SUPREME COURT OF THE STATE OF NEW YORK : COUNTY OF MONROE
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Index No E2024018569

SWIFT FUNDING SOURCE INC,

Plaintiff,

-against-

GOOD DEEDS PAINTING & RENOVATING INC, MICHAEL F CHECKO and A PAINTERS TOUCH INC.,

Defendants.

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ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

1. Admit paragraph 1.

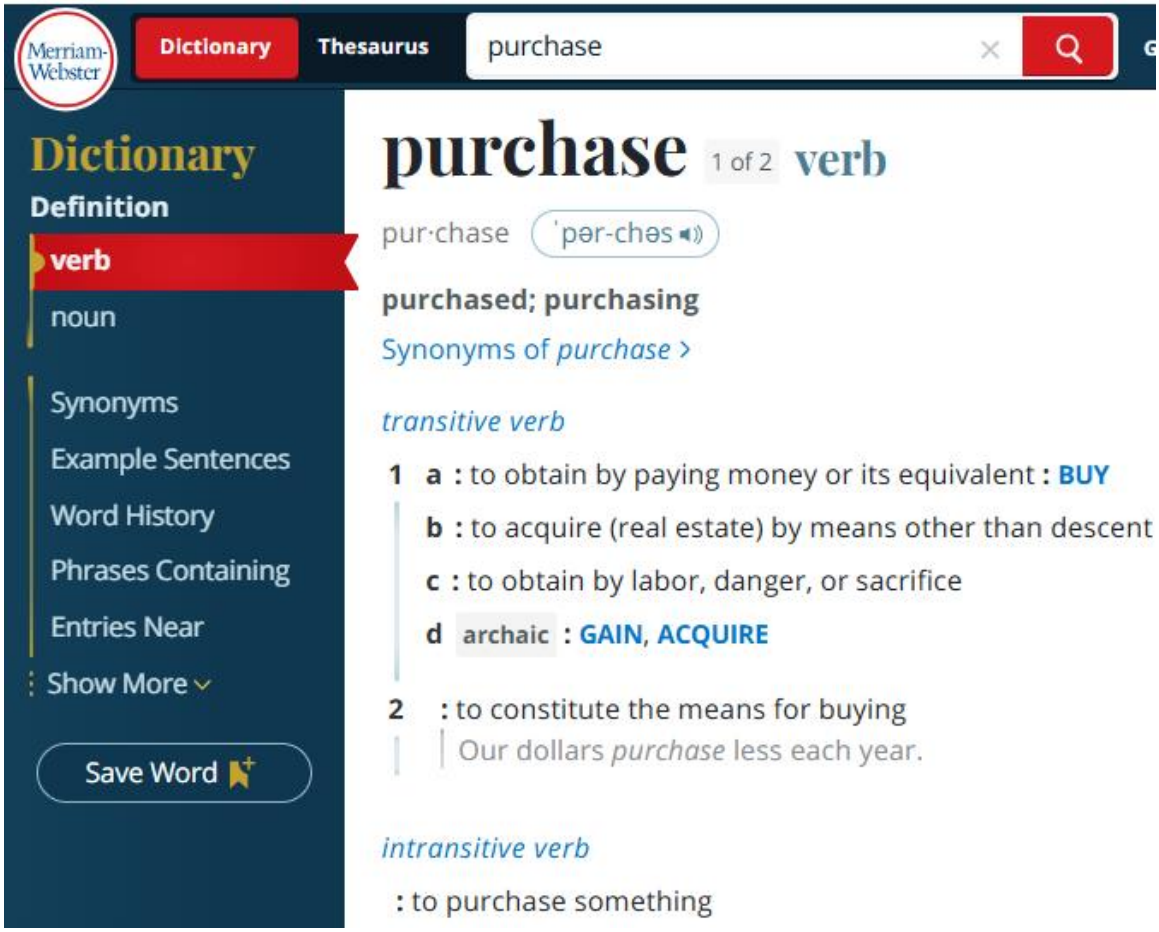
2. Admit paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Paragraph 5: Admit that this is what plaintiff's contract stated but deny that defendants otherwise agreed to same. Deny that subject matter jurisdiction can be created by agreement.

