SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

Index No 520372/2024

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CFG MERCHANT SOLUTIONS, LLC,,

ANSWER

Plaintiff,

-against-

NATIONALRX, INC DBA NATIONALRX AND JAMES FROST,

Defendants.

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Defendants by their attorney retained solely therefor answer the complaint:

1. Deny paragraph 1. Utterly false. Plaintiff has lied about its Delaware formation in order to evade the lack of subject matter jurisdiction.

https://apps.dos.ny.gov/publicInquiry/

ENTITY NAME: CFG MERCHANT SOLUTIONS, LLC
DOS ID: 5243896
ENTITY TYPE: FOREIGN LIMITED LIABILITY COMPANY
DATE OF INITIAL DOS FILING: 12/01/2017
FOREIGN FORMATION DATE: 05/18/2015
COUNTY: ALBANY
NEXT STATEMENT DUE DATE: 12/31/2023
JURISDICTION: DELAWARE, UNITED STATES

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Deny paragraph 4. No such agreement was entered nor signed by any defendant.

5. Deny paragraph 5. No such agreement as set forth in paragraph 4 was entered nor signed by any defendant.

6. Deny paragraph 6. No such agreement as set forth in paragraph 4 was entered nor signed by any defendant.

7. Deny paragraph 7. No such agreement as set forth in paragraph 4 was entered nor signed by any defendant.

8. Deny paragraph 8.

9. Deny paragraph 9 but admit payments made of at least $85,373.

10. Deny paragraph 10 and each and every subsequent allegation of the complaint not expressly admitted herein.

First Affirmative Defense: Illusory Contract. No Risk

11. To find as a matter of law that the contract was a genuine purchase, and not a loan, the transaction must be "sufficiently risky" for the funder. Strategic Funding Source, Inc. v. Takeastrole, LLC, 2023 NY Slip Op 33062(U), 4; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 A.D.3d 664 [2020]: "These provisions suggest that the plaintiff did not assume the risk that United would have less-than-expected or no revenues."

12. Plaintiff's contract eliminated the risk.

13. Here, the numbers prove that the reconciliation could only exist in the real world if there was criminal usury.

14. The plaintiff's funding/loan started at a 66% annual rate of interest. 66% is 2.65 times the 25% maximum under the criminal usury statute.

15. **Calculation of Interest**: Under the Agreement, the total payable to Defendant was $82,450, less startup fees, for which Defendant had to pay plaintiff back $114,750, by a daily payment of $765.00 per day. Defendant getting gross proceeds from plaintiff of $82,450, and having to pay back $114,750, the difference, of $32,300, was the interest that Defendant had to pay on the $82,450. $32,300 interest on $82,450, if it had to be paid back over a year, would have been 39% interest. The agreement required payments of $765.00 per day, which meant 150 payments of $765.00 each, or 150 days, to pay the $114,750. However, the $765.00 payments were only to be debited on banking, or weekdays. There being five banking days each week and taking into account the nation's annual 10 banking holidays, this meant that the 150 payments of $765.00 each were going to take 210 days total. 210 days is 59% of a year. Since 39% interest had to be paid back in 59% of a year, that was an annual interest rate of 66%.

16. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 13.89%, equaled $5,713.22 ($765.00 divided by 13.89% $5,713.22).

17. The initial 66% interest rate was 2.65 times the 25% criminal usury cap. 25 times 2.65 = 66%.

18. By the 25% criminal usury cap, the Legislature determined that any higher rate was utterly unaffordable and took criminal advantage of a borrower.

19. If the fixed daily payment was reduced so that 13.89% of receipts equaled the 25% maximum criminal usury rate rather than the 66% criminal rate, the receipts needed would only be $2,178.85. **Calculation**: The 66% interest rate divided by 25 =2.65. The $5,713.22 receipts needed under the contract to cover the 13.89% Specified Percentage divided by 2.65 = $2,178.85.

20. Therefore, until the plaintiff granted a reconciliation taking 13.89% of only $2,178.85 of receipts, the funding was criminally usurious.

21. Until receipts dropped to $2,178.85, the 13.89% specified percentage was criminally usurious.

22. If the defendant's receipts diminished from $5,713.22 to $2,178.85, it would obviously be heading out of business, unable to function or fully pay anyone. It would have no money to fully pay any employee, any landlord, any tax, any materials, any work expense, etc. Assuming that someone in business for themselves, like the individual defendant, needed

some kind of draw from his business to live on, his family was going hungry and homeless.

23. It is as if the $210,900 salary of a New York Supreme Court justice was reduced by 2.65 times = $79,584.91.

24. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 13.89% of the $2,178.85 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 13.89% debit if receipts dropped to $2,178.85.

25. This would enable plaintiff to declare a default.

26. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $765.00 fixed daily payment is enforcing criminal usury.

27. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $765.00 fixed daily payment is enforcing criminal usury.

28. The agreement was for a finite term of 210 days with payments of $765.00 each business day.

29. The entire premise of the contract was false and illusory because it purported to restrict defendants from any personal use of the business account when, to the contrary, it was obvious from the inception that the said

account would be the source of the individual defendant's livelihood. People do not form a company in order to serve as its unpaid volunteer director/officer but, instead, to draw their livelihood from it. People's livelihood includes not only basics but other expenses such as children's college tuition, annual vacations, etc.

30. The entire premise of the contract was false and illusory because it purported to restrict defendants from any personal use of the business account when, to the contrary, it was obvious from the inception that the said account would be the source of the individual defendant's livelihood. People do not form a company in order to serve as its unpaid volunteer director/officer but, instead, to draw their livelihood from it. People's livelihood includes not only basics but other expenses such as children's college tuition, annual vacations, etc.

> 4
> c. Seller *** shall use the Purchase Price, whether the funding of such Purchase Price occurs contemporaneous with the execution of this Agreement or anytime time thereafter, solely for business purposes and none will be used for personal, household or consumer purposes.
>
> o. The Bank Account is established and used for business purposes only and not for personal, family, or household purposes. p. Seller shall use the Purchase Price paid by Buyer for Future Receipts solely for business purposes in the ordinary course of Seller's business and will not use any of the Purchase Price paid by Buyer for personal, household or consumer purposes.

31. The entire premise of the contract was illusory because it purported to be a purchase of receivables, or receipts, payable from future sales, but if there was a default, the entire purchase price for such future sales was immediately due and payable even though such sales perforce did not exist.

