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

Index No E2025005509

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CASHABLE, LLC,

Plaintiff,

-against-

PREMIER HOME REMODELS LTD D/B/A PREMIER HOME REMODELS, BRIAN VICTOR PRENDERGAST, MAIN SOURCE MANAGEMENT INC. and GENESIS I COMMODITY POOL LIMITED PARTNERSHIP,

Defendants.

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ANSWER

Defendants by their attorney answer the complaint:

1. Admit that plaintiff is a domestic limited liability company and otherwise deny.

2. Admit paragraph 2.

3. Admit paragraph 3.

4. Admit paragraph 4.

5. Admit paragraph 5.

6. Deny paragraph 6 except as to PREMIER HOME REMODELS LTD and BRIAN VICTOR PRENDERGAST.

7. Paragraph 7: Admit that the contract was annexed as stated and signed by the individual defendant and that plaintiff had to be paid back $15,990 under the contract and otherwise deny.

8. Paragraph 8: Admit the payment (which is a different payment than was falsely alleged at paragraph 7, and otherwise deny.

9. Deny paragraph 9 and each and every subsequent allegation of the complaint, except admit that the contract provided that upon plaintiff declaring a default, the full $15,990 was immediately accelerated.

First Affirmative Defense: Illusory Contract. No Risk

10. 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.

11. 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.

12. The contract stated:

> Merchant s customers shall remit the Specified Percentage of the Merchants settlement amounts due from each Transaction, until such time as Cashable LLC. receives payment in full of the Purchased Amount.

13. The contract was therefore illusory because this apparent right of defendant to only pay plaintiff the Specified Percentage of receipts via its customers was taken away by the fixed payment ACH-debited each day or 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]).”

14. Plaintiff had no right to refuse enforcement of the provision stating that repayment was the Specified Percentage of receipts from defendant’s customers, 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]).”

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

16. 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].

17. 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.

18. 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."

19. Plaintiff's contract eliminated the risk.

20. The plaintiff's funding/loan started at a 698% annual rate of interest. 698% is 27.9 times the 25% maximum under the criminal usury statute.

21. **Calculation of Interest**: Under the Agreement, the total payable to Defendant was $8,500, less startup fees, for which Defendant had to pay plaintiff back $15,990, by a daily payment of $499.00 per day. Defendant getting gross proceeds from plaintiff of $8,500, and having to pay back $15,990, the difference, of $7,490, was the interest that Defendant had to pay on the $8,500. $7,490 interest on $8,500, if it had to be paid back over a year,

would have been 88.1% interest. The agreement required payments of $499.00 per day, which meant 32 payments of $499.00 each, or 32 days, to pay the $15,990. However, the $499.00 payments were only to be debited on banking, or weekdays. There being five banking days each week and taking into account the nation's annual 10 banking holidays, this meant that the 32 payments of $499.00 each were going to take 49 days total. 49 days is 12.6% of a year. Since 88.1% interest had to be paid back in 12.6% of a year, that was an annual interest rate of 698%.

22. The daily receipts of defendant needed for the fixed daily payment under the contract, at the specified percentage of 88%, equaled $567.05 ($499.00 divided by 88% $567.05).

23. The initial 698% interest rate was 27.9 times the 25% criminal usury cap. 25 times 27.9 = 698%.

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

25. If the fixed daily payment was reduced so that 88% of receipts equaled the 25% maximum criminal usury rate rather than the 698% criminal rate, the receipts needed would only be $14.12. **Calculation**: The 698%

interest rate divided by 25 =27.9. The $567.05 receipts needed under the contract to cover the 88% Specified Percentage divided by 27.9 = $14.12.

26. Therefore, until the plaintiff granted a reconciliation taking 88% of only $14.12 of receipts, the funding was criminally usurious.

27. If $15,990 has to be paid back after receipt of $8,500 with fixed daily payments each business day and an annual interest rate of 25%, each daily payment would equal $12.43 which at 88% of daily receipts would equal $14.12 of receipts.

28. Until receipts dropped to $14.12, the 88% specified percentage was criminally usurious.

29. If the defendant's receipts diminished from $567.05 to $14.12, it would obviously be utterly out of business, unable to function or pay anyone. It would have no money to pay any employee, any landlord, any tax, any materials, any work expense, etc. Assuming that someone in business for themselves, like the individual defendant, needed some kind of draw from his business to live on, his family was going hungry and homeless.

