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

Index No 503982/2024

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Vox Funding LLC,

Plaintiff,

-against-

A Call Away Roofing LLC and James Gruber,

Defendants.

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ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

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

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Admit paragraph five only as to personal jurisdiction due to a forum selection clause but not subject matter jurisdiction.

6. Paragraph 6: Same as above.

7. Paragraph 7: Admit the date of the contract and that the parties' transaction was for the amount stated, but otherwise denies. The contract had nothing to do with any purchase. The allegation that payment was by a

percentage of daily revenue is completely false. The contract stated that payment was an immutable $116.19 fixed daily payment to be ACH-debited by plaintiff. Plaintiff having uttered a patently false allegation defendants deny the entirety of the complaint not specifically admitted above.

First Affirmative Defense: Illusory Contract. No Risk

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

9. The plaintiff's funding/loan started at a 82.4% annual rate of interest. 82.4% is 3.3 times the 25% maximum under the criminal usury statute.

10. **Calculation of Interest**: Under the Agreement, the total payable to Defendant was $12,230, less startup fees, for which Defendant had to pay plaintiff back $18,590, by a daily payment of $116.19 per day. Defendant getting gross proceeds from plaintiff of $12,230, and having to pay back $18,590, the difference, of $6,360, was the interest that Defendant had to pay on the $12,230. $6,360 interest on $12,230, if it had to be paid back over a year, would have been 52% interest. The agreement required payments of $116.19 per day, which meant 160 payments of $116.19 each, or 160 days, to pay the $18,590. However, the $116.19 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 160 payments of $116.19 each were going to take 224 days total. 224 days is 63% of a year. Since 52% interest had to be paid back in 63% of a year, that was an annual interest rate of 82.4%.

11. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 9%, equaled $1,291.00 ($116.19 divided by 9% $1,291.00).

12. The initial 82.4% interest rate was 3.3 times the 25% criminal usury cap. 25 times 3.3 = 82.4%.

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

14. If the fixed daily payment was reduced so that 9% of receipts equaled the 25% maximum criminal usury rate rather than the 82.4% criminal rate, the receipts needed would only be $395.61. Calculation: The 82.4% interest rate divided by 25 =3.3. The $1,291.00 receipts needed under the contract to cover the 9% Specified Percentage divided by 3.3 = $395.61.

15. Therefore, until the plaintiff granted a reconciliation taking 9% of only $395.61 of receipts, the funding was criminally usurious.

16. Until receipts dropped to $395.61, the 9% specified percentage was criminally usurious.

17. If the defendant's receipts diminished from $1,291.00 to $395.61, 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.

18. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 9% of the $395.61 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 9% debit if receipts dropped to $395.61.

19. This would enable plaintiff to declare a default.

20. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $116.19 fixed daily payment is enforcing criminal usury.

21. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $116.19 fixed daily payment is enforcing criminal usury.

22. The agreement was for a finite term of 224 days with payments of $116.19 each business day.

23. Plaintiff's contract stated:

> 13 * * * Additionally, because this is not a loan, Purchaser does not charge any interest, finance charges, points, late fees or similar fees (except as permitted by applicable law in connection with civil judgments).

24. Plaintiff's criteria for whether the contract was a loan was that it "does not charge any interest, finance charges, points".

25. Interest is defined as the profit on invested money.

26. Plaintiff's profit under the contract was the difference between the amount invested, $12,230 and the amount that had to be repaid, $18,590:

Purchase Detail

Amount Sold	$ 18,590.00	The dollar value of the Future Receipts
Discount Factor	1.430	The risk adjustment to the Amount Sold that determines the Future Receipts Discount
Future Receipt Discount	$ 5,590.00	The difference in value between the Purchase Price and the Amount Sold

Disbursement Amount to Merchant	$ 12,230.00	**Net of fees, discount, and direct payments**

27. Plaintiff deducted a $6000 "processing fee":

Processing Fee	$ 6,000.00	The dollar amount to be deducted from Purchase Price

28. The entire premise of the contract was illusory because it purported to be a purchase of receivables, or receipts, payable from future sales, but if there was a default, the entire purchase price for such future sales

was immediately due and payable even though such sales perforce did not exist.