32. It has already been established that there is no such thing as a purchase of future receivables. Stathos v. Murphy, 26 A.D.2d 500 First Dept. [1966] "(affirmed *** upon the opinion at the Appellate Division" 19 N.Y.2d 883, 885 [1967]):

> "The confusion in this area of the law arises primarily from a failure to distinguish between the assignment of future rights, such as future wages, revenues on contracts yet to be made, and the like, regarded as after-acquired property, and the assignment of present rights, typically choses in action, which have yet to ripen into deliverable assets, particularly money. * * *
> There is no doubt that the assignment of a truly future claim or interest does not work a present transfer of property. It does not because it cannot; no property yet exists."

33. The contract was full of promised benefits and rights which were illusory and false, having been taken away or made impossible by other provisions.

34. The contract indicated that payments made to plaintiff would be conditioned upon defendant's sale of products and services, and the payment therefore by defendant's customers:

> 1. Sale of Future Receipts. Seller agrees to sell to Buyer, in consideration of the Purchase Price as specified in the Schedule of Purchased Receipts, the Amount Sold, by delivering the Purchased Percentage of the proceeds of each future sale made by Seller ("Future Receipts"),

35. This benefit was illusory because under the contract, plaintiff intended to ACH-debit the fixed daily payment each business day or fixed weekly payment regardless of receipts.

> 2
> Buyer will be entitled to collect on a daily basis the cash attributable to the Purchased Percentage of the Future Receipts as specified in the Schedule of Purchased Receipts. Buyer agrees to accept the remittance of the Daily Amount

36. The reconciliation provision was illusory (see, more specific defense below).

37. The contract did not expressly make bankruptcy a default and appeared to permit bankruptcy without a default.

38. However, bankruptcy was effectively barred by the parties' agreement, among others, because the plaintiff's contract prohibited defendants from changing the approved bank account or depositing receipts into any other account:

> 4
> c. Seller shall conduct its business consistent with past practice
>
> e. Seller shall deposit all Future Receipts into the Bank Account and shall not close or change the Bank Account or change the Processor through which the major Payment Cards are settled to another processor, cease or change its payment instruction or other arrangements with Processor or to permit any event to occur that could cause a diversion of any of Seller's Payment Card transactions to another processor without Buyer's prior written consent. In the event that Seller changes its Buyer-approved Processor without Buyer's written consent, Seller shall, in addition to paying any other damages suffered by Buyer, pay to Buyer the Blocked Account Fee set forth in the Fee Structure Addendum as liquidated damages, as it will be impracticable or extremely difficult to determine the resulting damages suffered by Buyer.

39. A bankrupt or debtor in possession violates Federal Law by failing to open a debtor-in-possession account or failing to deposit receipts into the debtor-in-possession account.

> Rushton v. American Pac. Wood Prods. (In re Americana Expressways), 133 F.3d 752, 756-757 [1997]:
> "The United States Trustee has the responsibility for supervising Chapter 11 debtors in possession. The trustee's Operating Guidelines and Reporting Requirements mandate that the debtor in possession close prepetition bank accounts and open new accounts that include the words "Debtor in Possession." See Appellees' Supp. App. 91. 4 The debtor in possession is an officer of the court and subject to the bankruptcy court's power and control. See Chmil v. Rulisa Operating Co. (In re Tudor Assocs. Ltd. II), 64 B.R. 656, 661 (E.D.N.C. 1986)."

> C.C Canal Realty Trust v. Harrington, (In re Spenlinhauer), 2017 WL 1098820; 2017 U.S. Dist. LEXIS 42336, *9:
> "Debtors-in-possession are also required to deposit post-petition funds into designated debtor-in-possession bank accounts. See In re Sieber, 489 B.R. 531, 548-49 (Bankr. D. Md. 2013)."
>
> Jackson v. GSO Bus. Mgmt., LLC (In re Jackson), 643 B.R. 664, 699 [2022]:
> "The unauthorized withdrawal of funds from a debtor-in-possession bank account is an affront to the integrity of the bankruptcy process."

40. The Security Agreement portion of the contract stated

> 14 iii
> Seller further agrees that, with or without a Breach, Buyer may notify account debtors, or other persons obligated on the Future Receipts, of Seller's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Buyer.

41. That made the entire contract illusory it enabling the plaintiff to grab all assets at any time for any reason or no reason at all and thereby cause the business defendant to breach the contract by plaintiff's appropriation of the assets and funds of the business defendant.

42. The contract purported to be a purchase. This was illusory. Plymouth Venture Partners, II, L.P. v. GTR Source, LLC, 37 N.Y.3d 591, [Now Chief Justice] Rowan Wilson Diss. Op. (4-3 majority held that a CPLR

5240 motion is required, not a tort action, to attack the illegal enforcement method of a judgment):

> "Although the GTR and CMS agreements are described as "factoring" agreements, they do not bear several of the hallmarks of traditional factoring arrangements, in that FutureNet did not sell any identifiable receivable to GTR or CMS; GTR and CMS did not collect any receivables; GTR and CMS received fixed daily withdrawals from FutureNet's bank account regardless of whether or how much FutureNet collected from or billed to its clients; and GTR and CMS did not bear the risk of nonpayment by any specific customer of FutureNet. The arrangements FutureNet entered with GTR and CMS appear less like factoring agreements and more like high-interest loans that might trigger usury concerns (*see Adar Bays, LLC v GeneSYS ID*, — NY3d —, 2021 NY Slip Op 05616 [2021])"

43. The foregoing has reasonably placed the plaintiff on notice of the defense that the contract was illusory, nor need the defendants enumerate every manner in which the contract could be found illusory.

Second Affirmative Defense: Opinion Granting Summary Judgment in Case Brought By Letitia James, New York State Attorney General, Requires Dismissal

44. Under People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.) the plaintiff's MCA agreement was a predatory, illegal, criminally usurious loan, because [the plaintiff knew from the very beginning of the MCA transaction that the defendant was going to be in default of the agreement,

45. Here, plaintiff knew from the outset that defendants would be in default because the agreement forbade the individual defendant from earning a livelihood from the proceeds of the business.

46. People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.), held that the reconciliation provision was "a total sham" because "[a]lthough the MCAs provided for mandatory reconciliation of the daily amounts collected with the amounts of accounts receivable actually received" "the Borrowers were required to send bank statements to the Predatory Lenders".

47. Similarly, here, the plaintiff's MCA contract provided that, at all times, defendant was required to provide its bank statements to plaintiff:

> Dear Merchant,
> CFG Merchant Solutions, LLC will require viewing access to your bank account, each business day, in order to calculate the amount of your daily or weekly payment. *** only essential personnel will have access to it.*** Please fill out the form below with the information necessary to access your account.
> [Account information]

Third Affirmative Defense: Appellate Division Opinion of Nov. 28, 2023, Guiding Whether Transaction Is a Loan

48. Kapitus Servicing, Inc. v Point Blank Constr., Inc., 221 A.D.3d 532 [2023]:

> "Further, although the presence in an agreement of a right to reconciliation may be an indication of whether an agreement constitutes a loan, the agreement here does not make clear on its face whether it conferred that right (see Davis v Richmond Capital Group, LLC, 194 AD3d 516, 517 [1st Dept 2021])."

