

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

Index No
E2025005151

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SPARTAN BUSINESS SOLUTIONS LLC D/B/A SPARTAN CAPITAL,

ANSWER

Plaintiff,

-against-

SECOR LOGISTICS, LLC D/B/A SECOR LOGISTICS, CDMC HOLDINGS LLC,
DZL POWER LLC, MOXILLO TRANSPORT LLC, R1G MANAGEMENT LLC,
C2J HOLDINGS, AND COURTNEY ALAN ROYSTER,

Defendants.

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Defendants by their attorney answer the complaint:

1. Admit that plaintiff is a domestic limited liability company.
2. Admit paragraph 2.
3. Admit paragraph 3.
4. Deny paragraph 4.
5. Deny paragraph 5, though the choice of county (venue) is not
disputed.
6. Deny paragraph 6. The said stated sum was not paid nor did the
contract have anything to do with any purchase.

7. Admit paragraph 7 as to revenue but deny as to receivables. Receivables are book entries of amounts due. One does not deposit a receivable.

8. Admit that the agreement had certain provisions under which plaintiff ACH-debited a fixed weekly payment of \$19,449 and otherwise deny paragraph 8.

9. Deny paragraph 9. Is false. See defenses and provisions quoted below.

10. Admit paragraph 10.

11. Deny paragraph 11 and each and every other allegation of the complaint not expressly admitted above but does not dispute that \$506,863.80 was paid to plaintiff.

First Affirmative Defense: Illusory Contract. No Risk

12. 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.

13. 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.

14. The contract expressly stated that defendant's payments would be the Specified Percentage of receipts:

1. *** to remit the percentage specified above (the "Specified Percentage") of each Merchant's settlement amounts due from each transaction, until such time as SC receives payment in full of the Receivables Purchased Amount.

6.*** Merchant(s) shall authorize SC and/or its agent(s) to deduct the amounts owed to SC for the Receivables as specified herein from settlement amounts which would otherwise be due to each Merchant and to pay such amounts to SC by permitting SC to withdraw the Specified Percentage by ACH debiting of the account.

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

15. The contract was therefore illusory because this apparent right of defendant to only pay plaintiff the Specified Percentage of receipts was taken away by the fixed payment ACH-debited each week regardless of receipts. Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins., 28 N.Y.3d 675, 684-685 [2017]:

“an illusory contract—that is, “[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation”—is “unenforceable” (Black's Law Dictionary 370 [9th ed 2009]; see generally Thomas J. Lipton, Inc. v Liberty Mut. Ins. Co., 34 NY2d 356, 361 [1974]; Madawick Contr. Co. v Travelers Ins. Co., 307 NY 111, 118 [1954]).”

16. Plaintiff had no right to refuse enforcement of the provision stating that repayment was the Specified Percentage of receipts, just because other provisions imposed a fixed daily/weekly payment regardless of receipts. Kanner v. Westchester Med. Group, 233 A.D.3d 410, 411 [2024]:

“Moreover, insofar as plaintiff also relies on these agreements as the basis for his claims, he cannot pick and choose which provisions bind him (see [God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP], 6

NY3d 371 [2004] at 374]; Arrowhead Golf Club, LLC v Bryan Cave, LLP, 59 AD3d 347 [1st Dept 2009]).”

17. The plaintiff breached its own contract by ACH-debiting a fixed or weekly payment regardless of any receipts.

18. Under the prevailing case law, the parties’ contract is a loan if bankruptcy is a default, or there is no right to a reconciliation or payment adjustment, or inability to pay is a default. Oakshire Props., LLC v Argus Capital Funding, 229 A.D.3d 1199, Fourth Dept. [2024]; Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023]; Davis v. Richmond Capital Group, 194 AD3d 516 [2021]; LG Funding, LLC v United Senior Props. of Olathe, LLC, 181 A.D.3d 664 [2020].

19. Bankruptcy was supposedly permitted under the contract but was effectively prohibited by other provisions making if a default to open a debtor-in-possession account or transferring any income or assets to a bankruptcy trustee.

20. 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.”

