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

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Index No E2025010430

SMART STEP FUNDING LLC,

Plaintiff,

-against-

DOGGIE DOLITTLE PET SALON & SPA, LLC and CORY JASON SHEETS,

Defendants.

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ANSWER

Defendants by their attorney answer the complaint:

1. Admit that plaintiff is a Delaware limited liability company and deny that it is in any other business but lending.

2. Admit paragraph 2 and 3.

3. Admit that the parties' contract is annexed and otherwise deny paragraph 4.

4. Admit the payment and otherwise deny paragraph five.

5. Deny paragraph six. The contract provided for an immutable fixed daily payment.

6. Admits paragraph 7 except denies the allegation of anything being "critical to the matter at hand".

7. Denies paragraph 8 and each and every other allegation of the complaint not expressly admitted herein.

First Affirmative Defense: Illusory Contract. No Risk

8. 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.

9. 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.

10. The plaintiff's funding/loan started at a 31% annual rate of interest. The rate was actually more because this calculation is based on a $197.36 fixed daily payment but the rate was higher in certain months.

11. Calculation of Interest: Under the Agreement, the total payable to Defendant was $46,977, net of the startup fee deduction, for which Defendant had to pay plaintiff back $66,291, by a daily payment of at least $197.36 per day. Defendant getting gross proceeds from plaintiff of $46,977, and having to pay back $66,291, the difference, of $19,314, was the interest that Defendant had to pay on the $46,977. $19,314 interest on $46,977, if it had to be paid back over a year, would have been 41% interest. The agreement required payments of $197.36 per day, which meant 336 payments of $197.36 each, or 336 days, to pay the $66,291. However, the $197.36 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 336 payments of $197.36 each were going to take 471 days total. 471 days is 1.3% of a year. Since 41% interest had to be paid back in 1.3% of a year, that was an annual interest rate of 31%.

12. The agreement was for a finite term of 471 days with payments of $197.36 each business day.

13. The entire premise of the contract was false and illusory because it purported to restrict defendants from any personal use of the business account:

> 6 *** (iii) the proceeds of this Agreement will not be used for personal, family or household purposes.

14. The funds in the business account were not restricted to plaintiff's funding wire and were fungible so that any withdrawal from the account for personal purposes could be said to violate the said provision.

15. 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.

16. 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:

> 9 Remedies: Upon the occurrence of a Default, Purchaser shall be entitled to all remedies available hereunder and under applicable law, including, but not limited to the following:The Specified Percentage shall equal 100%

17. 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."

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

19. 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]:

> 4.2 a. Seller shall not attempt to revoke its ACH authorization to Purchaser set forth in this Agreement or otherwise take any similar measure to interfere with Purchaser's ability to collect the Flex-Defined Daily Amount from the Designated Bank Account;
>
> b. Seller shall not change its Designated Bank Account without first providing Purchaser at least ten (10) days prior written notice and providing all information required by Purchaser to debit the Flex-Defined Daily Amount from the new Designated Bank Account;
>
> c. Seller shall deposit all of its sales receipts from any and all sources each and every day into the Designated Bank Account;
>
> 9 *** In the event that Seller: (i) prevents, or interferes with the Purchaser's collection of receipts from the Designated Bank Account; or, (ii) begins to deposit its sales receipts into another bank account, then Purchaser shall have the right, without waiving any of its other rights and remedies and without notice to Seller or any guarantor, to notify the bank holding the Designated Bank Account or other bank account(s) regarding the sale of Future Receipts hereunder and to direct such bank to permit Purchaser to debit from Seller's account any amounts to which Purchaser is entitled under this Agreement.

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

21. 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 (quoted above).

22. 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."

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

> 4.2 e. Seller shall not voluntarily sell, convey or otherwise transfer: (i) its ownership in the business; or, (ii) a material amount of the business' assets outside the ordinary course of business, without the express prior written consent of Purchaser;

24. 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."

25. 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)."

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

26. 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])."

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

> **3 Reconciliation and Changes to Flex-Defined Daily Amount:** The Flex-Defined Daily Amount isintended to represent the Specified Percentage of Seller's daily future sales receipts. Seller and/or Purchaser may request a reconciliation of the Flex-Defined Daily Amount against the actual amount of receipts collected by Purchaser ("Reconciliation"). Seller agrees to provide the relevant monthly bank account statements for the Designated Bank Account AND the merchant processing statements issued for Seller's Merchant Account reflecting all credit card receipts credited to Seller in the preceding month AND Seller's accounts receivable report outstanding if applicable, **and any other relevant information reasonably requested by Purchaser** for such purposes. Upon Purchaser's receipt of such information, Purchaser shall adjust the Flex-Defined Daily amount to reflect the Specified Percentage of Seller's actual daily sales receipts. If such Reconciliation will result in an increase in the Flex-Defined Daily Amount, Purchaser shall give Seller

> advance notice of at least five (5) business days before the new Flex-Defined Daily Amount goes into effect. After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Flex-Defined Daily Amount until any subsequent adjustment. Seller may request a Reconciliation by e-mail to CustomerCare@smartstepfunding.com.

