

SUPREME COURT OF THE STATE
OF NEW YORK : BRONX COUNTY

Index No
803822/2025E

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CFG MERCHANT SOLUTIONS, LLC,

ANSWER

Plaintiff,

-against-

SIXPENNY BRIGGS INC and CARYL CHUQUILLANGU,

Defendants.

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Defendants by their attorney answer the complaint:

1. Admit that plaintiff (a foreign limited liability company) is authorized to do business in New York. Deny that it has offices in New York or is engaged in any business other than loans charging over 25% interest annually. Plaintiff is a lender:



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- 2. Admit paragraph 2.
 - 3. Admit paragraph 3.
 - 4. Admit that the contract is annexed and otherwise deny paragraph
4. The agreement was solely for a loan, nor was \$41,200 paid.

5. Admit paragraph five only as to personal jurisdiction due to a forum selection clause but not subject matter jurisdiction. Deny the existence of jurisdiction under CPLR §301.

6. Admit paragraph 6 as to the ACH-debit for the total of \$56,856 and otherwise deny. Plaintiff placed an ACH-debit for the fixed daily payment regardless of receipts.

7. Admit paragraph 7 except deny the needless word, “critical.”

8. Deny paragraph 8 and each and every subsequent allegation of the complaint except as expressly admitted above.

First Affirmative Defense: Illusory Contract. No Risk

9. The contract stated:

1. Sale of Future Receipts. Seller agrees to sell to Buyer, in consideration of the Purchase Price as specified in the Schedule of Purchased Receipts, the Amount Sold, by delivering the Purchased Percentage of the proceeds of each future sale made by Seller (“Future Receipts”),

10. 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 day regardless of receipts:

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Buyer will be entitled to collect on a daily basis the cash attributable to the Purchased Percentage of the Future Receipts as specified in the Schedule of Purchased Receipts. Buyer agrees to accept the remittance of the Daily Amount

11. . 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]).”

12. 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].

13. 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.

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 an 82% annual rate of interest. 82% is 3.29 times the 25% maximum under the criminal usury statute.

17. **Calculation of Interest:** Under the Agreement, the total payable to Defendant was \$40,963, less startup fees, for which Defendant had to pay plaintiff back \$56,856, by a daily payment of \$475.00 per day. Defendant getting gross proceeds from plaintiff of \$40,963, and having to pay back \$56,856, the difference, of \$15,893, was the interest that Defendant had to pay on the \$40,963. \$15,893 interest on \$40,963, if it had to be paid back over a year, would have been 39% interest. The agreement required payments of \$475.00 per day, which meant 120 payments of \$475.00 each, or 120 days, to pay the \$56,856. However, the \$475.00 payments were only to be debited on banking days. There being five banking days each week and taking into account the nation’s annual 10 banking holidays, this meant that the 120 payments of \$475.00 each were going to take 168 days total. 168 days is 47%

of a year. Since 39% interest had to be paid back in 47% of a year, that was an annual interest rate of 82%.

18. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 13.3%, equaled \$3,571.43 (\$475.00 divided by % \$3,571.43).

19. The initial 82% interest rate was 3.29 times the 25% criminal usury cap. $25 \text{ times } 3.29 = 82\%$.

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 daily payment was reduced so that 13.3% of receipts equaled the 25% maximum criminal usury rate rather than the 82% criminal rate, the receipts needed would only be \$1,097.43. **Calculation:** The 82% interest rate divided by 25 = 3.29. The \$3,571.43 receipts needed under the contract to cover the 13.3% Specified Percentage divided by 3.29 = \$1,097.43.

22. Therefore, until the plaintiff granted a reconciliation taking 13.3% of only \$1,097.43 of receipts, the funding was criminally usurious.

23. If \$56,856 has to be paid back after receipt of \$40,963 with fixed daily payments each business day and an annual interest rate of 25%, each

daily payment would equal \$145.96 which at 13.3% of daily receipts would equal \$1,097.43 of receipts.

24. Until receipts dropped to \$1,097.43, the 13.3% specified percentage was criminally usurious.

25. If the defendant's receipts diminished from \$3,571.43 to \$1,097.43, it would obviously be utterly out of business, unable to function or pay anyone. It would have insufficient 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, her family was going hungry or homeless.

26. It is as if the \$210,900 salary of a New York Supreme Court justice was reduced by 3.29 times = \$64,103.34 ($210900/3.29$).

27. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 13.3% of the \$1,097.43 could not reasonably be contemplated under the parties' contract since the debtor would be forced to block plaintiff's % debit if receipts dropped to \$1,097.43.

