STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

LIFTFORWARD, INC.,

Plaintiff,

v

Case No. 21-187710-CB
Hon. Michael Warren

SIMONXPRESS PIZZA, LLC, et al.,

Defendants.

OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(9) AND (10)

At a session of said Court, held in the County of Oakland, State of Michigan
July 12, 2022

PRESENT: HON. MICHAEL WARREN

OPINION

I

This cause of action arises out of the execution of an Amended and Restated LiftForward Credit Agreement (the "Amended Credit Agreement") and an accompanying Amended and Restated Promissory Note (the "Amended Promissory Note") (collectively the "Loan Documents"). LiftForward, Inc. ("LiftForward") alleges that the Defendants have failed to fulfill their obligations under the Loan Documents. In

particular, LiftForward alleges Breach of Amended Credit Agreement and Amended Promissory Note (Count I) and Breach of Guaranty (Count II).

Before the Court is LiftForward's Motion for Summary Disposition Pursuant to MCR 2.116(C)(9) and (10). Oral argument is dispensed as it would not assist the Court in its decision-making process.[1]

At stake is whether summary disposition is warranted in LiftForward's favor pursuant to MCR 2.116(C)(9)? Because the Defendants have denied material allegations of the Complaint, the answer is "no" and summary disposition pursuant to MCR 2.116(C)(9) is denied.

Also, at stake is whether the Defendants are in default of the terms of the Amended Credit Agreement and Amended Promissory Note? Because the Defendants failed to make the required installment payments, and the wrongful conduct rule and frustration of purpose doctrine are unavailing, the answer is "yes."

[1] MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing – not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

Finally, at stake is whether summary disposition is warranted in LiftForward's favor pursuant to MCR 2.116(C)(10) where Defendants are in default of the terms of the Amended Credit Agreement and Amended Promissory Note? Because the Loan Documents are enforceable, the answer is "yes."

II
The Loan Documents

The parties agree that on or about September 28, 2018, LiftForward and SimonXpress Pizza, LLC ("SimonXpress") executed a LiftForward Credit Agreement whereby LiftForward agreed to lend SimonXpress $697,000.00 on a secured basis to be used for (a) working capital, (b) general corporate purposes, (c) business purposes and improvements to the Property (as defined in the Credit Agreement) and (d) purchases of inventory, equipment, software and services set forth in the Credit Agreement. Pursuant to an accompanying Promissory Note (Exhibit A to the LiftForward Credit Agreement) SimonXpress was required to repay the principal and interest in thirty-six monthly installment payments of $24,581.19 at a factor rate of 1.30 and Fawsi Simon, Cactus Hell, LLC, F&Z Holding, LLC, 643 Telegraph, LLC, Pinckney Petroleum, LLC, SE Corporation of Michigan, Simon Land Development Group, LLC, Simon Land Development Group of Arizona, LLC, Simon Stores Corporation, Simon's Enterprise, Inc. and Three Eagles, LLC (collectively the "Guarantors") guaranteed SimonXpress' obligations under the Credit Agreement. As security for SimonXpress' obligations, SimonXpress granted LiftForward a security interest in all of its personal property. The Guarantors also granted

LiftForward a security interest in all of their personal property and as additional security, for their obligations, Guarantors Pinckney Petroleum, LLC granted LiftForward a mortgage in real property, and 643 Telegraph, LLC and Simon's Enterprise, Inc. assigned their interests in land contracts in real property to LiftForward. Under the Credit Agreement, the outstanding principal and interest became due on May 5, 2019.

On or about May 5, 2019, LiftForward and SimonXpress executed the Amended Credit Agreement, the purpose of which was:

> to modify the terms of that certain LiftForward Credit Agreement, dated September 28, 2018 and that certain Promissory Note, dated September 28, 2018 secured by those certain Mortgages and related documents all dated September 28, 2018. As of this date, May 5, 2019, the outstanding principal amount due under the note is $608,211.28 and the accrued interest thereon is now $4,281.05, totaling $612,492.33. All parties desire to modify the terms as set forth herein.

The Amended Credit Agreement reflects that the purpose of the loan was "for (a) working capital, (b) general corporate purposes (c) business purposes and for improvements to the Property and (d) purchases of inventory, equipment, software and services set forth in Exhibit B attached hereto (collectively, 'Products')." [Amended Credit Agreement.]