21. Plaintiff's contract eliminated the risk.
22. The plaintiff's funding/loan started at an 88% annual rate of interest. 88% is 3.53 times the 25% maximum under the criminal usury statute.
23. **Calculation of Interest:** Under the Agreement, the total paid to Defendant was \$378,000, less startup fees, for which Defendant had to pay plaintiff back \$564,000, by a weekly payment of \$19,449.00 per week. Defendant getting gross proceeds from plaintiff of \$378,000, and having to pay back \$564,000, the difference, of \$186,000, was the interest that Defendant had to pay on the \$378,000. \$186,000 interest on \$378,000, if it had to be paid back over a year, would have been 49.2% interest. The agreement required weekly payments of \$19,449.00 per week, which meant 29 payments of \$19,449.00 each, to pay the \$564,000. 29 weeks is 55.7% of a year. Since 49.2% interest had to be paid back in 55.7% of a year, that was an annual interest rate of 88%.
24. The weekly receipts of defendant needed for the \$19,449.00 fixed weekly payment under the contract, at the specified percentage of 15%, equaled \$129,660.00 (15% of \$129,660.00 = \$19,449.00).
25. The initial 88% interest rate was 3.53 times the 25% criminal usury cap. 25 times 3.53 = 88%.

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

27. If the fixed weekly payment was reduced so that 15% of receipts equaled the 25% maximum criminal usury rate rather than the 88% criminal rate, the receipts needed would only be \$36,736.97. Calculation: The 88% interest rate divided by 25 = 3.53. The \$129,660.00 receipts needed under the contract to cover the 15% Specified Percentage divided by 3.53 = \$36,736.97.

28. Therefore, until the plaintiff granted a reconciliation taking 15% of only \$36,736.97 of receipts, the funding was criminally usurious.

29. If \$564,000.00 has to be paid back after receipt of \$378,000.00 with fixed weekly payments each week and an annual interest rate of 25%, each weekly payment would equal \$5510.55 which at 15% of weekly receipts would equal \$36,736.97 of receipts.

30. Until receipts dropped to \$36,736.97, the 15% specified percentage was criminally usurious.

31. If the defendant's receipts diminished from \$129,660.00 to \$36,736.97, 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 scrimping on everything.

32. It is as if the \$210,900 salary of a New York Supreme Court justice was reduced to \$59,745.04 ($210900/3.53$).

33. For plaintiff to then use a reconciliation to deduct a fixed weekly payment of 15% of the \$36,736.97 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's 15% debit if receipts dropped to \$36,736.97.

34. This would enable plaintiff to declare a default.

35. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this \$19,449.00 fixed weekly payment is enforcing criminal usury.

36. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this \$19,449.00 fixed weekly payment is enforcing criminal usury.

37. The agreement was for a finite term of 29 weeks with payments of \$19,449.00.

38. 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.

39. 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.”

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

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

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

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

44. 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:

The Receivables Purchased Amount shall be paid to SC by each Merchant irrevocably authorizing only one depositing account acceptable to SC

6. Merchant Deposit Agreement. Merchant(s) shall appoint a bank acceptable to SC, to obtain electronic fund transfer services and/or “ACH” payments.

34 [Defaults] *** (8) Any Merchant uses multiple depository accounts without the prior written consent of SC; (9) Any Merchant changes the Account without the prior written consent of SC;

45. 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."

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

17 [Defaults] ***(d) Any Merchant interrupts the operation of its business (other than adverse weather, natural disasters, or acts of God) or transfers, moves, sells, disposes, or otherwise conveys its business or assets

34 [Defaults] *** (6) Any Merchant transfers or sells all or substantially all of its assets without the prior written consent of SC;

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

Security Interest ***

Each Merchant agrees to execute any documents or take any action in connection with this Agreement as SC deems necessary to perfect or maintain SC's first priority security interest in the Collateral and the Cross-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 the above constituted invented or theoretical defenses.

Crystal Springs Capital v Big Thicket Coin, 220 AD3d 745, 747, 748 [2023]

held that the language in the merchant funding agreement, alone, will establish these defenses.

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

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 or prevented any right to a reconciliation:

Addendum and paragraph 4

4. Reconciliations. Any Merchant may give written notice to SC requesting that SC conduct a reconciliation in order to ensure that the amount that SC has collected equals the Specified Percentage of Merchant(s)’s Receivables under this Agreement. Any Merchant may give written notice requesting a reconciliation. A reconciliation may also be requested by e-mail to uw@spartancapitalgroup.com and **such notice will be deemed to have been received if and when SC sends a reply e-mail (but not a read receipt)**. If such reconciliation determines that SC collected more than it was entitled to, then SC **will credit to the Account all amounts to which SC was not entitled within seven days thereafter**. If such reconciliation determines that SC collected less than it was entitled to, then SC will debit from the Account all additional amounts to which SC was

entitled within seven days thereafter. In order to effectuate this reconciliation, any Merchant must produce with its request the login and password for the Account and any and all bank statements and merchant statements covering the period **from the date of this Agreement through the date of the request for a reconciliation**. SC will complete each such reconciliation within two business days after receipt of a written request for one accompanied by the information and documents required for it. Nothing herein limits the amount of times that such a reconciliation may be requested.