49. The plaintiff's contract had a seeming reconciliation provision but other provisions that abridged any right to a reconciliation:

> 8
> Seller agrees to provide Buyer any information reasonably requested by Buyer to assist in this reconciliation, i
> Upon reasonable verification of such information, Buyer shall adjust the Daily Amount on a going-forward basis
>
> 19
> b. Notices from Seller to Buyer. Seller may send any notices to Buyer by e-mail only upon the prior written consent of Buyer, which consent may be withheld or revoked at any time in Buyer's sole discretion. Otherwise, any notices or other communications from Seller to Buyer must be delivered by certified mail, return receipt requested, to Buyer's address at CFG Merchant Solutions, LLC, 201 Route 17 North, Suite 805, Rutherford, New Jersey 07070. Notices sent to Buyer shall become effective only upon receipt by Buyer.

50. This allowed plaintiff to interminably delay any reconciliation by requesting more information and verification while quixotically hunting for diverted receipts.

51. The notice provision completely insulated plaintiff from ever having to receive any reconciliation request.

52. At no time in its existence has the plaintiff ever refunded to any "merchant" any amount previously ACH-debited from the merchant because a reconciliation found that the total previously ACH-debited exceeded the Specified Percentage of the prior sales, receipts, revenue, or receivables.

53. At no time in its existence has the plaintiff ever credited to any "merchant" any amount previously ACH-debited from the merchant because a reconciliation found that the total previously ACH-debited exceeded the Specified Percentage of prior sales, receipts, or revenue, receivables.

54. The same section stated, "Seller or Buyer may request an adjustment to the Daily Amount to more closely reflect the Seller's actual Future Receipts times the Specified Percentage."

55. "Actual Future Receipts" is an oxymoron.

56. Any predilection or prognostication of the future receipts was entirely subjective.

Fourth Affirmative Defense: Illegal Contract

57. The contract stated:

> 7.
> Seller and Buyer agree that the Purchase Price paid by Buyer in exchange for the dollar figure listed as the Amount Sold of Future Receipts as set forth in the Schedule of Purchased Receipts is for the purchase and sale of the Amount Sold of Future Receipts, is a true sale of receipts

58. This rendered the contract illegal and unenforceable. It meant that defendants had to immediately pay sales and income taxes on the entire funded amount and ensuing payment of the "purchased amount". Matter of Darman Bldg. Supply Corp. v. Mattox, 106 A.D.3d 1150, 1151 [2013]:

> "In any event, sales tax is required to be remitted for the period in which the sale is made, regardless of the amount collected (*see* 20 NYCRR 532.1 [a] [2])."

59. The provision that plaintiff inserted into its contract is completely illegal and violates the tax laws of the United States by forcing the defendant to absorb the tax burden and obligation of the plaintiff.

> https://en.wikipedia.org/wiki/Loan
> United States taxes[edit]
> Most of the basic rules governing how loans are handled for tax purposes in the United States are codified by both Congress (the Internal Revenue Code) and the Treasury Department (Treasury Regulations– another set of rules that interpret the Internal Revenue Code).[6]:111
> 1. A loan is not gross income to the borrower.[6]:111 Since the borrower has the obligation to repay the loan, the borrower has no accession to wealth.[6]:111[7]
> 2. The lender may not deduct (from own gross income) the amount of the loan.[6]:111 The rationale here is that one asset (the cash) has been converted into a different asset (a promise of repayment).[6]:111 Deductions are not typically available when an outlay serves to create a new or different asset.[6]:111
> 3. The amount paid to satisfy the loan obligation is not deductible (from own gross income) by the borrower.[6]:111

> 4. Repayment of the loan is not gross income to the lender.[6]:111 In effect, the promise of repayment is converted back to cash, with no accession to wealth by the lender.[6]:111
> 5. Interest paid to the lender is included in the lender's gross income.[6]:111[8] Interest paid represents compensation for the use of the lender's money or property and thus represents profit or an accession to wealth to the lender.[6]:111 Interest income can be attributed to lenders even if the lender doesn't charge a minimum amount of interest.[6]:112
> 6. Interest paid to the lender may be deductible by the borrower.[6]:111 In general, interest paid in connection with the borrower's business activity is deductible, while interest paid on personal loans are not deductible.[6]:111The major exception here is interest paid on a home mortgage.[6]:111

60. The plaintiff has never declared as taxable income any receipt or repayment under its MCA contract.

61. The plaintiff's contract seeks to violate the tax law of the United States.

62. The contract should be stricken and the action dismissed. Rosenblum v. Manufacturers Trust Co., 270 N.Y. 79, 84-85[1936]:

> "[E]quity can interfere in a suit for cancellation or rescission to prevent the enforcement of an unjust agreement induced by a unilateral mistake of fact. A mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract. (Smith v. Mackin, 4 Lans. 41, 44, 45; Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373.) If the erroneous transaction was such as to involve the act of the plaintiff only and the effect of the transaction would be the unjust enrichment of the defendant, the plaintiff is entitled to

> have the transaction rescinded, although he was the only party mistaken. (Clark on Equity, § 372.)".
>
> Metropolitan Model Agency USA v. Rayder, 168 Misc. 2d 324, 326 [1996]:
> "[I]t is well-settled law that a contract which violates a State statute is void and unenforceable. (New York State Med. Transporters Assn. v Perales, 77 NY2d 126, 133; Weir Metro Ambu-Serv. v Turner, 57 NY2d 911; Village of Upper Nyack v Christian & Missionary Alliance, 143 Misc 2d 414, affd 155 AD2d 530.)"

63. The contract requiring defendant to pay sales and income taxes on the purchased amount, in addition to the unheard of interest and repayment, it is illusory.

Third Affirmative Defense: Criminal Usury.

64. Oakshire Props., LLC v Argus Capital Funding, LLC, ___ AD3d ___, 2024 NY Slip Op 03943, Fourth Dept. Appellate Division, held that:

A. "although there is a reconciliation provision in the agreement, the provision appears illusory inasmuch as Argus may not be subject to any consequences for failing to comply with its terms"

> Here, while not stating that failure to reconcile would constitute a breach, neither did the contract provide any remedy or consequences to plaintiff in the event that plaintiff failed to reconcile, and permitted plaintiff to continue to ACH-debit the automatic payments even if it

did not reconcile. Instead, the contract only made a breach by defendant a breach:

> 11. **Breach of Contract.** A "Breach" of this Agreement shall include, but not be limited to, any of the following events: (a) Seller intentionally interferes with Buyer's right to collect the Purchased Percentage or the Daily Amount; (b) the breach by Seller of any covenants, terms or conditions contained in this Agreement; (c) any representation or warranty made by the Seller in this Agreement or Seller's application for this Agreement is incorrect, false or misleading; and (d) Seller fails to provide bank statements and other reasonably requested financial information within seven (7) calendar days after request from Buyer.
> 12. **Remedies for Breach of Contract.** In the event of a Breach, Buyer shall be entitled to all remedies available at law and equity.