The Amended Credit Agreement identifies the Factor Rate as follows:

> **Factor Rate.** The Factor Rate that applies will be documented in the Promissory Note executed with this Credit Agreement and Borrower shall pay interest on all outstanding amounts under the Credit Facility, including all unpaid interest, charges and fees payable, based on the Factor Rate as set forth in the Promissory Note. Such interest shall be payable in arrears on each Scheduled Repayment Date for all outstanding amounts, including

all unpaid interest, charges and fees payable, for the period from the preceding Scheduled Repayment Date to and including the day preceding such current Scheduled Repayment Date. You agree that Lender may compound interest daily on all outstanding amounts under the Credit Facility, including all unpaid interest, charges and fees payable.

Notwithstanding anything herein to the contrary, in no event shall any Factor Rate, rates or "interest" referred to herein (together with other fees or amounts payable hereunder which are construed by a court of competent jurisdiction to be interest or in the nature of interest) exceed the maximum rate of interest lawfully permitted by applicable law. If such maximum Factor Rate would be exceeded by the terms hereof, the rates of interest payable hereunder shall be reduced to the extent necessary so that such rates (together with other fees or amounts which are construed by a court of competent jurisdiction to be interest or in the nature of interest) equal the maximum Factor Rate permitted by applicable law, and any overpayment of interest received by Lender theretofore shall be applied, forthwith after determination of such overpayment, to reduce the unpaid principal balance under the Credit Facility and not to pay interest, or, if such excessive interest exceeds the unpaid principal balance under the Credit Facility, such excess shall be refunded, used to pay outstanding interest on the Credit Facility or otherwise returned to Borrower.

The Amended Credit Agreement identifies Events of Default, in part, as follows:

Events of Default. The occurrence of any one or more of the following events shall constitute an event of default hereunder ("**Event of Default**"):

If Borrower shall fail to pay when due any payment of principal, interest, fees or other amounts in accordance with the terms of this Credit Agreement and the Promissory Note, including, without limitation, upon the Maturity Date;

* * *

If Borrower shall default on, or breach, any of its representations, covenants or other obligations contained in this Credit Agreement, the Promissory Note or any other document or instrument provided in connection therewith (including any security agreements or similar instruments);

* * *

If this Credit Agreement or any other document or instrument provided in connection therewith (including any guarantees, security agreements or similar instruments) or any material provision of any of them becomes unenforceable, unlawful or is changed by virtue of legislation or by a court, statutory board or commission, and if any Borrower or Guarantor, as applicable, does not, within (3) days of receipt of notice such document or material provision becoming unenforceable, unlawful or being changed and being provided with any new agreement or amendment for execution, replace such document with a new agreement that is in form and substance satisfactory to lender or amend such document to the satisfaction of lender;

The Amended Credit Agreement also identifies the remedies as follows:

Remedies. Upon the occurrence of an Event of Default hereunder (unless all Events of Default have been cured by Borrower or Guarantor, as applicable, or waived by Lender in writing), Lender may, at its option: (i) by written notice to Borrower, declare the entire unpaid principal balance of the Credit Facility, together with accrued interest thereon and any other charges or fees payable hereunder, immediately due and payable regardless of any prior forbearance and (ii) exercise any and all rights and remedies available to it under applicable law, including, without limitation, the right to collect from Borrower all sums due under this Credit Agreement and the Promissory Note and repossess any Products at Borrower's expense. Borrower shall pay all reasonable costs and expenses incurred by or on behalf of Lender in connection with Lender's exercise of any or all of its rights and remedy es under this Credit Agreement, including, without limitation, reasonable attorneys' fees. Borrower waives the right to any stay of execution and the benefit of all exemption laws now or hereafter in effect.

