

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

Index No 605371/2024

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WORLDWIDE CAPITAL MANAGEMENT,

ANSWER

Plaintiff,

-against-

RED DOOR REALTY GROUP LLC and MARK STEVEN
HAAN,

Defendants.

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Defendants by their attorney retained solely therefor answer the complaint:

1. Deny paragraph 1. Absolutely false. Plaintiff is neither registered in New York nor formed in New York. Exhibit A.
2. Admit paragraph 2.
3. Admit paragraph 3.
4. Admit paragraph four only as to personal jurisdiction due to a forum selection clause but not subject matter jurisdiction.
5. Paragraph 5: 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. \$5000 was deducted from the \$100,000.

6. Paragraph 6: Deny. There is no default actually alleged since “and/or” can hardly be considered an actual allegation but just alternative hypotheticals. *Cf.*, paragraph 8 of the complaint.

7. Deny. \$5000 deducted. *Ibid.*

8. Deny paragraph 8 and each and every subsequent allegation of the complaint not expressly admitted above.

First Affirmative Defense: Illusory Contract. No Risk

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

10. The plaintiff’s funding/loan started at a 300% annual rate of interest. 300% is 12 times the 25% maximum under the criminal usury statute.

11. Calculation of Interest: Under the Agreement, the total payable to Defendant was \$95,000, less startup fees, for which Defendant had to pay plaintiff back \$140,000, by a daily payment of \$3,500.00 per day. Defendant getting gross proceeds from plaintiff of \$95,000, and having to pay back \$140,000, the difference, of \$45,000, was the interest that Defendant had to pay on the \$95,000. \$45,000 interest on \$95,000, if it had to be paid back over a year, would have been 47.3% interest. The agreement required payments of \$3,500.00 per day, which meant 40 payments of \$3,500.00 each, or 40 days, to pay the \$140,000. However, the \$3,500.00 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 40 payments of \$3,500.00 each were going to take 56 days total. 56 days is 15.7% of a year. Since 47.3% interest had to be paid back in 15.7% of a year, that was an annual interest rate of 300%.

12. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 22%, equaled \$15,909.09 (\$3,500.00 divided by 22% \$15,909.09).

13. The initial 300% interest rate was 12 times the 25% criminal usury cap. 25% times 12 = 300%.

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

15. If the fixed daily payment was reduced so that 22% of receipts equaled the 25% maximum criminal usury rate rather than the 300% criminal rate, the receipts needed would only be \$1,338.08. Calculation: The 300% interest rate divided by 25% =12. The \$15,909.09 receipts needed under the contract to cover the 22% Specified Percentage divided by 12 = \$1,338.08.

16. Therefore, until the plaintiff granted a reconciliation taking 22% of only \$1,338.08 of receipts, the funding was criminally usurious.

17. Until receipts dropped to \$1,338.08, the 22% specified percentage was criminally usurious.

18. If the defendant's receipts diminished from \$15,909.09 to \$1,338.08, 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.

19. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 22% of the \$1,338.08 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 22% debit if receipts dropped to \$1,338.08.

20. This would enable plaintiff to declare a default.

21. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this \$3,500.00 fixed daily payment is enforcing criminal usury.

22. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this \$3,500.00 fixed daily payment is enforcing criminal usury.

23. The agreement was for a finite term of 56 days with payments of \$3,500.00 each business day.

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

31. **Business Purpose.** Each Merchant represents, warrants, and covenants that it is a valid business in good standing under the laws of the jurisdictions in which it is organized and/or operates, and each Merchant is entering into this Agreement for business purposes and not as a consumer for personal, family, or household purposes.

25. 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.

26. 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.”

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

28. The contract indicated that payments made to plaintiff would be conditioned upon defendant’s sale of products and services, and the payment therefore by defendant’s customers:

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Payments made to WCM in respect to the full amount of the Receivables shall be conditioned upon each Merchant’s sale of products and services and the payment therefor by each Merchant’s customers in the manner provided in this Agreement.

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

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

31. The notice provision stated:

38. Notices. All notices, requests, consents, demands, and other communications hereunder to WCM shall be delivered by certified mail, return receipt requested, or by overnight delivery with signature confirmation addressed to 101 Chase Ave, Suite 207- 208, Lakewood, NJ 08701 and shall become effective only upon receipt.