B. "Argus has sole discretion to adjust the amount of the daily payments."

C. "a default on the part of Oakshire would occur where, inter alia, "two or more [automatic withdrawal] transactions attempted by [Argus] within one calendar month are rejected by [the] bank," immediately accelerating the entire amount"

D. "there was an implied finite term in the agreement inasmuch as plaintiffs allege that the daily payment amount was set to ensure that Argus's targeted return would be met in a predetermined

period of time as opposed to having been set based on the specified percentage of Oakshire's sales"

It has already been demonstrated, above, that the fixed payment was to be ACH-debited by plaintiff regardless of any receipts, and not as a percentage of any receipts.

E. "the agreement allowed Argus, in its sole discretion, to continue making daily payment withdrawals even if the daily payment amount exceeded Oakshire's sales, thereby providing Argus with a means to compel an event of "default" upon which it could then immediately accelerate the entire debt".

It has already been demonstrated, above, that the fixed payment was to be ACH-debited by plaintiff regardless of any receipts at all, and not as a percentage of any receipts, providing plaintiff with a means to compel a default upon which it could immediately accelerate the entire debt.

65. For the reasons outlined in this answer, the transaction was criminally usurious, the interest rate being above the maximum legal threshold of 25%.

66. The idea that a reconciliation provision creates risk that precludes usury is absurd. The initial interest far exceeded the 25% interest

rate above which the Legislature has determined a loan is criminally usurious. By stating that an interest rate above 25% is criminally usurious, the Legislature believed that any higher rate was utterly unaffordable and took criminal advantage of a borrower. Therefore if receipts stayed exactly the same, the funding was already deemed utterly unaffordable. The idea that such a borrower could be faulted for not seeking a reconciliation if receipts plummeted even further endorses the criminally usurious funding. Criminal usury has been rebuked by the Court of Appeals in the strongest possible terms. Adar Bays, LLC v. GeneSYS ID, Inc., 37 NY3d 320 [2021].

67. The interest rate was ridiculously higher than the 25% legal limit.

68. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] held that criminal usury was demonstrated by "in the event of the [ ] defendants' default by changing their payment processing arrangements or declaring bankruptcy."

69. The plaintiff's contract prohibited any change of the payment processing arrangements.

70. The plaintiff's contract effectively made bankruptcy a default (above).

71. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] found that the agreement was a criminally usurious loan because

"the plaintiff was "under no obligation" to reconcile the payments to a percentage amount of the [ ] defendants' sales rather than the fixed daily amount".

72. Here, while the contract did not expressly state that plaintiff was "under no obligation" to provide a reconciliation, the contract effectively permitted plaintiff to avoid any reconciliation.

73. Nothing in the plaintiff's contract enabled defendants to stop the fixed daily or weekly payment without being in default, nor did anything in plaintiff's contract force plaintiff to stop its ACH-debit of the fixed daily or weekly payment.

74. Nothing in the contract avoided the fixed daily or weekly payment if defendants had no receipts.

75. The contract eliminated all risk (provisions quoted herein).

76. While the initial interest rate could have been theoretically reduced by a reconciliation, this would not negate the usury:

> Band Realty Co. v. North Brewster, Inc., 37 N.Y.2d 460 [1975] (quoting Feldman v Kings Highway Sav. Bank (278 App Div 589, 590, affd 303 NY 675) "[So] long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury."); Canal v Munassar, 144 A.D.3d 1663 [2016]; Norstar Bank v. Pickard & Anderson, 140 A.D.2d 1002, [1988]; DeStaso v Bottiglieri, 25 Misc. 3d 1213(A), 2009 NY Slip Op 52082(U); Fremont Inv. & Loan v. Haley, 23 Misc. 3d 1138(A), 2009 NY Slip Op 51186(U).

Canal v Munassar, 144 A.D.3d 1663, 1664 [2016]:
In determining whether the interest charged exceeded the usury limit, courts must apply the traditional method for calculating the effective interest rate as set forth in *Band Realty Co. v North Brewster, Inc*. (37 NY2d 460, 462 [1975], *rearg denied* 37 NY2d 937 [1975]) (*see Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972 [2013]). According to that method, "[s]o long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury" (*Band Realty Co.*, 37 NY2d at 464 [internal quotation marks omitted]).

Norstar Bank v. Pickard & Anderson, 140 A.D.2d 1002, [1988]: "[T]he bank contended that the variable rate of interest charged on the loan should be averaged over the term of the loan for the purpose of determining whether the interest rate was usurious. ***. Although there is a conflict in authority (see, Annotation, Usury in Connection with Loan Calling for Variable Interest Rate, 18 ALR4th 1068), we believe the better rule is that, in the case of a loan at a variable rate of interest, the interest charged should not be averaged over the term of the loan in determining whether a usurious rate has been charged [citations] * * * If defendants were compelled to average the rate of interest charged over the full term of the loan, they would not know whether a usurious rate was being charged until the end of the term. Thus, they would be compelled to make excessive interest payments for a substantial period and would not be able to seek relief from the usurious payments until the expiration of the loan. On the other hand, the bank could have readily avoided charging usurious interest on its loan by placing a cap on the charges for interest so that no payment would exceed the variable legal rate".

American Express Natl. Bank v. Ellis, 2023 NY Slip Op 51428(U), 2
That the initial interest rate of 0% is legal under GOL § 5-501 would not save the agreement, given the contemplated increase to rates that exceed New York's 16% cap.1 (*See Fremont Inv. & Loan v Haley*, 23 Misc. 3d 1138[A], 889 N.Y.S.2d 505, 2009 NY Slip Op 51186[U], at *7 [Sup Ct, Queens County 2009]; *accord Norstar Bank v Pickard & Anderson*, 140 AD2d 1002, 1002-1003, 529 N.Y.S.2d 667 [4th Dept 1988] [holding that "in the case of a loan at a variable rate of interest,

the interest charged should not be averaged over the term of the loan in determining whether a usurious rate has been charged"].)

77.

