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

Index No 513419/2025

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MAIN STREET MERCHANT SERVICES INC.,

Plaintiff,

-against-

MAIN SEQUENCE TECHNOLOGY, INC. AND GRETCHEN KUBICEK,

Defendants.

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ANSWER

Defendants by their attorney answer the complaint:

1. Admit paragraph 1.

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Paragraph 4: Admit the date of the contract and that the parties' transaction was for the amount stated, but otherwise deny. The contract had nothing to do with any purchase and nothing under which there was to be delivery of any receivable before any default.

5. Admit paragraph 5.

6. Admit paragraph 6.

7. Admit paragraph 7 but deny any obligation by defendants under the agreement as set forth in the defenses below.

8. Admit plaintiff's ACH-debit from defendants' bank account of $53,964 and otherwise deny paragraph 8 and each and every other allegation of the complaint not expressly admitted above.

First Affirmative Defense: Illusory Contract. No Risk

9. 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.

10. 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.

11. 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."

12. Plaintiff's contract eliminated the risk.

13. Plaintiff's contract stated the following under which any subsequent employer of the individual-defendant-guarantor would automatically be liable under plaintiff's contract and plaintiff could destroy such employer's business at its whim, meaning that the individual-defendant-guarantor could never obtain any employment if the business defendant became unable to pay plaintiff:

> Rider 4
> In the event Seller's Principal(s) including but not limited to its officer(s) or Director(s), during the term of this agreement or while seller remains liable to purchaser for any obligations under this agreement, directly or indirectly, including acting by, through or in conjunction with any other person, causes to be formed a new entity or otherwise becomes associated with any new or existing

> entity, whether corporate, partnership, limited liability company or otherwise, which operates a business similar to or competitive with that of seller, such entity shall be deemed to have expressly assumed the obligations due purchaser under this agreement. With respect to any such entity, purchaser shall be deemed to have been granted an irrevocable power of attorney with authority to file, naming such newly formed or existing entity as debtor, an initial UCC financing Statement and to have it filed with any and all appropriate UCC filing offices. Purchaser shall be held harmless by seller and its principals and be relieved of any liability as a result of Purchaser's authentication and filing of any such Financing Statement or the resulting perfection of its ownership rights or security interests in such entity's assets. Purchaser Shall Have the right to notify such entity's payors or Account Debtor (as defined by the Uniform Commercial Code) of purchaser's rights, including without limitation, Purchaser's right to collect all Accounts, and to notify any creditor of such entity that purchaser has such rights in such entity's assets. Seller also agrees that, at the Purchaser's discretion, Purchaser may choose to amend the UCC Financial Statement to include any newly formed entity that is considered to be in an active state from the date hereof.

14. Further provisions eliminating any risk are set forth below.

15. The numbers prove that the reconciliation could only exist in the real world if there was criminal usury.

16. The plaintiff's funding/loan started at a 199% annual rate of interest. 199% is 7.9 times the 25% maximum under the criminal usury statute.

17. **Calculation of Interest**: Under the Agreement, the total paid to Defendant was $74,400, less startup fees, for which Defendant had to pay plaintiff back $119,920, by a weekly payment of $7,495.00 per week. Defendant getting gross proceeds from plaintiff of $74,400, and having to pay back $119,920, the difference, of $45,520, was the interest that Defendant had to pay on the $74,400. $45,520 interest on $74,400, if it had to be paid back over a year, would have been 61% interest. The agreement required weekly payments of $7,495.00 per week, which meant 16 payments of $7,495.00 each, to pay the $119,920. 16 weeks is 30.7% of a year. Since 61% interest had to be paid back in 30.7% of a year, that was an annual interest rate of 199%.

18. The weekly receipts of defendant needed for the $7,495.00 fixed weekly payment under the contract, at the specified percentage of 6%, equaled $124,916.67 (6% of $124,916.67 = $7,495.00).

