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

Index No 515065/2024

----------x

VELOCITY CAPITAL GROUP LLC,

Plaintiff,

-against-

CLEVER PERFORMANCE LLC D/B/A 360 PAINTING GASTONIA/ROCK HILL and JOHN WRIGHT, JR CLEVENGER,

Defendants.

----------x

ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

1. Admit paragraph 1.

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Paragraph 5: Admit the date of the contract and that the parties' transaction was for the amount stated, but otherwise deny. The contract had nothing to do with any purchase. $25,000 was not paid.

6. Admit paragraph 6.

7. Deny "purchase price" and otherwise admit paragraph 7.

8. Deny paragraph 8 and each and every subsequent allegation of the complaint.

First Affirmative Defense: Illusory Contract. No Risk

9. 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."

10. Plaintiff's contract eliminated the risk.

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

12. The plaintiff's funding/loan started at a 118% annual rate of interest. 118% is almost 4.7 times the 25% maximum under the criminal usury statute.

13. **Calculation of Interest**: Under the Agreement, the total paid to Defendant was $24,250 ($25,000 less $750 origination fee) for which Defendant had to pay plaintiff back $37,475, by a weekly payment of $1,561.00 per week. Defendant getting gross proceeds from plaintiff of $24,250, and having to pay back $37,475, the difference, of $13,225, was the interest that Defendant had to pay on the $24,250. $13,225 interest on $24,250, if it had to be paid back over a year, would have been 54.5% interest.

The agreement required weekly payments of $1,561.00 per week, which meant 24 payments of $1,561.00 each, to pay the $37,475. 24 weeks is 46.1% of a year. Since 54.5% interest had to be paid back in 46.1% of a year, that was an annual interest rate of 118%.

14. The agreement was for a finite term of 24 weeks with payments of $1,561.00.

15. The weekly receipts of defendant needed for the $1,561.00 fixed weekly payment under the contract, at the specified percentage of 7%, equaled $22,300.00 (7% of $22,300.00 = $1,561.00).

16. The initial 118% interest rate was 4.7 times the 25% criminal usury cap. 25 times 4.7 = 118%.

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

18. If the fixed weekly payment was reduced so that 7% of receipts equaled the 25% maximum criminal usury rate rather than the 118% criminal rate, the receipts needed would only be $4,719.50. Calculation: The 118 interest rate divided by 25 =4.7. The $22,300.00 receipts needed under the contract to cover the 7% Specified Percentage divided by 4.7 = $4,719.50.

19. Therefore, until the plaintiff granted a reconciliation taking 7% of only $4,719.50 of receipts, the funding was criminally usurious.

20. Until receipts dropped to $4,719.50, the 7% specified percentage was criminally usurious.

21. If the defendant's receipts diminished from $22,300.00 to $4,719.50, 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.

22. It is as if the $210,900 salary of a New York Supreme Court justice was reduced to $44,872.34 ($210900/4.7).

23. For plaintiff to then use a reconciliation to deduct a fixed weekly payment of 7% of the $4,719.50 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 7% debit if receipts dropped to $4,719.50.

24. This would enable plaintiff to declare a default.

25. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $1,561.00 fixed weekly payment is enforcing criminal usury.

26. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $1,561.00 fixed weekly payment is enforcing criminal usury.

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.

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:

> 1.10 *** Payments made to VCG 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

32. This benefit was illusory because under the contract, plaintiff intended to ACH-debit the fixed weekly payment each week regardless of receipts.

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

34. 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 VCG shall become effective only upon receipt by VCG

35. This made any right of defendant to demand anything under the agreement illusory because the benefit of allowing requests could be delayed and rejected at plaintiff's whim by refusing to sign for or claim the certified mail.

36. Section 4.3 further made any benefit or right of defendant to notify plaintiff or demand anything of plaintiff illusory, there being no address of plaintiff stated in the contract and anything outside of the contract was invalid:

> 4.9 Entire Agreement. Any provision hereof prohibited by law shall be ineffective only to the extent of such prohibition without invalidating the remaining provisions hereof. This Agreement and the Security Agreement and Guaranty hereto embody the entire agreement between Merchant and VCG and supersede all prior agreements and understandings relating to the subject matter hereof
> 4.1 Modifications; Agreements. No modification, amendment, waiver or consent of any provision of this Agreement shall be effective unless the same shall be in writing and signed byVCG

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

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

39. 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:

> VCG will debit the Remittance each business day from only one depositing bank account, which account must be acceptable to, and pre-approved by, VCG
> 1.1 *** This additional authorization is not a waiver of VCG's entitlement to declare this Agreement breached by Merchant as a result of its usage of an account which VCG did not first pre-approve in writing prior to Merchant's usage thereof
> 1.12
> (b) Merchant changes its arrangements with Processor or the Bank in any way that is adverse or unacceptable to VCG; (c) Merchant changes the electronic check processor through which the Receipts are settled from Processor to another electronic check processor, or permits any event to occur that could cause diversion of any of Merchant's check or deposit transactions to another processor;
> 3.1 Defaults
> (h) Merchant shall use multiple depository accounts without the prior written consent of VCG (i) Merchant shall change its depositing account without the prior written consent of VCG; or (j) Merchant shall close its depositing account used for ACH debits without the prior written consent of VCG

40. 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."