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 \$475.00 fixed daily 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 \$475.00 fixed daily payment is enforcing criminal usury.

31. The agreement was for a finite term of 168 days with payments of \$475.00 each business day.

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

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c. Seller *** shall use the Purchase Price, whether the funding of such Purchase Price occurs contemporaneous with the execution of this Agreement or anytime time thereafter, solely for business purposes and none will be used for personal, household or consumer purposes.

o. The Bank Account is established and used for business purposes only and not for personal, family, or household purposes. p. Seller shall use the Purchase Price paid by Buyer for Future Receipts solely for business purposes in the ordinary course of Seller's business and will not use any of the Purchase Price paid by Buyer for personal, household or consumer 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.

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

38. The plaintiff breached its own contract by ACH-debiting a fixed dailyly payment regardless of any receipts. Plaintiff's contract stated:

15. * * * Payments made to VITALCAP 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.

39. Nothing in plaintiff's contract stated that this provision could be negated by plaintiff reciting other provisions in the agreement stating a different payment method. Plaintiff is essentially cherry-picking provisions of its contract that suit it.

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

41. The contract contained a reconciliation provision. However, the provision was only a backward looking reconciliation under which prior

payments in excess of the Specified Percentage of past receipts would theoretically be refunded. There was no forward looking reconciliation under which future ACH-debits would be downwardly adjusted by the Specified Percentage to match the declining receipts. This meant that even if the receipts fell to zero, the plaintiff would still ACH-debit each day the fixed daily payment or fixed weekly payment.

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

43. The notice provision stated:

4.3 Notices. All notices, requests, consents, demands and other communications hereunder shall be delivered by certified mail, return receipt requested, to the respective parties to this Agreement at the addresses set forth in this Agreement. Notices to Purchaser shall become effective only upon receipt by Purchaser.

44. This made any right of defendant to demand anything under the agreement illusory because the benefit of allowing requests could be delayed and rejected at plaintiff's whim by refusing to sign for or claim the certified mail.

45. Section 4.3 further made any benefit or right of defendant to notify plaintiff or demand anything of plaintiff illusory, there being no address of plaintiff stated in the contract and anything outside of the contract was invalid:

3.5 Required Notifications. Merchant is required to give Purchaser written notice within 24 hours of any filing under Title 11 of the United States Code. Merchant is required to give Purchaser seven days' written notice prior to the closing of any sale of all or substantially all of the Merchant's assets or stock.

4.1 Modifications; Agreements. No modification, amendment, waiver or consent of any provision of this Agreement shall be effective unless the same shall be in writing and signed by Purchaser.

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

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

48. 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:

e. Seller shall deposit all Future Receipts into the Bank Account and shall not close or change the Bank Account or change the Processor through which the major Payment Cards are settled to another processor, cease or change its payment instruction or other arrangements with Processor or to permit any event to occur that could cause a diversion of any of Seller's Payment Card transactions to another processor without Buyer's prior written consent. In the event that Seller changes its Buyer-approved Processor without Buyer's written consent, Seller shall, in addition to paying any other damages suffered by Buyer, pay to

Buyer the Blocked Account Fee set forth in the Fee Structure Addendum as liquidated damages, as it will be impracticable or extremely difficult to determine the resulting damages suffered by Buyer.

49. 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.”

50. Bankruptcy, under which a bankrupt must transfer all assets to a trustee in bankruptcy or liquidate the business was prohibited by this provisions:

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c. Seller shall conduct its business consistent with past practice

51. The Security Agreement portion of the contract stated

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Seller further agrees that, with or without a Breach, Buyer may notify account debtors, or other persons obligated on the Future Receipts, of Seller's sale of the Future Receipts and may instruct them to make payment or otherwise render performance to or for the benefit of Buyer.

52. 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.

53. The said provision is not lessened by any subsequent provision that such a remedy was available upon a default. 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)."

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

Merchant and each entity Guarantor agree to execute any documents or take any action in connection with this Agreement as Purchaser deems reasonably necessary to perfect or maintain Purchaser's priority security interest in the Secured Assets, including the execution of any account control agreements.

55. This made the entire contract illusory.

56. 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.”

57. 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).”

58. 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

59. 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]).”