19. The initial 199% interest rate was 7.9 times the 25% criminal usury cap. 25 times 7.9 = 199%.

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

21. If the fixed weekly payment was reduced so that 6% of receipts equaled the 25% maximum criminal usury rate rather than the 199% criminal rate, the receipts needed would only be $15,705.35. Calculation: The 199% interest rate divided by 25 =7.9. The $124,916.67 receipts needed under the contract to cover the 6% Specified Percentage divided by 7.9 = $15,705.35.

22. Therefore, until the plaintiff granted a reconciliation taking 6% of only $15,705.35 of receipts, the funding was criminally usurious.

23. If $119,920.00 has to be paid back after receipt of $74,400.00 with fixed weekly payments each week and an annual interest rate of 25%, each weekly payment would equal $942.32 which at 6% of weekly receipts would equal $15,705.35 of receipts.

24. Until receipts dropped to $15,705.35, the 6% specified percentage was criminally usurious.

25. If the defendant's receipts diminished from $124,916.67 to $15,705.35, it would obviously be utterly out of business, unable to function or pay anyone.

26. It is as if the $210,900 salary of a New York Supreme Court justice was reduced to $26,696 (210,900/7.9).

27. For plaintiff to then use a reconciliation to deduct a fixed weekly payment of 6% of the $15,705.35 could not reasonably be contemplated under

the parties' contract since the debtor would be forced to block plaintiff's 6% debit if receipts dropped to $15,705.35.

28. This would enable plaintiff to declare a default.

29. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $7,495.00 fixed weekly payment is enforcing criminal usury.

30. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $7,495.00 fixed weekly payment is enforcing criminal usury.

31. The agreement was for a finite term of 16 weeks with payments of $7,495.00.

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

> 5 *** Seller agrees to use the Purchase Price exclusively for the benefit and advancement of Seller's business operations and for no other purpose.

33. To the contrary, it was obvious from the inception that the said account would be the source of the individual defendant's livelihood. People do not form a company in order to serve as its unpaid volunteer director/officer but, instead, to draw their livelihood from it. People's

livelihood includes not only basics but other expenses such as children's college tuition, annual vacations, etc.

34. 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:

> 28. Seller's Obligations Upon Default. Upon occurrence of an Event of Default due to Seller's breach of its obligations under this Agreement, Seller shall immediately deliver to MSM the entire unpaid portion of the Purchased Amount.

35. 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."

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

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

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

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

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

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

42. 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:

> 7. Approved Bank Account and Credit Card Processor. During the term of this Agreement, Seller shall: (i) deposit all Future Receipts into one (and only one) bank account which bank account shall be acceptable and preapproved by MSM (the "Approved Bank Account"),
>
> 21 *** i. No Diversion of Future Receipts. Seller shall not allow any event to occur that would cause a diversion of any portion of Seller's Future Receipts from the Approved Bank Account or Approved Processor without MSM's written permission.

43. 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."

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

> k. Prohibited Business Transactions. Seller shall not: (i) transfer or sell all or substantially all of its assets (including without limitation the Collateral (as such term is defined in Section 22) or any portion thereof) without first obtaining MSM's consent;

45. This provision directly prohibited any bankruptcy ending the business:

> l. No Closing of Business. Seller will not sell, dispose, transfer or otherwise convey all or substantially all of its business or assets without first: (i) obtaining the express written consent of MSM, and (ii) providing MSM with a written agreement of a purchaser or transferee of Seller's business or assets to assume all of Seller's obligations under this Agreement pursuant to documentation satisfactory to MSM. *** Seller agrees that until MSM shall have received the Purchased Amount in full, Seller will not voluntarily close its business on a permanent or temporarily basis for renovations, repairs, or any other purposes. Notwithstanding the foregoing, Seller shall have the right to close its business temporarily if such closing is necessitated by a requirement to conduct renovations or repairs imposed upon Seller's business by legal authorities having jurisdiction over Seller's business (such as from a health department or fire department), or if such closing is necessitated by circumstances outside Seller's reasonable control. Prior to any such temporary closure of its

business, Seller shall provide MSM ten (10) business days advance notice.