41. The contract made it a default if:

> 1.12
> (d) Merchant intentionally interrupts the operation of this business transfers, moves, sells, disposes, or otherwise conveys its business and/or assets

42. A bankrupt must transfer all of its assets to a trustee in bankruptcy.

43. The Security Agreement portion of the contract stated

> Security Agreement ***
> This security interest may be exercised by VCG without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets. VCG 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, VCG has control over and may direct the disposition of the Secured Assets, without further consent of Merchant.

44. 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.

45. The contract stated:

> In no event shall the aggregate of all amounts or any portion thereof be deemed as interest hereunder

46. That was false. *Interest* is defined by Merriam-Webster online dictionary as "3b : the profit in goods or money that is made on invested capital". The difference between the amount funded and amount that had to be paid back was INTEREST.

47. 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 weekly 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."

48. 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)."

49. 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

50. 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])."

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

52. The reconciliation provision, paragraph 1.4 stated

> Seller shall provide VCG with viewing access to their bank account as well as all information reasonably requested by VCG to properly calculate the Merchant's Remittance.

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

54. The reconciliation provision had no time frame for any reconciliation.

55. The reconciliation was immediately negated by its own terms:

> 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.

56. The manner of calculating the reconciliation made no sense. The "merchant" had to furnish all statements:

> since the date of this Revenue Purchase Agreement. 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

57. A calculation using data from the beginning of the contract divided by 10 (the number of business days in any (2) calendar weeks) makes no sense.

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. 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)."

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

62. Nonpayment was a default under the contract:

> Merchant understands that it is responsible for ensuring that the Agreed Remittance to be debited by VCG remains in the Account
> 3.1 Defaults *** (d) the Merchant fails to give VCG 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
> (l) Merchant has 5 bounced payments

63. As demonstrated above, any notice under the terms of the contract was impossible.

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

66. 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."

67. The plaintiff's contract prohibited any change of the payment processing arrangements. Quoted above.

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

69. 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 weekly amount".

70. 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. Quoted above.

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

72. Nothing in the contract avoided the fixed weekly payment if defendants had no receipts.

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

74. 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"].)

75.

76. 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

77. 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,

78. 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:

> 2.4 Use of Funds. Merchant agrees that it shall use the Purchase Price for business purposes and not for personal, family, or household purposes
> 2.11 Business Purpose. Merchant is a valid business in good standing under the laws of the jurisdictions in which it is organized and/or operates, and Merchant is entering into this Agreement for business purposes and not as a consumer for personal, family or household purposes

79. Under People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.) the plaintiff's MCA agreement was a predatory, illegal, criminally usurious loan, because [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%.

80. The parties' contract was dated: Feb. 6, 2024.

81. A prior UCC-1 was filed against defendants. Appendix A, below.

82. Contract provisions:

> 2.10 Unencumbered Receipts. Merchant has good, complete, unencumbered and marketable title to all 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 that may be inconsistent with the transactions contemplated with, or adverse to the interests of VCG.

83. 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 weekly amounts collected with the amounts of accounts receivable actually received" "the Borrowers were required to send bank statements to the Predatory Lenders".

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

> 1.1 . Merchant shall provide VCG 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

85. 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.

86. 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.

87. 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.

> Notwithstanding anything to the contrary in this Agreement or any other agreement be- tween VCG and Merchant, upon the occurrence of an Event of Default under Section 3 of the MERCHANT AGREEMENT TERMS AND CONDITIONS the Purchased Percentage shall equal 100%
> Protection 1. The full uncollected Purchased Amount plus all fees (including reasonable attorney's fees) due under

> this Agreement and the attached Security Agreement become due and payable in full immediately

88. 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".

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

> Security Interest. This Agreement will constitute a security agreement under the Uniform Commercial Code. Merchant and Guarantor(s) grants to VCG 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), (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) Account, regardless of the source of such funds, (d) present and future Electronic Check Transactions, and (e) any amount which may be due to VCG under this Agreement, including but not limited to all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets"). Merchant agrees to provide other security to VCG upon request to secure Merchant's obligations under this Agreement. Merchant agrees that, if at any time there are insufficient funds in Merchant's Account to cover VCG's entitlements under this Agreement, VCG is granted a further security interest in all of Merchant's assets of any kind whatsoever, and such assets shall then become Secured Assets

90. 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 Weekly 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.

