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

Index No E2025013125

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REDSTONE ADVANCE INC,

Plaintiff,

-against-

SECOR LOGISTICS LLC D/B/A SECOR LOGISTICS, and COURTNEY ALAN ROYSTER,

Defendants.

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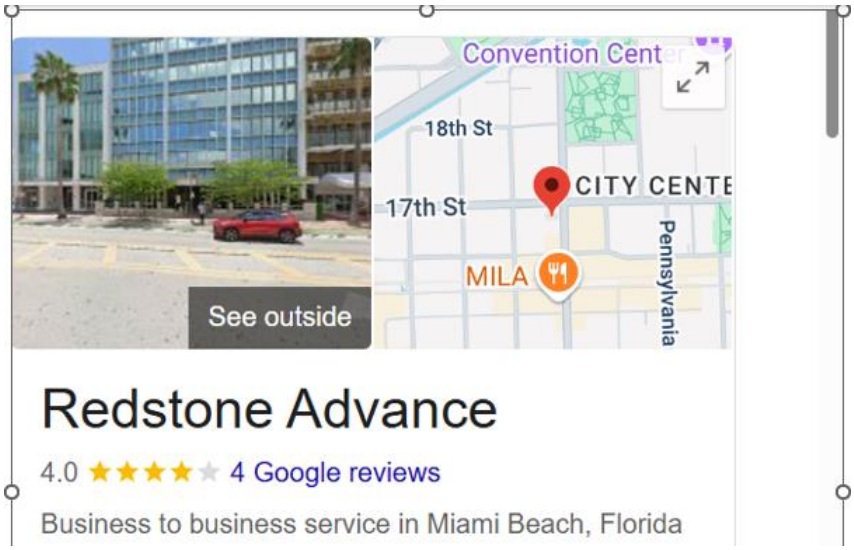
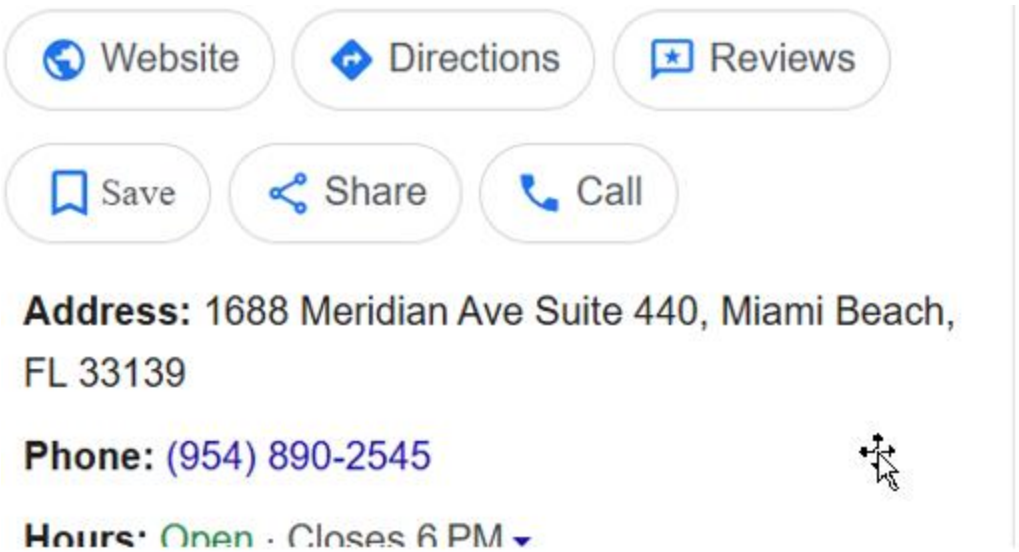
ANSWER

Defendants by their attorney answer the complaint:

1. Admit that plaintiff, a Florida corporation, is authorized to do business in New York. Deny that it has offices in New York. A Google search for Redstone Advance yielded this:





2. Admit paragraph 2.

3. Admit paragraph 3.

4. Deny paragraph 4. A forum selection clause does not equal jurisdiction under CPLR §301.

5. Venue is not contested (paragraph 5).

6. Deny paragraphs 6 and 8 and 9 and 10. The contract alleged by plaintiff has not been efiled and has not to date been made available to the undersigned by defendants. Nothing admitted. Signature denied.

7. All admissions below are only in regard to contracts filed by plaintiff in other cases and do not alter the above denial.

8. Admit paragraph 7 but deny that any purchase was involved and deny that receivables get deposited. Receivables are book entries of billings, not to be confused with *receipts*.

9. Deny paragraph 11. There is no concrete allegation of the sum alleged to have been advanced.

10. Deny paragraph 12 and each and every other allegation of the complaint except admits any payments alleged to have been made by defendants.

First Affirmative Defense: Illusory Contract. No Risk

11. Plaintiff's contract was a nonsensical tax fraud. Plaintiff claims that its contract was a purchase of receipts from defendant for the "Purchase Price" or "Purchased Amount," and that the purchase price or purchased amount was the fair market value of the receipts purchased. This meant that the more that defendant paid back the plaintiff, the greater the plaintiff's purchase. The greater the plaintiff's purchase, the larger its tax deduction for the purchase. Therefore, the more that plaintiff got paid back, the more it deducted from its taxes. In the real world, the more one gets paid, the higher his tax bill. The more that defendant paid back, the greater its sales to plaintiff, requiring defendant to pay sales and income tax on the money that defendant paid back to the plaintiff. In the real world, the more one pays back money received, the greater his expense and the less his taxes.

