SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NIAGARA

Index No
E185130/2024

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EPIC ADVANCE,

Plaintiff,

-against-

KST CAPITAL LLC; and TOBIN M PARKER,

Defendants.

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ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

1. Deny paragraph 1 but do not contest venue.

2. Deny paragraph 2. Paragraph 2 is FALSE. There is no EPIC ADVANCE LLC registered in New York.

3. Admit paragraph 3.

4. Deny paragraph 4 though admit that defendants signed the contract referenced. Deny that $25,000 was paid. It was not. Deny that plaintiff entered into any agreement since there is no way of knowing what entity the plaintiff is or what entity the contract was made by. “Epic Advance” is a trade name.

5. Deny paragraph 5. The agreement had a totally different term, as well as the term alleged.

6. Deny paragraph 6 and each and every subsequent allegation of the complaint, except to admit that the individual defendant signed the contract referenced.

First Affirmative Defense: Illusory Contract. No Risk

7. 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."

8. Plaintiff's contract eliminated the risk.

9. The plaintiff's funding/loan started at a 511% annual rate of interest. 511% is 20.4 times the 25% maximum under the criminal usury statute.

10. **Calculation of Interest**: Under the Agreement, the total payable to Defendant was $22,000, less startup fees, for which Defendant had to pay plaintiff back $37,500, by a daily payment of $1,072.00 per day. Defendant getting gross proceeds from plaintiff of $22,000, and having to pay back $37,500, the difference, of $15,500, was the interest that Defendant had to pay on the $22,000. $15,500 interest on $22,000, if it had to be paid back over a

year, would have been 70% interest. The agreement required payments of $1,072.00 per day, which meant 35 payments of $1,072.00 each, or 35 days, to pay the $37,500. However, the $1,072.00 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 35 payments of $1,072.00 each were going to take 49 days total. 49 days is 13.8% of a year. Since 70% interest had to be paid back in 13.8% of a year, that was an annual interest rate of 511%.

11. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 25%, equaled $4,288.00 ($1,072.00 divided by 25% $4,288.00).

12. The initial 511% interest rate was 20.4 times the 25% criminal usury cap. 25 times 20.4 = 511%.

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

14. If the fixed daily payment was reduced so that 25% of receipts equaled the 25% maximum criminal usury rate rather than the 511% criminal rate, the receipts needed would only be $212.06. **Calculation**: The 511%

interest rate divided by 25 =20.4. The $4,288.00 receipts needed under the contract to cover the 25% Specified Percentage divided by 20.4 = $212.06.

15. Therefore, until the plaintiff granted a reconciliation taking 25% of only $212.06 of receipts, the funding was criminally usurious.

16. If $37,500 has to be paid back after receipt of $22,000 with fixed daily payments each business day and an annual interest rate of 25%, each daily payment would equal $53.01 which at 25% of daily receipts would equal $212.06 of receipts.

17. Until receipts dropped to $212.06, the 25% specified percentage was criminally usurious.

18. If the defendant's receipts diminished from $4,288.00 to $212.06, 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.

19. It is as if the $210,900 salary of a New York Supreme Court justice was reduced by 20.4 times = $10,338.24.

20. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 25% of the $212.06 could not reasonably be contemplated under

the parties' contract since the debtor would be forced to block plaintiff's 25% debit if receipts dropped to $212.06.

21. This would enable plaintiff to declare a default.

22. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $1,072.00 fixed daily payment is enforcing criminal usury.

23. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $1,072.00 fixed daily payment is enforcing criminal usury.

24. The agreement was for a finite term of 49 days with payments of $1,072.00 each business day.

25. The entire premise of the contract was false and illusory because it purported to restrict defendants from any personal use of the business account:

> The Account may not be used for any personal, family or household purposes.

26. 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.

27. 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.

28. 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."

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

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

> 1.10 *** Payments made to FUNDER in respect to the full amount of the Receipts shall be conditioned upon Merchant's sale of products and services, and the payment therefore by Merchant's customers.

31. The plaintiff breached its own contract by ACH-debiting a fixed daily payment regardless of any receipts.

32. Nothing in plaintiff's contract stated that this provision could be negated by plaintiff reciting other provisions in the agreement stating a different payment method. Plaintiff is essentially cherry-picking provisions of its contract that suit it.