6. Paragraph 6: Admit so much as states the date of the parties' agreement and admits that the parties' transaction was for $37,250, admits that plaintiff's funding was wired to the business defendant's bank account, and otherwise denies. The transaction had nothing to do with a purchase:



7. Paragraph 7: Admits that the full payback was due in the event of default but otherwise denies. The contract had nothing to do with receivables.

8. Paragraph 8: Admit the payment but denies that there was any purchase price or purchase of anything.

9. Denies paragraph 9 and each and every allegation of the complaint not expressly admitted herein.

First Affirmative Defense: Illusory Contract. No Risk

10. 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."

11. Plaintiff's contract eliminated the risk.

12. The loan was at a criminally usurious 162% annual rate of interest. **Calculation of Interest**: Under the Agreement, the total payable to Defendant was $22,500, less startup fees, for which Defendant had to pay plaintiff back $37,250, by a daily payment of $372.50 per day. Defendant getting gross proceeds from plaintiff of $22,500, and having to pay back $37,250, the difference, of $14,750, was the interest that Defendant had to pay on the $22,500. $14,750 interest on $22,500, if it had to be paid back over a year, would have been 66% interest. The agreement required payments of $372.50 per day, which meant 100 payments of $372.50 each, or 100 days, to pay the $37,250. However, the $372.50 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 100 payments of $372.50 each were going to take 144 days total. 144 days is

40.4% of a year. Since 66% interest had to be paid back in 40.4% of a year, that was an annual interest rate of 162%.

13. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 20%, equaled $1,862.50 ($372.50 divided by 20% $1,862.50).

14. The initial 162% interest rate was 6.47 times the 25% criminal usury cap. 25 times 6.47 = 162%.

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

16. If the fixed daily payment was reduced so that 20% of receipts equaled the 25% maximum criminal usury rate rather than the 162% criminal rate, the receipts needed would only be $282.98. **Calculation**: The 162% interest rate divided by 25 = 6.47. The $1,862.50 receipts needed under the contract to cover the 20% Specified Percentage divided by 6.47 = $282.98.

17. Therefore, until the plaintiff granted a reconciliation taking 20% of only $282.98 of receipts, the funding was criminally usurious.

18. If $37,250 has to be paid back after receipt of $22,500 with fixed daily payments each business day and an annual interest rate of 25%, each

daily payment would equal $56.60 which at 20% of daily receipts would equal $282.98 of receipts.

19. Until receipts dropped to $282.98, the 20% specified percentage was criminally usurious.

20. If the defendant's receipts diminished from $1,862.50 to $282.98, it would obviously be utterly out of business, unable to function or pay anyone. It would have no money to pay any employee, any landlord, any tax, any materials, any work expense, etc. Assuming that someone in business for themselves, like the individual defendant, needed some kind of draw from his business to live on, his family was going hungry and homeless.

21. It is as if the $210,900 salary of a New York Supreme Court justice was reduced by 6.47 times = $32,596.60 ($210,900/6.47).

22. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 20% of the $282.98 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 20% debit if receipts dropped to $282.98.

23. This would enable plaintiff to declare a default.

24. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $372.50 fixed daily payment is enforcing criminal usury.

25. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $372.50 fixed daily payment is enforcing criminal usury.

