SUPREME COURT OF THE STATE OF NEW YORK : COUNTY OF MONROE

Index No E2024011424

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EMINENT FUNDING LLC,

Plaintiff,

-against-

UDELIVER LLC, PREORDER WITH US LLC, MB FREIGHT CORP, MB FLEET SERVICES LLC and EDWIN RAUL MOYANO,

Defendants.

----------x

ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

1. Admit that plaintiff (a foreign, New Jersey, limited liability company) is authorized to do business in New York.

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Admit paragraph 5.

6. Admit paragraph 6.

7. Admit paragraph 7 only as to personal jurisdiction due to a forum selection clause but not subject matter jurisdiction. Exhibit A (forum jurisdiction clause cannot create subject matter jurisdiction).

8. Admit the date of the contract and that the parties' transaction was for the amount stated, but otherwise deny paragraph 8. The contract had nothing to do with any purchase.

9. Admit paragraph 9.

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

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. The plaintiff's funding/loan started at a 282% annual rate of interest. 282% is 11.27 times the 25% maximum under the criminal usury statute.

13. **Calculation of Interest**: Under the Agreement, the net payable to Defendant was $22,500, for which Defendant had to pay plaintiff back $37,498, by a daily payment of $624.96 per day. Defendant getting gross proceeds from plaintiff of $22,500, and having to pay back $37,498, the

difference, of $14,998, was the interest that Defendant had to pay on the $22,500. $14,998 interest on $22,500, if it had to be paid back over a year, would have been 66.6% interest. The agreement required payments of $624.96 per day, which meant 60 payments of $624.96 each, or 60 days, to pay the $37,498. However, the $624.96 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 60 payments of $624.96 each were going to take 84 days total. 84 days is 23.6% of a year. Since 66.6% interest had to be paid back in 23.6% of a year, that was an annual interest rate of 282%.

14. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 18%, equaled $3,472.00 ($624.96 divided by 18% = $3,472.00).

15. The initial 282% interest rate was 11.27 times the 25% criminal usury cap. 25 times 11.27 = 282%.

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

17. If the fixed daily payment was reduced so that 18% of receipts equaled the 25% maximum criminal usury rate rather than the 282% criminal

rate, the receipts needed would only be $311.29. Calculation: The 282% interest rate divided by 25 =11.27. The $3,472.00 receipts needed under the contract to cover the 18% Specified Percentage divided by 11.27 = $311.29.

18. Therefore, until the plaintiff granted a reconciliation taking 18% of only $311.29 of receipts, the funding was criminally usurious.

19. Until receipts dropped to $311.29, the 18% specified percentage was criminally usurious.

20. If the defendant's receipts diminished from $3,472.00 to $311.29, it would obviously be utterly out of business, unable to function or pay anyone. It would have no money to 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.

21. It is as if the $210,900 salary of a New York Supreme Court justice was reduced by 11.27 times = $18,713.40.

22. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 18% of the $311.29 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 18% debit if receipts dropped to $311.29.

23. This would enable plaintiff to declare a default.

24. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $624.96 fixed daily payment is enforcing criminal usury.

25. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $624.96 fixed daily payment is enforcing criminal usury.

26. The agreement was for a finite term of 84 days with payments of $624.96 each business day.

27. 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. The contract stated:

> **WHEREAS**, Guarantor is an individual who, as an owner, officer, or manager of Merchant, will derive substantial benefit from Merchant selling the Sold Future Receipts to Purchaser
>
> 15(a) *** Merchant agrees to use the Purchase Price exclusively for the benefit and advancement of Merchant's business operations and for no other purpose.

> ACH Authorization * * * Merchant shall be bound by the rules and operating guidelines of NACHA (formerly known as the National Automated Clearing House Association), and represents and warrants that the designated account is established and used primarily for commercial/business purposes, and not for consumer, family or household purposes

28. 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.

29. 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."

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

31. 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:

