SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
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Index No EF008699-2024

SIMPLY FUNDING, LLC,

Plaintiff,

-against-

PROBUILDOF THE CAROLINAS, LLC, . DBA PROBUILDOF THE CAROLINAS CLEVER PERFORMANCE LLC; CLEVER ACQUISITIONS HOLDINGS INC; JOC, INC.; CLEVER PROPROPERTIES LLC; and JOHN WRIGHT CLEVENGER,

Defendants.

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ANSWER

Defendants by their attorney retained solely therefor answer the complaint:

1. Takes no issue with paragraph 1.

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Admit paragraph five.

6. Deny paragraph 6. The contract had nothing to do with any purchase.

7. Deny paragraph 7. The contract had nothing to do with any purchase or “buy”.

8. Admit paragraph 8.

9. Admit paragraph 9 but denies any "purchase price".

10. Admit paragraph 10 as to the requirement of one bank account. Deny the remainder which is false. Plaintiff plainly was not ACH-debit 9.66% or any other per cent of receipts or anything else.

11. Paragraph 11: admits that the contract states what it states but denies any enforceability thereof.

12. Admit the payments of $25,200 by plaintiff's ACH-debit from the account and denies that the contract was capable of enforcement and denies the balance.

13. Deny paragraph 1 and each and every other allegation of the complaint not admitted above.

First Affirmative Defense: Illusory Contract. No Risk

14. 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."

15. Plaintiff's contract eliminated the risk.

16. The plaintiff's funding/loan started at a 72% annual rate of interest. 72% is 2.89 times the 25% maximum under the criminal usury statute.

17. **Calculation of Interest**: Under the Agreement, the total paid to Defendant was $43,200, less startup fees, for which Defendant had to pay plaintiff back $64,800, by a weekly payment of $1,800.00 per week. Defendant getting gross proceeds from plaintiff of $43,200, and having to pay back $64,800, the difference, of $21,600, was the interest that Defendant had to pay on the $43,200. $21,600 interest on $43,200, if it had to be paid back over a year, would have been 50% interest. The agreement required weekly payments of $1,800.00 per week, which meant 36 payments of $1,800.00 each, to pay the $64,800. 36 weeks is 69% of a year. Since 50% interest had to be paid back in 69% of a year, that was an annual interest rate of 72%.

18. The weekly receipts of defendant needed for the $1,800.00 fixed weekly payment under the contract, at the specified percentage of 9.66%, equaled $18,633.54 (9.66% of $18,633.54 = $1,800.00).

19. The initial 72% interest rate was 2.89 times the 25% criminal usury cap. 25 times 2.89 = 72%.

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 9.66% of receipts equaled the 25% maximum criminal usury rate rather than the 72% criminal rate, the receipts needed would only be $6,450.07. Calculation: The 72 interest rate divided by 25 =2.89. The $18,633.54 receipts needed under the contract to cover the 9.66% Specified Percentage divided by 2.89 = $6,450.07.

22. Therefore, until the plaintiff granted a reconciliation taking 9.66% of only $6,450.07 of receipts, the funding was criminally usurious.

23. If $64,800.00 has to be paid back after receipt of $43,200.00 with fixed weekly payments each week and an annual interest rate of 25%, each weekly payment would equal 623.08 which at 9.66% of weekly receipts would equal $6,450.07 of receipts.

24. Until receipts dropped to $6,450.07, the 9.66% specified percentage was criminally usurious.

25. If the defendant's receipts diminished from $18,633.54 to $6,450.07, it would obviously be utterly out of business, unable to function or pay anyone. It would have no money to pay any employee, any landlord, any

tax, any materials, any work expense, etc. Assuming that someone in business for themselves, like the individual defendant, needed some kind of draw from his business to live on, his family was going hungry and homeless.

26. It is as if the $210,900 salary of a New York Supreme Court justice was reduced to $72,975.78 (210900/2.89).

27. For plaintiff to then use a reconciliation to deduct a fixed weekly payment of 9.66% of the $6,450.07 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 9.66% debit if receipts dropped to $6,450.07.

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 $1,800.00 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 $1,800.00 fixed weekly payment is enforcing criminal usury.

31. The agreement was for a finite term of 36 weeks with payments of $1,800.00 per week.

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

> 28 *** Seller further agrees that none of the Purchase Price will be used for personal, family, or household purposes.

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:

> 12 [Default Remedies] a. The Purchased Percentage shall equal 100%.

