

Arena Invs., LP v Ault Alliance, Inc.

2025 NY Slip Op 30248(U)

January 21, 2025

Supreme Court, New York County

Docket Number: Index No. 652792/2024

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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ARENA INVESTORS, LP,	INDEX NO. <u>652792/2024</u>
Plaintiff,	MOTION DATE <u>10/16/2024</u>
- v -	MOTION SEQ. NO. <u>001</u>
AULT ALLIANCE, INC. and RISKON INTERNATIONAL, INC.,	DECISION + ORDER ON MOTION
Defendants.	
-----X	

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, 36 were read on this motion to/for DISMISSAL.

Plaintiff Arena Investors, LP (Arena), in its capacity as collateral agent for several noteholders, brings this action against defendants Ault Alliance, Inc. (Ault) and RiskOn International (RiskOn, and together with Ault, defendants) asserting claims for breach of certain contractual obligations arising out of a guaranty agreement and a security agreement. Defendants now move, pursuant to CPLR 3211(a)(1) and (a)(7), for an order (1) dismissing, in part, the Complaint’s first cause of action, and (2) dismissing the second cause of action in its entirety (NYSCEF # 7). Arena opposes the motion. For the following reasons, defendants’ motion is granted in part and denied in part.

Background¹

The Purchase Agreement and the Notes

RiskOn, previously known as BitNile Metaverse, Inc., is a Nevada corporation focused on the development, promotion, and awareness of artificial intelligence integration within the business community ((NYSCEF # 2 – Complaint or compl ¶¶ 12-14). On April 27, 2023, RiskOn and six investors—identified as Arena Special Opportunities (Cayman Master) II, LP, Arena Special Opportunities Partners II, LP, Arena Special Opportunities Fund, LP, Arena Special Opportunities (Offshore) Master, LP, Arena Finance Markets, LP (collectively, the Arena Investors), and Walleye Opportunities Master Fund Ltd (Walleye, and

¹ The following facts are drawn from the Complaint and documents incorporated by reference (including those exhibits accompanying to the parties’ submissions). These facts are assumed true solely for purposes of resolving defendants’ motions

together with the Arena Investors, the Investors)—entered into a Securities Purchase Agreement, dated as of April 27, 2023 (the Purchase Agreement) (*see id.* ¶ 25; NYSCEF # 22 – Purchase Agreement at 1 & Schedule of Buyers, column 1). In connection with this Purchase Agreement, RiskOn authorized a new series of six senior secured convertible notes (each a Note and together, the Notes) (*see compl* ¶ 26; Purchase Agreement at Recital B). RiskOn, in turn, agreed to issue and sell the Notes to the Investors, along with warrants to initially acquire an aggregate number of shares in the company (Purchase Agreement § 1[a] & Recital C). Specifically, through the Notes, RiskOn promised to pay:

- (1) the original principal amount of \$2,301,903.00 to the order of Arena Special Opportunities (Cayman Master) II, LP or its registered assigns (the Arena Cayman II Note) in exchange for a purchase price of \$1,841,522.00;
- (2) the original principal amount of \$733,845.00 to the order of Arena Special Opportunities Partners II, LP or its registered assigns in exchange for a purchase price of \$587,076.00;
- (3) the original principal amount of \$351,930.00 to the order of Arena Special Opportunities Fund, LP or its registered assigns in exchange for a purchase price of \$281,544.00;
- (4) the original principal amount of \$190,865.00 to the order of Arena Special Opportunities (Offshore) Master, LP or its registered assigns in exchange for a purchase price of \$152,692.00;
- (5) the original principal amount of \$171,458.00 to the order of Arena Finance Markets, LP or its registered assigns (the Arena Finance Note) in exchange for a \$137,166.00 purchase price; and
- (6) the original principal amount of \$3,125,000.00 to the order of Walleye or its registered assigns in exchange for a purchase price of \$2,500,000.00

(*see compl* ¶¶ 2, 31-36; Purchase Agreement at Schedule of Buyers, column 6; NYSCEF # 14 – Arena Cayman II Note; NYSCEF # 12 – Arena Finance Note; NYSCEF #s 25-26; *see also* NYSCEF #s 13, 15). The aggregate principal amount of the Notes was \$6,875,000.00, and the total purchase price paid by the Investors was \$5,500,000.00 (*compl* ¶¶ 2, 26, 30-37; Purchase Agreement § 1[a] & Schedule of Buyers, columns 2, 6). The maturity date for each Note was set at April 26, 2024 (*see compl* ¶ 37).