91. Plaintiff's contract stated:

> 1.4 Adjustments to the Remittance. If an Event of Default has not occurred, Merchant may give notice to VCG to request a decrease in the Remittance

92. 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.

93. Plaintiff had a similar provision.

> The amount shall be decreased if the amount received by VCG was more than the Purchased Percentage of all revenue of Merchant since the date of this Revenue Purchase Agreement

Sixth Affirmative Defense: Illegal Contract

94. The contract stated:

> 1.4

> Purchase Price is not intended to be, nor shall it be construed as a loan from VCG to Merchant. Merchant agrees that the Purchase Price is in exchange for the Receipts pursuant to this Agreement, and that it equals the fair market value of such Receipts. VCG has purchased and shall own all the Receipts described in this Agreement up to the full Purchased Amount as the Receipts are created

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

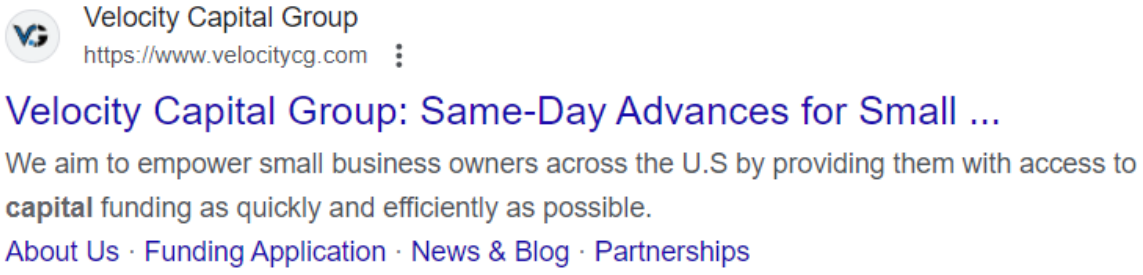
> mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract. (Smith v. Mackin, 4 Lans. 41, 44, 45; Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373.) If the erroneous transaction was such as to involve the act of the plaintiff only and the effect of 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: Unconscionability/Adhesion Contract

101. Plaintiff's contract was for immediate funding.

102. Plaintiff's website states:



103. 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.

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

105. 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.").”

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

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

108. 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." ”

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

110. 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 weekly 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.

111. 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].

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

Eighth Affirmative Defense: The Contract Caused Its Own Breach

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

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

115. 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).

116. Even if receipts plummeted to near zero, there was no right to a payment reduction, the reconciliation being illusory (above) and plaintiff was still debiting the fixed weekly payment.

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

Ninth Affirmative Defense: Unenforceable Default Fee

118. 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: June 15, 2024

Amos Weinberg
Attorney for Defendants
Office and P.O. Address:
49 Somerset Drive South
Great Neck NY 11020-1821
Phone: (516) 829-3900.
Email: amos@AmosLegal.com

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: June 15, 2024

Amos Weinberg

Appendix A

UCC Filings

1:NORTH CAROLINA UCC Record

Debtor Information

Name: CLEVER PERFORMANCE LLC

Standardized Address: 11701 PARKS FARM LN
CHARLOTTE, NC 28277

Original Address: 11701 PARKS FARM LN
CHARLOTTE, NC 28277-5611

Secured Party Information

Name: NORTH STATE BANK
Standardized Address: 6200 FALLS OF NEUSE RD STE 200
RALEIGH, NC 27609

Original Address: 6200 FALLS OF NEUSE ROAD STE 200
RALEIGH, NC 27609-3563

Filing Information

Original Filing Number: 20220066339E
Original Filing Date: 05/10/2022
Filing Agency: SECRETARY OF STATE/UCC DIVISION

Filing Agency Address: 300 N SALISBURY ST, LEGIS OFF BLDG
RALEIGH, NC 27603

Filing Type: INITIAL FILING
Filing Number: 20220066339E
Filing Date: 05/10/2022
Filing Time: 10:00
Filing Expiration Date: 05/10/2027
Vendor Entry Date: 05/18/2022
Vendor Update Date: 2022

Collateral

Collateral Description: 05/10/2022 20220066339E - INVENTORY INCLUDING PROCEEDS AND PRODUCTS;EQUIPMENT INCLUDING PROCEEDS AND PRODUCTS;GENERAL INTANGIBLE(S) INCLUDING PROCEEDS AND PRODUCTS;FIXTURES INCLUDING PROCEEDS AND PRODUCTS;CHATTEL PAPER INCLUDING PROCEEDS AND PRODUCTS;ACCOUNT(S) INCLUDING PROCEEDS AND PRODUCTS;ACCOUNTS RECEIVABLE INCLUDING PROCEEDS AND PRODUCTS;MACHINERY INCLUDING PROCEEDS AND PRODUCTS;NEGOTIABLE INSTRUMENTS INCLUDING PROCEEDS AND PRODUCTS;CONTRACT RIGHTS INCLUDING PROCEEDS AND PRODUCTS