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

34. The contract did not expressly make bankruptcy a default and purported to permit bankruptcy without a default.

35. The individual guarantor, under the contract, guaranteed the performance of the "merchant" defendant. This guaranty of performance did not cease upon a bankruptcy. Worse, the guarantor's assets were subject to the obligation to repay the plaintiff, regardless of how the "merchant" wound up functioning:

> Security Interest. *** Guarantor(s)(s) grants to FUNDER a security interest in and lien upon: (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are each defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by *** Guarantor(s)(s) *** (c) all funds at any time in the *** Guarantor(s)(s) Account, regardless of the source of such funds

36. 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:

> 1.1 * * * FUNDER's entitlement to declare this Agreement breached by Merchant as a result of its usage of an account which FUNDER did not first pre-approve in writing prior to Merchant's usage thereof.
>
> 2.13 [defaults] (j)Merchant shall change its depositing account without the prior written consent of FUNDER;

37. 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."

38. Bankruptcy, under which the business is closed and a bankrupt must transfer all assets to a trustee in bankruptcy was prohibited by these provisions:

> 1.12 [Defaults] *** (d) Merchant intentionally interrupts or ceases the operation of this business transfers, moves, sells, disposes, or otherwise conveys its business and/or assets
> 2.13 [Defaults] (f)Merchant shall voluntarily transfer or sell all or substantially all of its assets;

39. The Security Agreement portion of the contract stated

> Security Agreement ***
> This security interest may be exercised by FUNDER without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets. FUNDER shall have the right to notify account debtors at any time. Pursuant to Article 9 of the Uniform

> Commercial Code, as amended from time to time, FUNDER has control over and may direct the disposition of the Secured Assets, without further consent of Merchant.

40. 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.

41. The bank account could be grabbed at any time that plaintiff wanted by enforcement of the account control provision:

> Merchant and Guarantor(s)(s) each agrees to execute any documents or take any action in connection with this Agreement as FUNDER deems necessary to perfect or maintain FUNDER's first priority security interest in the Collateral and the Additional Collateral, including the execution of any account control agreements.

42. This made the entire contract illusory.

43. 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."

44. 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)."

45. 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

46. 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])."

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

1.3 Reconciliation. **As long as an Event of Default, or breach of this agreement, has not occurred**, Merchant may request a retroactive reconciliation of the total Remittance Amount. All requests hereunder must be in writing to Subs@epic-advance.com Said request must include copies of all of Merchant's bank account statements, credit card processing statements, and accounts receivable report outstanding if applicable, **from the date of this Agreement through and including the date the request is made**. **FUNDER retains the right the request additional reasonable documentation** including without limitation bank login or access to view Merchant's accounts using third party software, and Merchant's refusal to provide access shall be a breach of this Agreement and FUNDER shall have no obligation to reconcile. Such reconciliation, if applicable, shall be performed by FUNDER within two (2) Business Days following its receipt of Merchant's request for reconciliation by either crediting or debiting the difference back to, or from, Merchants Bank Account so that the total amount debited by FUNDER shall equal the Specific Percentage of the Future Receipts that Merchant collected during the requested month. Nothing set forth in this section shall be deemed to provide Merchant with the right to interfere with FUNDER's right and ability to debit Merchant's Account while the request is pending or to unilaterally modify the Remittance Amount, in any method other than the ones listed in this Agreement.

1.4 Adjustments to the Remittance. **As long an Event of Default, or breach of this agreement**, has not occurred, Merchant may give notice to FUNDER to request a decrease in the Remittance, should they experience a decrease in its Future Receipts. All requests hereunder must be in writing to Subs@epic-advance.com and must include copies of all of Merchant's bank account statements, credit card processing statements, and accounts receivable report outstanding **from the date of this Agreement through and including the date the request is made**. **FUNDER retains the right the request additional reasonable documentation** including without

> limitation bank login or 3rd party software access to view Merchant's accounts, refusal to provide access shall be a breach of this Agreement and FUNDER shall have no obligation to reconcile. **The Remittance shall be modified to more closely reflect the Merchant's actual receipts by multiplying the Merchant's actual receipts by the Purchased Percentage divided by the number of business days in the previous (2) calendar weeks**. **Merchant shall provide FUNDER with** viewing access to their bank account as well as **all information reasonably requested by FUNDER** to properly calculate the Merchant's Remittance. **At the end of the two (2) calendar weeks the Merchant may request another adjustment pursuant to this paragraph or it is agreed that the Merchant's Remittance shall return to the Remittance as agreed upon on Page 1 of this Agreement.**

48. As quoted above, the reconciliation provisions stated, "FUNDER retains the right the request additional reasonable documentation".