28. 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.

29. 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.

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

31. 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."

Third Affirmative Defense: Criminal Usury.

32. 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"

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 there were provisions 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".

Tthe 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.

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

34. 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."

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

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

37. 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".

38. 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.

39. 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.

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

41. 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

42. 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,

43. 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.

44. 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%.

45. The parties' contract was dated: Jan. 18, 2024. It provide that:

> 4.1 c. Seller represents that the Future Receipts are all free and clear of all claims, liens, charges or encumbrances of any kind whatsoever;

46. The SBA had a prior UCC lien on all the assets and accounts:

> LEXIS:
> UCC Filings
> 1:PENNSYLVANIA UCC Record
> Debtor Information
> Name: DOGGIE DOLITTLE PET SALON & SPA, LLC
> Standardized Address: 2738 S QUEEN ST
> DALLASTOWN, PA 17313
>
> Original Address: 2738 S QUEEN ST
> DALLASTOWN, PA 17313-9541
>
> Secured Party Information
>
> Name: U.S. SMALL BUSINESS ADMINISTRATION
> Standardized Address: 2 20TH ST N STE 320
> BIRMINGHAM, AL 35203

Original Address: 2 NORTH 20TH STREET, SUITE 320
BIRMINGHAM, AL 35203-4002

Filing Information
Original Filing Number: 2021082900025
Original Filing Date: 08/29/2021
Filing Agency: SECRETARY OF STATE/UCC DIVISION

Filing Agency Address: 308 NORTH OFFICE BUILDING
HARRISBURG, PA 17120

Filing Type: INITIAL FILING
Filing Number: 2021082900025
Filing Date: 08/29/2021
Filing Expiration Date: 08/29/2026
Vendor Entry Date: 09/09/2021
Vendor Update Date: 2021

Collateral
Collateral Description: 08/29/2021 2021082900025 - INVENTORY ALL INCLUDING PROCEEDS AND PRODUCTS;EQUIPMENT ALL INCLUDING PROCEEDS AND PRODUCTS;NEGOTIABLE INSTRUMENTS ALL INCLUDING PROCEEDS AND PRODUCTS;CHATTEL PAPER ALL INCLUDING PROCEEDS AND PRODUCTS;ACCOUNT(S) ALL INCLUDING PROCEEDS AND PRODUCTS;GENERAL INTANGIBLE(S) ALL INCLUDING PROCEEDS AND PRODUCTS;COMPUTER EQUIPMENT ALL INCLUDING PROCEEDS AND PRODUCTS

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

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

48. 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:

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").

49. 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.

50. 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.

51. 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."

52. 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.

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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

53. Similarly, in this action, the plaintiff, SMART STEP FUNDING LLC, set a 14.42 Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

54. 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".

55. The contract of plaintiff had a similar secured interest.

56. 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:
> (b) "there was no time to [reconcile] because [the merchant] could request reconciliation only within five business days following the end of a business month," and (c) "the fixed daily payment . . . was not a good faith estimate of 15% of [the merchant's] receivables."
>
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> e, Respondents restricted reconciliation in additional ways, including by allowing merchants to request relief only during a narrow, five-day window each month. Petition ¶¶ 287-88. Consequently, a "mid-month decline in revenues" could "trigger a default under the contract and entitle the lender to immediately seek the whole uncollected amount." Haymount, 609 F. Supp. 3d at 248; accord McNider Marine, 2019 WL 6257463, at *4

57. Plaintiff's contract, here, abridged any right to a reconciliation.

Sixth Affirmative Defense: Illegal Contract

58. The contract stated that the loan payback by the defendant to the plaintiff would instead be a sale by the defendant to the plaintiff:

> 6 Sale of Future Receipts; ***: Seller expressly recognizes and agrees that it is selling a portion of its future revenue stream to Purchaser*** Purchaser is buying the Specified Amount of Future Receipts *** Seller and Purchaser agree that the Purchase Price paid by Purchaser in exchange for the Specified Amount of Future Receipts is for the purchase and sale of the Specified Amount of Future Receipts and is not intended to be, nor shall it be construed as, a loan or an assignment for security from Purchaser to the Seller. By this Agreement, Seller transfers to Purchaser full and complete ownership of the Specified Amount of Future Receipts

59. This rendered the contract illegal. It meant that the more plaintiff earned as income the greater its tax deduction for *cost of goods sold* and the more 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]:111The 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. Defendants had no part in the scheme, were not aware of it, and bear zero guilt.

