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

Index No 035345/2024

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KALAMATA CAPITAL GROUP, LLC,

Plaintiff,

ANSWER
and NOTICE OF ADDRESS

-against-

POUR SPORTS, LLC D/B/A KELLY'S PUB and DEEDEE KELLY,

Defendants.

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Defendant POUR SPORTS, LLC by its attorney retained solely therefor answers the complaint:

Notice

1. POUR SPORTS, LLC has neither signed nor authorized the contract at issue. ALL MAIL TO POUR SPORTS, LLC MUST BE SENT TO:

Adam Seligman
228 Walnut Hills Drive
San Marcos, CA 92078

2. The office of Amos Weinberg is intending to limitedly appear and answer only for defendant, POUR SPORTS, LLC. Any other printed matter issued by the office of Amos Weinberg stating or implying that he also

appears for co-defendant, Deedee Kelly, is an oversight and should be ignored.

3. Admit that plaintiff (a foreign limited liability company) is authorized to do business in New York. Deny that it has offices in New York.

4. Admit paragraph 2.

5. Admit paragraph 3.

6. Deny paragraph 4 as such venue would only apply to a signator of a contract with such a term, or a party held to be bound to the terms of such a contract.

7. Deny paragraph 5. POUR SPORTS, LLC did not sign such a contract. Nor was any contract by plaintiff annexed to the complaint.

8. Deny paragraphs 6, 7, 8, 9, 10. Repeat: there is no contract by plaintiff annexed to the complaint.

9. Takes no issue with paragraph 11 insofar as $21,195 is alleged to have been drawn from a subject bank account, and denies the balance of paragraph 11 and each and every other allegation of the complaint not expressly admitted above.

10. In analyzing, below, the contract annexed to the complaint, POUR SPORTS, LLC reserves all rights to any other defenses set forth in this answer.

First Affirmative Defense: Illusory Contract. No Risk

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

12. Plaintiff's contract eliminated the risk.

13. The plaintiff's funding/loan started at a 36% annual rate of interest. 36% is 1.43 times the 25% maximum under the criminal usury statute.

14. **Calculation of Interest**: Under the Agreement, the total paid to Defendant was $104,751, less startup fees, for which Defendant had to pay plaintiff back $150,700, by a weekly payment of $2,355.00 per week. Defendant getting gross proceeds from plaintiff of $104,751, and having to pay back $150,700, the difference, of $45,949, was the interest that Defendant had to pay on the $104,751. $45,949 interest on $104,751, if it had to be paid back over a year, would have been 44% interest. The agreement required weekly payments of $2,355.00 per week, which meant 64 payments of

$2,355.00 each, to pay the $150,700. 64 weeks is 123% of a year. Since 44% interest had to be paid back in 123% of a year, that was an annual interest rate of 36%.

15. The weekly receipts of defendant needed for the $2,355.00 fixed weekly payment under the contract, at the specified percentage of 14%, equaled $16,821.43 (14% of $16,821.43 = $2,355.00).

16. The initial 36% interest rate was 1.43 times the 25% criminal usury cap. 25% times 1.43 = 36%.

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 14% of receipts equaled the 25% maximum criminal usury rate rather than the 36% criminal rate, the receipts needed would only be $11,797.88. Calculation: The 36 interest rate divided by 25 =1.43. The $16,821.43 receipts needed under the contract to cover the 14% Specified Percentage divided by 1.43 = $11,797.88.

19. Therefore, until the plaintiff granted a reconciliation taking 14% of only $11,797.88 of receipts, the funding was criminally usurious.

20. If $150,700.00 has to be paid back after receipt of $104,751.00 with fixed weekly payments each week and an annual interest rate of 25%,

each weekly payment would equal $1652 which at 14% of weekly receipts would equal $11,797.88 of receipts.

21. Until receipts dropped to $11,797.88, the 14% specified percentage was criminally usurious.

22. If the defendant's receipts diminished from $16,821.43 to $11,797.88, it could not be expected to fully run its business. It would have insufficient 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 eating fast food.