54. The provision that “such notice will be deemed to have been received if and when SC sends a reply e-mail (but not a read receipt)” has already been held to prevent a reconciliation. Wynwood Capital v God’s Love Outreach, 2022 NY Slip Op 33211(U):

“However, plaintiff’s counsel omits relevant language, and the Court finds that when the reconciliation provision is read in its entirety, there is a triable issue of fact as to whether the reconciliation provision was mandatory or discretionary. To wit, the reconciliation provision provides that “[a] reconciliation may also be requested by email to [sic] and such notice will be deemed to have been received *if and when [plaintiff] sends a reply e-mail [but not a read receipt]*” [emphasis supplied]. The language “if and when” indicates that it was in the plaintiff’s discretion as to whether to send a reply e-mail, which would begin the time on the plaintiff’s obligation to conduct the requested reconciliation. As the reconciliation provision in the parties’ agreement afforded the plaintiff with the discretion as to whether it was obligated to conduct the reconciliation, the plaintiff failed to establish the absence of triable issues of fact as to whether the reconciliation provision in the parties’ agreement was *discretionary*, the Court finds that there are issues of fact as to whether the parties’ transaction was a criminally usurious loan. (*Davis v. Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]).

In light of the foregoing, the plaintiff's motion for summary judgment pursuant to CPLR § 3212 is DENIED, in its entirety."

55. The notice provision prevented any reconciliation.

38. Notices. All notices, requests, consents, demands, and other communications hereunder shall be delivered by certified mail, return receipt requested, or by overnight delivery with signature confirmation to the respective parties to this Agreement at their addresses set forth in this Agreement and shall become effective only upon receipt.

56. The agreement had no address for plaintiff.

57. Therefore, the contract made it impossible to effectively send any request or notice or anything else.

58. 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.

59. 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.

60. 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. The contract had a no-liability clause:

38. Notices. All notices, requests, consents, demands, and other communications hereunder shall be delivered by certified mail, return receipt requested, or by overnight delivery with signature confirmation to the respective parties to this Agreement at their addresses set forth in this Agreement and shall become effective only upon receipt.

B. “Argus has sole discretion to adjust the amount of the daily payments.”

Here, plaintiff had sole discretion of whether to reply to an email request for reconciliation.

C. “a default on the part of Oakshire would occur where, inter alia, "two or more [automatic withdrawal] transactions attempted by

[Argus] within one calendar month are rejected by [the] bank," immediately accelerating the entire amount”

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

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

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

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.

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

62. 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].

63. 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.”

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

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

66. 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".

67. 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.

68. 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 or weekly payment.

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

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

71. 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"].)

72. 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

73. 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%.

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

75. The contract made this a default from the outset:

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

76. 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”.

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

1--*** will provide SC with all required access codes and monthly bank statements

6. *** Merchant(s) shall provide SC and/or its authorized agent with all of the information, authorizations, and passwords necessary to verify each Merchant's Receivables.

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

78. 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.

79. 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.

80. 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.

17 [Defaults]: Protection 1: The full uncollected Receivables Purchased Amount plus all fees due under this Agreement may become due and payable in full immediately.

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

Addendum: if any Default occurs under the Agreement, Merchant authorizes SC to debit any and all accounts controlled by Merchant or controlled by any entity with the same Federal Tax Identification Number as Merchant up to the total amount,

82. The Attorney General stated in her petition, paragraph 210: “By Reconciling merchants’ payments against a made-up, inflated Specified Percentage number that bore no relation to the Daily Amount actually negotiated by the Parties, Yellowstone, Delta bridge, and their Funders made it virtually impossible for merchants to qualify for any Reconciliation refund. As one merchant explained, “I cannot imagine that [my business] would have taken advantage of this reconciliation process, since reconciling [my business’s] payments based on this 15% ‘Specified Percentage’ likely would have caused its payment amount not to decrease but to increase.”