12. While the plaintiff's contract called the *funding and expected payback* a purchase, it was not a purchase. Plaintiff got nothing under its

contract but the right to periodically debit from defendant's bank account the amount that defendant had to pay back plaintiff, with a secured interest to give plaintiff priority over defendant's assets, plus the right to debit the full amount that defendant had to pay back plaintiff if defendant's bank account could not cover the debit. This is not a purchase.

13. Under the prevailing case law, the parties' contract is a loan if bankruptcy is a default, or there is no right to a reconciliation or payment adjustment, or inability to pay is a default. Oakshire Props., LLC v Argus Capital Funding, 229 A.D.3d 1199, Fourth Dept. [2024]; Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023]; Davis v. Richmond Capital Group, 194 AD3d 516 [2021]; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 A.D.3d 664 [2020].

14. The plaintiff's funding/loan started at a 307% annual rate of interest. 307% is 12.28 times the 25% maximum under the criminal usury statute.

15. **Calculation of Interest**: Under the Agreement, the total payable to Defendant was $90,000, for which Defendant had to pay plaintiff back $149,900, by a daily payment of $2,726.00 per day. Defendant getting net proceeds from plaintiff of $90,000, and having to pay back $149,900, the difference, of $59,900, was the interest that Defendant had to pay on the $90,000. $59,900 interest on $90,000, if it had to be paid back over a year,

would have been 66.5% interest. The agreement required payments of $2,726.00 per day, which meant 55 payments of $2,726.00 each, or 55 days, to pay the $149,900. However, the $2,726.00 payments were only to be debited on banking, or weekdays. There being five banking days each week and taking into account the nation's annual 10 banking holidays, this meant that the 55 payments of $2,726.00 each were going to take 77 days total. 77 days is 22% of a year. Since 66.5% interest had to be paid back in 22% of a year, that was an annual interest rate of 307%.

16. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 35%, equaled $7,788.57 ($2,726.00 divided by 35% $7,788.57).

17. The initial 307% interest rate was 12.28 times the 25% criminal usury cap. 25 times 12.28 = 307%.

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

19. If the fixed daily payment was reduced so that 35% of receipts equaled the 25% maximum criminal usury rate rather than the 307% criminal rate, the receipts needed would only be $640.94. **Calculation**: The 307%

interest rate divided by 25 =12.28. The $7,788.57 receipts needed under the contract to cover the 35% Specified Percentage divided by 12.28 = $640.94.

20. Therefore, until the plaintiff granted a reconciliation taking 35% of only $640.94 of receipts, the funding was criminally usurious.

21. If $149,900 has to be paid back after receipt of $90,000 with fixed daily payments each business day and an annual interest rate of 25%, each daily payment would equal $224.33 which at 35% of daily receipts would equal $640.94 of receipts.

22. Until receipts dropped to $640.94, the 35% specified percentage was criminally usurious.

23. If the defendant's receipts diminished from $7,788.57 to $640.94, 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.

24. It is as if the $210,900 salary of a New York Supreme Court justice was reduced by 12.28 times = $17,174.27 (210900/12.28).

25. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 35% of the $640.94 could not reasonably be contemplated under

the parties' contract since the debtor would be forced to block plaintiff's 35% debit if receipts dropped to $640.94.

26. This would enable plaintiff to declare a default.

27. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $2,726.00 fixed daily payment is enforcing criminal usury.

28. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $2,726.00 fixed daily payment is enforcing criminal usury.

29. The agreement was for a finite term of 77 days with payments of $2,726.00 each business day.

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:

> **15. Remedies for Seller's Breach of this Agreement.** If Seller violates any term or covenant in this Agreement, Buyer may proceed to protect and enforce its rights including, but not limited to, the following:
>
> a. The Specified Percentage shall equal 100%. The full undelivered Purchased Amount plus all fees and charges (including legal fees) assessed under this Agreement will become due and payable in full immediately.

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

33. The notice provision stated:

34. 21.

> **b. Notices from Seller and Guarantor.** Subject to Section 4 of this Agreement, Seller and Guarantor may send any notices to Buyer by e-mail only upon the prior written consent of Buyer, which consent may be withheld or revoked at any time in Buyer's sole discretion. Otherwise, any notices or other communications from Seller and Guarantor to Buyer must be delivered by certified mail, return receipt requested, to Buyer's address set forth in this Agreement. Notices sent to Buyer shall become effective only upon receipt by Buyer.

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

36. It has already been held that the above quoted restriction to emailing renders any reconciliation illusory. 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 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."

37. Despite any puffery to the contrary bankruptcy was effectively barred by plaintiff's contract

38. While the contract did not expressly make bankruptcy a default, other provisions did. If the "merchant" filed for bankruptcy, it still had to deposit all receipts into the account and it had to let plaintiff completely drain the account or else it would be in default. This makes bankruptcy legally impossible. "The purpose of the automatic stay is to preserve what remains of the debtor's insolvent estate and to provide a systematic equitable liquidation procedure for all creditors, secured as well as unsecured" In re Holtkamp, 669 F.2d 505, 508 [1982].

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

40. 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:

> 13.
>
> a. **No Diversion of Future Receipts.** Seller must deposit all Future Receipts into the Account on a daily basis and must instruct Seller's credit card processor, which must be approved by Buyer (the "Processor") to deposit all Payment Card receipts of Seller into the Account on a daily basis. Seller agrees not to (i) change the Account, (ii) add an additional Account, (iii) revoke Buyer's authorization to debit the Account, (iv) close the Account without the express written consent of Buyer or, (v) take any other action with the intent to interfere with Buyer's right to collect the purchased Future Receipts.

41. 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."