23. It is as if the $210,900 salary of a New York Supreme Court justice was reduced $147,482.52. ($210900/1.43).

24. For plaintiff to then use a reconciliation to deduct a fixed weekly payment of 14% of the $11,797.88 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 14% debit if receipts dropped to $11,797.88.

25. This would enable plaintiff to declare a default.

26. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $2,355.00 fixed weekly payment is enforcing criminal usury.

27. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $2,355.00 fixed weekly payment is enforcing criminal usury.

28. The agreement was for a finite term of 64 weeks with payments of $2,355.00.

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

> 2.4 Use of Funds Seller and Guarantor(s) agree that it shall use the Purchase Price for business purposes, that Seller 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 Seller's business and not for personal, family, or household purposes.

30. 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.

31. 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."

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

33. 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:

> payments to Seller as a result of Seller's sale of goods and/or services
> 1.10

> Remittances made to Purchaser in respect of the Purchased Amount shall be conditioned upon Seller's sale of products and services, and the payment therefore by Seller's customers.

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

> Seller hereby authorizes Purchaser to ACH debit the Remittance from the Account on the Remittance Frequency

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

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

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

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

> Seller shall not deposit any Future Receipts into any account other than the Account

1.1 *** This additional authorization is not a waiver of Purchaser's entitlement to declare this Agreement breached by Seller as a result of its usage of an account which Purchaser did not first pre-approve in writing prior to Seller's usage thereof.

1.2

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

> Rushton v. American Pac. Wood Prods. (In re Americana Expressways), 133 F.3d 752, 756-757 [1997]:
> "The United States Trustee has the responsibility for supervising Chapter 11 debtors in possession. The trustee's Operating Guidelines and Reporting Requirements mandate that the debtor in possession close prepetition bank accounts and open new accounts that include the words "Debtor in Possession." See Appellees' Supp. App. 91. 4 The debtor in possession is an officer of the court and subject to the bankruptcy court's power and control. See Chmil v. Rulisa Operating Co. (In re Tudor Assocs. Ltd. II), 64 B.R. 656, 661 (E.D.N.C. 1986)."
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> C.C Canal Realty Trust v. Harrington, (In re Spenlinhauer), 2017 WL 1098820; 2017 U.S. Dist. LEXIS 42336, *9:
> "Debtors-in-possession are also required to deposit post-petition funds into designated debtor-in-possession bank accounts. See In re Sieber, 489 B.R. 531, 548-49 (Bankr. D. Md. 2013)."
>
> Jackson v. GSO Bus. Mgmt., LLC (In re Jackson), 643 B.R. 664, 699 [2022]:
> "The unauthorized withdrawal of funds from a debtor-in-possession bank account is an affront to the integrity of the bankruptcy process."

40. Bankruptcy was prohibited by this provision:

> 2.4 Seller and Guarantor(s) agree that it *** will *** maintain and grow Seller's business ***.

41. 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 Seller's account debtors at any time.

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

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

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

44. This made the entire contract illusory.

45. 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."

46. 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)."

47. 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

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

> "Further, although the presence in an agreement of a right to reconciliation may be an indication of whether an

> agreement constitutes a loan, the agreement here does not make clear on its face whether it conferred that right (see Davis v Richmond Capital Group, LLC, 194 AD3d 516, 517 [1st Dept 2021])."

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

> 1.3
> **Purchaser retains the right to request additional documentation** including but not limited to bank login or DecisionLogic access to view Seller's accounts.

50. 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.

51. 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.

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

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

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

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

Third Affirmative Defense: Criminal Usury.

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

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

Here, the contract had a no liability clause ("1.8 No Liability") and 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."

Plaintiff had sole discretion to delay any reconciliation interminably through discovery requests (above).

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"

Section 3.1(d) of the plaintiff's contract had the same effect.

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.