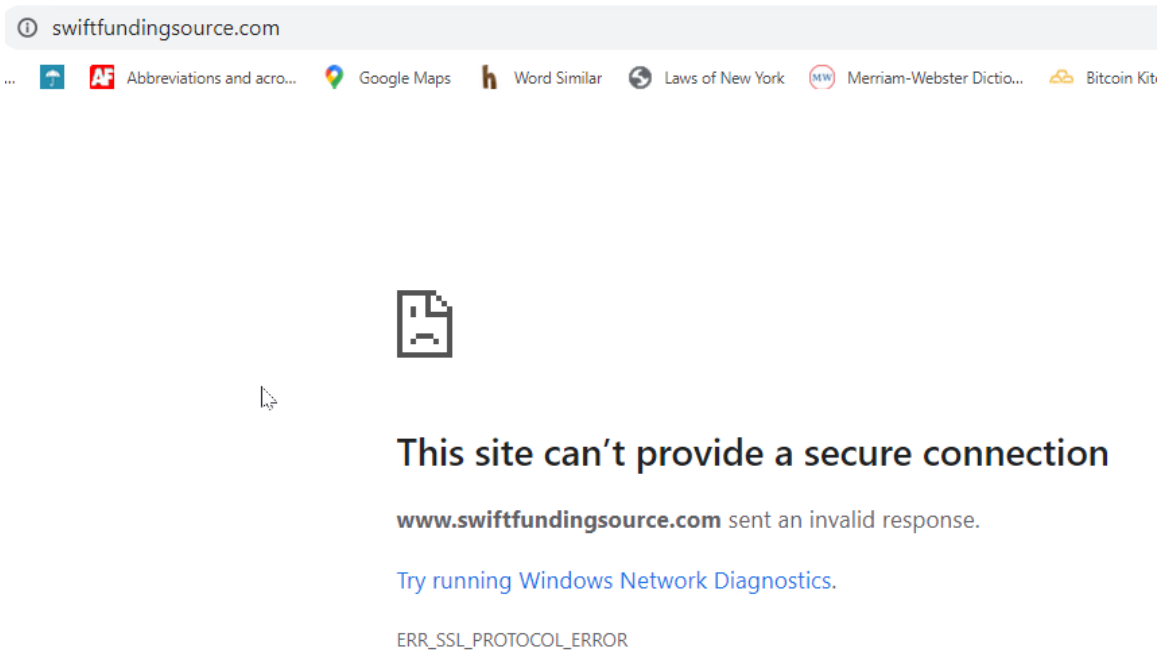
26. The agreement was for a finite term of 144 days with payments of $372.50 each business day.

27. The notice provision in the agreement and merger clause in the agreement provided:

> 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 Purchaser shall become effective only upon receipt by Purchaser. Notices to Merchant shall become effective three days after mailing.
>
> 4.11 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 and the Authorization Agreement embody the entire agreement between Merchant and Purchaser and supersede all prior agreements and understandings relating to the subject matter hereof.

28. The agreement had no address for defendant.

29. The internet had no available website for defendant:



30. Accordingly, any reconciliation in the agreement was illusory because no notice could be given.

31. Any required notice of insufficient funds was illusory because no notice could be given:

> 3.1 Events of Default
> d) the Merchant, either for (i) two (2) consecutive business days or (ii) four (4) business days within one month, fails to give Purchaser 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, and the Merchant fails to supply all requested documentation and allow for daily and/or real time monitoring of its bank account;

32. Prior to this lawsuit, defendants gave notice to their broker (see defense below) that they were not able to continue to afford the fixed payment.

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

> 2.4 Use of Funds. During the term of this Agreement, Merchant shall use the Purchase Price for business purposes and not for personal, family, or household purposes.

34. 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.

35. 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.

36. 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."

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

38. 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 Purchaser 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.

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

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

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

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

43. 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:

> Purchaser will debit the Remittance each business day from only one depositing bank account, which account must be acceptable to, and pre-approved by Purchaser, (the "Account")

44. 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."

45. Bankruptcy, under which a bankrupt must transfer all assets to a trustee in bankruptcy was prohibited by these provisions:

> 1.12 [defaults]
> (d) Merchant intentionally interrupts the operation of this business transfers, moves, sells, disposes, or otherwise conveys its business and/or assets without (i) the express prior written consent of Purchaser, and (ii) the written agreement of Purchaser or transferee to the assumption of all of Merchant's obligations under this Agreement pursuant to documentation satisfactory to Purchaser;

46. The following provision effectively barred any bankruptcy:

> **2.13 Good Faith**. Merchant and Guarantors hereby affirm that Merchant is receiving the Purchase Price and selling Purchaser the Purchased Amount in good faith and will use the Purchase Price funds to maintain and grow Merchant's business.

47. The Security Agreement portion of the contract stated

> Security Agreement
> This security interest may be exercised by Purchaser without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets. Purchaser shall have the right to notify account debtors at any time after a breach of the RPA and/or this SAGP. Pursuant to Article 9 of the Uniform Commercial Code, as amended from time to time, Purchaser has control over and may direct the disposition of the Secured Assets, without further consent of Merchant or any Guarantor. Merchant and each Guarantor hereby represent and warrant that no other person or entity has a security interest in the Secured Assets.

48. 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.

