2020 WL 4744343 (Fla.App. 3 Dist.) (Appellate Brief)
District Court of Appeal of Florida, Third District.

CRATON ENTERTAINMENT, LLC and Charles T. Craton, Appellants,
v.
MERCHANT CAPITAL GROUP, LLC and Jordan Fein, Appellees.

No. 3D19-1643.
July 21, 2020.

On Appeal from the Eleventh Judicial Circuit in and for Miami-Dade County, Florida the Honorable Reemberto Diaz, Circuit Court Judge
L.T. No. 16-30985

Answer Brief of Appellees

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*1 *PRELIMINARY STATEMENT*

Appellee, Merchant Capital Group, LLC, shall refer to itself as Merchant Capital.

Appellee, Jordan Fein, shall refer to himself as Mr. Fein, and collectively with Merchant Capital as Appellees.

Appellees shall refer to Appellant, Craton Entertainment, LLC, as Craton Entertainment.

Appellees shall refer to Appellant, Charles T. Craton, as Mr. Craton, and collectively with Craton Entertainment as Appellants.

Citations to the Record on Appeal will be designated by "R" followed by the page number: R. ___.

Citations to the Appendix on Appeal will be designated by "A" followed by the page number: A. ___.

Citations to the Second Appendix on Appeal will be designated by "SA" followed by the page number: SA. ___.

Citations to the Third Appendix on Appeal will be designated by "TA" followed by the page number: TA. ___.

Citations to the Appellants' Initial Brief will be designated by "IB" followed by the page number: IB. ___.

*2 *STATEMENT OF THE CASE AND FACTS*

A. The Purchase and Sale Agreements

This case involves an action for damages resulting from Craton Entertainment's breach under a purchase agreement of future receivables. R. 122-123. In or around July 2016, Mr. Craton (President of Craton Entertainment) notified Advance Funds Network (a third party entity) that he was interested in pursuing funds for Craton Entertainment. TA. 14, 45. Advance Funds Network provided Mr. Craton with funding options from multiple sources. TA. 46. On or about July 26, 2016, Merchant Capital, as buyer, and Craton Entertainment d/b/a Sexy Suz Couple Boutique, as seller, entered into a written contract titled "Purchase and Sale Agreement" ("First Agreement"). R. 609. Similarly, on or about August 2, 2016, Mr. Craton, on behalf of Craton Entertainment, d/b/a The Love Library, entered into a second purchase and sale agreement with Merchant Capital (the "Second Agreement," and together with the First Agreement, the "Agreements"). R. 609-610. With the exception of the purchase price, purchase amount and initial daily debit addressed further below, the Agreements' terms are substantially identical in nature. See. R. 613-642.

The Agreements memorialized a transaction in which Merchant Capital purchased future accounts receivable from Craton Entertainment at a discount. R. 610. In exchange, Craton Entertainment promised to pay a percentage of its future ***3** receivables (to the extent said receivables came into existence) until Merchant Capital received the value of the purchased receivables. R. 610. The parties agreed to an initial daily retrieval under the Agreements, which was based on Craton Entertainment's average monthly sales at the time of execution of the Agreements. R. 610. The daily retrieval was not a set figure, and could be adjusted monthly based on a change in Craton Entertainment's revenue. R. 610. As to the First Agreement, Merchant Capital purchased $30,140.00 worth of future accounts receivable for $22,000.00. R. 610. The parties agreed to an initial daily debit of $239.00 until an adjustment was needed based upon a change in Craton Entertainment's revenue. R. 610. As to the Second Agreement, Merchant Capital purchased 31,510.00 worth of future accounts receivable for $23,000.00. R. 610. The parties agreed to an initial daily debit of $250.00 until an adjustment was needed based upon a change in Craton Entertainment's revenue. R. 610.

Per the express terms of the Agreements, the funds provided to Merchant Capital were not in connection with a loan. Specifically, Section 7(a) of the Agreements provides as follows:

Sale of Future Receivables Not a Loan. (i) Seller and Buyer acknowledge and agree that the transaction memorialized in this Agreement is a purchase of the Purchased Amount of Seller's Future Receivables, and is not intended to be, nor shall it be construed as a loan from Buyer to Seller or an assignment for security from Buyer to Seller. Each Future Receivable purchased by Buyer hereunder represents a bona fide sale by Seller to a Master Card, Visa, or other credit card and or debit cardholder, or cash transaction. Seller ***4** acknowledges that no law applicable to lending transactions is intended by Buyer or Seller to apply to the purchase of Future Receivables covered by this Agreement... R. 617, 632.

Reconciliation Provisions

The Agreements have no absolute payment obligation. R. 610. If, after executing the Agreements, Craton Entertainment failed to earn another dollar of revenue, it would have no obligation to repay Merchant Capital, so long as it complied with the other procedural aspects of the Agreements. R. 610. At the conclusion of every month, Section 7(b) of the Agreements expressly provide for a reconciliation of Craton Entertainment's actual sales figures with the default daily debit figure. R.

930-931, 939, 954. Through this mechanism, Craton Entertainment could ensure that the daily debits accurately reflected Craton Entertainment's actual sales and deposits. R. 931, 939, 954. Alternatively, Section 7(b) provides for a refund from Merchant Capital to Craton Entertainment in the event the daily debits exceeded the agreed upon daily debit percentage. R. 931, 939, 954. Specifically, Section 7(b) of the Agreements provides as follows:

Monthly Reconciliation. At the conclusion of every month, Buyer may request in writing a reconciliation of the amount of Daily Retrievals received by Buyer with the amount of Future Receivables owed to Buyer under this Agreement for that month, which amount is determined by taking the Purchased Percentage of the sales deposited into all of Seller's bank accounts. In order for Buyer to properly determine the amount of Future Receivables Buyer should have received based on the Purchased Percentage of the sales deposited into Seller's bank accounts, Seller shall provide Buyer with all of Seller's previous months bank account statements in which Buyer deposited ***5** sales revenue into. In the event the monthly total of Daily Retrievals received by Buyer in the previous month exceeds the amount Buyer should have received based on the Purchase Percentage, and upon written request from Seller to reconcile, Buyer, at Buyers' sole and absolute discretion, may (i) adjust the Daily Retrieval to reflect Seller's actual sales and deposits during such time period; or (ii) refund the Seller any amount debited from the prior month that exceeded the Purchased Percentage. R. 618, 633.