57. The contract stated:

> 3.1
> (d) Seller fails to give Purchaser 24 hours advance notice that there will be insufficient funds in the account such that the ACH of the Remittance will not be honored by Seller's bank;

58. This duty of notice by the debtor was illusory. Among others:

> 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." ”

59. Empery is even more applicable to any transaction of the funder, here, it being based upon immediate funding. (Below).

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

61. 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].

62. 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."

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

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

65. 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".

66. 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.

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

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

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

70. 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"].)

71. 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

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

73. 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.

74. 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".

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

> 1.1
> Seller shall provide Purchaser and/or its authorized agent(s) with all of the information, authorizations and passwords necessary for verifying Seller's receivables, receipts, deposits and withdrawals into and from the Account. Seller

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

76. 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.

77. 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.

78. 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 hereunder, the Purchased Percent shall equal 100% and the entire undelivered Purchased Amount is immediately due.
>
> 3.4 [Remedies upon default]
> Purchaser may debit Seller's depository accounts wherever situated

79. 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."

80. 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".

81. The contract annexed stated:

> Security Agreement
> Seller and Guarantor(s) grant(s) to Purchaser a security interest in and lien upon all of their present and future: (a) accounts (the "Accounts Collateral"), 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 Seller and/or Guarantor(s), (b) all proceeds, as that term is defined in Article 9 of the UCC, (c) funds at any time in any of the Seller's and/or Guarantor(s)' deposit accounts, regardless of the source of such funds, (d) present and future Electronic Check Transactions, and (e) any Future Receipts purchased by Purchaser (collectively, the "Secured Assets").

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

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

83. The contract annexed stated:

> 1.3
> Seller shall have no right to a reconciliation if an Event of Default, or other breach of this Agreement, has occurred.

Sixth Affirmative Defense: Illegal Contract

84. The contract stated:

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

85. 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])."

86. 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

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

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

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

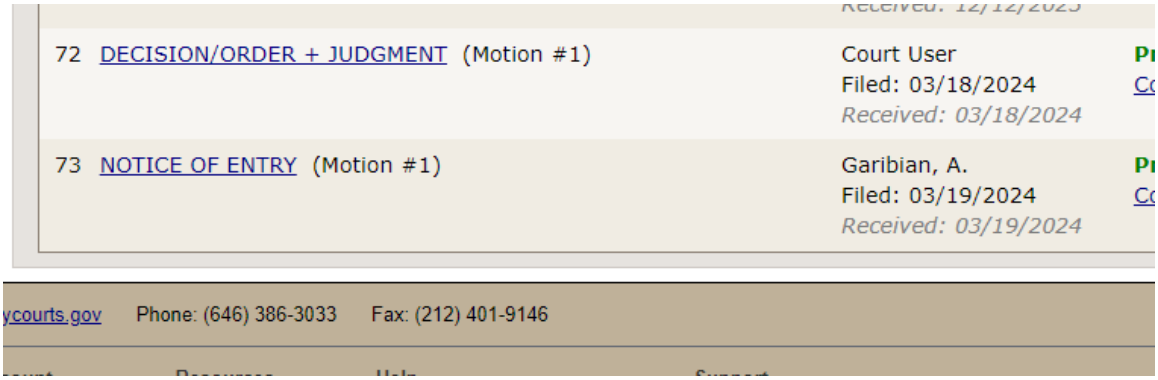
> "[E]quity can interfere in a suit for cancellation or rescission to prevent the enforcement of an unjust agreement induced by a unilateral mistake of fact. A mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract. (Smith v. Mackin, 4 Lans. 41, 44, 45; 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.)"

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

Seventh Affirmative Defense. Lack of Subject Matter Jurisdiction.

91. It has already been held that there is no subject matter jurisdiction in an action by plaintiff, like this, against out of state defendants. Kalamata Capital Group, LLC vs D&S Pallets, Inc. *et al.*, Supreme Court, Monroe County Index No. E2023006869 (NYSCEF Doc. No. 72).