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

> Merchant and each entity Guarantor agree to execute any documents or take any action in connection with this Agreement as Purchaser deems reasonably necessary to perfect or maintain Purchaser's priority security interest in the Secured Assets, including the execution of any account control agreements.

50. This made the entire contract illusory.

51. 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."

52. 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)."

53. 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

54. 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])."

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

> 1.4 *** Merchant may give notice to Purchaser to request a decrease in the Remittance. The amount shall be decreased if the amount received by Purchaser was more than the Purchased Percentage of all revenue of Merchant 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. **Seller shall provide Purchaser with** viewing access to their bank account as well as **all information reasonably requested by Purchaser** to properly calculate the Merchant's Remittance.

56. 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.

57. 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.

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

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

60. There was no time limit stated in the reconciliation provision for when plaintiff had to reduce the fixed daily payment.

61. The contract provided no means by which to request a reconciliation or adjustment (notice provisions quoted above).

62. 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.

63. 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.

64. Oakshire Props., LLC v Argus Capital Funding, LLC, 229 A.D.3d 1199 [2024] 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"

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

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

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

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

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

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

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

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

67. 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."

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

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

70. 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".

71. 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.

72. 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.

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

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

75. 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"].)

76.

77. 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

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 [the plaintiff knew from the very beginning of the MCA transaction that the defendant was going to be in default of the agreement,

79. 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.

80. 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%.

81. The parties' contract was dated: Dec. 30, 2022.

82. Annexed as Exhibit A is a record of UCC-1's filed against defendant including prior UCC-1's (records #2 and #3).

83. The contract made this a default from the outset:

> 2.10 Unencumbered Receipts. As of the date of this Agreement and during the term of this Agreement, Merchant has, and shall have, 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 under this Agreement or adverse to the interests of Purchaser.

84. 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".

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

> 1.5 Financial Condition. Merchant and Guarantor(s) (as hereinafter defined and limited) authorize Purchaser and its agents to investigate their financial responsibility and history, and will provide to Purchaser any authorizations, bank or financial statements, tax returns, etc., as Purchaser deems necessary in its sole and absolute discretion prior to or at any time after execution of this Agreement.

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

86. 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.

87. 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.

88. 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.

> upon the occurrence of an Event of Default under Section 3 of the MERCHANT AGREEMENT TERMS AND CONDITIONS, the Purchased Percentage shall equal 100%.

89. 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."

90. 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.

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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

91. Similarly, in this action, the plaintiff, SWIFT FUNDING SOURCE INC, set a 25% Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

92. 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".

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

> Security Agreement
> Merchant and each Guarantor that is not a natural person ("entity guarantor") grants to Purchaser a security interest in and lien upon: (a) all of their respective 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 each entity Guarantor; (b) all of their respective proceeds, as that term is defined in Article 9 of the UCC; (c) all of their respective funds at any time in the Merchant's and/or each entity Guarantor's bank accounts, regardless of the source of such funds; (d) present and future Electronic Check Transactions; and (e) any amount which may be due to Purchaser under the RPA and this SAGP, including but not limited to all of their respective rights to receive any payments or credits under the RPA and this SAGP (collectively [(a), (b), (c), (d) and (e)], the "Secured Assets").

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

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

95. Plaintiff's contract, here, abridged the right to any reconciliation altogether through the absence of any means of notice and the right to disclosure.

96. 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.

97. Plaintiff had a similar provision.

Sixth Affirmative Defense: Arbitration

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

> 4.5 Arbitration. Any action or dispute relating to this Agreement or involving Purchaser on one side and any Merchant or any Guarantor on the other, including, but not limited to issues of arbitrability, will, at the option of any party to such action or dispute, be determined by arbitration before a single arbitrator. The arbitration will be administered either by Arbitration Services, Inc. under its Commercial Arbitration Rules as are in effect at that time, which rules are available at www.arbitrationservicesinc.com, or by Mediation & Commercial Arbitration, Inc. under its Commercial Arbitration Rules as are in effect at that time, which rules are available at www.mcarbitration.org.

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

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

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

> "We cannot conclude, as a matter of law, that a reasonable person reviewing a 20-page warrant and a 42-plus-page

> Securities Purchase and Registration Rights Agreement would have realized that the word "sentence" (in "immediately preceding sentence") should have been "sentences." ”

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

Seventh Affirmative Defense: Unconscionability/Adhesion Contract

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 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.