No interest would accrue under the Notes unless and until an Event of Default (as defined in the Notes) (*see compl* ¶ 38; Arena Cayman II Note § 2; Arena Finance Note § 2; NYSCEF #s 24-26 at § 2). But “[f]rom and after the occurrence

and during the continuance of an Event of Default, Interest shall accrue [] at a rate of eighteen percent (18.0%) per annum” (*see* compl ¶ 39; Arena Cayman II Note § 2; Arena Finance Note § 2; NYSCEF #s 24-26 at § 2).

The Guaranty and the Security Agreement

As part of their acquisition of the Notes, each Investor appointed Arena as its collateral agent to act on its behalf in accordance with the terms of the Purchase Agreement (compl ¶ 27; Purchase Agreement § 4[v]). Ault, a New York-based diversified holding company, then executed a Guaranty, dated April 27, 2023, in favor of Arena (the Guaranty) (compl ¶¶ 4, 28, 42, 45; NYSCEF # 27 – Guaranty at 1). Both Ault’s executive chairman, Milton C. Ault, III (Mr. Ault), and his spouse, Kristine L. Ault (Ms. Ault), also entered into the Guaranty (compl ¶¶ 43-45; Guaranty at 10). Under the terms of the Guaranty, each guarantor “jointly and severally, unconditionally and irrevocably” guaranteed “the prompt and complete payment and performance when due (whether at the stated maturity, by acceleration or otherwise) of” certain obligations set forth in the Guaranty (compl ¶ 45; Guaranty § 2[a][i]). The parties then agreed that “the construction, validity, enforcement and interpretation of this Guaranty shall be governed by and construed and enforced in accordance with the internal laws of the State of Nevada” (compl ¶ 52; Guaranty § 5[k]).

In addition to the Guaranty, RiskOn and Arena also entered into a Security and Pledge Agreement (Security Agreement) (compl ¶ 29). Under the Security Agreement, RiskOn granted Arena the right to inspect RiskOn’s books and records (NYSCEF # 23 – Security Agreement § 6[l]). This included (1) “examin[ing] and mak[ing] copies of and abstracts from [RiskOn’s] Records and books of account,” (2) “visit[ing] and inspect[ing] its properties,” (3) “verify[ing] materials, leases, Instruments, Accounts, Inventory and other assets,” and (4) “conduct[ing] audits, physical counts, appraisals, valuations and/or examinations at” specified locations (*see* Security Agreement § 6[l]). Like the Guaranty, Nevada law governed “[a]ll questions concerning the construction, validity, enforcement and interpretation of th[e] [Security] Agreement” (*id.* § 11[f]).

The Events of Default and Breaches

On February 28, 2024, RiskOn’s common stock was suspended from trading on the Nasdaq Capital Market and was not listed on any other qualifying exchange (*see* compl ¶¶ 53-54). RiskOn later received a written notice that the Nasdaq Hearings Panel determined that RiskOn’s common stock would be delisted from the Nasdaq Capital Market (*id.* ¶ 55). On April 27, 2024, the Notes matured without RiskOn making its required payments (*see id.* ¶¶ 56, 64).

Accordingly, on May 1, 2024, Ault, RiskOn, and Mr. and Ms. Ault received a notice of events of default (the Default Notice) (compl ¶ 57; NYSCEF # 18). The

Default Notice identified two specific defaults: (1) RiskOn's failure to have its common stock be listed on an eligible market for a period of seven consecutive trading days, and (2) RiskOn's failure to repay the indebtedness due under the Notes by their maturity date (*id.*). Arena, who brings this lawsuit only on behalf of the Arena Investors, alleges that the outstanding principal amount of the Notes held by Arena Investors as of May 1, 2024 is \$3,684,284.47 (compl ¶¶ 5, 65; NYSCEF # 18 at 1). This number is comprised of the original principal amount of \$3,750,000, less the amounts of principal converted to common stock in October 2023 and January 2024 by the Arena Investors (i.e., \$163,209),² and accrued default interest through April 30, 2024 of \$97,493.47³ (compl ¶ 66). To date, no entity has paid the indebtedness due to the Arena Investors under the Notes (*id.* ¶¶ 6, 67).

In addition to these breaches, Arena also alleges that, by notice dated May 8, 2024, Arena made an information and document request to RiskOn and Ault (compl ¶ 77). RiskOn purportedly did not timely respond to Arena's request and has not made any requested information and documentation available (*id.* ¶¶ 78-79).

Legal Standard

CPLR 3211(a)(7) provides for dismissal when a pleading "fails to state a cause of action." When deciding such a motion, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]). Whether a plaintiff can ultimately establish its allegations is not considered when determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). But the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" (*Wilson v Tully*, 243 AD2d 229, 234 [1st Dept 1998]).