Pursuant to an Amended Promissory Note, the Guarantors reaffirmed and guaranteed all of SimonXpress' obligations under the Amended Credit Agreement:

Personal Guarantee. Every Guarantor agrees to unconditionally, absolutely and irrevocably personally guarantee payment all amounts due (including all present and future debts and liabilities) under the terms of this Credit Agreement and the performance of Borrower its obligations under this Credit Agreement. In the event of a default under this Credit

Agreement, Guarantor agrees to pay the total outstanding balance under this Credit Agreement (including any fees, charges and interests) upon demand and perform the obligations under the terms of this Credit Agreement, without requiring Lender to proceed first to enforce payment against the Borrower. Guarantor agrees that if any amounts are for any reason whatsoever not paid or performed under the above guarantee, such Guarantor will, as a separate and distinct obligation, indemnify and save harmless Lender from and against all losses resulting from the failure of such Guarantor to pay such payment or perform such obligation Each Guarantor agrees that if any amounts are for any reason whatsoever are not paid or performed under the above guarantee or Lender is not indemnified for any reason whatsoever under the indemnity contained above, such obligations will, as a separate and distinct obligation, be performed by such Guarantor as primary obligor. The Guarantor waives all notices regarding the Credit Agreement or this guarantee, and agrees that this guarantee shall remain in full force and effect until the Credit Agreement has terminated and all amounts due have been paid in full. Guarantor agrees that Lender may report the personal liability of Guarantor for indebtedness and obligations under this Credit Agreement and the status of the Credit Facility to credit bureaus and others who may lawfully receive such information. Guarantor agrees that his or her personal credit history may be used in making credit decisions, and authorizes Lender to obtain consumer reports on the Guarantor from time to time.

The Amended Credit Agreement identifies the following Security Interest:

Security Interest. As continuing security for the prompt payment, as and when due and payable, of all amounts now or subsequently owing by Borrower to Lender and the strict performance and observance by Secured Party of all agreements, warranties, representations, covenants and conditions of Secured Party made pursuant to this Credit Agreement, the Promissory Note or any other agreement between Secured Party and Lender, Secured Party hereby grants in favor of Lender a continuing, specific and fixed security interest in all of Secured Party's undertaking, property, rights and assets of every nature and kind, now owned or subsequently acquired and at any time and from time existing or in which Secured Party has or acquires an interest, wherever situate, including all personal property, insurance policies, annuities, financial assets, accounts, chattel paper, contracts, documents of title, equipment, intangibles, instruments, inventory, investment property, money and proceeds, together with increases, additions and accessions to any of them, and all substitutions or any replacements of any of them. For certainty, Secured

> Party hereby grants in favor of Lender a first priority purchase money security interest in the PMSI Goods under the UCC and such security interest includes all accretions, substitutions, replacements, additions and accessions to any of them and all proceeds of any PMSI Goods.
>
> Secured Party agrees that Lender may file financing statements and fixture filings and deliver all notices required under applicable law or otherwise (including to any prior secured parties) to perfect its security interest.
>
> Secured Party acknowledges that value has been given by Lender to Borrower and that Lender has not agreed to postpone the time for attachment of the security interests in any of its property, rights or assets, including, for certainty, in any of the Property or PMSI Goods if applicable.
>
> The property listed in the Collateral section of this Agreement together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by a separate deed of trust instrument which will be signed in conjunction with this Agreement All the foregoing is referred to in this Agreement as (the "Property").
>
> Secured Party covenants that Borrower is lawfully seized of the Property hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for the encumbrances of record. Borrower hereby grants Lender the right to a public sale of the Property, including a power of sale if legally permissible under the law of the jurisdiction in which the property is located, even if mortgages are usually foreclosed through a judicial proceeding.

In additional to that collateral, Exhibit B to the Amended Promissory Note identifies two parcels of real property serving as collateral which LiftForward would be entitled to file a lien upon.

Pursuant to the Amended Promissory Note, SimonXpress was required to pay the outstanding balance in forty-eight (48) month installment payments of $16,496.26 at a factor rate of 1.29 with the final payment due on May 3, 2023. [Exhibit A to Amended

Promissory Note.] The Amended Promissory Note states that "Upon the occurrence of an Event of Default, additional interest and penalties shall be due and payable as follows: (i) the principal balance of this Note shall bear interest at a rate equal to three percent (3%) per month from the date of the Event of Default; and (ii) a penalty equal to the maximum amount allowed by law. Interest shall be calculated on the basis of a year of 360 days and charged for the actual number of days elapsed from the date hereof on the unpaid principal balance hereof."

SimonXpress has allegedly failed to make any installment payments since January 2, 2020. [Affidavit of Chief Credit Officer Blendi Batusha.] On October 13, 2020, LiftForward sent written notice to the Defendants, declaring them in default and accelerating the entire unpaid principal balance due under the Amended Promissory Note, together with accrued interest and other charges and fees. LiftForward alleges SimonXpress owes $1,179,455.59 representing the principal balance of $550,296.78 plus interest and fees totaling $577,556.00 plus attorneys' fees in the amount of $51,602.81.