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 flatly stated that payments made to plaintiff would be conditioned upon defendant's sale of products and services, and the payment therefore by defendant's customers:

> all proceeds of operations and activities (collectively "Receivables"), that involve making a product or service available for purchase, selling of goods, or work being performed ("Sales") that occur during the course of Seller's business
>
> **d Buyer shall have the right to collect the Purchased Amount by initiating transactions, including but not limited to ACH debits, in the monetary amount equal to the Purchased Percentage**

38. This benefit was illusory because under the contract, plaintiff intended to ACH-debit the $1800 fixed weekly payment each week 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:

> Seller shall immediately deliver all Receivables to a Bank Account ("Bank Account") at a financial institution acceptable to Buyer
>
> 8 (a) (i) Seller shall not change the Bank Account or Processor(s), add an additional Bank Account, revoke Buyer's authorization to debit the Bank Account, close the Bank Account without the express written consent of Buyer

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 the contract.

45. The Security Agreement portion of the contract stated

> Security Agreement
> ***
> c) The security interest may be exercised by Buyer without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets.
> Security Agreement
>
> 4 *** Seller's obligation to deliver the Receivables is conditioned upon the continuance of the Seller's

> Receivables. *** Pursuant to Article 9 of the Uniform Commercial Code, as amended from time to time, Buyer has control over and may direct the disposition of the Secured Assets, without further consent of Obligor.

46. 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.

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

> Security Agreement ***
> *** Obligor each agrees to execute any documents or take any action in connection with this Agreement as Buyer deems necessary to perfect or maintain Buyer's first priority security interest in the Collateral and the Additional Collateral, including the execution of any account control agreements

48. This made the entire contract illusory.

49. 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."

50. 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)."

51. 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

52. 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])."

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

> 3 *** a. Refund/Debit Reconciliation. Seller and Buyer may request a Reconciliation of Seller's actual Receivables by Buyer either crediting or debiting the difference to or from the Bank Account so that the amount Buyer debited in the most recent calendar month (the "Reconciliation Month") will equal the Purchased Percentage of Receivables that Seller actually collected in the Reconciliation Month the ("Reconciled Receipts Amount"). **Upon reasonable verification** that the amount Seller delivered to Buyer in the Reconciliation Month exceeded the Reconciled Receipts Amount, Buyer shall refund the excess to Seller within 5 business days. If the amount Seller delivered in the Reconciliation Month was less than the Reconciled Receipts Amount, then Buyer will debit the difference from the Bank Account within 10 days.
>
> b. Adjustment to Periodic Amount Reconciliation. Seller and Buyer may request a Reconciliation adjustment to the Specified Amount on a going-forward basis to more closely reflect Seller's actual Receivables times the Purchased Percentage. **Upon reasonable verification of Seller's actual Receivables, Buyer shall adjust the Specified Amount on a going-forward basis** to more closely reflect the Seller's actual Receivables times the Purchased Percentage. After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Specified Amount until any subsequent adjustment.
>
> c. Reconciliation Documentation. **Seller shall provide any documentation reasonably requested by Buyer to verify Sellers actual Receivables** within 5 business days of Buyer's request.

54. 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.

55. 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.

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

57. This allowed plaintiff to interminably delay any reconciliation by requesting more information and verification while quixotically hunting for diverted receipts.

58. There was not provided in the reconciliation provisions how or to whom to immediately convey a reconciliation request.

59. The reconciliation provision stated:

> d. How to Request a Reconciliation. A reconciliation request by Seller must be: (i) in writing; (ii) include a copy of Seller's bank statement for the Reconciliation Month and **Sellers reasonable estimate of expected Receivables for the next calendar month**; and (iii) be sent to Buyer or emailed to Buyer. A reconciliation request by Buyer may be sent to Seller by regular mail or by e-mail at reconciliations@simplyfunding.com.

60. This empowered plaintiff to contest the reasonability of any future estimate.

61. The reconciliation provision 3(b) stated that a future ACH-debit adjustment was "to more closely reflect the Seller's actual Receivables times the Purchased Percentage".

62. The "more closely" standard was entirely subjective.

63. 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.

64. 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.

65. 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. "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.

D. "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.

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

67. 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].

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

69. 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."

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

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

72. 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".

73. 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.

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

75. Nothing in the contract avoided the fixed weekly payment if defendants had no receipts.

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

77. 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"].)

78. 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

79. 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,

80. 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.

81. 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%.

82. The parties' contract was dated: May 16, 2024.

83. Annexed as Exhibit A is a record of UCC-1's filed against defendant including prior UCC-1's:

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

> 10 *** No portion of Seller's Receivables is subject to any lien, security interest, assignment, option or encumbrance, other than the security interest(s) granted to Buyer, except as disclosed to Buyer in writing prior to the date of this Agreement

85. 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".