Meanwhile, dismissal based on documentary evidence under CPLR 3211(a)(1) is warranted "where 'it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [alterations omitted]). It is only in "those circumstances where the legal conclusions and factual allegations are

² On October 30, 2023, RiskOn received conversion notices from the Arena Investors that converted an aggregate of \$62,000 of the Notes into common stock (compl ¶ 40). RiskOn accordingly issued shares of common stock to the Arena Investors (*id.*). Then, on January 5, 2024, RiskOn received conversion notices from the Arena Investors that converted an aggregate of \$101,209 of the Notes into common stock (*id.* ¶ 41). RiskOn, in turn, issued those shares to the Arena Investors (*id.*).

³ According to Arena, RiskOn's stock delisting and failure to re-list within seven days constituted an event of default under each of the Notes, meaning that interest began accruing pursuant to Section 2 of each Note on March 8, 2024, at a daily rate of \$1,793.40 (*see* compl ¶¶ 59-61). Interest in the amount of \$44,834.89 accrued between March 8, 2024, through April 1, 2024, and interest in the amount of \$52,658.58 accrued between April 2, 2024, through April 30, 2024 (*id.* ¶¶ 62-63).

flatly contradicted by documentary evidence” that a court will not presume them “to be true or accord[] every favorable inference” (*see Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003]).

Discussion

Defendants seek to partially dismiss Arena’s first cause of action for breach of the Guaranty, asserting that those portions of the claim premised on a failure to repay the Arena Cayman II Note and Arena Finance Note must be dismissed because these two Notes are criminally usurious on their face (*see* NYSCEF # 19 – MOL at 1, 6-13; NYSCEF # 36 – Reply at 1-4). Defendants separately seek full dismissal of Arena’s second cause of action for breach of the Security Agreement because, defendants aver, Arena has failed to adequately allege any breach of the Security Agreement by RiskOn (MOL at 13-17; Reply at 6-9).

I. Motion to Dismiss First Cause of Action for Breach of Guaranty Insofar As Premised on the Arena Cayman II Note and Arena Finance Note

Defendants maintain that the Arena Cayman II Note and Arena Finance Note are criminally usurious on their face because, based on defendants’ calculations, both of these Notes have an aggregate interest rate in excess of New York’s 25% legal threshold for criminal usury (MOL at 8-13). And because the Arena Cayman II Note and Arena Finance Note are criminally usurious, defendants continue, they are void *ab initio*, meaning any claim by Arena premised on these two Notes must be dismissed (*id.* at 8-13). Arena counters that, even assuming defendants have proffered correct interest rate calculations, the aggregate amount of all of the Notes, which includes the Arena Cayman II Note and Arena Finance Note, exceeds \$2.5 million (NYSCEF # 28 – Opp at 7). Hence, Arena explains, none of the Notes are subject to the criminal usury statutes under General Obligations Law (GOL) § 5-501(6)(b), and defendants therefore cannot rely on that defense to seek dismissal of this claim (*see id.* at 6-9). The court agrees.

Under New York law,⁴ a loan may be criminally usurious if it violates Penal Law § 194.4, which sets the maximum per annum interest rate for a loan at 25% (*see Bakhsh v Winston*, 134 AD3d 468, 469 [1st Dept 2015]). To successfully raise

⁴ The Arena Cayman II Note and Arena Finance Note are both governed by Nevada law. Defendants nevertheless argue that, in resolving this motion, the court should apply New York’s usury law instead given New York’s strong public policy prohibiting criminally usurious loans (MOL at 8, citing *Propellus, Inc. v Royal Sovereign Grp.*, 2023 WL 4453880, at *7 [Sup Ct, NY County, July 6, 2023]). In opposition, Arena does not appear to contest this position, and, in fact, it relies on New York law in its challenge to defendants’ position (*see* Opp at 6-9). Because the parties appear to agree that New York law should govern the court’s usury analysis, the court will apply New York law instead of Nevada law (*see generally A. Conner Gen. Contr. v Rols Capital Co.*, 145 AD2d 452, 453 [2d Dept 1988] [“New York’s present choice-of-law rule, dubbed the center of gravity approach is that the law of the state having the most significant contacts with the matter in dispute will be applied, even where the matter in dispute is usury”]).

the defense of usury, a defendant must allege “and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate” (*see Blue Wolf Capital Fund II, L.P. v Am. Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013], citing *Giventer v Arnou*, 37 NY2d 305, 309 [1975]). If usury can be determined from the face of the instrument, “intent will be implied and usury will be found as a matter of law” (*id.*). In such cases where criminal usury is found, the loan instrument will be deemed void *ab initio* (*see Adar Bays, LLC v GeneSYS ID, Inc.*, 37 NY3d 320, 333 [2021]).