49. The CPLR has already codified by section 3212(f) that where a party is found to have the right to disclosure, the adversary may not then request summary judgment until the disclosure is completed.

50. Here, the above quoted language in plaintiff's agreement means that plaintiff has given itself the right of disclosure which inescapably means that the debtor has no right to the reconciliation until plaintiff completes its disclosure process.

51. Period. End of story. Plaintiff wrote this language. Not defendants.

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

53. The reconciliation could be immediately negated if another one was not requested in two weeks, notwithstanding that plaintiff could draw out the reconciliation process by demanding further information or declaring defendant in default.

54. The reconciliation provision made no sense. It demanded all statements from the inception of the agreement, and stated: "The Remittance shall be modified to more closely reflect the Merchant's actual receipts by multiplying the Merchant's actual receipts by the Purchased Percentage divided by the number of business days in the previous (2) calendar weeks".

55. This essentially stated that the actual receipts X the Specified Percentage would be divided by 10.

56. This was senseless.

57. It was further senseless since plaintiff did not require the prior two weeks statements but all statements from inception of the contract.

58. 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.

59. 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.

60. Oakshire Props., LLC v Argus Capital Funding, LLC, 229 A.D.3d 1199 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.

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

Here, plaintiff had sole discretion of how much disclosure to seek before implementing any reconciliation.

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"

i. Plaintiff's contract essentially provided that any time there was insufficient funds in the bank account for plaintiff's debit there was a default. The contract stated:

> Merchant agrees not to make or cause debits to the Account (other than in favor of FUNDER) at any time that would cause the balance therein on any business day to be insufficient to fund payment in full of the agreed Remittance.

ii. The contract further stated:

> 2.13 [Defaults] (d) the Merchant fails to give FUNDER 24 hours advance notice that there will be insufficient funds in the account such that the ACH of the Remittance amount will not be honored by Merchant's bank, the Merchant fails to supply all requested documentation and allow for daily and/or real time monitoring of its bank account;

iii. Such notice was impossible under the terms of the contract. The notice provision stated:

> 4.3 Notices. All notices, requests, consents, demands and other communications hereunder shall be delivered by certified mail, return receipt requested, to the respective parties to this Agreement at the addresses set forth in this Agreement. Notices to FUNDER shall become effective only upon receipt by FUNDER. Notices to Merchant shall become effective three days after mailing.

iv. This made notice impossible because the contract failed to state any mailing address for plaintiff. Even if it did, plaintiff would have to sign for the certified mail the first day it came which would be far beyond 24 hours after the account had insufficient funds.

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"

Plaintiff ACH-debited the fixed daily payment 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".

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.

61. The plaintiff's contract made the guarantor's property and funds subject to the obligation to pay back the plaintiff:

> Security Interest. *** Guarantor(s)(s) grants to FUNDER a security interest in and lien upon: (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are each defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by *** Guarantor(s)(s) *** (c) all funds at any time in the *** Guarantor(s)(s) Account, regardless of the source of such funds

62. The contract forbade the guarantor from earning any livelihood elsewhere in the event that the "merchant" failed to pay the plaintiff and went out of business and/or the guarantor wanted to work elsewhere at his trade:

> 2.13 [defaults] (m)Merchant or any Owner/Guarantor(s), directly or indirectly, causes to be formed a new entity or otherwise becomes associated with any new or existing entity, which operates a business similar to or competitive with that of Merchant;
>
> In the event Merchant, any of its officers or directors or any Owner/Guarantor(s), during the term of the Revenue Purchase Agreement or while Merchant remains liable to FUNDER for any obligations under the Revenue Purchase Agreement, directly or indirectly, including acting by, through or in conjunction with any other person, causes to be formed a new entity or otherwise becomes associated with any new or existing entity, whether corporate, partnership, limited liability company or otherwise, which operates a business similar to or competitive with that of Merchant, such entity shall be deemed to have expressly assumed the obligations due FUNDER under the Revenue Purchase Agreement. With respect to any such entity, FUNDER shall be deemed to have been granted an irrevocable power of attorney with authority to file, naming such newly formed or existing entity as debtor, an initial UCC financing Statement and to have it filed with any and all appropriate UCC filing offices.