32. 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.

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

34. However, 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:

34 Events of Default

- (9) Any Merchant changes the Account without the prior written consent of WCM;
- (10) WCM is not provided with updated login or password information for the Account
- (14) Any Merchant fails to deposit its Receivables into the Account;

35. 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.”

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

37. 33 Security Interest

Each Merchant agrees to execute any documents or take any action in connection with this Agreement as WCM deems necessary to perfect or maintain WCM's first priority security interest in the Collateral and the Cross-Collateral, including the execution of any account control agreements.

38. This made the entire contract illusory.

39. 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])”

40. 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

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

42. Here, plaintiff knew from the outset that defendants would be in default because the agreement forbade the individual defendant from earning a livelihood from the proceeds of the business. (Provision quoted above).

43. 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%.

44. The parties' contract was dated: Jun. 8, 2022.

45. Prior UCC-1's are annexed as Exhibit B.

46. Contract provisions:

29. Unencumbered Receivables. Each Merchant represents, warrants, and covenants that it has good, complete, and marketable title to all Receivables, free and clear of any and all liabilities, liens, claims, changes, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges, and encumbrances of any kind or nature whatsoever or any other rights or interests that may be inconsistent with this Agreement or adverse to the interests of WCM, other than any for which WCM has actual or constructive knowledge as of the date of this Agreement.

47. 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”.

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

Each Merchant hereby authorizes WCM to ACH debit the specified remittances from the Account on a daily basis as of the next business day after the date of this Agreement and will provide WCM with all required access codes and monthly bank statements.

6. Merchant Deposit Agreement. Merchant(s) shall appoint a bank acceptable to WCM, to obtain electronic fund transfer services and/or “ACH” payments. Merchant(s) shall provide WCM and/or its authorized agent with all of the information, authorizations, and passwords necessary to verify each Merchant’s Receivables.

Bank Information:

WORLDWIDE CAPITAL MANAGEMENT will require viewing access to your bank account, each business day. WORLDWIDE CAPITAL MANAGEMENT will also require viewing access to your bank account, prior to funding, as part of our underwriting process. Please fill out the form below with the information necessary to access your account.

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

49. 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]).”

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

Addendum

Any Merchant may give written notice requesting a reconciliation. A request for reconciliation may also be made by e-mail to Funding@wwcapitalmanagement.com and such notice will be deemed to have been received if

and when WCM sends a reply email (but not a read receipt).

51. This allowed plaintiff to refuse any reconciliation request.¹

52. 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.

53. 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.

54. The same section stated, “Seller or Buyer may request an adjustment to the Daily Amount to more closely reflect the Seller’s actual Future Receipts times the Specified Percentage.”

55. “Actual Future Receipts” is an oxymoron.

56. Any predilection or prognostication of the future receipts was entirely subjective.

Fourth Affirmative Defense: Illegal Contract

57. The contract stated:

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Each Merchant agrees that the Purchase Price in exchange for the Receivables pursuant to this Agreement equals the fair market value of such Receivables. WCM has purchased and shall own all the Receivables described in this Agreement up to the full Receivables Purchased Amount as the Receivables are created.

59. 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]).”

60. 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]:111 The major exception here is interest paid on a home mortgage.[6]:111

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

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

63. 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.)”

64. 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: Criminal Usury.

65. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] held that the contract itself was all that was needed to establish criminal usury. “ "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" [citation]. Here, for the reasons stated above, the defendants conclusively established through the submission of the agreement that it constituted a criminally usurious loan (see

Adar Bays, LLC v GeneSYS ID, Inc., 37 NY3d at 332; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 AD3d at 666).”

66. The contract stated:

34 Events of Default

16) Four or more ACH debits to the Account by WCM are returned for not sufficient funds (NSF) without advance written notice from any Merchant;

67. Plaintiff’s signature and acceptance of certified mail could not timely avoid its ACH-debit of the fixed daily payment.

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

69. 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].

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

71. 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.”

72. The plaintiff’s contract prohibited any change of the payment processing arrangements.

73. The plaintiff’s contract effectively made bankruptcy a default (above).

74. 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”.

75. 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.

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

77. Nothing in the contract avoided the fixed daily/weekly payment if defendants had no receipts.

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

Sixth Affirmative Defense: Unconscionability/Adhesion Contract

79. 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.

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

81. 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.").

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

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

84. 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." ”

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.

Seventh 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"]).

Eighth Affirmative Defense: Arbitration

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

48. Arbitration. Any action or dispute relating to this Agreement or involving WCM on one side and any Merchant or any Guarantor on the other, including, but not limited to issues of arbitrability, will, at the option of any party to such action or dispute, be determined by arbitration before a single arbitrator. The arbitration will

be administered either by Arbitration Services, Inc. under its Commercial Arbitration Rules as are in effect at that time, which rules are available at www.arbitrationservicesinc.com , or by Mediation & Commercial Arbitration, Inc. under its Commercial Arbitration Rules as are in effect at that time, which rules are available at www.mcarbitration.org . Once an arbitration is initiated with one of these arbitral forums, it must be maintained exclusively before that arbitral forum and the other arbitral forum specified herein may not be used.

91. 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.)”

92. However, the right to arbitration should only be with an actual arbitration entity like the American Arbitration Association or JAMS Endispute. Arbitration Services, Inc. and Mediation & Commercial

Arbitration, Inc. were each formed by unscrupulous attorneys to act as rubber stamps for their clients.

Ninth Affirmative Defense. Lack of Subject Matter Jurisdiction.

93. 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.

94. 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).

95. *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]).”

96. 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].

97. 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).

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

“We agree with Supreme Court's finding that it had subject matter jurisdiction over the action, but on grounds different from those that the court stated. An action against a foreign corporation may be maintained "where it is brought to recover damages for a breach of contract made within New York State" (Business Corporation Law §

1314[b][1]). Here, the agreement was made in New York. As this Court has held, the "place of making of [a] contract is established when the last act necessary for its formulation is done, and at the place where that final act is done" (*Fremay, Inc. v Modern Plastic Mach. Corp.*, 15 AD2d 235, 237 [1st Dept 1961] [internal quotation marks omitted]). According to the affidavit of plaintiff's vice president, plaintiff performed the last necessary act in New York by sending funds to Point Blank's Florida bank account; the sending of those funds, not Point Blank's passive receipt of them in Florida, was the last act necessary for formulation of the agreement."

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

Tenth Affirmative Defense: Lack of Standing

100. The plaintiff has sued as a trade name. Therefore, the court lacks jurisdiction of the action.

Provosty v Hall Hosp., 91 AD2d 658, 659 (1982, aff'd. 59 NY2d 812): "It is undisputed that Lydia E. Hall Hospital is not a corporation, and that it is a trade name employed by its sole owner, Dr. Carl H. Neuman. Moreover, it is further undisputed that a certificate of doing business under the assumed name Lydia E. Hall Hospital had been filed by Dr. Neuman in the Nassau County Clerk's office in the summer of 1974 (see General Business Law, 130). *** In arguing, inter alia, that the complaint in Action No. 1 must be dismissed, Dr. Neuman correctly maintains that a trade name, as such, has no separate jural existence, and that it can neither sue nor be sued independently of its owner".

Little Shoppe Around the Corner v. Carl, 80 Misc. 2d 717, 719 [1975]:

“In the instant action, the name of the would-be plaintiff is not that of a partnership or a general association, but is merely a trade name. No action may be brought by, nor may any suit be maintained against, a trade name as an entity. (Marder v. Betty's Beauty Shoppe, 38 Misc 2d 687.) Any such proceeding is a nullity (Marder, supra). Absent a party plaintiff, "the judgment is in such case futile, because in truth no action is then pending between the parties named. If the plaintiff in that action was not in existence, the defendants named in the summons and complaint were, in fact, not required to appear in court and answer the complaint." (MacAffer v. Boston & Maine R. R., 268 N. Y. 400, 404, supra.)”

101. The plaintiff is not registered to do business in New York but is doing business in New York and its action is therefore barred. *Cf.*, Business Corporation Law §1312; any counterpart in the limited liability company law.

WHEREFORE, defendant respectfully demands judgment dismissing the complaint.

Dated: April 4, 2024



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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: April 4, 2024



Amos Weinberg