46. The contract stated:

> 26. Attorney-in-Fact. Seller hereby authorizes MSM at any time to take any action and to execute any instrument, including without limitation *** and irrevocably appoints MSM as its true and lawful attorney-in-fact, which power of attorney shall be coupled with an interest, with full authority in the place and stead of Seller and in the name of Seller or otherwise, from time to time, in MSM's sole and absolute discretion, including without limitation *** (b) to receive, endorse and collect all instruments made payable to Seller.
>
> 31. Power of Attorney. Seller irrevocably appoints MSM and its representatives as its agents and attorneys-in-fact with full authority to take any action or execute any instrument or document to do the following: (A) to settle all obligations due to MSM from any credit card processor and/or account debtor(s) of Seller;

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

48. The contract prohibited the defendant from engaging an attorney to communicate with plaintiff:

> THIRD (3rd) PARTY INTERMEDIARY FEE
> IF PURCHASER RECEIVES A COMMUNICATION FROM A 3RD PARTY DEBT RELIEF/ RENEGOTIATOR ENTITY OR INDIVIDUAL WHICH

> HAS BEEN RETAINED BY MERCHANT AND WHICH CONTACTS PURCHASER ON MERCHANT'S BEHALF SEEKING TO REDIRECT COMMUNICATION (RELATED TO OBLIGATIONS CONTAINED IN THIS OR ANY AGREEMENT WITH Main Street Merchant Services, Inc.) TO ITSELF/ THEMSELVES AND AWAY FROM MERCHANT. THIS FEE COVERS PURCHASER'S ADDITIONAL EXPENSES IN RETAINING COUNSEL OR OTHER PARTIES TO HANDLE THIS ADDITIONAL ADMINISTRATION REQUIRED BY THIS RETENTION OF THE INTERMEDIARY BY PURCHASER. FEE AMOUNT: $5,000

49. The contract stated:

> 16(a) (ii) MSM does not charge Seller and will not collect from Seller any interest on the monies used by MSM for the purchase of the Purchased Future Receipts.

50. This was false. *Interest* is defined by Merriam-Webster online dictionary as "3b : the profit in goods or money that is made on invested capital". The difference between the amount funded by plaintiff and amount that had to be paid back was PROFIT on that funded amount.

51. 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."

52. 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)."

53. 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

54. 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])."

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

56. The contract stated:

> 21 x. MSM's Consent. Seller agrees that in every instance Seller's rights under this Agreement are contingent upon first obtaining MSM's consent, such consent may be withheld, granted or conditioned at MSM's sole and absolute discretion.

:

57. Such a provision has been held to bar a reconciliation. Union Funding Source, Inc. v. D & S Trucking LLC, 2021 NY Slip Op 32162(U), 4:

> Courts have consistently held that any reconciliation provision that is left to the sole discretion of the alleged purchaser of the future receivables suggests that payment is absolute. Id. at 666. The within agreement does not use the words "sole discretion" in the paragraph entitled reconciliation. However, paragraph 6.10 of the Agreement provides: "Merchant agrees that in every instance in which Merchant's rights under this Agreement are contingent upon first obtaining UFS's consent, such consent may be withheld, granted or Conditioned at UFS's sole and absolute discretion." The law is clearly established that courts must consider these transactions in their totality and determine their real character, rather than the name or form it has been given. Id. at 666. Therefore, when considering the within Agreement as a whole it is clear that UFS's intention was that payment would be absolute.

58. The plaintiff's contract had a seeming reconciliation provision but scrutiny shows it to be irreconcilable nonsense. First, the reconciliation stated:

> 10. Seller's Right for Reconciliation. Seller and PURCHASER each acknowledges and agrees that:
>
> a. If at any time during the term of this Agreement Seller will experience unforeseen decrease or increase in its Receipts, Seller shall have the right, at its sole and absolute discretion, but subject to the provisions of Section 11 below, to request **retroactive reconciliation of the Initial Installments for one (1) full calendar month immediately preceding the day when such request for reconciliation is received by MSM (each such calendar month, a "Reconciliation Month").**

59. 10(a) thus states that the reconciliation can be requested "*at any time*."