29. It has already been established that there is no such thing as a purchase of future receivables. Stathos v. Murphy, 26 A.D.2d 500 First Dept. [1966] "(affirmed *** upon the opinion at the Appellate Division" 19 N.Y.2d 883, 885 [1967]):

> "The confusion in this area of the law arises primarily from a failure to distinguish between the assignment of future rights, such as future wages, revenues on contracts yet to be made, and the like, regarded as after-acquired property, and the assignment of present rights, typically choses in action, which have yet to ripen into deliverable assets, particularly money. * * *
> There is no doubt that the assignment of a truly future claim or interest does not work a present transfer of property. It does not because it cannot; no property yet exists."

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

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

32. However, the contract provided for plaintiff to ACH-debit $116.19 each business day from defendant's bank account regardless of receipts:

Estimated Remittance Amount	$ 116.19	Estimated Remittance Amount of Future Receipts to be collected according to the Remittance Frequency

33. The contract contained a hypothetical reconciliation provision at section 2a.

34. The contract failed to provide any time constraint by which plaintiff had to effectuate a reconciliation.

35. The contract had a provision for a hypothetical adjustment of the fixed weekly payment at section 2b.

36. The contract failed to provide any time constraint by which plaintiff had to effectuate the adjustment.

37. Section 2b allowed plaintiff to interminably delay the process of filing for the adjustment, "Upon reasonable verification of Merchant's actual Future Receipts for the month under review".

38. If at any point the plaintiff completed its calculation of an adjustment, the contract allowed plaintiff to further delay the adjustment, "Purchaser will give Merchant notice five days prior to any such adjustment."

39. The notice provision stated:

> 25. Notices. Purchaser may send any notices, disclosures, terms and conditions, other documents, and any future changes to Merchant by regular mail or by e-mail, at Purchaser's option and Merchant consents to such electronic delivery. Notices sent by e-mail are effective when sent. Notices sent by regular mail become effective three days after mailing to Merchant's address set forth in this Agreement. **Merchant may send any notices to Purchaser by e-mail only upon the prior written consent of Purchaser, which consent may be withheld or revoked at any time in Purchaser's sole discretion.** Otherwise, any notices or other communications from Merchant to Purchaser must be delivered by certified mail, return receipt requested, to Purchaser's address set forth in this Agreement. **Notices sent to Purchaser shall become effective only upon receipt by Purchaser**.

40. It has already been held that a reconciliation is illusory if the plaintiff has the right to reject any emailed request unless it gives prior written consent.[1]

[1] Wynwood Capital v God's Love Outreach, 2022 NY Slip Op 33211(U):

> "However, plaintiff's counsel omits relevant language, and the Court finds that when the reconciliation provision is read in its entirety, there is a triable issue of fact as to whether the reconciliation provision was mandatory or discretionary. To wit, the reconciliation provision provides that "[a] reconciliation may also be requested by email to [*sic*] and such notice will be deemed to have been received *if and when [plaintiff] sends a reply e-mail [but not a read receipt]*' [emphasis supplied]. The language "if and when" indicates that it was in the plaintiff's discretion as to whether to send a reply e-mail, which would begin the time on the plaintiff's obligation to conduct the requested reconciliation. As the reconciliation provision in the parties' agreement afforded the plaintiff with the discretion as to whether it was obligated to conduct the

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

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

43. However, the contract provided at section 16 (xix) Merchant will conduct its business consistent with past practice:

44. That provision rendered a bankruptcy filing a default.

45. Bankruptcy was entirely pretended and illusory, due to other provisions of the contract set forth right after this paragraph, for the reason stated in the next enumerated paragraph:

> 3(a)1
> 1. Bank Account. Merchant shall deposit all of Merchant's Future Receipts into a bank account approved by Purchaser (the "Account").

> reconciliation, the plaintiff failed to establish the absence of triable issues of fact as to whether the reconciliation provision in the parties' agreement was *discretionary*, the Court finds that there are issues of fact as to whether the parties' transaction was a criminally usurious loan. (*Davis v. Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).
> In light of the foregoing, the plaintiff's motion for summary judgment pursuant to CPLR § 3212 is DENIED, in its entirety."