30. It is as if the $210,900 salary of a New York Supreme Court justice was reduced by 27.9 times = $7559.14 (210900/27.9).

31. For plaintiff to then use a reconciliation to deduct a fixed daily payment of 88% of the $14.12 could not reasonably be contemplated under

the parties' contract since the debtor would be forced to block plaintiff's 88% debit if receipts dropped to $14.12.

32. This would enable plaintiff to declare a default.

33. In sum, taking the position that a debtor whose receipts stayed the same has no excuse not to suffer this $499.00 fixed daily payment is enforcing criminal usury.

34. Taking the position that a debtor who has not requested a reconciliation has no excuse not to pay this $499.00 fixed daily payment is enforcing criminal usury.

35. The agreement was for a finite term of 49 days with payments of $499.00 each business day.

36. 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.

37. 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."

38. 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.

39. The contract stated:

> . Cashable LLC. may, upon Merchants request, adjust the amount of any payment due under this Agreement at Cashable LLC. sole discretion and as it deems appropriate.

40. The reconciliation provision was illusory and technically impossible (see, more specific defense below).

41. The notice provision stated:

> 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 Cashable LLC. shall become effective only upon receipt by Cashable LLC.

42. 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.

43. Moreso, the said provision made it contractually impossible to contract plaintiff for anything **there being no address of plaintiff stated in the contract**.

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

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

46. 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 Purchased Amount shall be paid to Cashable LLC. by Merchant's irrevocably directing and authorizing that there be only one depositing bank account, which account must be acceptable to, and pre-approved by, Cashable LLC. (the "Account")
>
> Cashable LLC.' entitlement to declare this Agreement breached by Merchant as a result of its usage of an account that Cashable LLC. did not first pre-approve in writing prior to Merchant's usage thereof. The aforementioned authorizations shall be irrevocable

47. 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)."
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> 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."

48. Bankruptcy, under which a bankrupt must transfer all assets to a trustee in bankruptcy, was prohibited by provisions barring any transfer out of the ordinary course of business.

49. Bankruptcy was effectively prohibited by this provision:

> **Good Faith**, Best Efforts and Due Diligence. Merchant and Guarantors hereby affirm that they will conduct the business in Good Faith and will expend their best efforts to maintain and grow its business, to ensure that Cashable LLC. obtains the Purchased Amount.

50. The Security Agreement portion of the contract stated

> This security interest may be exercised by Cashable LLC. without notice or demand of any kind by making an immediate withdrawal or freezing the Secured Assets. Pursuant to Article 9 of the Uniform Commercial Code, as amended from time to time, Cashable LLC. has control over and may direct the disposition of the Secured Assets, without further consent of merchant. Merchant

51. 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.

52. 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)."

53. 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."

54. 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)."

55. 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

56. 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])."

57. The plaintiff's contract had a seeming reconciliation provision which was no reconciliation right, at all, since, as quoted above, any request to reconciliation was made contractually impossible and any payment adjustment was at plaintiff's whim.

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. Nonpayment was a default under the contract

> Merchant understands that it is responsible for ensuring that the specified percentage to be debited by Cashable LLC. remains in the Account

61. Oakshire Props., LLC v Argus Capital Funding, LLC, 229 A.D.3d 1199 held that:

A. "although there is a reconciliation provision in the agreement, the provision appears illusory inasmuch as Argus may not be subject to any consequences for failing to comply with its terms"

> Here, while not stating that failure to reconcile would constitute a breach, neither did the contract provide any remedy or consequences to plaintiff in the event that plaintiff failed to reconcile, and permitted plaintiff to continue to ACH-debit the automatic payments even if it did not reconcile.

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

Exactly what plaintiff's contract states.

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.

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

63. 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].

64. 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."

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

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

67. 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".

68. 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 by making any request contractually impossible.

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

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

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

72. 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).
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> 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"].)

73. 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

74. 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%.

75. The parties' contract was dated Jan. 8, 2025

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

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

> Unencumbered Receipts. Merchant has good, complete, unencumbered and marketable title to all Receipts, free and clear of any and all liabilities, liens, claims, changes, restrictions, conditions, options, rights, mortgages, security interests, equities, pledges and encumbrances of any kind or nature what so ever or any other rights or interests that maybe inconsistent with the transactions contemplated with, or adverse to the interests of Cashable LLC.