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

64. 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].

65. 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."

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

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

68. 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".

69. 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.

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

71. Nothing in the contract avoided the fixed daily payment if defendants had no receipts.

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

73. 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"].)

74.

75. 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

76. 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,

77. 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.

78. 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%.

79. The parties' contract was dated: July 3, 2024. It stated:

> 2.10 Unencumbered Receipts. Merchant has good, complete, unencumbered and marketable title to all Receipts and all collateral in which FUNDER has been granted a security interest under the Security Agreement, free and clear of any and all liabilities, liens, claims, charges, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges and encumbrances of any kind or nature whatsoever

80. Annexed as Exhibit A is a record of UCC-1's filed against defendant including prior UCC-1's (Exhibit A, Record #2 *et seq*.):

81. The contract made this a default from the outset.

82. 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".

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

> Merchant will provide FUNDER with all required access codes and monthly bank statements regarding the Account so that FUNDER may monitor the Account.
> 1.1 * * * Merchant shall provide FUNDER and/or its authorized agent(s) with all of the information, authorizations and passwords necessary for verifying

> Merchant's receivables, receipts, deposits and withdrawals into and from the Account

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

84. 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.

85. 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.

86. 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.

87. The contract further discarded any notion of payments tied to revenue with this provision:

> upon the occurrence of an Event of Default of the MERCHANT AGREEMENT TERMS AND CONDITIONS the Purchased Percentage shall equal 100%.

88. 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."

89. 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

90. Similarly, in this action, the plaintiff, EPIC ADVANCE, set a 25% Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

91. 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".

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

> Security Interest. This Agreement will constitute a security agreement under the Uniform Commercial Code. To secure Merchant's obligations under the Revenue Purchase Agreement to make available or deliver Purchased Amount to FUNDER and FUNDER's right to realize the Purchased Amount, as and to the extent required by the terms of the Revenue Purchase Agreement, and performance of and compliance by Merchant with its other undertakings and agreements herein, Merchant and Guarantor(s)(s) grants to FUNDER a security interest in and lien upon: (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are each defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by Merchant and/or Guarantor(s)(s), (b) all proceeds, as that term is defined in Article 9 of the UCC (c) all funds at any time in the Merchant's and/or Guarantor(s)(s) Account, regardless of the source of such funds, (d) present and future Electronic Check Transactions, and (e)any amount which may be due to FUNDER under this Agreement, including but not

> limited to all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets").

93. 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.

Sixth Affirmative Defense: Illegal Contract

94. The contract stated:

> 1.10 *** Purchased Amount, and Merchant agrees that all such Receipts shall be received and held in trust for the benefit of SPFL for purposes of carrying out the terms of this Agreement. Merchant agrees that it will treat the amounts received and the Purchased Receipts delivered to FUNDER under this Agreement in a manner consistent with a sale in its accounting records and tax returns. Merchant agrees that FUNDER is entitled to audit Merchant's accounting records upon reasonable notice in order to verify compliance.

95. 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])."

96. 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

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

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

99. 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.)"

100. 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. Lack of Subject Matter Jurisdiction.

101. The plaintiff, if it was formed at all, 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.

102. 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).

103. 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]).”

104. 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].

105. 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).

106. 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."