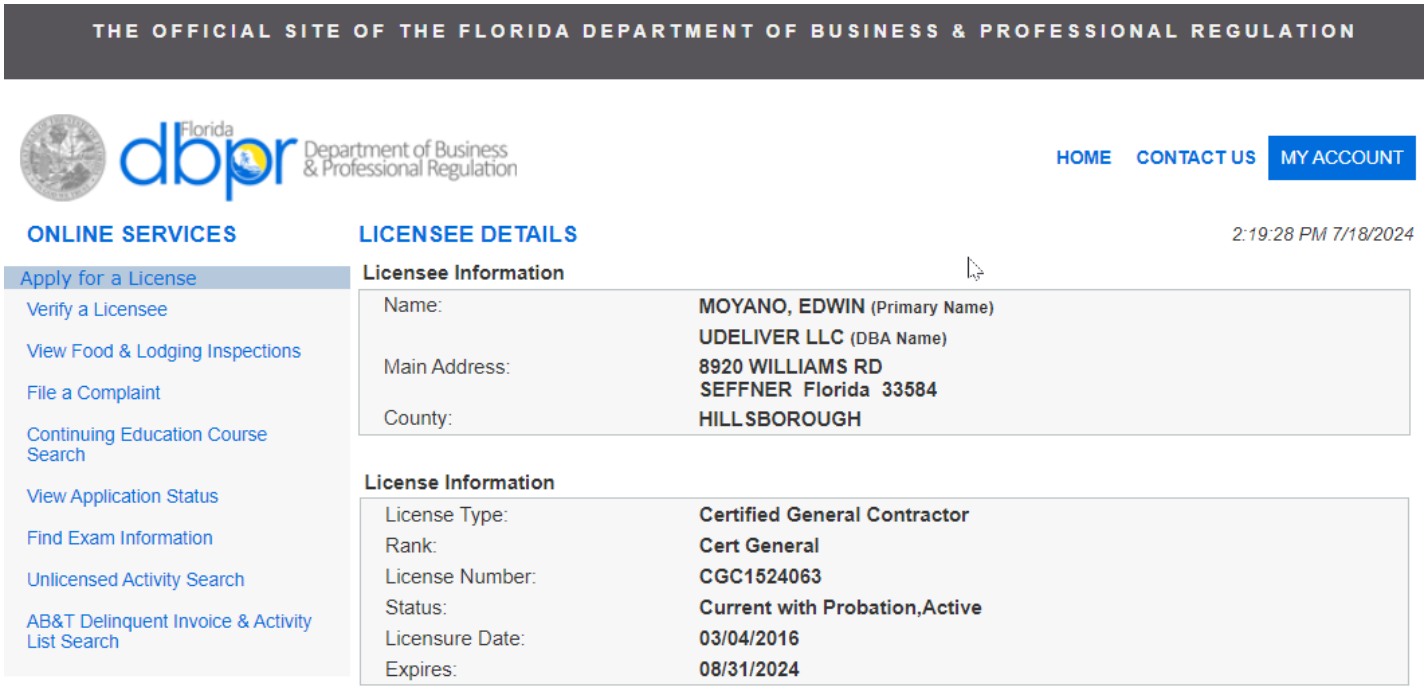
> An agreed upon percentage of the Weekly/Daily Future Receipts that Merchant shall deliver to Purchaser until the centric Sold Amount of Future Receipts is delivered to Purchaser in accordance with this Agreement.
> 14(b) *** As an extreme example, in the event Merchant's business ceases to exist after Purchaser's payment of the Purchase Price and purchase of the Sold Amount of Future Receipts for reasons outside Merchant's control and reasons not anticipated by Purchaser, Purchaser may never recover any moneys spent on such purchase without recourse.
> 14(e) if the full Sold Amount of Future Receipts is not remitted because Merchant's business went bankrupt or otherwise ceased operations in the ordinary course of business (so long as the Bankruptcy or change in operations was not known or anticipated at the time of the execution of the Agreement, and also not due to Merchant's willful mishandling, negligence, or transfer of its business), and Merchant shall have not breached this Agreement, Merchant would not owe anything to Purchaser and would not be in breach of or in default under this Agreement.
> 15 *** Furthermore, Purchaser hereby acknowledges and agrees that Merchant shall be excused from performing its obligations under this Agreement in the event Merchant's business ceases its operations exclusively due to the following reasons (collectively, the "Valid Excuses"): a. Adverse business conditions that occurred for reasons

> outside Merchant's control and foreknowledge and not due to Merchant's willful or negligent mishandling of its business; b. Loss of the premises where Merchant's business operates (but not due to Merchant's violation of its obligations to its landlord or via an action by governmental authorities); c. Bankruptcy of Merchant (so long as Merchant was not legally insolvent at the time this Agreement was entered into); d. Natural disasters or similar occurrences beyond Merchant's control.