78. The above and foregoing has reasonably placed the plaintiff on notice of the defense of criminal usury.

Fourth Affirmative Defense: Opinion Granting Summary Judgment in Case Brought By Letitia James, New York State Attorney General, Requires Dismissal

79. Under People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.) the plaintiff's MCA agreement was a predatory, illegal, criminally usurious loan, because [the plaintiff knew from the very beginning of the MCA transaction that the defendant was going to be in default of the agreement,

80. Here, plaintiff knew from the outset that defendants would be in default because the agreement forbade the individual defendant from earning a livelihood from the proceeds of the business.

81. Under People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.) the plaintiff's MCA agreement was a predatory, illegal, criminally usurious loan, because [1] there was one or more prior UCC's filed against the defendant, prior to plaintiff's MCA contract, [2] the plaintiff's MCA contract provided that the defendant represented that there were no prior UCC liens, [3] the plaintiff's MCA contract provided that

any breach of such representation was a default, [4] the plaintiff therefore had actual or constructive knowledge, from the very beginning of the MCA transaction that the defendant was in default of the agreement, [5] the annualized interest rate was far above 25%.

82. The parties' contract was dated: ////////.

83. Prior UCC-1's:

84.

85. Contract provisions:

86. People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.), held that the reconciliation provision was "a total sham" because "[a]lthough the MCAs provided for mandatory reconciliation of the daily amounts collected with the amounts of accounts receivable actually received" "the Borrowers were required to send bank statements to the Predatory Lenders".

87. Similarly, here, the plaintiff's MCA contract provided that, at all times, defendant was required to provide its bank statements to plaintiff:

Fifth Affirmative Defense: Violations Found in Action by the New York State Attorney General

88. Her Honor, Letitia James, Attorney General, filed an action against a host of merchant cash advance lenders on March 5, 2024, People v

Yellowstone et al., Supreme Court, Albany County, Index No. 450750/2024, for $1.3B.

89. This action was based upon an investigation by the New York Attorney General and proves that none of the defenses recited in this answer were invented by defense counsel.

90. At paragraph 384 of her petition, Attorney General noted that the "Agreements also require full, immediate payment of the entire Payback Amount in the event of default—discarding altogether the notion of payments tied to the merchants' revenue." The same provision is in plaintiff's contract.

91. The Attorney General stated in her petition, paragraph 210: "By Reconciling merchants' payments against a made-up, inflated Specified Percentage number that bore no relation to the Daily Amount actually negotiated by the Parties, Yellowstone, Delta bridge, and their Funders made it virtually impossible for merchants to qualify for any Reconciliation refund. As one merchant explained, "I cannot imagine that [my business] would have taken advantage of this reconciliation process, since reconciling [my business's] payments based on this 15% 'Specified Percentage' likely would have caused its payment amount not to decrease but to increase."

92. Attorney General's Memorandum of Law:

20:

Respondents determine payment amounts for each transaction based not on such percentages but instead on the number of days in the term. Supra at 8-9. The term length, in turn, is based not on Specified Percentages but primarily on the risk of nonpayment, as reflected by such factors as merchants' credit ratings and payment histories. Petition ¶¶ 152-70. Furthermore, even beyond the payment amount, the Specified Percentage is treated as irrelevant to the entire so-called purchase of revenue. Petition ¶¶ 318-78.

b. Respondents Manipulate Their Specified Percentages to Prevent Merchants from Obtaining Reconciliation Refunds

For years, Respondents have set their Specified Percentages at values so high that it has been virtually impossible for merchants to obtain refunds through payment reconciliation. As a result, Respondents' Reconciliation Clauses are illusory, further showing that their purported MCAs are loans. See generally Petition ¶¶ 203-48.

For example, Delta Bridge in 2022 issued an MCA to the merchant Cookies Restaurant Group ("Cookies") which set a Daily Amount of $208, Rubey Aff. Ex. 2B at 1, an amount equaling 13-18% of the merchant's historical daily revenue, Rubey Aff. ¶ 29. But Delta Bridge fraudulently stated 49% as Cookies' Specified Percentage and falsely stated that $208 was a "good faith approximation" of the 49% number. Rubey Aff. Ex. 2B at 1. By doing so, Delta Bridge raised the bar impossibly high for Cookies to obtain a reconciliation of its past payments. Thus, when Cookies experienced a 50% decline in its revenues, Delta Bridge refused the merchant's request for a reconciliation refund because the amount Delta Bridge had collected ($6,953) was still less than 49% (the Specified Percentage) of the merchant's $37,041 in revenues. Ex. 394 at 164 (row 26989); Rubey Aff. ¶ 33.

21

In its earliest agreements, Yellowstone set its Specified Percentages at around 10% and 15%, then in 2017 and

> 2018 raised the percentages to 25%. Petition ¶¶ 216-23. From 2019 through 2021 Yellowstone issued MCAs with higher and higher percentages – most commonly 49% of merchants' revenue (as in the case of Cookies, supra), a practice that Delta Bridge adopted when it continued Yellowstone's business in May 2021. Petition ¶¶ 226-48. Respondents set Specified Percentages far higher than the payment amounts merchants agree to, see Rubey Aff. ¶¶ 29, 54, and far higher than merchants can realistically repay, e.g., Saffer Tr. at 238:9-17; McNeil Tr. at 119:14-17, 122:22-24. The purpose and effect of doing so is to put reconciliation out of reach for merchants, Petition ¶¶ 236, 241-48, ensuring that Respondents' Reconciliation Clauses are mere "window dressing." Fleetwood, 2022 WL 1997207, at *11.4

93. Similarly, in this action, the plaintiff, CFG MERCHANT SOLUTIONS, LLC,, set a Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

94. At paragraph 387 of her petition (NYSCEF Doc. No. 1), the Attorney General noted that "These secured interests give Respondents priority status in the event of a merchant's bankruptcy, ensuring that they can still recover in full against the merchant's assets—even if the merchant has collected zero dollars in revenue".

95. The contract of plaintiff had a similar secured interest:

96. The Attorney General noted that a reconciliation was blocked, under the same provision as here: Petition page 91, paragraph 262 and 263:

> "262*** Reconciliation was not available at all to merchants whose declining revenues left insufficient funds in their bank accounts to accommodate debits of the Daily Amounts *** 263. Respondents accomplished this through contractual language barring merchants from Reconciliation if the merchant was "in default" of its Agreement, and by deeming a "default" to include four bounced payments.