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

> 13--
> f. **Change of Name or Location or Sale or Closing of Business.**
> Seller will not conduct Seller's businesses under any name other than as disclosed to Buyer or change any of its places of business without prior written consent of Buyer. Seller will not voluntarily sell, dispose, transfer or otherwise convey all or substantially all of its business or assets without (i) the express prior written consent of Buyer, and (ii) the written agreement of any purchaser or transferee assuming all of Seller's obligations under this Agreement pursuant to documentation satisfactory to Buyer. Except as disclosed to Buyer in writing, Seller has

43. The Security Agreement portion of the contract stated

> Seller further agrees that, with or without a breach of this Agreement, Buyer may notify account debtors, or other persons obligated on the Future Receipts, or holding the Future Receipts, of Seller's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Buyer.

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

45. The contract 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 the above 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:

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c
If necessary to verify the Reconciliation Information, Buyer may request additional documentation including view-only access to the Account.
d. **Adjusting the Periodic Amount.** Within five (5) calendar days of Buyer's reasonable verification of the Reconciliation Information, Buyer shall adjust the Periodic Amount on a going-forward basis to more closely reflect Seller's actual Receipts times the Specified Percentage. Buyer will notify Seller prior to any such adjustment. After

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. This is not a made up defense. Royal Business Group v Sky Airparts, 2025 NY Slip Op 30508(U), Daniel J. Doyle, Supervising Judge for the Civil Supreme Court in the 7th Judicial District:

> "Here, the agreement contains a provision purporting to provide a right of reconciliation. However, while the presence of a purported reconciliation provision is "an indication of whether an agreement constitutes a loan" and regardless of the inclusion of the "buzz" words purporting to confer such protection, the court must assess whether the agreement at issue before it "make[s] clear on its face whether it conferred that right." Kapitus Servicing, Inc. v. Point Blank Constr., Inc., 221 A.D.3d 532, 534 (1st Dept. 2023). If there is no true obligation to reconcile, despite the inclusion of a purported

> reconciliation provision, the true nature of the agreement will be called into question.
> In the case at bar, the purported reconciliation provision provides that "Seller agrees to provide RBG any information requested by RBG to assist in the reconciliation." The provision continues that "[w]ithin five days of RBG's reasonable verification of such information," the periodic amount shall be adjusted. This provision raises a question as to Plaintiffs entitlement to summary judgment because Plaintiff's obligation to reconcile is unclear. Pursuant to the purported reconciliation provision, Plaintiff has the unfettered right to demand any and all information it wants and then can determine whether there is "reasonable verification" for the reconciliation request. The terms of the purported reconciliation provision do not clearly confer a right of reconciliation, as Plaintiff could, at will, abridge that right by demanding any and all information for as long as it wants and then also has the unrestrained ability to determine whether the information provided is reasonably verified."

54. The reconciliation provision did not state how plaintiff was doing its calculation.

55. The reconciliation provision stated that plaintiff first got to notify a debtor before reducing the fixed daily payment. However, it did not state any time limit for when plaintiff had to notify the debtor.

56. 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.

57. 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.

58. Under the prevailing case law, the parties' contract is a loan if bankruptcy is a default, or there is no right to a reconciliation or payment adjustment, or inability to pay is a default. Oakshire Props., LLC v Argus Capital Funding, 229 A.D.3d 1199, Fourth Dept. [2024]; Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023]; Davis v. Richmond Capital Group, 194 AD3d 516 [2021]; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 A.D.3d 664 [2020].

59. Criminal usury can be established strictly by the terms of the contract. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] denied a pre-answer dismissal motion under CPLR 3211(a)(1), "on the ground that the action is barred by documentary evidence," because "the defendants conclusively established through the submission of the agreement that it constituted a criminally usurious loan".

60. 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])."

61. Oakshire Props., LLC v Argus Capital Funding, LLC, 229 A.D.3d 1199 [2024] affirmed denial of a pre-answer dismissal motion by reviewing provisions of the agreement in order to determine that "[w]e therefore conclude that the amended complaint sufficiently alleges that the transaction is a loan subject to usury laws".

62. Oakshire Props., LLC v Argus Capital Funding, LLC, 229 A.D.3d 1199 held that:

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

> Here, while not stating that failure to reconcile would constitute a breach, neither did the contract provide any remedy or consequences to plaintiff in the event that plaintiff failed to reconcile, and permitted plaintiff to continue to ACH-debit the automatic payments even if it did not reconcile.

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

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

C. "a default on the part of Oakshire would occur where, inter alia, "two or more [automatic withdrawal] transactions attempted by [Argus] within one calendar month are rejected by [the] bank," immediately accelerating the entire amount"

Here, the complaint alleges mere nonpayment.

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"

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".

> 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.

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

64. The idea that a reconciliation provision creates risk that precludes usury is absurd. The initial interest far exceeded the 25% interest rate above which the Legislature has determined a loan is criminally usurious. By stating that an interest rate above 25% is criminally usurious, the Legislature believed that any higher rate was utterly unaffordable and took criminal advantage of a borrower. Therefore if receipts stayed exactly the same, the funding was already deemed utterly unaffordable. The idea that such a borrower could be faulted for not seeking a reconciliation if receipts plummeted even further endorses the criminally usurious funding. Criminal

usury has been rebuked by the Court of Appeals in the strongest possible terms. Adar Bays, LLC v. GeneSYS ID, Inc., 37 NY3d 320 [2021].

65. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] held that criminal usury was demonstrated by "in the event of the [ ] defendants' default by changing their payment processing arrangements or declaring bankruptcy."