LiftForward alleges that SimonXpress has breached the Amended Credit Agreement and Amended Promissory Note as follows:

> 39. Lender and Borrower are parties to the Amended Credit Agreement and the Amended Promissory Note, which is a valid, binding, and enforceable contract.
>
> 40. Lender has performed all of its obligations under the Amended Credit Agreement and the Amended Promissory Note.
>
> 41. Borrower breached the Amended Credit Agreement by, *inter alia,* failing to pay when required.

42. Lender has demanded that Borrower comply with the Amended Credit Agreement, but Borrower has failed and refused to do so.

43. Lender has been damaged by Borrower's breaches of the Amended Credit Agreement.

LiftForward further alleges that the Guarantors have breached the Guaranty:

45. Lender and Guarantors are parties to the Guaranty, which is a valid, binding, and enforceable contract.

46. Lender has performed all of its obligations under the Guaranty.

47. Guarantors breached the Guaranty by, inter alia, failing to pay when required.

48. Lender has demanded that Guarantors comply with the Guaranty, but they have failed and refused to do so.

49. Lender has been damaged by Guarantors' breaches of the Guaranty.

III
The Arguments

LiftForward moves for summary disposition pursuant to MCR 2.116(C)(9) and (10).[2] LiftForward argues that there is no genuine issue of material fact that the Defendants have failed to fulfill their repayment obligations under the Loan Documents and their affirmative defenses fail as a matter of law.

[2] In its Motion, LiftForward argues that "The Loan Documents provide for the application of California Law." In fact, the Amended Credit Agreement states that "This Credit Agreement and use of the Credit Facility are governed by the laws of the State of California." However, the Defendants' Response raises and applies Michigan law, and the Reply does not address this issue. Furthermore, the Reply raises and applies a Michigan statute. For that reason, the parties have waived any argument that California law should be applied.

The Defendants move for summary disposition pursuant to MCR 2.116(I)(2). The Defendants argue LiftForward cannot enforce the Loan Documents because LiftForward first breached the Loan Documents by charging an unlawful rate of interest and the Loan Documents are in fact void and unenforceable due to the usurious rate of interest. The Defendants further argue that their performance is excused due to frustration of purpose because SimonXpress' business was devastated by the Covid-19 pandemic.

IV
Standards of Review

A
MCR 2.116(C)(9)

MCR 2.116(C)(9) permits summary disposition when "the opposing party has failed to state a valid defense to the claim against him or her." A motion for summary disposition under MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings and is decided by the pleadings alone. *In re Smith Estate*, 226 Mich App 285, 288 (1997). All well-pled allegations must be accepted as true, and only if the non-moving party's defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff's right to recovery, should the motion be granted. *Grebner v Clinton Charter Twp*, 216 Mich App 736, 740 (1996).

B
MCR 2.116(C)(10)

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden,* 461 Mich at 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto,* 451 Mich at 358. The moving party "must specifically identify the issues" as to which it "believes there is no genuine issue" of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto,* 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id*. at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

V
Summary Disposition Pursuant to MCR 2.116(C)(9) is Unwarranted

Summary disposition under MCR 2.116(C)(9) is generally improper where a material allegation of the complaint is categorically denied. *Nasser v Auto Club Ins Ass'n,* 435 Mich 33, 48 (1990); *Fancy v Egrin*, 177 Mich App 714, 724 (1989); *Heligman v Otto*, 161 Mich App 735, 738 (1987) (summary disposition for failure to state a valid defense held improper where defendants categorically denied some of plaintiff's material allegations). Under MCR 2.111(C)(3), a statement that the defendant lacks knowledge or information sufficient to form a belief as to the truth of an allegation has the effect of a denial. MCR 2.111(C)(3). Furthermore, "[t]he fact that the defense ultimately might be unsuccessful in whole or in part does not render it invalid for purposes of MCR 2.116(C)(9), nor does the fact that it ultimately might be found not to create a genuine issue of material fact to be resolved at trial, thus entitling plaintiff to summary disposition." *Nasser,* 435 Mich at 48.

Here, the Defendants have categorically denied material allegations of the Complaint. The Defendants have also asserted several affirmative defenses. For these reasons, summary disposition pursuant to MCR 2.116(C)(9) is not warranted.