92. That decision was never appealed and the time to appeal expired. *Op. Cit.*:



93. The plaintiff is therefore collaterally estopped from claiming subject matter jurisdiction:

> 73A NY Jur 2d Judgments § 379: "the modern rule is that an order made upon a motion has the same effect as a judgment, and that although technical and historical distinctions might be drawn between final order and final judgments, the doctrine of res judicata applies to both."
> Citing Vavolizza v. Krieger, 33 N.Y.2d 351, 356 [1974]:
> "What we do find is a prior adjudication on a motion brought within a prior proceeding in which issues identical to those now raised were decided. It so happens that in this case, considering the manner in which the motion was presented and decided, the twin requisites for the invocation of the doctrine of

> collateral estoppel have been met, i.e., "'[there] must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling'" (32 N Y 2d, at p. 304 quoting from Schwartz v. Public Administrator of County of Bronx, 24 N Y 2d 65, 71). There is, moreover, cogent precedent for the proposition that an order made upon a motion provides such a "judgment" as will bar relitigation under the doctrine of res judicata or collateral estoppel so long as the requisites of identity of issue and opportunity to contest are present (Matter of Levine v. Levine, 177 Misc. 412, affd. 263 App. Div. 1013, mot. for lv. to app. den. 288 N. Y. 739; see 9 Carmody-Wait, 2d, N. Y. Prac., § 63:214)."
>
> Moon 170 Mercer v Vella, 146 AD3d 537 [2017]:
> "Defendant's argument *** is barred by the doctrine of collateral estoppel. The claim of unlawful eviction was dismissed on the merits in a separate action between the tenant and plaintiff, and a motion to renew and reargue was denied based on the same purportedly new evidence defendant cites here. Since the unlawful eviction issue was raised in the prior action and decided against the tenant, with whom defendant, as guarantor of the lease, stands in privity, defendant is precluded from relitigating it in this action [citations]."

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

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

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

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

98. Actions required to be dismissed under BCL §1314(b) are routinely dismissed against the foreign entity defendant as well as the individual defendant. Mobile Programming LLC v. Tallapureddy, 2021 NY

Slip Op 50411(U); Pearl Beta Funding, LLC v Eleant, 2023 NY Slip Op 31936(U); Harper Advance, LLC v Reynolds, 2023 NY Slip Op 31191(U); Parkview Advance, LLC v High Purity, 2023 NY Slip Op 32976(U); Fox Capital Group Corp. v Tomassetti, Sup. Ct., Kings Cty. Index No. 523737/2021 (NYSCEF Doc. No. 60, Dec. 23, 2022).

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

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

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

Eighth Affirmative Defense: Lack of Standing

101. The plaintiff sues upon a contract made by another entity.

102. The complaint does not allege any valid assignment of the said contract to plaintiff, nor any merger of the obligee of said contract into plaintiff.

Ninth 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.