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

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

68. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] found that the agreement was a criminally usurious loan because "the plaintiff was "under no obligation" to reconcile the payments to a percentage amount of the [ ] defendants' sales rather than the fixed daily amount".

69. Here, while the contract did not expressly state that plaintiff was "under no obligation" to provide a reconciliation, the contract effectively permitted plaintiff to avoid any reconciliation.

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

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

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

73. While the initial interest rate could have been theoretically reduced by a reconciliation, this would not negate the usury:

> Band Realty Co. v. North Brewster, Inc., 37 N.Y.2d 460 [1975] (quoting Feldman v Kings Highway Sav. Bank (278 App Div 589, 590, affd 303 NY 675) "[So] long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury."); Canal v Munassar, 144 A.D.3d 1663 [2016]; Norstar Bank v. Pickard & Anderson, 140 A.D.2d 1002, [1988]; DeStaso v Bottiglieri, 25 Misc. 3d 1213(A), 2009 NY Slip Op 52082(U); Fremont Inv. & Loan v. Haley, 23 Misc. 3d 1138(A), 2009 NY Slip Op 51186(U).
>
> Canal v Munassar, 144 A.D.3d 1663, 1664 [2016]:
> In determining whether the interest charged exceeded the usury limit, courts must apply the traditional method for calculating the effective interest rate as set forth in *Band Realty Co. v North Brewster, Inc*. (37 NY2d 460, 462 [1975], *rearg denied* 37 NY2d 937 [1975]) (*see Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972 [2013]). According to that method, "[s]o long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury" (*Band Realty Co.*, 37 NY2d at 464 [internal quotation marks omitted]).

Norstar Bank v. Pickard & Anderson, 140 A.D.2d 1002, [1988]: "[T]he bank contended that the variable rate of interest charged on the loan should be averaged over the term of the loan for the purpose of determining whether the interest rate was usurious. ***. Although there is a conflict in authority (see, Annotation, Usury in Connection with Loan Calling for Variable Interest Rate, 18 ALR4th 1068), we believe the better rule is that, in the case of a loan at a variable rate of interest, the interest charged should not be averaged over the term of the loan in determining whether a usurious rate has been charged [citations] * * * If defendants were compelled to average the rate of interest charged over the full term of the loan, they would not know whether a usurious rate was being charged until the end of the term. Thus, they would be compelled to make excessive interest payments for a substantial period and would not be able to seek relief from the usurious payments until the expiration of the loan. On the other hand, the bank could have readily avoided charging usurious interest on its loan by placing a cap on the charges for interest so that no payment would exceed the variable legal rate".

American Express Natl. Bank v. Ellis, 2023 NY Slip Op 51428(U), 2 That the initial interest rate of 0% is legal under GOL § 5-501 would not save the agreement, given the contemplated increase to rates that exceed New York's 16% cap.1 (*See Fremont Inv. & Loan v Haley*, 23 Misc. 3d 1138[A], 889 N.Y.S.2d 505, 2009 NY Slip Op 51186[U], at *7 [Sup Ct, Queens County 2009]; *accord Norstar Bank v Pickard & Anderson*, 140 AD2d 1002, 1002-1003, 529 N.Y.S.2d 667 [4th Dept 1988] [holding that "in the case of a loan at a variable rate of interest, the interest charged should not be averaged over the term of the loan in determining whether a usurious rate has been charged"].)

Fourth Affirmative Defense: Opinion Granting Summary Judgment in Case Brought By Letitia James, New York State Attorney General, Requires Dismissal

74. 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%.

75. Annexed as Exhibit A is a list of UCC-1's filed against defendant including prior UCC-1's.

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

> b. **Financing Statements.** Seller authorizes Buyer to file one or more UCC-1 forms consistent with the UCC to give notice that the Purchased Amount of Future Receipts is the sole property of Buyer.
>
> i. **No Violation of Prior Agreements.** Seller's execution and performance of this Agreement will not conflict with any other agreement, obligation, promise, court order, administrative order or decree, law or regulation to which Seller is subject, including any agreement that prohibits the sale or pledge of Seller's Future Receipts.

77. 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".

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

> **3. Delivery of Purchased Amount.** Seller authorizes Buyer to debit the Initial Periodic Amount or any updated periodic amount (the "Periodic Amount") from the Account each business day by either ACH or electronic check. Seller will provide Buyer with all required Account information and agrees not to change them without prior written consent from Buyer. Seller will provide an appropriate ACH

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

79. 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. The action resulted in a consent judgment:

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NYSCEF DOC. NO. 642 RECEIVED NYSCEF: 01/16/2025

CONSENT ORDER AND JUDGMEN'l'

7. Upon the signing of this Consent Order by the Court, all obligations owed or purportedly owed by Merchants or their Guarantors to the Settling Respondents or to any parent entity or subsidiary entity of the Yellowstone Entities, or to their assigns, in connection with the Yellowstone Entities' Merchant Cash Advances, including but not limited to unpaid balances of any kind, fees, attorneys' fees, settlement amounts, and unsatisfied judgments shall be and are irrevocably cancelled ("Cancelled Debts"). Each and every agreement giving rise to

8. Based on current calculations and information, the amount of the Cancelled Debts is currently calculated by the Settling Respondents to be $534,552,724.00, as stated in paragraph 21 below.

MONETARY RELIEF

18. Settling Respondents agree, within five (5) calendar days of the signing of this Consent Order by the Court, to pay to the NYAG by wire transfer to the State the total amount of Three Million, Four Hundred Thousand Dollars ($3,400,000.00) ("Cash Payment"), and to comply fully with the terms of this Consent Order. Settling Respondents shall use the wire instructions provided by the NYAG.