VI
Summary Disposition Pursuant to MCR 2.116(C)(10) is Warranted

A
The Law of Contracts

A claim for breach of contract lies when the following elements are established: "(1) parties competent to contract; (2) a proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422 (1991). A plaintiff may recover in a breach of contract action when it proves that the defendant's breach was the proximate cause of the harm the plaintiff suffered. *Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 254 (2010).

The cardinal rule when interpreting contracts is to ascertain and give effect to the intention of the parties. *Zurich Ins Co v CCR & Co, (on rehearing)*, 226 Mich App 599, 603 (1997). "In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." *In re Smith Trust*, 480 Mich 19, 24 (2008). If the language of the contract is clear and unambiguous, it must be enforced as written. *Phillips v Homer*, 480 Mich 19, 24 (2008).

B

The Defendants breached the Loan Documents by failing to make the required installment payments and is entitled to a judgment in the entire unpaid principal balance together with interest and other charges and reasonable attorney fees

The Defendants acknowledge that LiftForward loaned funds to SimonXpress and the Defendants have failed to make all required installment payments. Indeed, in their First Amended Initial Disclosures, the Defendants "contend the outstanding balance is $550,296.78, and believes (sic) the amount could be less after reconciliation and verification of the balances." In their Response, the Defendants acknowledge that "Due to extreme financial hardship brought on by the Covid-19 pandemic, Borrower stopped making payments on the Agreement and Note, and Guarantors did not make up any of the payments purportedly required by the guaranty." [Response, p 3.] Accordingly, there is no genuine issue of material fact that the Defendants are in default of the Loan Documents. Due to the default, LiftForward is entitled to the entire unpaid principal balance together with accrued interest and any other charges or fees payable under the Loan Documents.

In addition, pursuant to the Amended Credit Agreement, SimonXpress "shall pay all reasonable costs and expenses incurred by or on behalf of Lender in connection with Lender's exercise of any or all of its rights and remedies under this Credit Agreement, including, without limitation, reasonable attorneys' fees." LiftForward has presented an affidavit claiming the amount of attorney fees. The Defendants do not challenge the reasonability of the same and any argument to the contrary is deemed abandoned.

Walters v Nadell, 481 Mich 377, 388 (2008); *Houghton v Keller,* 256 Mich App 336, 339-340 (2003).

C
None of the Defendants' defenses are viable

1
The Loan Documents are enforceable and LiftForward is not the first breaching party

"[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 613 (2010) (quotation marks and citation omitted). See also *Flamm v Scherer*, 40 Mich App 1, 8-9 (1972), citing 5 Callaghan's Michigan Civil Jurisprudence, Sec. 249, pp 820-821 ("one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform"); *Verran v Blacklock*, 60 Mich App 763, 768 (1975); *Hanley v Seymour*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket No. 355033), p 4 (affirming this Court's ruling that no substantial first breach occurred). But this rule only applies if the initial breach was substantial, which requires the trial court to consider whether the nonbreaching party received the expected benefit. *Able Demolition v Pontiac*, 275 Mich App 577, 585 (2007). See also *Michaels v Amway Corp*, 206 Mich App 644, 650 (1994) (citation omitted); *Hanley*, slip opin. at 4. Other authorities characterize a substantial breach as occurring "where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby

rendered ineffective or impossible, such as the causing of a complete failure of consideration." *McCarty v Mercury Metal Co*, 372 Mich 567, 574 (1964).

Despite the Defendants' argument that LiftForward breached the Loan Documents by charging an unlawful amount of interest and the Loan Documents are unenforceable because the interest provisions violate public policy, the Amended Promissory Note contains the following Usury provision:

> H. USURY. Notwithstanding anything herein to the contrary, in no event shall any interest rate, rates or "interest" referred to herein (together with other fees or amounts payable hereunder which are construed by a court of competent jurisdiction to be interest or in the nature of interest) exceed the maximum rate of interest lawfully permitted by applicable law. If such maximum interest rate would be exceeded by the terms hereof, the rates of interest payable hereunder shall be reduced to the extent necessary so that such rates (together with other fees or amounts which are construed by a court of competent jurisdiction to be interest or in the nature of interest) equal the maximum interest rate permitted by applicable law, and any overpayment of interest received by Lender theretofore shall be applied, forthwith after determination of such overpayment, to reduce the unpaid principal balance under this Note and not to pay or, if such excessive interest exceeds the unpaid principal balance under this Note, such excess shall be refunded to Borrower. This provision shall control every other provision of all agreements between Borrower and Lender.[3]