No Guaranteed Term of Payment

As a result of the reconciliation mechanism, the Agreements have no absolute payment obligation or time frame. R. 931. Thus, no interest rate can be calculated, as the Agreements do not provide for a guaranteed date of repayment or date of maturity. R. 610. Rather, the Agreements acknowledge that the daily retrieval may change depending on the amount of accounts receivable collected by Craton Entertainment. R. 616, 631. At the end of each business month, Craton Entertainment was to provide Merchant Capital with a copy of its business operating account from the prior month in order to determine Craton Entertainment's average monthly sales and adjust the daily retrieval accordingly. R. 616, 631. As stated in Section 3(c) of the Agreement, "Seller hereby agrees and acknowledges that Buyer will determine the Purchased Percentage and thus the Daily Retrievals based on the Sellers Avg. Monthly Sales; the Daily Retrieval amount may change, upon notice to Seller, after review of Buyer's submission of Seller's business operating account statement." R. 616, 631.

***6** *Potential Causes for Breach under Agreements*

The Agreements expressly provide what specific actions and/or inactions are prohibited and that a breach of any representations, warranties, and/or covenants contained in the Agreements constitute a breach of the Agreements. R. 932. For example, the Agreements provided that Craton Entertainment was required to, among other things, refrain from: (a) using multiple credit/debit/bank card processing terminals without prior written consent of Merchant Capital; (b) changing its credit/debit/bank card processing terminals without prior written consent; and (c) changing its bank depository accounts without prior written consent. R. 932. Per the terms of the Agreements, failure to comply with the express procedural acts would result in a breach of the Agreements. R. 616, 631, 932. In contrast, the Agreements do not provide that Craton Entertainment's failure to receive business revenue is an event of default. *See* R. 619-642.

B. Performance and Breach of the Purchase and Sale Agreements

Merchant Capital performed its obligations under the Agreements by paying Craton Entertainment the agreed upon purchase price under both Agreements. R. 122. To the extent Craton Entertainment's business revenues decreased, it had the option to exercise the reconciliation provision in the Agreement by contacting Merchant Capital to request a refund of the amounts paid or an adjustment to the daily retrieval based on its actual accounts receivable for the prior month. R. 939, ***7** 954. However, Craton Entertainment never contacted Merchant Capital to request a modification of the Agreements, nor a reconciliation of the daily debit amounts. R. 932; TA. 65-66. Further, Craton Entertainment never contacted Merchant Capital to request a refund of any amount paid. R. 932. Rather, Craton Entertainment defaulted under the Agreements by placing a stop payment on the bank accounts, thereby blocking Merchant Capital's access to seek the daily debit. R. 932. As a result of Craton Entertainment's

default of the procedural terms of the Agreement, Merchant Capital was entitled to the remaining balance of Future Receivables remaining due under the Agreements. R. 617, 632, 932.

C. Mr. Fein's Lack of Involvement with the Agreements

Mr. Fein is one of the managing members of Merchant Capital, which is a Florida limited liability company. A. 17-18. The Agreements were entered into exclusively between Merchant Capital, as buyer, Craton Entertainment, as seller, and Mr. Craton, as guarantor, to the extent Craton Entertainment defaulted under one of the procedural terms of the Agreements. R. 933. Mr. Fein was not, nor was he ever intended to be, a party to the subject Agreements. R. 611, 933; see also R. R. 619-642. Craton Entertainment and Mr. Craton have never entered into any agreements with Mr. Fein individually. TA. 69. Mr. Fein did not prepare or draft the subject Agreements. R. 611. Rather, Merchant Capital relied heavily on counsel and consultants in creating the Agreements to ensure their legality. R. 611. At the time ***8** the Agreements were entered into, there were representatives other than Mr. Fein that worked at Merchant Capital that had decision making authority to review and approve merchant agreements. R. 611. With regard to the subject Agreements, other representatives of Merchant Capital completed the underwriting and provided final approval for funding of the transactions. R. 611.

During the entirety of Craton Entertainment's business relationship with Merchant Capital - from initial contact through default - Mr. Craton and Craton Entertainment had no contact with Merchant Capital or Mr. Fein. R. 611. Mr. Fein never spoke to or otherwise communicated with Mr. Craton, or any other officer, director or representative of Craton Entertainment. R. 933. Moreover, Mr. Craton and Craton Entertainment admitted they have no personal knowledge that Fein directly and personally participated in the making of the Agreements, or that Merchant Capital otherwise acted through Mr. Fein. TA. 67-69; 85-88. Mr. Craton and Craton Entertainment also admitted they have no personal knowledge that Mr. Fein directly and personally participated in any scheme, device or artifice to disguise the alleged usurious nature of the Agreements. TA. 69, 87.

D. Procedural History

On December 5, 2016, Merchant Capital initiated this proceeding by filing a four-count complaint against Craton Entertainment and Mr. Craton for breach of contract, personal guaranty, services rendered, and unjust enrichment. R. 25-41. ***9** Merchant Capital filed an amended complaint on July 20, 2017, which stood as the operative complaint. R. 122-157. On August 22, 2017, Appellants filed an answer to amended complaint and Craton Entertainment filed a twelve count amended counterclaim. R. 162-242. The claims raised in the counterclaim included: (1) usury under Fla. Stat. § 687.03 as to the First Agreement; (2) criminal usury as to the First Agreement; (3) usury under Fla. Stat. § 687.03 as to the First Agreement against Mr. Fein; (4) criminal usury as to First Agreement against Mr. Fein; (5) violation of FDUPTA as to the First Agreement; (6) declaratory judgment as to the First Agreement; (7) usury under Fla. Stat. § 687.03 as to the Second Agreement; (8) criminal usury as to the Second Agreement; (9) usury under Fla. Stat. § 687.03 as to the Second Agreement against Mr. Fein; (10) criminal usury as to Second Agreement against Mr. Fein; (11) violation of FDUPTA as to the Second Agreement; and (12) declaratory judgment as to the Second Agreement. R. 166-189. All twelve causes of action raised in the amended counterclaim stem from the argument that the subject Agreements violate Florida's usury laws. R. 166-189.

On September 22, 2017, Appellees filed a motion to dismiss various counts of the amended counterclaim, including the FDUPTA claims. R. 244-249. On December 21, 2017, the trial court entered an order dismissing the FDUPTA claims. R. 266-267. On May 15, 2018, Craton Entertainment filed a motion for reconsideration as to the order dismissing the FDUPTA claims. R. 320-324. On ***10** August 13, 2018, prior to the hearing on Craton Entertainment's motion for reconsideration, Merchant Capital and Mr. Fein filed a motion for summary judgment as to all counts of the counterclaim except for the FDUTPA claims, as they were previously dismissed. R. 594-607. Also on August 13, 2018, Craton Entertainment filed a motion for summary judgment as to the amended complaint and amended counterclaim. R. 645-720. On October 12, 2018, the Court heard argument on Craton Entertainment's motion for reconsideration, granted the motion, and reinstated the FDUPTA claims. R. 901.