60. The reconciliation request will perforce be received the day it is issued since it has to be issued by email under 11(b) and it can't be sent any other way because the contract has no mailing address for plaintiff.

61. 10(a) t states that the calendar month that precedes the date of the reconciliation request is the "reconciliation month".

62. Therefore, if a reconciliation request is made, for instance, in any day in May, be it May 1 or May 31, the reconciliation month is the preceding April.

63. Paragraph 11(b) states that

> b. Any such request for Reconciliation of the Seller's Initial Installments for a specific Reconciliation Month shall *** be received by MSM via email to retention@inadvancecap.com, with the subject line "REQUEST FOR RECONCILIATION**," within five (5) Workdays after the last day of the Reconciliation**

> **Month at issue (time being of the essence as to the last day of the period during which such demand for Reconciliation shall be received by MSM).**

64. Using the example of a reconciliation request made in May; under 11(b), the reconciliation could only be requested within the first 5 workdays after April.

65. Any later request is void under 11(c):

> 11 *** c. MSM's receipt of Seller's request for Reconciliation after the expiration of the five (5) Workday period following the last day of the Reconciliation Month for which such Reconciliation is requested nullifies and makes obsolete Seller's request for Reconciliation for that specific Reconciliation Month.

66. Section 10(a) permits a reconciliation request *at any time*, but Section 11(b) permits the request only within the first five working days after the preceding calendar month. 11(b) negates and cancels out any reconciliation request otherwise properly made under 10(a) if it was made after the first 5 working days of the month.

67. If on Monday, May 1, a debtor wants to get a reconciliation for April, he can only request it on May 1 through Friday, May 5. If not, the request is void,

68. Therefore, starting May 6, the debtor can no longer get any reconciliation for April. The provision in 10(a) under which the debtor could

have validly requested a reconciliation any day in May for the month of April, was negated by 11(b).

69. These provisions are irreconcilable, utter nonsense.

70. Nor does the trier of fact have to worry that the above is merely some *creativity* by defendants' counsel. The Attorney General of New York focused on this very point (defense, below, at paragraph 105).

71. Nor is there any provision in plaintiff's contract for when an actual refund is getting paid by plaintiff after it calculates that too much was previously ACH-debited.

72. A request to reduce the fixed daily payment suffers from even more nonsense.

73. Under 13(b) the request for an adjustment can only be made "within (5) Workdays five after the date that is the later of (i) the last day of the latest bank statement enclosed with the Adjustment Request and (ii) the last date of the latest credit card processing statement enclosed with the Adjustment Request". Assuming that the bank statement is issued on the first of the month, that limits a reduction to only being requested within 5 business days after the first of the month.

74. Worse, under 12(b), "no Adjustment shall take place until and unless Reconciliation for at least one (1) Reconciliation Month takes place

resulting in the reduction of the total amount debited from Seller's Approved Bank Account during the Reconciliation Month by at least fifteen percent (15%) in comparison to the amount that would have been debited during that month without Reconciliation."

75. This means that the debtor must first request a reconciliation within the first 5 business days of the month or wait until the following month, await the result, and, then hope to get the result before there expires 5 business days after the date of the bank statement issued before the first five business days of the next month.

76. All during these months of delay, even though the debtor may have no more available funds, mandating an immediate, instant adjustment, the debtor must suffer the full fixed daily payment ACH-debited each day:

> 13 ***e. Nothing set forth in Sections 12 or 13 of this Agreement shall be deemed to provide Seller with the right to (i) interfere with MSM's right and ability to debit the Approved Bank Account while the request for Adjustment is pending or until the Purchased Amount is collected by MSM in full or (ii) request Adjustment retroactively for the portion of the term of this Agreement preceding the date of an Adjustment Request.

77. Unquestionably, these provisions are designed to ensure a default by the debtor so that the plaintiff can tell the Court how bad and terrible the defendant is by not paying the criminally usurious sums back.

78. The Attorney General of New York found that such a provision indicated a predatory, criminally usurious loan.

79. 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.

80. 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.