> 6. Events of Default. The occurrence of any of the following events shall constitute an "Event of Default": (a) Merchant intentionally interferes with Purchaser's right to collect the Specified Percentage; (b) Merchant violates any term, representation, warranty or covenant in this Agreement;
> (xvi) Merchant will not take any action to cause the Future Receipts to be settled or delivered to any bank account other than the bank account that the Future Receipts are being settled or delivered to as of the date of this Agreement and in accordance with the terms of this Agreement;
> (xxi) Merchant will not voluntarily block Purchaser from receiving/requesting ACH remittances from Merchant's Account;

46. Bankruptcy was barred by the above quoted provisions, because the plaintiff's contract prohibited defendants from changing the approved bank account or depositing receipts into any other account and 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."

47. The Security Agreement portion of the contract stated

> 10 * * * Merchant further agrees that, with or without an Event of Default, Purchaser may notify account debtors, or other persons obligated on the Future Receipts or holding the Future Receipts of Merchant's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Purchaser.

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.

49. 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])"

50. 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: Opinion Granting Summary Judgment in Case Brought By Letitia James, New York State Attorney General, Requires Dismissal

51. 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".

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

> 2.
> a. Merchant also hereby authorizes Purchaser to obtain any bank statement directly from the Merchant's Bank.
>
> 22. Financial Information. Merchant authorizes Purchaser and its agents to investigate its 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 discretion prior to or at any time after execution of this Agreement.

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

53. 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])."

54. The plaintiff's contract had a seeming reconciliation provision but other provisions abridging any right to a reconciliation. (Quoted above).

Fourth Affirmative Defense: Illegal Contract

55. The contract stated:

> 1. * * *

> Merchant agrees that it will treat the Purchase Price and Amount Sold in a manner consistent with a sale in its accounting records and tax returns. Merchant agrees that Purchaser is entitled to audit Merchant's accounting records upon reasonable notice in order to verify compliance.
>
> 10. *** such sale shall constitute and shall be construed and treated for all purposes as a true and complete sale,.

56. 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])."

57. 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

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

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

60. 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.)"

61. 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.

Fifth Affirmative Defense. Lack of Subject Matter Jurisdiction.

62. 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.

63. 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).

64. 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])."

65. 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].

66. 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).

Sixth Affirmative Defense: Criminal Usury.

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 reconciliation along with the notice provision made any reconciliation at plaintiff's whim.

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

71. 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".

72. 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.

73. 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 the fixed daily payment.

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

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

76. The plaintiff's contract had features found to constitute an illegal, criminally usurious loan, in People v. Richmond Capital Group LLC, 2023 NY Slip Op 50975(U), 3 (Andrew Borrok, J.):

> Indeed, the risk of loss associated with ownership of the Borrower's account receivable never passed to the Predatory Lenders. Pursuant to the MCAs, the Borrowers were required to send bank statements to the Predatory Lenders (see, e.g., NYSCEF Doc. No. 9, at 1). Although the MCAs provided for mandatory reconciliation of the daily amounts collected with the amounts of accounts receivable actually received by the Borrowers following receipt of such bank statements—as if the transactions

> were sale transactions—this was a total sham (id.).
> At 4:
> [A]lthough the MCAs indicate that a Borrower's failure to make payments because it went bankrupt would not constitute a breach of, or default under, the MCAs (provided that no other breach occurred), this too was a sham. The Predatory Lenders made sure that their Borrowers were in default on Day 1 of the MCAs by requiring that the Borrowers falsely represent that the collateral (i.e., the accounts receivable) was free and clear of all other loans (see, e.g., NYSCEF Doc. No. 8, § 2.10) and that they would not pledge those assets to others (id., at 6). The Predatory Lenders knew this was false (NYSCEF Doc. Nos. 136, 699). The Predatory Lenders knew that their money was behind other lenders as to the pledged accounts receivable (NYSCEF Doc. No. 150, at 4 ["I care about 110 days in 5th or 6th"] [emphasis added]). The Addendum to the MCAs also makes clear that a few missed payments constituted a default (see, e.g., NYSCEF Doc. No. 8, at 9 ["NSF Fee Standard - $50.00 (each) up to THREE TIMES ONLY before a default is declared"] [emphasis in original]; see also NYSCEF Doc. No. 699).4 Additionally, Section 2.9 of the MCAs makes clear that any encumbrance of the collateral would make the full amount immediately due and payable and that the Predatory Lenders could enforce the personal guaranties that they required the Borrowers to provide. Thus, bankruptcy never relieved the Borrowers or the guarantors of their obligation under the MCAs or the guaranties. Inasmuch as missed payments constituted a default".