On November 15, 2018, the parties held a one-hour special set hearing on (1) Merchant Capital and Mr. Fein's motion for summary judgment as to all counts of the counterclaim (except for the recently reinstated FDUPTA counts); and (2) Craton Entertainment's motion for summary judgment as to amended complaint and amended counterclaim. SA. 4-49. On November 20, 2018, the trial court entered an order granting Merchant Capital and Mr. Fein's motion for summary judgment, holding that "the Purchase and Sale Agreements which are the subject of this action were sales of future receivables which included reconciliation provisions, and thus, were not loans that would be subject to Florida's usury laws." R. 1708-1709. On the same date, the trial court entered an order denying Craton Entertainment and Mr. Craton's motion for summary judgment as to the amended complaint and amended counterclaim on the same grounds. R. 1706-1707.

***11** On December 4, 2018, Merchant Capital filed a motion for summary judgment as to its amended complaint. R. 996-997. Also, on January 5, 2019, Merchant Capital and Mr. Fein filed their motion for summary judgment as to the two FDUPTA claims remaining as to the amended counterclaim. R. 1158-1162. Following a hearing, on May 24, 2019, the trial court entered an order granting Merchant Capital and Mr. Fein's motion for summary judgment as to the FDUPTA counts in the amended counterclaim, thus entirely disposing of the counterclaim. R. 1710. Further, following a hearing, on June 26, 2019, the trial court entered an order granting Merchant Capital's motion for summary judgment as to the amended complaint. R. 1712-1713. In connection with the above-referenced orders, on August 3, 2019, the trial court entered an amended final judgment in favor of Merchant Capital and against Craton Entertainment and Mr. Craton, finding that the Appellants owed the sum of $55,782.00 on principal and $881.70 for costs, for a total sum of $56,663.70. R. 1714-1716. This appeal followed.

***12** *ISSUES ON APPEAL*

I. WHETHER THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF APPELLEES BY HOLDING THAT THE PURCHASE AND SALE AGREEMENTS OF FUTURE RECEIVABLES WERE NOT LOANS AND THUS NOT SUBJECT TO USURY LAWS

II. WHETHER THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF MR. FEIN IN HIS INDIVIDUAL CAPACITY

***13** *SUMMARY OF ARGUMENT*

The trial court properly entered the Final Summary Judgment in favor of Appellees. The undisputed facts establish that Craton Entertainment's counterclaims fail as a matter of law, because the Florida usury laws do not govern the transaction between Merchant Capital and Craton Entertainment. Despite Craton Entertainment's hyperbolic version of the facts, the record establishes that Craton Entertainment knowingly and voluntarily sold its future receivables to Merchant Capital in exchange for cash consideration. Craton Entertainment agreed to sell its future receivables at a set daily rate based on its monthly earnings, which amount could be adjusted upon request, in the event it had a decline in business. If Craton Entertainment failed to earn revenue, the agreement between the parties provided that Craton Entertainment had no obligation to continue making payments to Merchant Capital, so long as it complied with the other procedural terms of the Agreements. Likewise, pursuant to the Agreements' reconciliation provision, if Craton Entertainment's revenue fell, the daily debit figure would proportionately drop, thus extending the payment timeframe. As a result of Craton Entertainment's right to request to a modification to the daily debit amount, no rate of interest can be affixed to the Agreements, and there is no guaranteed date of payment. Simply put, Merchant Capital risked not only its chance at making a profit, but also the principal amount invested with Craton Entertainment. These indisputable characteristics of ***14** the transaction dictate that the Agreements were not loans and thus, are not governed by the Florida usury laws.

Further, there is no legal basis to support Craton Entertainment's attempt to hold Mr. Fein personally liable for the transactions between Merchant Capital and Craton Entertainment. General corporate law principles insulate Mr. Fein from liability, and Craton Entertainment failed to meet the heavy burden required to pierce the corporate veil in order to hold Mr. Fein personally liable. Further, Craton Entertainment and Mr. Craton admitted they lack any personal knowledge to support the allegations that

Mr. Fein intended to concoct a usurious transaction. Rather, the record evidence is undisputed that Mr. Fein was not a party to the Agreements, Mr. Fein never communicated with Craton Entertainment or Mr. Craton, and Craton Entertainment and Mr. Craton had no factual basis to allege that Merchant Capital acted through Mr. Fein.

For the foregoing reasons, the trial court properly entered summary judgment in favor of Merchant Capital as to the claims raised in the amended complaint, and properly entered summary judgment in favor of Merchant Capital and Mr. Fein as to all claims raised in the amended counterclaim.

15** ***ARGUMENT

I. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF APPELLEES BECAUSE THE PURCHASE AND SALE OF FUTURE RECEIVABLES IS NOT A LOAN

A. Standard of Review

The trial court's decision to grant summary judgment in favor of Merchant Capital as to the complaint and counterclaim are reviewed under a de novo standard of review. *Volusia County v. Aberdeen at Ormond Beach, L.P.* 760 So. 2d 126, 130-131 (Fla. 2000). Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. Id. at 130. "Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." Id. at 131 (quoting *Cox v. CSX Intermodal, Inc.,* 732 So. 2d 1092, 1096 (Fla. 1st DCA 1999)).

B. The Purchase and Sale of Future Receivables are not Loans and thus not Subject to Usury Laws

The purpose of Florida's usury laws is to protect the needy borrower from the unconscionable money lender. *First Mortg. Corp. of Vero Beach v. Stellmon,* 170 So. 2d 302, 303 (Fla. 2d DCA 1964). In order to find that a transaction is usurious, the moving party must prove all four of the following elements: (1) the presence of an express or implied loan; (2) an understanding between the parties that the money ***16** loaned is to be returned; (3) an agreement to pay interest in excess of the legal rate; and (4) a corrupt intent to take more than the legal rate for the money loaned. Lord v. Hodge, 209 So. 2d 692, 692 (Fla. 2d DCA 1968). As was argued in front of the trial court, Appellants have the burden of proving all four elements of usury in order to succeed on their claims. *See Nolden v. Summit Financial Corp.,* 244 So. 3d 322, 325 (Fla. 4th DCA 2018) (The moving party claiming usury has the burden of establishing its elements). In the event Appellants failed to prove even one of the elements of usury, summary judgment was properly granted in favor of Appellees.

1. *The express terms of the Agreements negate the finding of a loan.*

Section 687, Florida Statutes "expressly applies only to 'contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of a debt'." *Nolden v. Summit Financial Corp.,* 244 So. 3d 322, 325 (quoting Fla. Stat. § 687.02(1)). Thus, "[t]he law is well settled that usury can only attach to a loan of money, or to the forbearance of a debt...." Id. (quoting Davidson v. Davis, 59 Fla. 476, 52 (1910)).