The usury defense, however, is not always available to litigants. Specifically, under GOL § 5-501(6)(b):

[n]o law regulating the maximum rate of interest which may be charged, taken or received, including section 190.40 and section 190.42 of the penal law, shall apply to any loan or forbearance in the amount of two million five hundred thousand dollars or more. Loans or forbearances aggregating two million five hundred thousand dollars or more which are to be made or advanced to any one borrower in one or more installments pursuant to a written agreement by one or more lenders shall be deemed to be a single loan or forbearance for the total amount which the lender or lenders have agreed to advance or make pursuant to such agreement on the terms and conditions provided therein

(GOL § 5-501 [6] [b]). As this provision establishes, neither civil nor criminal usury can be asserted as a defense if an at-issue loan is in excess of \$2.5 million (*see AJW Partners LLC v Itronics Inc.*, 68 AD3d 567, 568 [1st Dept 2009]). And that exemption will trigger even in those circumstances when loans are made by multiple lenders if such loans are advanced to “one borrower” and “pursuant to a written agreement” (*see Tripoint Global Equities, L.L.C. v Fasolino*, 2013 WL 5677126, at *5 [SD NY, Oct. 18, 2013, No. 13 Civ. 1030(DLC)] [observing that GOL § 5-501(6)(b) “has two important elements. First, it calls for treating loans from multiple lenders advanced to ‘one borrower’ and ‘pursuant to a written agreement’ as ‘a single loan.’ Second, if the aggregate total for this single loan exceeds \$2,500,000, it is not subject to the protection of New York's usury laws”]).

Here, there is no dispute that, whether relying on the Notes’ outstanding principal amount or their purchase price, the aggregate amount of the Notes—which includes the Arena Finance Note and the Arena Cayman II Note—is well over \$2.5 million dollars (*see* compl ¶¶ 2, 26, 31-37). Defendants nevertheless assert that the Notes do not constitute a “single loan or forbearance” under GOL § 5-501(6)(b) because each Note was issued to a distinct Investor under each Notes’ own terms and conditions (*see* Reply at 2). In defendants’ view, this means that, when

assessing whether they are criminally usurious, the Notes must be reviewed on a note-by-note basis (*id.*)

Defendants' contention, however, fails to acknowledge that each of the Notes, including the Arena Cayman II Note and Arena Finance Note, were collectively issued pursuant to a broader transaction between RiskOn and the Investors that was ultimately consummated through the Purchase Agreement (*see* compl ¶ 26; Purchase Agreement § 1[a] & Recital B, C). When accounting for this full context, it becomes evident that the Investors' acquisition of the Notes from RiskOn is precisely the type of aggregating situation contemplated by GOL § 5-502(6)(b). In essence, the Notes were issued to "one or more lenders" (the Investors) from "one borrower" (RiskOn), and this transaction was accomplished pursuant to a single "written agreement," i.e., the Purchase Agreement. Thus, given these circumstances, the only conclusion that can be drawn from the pleadings and accompanying documents is that the Notes constitute a "single loan" in excess of \$2.5 million,⁵ and they are therefore covered by GOL § 5-501(6)(b)'s exemption (*see, e.g. AJW Partners*, 68 AD3d at 568 [concluding that usury laws did not apply to "complex financing arrangement" in which defendants "issued callable secured convertible notes valued at the loan amount of \$3.25 million" pursuant to a "securities purchase agreement"]; *In re 16th Street Regency LLC*, 2018 WL 4219179, at *6 [Bankr ED NY, Sept. 4, 2018, No. 14-46104-nhl] [holding that, although the at-issue loans were made pursuant to separate documents, the record established that they were part of a larger aggregate loan agreement for a total amount of \$4,000,000 and therefore covered by GOL § 5-501(6)(b)'s exemption]). Consequently, the defense of usury is inapplicable here and dismissal on this ground is not warranted.