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

> 27. Providing Financial Information. Buyer may request financial statements, documents, reports, bank statements, and/or Bank Account information, at any time during the performance of this Agreement which the Seller shall provide to Buyer within five (5) business days of such request.

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

87. 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.

88. 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.

89. 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).

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

> 8(b) b. Authorization to Debit Funds. Seller authorizes Buyer to debit funds in accordance with this Agreement directly from all business bank accounts owned by Seller, including the Bank Account

91. 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".

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

> 1. Security Interest a) Obligor grants to Buyer a security interest in and lien upon: (a) all accounts, chattel paper, documents, equipment, general intangibles, instruments, and inventory, as those terms are each defined in Article 9 of the Uniform Commercial Code (the "UCC"), now or hereafter owned or acquired by Obligor, (b) all proceeds, as that term is defined in Article 9 of the UCC(c) all funds at any time in the Buyer's Account, regardless of the source of such funds, (d) present and future Electronic Check Transactions, and (e) any amount which maybe due to Buyer under this Agreement, including but not limited to all rights to receive any payments or credits under this Agreement (collectively, the "Secured Assets"). O

93. The Attorney General noted that a reconciliation was blocked, under the same provision as here: Petition page 91, paragraph 262 and 263:

> "262*** Reconciliation was not available at all to merchants whose declining revenues left insufficient funds in their bank accounts to accommodate debits of the Daily Amounts *** 263. Respondents accomplished this through contractual language barring merchants from Reconciliation if the merchant was "in default" of its Agreement, and by deeming a "default" to include four bounced payments.

94. 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.

> 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

95. Plaintiff's contract, here, abridged the right to any reconciliation by its unfettered right of disclosure.

Sixth Affirmative Defense: Illegal Contract

96. The contract stated:

> Security Agreement ***
> Seller and Buyer agree, and intend, that the purchase and sale of the Receivables pursuant to the Purchase Agreement shall constitute a sale of accounts or payment intangibles as such term is used in Article 9 of the Uniform Commercial Code

97. This rendered the contract illegal and unenforceable. It meant that defendants had to immediately pay sales and income taxes on the entire funded amount and ensuing payment of the "purchased amount". Matter of Darman Bldg. Supply Corp. v. Mattox, 106 A.D.3d 1150, 1151 [2013]:

> "In any event, sales tax is required to be remitted for the period in which the sale is made, regardless of the amount collected (*see* 20 NYCRR 532.1 [a] [2])."

98. 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

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

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

101. The contract should be stricken and the action dismissed. Rosenblum v. Manufacturers Trust Co., 270 N.Y. 79, 84-85[1936]:

> "[E]quity can interfere in a suit for cancellation or rescission to prevent the enforcement of an unjust agreement induced by a unilateral mistake of fact. A mistake not mutual but only on one side may be ground for rescinding but not for reforming a contract. (Smith v. Mackin, 4 Lans. 41, 44, 45; Moffett, Hodgkins & Clarke Co. v. Rochester, 178 U.S. 373.) If the erroneous transaction was such as to involve the act of the plaintiff only and the effect of the transaction would be the unjust enrichment of the defendant, the plaintiff is entitled to have the transaction rescinded, although he was the only party mistaken. (Clark on Equity, § 372.)".
>
> Metropolitan Model Agency USA v. Rayder, 168 Misc. 2d 324, 326 [1996]:
> "[I]t is well-settled law that a contract which violates a State statute is void and unenforceable. (New York State Med. Transporters Assn. v Perales, 77 NY2d 126, 133; Weir Metro Ambu-Serv. v Turner, 57 NY2d 911; Village of Upper Nyack v Christian & Missionary Alliance, 143 Misc 2d 414, affd 155 AD2d 530.)"