Here, the plain language of the Agreements (which were executed by Mr. Craton) provide the relationship between the parties is that of buyer and seller, as opposed to a lender and borrower. The Agreements are titled "Purchase and Sale Agreement," and expressly contemplate the purchase of future accounts receivables, as opposed to a loan that requires absolute repayment of money. *See Nolden v.* ***17** *Summit Financial Corp.,* 244 So. 3d at 325 (The title "Retail Installment Sale Contract" on the document was a factor that weighed in favor of finding the transaction was not a loan). Further, in Section 7(a) of the Agreements, entitled "Sale of Future Receivables Not a Loan," Craton Entertainment specifically acknowledged that "the transaction memorialized in this Agreement is a purchase of the Purchased Amount of Seller's Future Receivables, and is not

intended to be, nor shall it be construed as a loan from Buyer to Seller or an assignment for security from Buyer to Seller." R. 617, 632. As supported by the express terms of the Agreements, Appellants cannot establish the existence of a usurious transaction because they lack an essential element - the existence of a loan.

2. *The Agreements do not provide a guarantee of repayment.*

The Agreements are not usurious transactions, because Merchant Capital did not provide Craton Entertainment a "loan." Rather, Merchant Capital risked capital and invested in Craton Entertainment's ability to produce revenue. A plain reading of the Agreements shows that Merchant Capital lacked the absolute right to demand repayment. Rather, Craton Entertainment's repayment obligation was expressly conditioned upon its ability to earn revenue. Florida law provides that transactions of this nature, where the buyer is exposed to substantial risk without a guarantee of return, are exempted from usury laws. For example, in Diversified Enterprises, Inc. v. West, the Second DCA held that a rate of return in excess of the usury limits is ***18** permissible where the "lender's" money is at risk, as long as the risk is substantial. 141 So. 2d 27, 30 (Fla. 2d DCA 1962). The court in West relied on the Supreme Court of Arizona's decision in Britz v. Knsvater, 351 P. 2d 986 (AZ 1960), which stated:

> The theory behind the rule is that where the lender risks the principal with the chance of either getting a greater return than the lawful interest rate or possibly getting nothing (if the contingent event fails to occur), there is no usury, since Usury laws do not forbid the taking of business chances in the employment of money. Thus, as a general rule, it would appear that an ordinary secured loan with interest at a definite rate would always be 'absolutely payable' in the terms of this rule, since the lender would never, in such case, face any greater hazard than that the borrower might default or that the security might depreciate.

Id., at 991 (internal citations omitted). The Second DCA in *West* further relied upon the Kentucky Court of Appeals, which similarly held:

> Where, under a contract for the payment or repayment of money, the payment of interest on the principal sum is subject to a contingency, so that the creditor's entire profit or return is put in hazard, the interest so contingently payable need not be limited to the maximum affixed by the usury statutes, provided the contract is made in good faith and without intention to evade or avoid the usury laws.

Dublin v. Veal, 341 S.W.2d 776, 777-778 (Ky. 1960).

In the instant case, Merchant Capital exposed its capital with no guarantee of repayment or protection of its principal investment. Craton Entertainment's only payment obligation to Merchant Capital was to provide a certain percentage of its ***19** receivables ***to the extent it continued to earn revenue.*** If, after executing the Agreements, Craton Entertainment failed to earn another dollar of revenue, it would have no obligation to repay Merchant Capital, so long as it complied with the other procedural aspects of the Agreements. In contrast, if Merchant Capital would have issued Craton Entertainment a traditional loan, Craton Entertainment would be required to repay Merchant Capital the principal sum, regardless of whether it earned revenue or not. For this additional risk (i.e. the chance of losing not only profit, but also principal), Merchant Capital is entitled to a greater profit than is permitted through traditional loan transactions regulated by usury laws. West, 141 So. 2d at 30.

Moreover, despite Appellants' contentions that the Agreement required absolute repayment, there was no understanding between the parties that the funds would be unconditionally returned. If Craton Entertainment ceased to earn revenue, Merchant Capital

lacked a mechanism to demand repayment. This concept was not lost on Mr. Craton. Rather, he understood that Craton Entertainment's payment obligation was contingent upon the existence of business revenue. In fact, Mr. Craton testified to the following at his deposition taken on July 27, 2018:
Q: So, for instance, if - if The Love Library went out of business -

A: Uh-huh.

Q: -- Is it your understanding that you would still be obligated to pay the daily receivables every day?

A: No.

***20** TA. 56.

Similarly, Mr. Fein testified at his deposition on July 13, 2017 that there was no guaranty of repayment:
Q: So you're saying that there is no default by the customer, the seller, if he does not have money in the account because of no revenues. Is that correct?

A: Yes. If there is no revenue, there is nothing to collect. He says, "I have no revenue." And if you follow the agreement, he says "Look at my bank statements. I have no revenue." We give the money back because there is no revenue.

A. 97-98.

Appellants further argue in their Initial Brief that Mr. Craton was required to guarantee Craton Entertainment's "full performance, that is, payment of the 'Purchased Amount' of the 'Future Receivables"'. IB. 19. However, such claim is inaccurate and contrary to the express terms of the Agreements. Mr. Craton merely guaranteed Craton Entertainment's performance under the terms of the Agreement. Specifically, Section 8(v) of the Agreements provide that "[a]s a condition to the consummation of the transactions contemplated hereby, the undersigned guarantor(s) (the "Guarantor(s)") hereby unconditionally, jointly and severally, personally guarantee(s) the performance of all covenants, representations and warranties of Seller." R. 623, 638. There is no covenant, representation or warranty contained in the Agreements that requires absolute repayment. Accordingly, the guarantor's liability is only triggered when the seller defaults by failing to perform ***21** one of the non-monetary, procedural covenants, representations and warranties provided for in the Agreements.

As shown above, the record evidence establishes there was no understanding between the parties that the money loaned was to be unconditionally returned. Thus, Craton Entertainment failed to prove another element necessary to establish the existence of a usurious transaction.

3. *There can be no set rate of interest due to the reconciliation provision.*

Based on the unambiguous terms of the Agreements, there can be no set rate of interest. Specifically, Section 7(b) of the Agreements provide for a monthly reconciliation, so that the daily debits accurately reflected Craton Entertainment's actual sales and deposits. Section 7(b) alternatively provides a refund from Merchant Capital to Craton Entertainment in the event that the daily debits exceeded the agreed-upon daily debit percentage. In other words, the Agreements provide for a mechanism to adjust the daily debit amount, depending on the amount of revenues Craton Entertainment received. As there is no guaranteed date for Merchant Capital to be paid under the Agreements (let alone be paid at all), there can be no established rate of interest under the terms of the Agreements.

Moreover, as a result of the reconciliation mechanism, the Agreements have no absolute payment obligation or timeframe. The Agreements were designed to have the daily debit follow the inevitable ebbs and flows of Craton Entertainment's ***22** business. If, after executing the Agreements, Craton Entertainment failed to earn another dollar of revenue, it would have no obligation to repay Merchant Capital, so long as it complied with the other procedural terms of the Agreements. Likewise, if Craton Entertainment's revenue fell, the daily debit figure would proportionately drop, thus extending the payment timeframe as long into the future as would be required. In contrast, had Merchant Capital issued Craton Entertainment a traditional loan, it would be required to repay Merchant Capital the principal sum by a set deadline, regardless of whether it earned revenue or not.