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

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Seller agrees to provide Buyer any information reasonably requested by Buyer to assist in this reconciliation, i
Upon reasonable verification of such information, Buyer shall adjust the Daily Amount on a going-forward basis

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b. Notices from Seller to Buyer. Seller may send any notices to Buyer by e-mail only upon the prior written consent of Buyer, which consent may be withheld or revoked at any time in Buyer’s sole discretion. Otherwise, any notices or other communications from Seller to Buyer must be delivered by certified mail, return receipt

requested, to Buyer's address at CFG Merchant Solutions, LLC, 201 Route 17 North, Suite 805, Rutherford, New Jersey 07070. Notices sent to Buyer shall become effective only upon receipt by Buyer.

61. 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.

62. 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.

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

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

65. It has already been held that such language negated the right to any reconciliation. Royal Business Group v Sky Airparts, 2025 NY Slip Op 30508(U), Daniel J. Doyle, Supervising Judge for the Civil Supreme Court in the 7th Judicial District:

"Here, the agreement contains a provision purporting to provide a right of reconciliation. However, while the presence of a purported reconciliation provision is "an

indication of whether an agreement constitutes a loan" and regardless of the inclusion of the "buzz" words purporting to confer such protection, the court must assess whether the agreement at issue before it "make[s] clear on its face whether it conferred that right." *Kapitus Servicing, Inc. v. Point Blank Constr., Inc.*, 221 A.D.3d 532, 534 (1st Dept. 2023). If there is no true obligation to reconcile, despite the inclusion of a purported reconciliation provision, the true nature of the agreement will be called into question.

In the case at bar, the purported reconciliation provision provides that "Seller agrees to provide RBG any information requested by RBG to assist in the reconciliation." The provision continues that "[w]ithin five days of RBG's reasonable verification of such information," the periodic amount shall be adjusted. This provision raises a question as to Plaintiffs entitlement to summary judgment because Plaintiff's obligation to reconcile is unclear. Pursuant to the purported reconciliation provision, Plaintiff has the unfettered right to demand any and all information it wants and then can determine whether there is "reasonable verification" for the reconciliation request. The terms of the purported reconciliation provision do not clearly confer a right of reconciliation, as Plaintiff could, at will, abridge that right by demanding any and all information for as long as it wants and then also has the unrestrained ability to determine whether the information provided is reasonably verified."

66. 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.

67. 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.

68. The same section stated, “Seller or Buyer may request an adjustment to the Daily Amount to more closely reflect the Seller’s actual Future Receipts times the Specified Percentage.”

69. The standard of “to more closely reflect” is entirely subjective.

Third Affirmative Defense: Criminal Usury.

70. 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. Instead, the contract only made a breach by defendant a breach:

11. Breach of Contract. A “Breach” of this Agreement shall include, but not be limited to, any of the following events: (a) Seller intentionally interferes with Buyer’s right to collect the Purchased Percentage or the Daily Amount; (b) the breach by Seller of any covenants, terms or conditions contained in this Agreement; (c) any representation or warranty made by the Seller in this Agreement or Seller’s application for this Agreement is incorrect, false or misleading; and (d) Seller fails to provide bank statements and other reasonably requested financial information within seven (7) calendar days after request from Buyer.

12. Remedies for Breach of Contract. In the event of a Breach, Buyer shall be entitled to all remedies available at law and equity.

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

Here, plaintiff had sole discretion of how much disclosure to seek before implementing any reconciliation.

C. “a default on the part of Oakshire would occur where, inter alia, "two or more [automatic withdrawal] transactions attempted by [Argus] within one calendar month are rejected by [the] bank," immediately accelerating the entire amount”

D. “there was an implied finite term in the agreement inasmuch as plaintiffs allege that the daily payment amount was set to

ensure that Argus's targeted return would be met in a predetermined period of time as opposed to having been set based on the specified percentage of Oakshire's sales”

It has already been demonstrated, above, that 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.

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

72. 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].

73. 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.”

74. The plaintiff’s contract prohibited any change of the payment processing arrangements.

75. The plaintiff’s contract effectively made bankruptcy a default (above).

76. 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”.

77. 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.

78. Nothing in the plaintiff’s contract enabled defendants to stop the fixed dailyly payment without being in default, nor did anything in plaintiff’s contract force plaintiff to stop its ACH-debit of the fixed dailyly payment.

79. Nothing in the contract avoided the fixed dailyly payment if defendants had no receipts.

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

81. While the initial interest rate could have been theoretically reduced by a reconciliation, this would not negate the usury:

Band Realty Co. v. North Brewster, Inc., 37 N.Y.2d 460 [1975] (quoting Feldman v Kings Highway Sav. Bank (278 App Div 589, 590, affd 303 NY 675) “[So] long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury.”); Canal v Munassar, 144 A.D.3d 1663 [2016]; Norstar Bank v. Pickard & Anderson, 140 A.D.2d 1002, [1988]; DeStaso v Bottiglieri, 25 Misc. 3d 1213(A), 2009 NY

Slip Op 52082(U); Fremont Inv. & Loan v. Haley, 23 Misc. 3d 1138(A), 2009 NY Slip Op 51186(U).