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

Eighth Affirmative Defense: Lack of Standing

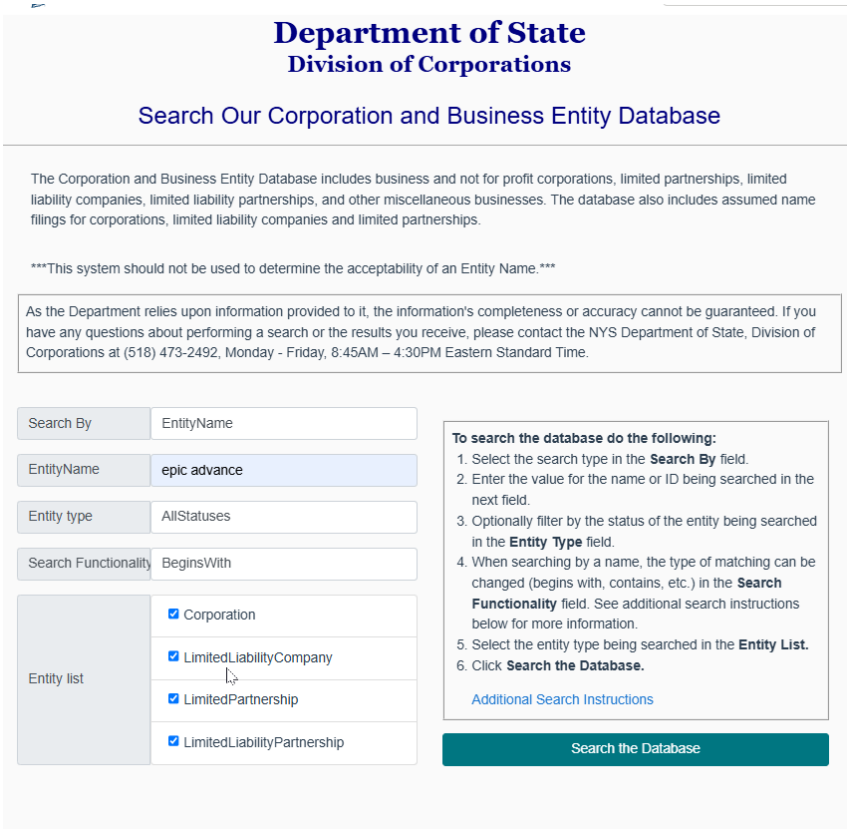
108. The plaintiff has sued as a trade name. Therefore, the court lacks jurisdiction of the action.

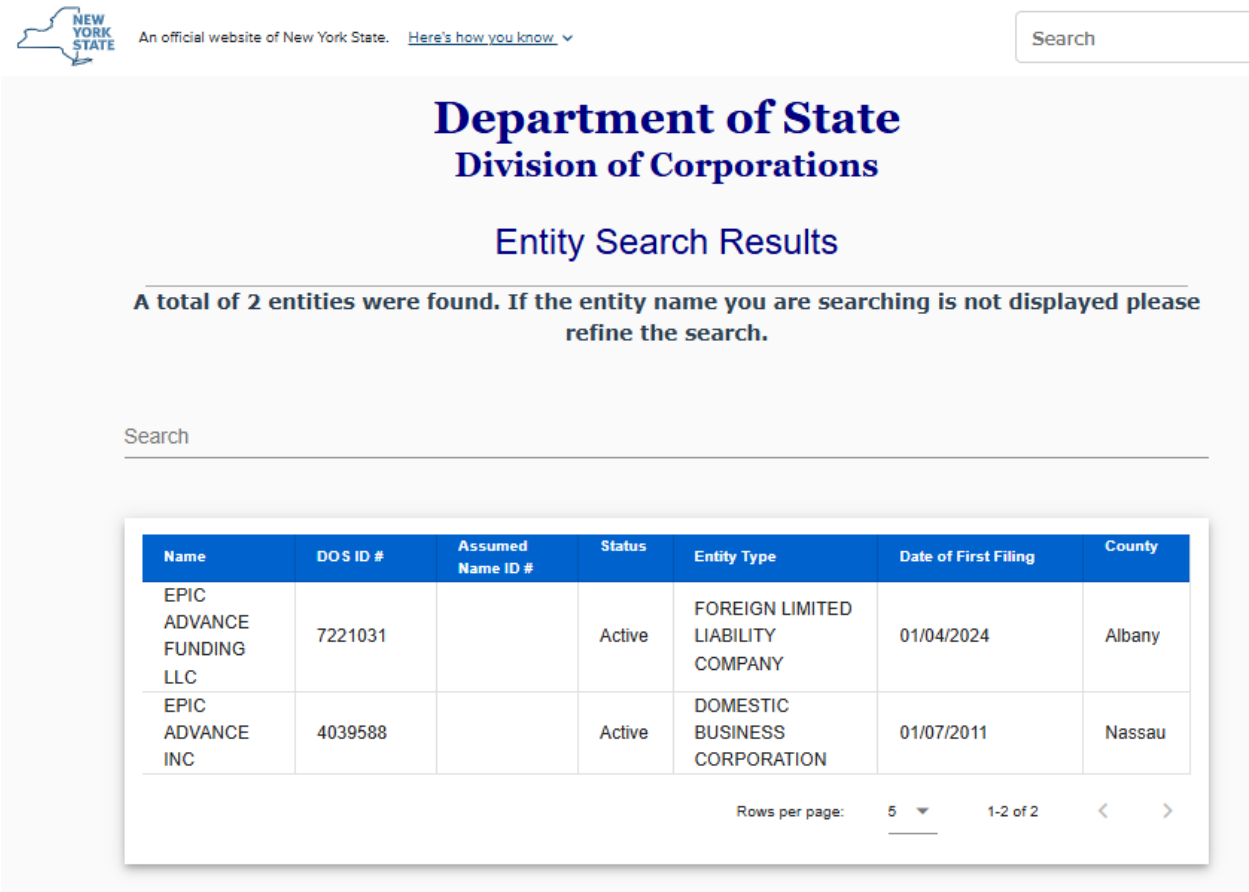
> Provosty v Hall Hosp., 91 AD2d 658, 659 (1982, aff'd. 59 NY2d 812): "It is undisputed that Lydia E. Hall Hospital is not a corporation, and that it is a trade name employed by its sole owner, Dr. Carl H. Neuman. Moreover, it is further undisputed that a certificate of doing business under the assumed 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.)"