JUDGMENT

19. Settling Respondents further consent to entry of this Consent Order as a judgment against the Settling Respondents, in favor of the NYAG on behalf of the People of the State of New York, in the total amount of One Billion, Sixty-Five Million Dollars ($1,065,000,000.00) (the "Total Judgment Amount").

80. 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.

81. 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. (Quoted above).

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

Authorization Agreement

Authorization will constitute a breach of the Agreement for the Sale of Future Receipts. In the event that Seller closes the designated checking account, or the designated checking account has insufficient funds for any ACH transaction under this Authorization, Seller authorizes Buyer to contact Seller's financial institution and obtain information (including account number, routing number and available balance) concerning any other deposit account(s) maintained by Seller with Seller's financial institution, and to initiate ACH transactions under this Authorization to such additional account(s). To the extent necessary, Seller grants Buyer a limited Power of Attorney to take action in Seller's name to facilitate this authorization.

83. 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."

84. Attorney General's Memorandum of Law:

> 20:
> Respondents determine payment amounts for each transaction based not on such percentages but instead on the number of days in the term. Supra at 8-9. The term length, in turn, is based not on Specified Percentages but primarily on the risk of nonpayment, as reflected by such factors as merchants' credit ratings and payment histories. Petition ¶¶ 152-70. Furthermore, even beyond the payment amount, the Specified Percentage is treated as irrelevant to the entire so-called purchase of revenue. Petition ¶¶ 318-78.
> b. Respondents Manipulate Their Specified Percentages to Prevent Merchants from Obtaining Reconciliation Refunds
> For years, Respondents have set their Specified Percentages at values so high that it has been virtually impossible for merchants to obtain refunds through payment reconciliation. As a result, Respondents' Reconciliation Clauses are illusory, further showing that

their purported MCAs are loans. See generally Petition ¶¶ 203-48.

For example, Delta Bridge in 2022 issued an MCA to the merchant Cookies Restaurant Group ("Cookies") which set a Daily Amount of $208, Rubey Aff. Ex. 2B at 1, an amount equaling 13-18% of the merchant's historical daily revenue, Rubey Aff. ¶ 29. But Delta Bridge fraudulently stated 49% as Cookies' Specified Percentage and falsely stated that $208 was a "good faith approximation" of the 49% number. Rubey Aff. Ex. 2B at 1. By doing so, Delta Bridge raised the bar impossibly high for Cookies to obtain a reconciliation of its past payments. Thus, when Cookies experienced a 50% decline in its revenues, Delta Bridge refused the merchant's request for a reconciliation refund because the amount Delta Bridge had collected ($6,953) was still less than 49% (the Specified Percentage) of the merchant's $37,041 in revenues. Ex. 394 at 164 (row 26989); Rubey Aff. ¶ 33.

21

In its earliest agreements, Yellowstone set its Specified Percentages at around 10% and 15%, then in 2017 and 2018 raised the percentages to 25%. Petition ¶¶ 216-23. From 2019 through 2021 Yellowstone issued MCAs with higher and higher percentages – most commonly 49% of merchants' revenue (as in the case of Cookies, supra), a practice that Delta Bridge adopted when it continued Yellowstone's business in May 2021. Petition ¶¶ 226-48. Respondents set Specified Percentages far higher than the payment amounts merchants agree to, see Rubey Aff. ¶¶ 29, 54, and far higher than merchants can realistically repay, e.g., Saffer Tr. at 238:9-17; McNeil Tr. at 119:14-17, 122:22-24. The purpose and effect of doing so is to put reconciliation out of reach for merchants, Petition ¶¶ 236, 241-48, ensuring that Respondents' Reconciliation Clauses are mere "window dressing." Fleetwood, 2022 WL 1997207, at *11.4

85. Similarly, in this action, the plaintiff, REDSTONE ADVANCE INC, set a 35% Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

86. 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".

87. The contract of plaintiff had a similar secured interest. Paragraph 14(a).

88. 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.

89. Plaintiff's contract, here, abridged the right to any reconciliation at any time through plaintiff's right of disclosure and requirement of a reply email.

Sixth Affirmative Defense: Illegal Contract

90. The contract had provisions under which the repayment to plaintiff of the "purchased amount" was instead deemed a sale to the plaintiff by the "merchant".

5. Nonrecourse Sale of Future Receipts (THIS IS NOT A LOAN). Seller is selling a portion of a future revenue stream to Buyer

h. **Seller to Pay Taxes Promptly.** Seller will promptly pay all necessary taxes, including but not limited to employment and sales and use taxes.

91. This meant that the more that plaintiff earned as income by way of repayment the greater its tax deduction for the cost of goods sold and the more a "merchant" had to immediately pay in sales and income taxes on the entire funded amount and ensuing payment of the "purchased amount".

92. To the contrary, the income that plaintiff made from repayment of its advance was interest income chargeable to plaintiff. Siemens Corp. v. Tax Appeals Tribunal, 89 N.Y.2d 1020, 1022 [1997]:

> "Under Tax Law § 210 (3) (a) (2) (D), "business receipts earned" in New York must be included in the numerator of the receipts factor. The Tax Department has long interpreted this section as requiring a corporation to include in its New York receipts factor interest income on loans to the extent that the work done to establish and maintain such loans is done in New York, without regard to the situs of the obligor (see, Opns State Dept of Taxation & Fin No. TSB-A-88 [2] C; No. TSB-A-83 [7] C). *** To the extent that interest income, whatever its source, results from work performed in New York, the income may fairly be characterized as "earned in New York." *** [T]he interest income was earned in New York within the meaning of Tax Law § 210 (3) (a) (2) (D)."