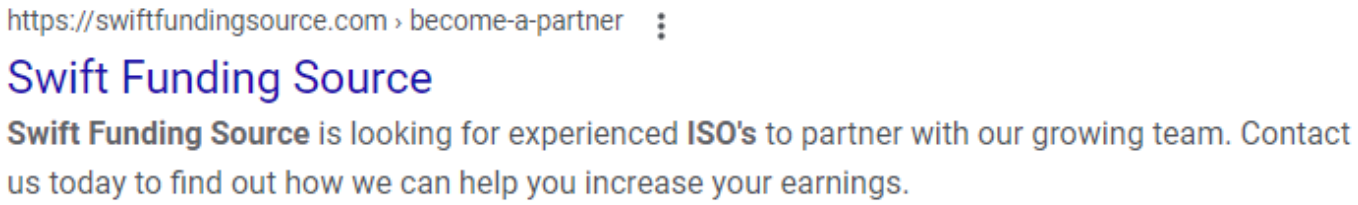
111. There is no term in plaintiff's contract that should shield it from the defense of unconscionability of adhesion contract. *Cf.*, Danann Realty Corp. v. Harris, 5 N Y 2d 317 [1959].

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

Eighth Affirmative Defense: Broker

113. In pursuit of and furtherance of any funding, defendants did not deal with plaintiff but dealt with CAPTAIN CAPITAL GROUP and JOHN TORELLO an alleged broker or ISO (independent sales organization), hereinafter, "broker").

114. Plaintiff solicits brokers or partners or ISO's including on its website.



115. The purpose of such a partner is to work with plaintiff to get a prospective borrower to submit three months' bank statements and a contract application for plaintiff's funding.

116. Plaintiff needs to solicit such partners in order to sustain the volume of loans or funding that it needs or seeks to generate.

117. Broker acted as such a partner.

118. Broker communicated with defendants in regard to immediate funding of a loan.

119. Broker held itself out as a lender making loans.

120. The said representation was knowingly false.

121. In the course thereof, broker issued promises and representations to defendants.

122. Defendants justifiably relied on such representations, including the amount of funding and the terms of the funding.

123. Broker was an untraceable entity and individual whose actual name and address was known to defendant.

124. Defendants' communications included texts clearly from broker.

125. Broker produced funding that was not from broker but was from plaintiff.

126. Broker submitted by text/email to defendants documents to sign in order to get the funding. The said documents were to be DocuSigned. The funding was to be immediate.

127. Broker implored defendants that the documents had to be immediately signed.

128. Broker thereby knew that there was neither time, opportunity, nor ability to review the fine print of the documents that it submitted for DocuSigning by defendants and email back to broker for submission to plaintiff.

129. Broker imparted the pertinent and necessary provisions of the funding agreement to defendants before submitting the documents to defendants to DocuSign.

130. Broker knew, and had a duty to inform defendants, but failed to inform defendants of provisions of the agreement known by broker 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 forum selection clause under which the defendants would be sued in New York in any random county
- 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 agreement and assumption between broker and defendants that broker 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.

131. Broker misrepresented and concealed the rate of interest payable to plaintiff.

132. Pursuant to broker's representations, defendants forwarded three months' bank statements to broker along with a DocuSigned contract application for plaintiff.

133. Broker failed to advise defendants at the time of submission of their bank statements that they needed to to block out the identities of any clients of defendants or other parties having transferred funds to defendants, otherwise, on any missed payment, plaintiff would send UCC lien notices to such parties.

134. As a result, when defendants could no longer afford to make the payments to plaintiff, the latter had the ability to identify such clients or other parties having transferred funds to defendants and to serve such parties with UCC lien notices.

135. Such omission on broker's part was for the benefit of the plaintiff and in keeping with broker's relationship with the plaintiff.

136. Broker obtained a substantial fee for procuring plaintiff's funding for defendants, payable out of the said funding.