102. 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: Arbitration

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

> 30. ARBITRATION. IF BUYER, SELLER OR ANY GUARANTOR REQUESTS, THE OTHER PARTIES AGREE TO ARBITRATE ALL DISPUTES AND CLAIMS ARISING OUT OF OR RELATING TO THIS AGREEMENT. IF BUYER, SELLER OR ANYGUARANTOR SEEKS TO HAVE A DISPUTE SETTLED BY ARBITRATION, THAT PARTY MUST FIRST SEND TO ALL OTHER PARTIES, BY CERTIFIED MAIL, A WRITTEN NOTICE OF INTENT TO ARBITRATE. IF BUYER, SELLER OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 DAYS AFTER THE NOTICE IS RECEIVED, BUYER, SELLER OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION("AAA"), JAMS, OR THE FORUM

104. Defendants reserve the right to demand arbitration. De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 405-406 [1974]: "[A] defendant's right to compel arbitration, and the concomitant right to stay an action, does not remain absolute regardless of the degree of his participation in the action. (Matter of Zimmerman v. Cohen, 236 N. Y. 15.) *** On the other hand, interposing an answer of itself does not work to waive a defendant's right to a stay. (Matter

of Hosiery Mfrs. Corp. v. Goldston, 238 N. Y. 22, 27.) *** Of course, the existence of an arbitration agreement is not a defense. (American Reserve Ins. Co. v. China Ins. Co., 297 N. Y. 322, 327; Aschkenasy v. Teichman, 12 A D 2d 904.)"

Eighth Affirmative Defense: Unconscionability/Adhesion Contract

105. 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.

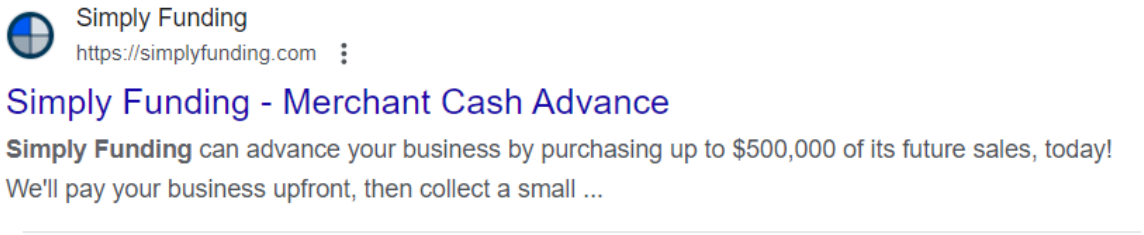
106. The parties' transaction was the very antithesis of two sophisticated parties hammering out the terms of a contract through experienced counsel.

107. 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.")."

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



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

110. 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." "

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

112. 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.

113. 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].

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

Ninth Affirmative Defense: Breach of Contract

115. The contract stated:

> d Buyer shall have the right to collect the Purchased Amount by initiating transactions, including but not limited to ACH debits, in the monetary amount equal to the Purchased Percentage

116. Plaintiff's contract stated a Percentage of 9.66

117. Plaintiff never debited 9.66% of anything.

118. Plaintiff ACH-debited $1800 per week.

119. The ACH-debit of $1800 was drawn regardless of any receipts or whether plaintiff knew of any receipts.

120. Plaintiff therefore breached the contract.

> Castle Restoration, LLC v. Castle Restoration & Constr., Inc., 2022 NY Slip Op 50082(U), 3:
> "The consideration to be paid under a contract is a material term (Gutkowski v Steinbrenner, 680 F Supp 2d 602, 610 [SDNY]; see also, Regency Homes Realty Group, Inc. v Leo and Laura, LLC, 155 AD3d 1075, 1077 [essential terms include the time and terms of payment]). If the parties understand the contract's material terms differently, there is no meeting of the minds (Gessin Elec. Contrs., Inc. [74 AD3d 516, 518 (2010].)"

121. Plaintiff's prior breach requires dismissal of its contract claim.

> ADC Orange, Inc. v. Coyote Acres, Inc., 20 A.D.3d 493, 495 [2005]:
> "In particular, it demonstrated that the plaintiff purchaser failed to make a contractually-required installment payment of $250,000 when due. The contract stated that the foregoing payment was to be made "[u]pon the later of

> the preliminary [subdivision] approval having been received . . . or December 31, 2001 but in no event later than December 31, 2001." The plaintiff's failure to perform in accordance with this term constituted a material breach of the contract precluding it from obtaining specific performance (see Grace v Nappa, 46 NY2d 560, 567 [1979]; Hooker v Wooten, 237 AD2d 572 [1997]; Swezey v Marra, 143 AD2d 827 [1988]).
>
> Modica v Topaz Enters., Inc., 147 A.D.3d 1041, 1043 [2017]:
> "The plaintiffs' breach of the settlement agreement divested them of any right to enforce any of Topaz's obligations under the agreement, and relieved Topaz of any obligation to perform [string citation]."

Tenth Affirmative Defense: Unenforceable Default Fee

122. 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"]).

123. 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: October 22, 2024

Amos Weinberg
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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: October 22, 2024

Amos Weinberg