78. 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".

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

> Merchant shall provide Cashable LLC. and/or its authorized agent(s) with all of the information, authorizations and passwords necessary for verifying Merchant's receivables, receipts, deposits and withdrawals into and from the Account.
>
> Merchant hereby authorizes Cashable LLC. to ACH Debit the Daily Amount (as specified below) from the Merchants Account on a daily basis and will provide Cashable LLC. with all required access codes, and monthly bank statements.

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

80. 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.

81. 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.

82. 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 was in plaintiff's contract:

> Notwithstanding anything to the contrary in this Agreement or any other agreement between Cashable LLC. and Merchant, upon the violation of any provision contained in Section 1.11of the MERCHANT AGREEMENT TERMS AND CONDITIONS the occurrence of an Event of Default under Section 3 of the MERCHANT AGREEMENT TERMS AND CONDITIONS, the Specified Percentage shall equal 100%.

83. The contract further discarded any notion of payments tied to revenue with the automatic ACH-debit of the fixed daily payment.

84. 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."

85. 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

86. Similarly, in this action, the plaintiff, CASHABLE, LLC, set an 88% Specified Percentage grossly inflated over and above the defendant's receipts available to repay the plaintiff's advance.

87. 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".

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

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

> (NYSCEF Doc. No.3) page 17 of 39:
> (b) "there was no time to [reconcile] because [the merchant] could request reconciliation only within five business days following the end of a business month," and (c) "the fixed daily payment . . . was not a good faith estimate of 15% of [the merchant's] receivables."
>
> Page 23
> e, Respondents restricted reconciliation in additional ways, including by allowing merchants to request relief only during a narrow, five-day window each month. Petition ¶¶ 287-88. Consequently, a "mid-month decline in revenues" could "trigger a default under the contract and entitle the lender to immediately seek the whole uncollected amount." Haymount, 609 F. Supp. 3d at 248; accord McNider Marine, 2019 WL 6257463, at *4

90. Plaintiff's contract, here, abridged the right to any 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:

> each party to this Agreement acknowledges, agrees and understands that the transaction contemplated by this Agreement is a purchase and sale of future receivables and not a loan, and no party hereto intends for this Agreement to be, or to be deemed to be, a loan agreement. Accordingly, there is no interest payable hereunder
>
> Merchant agrees that the Purchase Price is in exchange for the Receipts pursuant to this Agreement, and that it equals the fair market value of such Receipts.

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. 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])."

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

> https://en.wikipedia.org/wiki/Loan
> United States taxes[edit]
> Most of the basic rules governing how loans are handled for tax purposes in the United States are codified by both Congress (the Internal Revenue Code) and the Treasury Department (Treasury Regulations– another set of rules that interpret the Internal Revenue Code).[6]:111
> 1. A loan is not gross income to the borrower.[6]:111 Since the borrower has the obligation to repay the loan, the borrower has no accession to wealth.[6]:111[7]
> 2. The lender may not deduct (from own gross income) the amount of the loan.[6]:111 The rationale here is that one asset (the cash) has been converted into a different asset (a promise of repayment).[6]:111 Deductions are not

> typically available when an outlay serves to create a new or different asset.[6]:111
> 3. The amount paid to satisfy the loan obligation is not deductible (from own gross income) by the borrower.[6]:111
> 4. Repayment of the loan is not gross income to the lender.[6]:111 In effect, the promise of repayment is converted back to cash, with no accession to wealth by the lender.[6]:111
> 5. Interest paid to the lender is included in the lender's gross income.[6]:111[8] Interest paid represents compensation for the use of the lender's money or property and thus represents profit or an accession to wealth to the lender.[6]:111 Interest income can be attributed to lenders even if the lender doesn't charge a minimum amount of interest.[6]:112
> 6. Interest paid to the lender may be deductible by the borrower.[6]:111 In general, interest paid in connection with the borrower's business activity is deductible, while interest paid on personal loans are not deductible.[6]:111The major exception here is interest paid on a home mortgage.[6]:111

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

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

97. 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.)"