64. The contract should be stricken and the action dismissed.

> 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.)"

> 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)."
>
> 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).

65. 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

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

8. Default: A "Default" shall include, but not be limited to, any of the following events:
(a) Seller intentionally interferes with Purchaser's right to collect the Flex-Defined Daily Amounts or Specified Percentage, including by blocking access to the Designated Bank Account, depositing or instructing any of its payment processors to deposit collected receipts into some other account besides the Designated Bank Account, or moving the Designated Bank Account to another financial institution without the prior express written permission of Purchaser;
(b) a breach by Seller of any covenants, warranties, undertakings, terms or agreements, contained in this Agreement;
(c) any representation or warranty made by the Seller in this Agreement, proving to have been incorrect, false or misleading in any material respect at the time the representation or warranty was made;
(d) Seller misrepresents and fraudulently induces Purchaser to execute this Agreement based upon misleading or erroneous information; and,
(e) Seller defaults under any of the terms, covenants and conditions of any other agreement with Purchaser.

67. The complaint stated:

7. Critical to the matter at hand, Section 4.2 of the Agreement contains defendant-seller's covenant and representations, inter alia:
- not to revoke its ACH authorization to Plaintiff set forth in the Agreement or otherwise take any measure to interfere with Plaintiff's ability to collect the Flex-Defined Daily Amount from defendant-seller's account;
- not to change the Designated Bank Account without first notifying Plaintiff and providing all information required by Plaintiff to debit the Flex-Defined Daily Amount from the new designated bank account;
- that defendant-seller will deposit all of its sales receipts into the Designated Bank Account and maintain such deposits until such time that Plaintiff has withdrawn the

> Flex-Defined Daily Amount from such Designated Bank Account each day; and
> - that defendant-seller shall not create, incur or permit to exist any lien, security interest, pledge, charge or encumbrance of any kind in respect to Future Receivables; and
> - that defendant-seller will not sell, convey or otherwise transfer its ownership in the business without the express prior written consent of
> Plaintiff 8. In direct contravention of defendant-seller's covenants and representations set forth above, on or before May 5, 2025, Plaintiff's debits to defendant-seller's account in an attempt to collect the Flex-Defined Daily Amounts were consistently returned by defendant-seller's bank.
> 9. As a result, defendant-seller has wholly frustrated Plaintiff's ability to collect the Future Receivables it purchased from defendant-seller under the Agreement.

68. The said quoted provisions and allegation do not, in fact, set forth any default under the contract provisions.

69. Plaintiff waived any right to demand bank statements and filed its action before the time limit to provide any bank statements.

Eighth Affirmative Defense: Arbitration

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

> 23 ARBITRATION: IF PURCHASER, SELLER OR ANY GUARANTOR REQUESTS, THE OTHER PARTIES AGREE TO ARBITRATE ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT. IF PURCHASER, 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 PURCHASER, SELLER OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 DAYS AFTER THE NOTICE IS RECEIVED, PURCHASER, SELLER OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR THE FORUM.

71. 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.

72. 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.

73. Under Business Corporation Law §1314(b), the court lacks subject matter jurisdiction. Pearl Beta Funding, LLC v Elegant Trio Colors Corp., ___ AD3d ___ 2025, NY Slip Op 02217, 2

> "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)."

74. 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).

75. 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."

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

77. Moreover, the Kapitus court held that the last act was the linchpin to jurisdiction. The last act was receipt of the funding by defendants at defendant's bank, which was outside of the State of New York and known to be outside of the State of New York. A home run is not hit when the ball comes off the bat but when the ball lands in the stands.

Tenth Affirmative Defense: Unconscionability/Adhesion Contract

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

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.

Eleventh 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]:

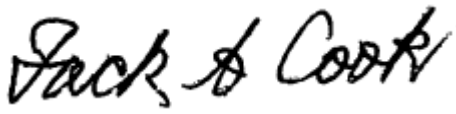
> "(W)here the breach of contract was a failure to pay money, plaintiff should be limited to a recovery of the contract amounts plus appropriate interest] [citation omitted]; Cotheal v Talmage, 9 NY 551, 554, Seld. Notes 238 [1854] ["Where there is a contract to pay money, the damages for its breach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

90. 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: May 30, 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: May 30, 2025

Jack A. Cook
Weinberg Legal PLLC