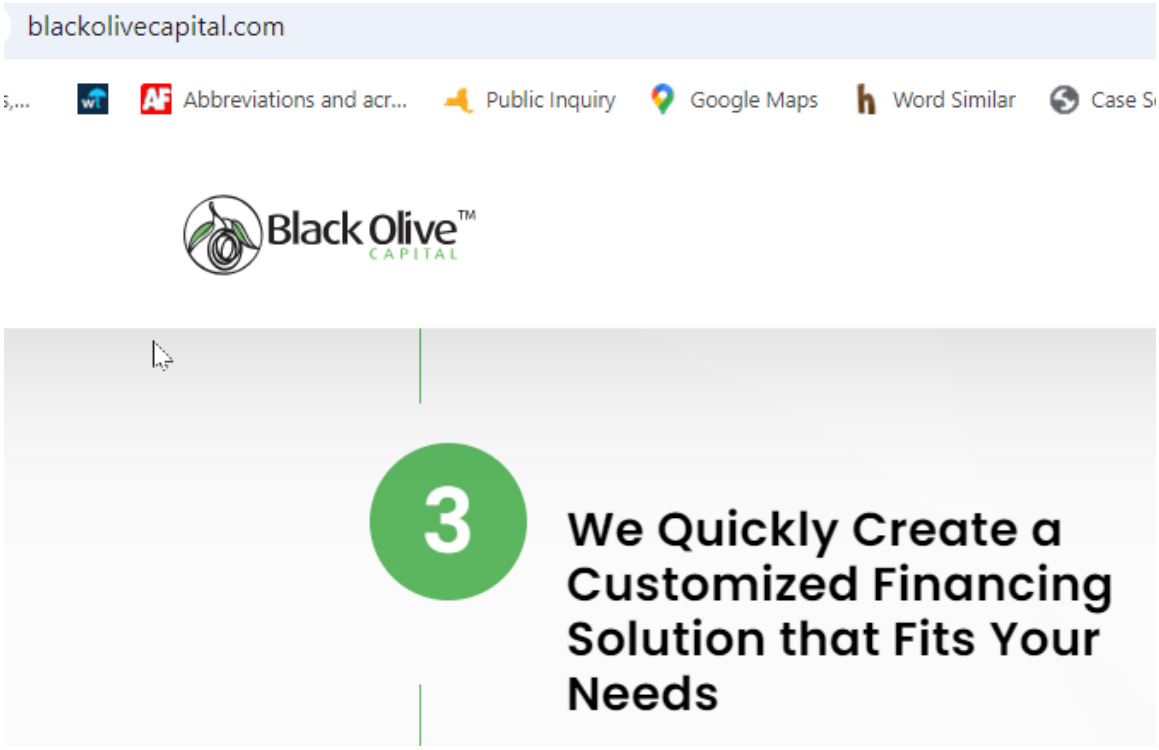
104. The parties' transaction was the very antithesis of two sophisticated parties hammering out the terms of a contract through experienced counsel.

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



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.

Tenth Affirmative Defense: Unenforceable Default Fee

113. 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"]).

114. 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.

Eleventh Affirmative Defense: Lack of Liability / Lack of Personal Jurisdiction

115. POUR SPORTS, LLC did not sign the contract.

116. No one authorized on behalf of POUR SPORTS, LLC signed the contract.

117. Regardless of the disposition of any funding by plaintiff or the contract obligee, POUR SPORTS, LLC had no knowledge of the contract.

118. Therefore, no ratification can be had.

> Hallow v Hallow, 200 A.D.642, First Dept. 1922: "The acceptance of checks for the reduced amount of alimony by the plaintiff without knowledge of the unauthorized stipulation d**id not constitute ratification of the same, since in order to ratify an unauthorized act of an agent, the principal must have full knowledge of all the circumstances**, mere acquiescence without knowledge being insufficient."
>
> 2A NY Jur 2d Agency Sec. 190 (1998) Sec. 170:
> "It is the general rule that by accepting the benefits of a contract executed by an agent the principal ratifies the acts

> of the agent. Where a person acts for another who accepts or retains the benefits or proceeds of these efforts **with knowledge of the material facts surrounding the transaction**, the latter must be deemed to have ratified the methods employed, as this party may not, even though innocent, receive or retain the benefits and at the same time disclaim responsibility for the measures by which they were acquired. Nor may the party accepting the benefits prevent the other party to the transaction from showing what the contract was which was made with the agent."

119. POUR SPORTS, LLC having neither signed any subject contract, nor being bound by it, the manner of service was improper and there is no basis for the exercise of personal jurisdiction over POUR SPORTS, LLC.

WHEREFORE, defendants respectfully demand judgment dismissing the complaint.

Dated: September 27, 2024

Amos Weinberg
Attorney for Defendant, POUR SPORTS, LLC
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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 POUR SPORTS, LLC, 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 POUR SPORTS, LLC is not in the county (or state) where I have my office. The source of my information is privileged emails and discussions with the managing member of POUR SPORTS, LLC (NOT Ms. Kelly) and review of plaintiff's documents.

Dated: September 27, 2024

Amos Weinberg