Appellants mistakenly argue that interest rates can be calculated based on the terms of the Agreements. IB. 5-6, 32. However, such argument completely disregards the important function played by the reconciliation provision. For example, under the terms of the Second Agreement, if the Love Library's monthly sales dropped to $62.00 and Craton Entertainment requested a reconciliation, the daily debit figure would have dropped to $1.00. Based on a $1.00 daily debit, Craton Entertainment would have paid back the purchased amount over 65,390 days. Using Appellants' method of calculating "interest," the "interest rate" under this scenario would be *de minimus*. Appellants' calculation of alleged usurious interest rate is only based on one of countless possible scenarios that could have occurred under the Agreements.

***23** As a result of the express terms of the Agreements including to the reconciliation provision, Appellants are unable to prove another necessary element of usury - that there was an agreement to pay interest in excess of the legal rate.

4. ***Appellants defaulted under the non-monetary terms of the Agreements.***

As discussed above, to the extent Craton Entertainment's business revenues decreased, it had the option to exercise the reconciliation provision in the Agreement by contacting Merchant Capital to request a refund of the amounts paid or an adjustment to the daily retrieval based on its actual accounts receivable for the prior month. Notwithstanding, it is undisputed that Craton Entertainment never contacted Merchant Capital to request a modification of the Agreements, a reconciliation of the daily debit amounts, or a refund of any amount paid. Moreover, there is no record evidence to suggest that Craton Entertainment's business was suffering, resulting in a decrease in revenue. Rather, the record evidence is undisputed that Craton Entertainment defaulted under the Agreements by placing a stop payment on the bank accounts, thereby blocking Merchant Capital's access to seek the daily debit. As Appellants' breached a procedural covenant under the Agreements, Merchant Capital was entitled to seek all remedies provided to it under Section 5 of the Agreements.

5. ***Appellants' Supporting Case Law is Distinguishable.***

***24** Appellants cite to a few older Florida cases in support of their contention that the Agreements are loans. However, these cases do not address the sale of future accounts receivable and are distinguishable at the most fundamental level - the parties providing funding did not risk principal. *See General Capital Corp. v. Tel Service Co.,* 212 So. 2d 369, 375 (Fla. 2d DCA 1968) (affirming ruling that sale agreement was in fact a loan where the lender "intended to insure the return of all money advanced to [the borrower] at all events, and that the return of the advance was secured rather than being put in hazard[.]); *Kay v. Amendola,* 129 So. 2d 170, 173 (Fla. 2d DCA 1961) ("At no place in the record does it appear that plaintiff did not consider himself obligated to repurchase.").

In General Capital Corp., the agreement provided the plaintiff purchased commercial paper from the defendant and had full recourse against the defendant in the event the makers of the commercial paper failed to pay. *General Capital Corp.,* 212 So. 2d at 372. On review, the appellate court found the evidence presented to the trial court supported the finding of a loan. Id. at 374. Specifically, the evidence included testimony that the agreement's purpose was to allow the defendant to "borrow money" from the plaintiff and that the plaintiff told the defendant the agreement needs to "look like a sale" even though it was a loan. Id. at 375. Here, the evidence shows the contrary. As discussed above, the parties never intended for the Agreements at issue

to be considered loans, and understood there was no ***25** guaranteed right to repayment in the event Craton Entertainment went out of business.

Unlike the parties in General Capital Corp., Merchant Capital does not have full recourse against Appellants. In *General Capital Corp.,* the plaintiff required the defendant execute mortgages on their personal real property and required all assigned commercial paper to be "unqualifiedly endorsed with full recourse" to the plaintiff. See Id. at 375. In contrast, Merchant Capital has no recourse against Appellants in the event Craton Entertainment goes out of business (assuming it complied with the procedural terms of the Agreements). Given these fundamental differences, the ruling by the court in *General Capital Corp.* is inapplicable to this case.

Additionally, Appellants strongly rely on *Kay v. Amendola* which found a real estate option contract to be a loan, where the parties regarded the contract as a loan with a set rate of interest. *Kay v. Amendola,* 129 So. 2d at 173. In Kay, the court reasoned that as a result of a pending divorce proceeding, an option to purchase contract was created to loan funds to the plaintiff, who at all material times, was obligated to purchase the real estate and pay back the defendant. Id. at 173. Again, this factual scenario is vastly different from the transactions entered into between Merchant Capital and Appellants, where there is no absolute guarantee of repayment and no security for the funds that were provided.

***26** Finally, Appellants cite to Gordon v. West Florida Enterprises of Pensacola, Inc., 177 So. 2d 859 (Fla. 1st DCA 1965) in support of their argument that the "acceleration clause in the Agreements, by itself renders the Agreement usurious." IB. 40. However, Gordon is inapplicable to the Agreements at issue as the transaction in Gordon was unquestionably a loan, consisting of a promissory note and mortgage. See id. at 862 (stating "our holding operates to cancel the note and mortgage involved."). In Gordon, there was no dispute that the promissory note and mortgage constituted a loan, from which a claim of usury may derive. Here, assuming the purchase and sale of future accounts receivable do not constitute a loan, the usury laws do not apply to the transactions. Moreover, importantly, nothing in the Gordon decision (or any other decision presented by Appellants) provides that the presence of an acceleration clause renders a transaction usurious. Such an interpretation would result in an untold number of legal transactions being deemed usurious, simply due to the presence of an acceleration clause. To the contrary, acceleration clauses are widely used and accepted in business transactions throughout the state of Florida.

Craton Entertainment also relies on a handful of cherry-picked out-of-state decisions which ignore the overwhelming persuasive case law to the contrary. As discussed more thoroughly below, the majority of New York courts that have considered this issue have held that merchant cash advance agreements providing ***27** for the sale of accounts receivable (which are similar if not identical in nature to the subject Agreements) do not constitute loans, and thus, are not subject to usury laws.

C. The Majority of New York Courts that have considered this issue have held that Purchase and Sale Agreements are not Loans

As of the date of filing this brief, no Florida appellate court has ruled on the issue of whether a purchase and sale agreement of future receivables constitutes a loan that would be subject to Florida's usury laws. However, this issue has been extensively litigated in the state of New York, and the overwhelming majority of New York courts presented with this issue have held that a claim for usury does not arise from the purchase and sale of future receivables.