> Matter of Rivera v Blass, 127 A.D.3d 759, 763 [2015]: "[T]he petitioner's husband received a stream of income from the loan by way of the monthly payments".

93. Conversely, the contract required the "merchant" to thereby treat the repayment of the purchased amount as "sales," meaning that plaintiff not only had to get paid back the criminally usurious purchased amount, but the "merchant" had to pay sales and income tax on it. 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])."

94. The provision that plaintiff inserted into its contract is completely illegal and violated the tax laws by forcing the "merchant" to absorb the tax burden and obligation of plaintiff. Neb. Dep't of Revenue v. Loewenstein, 513 U.S. 123, 130-131 [1997]:

> "We conclude instead that for purposes of § 3124(a), the interest income earned by the Trusts is interest on loans from the Trusts to the Seller-Borrower, and that the federal securities are involved in the repo transactions as collateral for these loans. Several features of the repos lead to this conclusion. First, at the commencement of a repo, the Trusts pay the Seller-Borrower a fixed sum of money; at the repo's termination, the Seller-Borrower repays that sum with "interest." "

95. The "merchant" was the party entitled to a tax deduction for repaying the loan/funding/advance. United States v. Castiglia, 894 F.2d 533,

535 [1990] ("his substantial interest payment entitled him to a large tax deduction").

96. Plaintiff's contract should be voided. Cohen v Cohen, 179 A.D.3d 1014 [2020]:

> "The appellants made a prima facie showing that the trust and partnership which are at the heart of the causes of action set forth in the complaints were part of a scheme to illegally avoid the payment of taxes. However, in opposition to the appellants' motion, the plaintiffs in those actions raised triable issues of fact [citations]. Moreover, contracts in violation of federal tax law are not per se unenforceable on public policy grounds in the absence of a statute that expressly so provides (see Greenwald v LeMon, 277 AD2d 202, 204 [2000]; Murray Walter, Inc. v Sarkisian Bros., 107 AD2d 173, 175-176 [1985]). Where no such express statutory provision applies, the words of the statute must be interpreted, the purposes of the legislation weighed, and the social effect of giving or refusing a remedy considered (see Murray Walter, Inc. v Sarkisian Bros., 107 AD2d at 176). Furthermore, where the party seeking enforcement has substantially performed his or her obligations, the court should consider the quality of the illegality, the extent of the public harm, the relative guilt of the parties, and the cruelty of the forfeiture involved in the denial of a remedy (see id. at 177). Consequently, resolution of the appellants' illegality defense must await a plenary trial of the issue (see id. at 178).
>
> Greenwald v. LeMon, 277 A.D.2d 202, 203-204 [2000]:
> "The Supreme Court erred in granting summary judgment to the plaintiffs on their causes of action relating to the two promissory notes in the sums of $137,500 since there is a triable issue of fact as to whether enforcement of these notes violates public policy. The evidence proffered by both parties indicates that the sale of the pharmacy may

> have been structured to avoid the payment of income taxes. The documents drafted by the attorneys did not reflect the alleged full purchase price of the business, since the two notes at issue were executed "under the table" after the closing. While agreements providing for the evasion of tax payments are not per se unenforceable, the defense of illegality should be resolved at trial (see, Murray Walter, Inc. v Sarkisian Bros., 107 AD2d 173, 175-176)."

97. Here, plaintiff employed a form contract used to perpetrate continual tax fraud, with no guilt on the part of appellant. 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." "

98. The plaintiff has never declared as taxable income any receipt or repayment under its contract with anyone.

99. The plaintiff's contract seeks to violate the tax laws of this country.

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

Seventh Affirmative Defense: Failure to State a Cause of Action

101. Under the provisions of the plaintiff's contract, nonpayment was not a default.

102. The complaint pleads nonpayment, and pleads anything else in the alternative ("or") with contradictory allegations of any cause of nonpayment. MCA Servicing Co. v Nic's Painting, LLC, 2024 NY Slip Op 51847(U):

> "Further, per the RPA, failure to pay is not, in and of itself, a breach by Defendant. See Doc. 2, RPA at 1, 2nd paragraph ("Merchant is selling a portion of a future revenue stream to MCA at a discount, and is not borrowing money from MCA, therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by MCA. . . . Merchant and Guarantor(s)(s) [sic] are only guaranteeing their performance of the terms of this Revenue Purchase Agreement, and are not guaranteeing the payment of the Purchased Amount.") (emphasis added). "

103. Such speculative, contradictory allegations are not permitted.

> Fernsmith v. City of New York, 2024 NY Slip Op 33868(U), 2:
> "If a complaint's allegations are vague, speculative, or devoid of substantive factual content, dismissal for failure to state a cause of action is warranted ([*5] Schuckman Realty v. Marine Midland Bank, N.A., 244 AD2d 400, 401 [2d Dept 1997]; O'Riordan v. Suffolk Ch., Local No. 852, Civ. Serv. Empls. Assn., 95 A.D.2d 800 [2d Dept 1983])."
>
> Board of Mgrs. of 550 Grand St. Condominium v. Schlegel LLC, 2014 NY Slip Op 50576(U), 4 (complaint dismissed): "The complaint takes contradictory approaches to the same factual circumstances."