81. Nonpayment was a default under paragraph 27(a)and 27(h).

82. Oakshire Props., LLC v Argus Capital Funding, LLC, 229 A.D.3d 1199, Fourth Dept. 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, the contract had a no-liability clause for plaintiff (37. **No Liability**) and 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."

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 contract made nonpayment a default: "27 [defaults] h. Four (4) or more ACH transactions attempted by MSM are rejected by Seller's bank."

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.

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

84. The idea that a reconciliation provision creates risk that precludes usury is absurd. The initial interest far exceeded the 25% interest rate above which the Legislature has determined a loan is criminally usurious. By stating that an interest rate above 25% is criminally usurious, the

Legislature believed that any higher rate was utterly unaffordable and took criminal advantage of a borrower. Therefore if receipts stayed exactly the same, the funding was already deemed utterly unaffordable. The idea that such a borrower could be faulted for not seeking a reconciliation if receipts plummeted even further endorses the criminally usurious funding. Criminal usury has been rebuked by the Court of Appeals in the strongest possible terms. Adar Bays, LLC v. GeneSYS ID, Inc., 37 NY3d 320 [2021].

85. 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."

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

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

88. 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".

89. 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.

90. 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 or weekly payment.

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

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

93. 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"].)

94. 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

95. 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,

96. 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.

97. 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%.

98. Prior UCC-1's are annexed in Exhibit A:

99. Contract provision barring prior UCC-1's or MCA contracts:

> 21 o. Unencumbered Future Receipts. Seller has and will continue to have good, complete and marketable title to all Future Receipts, 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 other than by virtue or entering into this Agreement. Seller specifically warrants and represents that it is not currently bound by the terms of any future receivables and/or factoring agreement which may encumber in any way the Future Receipts. p. No Stacking.

100. 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".

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

> 21(a) MSM may request Seller's bank statements at any time during the term of this Agreement and Seller shall provide them to MSM

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

102. 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:

FILED: NEW YORK COUNTY CLERK 01/16/2025 11:45 AM INDEX NO. 450750/2024
NYSCEF DOC. NO. 642 RECEIVED NYSCEF: 01/16/2025

CONSENT ORDER AND JUDGMEN'l'

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

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

MONETARY RELIEF

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

JUDGMENT

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

103. 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.

104. 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).

105. 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."
>
> Page 23
> 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

106. 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.

Sixth Affirmative Defense:: Failure to State a Cause of Action

107. The complaint pleads breaches in the alternative and with contradictory allegations:

> 8. Company Defendant stopped making its payments to Plaintiff and otherwise breached the Agreement by intentionally impeding and preventing Plaintiff from making the agreed upon ACH withdrawals from the Bank Account while conducting regular business operations.
>
> 16. Company Defendant has materially breached the Agreement by failing to make the specified payment amount to Plaintiff as required under the Agreement and otherwise intentionally impeding and preventing Plaintiff from receiving the proceeds of the receivables purchased by them.
>
> 17. Upon information and belief, Company Defendant has also materially breached the Agreement by using more than one depositing bank account which has not been approved by Plaintiff.

108. Such speculative, contradictory allegations are not permitted.

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

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

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

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

> “Plaintiffs assert 26 causes of action in the amended complaint. However, virtually all of the operative allegations of the amended complaint that form the basis of these causes of action are pled solely "upon information and belief." Because these operative allegations are all alleged only "upon information and belief," the amended complaint is defective, and must be dismissed for that reason alone (see Angel v Bank of Tokyo-Mitsubishi, Ltd.,

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

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

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

> NFA Group v Lotus Research, Inc., 180 A.D.3d 1060, 1061 [2020]:
> "[T]o state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached" (Barker v Time Warner Cable, Inc., 83 AD3d 750, 751; see Sutton v Hafner Valuation Group, Inc., 115 AD3d 1039, 1042;

Woodhill Elec. v Jeffrey Beamish, Inc., 73 AD3d 1421, 1422; Peters v Accurate Bldg. Inspectors Div. of Ubell Enters., Inc., 29 AD3d 972, 973). Here, the complaint failed to specify the provisions of the parties' agreement that were allegedly breached."