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

> 3. Daily Deliveries. The Sold Amount of Future Receipts shall be delivered to Purchaser in equal amounts of Daily Delivery.
>
> 4. Method of Delivery of Sold Amount of Future Receipts. Purchaser shall have the right, at its sole and absolute discretion, to choose among the following three methods of delivery of the Daily Delivery to Purchaser:
> a. Directly from the Merchant's Approved Bank Account (as such term is defined below) by weekly debiting the amount of Daily Delivery via ACH debit ("Direct Debit"); or
>
> 6. Authorization of Direct Debit, Credit Card Split, and Lockbox Arrangement. a. Merchant hereby authorizes Purchaser to initiate Direct Debit by way of electronic checks or ACH debits from the Approved Bank Account in the amount of Daily Delivery each Business Day

33. A fixed daily payment was illusory, defendant being known to be a construction contractor:



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LICENSEE DETAILS

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Licensee Information

Name:	MOYANO, EDWIN (Primary Name)
	UDELIVER LLC (DBA Name)
Main Address:	8920 WILLIAMS RD SEFFNER Florida 33584
County:	HILLSBOROUGH

License Information

License Type:	Certified General Contractor
Rank:	Cert General
License Number:	CGC1524063
Status:	Current with Probation,Active
Licensure Date:	03/04/2016
Expires:	08/31/2024

34. A construction contractor does not get daily payments, such as a store or retail establishment.

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

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

37. The individual guarantor, under the contract, guaranteed the performance of the "merchant" defendant. This guaranty of performance did not cease upon a bankruptcy.

38. 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:

> 5. Approved Bank Account and Credit Card Processor. During the term of this Agreement, Merchant shall: (i) deposit all Future Receipts into one (and only one) bank account, which bank account shall be preapproved by Purchaser
> 15[Defaults] (b) i. Change or close the Approved Bank Account

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. Bankruptcy was effectively barred by these provisions in the contract:

> 15(n) No Closing of Business. Merchant will not sell, dispose, transfer or otherwise convey all or substantially all of its business or assets without first: (i) obtaining the express written consent of Purchaser, and (ii) providing Purchaser with a written agreement of a purchaser or transferee of Merchant's business
>
> 41. Guarantor's Other Obligations. Guarantor will not dispose, convey, sell, or otherwise transfer, or cause Merchant to dispose, convey, sell, or otherwise transfer, any material business assets of Merchant without the prior written consent of Purchaser, which consent may be withheld for any reason, until Purchaser's receipt of the entire Sold Amount of Future Receipts.

41. The Security Agreement portion of the contract stated

> 18 * * * Merchant further agrees that, with or without an Event of Default, Purchaser may notify account debtors, or other persons obligated on the Future Receipts, on holding the Future Receipts of Merchant's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Purchaser.

42. 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.

43. The contract falsely stated that there was no interest payable by the "merchant"

> 14(b) * * * Purchaser does not charge Merchant and will not collect from Merchant any interest on the monies spent on the purchase of the Sold Amount of Future Receipts

44. *Interest* is defined by Merriam-Webster online dictionary as "3b : the profit in goods or money that is made on invested capital".

45. The contract required defendants to pay $14,998 interest on the funding of $22,500.

46. 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])"

Home Bond Co. v. McChesney, 239 U.S. 568, 575-576 [1916]:

> "[A]ppellant, by virtue of the contracts between it and the bankrupts *** did not become the purchaser or owner of the accounts receivable in question, and *** the transactions were really loans, with the accounts receivable transferred as collateral security. *** To quote from the opinion of the District Court: "The considerations which support this conclusion are that the bankrupts were to and did collect the accounts and bear all expense in connection with their collection * * * In so far as the contracts in question here use words fit for a contract of purchase they are mere shams and devices to cover loans of money at usurious rates of interest."

Endico Potatoes v. CIT Group/Factoring, 67 F.3d 1063, 1069, 2d Cir. Ct. of App. N.Y. [1995]:

> "Where the lender has purchased the accounts receivable, the borrower's debt is extinguished and the lender's risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor. If the lender holds only a security interest, however, the lender's risk is derivative or secondary, that is, the borrower remains liable for the debt and bears the risk of non-payment by the account debtor, while the lender only bears the risk that the account debtor's non-payment will leave the borrower unable to satisfy the loan."

47. None of these defects constituted invented or theoretical defenses. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747,

748 [2023] held that the language in the merchant funding agreement, alone, will establish these defenses.

> "Here, the defendants established that the agreement constituted a criminally usurious loan. *** [T]he defendants conclusively established through the submission of the agreement that it constituted a criminally usurious loan (see Adar Bays, LLC v GeneSYS ID, Inc., 37 NY3d at 332; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 AD3d at 666)."

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

49. 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])."