"Usury laws apply only to loans or forbearances, not investments. If the transaction is not a loan, there can be no usury, however unconscionable the contract may be." *Seidel v. 18 E. 17th St. Owners. Inc.,* 79 N.Y. 2d 735, 744 (1992). "It is well established that there can be no usury in the absence of a loan or forbearance of money." *Donatelli v. Siskind,* 170 A.D. 2d 433, 434 (2d Dep't 1991); *see also IBIS Capital Group, LLC v. Four Paws Orlando LLC,* 2017 WL 1065071, *2 (Nassau Co. Sup. Ct. Mar. 10, 2017) ("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."). "A claim for overcharge of interest can only be based on interest overcharged on a ***28** loan. It cannot arise from a purchase." *Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc.,* 252 F. Supp. 3d 274, 280 (S.D.N.Y. 2017).

Unlike a loan, in the context of a sale of receivables, "the 'receipts purchased amounts' are not payable absolutely. Payment depends upon a crucial contingency: the continued collection of receipts by [the seller] from its customers." Colonial Funding Network, Inc. for TVT Capital, LLC v. Epazz, Inc., 252 F. Supp. 3d at 280; see also IBIS Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071 at *4 ("[P]rimary indicia of usury is repayment of the principal sum advanced absolutely. Yet in the underlying agreement... the advance will only assuredly [be] repaid if the defendant defaults"). Accordingly, the resulting uncertainty as to payment is inherent in the purchase of future receivables, and is one of the primary factors considered by New York courts in distinguishing between purchase and sale transactions and loans.

"New York State Courts encourage courts to consider three factors to determine if an agreement is a loan or a merchant agreement: (1) whether there is a reconciliation provision; (2) whether the agreement has an indefinite term; and (3) whether the plaintiff has any recourse should the merchant declare bankruptcy. Womack v. Capital Stack, LLC, 2019 WL 4142740 *5 (S.D.N.Y. August 30, 2019); *see also* ***29** *K9 Bytes, Inc. v. Arch Capital Funding, LLC,* 56 Misc. 3d 807, 817 (Sup. Ct. Westchester Co. May 4, 2017) (noting there are certain factors that courts look at to see if payment is absolute or contingent).

***30** In Capital Stack, the court held the terms of the agreement (which included the purchase and sale of future receivables, an agreed upon daily debit and a reconciliation provision) were consistent with a purchase and sale of future receivables as opposed to a loan. Id. at *8. In support of its decision, the court noted that "[a]t least twenty-eight other recent decisions by State and Federal courts in New York found that similar MCA transactions were not loans subject to New York's usury laws" and cited to the cases in a footnote [1] . Importantly, several of the agreements in the cases cited by Capital Stack did not meet all three factors or the courts did not address all of the factors, yet still upheld the enforceability of the agreements. For instance, in *K9 Bytes, Inc. v. Arch Capital Funding, LLC,* the Supreme Court of Westchester County, New York, considered the three factors and determined the agreement was a valid sale of future receivables, despite one of the factors weighing against the buyer. 56 Misc.3d 807, 57 N.Y.S.3d 625, 633-634 (Sup. Ct. Westchester Co. May 4, 2017). As to the first factor, the Arch Capital court noted "the one [factor] cited by each and every court that found that the transaction was not a loan, is whether or not there is a reconciliation provision in the agreement. The reconciliation provisions allow the merchant to seek an adjustment of the amounts being taken out of its account based on its cash flow (or lack thereof)." Id. at 632. Likewise, "[i]f there is no reconciliation provision, the agreement may be considered a loan." Id. at 633. The Arch Capital court determined that since the agreement included a reconciliation agreement, the first factor was met. Id.

***31** The *Arch Capital* court then turned to the second factor regarding whether the agreement has a finite term or not. As discussed by the court, "[i]f the term if indefinite, then it 'is consistent with the contingent nature of each and every collection of future sales proceeds under the contract."' Id. (quoting IBIS Capital Group, LLC v. Four Paws Orlando LLC, 2017 WL 1065071 at *5 (Sup. Ct. Nassau Co. March 10, 2017)). This is because the seller's "collection of sales proceeds is contingent upon [plaintiffs'] actually generating sales and those sales actually resulting in the collection of revenue." Id. As a result, the court found that the "existence of this uncertainty in the length of the Agreement" weighed in favor of finding that the second factor was met. Id.

However, as to the third factor (regarding whether the buyer has any recourse should the merchant declare bankruptcy), the *Arch Capital* court found the factor "weighs against" the buyers. *Id.* Specifically, the agreement provided that "should the merchant file for bankruptcy, the personal guaranty may be enforced, and [the buyer] may file the confession of judgment." Id. Notwithstanding that language, the ***32** court stated that "[h]aving weighed all of the factors, the Court finds that the Arch agreements are sufficiently risky such that they cannot be considered loans, as a matter of law. Under no circumstances could Arch be assured of repayment, because its agreements are contingent on a merchant's success, and the term is indefinite." *Id.* at 634-644.

Here, the terms of the subject Agreements are strikingly similar to the purchase and sale agreements considered by the New York courts. Moreover, the factors considered by the New York courts weigh in favor of finding the subject Agreements are valid and enforceable sales of future receivables. In looking to the first factor, Section 7(b) of the Agreements expressly include a

reconciliation provision, which provides a mechanism for reconciling the daily retrieval amount, such that Craton Entertainment can request to adjust the amount and/or receive a refund in the event its revenue declines.

Turning to the second factor, the Agreement is indefinite in term, and does not provide for a guaranteed date of repayment. Per the Agreement, at the end of each business month, Craton Entertainment was to provide Merchant Capital with a copy of its business operating account from the prior month in order to determine its average monthly sales and adjust the daily retrieval accordingly. In conjunction with the reconciliation provision, Section 3(c) of the Agreements expressly provide that "the Daily Retrieval amount may change, upon notice to Seller, after review of ***33** Buyer's submission of Seller's business operating account statement." R. 616, 631. As a result, the amount of the daily retrieval can fluctuate monthly and there is no guarantee that Merchant Capital will receive a return of the purchased amount, nor is there a guarantee regarding the length of time that transpires before the final payment becomes due. Craton Entertainment's only payment obligation to Merchant Capital was to provide a set percentage of its receivables to Merchant Capital, to the extent it continued to earn revenue. As a result of the potential fluctuation of Craton Entertainment's revenue, the length of the Agreement is indefinite. Further, if Craton Entertainment failed to earn revenue, it would have no obligation to repay Merchant Capital, so long as it sought an adjustment of the daily retrievals and complied with the other procedural aspects of the Agreement. For these reasons, the second factor considered by New York courts is met.