None of the cases cited by defendants alter this conclusion. For example, in *In re BH Sutton Mezz LLC*, although the court concluded that a building loan of \$1,400,000, which was issued as part of larger financing arrangement, did not fall under GOL § 5-501(6)(b)'s exemption, central to that conclusion was that there was sufficient evidence in the record establishing that the loan was being "treated as separate and distinct" by the parties (2016 WL 8352445, at *36 [Bankr SD NY, Dec. 1, 2016, No. 16-10455(SHL)]). This included, among other things, the fact that (1) the parties consolidated all of the promissory notes, except the building loan, into a single promissory note, and (2) the building loan was funding separate and distinct items from other loans issued in connection with the project financing arrangement (*see id.*). Here, by contrast, there is no indication—beyond each Investor obtaining its own separate Note pursuant to a single underlying purchase agreement—that

⁵ That the Investors' purchase of the Notes should be viewed as a "single loan" is buttressed by the fact that Ault only issued one Guaranty aggregating the Notes' payment obligations, rather than issuing separate guaranties for each specific Note (*see* compl ¶ 45; Guaranty § 2[a][i]).

the parties intended to treat these Notes as separate and distinct (*see* compl ¶¶ 2, 26, 30-36; Purchase Agreement § 1[a] & Schedule of Buyers, column 6).

Defendants' reliance on *Puritan Partners LLC v Breezer Holdings, LLC* (2024 WL 1443484 [Sup Ct, NY County, Apr. 3, 2024]) is even less availing. In *Puritan Partners*, the court concluded that the loan at issue exceeded the criminal usuary cap of 25% per annum, and, in so holding, it rejected plaintiff's contention that there were "[o]ther monies advanced" by "other investors," which, plaintiff argued, brought the aggregate amount of the loan to \$2.8 million (*id.* at *3). But, unlike here, there was nothing before the court suggesting that these "other investors" had advanced funds as part of a single transaction under a single purchase agreement. Accordingly, the holding and analysis in *Puritan Partners* is completely inapposite to this case.

In sum, because the defense of criminal usury is not applicable to any of the Notes under GOL § 5-501(6)(b), defendants' motion to dismiss that portion of Arena's first cause of action that seeks recovery under the Arena Cayman II Note and the Arena Finance Note is denied.

II. Motion to Dismiss Second Cause of Action for Breach of Security Agreement

The remainder of defendants' motion targets Arena's second cause of action for breach of the Security Agreement against RiskOn (MOL at 13-17; Reply at 6-9). In support, defendants argue that, although Arena alleges that it made an information and documentation request to RiskOn and Ault on May 8, 2024, it fails to allege what specific information and documentation was requested, from whom such information was requested, or what, if any, information RiskOn failed to provide to Arena as required under the Security Agreement (*see* MOL at 15-16, Reply at 7). The court agrees.

Under Nevada law, which governs "[a]ll questions concerning the construction, validity, enforcement and interpretation of th[e] [Security] Agreement" (Security Agreement § 11[f]), "[a] breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement" (*Bernard v Rockhill Dev. Co.*, 734 P2d 1238, 1240 [Nev 1987]). To state a claim for breach of contract, a plaintiff must allege "(1) the existence of a valid contract; (2) that plaintiff performed or was excused from performance; (3) that the defendant breached the contract; and (4) that the plaintiff sustained damages" (*see Sierra Dev. Co. v Chartwell Advisory Group, Ltd.*, 223 F Supp 3d 1098, 1103 [D Nev 2016], citing *Calloway v City of Reno*, 993 P2d 1259, 1263 [Nev 2000]).

Here, the crux of Arena's second cause of action is that, under Section 6(l) of the Security Agreement, it has certain rights to inspect RiskOn's books and records, and that RiskOn failed to respond to an "information and documentation request" sent on May 8, 2024 (*see* compl ¶¶ 76-79). The issue with this claim, however, is

that Arena fails to plausibly allege what, if any, information sought by Arena’s purported request would have fallen within the category of documents delineated by Section 6(l), or even that the “information and documentation request” was made pursuant to the Security Agreement. Consequently, there is no basis to determine *how*, if at all, RiskOn could have breached Section 6(l) of the Security Agreement by allegedly failing to respond to Arena’s vaguely referenced “information and documentation request.” Put simply, without more particularity, Arena’s second cause of action—which appears to be largely asserted as an afterthought—must be dismissed for failure to state a claim (*see generally* CPLR 3013 [“Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense”]).

Defendants’ motion to dismiss Arena’s second cause of action is granted, without prejudice.

Conclusion


For the foregoing reasons, it is hereby

ORDERED that defendants’ motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss, in part, plaintiff’s first cause of action is denied; and it is further

ORDERED that defendants’ motion to dismiss plaintiff’s second cause of action is granted and the claim is dismissed without prejudice; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order, together with notice of entry, upon defendants and the Clerk of the Court within 10 days of this order.

This constitutes the Decision and Order of the court.

<p>01/21/2025 DATE</p>	 <hr/> <p>MARGARET A. CHAN, J.S.C.</p>	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE