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

Index No 522517/2024

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3POINT CAPITAL GROUP d/b/a 3PCG INC,

Plaintiff,

-against-

BLUPOINT MERRIMACK HEALTHCARE LLC d/b/a BLUPOINT MERRIMACK HEALTHCARE, MILL TOWN HEALTH AND REHABILITATION and JOSEPH CUZZUPOLI,

Defendants.

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ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

1. Deny paragraph 1. Plaintiff is a Florida formed entity not registered or licensed to do business in New York State. The action cannot be maintained under NYBCL §1312.

2. Admit paragraph 2.

3. Admit paragraph 3 but deny that any defendant is a seller of anything.

4. Admit the date of the contract and that the parties' transaction was for the payback amount stated, but otherwise deny. The contract had nothing to do with any purchase. Acknowledge the existence of Exhibit A to the complaint.

5. Admit paragraph five only as to personal jurisdiction due to a forum selection clause but not subject matter jurisdiction. Nor can a forum selection clause create subject matter jurisdiction. Exhibit A to this answer.

6. Admit paragraph 6 that plaintiff had a fixed weekly payment by ACH-debit and otherwise deny.

7. Admit paragraph 7 but deny "Seller".

8. Deny paragraph 8. Nor does the remittance history state any such thing as is alleged in this paragraph. Nothing in the remittance history (NYSCEF Doc. No. 4) in the least supports the alternative allegations that "by changing the designated bank account without Plaintiff's authorization, by placing a stop payment on Plaintiff's debits to the account or by otherwise taking measures to interfere with Plaintiff's ability to collect the Future Receivables."

9. Paragraph 9: Admit no ACH-debits by plaintiff after Aug. 14, 2024 and otherwise deny.

10. Deny paragraph 10.

11. Admit paragraph 11.

12. Deny paragraph 12 and each and every other allegation of the complaint not expressly admitted above.

First Affirmative Defense: Illusory Contract. No Risk

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

14. Plaintiff's contract eliminated the risk.

15. The plaintiff's funding/loan started at a 114% annual rate of interest. 114% is 4.56 times the 25% maximum under the criminal usury statute.

16. **Calculation of Interest**: Under the Agreement, the total paid to Defendant was $237,500, less startup fees, for which Defendant had to pay plaintiff back $362,500, by a weekly payment of $15,104.17 per week. Defendant getting gross proceeds from plaintiff of $237,500, and having to pay back $362,500, the difference, of $125,000, was the interest that Defendant had to pay on the $237,500. $125,000 interest on $237,500, if it had to be paid back over a year, would have been 52% interest. The agreement required weekly payments of $15,104.17 per week, which meant 24 payments of $15,104.17 each, to pay the $362,500. 24 weeks is 46% of a year. Since

52% interest had to be paid back in 46% of a year, that was an annual interest rate of 114%.

17. The weekly receipts of defendant needed for the $15,104.17 fixed weekly payment under the contract, at the specified percentage of 8.06%, equaled $187,396.65 (8.06% of $187,396.65 = $15,104.17).

18. The initial 114% interest rate was 4.56 times the 25% criminal usury cap. 25 times 4.56 = 114%.

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

20. If the fixed weekly payment was reduced so that 8.06% of receipts equaled the 25% maximum criminal usury rate rather than the 114% criminal rate, the receipts needed would only be $41,083.10. Calculation: The 114% interest rate divided by 25 =4.56. The $187,396.65 receipts needed under the contract to cover the 8.06% Specified Percentage divided by 4.56 = $41,083.10.

21. Therefore, until the plaintiff granted a reconciliation taking 8.06% of only $41,083.10 of receipts, the funding was criminally usurious.

22. If $362,500.00 has to be paid back after receipt of $237,500.00 with fixed weekly payments each week and an annual interest rate of 25%,

each weekly payment would equal $3311.29 which at 8.06% of weekly receipts would equal $41,083.10 of receipts.

23. Until receipts dropped to $41,083.10, the 8.06% specified percentage was criminally usurious.

24. If the defendant's receipts diminished from $187,396.65 to $41,083.10, 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.

25. It is as if the $210,900 salary of a New York Supreme Court justice was reduced $46,250 (210900/4.56).

26. For plaintiff to then use a reconciliation to deduct a fixed weekly payment of 8.06% of the $41,083.10 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 8.06% debit if receipts dropped to $41,083.10.

27. This would enable plaintiff to declare a default.

28. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $15,104.17 fixed weekly payment is enforcing criminal usury.

29. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $15,104.17 fixed weekly payment is enforcing criminal usury.

30. The entire premise of the contract was illusory because it purported to be a purchase of receivables, or receipts, payable from future sales.

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

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

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

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

> 14 *** Payments made to 3PCG Inc 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.

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

> 3. Estimated Payments. Instead of debiting the Specified Percentage of Merchant's Receivables, 3PCG Inc may instead debit an "Estimated Payment" from the Account every Tuesday. The Estimated Payment is intended to be an approximation of no more than the Specified Percentage. The initial amount of the Estimated Payment is $15,104.17,

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

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

37. 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:

> 1 *** The Receivables Purchased Amount shall be paid to 3PCG Inc by each Merchant irrevocably authorizing only one depositing account acceptable to 3PCG Inc (the "Account")

38. 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."

39. The contract stated

> 15. Power of Attorney. Each Merchant irrevocably appoints 3PCG Inc as its agent and attorney-in-fact with full authority to take any action or execute any instrument or document to settle all obligations due to 3PCG Inc for the benefit of each Merchant and only in order to prevent the occurrence of an Event of Default (as described in Section 30).

40. That made the entire contract illusory it enabling the plaintiff to grab all receipts at any time by under the pretext of a pro-active seizure before any fixed weekly payment was overdue.

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

> 29 *** Each Merchant agrees to execute any documents or take any action in connection with this Agreement as 3PCG Inc deems necessary to perfect or maintain 3PCG Inc's first priority security interest in the Collateral and the Cross-Collateral, including the execution of any account control agreements.

42. This made the entire contract illusory.

43. 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."

44. None of these defects constituted invented or theoretical defenses. Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023] held that the language in the merchant funding agreement, alone, will establish these defenses.

> "Here, the defendants established that the agreement constituted a criminally usurious loan. *** [T]he defendants conclusively established through the submission of the agreement that it constituted a criminally usurious loan (see Adar Bays, LLC v GeneSYS ID, Inc., 37 NY3d at 332; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 AD3d at 666)."

45. 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

46. 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])."

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

> 4. **Reconciliations**. ***. In order to effectuate the reconciliation, any Merchant must produce with its request **any and all statements covering the period from the date of this Agreement** through the date of the request for a reconciliation and, if available, the login and password for the Account. 3PCG Inc will complete each reconciliation requested by any Merchant within two business days after receipt of proper notice of a request for one **accompanied by the information and documents required for it**. **3PCG Inc may also conduct a reconciliation on its own at any time by reviewing Merchant(s)'s Receivables covering the period from the date of this Agreement until the date of initiation of the reconciliation, each such reconciliation will be completed within two business days after its initiation**, and 3PCG Inc will give each Merchant written notice of the determination made based on the reconciliation within one business day after its completion. If a reconciliation determines that 3PCG Inc collected more than it was entitled to, then **3PCG Inc will credit to the Account all amounts to which 3PCG Inc was not entitled** and, if there is an Estimated Payment, decrease the amount of the Estimated Payment so that it is consistent with the Specified Percentage of Merchant(s)'s Receivables from the date of the Agreement through the date of the reconciliation.

48. The reconciliation provision: failed to state what kind of statements were needed ("all statements" and did not limit it to bank

statements of the authorized account; indicated that the calculation would start from the inception of the agreement from before the time a reconciliation was needed and thereby averaging in excessive receipt amounts before a reconciliation was needed, thereby guaranteeing that the reconciliation amount would not reflect the diminished receipts at the time a reconciliation was requested (see Attorney General action below noting this defect); the reconciliation request had to be "accompanied by the information and documents required for it" enabling plaintiff to demand additional information and documents not known to be required at the time the reconciliation was requested; by stating that plaintiff could complete its own *sua sponte* reconciliation at any time it proved that the reconciliation requirements were bogus (see Richmond opinion, below); there was not set any time deadline for payment of the excess prior ACH-debit determined by a reconciliation.

49. 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.

50. 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.

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

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

Here, while not stating that failure to reconcile would constitute a breach, the contract did have a no-liability-to-plaintiff clause ("13. No Liability"). 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 the discretion to calculate a reconciliation from the beginning of the contract before receipts diminished.

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”

> Plaintiff’s remittance history fails to set forth any return code, indicating that mere nonpayment was a default.

D. “there was an implied finite term in the agreement inasmuch as plaintiffs allege that the daily payment amount was set to ensure that Argus's targeted return would be met in a predetermined period of time as opposed to having been set based on the specified percentage of Oakshire's sales”

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

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

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

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

53. 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."

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

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

56. 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".

57. 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 by determining what statements, documents and information were supposedly needed.

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

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

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

61. 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"].)

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

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

63. 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,

64. 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%.

65. The parties' contract was dated: Feb. 1, 2024.

66. The contract stated:

> 26. 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 3PCG Inc, other than any for which 3PCG Inc has actual or constructive knowledge or inquiry notice as of the date of this Agreement.

67. Prior UCC-1's against the principal defendant are annexed in Exhibit B.

68. 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".

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

> 1 *** Each Merchant hereby authorizes 3PCG Inc to ACH debit the specified remittances and any applicable fees listed in Section 2 from the Account *** and will provide

> 3PCG Inc with all required access codes and monthly bank statements.

70. Plaintiff's reconciliation provision demonstrated that the reconciliation provision was a sham it enabling plaintiff to reconcile for its own benefit at any time it wanted.

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

71. 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.

72. 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.

73. 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.

> 16 *** Protection 1: The full uncollected Receivables Purchased Amount plus all fees due under this Agreement may become due and payable in full immediately.

74. The contract enabled plaintiff on default to grab all accounts of the defendant regardless of the source of funds:

> Protection 5. 3PCG Inc may debit any Merchant's depository accounts wherever situated

75. 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".

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

> 29. Security Interest. To secure each Merchant's performance obligations to 3PCG Inc under this Agreement and any future agreement with 3PCG Inc, each Merchant hereby grants to 3PCG Inc a security interest in collateral (the "Collateral"), that is defined as collectively: (a) all accounts, including without limitation, all deposit accounts, accounts-receivable, and other receivables, as those terms are defined by Article 9 of the Uniform Commercial Code

77. The Attorney General stated at page 98 of her petition:

> 281. In addition, because Yellowstone and Delta Bridge's Reconciliation procedures looked at merchants' payments over the entire term of the MCA [citation] Reconciliation refunds continued to be unavailable in the case of a sudden drop in revenue.

78. Plaintiff had a similar provision in the reconciliation paragraph 4, quoted above.

Sixth

Affirmative Defense: Arbitration

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

> 42. Arbitration. Any action or dispute, whether sounding in contract, tort, law, equity, or otherwise, relating to this Agreement or involving 3PCG Inc on one side and any Merchant or any Guarantor on the other, including, but not limited to issues of arbitrability, and including, without limitation, any action or dispute that predates this Agreement, will, at the option of any party to such action or dispute, be determined by arbitration in the State of New York. A judgment of the court shall be entered upon the award made pursuant to the arbitration. The arbitration will be administered either by the American Arbitration Association under its Commercial Arbitration Rules as are in effect at that time

80. 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.)"

Eighth Affirmative Defense. Lack of Subject Matter Jurisdiction.

81. 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.

82. 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).

83. 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])." *See Exhibit A.*

84. 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).

85. 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."

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

Ninth Affirmative Defense: Lack of Standing

87. Plaintiff is not registered to do business in the State of New York but does a regular and continuous course of business in New York. Among others, plaintiff inserts New York forum selection clauses and choice of law clauses into its contracts. Plaintiff routinely brings its collection lawsuits in New York.

88. The action is therefore barred under NY Business Corporation Law, § 1312. Highfill, Inc. v. Bruce & Iris, Inc., 50 A.D.3d 742, 743-744 [2008]:

> "The defendants moved to dismiss the complaint on the ground that the plaintiff lacked standing to maintain the action in New York, since it was a foreign corporation doing business in New York without authorization. Business Corporation Law § 1312 (a) "constitutes a bar to the maintenance of an action by a foreign corporation" in New York if that corporation is found to be "doing business" here without having obtained the requisite authorization to do so (Airline Exch. v Bag, 266 AD2d 414, 415 [1999]). The question of whether a foreign corporation is "doing business" in New York "must be approached on a case-by-case basis with inquiry made into the type of business being conducted" (Alicanto, S. A. v Woolverton, 129 AD2d 601, 602 [1987]). In order for a court to find that a foreign corporation is "doing business" in New York within the meaning of Business Corporation Law § 1312 (a), "the corporation must be engaged in a

> regular and continuous course of conduct in the State" (Commodity Ocean Transp. Corp. of N.Y. v Royce, 221 AD2d 406, 407, [1995]). A defendant relying upon Business Corporation Law § 1312 (a) as a statutory barrier to a plaintiff's lawsuit "bears the burden of proving that the [plaintiff-corporation's] business activities in New York were not just casual or occasional,' but so systematic and regular as to manifest continuity of activity in the jurisdiction'" (S & T Bank v Spectrum Cabinet Sales, 247 AD2d 373 [1998], quoting Peter Matthews, Ltd. v Robert Mabey, Inc., 117 AD2d 943, 944 [1986]). Absent sufficient evidence to establish that a plaintiff is doing business in this State, "the presumption is that the plaintiff is doing business in its State of incorporation . . . and not in New York" (Cadle Co. v Hoffman, 237 AD2d 555 [1997]).”

Tenth Affirmative Defense: Unconscionability/Adhesion Contract

89. 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.

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

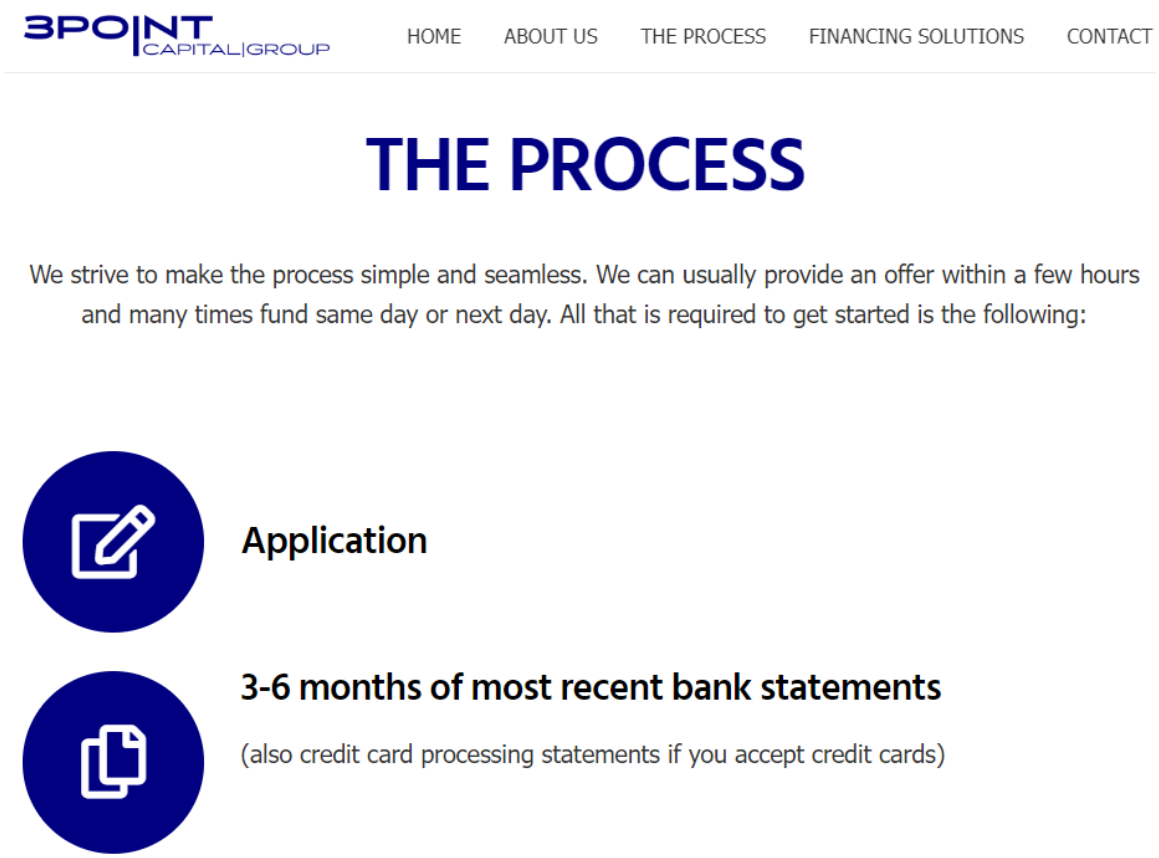
91. Under the circumstances, as more fully set forth below, unconscionability and adhesion contract is an available defense, notwithstanding that the one-person business defendant was filed as a

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.")."

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

[please see next page: plaintiff's website]



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

94. 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." ”

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

96. 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.

97. 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].

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

Eleventh Affirmative Defense: This Action is Barred By An Order of Receivership

99. Exhibit B is an order of receivership.

100. It is entitled to full faith and credit.

101. There was not granted any permission by the receiver or the court appointing the receiver to institute or maintain this action.

102. The maintenance of this action is barred. Guberman v Rudder, 85 A.D.3d 683, 684 [2011]:

> Plaintiff, a prospective purchaser of real property, failed to obtain leave of court to sue defendant, the receiver of the property in the underlying action, to which plaintiff was not a party, for defendant's conduct in facilitating the sale of the property. Nonetheless, the rule requiring leave to sue a receiver is not statutory and does not affect the court's jurisdiction (see Copeland v Salomon, 56 NY2d 222, 230 [1982]).
> However, dismissal of the complaint was warranted for lack of legal capacity under CPLR 3211 (a) (3), since a legal action filed against a receiver without leave of court cannot be maintained (see Chang v Zapson, 67 AD3d 435 [2009]) unless the court permits the action to be filed nunc pro tunc (see Copeland at 230), which was not the case here.
>
> Independence Sav. Bank v. Triz Realty Corp., 100 A.D.2d 613, 614 [1984]:
> However, the rule is firmly ensconced in our judicial tradition. Without a clear indication from the Legislature that it intends to abrogate the rule in a specific case, we would be wise not to ignore it (see Matter of McGuinness v New York State Off. of Ct. Admin., 96 AD2d 561, 563). While it is clear from the statutes and ordinances cited by HPD that the Civil Court has jurisdiction to hear a case brought against a receiver for housing violations, there is no indication that permission from the appointing court is not needed as a condition precedent. We therefore conclude, applying the rule favoring such permission, that

> leave is necessary. Special Term decided this case without the benefit of the Court of Appeals opinion in Copeland v Salomon (supra). There, the court held that permission from the appointing court was a condition precedent to suit and not a jurisdictional predicate without which a suit must be dismissed. Further, the Court of Appeals noted that, dependent on the circumstances of each situation, there are three possible alternatives that could be followed where a suit against a receiver is commenced without permission from the appointing court: (1) "the court in which the action had been begun was free to consider it regular and permit it to continue subject to the later order of the appointing court"; (2) the action may be stayed "pending an application to the appointing court for leave nunc pro tunc", (3) the action could be dismissed "without prejudice to recommencement after such leave had been obtained" (Copeland v Salomon, supra, p 230). para. Taking into account the obvious and important public need of having buildings in compliance with housing standards, particularly in reference to such items as heat and hot water, we are of the view that the proper resolution in this case would be to let the matter or matters proceed in the Civil Court, subject to a grant of permission from the Supreme Court

Twelfth Affirmative Defense: Unenforceable Default Fee

103. 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"]).

104. 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.

Thirteenth Affirmative Defense: Waiver

105. Plaintiff's remittance history (NYSCEF Doc. No. 4) shows the following as the last two entries of the history:

146751 08-05-2024 $0.00 $217,764.61 $144,735.39
146751 08-14-2024 $1,000.00 $218,764.61 $143,735.39

106. This shows that plaintiff's ACH-debit of Aug. 5, 2024 failed but that plaintiff's ACH-debit of Aug. 14, 2024, the last entry, succeeded in extracting $1000 from defendant's bank account.

107. Any and all prior failures of payment, regardless of the reason, have therefore been waived and the action must be dismissed. Vox Funding v Champion Family Auto Sales, Sup. Ct., Nassau County, Index No. 615887/2022, (NYSCEF Doc. No. 17). Also:

> Sauer v. Xerox Corp., 5 Fed. Appx. 52, 56, Second Circuit Court of Appeals [2001]:
> "Where a party to an agreement has actual knowledge of another party's breach and continues to perform under and accepts the benefits of the contract, such continuing performance constitutes a waiver of the breach."), aff'd sub nom, Yaeger v. National Westminster, 962 F.2d 1 (2d Cir. 1992)."
>
> New York Tel. Co. v. Jamestown Tel. Corp., 282 N.Y. 365, 372 [1940]: "
> "Acceptance of benefit under the contract with knowledge of the wrong constitutes a waiver of the wrong."
>
> Rebecca Broadway L.P. v Hotton, 143 A.D.3d 71, 80-81 [2016[:
> "A party to a bilateral contract, when faced with a breach by the other party, must make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract."
> National Westminster Bank v. Ross, 130 B.R. 656, 675 (S.D.N.Y. 1991):

> "It is well-established that where a party to an agreement has actual knowledge of another party's breach and continues to perform under and accepts the benefits of the contract, such continuing performance constitutes a waiver of the breach. See New York Tel. Corp. v. Jamestown Tel. Co., 282 N.Y. 365, 26 N.E.2d 295 (1940); Housekeeper v. Lourie, 39 A.D.2d 280, 333 N.Y.S.2d 932 (1st Dept. 1972); Helsmley-Spear Inc. v. Westdeutsche Landesbank Girozentrale, 692 F. Supp. 194 (S.D.N.Y. 1988)."
>
> 22A NY Jur 2d Contracts, (1996) Sec. 430:
> "Similarly, the acceptance of a benefit under a contract with knowledge of a breach thereof constitutes a waiver of the wrong."

WHEREFORE, defendants respectfully demand judgment dismissing the complaint.

Dated: September 17, 2024

A m o s W e i n b e r g
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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: September 17, 2024

Amos Weinberg