Canal v Munassar, 144 A.D.3d 1663, 1664 [2016]:

In determining whether the interest charged exceeded the usury limit, courts must apply the traditional method for calculating the effective interest rate as set forth in *Band Realty Co. v North Brewster, Inc.* (37 NY2d 460, 462 [1975], *rearg denied* 37 NY2d 937 [1975]) (*see Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972 [2013]). According to that method, "[s]o long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury" (*Band Realty Co.*, 37 NY2d at 464 [internal quotation marks omitted]).

Norstar Bank v. Pickard & Anderson, 140 A.D.2d 1002, [1988]: “[T]he bank contended that the variable rate of interest charged on the loan should be averaged over the term of the loan for the purpose of determining whether the interest rate was usurious. ***. Although there is a conflict in authority (see, Annotation, Usury in Connection with Loan Calling for Variable Interest Rate, 18 ALR4th 1068), we believe the better rule is that, in the case of a loan at a variable rate of interest, the interest charged should not be averaged over the term of the loan in determining whether a usurious rate has been charged [citations] * * * If defendants were compelled to average the rate of interest charged over the full term of the loan, they would not know whether a usurious rate was being charged until the end of the term. Thus, they would be compelled to make excessive interest payments for a substantial period and would not be able to seek relief from the usurious payments until the expiration of the loan. On the other hand, the bank could have readily avoided charging usurious interest on its loan by placing a cap on the charges for interest so that no payment would exceed the variable legal rate”.

American Express Natl. Bank v. Ellis, 2023 NY Slip Op 51428(U), 2 That the initial interest rate of 0% is legal under GOL § 5-501 would not save the agreement, given the contemplated increase to rates that exceed New York's 16% cap.1 (*See Fremont Inv. & Loan v Haley*, 23 Misc. 3d 1138[A], 889 N.Y.S.2d 505, 2009 NY Slip Op 51186[U], at *7 [Sup Ct, Queens County 2009]; *accord Norstar Bank v Pickard &*

Anderson, 140 AD2d 1002, 1002-1003, 529 N.Y.S.2d 667 [4th Dept 1988] [holding that "in the case of a loan at a variable rate of interest, the interest charged should not be averaged over the term of the loan in determining whether a usurious rate has been charged".])

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

82. 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,

83. 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.

84. 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".

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

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

86. 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.

87. 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.

88. 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.

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

90. 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.”

91. 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.

21

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

92. Similarly, in this action, the plaintiff, CFG MERCHANT SOLUTIONS, LLC, set a Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

93. 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”.

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

95. 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.

96. 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

97. Plaintiff’s contract, here, abridged the right to any reconciliation.

98. 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.

99. Plaintiff had a similar provision.

Sixth Affirmative Defense: Illegal Contract

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

Seller and Buyer agree that the Purchase Price paid by Buyer in exchange for the dollar figure listed as the Amount Sold of Future Receipts as set forth in the Schedule of Purchased Receipts is for the purchase and sale of the Amount Sold of Future Receipts, is a true sale of receipts and is not intended to be, nor shall it be construed as, a loan or an assignment for security from Buyer to the Seller.

101. 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]:

102. 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]).”

103. 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

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

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

106. 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.)”

107. 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

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

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 ANY GUARANTOR SEEKS TO HAVE A DISPUTE SETTLED BY ARBITRATION, THAT PARTY MUST FIRST SEND TO ALL OTHER PARTIES, BY CERTIFIED MAIL, A WRITTEN NOTICE OF INTENT TO ARBITRATE. IF BUYER, SELLER OR ANY GUARANTOR DO NOT REACH AN AGREEMENT TO RESOLVE THE CLAIM WITHIN 30 CALENDAR DAYS AFTER THE NOTICE IS RECEIVED, BUYER, SELLER OR ANY GUARANTOR MAY COMMENCE AN ARBITRATION PROCEEDING WITH THE AMERICAN ARBITRATION ASSOCIATION (“AAA”) OR THE FORUM.BUYER

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

Eighth Affirmative Defense. Lack of Subject Matter Jurisdiction.