109. No entity such as EPIC ADVANCE or EPIC ADVANCE LLC is registered in New York.





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Entity Search Results

A total of 2 entities were found. If the entity name you are searching is not displayed please refine the search.

Search

Name	DOS ID #	Assumed Name ID #	Status	Entity Type	Date of First Filing	County
EPIC ADVANCE FUNDING LLC	7221031		Active	FOREIGN LIMITED LIABILITY COMPANY	01/04/2024	Albany
EPIC ADVANCE INC	4039588		Active	DOMESTIC BUSINESS CORPORATION	01/07/2011	Nassau

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110. If the plaintiff is a foreign entity **not** registered in New York, the action is barred, plaintiff bringing all of its collection actions in New York and its contract containing a New York forum selection clause:

111. Limited Liability Company Law § 808: "Doing business without certificate of authority. (a) A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state."

112. Caring People Mgt. Servs., LLC v Assistcare Home Health Servs. LLC, 162 A.D.3d 509 [2018]:

> "Plaintiff, as the assignee of contract rights of nonparty Homestar LLC, commenced this action against defendants to enforce its rights. It is undisputed that Homestar, a New Jersey limited liability company, did not obtain a certificate of authority to do business in New York State and thereby was barred from maintaining an action in New York courts (see Limited Liability Company Law § 808 [a]). Although plaintiff obtained a certificate of authority prior to commencing this action, it nonetheless lacks capacity to sue, as it has no greater rights than Homestar (see Halsey v Jewett Dramatic Co., 190 NY 231, 234-235 [1907]; Manufacturers' Commercial Co. v Blitz, 131 App Div 17, 20 [1st Dept 1909]; Kinney v Reid Ice Cream Co., 57 App Div 206, 209 [2d Dept 1901])."

113. The action is therefore barred under NY Business Corporation Law, § 1312. Highfill, Inc. v. Bruce & Iris, Inc., 50 A.D.3d 742, 743-744 [2008]:

> "The defendants moved to dismiss the complaint on the ground that the plaintiff lacked standing to maintain the action in New York, since it was a foreign corporation doing business in New York without authorization. Business Corporation Law § 1312 (a) "constitutes a bar to the maintenance of an action by a foreign corporation" in New York if that corporation is found to be "doing business" here without having obtained the requisite authorization to do so (Airline Exch. v Bag, 266 AD2d 414, 415 [1999]). The question of whether a foreign corporation is "doing business" in New York "must be approached on a case-by-case basis with inquiry made into the type of business being conducted" (Alicanto, S. A. v Woolverton, 129 AD2d 601, 602 [1987]). In order for a court to find that a foreign corporation is "doing business"