50. The plaintiff's contract had a seeming reconciliation provision but other provisions limiting any right to a reconciliation:

> 11. reconciliation *** shall be received by Purchaser via email to admin@eminentfunding.com within five (5) Business Days after the last day of the Reconciliation Month at issue

51. This forbade any reconciliation request from the 6th through the 31st of each month.

52. A hypothetical refund under a reconciliation would not automatically reduce the fixed daily payment:

> 12 [ACH-debit decrease] * * * no Adjustment shall take place until and unless Reconciliation for at least One (l) Reconciliation Month takes place, resulting in a reduction of the total amount debited from Merchant's Approved Bank Account during the Reconciliation Month by at least 20% in comparison to the amount that would have been debited during that month without Reconciliation.
>
> 13(b) * * * within five (5) Business Days after the date that is the later of the last day of the latest bank statement enclosed with the Adjustment Request and the last date of the latest card processing statement enclosed with the Adjustment Request (time being of the essence as to the last day of the period during which an Adjustment Request shall be received by Purchaser).

53. The hypothetical reduction of the fixed daily payment would not be based on the prior month's bank statement but bank statements going back three months, before a reconciliation was ever needed:

> 13 * * * b. A request for Adjustment (an "Adjustment Request") shall be in writing, shall include copies of: (i) Merchant's three (3) consecutive bank statements of the Approved Bank Account and credit card processing statements immediately preceding the date of Purchaser's receipt of the Adjustment Request

54. 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.

55. 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.

Third Affirmative Defense: Criminal Usury.

56. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] held that the contract itself was all that was needed to establish criminal usury. " "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" [citation]. Here, for the reasons stated above, the defendants conclusively established through the submission of the agreement that it constituted a criminally usurious loan (see Adar Bays, LLC v GeneSYS ID, Inc., 37 NY3d at 332; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 AD3d at 666)."

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

58. 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].

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

60. 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."

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

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

63. 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".

64. 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.

65. Nothing in the plaintiff's contract enabled defendants to stop the fixed daily/weekly payment without being in default, nor did anything in plaintiff's contract force plaintiff to stop the fixed daily/weekly payment.

66. Nothing in the contract avoided the fixed daily/weekly payment if defendants had no receipts.

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

68. 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"].)

69. 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

70. 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,

71. 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.

72. 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%.

73. The parties' contract was dated: 6-28-2024.

74. Prior UCC-1's are annexed as Exhibit B.

75. Contract provisions:

> 1. Sale of Future Receipts. Merchant hereby sells, assigns, transfers, and conveys (hereinafter, the "Sale") unto Purchaser all of Merchant's right, title, and interest in the Specified Percentage of the Future Receipts
>
> 15(r) Unencumbered Future Receipts. Merchant has and will continue to have good, complete, and marketable title to all Future Receipts, free and clear of any and all liabilities, liens, claims, changes, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges, and encumbrances of any kind or nature whatsoever or any other rights or interests other than by virtue or entering into this Agreement.

76. 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".

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

> 9. Read Only Access to the Approved Bank and Credit Card Accounts. Merchant hereby agrees that during the term of this Agreement Purchaser shall have the right to perform ongoing read only electronic monitoring of transactions occurring in the Approved Bank Account and Merchant's account with the Approved Credit Card Processor (the "Approved Credit Card Account"). Merchant agrees to provide Purchaser all required online access codes for the Approved Bank Account and the Approved Credit Card Account.

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

78. 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.

79. 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.

80. 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.

81. The same was in plaintiff's contract

> 29 f. In case any Event of Default occurs and is not waived, Purchaser will be entitled to the issuance of an injunction, restraining order, or other equitable relief in Purchaser's favor, subject to court approval, restraining Merchant's accounts and/or receivables up to the amount due to Purchaser as a result of the Event of Default, and Merchant will be deemed to have consented to the granting of an application for the same to any court of competent jurisdiction without any prior notice to any Merchant or any Guarantor and without Purchaser being required to furnish a bond or other undertaking in connection with the application.

82. 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."

83. Similarly, in this action, the plaintiff, EMINENT FUNDING LLC, set an 18% Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

84. 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".

> The contract of plaintiff had a similar secured interest:
> 18. Acknowledgment of Security Interest and Security Agreement. The Future Receipts sold by Merchant to Purchaser pursuant to this Agreement are "accounts" or "payment intangibles" as those terms are defined in the Uniform Commercial Code as in effect in the state in which the Merchant is located (the "UCC") and such sale shall constitute and shall be construed and treated for all purposes as a true and complete sale, conveying good title to the Future Receipts free and clear of any liens and encumbrances, from Merchant to Purchaser. To the extent the Future Receipts are "accounts" or "payment intangibles" then (i) the sale of the Future Receipts creates a security interest as defined in the UCC; (ii) this Agreement constitutes a "security agreement" under the UCC; and (iii) Purchaser has all the rights of a secured party under the UCC with respect to such Future Receipts.