77. 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 the fixed daily payment.

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

79. The above and foregoing has reasonably placed the plaintiff on notice of the defense of criminal usury.

Seventh Affirmative Defense: Unconscionability/Adhesion Contract

80. 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.

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

82. 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]:

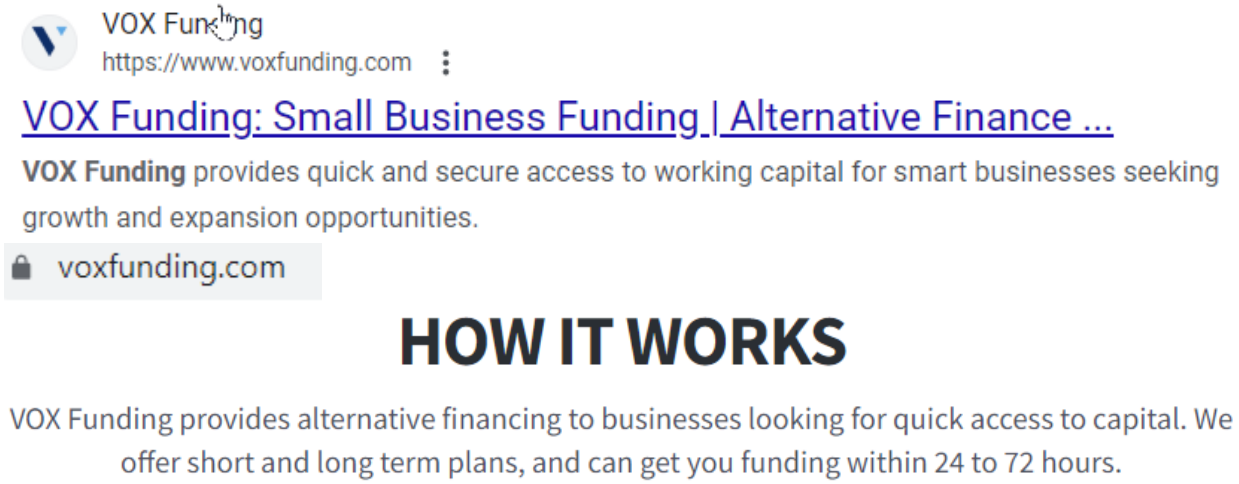
> "[T]he doctrine of unconscionability has little applicability in the commercial setting because it is presumed that businessmen deal at arm's length with relative equality of bargaining power [string cite]. Apparently, the doctrine is primarily a means with which to protect the `commercially

> 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.")."

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



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." "

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

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

86. 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.

87. 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].

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

Eighth Affirmative Defense: Unenforceable Default Fee

89. 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"]).

Ninth Affirmative Defense: Arbitration

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

> 31. ARBITRATION. IF PURCHASER, MERCHANT OR ANY GUARANTOR REQUESTS, THE OTHER PARTIES AGREE TO ARBITRATE ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT. IF PURCHASER, MERCHANT OR ANY GUARANTOR SEEKS TO HAVE A

> DISPUTE SETTLED BY ARBITRATION, THAT PARTY MUST FIRST SEND TO ALL OTHER PARTIES, BY CERTIFIED MAIL, A WRITTEN NOTICE OF INTENT TO ARBITRATE. IF PURCHASER, MERCHANT OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 DAYS AFTER THE NOTICE IS RECEIVED, PURCHASER, MERCHANT OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA"), JAMS

91. Defendants reserve the right to demand arbitration if plaintiff proceeds with this infirm action. 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.)"

WHEREFORE, defendant respectfully demands judgment dismissing the complaint.

Dated: March 5, 2024

Amos Weinberg

VERIFICATION: State of New York, County of Nassau, ss.: The undersigned attorney for defendant, duly admitted to practice in the courts of the State of New York, affirms under penalties of perjury: that he has read the foregoing answer, and knows the contents thereof; that it is true upon information and belief and I believe it to be true. This verification is made by me because defendants are not in the county where I have my office. The source of my information is privileged emails and discussions with the individual defendant and review of plaintiff's documents.

Dated: March 5, 2024

Amos Weinberg

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