> in New York within the meaning of Business Corporation Law § 1312 (a), "the corporation must be engaged in a regular and continuous course of conduct in the State" (Commodity Ocean Transp. Corp. of N.Y. v Royce, 221 AD2d 406, 407, [1995]). A defendant relying upon Business Corporation Law § 1312 (a) as a statutory barrier to a plaintiff's lawsuit "bears the burden of proving that the [plaintiff-corporation's] business activities in New York were not just casual or occasional,' but so systematic and regular as to manifest continuity of activity in the jurisdiction'" (S & T Bank v Spectrum Cabinet Sales, 247 AD2d 373 [1998], quoting Peter Matthews, Ltd. v Robert Mabey, Inc., 117 AD2d 943, 944 [1986]). Absent sufficient evidence to establish that a plaintiff is doing business in this State, "the presumption is that the plaintiff is doing business in its State of incorporation . . . and not in New York" (Cadle Co. v Hoffman, 237 AD2d 555 [1997]).”

114. If the plaintiff is a New York limited liability company, the plaintiff failed to publish its articles of organization. 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])."

Ninth Affirmative Defense: Unconscionability/Adhesion Contract

115. 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.

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

117. 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.")."

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

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

120. 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." "

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

122. 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.

123. 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].

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

Tenth Affirmative Defense: The Contract Was Breached By Plaintiff

125. The contract contained a provision expressly hinging repayment on the payment to defendant from its customers. *Quoted above*.

126. Plaintiff breached the contract by violating this provision. Westminster Properties v. Kass, 163 Misc. 2d 773, App. Term, First Dept. [1995]:

> "The holdover petition pleads tenants' violation of a specified lease provision. Since the underlying misconduct alleged is a breach of contract, the six-year limitations period applicable to actions upon contract (CPLR 213 [2]) should apply."

127. The contract was also breached for the reason stated in the next defense.

Eleventh Affirmative Defense: The Contract is Void for Vagueness

128. The contract stated that the "merchant" was to get gross funding of $25,000.

129. The contract provided for two deductions:

> A list of all fees applicable under this Agreement is contained in Appendix A.
>
> A. Underwriting Fee 7.5%
>
> B. Origination Fee 7.5%

130. The contract did not state how the 7.5% fee were to be calculated, to wit, whether it was 7.5% of the $37,500, the $25,000 or something else.

131. In fact, it was something else, since defendant got wired $22,000.

132. The contract was void for vagueness.

> 166 Mamaroneck Ave. Corp. v. 151 East Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]:
> "The doctrine of definiteness or certainty is well established in contract law. In short, it means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to (see, 1 Corbin, Contracts § 95, at 394). As we noted recently in Cobble Hill, "[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (74 NY2d, at 482, citing Martin Delicatessen v Schumacher, 52 NY2d, at 109; Restatement [Second] of Contracts § 33 [1981]). * * *
> This Court, however, has not applied the definiteness

> doctrine rigidly. * * * Thus, where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain (see, 1 Williston, Contracts § 46, at 152-153 [3d ed]).”

> Ayer v. Board of Education, 69 Misc. 2d 696, 698 [1972]: “There can be no contract unless the parties have agreed upon all of the essential terms thereof (9 N. Y. Jur., Contracts, § 16). "The general rule is that price is an essential ingredient of every contract for * * * the rendering of services. Accordingly, an agreement must be definite as to compensation. In order that an executory agreement may be valid, it is generally necessary that the price be certain or capable of being ascertained from the agreement itself." (9 N. Y. Jur., Contracts, § 51; see, also, United Press v. New York Press Co., 164 N. Y. 406).”

Twelfth Affirmative Defense: Unenforceable Default and Attorney Fee

133. 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"]).

134. Plaintiff has no right to the amount of the contractual attorney fee claimed. Kamco Supply Corp. v. Annex Contr. Inc., 261 A.D.2d 363, 364-365 [1999]; First Nat'l Bank v. Brower, 42 N.Y.2d 471, 474 [1977]; Fed. Land Bank of Springfield v. Ambrosano, 89 A.D.2d 730, 731 [1982]; Community Nat'l Bank & Trust Co. v. I.M.F. Trading, Inc., 167 A.D.2d 193 [1990]; Korea First Bank v. Chung Jae Cha, 259 A.D.2d 378, 379.

WHEREFORE, defendants respectfully demand judgment dismissing the complaint.

Dated: November 22, 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: November 22, 2024

Amos Weinberg