83. Attorney General’s Memorandum of Law:

20:

Respondents determine payment amounts for each transaction based not on such percentages but instead on the number of days in the term. Supra at 8-9. The term length, in turn, is based not on Specified Percentages but primarily on the risk of nonpayment, as reflected by such factors as merchants’ credit ratings and payment histories. Petition ¶¶ 152-70. Furthermore, even beyond the payment amount, the Specified Percentage is treated as irrelevant to the entire so-called purchase of revenue. Petition ¶¶ 318-78.

b. Respondents Manipulate Their Specified Percentages to Prevent Merchants from Obtaining Reconciliation Refunds

For years, Respondents have set their Specified Percentages at values so high that it has been virtually impossible for merchants to obtain refunds through payment reconciliation. As a result, Respondents' Reconciliation Clauses are illusory, further showing that their purported MCAs are loans. See generally Petition ¶¶ 203-48.

For example, Delta Bridge in 2022 issued an MCA to the merchant Cookies Restaurant Group ("Cookies") which set a Daily Amount of \$208, Rubey Aff. Ex. 2B at 1, an amount equaling 13-18% of the merchant's historical daily revenue, Rubey Aff. ¶ 29. But Delta Bridge fraudulently stated 49% as Cookies' Specified Percentage and falsely stated that \$208 was a "good faith approximation" of the 49% number. Rubey Aff. Ex. 2B at 1. By doing so, Delta Bridge raised the bar impossibly high for Cookies to obtain a reconciliation of its past payments. Thus, when Cookies experienced a 50% decline in its revenues, Delta Bridge refused the merchant's request for a reconciliation refund because the amount Delta Bridge had collected (\$6,953) was still less than 49% (the Specified Percentage) of the merchant's \$37,041 in revenues. Ex. 394 at 164 (row 26989); Rubey Aff. ¶ 33.

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In its earliest agreements, Yellowstone set its Specified Percentages at around 10% and 15%, then in 2017 and 2018 raised the percentages to 25%. Petition ¶¶ 216-23. From 2019 through 2021 Yellowstone issued MCAs with higher and higher percentages – most commonly 49% of merchants' revenue (as in the case of Cookies, *supra*), a practice that Delta Bridge adopted when it continued Yellowstone's business in May 2021. Petition ¶¶ 226-48. Respondents set Specified Percentages far higher than the payment amounts merchants agree to, see Rubey Aff. ¶¶ 29, 54, and far higher than merchants can realistically repay, e.g., Saffer Tr. at 238:9-17; McNeil Tr. at 119:14-17, 122:22-24. The purpose and effect of doing so is to put reconciliation out of reach for merchants, Petition ¶¶ 236, 241-48, ensuring that Respondents' Reconciliation

Clauses are mere “window dressing.” Fleetwood, 2022 WL 1997207, at *11.4

84. Similarly, in this action, the plaintiff, SPARTAN BUSINESS SOLUTIONS LLC D/B/A SPARTAN CAPITAL, set a 15% Specified Percentage grossly inflated over and above the defendant’s receipts available to repay the plaintiff’s advance.

85. 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”.

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

87. The Attorney General pointed out that a reconciliation was abridged by the ability to demand one only within a five day window period each month:

(NYSCEF Doc. No.3) page 17 of 39:

(b) “there was no time to [reconcile] because [the merchant] could request reconciliation only within five business days following the end of a business month,” and
(c) “the fixed daily payment . . . was not a good faith estimate of 15% of [the merchant’s] receivables.”

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e, Respondents restricted reconciliation in additional ways, including by allowing merchants to request relief only during a narrow, five-day window each month.

Petition ¶¶ 287-88. Consequently, a “mid-month decline in revenues” could “trigger a default under the contract and entitle the lender to immediately seek the whole uncollected amount.” Haymount, 609 F. Supp. 3d at 248; accord McNider Marine, 2019 WL 6257463, at *4

88. Plaintiff’s contract, here, prevented any right to any reconciliation. (Above).

89. 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.

90. Plaintiff had a similar provision.

“from the date of this Agreement through the date of the request for a reconciliation.”