97. The Attorney General pointed out that a reconciliation was abridged by the ability to demand one only within a five day window period each month:

> (NYSCEF Doc. No.3) page 17 of 39:
> (b) "there was no time to [reconcile] because [the merchant] could request reconciliation only within five business days following the end of a business month," and (c) "the fixed daily payment . . . was not a good faith estimate of 15% of [the merchant's] receivables."
>
> Page 23
> e, Respondents restricted reconciliation in additional ways, including by allowing merchants to request relief only during a narrow, five-day window each month. Petition ¶¶ 287-88. Consequently, a "mid-month decline in revenues" could "trigger a default under the contract and entitle the lender to immediately seek the whole uncollected amount." Haymount, 609 F. Supp. 3d at 248; accord McNider Marine, 2019 WL 6257463, at *4

98. Plaintiff's contract, here, abridged the right to any reconciliation.

99. The Attorney General stated at page 98 of her petition:

> 281. In addition, because Yellowstone and Delta Bridge's Reconciliation procedures looked at merchants' payments over the entire term of the MCA [citation] Reconciliation

> refunds continued to be unavailable in the case of a sudden drop in revenue.

100. Plaintiff had a similar provision.

92.

Sixth Affirmative Defense: Illegal Contract

101. The contract stated:

> 16 *** g. Accounting Records and Tax Returns. Merchant shall treat receipt of the Purchase Price and delivery of the Specified Percentage of Future Receipts in a manner consistent with its nature as a true sale of Future Receipts in its accounting records and tax returns and further agrees that Purchaser is entitled to audit Merchant's accounting records upon reasonable Notice in order to verify compliance. Merchant hereby waives any rights of privacy, confidentiality, or taxpayer privilege in any litigation or arbitration arising out of this Agreement in which Merchant asserts that this transaction is anything other than a sale of future receipts.

102. This rendered the contract illegal and unenforceable. It meant that defendants had to immediately pay sales and income taxes on the entire funded amount and ensuing payment of the "purchased amount". Matter of Darman Bldg. Supply Corp. v. Mattox, 106 A.D.3d 1150, 1151 [2013]:

> "In any event, sales tax is required to be remitted for the period in which the sale is made, regardless of the amount collected (*see* 20 NYCRR 532.1 [a] [2])."

103. The provision that plaintiff inserted into its contract is completely illegal and violates the tax laws of the United States by forcing the defendant to absorb the tax burden and obligation of the plaintiff.

> https://en.wikipedia.org/wiki/Loan
> United States taxes[edit]
> Most of the basic rules governing how loans are handled for tax purposes in the United States are codified by both Congress (the Internal Revenue Code) and the Treasury Department (Treasury Regulations– another set of rules that interpret the Internal Revenue Code).[6]:111
> 1. A loan is not gross income to the borrower.[6]:111 Since the borrower has the obligation to repay the loan, the borrower has no accession to wealth.[6]:111[7]
> 2. The lender may not deduct (from own gross income) the amount of the loan.[6]:111 The rationale here is that one asset (the cash) has been converted into a different asset (a promise of repayment).[6]:111 Deductions are not typically available when an outlay serves to create a new or different asset.[6]:111
> 3. The amount paid to satisfy the loan obligation is not deductible (from own gross income) by the borrower.[6]:111
> 4. Repayment of the loan is not gross income to the lender.[6]:111 In effect, the promise of repayment is converted back to cash, with no accession to wealth by the lender.[6]:111
> 5. Interest paid to the lender is included in the lender's gross income.[6]:111[8] Interest paid represents compensation for the use of the lender's money or property and thus represents profit or an accession to wealth to the lender.[6]:111 Interest income can be attributed to lenders even if the lender doesn't charge a minimum amount of interest.[6]:112
> 6. Interest paid to the lender may be deductible by the borrower.[6]:111 In general, interest paid in connection with the borrower's business activity is deductible, while

> interest paid on personal loans are not deductible.[6]:111The major exception here is interest paid on a home mortgage.[6]:111

104. The plaintiff has never declared as taxable income any receipt or repayment under its MCA contract.

105. The plaintiff's contract seeks to violate the tax law of the United States.

106. The contract should be stricken and the action dismissed. Rosenblum v. Manufacturers Trust Co., 270 N.Y. 79, 84-85[1936]:

> "[E]quity can interfere in a suit for cancellation or rescission to prevent the enforcement of an unjust agreement induced by a unilateral mistake of fact. A mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract. (Smith v. Mackin, 4 Lans. 41, 44, 45; Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373.) If the erroneous transaction was such as to involve the act of the plaintiff only and the effect of the transaction would be the unjust enrichment of the defendant, the plaintiff is entitled to have the transaction rescinded, although he was the only party mistaken. (Clark on Equity, § 372.)".

> Metropolitan Model Agency USA v. Rayder, 168 Misc. 2d 324, 326 [1996]:
> "[I]t is well-settled law that a contract which violates a State statute is void and unenforceable. (New York State Med. Transporters Assn. v Perales, 77 NY2d 126, 133; Weir Metro Ambu-Serv. v Turner, 57 NY2d 911; Village of Upper Nyack v Christian & Missionary Alliance, 143 Misc 2d 414, affd 155 AD2d 530.)"

107. The contract requiring defendant to pay sales and income taxes on the purchased amount, in addition to the unheard of interest and repayment, it is illusory.

Seventh Affirmative Defense: Arbitration

108. The plaintiff's contract had an arbitration clause.

109. However, ARBITRATION SERVICES, INC. is not a genuine arbitration organization with independent neutrals. It was incorporated by a crafty attorney in order to serve as a rubber stamp for clients paying his initial fee. *Cf.*, Petition to stay arbitration in Matter of Automodule, Index No. 616585/2022, Nassau County Supreme Court.

110. Defendants therefore reserve the right to demand arbitration in a genuine arbitration forum like the American Arbitration Association.

111. Nor could defendants have been reasonably expected when signing plaintiff's contract that ARBITRATION SERVICES, INC. was not a genuine arbitration organization. *Cf.*, Empery Asset Master, Ltd. v. AIT Therapeutics, Inc., 197 A.D.3d 1064, 1065 [2021]:

> "We cannot conclude, as a matter of law, that a reasonable person reviewing a 20-page warrant and a 42-plus-page Securities Purchase and Registration Rights Agreement would have realized that the word "sentence" (in "immediately preceding sentence") should have been "sentences." "

112. Defendants reserve the right to demand arbitration. De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 405-406 [1974]: "[A] defendant's right to compel arbitration, and the concomitant right to stay an action, does not remain absolute regardless of the degree of his participation in the action. (Matter of Zimmerman v. Cohen, 236 N. Y. 15.) *** On the other hand, interposing an answer of itself does not work to waive a defendant's right to a stay. (Matter of Hosiery Mfrs. Corp. v. Goldston, 238 N. Y. 22, 27.) *** Of course, the existence of an arbitration agreement is not a defense. (American Reserve Ins. Co. v. China Ins. Co., 297 N. Y. 322, 327; Aschkenasy v. Teichman, 12 A D 2d 904.)"