98. 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: Lack of Standing

99. Plaintiff failed to publish its articles of organization.

Lexis/Nexis search result of even date:

New York Secretary of State

Corporate Filing

Business Information

Filing Number:	5832973
Name:	CASHABLE LLC
Name Type:	LEGAL
Additional Name Information:	ACTIVE
Business Type:	DOMESTIC LIMITED LIABILITY COMPANY
Status:	ACTIVE
Status Date:	09/10/2020
Place Incorporated:	NEW YORK
County Incorporated:	KINGS
Date Incorporated:	09/10/2020
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

Officers

Name	Date(s)	Standardized Address	Original Address
CASHABLE LLC Contact Type: PROCESS NAME	Date: 10/05/2021		5314 16TH AVE STE 155 BROOKLYN, NY 11204 US

Historical Contacts

Name	Date(s)	Standardized Address	Original Address
CASHABLE LLC Contact Type: PROCESS NAME	DATE FILED Date: 09/10/2020		5314 16TH AVE STE 155 BROOKLYN, NY 11204 US

Filing History

Filing Date	Filing Type	Number	Description	Misc.
09/10/2020	EFFECTIVE		ARTICLES OF ORGANIZATION (DOMESTIC LLC)	
09/10/2020	FILING	Ref No.: 200910010651	ARTICLES OF ORGANIZATION	

100. This failure requires that the action be dismissed. Limited Liability Company Law §206. Affidavits of publication. (a) Within one hundred twenty days after the effectiveness of the initial articles of organization as determined pursuant to subdivision (d) of section two hundred

three of this article, a copy of the same or a notice containing the substance thereof shall be published once in each week for six successive weeks, in two newspapers of the county in which the office of the limited liability company is located, one newspaper to be printed weekly and one newspaper to be printed daily, to be designated by the county clerk. *** **Proof of the publication required by this subdivision, consisting of the certificate of publication of the limited liability company with the affidavits of publication of such newspapers annexed thereto, must be filed with the department of state.**

> Three Egg Studios LLC v FJH Realty Inc., 2019 NY Slip Op 30805(U), 2-3, Kings County:
> "The Second Department has recently held that the language of §206 requires that where a plaintiff has failed to comply with the publication requirement, the action must be dismissed, citing Barklee."
>
> Small Step Day Care, LLC v Broadway Bushwick Bldrs., L.P., 137 A.D.3d 1102, 1103 [2016]:
> "Limited Liability Company Law § 206 requires limited liability companies to publish their articles of organization or comparable specified information for six successive weeks in two local newspapers designated by the clerk of the county where the limited liability company has its principal office, followed by the filing of an affidavit with the Department of State, stating that such publication has been completed (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki , 309 AD2d 310, 311 [2003]). Failure to comply with these requirements precludes a limited liability company from maintaining any action or special proceeding in New York (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v

> Pataki, 309 AD2d at 311). Here, as the defendants correctly contend, since the plaintiff failed to comply with the publication requirements of Limited Liability Company Law § 206, it is precluded from bringing this action (see Limited Liability Company Law § 206 [a]; Barklee Realty Co. v Pataki, 309 AD2d 310 [2003]).”

Eighth Affirmative Defense: Unconscionability/Adhesion Contract

101. 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.

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

103. 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.")."

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

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

106. 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." "

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

108. 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.

109. 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].

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

Ninth Affirmative Defense: The Contract Was Breached by Plaintiff

111. The contract contained a provision expressly hinging repayment on the payment to defendant from its customers. *Quoted above*.

112. 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."

113. 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)."

Tenth Affirmative Defense: Unenforceable Default Fee

114. 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"]).

115. 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: April 2, 2025

Jack A. Cook
Weinberg Legal PLLC
Attorney for Defendants

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Phone: (516) 829-3900.
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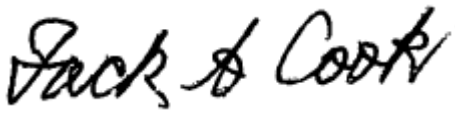
VERIFICATION: State of New York, County of Nassau, ss.: The undersigned attorney for defendants, duly admitted to practice in the courts of the State of New York, affirms under penalties of perjury: that he has read the foregoing answer, and knows the contents thereof; that it is true upon information 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: April 2, 2025



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