[3] The Amended Credit Agreement similarly states: "Notwithstanding anything herein to the contrary, in no event shall any Factor Rate, rates or "interest" referred to herein (together with other fees or amounts payable hereunder which are construed by a court of competent jurisdiction to be interest or in the nature of interest) exceed the maximum rate of interest lawfully permitted by applicable law. If such maximum Factor Rate would be exceeded by the terms hereof, the rates of interest payable hereunder shall be reduced **to** the extent necessary so that such rates (together with **other** fees or amounts which are construed by a court of competent jurisdiction to be interest or in the nature of interest) equal the maximum Factor Rate permitted by applicable law, and any overpayment of interest received by Lender theretofore shall be applied, forthwith after determination of such overpayment, to reduce the unpaid principal balance under the Credit Facility and not to pay **interest, or,** if such excessive interest exceeds the unpaid principal balance under the Credit Facility, such excess shall be refunded, used to pay outstanding interest on the Credit Facility or otherwise returned to Borrower."

Because the parties agreed to never charge or collect interest above that permitted by applicable law, the Amended Promissory Note is not usurious.

Furthermore, MCL 438.31c(11) carves out an exception to the criminal usury rate provisions. That is, under MCL 438.31c(11) "The parties to a note, bond, or other indebtedness of $100,000.00 or more, the bona fide primary security for which is a lien against real property other than a single family residence, or the parties to a land contract of such amount and nature, may agree in writing for the payment of any rate of interest." Primary security has been defined as "that security which the creditor would sell first and to which he would look to obtain the greatest yield to pay the indebtedness due." *Macklin v Brown*, 111 Mich App 110, 114 (1981).

In the instant case, there is no dispute that the Loan Documents provide for financing in excess of $100,000. In addition, real property, other than a single-family residence, identified as Collateral in Exhibit B to the Amended Promissory Note serves as security for the loans and LiftForward is entitled to a lien on that property. Accordingly, MCL 438.31c(11) is applicable and the interest rate charged in the amount the Defendants agreed to pay is not usurious.

Furthermore, under the original Promissory Note and the Amended Promissory Note, the Defendants agreed "Upon the occurrence of an Event of Default, additional interest and penalties shall be due and payable as follows: (i) the principal balance of this Note shall bear interest at a rate equal to three percent (3%) per month from the date of

the Event of Default; and (ii) a penalty equal to the maximum amount allowed by law. Interest shall be calculated on the basis of a year of 360 days and charged for the actual number of days elapsed from the date hereof on the unpaid principal balance hereof." Only after they admittedly breached the Loan Documents do the Defendants claim the Amended Promissory Note is usurious. In sum the Loan Documents are enforceable and warrant summary disposition pursuant to MCR 2.116(C)(10) in LiftForward's favor.

2
The Wrongful Conduct Rule is inapplicable

The Wrongful Conduct Rule is a common law rule which generally provides that a plaintiff cannot maintain an action if the cause of action is based, in whole or in part, on the plaintiff's own illegal conduct. *Orzel v Scott Drug Co,* 449 Mich 550, 558 (1995). The rule is rooted in the public policy that courts should not lend their aid to plaintiffs whose cause of action is premised on their own illegal conduct. *Id* at 560*; Robinson v City of Detroit,* 462 Mich 439 (2000). The Rule incorporates the fundamental maxim:

> [A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party.
>
> [*Orzel*, 449 Mich at 558, citing 1A CJS, Actions, § 29, p 386. See also 1 Am Jur2d, Actions, § 45, p 752.]

The rule also incorporates the doctrine of "*in pari delicto*":

> When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-

> law maxim, known as the 'doctrine of in pari delicto' generally applies to also bar the plaintiff's claim:
>
> [A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them.
>
> [*Id.*, citing 1A CJS, Actions, § 29, p. 388. See also 1 Am Jur2d, Actions, § 46, p 753.]