Eighth Affirmative Defense. Lack of Subject Matter Jurisdiction.

113. The plaintiff was formed in a state other than New York. The business defendant was formed in a state other than New York and was never registered or authorized to do business in New York. No party is a resident of New York. The parties' transaction was for less than $1,000,000. The object of the action does not affect the title of real property in New York.

114. Under Business Corporation Law §1314(b), the court lacks subject matter jurisdiction. Parkview Advance LLC v High Purity, 2023 NY Slip Op 32976(U); Pearl Beta Funding, LLC v Elegant, 2023 NY Slip Op 31936(U); Harper Advance LLC v Reynolds, 2023 NY Slip Op 31191(U).

115. Techo-TM, LLC v Fireaway, Inc., 123 A.D.3d 610 [2014], where the First Department dismissed for lack of subject matter jurisdiction an action by a limited liability company, confirmed that any type of forum selection clause could not confer subject matter jurisdiction: "However, while New York recognizes consent as a basis for personal jurisdiction (see CPLR 301 and Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 301:1), it does not recognize consent as a basis for long-arm jurisdiction (see Graham v New York City Hous. Auth., 224 AD2d 248 [1st Dept 1996])."

116. Techo-TM, though a First Department opinion, is binding on all trial courts in New York, there being no contrary appellate division opinion from any other department. Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 665, Second Department. [1984].

117. Actions required to be dismissed under BCL §1314(b) are routinely dismissed against the foreign entity defendant as well as the individual defendant. Mobile Programming LLC v. Tallapureddy, 2021 NY Slip Op 50411(U); Pearl Beta Funding, LLC v Eleant, 2023 NY Slip Op 31936(U); Harper Advance, LLC v Reynolds, 2023 NY Slip Op 31191(U); Parkview Advance, LLC v High Purity, 2023 NY Slip Op 32976(U); Fox

Capital Group Corp. v Tomassetti, Sup. Ct., Kings Cty. Index No. 523737/2021 (NYSCEF Doc. No. 60, Dec. 23, 2022).

118. The exception to BCL §1314(b) is if the transaction arose in New York. The test for this was established by Kapitus Servicing, Inc. v Point Blank Constr., Inc., 221 A.D.3d 532 [2023]:

> "We agree with Supreme Court's finding that it had subject matter jurisdiction over the action, but on grounds different from those that the court stated. An action against a foreign corporation may be maintained "where it is brought to recover damages for a breach of contract made within New York State" (Business Corporation Law § 1314[b][1]). Here, the agreement was made in New York. As this Court has held, the "place of making of [a] contract is established when the last act necessary for its formulation is done, and at the place where that final act is done" (Fremay, Inc. v Modern Plastic Mach. Corp., 15 AD2d 235, 237 [1st Dept 1961] [internal quotation marks omitted]). According to the affidavit of plaintiff's vice president, plaintiff performed the last necessary act in New York by sending funds to Point Blank's Florida bank account; the sending of those funds, not Point Blank's passive receipt of them in Florida, was the last act necessary for formulation of the agreement."

119. Plaintiff's funding was wired to defendant from a bank outside of New York.

Ninth Affirmative Defense: Lack of Standing

120. The plaintiff has sued as a trade name. Therefore, the court lacks jurisdiction of the action.

> Provosty v Hall Hosp., 91 AD2d 658, 659 (1982, aff'd. 59 NY2d 812): "It is undisputed that Lydia E. Hall Hospital is not a corporation, and that it is a trade name employed by its sole owner, Dr. Carl H. Neuman. Moreover, it is further undisputed that a certificate of doing business under the assumed name Lydia E. Hall Hospital had been filed by Dr. Neuman in the Nassau County Clerk's office in the summer of 1974 (see General Business Law, 130). *** In arguing, inter alia, that the complaint in Action No. 1 must be dismissed, Dr. Neuman correctly maintains that a trade name, as such, has no separate jural existence, and that it can neither sue nor be sued independently of its owner".
>
> Little Shoppe Around the Corner v. Carl, 80 Misc. 2d 717, 719 [1975]:
> "In the instant action, the name of the would-be plaintiff is not that of a partnership or a general association, but is merely a trade name. No action may be brought by, nor may any suit be maintained against, a trade name as an entity. (Marder v. Betty's Beauty Shoppe, 38 Misc 2d 687.) Any such proceeding is a nullity (Marder, supra). Absent a party plaintiff, "the judgment is in such case futile, because in truth no action is then pending between the parties named. If the plaintiff in that action was not in existence, the defendants named in the summons and complaint were, in fact, not required to appear in court and answer the complaint." (MacAffer v. Boston & Maine R. R., 268 N. Y. 400, 404, supra.)"

121. Plaintiff failed to publish its articles of organization.

Lexis/Nexis search result of even date:

122. This failure requires that the action be dismissed. Limited Liability Company Law §206. Affidavits of publication. (a) Within one hundred twenty days after the effectiveness of the initial articles of

organization as determined pursuant to subdivision (d) of section two hundred three of this article, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers of the county in which the office of the limited liability company is located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk. *** **Proof of the publication required by this subdivision, consisting of the certificate of publication of the limited liability company with the affidavits of publication of such newspapers annexed thereto, must be filed with the department of state.**

> Three Egg Studios LLC v FJH Realty Inc., 2019 NY Slip Op 30805(U), 2-3, Kings County:
> "The Second Department has recently held that the language of §206 requires that where a plaintiff has failed to comply with the publication requirement, the action must be dismissed, citing Barklee."
>
> Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P., 137 A.D.3d 1102, 1103 [2016]:
> "Limited Liability Company Law § 206 requires limited liability companies to publish their articles of organization or comparable specified information for six successive weeks in two local newspapers designated by the clerk of the county where the limited liability company has its principal office, followed by the filing of an affidavit with the Department of State, stating that such publication has been completed (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki , 309 AD2d 310, 311 [2003]). Failure to comply with these requirements precludes a limited liability company from maintaining

> any action or special proceeding in New York (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki, 309 AD2d at 311). Here, as the defendants correctly contend, since the plaintiff failed to comply with the publication requirements of Limited Liability Company Law § 206, it is precluded from bringing this action (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki, 309 AD2d 310 [2003]).”

Tenth Affirmative Defense: Unconscionability/Adhesion Contract

123. By the very nature of their transaction, as more fully set forth below, the parties had completely unequal bargaining power, defendants were not in the least “sophisticated,” and any review of plaintiff’s contract by any counsel for defendants was known to be incongruous with the parties’ transaction.

124. The parties’ transaction was the very antithesis of two sophisticated parties hammering out the terms of a contract through experienced counsel.

