, 2022 WL 1997207 (S.D.N.Y. 2022).

At bar, the Court finds that defendants fail to establish that the transaction set forth in the Agreement was a loan. First, the terms of the Agreement specifically provide for adjustments to the Estimated Daily Remittance based on changes in the Merchant’s Future Receipts. See Agreement, ¶2. To the extent that defendants required a reconciliation, it was incumbent upon them to give notice to plaintiff and to follow the procedures set forth in the Agreement. If they had done so, the adjustment would have been mandatory.

The reconciliation provision is not rendered illusory by the condition that the adjustment shall be made “upon reasonable verification” of the Merchant’s actual Future Receipts. Contrary to defendants’ interpretation, this language does not allow plaintiff to request unlimited information in order to delay the adjustment indefinitely. Read in its entirety, the reconciliation provision specifies precisely what information will constitute reasonable verification of the Merchant’s actual Future Receipts: “Merchant shall either provide Purchaser with online access to its Bank Account or, at Purchaser’s request, provide bank statements showing the activity related to the Bank Account within three (3) days after any request. Merchant also hereby authorizes Purchaser to obtain any bank statement directly from the Merchant’s Bank.” See Agreement 2(a). In fact, when plaintiff actually did request a reconciliation, of its own accord, it requested only the Merchant’s “most recent bank statements.” See Reply, Exhibit K.

Second, because the amount of the Estimated Daily Remittance could change as a result of a reconciliation, the term of the Agreement was not finite. See *Principis Cap.*, 201 A.D.3d at 754.

Third, the sum advanced by plaintiff was not, in any other respect, repayable absolutely. The Agreement provided plaintiff no recourse in the event of the Merchant’s bankruptcy. That is, the Agreement contained no provision establishing that a declaration of bankruptcy on the part of the Merchant would constitute an event of default. See *Id.* To the contrary, the Agreement expressly

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provided that “If Merchant's business slows down and Merchant's Future Receipts decrease or if Merchant closes its business or ceases to process Payment Cards and Merchant has not violated any of the representations, warranties and covenants provided in Section 16 below, there shall be no default of this Agreement. Purchaser assumes the risk that Merchant's business may fail or be adversely affected by conditions outside the control of Merchant provided Merchant has not breached a representation, warranty or covenant set forth in Section 16 below.” Agreement ¶13.

The Court is not persuaded by defendants’ argument that the plaintiff has orchestrated a built-in default by virtue of the representations enumerated in Paragraph 16. In the first instance, defendants do not submit properly authenticated proof in admissible form to demonstrate that defendants were, in fact, in breach of the Agreement at the outset – i.e., that there were outstanding UCC filings covering the Future Receipts that the Merchant failed to disclose to the plaintiff – or that plaintiff had actual or constructive knowledge of such filings. See *Pirs Cap., LLC v. D & M Truck, Tire & Trailer Repair Inc.*, 69 Misc. 3d 457, 461 (Sup. Ct., NY Cty, 2020). More fundamentally, any potential breach, in this case, is purely speculative. Plaintiff did not, in fact, declare a default based upon the Merchant’s breach of its representation that there were no prior encumbrances. Rather, plaintiff declared a default based upon the Merchant’s undisputed cessation of payments. The Court is disinclined to invalidate a contract based upon a hypothetical scenario invented by the defendants to avoid the consequences of their actual breach.

Nor is the Court persuaded by the defendants’ argument that the Security Agreement affords plaintiff unfettered access to all of the Merchant’s assets at any time. Paragraph 10 of the Agreement provides:

Purchaser has all the rights of a secured party under the UCC with respect to such Future Receipts. Merchant further agrees that, with or without an Event of Default, Purchaser may notify account debtors, or other persons obligated on the Future Receipts or holding the Future Receipts of Merchant’s sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Purchaser.

Read in light of the Agreement’s operative terms and its overall intent and function, the foregoing permits plaintiff to collect directly from account debtors, with or without an event of default, only the Future Receipts currently due and owing. To interpret this provision as defendants urge is contrary to the well-settled principle that “Courts should rule against any construction which would render a contractual provision meaningless or without force or effect.” *Valle v. Rosen*, 138 A.D.3d 1107, 1109, 30 N.Y.S.3d 285 (2d Dept, 2016) (internal citations and quotation marks omitted).

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Further, although Paragraph 10 authorizes plaintiff to file a UCC financing statement covering the Merchant's assets, this alone is insufficient to establish that the Amount Sold is repayable absolutely. See *NY Cap. Asset Corp. v. F & B Fuel Oil Co.*, 58 Misc.3d 1229(A) (Sup. Ct., Westchester Cty, 2018); *Rapid Cap. Fin., LLC v. Natures Mkt. Corp.*, 57 Misc.3d 979, 985 (Sup. Ct., Westchester Cty, 2017).

Based upon the foregoing, the Court concludes that defendants have not refuted plaintiff's *prima facie* showing, nor raised a material issue of fact, as to whether or not the transaction underlying the Agreement is essentially a loan, as opposed to a sale of future receivables. Accordingly, defendants have not met their "heavy burden" to impeach the transaction on the basis of usury. See *Hochman v LaRea*, 14 AD3d 653 (2d Dept. 2005).

Other Challenges to Validity of the Agreement (First and Sixth Affirmative Defenses)

The remainder of defendants' affirmative defenses and arguments constitute other challenges to the legality and enforceability of the Agreement itself. In its supporting Memorandum of Law, plaintiff argues for dismissal of the First and Sixth Affirmative Defenses, for the reasons stated therein. Defendants neither address plaintiff's arguments, nor offer any evidence or authority in support of these affirmatives defenses. Accordingly, the Court finds that defendants have conceded the First and Sixth Affirmative Defenses. See *McNamee Const. Corp. v City of New Rochelle*, 29 AD3d 544 (2d Dept 2006); *Norex Petroleum Ltd. v Blavatnik*, 2015 NY Slip Op 51280 [U] (Sup Ct, New York Co 2015), *aff'd* 151 AD3d 647 (1st Dept 2017).

The Court notes, tangentially, that defendants devote a portion of their argument to a recent decision in a case brought by the New York State Attorney General against a group of merchant cash advance companies and their principals. In that case, entitled *People v Richmond Capital Group LLC*, 80 Misc.3d 1213(A) (Sup. Ct., NY Cty, 2023), the Attorney General accused several companies of engaging in fraudulent or illegal practices in connection with their business of extending funding through merchant cash advance agreements. Following a seven-day hearing, the Supreme Court determined, among other things, that the agreements offered by these companies were, in fact, predatory loans.

The *Richmond Capital* case is noteworthy insofar as may it reflect a trend toward greater scrutiny of the industry as a whole. The case is not controlling in this matter, however, as it was decided by a court of coordinate jurisdiction. Moreover, it was decided in an entirely different legal and procedural context, and appears to be factually distinguishable. The Court has decided the instant

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matter on the evidence before it. Here, on the record presented, the Court finds no basis to depart from controlling precedent, and the weight of non-controlling authority applicable to the facts at bar.

CONCLUSION

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

Based upon the foregoing, it is

ORDERED, that plaintiff's motion for summary judgment on the causes set forth in its Verified Complaint, dismissing defendant's affirmative defenses, and awarding costs and disbursements, is **granted**.

This constitutes the Decision and Order of this Court.

Dated: *February 2nd, 2024*
Mineola, NY, 11501

ENTER:



HON. ERICA L. PRAGER, J.S.C.