While the first and second factors are addressed by the express terms of the Agreements, the Agreements do not include a provision regarding whether a bankruptcy filing would act as a default under the Agreements. Notwithstanding, the Agreements' silence as to bankruptcy weighs in favor of finding an enforceable sale of future receivables. The Agreements expressly provide that specific actions are prohibited under the Agreements and state that a breach of any of the representations, warranties, and/or covenants contained in the Agreements constitute a breach. In contrast to the terms of the *Arch Capital* agreement, the subject Agreements do not ***34** provide that Craton Entertainment's failure to receive business revenue is an event of default, nor that the filing of bankruptcy creates an event of default. Accordingly, the Agreements should be interpreted to mean that filing for bankruptcy protection and/or failing to generate business revenue does not constitute a breach of the Agreements. See *Blok Builders, LLC v. Katryniok,* 245 So. 3d 779, 784 (Fla. 4th DCA 2018) ("[W]hen a contract is silent on a matter, the court cannot impose contractual rights and duties under the guise of construction."); BMW of N. Am., Inc. v. Krathen, 471 So. 2d 585, 587 (Fla. 4th DCA 1985) "[W]here a contract is silent as to a particular matter, courts should not, under the guise of construction, impose on parties contractual rights and duties which they themselves omitted."). In sum, when considering the factors, a lack of a bankruptcy provision should be weighed more favorably than inclusion of a provision that provides a bankruptcy filing is a breach of the agreement, as was the case in Arch Capital.

As shown above, the factors considered by New York courts weigh in favor of finding that the subject Agreements are enforceable purchase and sales of future receivables, as opposed to loans that would be subject to usury laws.

D. Mr. Fein cannot be held Personally Liable for the Alleged Actions of Merchant Capital

Even if the Court held that the Agreements were loans subject to usury laws, Mr. Fein cannot be held personally liable to Craton Entertainment. As an initial matter, members of limited liability companies are shielded from personal liability ***35** stemming from the acts of the company. *See* Fla. Stat. § 605.04093(1). To overcome this fundamental principal, Appellants attempt to argue that the language of § 687.03(1) specifically makes any "agent, officer, or other representative" liable for participating in a usurious loan. However, this is neither an accurate reading of the statute nor supported by case law. § 687.03(1), in pertinent part, states the following:

> Except as provided herein, it shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit,

> forbearance to enforce the collection of any sum of money, or other obligation at a rate of interest greater than the equivalent of 18 percent per annum simple interest...

Fla. Stat. § 687.03(1). Contrary to Craton Entertainment's argument, this section merely broadens the scope of actors that could conduct a usurious transaction on behalf of a lender or contribute to the calculation of usurious interest. See e.g. North American Mortg. Investors v. Cape San Blas Joint Venture, 378 So. 2d 287 (Fla. 1979) (discussing that agent's commission contributed to interest on a loan, making the transaction usurious; no discussion that the agent was held liable for its actions); Feemster v. Schurkman, 291 So. 2d 622 (Fla. 3d DCA 1974) (same). The lender remains the only "person" liable for the violation of the statute. See e.g. Applebaum v. Laham, 161 So. 2d 690, 692 (Fla. 3d DCA 1964) (reversing the trial court's decision holding the agent personally liable for usury and holding agent cannot be ***36** held liable absent a "showing that the agent or employee acted in excess of his authority.").

Craton Entertainment also attempts to argue that Fein should be held liable, because officers of corporations are liable for torts they commit on behalf of the company. However, this principal is not applicable, as usury is not a tort. See Harned v. E-Z Finance Co., 254 S.W.2d 81, 86 (Tex. 1953). Further, to hold a corporate officer personally liable for usury, there must be evidence justifying piercing the corporate veil. See Bermil Corp. v. Sawyer, 353 So. 2d 579, 584 (Fla. 3d DCA 1977) (finding a corporate officer was liable for usury when he was "personally utilizing the assets of the [corporation] for the payment of personal obligations and investments; failing to maintain either the de jure or de facto existence of the corporate entity; and generally treating the corporation as a sham"). Here, Appellants failed to allege that the corporate veil should be pierced, nor have they presented the facts required to support such relief.

"A general principle of corporate law is that a corporation is a separate legal entity, distinct from the persons comprising them." Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008). "It is black letter law in Florida that to disregard this corporate fiction and hold the corporation's owners liable - to 'pierce the corporate veil' - the [party] must prove that: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent ***37** existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant." Molinos Valle Del Cibao, C. por A v. Lama, 633 F. 3d 1330, 1349 (11th Cir. 2011) (citing Gasparini v. Pordomingo, 972 So. 2d at 1055). "Even if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity is maintained." Gasparini v. Pordomingo, 972 So. 2d at 1055 (quoting Lipsig v. Ramlawi, 760 So. 2d 170, 187 (Fla. 3d DCA 2000)).

In the present case, Appellants failed to plead the necessary elements to pierce the corporation veil, and further failed to produce sufficient evidence to support such theory. Merchant Capital is a limited liability company with multiple members. Mr. Fein is one of three members of the company. A. 16-17. It is undisputed that Mr. Fein was not a party to the Agreements, nor did Mr. Fein prepare or draft the Agreements. R. 611, 933. Rather, Merchant Capital relied heavily on counsel and consultants in creating the Agreements to ensure their legality. R. 611. At the time the Agreements were entered into, there were representatives other than Mr. Fein that worked at Merchant Capital that had decision making authority to review and approve merchant agreements. R. 611. With regard to the subject Agreements, other representatives of Merchant Capital completed the underwriting and provided final ***38** approval for funding of the transactions. R. 611. Further, based on the deposition testimony provided by both Mr. Fein and Mr. Craton, Mr. Fein never communicated with Craton Entertainment or Mr. Craton. At his deposition on July 13, 2017, Mr. Fein testified as follows:

Q. Did you have any direct contact with Charles Craton?

A: I don't believe so. No, I don't think so.

A. 65.

Similarly, Charles Craton testified at his deposition on July 27, 2017 that he had no communication with Merchant Capital:
Q: Well, I guess I will start by saying have you ever had any conversations with Jordan Fein?

A: No.

Q: Has anybody at Merchant Entertainment had any conversations with Jordan Fein?

A: You mean Craton Entertainment?

Q: I am sorry.

A: No.

Q: Craton Entertainment?

A. No.

Q: Do you know what - what was Jordan Fein's connection to this lawsuit? Why did you name him as a Defendant in the counterclaim?

Mr. Gammill: Object to the form of the question. Calls for a legal conclusion. You can answer if you know.

A: Oh, me. Because my attorney told me that we needed to do that.

TA. 66-67.

Mr. Craton further testified that he had no factual basis to support the claims in the amended counterclaim regarding Mr. Fein's involvement with the Agreements:
***39** Q. So kind of getting back to the first part where it says: "Jordan Fein directly and personally participated in and oversaw the implementation of this scheme." Do you have - or do you or anybody at Craton Entertainment have any knowledge of that being true?

A. Again, as a consultation with my attorney.

Q. Okay. But putting aside whatever your attorney did - did - do you have any -

A. Personally? No.

Q: Okay. And do you as the corporate representative of Craton Entertainment have any knowledge of that being true?