137. The fee was caused to be paid or transferred to broker by the plaintiff.

138. Broker and plaintiff knew that the primary purpose of defendants entering into the transaction with broker and plaintiff was to obtain immediate funding for a loan, which defendants would undertake without any review of plaintiff's dense, prolix contract and without any time to retain professional counsel and for counsel's review. 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." "

139. Plaintiff did not pay or transfer payment to broker by making such payment to a fictitious person or entity but knew upon paying or transferring payment to broker the true and correct identity of broker.

140. Plaintiff knew that such true and correct identity of broker had not been disclosed to defendants.

141. The documents submitted by broker were contrary to its promises and representations.

142. Had defendants' known the truth about the plaintiff's funding, concealed or misrepresented by broker, they would not have accepted the offer of the funding.

143. Plaintiff is united in interest with broker.

144. Broker and plaintiff are instrumentalities of each other.

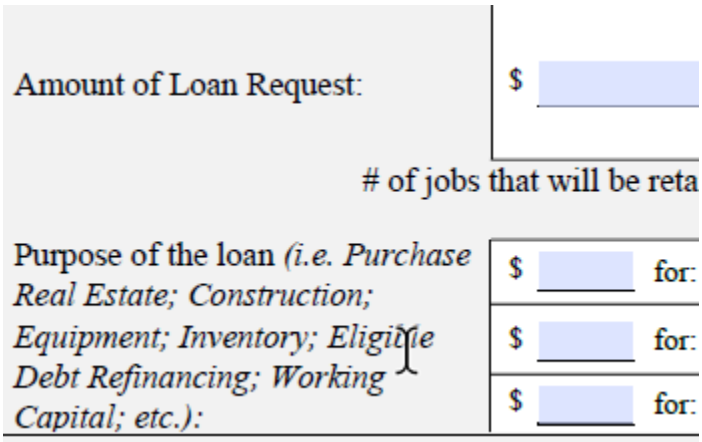
145. Plaintiff knew or had reason to know that defendants signed and processed plaintiff's contract applications based upon all of the said misrepresentations of broker.

146. Plaintiff knew or had reason to know of all of the said misrepresentations of broker.

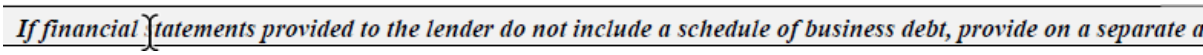
147. Plaintiff knew from prior complaints of its borrowers that funding procured by broker or brokers, partners or ISO's like it was based on misrepresentations.

148. Plaintiff knew that the loan application was a sham. There was no inquiry by plaintiff of the reason why the loan or funding was requested. There was no inquiry by plaintiff as to defendants' business debts or expenses.

149. In contrast, a genuine business loan or funding application requires the borrower to disclose the reason why the loan or funding is needed. Cf., United States SBA 7A loan application, Form 1919:



150. A genuine business loan or funding application requires disclosure of business debts. SBA 7A loan application, Form 1919:


If financial statements provided to the lender do not include a schedule of business debt, provide on a separate a

151. Plaintiff acted in concert with broker in procuring defendants' signed contract/application for plaintiff's funding.

152. But for broker's misrepresentations, defendants would never have DocuSigned plaintiff's contract/application nor entered into the transaction with plaintiff.

153. Broker's misrepresentations were made with knowledge that they were wrongful and with the intent that they were wrongful and that defendants act on them.

154. Plaintiff had knowledge of broker's fraudulent misrepresentations. Plaintiff knew from prior dealings with partners like broker, that they utilized misrepresentations to procure borrowers for plaintiff.

155. Plaintiff provided substantial assistance to advance broker's fraud.

156. There is no term in plaintiff's contract that should shield it from the fraud. Danann Realty Corp. v. Harris, 5 N Y 2d 317 [1959].

157. Defendants merit a rescission of the contract with plaintiff upon which this action is based.

158. Plaintiff's action for breach of contract should be dismissed and the contract declared void and unenforceable.

159. Any fraud disclaimer in plaintiff's contract does not cover broker. Wittenberg v. Robinov, 9 N.Y.2d 261, 263-264 [1961].

160. Any agreement as alleged or as between the parties should be rescinded.

161. Upon rescission there would be no basis for personal jurisdiction over defendants.

Ninth Affirmative Defense: Unenforceable Default Fee

162. 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"]).

163. 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 8, 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 8, 2024

Amos Weinberg