104. This is why a plaintiff is not permitted to deficiently plead and then harass the defendant through discovery to see if a valid cause of action exists:

> Park Ave. Realty, LLC v Schindler El. Corp., 129 A.D.3d 598 [2015]:
> "The discovery rules are designed to support a properly pleaded cause of action and to prepare defenses to charges made not to discover whether a claim exists" (American Communications Assn., Local 10, I.B.T. v Retirement Plan for Empl. of RCA, 488 F Supp 479, 484 [SD NY 1980], affd [without opinion] 646 F2d 559 [2d Cir 1980])."
>
> Naderi v North Shore-Long Is. Jewish Health Sys., 135 A.D.3d 619 [2016]:
> "Plaintiff's cross motion for discovery pursuant to CPLR 3211(d) was correctly denied, as "he may not use discovery . . . to remedy the defects in his pleading" (Weinstein v City of New York, 103 AD3d 517, 517-518 [1st Dept 2013])."
>
> Weinstein v City of New York, 103 A.D.3d 517, 517-518 [1980]:
> "he may not use discovery —either pre-action or pretrial—to remedy the defects in his pleading (see Liberty Imports v Bourguet, 146 AD2d 535, 536 [1st Dept 1989]; Chappo & Co., Inc. v Ion Geophysical Corp., 83 AD3d 499, 500-501 [1st Dept 2011])."

105. Allegations in a complaint *upon information and belief* are worthless as a matter of law. Gluckman v Laserline-Vulcan Energy Leasing, LLC, 2009 NY Slip Op 33080(U), 8-9

> "Plaintiffs assert 26 causes of action in the amended complaint. However, virtually all of the operative

> allegations of the amended complaint that form the basis of these causes of action are pled solely "upon information and belief." Because these operative allegations are all alleged only "upon information and belief," the amended complaint is defective, and must be dismissed for that reason alone (see Angel v Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368, 835 N.Y.S.2d 57 [1st Dept 2007] [allegations in complaint made upon information and belief are insufficient to withstand a motion to dismiss]; Mandarin Trading Ltd. v Wildenstein,17 Misc 3d 1118[A], 2007 NY Slip Op 52059[U], * 5 [Sup Ct, NY County 2007], affd 65 AD3d 448 [1st Dept 2009] [allegation based upon information and belief "is simply a conclusory claim or statement unsupported by factual evidence," and, as such, "the bald allegation is not entitled to preferential consideration" on a motion to dismiss]; see e.g. Belco Petroleum Corp. v AIG Oil Rig, Inc.,164 AD2d 583 [1st Dept 1991] [complaint dismissed for failure to state a claim where plaintiff's allegations of defendant's patterns and practices were made "upon information and belief" and thus were wholly conclusory])."

106. The complaint fatally failed to set forth which provision of the contract was breached.

> VB Soho LLC v. Broome Prop. Owner JV LLC, 232 A.D.3d 520 [2024]:
> Plaintiff asserts that defendant sponsor breached the parties' purchase agreement, which incorporated by reference the condominium's offering plan, by failing to install an integrated wine cooler in plaintiff's kitchen or to design a kitchen that could accommodate an integrated wine cooler while maintaining "sufficient cabinetry." However, plaintiff "fail[s] to identify which, if any, contractual provisions were breached" (Manipal Educ. Ams., LLC v Taufiq, 203 AD3d 662, 663 [1st Dept 2022])."

NFA Group v Lotus Research, Inc., 180 A.D.3d 1060, 1061 [2020]:
"[T]o state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" (Barker v Time Warner Cable, Inc., 83 AD3d 750, 751; see Sutton v Hafner Valuation Group, Inc., 115 AD3d 1039, 1042; Woodhill Elec. v Jeffrey Beamish, Inc., 73 AD3d 1421, 1422; Peters v Accurate Bldg. Inspectors Div. of Ubell Enters., Inc., 29 AD3d 972, 973). Here, the complaint failed to specify the provisions of the parties' agreement that were allegedly breached."

Reznick v Bluegreen Resorts Mgt., Inc., 154 A.D.3d 891, 893 [2017]:
" "In order to state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" (Barker v Time Warner Cable, Inc., 83 AD3d 750, 751 [2011]; see Canzona v Atanasio, 118 AD3d at 839)."

Kaur v Lema, 187 AD3d 870, 872 [2020]:
"Here, nowhere in the complaint or in Sandhu's affidavit submitted in opposition to the defendants' motion did the plaintiffs identify which contractual provisions the defendants allegedly breached based on Lema's alleged misrepresentations (see Reznick v Bluegreen Resorts Mgt., Inc., 154 AD3d 891, 893; Canzona v Atanasio, 118 AD3d 837, 839; Barker v Time Warner Cable, Inc., 83 AD3d 750, 751)."

Eighth Affirmative Defense: Arbitration

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

30. ARBITRATION. IF BUYER, SELLER OR ANY GUARANTOR REQUESTS, THE OTHER PARTIES AGREE TO ARBITRATE ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT. IF BUYER, SELLER 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 BUYER, SELLER OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 DAYS AFTER THE NOTICE IS RECEIVED, BUYER, SELLER OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR THE FORUM. BUYER WILL PROMPTLY REIMBURSE SELLER OR GUARANTOR FOR ANY ARBITRATION FILING FEE, HOWEVER, IN THE EVENT THAT BOTH SELLER AND GUARANTOR MUST PAY FILING FEES, BUYER WILL ONLY REIMBURSE SELLER'S ARBITRATION FILING FEE AND, EXCEPT AS PROVIDED IN THE NEXT SENTENCE, BUYER WILL PAY ALL ADMINISTRATION AND ARBITRATOR FEES. IF THE ARBITRATOR FINDS THAT EITHER THE SUBSTANCE OF THE CLAIM RAISED BY SELLER OR GUARANTOR OR THE RELIEF SOUGHT BY SELLER OR