Sixth Affirmative Defense: Illegal Contract

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

92. This rendered the contract illegal. It meant that the more plaintiff earned as income the greater its tax deduction for *cost of goods sold* and the more defendants had to immediately pay sales and income taxes on the entire funded amount and ensuing payment of the “purchased amount”. Matter of Darman Bldg. Supply Corp. v. Mattox, 106 A.D.3d 1150, 1151 [2013]:

93. The contract stated:

15. Sale of Receivables. Each Merchant and SC agree that the Purchase Price under this Agreement is in exchange for the Receivables Purchased Amount and that such Purchase Price is not intended to be, nor shall it be construed as a loan from SC to any Merchant. *** Each Merchant agrees that the Purchase Price in exchange for the Receivables pursuant to this Agreement equals the fair market value of such Receivables.

94. 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]).”

95. The provision that plaintiff inserted into its contract is completely illegal and violates the tax laws of the United States by forcing the defendant to absorb the tax burden and obligation of the plaintiff.

<https://en.wikipedia.org/wiki/Loan>
United States taxes[edit]

Most of the basic rules governing how loans are handled for tax purposes in the United States are codified by both Congress (the Internal Revenue Code) and the Treasury Department (Treasury Regulations— another set of rules that interpret the Internal Revenue Code).[6]:111

1. A loan is not gross income to the borrower.[6]:111 Since the borrower has the obligation to repay the loan, the borrower has no accession to wealth.[6]:111[7]

2. The lender may not deduct (from own gross income) the amount of the loan.[6]:111 The rationale here is that one

asset (the cash) has been converted into a different asset (a promise of repayment).[6]:111 Deductions are not typically available when an outlay serves to create a new or different asset.[6]:111

3. The amount paid to satisfy the loan obligation is not deductible (from own gross income) by the borrower.[6]:111

4. Repayment of the loan is not gross income to the lender.[6]:111 In effect, the promise of repayment is converted back to cash, with no accession to wealth by the lender.[6]:111

5. Interest paid to the lender is included in the lender's gross income.[6]:111[8] Interest paid represents compensation for the use of the lender's money or property and thus represents profit or an accession to wealth to the lender.[6]:111 Interest income can be attributed to lenders even if the lender doesn't charge a minimum amount of interest.[6]:112

6. Interest paid to the lender may be deductible by the borrower.[6]:111 In general, interest paid in connection with the borrower's business activity is deductible, while interest paid on personal loans are not deductible.[6]:111 The major exception here is interest paid on a home mortgage.[6]:111

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

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

98. 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.)”

99. The contract requiring defendant to pay sales and income taxes on the purchased amount, in addition to the unheard of interest and repayment, it is illusory.

Seventh Affirmative Defense: Failure to State a Cause of Action

100. Plaintiff’s complaint treats nonpayment as a default but mere nonpayment, *i.e.*, insufficient funds in the bank account is not listed as a default.

101. If insufficient funds without proper notice is a default under the contract same is defective since the contract prevented any notice (above).

102. MCA Servicing Co. v Nic's Painting, LLC, 2024 NY Slip Op 51847(U):

“Further, per the RPA, failure to pay is not, in and of itself, a breach by Defendant. See Doc. 2, RPA at 1, 2nd paragraph (“Merchant is selling a portion of a future revenue stream to MCA at a discount, and is not borrowing money from MCA, therefore there is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by MCA. . . . Merchant and Guarantor(s)(s) [sic] are only guaranteeing their performance of the terms of this Revenue Purchase Agreement, and are not guaranteeing the payment of the Purchased Amount.”) (emphasis added). “

Eighth Affirmative Defense: Arbitration

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

104. 48. Arbitration. Any action or dispute relating to this Agreement or involving SC on one side and any Merchant or any Guarantor on the other, including, but not limited to issues of arbitrability, will, at the option of any party to such action or dispute, be determined by arbitration before a single arbitrator. The arbitration will be administered either by Arbitration Services, Inc. under its Commercial Arbitration Rules as are in effect at that time, which rules are available at www.arbitrationservicesinc.com, or by Mediation & Commercial Arbitration, Inc.

105. However, ARBITRATION SERVICES, INC. is not a genuine arbitration organization with independent neutrals. It was incorporated by a crafty attorney in order to serve as a rubber stamp for clients paying his initial fee. *Cf.*, Petition to stay arbitration in Matter of Automodule, Index No. 616585/2022, Nassau County Supreme Court.

106. The same is true for Mediation & Commercial Arbitration, Inc.

107. Defendants therefore reserve the right to demand arbitration in a genuine arbitration forum like the American Arbitration Association.