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

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

Seventh Affirmative Defense: Arbitration

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

49. ARBITRATION. THE PARTIES ACKNOWLEDGE AND AGREE THAT, PROVIDED THAT NO SUIT, ACTION OR PROCEEDING (INCLUDING WITHOUT LIMITATION FILING OF AN AFFIDAVIT OF CONFESSION OF JUDGMENT) HAS BEEN ALREADY COMMENCED IN CONNECTION WITH ANY MATTER ARISING OUT OF OR RELATED TO THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT, EACH MSM, SELLER, AND ANY GUARANTOR OF SELLER SHALL HAVE THE RIGHT TO REQUEST THAT ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THE

> CONSTRUCTION AND INTERPRETATION OF THIS AGREEMENT, ARE SUBMITTED TO ARBITRATION. THE PARTY SEEKING ARBITRATION SHALL FIRST SEND A WRITTEN NOTICE OF INTENT TO ARBITRATE TO ALL OTHER PARTIES, BY CERTIFIED MAIL UPON SENDING OF SUCH NOTICE, A PARTY REQUESTING ARBITRATION MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") OR NATIONAL ARBITRATION FORUM ("NAF").

113. 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.)"

Seventh Affirmative Defense: Lack of Standing

114. Plaintiff failed to publish its articles of organization. Exhibit B - Lexis report of plaintiff's filings, omitting any proof of publication.

115. This failure requires that the action be dismissed. Limited Liability Company Law §206. Affidavits of publication. (a) Within one hundred twenty days after the effectiveness of the initial articles of organization as determined pursuant to subdivision (d) of section two hundred three of this article, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers of the county in which the office of the limited liability company is located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk. *** **Proof of the publication required by this subdivision, consisting of the certificate of publication of the limited liability company with the affidavits of publication of such newspapers annexed thereto, must be filed with the department of state.**

> Three Egg Studios LLC v FJH Realty Inc., 2019 NY Slip Op 30805(U), 2-3, Kings County:
> "The Second Department has recently held that the language of §206 requires that where a plaintiff has failed to comply with the publication requirement, the action must be dismissed, citing Barklee."
>
> Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P., 137 A.D.3d 1102, 1103 [2016]:
> "Limited Liability Company Law § 206 requires limited liability companies to publish their articles of organization or comparable specified information for six successive weeks in two local newspapers designated by the clerk of the county where the limited liability company has its

> principal office, followed by the filing of an affidavit with the Department of State, stating that such publication has been completed (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki , 309 AD2d 310, 311 [2003]). Failure to comply with these requirements precludes a limited liability company from maintaining any action or special proceeding in New York (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki, 309 AD2d at 311). Here, as the defendants correctly contend, since the plaintiff failed to comply with the publication requirements of Limited Liability Company Law § 206, it is precluded from bringing this action (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki, 309 AD2d 310 [2003]).”

Eighth Affirmative Defense: Unconscionability/Adhesion Contract

116. By the very nature of their transaction, as more fully set forth below, the parties had completely unequal bargaining power, defendants were not in the least “sophisticated,” and any review of plaintiff’s contract by any counsel for defendants was known to be incongruous with the parties’ transaction.

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

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

business entity. Gillman v Chase Manhattan, 135 A.D.2d 488, 491, Second Dept. [1987]:

> "[T]he doctrine of unconscionability has little applicability in the commercial setting because it is presumed that businessmen deal at arm's length with relative equality of bargaining power [string cite]. Apparently, the doctrine is primarily a means with which to protect the `commercially illiterate consumer beguiled into a grossly unfair bargain by a deceptive vendor or finance company' [citation]."
>
> Delphi-Delco Elecs. Sys. v. M/V Nedlloyd Europa, 324 F. Supp. 2d 403, 414, S.D.N.Y. [2004]:
>
> "Allied Chemical Intern. Corp. v. Companhia de Navegacao Lloyd Brasileiro, 775 F.2d 476, 482 (2d Cir. 1985) ("We bear in mind that bills of lading are contracts of adhesion and, as such, are strictly construed against the carrier.")."