GUARANTOR IS IMPROPER OR NOT WARRANTED, AS MEASURED BY THE STANDARDS SET FORTH IN FEDERAL RULE OF PROCEDURE 11(B), THEN BUYER WILL PAY THESE FEES ONLY IF REQUIRED BY THE AAA OR FORUM RULES. SELLER AND GUARANTOR AGREE THAT, BY ENTERING INTO THIS AGREEMENT, THEY ARE WAIVING THE RIGHT TO TRIAL BY JURY. BUYER, SELLER OR ANY GUARANTOR MAY BRING CLAIMS AGAINST ANY OTHER PARTY ONLY IN THEIR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. FURTHER, BUYER, SELLER AND ANY GUARANTOR AGREE THAT THE ARBITRATOR MAY NOT CONSOLIDATE PROCEEDINGS FOR MORE THAN ONE PERSON'S CLAIMS, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING, AND THAT IF THIS SPECIFIC PROVISION DEALING WITH THE PROHIBITION ON CONSOLIDATED, CLASS OR AGGREGATED CLAIMS IS FOUND UNENFORCEABLE, THEN THE ENTIRETY OF THIS ARBITRATION CLAUSE SHALL BE NULL AND VOID. THIS AGREEMENT TO ARBITRATE IS GOVERNED BY THE FEDERAL ARBITRATION ACT AND NOT BY ANY STATE LAW REGULATING THE ARBITRATION OF DISPUTES. THIS AGREEMENT IS FINAL AND BINDING EXCEPT TO THE EXTENT THAT AN APPEAL MAY BE MADE UNDER THE FAA. ANY ARBITRATION DECISION RENDERED PURSUANT TO THIS ARBITRATION AGREEMENT MAY BE ENFORCED IN ANY COURT WITH JURISDICTION. THE TERMS "DISPUTES" AND "CLAIMS" SHALL HAVE THE BROADEST POSSIBLE MEANING.

108. 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.)"

Ninth Affirmative Defense. Lack of Subject Matter Jurisdiction.

109. 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.

110. Under Business Corporation Law §1314(b), the court lacks subject matter jurisdiction. Pearl Beta Funding, LLC v Elegant Trio Colors Corp., 237 A.D.3d 964 [2025]:

> "Under Business Corporation Law § 1314(b), generally, "an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in [certain] cases only." As relevant here, those "cases" include where the action "is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract" (id. § 1314[b][1]), or where "a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under" CPLR 302(a)(1), New York's long-arm statute (Business Corporation Law § 1314[b][4]). Under CPLR 302(a)(1), "a court may exercise personal jurisdiction over any non-domiciliary" who "transacts any business within th[is] state or contracts anywhere to supply goods or services in

> the state."
> Initially, contrary to the plaintiff's contention, Business Corporation Law § 1314(b) applies to this action, since the plaintiff is a "non-resident" limited liability company and Elegant is a foreign corporation (id.; see Techo-TM, LLC v Fireaway, Inc., 123 AD3d 610, 610; Mobile Programming LLC v Tallapureddy, 71 Misc 3d 1219[A], 2021 NY Slip Op 50411[U] [Sup Ct, NY County]). In opposition to the defendants' motion, the plaintiff submitted an affidavit of Adnan Abrar, its funding manager. In his affidavit, Abrar averred, among other things, that he reviewed and countersigned the underlying agreement in New York, that the plaintiff performed under the agreement by delivering the purchase price and making payment from its account at BankUnited located in Melville, and that the defendants remitted purchased receivables under the agreement to the plaintiff, which were accepted by the plaintiff at its account located in New York. These averments, viewed in the light most favorable to the plaintiff, were sufficient, at this early stage of the litigation, to establish that the Supreme Court could exercise subject matter jurisdiction over this action (see Business Corporation Law § 1314[b][1], [4]; cf. Techo-TM, LLC v Fireaway, Inc., 123 AD3d at 610)."

111. 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); 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).

112. It is pleaded that the plaintiff's funding was wired to defendant from a bank outside of New York.

113. Plaintiff's funding was wired to defendant's bank outside of New York.

114. The transaction was not complete until the wire hit defendant's bank. A home run does not occur when the ball leaves the bat but only when it lands in the stands.

Tenth Affirmative Defense: Unconscionability/Adhesion Contract

115. Plaintiff's funding was advertised and utilized for same day or next day funding.

116. 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.

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

118. 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.")."

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

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

121. 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." "

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

123. 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.

124. 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].

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

Eleventh Affirmative Defense: Unenforceable Default Fee

126. 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]:

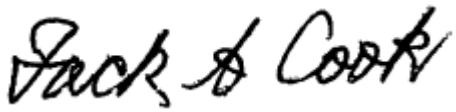
> "(W)here the breach of contract was a failure to pay money, plaintiff should be limited to a recovery of the contract amounts plus appropriate interest] [citation omitted]; Cotheal v Talmage, 9 NY 551, 554, Seld. Notes 238 [1854] ["Where there is a contract to pay money, the damages for its breach 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"]).

127. 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: July 11, 2025



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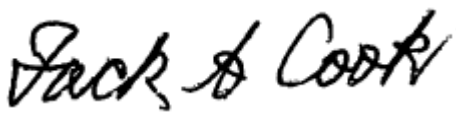
VERIFICATION: State of New York, County of Nassau, ss.: The undersigned attorney for defendants, duly admitted to practice in the courts of the State of New York, affirms under penalties of perjury: that he has read the foregoing answer, and knows the contents thereof; that it is true upon information 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: July 11, 2025



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