A. No.

Q: Okay. Moving on to paragraph 45 it states that: "On behalf of Merchant, Jordan Fein engaged in usury in this loan transaction in a willful, wanton, malicious, callous and corrupt disregard for an indifference to Craton, its rights and its property interests." So do you individually or as the corporate representative of Craton Entertainment have any knowledge that that's true?

A: No.

Q: And have you personally or Craton Entertainment ever entered into any agreements with Jordan Fein personally?

A: No.

TA. 68-69.

Lastly, Mr. Craton testified that he has no factual basis to support the allegation in the amended counterclaim that Merchant Capital acted through Mr. Fein:
Q: Okay. Moving on to paragraph 118 it states that: "Counter-Defendant Merchant at all material times hereto acted through Defendant, Jordan Fein, its agent and its Chief Executive Officer." Do you have any factual basis to believe that statement is true?

A. No.

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As shown above, the record evidence supports a finding that (1) Mr. Fein was not a party to the Agreements and did not create the Agreements; (2) other officers ***40** or employees of the company were also involved with approval for and underwriting of the Agreements; (3) Mr. Fein never communicated with Craton Entertainment or Mr. Craton; and (4) Craton Entertainment and Mr. Craton had no factual basis to support their claim that Merchant Capital acted through Mr. Fein. Moreover, there is no record evidence to support a claim that Merchant Capital's corporate form and separate identity were not maintained, which must be proven in order to pierce the corporate veil. *See Gasparini v. Pordomingo,* 972 So. 2d at 1055. For the foregoing reasons, the trial court properly entered summary judgment in favor of Mr. Fein as to all counts raised against him in the amended counterclaim.

***41** *CONCLUSION*

For the foregoing reasons, Merchant Capital and Mr. Fein request this Court affirm the trial court's entry of the Amended Final Judgment in their favor and against Craton Entertainment and Mr. Craton.

Footnotes

1 The New York cases cited to by the Capital Stack court are as follows: Wilkson Floor Covering, Inc. v. Cap Call LLC, 2018 NY Slip Op 30943(U) (Sup. Ct. N.Y. Co. May 16, 2018); Colonial Funding Network, Inc. v. Epazz, Inc., 252 F.Supp.3d 274, 281-84 (S.D.N.Y. 2017); K9 Bytes, Inc. v. Arch Capital Funding, LLC, 56 Misc.3d 807, 57 N.Y.S.3d 625, 2017 WL 2219916, *5-7 (Sup. Ct. Westchester Co. May 4, 2017); IBIS Capital Group, LLC v. Frontier Auto Plans, Inc., 2017 N.Y. Misc. LEXIS 1684, *I (Sup. Ct. Apr. 25, 2017); Four Paws Orlando LLC, 2017 WL 1065071, *3-7 (Nassau Co. Sup. Ct. Mar. 10, 2017); Merchant Cash & Capital, LLC v. Sogomonyan, 2017 WL 2296316, *4-5 (Sup. Ct. Nassau Co. Mar. 2, 2017); *Chartock v. National Bank of California,* 2017 WL 849921, *2 (Sup. Ct. Queens Co. Jan. 17, 2017); Merchant Cash & Capital, LLC v. Frederick & Cole, LLC, 2016 WL 9026152, *5-6 (Sup. Ct. N.Y. Co. Dec. 21, 2016); Merchant Cash & Capital, LLC v. Fire Suppression Servs., Inc., 2016 WL 7655831, *1-2 (Sup. Ct. Nassau Co. Dec. 16, 2016); Retail Capital, LLC v. Spice Intentions Inc., 2016 N.Y. Misc. LEXIS 4883, *6-7 (Sup. Ct. N.Y. Co. Dec. 9, 2016); Liberation Land Co., LLC, 2016 WL 7655829, *2-4; Merchant Cash & Capital, LLC v. South Jersey Speed

LLC, 2016 WL 7655830, *1-2, 2016 N.Y. Misc. LEXIS 4852, *3-4 (Sup. Ct. Nassau Co. Dec. 13, 2016); Merchant Cash & Capital, LLC v. Transfer Intl. Inc., 2016 WL 7213444, *3 (Sup.Ct. Nassau Co. Nov. 2, 2016); Merchant Cash & Capital, LLC v. Randa's Bakely, Inc., 2016 WL 5335585, *3-4 (Sup. Ct. Nassau Co. Sept. 20, 2016); Merchant Cash & Capital, LLC v. Yehowa Med Servs., Inc., 2016 WL 4478805, *3 (Sup. Ct. Nassau Co. July 29, 2016); Merchant Cash & Capital, LLC v. G&E Asian Am. Enter., Inc., 2016 WL 4478806, *4-5 (N.Y. Sup. Ct. July 29, 2016); Platinum Rapid Funding Group Ltd, v. VIP Limousine Servs., Inc., 2016 WL 4478807, *3-4 (Sup. Ct. Nassau Co. June 8, 2016); Professional Merchant Advance Capital, LLC v. Your Trading Room, LLC, 2012 WL 12284924, *4-5 (Sup. Ct. Suffolk Co. Nov. 28, 2012); Merchants Capital Access, LLC v. South Shore Motorsports, LLC, 2011 N.Y. Misc. LEXIS 4202, *27 (Sup. Ct. Nassau Co. Aug. 19, 2011); Merchants Advance, LLC v. Tera K, LLC, 2008 N.Y. Misc. LEXIS 10889, *4 (Sup. Ct. N.Y. Co. Dec. 16, 2008); Merchant Cash & Capital, LLC v. Edgewood Group, LLC, 2015 WL 4430643, *4-5 (S.D.N.Y. July 2, 2015) affd 2015 WL 4451057, *1 (S.D.N.Y. July 20, 2015); Merchant Cash & Capital, LLC v. Hobby Horse Welding, Inc., 2016 N.Y. Misc. LEXIS 4894, *3 (Sup. Ct. Nassau Co. Dec. 21, 2016); Merchant Funding Services, LLC v. Micromanos Corp., 179 A.D. 3d 1049 (2d Dept. Jan. 29, 2020); Merchant Cash & Capital, LLC v. Ethnicity, Inc., 2016 WL 7655827 (Sup. Ct. Nassau Co. Dec. 8, 2016); Merchant Cash & Capital, LLC v. Cramer E. Constr. LLC, 2016 N.Y. Misc. LEXIS 4647 (Sup. Ct. Nassau Co. Nov. 4, 2016); Retail Capital. LLC v. Daniel Leahy, 2016 WL 6472028 (Sup. Ct. Nassau Co. Oct. 13, 2016); First Funds, LLC v. Yoshi Trading Co., (Sup. Ct. N.Y. Co. Index No. 650030/2011, ECF. No. 14, Sept. 28, 2011).

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