110. The plaintiff was formed in a state other than New York. The business defendant was formed in a state other than New York and was never registered or authorized to do business in New York. No party is a resident of New York. The parties’ transaction was for less than \$1,000,000. The object of the action does not affect the title of real property in New York.

111. Under Business Corporation Law §1314(b), the court lacks subject matter jurisdiction. Parkview Advance LLC v High Purity, 2023 NY Slip Op 32976(U); Pearl Beta Funding, LLC v Elegant, 2023 NY Slip Op 31936(U); Harper Advance LLC v Reynolds, 2023 NY Slip Op 31191(U).

112. Techo-TM, LLC v Fireaway, Inc., 123 A.D.3d 610 [2014], where the First Department dismissed for lack of subject matter jurisdiction an action by a limited liability company, confirmed that any type of forum selection clause could not confer subject matter jurisdiction: “However, while New York recognizes consent as a basis for personal jurisdiction (see CPLR 301 and Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 301:1), it does not recognize consent as a basis for long-arm jurisdiction (see Graham v New York City Hous. Auth., 224 AD2d 248 [1st Dept 1996]).”

113. Techo-TM, though a First Department opinion, is binding on all trial courts in New York, there being no contrary appellate division opinion from any other department. Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 665, Second Department. [1984].

114. Actions required to be dismissed under BCL §1314(b) are routinely dismissed against the foreign entity defendant as well as the individual defendant. Mobile Programming LLC v. Tallapureddy, 2021 NY Slip Op 50411(U); Pearl Beta Funding, LLC v Eleant, 2023 NY Slip Op 31936(U); Harper Advance, LLC v Reynolds, 2023 NY Slip Op 31191(U); Parkview Advance, LLC v High Purity, 2023 NY Slip Op 32976(U); Fox

Capital Group Corp. v Tomassetti, Sup. Ct., Kings Cty. Index No. 523737/2021 (NYSCEF Doc. No. 60, Dec. 23, 2022).

115. The exception to BCL §1314(b) is if the transaction arose in New York. The test for this was established by Kapitus Servicing, Inc. v Point Blank Constr., Inc., 221 A.D.3d 532 [2023]:

“We agree with Supreme Court's finding that it had subject matter jurisdiction over the action, but on grounds different from those that the court stated. An action against a foreign corporation may be maintained "where it is brought to recover damages for a breach of contract made within New York State" (Business Corporation Law § 1314[b][1]). Here, the agreement was made in New York. As this Court has held, the "place of making of [a] contract is established when the last act necessary for its formulation is done, and at the place where that final act is done" (Fremay, Inc. v Modern Plastic Mach. Corp., 15 AD2d 235, 237 [1st Dept 1961] [internal quotation marks omitted]). According to the affidavit of plaintiff's vice president, plaintiff performed the last necessary act in New York by sending funds to Point Blank's Florida bank account; the sending of those funds, not Point Blank's passive receipt of them in Florida, was the last act necessary for formulation of the agreement.”

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

117. Moreover, the Kapitus court held that the last act was the linchpin to jurisdiction. The last act was receipt of the funding by defendants at defendant's bank, which was outside of the State of New York and known to

be outside of the State of New York. A home run is not hit when the ball comes off the bat but when the ball lands in the stands.

Ninth Affirmative Defense: Unconscionability/Adhesion Contract

118. 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.

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

120. 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.”).”

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

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

123. 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.” ”

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

125. 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.

126. 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].

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

Tenth Affirmative Defense: The Contract Was Breached by Plaintiff

128. The contract contained a provision expressly hinging repayment on the payment to defendant from its customers.

1. Sale of Future Receipts. Seller agrees to sell to Buyer, in consideration of the Purchase Price as specified in the Schedule of Purchased Receipts, the Amount Sold, by

delivering the Purchased Percentage of the proceeds of each future sale made by Seller (“Future Receipts”),

129. 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.”

130. 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. Fergusson, 223 N. Y. 235, 239).”

Eleventh Affirmative Defense: Unenforceable Default Fee

131. 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"]).

132. 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: March 14, 2025

Jack A. Cook

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VERIFICATION: State of New York, County of Nassau, ss.: The undersigned attorney for defendants, duly admitted to practice in the courts of the State of New York, affirms under penalties of perjury: that he has read the foregoing answer, and knows the contents thereof; that it is true upon information and belief and I believe it to be true. This verification is made by me because defendants are not in the county where I have my office. The source of my information is privileged emails and discussions with the individual defendant and review of plaintiff's documents.

Dated: March 14, 2025



Jack A. Cook
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