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

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

121. Plaintiff knew that there was neither time, opportunity, nor ability to review the fine print of the documents that it submitted for DocuSigning by defendants for emailing to plaintiff and that the transaction was designed for no review of plaintiff's contract. *Cf*., Empery Asset Master, Ltd. v. AIT Therapeutics, Inc., 197 A.D.3d 1064, 1065 [2021]:

> "We cannot conclude, as a matter of law, that a reasonable person reviewing a 20-page warrant and a 42-plus-page Securities Purchase and Registration Rights Agreement would have realized that the word "sentence" (in "immediately preceding sentence") should have been "sentences." "

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

123. Plaintiff knew but failed to inform defendants of provisions of the agreement known by plaintiff to be intended and used by plaintiff to the detriment of defendants, such as:

- The exorbitant interest rate.
- That plaintiff would not routinely lower the interest rate after the first set of payments.
- The funding was unaffordable especially by a borrower needing instant cash financing.
- The fixed daily payment or fixed weekly payment was immutable with no way of defendants to avoid it and with no ability to obtain any immediate relief from the fixed payments.
- a secured interest provision under which plaintiff would and could send UCC lien notices to defendant's customers to cut off payments to defendant and disable defendant from any

further business with such customer with such UCC lien notices demanding inflated unjustified amounts.

- inclusion of additional guarantors other than the individual defendant.
- a reconciliation provision, never actually employed by plaintiff, but used by plaintiff to confuse a court into believing that its loan was an investment.
- the fact that plaintiff would not accord with the underlying assumption of defendants that plaintiff was *loaning monies* but that the transaction would be claimed by plaintiff not to be a loan at all but to be a purchase and sale in order to justify the criminally usurious rate of interest.
- a forum selection clause under which the defendants would be sued in New York in any random county.

124. There is no term in plaintiff's contract that should shield it from the defense of unconscionability of adhesion contract. *Cf.*, Danann Realty Corp. v. Harris, 5 N Y 2d 317 [1959].

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

Ninth Affirmative Defense: Unenforceable Default Fee

126. Plaintiff has no right to any default fee. Rubin v. Napoli Bern Ripka Shkolnik, LLP, 179 AD3d 495 [2020]:

> "Although the party challenging the liquidated damages provision has the burden to prove that the liquidated damages are, in fact, an unenforceable penalty (see JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373, 380 [2005]; Parker v Parker, 163 AD3d 405, 406 [1st Dept 2018]), the party seeking to enforce the provision must necessarily have been damaged in order for the provision to apply (see e.g. J. Weinstein & Sons, Inc. v City of New York, 264 App Div 398, 400 [1st Dept 1942]."

Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc., 36 N.Y.3d 69, 73, 74-77 [2020]:

> "(W)here the breach of contract was a failure to pay money, plaintiff should be limited to a recovery of the contract amounts plus appropriate interest] [citation omitted]; Cotheal v Talmage, 9 NY 551, 554, Seld. Notes 238 [1854] ["Where there is a contract to pay money, the damages for its breach are fixed and liquidated by law, and require no liquidation by the parties"]; 36 NY Jur 2d, Damages § 173 [stating that liquidated damages clauses in contracts for the payment of money are typically inappropriate because "for the nonpayment of money, the law awards interest as damages"]).

127. Plaintiff has no right to the amount of the contractual attorney fee claimed. Kamco Supply Corp. v. Annex Contr. Inc., 261 A.D.2d 363, 364-365 [1999]; First Nat'l Bank v. Brower, 42 N.Y.2d 471, 474 [1977]; Fed. Land Bank of Springfield v. Ambrosano, 89 A.D.2d 730, 731 [1982]; Community

Nat'l Bank & Trust Co. v. I.M.F. Trading, Inc., 167 A.D.2d 193 [1990]; Korea First Bank v. Chung Jae Cha, 259 A.D.2d 378, 379.

WHEREFORE, defendants respectfully demand judgment dismissing the complaint.

Dated: May 6, 2025

Jack A. Cook
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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 6, 2025

Jack A. Cook
Weinberg Legal PLLC