> 20. Security. As security for the prompt and complete performance of any and all liabilities, obligations, covenants, or agreements of Merchant under this Agreement, now or hereafter arising from, out of, or relating to this Agreement, whether direct, indirect, contingent or otherwise (hereinafter referred to collectively as the "Merchant Obligations"), Merchant hereby pledges, assigns and hypothecates to Purchaser and grants to Purchaser a continuing, perfected and first priority lien upon and security interest in, to and under all of Merchant's right, title and interest in and to the following (collectively, the "Collateral"), whether now existing or hereafter from time to time acquired: a. All accounts, including without limitation, all deposit accounts, accounts-receivable, and other receivables, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are defined by Article 9 of the Uniform Commercial Code, now or hereafter owned or acquired by Merchant; and b. All Merchant's proceeds, as that term is defined by Article 9 of the Uniform Commercial Code.

85. 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.

86. Plaintiff's contract stated:

> 10. Merchant's Right for Reconciliation of Daily Deliveries. If any time during the term of this Agreement,

> so long as an Event of Default, or breach of this Agreement, has not occurred, should
>
> 11. * * * d. So long as an Event of Default, or breach of this Agreement, has not occurred, Merchant shall have the right to request Reconciliation

87. 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

88. Plaintiff's contract, here, identically abridged the right to any reconciliation. (Quoted above).

89. 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.

90. Plaintiff had a similar provision in order to get a reduction of the fixed daily payment. (Quoted above).

Sixth Affirmative Defense: Illegal Contract

91. The contract stated:

> 15 *** g. Accounting Records and Tax Returns. Merchant will treat receipt of the Purchase Price and delivery of the Sold Future Receipts in a manner evidencing sale of its 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.

92. 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])."

93. 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

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

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

96. 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.)"

97. 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

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

> 58. ARBITRATION. THE PARTIES ACKNOWLEDGE AND AGREE THAT EACH PURCHASER, MERCHANT, AND ANY GUARANTOR SHALL HAVE THE RIGHT TO REQUEST THAT ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THE CONSTRUCTION AND INTERPRETATION OF THIS AGREEMENT ARE SUBMITTED TO ARBITRATION. THE PARTY SEEKING ARBITRATION SHALL FIRST SEND A WRITTEN NOTICE OF INTENT TO ARBITRATE TO ALL OTHER PARTIES, BY CERTIFIED MAIL. UPON SENDING OF SUCH NOTICE, A PARTY REQUESTING ARBITRATION MAY COMMENCE AN ARBITRATION PROCEEDING WITH ARBITRATION SERVICES INC. THE ARBITRATION WILL BE ADMINISTERED BY ARBITRATION SERVICES, INC. UNDER ITS COMMERCIAL ARBITRATION RULES AS ARE IN EFFECT AT THAT TIME, WHICH RULES ARE AVAILABLE AT WWW.ARBITRATIONSERVICESINC.COM. EACH MERCHANT, GUARANTOR AND PURCHASER SHALL PAY THEIR OWN ATTORNEYS' FEES INCURRED DURING THE ARBITRATION PROCEEDING. THE PARTY INITIATING THE ARBITRATION SHALL PAY ANY ARBITRATION FILING FEE, ADMINISTRATION FEE AND ARBITRATOR'S FEE.

99. 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.

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

101. 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." "

102. 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.

103. 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.

104. 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).

105. 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])."

106. 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].

107. 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).

108. 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."

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

Ninth Affirmative Defense: Unconscionability/Adhesion Contract

110. Plaintiff's contract was for immediate funding.

111. 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.

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

113. 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.")."

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

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

116. 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." ”

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

118. 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.

119. 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].

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

Tenth Affirmative Defense: The Contract Caused Its Own Breach

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

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

123. 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).

124. 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.

125. However, there was a complete impediment, as quoted above, to a forward looking reconciliation under which the fixed daily payment could be reduced.

126. 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.

127. 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.

128. 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%.

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

Eleventh Affirmative Defense: Unenforceable Default Fee

130. 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, defendant respectfully demands judgment dismissing the complaint.

Dated: July 22, 2024

A m o s W e i n b e r g
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VERIFICATION: State of New York, County of Nassau, ss.: The undersigned attorney for defendant, 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: July 22, 2024

A m o s W e i n b e r g