108. Nor could defendants have been reasonably expected when signing plaintiff's contract that ARBITRATION SERVICES, INC. or Mediation & Commercial Arbitration, Inc. was not a genuine arbitration organization. *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." ”

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

Ninth Affirmative Defense: Lack of Standing

110. Plaintiff failed to publish its articles of organization.

Lexis/Nexis search result of even date:

New York Secretary of State

Corporate Filing 1	
Business Information	
Filing Number:	5220952
Name:	SPARTAN BUSINESS SOLUTIONS, LLC
Name Type:	LEGAL
Business Type:	DOMESTIC LIMITED LIABILITY COMPANY
Status:	ACTIVE
Status Date:	10/04/2023
Place Incorporated:	NEW YORK
County Incorporated:	ORANGE
Date Incorporated:	10/20/2017
Foreign/Domestic:	DOMESTIC
Terms:	PERPETUAL
Status Comment:	GOOD STANDING STATUS CAN ONLY BE DETERMINED BY PERFORMING A SEARCH IN THE RECORDS OF BOTH THE DEPARTMENT OF STATE CORPORATION RECORDS AND THE DEPARTMENT OF TAX AND FINANCE
Date Last Seen:	03/18/2025
Corporate Filing 2	
Business Information	
Filing Number:	5220952
Name:	SPARTAN BUSINESS SOLUTIONS, LLC
Name Type:	LEGAL
Business Type:	DOMESTIC LIMITED LIABILITY COMPANY

Corporate Filing 2	
Status:	ACTIVE
Status Date:	11/13/2018
Place Incorporated:	NEW YORK
County Incorporated:	ORANGE
Date Incorporated:	10/20/2017
Foreign/Domestic:	DOMESTIC
Terms:	PERPETUAL
Status Comment:	GOOD STANDING STATUS CAN ONLY BE DETERMINED BY PERFORMING A SEARCH IN THE RECORDS OF BOTH THE DEPARTMENT OF STATE CORPORATION RECORDS AND THE DEPARTMENT OF TAX AND FINANCE
Date Last Seen:	03/18/2025
Registered Agent	
Name:	REGISTERED AGENT REVOKED
Corporate Filing 3	
Business Information	
Filing Number:	5220952
Name:	SPARTAN BUSINESS SOLUTIONS, LLC
Name Type:	LEGAL
Additional Name Information:	ACTIVE
Business Type:	DOMESTIC LIMITED LIABILITY COMPANY
Status:	ACTIVE
Status Date:	10/20/2017
Place Incorporated:	NEW YORK
County Incorporated:	ORANGE

Corporate Filing 3			
Date Incorporated:	10/20/2017		
Foreign/Domestic:	DOMESTIC		
Terms:	PERPETUAL		
Status Comment:	GOOD STANDING STATUS CAN ONLY BE DETERMINED BY PERFORMING A SEARCH IN THE RECORDS OF BOTH THE DEPARTMENT OF STATE CORPORATION RECORDS AND THE DEPARTMENT OF TAX AND FINANCE		
Date Last Seen:	03/18/2025		
Registered Agent			
Name:	MERCADO, TARA		
Registered Agent Address:	680 ROUTE 211 E STE 3B MIDDLETOWN, NY 10941-1757		
Annual Report Filings			
Filing 1			
Filed Date:	10/04/2023		
Filing 2			
Filed Date:	03/11/2022		
Filing 3			
Filed Date:	02/02/2021		
Officers			
Name	Date(s)	Standardized Address	Original Address
SPARTAN CAPITAL Contact Type: PROCESS NAME	DATE FILED Date: 10/04/2023		371 E MAIN ST SUITE 2 MIDDLETOWN, NY 10940 US
Historical Contacts			
Name	Date(s)	Standardized Address	Original Address