To appropriately invoke the Wrongful Conduct Rule, two factors must exist: (1) the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute, *Id.* at 561, and (2) there must be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages. *Id*. at 564. In explaining the causation prong (second prong), the Michigan Supreme Court has noted:

> The maintenance of an action, under the general rule, may be refused or precluded only where the illegality or immorality with which plaintiff is chargeable has a causative connection with the particular transaction out of which the alleged cause of action asserted arose. . . .
>
> * * *
>
> [The Plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act. The unlawful act must be at once the source of both his criminal responsibility and his civil right. The injury must be traceable to his own breach of the law and such breach must be an integral and essential part of his case. Where the violation of law is merely a condition and not a contributing cause of the injury, a recovery may be permitted.
>
> [*Id.* at 564-565 (citations omitted).]

Here, LiftForward's cause of action is not based upon its own alleged illegal conduct. The subject matter of the Loan Documents is clearly legal and pursuant to MCL

438.31c(11), the interest rate assessed under the Loan Documents is not prohibited under any penal or criminal statute. The wrongful conduct rule is unavailing and does not bar LiftForward's cause of action.

3
The Frustration of Purpose defense is unavailing

Frustration of purpose is a defense to contractual performance. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133-135 (2003); *City of Flint v Chrisdom Properties, Ltd*, 283 Mich App 494, 498 (2009). "A contractual frustration of purpose exists when "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract," despite the fact that nothing impedes the party from performing the contract." *Zwiker v Lake Superior State University*, unpublished opinion of the Court of Appeals, issued February 10, 2022 (Docket Nos. 355128, 355377, 357275), p 12. As explained by our Court of Appeals in *Liggett Restaurant Group, Inc*, 260 Mich App 127 (which the Court of Appeals in *City of Flint*, 283 Mich App 494 recognized to be the leading case on point):

> Frustration of purpose is generally asserted where a change in circumstances makes one party's performance **virtually worthless** to the other, frustrating his purpose in making the contract.
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> While the frustration of purpose doctrine has yet to be considered by the Michigan Supreme Court, this Court discussed the doctrine in *Molnar v Molnar*, [110 Mich App 622 (1981)] . . . .
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> Before a party may avail itself of the doctrine of frustration of purpose, the following conditions must be present:

> (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made; (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him.
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> As noted in the Second Restatement of Contracts, "[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract." Further, "the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made."
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> [*Liggett Restaurant Group, Inc*, 260 Mich App at 133-135 (internal quotations and footnote citations omitted).]

In the instant case, the Defendants make a blanket argument that SimonXpress' business was "devastated by the Covid-19 pandemic" and as a result, the Defendants' performance is excused. The Defendants do not proffer any evidence that they were prevented from performing their obligations under the Loan Documents. Indeed, the Defendants do not even allege that SimonXpress' business was shuttered. "Trial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). A party may not simply announce a position or assert an error and leave it up to this Court to discover and rationalize the basis for their claims, or unravel and elaborate their arguments, and then search for authority to sustain or reject their position. *Mudge v Macomb Co*, 458 Mich 87, 105 (1998) ("The [Defendants themselves] must first adequately prime the pump; only then does the [trial court] well begin to flow.")

Notwithstanding the foregoing, the Covid-19 pandemic did not make LiftForward's performance virtually worthless to SimonXpress or frustrate the purpose of the loan. Indeed, the Amended Credit Agreement reflects that all advances were to be used for (a) working capital, (b) general corporate purposes, (c) business purposes and improvements to the Property and (d) purchases of inventory, equipment, software and services set forth in Exhibit B to the Amended Credit Agreement. Again, there is no allegation that SimonXpress' business ceased to operate. Furthermore, SimonXpress allegedly failed to make any payments since January 2, 2020, more than two months before the Michigan Department of Health and Human Services even identified the first two presumptive-positive cases of Covid-19 in Michigan and the first Executive Order was issued on March 10, 2020. In short, the frustration of purpose doctrine is unavailing and does not excuse the Defendants' performance or estop LiftForward from enforcing the terms of the Loan Documents.

ORDER & JUDGMENT

Based on the foregoing Opinion, LiftForward's Motion for Summary Disposition Pursuant to MCR 2.116(C)(9) and (10) is GRANTED. The Court hereby issues this Judgment of the principal balance due under the Amended Promissory Note in the amount of $550,296.78, plus accrued interest in the amount of $577,556.00, plus reasonable attorney fees of $51,602.81.

This resolves the last pending claim and closes the case.