125. Under the circumstances, as more fully set forth below, unconscionability and adhesion contract is an available defense, notwithstanding that the one-person business defendant was filed as a business entity. Gillman v Chase Manhattan, 135 A.D.2d 488, 491, Second Dept. [1987]:

> "[T]he doctrine of unconscionability has little applicability in the commercial setting because it is presumed that

> businessmen deal at arm's length with relative equality of bargaining power [string cite]. Apparently, the doctrine is primarily a means with which to protect the `commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company' [citation]."
>
> Delphi-Delco Elecs. Sys. v. M/V Nedlloyd Europa, 324 F. Supp. 2d 403, 414, S.D.N.Y. [2004]:
>
> "Allied Chemical Intern. Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476, 482 (2d Cir. 1985) ("We bear in mind that bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier.")."

126. Plaintiff advertised its funding/loan as being immediate funding/loan available in 24 hours.

127. Plaintiff knew that its borrowers came to it for immediate funding available in 24 hours/

128. Plaintiff knew that there was neither time, opportunity, nor ability to review the fine print of the documents that it submitted for DocuSigning by defendants for emailing to plaintiff and that the transaction was designed for no review of plaintiff's contract. *Cf.*, Empery Asset Master, Ltd. v. AIT Therapeutics, Inc., 197 A.D.3d 1064, 1065 [2021]:

> "We cannot conclude, as a matter of law, that a reasonable person reviewing a 20-page warrant and a 42-plus-page Securities Purchase and Registration Rights Agreement would have realized that the word "sentence" (in "immediately preceding sentence") should have been "sentences." "

129. Plaintiff's lengthy contract is pre-printed in fine print and not available for negotiation by borrowers like defendant.

130. Plaintiff knew but failed to inform defendants of provisions of the agreement known by plaintiff to be intended and used by plaintiff to the detriment of defendants, such as:

- The exorbitant interest rate.
- That plaintiff would not routinely lower the interest rate after the first set of payments.
- The funding was unaffordable especially by a borrower needing instant cash financing.
- The fixed daily payment or fixed weekly payment was immutable with no way of defendants to avoid it and with no ability to obtain any immediate relief from the fixed payments.
- a secured interest provision under which plaintiff would and could send UCC lien notices to defendant's customers to cut off payments to defendant and disable defendant from any further business with such customer with such UCC lien notices demanding inflated unjustified amounts.

- inclusion of additional guarantors other than the individual defendant.
- a reconciliation provision, never actually employed by plaintiff, but used by plaintiff to confuse a court into believing that its loan was an investment.
- the fact that plaintiff would not accord with the underlying assumption of defendants that plaintiff was *loaning monies* but that the transaction would be claimed by plaintiff not to be a loan at all but to be a purchase and sale in order to justify the criminally usurious rate of interest.
- a forum selection clause under which the defendants would be sued in New York in any random county.

131. There is no term in plaintiff's contract that should shield it from the defense of unconscionability of adhesion contract. *Cf.*, Danann Realty Corp. v. Harris, 5 N Y 2d 317 [1959].

132. The foregoing has reasonably placed the plaintiff on notice of the defense of unconscionability and adhesion contract.

Eleventh Affirmative Defense: The Contract Caused Its Own Breach

133. Plaintiff's contract stated a "Specified Percentage.

134. The contract also stated a fixed daily or weekly payment that plaintiff was to ACH-debit from defendant's bank account.

135. The fixed payment is generally regarded to be alleged by the funder to be an estimate of the Specified Percentage of the future receipts. Apex Funding Source LLC v. Boomer Naturals Inc., 2023 N.Y. Misc. LEXIS 3854, 2023 NY Slip Op 32595(U); Capybara Capital LLC v. Zilco NW LLC, 2023 N.Y. Misc. LEXIS 2395; 2023 NY Slip Op 50476(U).

136. As to reductions of the fixed payment, the contract contained a backward looking reconciliation contemplating that prior ACH-debits that were in excess of the Specified Percentage of receipts would be refunded.

137. However, there was no forward looking reconciliation under which the fixed daily payment or fixed weekly payment could be reduced.

138. Therefore, even if receipts plummeted to near zero, there was no right to a payment reduction and plaintiff was still debiting the fixed daily or weekly payment.

139. With receipts near zero, or any substantially diminished amount, the fixed daily payment or fixed weekly payment from defendant's bank was no longer anything near the Specified Percentage but substantially higher, up to 100% if there were zero receipts.

140. The terms of the contract therefore permitted plaintiff to breach its fundamental provision: the repayment term. If receipts diminished, the repayment fixed weekly ACH-debit, originally estimated at the Specified Percentage, increased up to 100%.

141. A debtor's only recourse would be to block any further ACH-debit, but under the contract's terms, this would be a default.

Twelfth Affirmative Defense: Unenforceable Default Fee

142. Plaintiff has no right to any default fee. Rubin v. Napoli Bern Ripka Shkolnik, LLP, 179 AD3d 495 [2020]:

> "Although the party challenging the liquidated damages provision has the burden to prove that the liquidated damages are, in fact, an unenforceable penalty (see JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 380 [2005]; Parker v Parker, 163 AD3d 405, 406 [1st Dept 2018]), the party seeking to enforce the provision must necessarily have been damaged in order for the provision to apply (see e.g. J. Weinstein & Sons, Inc. v City of New York, 264 App Div 398, 400 [1st Dept 1942]."

Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc., 36 N.Y.3d 69, 73, 74-77 [2020]:

> "(W)here the breach of contract was a failure to pay money, plaintiff should be limited to a recovery of the contract amounts plus appropriate interest] [citation omitted]; Cotheal v Talmage, 9 NY 551, 554, Seld. Notes 238 [1854] ["Where there is a contract to pay money, the damages for its breach are fixed and liquidated by law, and require no liquidation by the parties"]; 36 NY Jur 2d, Damages § 173 [stating that liquidated damages clauses in

> contracts for the payment of money are typically inappropriate because "for the nonpayment of money, the law awards interest as damages"]).

WHEREFORE, defendants respectfully demand judgment dismissing the complaint.

Dated: August 6, 2024

Amos Weinberg
Attorney for Defendants
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VERIFICATION: State of New York, County of Nassau, ss.: The undersigned attorney for defendants, duly admitted to practice in the courts of the State of New York, affirms under penalties of perjury: that he has read the foregoing answer, and knows the contents thereof; that it is true upon information and belief and I believe it to be true. This verification is made by me because defendants are not in the county where I have my office. The source of my information is privileged emails and discussions with the individual defendant and review of plaintiff's documents.

Dated: August 6, 2024

Amos Weinberg