Historical Contacts				
SPARTAN CAPITAL Contact Type: PROCESS NAME	DATE FILED Date: 03/27/2019		371 E MAIN ST SUITE 2 MIDDLETOWN, NY 10940 US	
MERCADO, TARA Contact Type: PROCESS NAME	DATE FILED Date: 10/20/2017		680 ROUTE 211 E., STE. 3B #393 MIDDLETOWN, NY 10941 US	
Filing History				
Filing Date	Filing Type	Number	Description	Misc.
03/27/2019	EFFECTIVE		CERTIFICATE OF CHANGE (DOMESTIC LIMITED LIABILITY COMPANY)	
03/27/2019	FILING	Ref No.: 190327000858	CERTIFICATE OF CHANGE	
11/13/2018	EFFECTIVE		CERTIFICATE OF CHANGE (DOMESTIC LIMITED LIABILITY COMPANY)	
11/13/2018	FILING	Ref No.: 181113000754	CERTIFICATE OF CHANGE	
10/20/2017	EFFECTIVE		ARTICLES OF ORGANIZATION (DOMESTIC LLC)	
10/20/2017	EFFECTIVE		CERTIFICATE OF CHANGE (DOMESTIC LIMITED LIABILITY COMPANY)	
10/20/2017	EFFECTIVE		CERTIFICATE OF CHANGE (DOMESTIC LIMITED LIABILITY COMPANY)	
10/20/2017	FILING	Ref No.: 171020010050	ARTICLES OF ORGANIZATION	

111. 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]).”

Tenth Affirmative Defense: Unconscionability/Adhesion Contract

112. 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.

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

114. 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.").

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

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

117. 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." "

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

119. 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.

120. 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].

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

Eleventh Affirmative Defense: The Contract Was Breached by Plaintiff

122. The contract contained provisions expressly hinging repayment on the payment to defendant from its customers:

1. *** to remit the percentage specified above (the "Specified Percentage") of each Merchant's settlement amounts due from each transaction, until such time as SC receives payment in full of the Receivables Purchased Amount.

6.*** Merchant(s) shall authorize SC and/or its agent(s) to deduct the amounts owed to SC for the Receivables as specified herein from settlement amounts which would otherwise be due to each Merchant and to pay such amounts to SC by permitting SC to withdraw the Specified Percentage by ACH debiting of the account.

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

123. Plaintiff breached the contract by violating this provision.

Westminster Properties v. Kass, 163 Misc. 2d 773, App. Term, First Dept.

[1995]:

"The holdover petition pleads tenants' violation of a specified lease provision. Since the underlying misconduct alleged is a breach of contract, the six-year limitations period applicable to actions upon contract (CPLR 213 [2]) should apply."

124. Plaintiff could not avoid its breach by placing contradicting language into its contract. Corhill Corp. v. S. D. Plants, Inc., 9 N.Y.2d 595, 599 [1961]:

It is a cardinal rule of construction that a court should not "adopt an interpretation" which will operate to leave a "provision of a contract * * * without force and effect"

(Muzak Corp. v. Hotel Taft Corp., 1 N Y 2d 42, 46; Fleischman v. Furgueson, 223 N. Y. 235, 239).”

Twelfth Affirmative Defense: Unenforceable Default Fee

125. 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”]).

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

Bank of Springfield v. Ambrosano, 89 A.D.2d 730, 731 [1982]; Community Nat'l Bank & Trust Co. v. I.M.F. Trading, Inc., 167 A.D.2d 193 [1990]; Korea First Bank v. Chung Jae Cha, 259 A.D.2d 378, 379.

Thirteenth Affirmative Defense: Lack of Personal Jurisdiction

127. The contract stated

49. Service of Process. Each Merchant and each Guarantor consent to service of process and legal notices made by First Class or Priority Mail

G16. Service of Process. Each Merchant and each Guarantor consent to service of process and legal notices made by First Class or Priority Mail

128. Plaintiff served by certified mail. (NYSCEF Doc. No. 3).

129. This is improper service.

Macchia v. Russo, 67 N.Y.2d 592, 595 [1986]:

“In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment (see, e.g., De Zego v Donald F. Bruhn, M. D., P. C., 67 NY2d 875). Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court (see, Feinstein v Bergner, 48 NY2d 234, 241; McDonald v Ames Supply Co., 22 NY2d 111, 115, *supra*).”

Hagaman v. City of Rochester, 185 A.D. 161, 168 [1918]:

“The contract definitely prescribed the method of the service of the notices and the city authorities had no right to adopt a less exacting means of service. The letter and the spirit of the contract required strict adherence to the prescribed method of service of the notices and such method of service of the notices was a condition precedent

to the right of the city to make the repairs at the expense of the contractors.”

WHEREFORE, defendants respectfully demand judgment dismissing the complaint.

Dated: April 4, 2025



Jack A. Cook
Weinberg Legal PLLC
Attorney for Defendants
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49 Somerset Drive South
Great Neck NY 11020-1821
Phone: (516) 829-3900.
Email: jack@WeinbergLegalPLLC.com

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: April 4, 2025



Jack A. Cook
Weinberg Legal PLLC